universität wien

# DISSERTATION / DOCTORAL THESIS

Titel der Dissertation /Title of the Doctoral Thesis

## „The Establishment of a World Court of Human Rights and The Design of Its Complementary Jurisdiction“

verfasst von / submitted by

Li Tian

angestrebter akademischer Grad / in partial fulfilment of the requirements for the degree of

Doktor der Rechtswissenschaften (Dr. iur)

Wien, 2017 / Vienna 2017

| | |
|---|---|
| Studienkennzahl lt. Studienblatt / degree programme code as it appears on the student record sheet: | A 783 101 |
| Dissertationsgebiet lt. Studienblatt / field of study as it appears on the student record sheet: | Rechtswissenschaften |
| Betreut von / Supervisor: | Prof. Dr. MANFRED NOWAK |

# Table of Contents

# Bibliography

Abraham, Elizabeth: "The Sins of the Savior: Holding the United Nations Accountable to International Human Rights Standards for Executive Order Detentions in Its Mission in Kosovo", in: *American University Law Review*, Vol. 52, No. 5, pp.1291 – 1337.

Adede, A. O.: "A Survey of Treaty Provisions on the Rule of Exhaustion of Local Remedies", in: *Harvard International Law Journal*, Vol. 18, No. 1, pp.1 – 17.

Alfredsson, Gudmundur; Grimheden, Jonas & Ramcharan, Bertrand G.; *et al.* (eds.): *International Human Rights Monitoring Mechanisms: Essays in Honour of Jakob. Möller* (2nd Revised Edition), Leiden; Boston: Martinus Nijhoff, 2009.

Alston, Philip: "Against a World Court for Human Rights", in: *Ethics & International Affairs*, Vol. 28, No. 2, 2014, pp.197 – 212.

Alston, Philip: "A truly bad idea: a 'World Court for Human Rights'", available at: https://www.opendemocracy.net/openglobalrights-blog/philip-alston/truly-bad-idea-world-court-for-human-rights.

Alston, Philip: "A 'World Court for Human Rights' is Not a Good Idea", available at: http://justsecurity.org/2796/world-court-human-rights-good-idea/.

Alston, Philip & Tessitore, John: "EIA Interview with Philip Alston on a 'World Court for Human Rights'", 10 November 2014, available at: https://www.ethicsandinternationalaffairs.org/2014/eia-interview-with-philip-alston-on-a-world-court-for-human-rights/.

Amerasinghe, Chittharanjan F.: *Local Remedies in International Law* (2nd edition), Cambridge; New York: Cambridge University Press, 2004.

Amerasinghe, Chittharanjan F.: *Principles of the institutional law of international organizations*, Cambridge; New York: Cambridge University Press, 2005.

Amerasinghe, Chittharanjan F.: "The Local Remedies Rule in an Appropriate Perspective", in: *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (ZaöRV), Vol. 36, 1976, pp.727 – 759.

Amerasinghe, Chittharanjan F.: "The Rule of Exhaustion of Domestic Remedies in the Framework of International Systems for the Protection of Human Rights", in: *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (ZaöRV), Vol. 28, 1968, pp.257 – 300.

Annan, Kofi A.: "Strengthening United Nations Action in the Field of Human Rights

Prospects and Priorities", in: *Harvard Human Rights Journal*, Vol. 10, No. 1, 1997, pp. 1 – 9.

Arsanjani, Mahnoush H.: "Claims Against International Organizations: Quis custodiet ipsos custodes", in: *Yale Journal of World Public Order*, Vol. 7, 1981, pp.131 – 176.

Auer, Paul De: "The Competency of Mixed Arbitral Tribunals" in: *Transactions of the Grotius Society*, Vol. 13, Problems of Peace and War, Papers Read before the Society in the Year 1927 (1927), pp. xvii – xxx.

Australian Human Rights Commission: "Mechanisms for advancing women's human rights: A guide to using the optional protocol to CEDAW and other international complaint mechanisms", 2011, available at: https://www.humanrights.gov.au/sites/default/files/content/sex_discrimination/publication/mechanisms/opcedaw.pdf.

Baderin, Mashood A. & Ssenyonjo, Manisuli (eds.): *International Human Rights Law: Six Decades after the UDHR and Beyond*, Farnham, Surrey, England; Burlington, VT: Ashgate Publishing, 2010.

Bassiouni, Mahmoud C. & Schabas, William A. (eds.): *New Challenges for the UN Human Rights Machinery: What Future for the UN Treaty Body System and the Human Rights Council Procedures?*, Cambridge, UK; Portland, OR: Intersentia, 2011.

Bayefsky, Anne: The UN Human Rights Treaty System: Universality at the Crossroads, Ardsley, NY: Transnational Publishers, 2001.

Beauvais, Joel C.: "Benevolent despotism: a critique of U.N. state-building in East Timor", in: *New York University journal of international law and politics*, Vol. 33, No. 4, 2001, pp.1101 – 1178.

Bekker, Peter H. F.: *The Legal Position of International Organizations: a functionary necessity analysis of their legal status and immunities*, The Hague: T.M.C. Asser Instituut, 1994.

Benedek, Wolfgang: "Kosovo – UNMIK accountability: Human Rights Advisory Panel Finds Discrimination in Privatization Cases", in: *Austrian Law Journal*, No. 2, 2015, pp.277 – 284.

Benedek, Wolfgang; Gregory, Clare & Kozma, Julia; *et al.* (eds.): *Global Standards - Local Action: 15 Years Vienna World Conference on Human Rights*, Wien & Graz: Neuer Wissenschaftlicher Verlag, 2009.

Bentwich, Norman: "The Limits of the Domestic Jurisdiction of the State", in: *Transactions of the Grotius Society*, Vol. 31, Problems of Public and Private International

Law, Transactions for the Year 1945 (1945), pp.59 – 89.

Besson, Samantha & Tasioulas, John (eds.): *The Philosophy of International Law*, Oxford: Oxford University Press 2010.

Bongiorno, Carla: "A Culture of Impunity: Applying International Human Rights Law to the United Nations in East Timor", in: *Columbia Human Rights Law Review*, Vol. 33, No. 3, 2002, pp.623 – 692.

Boschiero, Nerina; Scovazzi, Tullio & Pitea, Cesare; *et al*. (eds.): *International Courts and the Development of International Law: Essays in Honour of Tullio Treves*, The Hague: Berlin; Heidelberg: Asser Press; Springer, 2013.

Bothe, Michael: "Security Council's Targeted Sanctions against Presumed Terrorists: The Need to Comply with Human Rights Standards", in *Journal of International Criminal Justice*, Vol. 6, No. 3, 2008, pp.541 – 555.

Brockman-Hawe, Benjamin E.: "Questioning the UN's Immunity in the Dutch Courts: Unresolved Issues in the Mothers of Srebrenica Litigation", in: *Washington University Global Studies Law Review*, Vol. 10, Issue 4, 2011, pp.727 – 748.

Brower, Charles H.: "International Immunities: Some Dissident Views on the Role of Municipal Courts", in: *Virginia Journal of International Law*, Vol. 41, No. 1, pp.1 – 92.

Brownlie, Ian: *The Rule of Law in International Affairs*, The Hague; Boston: Martinus Nijhoff Publishers; Cambridge, MA: Sold and distributed in North, Central and South America by Kluwer Law International, 1998.

Buchanan, Allen E. & Keohane, Robert O.: "The Legitimacy of Global Governance Institutions", in: *Ethics & International Affairs*, Vol. 20, Issue 4, 2006, pp.405 – 437.

Buckley, Kenneth D.; Dale, Barbara; Reynolds, Wayne: *Doc Evatt: Patriot, Internationalist, Fighter, and Scholar*, Melbourne, Australia: Longman Cheshire, 1994.

Buergenthal, Thomas: "The Advisory Practice of the Inter-American Human Rights Court", in: *American Journal of International Law*, Vol. 79, 1985, pp.1 – 27.

Buergenthal, Thomas: "The Inter-American Court of Human Rights", in: *American Journal of International Law*, Vol. 76, No. 2, 1982, pp.231 – 245.

Buergenthal, Thomas: "The Normative and Institutional Evolution of the International Human Rights", in: *Human Rights Quarterly*, Vol. 19, No. 4, November 1997, pp.703 – 723.

Burgers, Jan H.: "The Road to San Francisco: The Revival of the Human Rights Idea in the Twentieth Century", in: *Human Rights Quarterly*, Vol. 14, No. 4, 1992, pp.447 – 477.

Burgorgue-Larsen, Laurence & De Torres, Amaya Úbeda: *The Inter-American Court of Human Rights: Case Law and Commentary*, Oxford: Oxford University Press, 2011.

Cameron□Lain: "UN Targeted Sanctions, Legal Safeguards and the European Convention on Human Rights", in: *Nordic Journal of International Law*, Vol. 72, No. 2, 2003, pp.159 – 214.

Cameron, Lindsey: "Accountability of International Organisations Engaged in the Administration of Territory", 13 February 2006, University Centre for International Humanitarian Law, available at: http://www.prix-henry-dunant.org/wp-content/uploads/2006b_LCameron.pdf.

Cassese, Antonio: *Realizing Utopia: The Future of International Law*, Oxford: Oxford University Press, 2012.

Cheng, Bin: *General Principles of Law as Applied by International Courts and Tribunals*, Cambridge: Grotius Publications, 1994.

Childers, Erskine & Urquhart, Brian E.: *Renewing the United Nations System*, Uppsala: Dag Hammarskjöld Foundation, 1994.

Chinkin, Christine: "International Law Meeting Summary: The Kosovo Human Rights Advisory Panel", 26th January 2012, available at: www.chathamhouse.org.

Chinkin, Christine: "International Dispute Resolution, with specific attention to China", in: Xiamen Academy of International Law: *Collected Courses of the Xiamen Academy of International Law*, Vol. 4, 2011, Leiden, Netherlands: Martinus Nijhoff Publishers, 2013.

Chopra, Jarat: "The UN's Kingdom of East Timor", in: *Survival*, Vol. 42, No. 3, Autumn 2000, pp.27 – 39.

Clark, Roger S.: "Human Rights Strategies of the 1960s Within the United Nations: A Tribute to the Late Kamleshwar Das", in: *Human Rights Quarterly*, Vol. 21, No. 2, May 1999, pp.308 – 341.

Cohen, Jean L.: "Rethinking Human Rights, Democracy, and Sovereignty in the Age of Globalization", in: *Political Theory*, Vol. 36, No. 4, 2008, pp.578 – 606.

Crawford, James R. & Grant, Thomas D.: "Local Remedies, Exhaustion of", *Max Planck Encyclopedia of Public International Law*, January 2007.

Crook, John R.: "The International Court of Justice and Human Rights", in: *Northwestern Journal of International Human Rights*, Vol. 1, Issue 1, 2004, pp.1 – 7.

Danchin, Peter G. & Fischer, Horst: *United Nations Reform and the New Collective Security*, Cambridge, UK; New York: Cambridge University Press, 2010.

Darrow, Mac & Arbour, Louise: "The Pillar of Glass: Human Rights in the Development Operations of the United Nations", in: *The American Journal of International Law*, Vol. 103, No. 3, July 2009, pp.446 – 501.

D'Ascoli, Silvia & Scherr, Kathrin Maria: "The Rule of Prior Exhaustion of Local Remedies in the International Law Doctrine and its Application in the Specific Context of Human Rights Protection The Rule of Prior Exhaustion of Local Remedies in the International Law Doctrine and its Application in the Specific Context of Human Rights Protection", EUI Working Papers Law 2007/02, available at: http://cadmus.eui.eu/bitstream/handle/1814/6701/LAW_2007_02.pdf.

Day, David (ed.): *Brave New World: Dr H V Evatt and Australian Foreign Policy (1941-49)*, St. Lucia, Qld., Australia: University of Queensland Press, 1996.

Department of Public Information United Nations: *Yearbook of the United Nations 1946-47*, New York, United Nations Publications, 1947.

Department of Public Information United Nations: *Yearbook of the United Nations 1947-48*, Lake Success, New York, United Nations Publications, 1949.

Department of Public Information United Nations: *Yearbook of the United Nations 1948-49*, United Nations, Lack Success, New York, 1950.

Devereux, Annemarie: "Australia and the International Scrutiny of Civil and Political Rights: An Analysis of Australia's Negotiating Policies, 1946-1966", in: *Australian Year Book of International Law*, Vol. 22, 2002, pp.47 – 75.

Dinjens, Els & Henning, Warda: "Undue Delay in the case-law of the European Court of Human Rights: Varicak Marica v. Croatia Osiguranje", Amsterdam International Law Clinic, 2 November 2001.

Donnelly, Jack: "International Human Rights: a regime analysis", in: *International Organizations*, Vol. 40, No. 3, Summer 1986, pp.599 – 642.

Dupuy, Pierre-Marie: "The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice", in: International Law and Politics, Vol. 31, 1999, pp.791 – 807.

Ebobrah, Solomon T.: "Towards a Positive Application of Complementarity in the African Human Rights System: Issues of Functions and Relations", in: *The European Journal of International Law*, Vol. 22, No. 3, 2011, pp.663 – 688.

Ede, Emma: "Internationalist Vision for a Post-war World: H. V. Evatt, Politics & the Law", A thesis submitted in partial fulfilment of the requirements for the degree of B.A.

(Hons) in History, University of Sydney, October 2008.

Edel, Frédéric: *The length of civil and criminal proceedings in the case-law of the European Court of Human Rights* (2nd edition), Strasbourg: Council of Europe Publishing, 2007.

Eno, Robert W.: "The jurisdiction of the African Court on Human and Peoples' Rights", in: *African Human Rights Journal*, Vol. 2, No. 2, 2002, pp.223 – 233.

Evans, Gareth: "Herbert Vere Evatt: Australia's First Internationalist", 1995 Daniel Mannix Memorial Lecture by Senator the Hon Gareth Evans QC, Minister for Foreign Affairs, Melbourne, 31 August 1995, available at: http://www.gevans.org/speeches/old/1995/310895_herbert_vere_evatt.pdf.

Farrall, Jeremy M.: *United Nations Sanctions and the Rule of Law*, Cambridge: Cambridge University Press, 2007

Fassbender, Bardo: "Targeted Sanctions and Due Process: The responsibility of the UN Security Council to ensure that fair and clear procedures are made available to individuals and entities targeted with sanctions under Chapter VII of the UN Charter", Study commissioned by the United Nations Office of Legal Affairs, 20 March 2006 (final), available at: http://www.un.org/law/counsel/Fassbender_study.pdf.

Fitzgerald, Peter L.: "Managing Smart Sanctions Against Terrorism Wisely", in: New England Law Review, Vol. 36, No. 4, 2002, pp.957 – 983.

Fonteyne, Jean-Pierre L.: "The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity Under the UN Charter", in: *California Western International Law Journal*, Vol. 4, 1973 – 74, pp.203 – 270.

Gaillard, Emmanuel & Pingel-Lenuzza, Isabelle: "International Organizations and Immunity from Jurisdiction, to Restrict or to Bypass", in: *International and Comparative Law Quarterly*, Vol. 51, No. 1, January 2002, pp.1 – 15.

Gibney, Mark: *International Human Rights Law: Returning to Universal Principles* (2nd edition), Lanham: Rowman & Littlefield Publishers, 2015.

Gibney, Mark; Katarina Tomaševski, Katarina & Vedsted-Hansen, Jens: "Transnational State Responsibility for Violations of Human Rights", in: *Harvard Human Rights Journal*, Vol. 12, 1999, pp.267 – 295.

Glanville, Luck: *Sovereignty and the Responsibility to Protect: A New History*, Chicago; London: The University of Chicago Press, 2014.

Goldberg, Arthur J.: "The Need for a World Court of Human Rights", in: *Howard Law*

*Journal*, Vol. 11, No. 2, Spring 1965, pp.621 – 623.

Goldstein, Judith; Kahler, Miles & Keohane, Robert O. *et al*. (eds.): *Legalization and World Politics*, Cambridge, Mass: The MIT Press, 2001.

Gomien, Donna: *Short guide to the European Convention on Human Rights* (3rd edition), Strasbourg: Council of Europe Publishing, 2005.

Gray, Christina D.: *Judicial Remedies in International Law*, Oxford: Clarendon Press, 1987.

Harris, David J.; O'Boyle, Michael & Warbrick, Colin *et al*.: *Law of the European Convention on Human Rights* (3rd edition), Oxford: Oxford University Press, 2014.

Hathaway, Oona A.; McElroy, Sabria & Solow, Sara A.: "International Law at Home: Enforcing Treaties in U.S. Courts", in: *Yale Journal of International Law*, Vol. 37, No. 1, 2012, pp.51 – 106.

Hill, Martin: *Immunities and Privileges of International Officials: The Experience of the League of Nations*, Washington: Carnegie Endowment for International Peace, 1947.

Holman, Frank E.: "'An International Bill of Rights': Proposals Have Dangerous Implications for U.S.", in: *American Bar Association Journal*, Vol. 34, No. 11, November 1948, pp.984 – 986.

Holman, Frank E.: "President Holman's Comments on Mr. Moskowitz's Reply", in: *American Bar Association Journal*, Vol. 35, No. 4, April 1949, pp.288 – 290, 360 – 362.

Hudson, Manley O.: "Integrity of International Instruments", in: *The American Journal of International Law*, Vol. 42, No. 1, 1948, pp.105 – 108.

Human Rights Watch, "U.N.: Sanctions Rules Must Protect Due Process", 4 March 2002, available at: https://www.hrw.org/news/2002/03/03/un-sanctions-rules-must-protect-due-process;

Idelson, Vladimir R.: "The Law of Nations and the Individual", in: *Transactions of the Grotius Society*, Vol. 30, Problems of Peace and War, Transactions for the Year 1944 (1944), pp.50 – 82.

International Commission of Jurists: Bulletin of the International Commission of Jurists, No. 36, December 1968.

International Commission of Jurists: "Towards a World Court of Human Rights: Questions and Answers", Supporting Paper to the 2011 Report of the Panel on Human Dignity, December 2011, available at: http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2013/07/World-court-final-23.12-

pdf1.pdf.

International Federation for Human Rights (FIDH): "Practical Guide: The African Court on Human and Peoples' Rights – towards the African Court of Justice and Human Rights", available at: https://www.fidh.org/IMG/pdf/african_court_guide.pdf.

International Justice Resource Center: "Advocacy before the African Human Rights System: A Manual for Attorneys and Advocates", November 2016, available at: http://www.ijrcenter.org/wp-content/uploads/2016/11/Advocacy-before-the-African-Human-Rights-System.pdf.

Jenks, Clarence W.: *International Immunities*, London, Stevens; New York, Oceana Publications, 1961.

Joseph, Sarah; Gyorki, Linda & Mitchell, Katie; *et al.*: *Seeking Remedies for Torture Victims: A Handbook on the Individual Complaints Procedures of the UN Treaty Bodies* (2nd edition), Geneva, Switzerland: World Organisation Against Torture, 2014.

Juma, Dan: "Lost (or Found) in Transition? The Anatomy of the New African Court of Justice and Human Rights", in: *Max Planck Yearbook of United Nations Law Online*, Vol. 13, No. 1, 2009, pp.267 – 306.

Juma, Dan: "Provisional Measures under the African Human Rights System: the African Court's Order against Libya", in: *Wisconsin International Law Journal*, Vol. 30, No. 2, 2012, pp.344 – 373.

Kaczorowska, Alina: *Public International Law*, Abingdon, Oxon [UK]; New York: Routledge, 2010.

Kamminga, Menno T.: *Inter-State Accountability for Violations of Human Rights*, Philadelphia: University of Pennsylvania, 1992.

Kelsen, Hans: *The Law of the United Nations: a critical analysis of its fundamental problems*, New York: F.A. Praeger, 1950.

Kelsen, Hans (ed.), Wedberg, Anders (trans.): *General Theory of Law and State*, 20th Century Legal Philosophy Series: Volume I, Harvard University Press, Cambridge, 1945.

Kent, George: "The Human Rights Obligations of Intergovernmental Organizations", in: United Nations, Department of Public Information: *UN Chronicle*, No. 3, 2005, pp.32 – 33.

Kent, George: *Freedom from Want: The Human Right to Adequate Food*, Washington: Georgetown University Press, 2005.

King. John K.: International Administrative Jurisdiction: with special reference to the domestic laws and practices of the United States of America, Brussels: International Institute of Administrative Sciences, 1952.

King. John K.: *The Privileges and Immunities of International Organizations*, Odense: Strandberg, 1949.

Kirby, Michael D.: "H. V. Evatt: Libertarian Warrior, Inaugural HV Evatt Memorial Address Evatt Foundation: Parliament House Sydney, 30 August 1991", available at: http://www.michaelkirby.com.au/images/stories/speeches/1990s/vol24/900-H_V_Evatt_-_Libertarian_Warrior_-_Inaugural_H_V_Evatt_Memorial_Address.pdf.

Kirkpatrick, Jesse: "A Modest Proposal: A Global Court of Human Rights", in: *Journal of Human Rights*, Vol. 3, No. 2, 2014, pp.230 – 248.

Klabbers, Jan: *An Introduction to International Institutional Law*, Cambridge University Press: Cambridge, United Kingdom, 2002.

Klabbers, Jan; Peters, Anne & Ulfstein, Geir: *The Constitutionalization of International Law*, Oxford; New York: Oxford University Press, 2009.

Kolb, Robert & Gaggioli, Gloria (eds.): *Research Handbook on Human Rights and Humanitarian Law*, Cheltenham; Northampton: Edward Elgar, 2013.

Kozheurov, YS: "Advisory jurisdiction of an international court: the experience of the Inter-American Court of Human Rights", in: *Russian Juridical Journal*, Vol. 84 Issue 4, 2012, pp.95 – 107.

Kozma, Julia; Müller-Funk, Anna & Nowak, Manfred (eds.): *Vienna+20, advancing the protection of human rights: achievements, challenges and perspectives 20 years after the world conference*, Mortsel (Antwerpen): Intersentia; Wien: NWV Verlag, 2014.

Kozma, Julia; Nowak, Manfred & Scheinin, Martin: *A World Court of Human Rights – Consolidated Statute and Commentary*, Studienreihe des Ludwig Boltzmann Instituts für Menschenrechte Band 22, Wien: Neuer Wissenschaftlicher Verlag – NWV, 2010.

Lauterpacht, Elihu: *International Law: Being the Collected Papers of Hersch Lauterpacht*, Vol. 2, The law of peace, Cambridge: Cambridge University Press 1975.

Lauterpacht, Hersch: *An International Bill of the Rights of Man*, Oxford, United Kingdom: Oxford University Press, 2013.

Lauterpacht, Hersch: *International Law and Human Rights*, London: Stevens & Sons Limited, 1950.

Lauren, Paul G.: *The Evolution of International Human Rights: Visions Seen*, Philadelphia : University of Pennsylvania Press, 2011.

Leckie, Scott: "The Inter-State Complaint Procedure in International Human Rights Law: Hopeful Prospects or Wishful Thinking?", in: *Human Rights Quarterly*, Vol. 10, No. 2,

1988, pp.249 – 303.

Mazower, Mark: "The Strange Triumph of Human Rights, 1933 – 1950", in: *The Historical Journal*, Vol. 47, Issue 02, 2004, pp.379 – 398.

MacBride, Seán: "International Protection of Human Rights", The Hammarskjöld Forum, New York, Tuesday, December 12, 1967.

MacBride, Seán: "The Promise of Human Rights Year", in: *Journal of the International Commission of Jurists*, Vol. IX, No. 1, June 1968, Introduction, pp.i – iv.

MacBride, Seán: "The United Nations and Human Rights" (2nd July 1968), in: United Nations Institute for Training and Research (UNITAR): *Seminar on "International Organization and Multilateral Diplomacy"*, 2 July 1968.

MacBride, Seán: "The Individual and the State", The discussions and conclusions of the Strasbourg conference of European Jurists held under the auspices of the International Commission of Jurists, October 1968.

Marshall, David & Inglis, Shelley: "The Disempowerment of Human Rights–Based Justice in the United Nations Mission in Kosovo", in: *Harvard Human Rights Journal*, Vol. 16, 2003, pp.95 – 146.

McDougal, Myres S.: "Reviews: *International Law and Human Rights* By H. Lauterpacht. London: Stevens & Sons Limited, 1950", in: *The Yale Law Journal*, Vol. 60, 1951, pp.1051 – 1056.

McDougal, Myres S. & Bebr, Gerhard: "Human Rights in the United Nations", in: *American Journal of International Law*, Vol. 58, 1964, p.603 – 641.

McDougal, Myres S. & Leighton, Gertrude C. K.: "The Rights of Man in the World Community: Constitutional Illusions Versus Rational Action", in: *Law and Contemporary Problems*, Vol. 14, No. 3, 1949, pp.490 – 536.

Mégret, Frederic & Hoffmann, Florian: "The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities", in: *Human Rights Quarterly*, Vol. 25, No. 2, May 2003, pp.314 – 342.

Miller, David: "Holding Nations Responsible", in *Ethics*, Vol. 114, No. 2, January 2004, pp. 240 – 268.

Mitoma, Glenn T.: *Human rights and the negotiation of American power*, Philadelphia: University of Pennsylvania Press, 2013.

Morawa, Alexander; Nicole B. P. Coenen; & Laura A. Jonas: *Article 3 of the European Convention on Human Rights: A Practitioner's Handbook* (2nd edition), OCCT Handbook Series Vol. 4, World Organisation Against Torture (OMCT), 2014.

Muller, Alexander S.: *International Organizations and Their Host States: aspects of their legal relationship*, The Hague; London; Boston: Kluwer Law International, 1995.

Muller, Alexander S.; Raič, David & Thuránszky, Johanna M.: *The International Court of Justice: Its Future Role After Fifty Years*, Hague; London: Martinus Nijhoff Publishers, 1997.

Naldi, Gino J.: "Observations on the Rules of the African Court on Human and Peoples' Rights", in: *African Human Rights Journal*, Vol. 14, No. 2, 2014, pp.366 – 392

Niedrist, Gerhard: "The United Nations and Human Rights – The Necessity of Being Part of It", available at: http://paperroom.ipsa.org/papers/paper_8564.pdf.

Normand, Roger & Zaidi, Sarah: *Human rights at the UN: the political history of universal justice*, Bloomington: Indiana University Press, 2008.

Nowak, Manfred: "The Right of Victims of Human Rights Violations to a Remedy: The Need for a World Court of Human Rights", in: *Nordic Journal of Human Rights*, Vol. 32, No. 1, pp.3 – 17.

Nowak, Manfred: *U.N. Covenant on Civil and Political Rights – CCPR Commentary* (2nd revised edition), Kehl; Strasbourg; Arlington: N.P. Engel, 2005.

Nowak, Manfred & Julia Kozma, Julia: "A World Court of Human Rights", Swiss Initiative to Commemorate the 60th Anniversary of the UDHR: *Protecting Dignity: An Agenda for Human Rights*, June 2009, available at: http://bim.lbg.ac.at/sites/files/bim/World%20Court%20of%20Human%20Rights_BIM_0.pdf.

Nowak, Manfred & McArthur, Elizabeth: *The United Nations Convention against Torture – A Commentary*, Oxford; New York: Oxford University Press, 2008.

Nurser, John: "The 'Ecumenical Movement' Churches, 'Global Order,' and Human Rights: 1938 – 1948", in: *Human Rights Quarterly*, Vol. 25, No. 4, 2003, pp. 841-881.

O'Boyle Michael: "Practice and Procedure under the European Convention on Human Rights Symposium International Human Rights", in: *Santa Clara Law Review*, Vol. 20, No. 3, 1980, pp.697 – 732.

Engdahl, Ola & Wrange, Pål: *Law at War: The Law as it Was and the Law as it Should Be*, Leiden; Boston: Martinus Nijhoff Publishers, 2008.

Pacquée, Didier & Dewulf, Steven: "International Territorial Administrations and the Rule of Law: The Case of Kosovo", in: *Essex Human Rights Review*, Vol. 4, No. 1, 2007, pp.1 – 14.

Parker, MC: "Other Treaties: The Inter-American Court of Human Rights Defines Its

Advisory Jurisdiction", in: *American University Law Review*, Vol. 33, Issue 1, 1983, pp.211 – 246.

Pasqualucci, Jo M.: *The Practice and Procedure of the Inter-American Court of Human Rights* (2nd edition), Cambridge: Cambridge University Press, 2013.

Paulsson, Jan: *Denial of Justice in International Law*, Cambridge: Cambridge University Press, 2005.

Paust, Jordan J.: "The U.N. Is Bound By Human Rights: Understanding the Full Reach of Human Rights, Remedies, and Non-immunity: Responding to Tom Dannenbaum, Translating the Standard of Effective Control into a System of Effective Accountability", in: *Harvard International Law Journal Online*, Vol. 51, 2010, pp.1 – 12.

Quénivet, Noëlle: "Binding the United Nations to Human Rights Norms by Way of the Laws of Treaties", in: *The George Washington International Law Review*, Vol. 42, No. 3, pp.587 – 621.

Ramcharan, Bertrand G.: A World Court on Human Rights: What Functions?, available at: http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=4&ved=0CEMQFjAD&url=http%3A%2F%2F74.220.219.58%2F~drafting%2Fsites%2Fdefault%2Ffiles%2Fpaper_article%2FRamcharan_A_WORLD_COURT_ON_HUMAN_RIGHTS%5B1%5D_0.doc&ei=QNqHUNz6GojMtAb3mYGwDA&usg=AFQjCNHP43OPZAp5vIRV9O8Cn-leinUh2Q&sig2=oOxh1c9EViYD9g_3SLSbBQ.

Rawski, Fredrick: "To Waive or Not To Waive: Immunity and Accountability in U.N. Peacekeeping Operations", in: Connecticut Journal of International Law, Vol. 18, No. 1, 2002, pp.103 – 132.

Rehman, Javaid: *International Human Rights Law* (2nd edition), Harlow, Essex: Pearson Education, 2010.

Reinisch, August: "Convention on the Privileges and Immunities of the United Nations, Convention on the Privileges and Immunities of the Specialized Agencies", United Nations Audiovisual Library of International Law, available at: http://legal.un.org/avl/pdf/ha/cpiun-cpisa/cpiun-cpisa_e.pdf.

Reinisch, August: "Securing the Accountability of International Organizations", in: *Global governance: a review of multilateralism and international organizations*, Vol. 7, No. 2, 2001, pp.131 – 149.

Reinisch, August: The Privileges and Immunities of International Organizations in Domestic Courts, Oxford, United Kingdom: Oxford University Press, 2013.

Reinisch, August & Weber, Ulf A.: "In the Shadow of Waite and Kennedy: the

jurisdictional immunity of international organizations, the individual's right of access to the courts and administrative tribunals as alternative means of dispute settlement", in: *International Organizations Law Review*, Vol. 1, No. 1, 2004, pp.59 – 110.

Reif, Linda C.: *The International Ombudsman Anthology: Selected Writings from the International Ombudsman Institute*, The Hague, London and Boston: Kluwer Law International, 1999

Rix, Carl B.: "Human Rights and International Law: Effect of the Covenant Under Our Constitution", in: *American Bar Association Journal*, Vol. 35, No. 7, July 1949, pp. 551 – 554, 618 – 621.

Rodley, Nigel S.: "Human Rights and Humanitarian Intervention: The Case Law of the World Court", in: *International and Comparative Law Quarterly*, Vol. 38, No. 2, April 1989, pp.321 – 333.

Russell, Ruth B. & Muther, Jeannette E.: *A History of the United Nations Charter: the role of the United States, 1940-1945*, Brookings series on the United Nations, Washington, Brookings Institution, 1958.

Rycroft, Robert: "United Nations High Commissioner for Human Rights: A Proposed International Government Control Agency", in: *Rutgers-Camden Law Journal*, Vol. 4, 1972-1973, pp.237 – 259.

Ryngaert, Cedric: "The Immunity of International Organizations Before Domestic Courts: Recent Trends", in: *International Organizations Law Review*, Vol. 7, No. 1, 2010, pp.121 – 148.

Sari, Aurel: "Jurisdiction and International Responsibility in Peace Support Operations: The Behrami and Saramati Cases", in: *Human Rights Law Review*, Vol. 8, No. 1, 2008, pp.151 – 170.

Saul, Matthew and Sweeney, James A.: *International Law and Post-Conflict Reconstruction Policy*, London; New York: Routledge, 2015.

Schabas, William A.: *The European Convention on Human Rights: A Commentary*, Oxford, United Kingdom: Oxford University Press, 2015.

Scheinin, Martin: "Towards a World Court of Human Rights", Swiss Initiative to Commemorate the 60th Anniversary of the UDHR: *Protecting Dignity: An Agenda for Human Rights*, June 2009, available at: http://www.enlazandoalternativas.org/IMG/pdf/hrCourt_scheinin0609.pdf.

Scheinin, Martin: "The Proposed Optional Protocol to the Covenant on Economic, Social and Cultural Rights: A Blueprint for UN Human Rights Treaty Body Reform – Without

Amending the Existing Treaties", in: *Human Rights Law Review*, Vol. 6, No. 1, 2008, pp.131 – 142.

Schwelb, Egon: "The International Court of Justice and the Human Rights Clauses of the Charter", in: *The American Journal of International Law*, Vol. 66, No. 2, April 1972, pp.337 – 351.

Sellars, Kristen: *The Rise and Rise of Human Rights*, Stroud, Gloucestershire: Sutton, 2002.

Seyersted, Finn: "Settlement of Internal disputes of intergovernmental Organisations by Internal and external Courts", in: *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (ZaöRV), Vol. 24, 1964, pp.1 – 121.

Shelton, Dinah: "An Introduction to The History of International Human Rights Law", The George Washington University Law School, Public Law and Legal Theory Working Paper No.346, Legal Studies Research Paper No.346.

Shelton, Dinah: *Remedies in International Human Rights Law*, Oxford: Oxford University Press, 1999.

Shelton, Dinah: "The Jurisprudence of the Inter-American Court of Human Rights", in: *American University International Law Review*, Vol.10, Issue 1, 1994, pp.333 – 372.

Simma, Bruno; Khan, Daniel-Erasmus; Nolte, Georg; *et al*.: *The Charter of the United Nations: A Commentary*, Volume I, (3rd edition), Oxford, United Kingdom: Oxford University Press, 2012.

Simma, Bruno; Khan, Daniel-Erasmus; Nolte, Georg; *et al*.: *The Charter of the United Nations: A Commentary*, Volume II, (3rd edition), Oxford, United Kingdom: Oxford University Press, 2012.

Singer, Michael: "Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns", in: *Virginia Journal of International Law*, Vol. 36, No. 1, 1995, pp.53 – 165.

Skjelten, KB: "The Principle of Exhaustion of Domestic Remedies in the Inter-American System of Human Rights: A reasonable obstacle or an impossible barrier?", University of Oslo, Faculty of Law, available at: https://www.duo.uio.no/bitstream/handle/10852/42762/695.pdf?sequence=1.

Slaughter, Anne-Marie: "A Global Community of Courts", in: *Harvard International Law Journal*, Vol. 44, No. 1, 2003, pp.191 – 219.

Sohn, Louis B.: "The New International Law: Protection of the Rights of Individuals Rather Than States", in: *The American University Law Review*, Vol. 32, No. 1, 1982, pp.1 – 64.

Sohn, Louis B.: "How American International Lawyers Prepared for the San Francisco Bill of Rights", in: *The American Journal of International Law*, Vol. 89, No. 3, 1995, pp. 540 – 546.

Southern Africa Litigation Centre: *Justice for all: Realising the Promise of the Protocol establishing the African Court on Human and Peoples' Rights*, available at: http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2014/12/Justice-for-all-Realising-the-Promise-of-the-Protocol-establishing-the-African-Court-on-Human-and-Peoples-Rights.pdf.

Squires, John; Langford, Malcolm & Thiele, Bret: *The Road to A Remedy: Current Issues in the Litigation of Economic, Social and Cultural Rights*, Sydney: Australian Human Rights Centre, The University of New South Wales in collaboration with Centre on Housing Rights and Evictions, Distributed by UNSW Press, 2005.

Ssenyonjo, Manisuli: *Economic, Social and Cultural Rights in International Law*, Oxford and Portland, Oregon: Hart Publishing, 2009.

Steiner, Henry J.; Alston, Philip & Goodman, Ryan: *International Human Rights in Context: Law, Politics, Morals: Text and Materials* (3rd edition), Oxford: Oxford University Press, 2008.

Sullivan, Donna J.: "Overview of the Rule Requiring the Exhaustion of Domestic Remedies under the Optional Protocol to CEDAW", OP-CEDAW Technical Papers No.1, Kuala Lumpur: International Women's Rights Action Watch Asia Pacific (IWRAW Asia Pacific), 2008.

The Watson Institute Targeted Sanctions Project, Brown University: "*Strengthening Targeted Sanctions through Fair and Clear Procedures*", 30 March 2006, available at: http://watsoninstitute.org/pub/Strengthening_Targeted_Sanctions.pdf.

Thompson, Andrew S.: "Teheran 1968 and the Origins of the Human Rights Council?", available at: http://acuns.org/wp-content/uploads/2012/06/Teheran-Origin-Human-Rights-Council-Andrew-Thompson-AM-2011.pdf.

Tolley, Howard: "Popular Sovereignty and International Law: ICJ Strategies for Human Rights Standard Setting", in: *Human Rights Quarterly*, Vol. 11, November 1989, pp.561 – 589.

Tolley, Howard: The International Commission of Jurists: Global Advocates for Human Rights, Pennsylvania: University of Pennsylvania Press, 1994.

Trechsel, Stefan: "A 'World Court for Human Rights'?", in: *Northwestern Journal of*

*International Human Rights*, Vol. 1, Issue 1, 2004, pp.1 – 18.

Triffterer, Otto & Ambos, Kai: *The Rome Statute of the International Criminal Court* (3rd edition), München: C.H. Beck, 2016.

Trindade, Antônio A. C.: *The Application of the Rule of Exhaustion of Local Remedies in International Law: Its Rationale in the International Protection of Individual Rights*, Cambridge: Cambridge University Press, 1983.

Trindade, Antônio A. C.: "The Merits of Coordination of International Courts on Human Rights", in: *Journal of International Criminal Justice*, Vol. 2, Issue 2, 2004, pp.309 – 312.

Ulfstein, Geir: *Making Treaties Work: Human Rights, Environment and Arms Control*, Cambridge: Cambridge University Press, 2007.

United Nations: "A More Secure World, Our Shared Responsibility", Report of the High-Level Panel on Threats, Challenges and Change, 2004, available at: http://www.un.org/en/peacebuilding/pdf/historical/hlp_more_secure_world.pdf.

United Nations: *Peacekeeping Best Practices Unit and Department of Peacekeeping Operations: Handbook on United Nations Multidimensional Peacekeeping Operations*, United Nations, December 2003.

United Nations, Department of Peacekeeping Operations, Department of Field Support: *United Nations Peacekeeping Operations: Principles and Guidelines*, 2008.

United Nations, Department of Peacekeeping Operations and Department of Field Support: Civil Affairs Handbook, Policy and Best Practices Service Department of Peacekeeping Operations United Nations, 2012.

United Nations Department of Peacekeeping Operations Training Unit: *We Are United Nations Peacekeepers*, available at: http://www.un.org/en/peacekeeping/documents/un_in.pdf.

United Nations, Office of the High Commissioner for Human Rights: *Commissions of Inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law: Guidance and Practice*, New York, NY; Geneva United Nations, 2015.

United States: "Department of State Study on Widening Access to the International Court of Justice", in: *International Legal Materials*, Vol. 16, No.1, 1977, pp.187 – 206.

Vazquez, Carlos M.: "Treaty-Based Rights and Remedies of Individuals", in: *Columbia Law Review*, Vol. 92, 1992, pp.1082 – 1163.

Van Boven, Theo: "The United Nations Basic Principles and Guidelines on the Right to A Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law", United Nations

Audiovisual Library of International Law, available at: http://legal.un.org/avl/pdf/ha/ga_60-147/ga_60-147_e.pdf.

Vandenhole, Wouter: *The Procedures Before the UN Human Rights Treaty Bodies: Divergence Or Convergence?*, Antwerp and Oxford: Intersentia, 2004.

Van der Mei, Anne P.: "The Advisory Jurisdiction of the African Court on Human and People's Rights", in: *African Human Rights Journal*, Vol. 5, No. 1, 2005, pp.27 – 46.

Van der Mei, Anne P.: "The New African Court on Human and Peoples' Rights: Towards an Effective Human Rights Protection Mechanism for Africa?", in: Leiden Journal of International Law, Vol. 18, Issue 1, 2005, pp.113 – 129.

Verdirame, Guglielmo: "Breaches of the European Convention on Human Rights resulting from the conduct of international organizations", in: *European Human Rights Law Review*, Vol. 2, 2008, pp.209 – 213.

Verdirame, Guglielmo: *The UN and Human Rights: Who Guards the Guardians?*, Cambridge, UK; New York: Cambridge University Press, 2011.

Frans Viljoen: "Fact-Finding by UN Human Rights Complaints Bodies – Analysis and Suggested Reforms", in: *Max Planck Yearbook of United Nations Law*, Vol. 8, 2004, pp.49 – 100.

Viljoen, Frans: *International Human Rights Law in Africa* (2nd edition), Oxford: Oxford University Press, 2013.

Warbrick, Colin: "The European Response to Terrorism in an Age of Human Rights", in: *The European Journal of International Law*, Vol. 15, No. 5, 2004, pp.989 – 1018.

Wet, Erika De & Vidmar, Jure: *Hierarchy in International law: the place of human rights*, Oxford; New York: Oxford University Press, 2012.

Wellens, Karel: *Remedies Against International Organizations*, Cambridge: Cambridge University Press 2004.

White, Nigel D. & Klaasen, Dirk: *The UN, Human Rights and Post-Conflict Situations*, Manchester: Manchester University Press, 2005.

Wickremasinghe, Chanaka: "International Organizations or Institutions, Immunities before Nation Courts", in: *Oxford Public International Law*, Oxford University Press, 2013, available at: http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e502?rskey=v0AXm6&result=1&prd=OPIL.

Zwanenburg, Marten: "UN Peace Operations Between Independence and Accountability", in: *International Organization Law Review*, Vol. 5, No. 1, 2008, pp.23 – 47.

Zwart, Tom: *The Admissibility of Human Rights Petitions: The Case Law of the European Commission of Human Rights and the Human Rights Committee*, Dordrecht; Boston; London: Martinus Nijhoff Publishers, 1994.

# Abbreviations

| | |
|---|---|
| ABA | American Bar Association |
| ACHR | American Convention on Human Rights |
| AfCHPR | African Charter on Human and Peoples' Rights |
| AfComHPR | African Commission on Human and Peoples' Rights |
| AfCtHPR | African Court of Human and Peoples' Rights |
| AU | African Union |
| BAI | Bureau des Avocats Internationaux |
| CAT | Convention against Torture and Other Cruel, Inhuman or Degrading Treatment |
| OP-CAT | Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment |
| CAT Committee | Committee against Torture |
| CATHB | Council of Europe Convention on Action against Trafficking in Human Beings |
| CEDAW | Convention on the Elimination of All Forms of Discrimination against Women |
| OP-CEDAW | Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women |
| CEDAW Committee | Committee on the Elimination of Discrimination against Women |
| CIVPOL | United Nations Civilian Police Force |
| CoE | Council of Europe |
| CPIUN | Convention on the Privileges and Immunities of the United Nations |
| CRC | Convention on the Rights of the Child |
| OP (on a communications procedure)-CRC | Optional Protocol to the Convention on the Rights of the Child on a communications procedure |
| CRC Committee | Committee on the Rights of the Child |

| | |
|---|---|
| CRPD | Convention on the Rights of Persons with Disabilities |
| OP-CRPD | Optional Protocol to the Convention on the Rights of Persons with Disabilities |
| CRPD Committee | Committee on the Rights of Persons with Disabilities |
| ECHR | Convention for the Protection of Human Rights and Fundamental Freedoms |
| EComHR | European Commission on Human Rights |
| ECOSOC | United Nations Economic and Social Council |
| ECtHR | European Court of Human Rights |
| EDNY | US District Court • Eastern District of New York |
| ESA | European Space Agency |
| EU | European Union |
| FIDH | International Federation for Human Rights |
| FRY | Federal Republic of Yugoslavia |
| HLP | United Nations Secretary-General's High-Level Panel |
| HRAP | Human Rights Advisory Panel |
| HRC | Human Rights Committee |
| IAComHR | Inter-American Commission on Human Rights |
| IACtHR | Inter-American Court of Human Rights |
| ICC | International Criminal Court |
| ICCPR | International Covenant on Civil and Political Rights |
| OP-ICCPR | Optional Protocol to the International Covenant on Civil and Political Rights |
| ICED | International Convention for the Protection of All Persons from Enforced Disappearance |
| CED Committee | Committee on Enforced Disappearance |
| ICERD | International Convention on the Elimination of All Forms of Racial Discrimination |
| CERD Committee | Committee on the Elimination of Racial Discrimination |
| ICESCR | International Covenant on Economic, Social and Cultural Rights |
| CESCR Committee | Committee on Economic, Social and Cultural Rights |
| ICHR | International Court of Human Rights |

| | |
|---|---|
| ICJ | International Court of Justice |
| ICMW | International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families |
| CMW Committee | Committee on Migrant Workers |
| ICTR | United Nations International Criminal Tribunal for Rwanda |
| ICTY | International Criminal Tribunal for the former Yugoslavia |
| IDP | Internally Displaced Persons |
| IJDH | Institute for Justice & Democracy in Haiti |
| ILA | International Law Association |
| ILC | International Law Commission |
| ILO | International Labour Organisation |
| IMF | International Monetary Fund |
| LEHI | Lohamei Herut Yisrael |
| MoA | Margin of Appreciation |
| MoU | United Nations Model Memorandum of Understanding |
| NGOs | Non-governmental organisations |
| OAS | Organisation of American States |
| ODIHR | OSCE Office for Democratic Institutions and Human Rights |
| OHCHR | Office of the United Nations High Commissioner for Human Rights |
| OMCT | World Organisation Against Torture |
| ONUC | Opération des Nations Unies au Congo |
| OSCE | Organization for Security and Co-operation in Europe |
| PCIJ | Permanent Court of International Justice |
| PRRA | Pre-Removal Risk Assessment |
| RAE | Roma, Ashkali, and Egyptian |
| R2P | Responsibility to Protect |
| SDNY | US District Court • Southern District of New York |
| SRSG | Special Representative of the Secretary-General |
| UDHR | Universal Declaration of Human Rights |
| UN | United Nations |
| UNCHR | United Nations Commission on Human Rights |
| UNCIO | United Nations Conference on International Organization |

| | |
|---|---|
| UNESCO | United Nations Education, Scientific and Cultural Organisation |
| UNHCR | United Nations Refugee Agency |
| UNMIK | United Nations Interim Administration Mission in Kosovo |
| UNOSOM II | United Nations Operation in Somalia II |
| UN PKOs | United Nations Peacekeeping Operations |
| UNPROFOR | United Nations Protection Force |
| UNSTAMIH | United Nations Stabilization Mission in Haiti |
| UNTAET | United Nations Transitional Administration in East Timor |
| UPR | Universal Periodic Review |
| USSR | Union of Soviet Socialist Republics |
| VCLT | Vienna Convention on the Law of Treaties |
| WFP | United Nations World Food Programme |

# Chapter One Introduction

## 1. Statement of the Problem

In a sense, post-war international law has a humanised character. The birth and development of international human rights law recognises the human individual as the key subject of law and upholds the sanctity of individual conscience.[1] A plenitude of legal instruments for the protection of a vast number of human rights, at both an international and regional level constitutes part of normative globalisation. At the same time, despite a degree of anarchy – there is no universal sovereignty or truly international government – there is, as a rule, a growing consensus in the politics of the international community that human rights are little more than rhetoric unless they are actually enforced. In other words, the existence of human rights law alone is insufficient without some way of enforcing it. As Paulsson said: 'Legal rights would be illusory if there were no entitlement to a procedural mechanism to give them effect'.[2] The last decades have witnessed a remarkable course of judicialisation in global human rights, which has transformed the human rights infrastructure from nothing to 'a complex web of institutions tasked with promoting and protecting human rights and preventing human rights violations'.[3]

It can be observed that the trend of judicialisation in human rights has not, however, gone as far as the creation of a permanent and specialised human rights court with global reach. At the international level, and particularly at United Nations (UN) level, the attention of international law circles has long been centred on substantive human rights rules and the practice of those established monitoring bodies with quasi-judicial functions, with little consideration given to the further promotion of judicialisation in the form of the creation of such a human rights court at this level.

[1] Roger Normand and Sarah Zaidi: *Human rights at the UN: the political history of universal justice*, Bloomington: Indiana University Press, 2008, p.15.
[2] Jan Paulsson: *Denial of Justice in International Law*, Cambridge: Cambridge University Press, 2005, p.134.
[3] Gerd Oberleitner: "Towards an International Court of Human Rights?", in: Mashood A. Baderin and Manisuli Ssenyonjo (eds.): *International Human Rights Law: Six Decades after the UDHR and Beyond*, Farnham, Surrey, England; Burlington, VT: Ashgate Publishing, 2010, pp.359 – 370, at 359.

## 2. The Background to the Study

The drive to promote judicialisation in international human rights mechanisms gained a new momentum in 2008 with the commemoration of the 60th anniversary of the Universal Declaration of Human Rights (UDHR), and the most significant current discussion on this issue concerned the establishment of a World Court of Human Rights (WCHR). In 2008, on the occasion of the 15th anniversary of the 1993 Vienna World Conference on Human Rights, Austria hosted an international conference of experts, entitled "Global Standards – Local Action". With regard to the UN human rights mechanisms and Office of the United Nations High Commissioner for Human Rights (OHCHR) in particular, the participating experts suggested that the capacity of these should be enhanced; they also suggested that 'the establishment of a "World Court on Human Rights" should be considered'.[4] Subsequently, in December of the same year, the Swiss Government, with the assistance of the Geneva Academy of International Humanitarian Law and Human Rights, initiated, sponsored and financed an 'Agenda for Human Rights' in Geneva. As part of the 60th anniversary celebrations of the UDHR, this Swiss initiative aimed 'to assess the development of human rights over the last 60 years and to point to ways in which human rights protection can be improved in the 21st century'.[5]

The 'Agenda for Human Rights' consisted of eight specific projects for further study, and 'A World Court of Human Rights' was one of them.[6] This project envisioned that a WCHR would strengthen the protection of human rights. Manfred Nowak and Julia Kozma from the University of Vienna, and Martin Scheinin from the European University Institute

[4] Global Standards – Local Action, 15 years Vienna World Conference on Human Rights, International Expert Conference, Vienna Hofburg, 28 -29 August 2008, in: Human Rights Council: "Follow-Up and Implementation of the Vienna Declaration and Programme of Action, Letter dated 15 September 2008 from the Permanent Mission of Austria to the President of the Human Rights Council", A/HRC/9/G/6, 22 September 2008, p.11. For more details about this conference, see: Wolfgang Benedek, Clare Gregory, Julia Kozma, *et al.* (eds.): *Global Standards - Local Action: 15 Years Vienna World Conference on Human Rights*, Wien & Graz: Neuer Wissenschaftlicher Verlag, 2009.

[5] See: https://www.admin.ch/gov/en/start/dokumentation/medienmitteilungen.msg-id-23651.html.

[6] The eight projects were: human dignity, prevention, detention, migration, statelessness, the right to health, climate change and human rights, and a world court of human rights. For more details about this agenda, see: for example, Panel on Human Dignity: "Protecting Dignity: An Agenda for Human Rights: Progress Report of the Eminent Persons Panel by Manfred Nowak, Panel member and rapporteur", available at: http://www.nhrc-qa.org/wp-content/uploads/2013/07/Protecting_Dignity_English_Report.pdf; Manfred Nowak and Julia Kozma: "A World Court of Human Rights", Swiss Initiative to Commemorate the 60th Anniversary of the UDHR: *Protecting Dignity: An Agenda for Human Rights*, June 2009, pp.13 – 14. This report is available at: http://bim.lbg.ac.at/sites/files/bim/World%20Court%20of%20Human%20Rights_BIM_0.pdf.

contributed their respective draft Statutes for the future WCHR in 2009.[7] These two drafts identified and addressed many relevant legal and practical issues that need to be taken into account when considering the establishment of the WCHR. In 2010, the three authors unanimously adopted a consolidated draft (hereinafter referred to as the Consolidated Statute) on the basis of extensive discussions.[8] These three draft statutes – the NK Statute, the MS Statute and the Consolidated Statute – form the basis for the discussion in this dissertation, so in a sense, this dissertation can be seen as further research into these three draft statutes.

## 3. Research Questions and the Structure of the Dissertation

With regard to the above, the following interrelated research questions came to the fore.

(1) Is there any effort to establish a dedicated human rights court at international level in history? If this question has gained a positive reply, what about the result of these previous efforts?

(2) Is the well-established principle of complementarity embodied in the current statutes for the proposed WCHR, and if so, how?

(3) Can the proposed WCHR exercise its jurisdiction over various entities other than sovereign states, and if so, how?

**Chapter Two** answers the question of why previous efforts to establish a dedicated human rights court at international level have come to nothing. The current proposal for establishing a WCHR represents the ideal of a universal implementation of human rights, which can be traced back to the initial phases of the UN. As Nowak and Kozma pointed

[7] Nowak and Kozma, *supra* note 6; Martin Scheinin: "Towards a World Court of Human Rights", Swiss Initiative to Commemorate the 60th Anniversary of the UDHR: *Protecting Dignity: An Agenda for Human Rights*, June 2009, available at: http://www.enlazandoalternativas.org/IMG/pdf/hrCourt_scheinin0609.pdf.

[8] See: Julia Kozma, Manfred Nowak and Martin Scheinin: *A World Court of Human Rights – Consolidated Statute and Commentary*, Studienreihe des Ludwig Boltzmann Instituts für Menschenrechte Band 22, Wien: Neuer Wissenschaftlicher Verlag – NWV, 2010, pp.29 – 30; Panel on Human Dignity: "Protecting Dignity: An Agenda for Human Rights: 2011 Report", p.63. This report is available at: http://graduateinstitute.ch/files/live/sites/iheid/files/sites/international_law/shared/international_law/Prof_Clapham_website/docs/vsi/Panel-humanDignity_rapport2011.pdf.

out, from the very beginning, the United Nations Commission on Human Rights (UNCHR) decided to codify all the human rights of individuals and the corresponding legal obligations of states, as well as adopting measures of implementation to ensure that all these rights and obligations would be complied with and enforced in practice.[9] With regard to the measures of implementation, some far-reaching ideas, *inter alia*, an International Court of Human Rights (ICHR) on the basis of an Australian proposal, were developed.[10] The current proposal for establishing a WCHR from Nowak and Kozma was inspired by this proposal.

The questions of what factors led to the failure of efforts to establish an ICHR, and whether there was any subsequent attempt to revive the idea of such a Court therefore remain unanswered, but few researchers have conducted a thorough study of these two issues from a legal perspective. In this context, **Chapter Two** attempts to restore the history of the unsuccessful attempts to establish an ICHR, and integrates these efforts into a broader historical and political context. To be specific, the research question underpinning this **Chapter** can be resolved by exploring the following issues: first, the background to and the content of the Australian Proposal for an ICHR; second, the debate on the Australian proposal among the representatives to the UNCHR and the results of that debate; and third, the later efforts to establish a human rights court at an international level.

The past is always prologue to the present. Although the proposal for establishing the ICHR was finally withdrawn by the Australian government, the goal set by this proposal: to establish a dedicated human rights court at international level, has never completely faded away. The current proposal for a WCHR is a remarkable attempt in a series of efforts to achieve this goal. **Chapter Three** and **Chapter Four** then focus on the current proposal, in particular, on the articles regarding the form of the WCHR's jurisdiction, with the expectation of contributing to the debate surrounding such a dedicated court and the universal implementation of human rights.

With regard to the jurisdiction of the future WCHR, two main subjects, namely, state actors and non-state actors, are highlighted respectively in **Chapter Three** and **Chapter Four**. **Chapter Three** is devoted to the WCHR's jurisdiction over state actors. The establishment of a WCHR will inevitably constitute an intervention into the jurisdiction of

[9] See: Nowak and Kozma, *supra* note 6, p.9.

[10] Other ideas that Nowak and Kozma mentioned are: the creation of an International Penal Tribunal of the United Nations based on the experiences with the Nuremberg and Tokyo Tribunals under the Genocide Convention of 1948, the establishment of a High Commissioner for Human Rights. See: Nowak and Kozma, *supra* note 6, p.10.

States Parties concerning issues of human rights. History has shown that the extent to which international jurisdiction impinges on the jurisdiction of the State can determine to a great extent whether or not a state will accept this jurisdiction. After decades of practice, all the existing human rights mechanisms are now required to keep their jurisdiction in line with the principle of complementarity, which is directly embodied in the rule of exhaustion of local remedies. The same holds true for the current proposal for establishing a WCHR. **Chapter Three,** therefore, addresses the research question of whether and how the principle of complementarity is embodied in the current statutes for the proposed WCHR. In order to answer this question, the following issues are investigated: the content of the jurisdiction of the proposed WCHR under the current statutes; the content of the rule of prior exhaustion of local remedies under the current statutes; and the application of this rule.

Compared with earlier proposals to establish a human rights court at an international level and the existing human rights mechanisms, the current proposal represents an advance with the inclusion of non-state actors (in the NK Statute) and 'entities' (in the MS Statute and the Consolidated Statute) other than sovereign states in the jurisdiction of the proposed WCHR. Accordingly, the research question for **Chapter Four** is how the proposed WCHR can exercise its jurisdiction over these entities. This Chapter chooses the UN as its research subject, considering the significant impact it can sometimes have on the human rights of individuals. To answer this research question **Chapter Four** first deals with the legal foundation of the WCHR's jurisdiction over this Organisation.

It can be observed that the MS Statute distinguished the rule of prior exhaustion of internal remedies from the rule of the prior exhaustion of local remedies, and the Consolidated Statute supports this distinction. This distinction seems to imply the inapplicability of the rule of prior exhaustion of local remedies in cases against the UN. This Chapter therefore goes on to examine this conjecture. Finally, since the current statutes do not provide full details about the application of the rule of prior exhaustion of internal remedies, the end of **Chapter Four** attempts to formulate possible ways in which this rule might be applied.

Lastly, **Chapter Five** summarises the opposing views to the current proposal for a WCHR and responds to these views with reference to the conclusions of the preceding chapters.

## 4. Methods of the Study

This dissertation is a library-based research. The key resources for this research include paper resources in the libraries of the University of Vienna and the Ludwig Boltzmann Institut für Menschenrechte (BIM) and electronic resources such as archives and online libraries. Documentary study, comparative study and case study are the three major methods used in this research.

### 4.1 Documentary study

The bibliography to which this study refers includes both primary sources and secondary sources. In the current study, primary sources mainly include the official documents of the existing human rights mechanisms, from both regional and international levels. Although not able to replace the role of primary sources, secondary sources, such as the teachings of 'publicists'[11] and the published works of the bodies (*e.g.* the International Law Commission (ILC)[12], the committees of the International Law Association (ILA)[13], the International Commission of Jurists[14] and the Institut de Droit International[15]), carry a good deal of weight.

Take, for example, **Chapter Two** of this dissertation, which relies heavily on primary sources. The official documents of the former UN Commission on Human Rights (UNCHR) and the United Nations Economic and Social Council (ECOSOC), proved to be of great value, and the current study obtained these documents through the Official Document System of the UN.[16] The main challenge was how to identify the relevant documents from the vast number of documents generated by the UNCHR and ECOSOC. Secondary sources proved useful in overcoming this challenge. For example, Devereux's article – 'Australia and the International Scrutiny of Civil and Political Rights: An

[11] According to Hall, '"publicists" are almost always eminent academic experts in international law … Their 'teachings' are generally found in published scholarly books and journals.' Stephen Hall: "Researching International Law", in: Mike McConville and Wing Hong Chui (eds.): *Research Methods for Law*, Edinburgh: Edinburgh University Press, 2007, pp.181 – 206, at 198.
[12] See: http://legal.un.org/ilc/.
[13] See: http://www.ila-hq.org/en/committees/.
[14] See: https://www.icj.org/category/publications/.
[15] See: http://justitiaetpace.org/historique.php.
[16] https://documents.un.org/prod/ods.nsf/home.xsp.

Analysis of Australia's Negotiating Policies, 1946-1966' – and the International Commission of Jurists' article, entitled 'Towards a World Court of Human Rights: Questions and Answers' mentioned 'E/CN.4/…' and 'E/CN.4/SR.X' as two relevant classes of document number (symbol). Accordingly, the scope of the search could be limited to those documents labelled with these two kinds of symbols. 'E/CN.4/…' documents are the specific proposals submitted by the representatives to the UNCHR and the working groups established by the UNCHR for discussion, whereas 'E/CN.4/SR.X' refers to the summary records of the UNCHR's meetings, and 'X' at the end, as indicated by the heading of the document, refers to the sequence of the recorded meeting.[17]

In addition, these two articles also offered clues to identifying the years in which the official documents were published. The International Commission of Jurists made specific mention of 1947, when the proposal for establishing the ICHR was tabled by the Australian representative to the UNCHR,[18] and also 1949, after which this proposal 'never gained substantial traction'.[19] The Devereux article examined Australia's policies concerning the shape of international mechanisms to monitor and support rights chronologically in what can be termed the "Evatt period" (1946 – 1949), the "Spender period" (1949 – 1951) and a period termed the "Casey and Bureaucratic period" (1951 – 1966)'.[20] Accordingly, the scope of the search was narrowed down to the period from 1947 to 1949. However, considering that there must be some background to the Australian proposal and that this proposal might have its final destiny, the current study expanded the time range of the search slightly. In the following phase of research, many documents identified by the codes 'E/HR/X', 'E/CN.4/AC.1/X' and 'E/CN.4/AC.1/SR.X' were found. These documents refer respectively to the summary record of the meetings of the 'nuclear commission' before the UNCHR officially began operations in 1947; the specific proposals submitted by the representatives in the meetings of the Drafting Committee; and the summary record of the meetings of the Drafting Committee appointed by the UNCHR.

The official documents of the UNCHR and ECOSOC brought this research into contact with first-hand, unfiltered information from the specific period under study, and

[17] For example, E/CN.4/SR.81 is summary record of the 81st meeting of the UNCHR.
[18] International Commission of Jurists: "Towards a World Court of Human Rights: Questions and Answers", Supporting Paper to the 2011 Report of the Panel on Human Dignity, December 2011, note. 2. This paper is available at: http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2013/07/World-court-final-23.12-pdf1.pdf.
[19] *Ibid*., p.5.
[20] Annemarie Devereux: "Australia and the International Scrutiny of Civil and Political Rights: An Analysis of Australia's Negotiating Policies, 1946-1966", in: *Australian Year Book of International Law*, Vol. 22, 2002, pp.47 – 75, at 50.

helped this study promote a deeper understanding of the unsuccessful efforts to establish an ICHR outlined in **Chapter Two**.

### 4.2 Comparative study

Examples of comparative study can be found in both **Chapter Three** and **Chapter Four**, especially with regard to the designs for the jurisdiction of the proposed WCHR under the current statutes – the NK Statute, the MS Statute and the Consolidated Statute respectively. In **Chapter Three**, a comparison regarding jurisdiction *ratione persone* among the three statutes finds that both the NK Statute and the MS Statute stipulated an inter-state complaints procedure; yet the Consolidated Statute does not include this procedure. Normally, the Consolidated Statute makes a compromise only when there is a divergence between the NK Statute and the MS Statute, but with the inter-state complaints procedure, the Consolidated Statute deleted it even though there was no divergence between the NK Statute and the MS Statute. This finding triggered in-depth research into the neeed for such a procedure within the framework of the future WCHR.

Another example can be found in **Chapter Four**. **Section 1** of this **Chapter** finds that the NK Statute differs from the MS Statute with regard to jurisdiction over the UN. As indicated in this section, the NK Statute identified the UN and its specialised agencies as a kind of respondent, parallel to other non-state actors. In addition, this jurisdiction has a compulsory nature. By contrast, the MS Statute did not highlight the UN and its specialised agencies, and saw the WCHR's jurisdiction over all the non-state actors as optional in nature. The final Consolidated Statute follows the MS Statute. By comparison, it can be found that although there are some differences in stipulation among the current statutes, they do in fact share the position that the UN should have defendant status before the proposed Court.

### 4.3 Case study

Case study is frequently adopted as a research method in the teachings of published scholars and the published works of the bodies. This method has contributed to a better understanding of the jurisdiction of the existing human rights mechanisms at regional and

international level, and it was therefore believed that a case study of the operation of the WCHR would likewise contribute to an understanding of the Court's jurisdiction. However, the proposed WCHR remains purely theoretical, and thus has no case law of its own. Given this, this research alternatively conducted a case study on the existing human rights mechanisms so as to understand the potential exercise of the WCHR's jurisdiction.

Take, for instance, the application of the rule of prior exhaustion of local remedies within the framework of the future WCHR's Statute. As **Chapter Three, Section 3** points out, the exhaustion rule necessitates that both the States Parties and the applicants fulfil their respective obligations under this rule. However, the current statutes of the proposed WCHR only stipulate these obligations in general terms. **Section 3** therefore investigates and analyses a number of cases to demonstrate the content of these obligations further. However, as **Chapter Four, Section 2** finds, the rule of prior exhaustion of local remedies is not likely to apply in the event of a future WCHR having jurisdiction over the UN. This finding is supported by the case study in **Section 2.3** of this **Chapter**. Further, this case study illustrates the dilemma this poses for the domestic courts: whether to respect the UN's jurisdictional immunity or protect the right of access to a court.

## 5. The Limitation of the Study

The limitation of this study lies in the following two aspects: the absence of 'the Treaty of Lucknow' which would ideally have provided further background to this research, and the inability of exhausting all relevant issues regarding the establishment of the WCHR.

As for the first aspect, as mentioned in the part of **The Background to the Study**, this research was conducted on the basis of the three current statutes drafted by Nowak, Scheinin and Kozma. However, these three statutes are not the only ones concerning a future WCHR. In 2012, the World Service Authority of Washington DC, the administrative body of the World Government of World Citizens (WGWC),[21] launched the World Court of Human Rights Development Project to establish a World Court of Human Rights. Mark Oettinger, who was appointed as the Director of this project, assembled the World Court of Human Rights Design Team (hereinafter referred to as

[21] The website of the WGWC: http://www.worldservice.org/index.html?s=1.

Design Team), which was composed of a mixture of judges, lawyers, academics, practitioners and non-profits, to draft a statute for the WCHR. In 2014, the Design Team finished a draft statute (also known as the Treaty of Lucknow) and presented it for endorsement at the 15th annual World Judiciary Summit in December 2014.[22] Since the scope of this research had been set in the winter of 2012, the Treaty of Lucknow is unfortunately not included here.

With regard to the second aspect, the length of the dissertation, and probably more important, the researcher's capability for academic research, do not allow for the addressing of other interesting questions concerning the establishment of the WCHR. Apart from the design of the jurisdiction, many other issues, such as the enforcement of judgments, other admissibility criteria alongside the rule of prior exhaustion of local remedies regarding the complaints procedure, and the organisation of the Court are all worthy of study.

[22] The current draft of the DT Statute is available at: http://www.worldcourtofhumanrights.net/wchr-statute-current-draft.

# Chapter Two Unsuccessful Efforts to the Establishment of an International Court of Human Rights (ICHR)

## Introductory Remarks

It is today widely accepted that the international human rights system consists of two interdependent aspects: the setting up of human rights standards and the establishment of a corresponding mechanism for implementation. Without proper measures for implementation, human rights would consist of nothing more than high-sounding phrases. The efforts to explore measures for implementation which would be beneficial to individuals while also being in a form acceptable to States, begun with the establishment of the United Naitons (UN) in 1945, have never ceased.

The establishment of the United Nations Economic and Social Council (ECOSOC)[1] and the United Nations Commission on Human Rights (UNCHR)[2] formed the notable opening of these efforts. In its first years, the UNCHR received numerous proposals from representatives to the UNCHR on the issue of

[1] The United Nations Economic and Social Council (ECOSOC) was 'charged with the responsibility of promoting universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion'. Department of Public Information United Nations: *Yearbook of the United Nations 1946-47*, New York, United Nations Publications, 1947, p.467. The ECOSOC developed the most complex organisation of the UN organs. See: Department of Public Information United Nations: *Yearbook of the United Nations 1947-48*, Lake Success, New York, United Nations Publications, 1949, p.10. At its first session, the ECOSOC decided to create the UNCHR to enable it to discharge this responsibility. See: UNCHR: "Commission on Human Rights and Sub-Commission on the Status of Women", E/27, 15 February 1946, p.1.

[2] The UNCHR operated initially as 'nucleus of nine members appointed, who were eligible for re-appointment, in their individual capacity. See: E/27, *supra* note 1, p.2. The nuclear commission held 18 meetings and one drafting session, recorded by affixing a document series symbol "E/HR/", which was replaced by series symbol "E/CN.4/". See: UNCHR "Commission on Human Rights Change of Document Series Symbol", E/HR/32, 7 January 1947, p.1; UNCHR: "Report of the Commission on Human Rights to the Second Session of the Economic and Social Council", E/38 and Rev.1, 21 May 1946, p.2.

implementation, and these resulted in significant development of UN human rights mechanisms in the years that followed. It should be noted that these proposals came, to some extent, out of the fierce debate on a proposal first put forward by the Australian representative to the UNCHR. This proposal suggested the establishment of an International Court of Human Rights (ICHR). Accordingly, it is the Australian proposal which must be the emphasis of this chapter.

**Section 1** of this chapter first discusses the background to the Australian proposal. The discussion reveals that, at the initial stage, there was a consensus among the representatives to the UNCHR on drafting an international bill of rights and attention for its implementation. However, the representatives seemed to be confused about the meaning of implementation, the form of the international bill of rights to be drafted and the maturity of discussing specific measures for implementation. The Australian representative was concerned that this confusion would be likely to cause procrastination in the discussion of this issue in the UNCHR forum. In this context, he decided to break the deadlock by submitting a proposal for the establishment of an international human rights court. The remainder of this section is an analysis of the main content of the Australian proposal. This analysis reveals that the proposed ICHR would exercise an extensive jurisdiction *ratione materiae*. An issue worthy of further discussion is that the Australian proposal was attempting to set up, through the ICHR's jurisdiction *ratione persone*, a long-standing system of individual petitions. This system would not only materialise the rights of individuals to petition the UN as a means of initiating the formal judicial process, but also raises individuals to the status of subjects of international human rights law.

In a sense, the strategy of the Australian representative proved to be successful, as it helped the representatives to the UNCHR to form an understanding of the issue of implementation. At the same time, the proposed establishment of an international human rights court immediately triggered heated debate among the representatives. As **Section 2** shows, the debate firstly revolved around the tensions surrounding the idea of an ICHR characterised by compulsory jurisdiction, a system of individual

petitions and the maintenance of state sovereignty. Divergent attitudes toward state sovereignty led to varying degrees of acceptance of the compulsory jurisdiction of an international court and a system of individual petitions. Some representatives, who maintained the inalienability of state sovereignty and feared a situation in which the State was the sole judge of its own cause, were firmly opposed, not only to the Australian proposal but also to any draft or proposal for implementation measures. Nor did the Australian proposal receive general acceptance from the representatives who were inclined to limit state sovereignty. While regarding the Australian proposal as a desirable and ultimate objective, many representatives argued that the prerequisite for establishing such a court, which required courage on the part of the nations, coupled with experience, was not yet ripe. For the time being, they prioritised making the proposal acceptable to states above ensuring that it would benefit the individual. There were several different proposals, based on differing opinions among these representatives, as to the degree to which state sovereignty should be constrained. It is worth noting that all of these proposals either made references, to some extent, to the Australian proposal or directly incorporated some innovations from it into their proposals.

However, the representatives failed to reach agreement on these proposals, and in 1950, the Australian representative abandoned the hope of immediate acceptance of the proposal by the majority of the representatives to the UNCHR. **Section 2** analyses some of the possible reasons for this abandonment. Although this proposal, as the Australian representative claimed, would not be withdrawn, it has gradually faded from the business of the UNCHR. Despite this, the Australian proposal has found another route to revitalisation outside of the UNCHR forum. In other words, efforts directed towards the revitalisation of an international human rights court have been unending throughout the decades which followed. **Section 3** subsequently devotes itself to these efforts through the discussion of some new proposals and motions. They include, but may not be limited to, a ‘World Court of Human Rights’ (hereinafter referred to as the World Court) as the judicial branch of the ‘World

Government of World Citizen' (WGWC) founded by Garry Davis in 1953, a 'Universal Court of Human Rights' (UCHR) put forward by Seán MacBride, and some proposals respectively at the International Conference on Human Rights held in Teheran (hereinafter referred to as the Teheran Conference) and the 1993 Vienna World Conference on Human Rights (hereinafter called the Vienna Conference).

Time has, however, witnessed an ill-fated evolution of this revitalisation. The practice at both regional and international level has shown a gradual reconciliation between international implementation and the imperative of state sovereignty, but the creation of an international judiciary with global reach has stopped short of becoming reality because of the repeated presence of a formidable difficulty in completely eliminating this tension.

## Section 1: The Australian Proposal for Establishing an International Court of Human Rights (ICHR)

As the predecessor of the UN, the League of Nations had paid certain attention to some particular individual rights, such as the right of foreigners, minorities, labourers and citizens of one state injured in another state. However, the absence of a competent machinery obstructed the guarantee of the observance of these rights.[3] During World War II, human rights were recognised among the Allies as one of the impetuses for winning the war against the Axis.[4] There was a consensus that human rights should serve as the legal and moral foundation of the post-war order and the shared goal of the international community.[5] However, this theme of human rights was in a marginalised position during the preparatory sessions of the UN, particularly the 1944 Dumbarton Oaks Conference in 1944[6] and the San Francisco Conference in

[3] See: for example, Louis B. Sohn: "How American International Lawyers Prepared for the San Francisco Bill of Rights", in: *The American Journal of International Law*, Vol. 89, No. 3, 1995, pp. 540 – 546; Jan H. Burgers: "The Road to San Francisco: The Revival of the Human Rights Idea in the Twentieth Century", in: *Human Rights Quarterly*, Vol. 14, No. 4, 1992, pp.447 – 477; Mark Mazower: "Minorities and the League of Nations in Interwar Europe", in: *Daedalus*, Vol. 126, No. 2, Human Diversity (Spring, 1997), pp.47 – 63; Mark Mazower: "The Strange Triumph of Human Rights, 1933 – 1950", in: *The Historical Journal*, Vol. 47, Issue 02, 2004, pp.379 – 398; and *etc*.

[4] See: Roger Normand and Sarah Zaidi: *Human rights at the UN: the political history of universal justice*, Bloomington: Indiana University Press, 2008, p.32.

[5] *Ibid*, p.107. See also: Mazower: "The Strange Triumph of Human Rights, 1933 – 1950", *supra* note 3, pp.386 – 387.

[6] No proposal on human rights was submitted until all the major issues had been settled at the Dumbarton Oaks Conference. The US President Franklin Roosevelt instructed the US delegation to secure the recognition for human rights by drafting human rights clauses, in order to 'win domestic support for new politics and institutions, and to silence critics at home. See: Kristen Sellars: *The Rise and Rise of Human Rights*, Stroud, Gloucestershire: Sutton, 2002, p.xiii. However, neither the Soviet Union nor the United Kingdom was keen on this proposal. See: Alfred William Brian Simpson: *Human Rights and the End of Empire: Britain and the Genesis of the European Convention*, Oxford; New York: Oxford University Press, 2001, p.244 – 247. As a compromise, a human rights clause was inserted in a single vague reference into Sec. A, Chapter IX ("Arrangements for International Economic and Social Cooperation") of the Dumbarton Oaks Proposals ("The Proposals for the Establishment of A General International Organisation") at the last minute:

1945.[7]

Despite this trend, the international community still harboured high expectation for the ECOSOC, and the UNCHR in particular, taking a new role in human rights and offering a fresh start to reverse the situation. Based on the introspection around

---

> With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations, the Organization should facilitate solutions of international economic, social and other humanitarian problems and promote respect for human rights and fundamental freedoms. Responsibility for the discharge of this function should be vested in the General Assembly and, under the authority of the General Assembly, in an Economic and Social Council.

To Normand and Zaidi, the word 'promote' in this section, compared with the term such as safeguard, protect, guarantee, fulfil, mandate, or enforce, was far weaker. See: Normand and Zaidi, *supra* note 4, pp.33, 107. More comments on the Dumbarton Oaks Conference can be found in: for example: Lawrence Preuss: "The International Court of Justice, the Senate, and Matters of Domestic Jurisdiction", in: *The American Journal of International Law*, Vol. 40, No. 4, October 1946, pp.720 – 736, note 16. John Nurser: "The 'Ecumenical Movement' Churches, 'Global Order,' and Human Rights: 1938 – 1948", in: *Human Rights Quarterly*, Vol. 25, No. 4, 2003, pp. 841-881. Burgers, *supra* note 3, pp.447 – 477. Mazower, "The Strange Triumph of Human Rights, 1933 – 1950", *supra* note 3, pp.391 – 394; Ruth B. Russell and Jeannette E. Muther: *A History of the United Nations Charter: the role of the United States, 1940-1945*, Brookings series on the United Nations, Washington, Brookings Institution, 1958, pp.240 – 242; Robert C Hilderbrand: *Dumbarton Oaks: the origins of the United Nations and the search for post-war security*, Chapel Hill: University of North Carolina Press, 1990, pp.91 – 93; and *etc*.

[7] Although the UN Charter was considered to be 'a landmark in the recognition of the status of the individual and his protection by international society' (Lauterpacht: "Human Rights, the Charter of the United Nations, and the International Bill of the Rights of Man", Human Rights Committee of the International Law Association, Brussels Conference, 1948, E/CN.4/89, 12 May 1948, p.1.), the human rights clauses of the UN Charter were an almost direct copy of Sec. A, Chapter IX of the Dumbarton Oaks Proposals. The human rights clauses provided by Arts.55 and 56 were buried in "International Economic and Social Cooperation", the fuzziest and least enforceable part of this charter, and were stripped of enforceability. See: Normand and Zaidi, *supra* note 4, p.113. As the Lauterpacht said: 'A cursory reading of the Charter of the United Nations and of the preparatory work of the San Francisco Conference create the impression that its provisions in the matter of human rights and fundamental freedoms are no more than a declaration of principles and an appeal to the conscience of the Members of the United Nations.' E/CN.4/89, *ibid*, pp.3 – 4. For more about the marginalisation of the human rights issues at the San Francisco Conference, see: for example, John Nurser, *supra* note 6, pp.867 – 876. Sohn, *supra* note 3, pp.540 – 553. Burgers, *supra* note 3, pp.447 – 477; Myres S. McDougal and Gertrude C. K. Leighton: "The Rights of Man in the World Community: Constitutional Illusions Versus Rational Action", in: *Law and Contemporary Problems*, Vol. 14, No. 3, 1949, pp.490 – 536, at 508, 513 – 515; and *etc.*

the causes of World War II and the humanitarian disaster it represented, both the ECOSOC and the UNCHR believed that drafting an international bill of rights was a significant advance upon the UN Charter through materialising the human rights principles laid down in it.[8] In Lauterpacht's words, it 'would amount to an achievement comparable to – and perhaps exceeding – the significance of the Charter itself in the matter of human rights.'[9] 'The prime purpose of this Bill must be to afford protection to all men from violations by the authorities of the State'.[10] The American Jewish Committee presented before the nuclear commission that: 'a bill of human rights be adopted and should be declared to be an integral part of the international law, and that on infraction of it shall be congnizable as a breach of international law before the International Court of Justice.'[11]

The UNCHR also quickly realised their impotence as regards the issue of implementation. Many representatives reminded the UNCHR to not only draw up a full bill of rights or any other documents, but to carefully monitor their observance by

[8] See: E/27, *supra* note 1, p.1. This priority had always been stressed in the course of the nuclear commission's work. See: for example, UNCHR: "Commission on Human Rights of the Social and Economic Council Summary Record of Meetings", first drafting session, E/HR/13, 8 May 1946, p.2; UNCHR: "Commission on Human Rights of the Economic and Social Council Summary Record of Meetings", seventh meeting, E/HR/15, 10 May 1946, p.5; UNCHR: "Commission on Human Rights of the Economic and Social Council Summary Record of Meetings", eighth meeting, E/HR/16, 10 May 1946, p.1; UNCHR: "Commission on Human Rights of the Economic and Social Council Summary Record of Meetings", ninth meeting, E/HR/30, 21 May 1946, p.1. At its eighth meeting, the nuclear commission decided to recommend the ECOSOC to accept that, as the general principle, 'basic human rights should be included in international treaties and should be accepted by all states who are members or who want to become members of the United Nations'. E/HR/16, *ibid*, p.1. The American Jewish Committee and the American Bar Association (ABA) advanced the proposition that a bill of human rights should be adopted as an integral part of international law. See: UNCHR: "Commission on Human Rights of the Economic and Social Council Summary Record of Meetings", eleventh meeting, E/HR/28, 21 May 1946, pp.6, 11 – 12. Similarly, the International League for the Rights of Man: 'Acceptance of the bills of rights should be one of the primary conditions for the future admission of states to the organization'. *Ibid*, p.26.

[9] E/CN.4/89, *supra* note 7, p.1.

[10] Commission on Human Rights Drafting Committee: "Summary Record of the Eighth Meeting", first session, E/CN.4/AC.1/SR.8, 3 July 1947, p.8.

[11] E/HR/28, *supra* note 8, p.6.

the UN.[12] It was in this context that the Australian representative made the proposal of establishing an international human rights court.

### 1.1 Background to the Australian Proposal of an ICHR

In a sense, the Australian proposal was motivated by concerns about the likely procrastination in the discussion of the issue of implementation in the UNCHR forum. This concern was based on the Australian representative's observations regarding the following aspects: the meaning of implementation, the form of the international bill of rights to be drafted and the maturity of discussing specific measures for implementation.

The first aspect is the meaning of implementation. With the recognition of the significance of the issue of implementation, the nuclear commission pointed out in its report to the ECOSOC:

> The purposes of the United Nations with regard to the promotion and observance of human rights … would only be fulfilled if provisions were made for the implementation of an

[12] UNCHR: "Commission on Human Rights of the Social and Economic Council Summary Record of Meetings", third meeting, E/HR/9, 3 May 1946, p.3. This stance was later quoted in many occasions. See: for example, E/HR/28, *supra* note 8, p.12; UNCHR: "Summary Record of the Second Meeting", first session, E/CN.4/SR.2, 29 January 1947, p.3. UNCHR: "Summary Record of the Eighth Meeting", first session, E/CN.4/SR.8, 31 January 1947, p.2; UNCHR: "Summary Record of the Fourteenth Meeting", first session, E/CN.4/SR.14, 5 February 1947, p.7; UNCHR: "Summary Record of the Sixteenth Meeting", first session, E/CN.4/SR.16, 6 February 1947, p.2; UNCHR, Drafting Committee on an International Bill of Human Rights: "Report of the Drafting Committee to the Commission on Human Rights", first session, E/CN.4/21, 1 July 1947, p.92; Resolution no. 2/9: Commission on Human Rights, Resolution adopted on 21 June 1946 (documents E/56/Rev.1 and E/84, paragraph 4, both as amended by the Council), in: UNCHR: "Information on activities concerning human rights of organs of the United Nations", second session, E/CN.4/46, 4 December 1947, p.17; UNCHR: "List of Communications Received from Non-Governmental Organizations in Categories (b) or (c) Eligible for Consultation", second session, E/CN.4/51, 5 December 1947, p.1; UNCHR: "Summary Record of Thirty-Ninth Meeting", second session, E/CN.4/SR.39, 15 December 1947, p.4; and *etc*.

International Bill of Rights.[13]

However, a wide range of views was expressed at the start as to the precise manner in which the observance of the rights to be included in the international bill of rights could be achieved. To some representatives, the issue of implementation only refers to the execution and enforcement of this incoming bill by the future signatories, or, for the future signatories, their domestic observance of the incoming bill.[14] States must incorporate the rights laid down in this bill into their constitutions and legislation and enforce these rights by administrative and judicial authorities.[15] The Division of Human Rights of the Secretariat appeared to accept this understanding. In a memorandum on implementation, it summarised the issue of implementation into the following four questions:

> (a) whether or not the Bill should contain a provision to the effect that it cannot be unilaterally abrogated or modified;
>
> (b) whether or not the Bill should include an express statement to the effect that the matters dealt with in it are of international concern;
>
> (c) whether or not the Bill should become part of the fundamental law of States accepting it; and
>
> (d) whether or not the provisions of the Bill should be declared to be directly applicable in the various countries without further implementation by national legislation

[13] See: E/HR/16, *supra* note 8, p.3. See also: UNCHR: "Draft Report of the Commission on Human Rights to the Second Session of the Economic and Social Council, Rapporteur: Mr. E.G. Neogy (India)", E/HR/19, 15 May 1946, p.5; E/HR/28, *supra* note 8, p.6; UNCHR: "Commission on Human Rights of the Economic and Social Council Summary Record of Meetings", seventeenth meeting, E/HR/29, 21 May 1946, p.5; UNCHR: "Comments from Governments on the Draft International Declaration on Human Rights, Draft International Covenant on Human Rights and the Question of Implementation", third session, E/CN.4/82, 16 April 1948, p.23.

[14] UNCHR: "Summary Record of Meetings, Twelfth Meeting", E/HR/23, 17 May 1946, p.3; For more details of this issue, see: UNCHR: "Opinion of the Legal Department on the Adaption of Municipal Law to International Conventions", third session, E/CN.4/116, 9 June 1948.

[15] See: UNCHR: "United States Proposals Regarding an International Bill of Rights", first session, E/CN.4/4, 28 January 1947, p.2.

or transformation into national law.[16]

There was also an argument that only requiring states to make the international bill of rights immediately applicable was insufficient, and special or additional agency for implementation might be necessary.[17] For example, the French representative suggested that the UNCHR should consider the necessity of creating an organ to study violations of human rights and inform the Commission of those violations.[18] The Assistant Secretary-General of the United Nations, Laugier, seconded this point of view, saying that the UNCHR must draft such a bill and should ask the ECOSOC 'for authority to supervise its observance by the nations of the world. It should be, in other words, a "watchdog" over human rights'.[19] Some non-governmental organisations (NGOs) invited to present their stance before the nuclear commission made their generous response to the establishment of an agency for implementation.[20]

The nuclear commission endorsed the establishment of an agency with the jurisdiction and the duty to supervise and enforce the international bill of rights. It also seems that the nuclear commission was additionally inclined to distinguish the creation of an agency for implementation from drafting the provisions for implementation. In its report to the ECOSOC, the nuclear commission suggested that this agency should be entrusted with the following mandates:

> Firstly, to assist the appropriate organs of the UN in the task defined for the General Assembly and the ECOSOC in Articles 13, 55, and 62 of the Charter concerning the promotion and observance of human rights and fundamental freedoms for all.

---

[16] E/CN.4/21, *supra* note 12, pp.87 – 88.

[17] See: UNCHR: "Draft Report of the Working Group on Implementation", second session, E/CN.4/53, 10 December 1947, p.8. See also: UNCHR: "Commission on Human Rights of the Social and Economic Council Summary Record of Meetings", sixteenth meeting, E/HR/27, 20 May 1946, p.1.

[18] See: E/HR/13, *supra* note 8, p.2.

[19] *Ibid*. See also: E/HR/16, *supra* note 8, pp.2 – 3.

[20] See: E/HR/28, *supra* note 8, pp.5, 26.

> Secondly, to aid the Security Council in the task entrusted to it by Art.39 of the UN Charter, by pointing to cases where violation of human rights committed in one country may, by its gravity, its frequency, or its systematic nature, constitute a threat to the peace.[21]

However, the nuclear commission did not clarify what this distinction would be, and asked the ECOSOC for clarification about the character of this agency.[22] Nor did the ECOSOC make a clarification on this issue, only requiring the UNCHR 'to submit an early date suggestion regarding the ways and means for the effective implementation of human rights and fundamental freedoms'.[23] The meaning of implementation was on hold pending the fifth session of the UNCHR. At this session, the Secretariat of the UNCHR prepared a memorandum in which the issue of implementation was divided into two aspects: the incorporation of the provisions of the Covenant in the internal law of States and the establishment of international machinery for the implementation of the Covenant.[24]

The second aspect lies in the form of the international bill of rights to be drafted. It should be noted that the term 'international bill of rights', rather than a general name given to the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) with its two Optional Protocols (Optional Protocol to the International Covenant on Civil and Political Rights (OP-ICCPR) and the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (2nd OP-ICCPR)) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) and its Optional Protocol (Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, OP-ICESCR) thereto today, for the time being only referred to a single document. As early as the session of the nuclear commission,

---

[21] See: E/38/Rev.1, *supra* note 2, pp.5, 7.

[22] See: E/HR/29, *supra* note 13, pp.3 – 4; E/HR/30, *supra* note 8, p.4.

[23] UNCHR: "Draft Resolution concerning the Report of the Commission on Human Rights, submitted by the Drafting Committee on the Social Commission", E/56/Rev.1, 19 June 1946, p.2.

[24] See: UNCHR: "Suggestions for Measures of Implementation, Memorandum prepared by the Secretariat", Fifth Session, E/CN.4/168, 5 May 1949, pp.3 – 13, 14.

the Chairman realised that it was one of the mandates for the nuclear commission to decide 'how such a bill of human rights should be written'.[25] To be specific, the UNCHR should decide the character, the content and the form of the international bill of rights to be drafted. For example, should this bill take the form of a resolution by the General Assembly or an appendix to the UN Charter? Does this bill have to be integrated into the constitution of all Member Nations or should it be a convention between states, or take some other form?[26]

At its first session, the UNCHR decided to 'examine the form of the proposed bill before going into its substance'.[27] On this issue, the opinion of the majority was that the UNCHR should first prepare the international bill of rights in the form of a Declaration on Human Rights and Fundamental Freedoms, to be followed by detailed treaty provisions on specific matters.[28] However, this issue was yet to be decided at this session. In this context, the Drafting Committee decided to prepare two working papers. One paper was on the preliminary draft of a declaration setting forth general principles and the other was a draft of a convention 'on those matters that the Committee felt might lend themselves to formulation as binding obligations'.[29]

---

[25] UNCHR: "Commission on Human Rights of the Economic and Social Council Summary Record of Meetings", sixth meeting, E/HR/12, 8 May 1946, p.7.

[26] See: E/HR/29, *supra* note 13, p.2. See also: E/38/Rev.1, *supra* note 2, p.3.

[27] UNCHR: "Summary Record of the Seventh Meeting", first session, E/CN.4/SR.7, 31 January 1947, p.7.

[28] See: for example, E/CN.4/4, *supra* note 15, p.1; E/CN.4/SR.7, *supra* note 27, p.2, 4; E/CN.4/SR.8, *supra* note 12, p.4; E/CN.4/SR.14, *supra* note 12, pp.7 – 8; UNCHR: "Summary Record of the Fifteenth Meeting", first session, E/CN.4/SR.15, 5 February 1947, pp.1 – 2, 4, 6; E/CN.4/21, *supra* note 12, p.3. With regard to the form of this declaration, the French representative preferred this declaration to be the preamble of the international bill of rights. See: E/CN.4/SR.8, *supra* note 12, pp.4 – 5. To the Indian representative, this preamble would raise four issues respectively on the form, the content, the application, and implementation. See: UNCHR: "Draft of a Resolution for the General Assembly Submitted by the Representative of the India", E/CN.4/11, first session, 31 January 1947, pp.1 – 2; UNCHR: "Summary Record of the Tenth Meeting", first session, E/CN.4/SR.10, 4 February 1947, p.2. The Australian representative was delighted to see the issue of implementation included in this declaration. Such an inspiring declaration would 'offer the peoples of the world hope that detailed provisions for implementation would be made'. UNCHR Drafting Committee: "Summary Record of the Seventh Meeting", first session, E/CN.4/AC.1/SR.7, 19 June 1947, p.3.

[29] E/CN.4/21, *supra* note 12, p.3. See also: Department of Public Information United Nations:

At its second session, the UNCHR decided to proceed without delay to the respective consideration of these two papers by a majority vote.[30] At the same time, the UNCHR decided to formally apply the term 'international bill of rights' to the entirety of documents in preparation.[31] These documents were: an International Declaration of Human Rights with merely moral force, an International Convention on Human Rights with mandatory obligations.[32] From that point on, there would no longer be a single document known as the 'international bill of rights'. Instead, the international bill of rights would consist of a declaration and two or more specific conventions.

The third aspect was the concern about whether the time was ripe for discussing specific measures for implementation. Some representatives argued that establishing an agency for implementation constituted an entirely new question for the UNCHR[33], as it would result in a different system for putting the principles of the international bill of rights into practice.[34] Therefore, as the first aspect shows, no one was 'in possession of sufficient instructions regarding the question of implementation'.[35] In

*Yearbook of the United Nations 1947-48*, *supra* note 1, p.573.

[30] See: UNCHR: "Report of the Commission on Human Rights, Second Session", E/600, 17 December 1947, p.5.

[31] See: *ibid.*, p.6.

[32] See: *ibid.*, p.4.

[33] See: E/CN.4/SR.15, *supra* note 28, p.4.

[34] See: E/CN.4/SR.15, *supra* note 28, p.4.

[35] E/CN.4/SR.16, *supra* note 12, p.4. This kind of argument continued over the sessions of the UNCHR. See: for example, UNCHR: "Statement Regarding the Possible Ways in Which the Recommendations of the Human Rights Commission Might be Presented to the General Assembly, Submitted by the Representative of the United Kingdom on the Commission on Human Rights", second session, E/CN.4/38, 25 November 1947, p.2; UNCHR: "Summary Record of the Thirty-Eighth Meeting", second session, E/CN.4/SR.38, 15 December 1947, p.9; E/CN.4/SR.39, *supra* note 12, p.3; E/CN.4/SR.15, *supra* note 28, p.6; E/CN.4/SR.16, *supra* note 12, p.3; UNCHR Drafting Committee: "Speech by Mr. A. N. Pavlov, Representative of the Union of Soviet Socialist Republics in the Drafting Committee of the Commission on Human Rights", second session, E/CN.4/AC.1/29, 11 May 1948, p.12; UNCHR: "Collation of the Comments of Governments on the Draft International Declaration on Human Rights, Draft International Covenant on Human Rights, and Question of Implementation", third Session, E/CN.4/82/Add.12, 3 June 1948, p.6; UNCHR: "Summary Record of the Eighty-First Meeting", third session, E/CN.4/SR.81, 1 July 1948, pp.11, 14, 20; UNCHR: "Summary Record of the Forty-Seventh Meeting", third session, E/CN.4/SR.47, 1 June 1948, pp.4 – 5,

this context, it seems to have been too early to discuss this issue before the rights that would be written in the international bill of rights had been clearly defined.[36]

To the Australian representative, 'all the Commission's work would be valueless so long as the machinery for applying the principles set forth had not been considered'.[37] Concerning the first and second aspects, the Australian representative criticised the UNCHR because the representatives to the UNCHR 'had not yet defined their objective nor the exact plan they wished to follow'.[38] He opined that the UNCHR 'should not confine itself to abstractions but was bound to consider immediately effective machinery for implementing human rights and fundamental freedoms, in accordance with its solemn obligations'.[39]

As for the third aspect, the Australian representative firmly opposed postponing discussion of the issue of implementation until 'the definite rights to be enforced would be known by the time the bill was submitted to the General Assembly'.[40] He

6; UNCHR: "Summary Record of the Forty-Eighth Meeting", third session, E/CN.4/SR.48, 4 June 1948, pp.13 – 14, 15, 16; UNCHR: "Summary Record of the Hundred and Thirty-Second Meeting", fifth session, E/CN.4/SR.132, 27 June 1949, p.13; UNCHR: "Summary Record of the Hundred and Sixty-Eighth Meeting", sixth session, E/CN.4/SR.168, 4 May 1950, p.6.

[36] See: E/CN.4/SR.2, *supra* note 12, pp.5 – 6; UNCHR: "Summary Record of the Fourth Meeting", first session, E/CN.4/SR.4, 29 January 1947, p.3; E/CN.4/SR.8, *supra* note 12, p.2; E/CN.4/SR.15, *supra* note 28, pp.4, 7. At the first session of the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, the UK representative reiterated this argument and 'opposed to any interim arrangements for the handling of petitions'. E/CN.4/51, *supra* note 12, p.12. This argument has also gained the support of some representatives. See: UNCHR: "Comments from Governments on the Draft International Declaration on Human Rights, Draft International Covenant on Human Rights and the Question of Implementation", third session, E/CN.4/82/Add.2, pp.11 – 12.

[37] See: UNCHR: "Summary Record of the Ninth Meeting", first session, E/CN.4/SR.9, 1 February 1947, p.3.

[38] *Ibid*.

[39] E/CN.4.SR.16, *supra* note 12, p.2. This point of view has gained the support of some other representatives. See: E/CN.4/SR.39, *supra* note 12, p.11.

[40] E/CN.4/SR.16, *supra* note 12, p.2. Previously, the representative from the Philippines also mentioned this concern when the UNCHR decided to examine a draft declaration of human rights from the Catholic Welfare Association. As he said: 'The subject (of this draft) was of an abstract nature and it was impossible when speaking of the various rights not to deal with their application'. UNCHR: "Summary Record of the Thirteenth Meeting", first session, E/CN.4/SR.13, 6 February 1947, p.3. The Australian representative took a similar line at the first session of Sub-Commission on the Prevention of Discrimination and the Protection of Minorities. See: Commission on Human Rights

argued that the elaboration and implementation of the international bill of rights constituted parallel processes.[41] While the Australian representative regarded having those rights and freedoms being written into the international bill of rights to be a significant advance upon the UN Charter, which laid the foundation of modern international human rights law[42], he pointed out that the UNCHR should also pay equal attention to the implementation of these rights.[43] The Australian representative admitted establishing an agency for the implementation was an entirely new question for the UNCHR. This new question might result in the creation of an agency for implementation as one of the possible solutions, but this should in any event not be an excuse for procrastination on the discussion of a solution. It can be seen that, in the opinion of the Australian representative, the implementation machinery should operate automatically from the start.[44] From this standpoint, the Australian

---

Sub-Commission on the Prevention of Discrimination and the Protection of Minorities: "Report Submitted to the Commission on Human Rights", first session (24 November – 6 December 1947), E/CN.4/52, 6 December 1947, pp.12 – 13. The Belgian representative expressed a similar viewpoint at the second session of the UNCHR. See: UNCHR: "Summary Record of the Twenty-Eighth Meeting", second session, E/CN.4/SR/28, 4 December 1947, p.3. At the second session of the UNCHR, the Australian representative reiterated this point of view. See: E/600, *supra* note 30, p.65. Some representatives, such as the Chinese representative, gradually recognised the importance of the question of implementation. See: UNCHR Drafting Committee: "Summary Record of the Second Meeting", first session, E/CN.4/AC.1/SR.2, 13 June 1947, p.5. See also: UNCHR Drafting Committee: "Summary Record of the Twentieth Meeting", second session, E/CN.4/AC.1/SR.20, 3 May 1948, p.6.

[41] See: E/CN.4/SR.16, *supra* note 12, p.2.

[42] Thomas Buergenthal: "The Normative and Institutional Evolution of the International Human Rights", in: *Human Rights Quarterly*, Vol. 19, No. 4, November 1997, pp.703 – 723, at 703.

[43] See: E/CN.4/SR.16, *supra* note 12, p.2. The Australian representative reiterated this dissatisfaction at the second session of the UNCHR. See: UNCHR: "Summary Record of the Twenty-Sixth Meeting", second session, E/CN.4/SR/26, 3 December 1947, pp.3 – 4. The representative from Lebanon similarly considered that while being quite distinct in function and priority, the contents of the Bill and the issue of implementation were inter-related in a general sense. See: E/CN.4/SR.2, *supra* note 12, p.5.

[44] E/CN.4/SR.39, *supra* note 12, p.8. Similar opinions can be found from other representatives to the UNCHR. For example, The Belgian representative seconded this thought and stated: 'It was not essential to know the substance of the Declaration or Conventions before deciding whether an International Human Rights Office should be established, whether there should be a Court of Justice, or how those organs should work.' UNCHR: "Summary Record of Twenty-seventh Meeting", second session, E/CN.4/SR.27, 3 December 1947, p.6; UNCHR: "Summary Record of the One Hundred and Eleventh Meeting", fifth session, E/CN.4/SR.111, 10 June 1949, p.11.

representative scrutinised the existing organs of the UN.

It was suggested that the UNCHR might consider the possibility of providing for international supervision and enforcement in successive stages. The first stage would consist of the establishment of the competencies of the UN, particularly the General Assembly, the UN Security Council and possibly the UNCHR, to discuss and make recommendations with regard to violations of the international bill of rights.[45]

The General Assembly has considerable moral weight in deterring violation of the international bill of rights through publicity and international censure, however, the UN Charter restrains the General Assembly from taking any further action. According to Art.10 of the UN Charter, the General Assembly should refer any such questions on which action is necessary to the UN Security Council. However, the UN Security Council should be wary of possible intervention with human rights violation, since no provision of the UN Charter has clarified to what extent a particular case would constitute a threat to world peace and security. In this regard, some highlighted the significance of the UNCHR's assistance in determining where a violation of human rights committed in one country may, by its gravity, its frequency or its systematic nature, constitute a threat to the peace.[46] If the UNCHR found an alleged human rights violation did not threaten world peace and security, the UN Security Council would not be receptive to a request for its attention for the allegation. The Australian representative also cited the peace treaties to be signed as an example. Some of these treaties contained territorial claims, the recognition of which would have as their consequence the displacement of hundreds of thousands of persons who had, for example, a right of nationality. The UN Security Council, however, had no precise authority to the application of peace treaties.[47] No machinery was in existence for the application of various peace treaties containing human rights clauses.[48]

---

[45] See: E/CN.4/21, *supra* note 12, p.88.

[46] See: E/HR/28, *supra* note 8, pp.19, 25, 26; E/HR/30, *supra* note 8, pp. 3 – 4.

[47] E/CN.4/SR.9, *supra* note 37, p.4.

[48] See: *ibid*. As a matter of fact, 'the peace treaty with Italy would include such provisions'. E/HR/29,

As for the UNCHR, the Australian representative found that the UNCHR was faced with an either-or situation when dealing with the 'communications concerning human rights' that it received. These appeals and communications covered a wide range of complex problems, which could be divided into two categories. Some of them were, more or less, sources of information regarding general principles, or containing suggestions of a general nature, particularly in connexion with the work of the UNCHR on the drawing up of the international bill of rights. Some of them, submitted by individual persons who considered themselves to be the victims of a violation of their rights, may have additional legal effects: seeking redress for them. For this kind of communication, on the one hand, the UNCHR could not be blind to any particular case of human rights violation since it 'is faced with a continuing duty which [is akin] to that of a sentinel'.[49]

On the other hand, the UNCHR found itself incompetent to take any action in these cases. It was suggested that the UNCHR should ask the ECOSOC for the authority to supervise its observance of the nations of the world.[50] However, the UNCHR resisted this suggestion and adopted a policy of self-denial, claiming that it had no power to conduct an inquiry or hold hearings regarding violations of human rights, or to put its decisions into force. [51] This policy effectively made the UNCHR

---

*supra* note 13, p.3. In 1948, the UN Secretary-General extracted the human rights provisions of the peace treaties that have taken effect. See: UNCHR: "Petitions Concerning the Violation of Provisions Concerning Human Rights Contained, Or To Be Inserted, in Treaties Other Than the International Covenant on Human Rights", third session, E/CN.4/92, 19 May 1948, pp.1 – 3. At the same time, the Secretary- General also pointed out that the existing peace treaties did not provide special machinery for the enforcement of the human rights provisions therein. See: *ibid.*, p.3.

[49] UNCHR: "Memorandum concerning the Commission on Human Rights from the National Council of Negro Women", E/HR/22, 16 May 1946, p.3.

[50] See: E/HR/9, *supra* note 12, p.3.

[51] At the session of the nuclear commission, the Indian representative felt that the UNCHR was serving only in an advisory capacity and had no executive power. See: E/HR/23, *supra* note 14, p.2. The representative of the International League for the Rights of Man similarly pointed out that the UCNHR was at that time functioning as an advisory body for studying certain problems and to make recommendations to the ECOSOC, as do other commissions under the ECOSOC. See: E/HR/28, *supra* note 8, p.21. At the first session of the UNCHR, some representatives repeatedly stressed this viewpoint. The Philippine representative, for example, said: 'The examination of complaints did not

a body, the purpose of which was only 'information gathering which made no reference to communications'.[52] The UNCHR was, however, still able to 'submit proposals as to the setting up of machinery for the hearing of such appeals'[53] despite this policy. At its first session, the UNCHR decided to appoint a Sub-Committee on the Handling of Communications, 'to study all the questions involved and particularly those concerning the communication of documents'.[54]

Due to the considerations mentioned above, the Australian representative decided to break the deadlock by submitting a concrete proposal on the issue of implementation at this session. As to the particular form of this machinery, the Australian representative expressed his preference for judicial method:

> The only effective machinery for implementation of the Bill would be the establishment of an International Court of Human Rights, a suggestion that was receiving increasing support from all over the world.[55]

He reiterated this point of view at the first session of the Drafting Committee:

---

enter the UNCHR's functions or powers.' E/CN.4/SR.4, *supra* note 36, pp.4, 5. The Belgian representative stated: 'The principal task of this UNCHR was not to examine these communications or to give the impression that it could redress grievance.' *Ibid*., p.4. The UNCHR agreed with this viewpoint. See: E/CN.4/SR.2, *supra* note 12, p.7; UNCHR: "Report to the Economic and Social Council on the First Session of the Commission", E/259, p.6. The French representative had similar a recognition and further suggested the UNCHR to draw the ECOSOC's attention to the serious gap which results from the absence of this power. See: UNCHR: "Summary Record of the Twentieth Meeting", E/CN.4/SR.20, first session, 7 February 1947, p.3.

[52] Howard Tolley: "The Concealed Crack in the Citadel: The United Nations Commission on Human Rights' Response to Confidential Communications", in: *Human Rights Quarterly*, Vol. 6, No. 4, November 1984, pp.420 – 462, at 427.

[53] UNCHR: "Summary Record of the First Meeting", first session, E/CN.4/SR.1, 28 January 1947, p.3.

[54] E/CN.4/SR.4, *supra* note 36, pp.3 – 4, 7, 8; UNCHR: "Report of the Sub-Committee on the Handling of Communications", first session, E/CN.4/14/Rev.2, 6 February 1947, p.1. This committee was replaced by the Committee on Communications established by the UNCHR at its fifth session. See: Commission on Human Rights: "Report of the Fifth Session of the Commission on Human Rights to the Economic and Social Council", Annex. III, E/1371-E/CN.4/350, 23 June 1949, p.20.

[55] E/CN.4/SR.4, *supra* note 36, p.4.

> [P]rovision should be made that if a government or nation does not carry into effect the terms of the Bill of Rights it should be taken to task by the aggrieved party before an International Court.[56]

The Australian representative also cited several historical precedents, including the Court of Upper Silesia, the International Court of Justice (ICJ) and the 'mixed' courts of Egypt, to support his view.[57]

The motion for judicial method attracted some level of support. As early as 1941, the World Citizens' Association voiced its support for a judicial approach: '[A] right consists only in the legal possibility to invoke a court.'[58] Similar support for a judicial method can be found in the statement of some participants at the International Law Conference held by the Committee of the Grotius Society[59] in 1944. For example, Norman Bentwich regarded judicial protection as the ideal.[60] Max Bresch believed that International Courts would be able to evolve international human rights law 'by building up a body of case law, just as municipal Courts have done'.[61] Lauterpacht also set out a blueprint for an international court of human rights with an extensive jurisdiction *ratione materiae*, which would reach all domains of State authority, including 'the laws, decisions and acts of the legislative, judicial, and

---

[56] UNCHR Drafting Committee: "Summary Record of the Fifth Meeting", first session, E/CN.4/AC.1/SR.5, 17 June 1947, p.10.

[57] See: *ibid.*, p.9.

[58] World Citizens' Association, The world's destiny and the United States, a report on a 'conference of experts in international relations' held at Lake Forest, Illinois, in April 1941, at which a wide variety of political, economic and social problems were examined. Cited in: Mazower, "The Strange Triumph of Human Rights, 1933 – 1950", *supra* note 3, p.385.

[59] The Grotius Society was a British society founded in 1915 and was dissolved in 1958 on the merger with the Society of Comparative Legislation founded in 1895. This merger gave birth to the British Institute of International and Comparative Law.

[60] See: Norman Bentwich: "The Limits of the Domestic Jurisdiction of the State", in: *Transactions of the Grotius Society*, Vol. 31, Problems of Public and Private International Law, Transactions for the Year 1945 (1945), pp.59 – 89, p.63.

[61] *Ibid.*, p.79.

administrative authorities'.[62] At the session of the nuclear commission, Ransom suggested establishing a world court, based on full consideration of the very different civilisations and backgrounds among the countries at the nuclear commission.[63] To him, such a world court would serve as the only way of bringing about a future international bill of rights which was both cognisable and enforceable.[64] The American Bar Association (ABA) similarly believed that the international bill of rights 'should be enforceable by the World Court'.[65] Schneiderman, who expressed that only an International Bill of Rights implemented with court action could prevent the tragedy from recurring, seconded this suggestion.[66] At the first session of the UNCHR, the proposal to establish the ICHR had the support of the Lebanese and French representatives.[67] The Sub-Commission on the Prevention of Discrimination and Protection of Minorities endorsed the right of an individual to petition the UN and the establishment of an international court or tribunal.[68]

### 1.2 The content of the Australian proposal – from the jurisdictional perspective

As mentioned above, the Australian proposal of an ICHR made its appearance at the first session of the UNCHR.[69] This proposal suggested that an ICHR should be

[62] Hersch Lauterpacht: *An International Bill of the Rights of Man*, Oxford, United Kingdom: Oxford University Press, 2013, p.173.

[63] See: E/HR/28, *supra* note 8, p.12.

[64] See: *ibid*.

[65] E/HR/28, *supra* note 8, p.12.

[66] E/HR/28, *supra* note 8, p.10.

[67] See: E/CN.4/SR.16, *supra* note 12, pp.2, 3.

[68] See: UNCHR: "Report of the Third Session of the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities to the Commission on Human Rights", sixth session, E/CN.4/358-E/CN.4/SUB.2/119, pp.27, 28; UNCHR: "Compilation of Comments of Governments on Measures of Implementation Memorandum by the Secretary-General", sixth session, E/CN.4/366, 22 March 1950, pp.4, 5.

[69] See: UNCHR: "Draft Resolution for an International Court of Human Rights Submitted by the Representative from Australia", first session, E/CN.4/15, 5 February 1947 (hereinafter referred to as

set up at the same time as the international bill of rights, on which the UNCHR was working, came into effect. At the same time, this court would form an integral part of this document.[70] The Draft Resolution established the guiding principles of the ICHR's jurisdiction:

> ... the jurisdiction of the court shall be both original and appellate, and shall extend to questions of interpretation arising in such disputes as are brought before administrative tribunals or administrative authorities.[71]

At the second session of the UNCHR, the Australian representative brought the "Draft Proposal for an International Court of Human Rights" with a draft statute of this court, before the UNCHR for discussion. This statute stipulated the ICHR's jurisdiction in detail.

### 1.2.1 the ICHR's jurisdiction *ratione materiae*

According to the Draft Resolution, the ICHR's jurisdiction *ratione materiae* would extend to disputes referring to the enjoyment of human rights and fundamental freedoms that shall be, or would be, written in the Declaration of Human Rights and to treaties of peace that were concluded.[72] The subsequent draft statute had slight differences from the Draft Resolution. It substituted the Covenant on Human Rights for the Declaration of Human Rights. As Art.19 of this statute stipulated, the ICHR's jurisdiction *ratione materiae* shall comprise, including the Covenant on Human Rights, the Articles concerning human rights in any treaty or convention between

---

the Draft Resolution) and Drafting Committee of the Commission on Human Rights: "Australia: Draft Proposal for an International Court of Human Rights", second session, E/CN.4/AC.1/27, 10 May 1948.

[70] See: E/CN.4/AC.1/27, *supra* note 69., p.1.

[71] E/CN.4/15, *supra* note 69, para.2.

[72] E/CN.4/15, *supra* note 69, p.1. See also: ECOSOC: "Official Records, first year, second session, Annex 4, Report of the Commission on Human Rights", pp.229 – 230. Cited in: *Yearbook on Human Rights for 1947*, New York, United Nations, 1947, p.435.

states referred to it by any party to such treaty or convention or by the UNCHR.[73] It can be found that this Article also deleted the treaties of peace. This deletion did not mean the exclusion of these treaties from the scope of the ICHR's jurisdiction *ratione materiae*. For one thing, as mentioned above, establishing a machinery for the application of these treaties was always one of the concerns of the Australian representative. As early as the Paris Peace Conference in 1946, the Australian delegation also suggested establishing a 'Special European Court of Human Rights' to guarantee the implementation of all assurances with regard to human rights that would be incorporated into the later Paris Peace Treaties, but without success.[74] For the rest, Art.19 could be considered a fallback provision for the ICHR's jurisdiction *ratione materiae*. In other words, the ICHR's jurisdiction *ratione materiae* under Art.19 of the statute could cover these treaties.

Moreover, this jurisdiction was likely to be widened in particular situations. According to Art.18 (2), under certain conditions laid down by the ECOSOC, the ICHR could exercise jurisdiction over the special provisions contained in treaties in force that were not within the jurisdiction established by the present statute.

### 1.2.2 the ICHR's jurisdiction *ratione persone*

Concerning the ICHR's jurisdiction *ratione persone*, the Australian proposal focused on what entity would be eligible for initiating a judicial process for the enforcement of human rights. According to Arts.17 and 18 (1) of the draft statute, state-actors (sovereign states) and non-state actors (individuals, groups of individuals, associations (national or international) would possess *locus standi* before the ICHR.[75]

---

[73] E/CN.4/AC.1/27, *supra* note 69, p.6. See also: E/CN.4/92, *supra* note 49, p.1.

[74] See: C.W.R Water: "Voices in the Wilderness: HV Evatt and the European Peace Settlement", in: David Day (ed.): *Brave New World: Dr H V Evatt and Australian Foreign Policy (1941-49)*, St. Lucia, Qld., Australia: University of Queensland Press, 1996, pp.62 – 81, at 73.

[75] See: E/CN.4/AC.1/27, *supra* note 69, p.5. See also: E/600, *supra* note 30, p.3.

1.2.2.1 the ICHR's jurisdiction *ratione persone* over disputes between state-actors

Given the experience of the Permanent Court of International Justice (PCIJ),[76] the predecessor of the ICJ, Art.34 of the ICJ Statute stipulated optional jurisdiction over contentious cases between state-actors. According to Art.36 (2) of the Statute of the ICJ, the States Parties may at any time declare their unconditional recognition of the ICJ's compulsory jurisdiction over the existence of any fact, which, if established, would constitute a breach of the contracting obligation under the international bill of rights. States may also, under Art.36 (3), recognised this jurisdiction on condition of reciprocity on the part of several or certain states, or for a certain time. The Australian proposal simplified the stipulation of the jurisdiction over the state-to-state disputes over human rights, in comparison with the ICJ Statute.

By contrast, under the Australian proposal the ICHR's jurisdiction over this kind of case would be original and compulsory. Once the ICHR was established, further consent or extra agreement on the ICHR's jurisdiction would in no event be required.[77] In other words, states acceding to the international conventions under the ICHR's jurisdiction *ratione materiae* implied, *ipso facto,* their acceptance of the ICHR's jurisdiction by any parties in cases before this court.[78]

1.2.2.2 the ICHR's jurisdiction *ratione persone* over disputes between non-state actors and state actors

The Australian proposal paid more attention to the access of non-state actors, and in particular to individuals planning on making an adjudicative claim for international justice before the ICHR. According to Art.17 of the draft statute, the

[76] The Permanent Court of International Justice (PCIJ) held its inaugural sitting in 1922 and was dissolved in 1946. Between 1922 and 1940 the PCIJ dealt with 29 contentious cases between states, and delivered 27 advisory opinions. For more information of the PCIJ, see: http://www.icj-cij.org/pcij/?p1=9.

[77] See: E/CN.4/AC.1/27, *supra* note 69, p.1.

[78] See: E/CN.4/AC.1/27, *supra* note 69, p.1.

ICHR would also be open to individuals, groups of individuals and associations, whether national or international.

It became clear to the UNCHR early on that appeals and communications from individual persons who considered themselves to be the victims of violations of their rights 'established a direct link between the United Nations and men in quest of justice'[79] In this context, the Australian proposal suggested that the UNCHR should consider an appropriate approach to deal with these appeals and communications, together with the issue of implementation.[80] It suggested the establishment of an agency with the competence to provide international justice, not only for communications already received, but also for those that would come forth in the future.[81] However, the UNCHR did not take up this suggestion and, as mentioned above, decided to appoint the Sub-Committee on the Handling of Communications. As a matter of fact, the appeals and communications before the Sub-Committee on the Handling of Communications, which was replaced by the Committee on Communications, served as a source of information for the UNCHR without any additional legal effect. However, the Australian representative worried that this sub-committee would, in every situation, generate a false 'impression that the UNCHR had already been constituted as a kind of Court of Appeal'.[82] The Australian representative therefore argued that the appeals and communications seeking redress for alleged human rights violations should be extracted from the mandate of the Sub-Committee on the Handling of Communications. It should be the mandate for the proposed ICHR to deal with such communications, through exercising its appellate jurisdiction to hear the appeals from all decisions of the courts of States submitted by non-state actors.[83] It follows that, in this sense, the proposed

[79] See: E/CN.4/SR.1, *supra* note 53, p.3.

[80] See: E/CN.4/SR.1, *supra* note 53, p.5.

[81] E/CN.4/SR.9, *supra* note 37, p.4.

[82] E/CN.4/SR.4, *supra* note 36, p.4. The Belgian representative similarly believed that this committee 'would produce the impression that the Commission was seized of the communications and was prepared to take action upon them'. E/CN.4/SR.16, *supra* note 12, p.10.

[83] See: E/CN.4/15, *supra* note 69, para.3.

ICHR could not be regarded as an arrogation of the mandate of the Sub-Committee on the Handling of Communications.

The appellate jurisdiction of the ICHR was theoretically based on the premise that, compared to states, individuals are the direct victims of human rights violations, and granting them the right to petition the UN may enable them to obtain redress.[84] More importantly, this jurisdiction in effect established a new system of individual petition, which was marked by the recognition of an individual's status in international law. Instead of being subject to international law, individual persons do not have access to dialogue with states at an international level as other states do. At the same time, they should have neither rights nor duties in international law, unless the law of their own state imposes duties on them in international relations.

Before the Australian proposal made its appearance, the issue of individuals' status in international law had already attracted much attention. For example, Lord Porter had argued that refusing to recognise an individual's status as a subject in international law might relegate 'the individual to a position in which international law could afford him no protection'.[85] Weis further suggested that establishing machinery which would enable 'the individual not only to bring but also to enforce claims based and recognized by international law is of necessity, whatever its name, federative in character'.[86] Lauterpacht similarly pointed out that a mechanism established with no power to take any action on the subject matter of the complaint would undermine the core value of the right to petition or even make a nonsense of this right.[87]

The jurisprudence of the International Trials at Nuremberg and Tokyo

---

[84] See: E/CN.4/53, *supra* note 17, pp.13 – 14. See also: E/CN.4/SR.9, *supra* note 37, pp. 4 – 5.

[85] Lord Porter, W. Adamkiewicz, René Cassin, *et al*.: "Consideration of Lord Porter's Committee on 'International Law and the Rights of the Individual'", *Transactions of the Grotius Society*, Vol. 31, Problems of Public and Private International Law, Transactions for the Year 1945 (1945), pp. 90 – 109, at 90.

[86] Vladimir R. Idelson: "The Law of Nations and the Individual", in: *Transactions of the Grotius Society*, Vol. 30, Problems of Peace and War, Transactions for the Year 1944 (1944), pp.50 – 82, at 81.

[87] See: E/CN.4/89, *supra* note 7, p.19.

represented a major step in recognising the status of the individual in international law. The jurisprudence of these two tribunals established the precedent that an individual could be prosecuted before international tribunals, and thus be held liable for the most notorious war crimes, including violations of human rights. Since then, the individual has occupied an ever-increasing place among the problems of international law. This jurisprudence also brought to individuals an imbalance of rights and duties in international law.[88] Whilst stressing the demands of the juridical conscience of civilised peoples,[89] the general plaintiff status of individuals has not been put on an equal footing with their defendant status in international law. As the French representative later pointed out:

> Yet, when international law takes cognizance of the individual with a view to protecting him … any programe for the international implementation of human rights must, at the present stage of the law of nations, be in a form acceptable to States.[90]

Whilst stressing the demands of the juridical conscience of civilised peoples[91], international has not put the general plaintiff status of individuals on an equal footing with their defendant status in international law.

In effect, international law has gone a long way towards recognising an individual as a plaintiff before international justice. Although an individual's appearance before an international court was not a normal occurrence, there were still some significant practices.[92] The UN Charter was not accompanied by a parallel

---

[88] See: UNCHR: "The Right of Petition", sixth session, E/CN.4/419, 11 April 1950, pp.38 – 39.

[89] See: UNCHR: "The Fundamental Rights of Man as the Basis for a Restoration of International Law, Declaration Adopted by the Institute of International Law at its Meeting at Lausanne on 9 August 1947", second session, E/CN.4/25, 17 October 1947, p.1.

[90] UNCHR: "Statement by Mr. René Cassin, Representative of France, On the Implementation of Human Rights", third session, E/CN.4/147, 16 June 1948, p.3; E/CN.4/SR.48, *supra* note 35, p.15.

[91] See: E/CN.4/25, *supra* note 89, p.1.

[92] For example, as early as 1907, an International Prize Court was established at the Hague Peace Conference. It empowered individual direct access to the Court. However, that Court never came into operation. The same year, the Central American Court of Justice announced cognizance of claims of

conferment of procedural capacity upon an individual to enable them to enforce, in their own right, the legal benefits of the status thus acquired.[93] However, the UN Charter did not deny the individual such capacity, but rather stipulated this capacity under the Trusteeship system, which was intended to respect human rights and fundamental freedoms for all those living under the governance of the Trusteeship Council. Art.87 (b) of the UN Charter requires the Trusteeship Council to accept petitions and examine them in consultation with the administering authority.[94]

---

international character submitted by citizens of one of the States against any other State, no matter whether or not their claims had the support of their own State. However, it functioned for only ten years. Idelson, *supra* note 86, p.60. Art.197 of the Versailles Treaty of 1919 also provided individuals direct access to the Mixed Arbitral Tribunals established under it, and, in some cases, protection against their own States. See: for example, Paul De Auer: "The Competency of Mixed Arbitral Tribunals" in: *Transactions of the Grotius Society*, Vol. 13, Problems of Peace and War, Papers Read before the Society in the Year 1927 (1927), pp. xvii – xxx. It was also the Slave Trade Conventions followed the First World War that international regulation would bring the individual national within the sphere of international law. See: Lord Porter *et al*., *supra* note 85, p.91. In addition, the procedure of the League of Nations for protection of minorities and the Upper Silesian system were also examples, which showed that individuals enjoyed some standing before international bodies. Additionally, in some cases where States appeared before an international court, individual was allowed to participate in the proceedings if an injury to him formed the subject matter of the dispute. See: Idelson, *supra* note 86, p.60.

[93] E/CN.4/89, *supra* note 7, p.12.

[94] For more details of the question of petitions under the Trusteeship System, see: E/CN.4/419, *supra* note 88, pp.25 – 26. In addition to the Trusteeship Council's continuity to receive individual petitions, the Special Committee on the Situation with regard to the implementation of the Declaration on the Granting of Independence to Colonial countries and Peoples (also known as the Special Committee on decolonization or C-24) could be another case in point. This committee was established in 1961 by the General Assembly with the purpose of monitoring the implementation of the Declaration (General Assembly Resolution 1514 (XV) of 14 December 1960). For more details of this committee, see: http://www.un.org/en/decolonization/specialcommittee.shtml. The Philippine representative similarly pointed out that the Trusteeship Council has 'expressly permitted such right of appeal, which provided the sole means of redress in the case of individuals from Trust territories'. UNCHR: "Summary Record of the Seventh Meeting of the Working Group on the Declaration", second session, E/CN.4/AC.1/SR.7, 9 December 1947, p.6. The French representative also said: '[T]he right of petition to the United Nations should be a right possessed by everyone, irrespective of whether they formed part of a minority or whether they lived in an autonomous state or in a non self-governing or Trust territory.' *Ibid*., p.7. At the sixth session of the UNCHR, the representative of the International League for the Rights of Man recalled that the right of petition had already been granted to the inhabitants of Trust Territories and mentioned a number of petitions upon which the Trusteeship Council had taken action. He said: '[T]o deny the inhabitants of administering States a right granted to the inhabitants of

Another issue closely related to the *locus standi* of individuals before the ICHR is the admissibility criteria of a legal claim submitted under Art.17 of the draft statute. Although the Australian proposal did not define these criteria, it implied the doctrine of exhaustion of local remedies (also known as the rule of prior exhaustion of local remedies), the most important of these criteria. While not making a clear appearance in the draft statute, the doctrine of exhaustion of local remedies can be found in the Draft Resolution, which stipulated that the appellate jurisdiction of the ICHR shall extend to appeals from all decisions of the courts of the States.[95] At the first session of the Drafting Committee, the Australian representative stated: 'This Court would be the Central Appeal Court to which States, groups of individuals or even a single individual could appeal when all domestic possibilities of appeal had been exhausted.'[96] He reiterated that point again at the second session of the UNCHR: 'That Court would provide an opportunity for appeal, should redress in national courts be denied.'[97]

The doctrine of exhaustion of local remedies 'is linked to the respect of sovereignty of the respondent State which after all has to be given an opportunity to do justice in its own way through its internal means of jurisdiction'[98] and represented the complementary nature of the ICHR. This doctrine highlighted the State's dominant position in human rights protection, which has also been recognised by the

---

Trust Territories under their administration would be t o discriminate in reverse.' E/CN.4/SR.168, *supra* note 36, p.14.

[95] See: E/CN.4/15, *supra* note 69, p.1.

[96] E/CN.4/21, *supra* note 12, p.91.

[97] UNCHR: "Summary Record of Twenty-seventh Meeting", second session, E/CN.4/SR/27, 3 December 1947, p.6.

[98] Silvia D'Ascoli and Kathrin Maria Scherr: "The Rule of Prior Exhaustion of Local Remedies in the International Law Doctrine and its Application in the Specific Context of Human Rights Protection The Rule of Prior Exhaustion of Local Remedies in the International Law Doctrine and its Application in the Specific Context of Human Rights Protection", EUI Working Papers Law 2007/02, p.4. This paper is available at: http://cadmus.eui.eu/bitstream/handle/1814/6701/LAW_2007_02.pdf. See also: Antônio A. C. Trindade: *The Application of the Rule of Exhaustion of Local Remedies in International Law: Its Rationale in the International Protection of Individual Rights*, Cambridge: Cambridge University Press, 1983, p.1.

UNCHR from the very start.[99] According to this doctrine, human rights protection is of domestic concern in the first place and international tribunals have only a subsidiary function.[100] A State should first be given an opportunity to take immediately available remedies with a view to correcting its wrong doing. At the same time, the Australian representative noted that all persons suffering from a sense of injustice at the domestic level would be likely to submit the ICHR complaints. The ICHR would then 'be faced with a formidable volume of business from many parts of the world and touching upon all aspects of the Bill of Rights'.[101] If this doctrine were not sufficiently developed, an amount of litigation so vast was likely to make the ICHR unworkable or even paralysed.

It should be further pointed out that the doctrine of exhaustion of local remedies also applies to nationals belonging to the State parties in the event of a claim for reparation for injuries suffered either domestically or abroad. For example, States A and B are both States Parties to the ICHR. A national of State A could press his mother country to offer him protection and shelter through diplomatic protection if he felt his rights have been violated by this State B and he had exhausted all the remedies available under the internal law of State B. According to Art.18 (1), State A may also file a lawsuit against State B before the ICHR on behalf of its national. In addition, in the light of the Australian proposal, this national could qualify the action of State B as amounting to the violation of the international bill of rights before the ICHR, if he has been unable to find a remedy through the municipal courts within State B, up to the highest possible level of jurisdiction. Apart from the doctrine of exhaustion of local remedies, the Australian proposal also sought to reduce the possible backlog of cases before it by other means. For example, according to Art.20 of the draft statute, the ICHR may refer the whole or part of a dispute, or any matter

[99] See: E/38/Rev.1, *supra* note 2, pp.4 – 5; E/CN.4/4, *supra* note 15, p.2.

[100] E/CN.4/SR.16, *supra* note 12, p.2. See also: UNCHR: "United States Proposal Regarding an International Bill of Rights", first session, E/CN.4/17, 6 February 1947, p.2; E/CN.4/89, *supra* note 7, p.45.

[101] Lauterpacht, *supra* note 62, p.173.

arising out of the dispute, to the UNCHR for investigation, report, and in certain cases, to reach an amicable settlement of the dispute.

### 1.2.3 the ICHR's advisory jurisdiction

According to Art.19 (iii) and Art.29 (1) of the draft statute, the ICHR may, at the request of the UNCHR, give an advisory opinion on questions of the observance of human rights by the parties to the international bill of rights or any such Treaty or Convention referred to it.[102]

The ICHR's advisory jurisdiction referred to whether the UNCHR was qualified to request an advisory opinion of the ICHR. According to the ECOSOC resolution (document E/20), the UNCHR was required to make studies and recommendations and provide information and other services at the ECOSOC's request. Given that some studies and recommendations would involve one or more legal questions that are really at stake in specific study or recommendation[103], the UNCHR may ask the ICHR for help through requesting advisory opinions. However, the UNCHR could not request the ICHR to give an advisory opinion on these questions until the ECOSOC authorised it to carry out this mandate. Nevertheless, the UNCHR may also propose any changes in its terms of reference to the ECOSOC.[104]

[102] E/CN.4/AC.1/27, *supra* note 69, pp.1, 6, 8.

[103] See: E/27, *supra* note 1, p.2.

[104] See: E/27, *supra* note 1, p.2.

## Section 2: The Debate on the Australian proposal for an International Court of Human Rights (ICHR)

The Australian proposal was, as many representatives pointed out, the most comprehensive scheme on the issue of implementation.[105] One of the greatest contributions of the Australian proposal was revealing the urgent necessity to establish the ICHR as a permanent body. As an indispensable part of the international bill of rights (later the Covenant on Human Rights), the ICHR would be competent to hear disputes between states as well as those between states and individuals. The ICHR attempted to establish an entirely new system of petitions, and it was through this that the Australian proposal linked the right of individuals to petition the UN to the provisions for implementation, and suggested the immediate application of this link. Another contribution of the Australian proposal was to suggest the establishment of a process for dealing with non-compliance with human rights doctrine as an effective dispute settlement mechanism.

In theory, if the Australian proposal was to have become a reality it would first have had to be adopted by the UNCHR in a majority vote. If this were to have happened, the Australian proposal would have been considered by the ECOSOC and would have had some chance of winning approval in this forum. Gaining the approval of the ECOSOC would have meant that the Australian proposal had the procedural capacity to be discussed in the General Assembly, which would eventually have led to final adoption. However, in practice this did not go entirely to plan, and no substantial agreement on the Australian proposal was reached. The Australian representative formally gave up hope of immediate acceptance of the proposal between 1949 and 1950.

---

[105] See: UNCHR: "India: Proposal on Implementation", third session, E/CN.4/153, 21 June 1948, p.1; UNCHR: "Draft Questionnaire on Implementation Prepared by the Secretary-General Pursuant to Resolution Adopted by the Commission on 8 June 1949", fifth session, E/CN.4/327, 14 June 1949, p.3.

This section will discuss the debate on the issue of implementation, and particularly the debate on the Australian proposal in the UNCHR forum. Before moving to this discussion, it is necessary to review the sessions of the UNCHR and ECOSOC in chronological order.

### 2.1 Outline of the debate during the sessions of the UNCHR and ECOSOC

As mentioned in **section 1**, the Australian representative put forward the proposal for the establishment of the ICHR at the UNCHR's first session. At the same session, the UNCHR decided to appoint a Drafting Committee to explore the issue of implementation and to study the Australian proposal and any other documents that may be submitted to it.[106] At its first session, the Drafting Committee decided to defer the consideration of the issue of implementation until a later date,[107] and submitted a report to the UNCHR, together with a summary of some principal suggestions regarding this matter, but without any decision as regards their merits.[108]

---

[106] For details of the establishment of the Drafting Committee, see: E/CN.4/SR.9, *supra* note 37, p.5; E/CN.4/SR.10, *supra* note 28, p.2, 3 – 4. UNCHR: "Summary Record of the Eleventh Meeting", first session, E/CN.4/SR.11, 3 February 1947, pp.1 – 5; E/CN.4/SR.15, *supra* note 28, pp.3 – 4; E/CN.4/SR.16, *supra* note 12, p.6; With regard to the mandates of the Drafting Committee, some representatives suggested that the incoming Drafting Committee was to 'deal only an international bill of rights' as an independent item of the issue of implementation on the agenda. See: E/CN.4/SR.16, *supra* note 12, p.4. 'If suggestions concerning implementation were also to be referred to the incoming Drafting Committee', Chinese representative added, 'that fact should be clearly stated'. *Ibid*., p.5. In this context, the U.S.S.R further suggested the UNCHR to reappoint a new drafting body 'with powers to draft a preliminary international bill of rights and explore methods of implementation'. *Ibid.*, pp.4 – 5. However, his suggestion was defeated by the UNCHR. See: *ibid*., p.5. The Drafting Committee only operated at the first two sessions of the UNCHR. The UNCHR at its third session decided to give up this method of working. See: UNCHR: "Summary Record of the Forty-sixth Meeting", third session, E/CN.4/SR.46, 27 May 1948, p.4.

[107] See: for example, UNCHR Drafting Committee: "Summary Record of the First Meeting", first session, E/CN.4/AC.1/SR.1, 10 June 1947, p.3; E/CN.4/AC.1/SR.2, *supra* note 40, p.7; UNCHR Drafting Committee: "Summary Record of the Third Meeting", first session, E/CN.4/AC.1/SR.3, 13 June 1947, pp.7 – 8; UNCHR Drafting Committee: "Summary Record of the Fourth Meeting", first session, E/CN.4/AC.1/SR.4, 13 June 1947, p.11; E/CN.4/AC.1/SR.5, *supra* note 56, p.9.

[108] See: E/CN.4/21, *supra* note 12, pp.6 – 7.

According to the provisional agenda of its second session, the UNCHR should have examined the issue of implementation, including the Australian proposal, when considering the report of the Drafting Committee.[109] In view of the limited time at its disposal, the UNCHR set up three working groups, respectively on drafting a universal declaration, an international bill of rights and the provisions of implementation, which started their work simultaneously.[110] The Australian proposal was the subject of numerous dialogues and discussions during the meetings of the third group. The third Working Group then submitted the outcome of their discussions to the UNCHR for further consideration. It should also be pointed out

[109] See: UNCHR: "Summary Record of Twenty-Third Meeting", second session, E/CN.4/SR.23, 2 December 1947, p.7.

[110] At the second session of the UNCHR, some representatives suggested establishing 'three Working Parties' to deal respectively with the problems of the Declaration, the Convention or Conventions, and implementation'. 'These Working Parties would present reports to the Plenary Commission as soon as possible; the Commission would, in the course of the present session, take such decisions in regard to their proposals as it deemed advisable.' UNCHR: "Belgian Proposal (to establish 3 working parties of the Commission on Human Rights to deal with the declaration, the convention or conventions, and implementation)", E/CN.4/44, 3 December 1947, p.1; UNCHR: "Proposal Submitted by the French Delegation", second session, E/CN.4/48, 4 December 1947, p.1. This proposal gained the Australian representative support. See: E/CN.4/SR.27, *supra* note 44, p.6; UNCHR: "Summary Record of the Thirtieth Meeting", second session, E/CN.4/SR.30, 5 December 1947, pp.2 – 3; E/600, *supra* note 30, pp.5 – 6, 41. See also: E/CN.4/53, *supra* note 17, p.1. In effect, at the sixth meeting, the nuclear commission decided to request that the ECOSOC grant the UNCHR the authority to call in ad hoc working groups of non-governmental experts or individual experts, without reference to the ECOSOC, but with the approval of the President of the Council and the UN Secretary-General. See: E/HR/12, *supra* note 25, p.5. At the seventh meeting, the nuclear commission reiterated this decision, pointing out that the UNCHR should establish sub-commissions for drafting an International Bill of Rights, if necessary. See: E/HR/15, *supra* note 8, p.5; E/HR/16, *supra* note 8, p.4. This decision was finally integrated by the nuclear commission into the report to the second session of the ECOSOC and was approved by the ECOSOC. See: E/38/Rev.1, *supra* note 2, p.9. See also: E/56/Rev.1, *supra* note 23, p.1. The third Working Group was composed of the Representatives of Australia, Belgium, India, Iran, the Ukrainian Soviet Socialist Republic, and Uruguay. The representative of the Ukrainian S.S.R. doubted that the Third Working Group was in an opposite position to embark on the study of implementation since this question demands previous knowledge of the rules to be implemented. To him, it was 'necessary to discuss the question of implementation at a later stage of the UNCHR's work, when the work of another Working Party will be finished'. UNCHR: "Draft Report of the Working Group on Implementation", second session, E/CN.4/53, *supra* note 17, p.3. Based on this thought, the representative of the Ukrainian S.S.R.s withdrew from the Third Working Group and took no further part in its work. E/600, *supra* note 30, pp.42 – 43.

that this outcome was not final; other members of the UNCHR reserved the right to bring up the whole issue again in subsequent sessions.[111] The UNCHR made no detailed decision on this report during the remainder of their second session.[112] Nevertheless, when submitting this report directly to the ECOSOC's sixth session for discussion,[113] the UNCHR decided also to forward this report and other suggestions and remarks to Member States for feedback.[114] But the ECOSOC decided to refer the discussion back to the third session of the UNCHR.[115]

The Drafting Committee held its second session before the third session of the UNCHR was convened, and at this, the Australian representative submitted the Draft Proposal.[116] However, the Drafting Committee lacked the time to consider the question of implementation, including this proposal.[117] A similar state of affairs prevailed at the UNCHR's third session. Despite the initial plan to discuss the question of implementation and study the preparatory measures for the establishment of a machinery for the implementation of the international bill of rights,[118] the

[111] See: E/CN.4/53, *supra* note 17, pp. 30 – 31.

[112] See: Department of Public Information United Nations: *Yearbook of the United Nations 1947-48*, *supra* note 1, p.573. See also: E/CN.4/153, *supra* note 105, p.1.

[113] The sixth session of the ECOSOC was held in Lake Success, New York, from 2 February to 11 March 1948.

[114] See: E/CN.4/SR.38, *supra* note 35, pp.3 – 5, 7, 12; E/CN.4/SR.39, *supra* note 12, p.12, 14.

[115] See: UNCHR: "Draft Articles on Implementation of the Bill on Human Rights", third session, E/CN.4/87, 6 May 1948. See also: Department of Public Information United Nations: *Yearbook of the United Nations 1947-48*, *supra* note 1, p.574.

[116] The second session of the Drafting Committee was held at Lake Success from May 3 to 21, 1948.

[117] Department of Public Information United Nations: *Yearbook of the United Nations 1947-48*, *supra* note 1, p.574.

[118] See: E/CN.4/SR.48, *supra* note 35, 4 June 1948, p.3. Prior to the third session of the UNCHR, the Australian government, through the comments on the draft International Bill of Human Rights, was anxious that the proposal for an ICHR could be carefully considered at this session. As they said:

> It is considered that all matters relevant to the implementation of the Covenant should be discussed at the meetings of the Drafting Committee and Session of the Commission in May 1948, including, in particular, the Australian proposal for the establishment of a Court of Human Rights; and a comprehensive plan of implementation, including a draft statute for the Court of Human Rights, should be drawn up by the Drafting Committee for approval by the Commission and submission to the General Assembly. The

UNCHR decided to examine the Declaration article by article and to submit to the ECOSOC only the text of this declaration.[119] This decision meant that the UNCHR would have no time to explore the issue of implementation in depth at this session.[120] Nevertheless, the representatives to the UNCHR were asked to state their views, observations or comments on the question of implementation, which would be taken into account at the UNCHR's fourth session.[121]

At its seventh session, the ECOSOC decided to transmit the question of implementation, albeit without any concrete decision, to the Third Committee of the

---

> implementation and methods of enforcement are essential component elements of the Covenant, and machinery for implementation should be agreed upon at the same time as the Covenant is drafted.

E/CN.4/82, *supra* note 13, p.5. See also: E/CN.4/SR.81, *supra* note 35, pp. 10 – 11. See also: E/CN.4/SR.46, *supra* note 106, p.4; UNCHR: "Program of Future Work", third session, E/CN.4/101, 27 May 1948, p.1. At the beginning of the UNCHR's third session, the Chairman 'hoped that agreement would be reached on the question of implementation'. E/CN.4/SR.46, *supra* note 106, p.3. At the same time, 'she did not advocate the system which had been successfully followed at Geneva of splitting into three working groups' and 'thought it would be preferable to discuss the Declaration, Covenant and Implementation in plenary meeting, in whatever order the Commission might decide, and suggested allotting one week to each subject'. *Ibid*., p.4. She further pointed out the necessity of reserving a considerable place for the problem of implementation. See: E/CN.4/SR.47, *supra* note 35, p.3. See also: E/CN.4/SR.48, *supra* note 35, p.4. Some other representatives held a similar point of view. See: UNCHR: "Summary Record of the Forty-Seventh Meeting", third session, E/CN.4/SR.47, *supra* note 35, p.2; UNCHR: "Summary Record of the Eightieth Meeting", third session, E/CN.4/SR.80, 29 June 1948, p.12.

[119] See: E/CN.4/SR.48, *supra* note 35, p.16; E/CN.4/SR.80, *supra* note 118, p.12. The Union of Soviet Socialist Republics (USSR) representative stated: 'They all knew that the Economic and Social Council had returned to the Commission, without comment, … and the measures of implementation which had been communicated to the Council at the end of the Commission's last session. It was senseless to risk making the Commission ridiculous in the eyes of the Council by repeating same procedure'. *Ibid*., p.13.

[120] See: Department of Public Information United Nations: *Yearbook of the United Nations 1947-48*, *supra* note 1, p.574. See also: E/CN.4/SR.80, *supra* note 118, p.12; UNCHR: "Report of the Third Session of the Commission on Human Rights", E/800, 28 June 1948, p.6; E/CN.4/168, *supra* note 24, pp.2, 15.

[121] E/CN.4/SR.81, *supra* note 35, p.12; E/800, *supra* note 120, pp.5, 6. According to the ECOSOC resolution 128 (VI) D, the UNCHR should take 'preparatory measures for the establishment of machinery for the implementation of the Bill'. UNCHR: "Programme of Future Work", third session, E/CN.4/101, 27 May 1948, p.1.

General Assembly for consideration.[122] The Third Committee of the General Assembly considered the Draft Articles regarding the right to petition,[123] however, it decided not to take any action on the right to petition the UN and requested the ECOSOC to ask the UNCHR to give further examination to the problem of petitions when studying the draft covenant on human rights and measures of implementation.[124] The ECOSOC conveyed this decision to the UNCHR, requiring the latter to 'continue to give priority in its work to the preparation of a draft Covenant on Human Rights and draft measures of implementation'.[125] Accordingly, the UNCHR decided that further work on implementation was of the utmost importance and that it should therefore embark on this work at its fourth session.[126]

Immediately following the unanimous adoption of the UDHR in 1948, the UNCHR held its fourth session (which consisted of one-meeting) and elected the new members of the Sub-Commission on Freedom of Information and of the Press.[127] At its fifth session, the UNCHR decided to complete the draft of the measures of implementation.[128] At this session, the UNCHR also decided to examine the

---

[122] Department of Public Information United Nations: *Yearbook of the United Nations 1948-49*, United Nations, Lack Success, New York, 1950, p.540. See also: E/CN.4/168, *supra* note 24, p.2.

[123] See: Department of Public Information United Nations: *Yearbook of the United Nations 1948-49*, *supra* note 122, pp.540 – 541.

[124] See: UNCHR: "Provisional Agenda", fifth session, E/CN.4/161, April 1949, p.1.

[125] E/CN.4/168, *supra* note 24, p.3.

[126] See: E/CN.4/SR.81, *supra* note 35, p.23; E/800, *supra* note 120, p.6. See also: E/CN.4/168, *supra* note 24, p.2.

[127] See: UNCHR: "Provisional Agenda", fourth session, E/CN.4/155, 2 March 1949, p.1.

[128] See: E/1371-E/CN.4/350, *supra* note 54, p.6. See also: E/CN.4/SR.81, *supra* note 35, pp. 12 – 13; E/CN.4/SR.111, *supra* note 44, pp.3 – 4; UNCHR: "Summary Record of the One Hundred and Fourteenth Meeting", fifth session, E/CN.4/SR.114, 16 June 1949, p.9; See also: UNCHR: "Report by the Secretary-General on the Present Situation With Regard to Communications concerning Human Rights", fifth session, E/CN.4/165, 2 May 1949, p.2; UNCHR: "Lebanon: Draft Resolution on the Draft International Covenant of Human Rights and Measures of Implementation", fifth session, E/CN.4/191, 17 May 1949, p.1; UNCHR: "Right of Petition, Guatemala, India and Philippines: Draft resolution", fifth session, E/CN.4/316, 13 June 1949, p.1; UNCHR: "Draft Report of the Fifth Session of the UNCHR", fifth session, E/CN.4/332, 17 June 1949, pp.6, 11; Department of Public Information United Nations: *Yearbook of the United Nations 1948-49*, *supra* note 122, p.538; UNCHR: "Provisional Agenda", E/CN.4/161, 18 April 1949, p.1.

International Covenant on Human Rights article by article, but made no decision on the issue of implementation.[129] Given the various proposals concerning the issue of implementation, some representatives suggested that the UNCHR should ask the UN Secretary-General to transmit all these proposals to the Member States for their comments.[130] Other representatives thought that the UNCHR should 'come to agreement on a single proposal, which would be communicated to the Governments as the majority view and would be accompanied by the proposals the majority had rejected'.[131] The UNCHR adopted the latter proposal, and decided to 'transmit one proposal to all the Governments, in the form of a majority report, without prejudice to the simultaneous forwarding to the Governments of the other proposals it had received'.[132] To reach agreement on a single text, the UNCHR crafted a questionnaire about the attitudes of the representatives towards all the recommendations on the issue of implementation.[133] If all went according to plan, the UNCHR could 'revise at its next (sixth) session, the Draft Covenant on Human Rights and Draft Measures of Implementation in the light of such replies as will be received'[134] and present these revised drafts to the ECOSOC in due course. The ECOSOC could then submit these drafts, with its approval, to the General Assembly at its fifth (1950) session.[135]

---

[129] See: E/1371-E/CN.4/359, *supra* note 54, p.12. See also: E/CN.4/332, *supra* note 128, p.11. See also: Department of Public Information United Nations: *Yearbook of the United Nations 1948-49*, *supra* note 122, p.539.

[130] See: UNCHR: "Draft International Covenant on Human Rights, India – United States of America: Proposal", fifth session, E/CN.4/336, 15 June 1949, p.1; UNCHR: "Implementation, France and Egypt: Draft Resolution", fifth session, E/CN.4/346, 17 June 1949, p.1. See also: E/CN.4/SR.114, *supra* note 128, p.3; UNCHR: "Summary Record of the Hundred and Nineteenth Meeting", fifth session, E/CN.4/SR.119, 13 June 1949, p.4, 7; UNCHR: "Summary Record of the Hundred and Thirty-Third Meeting", fifth session, E/CN.4/SR.133, 28 June 1949, p.13.

[131] E/CN.4/SR.114, *supra* note 128, p.4.

[132] *Ibid*., p.7.

[133] E/1371-E/CN.4/350, *supra* note 54, pp.16, 17.

[134] *Ibid*., p.12. See also: E/CN.4/332, *supra* note 128, p.11.

[135] See: *ibid*.

### 2.2 The tension between the Australian proposal and the maintenance of State sovereignty

From the very start, some representatives realised that the UNCHR 'would naturally have to distinguish between problems which are of national competence and those which transcend national concern'.[136] The Indian representative warned of the difficulty of setting up such an agency because states might feel that it would interfere with their sovereignty.[137] The debate started with a discussing of whether the international bill of rights should include an expressed statement to the effect that the matters dealt with in it were of international concern.[138]

It seemed to some representatives to the UNCHR that if the Australian proposal sought to subject the states that accepted compulsory procedure to a special international court, it constituted an attempt at a gross infringement of Art.2 (7) of the UN Charter.[139] They were genuine adherents to the principle of state sovereignty, and defined this principle as independence in both internal affairs and international relations with other states.[140] To them, any guarantee of human rights must be in accordance with the principles of national sovereignty and political independence.[141]

---

[136] E/HR/13, *supra* note 8, p.4.

[137] See: E/HR/13, *supra* note 8, p.2.

[138] E/CN.4/53, *supra* note 17, p.5.

[139] See: E/CN.4/SR.15, *supra* note 28, p.7; E/CN.4/SR.38, *supra* note 35, pp. 8 – 9. See also: E/CN.4/SR.81, *supra* note 35, p.14. Some representative held the identical position on the establishment of an international human rights court. For example, the Iranian representative said: 'Any attempt to set up a Court of Appeal to pass judgment on violations of human rights would constitute an infringement of the sovereignty of States.' E/CN.4/SR.8, *supra* note 12, p.3.

[140] See: E/CN.4/SR.38, *supra* note 35, p.10; E/CN.4/SR.39, *supra* note 12, p.11.

[141] See: for example, E/600, *supra* note 30, p.67; UNCHR Drafting Committee: "Summary Record of the Twenty-First Meeting", second session, E/CN.4/AC.1/SR.21, 7 May 1948, pp.3 – 4; E/CN.4/AC.1/29, *supra* note 35, p.11; UNCHR: "Summary Record of the Forty-Ninth Meeting", third session, E/CN.4/SR.49, 2 June 1948, p.7; UNCHR: "Summary Record of the Seventy-Sixth Meeting", third session, E/CN.4/SR.76, 1 July 1948, p.13; UNCHR: "Summary Record of the Seventy-Eighth Meeting", third session, E/CN.4/SR.78, 24 June 1948, p.3; E/800, *supra* note 120, p.38; E/CN.4/SR.111, *supra* note 44, p.10, 12 – 13; E/CN.4/SR.114, *supra* note 128, p.6; UNCHR: "Summary Record of the One Hundred and Fifteenth Meeting", fifth session, E/CN.4/SR.115, 9 June

They believed that a state organised on a solid basis of national sovereignty could effectively guarantee that the rights laid down in the international bill of rights would be observed and enforced by its administrative and judicial authorities. In that case, there would be no need of help from an international mechanism.[142] In addition, international machinery 'would be able to implement no more nor less than could be implemented by the separate governments'.[143] In other words, any international machinery would tend to be less good than the State at judging the purposes which the State ought to pursue.[144] If these recommendations were adopted, the goodwill of states to enforce the principles of human rights and the basic rights of freedom would be seriously affected.[145]

In effect, they worried that the mechanism for implementation might result in substantial changes in the distribution of power between states and the UN.[146] They believed that the discussion on the issue of implementation was aimed at trying to establish an international organisation for control and inspection in the field of human rights.[147] Some representatives even regarded these implementation-related recommendations, backed by the UN as a forum, as fresh attempts to transform the UN into some kind of world government, characterised by its supremacy over national sovereignty and exerting a preponderant political influence.[148]

---

1949, p.15.

[142] See: E/CN.4/SR.38, *supra* note 35, p.10.

[143] UNCHR Drafting Committee: "Summary Record of the Sixth Meeting", first session, E/CN.4/AC.1/SR.6, 16 June 1947, p.3.

[144] See: Timothy Endicott: "The Logic of Freedom and Power", in: Samantha Besson and John Tasioulas (eds.): *The Philosophy of International Law*, Oxford: Oxford University Press, 2010, pp.245 – 259, at 255.

[145] See: E/CN.4/SR.38, *supra* note 35, p.10.

[146] See: Myres S. McDougal and Gerhard Bebr: "Human Rights in the United Nations", in: *American Journal of International Law*, Vol. 58, 1964, p.603 – 641, at 633.

[147] See: E/CN.4/SR.39, *supra* note 12, p.12.

[148] See: E/CN.4/SR.38, *supra* note 35, pp.10, 11. See also: UNCHR: "Comments from Governments on the Draft International Declaration on Human Rights, Draft International Covenant on Human Rights and the Question of Implementation, Communication from Mexico (Ministry of Foreign Affairs)", third session, E/CN.4/82/Add.1, 16 April 1948, p.6; UNCHR: "Collation of the Comments of Governments on the Draft Declaration on Human Rights, Draft International Covenant on Human

This opposition was led by the Union of Soviet Socialist Republics (USSR) and other Soviet republics. As early as the drafting process of the UDHR, the USSR had exhibited concern about the maintenance of the principle of national sovereignty and political independence.[149] They even attempted to add the following text to the preamble to the UDHR:

> … recommends to all States Members of the United Nations for use at their discretion, both in taking the appropriate legislative and other measures and for the dissemination of the provisions contained in this Declaration ….[150]

As far as the USSR was concerned, the phrase 'recommends to all States Members ... for use at their discretion' was equivalent to a statement that it was up to states themselves to decide what legislative or other measures they would take for the dissemination of the provisions contained in the UDHR.[151] The U.S.S.R representative realised that a dilemma arises when the UNCHR considers the measures of implementation:

> The Commission was faced with two conflicting methods of procedure regarding measures of implementation: on the one hand, respect for and protection of human rights by each Government, which was the only method which would ensure the real implementation of certain of the provisions; on the other, enforcement by various States under international pressure of the provisions of the Covenant.[152]

---

Rights and the Question of Implementation (Note by the Secretary-General)", third session, E/CN.4/85, 1 May 1948, pp.52, 100 – 101; 3rd Committee of the General Assembly: Draft international declaration of human rights (E/800) (*continued*), Hundred and Fifty-Ninth Meeting, E/CN.4/SR.118, 26 November 1948, p.700; E/CN.4/SR.119, *supra* note 130, p.2; UNCHR: "Summary Record of the Hundred and Seventy-Seventh Meeting", sixth session, E/CN.4/SR.177, 12 May 1950, p.14.

[149] See: E/CN.4/AC.1/29, *supra* note 35, p.2.

[150] E/CN.4/SR.78, *supra* note 141, p.5.

[151] See: *ibid*.

[152] E/CN.4/SR.114, *supra* note 128, p.6.

The USSR's representative subsequently trenchantly criticised all the proposed recommendations regarding the issue of implementation submitted by the Third Working Group:

> In its recommendations the Working Group had shown itself to be actuated, not by a desire to adopt practical measures for the implementation of human rights and freedoms, but by the intention to subject States accepting the Declaration to the procedures of enquiry and conciliation, and to a special International Court, or even an international Attorney General.[153]

At the third session of the UNCHR, the USSR's representative repeated a number of pointed criticisms of this working group:

> All these drafts and proposals interpret implementation to mean not a system of measures for ensuring that human rights are implemented and guaranteed in every country by the State and society, but rather, a system of international methods of pressure to be exercised through special organs established for this purpose (e.g. an international court, international committee or a United Nations public prosecutor, and *etc.*), and intended to force individual States to take particular steps connected with execution of the Convention on Human Rights. … It is clear, therefore, that such "implementation" may become a means of interfering in the internal affairs of a State party to the Convention, and of undermining the sovereignty and independence of particular States.[154]

Specific to the Australian proposal, he believed that the proposed ICHR would be 'a Court which would stand higher than the separate governments as regards the inter-relations between governments and their citizens and [sic] would inevitably lead

[153] See: E/CN.4/SR.38, *supra* note 35, p.8.

[154] UNCHR: "Statement made by the USSR Delegation in the Commission on Human Rights on 18 May 1948 With Regard to the Drafts and Proposals on Implementation", third session, E/CN.4/154, 24 June 1948, p.1.

to the destruction of governments'.[155] He felt that the proposed ICHR would be working against governments and would remove from states the function of regulating relations between their governments and their citizens.[156] In conclusion, he said that the Australian proposal, in his opinion, would violate the principles of national sovereignty and political independence. He also expressed his opposition to the system of individual petitions introduced by the Australian proposal. To him, there was no hindrance to the existence of this right, because the individual could already address a complaint to the UN. The crux of the matter was not the right itself, but how the UN, to which the petitions would be sent, should take appropriate action on the petitions it received.[157] In the opinion of representative of the USSR, 'in every State which wished to ensure the observance of human rights, machinery should be established to deal with complaints',[158] he added that in his country 'the system of petitions was definitely established; special Government offices had been set up to deal with them and a serious petition was never left unanswered.'[159] He warned that the proposed system would result in friction among states at an international level and thus be in conflict with newly established world peace:

> [It] will have the effect of transforming a dispute between a private individual or group of individuals and their State or Government into an international dispute, thereby substantially enlarging the area of international differences, frictions and incidents, unnecessarily burdening and aggravating international relations and undermining the foundations of peace.[160]

At the same time, he thought that his stance represented no conflict with the practice of the Trusteeship Council, 'because in the Trust Territories no bodies

---

[155] E/CN.4/AC.1/SR.5, *supra* note 56, p.9.

[156] See: *ibid*.

[157] See: E/CN.4/SR.115, *supra* note 141, p.5.

[158] *Ibid*.

[159] *Ibid*.

[160] E/CN.4/154, *supra* note 154, p.1.

existed which could deal with such petitions.'[161] However, it would 'be odd to extend the procedure appropriate to Trust Territories to sovereign States'.[162] At the sixth session of the UNCHR, the USSR's representative even declined to recognise the need for any international agreements on this subject.[163]

Although not denying the concept of state sovereignty under Art.2 (7) of the UN Charter, many representatives to the UNCHR argued that state sovereignty should not constitute a bulwark against human rights protection. They were inclined to narrow or even minimise the application of this Article. They did not want the treatment by a state of its own nationals to be a typical example falling completely within the domestic jurisdiction of the State. As the American Jewish Committee stated, no state could be given permission to make use of a plea of sovereignty if in doing so it deprived people within its borders of these fundamental rights by claiming them to be matters of internal concern.[164] Laugier also made a similar statement in the opening remarks of the UNCHR's first session:

> The general impression had arisen that no violation of human right should be covered up by the principle of national sovereignty, and that violations of the Charter in one State constituted a threat to all, and should set in motion the defense mechanisms of the international community.[165]

Consequently, some suggested reading Art.2 (7) in conjunction with other Articles of the UN Charter. Firstly, they regarded the UN Charter as constituting 'the unshakeable foundation of any measure to be applied internationally'.[166] According to this interpretation, Arts. 55 and 56 should not be 'interpreted as an exception to the

---

[161] E/CN.4/SR.115, *supra* note 141, p.6; See also: E/CN.4/SR.133, *supra* note 130, pp.3 – 4.

[162] *Ibid*.

[163] See: UNCHR: "Comments of Governments on the Draft International Covenant on Human Rights and Measures of Implementation", sixth session, E/CN.4/353, 29 December 1949, p.1.

[164] See: E/HR/28, *supra* note 8, p.7.

[165] E/CN.4/SR.1, *supra* note 53, p.2.

[166] See: E/CN.4/147, *supra* note 90, p.8.

operation of Article 2 (7), since it might lead to an interference in the domestic affairs of Member States'.[167] However, Art.2 (7) did not *per se* mean that a Member State had the final say over whether a particular matter was within its domestic jurisdiction[168], nor could this Article be resorted to in order to impede the UN from taking action when an issue involved human rights.[169] Put another way, the boundary between Art.2 (7) and other provisions of the UN Charter concerning the question of the respect for and observance of human rights and fundamental freedoms was blurred.[170] To them, the above mentioned interpretation might bar further consideration of almost any question by the UN, given that the UN Charter does not stipulate who has the power to clarify this boundary.[171] By depriving the UN of the power to intervene under certain circumstances, the UN Charter reduced to a mere form of words its provisions relating to human rights and fundamental freedoms.[172] If this were to be the case, the UN's functions 'were, in practice, to be whittled down to the mere registration of treaties, negotiated and concluded between individual States acting independently'.[173]

For example, some representatives referred to Art.2 (5) of the UN Charter, which obliges all Member States to give the UN every assistance in any action it

---

[167] UNCHR: "Report on the Present Situation With Regard to Communications Concerning Human Rights", fifth session, E/CN.4/165/Add.1, 1 June 1949, p.4.

[168] See: E/CN.4/89, *supra* note 7, p.6.

[169] Lauterpacht, *supra* note 62, p.214.

[170] Before Lauterpacht, some scholars argued that a matter essentially under domestic jurisdiction lacks a clear scope and there has been a too wide-ranging reading of this scope. As Bentwich, for example, said: 'Too wide a range of subjects has been regarded as falling exclusively within the domestic jurisdiction of the State.' Bentwich, *supra* note 60, p.59. He thus suggested that the UN Charter should narrow the scope of domestic jurisdiction, which 'would stultify any effective measure to protect the individual national from inhuman treatment by his Government'. *Ibid*. Idelson, *et al*. similarly said: 'The obscure – or too clear – notion of sovereignty became not only the main obstacle in any attempt of international organization for the preservation of peace, but also afforded no basis for solving new problems of international life.' Idelson, *supra* note 86, p.54.

[171] Quincy Wright: "Recent Trends in the Evolution of the United Nations", in: *International Organization*, Vol. 2, No. 4, November 1948, pp.617 – 631, at 626.

[172] E/CN.4/89, *supra* note 7, p.6.

[173] See: Bentwich, *supra* note 60, p.82.

takes in accordance with the UN Charter.[174] Some argued that Arts.55 and 56 of the UN Charter allowed for the view that the question of a state's treatment of its own nationals was far from being essentially within the domestic jurisdiction of the State.[175] As the French representative pointed out:

> [I]t must be fully borne in mind that the United Nations is not yet a World Government which could over-ride the authority of national governments. However, in his opinion the Charter itself stated the right of interference. The Charter itself recognized that the international community has the right to deal with the respect of human rights and fundamental freedoms in the interior and within the borders of countries.[176]

Some scholars set the severity of a human rights violation as the boundary of the application of Art.2 (7), which clearly indicated 'which problems are to be left to the individual nations and which should be taken up by the United Nations'.[177] Even those representatives who advocated the total maintenance of state sovereignty would have to agree that state sovereignty could not be invoked in cases where the UN Security Council was taking enforcement measures under Chapter VII. According to this Chapter, the systematic and flagrant violation by a State of human rights, on a scale likely to affect international peace and security, would remove this question from the orbit of matters essentially within its jurisdiction.[178] They found that the argument that Art.2 (7) was intended only 'to prevent any of the later provisions in the Charter (with the exception of Chapter VII) being used as a pretext for interfering in the domestic affairs of a Member State.'[179] As the French representative, for example, said: 'France had always been concerned with its independence and would

---

[174] See: E/HR/28, *supra* note 8, p.7.

[175] See: E/CN.4/89, *supra* note 7, p.6; E/CN.4/AC.1/SR.5, *supra* note 56, p.10.

[176] E/CN.4/AC.1/SR.5, *supra* note 56, p.10.

[177] See: E/HR/16, *supra* note 8, p.2. See also: Commission on Human Rights: "Summary Record of the Seventy-Third Meeting", third session, E/CN.4/SR.73, 24 June 1948, p.2.

[178] See: E/CN.4/89, *supra* note 7, p.7. See also: E/HR/13, *supra* note 8, pp.3 – 4; E/CN.4/SR.73, *supra* note 177, pp.2 – 3.

[179] E/CN.4/165/Add.1, *supra* note 167, p.3.

not voluntarily agree to indiscriminate intervention by the United Nations in its internal affairs'.[180] While believing that some insignificant violations should fall solely within the competence of the State concerned,[181] the French government would 'on condition of reciprocity, accept the limitations of sovereignty necessary to the organization and defence of peace'.[182]

As for the international bill of rights, a significant advance upon the UN Charter, many representatives were in agreement that the argument that rules on implementation would be contrary to the principles of sovereignty and independence of States must be refuted.[183] They believed that the 'domestic jurisdiction' of States should, if rightly interpreted, only cover the 'questions which had not become international in one way or another'.[184] However, acceding to the international bill of rights would constitute an exception to Art.2 (7), since it reveals an agreement among States that human rights should form the subject of international law, which clearly places human rights issues outside their domestic jurisdiction.[185] By this agreement, 'the question of human rights was no longer a matter of domestic, but of international concern'.[186] If an international bill of rights was finally adopted, 'then the treatment of the individual subject by the State will be a matter of international concern and will have international organs to secure its effective vindication'.[187]

For those states advocating the maintenance of state sovereignty, there was a concern for the dignity of states, and perhaps also a concern for regime legitimacy. They appear to have adopted the hypothesis that, on the one hand, the more intense

---

[180] E/CN.4/SR.111, *supra* note 44, pp.11 – 12.

[181] See: *ibid*., p.11.

[182] E/CN.4/147, *supra* note 90, p.2.

[183] See: for example, Observation of the Netherlands Government on the Report of the Commission on Human Rights (E/600), E/CN.4/82, *supra* note 13, p.23; Department of Public Information United Nations: *Yearbook of the United Nations 1948-49*, *supra* note 122, p.527.

[184] E/CN.4/53, *supra* note 17, p.5.

[185] See: E/CN.4/SR.177, *supra* note 148, pp.5, 6.

[186] Department of Public Information United Nations: *Yearbook of the United Nations 1948-49*, *supra* note 122, p.528.

[187] Bentwich, *supra* note 60, p.63.

the domestic protection of human rights, the stronger legitimacy a regime would be given. On the other hand, a mechanism for implementation, if it could discover and denounce violations of human rights, would have a serious impact on the goodwill of the State to enforce the principles of human rights and the basic rights of freedom. To many representatives, by contrast, 'a series of prohibitions and restrictions upon governments in favour of individuals'[188] in the international bill of rights would not set upholding the sanctity of human rights against state sovereignty. They felt that regime legitimacy must rely on compliance with the UN Charter and the international bill of rights. In their eyes, human rights violations in one state which disobeyed the UN Charter might constitute a threat to peace and security all over the world, and would harm regime legitimacy. They therefore endorsed 'a body of positive measures designed to ensure some degree of international supervision over the respect actually accorded to human rights in each State'[189] and to promote direct collaboration among states.[190] This body could also help states to ensure lasting regime legitimacy.

### 2.3 Other proposals on implementation based on the Australian proposal

It can be found that the establishment of the ICHR was based upon the recognition of a need for the partial surrender of state sovereignty. In the course of the discussion on the Australian proposal, almost all the delegates doubted that the Australian proposal could achieve immediate acceptance. Some other representatives also referred their own proposals on the issue of implementation to the UNCHR. As with the Australian proposal, the authors of these proposals supported the idea that total sovereignty must be relinquished to some extent, as well as the right of the UN to intervene to varying degrees. However, this right, as the French representative pointed out, 'must be used with moderation, that it must be used with conviction, and

[188] E/HR/28, *supra* note 8, p.12.

[189] E/CN.4/147, *supra* note 90, p.2.

[190] E/CN.4/53, *supra* note 17, p.11.

that many stages would have to be gone through before such interference could be effectuated equitably'.[191]

### 2.3.1 The new ICHR or an amendment to the ICJ Statute

In the course of the discussions of the third Working Group, the representatives made a broad expression of support for settling issues of non-compliance with human rights doctrine through judicial process.[192] However, no consensus was reached as to what form such a court should take. The controversy appeared to be as to whether a new tribunal should be created, or the services of the current ICJ should be adapted to the new objective.[193]

Some representatives suggested the creation of a special chamber, or a panel of three or five judges of the ICJ according to Art.26 of its Statute.[194] The probable reasons for this choice were, firstly, as the UK representative pointed out, no one could anticipate how much there would be for the ICHR to do in practice, and meanwhile the existing ICJ was not fully occupied.[195] Secondly, there would be an undue increase in the number of international organisations of a judicial character if the Australian proposal were adopted.[196] Given the considerable number of petitions

---

[191] E/CN.4/AC.1/SR.5, *supra* note 56, p.11.

[192] There were three votes in favour of a new court (Australia, Belgium and Iran) and one against (India). See: E/CN.4/53, *supra* note 17.

[193] See: for example, E/CN.4/SR.27, *supra* note 44, p.6; E/CN.4/82, *supra* note 13, p.24; E/CN.4/82/Add.2, 22 *supra* note 36, pp.7,12; E/CN.4/366, *supra* note 68, p.10.

[194] As one of the representatives voting in favour of a new court, the Belgian representative preferred to insert this new court, as a special chamber, into the International Court of Justice (ICJ). See: UNCHR, "Summary Record of Twenty-Fifth Meeting", second session, E/CN.4/SR.25, 2 December 1947, p.7. The American Federation of Labor appreciated this proposal. See: *ibid*. See also: E/CN.4/53, *supra* note 17, pp.25 – 26.

[195] See: UNCHR, "Comments of Governments on the Draft International Covenant on Human Rights and Measures of Implementation", sixth sesstion, E/CN.4/353/Add.2, 7 January 1950, p.11. The US representative shared this point of view, saying: 'It was undesirable to set up a costly and unwieldy body before knowing the extent of the work it-would have to do.' E/CN.4/SR.177, *supra* note 148, p.8.

[196] See: E/CN.4/53, *supra* note 17, p.27.

that might be brought before the ICJ, the Indian representative put forward the idea of a 'Standing Committee on Petitions' which could act prior to any judicial proceedings.[197] At the same time, a 'Permanent Human Rights Council' should also be established to supervise the decision of this 'High Commission' under certain circumstances.[198]

Specific to the ICJ's jurisdiction, while not underestimating the usefulness of the ICJ's advisory jurisdiction, these representatives argued that relying solely on this jurisdiction would be inadequate, and incapable of producing the desired guarantee of human rights.[199] They endorsed the Australian representative inasmuch that, even if the ICJ did give an advisory opinion in the field of human rights, that opinion had then to go all the way back to the UN, and would probably have to wait until it could be considered in the form of a recommendation by the General Assembly.[200] As a result, they must take up 'the idea of final decisions and viewing the problem in this light, were [sic] thus led to choose between the present Court and a new Court'.[201]

**Section 1.2** compared the ICHR and the ICJ on jurisdiction, *ratione persone,* over the dispute between state actors, and revealed the differences. Nothing would obstruct the utilisation of the ICJ more than the accessibility of the ICJ to individuals. The third Working Group found no difficulty in reaching agreement on the point that the right to petition should be open not only to states, but also to associations, individuals and groups.[202] Confining the right to petition to states alone would not furnish adequate guarantees regarding the effective observance of human rights.[203] In

[197] See: *ibid*., pp.19, 27. See also: E/CN.4/SR.81, *supra* note 35, p.11. At the third session of the UNCHR, the Dutch representative similarly suggested a 'High Commission' as an appropriate body of the first instance, to examine these petitions and to set aside those which were not legal problems, should be established. See: E/CN.4/82, *supra* note 13, pp.23 – 24.

[198] See: E/CN.4/82, *supra* note 13, pp.24 – 25. See also: UNCHR: "Comments of Governments on the Draft International Covenant on Human Rights and Measures of Implementation", sixth session, E/CN.4/353/Add.6, 23 February 1950, pp.6, 7.

[199] See: E/CN.4/53, *supra* note 17, p.20.

[200] See: E/600, *supra* note 30, p.66.

[201] E/CN.4/53, *supra* note 17, p.20.

[202] See: *ibid*., p.13.

[203] See: *ibid*.

this sense, the problem confronting the representatives who supported the setting up of an ICJ as a new objective became how to make the ICJ accessible to individuals. To achieve this goal, an amendment to Art.34 (1) of the ICJ Statute became a necessity. However, the procedure of revising the ICJ Statute would be cumbersome. According to Art.69 of the ICJ Statute, amendments to the ICJ Statute should be effected by the same procedure as that provided by Arts.108 and 109 of the UN Charter. As laid down inArt.108 of the UN Charter, a valid amendment needed a vote of two-thirds of the members of the General Assembly, followed by ratification by two-thirds of the Member States, including all the permanent members of the UN Security Council. Before that, according to Art.109, each motion for an amendment required an initiation of reviewing procedure through a General Conference of the Members of the UN. That is to say, making the ICJ accessible to individuals would not be possible without the consent of Member States.

### 2.3.2 Judicial system vs. extra-judicial systems

Some representatives regarded the establishment of an international human rights court as a desirable and ultimate objective.[204] 'However, the whole question was whether, at that time, a large enough number of States would be prepared to

[204] For example, the Third Working Group hoped that all the proposals on the issue of implementation should serve the main objective of the creation of a coherent system culminating in judicial proceedings. See: E/CN.4/53, *supra* note 17, p.20. The French representative 'highly esteems the idea behind the Australian Government's draft proposal for the creation of an International Court of Human Rights'. E/CN.4/147, *supra* note 90, p.7. The New Zealand Government concurred in the proposal that that an international court should be empowered to constitute the final guarantor of human rights. See: E/CN.4/82/Add.12, *supra* note 35, p.7; The Brazilian representative believed that recognition of the right to recourse to an international tribunal was a desirable objective. See: E/CN.4/85, *supra* note 148, p.102. The representative of the International League for the Rights of Man believed there should be a permanent implementation organ that should be so constituted as to be in a position to act independently and to maintain direct relations with an *ad hoc* court of human rights. See: E/CN.4/SR.168, *supra* note 36, p.13. The Indian representative 'considered that the ultimate aim should be the institution of a judicial body to deal with complaints regarding violations of human rights'. E/CN.4/SR.177, *supra* note 148, p.9.

accept the principle of final and binding decisions in the field of the violation of human rights.'[205]

It was anticipated that either establishing the ICHR or conferring the power of compulsory jurisdiction over individual petitions to the ICJ might put the sufficient ratification of the international bill of rights coming into effect at risk.[206] The success of establishing the ICHR, or a special chamber of the ICJ, would take a gradual progress, would have to be based on experience, and would demand courage on the part of the nation states.[207] At that stage, it was decided, the machinery for implementation should not 'go beyond the stage of enquiry, conciliation and

[205] E/CN.4/53, *supra* note 17, p.27.

[206] See: E/CN.4/53, *supra* note 17, p.27.

[207] See: UNCHR: "China and the United States: Proposal on Implementation for the Covenant on Human Rights", third session, E/CN.4/145, 16 June 1948, p.1; E/CN.4/147, *supra* note 90, p.7; E/CN.4/SR.81, *supra* note 35, p.9. The Greek and Danish representatives thought the design of an implementation mechanism ought to proceed with great caution. See: E/CN.4/SR.168, *supra* note 36, pp.6, 11. The French representative once hinted at some indicators of this progress. The first indicator would be the discussion on the establishment of regional human rights courts (an Inter-American Regional Court of Human Rights and a European court of human rights) and the jurisprudence thereof. The second indicator would be a discussion on the establishment of an international criminal tribunal, either as a new chamber of the ICJ or as a totally new court, which would be responsible for the punishment of the worst cases. See: E/CN.4/147, *supra* note 90, p.7. The Egyptian representative similarly pointed out that the plan for the creation of an international court which would give individuals direct access to international jurisdiction and pronounce judgment in disputes on human rights was premature. Nevertheless, Egypt was prepared to reconsider the setting up of an international court (the ICJ) responsible for settling disputes relating to human rights as soon as the system of petitions was in operation. See: UNCHR: "Comments from Governments on the Draft International Declaration on Human Rights, Draft International Covenant on Human Rights and the Question of Implementation", third session, E/CN.4/82/Add.3, 1 May 1948, p.4; E/CN.4/SR.81, *supra* note 35, pp.17 – 18; UNCHR: "Summary Record of the Hundred and Seventy-Eighth Meeting", sixth session, E/CN.4/SR.178, 12 May 1950, p.4. The UK representative expressed his satisfaction with 'a gradual formulation of implementation measures but leaving the actual development of those measures to the States which undertook to apply them'. E/CN.4/SR.81, *supra* note 35, p.16; E/CN.4/SR.168, *supra* note 36, p.9. The Chinese and U.S. representatives also felt that, in the field of implementation, 'it was necessary to act with caution and only in the light of experience'. E/CN.4/SR.81, *supra* note 35, p.9. At the sixth session of the UNCHR, the US representative reiterated that the 'first step in the field of implementation should be a modest one. Advance should therefore be cautious and slow; it should be made step by step and the Commission should learn from experience'. E/CN.4/SR.168, *supra* note 36, p.7.

recommendation'.[208]

Nevertheless, they shared the idea that it was no longer possible to refuse consideration of individual petitions when human rights were involved, and were also agreed on the concept of a precedent in the functions of the Trusteeship Council.[209] In Lauterpacht's words:

> [T]he procedural capacity of the individual petitioning the United Nations will be joined to his new status in international law. In turn, the full realization of the significance of this new status, brought about by the recognition of his fundamental rights and freedoms, as a subject of international law will smooth the path of enabling him to assert them in the international sphere.[210]

In accordance with these ideas, some representatives proposed another kind of system to deal with individual petitions.

#### 2.3.2.1 The French proposal: a special and permanent commission

As mentioned above, in the course of the discussions in the third Working Group, the Indian representative put forward the idea of a 'Standing Committee on Petitions' to act prior to any judicial proceedings. Apart from supervising the observance of the international bill of rights, this committee should also proceed in private session to examine petitions from individuals, groups, associations or States in the first instance.[211] In the opinion of the Indian representative, if the individual

---

[208] E/CN.4/147, *supra* note 90, p.6. See also: E/CN.4/SR.73, *supra* note 178, p.4; E/CN.4/153, *supra* note 105, pp.1, 2.

[209] See: for example, E/CN.4/SR.73, *supra* note 178, p.4; E/CN.4/82, *supra* note 13, p.23; E/CN.4/353/Add.6, *supra* note 198, p.6. The Lebanese representative similarly pointed out: 'If the Commission envisaged only State to State complaints and refused the right of petition to individuals and groups and even non-governmental organizations, its action would obviously merely facilitate and codify existing procedure on complaints but would mark no significant advance.' UNCHR: "Summary Record of the Hundred and Seventy-Sixth Meeting", sixth session, E/CN.4/SR.176, 10 May 1950, p.9.

[210] E/CN.4/89, *supra* note 7, p.13.

[211] See: E/CN.4/53, *supra* note 17, p.19. See also: E/CN.4/SR.81, *supra* note 35, p.12.

right to petition the UN 'was rejected, there would be no point in establishing a new body to guarantee the protection of human rights, since the necessary machinery had already been set up for the settlement of disputes between States'.[212] The standing committee could remedy, through negotiation, any violations of the international bill of rights.[213] In order to maximise the function, the committee 'could, naturally, itself appoint Sub-Committees, including a Sub-Committee to examine the admissibility of petitions'[214] and 'will be able to utilise, the services of the Human Rights Division of the Secretariat'.[215] The decisions of the standing committee would essentially be of a conciliatory rather than arbitrative nature, and still less judicial.[216] It would be only 'if its efforts at conciliation fail'[217], moreover, 'that other solutions, such as judicial proceedings, will come into consideration.'[218]

The French representative developed the idea of the Indian representative further[219] and suggested that the General Assembly should establish a special and permanent commission to examine applications submitted by States, NGOs and private persons.[220] [221] According to his proposal, this permanent commission would

[212] E/CN.4/SR.118, *supra* note 148, p.5.

[213] E/CN.4/53, *supra* note 17, p.19.

[214] E/CN.4/53, *supra* note 17, p.20. At the fifth session of the UNCHR, the Indian representative proposed that the Secretariat should be asked to prepare rules on the admissibility of petitions. See: E/CN.4/SR.115, *supra* note 141, p.4.

[215] E/CN.4/53, *supra* note 17, p.20.

[216] See: E/CN.4/53, *supra* note 17, p.20. The Indian representative reiterated this stance at the sixth session of the UNCHR: '[F]or the time being, the international machinery to be set up should not be in the nature of a judiciary: it should rather be a conciliation committee, the main task of which would be to ensure the observance of human rights.' E/CN.4/SR.81, *supra* note 35, p.5.

[217] E/CN.4/53, *supra* note 17, p.20.

[218] *Ibid*.

[219] As the French representative pointed out when convincing other representative to adopt his proposal, 'the representative of India had linked the question of the permanent organisation to the question of who would be entitled to submit complaints to it'. E/CN.4/SR.177, *supra* note 148, p.5.

[220] See: UNCHR: "Comment by Governments on the Draft International Declaration on Human Rights, the Draft International Convention on Human Rights, and Implementation: Communication Received from the French Government", third session, E/CN.4/82/Add.10, 17 May 1948, p.1. For the meaning of the term 'permanent', the French representative did not propose that this commission 'should be a permanent one in the material and physical sense of the word, nor that should have as broad a scope as the International Court of Justice'. E/CN.4/SR.177, *supra* note 148, p.4. To him, this

be empowered to conduct investigations, during which the commission would be able to draw on any sources of information it deemed necessary.[222] It could also request the ICJ to give advisory opinions on legal questions arising within the scope of its activities if the General Assembly authorised it to do so.[223] Based on the result of the investigations, the commission would call for dialogue with the party or parties concerned and make recommendations for an appropriate settlement.[224] Having anticipated 'the enormous burden which might weigh on the new commission if it had, indiscriminately, to deal with thousands of petitions of very minor importance or futile'[225], the French representative favoured the establishment of one or more agencies to screen for insignificant petitions.[226] In this way, as the Lebanese

commission should be 'a permanent group of eminent persons selected for their competence whose function it would be to hear complaints from States on violations of human rights'. *Ibid*. The UNCHR finally decided to establish a permanent, rather than *ad hoc*, body to consider violations of human rights. See: E/CN.4/SR.178, *supra* note 207, pp.4, 5.

[221] See: E/CN.4/82/Add.10, *supra* note 220., pp.1, 2; E/CN.4/147, *supra* note 90, pp.4, 5; E/CN.4/SR.73, *supra* note 178, p.3; See also: Department of Public Information United Nations: *Yearbook of the United Nations 1948-49*, *supra* note 122, p.539. At the sixth session of the UNCHR, the French representative made a slight amendment to this proposal. The revised proposal pointed out that the ICJ, rather than the General Assembly should appoint the members of this commission. See: UNCHR: "Comments of Governments on the Draft International Covenant on Human Rights and Measures of Implementation", sixth session, E/CN.4/353/Add.8, 10 March 1950, pp.9 – 11.

[222] See: E/CN.4/82/Add.10, *supra* note 220, p.2; E/CN.4/147, *supra* note 90, p.4. Moreover, unlike the original proposal, this proposal 'would be set forth in a supplementary protocol open to signature by the States which were already parties to the Covenant'. See: *ibid*., pp.10 – 11. See also: E/CN.4/SR.177, *supra* note 148, p.3.

[223] See: E/CN.4/82/Add.10, *supra* note 220, p.2. See also: E/CN.4/147, *supra* note 90, pp.4, 7.

[224] See: E/CN.4/82/Add.10, *supra* note 220, p.2. See also: E/CN.4/147, *supra* note 90, p.4.

[225] E/CN.4/147, *supra* note 90, p.6.

[226] See: *ibid*.; E/CN.4/SR.177, *supra* note 148, p.6. At the fifth and sixth sessions of the UNCHR, some representatives suggested the UNCHR should request the ECOSOC to ask the UN Secretary-General to prepare a study on the admissibility and the preliminary examination of petitions and the UNCHR adopted this suggestion. See: E/CN.4/316, *supra* note 128, p.1; UNCHR: "Comments of Governments on the Draft International Covenant on Human Rights and Measures of Implementation", sixth session, E/CN.4/353/Add.4, 23 January 1950, p.6; E/CN.4/353/Add.8, *supra* note 221, p.11; UNCHR: "Comments of Governments on the Draft International Covenant on Human Rights and Measures of Implementation", sixth session, E/CN.4/353/Add.9, 16 March 1950, p.3; E/CN.4/SR.115, *supra* note 141, p.11; E/CN.4/SR.132, *supra* note 35, p.9; E/CN.4/SR.133, *supra* note 130, p.7; E/1371-E/CN.4/350, *supra* note 54, pp.19 – 20.

representative also believed, 'there would be little reason to fear that more petitions would be received than could be handled.'[227]

Concerning the mode of redress, having made reference to the precedent of the International Prosecution at Nuremberg, the French proposal suggested that the introduction of a UN Attorney-General would be a necessary transition.[228] The Attorney-General would serve as a precaution 'lest the delicate and often very serious disputes liable to arise on the subject of human rights be laid open to the charge of being fomented by one State politically interested in bringing another State into disrepute with its own nationals'.[229]

In terms of the relationship between this Commission and other mechanisms already in existence, the French representative pointed out that this commission would not replace the UNCHR in the general supervision of human rights,[230] nor prejudge the functions of the ICJ.[231] He believed that this proposal would not only meet the demands of eminent jurists and publicists and the suggestions made by the third Working Group, but would also satisfy other representatives to the UNCHR.[232] More than that, he regarded the establishment of this commission not as a final aim, but as a short-term objective.[233] He reiterated that the possibility of considering the establishment of international judicial guarantees of human rights, as a human being's last remedy, should not be ruled out, even though the time was yet to come for bringing such a positive proposal to reality.[234] As mentioned above, as he saw it, in a completely international society 'international law takes cognizance of the individual, postulates the establishment of appellate proceedings for his benefit'.[235]

---

[227] E/CN.4/SR.115, *supra* note 141, p.9.

[228] See: E/CN.4/147, *supra* note 90, pp.7 – 8. See also: E/CN.4/SR.73, *supra* note 178, p.4.

[229] E/CN.4/147, *supra* note 90, p.8.

[230] See: E/CN.4/SR.177, *supra* note 148, p.4.

[231] See: E/CN.4/SR.73, *supra* note 178, p.4.

[232] See: E/CN.4/147, *supra* note 90, p.5.

[233] See: E/CN.4/SR.177, *supra* note 148, p.3.

[234] See: E/CN.4/147, *supra* note 90, p.6. See also: E/CN.4/SR.177, *supra* note 148, p.15.

[235] E/CN.4/147, *supra* note 90, p.9.

Some representatives and NGOs supported the French proposal in principle.[236] By contrast, some representatives argued that the establishment of the system of individual petitions was equivalent to precipitating an ill-prepared revolution in international law.

[236] Based on the agreement on the right of individual to petition the UN, the Egyptian representative had no opposition in principle to the French proposal. He further pointed out that the procedure for such examination should be clearly defined by detailed regulations. See: E/CN.4/82/Add.3, *supra* note 207, pp.3 – 4; E/CN.4/SR.81, *supra* note 35, p.17; E/CN.4/85, *supra* note 148, p.103; E/CN.4/SR.178, *supra* note 207, p.4. The Indian representative preferred to try the idea of establishing a Standing Committee, which would be supplemented by regional committees, for the purpose not of arbitration but of conciliation. See: UNCHR: "Comments from Governments on the Draft International Declaration on Human Rights, Draft International Covenant on Human Rights and the Question of Implementation", third session, E/CN.4/82/Add.7, 4 May 1948, p.3. The Indian representative felt that this committee would investigate the matter and by means of negotiation would try to obtain a withdrawal of the complaint. If it failed to do so, it would report its failure to the General Assembly through the UNCHR. See: E/CN.4/SR.168, *supra* note 36, p.5; E/CN.4/SR.177, *supra* note 148, pp.9 – 10. The Lebanese representative shared the sentiments of the Indian representative. See: *ibid.*, p.12. The Uruguayan representative supported 'the establishment, on a permanent basis, of a special control organ the functions of which would be clearly defined in the Covenant' similar to the French proposal. He further pointed out an important thing that the French proposal did not mention. That is, when no settlement could be reached, the dispute should be compulsorily referred to the ICJ or any other judicial organ established for the purpose to which both States and individuals would have access. See: *ibid.*, p.18. Although the New Zealand representative did not expressly endorsed the French proposal, he still considered 'that there is clear need for the establishment of a satisfactory procedure dealing with petitions'. E/CN.4/82/Add.12, *supra* note 35, p.7. This procedure, to him, should cover the receipt of petitions from individuals, groups, associations or states, including determination of their admissibility and the negotiation with the states concerned settlements through private discussions, in cases where the petitions were deserving of such consideration. See: *ibid*. The Guatemalan representative suggested that complaints from non-governmental organizations or individuals should be submitted to the UN Secretary-General, who shouldl then transmit the complaint to a conciliation committee presided over by the UNCHR or conciliators from the panel of persons appointed by him. If the conciliation committee or conciliators were unable to reach a settlement acceptable to the parties, the matter shall be referred to the ICJ. See: UNCHR: "Guatemala: Articles on the implementation of human rights", fifth session, E/CN.4/293, 6 June 1949, pp.1, 2. The Danish representative regarded the extension of the application of the right of individual to petition the UN and to invest wider functions in the international body charged with the implementation of the covenant were desirable. See: E/CN.4/SR.81, *supra* note 35, p.11; E/CN.4/SR.177, *supra* note 148, p.14. The representatives of the International League for the Rights of Man and international Confederation of Free Trade Union had similar opinions. See: E/CN.4/SR.81, *supra* note 35, pp.13 – 17; E/CN.4/SR.177, *supra* note 148, p.11.

2.3.2.2 The UK – US proposal: an *ad hoc* committee of inquiry

Some representatives regarded the idea of a judicial method, (the Australian proposal was for the creation of an international human rights court and the establishment of a special chamber in the present ICJ), to be premature. They were inclined to adopt a more conservative approach to implementation. For example, the Chinese representative said:

> It was his opinion that at this stage of political and social development of human society, the creation of a World Court, either independently or as an adjunct to the present International Court of Justice, could not solve the problem of implementation. Implementation should be provided for not by immediate creation of international machinery of a radical nature, but through gradual processes of education.[237]

Nor did they think that the right of an individual to petition the UN was appropriate as a means of initiating procedure for either enquiry or conciliation for the time being. For example, because of concerns about the likelihood of a ratification crisis,[238] the UK representative suggested that, as a first step, positive and modest measures without over-elaborated procedures should be taken, and advances should be made step by step, each to be determined according to the experience with the previous one.[239] Although not expressing an unambiguous sign of support for the maintenance of state sovereignty as submitted by the representative from the USSR, the UK representative held that the creation of the right to petition on any matter might connote a corresponding right of interference by the UN in an internal matter of a state.[240] As early as the first session of the Sub-Commission on the Prevention of

[237] E/CN.4/AC.1/SR.20, *supra* note 40, pp.6 – 7.

[238] The UK representative recognised that States Members of the UN were free to ratify or not to ratify the covenant and that the measures for implementation would be embodied in the covenant. See: E/CN.4/SR.168, *supra* note 36, p.7.

[239] See: *ibid*., p.7. The US representative also tried to confine the issue of implementation to as simple a programme as possible. See: E/CN.4/SR.81, *supra* note 35, p.9.

[240] UNCHR: "Comments from Governments on the Draft International Declaration on Human Rights,

Discrimination and the Protection of Minorities, the UK representative expressed opposition to any interim arrangements for the handling of individual petitions.[241] At the sixth session of the UNCHR, he said: 'Constitutional problems of some complexity would be raised by petitions which appealed from the decision of the highest tribunal of a State'.[242] The UK representative felt that the UN had made 'a new departure in granting States the right to petition and it was not yet prepared to accept the right of individuals to do so'.[243] The provision regarding the enforcement of the Covenant should be confined to complaints laid by contracting States.[244]

A similar situation applied to the US representative. With respect to the enforcement measures against the violation of the Covenant on Human Rights, Durward Sandifer, a legal specialist, suggested the US representative not to serve the establishment of machinery for international supervision of human rights as an immediate objective of the UNCHR.[245] As he said:

> [A]gree (with great fanfare) to human rights principles without accepting coercive enforcement measures, judicial review of any kind, or even specific language that might eventually give rise to concrete obligations. By this method, strong states could still promote human rights in foreign policy, pressuring other states to respect the same, without themselves being bound to take any action against interests.[246]

Some circumstantial clues also indirectly indicated the grave concern about the tension between the measures for implementation and the maintenance of state sovereignty. Benjamin Cohen similarly reminded the US representative to protect the

---

Draft International Covenant on Human Rights and the Question of Implementation, Communication Received from the United Kingdom", third session, E/CN.4/82/Add.9, 10 May 1948, p.7.

[241] E/CN.4/51, *supra* note 12, p.12; E/CN.4/SR.25, *supra* note 194, pp.5 – 6.

[242] E/CN.4/353/Add.2, *supra* note 195, p.11.

[243] E/CN.4/SR.115, *supra* note 141, p.5.

[244] See: E/CN.4/353/Add.2, *supra* note 195, pp.10 – 11, 12 – 13.

[245] See: Normand and Zaidi, *supra* note 4, p.104.

[246] See: Normand and Zaidi, *supra* note 4, pp.104 – 105.

internal affairs of the United States from the UN's intervention. As he said:

> The International Organization should refrain from intervention in the internal affairs of any state, it being the responsibility of each state to see that conditions prevailing within its jurisdiction do not endanger international peace and security and, to this end, respect the human rights and fundamental freedoms of all its people and to govern in accordance with principles of humanity and justice.[247]

Due to domestic political pressure,[248] the US representative stated that granting those states ratifying the covenant the right to bring charges against, and only against, other ratifying states would be a good beginning.[249] It should be noted that the US representative was not opposed to the individual's right to petition. However, she argued that this right should be provided for in a later protocol.[250]

The ABA held considerable weight as regards the position of the US Government on the issue of implementation. As mentioned above, at the session of the nuclear commission William L. Ransom, on behalf of the ABA, had suggested that no one country or system could expect to force its own concepts on the others.[251] As for international implementation, Carl B. Rix, who was president of the ABA during 1946 and 1947, suggested that an undue interference with the domestic jurisdiction would obstruct the widespread adherence to the Covenant on Human

---

[247] Russell and Muther: *supra* note 6, p.423.

[248] For more details of the debate on the issue of implementation within the United States can be found in, for example, Glenn Tatsuya Mitoma: *Human rights and the negotiation of American power*, Philadelphia: University of Pennsylvania Press, 2013, pp.17 – 43, 103 – 134; Luke Glanville: *Sovereignty and the Responsibility to Protect: A New History*, Chicago; London: The University of Chicago Press, 2014, pp.132 – 170; Paul Gordon Lauren: *The Evolution of International Human Rights: Visions Seen*, Philadelphia : University of Pennsylvania Press, 2011, pp.159 – 164.

[249] See: E/CN.4/SR.115, *supra* note 141, p.5; UNCHR: "Comments of Governments on the Draft International Covenant on Human Rights and Measures of Implementation", sixth session, E/CN.4/353/Add.1, 4 January 1950, p.10; E/CN.4/SR.168, *supra* note 36, p.7.

[250] E/CN.4/SR.115, *supra* note 141, p.5.

[251] See: E/HR/28, *supra* note 8, pp.12 – 13.

Rights.[252] He rightly observed that the UN Charter calls for the careful promoting, assisting, encouraging and recommending of the cause of human rights, without the creation of any contractual liability for recognition of human rights by any state.[253] In other words, the UN Charter has never imposed on any state any 'contractual liability for recognition of human rights'.[254] He pointed out that nothing contained in the UN Charter, except the application of enforcement measures under Chapter VII, should authorise the UN to intervene in matters that are essentially within the domestic jurisdiction of any state.[255] Nor shall the UN require the Members to submit such matters to an international settlement.[256] His successor, Frank E. Holman, continued this stance during his term in office during 1948 and 1949. He was firmly opposed to making the UN a final arbiter of what constitutes a matter of international concern by *ipse dixit* and thus controlling all acts of the United States.[257] He further warned of the dangers of international jurisdiction over individual petitions, and suggested that the UN was mandated to deal with, and only with, inter-state relationship, rather than those between the State and the individual.[258]

At the second session of the UNCHR, the US representative suggested establishing small committees to give consideration to each allegation of human rights abuse made by any of the High Contracting Parties.[259] According to this proposal, any allegation should be firstly submitted to the UN Secretary-General.[260]

---

[252] See: Carl B. Rix: "Human Rights and International Law: Effect of the Covenant Under Our Constitution", in: *American Bar Association Journal*, Vol. 35, No. 7, July 1949, pp. 551 – 554, 618 – 621, at 553.

[253] See: *ibid*.

[254] *Ibid*.

[255] *Ibid*.

[256] *Ibid*.

[257] See: Frank E. Holman: "President Holman's Comments on Mr. Moskowitz's Reply", in: *American Bar Association Journal*, Vol. 35, No. 4, April 1949, pp.288 – 290, 360 – 362, at 290.

[258] Frank E. Holman: "'An International Bill of Rights': Proposals Have Dangerous Implications for U.S.", in: *American Bar Association Journal*, Vol. 34, No. 11, November 1948, pp.984 – 986, at 985.

[259] See: UNCHR: "Proposal for a Human Rights Convention Submitted by the Representative of the United States on the Commission on Human Rights", second session, E/CN.4/37, 26 November 1947, p.2.

[260] See: *ibid*.

The respondent party must, on the request of the UN Secretary-General, present its observations on the complaint.[261] All the documents should be referred to an *ad hoc* committee established by the UNCHR for consideration with a view to reaching an agreed settlement.[262] In the course of the consideration, each party to the case may request the ECOSOC or the General Assembly to obtain the advisory opinion of the ICJ thereon and to refrain from taking any further action on the matter until this opinion has been obtained.[263] This committee would then submit a report on its consideration for the UNCHR or this sub-commission reference.[264]

At the third session of the UNCHR, the Chinese and US representatives submitted a joint proposal, defining the alleged violation of human rights or fundamental freedoms as disputes only between two States.[265] According to this proposal, States should settle complaints arising under the Covenant so far as possible by direct negotiation.[266] A matter not settled by negotiation or otherwise within a reasonable time[267] should be referred by the State or States concerned either to a

---

[261] See: *ibid*.

[262] See: *ibid*., p.3.

[263] See: *ibid*., p.4.

[264] See: *ibid*., p.3.

[265] See: E/CN.4/153, *supra* note 105, p.2. See also: E/CN.4/SR.81, *supra* note 35, p.11; E/CN.4/SR.115, *supra* note 141, p.13; E/CN.4/SR.118, *supra* note 148, p.7.

[266] See: E/CN.4/145, *supra* note 207, p.1. The Indian representative proposed an amendment to add a 'amicable solution' clause to the United State – China proposal: 'The Committee shall consider a complaint referred to it, and, in view of all the circumstances, make a recommendation addressed to the State or States concerned, looking to an amicable solution.' UNCHR: "India: Amendment to China – United States of America Proposal on Implementation for the Covenant on Human Rights", third session, E/CN.4/151, 17 June 1948, p.1.

[267] At the sixth session of the UNCHR, the US representative defined this 'reasonable time' as follows:

> Within three months after the receipt of the communication, the receiving State shall afford the communicating State an explanation or statement in writing concerning the matter, which should include, to the extent possible and pertinent, references to domestic procedures and remedies taken, or pending, or available in the matter. At any time after six months have elapsed from the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter, by notice to the Secretary-General of the United Nations and to the other State, to a Human Rights Committee to be established

committee appointed by the UNCHR or the ICJ according to Art.36 (2) of its Statute.[268] The proposal also emphasised the ICJ's advisory jurisdiction: any State charged with a violation of the Covenant and the Committee to which the matter was referred may request the ECOSOC to secure an advisory opinion from the ICJ on any legal question involved.[269] As with the French proposal, the Chinese/US proposal did not exclude the possibility of considering the desirability of further measures of implementation concerning petitions from individuals, organisations and groups.[270] The Chinese/US proposal was echoed and supported by some other representatives.[271] Based on this proposal, the US and UK representatives submitted another joint proposal on the implementation article included in the Covenant on Human Rights at the fifth session of the UNCHR.[272] At the sixth session of the UNCHR, the US and UK representatives made an amendment to the previous motion and formally submitted a joint proposal. [273]

The fundamental differences between the UK/US proposal and the French proposal were whether the mechanism to be created for implementation should include the right of an individual to petition the UN and the ultimate goal of this mechanism. In this proposal, the initial machinery for implementation would present

---

in accordance with the provisions of this Article.

E/CN.4/353/Add.1, *supra* note 250, p.11.

[268] See: E/CN.4/145, *supra* note 207, p.1.

[269] See: *ibid.*

[270] See: *ibid*.

[271] See: for example, E/CN.4/SR.81, *supra* note 35, pp.15, 16, 18, 20. The Chilean representative submitted a similar proposal. See: UNCHR: "Chile: Proposal on Implementation", fifth session, E/CN.4/288, 2 June 1949, p.1. It should be noted that, according to the proposal on implementation in the communication from the US Secretary of State to the UN Secretary-General, it should be the UN Secretary-General, rather than the UNCHR, that should maintain this committee. It would be also the duty of the UN Secretary-General to convene the initial meeting of the committee. See: E/CN.4/353/Add.1, *supra* note 250, p.11.

[272] UNCHR: "Draft International Covenant on Human Rights, United States and United Kingdom: Proposal for Implementation Article", fifth session, E/CN.4/274/Rev.1, 15 June 1949.

[273] UNCHR: "Draft International Covenant on Human Rights, United Kingdom – United States: Draft proposal for implementation of International Covenant on Human Rights", sixth session, E/CN.4/444, 22 April 1950.

in the form of a state-to-state complaints procedure. In this procedure, a State Party may bring this matter to the attention of that State and seek a settlement through diplomatic negotiation if it considered that another State Party was not complying with the Covenant.[274] If they had been unable to reach agreement in six months,[275] either State would have the right to refer this matter to an *ad hoc* committee of inquiry established by the UN Secretary-General.[276] In other words, a State Party could bring this allegation to the attention of this committee only in the situation where another State Party had not corrected an alleged violation of the Covenant within six months.[277] Persons well known for their wisdom and integrity would serve on the committee in their individual capacity and undertake a full study of the facts involved. [278] During the investigation, the committee could ask the UN Secretary-General to provide the necessary services and facilities, call for relevant information from any State concerned,[279] and ask the UNCHR to request the ICJ for an advisory opinion on legal questions.[280] Within eighteen months of its first meeting, the committee would have to report its findings of fact to the States concerned and to the UN Secretary-General for publication.[281] It should be noted that this *ad hoc*

[274] See: E/CN.4/274/Rev.1, *supra* note 272, p.1.

[275] See: E/CN.4/274/Rev.1, *supra* note 272, p.1. See also: UNCHR: "Draft International Covenant on Human Rights, India: Proposal for the Machinery of Implementation", fifth session, E/CN.4/276, 31 May 1949, p.1.

[276] See: E/CN.4/274/Rev.1, *supra* note 272, p.1.

[277] See: E/CN.4/SR.168, *supra* note 36, p.7.

[278] See: E/CN.4/274/Rev.1, *supra* note 272, p.1.

[279] *Ibid*., pp.1 – 2.

[280] On this point, the UK and US representatives pointed out that it would be necessary for the General Assembly to authorise the UNCHR to request advisory opinions of the ICJ in accordance with Art.96 of the UN Charter. See: *ibid*., p.2.

[281] According to the joint motion, 'the Committee shall within six months of its first meeting report its findings of fact to the States concerned, and to the Secretary-General for publication'. *Ibid*., p.2. The joint proposal extended the deadline for reporting its findings of fact to eighteen months from six months. See: E/CN.4/444, *supra* note 273, p.3. The UK representative 'attached great importance to the publication of the conclusions of the Ad Hoc Committee, as it felt that the best means of assuring respect for human rights was to publicise widely the decisions upon any complaints which might be filed, whether or not the complaints were well founded'. E/CN.4/SR.168, *supra* note 36, p.9. As he stated: 'Such publicity would have a profound effect upon world public opinion and would also

committee to be set up by the UN Secretary-General was to confine itself to fact finding, rather than conciliation or even adjudication. The UK/US proposal also counted on the support of several representatives.[282]

Owing to irreconcilable differences in stance and interests, progress in the

influence the implementation of human rights.' *Ibid*. The US representative similarly pointed out that, in this way, international understanding might be promoted and disputes between States would thus be avoided. At the same time, valuable experience, upon which the UNCHR would be able to build for the future, might be provided. See: *ibid*., p.7. As she said: 'The authors of the proposal believed that in that way the constructive force of public opinion would be brought to bear in such a manner as to remedy the situations which had given rise to the complaints and simultaneously improve the understanding of the principles of human rights on a world-wide scale'. See: *ibid*., pp.7 – 8.

[282] For example, the Greek representative suggested that the measures for implementation ought to proceed with great caution, since the UNCHR 'was embarking upon nothing less than the beginning of a vastly important development in human history'. E/CN.4/SR.168, *supra* note 36, p.6. He believed that the US – UK proposal, as a good example of this kind of caution, could not fail to produce good results. See: *ibid*. The Belgian representative thought that the Joint draft submitted by the UK and US representatives should prove to be the most effective. See: E/CN.4/SR.177, *supra* note 148, p.10. As he said: 'When a violation of human rights occurred, the most important thing was duly to establish the facts, in order to bring them to the knowledge of the world, as among peaceful sanction's the verdict of public opinion was one of the most telling.' *Ibid*. While partly appreciating the UK – US proposal, the Danish representative argued that, apart from making inquiry, the organ concerned should also be endowed with mediatory powers of arbitration and conciliation. He also noticed the weight of public opinion as an effective counter-agent in cases of the violation of human right. 'There were, however, numerous historical instances in which the subjects of a country condemned by public opinion rallied behind their rulers, whose disrepute appeared rather to strengthen their will to resist than to exercise a positive influence on them.' E/CN.4/SR.168, *supra* note 36, p.11. In conclusion, the Danish representative said: 'It seemed desirable to extend the application of that method and to invest wider functions in the international body charged with the implementation of the covenant than those envisaged by the United Kingdom and the United States of America.' *Ibid*. Similar point of view can be found in the statement of Dutch representatives. He suggested establishing an *ad hoc* fact-finding and conciliatory body to be referred in a dispute to which any state concerned is a party, if this dispute 'cannot be settled within a reasonable time either by negotiations or in any other manner to be agreed upon'. E/CN.4/353/Add.6, *supra* note 198, p.6; The Yugoslavian representative submitted a draft protocol on implementation, in which he also suggested establishing a human rights committee similar to the one in the UK – US proposal. UNCHR: "Comments of Governments on the Draft International Covenant on Human Rights and Measures of Implementation", sixth session, E/CN.4/353/Add.5, 15 February 1950, pp.2 – 3; UNCHR: "Comments of Governments on the Draft International Covenant on Human Rights and Measures of Implementation", sixth session, E/CN.4/353/Add.11, 22 April 1950, p.3; The Egyptian representative 'was not opposed to the principle of individual petition, but felt that the Commission should proceed step by step, and that the first step was to consider only petitions from Governments'. E/CN.4/SR.115, *supra* note 141, p.9. See also: E/CN.4/SR.81, *supra* note 35, p.17.

UNCHR forum stalled on reaching a general agreement on the issue of implementation. After a series of sessions of the UNCHR, 'there was no difference of opinion on the necessity of completing the covenant on human rights by measures of implementation. There was, however, less agreement on what those measures should be'.[283] In this context, at the sixth session of the UNCHR, the Chairman urged that the representatives 'who had submitted proposals regarding measures of implementation should meet and try to reach agreement'.[284] The UNCHR agreed that some permanent machinery of implementation, whose function was limited to the consideration of state-to-state complaints, should be included in the draft Covenant.[285] Accordingly, the UNCHR requested the representatives of France, India, the United Kingdom and the United States of America to work out a draft proposal on measures of implementation to be inserted into the first draft covenant based on the French and US/UK proposals.[286]

In this proposal, the body to be set up was named the 'Human Rights Committee'.[287] With regard to the accessibility and concrete procedures of the committee, this proposal adopted the UK/US proposal.[288] This committee was to be authorised to hear any inter-state complaints with regard to non-compliance with any provision of the covenant, and to offer its good offices with a view to reaching a friendly solution.[289] This French proposal suggesting that the function of this

[283] E/CN.4/SR.168, *supra* note 36, p.9. See also: E/CN.4/SR.176, *supra* note 209, p.5.

[284] See: E/CN.4/SR.119, *supra* note 130, p.6.

[285] See: E/CN.4/SR.178, *supra* note 207, p.13. See also: UNCHR: "Report of the Sixth Session (27 March – 19 May 1950)", Economic and Social Council Official Records, Fifth Year, eleventh session, Supplement No. 5, E/1681-E/CN.4/507, 29 May 1950, p.7.

[286] See: E/CN.4/SR.177, *supra* note 148, p.19; UNCHR: "France – India – United Kingdom – United States of America: Proposal Concerning Measures of Implementation, Establishment of a Human Rights Committee", sixth session, E/CN.4/474, 9 May 1950; E/1681-E/CN.4/507, *supra* note 285, pp.7 – 8.

[287] E/CN.4/474, *supra* note 286, p.1.

[288] See: *ibid*., pp.6 – 7; E/CN.4/SR.178, *supra* note 207, p.13; E/1681-E/CN.4/507, *supra* note 285, p.9. See also: Department of Public Information United Nations: *Yearbook of the United Nations 1950*, pp.520, 541.

[289] See: Economic and Social Council, eleventh session, Item 19 of the Provisional Agenda: Report of the Commission on Human Rights (sixth session), Establishment of a Human Rights Committee,

committee should be to 'ascertain the facts and make available its good offices to the States concerned, with a view to a friendly solution of the matter on the basis of respect for human rights as defined in the covenant' was also adopted in part.[290] As for the relationship with the ICJ, this proposal suggested allowing the committee to transmit to the UN Secretary-General a request for an advisory opinion from the ICJ on legal questions.[291]

This proposal also introduced the following two doctrines. The first doctrine was *Res judicata*, which would deprive the Human Rights Committee of the power to deal with matters for which special procedure was provided within the framework of the UN or the specialised agencies when the States concerned were governed by such procedure.[292] The other was the doctrine of exhaustion of domestic remedies. As mentioned in **Section 1**, the Australian proposal implied the doctrine of exhaustion of local remedies. As a kind of court of appeal, the ICHR would require the complainant, before lodging the case before the ICHR, to seek for a remedy through the municipal courts up to the highest possible level of jurisdiction. According to the joint proposal submitted by the representatives of France, India, the United Kingdom and the United States of America, 'the Committee shall deal with a matter referred to it only if domestic, judicial and administrative remedies have been involved and exhausted; this rule shall not apply where such remedies are unreasonably prolonged'.[293] This doctrine was, as the US representative pointed out, based on the conception embodied in Art.2 of the draft Covenant, which provided that, according to this Article, the

E/1681/Add.1-E/CN.4/507/Add.1, 30 June 1950.

[290] See: E/1681-E/CN.4/507, *supra* note 285, p.8.

[291] See: Commission on Human Rights: "Draft International Covenant on Human Rights: Proposal Concerning Measures f Implementation (E/CN.4/474) United Kingdom: Proposal for additional articles", sixth session, E/CN.4/487, 11 May 1950, p.1. However, this point was rejected by the UNCHR. See: UNCHR: "Summary Record of the Hundred and Ninety-Second Meeting", sixth session, E/CN.4/SR.192, 24 May 1950, p.16.

[292] See: E/CN.4/474, *supra* note 286, p.7. However, this suggestion was rejected by the UNCHR. See: UNCHR: "Summary Record of the Hundred and Ninetieth Meeting", sixth session, E/CN.4/SR.190, 25 May 1950, p.22; E/1681-E/CN.4/507, *supra* note 285, p.7.

[293] See: E/CN.4/474, *supra* note 286, p.7.

Contracting States would first implement the Covenant internally, and the proposed international implementation should not interfere with the regular course of domestic justice to protect the rights provided in the Covenant.[294] 'There was one possible exception under that rule; namely, if it appeared that domestic remedy had been deliberately withheld or that unreasonable delay had rendered the remedy completely nugatory.'[295] It would be for the committee to determine whether the domestic remedies had been exhausted when it was in receipt of a case.[296]

### 2.4 The withdrawal of the Australian proposal and the consideration of the ICHR which followed in the UNCHR forum

At its fifth session, the UNCHR distributed a questionnaire about the attitudes of the representatives towards all the proposals, including the Australian proposal, as regards the issue of implementation. Only nine responses came back to the UNCHR at its sixth session, and none of these suggested that the Australian proposal came close to enjoying the support of other states.[297] This feedback partly led the discussion on the issue of implementation during the fifth and sixth sessions of the UNCHR, which were to centre on the French and US/UK proposals. During this period, the Australian Government shifted its attitude towards its own proposal and finally decided to bring it to an anticlimactic end.

Herbert Vere Evatt, who was at the helm of External Affairs in Australia from 1946 to 1949 and presided at the third regular session of the General Assembly,

---

[294] See: E/CN.4/SR.190, *supra* note 292, p.23.

[295] *Ibid*.

[296] See: E/CN.4/474, *supra* note 286, p.7; E/CN.4/SR.190, *supra* note 292, p.23.

[297] They are: U.S.S.R. (E/CN.4/353, 29 December 1949); the US (E/CN.4/353/Add.1, 4 January 1950); the UK (E/CN.4/353/Add.2, 7 January 1950); Philippines (E/CN.4/353/Add.3, 16 January 1950); Israel (E/CN.4/353/Add.4, 23 January 1950); Yugoslavia (E/CN.4/353/Add.5, 15 February 1950); the Netherlands (E/CN.4/353/Add.6, 23 February 1950); Denmark (E/CN.4/353/Add.7, 27 February 1950); France (E/CN.4/353/Add.8, 10 March 1950); India (E/CN.4/353/Add.9, 16 March 1950) and Norway (E/CN.4/353/Add.11, 22 April 1950). See: E/CN.4/366, *supra* note 68, p.3. It should be noted that the Danish government made no comment on the measures of implementation.

strongly advocated the establishment of an international human rights court when he said:[298]

> … basic and essential rights and freedoms of the individual – who is so often the cipher in territorial adjustments – should not hinge simply upon declarations made by states. Such declarations, standing alone, are not sufficient to guarantee the inalienable rights of the individuals and behind them it is essential that some sufficient sanction be established.[299]

At the same time, as Devereux has pointed out, even the intensification of the Cold War did not threaten his belief in the fundamental right and duty of the international community to scrutinise and respond to individual human rights complaints.[300] Evatt doubted the State's capacity to settle alleged human rights violations by self-regulation and diplomatic negotiation. The failure of state self-regulation and diplomatic negotiation would inflict even further harm on civilians and thus undermine the universal nature of human rights. In addition, he endorsed Macartney's view that human rights 'were not things to be created or extinguished, to be granted or withheld, to be enlarged or restricted, according to the politics of governments and the workings of diplomatic processes.'[301]

Since 1949, however, the attitude of the Australia Government towards the establishment of the ICHR had shifted. This shift derived from the outcome of the election in Australia in that year. In this election, the Liberal Party had defeated the Labour Party to which Evatt belonged, and Evatt thus lost his control over External Affairs. Spender, who advocated a markedly conservative policy on international implementation measures, became the new Minister for External Affairs. Unlike his

---

[298] See: Annemarie Devereux: "Australia and the International Scrutiny of Civil and Political Rights: An Analysis of Australia's Negotiating Policies, 1946-1966", in: *Australian Year Book of International Law*, Vol. 22, 2002, pp.47 – 75, at 50.

[299] *Ibid*., p.55.

[300] See: *ibid*., p.53.

[301] Carlile Aylmer Macartney: *National States and National Minorities*, Oxford University Press, H. Milford, 1934, pp.11 – 12. Cited in: Devereux, *supra* note 298, p.55.

predecessor, Spender showed 'a greater wariness of the UN's ability to act as an impartial arbiter in the context of an intensified Cold War emerged'.[302] To him, the UN 'was envisaged as vulnerable to manipulation by state actors with differing political ideological agendas'.[303] He therefore reversed Evatt's policy, and sided with the maintenance of state sovereignty in speaking about human rights as a matter of domestic concern, rather than an appropriate subject for international scrutiny.[304] With this recognition in mind, he believed that a system of individual petitions would 'inevitably lead to outside interference frequently from people whose chief concern is interference in domestic matters of a State. Further, it will lend itself to agitation within a country for nefarious purposes'.[305]

In the comments transmitted from the Secretary of the Australian Department of External Affairs to the UN Secretary-General on 17 March 1950:

> The increasing support for this suggestion since it was first made at the Paris Conference of 1946 has "been gratifying and the recent endorsement of the essentials of the Australian proposals "by several regional organizations is appreciated.
>
> It is however, realized that the inclusion in the Covenant at this stage of machinery for the judicial determination of human rights may greatly limit the number of possible ratifications. In the interests of a speedy and as widespread an acceptance of the Covenant as possible it may be for the moment preferable to attempt to secure agreement on less ambitious machinery.[306]

At the same time, Spender ordered the representative to the UNCHR to

---

[302] Devereux, *supra* note 298, p.50.

[303] *Ibid*., p.64.

[304] See: *ibid*.

[305] Memorandum of A H Tange, Assistant Secretary to Australian representative on Commission on Human Rights, 13/4/51, A 1838/1, 856/13/10/6 Pt 1. Cited in: Devereux, *supra* note 298, p.65.

[306] See: Commission on Human Rights, Sixth Session: Comments of Governments on the Draft International Covenant on Human Rights and Measures of Implementation, E/CN.4/353/Add.10, 22 March 1950, p.13.

withdraw the previous proposal and replace the individual-centric view with a state-centric one.[307] The submission of feedback on the questionnaire as mentioned above also reflected this.[308] At the sixth session of the UNCHR, the Australian representative also admitted that establishing an international human rights court needed not necessarily be the UNCHR's immediate goal, even though the final objective should be to establish an international court to handle infringements of human rights.[309] As he pointed out:

> [A]mong the obligations imposed on Members of the United Nations by the Charter was the legal obligation to promote and encourage respect for human rights and for fundamental freedoms. The natural corollary of that was the recognition of the individual as a subject of international law.[310]

Despite this withdrawal, the Australian representative still regarded the establishment of the ICHR as an issue worthy of discussion by the International Law Commission (ILC).[311] As the Australian representative said: 'Should that first experiment succeed, the Commission could then consider increasing the scope and powers of the international body.'[312] At its sixth session, the UNCHR adopted the suggestion of the French representative that it was ready to consider the Australian

---

[307] See: Devereux, *supra* note 298, p.63.

[308] *Ibid*., p.64. See also: Department of Public Information United Nations: *Yearbook of the United Nations 1951*, p.479.

[309] See: E/CN.4/SR.176, *supra* note 209, p.13; E/CN.4/SR.177, *supra* note 148, p.8; Commission on Human Rights: "Summary Record of the Hundred and Ninety-Third Meeting", sixth session, E/CN.4/SR.193, 26 May 1950, p.3.

[310] E/CN.4/SR.193, *supra* note 309, p.3.

[311] E/CN.4/SR.177, *supra* note 148, p.7; Commission on Human Rights: "Measures of Implementation, Australia: Draft resolution", sixth session, E/CN.4/489, 12 May 1950, p.1. Given the UNCHR rejection, the Australian representative accepted the French amendment for studies to be carried out by the UNCHR. See: E/CN.4/SR.193, *supra* note 309, p.3; Commission on Human Rights: "Measures of Implementation, France: Amendment to the Australian draft resolution (E/CN.4/489)", E/CN.4/492, 15 May 1950, p.1.

[312] E/CN.4/SR.177, *supra* note 148, p.8.

proposal at the seventh session of the UNCHR.[313] However, at that seventh session, the UNCHR was unable to complete this consideration and decided to defer it to the eighth session.[314] The same situation recurred at the ninth and tenth sessions of the UNCHR.[315] Consideration of the ICHR was still on the provisional agenda for the UNCHR's eleventh session.[316] At this session, the UNCHR prioritised another nine programmes of work for future sessions and consideration of the ICHR was subsumed by the last item, namely: "any agenda items not completed at a previous session, and any new items that may be introduced".[317] Henceforth, consideration of the ICHR has never been singled out by the UNCHR in an agenda for its session. Nevertheless, efforts to revitalise the ICHR have never stopped.

[313] See: E/1681-E/CN.4/507, *supra* note 285, p.8; E/CN.4/SR.193, *supra* note 309, pp.3, 4; Commission on Human Rights: "Summary Record of the Two Hundred and First Meeting", E/CN.4/SR.201, 5 June 1950, p.12.

[314] See: Commission on Human Rights: "Report to the Economic and Social Council on the seventh session of the Commission, held at the Palais des Nations, Geneva, from 16 April to 19 May 1951", E/1992, E/CN.4/640, 24 May 1951, p.19.

[315] See: Commission on Human Rights: "Report to the Economic and Social Council on the eighth session of the Commission, held in New York, from 14 April to 14 June 1952", E/2256(SUPP), E/CN.4/669, p.43; Commission on Human Rights: "Report of the Ninth Session of the Commission on Human Rights (Geneva, 7 April to 30 May 1953)", Economic and Social Council Official Records: Sixteenth session, E/2447, E/CN.4/689, 6 June 1953, p.4; Commission on Human Rights: "Report of the Tenth Session (23 February – 16 April 1954)", Economic and Social Council Official Records: Eighteenth Session, E/2573, E/CN.4/705, April 1954, p.3.

[316] See: Commission on Human Rights: "Report of the Eleventh Session (5 – 29 April 1955)", Economic and Social Council Official Records: Twentieth session, E/2371 and Corr.1, E/CN.4/719 and Corr.1, June 1955, p.3.

[317] These agendas included: (A) covenants on human rights and other conventions; (B) prevention of discrimination and protection of minorities; (C) international respect for the right of peoples and nations to self-determination; (D) international respect for the right of peoples and nations to self-determination; (E) consideration of specific rights or groups of rights; (F) wider dissemination of the Universal Declaration of Human Rights and assessment of its effects and influence; (G) yearbook on Human Rights; (H) communications and (I) any agenda items not completed at a previous session, and any new items that may be introduced. See: *ibid*., p.14.

## Section 3: The withdrawal of the Australian proposal and the revitalisation of the idea of an international human rights court

Although the Australian proposal was hurriedly dropped amid a welter of controversies, efforts to achieve the goal set by this proposal have taken different routes outside of the UNCHR forum.

### 3.1 The revitalisation of an international human rights court: a 'World Court of Human Rights' by Garry Davis and a 'Universal Court of Human Rights' by Seán MacBride

Garry Davis, a devoted World Federalist, launched a campaign during the last years of the 1940s called the World Citizenship Movement, which asked the UN to transform itself into a world government. In 1953, after this attempt had failed, he then founded an organisation of global sovereignty: the World Government of World Citizens (WGWC), which was quite separate from the UN.[318] He was also advocating for and trying to establish a World Court of Human Rights within the framework of the WCWG.[319] According to the Ellsworth Declaration (the constituent instrument by reference to the UDHR and particularly Arts.1, 15 (2) 21 (3), 28 thereof) the WGWC was designed to be without territory and would have its own legislative (a World Parliament or Corporate Congress), administrative body (the World Service Authority (WSA), which evolved into a series of World Government Commissions) and adjudicative institutions (the World Court of Human Rights – hereinafter referred to as the World Court). In 1972, a provisional World Court was established as the WGWC's judicial system by the General Assembly of WGWC

[318] The WGWC expressed greater concern for the human rights than principles of jurisdiction derived from territorial sovereignty, nationality, and other technical concepts. See: Preamble to the Statute of the World Court of Human Rights, G) 2). This statute can be found at: http://www.worldgovernment.org/wsalstat.html.

[319] See: http://www.worldgovernment.org/ells.html.

delegates in France. Subsequently, a provisional Statute was drafted by the Commission for International Due Process of Law, which was aimed at continuing the evolution of the World Court.[320]

The jurisdiction *ratione persone* of this World Court was mostly concerned for the rights of stateless persons living under colonial domination, refugees and world citizens. According to Art. XXIII of this statute, only individuals or groups of individuals were permitted to be parties in cases brought before the World Court to seek redress for the deprivation of any human right. Whether the respondent State agreed to the submission of the cause for inquiry or disposition would not affect the competence of the court. The World Court would also have an extensive jurisdiction *ratione materiae*.[321] The rights selected to come under the protection of the World Court for their conscience, integrity and moral force, were extracted from the UDHR and 'world law'.[322] In addition, Davis agreed that the implementation of fundamental

[320] See: http://www.worldgovernment.org/wcwfaq.html?s=1#15.

[321] According to the Preamble G) 9), the rights under the protection of the World Court were: (a) freedom from arbitrary imprisonment, torture, physical or psychological abuses; (b) the right of everyone to liberty of movement and freedom to choose one's residence; (c) the right of everyone to leave any country freely, including one's own, and to enter any country freely; (d) the right of everyone not to be expelled from the territory of the State of which one is a national nor be refused permission to enter that State; (e) the prohibition of the collective removal of individuals from their current residence or domicile; (f) the right to work; (g) the right to an adequate standard of living; (h) the right to health; (i) the right to be presumed innocent; (j) the right to reasonable bail; (k) the right to a fair trial before an impartial tribunal; (l) the right to counsel of one's choice; (m) the right to defend oneself through legal assistance of one's own choosing; (n) the right to call, examine and cross-examine witnesses; (o) the right to have the services of an interpreter; (p) the right to education; (q) the right to self-determination; (r) freedom from discrimination based on age, culture, disability, gender, language, race, religion and sexual orientation; (s) the right to freedom of association;(t) the right to take part in government. (u) the right to a healthy and sustainable environment.

[322] According to the interpretation given by Garry Davis, the concept of 'world law' derives from the common behaviours directed by human nature. These behaviours constitute evidence of operative and common 'world laws', which are for the most part taken for granted and which operate concurrently with local and national laws and give rise to the notion and actuality of a common world citizenship. It can be found, however, that Garry Davis's interpretation, in effect, demystified the notion of world law from the non-legal point of view. His interpretation is available at: http://www.worldgovernment.org/law.html.

freedoms and human rights had regional and global formulae.[323] The World Court, as Arts. I, XIX and XXVIII and XIX stipulated, would consist of several Regional Circuit Tribunals as the court of first instance, presided over by Associate Justices, and a High Court of Review, as the appellate court under certain conditions, presided over by the Chief Justice. According to Arts. XXVI and XXIX, after a hearing for the relief for which the individual petition meeting with the criteria set forth in Art. XXX was sought, the World Court might issue a Writ of World Habeas Corpus in the form of a judgment. This judgment, issued either by the regional circuit tribunals or by the High Court, would be considered as having been rendered by the World Court with legally binding force.

Davis distributed his World Court proposals to jurists, legal academicians, diplomats and government leaders for comments, suggestions and criticism.[324] However, there is not sufficient available data to track the further development of this World Court.[325]

The efforts of the International Commission of Jurists to revitalise the idea of an international human rights court is also remarkable. Seán MacBride, who served as the Secretary-General of the International Commission of Jurists, launched an initiative to create a Universal Court of Human Rights (latterly called the UCHR) according to Arts.13, 55 and 56 of the UN Charter.

As with the Australian proposal, MacBride 'insisted that while the elaboration of binding treaties was critical, the treaties must be subject to judicial enforcement in order to represent an effective contribution to international justice'.[326] He criticised

---

[323] Preamble to the Statute of the World Court of Human Rights, G) 6).

[324] See: http://www.worldgovernment.org/wsalstat.html.

[325] As the WGWC has claimed that the majority of states worldwide have, either *de jure* or *de facto*, recognised the WGWC (all official letters of recognition can be found at: http://www.worldgovernment.org/official.html. For *de facto* recognition: http://www.worldgovernment.org/visagifs.html. A full list of all countries that have recognised the World Passport is available at: http://www.worldgovernment.org/visas.html). However, this recognition does not refer to the World Court.

[326] International Commission of Jurists: "Towards a World Court of Human Rights: Questions and Answers", Supporting Paper to the 2011 Report of the Panel on Human Dignity, December 2011, p.4.

the existing international human rights mechanisms for their piecemeal and *ad hoc* features, over-politicised trend, lack of independence and excessive dependence on political expediency rather than long-term solutions.[327] MacBride therefore suggested establishing a large and complex international judicial system, with full automatic jurisdiction, to rectify injustices or abuses of power. In addition to the ICJ, he suggested establishing another two judiciary branches at an international level. The first branch would contain an international criminal court, competent to try crimes against humanity, which would operate during periods of armed conflict, and a universal court of human rights which would operate in times of peace.[328] The second branch would consist of an International Court of Conscience to call for appropriate sanctions, and even to warn in advance that certain actions would be regarded as grave offences against human rights.[329]

The UCHR was designed to be the appellate court both of national and regional courts of human rights. Accordingly, 'appeals from decisions of National Courts on Human Rights issue would in the first place go to Regional Courts of Human Rights and in certain specified cases to a Universal Court of Human Rights'.[330] To MacBride, 'the protection of the individual is most effectively safeguarded at the

---

This paper is available at: http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2013/07/World-court-final-23.12-pdf1.pdf.

[327] See: Seán MacBride: "The Strengthening of International Machinery for the Protection of Human Rights", Nobel Symposium VII: The International Protection of Human Rights. Oslo, 25-27 September 1967, pp.16 – 17. Cited in: International Commission of Jurists, *supra* note 326, note 21; Seán MacBride: "International Protection of Human Rights", The Hammarskjöld Forum, New York, Tuesday, December 12, 1967, p.2; Seán MacBride: "The United Nations and Human Rights" (2nd July 1968), in: United Nations Institute for Training and Research (UNITAR): *Seminar on "International Organization and Multilateral Diplomacy"*, 2 July 1968, p.3; International Commission of Jurists, *supra* note 326, pp.4 – 5.

[328] See: Seán MacBride: "The Individual and the State", The discussions and conclusions of the Strasbourg conference of European Jurists held under the auspices of the International Commission of Jurists, October 1968, p.23; International Commission of Jurists: Bulletin of the International Commission of Jurists, No. 36, December 1968, p.11.

[329] International Commission of Jurists, *supra* note 328, p.38.

[330] MacBride: "The Strengthening of International Machinery for the Protection of Human Rights", *supra* note 327, p.10.

national level'[331] and judiciary independence would guarantee that this safeguard was 'effectively realizable and could [sic] be relied upon'.[332] However, this independence was so vulnerable, that states might easily subdue the independence of municipal tribunals or even convert them into subservient political instruments through political patronage or even direct interference.[333] In this context, any individual who was being subjected to persecution in violation of the universally accepted principles of justice should be permitted to access the UCHR.[334] In his opinion, 'in any international machinery provided, the right of individual petition is regarded as essential'.[335] MacBride further interpreted the appellate jurisdiction of the UCHR over the judgment of regional human rights courts:

> In areas where there already exists an effective international regional Court of Human Rights its function should be that of an appellate Court, in areas where there is no effective regional machinery it should have original jurisdiction to hear complaints by governments, groups or individuals.[336]

---

[331] International Commission of Jurists, *supra* note 328, p.11.

[332] MacBride: "The Strengthening of International Machinery for the Protection of Human Rights", *supra* note 327, p.10. See also: MacBride: "International Protection of Human Rights", *supra* note 326, p.2.

[333] See: MacBride: "The United Nations and Human Rights" *supra* note 327, p.2. MacBride: "The Individual and the State", *supra* note 328, p.6 – 8.

[334] See: International Commission of Jurists, *supra* note 328, p.11; Seán MacBride: "The Universal Declaration: Achievements and Objectives", Article for WAY Forum, November 8, 1967, p.5; MacBride: "International Protection of Human Rights", *supra* note 326, p.4. MacBride consistently highlighted the availability of international justice to individuals. As early as 1950, he proclaimed to the Council of Europe (CoE)'s Committee of Ministers at their Fifth Session: 'A Convention on Human rights, which did not grant any right of redress to individuals, was not worth the paper it was written on'. Quoted from NUI Galway University webpage available at: http://www.nuigalway.ie/irish-centre-human rights/publicpolicyengagement/projectsattheirishcentreforhumanrights/completedprojects/irelandparticipationininternationalhumanrightslawandinstitutions/.

[335] International Commission of Jurists, *supra* note 328, p.11.

[336] MacBride: "The Strengthening of International Machinery for the Protection of Human Rights", *supra* note 327, p.10.

As a final court of appeal, the UCHR would 'reflect the need to create measures for the protection of human rights and fundamental freedoms by international legal processes'.[337] A High Commissioner for Human Rights, acting as an adviser and assistance provider at the request of states and other UN human-rights bodies would complement the function of this court.[338] While the adoption of the proposal now before the General Assembly for the establishment of the UCHR should be encouraged, he also recognised, however, that such a proposal would have no hope of immediate acceptance by the majority of the General Assembly.[339]

It should be noted that, unlike the Australian proposal and the two other proposals already mentioned, respectively put forward by Davis and MacBride, these motions were not accompanied by well-defined proposals for such a court.

### 3.2 The revitalisation of an international human rights court: some motions at the two international conferences on human rights

In 1963, to mark the twentieth anniversary of the adoption of the UDHR, the General Assembly decreed 1968 to be International Year for Human Rights,.[340] The

---

[337] Seán MacBride: "The United Nations and Human Rights" *supra* note 327, p.4.

[338] See: MacBride: "The Universal Declaration: Achievements and Objectives" *supra* note 334, pp.5 – 6. See also: MacBride: "The Strengthening of International Machinery for the Protection of Human Rights", *supra* note 327, pp.19 – 20. MacBride: "International Protection of Human Rights", *supra* note 326, pp.3 – 4, 5 – 6; Seán MacBride: "The Promise of Human Rights Year", in: *Journal of the International Commission of Jurists*, Vol. IX, No. 1, June 1968, Introduction, pp.i – iv, at i – iii; Robert Rycroft: "United Nations High Commissioner for Human Rights: A Proposed International Government Control Agency", in: *Rutgers-Camden Law Journal*, Vol. 4, 1972-1973, pp.237 – 259; Howard Tolley: *The International Commission of Jurists: Global Advocates for Human Rights*, Pennsylvania: University of Pennsylvania Press, 1994, pp.105 – 109; Howard Tolley: "Popular Sovereignty and International Law: ICJ Strategies for Human Rights Standard Setting", in: *Human Rights Quarterly*, Vol. 11, November 1989, pp.561 – 589; and *etc*.

[339] MacBride: "The Universal Declaration: Achievements and Objectives", *supra* note 334, p.5. See also: MacBride: "International Protection of Human Rights", *supra* note 326, p.4.

[340] See: General Assembly: "Designation of 1968 as International Year of Human Rights", A/RES/1961(XVIII), 12 December 1963.

General Assembly decided to convene an International Conference on Human Rights in Teheran (hereinafter referred to as the Teheran Conference) to assess progress in the implementation of human rights. As General Assembly resolution 2081 (XX) stated: 'International measures for the guarantee or protection of human rights should be a subject for serious study during the International Year for Human Rights.'[341]

The Teheran Conference was widely expected to chart 'a new agenda for the UN Human Rights system, including the creation of new compliance mechanisms'.[342] According to its agenda, the Teheran Conference would, firstly, evaluate 'the effectiveness of methods and techniques employed in the field of human rights at the international and regional levels'.[343] Secondly, there would be a study of 'measures to strengthen the defence of human rights and freedoms of individuals' and 'international machinery for the effective implementation of international instruments in the field of human rights'.[344]

There were some proposals suggesting the establishment of an international judiciary specific to human rights at this conference. For example, Elias suggested the establishment of the ICHR.[345] The Haitian government also recommended that the establishment of the ICHR as a supreme authority which would exercise its functions in close co-operation with new Human Rights Council should be reconsidered.[346]

---

[341] See: General Assembly: "International Year for Human Rights", A/RES/2081(XX), 20 December 1965.

[342] Andrew S. Thompson: "Teheran 1968 and the Origins of the Human Rights Council?", pp.1 – 2. This paper is available at: http://acuns.org/wp-content/uploads/2012/06/Teheran-Origin-Human-Rights-Council-Andrew-Thompson-AM-2011.pdf.

[343] This item was further divided into four sub-items: (a) international instruments: conventions, declarations, and recommendations; (b) implementation machinery and procedures; (c) educational measures; and (d) organizational and institutional arrangements. See: Final Act of the International Conference on Human Rights, Teheran, 22 April to 13 May 1968, A/CONF.32/41, pp.2 – 5.

[344] *Ibid*., p.3.

[345] See: T.O. Elias: "International Institutions and Machinery of Implementation in the Field of Human Rights", study prepared for the International Conference on Human Rights, Teheran 1968, A/CONF.32/L.3.

[346] Haiti: draft resolution, A/CONF.32/L.14 and Corr.1, in: United Nations: "Final Act of the International Conference on Human Rights", A/CONF.32/41, Annex V (*Draft Resolutions, and*

The International Commission of Jurists also made the establishment of a World Court of Human Rights one of its central advocacy objectives at this conference, a global event at which the question was addressed.[347] Unfortunately, neither of these proposals was considered owing to lack of time, and thus no consensus was reached. The final act of the Teheran Conference, which was deemed to be 'a damp squib',[348] was the issuing of a statement to the effect that much remained to be done as regards the implementation of human rights and fundamental freedoms.[349]

The proliferation of international human rights law and corresponding treaty bodies during the last two decades of the Cold-War period revealed an imbalance between normative strength and weakness in implementation. The implementation of international human rights law 'rarely goes beyond information exchange and voluntarily accepted international assistance for the national implementation of international norms'.[350] Furthermore, 'there is no international enforcement'.[351] As Alston pointed out, the UN bodies and agencies were characterised by their reticence with regard to any effective involvement in human rights for many years, since they were afraid to be involved in human rights matters, which were often over-politicised during the Cold-War era.[352]

With the end of the Cold War, the international community once again welcomed a flurry of designs for international human rights mechanisms. Some were

---

*Amendments thereto, which the Conference was Unable to Consider Owing to Lack of Time*), pp.46 – 54, at 46.

[347] See: The International Commission of Jurists, *supra* note 327, p.4.

[348] Roger S. Clark: "Human Rights Strategies of the 1960s Within the United Nations: A Tribute to the Late Kamleshwar Das", in: *Human Rights Quarterly*, Vol. 21, No. 2, May 1999, pp.308 – 341, at 313.

[349] See: A/CONF.32/41, *supra* note 343, p.4. In this regard, Thompson considered the Teheran Conference as 'a missed opportunity to give human rights an elevated prominence within the UN system'. Thompson, *supra* note 342, p.2.

[350] Jack Donnelly: "International Human Rights: a regime analysis", in: *International Organizations*, Vol. 40, No. 3, Summer 1986, pp.599 – 642, at 614.

[351] *Ibid*.

[352] World Conference on Human Rights, Preparatory Committee, Fourth Session: Status of Preparation of Publications, Studies and Documents for the World Conference, Note by the Secretariat, Addendum, Interim report on updated study by Mr. Philip Alston, A/CONF.157/PC/62/Add.11/Rev.1, 22 April 1993, p.77.

optimistic, sensing that it was time to 'depoliticize the implementation of human rights norms in their entirety'[353] and eliminate the long-running ideological dichotomy or minimise its impact on the issue of implementation.[354] In 1990, the General Assembly adopted a resolution, deciding to convene a high level World Conference on Human Rights in 1993 in Vienna (hereinafter referred to as the Vienna Conference).[355] Evidence can be found that there was every confidence in and high expectation that this conference would result in the formulating of concrete recommendations for improving the effectiveness of UN activities and mechanisms in the field of human rights.[356]

[353] Recommendations to Ensure the Effective Enjoyment of All Human Rights and Improve the Coordination of the Mechanisms of the United Nations and Regional Systems, As Well As the Relationship between Them, As Appropriate, A/CONF.157/LACRM/8, 18 December 1992, p.4. See also: World Conference on Human Rights, Preparatory Committee, Fourth Session, Report on other Meetings and Activities, Report of the Secretary-General (Addendum), A/CONF.157/PC/42/Add.1, 30 April 1993, p.31.

[354] For example, Buergenthal said: 'The end of the Cold War has deideologized the struggle for human rights and reinforced the international human rights movement.' Buergenthal, *supra* note 43, p.704. Furthermore, it 'liberated international efforts to promote human rights from the debilitating ideological conflicts and political sloganeering of the past'. *Ibid*, p.713. He also believed that the collapse of the Soviet Union led to a change in the European human rights system when the former Eastern and Central European allies of the Soviet Union got access to the Convention for the Protection of Human Rights and Fundamental Freedoms (also known as the European Convention on Human Rights, ECHR). A similar situation existed in the inter-American system, as transition to democracy began in those oppressive regimes behind a veil of superpower protection. Even in Africa, the least developed continent, the liberation of South Africa from apartheid and other promising trends towards democracy had strengthened the role of the African human rights system. See: *ibid.*, pp.715 – 717.

[355] See: General Assembly: World Conference on Human Rights, 69th Plenary Meeting, A/RES/45/155, 18 December 1990.

[356] In this resolution, the General Assembly set the following six objectives for the upcoming conference: (a) to review and access the progress that had been made in the field of human rights since the adoption of the Universal Declaration of Human Rights and to identify obstacles to further progress in this area, and ways in which they could be overcome; (b) to seek examples of the relation between development and the enjoyment by everyone of economic, social and cultural rights as well as civil and political rights, recognising the importance of creating the conditions whereby everyone might enjoy these rights as set out in the International Covenants on Human Rights; (c) to examine ways and means to improve the implementation of existing human rights standards and instruments; (d) to evaluate the effectiveness of the methods and mechanisms used by the United Nations in the field of human rights; (e) to formulate concrete recommendations for improving the effectiveness of the

During a series of initial meetings, the preparatory committee of the Conference reached a consensus on the inclusion in the draft of the final document of an adequate international system for flexible and rapid preventive and corrective action for the promotion of and respect for human rights and humanitarian law.[357] Some of the proposals submitted referred to the revitalisation of an international human rights court. For example, some representatives of UN human rights treaty bodies, such as the CESCR and the Committee against Torture (hereinafter referred to as CAT Committee), suggested the upcoming conference should discuss the establishment of this kind of court.[358] An Austrian position paper also expressed a similar welcome for a human rights court at the international level.[359] With the preference for a permanent, rather than *ad hoc*, judicial mechanism,[360] some suggested establishing a

United Nations activities and mechanisms in the field of human rights through programmes aimed at promoting, encouraging and monitoring respect for human rights and fundamental freedoms; (f) to make recommendations for ensuring the necessary financial and other resources for United Nations activities in the promotion and protection of human rights and fundamental freedoms. A/RES/45/155, *ibid*. See also: World Conference on Human Rights, Preparatory Committee, Fourth session, Report on other Meetings and Activities, Report of the Secretary-General (Addendum), A/CONF.157/PC/42/Add.1, *supra* note 353, p.2.

[357] Elements for Consideration for Possible Inclusion in a Draft Final Document, Working Paper, Annex, World Conference on Human Rights, Preparatory Committee, Fourth session: Consideration of the Final Outcome of the World Conference, Taking into Consideration the Preparatory Work and the Conclusions of the Regional Meetings, Note by the Secretary-General, A/CONF.157/PC/82, 14 April 1993, p.9.

[358] Recommendations to the Preparatory Committee at its 2nd Session for the World Conference on Human Rights Submitted by United Nations Human Rights Treaty Bodies: Report of the Secretary-General, A/CONF.157/PC/23, 17 March 1992, p.3; World Conference on Human Rights, Preparatory Committee, Fourth session: Status of Preparation of Publications, Studies and Documents for the World Conference, Note by the Secretariat (Addendum), Contribution submitted by the Committee against Torture, Recommendations by the Committee against Torture to the Preparatory Committee of the World Conference on Human Rights as well as to the Conference Itself, A/CONF.157/PC/62/Add.3, 19 March 1993, p.3.

[359] See: World Conference on Human Rights, Preparatory Committee, Fourth session: Status of Preparation of Publications, Studies and Documents for the World Conference, Note verbal dated 25 March 1993 from the Permanent Mission of Austria to the United Nations Office at Geneva, A/CONF.157/PC/74, 16 April 1993, p.9.

[360] The Washington NGO Coalition: Recommendations for Reform in the United Nations Human Rights System, in: World Conference on Human Rights, Preparatory Committee, Fourth session: Report on Other Meetings and Activities, Note by the Secretary-General, Contribution from the

Permanent International Court on Human Rights with compulsory jurisdiction over all cases of human rights violations, together with a Permanent International Criminal Court, to which individuals would have direct access.[361] The preparatory committee also appealed *per se* to the UN to examine the desirability and feasibility of creating a special international court or regional courts for the international implementation of protections against unlawful detention.[362] However, the efforts to revitalise an international human rights court was to yield other proposals; notably, a proposal for the creation of an international criminal court[363] and High Commissioner for Human

---

Washington NGO Coalition, A/CONF.157/PC/81, 19 April 1993, p.19.

[361] World Conference on Human Rights, Preparatory Committee, Fourth session: Regional Meetings, Report by the Secretariat, Bangkok NGO Declaration on Human Rights, A/CONF.157/PC/83, 19 April 1993, p.19.

[362] See: The American Society of International Law, Project on An International Human Rights Agenda for the Post-Cold War World: Conclusions and Recommendations for the World Conference on Human Rights, in: World Conference on Human Rights, Preparatory Committee, Fourth session: Report on Other Meetings and Activities, Note by the Secretary-General, Contribution from the American Society of International Law, A/CONF.157/PC/79, 20 April 1993, p.25.

[363] With increasing concerns about the situation of the massive human rights violations in and after the Yugoslavian Civil War, the international community urged the UN to consider the means to respond more effectively and more speedily. Accordingly, the UN Security Council adopted a resolution, deciding to establish an international tribunal 'for the prosecution of persons responsible for serious violations of international humanitarian law' in this territory. See: S/RES/808 (1993), 22 February 1993. See also: A/CONF.157/PC/79, *supra* note 362, pp.24 – 25. There was an encouraging response to this resolution. See: for example, Canadian NGO Satellite Meeting of the World Conference on Human Rights, Recommendations on International Human Rights Mechanisms, in: World Conference on Human Rights, Preparatory Committee, Fourth session: Report on Other Meetings and Activities, Note by the Secretary-General, Contribution from the Canadian Satellite Meeting of the World Conference on Human Rights, A/CONF.157/PC/86, 23 April 1993, p.11; Annex II, Report by the General Rapporteur, Manfred Nowak, as adopted by the Final Plenary Session of the NGO-Forum, in: World Conference on Human Rights, Vienna, 14 – 25 June 1993, Agenda item 12 of the provisional agenda, Note by the secretariat, A/CONF.157/7, 14 June 1993, pp.4, 11; A/CONF.157/PC/79, *supra* note 362, p.24; Report from the Ninth Nordic Seminar on Human Rights, held by the Nordic Institutes of Human Rights at Lund, Sweden, 18 – 20 January 1993, in: World Conference on Human Rights, Preparatory Committee, Fourth session: Report on Other Meetings and Activities, Letter dated 2 April 1993 from the Permanent Representatives of Denmark, Norway and Sweden and the Chargé d'affaires of Finland and Iceland to the United Nations Office at Geneva addressed to the Assistant Secretary-General for Human Rights, A/CONF.157/PC/78, 16 April 1993, p.9. The International Criminal Court (ICC), as the first permanent, treaty based, international criminal court aimed at helping end impunity for the perpetrators of the most serious crimes of concern to the international

Rights.[364] In the event, the revitalisation of an international human rights court was only discussed peripherally by the Vienna Conference, and was not included in the Vienna Declaration and Programme of Action of the World Conference on Human Rights.

### 3.3 Some discussions since the turn of this century on revitalised plans for an international human rights court

The end of the Cold War brought about revolutionary changes in the UN's human rights architecture. The legitimacy of international human rights protection was solemnly proclaimed by world leaders in the Vienna Declaration and Programme

community, was established in 1998.

[364] Some stood for the proposal of appointing a commissioner for human rights 'as an independent high-level authority with a sole and specific human rights mandate, as well as for a range of measures for strengthening existing UN human rights structures'. A/CONF.157/PC/79, *supra* note 362, p.26. See also: for example, Summary of Bangkok NGO Declaration Joint Statement of Several Human Rights and Development NGOs, Presented at the Regional Meeting for the Asia-Pacific in preparation for the UN World Conference on Human Rights (Bangkok, Thailand, 1993 March 29 Monday), in: World Conference on Human Rights, Preparatory Committee, Fourth session: Regional Meetings, Report by the Secretariat, Bangkok NGO Declaration on Human Rights, A/CONF.157/PC/83, *supra* note 362, pp.4, 18; World Conference on Human Rights, Preparatory Committee, Fourth session: Status of Preparation of Publications, Studies and Documents for the World Conference, Consideration of the Final Outcome of the World Conference, Taking into Consideration the Preparatory Work and the Conclusions of the Regional Meetings, Note verbale from the Permanent Mission of Canada dated 23 April 1993, A/CONF.157/PC/88, 23 April 1993, p.3; Annex II, Report by the General Rapporteur, Manfred Nowak, as adopted by the Final Plenary Session of the NGO-Forum, in: World Conference on Human Rights, Vienna, 14 – 25 June 1993, Agenda item 12 of the provisional agenda, Note by the secretariat, A/CONF.157/7, *supra* note 363, p.4; Amnesty International: "World Conference on Human Rights, Facing Up to the Failures: Proposals for Improving the Protection of Human Rights by the United Nations", in: World Conference on Human Rights, Preparatory Committee, Fourth session: Status of Preparation of Publications, Studies and Documents for the World Conference, Noted by the Secretariat (Addendum), Contribution from Amnesty International, A/CONF.157/PC/62/Add.1, 1 January 1993, pp.9 – 14; A/CONF.157/PC/81, *supra* note 360, p.8. This proposal was echoed by the formal conference, which suggested the UN to consider 'the question of the establishment of a High Commissioner for Human Rights for the promotion and protection of all human rights'. World Conference on Human Rights, Vienna, 14 – 25 June 1993, Vienna Declaration and Programme of Action, Note by the secretariat, A/CONF.157/23, 12 July 1993, p.16.

of Action of 1993. Since the end of the Vienna Conference, the Office of the United Nations High Commissioner for Human Rights (OHCHR) was established in 1993 and the International Criminal Court (ICC) established in 1998 commenced its work in 2002. In 2005, the UN initiated a new wave of reforms in the human rights system. A main consequence of this reform was the upgrade of the UNCHR from a subsidiary body of the ECOSOC to the Human Rights Council, which is on a par with the ECOSOC as a subsidiary body of the General Assembly.

The establishment with respect to a judicial body, like the ICJ, the ICC, *ad hoc* tribunals, and regional human rights courts, with the mandate of providing a comprehensive and effective remedy for addressing human rights abuses is long overdue. Nevertheless, since the turn of this century, discussion on establishing a human rights court at international level has increased since the turn of the century. The revival of the Australian proposal has also been endorsed by some leading figures in international law circles.

### 3.3.1 Manfred Nowak

Manfred Nowak is a long-time proponent of a WCHR, and has made the case that the time has come to start contemplating its creation. He outlined eight key reasons for the establishment of such a court.

First, human rights without a remedy are empty promises.[365] There is a simple logic of rights and duties: 'A remedy means that the rights-holder can sue the duty-bearer before an independent neutral body, which has the power to decide in a binding manner whether or not the duty-bearer has violated his or her obligations.'[366]

[365] See: Manfred Nowak: "Eight Reasons Why We Need a World Court of Human Rights", in: Gudmundur Alfredsson, Jonas Grimheden, Bertrand G. Ramcharan and Alfred de Zayas (eds.): *International Human Rights Monitoring Mechanisms: Essays in Honour of Jakob. Möller* (2nd Revised Edition), Leiden; Boston: Martinus Nijhoff, 2009, pp.697 – 706.

[366] *Ibid*., p.697.

Nowak argued that this logic should apply to human rights.[367] He went further, saying:

> As with all other rights, human rights create obligations of others, above all states, and the rights-holders should have a remedy to hold the duty-holders accountable before an independent court. This is the simple logic of rights, duties and accountability.[368]

In practice, although the UN has developed a system of individual complaints against States, individuals have nevertheless long been deprived of the right to hold duty bearers accountable before an independent court at a global level. In Nowak's opinion, this situation is counterproductive and should no longer be allowed to continue.

Second, from a remedial perspective, judgments rendered by the WCHR with legally binding force would be better than the final views on communications issued by existing UN human rights treaty bodies.[369] According to Nowak's observation, the reasons for this viewpoint are partly historical. At the forum of the UN Human Rights Commission, there was a consensus that something needed to be done to show that human rights were being taken seriously. In spite of this consensus on the part of many states, particularly those which adhere to the Socialist concept of human rights, this might have generated tension between international human rights and the sovereign powers during the time of the Cold War.[370] There is also little room for optimism regarding compliance with the final views of the existing UN human rights treaty bodies. As for those countries that have subjected themselves to the individual communication/complaints procedures, it is also the case that some simply ignore those decisions handed down by bodies that they dislike.[371] According to Nowak,

---

[367] See: *ibid*., p.697.

[368] Manfred Nowak: "The Right of Victims of Human Rights Violations to a Remedy: The Need for a World Court of Human Rights", in: *Nordic Journal of Human Rights*, Vol. 32, No. 1, pp.3 – 17, at 10.

[369] See: Nowak, *supra* note 365, p.698.

[370] See: *ibid*., pp.698, 699.

[371] See: *ibid*., p.699.

this problem can be attributed to the lack of legally binding force of the UN human rights treaty bodies, and granting the WCHR with the power to decide in a legally binding manner on individual complaints might address this problem.[372]

Third, the establishment of the WCHR would liberate the existing complaints mechanisms of the UN human rights treaty bodies from a lingering cold-war logic. Nowak found that opposition to the proposal for establishing a WCHR were based on the long division between East and West formulated during the cold-war era.[373] He argued that this fundament is not tenable. Indeed, during the time of the Cold War, the political tensions between the two major camps of socialism and capitalism necessitated the use of very cautious approaches to human rights. In this context, complaints were not adjudicated but received 'final views', which were, in effect, little more than non-binding opinions. More than twenty years after the end of the Cold War, UN human rights complaint mechanisms still reflect the outmoded cold-war logic and carry little weight. The idea of establishing a WCHR, however, 'is neither new nor revolutionary, but was in fact already discussed in the late 1940s and then defeated by the political realities of the Cold War'.[374]

Fourth, the rationale for the proposal to establish a WCHR also derives from the fact that in most of the world regions (European, American and African) respective regional systems for the protection of human rights have been established.[375] Three regional organisations the Council of Europe (CoE), the Organisation of American States (OAS) and the African Union (AU)) have so far created courts, operating under different procedural mechanisms, to monitor and enforce the respect of human rights by states. Although the Asia-Pacific region remains without any regional judicial body to enable and empower people to make human rights complaints,

---

[372] See: *ibid*.

[373] As he observed: 'The sessions of the Committee in the late 1970s and early 1980s were characterised by highly ideological debates between western and eastern European experts, such as the two German members Christian Tomuschat, from the Federal Republic, and Bernhard Graefrath, from the Democratic Republic.' Nowak, *supra* note 368, p.3.

[374] Nowak, *supra* note 365, p.700.

[375] See: *ibid*.

Nowak suggested that the UN might learn from these regional organisations.[376] In his opinion, the absence of a human rights court in this region should be considered as an incentive, rather than a disincentive, for the UN to consider the establishment of the WCHR, allowing itself to be inspired by the experiences in the other three regional human rights courts.[377]

Fifth, the powerful UN Human Rights Council needs an independent and even more powerful WCHR as its counterpart.[378] Obviously, Nowak believes that the establishment of the WCHR will bring about a more clear-cut vertical division of labour in the human rights mechanisms at different levels. Apart from this vertical division of labour, a horizontal division of labour between the UN Human Rights Council and the WCHR would also be created. To be specific, he envisioned as situation where, as an independent court, the WCHR 'assesses the human rights situation in Member States on the basis of individual (or eventually also collective) complaints',[379] and the UN Human Rights Council as 'the highest political body supervises the execution of final and binding judgments'.[380] Nowak observed that, in some countries where serious human rights violations have been committed, the political considerations adopted by the UN Human Rights Council no longer play any role.[381] It seems to Nowak that this kind of division of labour is not going to create artificial roadblocks along the path to perfecting the existing human rights mechanisms; quite the reverse. The Universal Periodic Review (UPR) mechanism of the UN Human Rights Council would be an ideal political supervision mechanism for the implementation of the judgments of a future WCHR.[382]

---

[376] See: *ibid*.

[377] See: *ibid*., pp.700 – 702.

[378] See: *ibid*., p.702.

[379] *Ibid*., p.703.

[380] *Ibid*.

[381] See: *ibid*., p.702.

[382] See: Nowak, *supra* note 368, p.10. On this issue, Frouville believed that a World Commission of Human Rights should be created as a subsidiary body of the General Assembly. See: Olivier de Frouville: "Building a Universal System for the Protection of Human Rights: The Way Forward", in: Mahmoud Cherif Bassiouni and William A. Schabas (eds.): *New Challenges for the UN Human Rights*

The sixth reason concerns the difficulty of creating a WCHR, which lies in lengthy, complicated and cumbersome treaty amendment procedures. Nowak recalled the failure of the OHCHR's proposal for creating a unified treaty monitoring body. In this proposal, the OHCHR once suggested establishing a unified treaty monitoring body as a substitute for the present treaty monitoring bodies. Nowak argued that this unified treaty monitoring body would have required the amendment of all UN core human rights treaties except the ICESCR.[383] Nowak seemed to agree that the chances of success for this kind of proposal were microscopic, but that this would not be the case with the WCHR. He argued that the creation of the WCHR would be easier than anticipated, as it neither requires any treaty amendment nor abolishes the present UN treaty monitoring bodies.[384] The proposed WCHR could 'be established by means of an additional treaty containing the Statute of the Court'[385] 'similar to the Rome Statute of an International Criminal Court of 1998'.[386] At the same time, the WCHR would not replace the UN human rights treaty bodies already in existence; it 'would only gradually take over one of the functions of UN treaty monitoring bodies, namely dealing with individual and possibly also collective and inter-State complaints'.[387] Nowak also noticed the hesitancy of those states most concerned with maintaining state sovereignty to accept the jurisdiction of the WCHR. He suggested that the establishment of the WCHR could gradually eliminate this reluctance:

> Earlier than later the professionalism of the Court will convince States that the danger of

*Machinery: What Future for the UN Treaty Body System and the Human Rights Council Procedures?*, Cambridge, UK; Portland, OR: Intersentia, 2011, pp.241 – 266, at 265. This Commission should be entrusted with some monitoring functions that the WCHR does not have, such as the review of periodic reports, the onsite visits (except if needed for the establishment of facts in a particular case, of course) and continuous dialogue, follow-up of general issues, or development of international law. See: *ibid*.

[383] See: Nowak, *supra* note 365, p.703.

[384] See: *ibid*.

[385] For example, establishing one standing "super-committee" as a substitute for the existing treaty monitoring bodies. See: Nowak, *supra* note 368, p.10.

[386] Nowak, *supra* note 365, p.703.

[387] *Ibid*.

> accepting a comprehensive jurisdiction of the Court, which might also include older treaties which were never subject of an independent international monitoring, is much smaller than originally expected.[388]

Seventh, the jurisdiction *ratione persone* of the WCHR would be broader in scope than any other human rights mechanism in existence. The reach of the WCHR would no longer be limited to sovereign states. The WCHR would open the doors of international courtrooms to non-state actors.[389] The establishment of the WCHR 'would be an important step towards holding non-State actors accountable in relation to international human rights law'[390] based on their voluntary commitments.[391] The non-state actors include, but are not limited to, inter-governmental organisations (*e.g.* UN and its specialised agencies, the World Bank and other international financial institutions, the World Trade Organisation (WTO), the North Atlantic Treaty Organization (NATO) and the European Union (EU)), as well as transnational corporations and other powerful non-governmental actors in both the business and the non-profit sector. When it comes to why non-state actors should be interested in accepting the WCHR's jurisdiction, Nowak suggested that the motivation might derive from a hunger for a more secure and better world.[392]

The final and most important reason is that the WCHR 'can enforce the right of victims to adequate reparation'.[393] Nowak highlighted the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law adopted by the General Assembly in 2005.[394] He regarded this

[388] *Ibid.*, p.704.

[389] See: *ibid*.

[390] *Ibid*.

[391] See: *ibid.*; Nowak, *supra* note 368, p.10.

[392] See: Nowak, *supra* note 365, p.705.

[393] *Ibid.*; Nowak, *supra* note 368, pp.10 – 11.

[394] General Assembly: "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law", A/RES/60/147, 21 March 2006.

document as a major step forward, as it 'provides for various types of reparation, such as restitution, rehabilitation, compensation, guarantees of non-repetition and other forms of satisfaction'.[395] Notwithstanding the adoption of these principles and guidelines, there is no 'proper international body to ensure their implementation in practice'.[396] At the same time, considering that the victims' perception of adequate reparation would be different in each case, Nowak suggested that establishing the WCHR is a necessity.[397] In Nowak's opinion, the defect of the existing human rights mechanisms in the remedial aspect may further highlight this necessity. As far as the existing regional human rights courts, particularly the European Court of Human Rights (ECtHR) and Inter-American Court of Human Rights (IACtHR), are concerned, Nowak finds that:

> Traditionally, regional human rights courts focused their attention on deciding whether or not a human rights violation was established. The implementation of such judgment by means of adequate reparation is, in principle, left to the discretion of the respondent State.[398]

According to Nowak: '[i]n addition to handing down binding judgments at the global level, the Court could also be empowered to order the respondent party in a legally binding manner to provide adequate reparation to the victims, including restitution, rehabilitation, compensation, legal changes and other forms of satisfaction.'[399] The situation of the UN human rights treaty bodies offers little cause for optimism in this respect. '[T]hey lack any legally binding decision power and therefore can only indicate to the respondent State which type of domestic remedy and reparation they would consider adequate in response to a particular human rights

[395] Nowak, *supra* note 365, p.705.

[396] *Ibid*., p.706.

[397] According to Nowak, the perception 'largely depends on the type and gravity of the human rights violation, but also on the way the persons affected perceive justice'. *Ibid*.

[398] *Ibid*.

[399] Nowak, *supra* note 368, pp.10 – 11.

violation'.[400]

In conclusion, Nowak said:

> A future World Court of Human Rights with a proper mandate to order States and relevant non-State actors to provide victims of human rights violations adequate reparation in accordance with their individual needs, their sense of justice and the gravity of the particular human rights violation would be the ideal solution for filling this significant gap in the international human rights regime.[401]

### 3.3.2 Martin Scheinin

Martin Scheinin has been at the forefront of advocating the idea of establishing a World Court of Human Rights for many years. He suggested that the project of the WCHR is very much about the trend towards 'human rights law more and more achieving the status of a global constitution, a set of norms that bind all states irrespective of their will'.[402] This project is grounded in the gradual evolution of human rights law 'from consent to constitution'.[403]

Scheinin first discussed the necessity of establishing a WCHR. He suggested that the following three shortcomings of the current status of human rights law made the establishment of the WCHR a necessity. First, protecting the individual against states as the central idea of human rights law, including and even primarily his or her own state, has not systematically permeated the framework of public international law; the law primarily between states.[404] Second, apart from the failures in

---

[400] Nowak, *supra* note 365, p.706.

[401] *Ibid*.

[402] Martin Scheinin: "Towards a World Court of Human Rights", Swiss Initiative to Commemorate the 60th Anniversary of the UDHR Protecting Dignity: *An Agenda for Human Rights*, p.4. This document is available at: http://www.enlazandoalternativas.org/IMG/pdf/hrCourt_scheinin0609.pdf.

[403] See: *ibid*.

[404] See: *ibid*., p.7.

compliance with their treaty obligations, many countries do not esteem the procedural requirement of the mandatory monitoring mechanism.[405] Scheinin attributed this situation largely to the nonblack of enforcement capabilities of the existing UN human rights treaty bodies.[406] The third shortcoming is the exclusive focus of human rights treaties and their monitoring mechanisms upon states as the duty-bearers.[407] The current human rights treaties and their monitoring mechanisms no longer reflected the realities of this globalised world 'where other actors besides States … enjoy increasing powers that affect the lives of individuals irrespective of national borders, and therefore possess also the capacity to affect or even deny the enjoyment of human rights by people'.[408]

In Scheinin's opinion, a properly designed jurisdiction would help to free the WCHR from these shortcomings, and thus enable it to become one coherent solution to address the challenges in the international protection of human rights.[409] To his mind, the notion of an 'international court' is 'an expression that would reflect the consent-based and inter-state oriented nature of human rights law so far'.[410] In striking contrast, the proposed court is referred to as a 'World Court of Human Rights' because it 'would exercise jurisdiction not only in respect of States but also in respect of a wide range of other actors, jointly referred to as "Entities"'.[411] At the same time, the flexible way of accepting the jurisdiction of the WCHR would not only prevent the Court from being a provocative subversion of the consent-based and inter-state oriented nature of human rights law but also ensure the effective operation of the Court.[412]

As mentioned above, the proposal for establishing the WCHR 'has its

[405] See: *ibid*.
[406] See: *ibid*.
[407] See: *ibid*., p.8.
[408] *Ibid*.
[409] See: *ibid*., pp.5, 6.
[410] *Ibid*., p.8.
[411] *Ibid*.
[412] See: *ibid*.

foundation in the gradual evolution of human rights law towards a "global constitution"',[413] which means 'a framework of norms that are considered legally binding beyond the explicit consent by states, and even beyond the circle of states'.[414] This trend is broadly visible in the operation of the UN human rights treaty bodies and the regional systems of human rights protection.[415] This trend can also be understood as one 'from a state-centred world order to a new global order with focus on the individual endowed with rights',[416] which is demonstrated through a chronology of separate small steps forward in the application of human rights law.[417]

According to Scheinin, neither the ICJ nor the ICC is competent to address the challenges in the international protection of human rights. Seen from the ICC's jurisdiction, for the time being, '[t]he ICC does not directly address the question whether there was a human rights violation, or order remedies for such violations',[418] even though 'grave international crimes will invariably entail violations of the human rights of the victims of those crimes'.[419] Nevertheless, the overlap with human rights adjudication according to the international criminal law is partial.[420] A similar conclusion can be found through assessing the remedial function of the ICC. As Scheinin pointed out, prosecuting and punishing the individuals who have perpetrated those crimes through the means of criminal law will constitute an essential element in remedying human rights violations,[421] however, the victims of those crimes are also eager, through a mechanism of accountability, the attribution of the crimes to the state or other entity to which the individual perpetrators belong, holding them responsible for their suffering and obtaining such remedies as are endowed by

[413] *Ibid*., p.9.
[414] *Ibid*.
[415] See: *ibid*.
[416] *Ibid*.
[417] See: *ibid*., pp.9 – 15.
[418] *Ibid*., p.16.
[419] *Ibid*.
[420] See: *ibid*.
[421] See: *ibid*.

human rights law.[422]

Nor can the ICJ address the challenges in the international protection of human rights. The contentious jurisdiction exercised by the ICJ in a legally binding manner is only in respect of the 'rights and obligations of states *vis-a-vis* each other'.[423] Obviously, '[t]he individual and her human rights are not in focus'.[424] Moreover, the ICJ has no jurisdiction over a case submitted by a state against entities other than states. For the uncontentious jurisdiction of the ICJ, the UN General Assembly could utilise the advisory opinion procedure 'to submit selected legal issues of controversy under existing human rights treaties'.[425] As Scheinin observed, 'some of the advisory opinions have, in fact, addressed human rights issues'.[426] However, 'individuals have no power to initiate the advisory opinion procedure'.[427]

Scheinin found an alternative model which might work in practice. In this model, the ICJ could adjudicated human rights disputes because the ICJ Statute and the power of states entail a dispute concerning the application or interpretation of the human rights treaty to be lodged with the ICJ, disregarding whether this treaty includes this kind of clause.[428] In this sense, the ICJ might have played a role as an appeal court above the existing UN human rights treaty bodies.[429] In the short term, this model would relativise 'the authority of the human rights treaty bodies by subjecting them to review by a higher judicial authority'.[430] However, this model would strengthen the human rights system as a whole in the long run because the ICJ would become a weightier counterpart to the unilateral exercise of sovereignty by states.[431] However, Scheinin did not regard transforming the ICJ into a human rights

[422] See: *ibid*.
[423] *Ibid*.
[424] *Ibid*.
[425] *Ibid*., p.17.
[426] *Ibid*., p.16.
[427] *Ibid*.
[428] See: *ibid*.
[429] See: *ibid*., p.17.
[430] *Ibid*.
[431] See: *ibid*. Scheinin observed that today, many states just ignore the findings of the UN human

appeal instance superior to the UN human rights treaty bodies as a good idea. For one thing, there is no evidence that states or the UN General Assembly would facilitate this transformation. For another, this transformation 'does not reflect the idea of the human being, her rights and her empowerment, as the centerpiece of the international law of the 21st century'.[432]

Scheinin justified the feasibility of establishing the WCHR with regard to both its internal and external aspects. Externally, the WCHR would build and maintain a positive interaction with other branches of the UN human rights system. Take, for example, the OHCHR. Scheinin argued that as leader of the UN human rights programme and with support from the OHCHR, the position of the OHCHR would not be changed by the establishment of the WCHR.[433] Neither was there any need to pave the way for a WCHR by amending any existing human rights treaties through cumbersome procedures, since the future statute of the WCHR would *per se* be a new international treaty.[434] At the same time, despite gradually transferring the mandate for hearing individual complaints to the WCHR, the existing UN human rights treaties would retain their other monitoring functions intact.[435] Scheinin pointed out that in doing so:

> Gradually, the limited resources of the treaty bodies will be directed to the consideration of periodic reports by states and to the issuing of general comments. In preparing their general comments the treaty bodies will, of course, need to take into account the emerging case law by the Court.[436]

Furthermore, there is a mutually supportive relationship between the proposal

---

rights treaty bodies or, in exceptional cases, openly contest them without resorting to any higher legal authority than the lawyers of their own Foreign Ministry. See: *ibid*.

[432] *Ibid*.

[433] See: *ibid*.

[434] See: *ibid*. p.23.

[435] See: *ibid*.

[436] *Ibid*., p.24.

for establishing the WCHR and the proposal for merging the existing UN human rights treaty bodies.[437] According to Scheinin, this kind of proposal 'could very well be coupled with the creation of the WCHR'.[438] As far as the relationship of the WCHR with the regional human rights courts is concerned, the WCHR would complement rather than duplicate existing regional human rights courts.[439] However, this does not mean that the Court would become a court of appeals in respect of the regional human rights systems, even though this approach might reduce the potential case load of the WCHR.[440] Accordingly, the initiation of a case before a regional human rights court would automatically and indefinitely prohibit access to the WCHR in the same matter.[441]

The internal aspect can be divided into two parts. The first is the jurisdiction of the WCHR. Scheinin listed four reasons for states to accept the WCHR's jurisdiction. First, many countries are eager to demonstrate their unwavering commitment to human rights. Second, many states wish to see more consistency in the application of human rights law. Third, the WCHR, as a fully judicial institution with highly qualified full-time judges, as the World Court would be, will improve foreseeability and legal certainty. Fourth, the initiative of expanding the binding force of human rights norms beyond states only to cover entities other than states would be welcomed by many.[442] Scheinin tended to think that the proposal to establish a WCHR would eventually get enough support from states for its adoption if the future statute includes as many actors as possible, particularly within the range of 'entities', eligible to accept the jurisdiction of the Court.

As for the entities, Scheinin suggested that international organisations might be happy to accept the jurisdiction of the WCHR. In his opinion, on the one hand, accepting the jurisdiction of the WCHR would in principle open the prospect of

[437] See: *ibid*.
[438] *Ibid*., p.25.
[439] See: *ibid*., p.53.
[440] See: *ibid*., p.28.
[441] See: *ibid*.
[442] See: *ibid*., p.25.

judicial review over decisions.[443] It should be noted that judicial review of the WCHR would be 'highly qualified and fully independent'[444] and limited in the sense that it would only relate to the question of whether the organisation in question had violated the human rights of one or more individuals.[445] On the other hand, accepting this jurisdiction might represent, at the very least, a response to the increasing criticism as to their lack of commitment to or compliance with human rights norms.[446] In addition, the creation of the WCHR would make a significant contribution to the integrity of the law of accountability. To Scheinin's mind, the Court would be a proper regime of equivalent protection of human rights in respect of the acts of international organisations.[447] Last but not least, the rule of prior exhaustion of internal remedies would be well received by many international organisations. According to Scheinin, analogous considerations may apply in respect of transnational business corporations.[448]

With regard to 'autonomous communities' shaped by regional, ethnic, linguistic or religious nature, their acceptance of the WCHR's jurisdiction 'would enable international adjudication by highly qualified independent judges as to whether a group violates the human rights of its members'.[449] While securing accountability for human rights violations, both the autonomy of these communities and the sovereignty of the state concerned would be fully respected. As Scheinin pointed out, 'the ultimate jurisdiction of the Court would serve as an important counterbalance and help in avoiding a power monopoly of the State in the delicate balance between the rights of the individual, the powers of the group and the powers of the State'.[450] For any state belonging to the group of states inhabited by the autonomous community,

[443] *Ibid*., p.27.
[444] *Ibid*., p.27.
[445] See: *ibid*., p.26.
[446] See: *ibid*., p.25.
[447] See: *ibid*., p.26.
[448] See: *ibid*., p.27.
[449] See: *ibid*., p.28.
[450] *Ibid*.

the WCHR would avoid giving the final say to their organs.[451] As for the autonomous communities, they could sign an agreement with the state concerned, designating the courts of this state as remedies that needed to be exhausted before taking a case to the WCHR.[452]

The second internal aspect concerns the WCHR's mandates. For example, the WCHR would 'be able to intervene in ongoing or imminent human rights violations' though its power of issuing 'legally binding orders on interim measures of protection'.[453] Interim measures of protection, a concept built upon the practice of the ICJ, regional human rights treaties and the UN human rights treaty bodies,[454] 'can be addressed to any state or entity in relation to which the Court exercises jurisdiction'.[455] According to Scheinin, the duration of the proceedings is unlikely to be as long as that of an international criminal court, such as the *ad hoc* tribunals and the ICC.[456] For one thing, the proposed WCHR 'is not a criminal court and need not engage in the painful task of collecting, hearing and assessing hard evidence beyond any reasonable doubt'.[457] For another, the task of the WCHR will be different to that of an international criminal court.[458] As Scheinin said:

> [The WCHR] will conduct oral hearings and guarantee a day in court both for the complainant and for the respondent, be it a State or Entity. But the hearings are more about legal arguments, counter-arguments and conclusions, than about actual evidence. To the extent hard evidence is needed for assessing whether there was a human rights violation, this will usually be collected and submitted by the parties well in advance of the hearing.[459]

---

[451] See: *ibid*.
[452] See: *ibid*.
[453] *Ibid*., p.22.
[454] See: *ibid*.
[455] *Ibid*.
[456] See: *ibid*.
[457] *Ibid*.
[458] See: *ibid*.
[459] *Ibid*., pp.22 – 23.

As a result, the proposed WCHR 'will seek to decide every case within one year from submission'[460] while securing 'equal treatment of the parties, their chance to be heard, and their real possibility to comment each others' submissions'[461] and prohibiting 'delaying tactics by any of the parties involved'.[462]

### 3.3.3 Gerd Oberleitner

Oberleitner regarded an international court of human rights as necessary and realistic. He examined the necessity of setting up a WCHR in the following four aspects: added value in comparison to existing institutions and procedures, legal possibility, political feasibility, and effective results.

For the first of these – added value – the proposed WCHR would have to provide added value as compared to existing institutions and procedures.[463] According to Oberleitner:

> Added value means that the court should be able to remedy existing shortcomings and fill gaps in the present international human rights framework, supplement – and not duplicate or contradict – those procedures which at present function effectively, and enhance such procedures rather than endanger their further functioning.[464]

Oberleitner recognised the most striking shortcomings of the UN human rights treaty bodies as enumerated by Bayefsky and Nowak.[465] He suggested that, in line

---

[460] *Ibid*., p.23.

[461] *Ibid*.

[462] *Ibid*.

[463] See: Gerd Oberleitner: "Towards an International Court of Human Rights?", in: Mashood A Baderin and Manisuli Ssenyonjo (eds.): *International Human Rights Law: six decades after the UDHR and beyond*, Farnham, Surrey, England; Burlington, VT, USA: Ashgate, 2010, pp.359 – 370, at 365.

[464] *Ibid*.

[465] See: Anne Bayefsky: *The UN Human Rights Treaty System: Universality at the Crossroads*, Ardsley, NY: Transnational Publishers, 2001; Manfred Nowak: "The Need for a World Court of Human

with the law and practice of existing regional human rights courts, the WCHR could overcome many shortcomings of the UN human rights treaty bodies.[466] To be specific, the WCHR would have to be mandated to render legally binding judgements in an adjudicatory procedure; the Court could also be authorised to settle human rights disputes authoritatively in advisory opinions and would be able to compensate victims for damage suffered.[467] At the same time, such a court, bearing judicial independence and procedural rules, would provide consistency in jurisprudence.[468] Also, the extensive jurisdiction *ratione materiae* would mean that the WCHR covered all human rights – civil-political as well as social, economic and cultural – in a comprehensive way.[469] Moreover, '[a]s the highest judicial UN body in the field of human rights,'[470] Oberleitner added, the WCHR 'could be expected to exercise the visibility and the intellectual and societal impact which existing procedures do not'.[471] 'In terms of its geographical coverage, the court would be able to allow for decisions on cases from all regions of the world, including Asia, which has no

---

Rights", in: *Human Rights Law Review*, Vol. 7, No. 1, 2007, pp.251 – 259, at 253; Olufemi Amao: "The African Regional Human Rights System", in: Baderin and Ssenyonjo, *supra* note 463, pp.235 – 251. Oberleitner summarised the viewpoints of these scholars, saying that the existing UN human rights treaty bodies have the following shortcomings:

> … the respective procedures are not well known outside expert circles, their impact on the ground is limited, their proceedings are no match for proper court proceedings, their conclusions are mere recommendations and there is no follow-up to their decisions. Inter-state complaints have rarely been used before treaty bodies and the number of final conclusions on individual complaints is minute in comparison to the judgements regularly handed down by the ECtHR: an average of 1,000 decisions on individual complaints per year before the European Court compete against some 500 final views of all treaty bodies together in the more than 30 years of their existence.

Oberleitner, *supra* note 463, p.365.

[466] See: *ibid*.

[467] See: *ibid*.

[468] See: *ibid*.

[469] See: *ibid*.

[470] *Ibid*.

[471] *Ibid*.

regional human rights system.'[472] Based on the above analysis, Oberleitner believed that this kind of added value could be achieved through setting up an international court of human rights.

With regard to the WCHR's legal possibility, Oberleitner argued that the WCHR, as proposed by Nowak and Scheinin, should be legally possible because it follows the example of the ICC, which began functioning in 2002.[473] According to Oberleitner, optional jurisdiction is critical to the success of the establishment of the ICC.[474] Namely, the ICC was set up through a treaty open to all states, and they were invited to accept the jurisdiction of the ICC voluntarily.[475] Similarly, Nowak and Scheinin both declared that the treaty on the future WCHR's statute should 'be open to all states and allow them, upon accepting the court's jurisprudence, to indicate which human rights obligations they are willing to have scrutinized by the court'.[476] This treaty 'would enter into force after a certain number of ratifications'.[477] As well as being granted discretion about whether to accept the WCHR's jurisdiction, states would also be free with regard to the scope of rights that could be invoked before such a court.[478] At the same time, this jurisdictional design provides an option for those states willing to abide by the decisions of the Court.[479]

The relationship to the existing human rights infrastructure is also likely to affect the legal possibility of the WCHR. In Oberleitner's opinion, the establishment of the WCHR 'would mean a gradual phasing in of the court, would leave the existing human rights infrastructure untouched, would not require amendments to existing treaties, and would not need the introduction of new human rights norms'.[480] This relationship should be divided into two branches: the relationship of the WCHR with

[472] *Ibid*.
[473] See: *ibid*.
[474] See: *ibid*.
[475] See: *ibid*.
[476] *Ibid*.
[477] *Ibid*.
[478] See: *ibid*.
[479] See: *ibid*., pp.365 – 366.
[480] *Ibid*., p.366.

the UN human rights treaty bodies, and the relationship of the WCHR with the regional human rights courts. With regard to the first of these, the gradual transfer of the individual complaints procedure of the UN human rights treaty bodies to the WCHR would not prevent these bodies from continuing to fulfil all their other functions.[481] As for the other, Oberleitner suggested that it would be legally possible to facilitate the choice by victims of human rights violations of the most convenient court for them to seek justice, even though this kind of 'forum-shopping' might 'lead to contradictory human rights jurisprudence'.[482]

The third aspect refers to the political feasibility of the establishment of the WCHR. Oberleitner found that there is an interesting relationship between the existing human rights mechanisms and state sovereignty. The sheer existence of these

---

[481] See: *ibid*. Oberleitner also rejected another two alternative approaches to dealing with this relationship. The first alternative approach had been suggested by Scheinin, and was to make the WCHR the appellate court of the existing UN human rights treaty bodies. Individual applicants would be allowed to submit the application against the concluding views of these bodies before the international court. See: *ibid*.; Martin Scheinin: "The Proposed Optional Protocol to the Covenant on Economic, Social and Cultural Rights: A Blueprint for UN Human Rights Treaty Body Reform – Without Amending the Existing Treaties", in: *Human Rights Law Review*, Vol. 6, No. 1, 2008, pp.131 – 142. Oberleitner was afraid that such an approach was redundant:

> It is not quite clear what would be gained from such an approach, as it would mean that appellants would still have to go through the much criticized treaty body procedure before finally being allowed to go where they would most likely have headed anyway, namely to the court.

Oberleitner, *supra* note 463, p.366. It should be noted that Scheinin did not adopt this approach when drafting the statute of the WCHR (the MS Statute). The other alternative approach would make the relation between the WCHR and the UN human rights treaty bodies closer to a 'partnership' in handling complaints. This approach advocated transforming the existing human rights system into some sort of filtering mechanism, along the lines of the former European Commission of Human Rights or the current American and African Commissions of Human Rights. See: *ibid*. According to this approach, '[w]hen individual complaints are allowed before the international court of human rights, some sort of filtering mechanism might be necessary in any case, with or without the involvement of treaty bodies'. *Ibid*. Unifying all UN human rights treaty bodies in existence into one would be a necessity. See: *ibid*., p.367. In this case, '[t]he linkage between treaty body reform and the idea of an international human rights court may thus become an issue'. *Ibid*. This alternative approach was also not adopted by the authors of the current statutes.

[482] *Ibid*.

mechanisms and their sustained growth and development, on the one hand, 'remains an intriguing feature of an international legal order which rests firmly on state sovereignty'.[483] On the other hand, they keep 'creating and entrusting such institutions with the very mandate to intrude into that sovereignty'.[484] When it came to 'setting up an independent world court to adjudicate on the whole range of human rights and with respect to all states', [485] Oberleitner admitted that this is often dismissed as a utopian idea.[486] No coalition has ever been formed among states in support of a WCHR , and several elements explain the absence of such a coalition: the insistence of many states on sovereignty in governmental circles and their resulting reluctance to accept demanding supervisory procedures; the multitude of cases such a court would have to hear; the deep divisions in the international community over many fundamental principles of human rights in spite of the rhetoric concerning their universality.[487] However, this dismissal is questionable, first because everyone has a steadfast conception that the authoritative words of a judge will bring about justice where injustice has been done and all else has failed,[488] and second, because of praise for regional human rights courts and the settlement of dispute through judicial procedures ranging from arbitration panels to the ICJ in many fields of the law.[489]

In contrast to Trechsel and Alston, as well as other scholars, who consider the maintenance of state sovereignty to be the biggest obstacle to the establishment of the WCHR, Oberleitner seemed not to believe that the political prospects for the establishment of a WCHR are gloomy. He suggested that the *a priori* dislike of states might, in the end, be less difficult to overcome than the legal and practical issues

[483] *Ibid*., p.359.
[484] *Ibid*.
[485] *Ibid*.
[486] See: *ibid*.
[487] *Ibid*.
[488] See: *ibid*., pp.359 – 360.
[489] *Ibid*., p.360.

mentioned above.[490] Given the number of the states that have accepted the jurisprudence of regional courts and the individual complaints procedure before the UN human rights treaty bodies, Oberleitner made the following corollary:

> … a considerable number of states should thus have no reason to come forward with a principled objection to an international body which scrutinizes their performance on the basis of individual complaints.[491]

With regard to the fourth aspect, Oberleitner suggested that the ultimate test of the effectiveness of the court should be based on whether a realistic mandate in line with sufficient resources is given to the court;[492] in other words, whether there is some formalised political backing to see the Court's decisions implemented at a national level.[493]

Oberleitner concluded that despite considerable difficulties in and harsh critique against setting up an international human rights court, there are still two overarching reasons for the establishment of the WCHR.[494] The first is the realisation of the right to an effective remedy. As he said:

> First, it seems inconsistent, if not hypocritical, to push for the right to an effective remedy as a core human right on the national level while at the same time negating this right in the UN system and excluding a great number of persons from access to an international court. There is no better way to make this right a reality than to allow access to a court composed of independent judges, not only at the domestic and regional levels but also in the un system.[495]

---

[490] See: *ibid*., p.367.
[491] *Ibid*.
[492] See: *ibid*.
[493] See: *ibid*.
[494] *Ibid*., p.370.
[495] *Ibid*.

The other reason concerns the sustained development of human rights infrastructure. According to Oberleitner, for ordinary people, endless tinkering with procedural details of this or that sub-committee in the basement of the *Palais de Nations* in Geneva is neither meaningful nor attractive.[496] The WCHR, or at any rate the engaged debate over its establishment, could 'open a new chapter for the UN and for the development of international human rights law generally into the future'.[497]

### 3.3.4 Geir Ulfstein

The role of the international courts and tribunals as dispute settlement mechanisms is held in particularly high regard by Geir Ulfstein; as he said:

> The prime advantages of using international courts and tribunals for dispute settlement are that they represent impartial organs with legal expertise, and have a procedure well suited to resolving legal disputes. They provide binding and final decisions in the form of *res judicata*, and may impose obligations of restitution and payment of reparations for damage suffered.[498]

Ulfstein examined the establishment of the WCHR from the following four perspectives. First, the extent to which the WCHR would contribute to overcoming the present weaknesses of the supervisory system; second, the relationship between the proposed WCHR, the regional human rights courts, the treaty mechanisms and the Human Rights Council; third, the legitimacy of the proposed WCHR; and fourth, the realism of the proposed WCHR.

With regard to the first of these points, Ulfstein argued that the WCHR would

---

[496] See: *ibid*.

[497] *Ibid*., p.370.

[498] Geir Ulfstein: *Making Treaties Work: Human Rights, Environment and Arms Control*, Cambridge: Cambridge University Press, 2007, p.8.

contribute to overcoming the present weaknesses of the supervisory system by strengthening the effectiveness of individual (and possibly inter-state) complaints.[499] Like the examination of state reports and inquiry into allegations of grave or systematic violations, the consideration of individual complaints in the current human rights monitoring system faces serious challenges.[500] The proposed WCHR could address these concerns under the following four headings: visibility, efficiency (i.e. costs involved and timeliness of output), quality (i.e. composition, procedures and outcome) and effectiveness (i.e. implementation by state parties) of the complaints mechanism.

The visibility of the complaint procedures refers to the 'popularity' of these procedures among the international community, particularly those outside academic circles. Having considered the fact that the victims of human rights violations rarely have any perception of, and are unfamiliar with, the treaty body system, Ulfstein suggested that the proposed WCHR 'may become much more visible than the existing treaty bodies and attract much attention'.[501] However, he also acknowledged that a heavy caseload might be a by-product of such increased visibility.[502]

The efficiency of the complaints procedure will depend on the length of time the Court takes to process each complaint. Ulfstein suggested that an effective complaint settlement mechanism should provide redress within a reasonable time.[503] On this issue, Ulfstein cited the example of the OHCHR to illustrate that the operating mode of the existing human rights treaty bodies has been insufficient to handle the steep increase in workload that resulted from the growth in the number of human rights treaties and ratifications.[504] This situation can also partly be attributed to lack of

---

[499] See: Geir Ulfstein: "Do We Need a World Court of Human Rights?", in: Ola Engdahl and Pål Wrange: *Law at War: The Law as it Was and the Law as it Should Be*, Leiden; Boston: Martinus Nijhoff Publishers, 2008, pp.261 – 272, at 262.

[500] See: *ibid*.

[501] *Ibid*., p.263.

[502] See: *ibid*.

[503] See: *ibid*., p.264.

[504] See: *ibid*., pp.263, 264.

resources.[505] In the case of the proposed WCHR, the complaints procedure of this Court would require more resources than the existing UN human rights treaty bodies.[506] An under-resourced mechanism could hardly be expected to meet the requirement of efficiency.

As for the quality of the complaints procedure, it can be seen from the OHCHR that the quality of the monitoring process largely determines the visibility of the system, which is linked to the authority of the monitoring bodies.[507] Based on experiences with the quality and independence of members of the treaty bodies, Ulfstein suggested that the staff making up the existing UN human rights treaty bodies, which have been criticised by the OHCHR for their unevenness and inefficiency,[508] should not apply for election as judges of the proposed WCHR.[509] Ulfstein emphasised the significance of calibre and independence with regard to judges as critical for the ultimate success of the proposed WCHR. According to Ulfstein:

> Consideration should be given to election procedures whereby parallels may be drawn with similar processes in other international courts, including regional human rights courts. The International Criminal Court has for example elaborated requirements on qualifications, nominations and election of judges.[510]

As regards the effectiveness of the complaints procedure, Ulfstein suggested that judgments of the WCHR with legally binding force would carry more weight than decisions from the UN human rights treaty bodies. Notwithstanding the doubts about

---

[505] See: *ibid*., p.264.

[506] See: *ibid*.

[507] See: International Human Rights Instruments: "Concept Paper on the High Commissioner's Proposal for a Unified Standing Treaty Body", HRI/MC/2006/2, 22 March 2006, para.22. Cited in: Ulfstein, *supra* note 499, p.264.

[508] See: HRI/MC/2006/2, para.22.

[509] See: Ulfstein, *supra* note 499, p.264.

[510] *Ibid*., p.265.

this logic, he took the line that the stronger the legal effects of decisions made by a monitoring body, the more effective that body will be.[511]

Secondly, the WCHR and the regional human rights courts, the treaty mechanisms and the Human Rights Council can coexist. Ulfstein admitted that the establishment of the WCHR 'could be seen as a further step towards fragmentation of the international supervisory human rights system',[512] nevertheless, in Ulfstein's opinion, '[t]he dangers of multiple supervisory organs and courts should not, however, be exaggerated'.[513] Moreover, there are at least three approaches by which the challenges of fragmentation can be alleviated or overcome.[514] They include the state's acceptance of the WCHR's jurisdiction, the complementarity of the WCHR's jurisdiction and the hierarchical superiority of the WCHR – that is, that the proposed WCHR 'could be an appeals instance for decisions taken by treaty bodies, … or even for judgments by regional courts'.[515]

Ulfstein was concerned that the establishment of the WCHR would 'entail a danger of disconnecting individual complaints from the dialogue and follow-up instituted as part of the examination of state reports'.[516] To prevent this from happening, he suggested the future WCHR should 'establish an interaction between the Court and the treaty bodies in the sense that these bodies should take on the task of follow-up – and not review – judgments by the Court in their examination of state reports'.[517]

Thirdly, the establishment of the WCHR has the legitimacy of legislating

[511] The International Law Association's Committee on International Human Rights Law and Practice has submitted that 'the non-binding character of the findings of treaty bodies may be a factor impeding the implementation of a decision in the domestic legal systems'. *Ibid*., p.266. Some scholars, such as Steiner, maintained quite the opposite; that there is an illusory connection between the improvement of the compliance with the decisions made by the existing UN human rights bodies and making these decisions legally binding. See: *ibid*.

[512] *Ibid*., p.267.

[513] *Ibid*.

[514] See: *ibid*.

[515] See: *ibid*., pp.267 – 268.

[516] *Ibid*., p.268.

[517] *Ibid*., p.269.

international human rights. Starting from the preservation of the global diversity of values, it was argued that the WCHR should not be given jurisdiction over contentious, value-laden issues (*e.g.* the rights of women, homosexuals and other minorities, or freedom of religion) which are often also strongly identified with geography, politics, sociality, culture and religion.[518] Ulfstein did not agree with this argument. Indeed, he saw the establishment of the WCHR as 'a further step in the legalisation of international human rights, at the expense of political approaches and dialogue'.[519] At the same time, 'international human rights as contained in the legal instruments have been accepted in the representative national and international organs'.[520] To Ulfstein, however, the end of establishing a WCHR represents more than furthering the legalisation of international human rights; its objective would be to serve the effective implementation of the human rights treaty obligations.[521] In Ulfstein's opinion, democratic values, the effective protection of individuals and minorities against a democratic majority, the respected and professional composition and the application of the well-known procedures of high credibility would provide a further basis for the legitimacy of establishing the WCHR.[522]

The political will of states may also affect the legitimacy of the WCHR.[523] Ulfstein admitted that 'the possibility of having recourse to a World Court rendering binding judgments means less freedom for states to choose their own interpretations and adaptations',[524] and this possibility may lead to the reluctance of states to accept the jurisdiction of the WCHR. Besides, the global political climate in the human rights field, which is characterised by conflicts between different political systems, regions, cultures and religions, and 'the increasing scepticism regarding the expansive

[518] See: *ibid*.
[519] *Ibid*., pp.269, 270.
[520] *Ibid*., p.269.
[521] *Ibid*., p.270.
[522] See: *ibid*.
[523] See: *ibid*.
[524] *Ibid*.

role of regional courts may impact on the legitimacy of the WCHR'.[525] According to Ulfstein, a well-formulated rule of prior exhaustion of local remedies before approaching the WCHR, establishing the use of regional courts as a first instance, and the use of the doctrine of margin of appreciation (MoA) may help to reassure the reluctant states.[526] More importantly, Ulfstein appreciated the flexible design of the WCHR's jurisdiction in the current statutes of the WCHR. As he said:

> [T]he proposals from Nowak and Scheinin allow states to choose the human rights conventions with which the Court would be delegated jurisdiction to judge in relation to the relevant state. This would leave room for states to await allocation of jurisdiction for certain conventions until they felt assured by the jurisprudence of the Court.[527]

Ulfstein suggested that the legitimacy of the WCHR is closely related to the realism of the WCHR.[528] According to Ulfstein, the WCHR should be welcomed, since the establishment of this Court means 'more effective international control of national implementation of human rights obligations'.[529] Additionally, the creation of the WCHR can be justified by the following facts: first, 'the protection of human rights is not only a matter of collective concern, but affects in the highest degree individuals and minorities';[530] second, the newly established UN Human Rights Council and the debate on improvements to the treaty body system provides the proper timing for the establishment of the WCHR;[531] and third, there is 'a more general trend towards an increasing number of international courts'.[532] The potential for overcoming 'the weaknesses of the current supervisory mechanisms, such as the

[525] *Ibid*., p.271.

[526] Ulfstein suggested that this doctrine 'may be further extended in a global context due to the variations of cultures and political systems'. *Ibid*., p.270.

[527] *Ibid*.

[528] See: *ibid*., p.262.

[529] *Ibid*., p.270.

[530] *Ibid*., pp.270 – 271.

[531] See: *ibid*., p.271.

[532] *Ibid*.

lack of visibility, professionalism and independence of its members, procedural deficiencies, and – not least – the non-binding character of its decisions'[533] may also strengthen the realism of the WCHR.[534] In Ulfstein's eyes, because of this potential, the WCHR 'may be expected to extend greater availability for petitioners, enjoy higher legitimacy and exert more influence in national legal systems'.[535]

Ulfstein did not deny that the WCHR represents a further fragmentation of the human rights supervisory system due to the established regional human rights courts, the treaty bodies, and the UN Human Rights Council.[536] Nevertheless, this formal fragmentation would not affect the realism of the WCHR because the respective functions of WCHR and the bodies as mentioned above can be clarified.[537] '[I]t should be expected that such a Court would promote substantive consistency through its jurisprudence.'[538]

Likewise, the possible overload of the future WCHR would pose no threat to the realism of the WCHR.[539] In Ulfstein's mind, potential case overload of the WCHR 'may be overcome by a screening procedure while respect for the different political, cultural and religious systems in the world could be accommodated through a principle of "subsidiarity" in favour of regional courts, and the availability of a margin of appreciation'.[540]

[533] *Ibid*.
[534] See: *ibid*.
[535] *Ibid*.
[536] See: *ibid*.
[537] See: *ibid*.
[538] *Ibid*.
[539] See: *ibid*.
[540] *Ibid*.

## Concluding Remarks

The past is always prologue to the present. This Chapter has tried to unveil the mysterious history of the Australian proposal for the establishment of an international court of human rights. Donnelly once said: 'Understanding the structure of a regime (or its absence) requires that we know who has played which roles, when and why, and what agreements they reached.'[541] It is widely accepted today that our contemporary international human rights doctrine consists of two inalienable elements: formulating internationally recognised human rights standards and establishing appropriate machinery to implement these standards. As this **Chapter** has demonstrated, many ideas surrounding these two elements were transformed through discussion in the UNCHR forum into the foundations of the modern human rights framework. However, the process of this transformation has been full of twists and turns.

**Section 1** analysed the background and the contents of the Australian proposal. World War Two linked human rights to international peace and security.[542] As harsh as it is to admit it, human rights were marginalised in the time between the Dumbarton Oaks Conference and the San Francisco Conference. In the process of reconstructing international order, 'the three great powers seemed intent on securing the fruits of their victory in a bloody world war by maintaining a firm and controlling grip on the United Nations.'[543] It is generally accepted that the height of the cold war was a frightening era, and one during which it could be seen that 'intensified political tensions [were] dominating many of the discussions in the UN'.[544] In the case of the UNCHR, despite the awareness of the probable roadblock to popular hopes for genuine human rights protection that might be brought about by the escalation of the Cold War, the UNCHR did try to avoid becoming politicised, and it remained a

[541] Donnelly, *supra* note 350, p.614.

[542] See: E/HR/28, *supra* note 8, p.21.

[543] Normand and Zaidi, *supra* note 4, p.114.

[544] Devereux, *supra* note 298, p.64.

forum which should be composed of non-governmental representatives nominated by the UN Member States and appointed by the ECOSOC.[545] Accordingly, in the situation where a representative deemed something he would advocate to be right on the one hand, despite the likelihood of it being difficult for his own government to carry through on the other, he should defend it.[546] From the start, all the representatives to the UNCHR realised the significance of drafting an international bill of rights. The international bill of rights should be drafted, not as a mere declaration of international policy embodying a statement of principles, but as an instrument creating legal rights and obligations, and it should formally represent international concern about the relationship between the State and the individuals under its governance.[547] Such a bill would also include the right and the duty of enforcement.[548]

In practice, the representatives to the UNCHR, either in the capacity of representatives of their governments or in their capacity as individuals, could not undertake responsibility without the consent of their governments.[549] In other words,

---

[545] See: E/HR/12, *supra* note 25, pp.2, 5; "Commission on Human Rights of the Social and Economic Council Summary Record of Meetings", tenth meeting, E/HR/20, 15 May 1946, pp.1, 2. The National Council of Negro Women suggested that the representatives to the UNCHR should consist of 'men and women of such outstanding distinction and reputation that they have earned the respect not only of the various peoples of the world but of their governments'. E/HR/22, *supra* note 49, p.2. The Federal Council of Churches agreed with the non-governmental representation. See: E/HR/28, *supra* note 8, p.5. Finally, the nuclear commission submitted this non-governmental representation to the ECOSOC for consideration by an overwhelming majority. See: E/38/Rev.1, *supra* note 2, p.8.

[546] See: "Commission on Human Rights of the Social and Economic Council Summary Record of Meetings", fourth meeting, E/HR/10, 6 May 1946, p.1.

[547] See: for example, "Statement of Essential Human Rights Presented by the Delegation of Panama", E/HR/3, 26 April 1946, pp.1 – 2; E/HR/22, *supra* note 49, p.2.

[548] Lauterpacht, *supra* note 62, p.169.

[549] For the first time, Borisov took exception to the representation in individual capacity and suggested the UNCHR should be composed of state representatives. To him, the UNCHR 'would have no similarity to other bodies of the United Nations and that its members would only represent themselves and would have no direct relations with their governments'. "Commission on Human Rights of the Social and Economic Council Summary Record of Meetings", fifteenth meeting, E/HR/26, 22 May 1946, p.4. He further pointed out that representatives in individual capacity 'would be specialists in limited fields and would not have the authority of government representatives which they would need if their resolutions and decisions were to be carried through'. *Ibid*. At the first session, the U.S.S.R

the opinions the representatives expressed should present what their governments believed. The representatives to the UNCHR then focused their thoughts on whether the UNCHR should take the further step of providing for the possibility of action against a State in cases of violation. The following three questions: the meaning of implementation; the form of the international bill of rights to be drafted; and the maturity of discussing specific measures for implementation, almost threw the discussion on the issue of implementation into deadlock.

For the first question, the representatives to the UNCHR did not define what should distinguish the provisions for implementation from an agency for implementation until the fifth session of the UNCHR. The conclusion to the second question – the form of the international bill of rights – also had a significant impact on the issue of implementation. There was no agreement reached on this subject until the second session of the UNCHR. At this session, the UNCHR decided to prepare the international bill of rights in the form of a Declaration on Human Rights and Fundamental Freedoms followed by detailed treaty provisions in the form of legal obligations to be implemented. As for the third question, there was an argument that, on the one hand, the time for discussing the issue of implementation would not be opportune until the rights written into the international bill of rights had been clearly defined. On the other hand, the representatives also recognised that the drafting of a bill of rights might take a considerable time. Based on this recognition, the UNCHR decided to divide the drafting of the international bill of rights into two documents, and this decision, in effect, increased the burden on the UNCHR. The Australian representative was perceptive, in that this argument, if it had been adopted by the UNCHR, would have thrown the discussion on the issue of implementation into deadlock. It was the opinion of the Australian representative that the UNCHR should not allow the postponement of consideration of this issue, since 'no finality in a draft could be reached until the question of implementation had been considered'.[550] In

representative stated that he must reserve his opinion on the establishment of the ICHR before consulting with his government. See: E/CN.4/SR.15, *supra* note 28, p.4.

[550] E/CN.4/AC.1/SR.2, *supra* note 40, p.4.

1947, to prevent this from happening, the Australian representative presented a proposal to the UNCHR which suggested the establishment of an international judiciary for the adjudication of human rights issues.

The Australian proposal envisaged the ICHR as being 'the Central Appeal Court to which States, groups of individuals or even single individuals could appeal when all domestic possibilities of appeal had been exhausted'.[551] Most notably, it was the Australian proposal that introduced an entirely new system of petitions (which had not appeared in the UN Charter) as one of its core contents. This system attempted to make international law equally applicable to individuals through granting them *locus standi* before an international court as the prerequisite for a true and full vindication of individual rights. The starting point of this attempt was that the ultimate beneficiary of international human rights law doctrines has always been the individual. As Fransconà said:

> Regardless of whether we call them the law of nations or a League of Nations or States or sovereigns or municipalities, municipal law, or corporate bodies – what we really are aiming at are the rights of those who have interests in those things called by those different names. Individuals are at the heart of all of those particular names.[552]

This system, as the third Working Group found, gave rise to various organisational questions and would, therefore, need to be worked out in sufficient detail.[553]

This system was also based on the recognition of the State's dominant position in human rights protection on the one hand and the assumption that national governments alone could not be trusted to protect human rights without international supervision on the other. At the same time, the appeals and communications received by the UNCHR 'indicated a need to develop implementation machinery to redress

[551] E/CN.4/SR.15, *supra* note 28, p.3.

[552] Idelson, *supra* note 86, p.71.

[553] See: E/CN.4/53, *supra* note 17, p.14. See also: E/CN.4/SR.81, *supra* note 35, p.10.

human rights violations'.[554] With a system of individual petitions, individuals would no longer be forced to suffer in silence when they had a legitimate grievance against either their government or any other States Parties to the international bill of rights. In addition, with the involvement of individuals, the State would no longer be the sole interested party in an internationally contentious case.

In a sense, the appearance of the Australian proposal formally opened the substantive discussion on the issue of implementation and, in effect, the representatives to the UNCHR used the Australian proposal as the basis for their wrangle over this matter. The opening paragraphs of **Section 2** gave a brief chronological review of the discussion on the issue of implementation at the first sessions of the UNCHR. As a matter of fact, the UNCHR had several times set the deadline for making concrete decisions on the issue of implementation, but had never stuck to it. The UNCHR took a two-stage approach to addressing this issue. The first stage of the implementation of the human rights and fundamental freedoms, which was accomplished in 1948, was the drafting of the UDHR, a significant advance upon the UN Charter, but with no legally binding force. The first stage was to be followed by the conclusion of the Covenant on Human Rights, which would provide for the practical realisation of certain of the principles already proclaimed in the UDHR through imposing binding obligations upon states.[555]

The debate on the Australian proposal and the issue of implementation was, on the surface, focused on 'whether, at the present time, a large number of States would be prepared to accept the principle of final and binding decisions in the field of the violation of human rights'.[556] However, with the escalation of the Cold War, this discussion debate presented *de facto* a seemingly inescapable ideological appeal for human rights. This appeal was primarily embodied in the tension between the Australian proposal and the maintenance of national sovereignty. Those

[554] See: Normand and Zaidi, *supra* note 4, p.159.

[555] See: Department of Public Information United Nations: *Yearbook of the United Nations 1948-49*, *supra* note 122, p.538.

[556] E/CN.4/53, *supra* note 17, p.27.

representatives who advocated the absolute maintenance of state sovereignty argued that the State 'could be trusted to act in the best interests of its citizens and that those who sought international intervention were seeking to destabilize the state'.[557] In addition, they also insisted that, as D'Ascoli and Scherr said, 'it is in the interest of the respondent State to have an opportunity to adjudicate by its own tribunals upon the issues of law and fact which the claim involves in order to discharge its responsibility and to redress the wrong committed.'[558] Beyond that, the tradition of international law has long established the rule of non-interference, which was written in the form of Art.2 (7) in the UN Charter as one of the political foundations of the UN.[559] This meant that the State was not *ex hypothesi* bound by any objective rule, could not sin, could not be punished, and need not even blush.[560] However, the Australian proposal, if approved by the UNCHR, would have changed this situation so fundamentally that the proposed ICHR would have been seen by many as a conspiracy to trample on sovereignty if it had condemned the judgment rendered by municipal courts. As the U.S.S.R representative pointed out,

> (This plan) would have the effect of transforming a dispute between a private individual and his Government into an international dispute, thereby substantially enlarging the area of international differences, frictions and incidents, unnecessarily burdening and aggravating international relations and undermining the foundations of peace.[561]

It might even have been the case that any proposal submitted to the UNCHR was likely to 'undermine the sovereignty and independence of States, and be [sic] in conflict with the whole system of international public law regulating the relations

[557] Devereux, *supra* note 298, p.65.

[558] D'Ascoli and Scherr, *supra* note 98, p.8.

[559] See: McDougal and Leighton, *supra* note 7, p.510.

[560] See: Idelson *et al*, *supra* note 86, pp. 52 – 53.

[561] See: Official Records of the Economic and Social Council, Ninth Session, Supplement No. 10, Annex III.

between States'.[562]

By contrast, although not inclined to sweep away the concept of state sovereignty, many representatives doubted that international implementation would harm state sovereignty. They did not reject the implementation of the provisions of the covenant on a national level by States parties through appropriate legislative, administrative and other measures. However, they considered that Art.2 (7) of the UN Charter should be narrowly read, and argued that the application of state sovereignty should not be unfettered. To them, this unrestricted application would create the illusion that a state had supremacy over every rule not made by itself, which would induce the State not to prepare voluntarily to accept international jurisdiction. In addition, acceding to an international convention or concluding international agreement *per se* demonstrated a limitation on state sovereignty.

Contradictory opinions were also raised on the form and mandates of this organ. These views provided two scenarios. The first scenario hoped for the right of individuals and organisations to petition to be recognised immediately through the establishment of an international human rights court or a special chamber of the ICJ. The advocates of the Australian proposal believed that states which were going to subscribe to the Australian proposal would 'be able to begin now to lay the foundations of a true international protection of human rights, and through their example, eventually induce the dissidents to join them'.[563] With the recognition that hearing adjudicative claims from individuals implied a jurisdiction on the part of the UN, and one which it had apparently never possessed before[564], the other scenario argued that a gradual progress consisting of courage on the part of the nations and experience was first required. As can be seen, the French and UK/US proposal, represented a relatively conservative agenda on the issue of implementation. These

[562] See: Annotations on the text of the draft International Covenants on Human Rights, A/2929, 1 July 1955, p. 3.

[563] E/CN.4/53, *supra* note 17, p.28.

[564] See: Commission on Human Rights: "Comments from Governments on the Draft International Declaration on Human Rights, Draft International Covenant on Human Rights and the Question of Implementation", third session, E/CN.4/82/Add.4, 27 April 1948, p.23.

two proposals preferred an extrajudicial method, and stood for the establishment of either a permanent committee of conciliation or an *ad hoc* fact-finding committee. The advocates of the latter mode also differed over whether a system of individual petitions should be introduced. As the Chairman observed, 'the joint United States/United Kingdom proposal, for example, concerned only the right of States to petition, while the proposal, submitted by France and India contemplated the extension of the right of petition to individuals and to groups'.[565] At the sixth session of the UNCHR, the representatives of France, India, the United Kingdom and the United States of America were asked to work out a draft proposal on measures of implementation that might be acceptable to as many countries as possible. This proposal constituted the prototype of the Human Rights Committee (HRC) as the implementation mechanism of the ICCPR.

It can be seen that the Australian proposal did not come close to enjoying majority support within the UNCHR. A more conservative opinion – that it would be wise to allow a means for implementation that might be acceptable to as many countries as possible – prevailed within the UNCHR. Nevertheless, many representatives still believed that, as the French representative had pointed out, the Australian proposal 'would seem to be the normal step in the evolution of the world'[566] and 'would one day, no doubt, form part of the institutions of the world'.[567] It should be noted that it was the Australian Government itself that brought the proposal for establishing an ICHR to a premature end. Evatt had been the initiator of the proposal to establish this Court, and he went all-out in support of an immediate adoption of this proposal during his period in office. However, owing to the political changes in Australia, Evatt's successor quickly changed his positions on the issue of

[565] Commission on Human Rights: "Summary Record of the One Hundred and Fourteenth Meeting", fifth session, E/CN.4/SR.113, 16 June 1949, p.3.

[566] See: E/CN.4/SR.38, *supra* note 35, p.12. See also: Commission on Human Rights Drafting Committee: "Summary Record of the Eleventh Meeting", first session, E/CN.4/AC.1/SR.11, 3 July 1947, p.1. The Chilean representative seconded his point of view. As he said: '[A]n international tribunal at this stage was utopian and something for the future'. *Ibid*., p.12.

[567] *Ibid*.

implementation. He believed that the fundamental differences in humanistic philosophy and legal concepts and procedures between East and West rendered the proposal for an ICHR quite unreal.[568] As a result, he decided to withdraw the proposal at the sixth session of the UNCHR. At the forum of UNCHR, the agenda of the establishment of the ICHR 'has continued to surface periodically, albeit without attracting any significant support from states'.[569]

As mentioned in **Section 3**, there were two further proposals for establishment, put forward respectively by Garry Davis and Seán MacBride. These two proposals had the following aspects in common. Firstly, these two proposals identified individuals as the potentially interested parties of the *locus standi*. Secondly, the proposed judicial bodies would consist of regional courts of the first instance and an international court, which would function as a kind of Court of Appeal. Apart from these two proposals, **Section 3** also mentioned a number of motions targeted at achieving the resurgence of the Australian proposal, which were raised at the two international conferences on human rights. Specifically, the Teheran Conference was widely expected to chart the creation of new compliance mechanisms, and some proposals suggested the establishment of an international judiciary specific to human rights. However, none of these proposals was discussed during the conference. The Vienna Conference evaluated the effectiveness of implementation machinery and procedures of human rights at the international and regional levels[570] and agreed that 'guaranteeing human rights also means setting up jurisdictional controls to punish any violations that occur'.[571] However, the jurisdictional control eventually established was not in the form of an international court of human rights, but rather

[568] See: Copy of Submission from T G Glasheen to Minister of External Affairs, annotated by Spender, in NAA A 1838/1, Item 895/3/12. Cited in Devereux, *supra* note 298, p.64.

[569] Philip Alston: "Against a World Court for Human Rights", in: *Ethics & International Affairs*, Vol. 28, No. 2, 2014, pp.197 – 212, at 198.

[570] A/CONF.32/41, *supra* note 343, p.3.

[571] World Conference on Human Rights, Vienna, 14 – 25 June 1993, Address by the Secretary-General of the United Nations at the Opening of the World Conference on Human Rights, Vienna, 14 June 1993, A/CONF.157/22, 12 July 1993, p.10.

the ICC. Since the turn of present century, several attributes have been offered to support the establishment of the WCHR in the international-law circle.

To date, international human rights doctrines have not availed individuals of the opportunity to negotiate directly with the State concerned in the individual communication/complaint procedures, and international law has neither established any neutral third body for arbitration, nor a particular international court/tribunal accessible to them. Seen in this light, Goldberg's words a half century ago sounds still fresh and warm: 'The quest for universal enforcement of human rights has been age long and unhappily is still far from realization.'[572]

[572] Arthur J. Goldberg: "The Need for a World Court of Human Rights", in: *Howard Law Journal*, Vol. 11, No. 2, Spring 1965, pp.621 – 623, at 621.

# Chapter Three The Jurisdiction of the World Court of Human Rights over State Responsibility on Human Rights

## Introductory Remarks

The previous Chapter covered the earliest idea of establishing an International Court of Human Rights (ICHR), which was officially discussed at United Nations (UN) level in the 1940s. During this discussion, the Australian proposal came to a premature end because no consensus could be reached within the United Nations Commission on Human Rights (UNCHR), particularly on the question of jurisdiction over states. Since that time, no official discussion concerning the revitalisation of this idea has occurred, despite numeral proposals from some states and scholars during the Cold War period. It can, therefore, be clearly observed that an age-old tension between international jurisdiction and the maintenance of state sovereignty has constituted the main obstacle to establishing a permanent human rights court at an international level. The post-Cold-War era has ushered in a proliferation of great achievements when it comes to setting international human rights standards for all states.

Over the past decades, there have been regional and international human rights treaties that expressly provide for the basic rights of individuals and the obligations of States Parties. However, as the International Commission of Jurists has pointed out: 'The international human rights standards that States have accepted are so often honoured in their breach rather than their observance'.[1] For these treaties to be useful, some form of accountability or review has existed so that the States Parties to these treaties can be held accountable for any breaches of these treaties. At a regional level, the human rights courts have been established within the framework of the Council of Europe (CoE), the Organisation of American States (OAS) and the African Union (AU) Respectively, but as Kirkpatrick pointed out, 'While regional courts can often provide the right to effective remedy, this right is not extended universally'.[2] At an international level, although some international courts and *ad hoc* tribunals, such as the International Court of Justice (ICJ),

[1] International Commission of Jurists: "Towards a World Court of Human Rights: Questions and Answers", Supporting Paper to the 2011 Report of the Panel on Human Dignity, December 2011, p.2. This paper is available at: http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2013/07/World-court-final-23.12-pdf1.pdf.

[2] Jesse Kirkpatrick: "A Modest Proposal: A Global Court of Human Rights", in: *Journal of Human Rights*, Vol. 3, No. 2, 2014, pp.230 – 248, at 239.

the International Criminal Court (ICC), the International Criminal Tribunal for the former Yugoslavia (ICTY) and the United Nations International Criminal Tribunal for Rwanda (ICTR), have the authority to adjudicate human rights-related cases, they are not, strictly speaking, human rights courts. Moreover, the UN human rights treaty bodies which can deal with human rights communications do not have the authority to render decisions with legally binding force. Therefore, a permanent court with global reach, which is specifically designed to adjudicate human rights cases has never been established.

The current proposal for establishing a WCHR is an attempt to accomplish this. A future WCHR would be a competent adjudicatory body which could strengthen the judicial supervision of States Parties' observance of their commitments by holding them accountable for human rights violations, and substantialise the right to an effective remedy. In a sense, the current proposal for establishing a WCHR can be regarded as a revival of the Australian proposal for establishing an ICHR in the 1940s.

This Chapter will focus on the jurisdiction of the proposed WCHR over state actors. The current statutes – the NK Statute, the MS Statute and the Consolidated Statute – elaborate in greater detail on this issue. Accordingly, the WCHR would have both contentious jurisdiction and uncontentious jurisdiction over States Parties. **Section 1** of this chapter will expound on these jurisdictions respectively. **Section 1.1** discusses the WCHR's contentious jurisdiction. This discussion mainly focuses on the following aspects: the jurisdiction *ratione persone* and the jurisdiction *ratione materiae*. The former refers to who has the legal standing to submit a dispute for resolution, and who may be subject to the court's jurisdiction. The latter determines whether, and to what extent, a court can adjudicate on the conduct of persons or the status of issues. The end of **Section 1.1** deals with the relationship with regional human rights courts and the UN human rights treaty bodies. To be specific: whether the WCHR would be an appellate court of the regional human rights courts already in existence, and the possibility of a duplication of functions between the WCHR and the present UN human rights treaty bodies. **Section 1.2** addresses the WCHR's non-contentious jurisdiction: namely, the position of the current three statutes of the future WCHR on the issue of advisory jurisdiction.

One contentious issue behind the current proposal for establishing a WCHR is that of finding a way in which states can be convinced to adopt the Court's jurisdiction. The long-running debates on this issue reveal the concern of states with regard to the impact of international jurisdiction on state sovereignty. To solve this issue, existing human rights mechanisms at both a regional and international level have adopted some admissibility

criteria. Among these, the rule of prior exhaustion of local remedies (the exhaustion rule) undeniably enjoys a central position. The rule of prior exhaustion of local remedies has been widely accepted by human rights mechanisms (both international and regional) 'as a matter of principle – to respect the sovereignty of the respondent state and to avoid domestic courts being replaced by international courts – and for practical reasons, namely to avoid international organisms to be overloaded with excessive and irrelevant complaints'.[3] **Section 2** investigates this rule under all three statutes of the future WCHR in this context. The rationale of this rule is that each state in which a violation has occurred should have an opportunity to redress it by its own means, within the framework of its domestic system. Although all stipulate the exhaustion rule, the three statutes interpret the meaning of this rule differently. This section discusses the interpretation of this rule under these three statutes respectively.

Finally, taking the perspectives of both States Parties and applicants, **Section 3** deals with the application of the rule of prior exhaustion of local remedies within the framework of the WCHR. For States Parties, the exhaustion rule obliges them to establish domestic remedies with availability and effectiveness, and within a reasonable time. For the applicants, this means that the WCHR would not intervene unless they had exhausted all established domestic judicial remedies with due diligence. That is to say, under the exhaustion rule, they must have their cases substantiated and adjudicated, following domestic procedure, by the highest appropriate domestic court before they may lodge their complaint with the future WCHR.

[3] Silvia D'Ascoli and Kathrin Maria Scherr: "The Rule of Prior Exhaustion of Local Remedies in the International Law Doctrine and its Application in the Specific Context of Human Rights Protection The Rule of Prior Exhaustion of Local Remedies in the International Law Doctrine and its Application in the Specific Context of Human Rights Protection", EUI Working Papers Law 2007/02, p.15. This paper is available at: http://cadmus.eui.eu/bitstream/handle/1814/6701/LAW_2007_02.pdf.

## Section 1: The WCHR's Jurisdiction over State Actors and its Legal Foundation

The current statutes – the NK Statute, the MS Statute and the Consolidated Statute – elaborate in greater detail on the WCHR's jurisdiction over the state actors. The Court would have both contentious jurisdiction and uncontentious jurisdiction, and this section will expound on these two types of jurisdiction.

### 1.1 The contentious jurisdiction of the WCHR over state actors

The contentious jurisdiction of the proposed WCHR is, by its nature, compulsory. Of course, whatever route may be chosen to open access to the WCHR to individuals this will require the consent of states from the outset. As Scheinin said: 'In line with the traditional rules of public international law, no State will become party to the Statute and subject to the Court's general jurisdiction, without its explicit consent.'[4] The consent of a state will be expressed in the form of ratification of the Statute, which *ipso facto* recognises and accepts the WCHR's competence to receive and hear contentious cases in relation to this state.

#### 1.1.1 The WCHR's jurisdiction *ratione persone*

From a legal perspective, the jurisdiction *ratione persone* of the WCHR refers to who possesses the legal standing to submit a dispute for resolution, and who may be subject to the court's jurisdiction. According to the NK Statute and the MS Statute, those states ratifying the future statute of the WCHR would have a full *locus standi* before the proposed WCHR (both as plaintiff and defendant). With regard to the plaintiff status, according to Art.8 of the NK Statute, the WCHR shall have jurisdiction to examine inter-state complaints 'if they relate to alleged systematic violations of human rights, not to individual violations'.[5] The MS Statute also proposed this full *locus standi* before the

[4] Martin Scheinin: "Towards a World Court of Human Rights", Swiss Initiative to Commemorate the 60th Anniversary of the UDHR Protecting Dignity: *An Agenda for Human Rights*, p.18. This document is available at: http://www.enlazandoalternativas.org/IMG/pdf/hrCourt_scheinin0609.pdf.

[5] Manfred Nowak and Julia Kozma: "A World Court of Human Rights", Swiss Initiative to Commemorate the 60th Anniversary of the UDHR: *Protecting Dignity: An Agenda for Human Rights*, June 2009, p.60. This

WCHR. According to Art.12 (1)(b), a state subject to the jurisdiction of the WCHR can initiate cases by alleging that another ratifying state has committed a human rights violation.

As for defendant status, states have long been regarded as having defendant status before judicial and quasi-judicial bodies. International and regional human rights regimes have amassed a good deal of varied experience in this respect. Art.7 of the NK Statute – 'the central provision establishing the broad jurisdiction of the Court'[6] – deems any person, non-governmental organisation (NGO) or group of individuals claiming to be the victim of a human rights violation, eligible to appeal against states before the WCHR.[7] In addition, the NK Statute also introduced '*actio popularis*' within the framework of the future WCHR: the states subject to the jurisdiction of the Court may also face applications submitted by other states and some designated third parties (*i.e.* the Office of the United Nations High Commissioner for Human Rights (OHCHR), the UN Security Council[8] and the UN Human Rights Council), and Art.8 of the NK Statute enables these complaints to be heard. According to Nowak and Kozma, this new procedure 'may enable these third political bodies of the UN and the High Commissioner to depoliticize certain discussions by requesting a decision from an independent Court'.[9] However, Nowak and Kozma did not further explain the role of the above parties in human rights litigation. There are, consequently, two possible ways in which to understand this Article. The first is that a third party, representing those individuals who have no access to international justice before the WCHR, submits the case. The other understanding is that the third party, as with individuals, can claim to be the victim of a violation of human rights.[10]

The MS Statute similarly stipulated that ratifying states would be the principal type of

---

report is available at: http://bim.lbg.ac.at/sites/files/bim/World%20Court%20of%20Human%20Rights_BIM_0.pdf.

[6] *Ibid*., p.57.

[7] See: Art.7 of the NK Statute, Art.12 of the MS Statute and Art.7 of the Consolidated Statute.

[8] Nowak and Kozma further pointed out:

> In case of particularly serious violations, the Security Council, in accordance with Article 8(2) and its powers under Chapter VII of the UN Charter, may even request a judgment of the Court in relation to States or non-State actors which had not previously accepted the jurisdiction of the Court. … Complaints referred by the Security Council under Article 8(2) shall be treated with absolute priority and as speedily as possible.

Nowak and Kozma, *supra* note 5, pp.60, 61.

[9] Nowak and Kozma, *supra* note 5, p.60.

[10] The Consolidated Statute does not include third-party complaints procedure.

defendant under the legally binding jurisdiction of the proposed WCHR.[11] According to Arts.5 (1), 7 (1), 9 and 12 (1)(a)(b) of the MS Statute, complaints lodged by individuals or groups of individuals claiming to be the victim of a human rights violation by the States Parties will be the main channel for taking cases before the future WCHR.[12] In addition, Art.9 of the MS Statute facilitates the exercise of *ad hoc* jurisdiction by the WCHR over the state rather than those party to the WCHR statute in respect of individual cases. Accordingly, in those circumstances where the respondent state is not the party to the WCHR Statute, the WCHR shall bring the complaint to the attention of the state in question and seek *ad hoc* acceptance of the WCHR's jurisdiction in respect of the specific complaint.[13] This Article may be founded on the assumption of integrating *ad hoc* jurisdiction into the ICC Statute which was put forward by the International Law Commission (ILC) in 1992:

> Each State party to the Statute would be free to accept the court's jurisdiction. This could be done either *ad hoc* in relation to a particular offence alleged to have been committed by specified persons, or in advance for a specified category of offences against one or more of the treaties which fall within the subject-matter jurisdiction of the court, to the extent that the treaty is in force for the State concerned.[14]

As Scheinin pointed out, introducing this provision for *ad hoc* jurisdiction means that 'consent ... would not be an absolute limit to the Court's jurisdiction. All types of duty-bearers would have the possibility also to accept the Court's jurisdiction in respect of a single case'.[15] The introduction of the *ad hoc* jurisdiction provides states with more options by means of which they can take positive steps and measures to facilitate access to the WCHR's jurisdiction, and encourages them to accept the jurisdiction of the WCHR.

The third-party complaints procedure was not explicitly mentioned in the MS Statute, however, Art.10 of the MS Statute tried to link the WCHR with the OHCHR through a new function of the latter, namely the power to trigger the Opinions function of the WCHR

[11] See: Scheinin, *supra* note 4, pp.5, 18.
[12] See: *ibid*., p.18.
[13] See: *ibid*., p.5.
[14] Report of the Working Group on the Question of An International Criminal Jurisdiction, "Draft Code of Crimes against the Peace and Security of Mankind: Report of the Working Group on the question of an international criminal jurisdiction – reproduced in Yearbook of the International Law Commission (1992), Vol. II (Part Two), annex", A/CN.4/L.471, 6 July 1992, para.54.
[15] Scheinin, *supra* note 4, p.8.

in respect of any human rights complaint with any state as respondent.[16] The MS Statute based the WCHR's advisory jurisdiction upon Art.9 concerning the Court's *ad hoc* jurisdiction, provided that it has no jurisdiction over a particular complaint. As mentioned above, Art.9 (3) of the MS Statute enabled the WCHR to seek *ad hoc* acceptance of the Court's jurisdiction in respect of a complaint against one or more states that have not ratified the WCHR statute. At the same time, the Court has to inform the OHCHRof any such activity in accordance with Art.10 (1). If, as Art.10 (2) indicated, the Respondent State(s) refuse(s) to make this *ad hoc* acceptance within three months from the date of receipt, the High Commissioner may, within a period of six months, request the WCHR to proceed to 'issuing an opinion in the matter raised in the complaint'.[17] In this opinion, the WCHR would represent 'its interpretation of the issues of international human rights law raised by the complaint'[18] and 'the legal obligations of the respondent'.[19] It would not, of course, be necessary for the WCHR to grant the request for an Opinion from the OHCHR for each complaint,[20] nor could any objection by the state concerned change the WCHR's decision on that matter.

As far as the legal nature of these opinions is concerned, Scheinin pointed out that it would be similar to the present Final Views of the existing UN human rights treaty bodies for individual communications/complaints.[21] Accordingly, 'in an Opinion the Court may issue a recommendation to the respondent specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation'.[22] Put another way, unlike the NK Statute, 'Opinions', in the sense of the MS Statute, are of a quasi-judicial nature. Nevertheless, 'it is expected that its Opinions will, in fact, be acknowledged as authoritative and definitive, even if lacking legally binding force'.[23]

Scheinin seems particularly pleased with this procedure, stating that 'This channel will be a complement to the more direct and regular methods of bringing a case before the Court.'[24] More than that:

---

[16] To Scheinin, the OHCHR is the most qualified candidate to run this function, as it is independent of states and of the political organs of the UN. See: *ibid*., p.18. In addition, he/she 'is a recognized professional with experience, expertise and judgment' and 'is supported by staff capable of assisting her in the formulation of a request for an Opinion'. *Ibid*.
[17] Art.10(2) of the MS Statute.
[18] Scheinin, *supra* note 4, p.6.
[19] Art.44 (3) of the MS Statute.
[20] See: Art.10 (3) of the MS Statute.
[21] See: Scheinin, *supra* note 4, p.19.
[22] *Ibid*., p.22. See also: Art.47 (3) of the MS Statute.
[23] Scheinin, *supra* note 4, p.19.
[24] *Ibid*., p.18.

> This procedure for Opinions complements the binding jurisdiction of the Court and makes it literally into a World Court, i.e. a court that when the need arises can provide an authoritative legal opinion on an alleged human rights violation anywhere in the world and committed by whomsoever.[25]

Ultimately, the Consolidated Statute only remains an individual complaints procedure. In retrospective, individual access to international jurisdictions has increased gradually over time. Today, the individual communications/complaints procedure has become one of the principal functions of regional human rights courts[26] and of most of the existing UN treaty bodies.[27] Through this procedure, 'individuals and groups may seek to file suit challenging the actions of their home state'.[28] One of the key tenets of human rights is that, as Nowak pointed out, 'human rights without a remedy are empty promises'.[29] Therefore,

---

[25] *Ibid*.

[26] The achievement of the European Court of Human Rights (ECtHR) in examining individual complaints, particularly after the entry into force of the No.11 Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (also known as the European Convention on Human Rights, ECHR) providing for a reform of the Convention supervisory system, has been amply documented. Since then, all applicants have had direct access to the new full-time ECtHR. For more details, see: Statistical Reports in the ECtHR official website: http://www.echr.coe.int/Pages/home.aspx?p=reports&c=. Within the Inter-American system, individuals have had no direct access to the Inter-American Court of Human Rights (IACtHR) except through the route of the American Commission on Human Rights (IAComHR). The IAComHR submits a complaint to the IACtHR only if and when a State Party which has acknowledged the IACtHR's jurisdiction fails to comply with the recommendations given by the IAComHR. Statistics reveal that the IAComHR has submitted only a small number of cases to the IACtHR: In 2016 there were 14 cases (as of 30 November 2016); 14 in 2015; 19 in 2014; 11 in 2013; 12 in 2012; 23 in 2011; 15 in 2010; 12 in 2009; 9 in 2008; 11 in 2007; 14 in 2006; 10 in 2005 and 12 in 2004. Data sources: http://www.oas.org/en/iachr/decisions/cases.asp. The African Commission on Human and People's Rights (AfComHPR) has, since it came into existence in 1986, considered individual complaints procedure to be one of its principal functions. The African Court of Human and Peoples' Rights (AfCtHPR), established in 2004, began to share this mandate with the AfComHPR. For more details about the practice of individual complaints procedures at the regional level, see, for example, Dinah Shelton: "An Introduction to The History of International Human Rights Law", The George Washington University Law School, Public Law and Legal Theory Working Paper No.346, Legal Studies Research Paper No.346, pp. 22 – 28. This paper is available at: http://ssrn.com/abstract=1010489.

[27] Competence to consider individual communications may be conferred on certain treaty bodies by means of ratification of the relevant optional protocols (in the case of the Committee on Economic, Social and Cultural Rights (CESCR Committee), the Human Rights Committee (HRC), the Committee on the Elimination of Discrimination against Women (CEDAW Committee), the Committee on Migrant Workers (CMW Committee) and the Committee on the Rights of Persons with Disabilities (CRPD Committee)), or by a declaration under the relevant provision of the treaty in question (Art. 14 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); Art. 22 of the Convention against Torture (CAT); Art. 77 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW); and Art. 31 of the International Convention for the Protection of All Persons from Enforced Disappearance (ICED)). The competence of two treaty bodies (the CESCR Committee and the CMW Committee) has not yet entered into force.

[28] Robert O. Keohane, Andrew Moravcsik and Anne-Marie Slaughter: "Legalized Dispute Resolution: Interstate and Transnational", in: Judith Goldstein, Miles Kahler, Robert O. Keohane, and Anne-Marie Slaughter (eds.): *Legalization and World Politics*, Cambridge, Mass: The MIT Press, 2001, pp.73 – 104, at 79.

[29] Manfred Nowak: "Eight Reasons Why We Need a World Court of Human Rights", in: Gudmundur

the ultimate goal of the proposed WCHR is to substantiate the right of individuals to effective remedies. As Nowak and Kozma pointed out:

> The World Court of Human Rights shall be the main judicial organ of the United Nations holding States and certain non-State actors accountable for violations of international human rights law and providing victims of such human rights violations with the right to a remedy and reparation for the harm suffered.[30]

Accordingly, in the sense of the current proposal for establishing the WCHR, the right to a judicial remedy for human rights violations connotes the right of individual victims to receive adequate redress from the Court deemed competent to decide on the alleged human rights violation.[31] As the authors of the current statutes said:

> Judgments of the World Court shall serve two important purposes. First of all, the Court shall

---

Alfredsson, Jonas Grimheden, Bertrand G. Ramcharan and Alfred de Zayas (eds.): *International Human Rights Monitoring Mechanisms: Essays in Honour of Jakob. Möller* (2nd Revised Edition), Leiden; Boston: Martinus Nijhoff, 2009, pp.697 – 706, at 697.

[30] Nowak and Kozma, *supra* note 5, p.51. Scheinin similarly pointed out that the WCHR 'would have the powers … to make concrete and binding orders on the remedies to be provided to a victim of a human rights violations'. Scheinin, *supra* note 4, p.5.

[31] See: Nowak and Kozma, *supra* note 5, pp.3, 6, 8, 15, 25, 51 and 68 – 69; Scheinin, *supra* note 4, pp.21 – 22, 57 – 58; Julia Kozma, Manfred Nowak and Martin Scheinin: *A World Court of Human Rights – Consolidated Statute and Commentary*, Studienreihe des Ludwig Boltzmann Instituts für Menschenrechte Band 22, Wien: Neuer Wissenschaftlicher Verlag – NWV, 2010, pp.45 – 47. As Art.17 (1)(2) of the NK Statute provided:

> 1. The Court shall decide whether or not the respondent party has violated an obligation to respect, fulfil or protect any human right provided for in any applicable human rights treaty listed in Appendix 1.
> 2. If the Court finds a human rights violation, it shall also order the respondent party, ex officio or upon request, to afford the victim adequate reparation for the harm suffered, including restitution, rehabilitation, compensation and satisfaction.

According to Art.47 (2)of the MS Statute:

> After establishing in a Judgment that a human rights violation was committed by the respondent, the Court may make an order directly against the respondent specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.

Art.17 (1)(2) of the Consolidated Statute follows Art.17 (1)(2)of the NK Statute with some amendments:

> 1. The Court shall decide by a written judgment whether or not the respondent party has violated an obligation to respect, fulfil or protect any human rights provided for in any applicable human rights treaty.
> 2. If the Court finds a human rights violation, it shall also order the respondent party, *ex officio* or upon request, to afford the victim adequate reparation for the harm suffered, including restitution, rehabilitation, compensation, guarantees of non-repetition, or any other form of satisfaction.

> assess, on the basis of all evidence available, whether or not the facts of the case amount to a human rights violation attributable to the respondent party, and the Court shall secondly, in case it found a violation, afford the victim with adequate reparation for the harm suffered.[32]

According to the authors of the current statutes, to receive remedies for a human rights violation, individuals need a judicial pronouncement in their favour.[33] The first step towards this end is having access to an international court/tribunal charged with the supervision and enforcement of international human rights law.[34]

Furthermore, it is apparent that the individual complaints procedure makes the proposed WCHR a forum for transnational litigation. In accordance with the dimensions of independence[35], access[36] and embeddedness[37], Keohane, *et al*., distinguished two types of legalised dispute resolution:

> In one ideal-type – interstate dispute resolution – adjudicators, agenda, and enforcement are all subject to veto by individual national governments. Individual states decide who judges, what they judge, and how the judgment is enforced. At the other end of the spectrum, adjudicators, agenda, and enforcement are all substantially independent of individual and collective pressure from national governments. We refer to this ideal type as transnational dispute resolution.[38]

---

[32] Kozma, *et al*., *supra* note 31, pp.45 – 46.
[33] See: Andreas L. Paulus: "Dispute resolution", in: Geir Ulfstein (ed.): *Making Treaties Work: Human Rights, Environment and Arms Control*, Cambridge: Cambridge University Press, 2007, pp.351 – 372, at 360.
[34] See: Nowak and Kozma, *supra* note 5, p.15; The NK Statute, preamble, para.6.
[35] To Keohane, *et al*., 'independence specifies the extent to which formal legal arrangements ensure that adjudication can be rendered impartially with respect to concrete state interests'. Keohane, Moravcsik and Slaughter, *supra* note 28, p.74.
[36] Keohane, *et al*. suggested that 'access refers to the ease with which parties other than states can influence the tribunal's agenda'. *Ibid*.
[37] In Keohane, *et al*.'s opinion, '[e]mbeddedness denotes the extent to which dispute resolution decisions can be implemented with- out governments having to take actions to do so'. *Ibid*.
[38] Keohane, Moravcsik and Slaughter, *supra* note 28, pp.84 – 85. In a subsequent article, Slaughter reiterated the significant differences between international dispute resolution and transnational litigation:

> International disputes were disputes between states, which were relatively rare. Typically these were carefully considered instances in which a state was willing to bring a claim against a fellow state under international law, itself defined as governing the relations between states. … Transnational litigation as defined here, however, encompasses domestic and international tribunals. It includes cases between states (with individuals typically in the wings), between individuals and states, and between individuals across borders.

Anne-Marie Slaughter: "A Global Community of Courts", in: *Harvard International Law Journal*, Vol. 44, No. 1, 2003, pp.191 – 219, at 191 – 192. At the same time, she indicated that transnational litigation typically refers to human rights litigation. See: *ibid*., p.191. Furthermore, according to Santos's observation, Slaughter 'is enthusiastic about the emergence of what she envisions as a "global community of courts" and "global jurisprudence", which she sees as a consequence of the emerging fora of "transnational litigation"'. Cecília MacDowell Santos: "Transnational Legal Activism and the State: Reflections on Cases against Brazil in the Inter-American Commission on Human Rights", in: *SUR – International Journal on Human Rights*, pp.29 – 59, at 31. The division of interstate dispute settlement and transnational litigation is also adopted by Chinkin.

With regard to the question of access, Keohane, *et al*. opined that, in the interstate dispute resolution, states act as 'gatekeepers' to the international legal process.[39] They could 'control access to dispute resolution tribunals or courts'.[40] By contrast, in the transnational model the initiation of the proceedings is 'legally insulated from the will of individual national governments'. [41] Individuals have direct access to the dispute-resolution process, and the processes are no longer formally limited to governments;[42] in other words, transnational dispute resolution removes the capacity for states to perform the gate keeping function in limiting access to tribunals.[43] In the case of the WCHR, an immediate consequence for those states accepting the Court's competence to examine individual complaints is that they will lose their control over the issue of access. This loss of this control also 'creates a range of opportunities for courts and their constituencies to set the agenda.'[44]

Keohane, *et al.* used the term 'transnational' 'to capture the individual to individual or individual to state nature of many of the cases in this type of dispute resolution'.[45] Accordingly, the individual complaints procedure belongs to the transnational model. It can also be said that, in the case of the WCHR, Scheinin used the term 'transnational' in the same sense. He pointed out that the current proposal for establishing the WCHR 'transforms the Court from a traditional international court into a transnational court'. As he said:

> [W]hile only States may become parties to the Statute as an international treaty, a whole range of other actors besides States will be able to accept, through their own free decision, the legally binding jurisdiction of the Court.[46]

According to Keohane, *et al*., such transnational dispute resolution diversifies the actors involved in human rights litigation and increases the likelihood that the cases

---

See: Christine Chinkin: "International Dispute resolution, with specific attention to China", in: Xiamen Academy of International Law: *Collected Courses of the Xiamen Academy of International Law*, Vol. 4, 2011, Leiden, Netherlands: Martinus Nijhoff Publishers, 2013, p.250.

[39] See: Keohane, Moravcsik and Slaughter, *supra* note 28, p.73.

[40] *Ibid*.

[41] *Ibid*., p.74.

[42] See: Judith Goldstein, Miles Kahler, Robert O. Keohane, *and Anne-Marie Slaughter*: "Introduction: Legalization and World Politics", in: Goldstein, Kahler, Keohane, and Slaughter (eds.), *supra* note 28, p.8.

[43] See: Keohane, Moravcsik and Slaughter, *supra* note 28, p.97.

[44] *Ibid*., p.74.

[45] *Ibid*., p.85, note.24.

[46] Scheinin, *supra* note 4, p.18.

levelled against the national government of the plaintiffs will be lodged with the international courts.[47] In a sense, 'transnational dispute-resolution systems help to mobilize and represent particular groups that benefit from regime norms'.[48] As a transnational tribunal, the WCHR 'can present itself in its decisions as a protector of individual rights and benefits against the state, where the state itself has consented to these rights and benefits, and the tribunal is simply holding it to its word'.[49] Moreover, transnational dispute resolution 'seems to have an inherently more expansionary character; it provides more opportunities to assert and establish new legal norms, often in unintended ways'.[50] As will be discussed in **Chapter Four**, human rights violations committed by entities other than states will also come under the jurisdiction of the WCHR.

According to the division presented by Keohane, *et al*., the inter-state complaints procedure belongs to the interstate dispute resolution. The Consolidated Statute does away with the procedures for inter-state complaints. The authors – Nowak, Scheinin and Kozma – did not expound upon their reasons for this deletion. The inter-state complaints procedure originates from the 1919 Constitution of the International Labour Organisation (ILO).[51] In the human rights arena, the inter-state complaints procedure 'involves the filing of a formal application by a state or group of states against another state alleging noncompliance with the norms contained in a human rights instrument to which all states concerned are legally bound'.[52] As with the individual complaints procedure, provisions for inter-state complaints procedure can also be found in many of the texts comprising regional human rights instruments.[53] The inter-state complaints procedure within the UN

[47] See: Keohane, Moravcsik and Slaughter, *supra* note 28, p.88.
[48] *Ibid*., p.104.
[49] *Ibid*., p.98.
[50] *Ibid*., p.75.
[51] See: Arts.26 – 34 of this Constitution.
[52] Scott Leckie: "The Inter-State Complaint Procedure in International Human Rights Law: Hopeful Prospects or Wishful Thinking?", in: *Human Rights Quarterly*, Vol. 10, No. 2, 1988, pp.249 – 303, at 249.
[53] The inter-state complaints procedure was first institutionalised at a European level with the adoption of the ECHR. Under the European system, the inter-state complaints procedure is not a dispute settlement mechanism. Art.33 (which, at the time ex-Article 24, allowed the states parties to bring inter-state applications before the former European Commission on Human Rights (EComHR) of the ECHR gives one or more High Contracting Parties the opportunity to refer to the ECtHR any alleged breach of the provisions of the Convention and the Protocols thereto by another state that has ratified the ECHR. The jurisdiction of the ECtHR over the inter-state cases is obligatory. In Schabas's words: '[S]ince Protocol No.11 there seems to be little practical difference between an individual application taken under article 34 and an inter-State one filed under article 33'. William A. Schabas: *The European Convention on Human Rights: A Commentary*, Oxford: Oxford University Press, 2015, p.726. The Inter-American human rights system largely follows the ECHR supervisory system prior to the entry into force of the 11th Protocol to the ECHR. The Inter-American Commission on Human Rights (IAComHR) has optional compulsory jurisdiction over inter-state complaints pursuant to Art.45 of American Convention on Human Rights (ACHR). Art.48 (f) of ACHR requires the Commission to place itself at the disposal of the parties concerned with a view to reaching an amicable

human rights treaty body system 'set out a procedure for the relevant Committee itself to consider complaints from one State party which considers that another State party is not giving effect to the provisions of the Convention'.[54] In theory, 'on the universal level there are considerably more problems between States which could lead to a larger number of inter-state applications'.[55] However, the utilisation of the inter-state complaints procedure is much rarer than that of the individual complaints procedure: thus far, the inter-state complaint procedure has been used only in the Convention for the Protection of Human Rights and Fundamental Freedoms (also knowns as the European Convention on Human Rights, ECHR) and the ILO. The inter-state complaint procedures incorporated into the UN human rights treaty bodies have never been used.

Leckie summarised the reasons for the marginalised utilisation of the inter-state complaints procedure into three aspects: the structural limitations of the procedure itself, the political and economic considerations of the states, and logistical factors. With regard to the first aspect, the inter-state complaints procedure is not the only possible avenue for state parties to address human rights problems in other countries.[56] In practice, 'states have certainly adopted more than one means of achieving the aspirations of human rights instruments'.[57] They might prefer 'to pursue mutually acceptable policies when addressing human rights in other states if they have interests other than human rights in the country in

settlement of the matter based on the respect for human rights recognised in ACHR. In the event that a friendly settlement could not be reached, the Commission would complete the procedure by drawing up a report and transmitting it to the parties concerned. In this case, the states concerned may, according to Art.61 of ACHR, submit a case to the IACtHR for adjudication. It should be noted that, as Art.62 of ACHR clearly specified, the IACtHR's adjudicatory/contentious jurisdiction is also optionally compulsory. The African human rights system is also a two-tier system. The inter-state communications procedure of the African Commission on Human and Peoples' Rights is governed by Arts.47 – 53 of African Charter on Human and Peoples' Rights (AfCHPR) and Rules 86 – 92 of the Commission's Rules of Procedure. The procedure governing inter-state communications before the AfCtHPR is set down in Arts.3 and 5 of the Protocol to AfCHPR on the Establishment of the AfCtHPR.

[54] The inter-state complaints procedure is set down in Arts.11 – 13 of ICERD, Arts.41 – 43 of the International Covenant on Civil and Political Rights (ICCPR), Art.21 of CAT, Art.74 of ICMW, Art.32 of CED, Art.10 of OP-ICESCR and Art.12 of Optional Protocol to the Convention on the Rights of the Child on a communications procedure (OP (on a communications procedure)-CRC). See: Office of the United Nations High Commissioner for Human Rights (OHCHR): "Inter-State Complaints", available at: http://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx#interstate. At an international level, the inter-state complaints procedure is also adopted by the United Nations Educational, Scientific and Cultural Organisation (UNESCO) according to Art.8 of the Convention against Discrimination in Education and Arts.12 – 19 of the Protocol instituting a Conciliation and Good Offices Commission to be Responsible for Seeking the Settlement of Disputes Which May Arise between States Parties to the Convention Against Discrimination in Education.

[55] Stefan Trechsel: ""A 'World Court for Human Rights'?", in: *Northwestern Journal of International Human Rights*, Vol. 1, Issue 1, 2004, pp.1 – 18, ¶ 31.

[56] See: Leckie, *supra* note 52, p.252.

[57] *Ibid*.

question'.[58] The political and economic considerations have certainly also contributed to the reluctance among states to use this procedure.[59] In law, no inter-state complaint would constitute interference in the domestic affairs of the state subject to the complaint, since 'the acceptance of a human rights treaty is tantamount to an acceptance of external interference in matters that were once domestic'.[60] However, the inter-state complaint represents 'one of the most drastic and confrontational legal measures available to states'.[61] In an ideal situation, states that wanted to operate a proactive human rights policy should feel able to take advantage of the inter-state complaints procedure to remedy human rights abuses,[62] however, this is rarely done, because whatever the human rights issues, they are, in practice, often subordinate to political and economic interests.[63] The receiving state would be likely to regard the complaint as a hostile action or humiliation, particularly if it was then found not to be complying with its treaty obligations.[64] In this context, 'for a state to go to the trouble of filing an inter-state complaint there must be a guarantee of success, or at least there must appear to be little chance of failure'.[65] As Leckie said:

> Thus, prior to actually filing a complaint a state must consider whether it is even feasible to do so in political, legal, or economic terms, whether the complaint would be deemed admissible by the monitoring body involved, and whether the complaint and the process involved would have any chance to rectifying the human rights situation in a country.[66]

Finally, logistical factors may inhibit the use or consideration of the inter-state

---

[58] *Ibid*. See also: Paulus, *supra* note 33, p.356. Zimmermann expressed a similar view:

> It seems to be quite obvious that the reason for this reluctance to bring inter-State complaints is that other national interests by and large overshadow the political interest in bringing about treaty compliance. Besides, in many cases, States seem to have the feeling that there are other, more promising ways to settle disputes concerning compliance by other States.

Andreas Zimmermann: "Dispute Resolution, Compliance Control and Enforcement in Human Rights Law", in: Ulfstein (ed.), *supra* note 33, pp.15 – 47, at 22.

[59] See: Leckie, *supra* note 52, pp.253 – 254, 297.

[60] Leckie, *supra* note 52, p.256.

[61] *Ibid*., p.254.

[62] See: *ibid*. Nowak similarly observed that, in some instances, 'some States are, in the event of particularly grievous human rights violations, prepared to accept negative political consequences even in the absence of specific self-interests; in such cases, they view themselves as *collectively responsible* for the observance of treaty obligations, filing an inter-State complaint as a kind of "*action popularis*"'. Manfred Nowak: *U.N. Covenant on Civil and Political Rights – CCPR Commentary* (2nd revised edition), Kehl; Strasbourg; Arlington: N.P. Engel, 2005, p.758.

[63] See: Leckie, *supra* note 52, p.254.

[64] See: *ibid*., pp.254, 297.

[65] *Ibid*., p.257.

[66] *Ibid*., pp.257 – 258. See also: *ibid*., pp.297 – 298.

complaints procedure by states.[67] In Leckie's opinion, 'involvement in this procedure can be costly to a state in temporal, financial, and human terms'.[68]

Nowak and Kozma seemed to agree with Leckie that if a state wishes to raise their concerns about the human rights situation in another country, 'there are many less formal alternatives available'.[69] Nowak similarly attributed the apparent reluctance of states to resort to initiating an inter-state complaint to concern for the potential burden on political and diplomatic relations arising from the submission of such a complaint.[70] Nowak and Kozma further argued that the reluctance of states to make use of the inter-state complaints procedure can also be attributed to the extremely weak provisions of UN human rights treaties in this regard.[71] And that it is the mediatory or conciliatory nature of the inter-state complaints procedure within the current UN human rights treaty body system that has contributed to the current situation. The inter-state complaints procedure has become an internationally admissible mechanism only once all judicial or quasi-judicial decision-making elements have been removed.[72] This inference is based on the experience of the Human Rights Committee (HRC) and the Committee against Torture (CAT Committee).[73] Take, for example, the HRC. According to Nowak, the procedure under the International Covenant on Civil and Political Rights (ICCPR) 'represents a pure *mediation or conciliation procedure* without the possibility of a final decision in the event that the efforts to reach conciliation fail'.[74]

Within the HRC, as well as other regional and international instruments containing

---

[67] See: *ibid*., p.254.

[68] *Ibid*., p.255. As he said:

> An inter-state complaint necessarily involves certain time- and resource-consuming measures, including: 1) intensive legal research and fact-finding; 2) the garnering of sufficient parliamentary and administrative support; 3) a well-planned and coordinated effort between various branches of government; and 4) continuous involvement in the procedure itself in all its facets including oral hearings, written submissions, diplomatic contact with the state complained against, and monitoring activities after the case has ended.

*Ibid*., pp.254 – 255.

[69] Nowak and Kozma, *supra* note 5, p.60.

[70] See: Nowak, *supra* note 62, p.758.

[71] Nowak and Kozma, *supra* note 5, p.60.

[72] It should be noted that some conventions, such as ICERD (Art.22), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, Art.29), CAT (Art.30), ICMW (Art.92) and ICED (Art.32) provide for disputes concerning interpretation or application of the Convention between state parties to be resolved by arbitration after, and only after, negotiation has failed. Yet for all that, the inter-state complaints procedure is by definition not a quasi-judicial procedure.

[73] See: Nowak, *supra* note 62, pp.753 – 776; Manfred Nowak and Elizabeth McArthur: *The United Nations Convention against Torture – A Commentary*, Oxford; New York: Oxford University Press, 2008, pp.699 – 718.

[74] Nowak, *supra* note 62, p.759.

similar procedures, the objective of the inter-state complaints procedure 'is to make available its good offices with a view to a "*solution amiable*" of the matter'.[75] Art.41(1)(h) of the ICCPR provided that the HRC would terminate the procedure of an inter-state complaint it had previously declared admissible with a report, regardless of whether a friendly solution had been reached. According to this Article, the Committee's report should contain a brief statement of the facts, however, despite this necessitating the ascertaining of the facts, the main function of the HRC 'has to do not with fact-finding',[76] rather, the Committee 'is exclusively dependent on information made available to it by the States involved'.[77] The established facts should be faithfully reflected in the Committee's report.[78] Art.41 of ICCPR unambiguously requires the submitted report to be confined to a brief statement of the facts. Accordingly, the HRC is deprived of the authority to evaluate these facts or submit an opinion on possible Covenant violations.[79] In this sense, it is incorrect to refer to the inter-state complaints procedure as a quasi-judicial procedure.[80]

If an inter-state communication is not resolved to the satisfaction of the State Parties concerned, Art.42 of ICCPR authorises the HRC to appoint an *ad hoc* Conciliation Commission as a second instance with the prior consent of these states. 'As a sort of compensation for the limited powers of the Committee in the inter-State communications procedure',[81] As with the HRC, 'the good offices of the Commission shall be made available to the States Parties concerned with a view to an amicable solution of the matter on the basis of respect for the present Covenant'.[82] According to Nowak's observation: '[t]he *conciliation function* is more strongly in the foreground of the Commission's work than with the Committee'.[83] However, 'it is doubtful whether the Commission's conciliation task constitutes a more efficient method of resolving the dispute than the good offices of the Committee'.[84]

Unlike the preliminary procedure before the HRC between the states involved, the entire procedure before the *ad hoc* Conciliation Commission would be 'concluded with a

---

[75] *Ibid*., p.772.
[76] *Ibid*., p.770.
[77] *Ibid*., p.771.
[78] See: *ibid*., p.773.
[79] See: *ibid*., p.774.
[80] See: *ibid*., p.759, note.11.
[81] *Ibid*., p.780.
[82] Art.42(1)(a) of ICCPR. As Nowak said: 'The functions of the Commission are essentially no different from those of the Committee under Art.41.' Nowak, *supra* note 62, p.783.
[83] *Ibid*.
[84] *Ibid*.

report by the Commission, in which it not only provides a statement of the facts but also makes recommendations for resolving the dispute'.[85] It seems that the power of the *ad hoc* Conciliation Commissions somewhat exceeds that of the HRC under Art.41(1)(h).[86] In the event of failure to reach conciliation, the report of the Commission 'shall embody its findings on all questions of fact relevant to the issue between the States Parties concerned'.[87] In Nowak's opinion, this is a long way from the truth, and in practice the powers of the *ad hoc* Conciliation Commissions are hardly any greater than those of the HRC.[88] According to Art.42(7)(d) of ICCPR, the Commission could in no event force the states concerned to accept these recommendations. 'The purpose of this provision is to safeguard the conciliation function of the procedure and to avoid interference with State sovereignty'.[89] Nowak seems to regard this compromise as a vulnerability which might be exploited by the States Parties to the ICCPR. As he said: 'States Parties now have the right to question not only the subjective views of the Commission but also its objective determinations as to the facts.'[90] This has additional retroactive effects for the authority of the HRC because, according to Art.42(6) of ICCPR, with regard to the facts, the *ad hoc* Conciliation Commissions can largely rely on the HRC's report and other possible information received and collated by the Committee.[91] In Nowak's words:

> A State party is, therefore, able to submit to the entire procedure without risk and does not need to make any efforts toward conciliation, since it is in any event entitled to question the entire procedure, including the determinations of fact, at the conclusion of the procedure.[92]

In Nowak's eyes, the current inter-state complaints procedure within the HRC is an unsatisfactory solution. The future statute of the WCHR should, therefore, include 'a much more effective system of inter-State complaints'.[93] First, according to the NK Statute, the inter-state complaints procedure under Art.8 is obligatory. To Nowak, 'the reluctance to resort to the inter-State complaint is also made evident by the *unwillingness to recognize this procedure expressly* when it is optional'.[94] According to Art.36 of the NK Statute, no

[85] *Ibid*., p.780.
[86] See: *ibid*., p.785.
[87] Art.42(7)(c) of ICCPR.
[88] See: Nowak, *supra* note 62, p.781.
[89] *Ibid*., p.786.
[90] *Ibid*.
[91] See: *ibid*.
[92] *Ibid*.
[93] Nowak and Kozma, *supra* note 5, p.60.
[94] Nowak, *supra* note 62, p.758.

reservation to inter-state complaints procedure under Art.8 should be permitted.[95] That is to say, the WCHR's competence to examine individual complaints procedure does not premise on a state's separate declaration to that effect. A similar Article, prohibiting reservations to the WCHR's competence in respect of the inter-state complaints, can be found in Art.57 of the MS Statute. As Scheinin pointed out, 'States may try to resist their commitment to human rights … by entering extensive reservations or by not accepting optional monitoring mechanisms, such as a procedure for individual complaints under a specific human rights treaty'.[96] This observation also applies to the inter-state complaints procedure.[97]

Secondly, the proposed WCHR could hold a public hearing of an inter-state complaint; indeed, hearings will always be required by the NK Statute.[98] Art.16 of the NK Statute requires that the Plenary Court hold hearings before rendering judgments on inter-state complaints, while the Chambers of the Court may decide whether or not to hold a hearing. In addition, hearings should, in principle, be public.[99] In these cases, 'the relevant documents deposited by the parties with the Registrar shall also be accessible to the public'.[100] Similarly, Art.37 (2) of the MS Statute stipulated that, in principle, all the inter-state complaints should be heard by the WCHR in public. The exception to the

---

[95] In the sense of Art.2 (d) of Vienna Convention on the Law of Treaties (VCLT), the term 'reservation' 'means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State'. Undoubtedly, the future statute of the WCHR can impose this kind of prohibition. According to Art.19 of VCLT:

> A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:
> (a) The reservation is prohibited by the treaty;
> (b) The treaty provides that only specified reservations, which do not include the reservation in question, may be made; or
> (c) In cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

[96] See: Scheinin, *supra* note 4, p.7.

[97] Scheinin cited the General Comment No. 24 of the CCPR: 'The principle of inter-State reciprocity has no place, save perhaps in the limited context of reservations to declarations on the Committee's competence under article 41.' HRC: "General comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant" (General Comment No. 24), CCPR/C/21/Rev.1/Add.6, para.17. Cited in: Scheinin, *supra* note 4, p.12.

[98] Nowak and Kozma, *supra* note 5, p.61.

[99] Art.16(2) of the NK Statute provides: 'Hearings shall be public unless the Court in exceptional circumstances decides otherwise'. According to Nowak and Kozma: 'Typical reasons for the exclusion of the public are the need to protect victims and/or witnesses, concerns for the protection of the right to privacy or of juvenile rights.' Nowak and Kozma, *supra* note 5, p.67.

[100] Nowak and Kozma, *supra* note 5, p.68.

principle of public hearings is found in Art.39.[101]

Third, the NK Statute strove to transform the inter-state complaints procedure from a non-judicial procedure into a judicial one. As Nowak and Kozma indicated, if an inter-state complaint is found to be admissible, the proceedings will eventually lead to 'a binding judgment of the Court with the same legal effects as judgments on individual complaints.'[102] Even so, the inter-complaints procedure under the NK Statute is also geared towards friendly settlement. According to Art.15 (1) of the NK Statute, the WCHR shall, on the basis of respect for human rights, 'place itself at the disposal of the parties as a mediator'.[103] The inter-state complaints procedure – as suggested by Nowak – is not intended to be used for conveying the hatred or antagonism of any state or group of states toward another. Instead, it strives to resolve conflict by conciliation – reaching an amicable solution or friendly settlement of the matter – on the basis of respect for human rights.[104] According to Art.7(1) of the MS Statute and Art.45(2) in the same statute, the whole inter-state complaints procedure before the proposed WCHR would culminate in a judgment with legally binding force.

As indicated in **Chapter Two**, fundamental differences of opinion existed among the representatives to the UNCHR with regard to a complaints system before an international body based on the Australian proposal for establishing the ICHR. The inter-state complaints procedure was also based upon some degree of limitation of state sovereignty.[105] The emergence of this procedure 'legally enshrines the idea that human rights are not to be seen as solely domestic affairs but as universal concerns of all

---

[101] As Art.39 of the MS Statute provided:

1. The Court may order the parties to produce documents and other information that is pertinent for the determination of a case.
2. The Court shall provide for the protection of confidential information, through measures that respect the equality of the parties. This applies, inter alia, in any case where the disclosure of the information or documents of a State would, in the opinion of that State, prejudice its national security interests.
3. The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of complainants, witnesses and experts appearing before the Court. In so doing, the Court shall have regard to all relevant factors, including age, gender and the nature of the alleged human rights violations. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.
4. As an exception to the principle of public hearings provided for in article 37, the Court may, to protect complainants, witnesses or experts, conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special means.

[102] Nowak and Kozma, *supra* note 5, p.60.
[103] *Ibid*., p.67.
[104] See: Nowak, *supra* note 62, p.758.
[105] See: Section 2.3.2 and of the Chapter Two.

states'.[106] In a human rights treaty, the inter-state complaints procedure reveals that all the state parties 'possess a legal interest in the treatment of (all) persons within each of the other states' territories'.[107] As he said:

> Since human rights treaties establish legal obligations of states parties towards their own citizens and vis-a-vis each other, states parties to such a treaty have a legal commitment to the other contracting states to afford guarantees to its subjects of the rights contained in the treaty. Thus, if any party to a treaty is convinced or has reason to believe that these rights are being violated in another state, that party has the right to complain about these violations since any state violating the human rights guaranteed by the treaty has also failed to honor its commitment to the states parties.[108]

In practice, however, many states still fear that accepting the inter-state complaints procedure would constitute an interference with national sovereignty. Given this situation, Nowak, drawing on the inter-state communications procedure set down in the ICCPR, enumerated some factors which might help to eliminate this fear:

> (1). the entire procedure is *confidential* (Art. 41(1)(d)) and, in contrast to comparable procedures by the ILO or under the ECHR and CERD, *optional*;
> (2). States that make a declaration under Art. 41 merely agree to submit to the mediation procedure before the *[Human Rights] Committee, which may not make any recommendations* on the matter, even in the event that an amicable solution cannot be reached;
> (3). in contrast to CERD and CAT, an *ad hoc Conciliation Commission* may be appointed *only with the prior consent* of the States parties concerned (Art. 42(1)(a));
> (4). as a sort of ultimate "sanction", this Commission can express its "*views on the possibilities of an amicable solution*", which may be *rejected by the States parties*.

It seems, however, that the NK Statute and MS Statute may ratchet up the anxiety of states even further.

It must be conceded that the international legal community has not witnessed a large number of inter-state complaints. States 'usually limit themselves to advancing claims in their own or their citizens' interests'.[109] Despite all this, as a method of seeking redress, the inter-state complaints procedure remains 'an element of international human rights law

---

[106] Leckie, *supra* note 52, p.298.
[107] *Ibid*.
[108] *Ibid*., p.256.
[109] Paulus, *supra* note 33, p.356.

if the system as a whole is ever to achieve its desired goals'.[110] Some positive effects of implementing the inter-state complaints procedure that have almost been forgotten should be mentioned.

First, the intended function of inter-state applications of the inter-state complaints procedure is to decrease the level of tension between the states concerned, while increasing the level of human rights protection. As Leckie pointed out, 'implementation of the inter-state complaint can raise a dispute between two or more states to a legal level rather than leaving the issue at a political, economic, or strategic level'.[111] Concurrently, the inter-state complaints procedure has the potential value of assisting 'in creating conditions more conducive to the respect of fundamental rights and freedoms within states'.[112] The proper utilisation of this procedure would enable states to move closer to the ideal of internationally adopted human rights standards. As mentioned above, the inter-state complaints procedure set down in the NK Statute and MS Statute may lead to the judicial solution of disputes where efforts to reach an amicable solution have not yielded success.

Second, the inter-state complaints procedure has advantages which the widely-used individual complaints procedure does not have. Unlike the individual complaint procedure, which focuses on a particular victim, the inter-state complaints procedure focuses more on enabling the states concerned 'to delve into patterns of nonconformity with the instrument concerned, both in domestic legislation and in the respect accorded international legal obligations by the state receiving a complaint'.[113] As an instrument of justice, this procedure 'may provide a more appropriate means of addressing large-scale violations than individual complaints procedures available for use by political bodies of regional or international organizations'.[114] At the same time, the invocation of an inter-state complaint might result in the initiation of activities which had not been undertaken before the filing of the complaint and 'may signal tacit support for more democratic and tolerant forces within a given country'.[115]

Third, the potential use of the inter-state complaints procedure might play a preventive role in ensuring the usefulness of human rights treaties in a world of diversity. As Leckie said: 'If a state is aware that another state may bring international attention to

[110] Leckie, *supra* note 52, p.299.
[111] *Ibid*., p.256.
[112] *Ibid*., p.299.
[113] *Ibid*., p.256. See also: Menno T. Kamminga: *Inter-State Accountability for Violations of Human Rights*, Philadelphia: University of Pennsylvania, 1992, p.179.
[114] Leckie, *supra* note 52, p.298.
[115] *Ibid*.

the status of human rights within its borders, such a prospect may act as an incentive for this state to respect its obligations towards those in its territory.'[116]

It is, therefore, suggested that the drafters of the future WCHR Statute reconsider the exclusion of inter-state complaints procedure.

### 1.1.2 The WCHR's jurisdiction *ratione materiae*

The jurisdiction *ratione materiae* determines whether, and to what extent, a court can adjudicate on the conduct of persons or the status of issues. The applicable laws – Donnelly called them 'regime norms'[117] – which would fall under the WCHR's jurisdiction *ratione materiae* include the two International Human Rights Covenants (ICCPR and International Covenant on Economic, Social and Cultural Rights (ICESCR)) and a variety of single-issue treaties and conventions on topics. Specifically, in the NK Statute, a list of applicable law is annexed to the text of the draft statute, and the WCHR will have jurisdiction *ratione materiae* against a State Party with regard to any human rights treaty listed in this annex. It is worth noting that the NK Statute 'went far beyond the core treaties and included a significant number of other human rights treaties of the United Nations and its specialized agencies',[118] including the ILO and United Nations Education, Scientific and Cultural Organisation (UNESCO).[119]

The NK Statute 'did not include … the four Geneva Conventions or other treaties relating to international humanitarian law'.[120] However, the third party complaints procedure in Art.8 implied that the scope of the WCHR's jurisdiction *ratione materiae* might necessarily refer to these instruments. Moreover, Nowak's personal view seems to be that there should be room for the Geneva Conventions and other treaties relating to international humanitarian law, such as refugee law and international criminal law, in the applicable law list, given the increasingly intensified relationship between human rights law and humanitarian law.[121] Nowak implied that he endorses the broader concept of

---

[116] *Ibid*., p.257.
[117] See: Jack Donnelly: "International Human Rights: a regime analysis", in: *International Organizations*, Vol. 40, No. 3, Summer 1986, pp.599 – 642, at p.606.
[118] Manfred Nowak: "A new World Court of Human Rights: a role for international humanitarian law?", in: Robert Kolb and Gloria Gaggioli: *Research Handbook on Human Rights and Humanitarian Law*, Cheltenham; Northampton: Edward Elgar, 2013, pp.531 – 539, at 533.
[119] See: Annex 1 of the NK Statute; Nowak and Kozma, *supra* note 5, pp.57 – 58.
[120] Nowak, *supra* note 118, p.533.
[121] See: *ibid*., pp.533 – 539.

international human rights law, which consists of international humanitarian law, international refugee law and international criminal law that spells out the specific human rights that apply to a particular group of human beings (whether combatants or civilians) during armed conflict.[122] Such a broad concept of international human rights law is also adopted by the Office of the UN High Commissioner for Human Rights (OHCHR). As Nowak observed:

> The official "Compilation of International Human Rights Instruments" published by OHCHR includes the Geneva Refugee Convention 1951, the Rome Statute of an International Criminal Court 1998 and the four Geneva Conventions of 1949 among "human rights instruments".[123]

The MS Statute enshrined the applicable laws in Art.7 (2).[124] As for the scope of the jurisdiction, Scheinin 'wished to entrust the Court to deal with all core UN human rights treaties, i.e., those treaties which are presently subject to the monitoring of existing treaty bodies'.[125] Bringing all UN human rights treaties under the jurisdiction of a single court may overcome an insurmountable obstacle within the current framework of UN treaty bodies. As Scheinin pointed out, this approach could make possible the acceptance of the simultaneous application of all treaties by the state in question.[126]

To avoid duplication concerning implementation and enforcement, Scheinin disapproved of including international humanitarian law in the WCHR's jurisdiction *ratione materiae*. To him, there is a considerable overlap of the substantive norms of human rights law with international humanitarian law.[127] The implementation and enforcement of international humanitarian law have made a qualitative leap thanks to the rapid progress in the field of international criminal law in the 1990s.[128] As a result, Scheinin added 'in cases related to alleged human rights violations in the course of an armed conflict',[129] the WCHR 'would take into account the norms of international humanitarian law in the interpretation of human rights law, particularly in issues where the norms of humanitarian law are more specific than the rules enshrined in human rights

---

[122] See: *ibid*., p.534.
[123] OHCHR: Human Rights. A Compilation of International Instruments, Volume I (Second Part), 2002, Chapters S, T and U. Cited in: Nowak, *supra* note 118, p.534.
[124] See: Scheinin, *supra* note 4, pp.32 – 33.
[125] Nowak, *supra* note 118, p.533.
[126] Scheinin, *supra* note 4, p.25.
[127] *Ibid*., p.21.
[128] See: *ibid*.
[129] *Ibid*.

treaties'.[130]

However, the MS Statute included the idea of individuals and states being given the opportunity to lodge complaints about violations of the Convention relating to the Status of Refugees of 1951 and its protocol of 1966 with the WCHR. To Scheinin, this refugee law 'is part and parcel of the normative code of international human rights law'.[131] More importantly, there is no proper mechanism for international monitoring, such as an international treaty body composed of independent experts which includes a procedure for individual complaints, to ensure the implementation and enforcement of these instruments.[132] There is currently, more than ever before, a burning need to upgrade the monitoring of refugee rights.[133] As Scheinin said:

> The number of refugees, the massive dimension of flows of other persons seeking to migrate, the diversity of the situations, and the complexity of measures taken by states to cut, curtail, manage or facilitate migration and asylum-seeking result in a massive need for legal analysis, assessment and response.[134]

The Consolidated Statute takes the MS Statute form, enumerating the applicable laws in Art.5 (1). The list of the applicable laws in this statute 'is smaller than the list originally proposed in Annex 1 NK, but more comprehensive than the list originally suggested in Article 7 MS'.[135] Nowak pointed out that the Consolidated Statute represents a compromise between the NK Statute and the MS Statute: Art.5 (1) of this statute 'contains … a fairly complete list of current UN human rights treaties but neither treaties of UN specialized agencies nor those relating to international humanitarian law'.[136]

The authors of the current statutes hold to the opinion that the scope of the WCHR's jurisdiction *ratione materiae* should be dynamic in nature. The Annex of the NK Statute 'can be amended by a simplified procedure in order to take into account the elaboration of future treaties for the protection of human rights'.[137] The amendment procedure is regulated by Art.39 of the NK Statute. This Article enables state parties to request expansion of the jurisdiction *ratione materiae* to human rights treaties not included in

---

130 *Ibid*.
131 *Ibid*.
132 See: *ibid*.
133 See: *ibid*.
134 *Ibid*.
135 Kozma, *et al.*, *supra* note 31, p.34.
136 Nowak, *supra* note 118, p.533.
137 Nowak and Kozma, *supra* note 5, p.86.

Annex 1.[138]

Scheinin agreed with the dynamic nature of the WCHR's jurisdiction *ratione materiae*. Two Articles in the MS Statute reflect this nature. The first is Art.7 (3), which stipulates that the applicable law list – the Court's jurisdiction *ratione materiae* – enumerated in Art.7 (2) can be extended by amendments to the Statute, and Art.58 of the MS Statute would regulate the amendment procedure. The WCHR may seek an *ad hoc* extension of its jurisdiction *ratione materiae*. According to Art.9 (3) of the MS Statute, when a complaint is brought in respect of a state that is a party to the Statute, and this complaint falls outside the Court's jurisdiction *ratione materiae* as determined by Art.7 (2), the WCHR may seek *ad hoc* acceptance of its jurisdiction.

According to Art.5 (2) of the Consolidated Statute, 'new treaties may be added to the list in Article.5 (1) by a simplified amendment procedure requiring only a decision of two-thirds of the Assembly of States Parties'.[139] Obviously, this Article retains the possibility of the inclusion of 'the Geneva Conventions or other treaties in the field of international humanitarian law or treaties relating to other fields of international law, such as environmental law'.[140] In addition, this Article provides room for future treaties for the protection of human rights, such as the Convention on the Rights of Detainees and the UN Declaration on the Right to Development[141], being added to the applicable law list. Art.50

---

[138] See: *ibid*.

[139] Kozma, *et al*., *supra* note 31, p.34. See also: Nowak, *supra* note 118, p.533. According to Art.2(1) of the NK Statute, 'The Court shall be brought into relationship with the United Nations through an agreement to be approved by the Assembly of States Parties to this Statute and thereafter concluded by the President of the Court on its behalf.' The NK Statute authorised the Assembly of States Parties to approve the headquarter agreement concluded by the WCHR with the host state. The latter may also, for example, decide the composition of the WCHR, preside over the election of the judges, and make amendments to the Statute. See: Arts.3(2), 5, 6, 39, 40. Under the MS Statute, the Assembly of States Parties is composed of the representatives of the ratifying states. See: Art.49 (1) of the MS Statute. The Assembly of States Parties shall approve the agreement concerning the relationship of the WCHR with the UN, which will be concluded thereafter by the President of the WCHR on its behalf. See: Art.2 of the MS Statute. Similar to the NK Statute, the MS Statute also authorised the Assembly of States Parties to approve the headquarter agreement, elect the judges of the WCHR, approve the staff regulation proposed by the Registrar of the Court, establish the guidelines of the employment of the expertise of gratis personnel offered by States Parties, international organisations or non-governmental organisations (NGOs) to assist with the work of any of the organs of the Court, make the decision as to the removal from office of a judge, decide the salaries, allowances and expenses of the judges, the Registrar and the Deputy Registrar, establish a Trust Fund and determine the criteria for its management, make amendments to the WCHR Statute. See: Arts.3(2), 19, 27(3)(4), 29(2), 32, 35 and 49 and 58. The powers of the Assembly of States Parties within the scope of the Consolidated Statute, see: Arts.2(2), 5(2), 23, 36, 39, 43 and 53 of the Consolidated Statute.

[140] Nowak, *supra* note 118, p.533.

[141] According to Ramcharan, as a new judicial body, the WCHR should not be the sole arbiter of individual petitions. This already falls into the domain of the UN human rights treaties which deals with existing political, quasi-judicial or judicial bodies. Rather, the WCHR would function as a safeguard of the right to development. Taking, the UN Declaration on the Right to Development as an example, Ramcharan observed that this document 'has solid content on the **national dimensions** of the right to development which have

(4) of the Consolidated Statute also enables each ratifying state to request the WCHR to exercise jurisdiction over one or a number of treaties in relation to human rights not listed in Art.5 (1). In other words, this Article also recognises a jurisdiction *ratione materiae* of the Court in relation to the UN treaties on human rights that is not listed in Article 5.[142] Whether the respective treaty meets the criterion of 'the UN treaties' remains at the discretion of the WCHR. The Consolidated Statute does not clarify this criterion, only pointing out that the scope of applicable law shall be 'restricted to UN treaties, including those of specialised agencies',[143] 'such as ILO and UNESCO, and other universal human rights treaties'.[144]

Most notable for the current proposal for establishing the WCHR is the need to find a flexible way in which states can accept the Court's jurisdiction *ratione materiae*. None of the lists of applicable laws in the current statutes represent a package that must be accepted in its entirety by the ratifying states. For pragmatic reasons of achieving the necessary support of states for such an endeavour, the current statutes expressly authorise reservations to the Court's jurisdiction *ratione materiae*, allowing ratifying states to choose those treaties in the list of applicable law on an individual basis.

With regards to the choice of treaties which should fall under the jurisdiction of the WCHR, the NK Statute provides for two alternatives: the 'opt-out' and 'opt-in' clauses. In theory, those states party to the future statute of the WCHR should be construed as recognising *ipso facto* the Court's jurisdiction *ratione materiae* over all human rights conventions to which they are also party. However, the 'opt-out' clause 'provides States with an opportunity to only gradually accept the full jurisdiction of the Court'.[145] According to Art.36 of the NK Statute, ratifying states would automatically be subject to the WCHR's jurisdiction *ratione materiae* with regard to any human rights treaty listed in

---

largely been ignored in international discussions since the UN General Assembly first proclaimed the declaration in 1987'. Bertrand G. Ramcharan: A World Court on Human Rights: What Functions?, p.1. This paper is available at: http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=4&ved=0CEMQFjAD&url=http%3A%2F%2F74.220.219.58%2F~drafting%2Fsites%2Fdefault%2Ffiles%2Fpaper_article%2FRamcharan_A_WORLD_COURT_ON_HUMAN_RIGHTS%5B1%5D_0.doc&ei=QNqHUNz6GojMtAb3mYGwDA&usg=AFQjCNHP43OPZAp5vIRV9O8Cn-leinUh2Q&sig2=oOxh1c9EViYD9g_3SLSbBQ. Given this, '[i]t would be timely to raise for discussion the question whether a future World Court on Human Rights might be given the competence to receive and pronounce upon petitions from individuals and groups that a government is in breach of its obligations to implement the right to development nationally'. *Ibid*., p.2. To Ramcharan, '[i]t is only a body like a World Court that can perform such a function'. *Ibid*., pp.2 – 3.

[142] See: Kozma, *et al*., *supra* note 31, p.34. See also: Nowak, *supra* note 118, p.533.

[143] Kozma, *et al*., *supra* note 31, p.65.

[144] *Ibid*., p.34.

[145] Nowak and Kozma, *supra* note 5, p.20.

the Annex. They could, however, enter a reservation with regard to certain treaties to express their wish not to be bound by them vis-à-vis the Court at the time of signature or ratification.[146] In addition, the 'opt-out' clause would also apply in the case of the inclusion of an additional treaty according to Art.39 of the NK Statute. As Nowak and Kozma pointed out:

> States Parties who do not wish to make the newly included treaty subject to the jurisdiction of the Court must immediately after the decision of two-thirds of the Assembly of States Parties enter a new reservation with regard to this treaty in accordance with Article 36.[147]

As the Alternative Art.36 (1) of the NK Statute indicated, ratifying states would be required 'to declare at the time of signature or ratification, which of the human rights treaties listed in the annex should be subject to the jurisdiction under the statute'.[148] This is the so-called 'opt-in' clause. To Nowak and Kozma, whichever clause is chosen, it can have the same effect on the choice of treaties. Moreover, both alternatives allow States Parties to withdraw such reservations at a later stage.[149] As Nowak and Kozma said:

> If States are more cautious at the beginning and exclude certain human rights treaties, e.g. those dealing with economic, social and cultural rights, they have, of course, the possibility to withdraw the respective "opting out" reservation at any later time.[150]

As with the entry into force of a reservation, the withdrawal of this reservation would become effective immediately upon notification of the UN Secretary-General, rather than other ratifying states.[151] When an additional treaty arises in the form of an amendment to the future statute of the WCHR, each ratifying state could declare that it recognises the WCHR's jurisdiction with respect to this treaty at any later time.[152]

It should be noted that, while not obliged to choose a minimum number of treaties, states must adopt and meet a 'membership criterion' on becoming a party to the WCHR statute. To Nowak and Kozma, all ratifying states should adopt at least one treaty in Annex

---

[146] See: *ibid*., p.7. According to Art.23 (1) of VCLT, this reservation must be formulated in writing and communicated to the contracting States and other States entitled to become parties to the treaty.
[147] Nowak and Kozma, *supra* note 5, p.86.
[148] *Ibid*., pp.7, 58.
[149] See: *ibid*., p.7. According to Art.22 (1) of VCLT, '[u]nless the treaty otherwise provides, a reservation may be withdrawn at any time'. Art.23 (4) of VCLT requires the withdrawal of a reservation to be formulated in writing.
[150] Nowak and Kozma, *supra* note 5, p.84.
[151] See: Art.36 of the NK Statute.
[152] See: Alternative Art.36 of the NK Statute.

1 as a minimum.[153]

The MS Statute also contains an 'opt-out' clause. According to Art.7 (3) of the MS Statute, a ratifying state may exclude one or more treaties in the applicable law list to which it is a party from the WCHR's jurisdiction *ratione materiae* through a specification. Although not mentioned in the NK Statute and the MS Statute, the entry into force of this declaration does not require the acceptance of other states party to the future statute of the WCHR provided no ratifying state raises objections to any declaration made by another state in relation to the WCHR's jurisdiction *ratione materiae*. In addition, the WCHR would not deal proactively with the permissibility of this declaration at the time of ratification of or accession to the Statute of the WCHR. This does not mean, however, that all the declarations made would be *a priori* permissible. The MS Statute requires the ratifying states to ensure that their declarations – if any – are compatible with the provisions of the treaty[154] and the principles of the international law of treaties.[155] At the admissibility stage, the WCHR must firstly ascertain whether the respondent state has made a reservation at the time of ratification or accession. If this proves to be the case, the Court must 'determine the permissibility of reservations to human rights treaties and not to apply impermissible reservations'[156] when examining the admissibility of particular complaints. This Article was inspired by, and extracted experience from, General Comment No.24 of the HRC on reservations to the ICCPR and its two Optional Protocols (the Optional Protocol to the International Covenant on Civil and Political Rights (OP-ICCPR) and the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (2nd OP-ICCPR)).[157] In this

[153] See: Nowak and Kozma, *supra* note 5, pp.48 – 50.

[154] Not all the instruments in the applicable law list of the MS Statute specify the compatibility of reservation: Convention on the Prevention and Punishment of the Crime of Genocide, ICCPR, International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Rights of the Child (CRC) and its two Protocols, ICMW and ICED have no Article on reservations. The Articles concerning reservation can be found in Convention Relating to the Status of Refugees (Art.42) and its Protocol (Art.7), ICERD (Art.20), the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (2nd OP-ICCPR, Art.2), CEDAW (Arts.28, 29), Convention on the Rights of Persons with Disabilities (CRPD, Art.46) and CAT (Arts.28, 30). The same holds true for the NK Statute. Besides to the instruments as mentioned above, the instruments containing the Article(s) on the issue of reservation were including: Protocol Amending the Slavery Convention (Art. II), Convention on the Political Rights of Women (Art. VII), Convention relating to the Status of Stateless Persons (Art.38), Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (Art.9), UNESCO Convention on the Elimination of Discrimination in the Field of Education (Art.9) and Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (Art.15).

[155] Arts.19 – 23 of the VCLT.

[156] Scheinin, *supra* note 4, pp.5, 9.

[157] See: *ibid*., pp.11 – 12.

general comment, the HRC suggested that when exercising its functions of considering individual complaints it has the power to determine that a reservation is incompatible with the object and purpose of the ICCPR and therefore impermissible.[158] In Scheinin's opinion, '[t]his general comment represents a shift from a state-centred view on public international law to the application of human rights law as a "global constitution" that is legally binding for states even beyond their explicit consent'[159] The immediate consequence of a permitted reservation in a complaint, as Art.14 (2) clearly specified, is the preclusion of the admissibility of this complaint. If the WCHR has found the relevant reservation impermissible the Court shall not apply this reservation and shall declare the case admissible.

The 'opt-out' clause could also impede the application of Art.9 of the MS Statute, which granted the WCHR *ad hoc* jurisdiction. As mentioned above, Scheinin enumerated two circumstances in which the WCHR could exercise its *ad hoc* jurisdiction. The first refers to the Court's jurisdiction *ratione persone,* and would apply when a state is not a party to the WCHR statute. In such a case, the WCHR shall bring the complaint to the attention of the state in question and seek *ad hoc* acceptance of the WCHR's jurisdiction in respect of the specific complaint. The second concerns the WCHR's jurisdiction *ratione materiae* where a state is a party to the WCHR statute but the complaint *per se* falls outside the Court's jurisdiction *ratione materiae* as determined by Art.7 (2). The situation would also be possible where a state is party to the WCHR Statute but has made a declaration excluding a certain human rights treaty in the applicable law list or certain provisions thereof; such a situation belongs to neither of the circumstances above.

Nevertheless, an *ad hoc* acceptance of the Court's jurisdiction would enable the state concerned to test the wisdom of withdrawing such a reservation at a later stage. Given this, a supplement of the WCHR's *ad hoc* jurisdiction can be considered. That is, in the event of a complaint in relation to alleged violations of a treaty to which the respondent state has entered a relevant reservation, the WCHR may, according to Art.9 (2), bring the complaint to the attention of the state concerned and seek *ad hoc* acceptance of the jurisdiction through consultation. If such an attempt at negotiation should fail, the Court should determine immediately whether or not the reservation is permissible under Art.14 of the MS Statute. Art.10 of the MS Statute is not applicable here. As mentioned above,

[158] See: *ibid*., p.11.
[159] *Ibid*.

according to this Article, the WCHR shall inform the OHCHR when it seeks *ad hoc* acceptance of its jurisdiction under the terms of Art.9. If the state refuses to accept this jurisdiction, the OHCHR may request the Court to proceed to consider this complaint and issue an opinion 'representing its interpretation of the issues of international human rights law raised by the complaint'[160] instead of a legally binding judgment.[161]

The Consolidated Statute follows the 'opt-out' approach. Art.50 (1) allows the States Parties to make a reservation to the Court's jurisdiction concerning certain human rights treaties, or certain provisions thereof, at the time of ratification of or accession to the Statute of the WCHR. Art.50 (2) implicitly encourages any ratifying state that has made a reservation to withdraw this reservation. The Consolidated Statute adopts the MS Statute concerning the permissibility of the reservations. According to Art.11 of the Consolidated Statute, the WCHR 'shall have binding jurisdiction to decide whether a specific reservation entered by a State Party to any applicable human rights treaty is permissible pursuant to the provisions of the treaty and Vienna Convention on the Law of Treaties (VCLT)'.[162] As the authors of the Consolidated Statute pointed out:

> If it arrives, e.g., at the conclusion that a reservation is against the object and purpose of the respective treaty, it shall declare it null and void and apply the treaty to the State Party without being barred by such reservation.[163]

Conversely, '[a] permissible reservation precludes the admissibility of a complaint to the extent covered by the reservation'.[164] The compatibility of the reservation with the object and purpose of the treaty is dependent on the appreciation of WCHR.

### 1.1.3 The relationship of the WCHR's jurisdiction with regional human rights courts and the UN human rights treaty bodies

The contentious jurisdiction of the WCHR over state actors also refers to the relationships of the WCHR with the regional human rights courts and the UN human rights treaty bodies. As to the first, the relationship between the WCHR and the regional human

[160] *Ibid*., p.6.
[161] See: *ibid*.
[162] Kozma, *et al*., *supra* note 31, p.42.
[163] *Ibid*.
[164] Art.11 (2) of the Consolidated Statute.

rights courts as discussed in **Chapter Two**, there was no connection between the ICHR and regional human rights courts, as no human rights court existed at a regional level in the 1940s. MacBride mentioned this relationship in the 1960s because the European Court of Human Rights (ECtHR) had been established during the intervening period. To MacBride, the UCHR should serve 'as a final court, both of the national court and regional court of human rights, of appeal in all matters related to human rights. In the areas where an effective regional court of human rights already existed, appeals against the decisions of national courts on human rights issues would, in the first instance, be directed to this regional court'.

MacBride's suggestion was again raised during discussion of the WCHR Statue. As indicated by one school of thought: '[C]omplainants would be obliged to try to reach a remedy on the regional level first, taking their case to the global only if that effort fails.'[165] This argument asserts that, as an appellate court for regional courts, the WCHR needs to be protected from the paralysis which could result from a potential backlog of cases. Unlike the relationship with national courts, what would be brought before the WCHR would consist of the same facts and the same human rights issues – and only those facts and issues – between the same parties. Additionally, the WCHR would better respect the authority of these courts.

The current statutes of the proposed WCHR reject this option. The WCHR would not act as an appellate court for the existing regional human rights courts, although the WCHR would have to establish a close collaboration with those regional human rights courts.[166] The Preamble and Art. 11(2)(c) of the NK Statute made it clear that the WCHR would not be permitted to hear appeals from regional human rights courts.[167] The MS Statute

---

[165] Scheinin, *supra* note 4, p.28.

[166] *Ibid*. On this issue, the ongoing and fruitful dialogue between the ECtHR and the IACtHR, in a spirit of cooperation, may constitute an inspiring example for the future WCHR. To Trindade, the ECtHR and IACtHR have achieved 'jurisprudential cross-fertilization' by means of interpretive interaction. 'In the pursuit of their common cause and ideal', Trindade added, the two courts 'have had no difficulty in referring to each other's case law whenever they have deemed it appropriate'. Antônio A. C. Trindade: "The Merits of Coordination of International Courts on Human Rights", in: *Journal of International Criminal Justice*, Vol. 2, Issue 2, 2004, pp.309 – 312, at 311 – 312. In addition:

> Interpretive interaction has, in a way, contributed to the universality of the treaty law on the protection of human rights. This has paved the way for a *uniform* interpretation of the *corpus juris* of contemporary international human rights law. Such uniform interpretation in no way threatens the unity of international law.

*Ibid*., p.312. This may hold true with respect to the cooperative relationship between the WCHR and the existing regional human rights courts.

[167] See: Nowak and Kozma, *supra* note 5, p.64.

similarly indicates: 'Such a court should complement rather than duplicate existing regional courts, and it could make a wide range of actors more accountable for human rights violations.'[168] To justify this, the MS Statute pointed out the advantages of this rejection:

> [I]t respects the integrity of regional human rights courts by not subjecting them to an appeal court on the global level, and that it avoids adding a new layer to the delays that often characterize regional human rights systems with a heavy workload.[169]

As Scheinin pointed out, the proposed WCHR 'would not replace regional human rights courts, compete with them, or become an appeal instance with them'.[170] Art.10 (1)(b) of the Consolidated Statute seconds this point of view.[171] Despite these advantages over the existing regional human rights courts, the current proposal has no motive for persuading the potential applicants to lodge their complaints with the WCHR rather than seeking justice in the regional human rights courts. The applicants 'must make up their mind whether they prefer to submit their case to the World Court or the respective regional human rights court.'[172]

Neither do the authors of the current statutes want the future WCHR to stand above the present UN human rights treaty bodies. No indication can be found in the text of current statutes that a hierarchical relationship between the WCHR and the UN human rights treaty bodies is about to be established. Establishing such a relationship would inevitably lead to a substantive reform of the UN human rights monitoring system.

The current statutes of the proposed WCHR also try to avoid the complaint proceedings of the WCHR in competition with the existing UN human rights treaty bodies. In light of the current statutes, the future WCHR would gradually take over the functions of the treaty monitoring bodies, namely by examining individual and inter-State complaints. According to Nowak and Kozma, within the present UN human rights treaty body system, a plurality of professional backgrounds and specific expertise in the particular field of their respective treaty help to 'verify the facts' in a particular case.[173] However, handing down admissibility decisions and assessing whether the facts of a

---

[168] Scheinin, *supra* note 4, p.53.
[169] *Ibid*., p.29.
[170] *Ibid*., p.61.
[171] See: Kozma, *et al*, *supra* note 31, p.41.
[172] *Ibid*.
[173] See: Nowak and Kozma, *supra* note 5, p.19.

particular case have amounted to a violation of any of the human rights protected by the respective international human rights treaty require specific legal expertise.[174] As they said:

> While the present human rights treaty monitoring bodies of the United Nations, taking into account the need for diverse backgrounds required to examine State reports, are composed of experts from different professions, the World Court of Human Rights as the highest judicial body deciding on human rights complaints, shall be composed only of jurists with the required competence in the field of human rights and the qualifications for the exercise of the highest judicial functions in their respective countries.[175]

Moreover:

> While the complaints proceedings before UN human rights treaty monitoring bodies are only written, court proceedings must provide for the possibility of public hearings, in full accordance with the human right to a fair and public trial before an independent and impartial tribunal.[176]

Accordingly, the States Parties to the future WCHR Statute must take the necessary action to ensure that individual complaints could no longer be lodged with the respective UN human rights treaty monitoring bodies. If the future drafters decide to reintegrate the inter-state complaints procedure into the WCHR's jurisdiction, the States Parties should also suspend the operation of this procedure under other human rights treaty bodies. It should, however, be noted that the completion of the handover of this power may have to pass through a long phase. 'The pace of this process will depend on how quickly and how extensively states accept the jurisdiction of the Court'.[177] During this period, the UN human rights treaty bodies would continue to deal with individual and inter-state complaints until this quasi-judicial function is finally replaced by the WCHR's fully judicial function.

### 1.2 The non-contentious jurisdiction of the WCHR over state actors

Art.9 of the NK Statute stipulates that each UN Member State may consult with the

[174] See: *ibid*., pp.20, 63.
[175] *Ibid*., p.57.
[176] *Ibid*., p.67.
[177] Scheinin, *supra* note 4, p.24.

WCHR regarding the interpretation of any human rights treaty listed in Annex 1, regardless of its membership.[178] The Plenary Court may, according to Art.21 (h), issue advisory opinions separately from its judgments regarding the compatibility of any of its domestic laws and proposed legislation with the aforesaid international instruments. By granting the WCHR this advisory jurisdiction, each UN Member State, even if it has neither ratified the WCHR Statute nor been a party to any human rights treaty in the list of applicable law, may benefit from the advisory function of the WCHR. Art.9 of the NK Statute also provided the UN Human Rights Council 'with an opportunity of requesting the Court for an advisory opinion regarding the interpretation of the Statute or any of the human rights treaties listed in Annex 1'.[179] The OHCHR is also entitled to ask for an advisory opinion.

Indeed, as mentioned in **Section 1.1.1**, unlike the NK Statute, opinions, in the sense of the MS Statute, are of a quasi-judicial nature. This means that, in a situation where the Court is seeking *ad hoc* acceptance of its jurisdiction from those not party to the Statute, the WCHR's competence to issue opinions is based on the specific complaint. It can therefore be suggested that the MS Statute does not establish an advisory jurisdiction in the same sense as does the NK Statute.

The advisory jurisdiction of the WCHR as set out in the Consolidated Statute is said to be a compromise between Art.9 of the NK Statute and Arts.10 and 12 (1)(c) of the MS Statute.[180] To the authors of the current statutes:

> In addition to its contentious jurisdiction, the advisory jurisdiction of an international court is of great importance for the uniform interpretation and development of its legal basis as well as of the substantive laws it applies.[181]

In the authors' opinion, the advisory jurisdiction of the WCHR must remain uncontentious in order to prevent this jurisdiction from being 'misused for political purposes'.[182] A dispute between States Parties concerning the application or interpretation of a certain human rights treaty in the applicable law list, or certain provisions thereof, could in no event be submitted to the Court. Art.8 (1) of the Consolidated Statute is based

[178] See: Nowak and Kozma, *supra* note 5, pp.34, 61.
[179] *Ibid*., p.27.
[180] See: *ibid*., p.37. However, as mentioned above, this dissertation does not think that the relevant Articles of the MS Statute refer to the advisory jurisdiction of the WCHR and is, therefore, inclined to classify these Articles as the WCHR's contentious jurisdiction.
[181] Kozma, *et al*., *supra* note 31, p.37. See also: Nowak and Kozma, *supra* note 5, p.61.
[182] Nowak and Kozma, *supra* note 5, p.37.

on Art.9 (1) of the NK Statute, albeit with slight differences: Two political organs of the UN (namely the UN Secretary-General, the OHCHR) may consult the WCHR regarding the interpretation of this Statute or of any human rights treaty listed in Art.5 (1) of the same Statute. Art.8 (2) copies Art.9 (2) of the NK Statute: any UN Member State may request the WCHR to provide it with an opinion regarding the compatibility of any domestic law with the human rights instruments under the Court's jurisdiction *ratione materiae*. In this opinion, the WCHR can 'give advice on domestic laws and proposed legislation', and 'clarify whether or not they are compatible with provisions of the Statute or those contained in any of the human rights instruments in Article 5 (1)'.[183] In response, the requesting state is expected to take this advice into consideration when designing, adopting, implementing, and applying their human rights policies. According to Art.26 (i), the Plenary Court shall issue advisory opinions.

The authors of the Consolidated Statute also pointed out that the Article concerning the WCHR's advisory jurisdiction was inspired by Article 64 of the American Convention on Human Rights (ACHR).[184] This Article grants the Inter-American Court of Human Rights (IACtHR) a broad advisory jurisdiction, extending to all OAS Member States who may consult the Court regarding interpretation of 'the Convention or other treaties concerning the protection of human rights in the Americas'[185] and 'regarding the compatibility of any of its domestic laws with the aforesaid international instruments'.[186] The IACtHR's advisory jurisdiction 'is intended to assist the American States in fulfilling their international human rights obligations and to assist the different organs of the inter-American system to carry out the functions assigned to them in this field'.[187] In addition, all the OAS Member States, regardless of their membership of ACHR, are entitled to seek advisory opinions.[188] Art.64 (1) also permits various OAS organs, including the Inter-American Commission on Human Rights (IAComHR), to seek advisory opinions on matters falling within their spheres of competence.[189]

---

[183] Kozma, *et al*., *supra* note 31, p.37.
[184] See: *ibid*.
[185] Dinah Shelton: "The Jurisprudence of the Inter-American Court of Human Rights", in: *American University International Law Review*, Vol.10, Issue 1, 1994, pp.333 – 372, at 338 – 339.
[186] Art.64 (2) of ACHR.
[187] Laurence Burgorgue-Larsen and Amaya Úbeda de Torres: *The Inter-American Court of Human Rights: Case Law and Commentary*, Oxford: Oxford University Press, 2011, Chapter 4: "Advisory jurisdiction", pp.75 – 103, at 78.
[188] See: *ibid*., p.76.
[189] For more studies on the IACtHR's advisory jurisdiction, see: for example, *ibid*., pp.75 – 103; MC Parker: "Other Treaties: The Inter-American Court of Human Rights Defines Its Advisory Jurisdiction", in: *American University Law Review*, Vol. 33, Issue 1, 1983, pp.211 – 246; Jo M. Pasqualucci: *The Practice and*

In fact, the two other regional human rights courts – the African Court on Human and Peoples' Rights (AfCtHR) and ECtHR – have also adopted the practice of giving advisory opinions. The AfCtHR was established by the Protocol to the African Charter on Human and People' Rights on the Establishment of an African Court on Human and Peoples' Rights (AfCtHPR). According to Arts.4 (1) and 34 (6) of this Protocol, the AfCtHPR has an optional advisory jurisdiction, under which it may issue advisory opinions on 'any legal matter relating to the Charter or any other relevant human rights instruments'. A wide variety of entities, including the Member States of the Organisation of African Unity (OAU), the OAU or any of its organs, the African NGOs recognised by the OAU, are entitled to request the advisory opinion of the AfCtHPR.[190] Within the scope of the European system, the ECtHR's advisory jurisdiction was established by adopting Protocol 2 to ECHR, which was incorporated, with some amendments, into the ECHR itself through

*Procedure of the Inter-American Court of Human Rights* (2nd edition), Cambridge: Cambridge University Press, 2013, pp. 35 – 80; YS Kozheurov: "Advisory jurisdiction of an international court: the experience of the Inter-American Court of Human Rights", in: *Russian Juridical Journal*, Vol. 84 Issue 4, 2012, pp.95 – 107; Thomas Buergenthal: "The Advisory Practice of the Inter‑American Human Rights Court", in: *American Journal of International Law*, Vol. 79, 1985, pp.1 – 27; Thomas Buergenthal: "The Inter-American Court of Human Rights", in: *American Journal of International Law*, Vol. 76, No. 2, 1982, pp.231 – 245, at 242 – 245; and *etc*.

[190] The OAU was disbanded in 2002 and replaced by the African Union (AU) which had been established in 2001. Accordingly, the advisory opinion of the AfCtHR may be requested by the AU, member states of the AU, AU organs and any African organisation recognised by the AU. As of October 2016, the AfCtHR has received 11 advisory cases in total (7 finalised and 4 pending). See: http://en.african-court.org/index.php/cases/2016-10-17-16-19-35#statistical-summary. It should also be noted, however, that the AfCtHR cannot exercise its advisory jurisdiction in a matter that is under examination by the African Commission. For more details about the AfCtHR's advisory jurisdiction, see: for example, International Federation for Human Rights (FIDH): "Practical Guide: The African Court on Human and Peoples' Rights – towards the African Court of Justice and Human Rights", available at: https://www.fidh.org/IMG/pdf/african_court_guide.pdf; Anne P. van der Mei: "The Advisory Jurisdiction of the African Court on Human and People's Rights", in: *African Human Rights Journal*, Vol. 5, No. 1, 2005, pp.27 – 46; Anne Pieter van der Mei: "The New African Court on Human and Peoples' Rights: Towards an Effective Human Rights Protection Mechanism for Africa?", in: Leiden Journal of International Law, Vol. 18, Issue 1, 2005, pp.113 – 129; Gino J. Naldi: "Observations on the Rules of the African Court on Human and Peoples' Rights", in: *African Human Rights Journal*, Vol. 14, No. 2, 2014, pp.366 – 392, at 390 – 391; Robert W. Eno: "The jurisdiction of the African Court on Human and Peoples' Rights", in: *African Human Rights Journal*, Vol. 2, No. 2, 2002, pp.223 – 233, at 231 – 233; Southern Africa Litigation Centre: *Justice for all: Realising the Promise of the Protocol establishing the African Court on Human and Peoples' Rights*, available at: http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2014/12/Justice-for-all-Realising-the-Promise-of-the-Protocol-establishing-the-African-Court-on-Human-and-Peoples-Rights.pdf; Frans Viljoen: *International Human Rights Law in Africa* (2nd edition), Oxford: Oxford University Press, 2013, Part III: "The Regional Level", Chapter 10: "The African Court on Human and Peoples' Rights", pp.446 – 460; Dan Juma: "Provisional Measures under the African Human Rights System: the African Court's Order against Libya", in: *Wisconsin International Law Journal*, Vol. 30, No. 2, 2012, pp.344 – 373, at 355 – 356; Dan Juma: "Lost (or Found) in Transition? The Anatomy of the New African Court of Justice and Human Rights", in: *Max Planck Yearbook of United Nations Law Online*, Vol. 13, No. 1, 2009, pp.267 – 306, at 300 – 304; Solomon T. Ebobrah: "Towards a Positive Application of Complementarity in the African Human Rights System: Issues of Functions and Relations", in: *The European Journal of International Law*, Vol. 22, No. 3, 2011, pp.663 – 688, at 676.

Protocol 11 to the Convention.[191] According to Art.47 of this Protocol, the Committee of Ministers of the CoE may request the ECtHR's non-binding advisory opinion, unless the matter relates to the content and scope of fundamental rights which the Court already considers. However, the ECtHR's advisory procedure has not been used often over the years.[192] Protocol No.16 to the ECHR (hereinafter referred to as the 16th Protocol) extends the ECtHR's advisory function. This protocol concerns advisory opinions requested by tribunals, including constitutional courts or courts of the last instance of a High Contracting Party, in the context of a specific case at domestic level, and not by the Committee of Ministers. The ECtHR may, through such advisory opinions, disclose whether the case has constituted a breach of the ECHR. 'Advisory opinions shall not be binding'.[193] It should be noted that the 16th Protocol does not, in fact, deprive the Committee of Ministers of the right to provoke the ECtHR's advisory jurisdiction because it 'is an additional protocol and not an amending protocol'.[194] The 16th Protocol was opened for signature as of 2013 but is not yet in force.[195]

The above discussions demonstrates that the current statutes provide states with a fairly diverse range of options as regards the ways in which they can accept the jurisdiction of the WCHR. Nowak, Scheinin and Kozma have rightly noted that bringing the current proposal for establishing the WCHR into being depends largely on a finding the right way to convince states to adopt the Court's jurisdiction. Their proposals seem to have been formulated in the belief that the approaches selected would improve the chances of the successful establishment of the WCHR. However, there is much more to be done in terms of persuading as many states as possible to ratify the future statute of the WCHR, as it is

---

[191] According to Schabas's observation:

> As amended, articles 47 to 49 are "virtually identical" to articles 1, 2, 3(2), and 3(4) of Protocol No. 2. The word 'two-thirds' in article 1(3) of Protocol No. 2 was deleted in article 47(3), a consequence of a change made by Protocol No. 10 to article 32 of the Convention. Also, mention of the Commission was removed in article 47. The reference to the plenary Court in Article 3(1) of Protocol No. 2 was changed to the Grand Chamber. The headings of the three provisions were also added by Protocol No. 11.

Schabas, *supra* note 53, p.876.

[192] As of November 2016, the ECtHR issued only six advisory opinions. See: HUDOC database, available at: http://hudoc.echr.coe.int/eng#{"documentcollectionid2":["ADVISORYOPINIONS"]}.

[193] Art.5 of the 16th Protocol.

[194] Schabas, *supra* note 53, p.877.

[195] At the end of 2016, the total number of ratifications/accessions was 6, and the total number of signatures not followed by ratifications was 10. See: Council of Europe (CoE): "Chart of signatures and ratifications of Treaty 214: Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms", available at: http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=214&CM=8&DF=01/08/2014&CL=ENG.

this which will ultimately determine the success of the establishment of such a court.[196] This task can be outwardly expressed in the form of a benign interaction between the WCHR and states, in which two types of relationship deserve emphasis: the first concerns the relationship of the WCHR's jurisdiction with national jurisdictions, and the second concerns the universality of human rights and the diversity of states. It is imperative that future drafters of the WCHR Statute create a format in which state sovereignty is fully respected and diversity is fully considered.

[196] According to Art.35(1) of the NK Statute, Art.60 (1) of the MS Statute and Art.49(1) of the Consolidated Statute, the entry into force of the WCHR Statute needs thirty instruments of ratification, accession or succession.

## Section 2: The Rule of Prior Exhaustion of Local Remedies as a Pre-condition for the Exercise of the WCHR's Jurisdiction

**Section 1** expounded on the jurisdiction of the proposed WCHR (both contentious and uncontentious). In addition to holding States Parties accountable for their breaches of conventional obligations, the design of the WCHR's contentious jurisdiction must also substantialise the right to effective remedies for the victims of human rights violations.

While being attaching to individual persons, human rights are, at the same time, still linked to state power. Over the decades, the expansion of international law has entered domains which were once solely within the domestic jurisdiction of states. In the human rights arena, the proliferation of international human rights instruments and the establishment of the relevant monitoring mechanisms have shown that human rights issues 'have ceased to belong to the domain of "domestic affairs"'[197] As Buergenthal said: 'There are few, if any, human rights issues today that are not of international concern.'[198] In practice, two kinds of attitude to international jurisdiction can be observed in contentious cases among states. Some states wish to demonstrate their unwavering commitment to human rights, and elevate the global protection of human rights to a qualitatively new level. These states appear to wish to see more consistency in the application of human rights law.[199] In such cases, establishing a new court serves as an important way to demonstrate that commitment.[200] By contrast, most other states exhibit a hostile, or even antagonistic, attitude. They declare a commitment to human rights while at the same time continuing to hope that they will not be held accountable if this commitment remains unfulfilled. Accordingly, they have given their consent to being bound by a human rights treaty, but make every effort to avoid being subject themselves to international scrutiny. These states believe that this vague commitment will protect them from being held accountable if this commitment remains unfulfilled.

It is, therefore, understandable that states may worry about the possible derogation of their authority in the governance of human rights if they accept international jurisdiction in

[197] World Conference on Human Rights, Preparatory Committee, Fourth Session: Status of Preparation of Publications, Studies and Documents for the World Conference, Note by the Secretariat, Addendum, Contribution by the Council of Europe, A/CONF.157/PC/66, 13 April 1993, p.9.
[198] Thomas Buergenthal: "The Normative and Institutional Evolution of the International Human Rights", in: *Human Rights Quarterly*, Vol. 19, No. 4, November 1997, pp.703 – 723, at 713.
[199] Scheinin, *supra* note 4, p.25.
[200] *Ibid*., p.25.

contentious cases. They would be especially concerned with whether, and to what extent, international human rights mechanisms may make concessions in their discretion regarding the protection of human rights at a domestic level. To mitigate this concern, the future drafters of the WCHR Statute will have to ensure that the WCHR acts in a complementary manner. The complementary principle would be an essential quality of the WCHR's jurisdiction. This principle firstly necessitates the rule of prior exhaustion of local remedies, which provides the necessary preconditions for any serious attempt at remedial action against it to be submitted to the WCHR.

As indicated in **Chapter Two**, the Australian proposal implied the inclusion of the rule of prior exhaustion of local remedies as one of the admissibility criteria of the proposed ICHR. To the Australian representative to the UNCHR, this rule not only recognised the State's dominant position in human rights protection but also prevented the ICHR from being unworkable or even paralysed due to a rapid increase in the number of cases. Despite the withdrawal of the Australian proposal, the rule of prior exhaustion of local remedies was adopted and developed by human rights mechanisms at both regional and international levels.[201]

The rule of prior exhaustion of local remedies represents the complementary nature of the international jurisdiction. Accordingly, human rights protection is, in the first place, of domestic concern, and international tribunals have only a subsidiary function. The essentials of this rule mean that each state should first be given an opportunity to implement immediately available remedies with a view to correcting its own wrongdoing.[202] The rule of prior exhaustion of domestic remedies is also one of the most important criteria for the WCHR declaring a particular case to be admissible. This rule obliges those who seek to bring their case against a state before the WCHR as an international judicial organ to first use the remedies provided by the national legal system. In other words, the local remedy which is open to an applicant must be a legal one.

---

[201] Precise provisions on the exhaustion of domestic remedies can be found in many regional and international human rights instruments. Take, for example, the core international human rights treaties: ICCPR (Art.41 (1)(c)) and the Optional Protocol to the International Covenant on Civil and Political Rights (OP-ICCPR, Arts.2 and 5 (2)(b)), OP-ICESCR (Arts.3 and 10 (1)(c)), ICERD (Arts.11, 14(2) and (7)(a)), the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (OP-CEDAW, Art.4(1)), CAT (Arts.21 (1)(c) and 22 (4)(b)), OP (on a communications procedure)-CRC (Art.7(e)), ICMW (Arts.76 (1)(c) and 77 (3)(b)), ICED (Art.2(d)). At the regional level, see: for example, ECHR (ex-Art.26 and Art.35(1)), ACHR (Art.46 (1)(a) and (2)(b)) and AfCHPR (Arts.50 and 56(5)).

[202] See: Antônio A. C. Trindade: The Application of the Rule of Exhaustion of Local Remedies in International Law: Its Rationale in the International Protection of Individual Rights, Cambridge: Cambridge University Press, 1983, p.1; D'Ascoli and Scherr, supra note 3, p.4.

### 2.1 The rule of prior exhaustion of local remedies in the NK Statute

In the NK Statute, the rule of prior exhaustion of domestic remedies firstly applies to an individual who wants to raise their case before the WCHR. A noteworthy proposition in this regard is the establishment, maintenance or designation of national human rights courts as envisaged in Art.10 of the NK Statute. 'The most important admissibility criterion for individual complaints is the requirement that the applicant first must submit a complaint to the national human rights court in the respective State Party'.[203] Art.10(6) of the NK Statute stipulated the exhaustion of an appeal to the national human rights court as a precondition for the admissibility of a complaint by the WCHR.[204] Nowak indicated the logic of the right to effective remedies and the realisation of human rights:

> A remedy means that the rights-holder can sue the duty-bearer before an independent neutral body, which has the power to decide in a binding manner whether or not the duty-bearer violated his or her obligations. Such an independent neutral body is usually called a court.[205]

To Nowak and Kozma, this is also the logic on which the proposal for obliging the respective States Parties to establish, maintain or designate a national court of human rights is based.[206]

Nowak and Kozma identified the huge gap in human rights implementation, which has two main dimensions. The first dimension is 'the lack of effective judicial and non-judicial national institutions for the protection of human rights and the implementation of international obligations'.[207] The other is 'the lack of effective international organs and procedures to hold States accountable for their non-compliance with international obligations'.[208] For the first dimension, many states have ratified international human rights treaties, but have not incorporated them into domestic law.[209] 'This leads to the consequence that such treaties are in effect ignored by domestic courts and administrative

[203] Nowak and Kozma, *supra* note 5, p.64.
[204] *Ibid*., pp.6, 21.
[205] Nowak, *supra* note 29, p.697.
[206] See: Nowak and Kozma, *supra* note 5, p.15.
[207] *Ibid*., p.21.
[208] *Ibid*., p.21.
[209] *Ibid*., p.62.

authorities'[210] and may also 'lead to overloading international or regional bodies'.[211] They went further, saying that:

> International human rights law did establish the right of all human beings to *equal access and a fair trial before independent courts and tribunals* in the fields of civil and criminal law. … Nevertheless, the same human rights treaties contain special provisions relating to *human rights litigation* which clearly fall short of demanding independent courts to decide about human rights claims.[212]

The proposal for establishing, maintaining or designating national human rights courts might bridge this gap. Art.10 of the NK Statute obliged the States Parties to establish, maintain or designate a national court of human rights as a counterpart to the WCHR and 'as the main organ responsible for human rights implementation on the territory of the State Party'.[213] The national courts of human rights would either operate independently or function as part of one or more domestic courts.[214] They shall adjudicate such complaints against States Parties as concern alleged violations of those international human rights treaties which the respective state has ratified.[215] These treaties are expected to be applied directly by the national human rights court,[216] and a logical consequence of the establishment, maintenance or designation of national human rights courts 'is that most States Parties will have to enact domestic legislation in order to make the respective treaties directly applicable for the courts'.[217] At this stage, whether the state concerned has entered a reservation with regard to certain treaties by which it has expressed that it does not wish to be bound vis-à-vis the WCHR at the time of signature or ratification does not affect the competence of national human rights courts.

It follows that, to Nowak and Kozma, the principle of complementarity is not only about the constraint of the WCHR's jurisdiction. In view of this principle, domestic courts should also 'take more seriously their responsibility to provide victims of human rights violations committed by … governmental authorities … with adequate reparation for the

[210] *Ibid*., p.62.
[211] *Ibid*., p.62.
[212] *Ibid*., p.16.
[213] *Ibid*., p.5.
[214] See: *ibid*., p.5.
[215] See: *ibid*., p.21.
[216] See: *ibid*., p.21.
[217] *Ibid*., p.6.

harm suffered'.[218] In this respect, the national human rights courts should serve as an incentive for the domestic justice system to combat the culture of impunity for human rights violations and would 'contribute to enhanced protection on the national level'.[219] The existence of national human rights courts would also 'have the effect of preventing the World Court from becoming overloaded with cases'.[220] As Nowak and Kozma pointed out:

> The better the national human rights courts apply international human rights treaties and thereby provide an effective remedy and reparation to the victims of human rights violations, the fewer cases will be submitted to the World Court. … If the national court of human rights … provides effective protection by following the respective case of the World Court and by providing the victims with adequate reparation for the harm suffered, only few cases will be submitted to the World Court and even fewer cases will be decided in favour of the applicants.[221]

Nowak and Kozma suggested that the national human rights courts 'shall decide cases in a final domestic manner and shall afford adequate reparation to the victim; its judgments shall be enforced by the responsible national law enforcement bodies'.[222] According to the NK Statute, the national human rights court would have the power to order the duty-bearer – usually the governmental authorities of the country concerned – to provide reparation to the victims if it finds that the duty-bearer has violated certain obligations.[223]

Human rights litigation at the domestic level can be understood as empowering the national human rights courts 'to decide whether or not a particular governmental behaviour violated human rights'[224] and to order 'enforceable reparation to the victim for the harm suffered.'[225] However, Nowak and Kozma also noticed 'the reluctance of States to grant a right to an effective human rights litigation before domestic courts',[226] and 'the right of victims of human rights violations to a judicial remedy before a domestic court … is indeed extremely limited'.[227]

On the question of whether the rule of prior exhaustion of local remedies is applicable

---

[218] *Ibid*., p.26.
[219] *Ibid*., p.6.
[220] See: *ibid*., p.63.
[221] *Ibid*., p.63.
[222] *Ibid*., p.6.
[223] See: *ibid*., p.15.
[224] *Ibid*., p.24.
[225] *Ibid*., p.24.
[226] *Ibid*., p.17.
[227] *Ibid*., p.19.

not only to individual complaints but also to third-party complaints,[228] the answer from Nowak and Kozma seems self-contradictory. To be specific, the position of Art.8 indicated in their explanation differs from that indicated in the explanation of Art.11. On the one hand, when they explained Art.8 of the NK Statute, they said: 'With the exception of the exhaustion of domestic remedies, all admissibility criteria for individual complaints listed in Article 11(2) shall equally apply to third party complaints',[229] on the other hand, their explanation of Art.11 suggested that the admissibility criteria for Art.11 (1) and (2) shall apply to third party complaints alleging systematic human rights violations.[230]

Returning to the question of whether the rule of exhaustion applies to third-party complaints, clues can be found in Nowak and Kozma's commentary. As they repeatedly stressed: 'An important principle modelled after the ICC statute is the complementary nature of the Court's jurisdiction in relation to the jurisdiction of national human rights courts'.[231] Specific to the rule of exhaustion of local remedies, the NK Statute followed Arts.1 and 17 of the ICC Statute. According to these two Articles, the ICC would not intervene unless 'the respective State authorities are either unwilling or unable to prosecute the person concerned'.[232] As Triffter and Ambos indicated, the Court cannot be 'absolved from the examination of admissibility under article 17'.[233] For example, in the case against Gaddafi and Al-Senussi based on the situation in Libya, the ICC made abundantly clear that 'as far as one of the accused was concerned, Libya retained domestic control and the

---

[228] According to Art.8 of the NK Statute, 'third party complaints' refers to those brought by any State Party to the present Statute, by the OHCHR, the UN Security Council and by the UN Human Rights Council relating to alleged systematic human rights violations.

[229] See: Nowak and Kozma, *supra* note 5, p.60. Some UN core human rights treaties stipulate the application of the rule of prior exhaustion of local remedies in the inter-state complaints procedure. See: for example, ICCPR (Art.41 (1)(c))), OP-ICESCR (Art.10 (1)(c)), ICERD (Art.11), CAT (Art.21 (1)(c)), ICMW (Arts.76 (1)(c)). The inclusion of this rule at a regional level is laid down in Art.50 of AfCHPR. The regional human rights systems in existence also stipulate the rule of exhaustion of local remedies as an admissibility criterion. See: ECHR (ex-Art.26 and Art.35(1)), ACHR (Art.46 (1)(a) and (2)(b)) and AfCHPR (Arts.50 and 56(5)). It should be noted that, in the *Greece v. United Kingdom (I)* (application no.176/56), the EComHR found the rule of prior exhaustion of domestic remedies not applicable because the scope of the application was 'to determine the compatibility with the Convention of legislative measures and administrative practices in Cyprus'. *Greece v. the United Kingdom*, application no. 176/56, EComHR Decision on the Admissibility, 2 June 1956, p.3. With the entry into force of 11th Protocol to the ECHR, the ECtHR continues to apply the rule of prior exhaustion of local remedies when examining the admissibility of inter-state complaints according to Art.35(1) of ECHR. See: for example, *Denmark v. Turkey*, application no. 34382/97, First Section, Decision as to the Admissibility, 8 June 1999; *Georgia v. Russian Federation (I)*, application no. 13255/07, Fifth Section, Decision as to the Admissibility, 30 June 2009; *Georgia v. Russian Federation (II)*, Former Fifth Section, Decision, 13 December 2011.

[230] See: Nowak and Kozma, *supra* note 5, p.64.

[231] Nowak and Kozma, *supra* note 5, p.4. See also: *ibid*., pp.6, 21, 51, 55, 62, 63.

[232] See: *ibid*., p.62.

[233] Otto Triffterer and Kai Ambos: *The Rome Statute of the International Criminal Court* (3rd edition), München: C.H. Beck, 2016, p.19.

case against him was accordingly held to be inadmissible'.[234] According to the complementary nature of the ICC, the above discussion may warrant the corollary that the exhaustion rule shall apply to the third party complaints.

As regards the relationship of the WCHR to the national human rights courts, the proposed WCHR is intended only to supplement the national human rights courts. The national human rights justice systems of States Parties have, in principle, jurisdictional primacy vis-à-vis the WCHR. In other words, as long as the national human rights court in a State Party's territory is able and willing to genuinely enforce liability for the violations of those international human rights treaties which the respective State has ratified, the WCHR does not have jurisdiction. Nowak and Kozma emphasised the principle of complementary jurisdiction in the preamble of the NK Statute.[235] The principle of complementary jurisdiction established by the NK Statute was modelled on the ICC Statute[236], which restricts the ICC's competence 'to try a person for a particular crime if the respective State authorities are either unwilling or unable to prosecute the person concerned'.[237] The complementary principle in the sense of the ICC Statute 'refers to the primacy of the national jurisdictions on the one hand, and the complementary role of the ICC to provide justice when it is not forthcoming at the national level'.[238] '[C]omplementarity means that national jurisdictions take priority unless the competent State is "unwilling or unable genuinely to carry out the investigation or prosecution"'.[239] As Judge Sang-Hyun Song, the former President of the ICC, pointed out:

> The ICC is merely a safety net that ensures accountability when the national jurisdictions are unable for whatever reason to carry out that task. Accordingly, the strengthening of national justice systems is crucial for establishing a credible and comprehensive system of deterrence and prevention against atrocity crimes, and to ensure accountability where crimes have occurred.[240]

The rationale behind the above quote is 'strengthening domestic criminal jurisdiction'.[241] This rationale is also in line with the expectations of Nowak and Kozma

---

[234] *Ibid*.
[235] See: the NK Statute, Preamble, para.8.
[236] The preamble of the Statute of the International Criminal Court (ICC) also includes an emphasis on the principle of complementarity. See: the ICC Statute, Preamble, para.10. The founders of the ICC reiterated this principle in Art.1 of the ICC Statute.
[237] Nowak and Kozma, *supra* note 5, p.62.
[238] Triffterer and Ambos, *supra* note 233, p.XV.
[239] *Ibid*., p.19.
[240] *Ibid*., p.XV.
[241] Nowak and Kozma, *supra* note 5, p.21.

towards the proposed WCHR.[242] The WCHR should act in a complementary manner, similar to the ICC and national criminal courts. This principle may help to prevent the WCHR from becoming overloaded with cases, while at the same time demonstrating respect for state sovereignty.[243]

Be that as it may, a closer inspection does reveal that the WCHR might take on the role of the appellate court of the national human rights courts. The WCHR and the national human rights court have essentially the same task; that of adjudicating individual complaints concerning alleged violations of those international human rights treaties which are under the Court's jurisdiction *raitone materiae*.[244] At the same time, they will have the same competence as the WCHR as regards complaints against a State Party.[245] The relationship between the WCHR and the national human rights courts can thus be compared to the relationship between the highest domestic court in the respective State Party and the lower courts.

It would be necessary for an applicant to raise their claim before the national human rights court of the respondent state in a form that corresponds to the form in which it is later presented before the WCHR. Establishing national courts of human rights may raise awkward constitutional problems for Sates Parties. According to the NK Statute, the national court of human rights in the respective State Party must come into operation 'at the latest one year after the entry into force of the present Statute or of its ratification or accession'.[246] 'If a State Party is unwilling or unable to provide adequate protection against human rights violations because it failed to establish a national human rights court',[247] Nowak and Kozma added, 'this domestic remedy does not have to be exhausted … and the victim can directly lodge a complaint with the World Court'.[248] That is to say, each State Party would have to determine the legal status of such a court within its own legal system, and its relationship to the highest domestic court in particular, within one year. In view of this, many states – including those wishing to demonstrate their

[242] In fact, as early as in the 1940s the French representative to the UNCHR called on states 'to set up, within the sphere of their jurisdiction, system of appeal to judicial and administrative bodies, in order to prevent and, if necessary, correct or suppress such violations of human rights as may have been committed within their territory'. Commission on Human Rights, Third Session, Meeting held on 15 June 1948, Statement by Mr. René Cassin, Representative of France, On the Implementation of Human Rights E/CN.4/147, 16 June 1948, pp.1 – 2.
[243] See: Nowak and Kozma, *supra* note 5, pp.21, 62.
[244] *Ibid*., p.21.
[245] See: *ibid*., pp.6, 21.
[246] Art.10(1) of the NK Statute.
[247] Nowak and Kozma, *supra* note 5, p.63.
[248] *Ibid*.

unwavering commitment to human rights and elevate the global protection of human rights to a qualitatively new level – might choose not to ratify the WCHR Statute. In addition, the failure of a State Party to fulfil this obligation could also lead to a rapid increase in the WCHR's caseload. The Consolidated Statute finally eliminates 'the obligation of States Parties to establish specific national courts of human rights'.[249]

An exception to the rule of prior exhaustion of local remedies may also occur if the WCHR finds that 'the procedure before the national court is not effective or does not afford due process of law'.[250] Nowak and Kozma pointed out that national human rights courts should provide the applicants with adequate reparation for the harm they have suffered by following the respective case law of the Court.[251]

### 2.2 The rule of prior exhaustion of local remedies in the MS Statute

Like the NK Statute, the MS Statute also wrote the complementary principle into its Preamble.[252] The rule of prior exhaustion of local remedies was set down in Art.13 of the MS Statute. Accordingly, the WCHR shall declare any complaint submitted in respect of a State Party inadmissible when there has been a failure to exhaust all available domestic remedies. As Art.13 (1) and (2) clearly indicate, the exhaustion requirement applies equally to the individual and to inter-state complaints.[253] It is worth noting that, according to Art.13 (2), this requirement also applies to 'complaints in respect of a State submitted under the Court's *ad hoc* jurisdiction under Art.9. For example: say that the WCHR receives a complaint against a non-Contracting State and subsequently turns to this state for *ad hoc* acceptance of its jurisdiction, informing the OHCHR of this request. The proceedings could then move forward in two different directions: if the respondent state accepted the WCHR's jurisdiction in respect of this complaint, the proceedings would move forward to the examination of the admissibility of the complaint, in which the Court would have to consider whether the complainant had exhausted all available domestic remedies. In the event that the respondent state ignored or declined the Court's request for *ad hoc* jurisdiction, the OHCHR could, in accordance with Art.10(2) of the MS Statute,

[249] Kozma, *et al.*, *supra* note …, p.39.
[250] Nowak and Kozma, *supra* note 5, p.63.
[251] See: *ibid*., p.63.
[252] See: The MS Statute, Preamble, para.7.
[253] See: Art.13(1) of the MS Statute.

request that the WCHR issue an opinion in the matter raised in the complaint. The Court could also dismiss the request for an Opinion submitted by the OHCHR if the domestic remedies available to the individual complainant(s) had not been exhausted.[254] Unreasonable prolongation of the domestic remedies might also result in an exception to this rule.[255]

### 2.3 The rule of prior exhaustion of local remedies in the Consolidated Statute

As mentioned in **Section 1**, the Consolidated Statute retains only the individual complaints procedure. The authors of the Consolidated Statute agreed upon the replacement of 'national human rights courts' with the more general term: 'the highest competent domestic court'. Accordingly, States Parties would have to establish (maintain or designate) 'competent domestic courts dealing with human rights'.[256] According to Art.9 (1) of the Consolidated Statute:

> The Court may only deal with any individual complaint if the complaint has first been submitted to the highest competent domestic court in the respective State Party and the applicant is not satisfied with the judgment of this court.

Although eliminating the obligation of States Parties to establish, maintain or designate national courts of human rights, the authors of the Consolidated Statute still insist on considering such judicial remedies as a requisite characteristic of the local remedies. The Consolidated Statute requires that this 'highest competent domestic court' should perform the same functions as the national human rights courts envisaged in Art.10 of the NK Statute, with the ability to apply such international human rights treaties as the respective State Party has ratified. To the authors of the Consolidated Statute, '[t]his requirement could have had an important effect on the domestic implementation of international human rights treaties'.[257] As they said:

> Many States ratify international human rights treaties without … ensuring that the respective human rights can be applied before domestic courts and that victims have an effective domestic

[254] See: Arts.10(3) and 13(5) of the MS Statute.
[255] See: Art.13(1)(a) of the MS Statute.
[256] Kozma, *et al*., *supra* note 31, p.40.
[257] *Ibid*., p.39.

> remedy against violations of their human rights. This leads to the consequence that such treaties are in effect ignored by domestic courts and administrative authorities, and victims often have no other opportunity than directly complaining to international courts or expert monitoring bodies. This may lead to overloading of international or regional bodies, such as the European Court of Human Rights (ECtHR), with too many cases.[258]

It can be found that the Consolidated Statute adopts the suggestion of the NK Statute that domestic remedies should be of a judicial nature. Accordingly, a judicial remedy at the domestic level which requires an applicant to 'resort to the courts of first instance and to the highest level of appellate review'[259] is the only prerequisite for the exercise of the WCHR's contentious jurisdiction.

Some would argue that limiting domestic remedies exclusively to judicial remedies is tantamount to seeking to start an adventurous reform of the existing rule of prior exhaustion of local remedies. In fact, remedies other than those of an essentially judicial nature, such as administrative remedies and extraordinary remedies, do not categorically fall outside the ambit of remedies which need to be exhausted. As Sullivan pointed out, the type of domestic remedy encompassed 'is understood in international and regional human rights jurisprudence to include judicial remedies, administrative remedies and extraordinary remedies'.[260] In addition, the remedies available to applicants will necessarily vary from state to state. Nevertheless, it seems likely that this attempt will raise state anxiety, and may therefore make gaining state support for the establishment of the WCHR even more difficult.

This concern may be excessive. **Chapter Two**, **Section 1** has already made it clear that seeking a remedy through national courts was recognised by the Australian representative as a prerequisite for accessing the ICHR. In its doctrine of exhaustion of local remedies, the Australian proposal for establishing the ICHR implied that the appellate jurisdiction of the ICHR should extend to appeals from all decisions of state courts.[261] This idea was recognised by the UN Commission on Human Rights (UNCHR) from the very start, and resulted in a significant development of UN human rights mechanisms at both regional and global levels in the years that followed.

---

[258] *Ibid*.
[259] Donna J. Sullivan: "Overview of the Rule Requiring the Exhaustion of Domestic Remedies under the Optional Protocol to CEDAW", OP-CEDAW Technical Papers No.1, Kuala Lumpur: International Women's Rights Action Watch Asia Pacific (IWRAW Asia Pacific), 2008, p.4.
[260] *Ibid*., p.3.
[261] See: **Chapter Two**, **Section 1**, pp.38 – 41.

At a regional level, the European human rights system (the former European Commission on Human Rights (EComHR) and the current ECtHR) has always highlighted the role of these judicial remedies in domestic remedies. As Amerasinghe said: 'From the point of view of the rule of exhaustion of domestic remedies *per se*, however, the requirement is clear that an individual needs and is required only to resort to the higher or last court from which he could have obtained an effective remedy.'[262] The ECtHR's jurisprudence similarly reveals that:

> The Court is intended to be subsidiary to the national systems safeguarding human rights and it is appropriate that the national courts should initially have the opportunity to determine questions regarding the compatibility of domestic law with the Convention. If an application is nonetheless subsequently brought to Strasbourg, the Court should have the benefit of the views of the national courts, as being in direct and continuous contact with the vital forces of their countries.[263]

In practice, in order to avoid the risk that the Court might declare the application inadmissible because of a failure to exhaust domestic remedies, it was often suggested that cases should appeal to the highest court of the state in question before individual complaints were lodged with the ECtHR.[264] Shelton similarly pointed out that the ECtHR's jurisprudence 'requires an applicant to "plead in substance" to domestic courts the complaints later presented in Strasbourg'.[265]

Within the scope of the Inter-American human rights system, admission by the IAComHR of a petition or communication requires that the remedies of a legal nature have

---

[262] Chittharanjan F. Amerasinghe: *Local Remedies in International Law* (2nd edition), Cambridge; New York: Cambridge University Press, 2004, pp.324 – 325.

[263] CoE/ECtHR: Practical Guide on Admissibility Criteria, para.45. This Guide is available at: http://www.echr.coe.int/Documents/Admissibility_guide_ENG.pdf.

[264] Council of Bars and Law Societies of Europe (CCBE): "The European Court of Human Rights: Questions & Answers for Lawyers", 2014, Section 1, ¶¶ 2, 3, 10.

[265] Dinah Shelton: "*Jura Novit Curia* in International Human Rights Tribunals", in: Nerina Boschiero, Tullio Scovazzi, Cesare Pitea, *et al.* (eds.): *International Courts and the Development of International Law: Essays in Honour of Tullio Treves*, The Hague: Berlin; Heidelberg: Asser Press; Springer, 2013, pp.189 – 211, at 195. In the *Akdivar and others v. Turkey* case, for example, the ECtHR held that:

> … the rule of exhaustion of local remedies … obliges those seeking to bring their case against the State before an international judicial or arbitral organ to use first the remedies provided by the national legal system.

*Akdivar and others v. Turkey*, application no.21893/93, Judgment, Strasbourg, 16 September 1996, para.65. See also: Amerasinghe, *supra* note 262, p.304; Mark E. Villiger: "The European Convention on Human Rights", in: Ulfstein (ed.), *supra* note 33, p.77; Michael O'Boyle: "Practice and Procedure under the European Convention on Human Rights Symposium International Human Rights", in: *Santa Clara Law Review*, Vol. 20, No. 3, 1980, pp.697 – 732, at 713.

been pursued and exhausted under domestic law in accordance with generally recognised principles of international law.[266] While acknowledging the diversity of domestic remedies, the Inter-American human rights system indirectly places emphasis on the importance of judicial remedies at a domestic level. As Art.31 (2) (c) of the Rules of Procedure of the IAComHR states: 'The provisions of exhaustion of domestic remedies shall not apply when there has been unwarranted delay in rendering a final judgment under the domestic legislation of the State Party.' By contrast, the OAS has made it clear that individual complainants 'must have exhausted domestic judicial remedies in keeping with the legislation in force in the State in question'.[267] The OAS pointed out that:

> [T]hose persons who want to file a petition with the Commission must first attempt to have the domestic courts decide on the situation they are denouncing. A person has exhausted domestic remedies when the judicial branch has issued a decision of last resort.[268]

A similar situation can be found in the African human rights system. Art.56 (5) of African Charter on Human and Peoples' Rights (AfCHPR) does not in itself specify what type of local remedies ought to be exhausted, however, the African human rights system requires the author of the communication to seek redress for the matter through all available domestic legal remedies by taking the case to the highest court of the land.[269] The African Commission on Human and Peoples' Rights (AfComHPR) 'has emphasized the importance of approaching national courts prior to communicating with the Commission if doing so has the slightest likelihood of resulting in an effective remedy'.[270]

---

[266] See: Art.46 (1) (a) of ACHR; IACtHR: "Exceptions to the Exhaustion of Domestic Remedies (Art. 46(1), 46(2)(a) and 46(2)(b) American Convention on Human Rights), requested by the Inter-American Commission on Human Rights", Advisory Opinion OC-11/90 of August 10, 1990, para.2.

[267] Organization of American States (OAS): Petition and Case System, informational brochure, 2010, Section 2, ¶ 19.

[268] *Ibid*., ¶ 20.

[269] See: AfComHPR: "Communication Procedure", Information Sheet No.3, p.6; Minority Rights Group International: "Guidance: Exhausting domestic remedies under the African Charter on Human and Peoples' Rights", p.2. This Guidance is available at: http://minorityrights.org/wp-content/uploads/2016/04/Domestic-remedies-guidance_final.pdf. According to the observation of the Minority Rights Group International:

> The African Commission (on Human and Peoples' Rights) has clearly stated that to meet the exhaustion requirement, a complainant must take his or her case to the highest judicial authority of the state exercising mandatory (not discretionary) powers to provide a remedy, and the judicial authority must be independent of the power of public authorities.

*Ibid*., p.6.

[270] Minority Rights Group International, *supra* note 269, p.3.

A communication would be ruled inadmissible due to non-exhaustion of this remedy.[271] In the in *Alfred B. Cudjoe v. Ghana* case, for example, the AfComHPR rejected consideration of the claim on merits on the grounds that the internal remedy to which Art.56 (5) of AfCHPR refers entails that a remedy be sought from courts of a judicial nature, which the Commission on Human Rights and Administrative Justice of Ghana (CHRAJ) clearly is not. However, the complainant 'does not give any indication … as to the procedure he has followed before the courts'.[272] In the *Constitutional Rights Project v Nigeria* case, the AfComHPR 'stated that the principle of exhaustion of domestic remedies, presupposes the existence of effective judicial remedies'.[273]

Indeed, as the OHCHR pointed out, in international human rights jurisprudence, the domestic remedies that the complainant must have exhausted usually include, but do not exclusively refer to, pursuing the claim through the local court system.[274] Each author of an individual communication is first required to bring their complaint to the attention of the relevant national authorities, including local courts, up to the highest available instance

[271] According to the AfComHPR, this position has been unquestionably restated and applied in subsequent cases including: *Bakweri Land Claims Committee v. Cameroon*, Communication No.260/02, AfComHPR 36th Ordinary Session, 4 December 2004, para.56; *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, Communication No.245/02, AfComHPR 39th Ordinary Session, 15 May 2006, para.45; *Article 19 v. Eritrea*, Communication No.275/03, AfComHPR 41st Ordinary Session, 30 May 2007, para.70; *Kenneth Good v. Republic of Botswana*, Communication No.313/05, AfComHPR 47th Ordinary Session, 26 May 2010, para.88; *Samuel T. Muzerengwa & 110 Others v Zimbabwe*, Communication No.306/05, AfComHPR 9th Extraordinary Session, 1 March 2011, para.74; *Dr. Farouk Mohamed Ibrahim (represented by REDRESS) v. Sudan*, Communication No.386/10, AfComHPR 13th extraordinary session, 18 October 2013, para.56; *Nixon Nyikadzino (represented by Zimbabwe Human Rights NGO Forum) v. Zimbabwe*, Communication No.340/07, AfComHPR 11th Extraordinary Session, 4 June 14, paras.51, 84; *Lawyers for Human Rights (Swaziland) v. The Kingdom of Swaziland*, Communication No.414/12, AfComHPR 14th Extraordinary Session, 16 February 2015, para.38; *Crawford Lindsay von Abo v. The Republic of Zimbabwe*, Communication No.477/14, AfComHPR 57th Ordinary Session, 31 March 2016, paras.92 – 94; *Human Rights Council and Others v. Ethiopia*, Communication No.445/13, AfComHPR 18th Extraordinary Session, 19 May 2016, para.59; and *etc*.

[272] See: *Alfred B. Cudjoe v Ghana*, Communication No. 221/98, AfComHPR 25th Ordinary Session, 5 May 1999, para.13.

[273] *Constitutional Rights Project v Nigeria*, Communication No.148/96, AfComHPR's 26th Ordinary Session, 15 November 1999, para.10, Cited in: *Ahmed Ismael and 528 Others v. the Arab Republic of Egypt*, Communication No.467/14, AfComCHPR 18th Extraordinary Session, 27 May 2016, para.155.

[274] Take, for example, the core international human rights treaties. Art.2 (1) of CAT and paragraph 5 of the preamble of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OP-CAT) obligate the States Parties to take effective judicial measures to prevent acts of torture in any territory under its jurisdiction. Art.83(b) of ICMW stipulated that the States Parties are under a legal obligation to ensure any persons seeking a domestic remedy 'shall have his or her claim reviewed and decided by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy'. In particular, Art.16(6) requires the States Parties to bring the arrested or detained migrant workers and members of their families on a criminal charge promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. The States Parties shall, as provided by Art.15(2) of ICPRD, take all effective judicial measures to prevent persons with disabilities, on an equal basis with others, from being subjected to torture or cruel, inhuman or degrading treatment or punishment. Arts.3(b) and 20 of ICED also imply the content of judicial domestic remedies.

in the state concerned.[275] Take, for example, the ICCPR. According to Art.2 (3)(b) of ICCPR, each State Party must 'ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State' and 'develop the possibilities of judicial remedy'. To Nowak, this Article expressed the primary importance of judicial remedies, and the States Parties are obligated to give priority to judicial remedies.[276] To Nowak, as a compromise between the common law and other legal traditions, Art.2 (3)(b) of the ICCPR only requires States Parties to develop the possibilities of a judicial remedy.[277] The States Parties to the OP-ICCPR 'are at liberty as to the form of remedy they wish to provide'.[278] As he said:

> In addition to ordinary, administrative and constitutional courts, permissible remedies include administrative appeals that do not have a solely political character, as well as complaints to legislative organs.[279]

In practice, however, 'complainants are generally expected to exhaust domestic judicial remedies'.[280] As Joseph *et al.* observed:

> It is established jurisprudence of the HRC that the wording "all available domestic remedies", within the meaning of Article 5, paragraph 2(b) of the OP, "clearly refers in the first place to judicial remedies".[281]

---

[275] See: for example, OHCHR: "Procedure for complaints by individuals under the human rights treaties", available at: http://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/IndividualCommunications.aspx; P. R. Gandhi: "Some aspects of the exhaustion of domestic remedies rule under the jurisprudence of the Human Rights Committee", in: *German Yearbook of International Law*, Vol. 44, pp.485 – 497; Jakob Th. Möller and Alfred M. De Zayas: *United Nations Human Rights Committee case law 1977-2008: a handbook*, Kehl am Rhein: N.P. Engel Verlag, 2009; Yogesh K Tyagi: *The UN Human Rights Committee: practice and procedure*, New York: Cambridge University Press, 2011.

[276] Nowak, *supra* note 62, p.886. See also: *Mariam Sankara et al. v. Burkina Faso*, Communication No. 1159/2003, CCPR/C/86/D/1159/2003, 28 March 2006, para.6.4.

[277] See: Nowak, *supra* note 62, pp.63 – 64.

[278] *Ibid*., p.64.

[279] *Ibid*. Amerasinghe similarly observed that, while emphasising the need to exhaust judicial remedies, the HRC has in some cases recognised that other remedies that are administrative or extraordinary in that they are not court remedies may, in appropriate circumstances, need to be exhausted. See: *Patiño v. Panama*, Communication No. 437/1990, CCPR/C/52/D/437/1990, 21 October 1994; *José Vicente and Amado Villafañe Chaparro, Luís Napoleón Torres Crespo, Angel María Torres Arroyo and Antonio Hugues Chaparro Torres v. Colombia*, Communication No.612/1995, CCPR/C/60/D/612/1995; *Paavo Muhonen v. Finland*, Communication No.89/1981, CCPR/C/24/D/ 89/1981. Cited in: Amerasinghe, *supra* note 262, p.316, note.33.

[280] Sarah Joseph; Linda Gyorki; Katie Mitchell; *et al*.: *Seeking Remedies for Torture Victims: A Handbook on the Individual Complaints Procedures of the UN Treaty Bodies* (2nd edition), Geneva, Switzerland: World Organisation Against Torture (OMCT), 2014, p.61.

[281] *Ibid*.

The rule of prior exhaustion of local remedies in the NK Statute and the Consolidated Statute requires more than just giving priority to judicial remedies. Nowak seems to believe that such a compromise is not necessarily to be reached in the WCHR case. Nevertheless, the States Parties to the future WCHR Statute will still be at liberty as to the form of judicial remedies they wish to provide. It seems that Art.9 (1) of the Consolidated Statute tries to relieve this anxiety by allowing the States Parties to identify, in relation to the applicable human rights treaties, the judicial remedies which applicants must exhaust under their domestic system when becoming a Party to the WCHR Statute.

In addition, Art.9 (1) of the Consolidated Statute indicates two points-in-time for the established 'domestic remedies': at the original declaration of internal remedies when the UN accepts the jurisdiction of the WCHR, and when any new local remedies are created following the acceptance of the WCHR's jurisdiction. Given the well-established jurisprudence that the rule of prior exhaustion of local remedies should be applied with some degree of flexibility and without excessive formalism, this Article allows subsequent changes in the required domestic remedies; the States Parties need only notify the WCHR concerning these changes.[282] It should be noted that the newly created remedies, in the sense of Art.9 (1) of the Consolidated Statute, are restricted to judicial remedies. In addition, in a sense, this Article also reserves the scope for the States Parties to establish, maintain and designate national human rights courts.

The case law of the ECtHR is thought to provide a reference on this point. In principle, the ECtHR should assess the issue of exhaustion as of the date on which the application is filed with the Court, but this principle is subject to exceptions if new remedies have been created thereafter. In the case of *Demiroğlu and Others v Turkey*, for example, the complainants lodged an application with the ECtHR on 16 August 2010, claiming the failure of the Turkish authorities to execute judgments in their favour under Art.6 (1) of ECHR and Art.1 of the Protocol No. 1 to the ECHR.[283] In January 2013, the Turkish National Assembly enacted Law no.6384 for the resolution, through compensation, of applications lodged with the ECtHR before 23 September 2012, concerning the length of judicial proceedings and non-enforcement or delayed enforcement of judicial decisions.[284] The ECtHR held that this law would enable the applicants to lodge an application for

[282] See: Art.9(1) of the Consolidated Statute.
[283] ECtHR: "Information Note on the Court's case-law", No.164, June 2013, p.28. This Note is available at: http://www.echr.coe.int/Documents/CLIN_2013_06_164_ENG.pdf.
[284] See: *ibid*.

compensation.[285] Having examined the sufficiency of the remedy provided for by Law no. 6384,[286] the ECtHR concluded that:

> [T]here was currently no reason to suppose that the remedy introduced by the compensation legislation would not afford the applicants the opportunity to obtain redress in respect of their grievances, or that the remedy would not offer any reasonable prospects of success.[287]

At the same time, the ECtHR admitted that:

> The remedy introduced by Law no. 6384 had been created with the aim of dealing with the large numbers of similar repetitive cases against Turkey which posed a growing threat to the Convention system.[288]

Consequently, the ECtHR held that, according to Art.35 (1) of ECHR, 'the applicants had to apply to the compensation commission set up under Law no. 6384 insofar as this appeared on the face of it to be an accessible remedy capable of offering them reasonable prospects of having their grievances redressed'.[289] The ECtHR finally ruled the complaint inadmissible due to the failure to exhaust domestic remedies.[290] Similar conclusions were also drawn by the ECtHR in other cases.[291]

Paragraph 2 of this Article focuses on the exceptional cases of the rule of prior exhaustion of local remedies. The Consolidated Statute requires the States Parties to ensure the remedies provided by the competent domestic courts to be available, effective and in conformity with due process of law. This Article particularly required the WCHR to pay attention to the following two criteria when dealing with the issues of admissibility:

a) Whether the domestic courts concerned have the competence to order the interim measures necessary to avoid irreparable damage to a victim or victims of an alleged human rights violation.
b) Whether such courts, when finding a human rights violation, can afford the victim adequate

---

[285] See: *ibid*.
[286] See: *ibid*., pp.28 – 29.
[287] *Ibid*., p.29.
[288] *Ibid*.
[289] *Ibid*.
[290] See: *ibid*.
[291] See: Takis Demopoulos and Others, Evoulla Chrysostomi, Demetrios Lordos and Ariana Lordou Anastasiadou, Eleni Kanari-Eliadou and Others, Sofia (Pitsa) Thoma Kilara Sotiriou and Nina Thoma Kilara Moushoutta, Yiannis Stylas, Evdokia Charalambou Onoufriou and Others and Irini (Rena) Chrisostomouv. Turkey, Application nos. 46113/99, 3843/02, 13751/02, 13466/03, 10200/04, 14163/04, 19993/04, 21819/04, Grand Chamber Decision as to the Admissibility, para.87.

> reparation for the harm suffered, including restitution, rehabilitation, compensation and satisfaction.

In any of these cases, 'this domestic remedy does not have to be exhausted … and the victim can directly raise a complaint before the World Court'.[292]

[292] Kozma, *et al*., *supra* note 31, p.40.

## Section 3: The Application of the Rule of Prior Exhaustion of Local Remedies in the framework of the WCHR

The rule of prior exhaustion of local remedies as a procedural precondition for the exercise of international jurisdiction, encompasses the disinclination to impinge on and/or respect for the sovereignty of States Parties, which in turn underpins this rule. This **Section** will discuss the application of this rule. On this issue, Romano said:

> Indeed, as every international human rights practitioner knows, whenever a new case looms on the horizon, the first questions to be asked are: Has the case been brought before a national court? What was the result? Was it appealed? Is there any remedy that could be pursued which was not? In sum, have domestic remedies been exhausted?[293]

As **Section 2** revealed, under the future WCHR, the rule of prior exhaustion of local remedies essentially stipulates that an applicant cannot lodge claims as to the violation of their rights with the WCHR unless they have first pursued and exhausted judicial remedies through the competent adjudicative bodies of the respondent states. However, the obligations of States Parties which derive from this rule should not be ignored or jettisoned.

### 3.1 The obligations of States Parties under the rule of prior exhaustion of local remedies

The ratification of an international human rights treaty creates both rights and corresponding obligations for a state. If these rights and obligations are to be meaningful, a state must establish mechanisms to test whether a failure to meet these obligations exists. Undoubtedly, '[t]he judiciary has a particularly important role in this regard, as it is the branch of government that, at least in theory, is designed to be independent and impartial and is ordinarily entrusted with the task of monitoring the other branches of

[293] Cesare P. R. Romano: "The Rule of Prior Exhaustion of Domestic Remedies: Theory and Practice in International Human Rights Procedures", in: Nerina Boschiero; Tullio Scovazzi; Cesare Pitea; Chiara Ragni:", in: *International Courts and the Development of International Law: Essays in Honour of Tullio Treves*, The Hague: Berlin; Heidelberg: Asser Press; Springer, 2013, pp.561 – 572, at 562.

government'.[294] In addition, 'the general rule under international law of "exhaustion of domestic remedies" would be unrealistic if the judiciary did not effectively perform this role'.[295]

The current statutes – the NK Statute, the MS Statute and the Consolidated Statute – include some rules about the exceptional situations in which domestic remedies do not have to be exhausted. According to the NK Statute, in a complaint against a State Party, if the WCHR finds that the respondent state failed to establish a national human rights court, or that the procedures before this court were not effective or did not afford due process of law, the complainant will be permitted to lodge the case directly with the WCHR. The MS Statute stipulates that the unreasonable prolongation of domestic remedies may result in an exception to the rule, and the Consolidated Statute indicates that an applicant can be relieved of their obligation to exhaust domestic remedies if these remedies are unavailable, ineffective or not in conformity with due process of law. In other words, it will be important for States Parties to a future Statute of the WCHR to develop domestic mechanisms which will properly remedy violations of rights, and in this way, minimise the need to resort to the WCHR.

### 3.1.1 The obligation to provide available domestic remedies

It will be for the WCHR to decide, on the facts of each case, whether or not an available remedy exists under the legal system of the State in question. In the meaning of both regional and international human rights law, an aggrieved individual is bound only to exhaust those domestic remedies that are available to them. The availability of domestic remedies is frequently defined in terms of the remedies accessible to the applicants under the jurisdiction of a state.[296] The requirement for availability/accessibility is stressed by the existing human rights mechanisms, both at regional and international level, however, the precise details of this requirement have not yet been defined.

States Parties must first provide judicial remedies through ordinary courts of

---

[294] John Squires, Malcolm Langford and Bret Thiele: *The Road to A Remedy: Current Issues in the Litigation of Economic, Social and Cultural Rights*, Sydney: Australian Human Rights Centre, The University of New South Wales in collaboration with Centre on Housing Rights and Evictions, Distributed by UNSW Press, 2005, p.173.

[295] *Ibid*.

[296] In the words of Amerasinghe: 'Availability implies, among other things, accessibility'. Amerasinghe, *supra* note 262, p.325.

unlimited general jurisdiction, both civil and criminal, within their jurisdictional area. In other words, the established judicial remedies within the mainstream of the State Party's justice system must be subject to exhaustion. This does not mean, however, that the WCHR would automatically deem a judicial remedy to be an ineffective remedy if it were provided by a special court generally addressing only one branch of law or having specifically defined powers. There is no doubt that established judicial remedies, in the sense of the current proposal for establishing the WCHR, include ordinary remedies. In addition, judicial remedies provided by special courts could also be characterised as exhaustible remedies in the sense of the future WCHR Statute provided they are directly accessible to individuals.[297]

At a regional level, it is longstanding jurisprudence of the European and Inter-American human rights systems that judicial remedies provided by special courts are subject to exhaustion, provided they are directly accessible to individuals. Within the scope of the European human rights system, Amerasinghe suggested that judicial remedies offered by, for example, special constitutional courts, administrative courts of different kinds, superior administrative courts, administrative courts of appeal, federal administrative courts or adinistrative Detention Commissions, may be subject to exhaustion.[298] As he pointed out:

> [These remedies] may include a disciplinary action of a special nature against the officer concerned before a person or committee with judicial powers, an appeal to the Attorney-General acting in a quasi-judicial capacity, an application for the transfer of a case to another court on the ground of prejudice which would have resulted in a rehearing, or an appeal which would have resulted in the rehearing of the case.[299]

Moreover, despite the fact that Amerasinghe regarded the judicial remedies provided by the special courts as extraordinary remedies of a judicial nature, he maintained the necessity for the exhaustion of these remedies.[300] In his opinion, the EComHR 'has taken

---

[297] *Ibid*., p.183.
[298] See: *ibid*., p.314.
[299] *Ibid*.
[300] Amerasinghe saw the judicial remedies provided by the special courts as extraordinary remedies of a judicial nature. See: *ibid*., p.313. See also: Sullivan, *supra* note 259, p.6. By contrast, some call those remedies not directly accessible to individuals 'extraordinary remedies'. See: for example, Alexander Morawa, Nicole B. P. Coenen and Laura A. Jonas: *Article 3 of the European Convention on Human Rights: A Practitioner's Handbook* (2nd edition), OCCT Handbook Series Vol. 4, World Organisation Against Torture (OMCT), 2014, p.129. To Morawa, *et al.*, access to this kind of remedy is dependent on the discretionary power of a public authority. See: *ibid*. The CoE similarly called such remedies a discretionary or

the view that the extraordinary nature of the remedy does not affect the requirement of exhaustion because the answer to the question of whether the remedy should have been exhausted depended entirely on whether the remedy was adequate and effective'.[301] An extraordinary remedy may be deemed to be not subject to exhaustion, not on the grounds that it is an extraordinary remedy, but rather because the remedy is not effective.[302] The same holds true for the ECtHR.[303]

According to Art.46(2) of ACHR, within the scope of the Inter-American human rights system, the remedies that need be exhausted are, in principle, ordinary rather than extraordinary.[304] As the IAComHR held in the case of *Domínguez Domenichetti v. Argentina*:

> [A]s a general rule the only remedies that need be exhausted are those whose function within the domestic legal system is appropriate for providing protection to remedy an infringement of a given legal right. In principle, these are ordinary rather than extraordinary remedies.[305]

Nevertheless, the IAComHR also pointed out that, in some cases, extraordinary remedies may be suitable for addressing human rights violations.[306] In the case of *Domínguez Domenichetti v. Argentina*, the Commission found the extraordinary *recurso de inaplicabilidad* to challenge convictions issued through the criminal proceedings to be non-exhaustible, not by virtue of its extraordinary nature, but because it could not provide the petitioner with an effective remedy within the meaning of Art.46(2) of ACHR.[307] In some other cases before the IAComHR, petitioners were absolved from the exhaustion of

extraordinary remedy. CoE/ECtHR, *supra* note 263, para.53.

[301] Amerasinghe, *supra* note 262, p.313.

[302] See: *ibid*., p.314. In the *Brückmann v. Federal Republic of Germany* case, as an example, the EComHR 'held that a petition filed with the Court of Appeal after a decision of the German Federal Constitutional Court, in order to re-open proceedings in the case, was not an effective and adequate remedy and, therefore, did not have to be exhausted'. *Ibid*., pp.314 – 315.

[303] See: CoE/ECtHR, *supra* note 263, paras.53, 74.

[304] Sullivan, *supra* note 259, p.6.

[305] *Domínguez Domenichetti v. Argentina*, Petition No. 11.819, IAComHR Report on Admissibility No.51/03, 22 October 2003, para.45. See also: *Tarazona Arriate et al. v. Peru*, Petition No. 11.581, IAComHR Report on Admissibility No. 83/01, 10 October 2001, para.24; *Schiavini and Schnack v. Argentina*, Petition No.12.080, IAComHR Report on Admissibility No. 68/01, 27 February 2002, para.53; *Russell Bucklew and Charles Warner v. the United States*, Petition No. 684-14, IAComHR Report on Admissibility No.54/14, 21 July 2014, para.30; *Digna Ochoa y Plácido et al. v. Mexico*, Petition No. 12.229, IAComHR Report on Admissibility No. 57/13, 16 July 2013, paras.54 – 55; and *etc*.

[306] See: *Domínguez Domenichetti v. Argentina*, *ibid*., para.45. See also: *Graciela Ramos Rocha v. Argentina*, Petition No. 1213-07, IAComHR Report on Admissibility No. 62/15, 26 October 2015, paras.20 – 23;

[307] See: *Domínguez Domenichetti v. Argentina*, *supra* note 305, para.45. See also: *Schiavini and Schnack v. Argentina*, supra note 305, para.53; *Zulema Tarazona Arriate et al. v. Peru*, Petition No.11.581, IAComHR Report on Admissibility No.83/01, 10 October 2001, para.24; *Alejandro Peñafiel Salgado v. Ecuador*, Petition No. 1671-02, IAComHR Report on Admissibility No. 65/12, 29 March 2012, paras.31 – 42; and *etc*.

extraordinary remedies on the grounds that there had been an unwarranted delay in the domestic proceedings.[308]

It is worth noting that, in some cases, the IAComHR did not examine whether the extraordinary remedy in question was in compliance with the rule of prior exhaustion of local remedies under ACHR, because the petitioner had exhausted this remedy. For example, in thecase of *Members of the Trade Union of Workers of the National Federation of Coffee Growers of Colombia v. Colombia*, the petitioner had filed an action seeking a writ of protection after filing his petition with the IAComHR, whereas he argued that this writ of protection is an extraordinary and residual remedy that cannot be filed to challenge judgments. Given this, the IAComHR did not examine whether the writ of protection in question was compatible with Art.46 of ACHR.[309] In some other cases, the IAComHR found the extraordinary remedy to be ineffective, but, given that the petitioner had in any case exhausted this remedy, the IAComHR declared the petition admissible not on the grounds that the remedy in question was ineffective, but because all domestic remedies had been exhausted.[310]

Inspired by the established jurisprudence of the regional human rights mechanisms already in existence, the compliance of a given judicial remedy with the rule of prior exhaustion of domestic remedies depends on its perceived effectiveness in each case. The requirement for effective judicial remedies at a national level will be discussed in **Section 3.1.2**.

Secondly, States Parties are under a legal obligation to ensure that all applicants have access to the courts. This obligation refers to ensuring the availability of all relevant information about established judicial remedies, as well as the suitability of the channels through which such information can be accessed. As mentioned in **Section 1**, specific to the WCHR, when a state submits to the WCHR's jurisdiction the Consolidated Statute will make it obligatory for this state to specify precisely the circumstances in which an

[308] See: for example, *Luiza Melinho v. Brazil*, Petition No.362-09, IAComHR Report on Admissibility No. 11/16, 14 April 2016, para.40; *Digna Ochoa y Plácido et al. v. Mexico*, *supra* note 305, paras.54 – 55; and *etc*.

[309] See: for example, Members of the Trade Union of Workers of the National Federation of Coffee Growers of Colombia v. Columbia, Petition No. 374-05, IAComHR Report on Admissibility No.15/15, 24 March 2015, paras.34 – 39; Emilio Palacio Urrutia et al. v. Ecuador, Petition No.436-11, IAComHR Report on Admissibility No. 66/15, 27 October 2015, para.43; Mariela Del Carmen Echeverría de Sanguino, v. Columbia, Petition No. 406-99, IAComHR Report on Admissibility No. 47/14, 21 July 2014, paras.26 – 33; Jesús Amado Sarria Agredo and children v. Columbia, Petition No. 197-05, IAComHR Report on Admissibility No. 55/12, 20 March 2012, paras.34 – 36; and *etc*.

[310] See: *Daría Olinda Puertocarrero Hurtado v. Ecuador*, Petition No. 910-07, IAComHR Report on Admissibility No. 91/13, 4 November 2013, para.30.

individual complainant must exhaust which particular judicial remedies before lodging their case with the WCHR. At the same time, States Parties have a duty to provide the applicants with this information, making sure that the applicants clearly understand from which court they can seek which established domestic remedies. In order to ensure that the established domestic remedies will be available to the applicants, the States Parties must develop adequate means of informing the general public of the available judicial remedies and of all services to which they could raise their allegations before the competent courts. The States Parties should not conduct themselves in such a way as to leave such information open to any doubt.

The States Parties must also protect applicants from unwarranted exposure to hardship or inappropriate impediment in seeking recourse to these judicial remedies. An onerous or impractical procedural requirement that creates extreme difficulties for any claimant wishing to pursue established judicial remedies may render these remedies effectively inaccessible, and thus absolve the applicant from exhausting them. Examples of unreasonable procedural requirements include short timelines for filing a claim or appeal in complex cases, excessively high fees for filing, and very restrictive requirements regarding standing to bring a case.

Take, for example, excessively high filing fees. The Inter-American human rights system has dealt with this issue. Given that in some petitions victims have alleged that they have not been able to exhaust the domestic remedies set forth in the legislation of the defendant state either because of unreasonably high fees for filing or the high expense of legal assistance, the IAComHR requested that the IACtHR render an advisory opinion on the question of whether the rule of prior exhaustion of local remedies would still apply to them.[311] In this advisory opinion, the IACtHR maintained that the crux of the issue is whether, or under what circumstances, a petitioner's indigence or inability to obtain legal representation would exempt him/her from the requirement to exhaust domestic remedies.[312] The answer to this question depends on a determination of whether an applicant's failure to exhaust domestic remedies in the circumstances posited falls under one or the other exception as spelled out in Art.46(2) of ACHR.[313]

The IACtHR emphasised the general principle that an applicant could not be exempt from the obligation to exhaust domestic remedies under Art.46(1) of ACHR merely

[311] See: IACtHR, *supra* note 266, paras.1 – 3.
[312] See: *ibid*., para.19.
[313] See: *ibid*.

because of economic circumstances.[314] Indigence alone does not mean that an applicant does not have to comply with the rule of prior exhaustion of domestic remedies.[315] In the IACtHR's opinion, the issue of indigence should also be considered, in addition toArt.46(2) of ACHR, in accordance with Arts.1, 8 and 24, which refer respectively to the obligation to respect rights, the right to a fair trial and the right to equal protection.[316] If the respondent state was found to be in violation of its obligations under the above Articles, 'indigence and poverty may be a ground for exempting an individual from exhausting internal remedies on the basis of provisions contained in the American Convention'.[317] As the IACtHR pointed out:

> If a person who is seeking the protection of the law in order to assert rights which the Convention guarantees finds that his economic status (in this case, his indigence), prevents him from so doing because he cannot afford either the necessary legal counsel or the costs of the proceedings, that person is being discriminated against by reason of his economic status and, hence, is not receiving equal protection before the law.[318]

According to Amerasinghe, 'whether indigence would create such a situation depends on a variety of circumstances'.[319] If these circumstances result in the respondent state being in violation of its obligations under ACHR, and Articles 1(1), 8 and 24 in particular, the domestic remedies should be considered as not available.[320]

The IACtHR's approach can be used as a reference for the future WCHR to determine in particular cases whether indigence should exempt an applicant from the obligation to exhaust domestic remedies. That is to say, the conclusion as regards an exception to the rule of prior exhaustion of local remedies arising from indigence should rest not only on the application of the Articles of the future WCHR Statute dealing specifically with this rule, but also on the interpretation of international human rights treaties, or certain provisions thereof, under its jurisdiction *ratione materiae*.

According to this approach, posing an insurmountable obstacle for an applicant to pursue established judicial remedies as regards other practical impediments may also result

---

[314] See: *ibid*., para.20.
[315] See: *ibid*.
[316] See: *ibid*., paras.21 – 30.
[317] Amerasinghe, *supra* note 262, p.330.
[318] IACtHR, *supra* note 266, para.22.
[319] For example, 'whether the proceeding is civil or criminal, whether legal representation is required or necessary for the case, whether court costs are payable and how much, and whether there is available legal representation free of charge as through legal aid, among others'. Amerasinghe, *supra* note 262, p.331.
[320] See: *ibid*.

in these remedies being unavailable. For example, the absence of legal assistance is another factor to be taken into consideration in deciding whether remedies have been made available. The States Parties to the future WCHR Statute could in no event deprive any individual of the right to be assisted by legal counsel of their own choosing. In particular, during criminal proceedings, irrational restrictions on or deprivation of access to legal aid in terms of refusing to allow the applicant legal representation for advice or assistance, or effectively cutting off the applicant's contact with their lawyer(s) either because of imprisonment or disappearance, is in violation of the obligation to respect the right to a fair trial, and other relevant rights under the conventional provisions within the scope of the WCHR's jurisdiction *ratione materiae*. Moreover, consistent patterns of crackdown, or abuses against attorneys by the authorities of a State Party may result in a general fear within the local legal community of representing an affected individual, which might easily lead lawyers to refuse to accept cases which they believe would place their own lives or those of their families in jeopardy. In such a case the WCHR shall, by applying these substantive provisions as supplemental to the rule of prior exhaustion of local remedies, consider the established judicial remedies to be unavailable.

It is worth noting that in the Inter-American human rights system, a consistent pattern of gross human rights violation may sometimes create a presumption that established judicial remedies are not available or would be ineffective.[321] The future WCHR will deliberately make such presumptions. The expression 'gross violation' has a long history in the UN, deriving from the United Nations Economic and Social Council (ECOSOC) Resolutions 1235 (XLII) of 1967[322] and 1503 (XLVIII) of 1970, which referred respectively to 'gross violations' and to 'a consistent pattern of gross and reliably attested violations of human rights'.[323] 'Obviously, the consistent pattern related to the scale of the violations and the word gross to the nature of the violations.'[324] In other words, the expression 'a consistent pattern of gross human rights violations' should be understood in phases: the occurrence of gross human rights violations and the consistent occurrence of such violations.

---

[321] See: *ibid*., p.327.

[322] United Nations Economic and Social Council (ECOSOC): 'Question of the violation of human rights and fundamental freedoms, including policies of racial discrimination and segregation and of apartheid, in all countries, with particular reference to colonial and other dependent countries and territories', ECOSOC 1479th plenary meeting, E/4393, 6 June 1967.

[323] ECOSOC: 'Procedure for Dealing with Communications Relating to Violations of Human Rights and Fundamental Freedoms', 1693rd plenary meeting, E/4832/Add.1, 27 May 1970.

[324] The Redress Trust: Implementing Victims' Rights: A Handbook on the Basic Principles and Guidelines on the Right to a Remedy and Reparation, London: The Redress Trust, March 2006, p.14, note.10.

As for the first phase, the term 'gross violations' indicates nothing more than the nature or gravity of the violations, and even in the case of a gross violation of international human rights law domestic remedies should not automatically be considered unavailable or inaccessible. As Nowak and Kozma pointed out, the term 'gross' 'means particularly serious violations, but does in no way imply that such violations must be widespread or systematic'.[325] The UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (also known as the Van Boven/Bassiouni Principles) reflects this point.[326] As Van Boven explained, in the initial study carried out by the Special Rapporteur under the mandate of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities in 1989, 'it was noted that the word "gross" qualifies the term "violations" and indicates the serious character of the violations but that the term "gross" is also related to the type of human rights that is being violated'.[327]

The Van Boven/Bassiouni Principles stipulates some consequential obligations for a state arising from gross violations of international human rights law (including those constituting crimes under international law). For example, states have the duty to 'investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him'[328] and 'cooperate with one another and assist international judicial organs competent in the investigation and prosecution of these violations'.[329] States have to ensure the non-applicability of statutes of limitations in cases of gross violation of international human rights law.[330] In addition to treating the victims of gross violations of international human rights law with humanity and respect for their dignity and human rights, states must also take appropriate measures to ensure their safety, physical and psychological well-being and privacy, as well as those of their families.[331]

---

[325] Nowak and Kozma, *supra* note 5, p.23, note.40.
[326] General Assembly: "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law", A/RES/60/147, 21 March 2006.
[327] Theo van Boven: "The United Nations Basic Principles and Guidelines on the Right to A Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law", United Nations Audiovisual Library of International Law, p.2. This paper is available at: http://legal.un.org/avl/pdf/ha/ga_60-147/ga_60-147_e.pdf.
[328] A/RES/60/147, *supra* note 326, para.4.
[329] *Ibid*.
[330] *Ibid*., Section V (paras.6 – 7).
[331] *Ibid*., para.10.

More importantly, remedies for gross violations of international human rights law in the sense of the Van Boven/Bassiouni Principles include the victim's right to equal and effective access to justice; to adequate, effective and prompt reparation for harm suffered; and to relevant information concerning violations and reparation mechanisms.[332] For the access to justice, a state is under the legal obligation to guarantee the right of the victims of gross violations of international human rights law to a judicial remedy as provided for under international law,[333] and its domestic laws should guarantee fair and impartial proceedings.[334] This means that the victims of serious/gross violations of human rights law 'have the right of access to justice, which includes being able to trigger effective judicial remedies of a sufficiently high standard of fairness and impartiality'.[335] Accordingly, States should:

a) Disseminate, through public and private mechanisms, information about all available remedies for gross violations of international human rights law and serious violations of international humanitarian law;
b) Take measures to minimize the inconvenience to victims and their representatives, protect against unlawful interference with their privacy as appropriate and ensure their safety from intimidation and retaliation, as well as that of their families and witnesses, before, during and after judicial, administrative, or other proceedings that affect the interests of victims;
c) Provide proper assistance to victims seeking access to justice;
d) Make available all appropriate legal, diplomatic and consular means to ensure that victims can exercise their rights to remedy for gross violations of international human rights law or serious violations of international humanitarian law.[336]

This obligation applies not only to single victims in the case of gross violations of international human rights, but also requires states to 'endeavour to develop procedures to allow groups of victims to present claims for reparation and to receive reparation, as appropriate.'[337]

According to the Van Boven/Bassiouni Principles', justice should be promoted 'by redressing gross violations of international human rights law'.[338] Accordingly, a state shall provide adequate, effective and prompt reparation to victims of acts or omissions which

[332] See: *ibid*., para.12.
[333] See: *ibid*.
[334] See: *ibid*.
[335] The Redress Trust, *supra* note 324, p.32.
[336] A/RES/60/147, *supra* note 326, para.12.
[337] *Ibid*., para.13.
[338] See: *ibid*., para.15.

can be attributed to it and constitute gross violations of international human rights law through endeavouring to establish national programmes for reparation.[339] The reparation may take the form of restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.[340] It is worth noting that some forms of the reparation in the sense of the Van Boven/Bassiouni Principles are of a judicial nature. For example, 'satisfaction' requires states to render 'a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim'[341] or impose 'judicial and administrative sanctions against persons liable for the violations'.[342] This reparation should be 'proportional to the gravity of the violations and the harm suffered'.[343] For example, in the case of an arbitrary detention, which constitutes a gross violation of international human rights law, the domestic law should, apart from allowing the victim to apply for compensation through an administrative procedure, guarantee the right of the victim to bring a claim against the governmental authorities in a judicial court for compensation. 'An adequate, effective and prompt remedy for gross violations of international human rights law … should include all available and appropriate international processes in which a person may have legal standing and should be without prejudice to any other domestic remedies.'[344] It should be pointed out that judicial remedies should be without prejudice to other remedies available to the victim, and should include 'access to administrative and other bodies, as well as mechanisms, modalities and proceedings conducted in accordance with domestic law'.[345]

As far as access to relevant information about violations and reparation mechanisms is concerned, states should develop the means to inform the general public and, in particular, the victims of gross violations of international human rights law, of the rights and remedies addressed by the Van Boven/Bassiouni Principles, as well as of all the available legal, medical, psychological, social, administrative and other services to which victims may have a right of access.

However, as Nowak and Kozma pointed out, the Van Boven/Bassiouni Principles 'do not define the term "gross violations"'.[346] In the ECOSOC Resolutions 1235 and 1503, the

[339] See: *ibid*., paras.15, 16.
[340] See: *ibid*., paras.19 – 23.
[341] *Ibid*., para.22(d).
[342] *Ibid*., para.22(f).
[343] *Ibid.*, para.15.
[344] *Ibid*., para.14.
[345] *Ibid*., para.12.
[346] Nowak and Kozma, *supra* note 5, p.23, note.40.

term 'gross violations' was restricted to the field of civil and political rights.[347] According to Nowak and Kozma, in light of the principle of the equality, indivisibility and interdependence of all human rights, the term 'gross violation' should no longer be restricted to civil and political rights.[348] They suggest that violations of economic, social and cultural (ESC) rights, such as the rights to food, health, housing and education, may also constitute gross violations of international human rights law.[349] As they said: 'Nobody can deny that poverty, illiteracy, starvation and homelessness rank among the most serious, i.e. gross, human rights violations.'[350] If such violations were included in the future WCHR Statute, the Van Boven/Bassiouni Principles could serve as a guide to determining the availability of established domestic remedies.

As for the second phase, the Van Boven/Bassiouni Principles do not explicitly mention whether this is applicable in a situation of the repeated or continuous occurrence of gross human rights violations. Obviously, continuous gross violations of international human rights law within the meaning of the Van Boven/Bassiouni Principles may constitute crimes under international law, which may trigger the intervention of international actors such as the ICC and the Responsibility to Protect (R2P), to halt these violations. International intervention always includes an emphasis of the principle of complementarity, no matter what form it takes.

As mentioned in **Section 2**, the jurisdiction of the ICC has a distinctively complementary character. In the past few decades, as far as the R2P is concerned, the principle of state sovereignty in the human rights arena has no longer been that of non-interference. Sovereignty not only means that a state has the right to control its affairs, it also confers upon a state the primary responsibility for protecting those within its territory. In other words, sovereignty is not a principle which can be allowed to prevent populations from being protected or shielded by international concern, but rather one which entails responsibilities which are shared by states and the entire international community. While being a collective international responsibility, the R2P still emphasises that the primary responsibility for protecting populations from genocide, war crimes, crimes against humanity and ethnic cleansing or their incitement still lies, first and foremost, with the State. The international community also identifies a broader array of

[347] See: *ibid.*
[348] See: *ibid*.
[349] See: *ibid*.
[350] *Ibid*.

tools which can be used to help states fulfil this responsibility. It is only when the national authorities of a state manifestly fail to protect its people, either through a lack of ability or willingness, that the responsibility shifts to the wider international community. In addition, any military intervention authorised by the UN Security Council should be used as a last resort which can be employed only when other peaceful means – including diplomatic, humanitarian and others – have proved to be inadequate. Furthermore, the jurisdiction *ratione materiae* of the ICC and the scope of the R2P are narrowly defined. Put another way; not all gross human rights violations have constituted international crimes such that the ICC or the R2P could become involved.

A corollary is thus warranted such that States Parties to a future WCHR Statute must be given an opportunity to remedy any gross violations of human rights which consistently occur in their territory before becoming subject to international intervention. It will be necessary for the future WCHR to be cautious in determining the availability of established judicial remedies in any State Party where the repeated occurrence of gross human rights violations is reported.

### 3.1.2 The obligation to provide effective domestic remedies

In addition to the assurance of the availability/accessibility of established remedies in the domestic judicial system, States Parties to the WCHR Statute must also ensure that these judicial remedies are effective. An applicant is only required to have recourse to remedies which are capable of providing means of redress. On the other hand, States Parties must ensure that the applicant has effective and sufficient means to obtain for themselves the remedies at their disposal.

The obligation to provide effective domestic remedies is clearly codified by the current statutes. This dissertation is not going to dabble in such a codification –, indeed it is probably not appropriate for it to do so – for the future WCHR. The vague nature of this codification will, however, leave the future WCHR with a large area in which to manoeuvre, and any 'effectiveness' test will be a jurisprudential construct. A *bona fide* 'effectiveness' test to determine when domestic remedies have been exhausted and whether any exceptions are applicable will therefore be a necessity to enable the WCHR to determine whether the domestic judicial system of the respondent state is reasonably capable of providing redress for the harm alleged by the applicants, or to directly remedy

the alleged wrong. This test will have to be conducted by the WCHR on a case-by-case basis in the context of local law and prevailing circumstances. The future WCHR could benefit considerably from jurisprudence to elaborate on precisely what would constitute such an effectiveness test and how it would operate; something which is currently nowhere to be found in the existing statutes.

In practice, existing human rights mechanisms prefer to use more precise phrases, such as 'the reasonable prospect of success' and 'the reasonable possibility of an effective remedy', rather than a generic term such as 'effective', to formulate the objectives of an effectiveness test. A test of 'the reasonable prospect of success' has found its way into the framework of the regional human rights system. In a number of cases, respondent states have been asked to provide examples of an alleged remedy having been successfully utilised by persons in a similar position to that of the applicant. If such a use could not be demonstrated, the ECtHR has rejected preliminary objections based on the failure of the exhaustion of specific domestic remedies and has stated that the remedies in question offered no prospects of success.[351] The Inter-American human rights system and the African human rights system have shared the view of the ECtHR. According to the IAComHR:

> [A] petitioner may be excused from exhausting domestic remedies with respect to a claim where it is apparent from the record before it that any proceedings instituted on that claim would have

[351] See: amongst other, *Open Door and Dublin Well Woman v. Ireland*, application nos. 14234/88 and 14235/88, Court (Plenary), Judgment, Strasbourg, 29 October 1992, paras.47 – 52; *Keegan v. Ireland*, application no. 16969/90, Court (Chamber), Judgment, Strasbourg, 26 May 1994, para.39; *Sejdovic v. Italy*, Application no. 56581/00, Grand Chamber, Judgment, Strasbourg, 1 March 2006, paras.30, 45 – 52, 102; *Paksas v. Lithuania*, Application no. 34932/04, Grand Chamber, Judgment, Strasbourg, 6 January 2011, paras.73 – 78; *Scoppola v. Italy (No.2)*, application no.10249/03, Grand Chamber, Judgment, Strasbourg, 17 September 2009, paras.70 – 78; *Carson and Others v. the United Kingdom*, application no. 42184/05, Grand Chamber, Judgment, Strasbourg, 16 March 2010, para.58, and *etc.*

[351] See: for example, *Akdivar and Others*, *supra* note 265, para.71; *Van Oosterwijck v. Belgium*, application no. 7654/76, Court (Plenary), Judgment, Strasbourg, 6 November 1980; *Brusco v. Italy*, application no. 69789/01, Court (Second Section), Decision, 6 September 2001, p.6; *Koltsidas, Fountis, Androutsos and Others v. Greece*, nos. 24962/94, 25370/94 and 26303/95, EComHR Decision as to the Admissibility, 1 July 1996; *Sardinas Albo v. Italy*, application no. 56271/00, First Section Decision as to the Admissibility, 8 January 2004, p.12; *Muazzez Epoözdemir v. Turkey*, application no. 57039/00, Third Section Decision as to the Admissibility, 31 January 2002, p.6; *Whiteside v. the United Kingdom*, application no. 20357/92, 7 March 1994; *X. v. Federal Republic Germany*, application no. 6271/73, EComHR Decision on the Admissibility, 13 May 1976; *Slobodan Miloševič v. the Netherlands*, application no. 77631/01, Second Section Decision as to the Admissibility, 19 March 2002, p.6; *Tame Allaoui and Others v. Germany*, application no. 44911/98, Fourth Section Decision as to the Admissibility, 19 January 1999, p.5; *D and E. S. v. The United Kingdom*, application no. 13669/88, EComHR Decision as to the Admissibility, pp.6 – 7; *MPP Golub v. Ukraine*, application no. 6778/05, Second Section Decision as to the Admissibility, 18 October 2005, p.12; *A.B. v. the Netherlands*, application no. 37328/97, Second Section, Judgment, Strasbourg, 29 January 2002, para.72; and *etc*.

> no reasonable prospect of success in light of prevailing jurisprudence of the state's highest courts.[352]

The established case law of the AfComHPR similarly reveals that a remedy having no prospect of success does not constitute an effective remedy.[353] The situation seems to be slightly different in the jurisprudence under the UN human rights treaty bodies. Take, for example, the HRC. As well as using the test of a 'reasonable prospect of success',[354] the HRC's case law has also adopted the test of 'the reasonable possibility of an effective remedy'.[355]

According to the Diplomatic Protection of Persons and Property of the International Law Association (ILA) and the ILC, the tests of 'the reasonable prospect of success' and of 'the reasonable possibility of an effective remedy' are different in the context of diplomatic protection. Despite the significant difference between the protection of human rights and diplomatic protection, these two realms are interrelated in that they often pursue similar aims. For example, diplomatic protection itself involves a type of claim concerning human rights. As with the protection of human rights, the effectiveness test in the context of diplomatic protection 'is not whether a successful outcome is likely or possible but whether the municipal system of the respondent State is reasonably capable of providing

---

[352] *Jessica Gonzales and Others v. the United States*, Petition No. 1490-05, IAComHR Report on Admissibility No.52/07, 24 July 2007, para.49. See also: *Gary Graham v. United States*, Case 11.193, IAComHR Report on Admissibility No. 51/00, 15 June 2000, para.60; *Ramón Martinez Villareal v. United States*, Case. 11.753, IAComHR Report on Admissibility No. 108/00, 4 December 2000, para.70; and *etc*.

[353] See: for example, *Dawda Jawara v. The Gambia*, Communication nos. 147/95 and 149/96, paras.32 and 38; *Lawyers for Human Rights v. Swaziland*, Communication No. 251/02, AfComHPR 37th Ordinary Session, 2 July 2005, para.27. See also: *Zimbabwe Human Rights NGO Forum v Zimbabwe*, Communication No. 245/02, AfComHPR 39th Ordinary Session, 15 May 2006, para.71; *Curtis Francis Doebbler v. Sudan*, Communication No. 236/00, AfComHPR 33rd Ordinary Session, 4 May 2003, para.23; and *etc.*

[354] Amerasinghe, *supra* note 262, p.317, note.36. The relevant cases, see: for example, *T. K. v. France*, Communication No.220/1987, CCPR/C/37/D/220/1987, 8 November 1989, para.8.2; *M. K. v. France*, Communication No. 222/1987, CCPR/C/37/D/222/1987, 8 November 1989, para.8.2; *Pratt and Morgan v. Jamaica*, Communications Nos. 210/1986 and 225/1987, 6 April 1989, para.12.3; *Cesario Gómez Vázquez v. Spain*, Communication No. 701/1996, CCPR/C/69/D/701/1996, 11 August 2000, para.10.1; *Franz Wallmann et al. v. Austria*, Communication No. 1002/2001, CCPR/C/80/D/1002/2001, 1 April 2004, para.8.11; and *etc*.

[355] See: for example, *William Torres Ramirez v. Uruguay*, Communication No. 4/1977, CCPR/C/OP/1, 26 August 1977, para.5; *Patiño v. Panama*, Communication No. 437/1990, CCPR/C/52/D/437/1990, 21 October 1994, para.5.2; *Sergey Sergeevich Dorofeev v. Russian Federation*, Communication No. 2041/2011, CCPR/C/111/D/2041/2011, 11 July 2014, para.9.6; *Vladimir Nepomnyaschikh v. Belarus*, Communication No. 2156/2012, CCPR/C/112/D/2156/2012, 18 November 2014, para.8.3; *Vasily Poliakov v. Belarus*, Communication No. 2030/2011, CCPR/C/111/D/2030/2011, 17 July 2014, para.7.3; *V.D. v. Russian Federation*, Communication No. 2198/2012, CCPR/C/116/D/2198/2012, 27 June 2016, para.5.3; *Valentin Evzrezov v. Belarus*, Communication No. 2101/2011, CCPR/C/117/D/2101/2011, 30 August 2016, para.7.3; *Bakur v. Belarus*, Communication no.1902/2009, CCPR/C/114/D/1902/2009, 7 September 2015 para.6.4; and *etc*.

effective relief'.[356]

The difference between these two tests is embodied in the distribution of the burden of proof, which serves as the centrality of the effectiveness test. According to the traditional maxim *onus probandi incumbit ei qui dicit*, it is for the party who makes an assertion to provide proof thereof. In the human rights arena, the applicant and the respondent state share the burden of proof on matters relating to the exhaustion of local remedies in particular cases.[357] In principle, the burden of proof will first and foremost be upon the applicants, who must explain in detail in their initial application what steps have been taken at a national level to exhaust remedies. Alternatively, their application must contain the reasons why they are exempted from doing so. The existence of mere doubts as to the prospect of success of a particular remedy or the reasonable possibility of an effective remedy is not a valid reason for failing to exhaust domestic remedies.[358] 'Unless

---

[356] International Law Commission (ILC): "Draft Articles on Diplomatic Protection with commentaries", p.79. This document is available at: http://legal.un.org/ilc/texts/instruments/english/commentaries/9_8_2006.pdf. As early as in 1956, the Institute of International Law has stated that the rule of prior exhaustion of local remedies in the context of diplomatic protection applies only 'if the internal legal order of the State against which the claim is made provides means of redress available to the injured person which appear to be effective and sufficient'. This Resolution reads:

> Lorsqu'un Etat prétend que la lésion subie par un de ses ressortissants dans sa personne ou dans ses biens a été commise en violation du droit international, toute réclamation diplomatique ou judiciaire lui appartenant de ce chef est irrecevable, s'il existe dans l'ordre juridique interne de l'Etat contre lequel la prétention est élevée des voies de recours accessibles à la personne lésée et qui, vraisemblablement, sont efficaces et suffisantes, et tant que l'usage normal de ces voies n'a pas été épuisé.

Institut de Droit International: "La règle de l'épuisement des recours internes", Session de Grenade – 1956, 18 avril 1956, available at: http://www.justitiaetpace.org/idiF/resolutionsF/1956_grena_01_fr.pdf.

[357] It is generally the case that an applicant maintains that the remedy in question is ineffective, and the respondent state routinely maintains the contrary. However, where an applicant concedes that the remedy concerned is an effective or essential one, there is no reason for the WCHR to go beyond this admission. By the same token, if the respondent state concedes the ineffectiveness of the established judicial remedies, the WCHR shall also accept this admission. Accordingly, there is no reason for the Court to make an 'effectiveness' test whose result may contradict the admission. In the situation where the applicant concedes the effectiveness of the remedy on the one hand, and an equal and opposite admission was made by the respondent state on the other, the admission of the applicant should be accepted by the WCHR.

[358] See: for example, *Retimag v. Federal Republic Germany*, application no. 712/60, EComHR Decision, 16 December 1961; *De Varga-Hirsch v. France*, application no. 9559/81, EComHR Decision on the Admissibility, 9 May 1983; *Akdivar and Others*, *supra* note 265, para.71; *Van Oosterwijck v. Belgium*, application no. 7654/76, Court (Plenary), Judgment, Strasbourg, 6 November 1980; *Brusco v. Italy*, application no. 69789/01, Court (Second Section), Decision, 6 September 2001, p.6; *Koltsidas, Fountis, Androutsos and Others v. Greece*, nos. 24962/94, 25370/94 and 26303/95, EComHR Decision as to the Admissibility, 1 July 1996; *Sardinas Albo v. Italy*, application no. 56271/00, First Section Decision as to the Admissibility, 8 January 2004, p.12; *Muazzez Epoözdemir v. Turkey*, application no. 57039/00, Third Section Decision as to the Admissibility, 31 January 2002, p.6; *Whiteside v. the United Kingdom*, application no. 20357/92, 7 March 1994; *X. v. Federal Republic Germany*, application no. 6271/73, EComHR Decision on the Admissibility, 13 May 1976; *Slobodan Miloševič v. the Netherlands*, *supra* note 351, p.6; *Tame Allaoui and Others v. Germany*, application no. 44911/98, Fourth Section Decision as to the Admissibility, 19 January 1999, p.5; *D and E. S. v. The United Kingdom*, application no. 13669/88, EComHR Decision as to

the domestic remedies rule has been complied with, at least *prima facie*, the petition will likely languish in a bureaucratic limbo or face an early and sudden death'.[359] *De jure*, if the respondent state counterclaims to the effect that there are effective remedies that could have been pursued by the applicant but which the applicant did not pursue, it is the respondent state that bears the burden of proving the existence of such remedies, and of demonstrating that said remedies are capable of providing redress in respect of the applicant's complaints and offer the reasonable prospect of success.[360] In addition, the burden of proof 'may shift during the course of the proceedings, depending on how parties formulate their assertions or propositions of law'.[361]

When it comes to the effectiveness test, the ILC once considered three optional phrases for formulating a negative result of such a test when it drafted the Articles on Diplomatic Protection: 'obvious futility', 'the lack of reasonable prospect of success' and 'the absence of a reasonable possibility of an effective remedy'.[362]

The ILC compared these three phrases. The test of 'obvious futility' 'requires evidence not only that there was no reasonable prospect of the local remedy succeeding but that it was obviously and manifestly clear that the local remedy would fail'.[363] In the

---

the Admissibility, pp.6 – 7; *MPP Golub v. Ukraine*, application no. 6778/05, Second Section Decision as to the Admissibility, 18 October 2005, p.12; *A.B. v. the Netherlands*, application no. 37328/97, Second Section, Judgment, Strasbourg, 29 January 2002, para.72; and *etc*. Within the scope of the Inter-American human rights system, when the petitioner contends that he or she is unable to prove compliance with the requirement indicated in this Article, it shall be up to the State concerned to demonstrate to the Commission that the remedies under domestic law have not been previously exhausted, unless that is clearly evident from the record (Rules of Procedure of the IAComHR, cited in: Romano, *supra* note 293, p.564.)

[359] Romano, *supra* note 293, p.568.

[360] It is impossible to list within the confines of this note the immense case law of the European human rights system on this issue. However, reference can be made to some comprehensive cases in the European human rights system, such as the following: *Akdivar and Others v. Turkey*, *supra* note 265, para.68; *Paksas v. Lithuania*, *supra* note 351, para.75; *Johnston and Others v. Ireland*, application no. 9697/82, Court (Plenary), Judgment, Strasbourg, 18 December 1986, para.45; *Selmouni v. France*, application no. 25803/94, Judgment, Strasbourg, 28 July 1999, para.76; *Scoppola v. Italy (no. 2)*, *supra* note 351, para.71; *Sejdovic v. Italy*, *supra* note 351, para.46; *Dalia v. France*, application no. 26102/95, Judgment, Strasbourg, 19 February 1998, para.38; *Vernillo v. France*, application no. 11189/85, Court (Chamber), Judgment, Strasbourg, 20 February 1991, para.27; *McFarlane v. Ireland*, application no.31333/06, Judgment, Strasbourg, 10 September 2010, para.107; *Yves Mifsud v. France*, application no.57220/00, Grand Chamber Decision as to the Admissibility, 11 September 2002, para.15; and *etc*. Within the Inter-American human rights system, the distribution of the burden of proof in a particular case where the respondent state objects that domestic remedies have not been exhausted is identical to that of the European human rights system. That is to say: the respondent state 'has the burden of proving which domestic remedies remain'. Pasqualucci, *supra* note 189, p.94. For relevant cases, see: *ibid*., p.94, note.88.

[361] ILC: "Third report on diplomatic protection by Mr. John Dugard, Special Rapporteur", A/CN.4/523, 7 March 2002, para.102.

[362] The ILC adopted the text of the Draft Articles on Diplomatic Protection (hereinafter referred to as the 2006 Draft Articles) at its fifty-eighth session in 2006, and submitted to the General Assembly as a part of the Commission's report covering the work of that session. See: ILC, *supra* note 356, p.77.

[363] A/CN.4/523, *supra* note 361, para.31.

ILC's opinion, the test of 'obvious futility' constitutes a very stringent burden of proof on the applicants.[364] As Amerasinghe pointed out, 'the personal opinion of the applicant that a remedy is highly unlikely to succeed is inadequate, if it is not supported by the facts of the case judged objectively'.[365] However, as the ILC observed, the 'obvious futility' test has been strongly criticised by some writers.[366] According to Simpson and Fox, for example, 'the use of such terms as "obviously futile" … in relation to rights of appeal is … misleading'.[367] In their opinion, describing something as 'obvious' means that this thing must be, *ex facie,* immediately apparent.[368] As they observed:

> In the *Finnish Ships* case the arbitrator heard lengthy arguments about the ship owners' right of appeal from the decision of the Arbitration Board of the Court of Appeal and their failure to exercise it, and in his award entered into most detailed reasoning before arriving at the conclusion that the appealable points of law were 'obviously' insufficient to secure a reversal of the decision of the Arbitration Board.[369]

According to the ILC, '[e]xemption from the local remedies rule on the ground of ineffectiveness may be better achieved by a formulation which renders the exhaustion of local remedies unnecessary when the remedies offer no reasonable prospect of success to the claimant'.[370] In its commentary on Article 44(b) of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, the ILC gave implicit support to this phrase. As the ILC stated: 'There is no requirement to use a remedy which offers no possibility of redressing the situation, for instance, where it is clear from the outset that the law which the local court would have to apply can lead only to the rejection of any appeal'.[371] The test of 'the reasonable prospect of success' understands the rule of prior exhaustion of local remedies as being designed by and for the benefit of the respondent states. Accordingly, the burden of proof should primarily be on the respondent state. In the words of Romano:

> Placing the burden of proof on the State makes logical sense. The domestic remedies rule exists

---

[364] *Ibid*., para.20.
[365] Chittharanjan F. Amerasinghe: "The Local Remedies Rule in an Appropriate Perspective", in: *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (ZaöRV), Vol. 36, 1976, pp.727 – 759, at 751.
[366] See: A/CN.4/523, *supra* note 361, para.30.
[367] John Liddle Simpson and Hazel Fox: *International Arbitration: Law and Practice*, London: Stevens & Sons, 1959, p.114. Cited in: *ibid*., para.36.
[368] See: *ibid*.
[369] *Ibid*.
[370] A/CN.4/523, *supra* note 361, para.31.
[371] ILC: *Yearbook of the International Law Commission*, 2001, Vol.2, Part.2, A/CN.4/SER.A/2001/Add.1 (Part 2), United Nations: New York and Geneva, 2007, p.121.

> for the benefit of the State, and, if the State decides to invoke it, the burden should be on the State.[372]

However, the ILC seemed to take another position when it came to diplomatic protection. In its commentaries on the 2006 Draft Articles, the ILC opined that the test of 'the reasonable prospect of success' 'is too generous to the claimant'.[373] All the applicants need to do is to demonstrate the existence of a claim of the same nature that has been dismissed by the domestic courts and such unpromising case law may be sufficient to indicate that there is no real prospect of success. 'It seems wiser, therefore, to seek a formulation that invokes the concept of reasonableness but which does not too easily excuse the claimant from compliance with the local remedies rule'.[374] The ILC adopted the test of 'the reasonable possibility of an effective remedy' in the context of diplomatic protection. This kind of test 'occupies an intermediate position between the test of 'obvious futility' and that of 'the reasonable prospect of success'.[375] As the ILC pointed out:

> This formulation avoids the stringent language of "obvious futility" but nevertheless imposes a heavy burden on the claimant by requiring that he prove that in the circumstances of the case, and having regard to the legal system of the respondent State, there is no reasonable possibility of an effective remedy.[376]

It can be found from the preceding discussion that the future WCHR will need to verify the effectiveness of domestic remedies on the evidence – presented in the submissions of both the applicant and the respondent state – presented to it and come to its own conclusion, taking into account the circumstances surrounding the remedy. The phrases 'obvious futility', 'the reasonable prospect of success' and 'the reasonable possibility of an effective remedy' discussed above represent different objectives of the effectiveness test, which may affect the distribution of the burden of proof between the applicant and the respondent state in particular cases. For the sake of the future WCHR, there is therefore a dire need for greater clarity as to the exact object of the effectiveness test.

---

[372] Romano, *supra* note 293, p.568.
[373] ILC, *supra* note 356, pp.77 – 78.
[374] A/CN.4/523, *supra* note 361, para.34.
[375] See: ILC: "Third report on diplomatic protection by Mr. John Dugard, Special Rapporteur", A/CN.4/523, 7 March 2002, para.20.
[376] ILC, *supra* note 356, p.78.

### 3.1.3 The obligation to provide domestic remedies without unreasonable prolongation

Even where established domestic remedies are available to the applicants and are capable of providing means of redress, unduly prolonged domestic processes may also exempt the applicants from the obligation to exhaust these remedies. Over the years, an obligation on states to provide domestic remedies within a reasonable time as a condition of accepting the contentious jurisdiction of the regional and international human rights mechanisms has been established by statutes.[377] Accordingly, a failure to exhaust domestic remedies becomes invalid as an objection to many applications where dilatory proceedings are concerned. In other words, undue delay may offer good grounds for a complaint to be heard before the WCHR immediately, without the exhaustion of local remedies.

The obligation to provide domestic remedies without unreasonable prolongation is also connected to the application of a time limit within which a communication/complaint must be submitted before the relevant human rights mechanism. Many regional and international human rights instruments have set such time limits. At the regional level, Art.35(1) of ECHR (the ex-Art.26) obliges petitioners to lodge their complaints within six

[377] See: for example, the UN human rights treaty bodies: Art.5(2)(b) of OP-ICCPR, Art.3(1) of OP-ICESCR, Art.22(4)(b) of CAT, Rule 107(1)(f) of the Committee against Torture (CAT Committee) Rules of Procedure (1998), Rule 107(e) of the CAT Committee Rules of Procedure (2002), Rule 113(e) of the CAT Committee Rules of Procedure (2011, 2014), Art.4(1) of OP-CEDAW, Art.7(e) of OP (on a communications procedure)-CRC, Rules 15(1)(i) and 16(3)(g) of the Committee on the Rights of the Child (CRC Committee)'s Rules of Procedure, Art.77(3)(b) of ICMW, Art.2(d) of Optional Protocol to the Convention on the Rights of Persons with Disabilities (OP-CRPD), Art.31(2)(d) of ICED, Rule 65(3)(c) of the Committee on Enforced Disappearance (CED Committee)'s Rules of Procedure. The regional human rights mechanisms: Art.46(2)(c) of ACHR, Art.31(1)(c) of IAComHR Rules of Procedure and Art.56(5) of AfCHPR. Administering justice without undue delay is a requirement of the rule of law. This obligation enshrines a favourite maxim that 'justice delayed is justice denied'. According to the Organization for Security and Co-operation in Europe (OSCE) Office for Democratic Institutions and Human Rights (ODIHR), this obligation 'is to avoid keeping persons in a state of uncertainty by protecting all parties to court proceedings against excessive procedural delays, which may, in turn, jeopardize the effectiveness and credibility of the administration of justice'. ODIHR: *Legal Digest of International Fair Trial Rights*, OSCE/ODIHR, 2012, p.126. In some regional and international human rights instruments, providing domestic remedies without undue delay also refers to the conventional obligation of the states to guarantee individuals the right to a trial without undue delay. See: for example, Art.14(3)(c) of ICCPR, Art.14(7)(a) of ICERD, Art.6(1) of ECHR, Art.8 of ACHR and Art.7(1) of AfCHPR. An unreasonable delay in entering a judgment/decision may therefore violate the above-mentioned Articles. The HRC further stated in the General Comment No.13 that the right to be tried without undue delay is a guarantee that 'relates not only to the time by which a trial should commence, but also the time by which it should end and judgement be rendered; all stages must take place "without undue delay"'. HRC General Comment No.13: Article 14 (Administration of justice), 13 April 1984, para.10.

months of any final decision. Amerasinghe observed that a six-month rule would also be relevant with regard to time taken to reach a final decision to the definition of the concept of undue delay for the exhaustion of local remedies proper.[378] As he said:

> For the purpose of the six-month rule the fact that further recourse is available would result in time not having begun to run, while, if there is no further recourse available, the final decision would have been taken and time would have begun to run from the time that decision had been taken ….[379]

Art 46(1)(b) of ACHR set the same time limit. This Article 'exists to allow for juridical certainty while still providing sufficient time for a potential petitioner to consider her position'.[380] Unlike the European and Inter-American human rights system, AfCHPR has not defined a time limit within which a communication must be submitted before the AfComHR, but Art.56(6) of AfCHPR indeed mentions that the communication must be submitted within a reasonable period. In practice, the AfComHPR once advised on the early submission of communications.[381] Subsequently, the AfComHPR, as observed by the Minority Rights Group International, drawing on the jurisprudence of the European and Inter-American human rights systems, 'now requires that a communication be submitted within a six month period to meet the reasonable time requirement'.[382] Despite this, the AfComHPR may still 'consider a delayed communication submitted after this time frame if compelling reasons are presented or if it is an unusual standard in relation to the merits of the case'.[383]

At the international level, many core international human rights treaties link the obligation to obtain a final judgment/decision to the time limit as such for the submission of communications. For example, Art.3(2)(a) of OP-ICESCR and Art. 7(h) of Optional Protocol to the Convention on the Rights of the Child on a communications procedure (OP (on a communicaitons procedure)-CRC) set a one-year time limit for initial submissions. Art.14(5) of International Convention on the Elimination of All Forms of Racial

---

[378] See: Amerasinghe, *supra* note 262, p.323.
[379] *Ibid*., pp.323 – 324. Romano expressed a similar view: '[T]he time-limit rule is in the end subordinate to the rule of the exhaustion of domestic remedies because the time limit only lapses after the remedies have been exhausted.' Romano, *supra* note 293, p.562, note.5.
[380] Pasqualucci, *supra* note 189, p.88.
[381] See: *Tsatsu Tsikata v. Republic of Ghana*, Communication No. 322/2006, AfComHPR 55th Ordinary Session, 14 October 2014, para.52.
[382] Minority Rights Group International, *supra* note 269, p.9. See also: FIDH: *Filing a Communication before the African Commission on Human and Peoples' Rights*, 2013, pp. 15-16.
[383] Minority Rights Group International, *supra* note 269, p.9.

Discrimination (ICERD) requires an author to submit their communication within six months of establishment by the competent body or indication from the respondent state according to Art.14(2) of the same Convention. By contrast, some treaty bodies, such as HRC, the Committees of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (CAT) and ICPRD, have no such time limits on the submission of complaints. Nevertheless, they also uphold the view that it is best to file complaints expeditiously following the exhaustion of domestic remedies.

It can be found that such a time limit forces the human rights mechanisms (both at a regional and international level) to deal with the question of the final decision within a reasonable time. None of the current statutes of the proposed WCHR stipulates a time limit for the submission of communications. In the light of the generally recognised rules of international law, it is sensible for any complainant to file complaints expeditiously. More importantly, the obligation of the States Parties to provide domestic remedies without unreasonable prolongation has a direct bearing on the determination of the starting point of this time limit. As this **Chapter** keeps emphasising, the rationale behind the rule of prior exhaustion of local remedies is that each State Party to the future WCHR Statute shall first be given an opportunity to take immediately available remedies with a view to rectifying the behaviour of its authorities within its own legal systems and thereby to do justice to the applicants.

As the discussion below (**Section 3.2.4**) indicates, the obligation of the applicants to obtain a final judgment/decision embodies, or gives meaning to, the exhaustion rule. A final decision means that no further recourse is available and that the proceedings of all potential domestic remedies have been completed. Accordingly, a complaint lodged with a regional or international human rights mechanism should not be deemed inadmissible if its allegations are in respect of an ongoing or unconcluded trial. It would, however, prove confusing and frustrating to the applicants if the WCHR were to return their complaints until such time as a final judgment or decision was provided, especially in view of the fact that justice is often delayed in the judicial system of the States Parties. As Edel pointed out:

> Access to the courts will remain largely theoretical and illusory if they do not deliver judgment within a reasonable time, since the right to a court is exercised for the purpose of obtaining a decision. It is the court's duty to settle cases, that is, to put an end to uncertainty. Delay in legal

> proceedings has the effect of keeping an individual in a protracted state of doubt that may be considered akin to a denial of justice.[384]

And worse still, an 'unreasonable delay' in the administration of justice would make this time limit meaningless, because its starting point would be indeterminate until the completion of domestic proceedings. As a result, if an applicant faces an undue delay in securing a remedy, this will override the need to first seek justice in the domestic courts.

Returning to the current proposal for establishing the WCHR, the MS Statute cites unduly prolonged or protracted national judicial procedure as one of the qualifying exceptions to the rule of prior exhaustion of local remedies. An applicant may be able to seek an exception to the rule of prior exhaustion of local remedies if they can convince the WCHR that no remedy can be acquired within a reasonable period of time. It seems somewhat odd that the Consolidated Statute does not also include this exception.

'Unreasonable (undue or unwarranted) delay (prolongation)' is, of course, a relative term. 'In the abstract, …, a particular duration cannot be termed reasonable or unreasonable solely according to whether it keeps within or overruns a certain period of time specified beforehand'.[385] The existing human rights mechanisms, including both those at the regional and international level, do not and cannot indicate a universally applicable criterion for how long the national judicial procedure should take or what can be understood as 'unreasonable delay'. In their jurisprudence of the 'reasonableness' assessment, the circumstances of the case play a dominant role.

Take, for example, the regional human rights mechanisms. A certain consistency adopted by the European human rights system is that the reasonableness should be assessed primarily with reference to the circumstances of the case. As the ECtHR held in the case of *König v. the Federal Republic of Germany*: 'The reasonableness of the duration of proceedings covered by Article 6 paragraph 1 ... must be assessed in each case according to its circumstances'.[386] 'In stating that reasonableness is to be assessed primarily with reference to "the circumstances of the case", the Court emphasises that the

---

[384] Frédéric Edel: The length of civil and criminal proceedings in the case-law of the European Court of Human Rights (2nd edition), Strasbourg: Council of Europe Publishing, 2007, p.6.
[385] *Ibid*., p.35.
[386] *König v. the Federal Republic of Germany*, application no. 6232/73, Court (Plenary), Judgment, Strasbourg, 28 June 1978, para.99. A similar or identical sentence can be found in a number of later EComHR's decisions and ECtHR's judgments. See: for example, *Cerin v. Croatia*, application no. 54727/00, Fourth Section Decision as to the Admissibility, 8 March 2001, para.1; *Kemmache v. France (No.1 and No.2)*, application nos. 12325/86 and 14992/89, Court (Chamber), Judgment (Merits), 27 November 1991; *Rajak v. Croatia*, application no. 49706/99, 28 June 2001, para.39; *Comingersoll S.A. v. Portugal*, application no. 35382/97, Judgment, Strasbourg, 6 April 2000, para.19, and *etc.*

assessment is highly relative and specific to each case.'[387] Within the scope of the Inter-American human rights system, IAComHR admitted that the Commission itself 'does not have hard-and-fast rules as to what period of time would constitute an "unwarranted delay". Instead, the Commission examines the circumstances of the case and does a case-by-case assessment to determine whether there has been an unwarranted delay….'[388] The same holds true for the African human rights system. The AfComHPR 'has previously interpreted the "reasonable time period" requirement in light of all facts surrounding a particular complaint and considered individual reasons for the delay to ensure a just and fair determination'.[389]

It can reasonably be predicted that the future WCHR will face a thorny problem when it comes to laying down a definite length of time that would constitute undue delay for all complaints. For the future WCHR, scrutiny of the compliance of the States Parties with the reasonable time requirement calls for an assessment of each specific case. In any particular case, taking into account *in toto* the circumstances of the case, the WCHR will have to assess whether the period of time which has elapsed between the date upon which domestic remedies had initially been invoked and the moment the complaint is submitted to the WCHR has constituted an unreasonable delay. To quote Amerasinghe: 'The circumstances of each case would certainly be a determining factor. Much would depend on the judicial assessment of the situation in each case'.[390]

Determinination of whether or not the delay in administering justice is on a case-by-case basis, and the existing human rights mechanisms have each developed their own criteria. Take, for example, the European human rights system. The ECtHR listed the following three criteria in the assessment of unreasonable prolongation, As the Court put it in the case of *Frydlender v. France*:

> The 'reasonableness' of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and of the relevant authorities and what was at stake for the applicant in the dispute.[391]

---

[387] Edel, *supra* note 384, p.34.
[388] *Capote et al. v. Venezuela*, Petition No. 4348-02, IAComHR Report on Admissibility No. 96/06, 21 October 2006, para.72.
[389] Minority Rights Group International, *supra* note 269, p.9.
[390] *Ibid*., p.211.
[391] *Frydlender v. Franc*, application no.30979/6, Judgment, Strasbourg, 27 June 2000, para.43. See also: *Unión Alimentaria Sanders S.A. v. Spain*, application no. 11681/85, Court (Chamber), Judgment, Strasbourg, 7 July 1989, para.31; *Kemmache v. France (No.1 and No.2)*, application nos. 12325/86 14992/89, Court

Edel further generalised three models for using these three criteria in the assessment of unreasonable prolongation, including the comparative assessment, the objective assessment, and the specific or overall assessment. For instance, in the objective assessment, Edel observed that the ECtHR uses two criteria: 'the nature of the case – firstly its degree of complexity and secondly what is at stake in the proceedings for the applicant' and 'the conduct of the parties to the proceedings' – to whom should the delay in question be attributed.[392] Dinjens and Henning have listed five criteria with regard to the same issue, including: the complexity of the case, the conduct of the applicant, the conduct of the competent authorities, what is at stake for the applicant in the proceedings and the state of those proceedings.[393] Apart from 'the conduct of the applicant and of the relevant authorities' listed by the ECtHR as two separate criteria, they suggested another criterion that needs to be taken into consideration during the assessment, that is: the 'state of proceedings'.[394] Namely: 'the Court would take into consideration the time frame between the beginning of the national procedure and the filing of the complaint before the ECtHR'.[395]

Although not as advanced as the ECtHR has been, the Inter-American human rights system has, for instance, in the case of *Capote et al. v. Venezuela,* also expressed the view that circumstances can be considered in the assessment of unreasonable delay. As the IAComHR found:

> To determine whether an investigation [in a criminal case] has been carried out 'promptly,' the Commission takes a number of factors into account, such as the time that has passed since the crime was committed, whether the investigation has moved beyond the preliminary stage, the measures the authorities are adopting, and the complexity of the case.[396]

On the grounds of this finding, Sullivan summarised some factors to be evaluated in

(Chamber), Judgment (Merits), 27 November 1999, para.50; *Martins Moreira Case v. Portugal*, application no. 11371/85, Court (Chamber), Judgment (Merits and Just Satisfaction), 26 October 1988, para.45; *Katte Klitsche de la Grange v. Italy*, application no. 12539/86, 27 October 1994, paras.51 – 63; and *etc*.

[392] For the information on how these three models use these criteria and factors, see: Edel, *supra* note 384, pp.33 – 70.

[393] Els Dinjens and Warda Henning: "Undue Delay in the case-law of the European Court of Human Rights: Varicak Marica v. Croatia Osiguranje", Amsterdam International Law Clinic, 2 November 2001, pp.9 – 14.

[394] *Ibid*., pp.13 – 14.

[395] *Ibid*., p.13.

[396] Capote et al. v. Venezuela, supra note 388, para.72.

determining the unacceptable delay in the Inter-American human rights system.[397] They include: to whom the delay in question should be attributed,[398] the nature and severity of the violation,[399] and the likelihood of the negative impact of this delay on the effectiveness of the relief sought by the petitioner.[400]

Generally speaking, as mentioned, it will predictably be difficult or even impossible for the future WCHR to lay down either a fixed length of time that would constitute undue delay for all complaints, or a complete list of factors or criteria that affect the assessment of undue delay. However, although it may have no definitive answers to these two issues, the future WCHR will still need to respond to them. A fixed length of time, such as six months, and a case-by-case basis, are the responses which have been developed by the current human rights systems and the proposed statutes for a WCHR. The future WCHR can take these into account when developing its own response.

### 3.2 The obligations of the applicant under the rule of prior exhaustion of local remedies

As explained in the previous section, the States Parties to the future WCHR Statute must guarantee that the judicial remedies they have established are available and effective, and must provide these remedies within a reasonable time. The rule of prior exhaustion of local remedies 'is riddled with many far-reaching exceptions that have gradually formed a rather ponderous – and somewhat still jumbled – body of law'.[401] If any of the obligations as mentioned in **Section 3.1** are not fulfilled by States Parties to the WCHR, the applicant may be excused from the duty of exhaustion. It should be noted that 'these exceptions are jurisprudential constructs, as opposed to statutory rules'.[402]

As for the applicants, the WCHR will not intervene unless the applicant has exhausted all established judicial remedies, where they are likely to be available, effective and

---

[397] See: Sullivan, *supra* note 259, p.18.
[398] See: *Silvia Arce et al. v. Mexico*, Petition No. 1176-03, IAComHR Report on Admissibility No. 31/06, 14 March 2005, paras.26 – 28.
[399] See: for example, *Workers Belonging to the Association of Fertilizer Workers (FERTICA) Union v. Costa Rica*, Petition No. 2893-02, IAComHR Report on Admissibility No. 21/06, 2 March 2006, para.37; *Nueva Venecia Massacre v. Colombia*, Petition No. 1306-05, IAComHR Report on Admissibility No. 88/06, 21 October 2006, paras.26 – 27; *Caso Velásquez-Rodríguez v. Honduras*, IACtHR Judgment (Preliminary Objections), 26 June 1987, para.93; and *etc*.
[400] See: Capote et al. v. Venezuela, supra note 388, para.72.
[401] Romano, *supra* note 293, p.564.
[402] *Ibid*., pp.564 – 565.

provided within a reasonable time, with due diligence. The idea of 'due diligence' embodies the following aspects: the obligation to substantiate the claim, to raise the substance of the claim before domestic courts, to observe the procedural requirements according to domestic laws, and to obtain a final judgment/decision. Before pronouncing on the question of the admissibility of a complaint, the WCHR must examine whether the prerequisites mentioned above have been fulfilled.

### 3.2.1 The obligation to substantiate the claim

'The decision whether to use an international complaint mechanism may be influenced by whether or not a violation of human rights has occurred and can be substantiated'.[403] The rule of prior exhaustion of local remedies applies to proceedings before the WCHR which are adversarial in nature. It is therefore for the parties to substantiate their claims and responses.

For the applicants, this means they must try to sufficiently substantiate their complaint in particular cases. The WCHR will consider a complaint inadmissible if the applicant is unable to sufficiently demonstrate that the facts of their complaint tend to establish a violation of the rights guaranteed in the relevant human rights instrument or certain provisions thereof. The obligation to substantiate claims has a two-fold meaning. It is first about the establishment of the facts. 'Although framed in legal terms, the question whether a matter is admissible is also often factual in nature'.[404] For the purposes of admissibility, an applicant has to convince the WCHR that these facts would amount to a breach of the treaty or certain provisions thereof under the WCHR's jurisdiction *ratione materiae*. Accordingly, they must submit to the Court as detailed an account of the facts as possible, and any relevant information they have at their disposal, rather than cherishing the illusion that the Court will imply any facts from the claim as presented before it. For example, in addition to detailing which rights protected under the treaty or certain provisions thereof have been violated by the respondent state, the applicant must also specify the way in

[403] Australian Human Rights Commission: "Mechanisms for advancing women's human rights: A guide to using the optional protocol to CEDAW and other international complaint mechanisms", 2011, p.37. This document is available at: https://www.humanrights.gov.au/sites/default/files/content/sex_discrimination/publication/mechanisms/opcedaw.pdf.

[404] Frans Viljoen: "Fact-Finding by UN Human Rights Complaints Bodies – Analysis and Suggested Reforms", in: *Max Planck Yearbook of United Nations Law*, Vol. 8, 2004, pp.49 – 100, at 66.

which these rights have been violated. The more salient the details in the complaint, the greater the likelihood that it will be considered credible. An individual complaint is only admissible if the applicant is able to substantiate that they have been affected by the conduct of the respondent state, since none of the international human rights treaties under the WCHR's jurisdiction *ratione materiae* confers upon the Court a right to have measures examined by the States Parties 'in abstracto' in light of their compatibility with the rights and freedoms enshrined in it.

The obligation to substantiate the claim(s) before domestic courts also refers to the provision of sufficient supporting evidence. On a preliminary examination of the complaint, an applicant does not need to provide irrefutable proof of their allegations, but they must submit sufficient evidence and legal argument to convince the WCHR to proceed to an examination of its merits at this stage. That is to say, at this stage the standard of proof involves a lower level of certainty: the applicant 'must initially make out a credible *prima facie* case'.[405] The supporting documentary evidence, such as 'witness statements, police reports, decisions by local courts or tribunals, photographs, medical and psychological reports including autopsies if relevant, and other official documentation',[406] may bolster this credibility. In addition, while not being specifically related to the facts of the case, ancillary material such as reports from IGOs or NGOs, specific press releases or governmental reports may be helpful.[407] The facts and evidence as mentioned above should be as concrete and accurate as possible, and directly relevant to the applicant's own situation.[408] If the WCHR considers that, in light of the applicant's submissions, their arguments have not been sufficiently developed to demonstrate a violation of the treaty in question or certain provisions thereof, the Court may reject the claim as 'insufficiently substantiated' or 'manifestly ill-founded'.

The obligation to substantiate is well-established jurisprudence of the UN human rights treaty bodies. For some of them (*i.e.,* HRC, Committee on the Elimination of Racial Discrimination (CERD Committee), CAT Committee and the Committee on Enforced Disappearances (CED Committee)), none of the admissibility requirements in the respective treaty or the optional protocol thereto refers explicitly to non-substantiation as a

[405] Joseph, *et al.*, *supra* note 280, p.89.
[406] *Ibid*., p.87.
[407] See: *ibid*., p.87.
[408] 'It is not enough, for example, to point out that one is a member of an ethnic group which has historically suffered from human rights abuses at the hands of a particular State government, without establishing that one has suffered or endures a high risk of suffering personal abuse.' *Ibid*., p.88.

ground for inadmissibility, nevertheless, this requirement can be found in the rules of procedure of these committees.[409] By contrast, the Committee on Economic, Social and Cultural Rights (CESCR Committee), the Committee on the Elimination of Discrimination against Women (hereinafter referred to as CEDAW Committee), the Committee on the Rights of the Child (CRC Committee) and the Committee on the Rights of Persons with Disabilities (CRPD Committee) enact this obligation in both the optional protocol to the respective convention and in the committee's rules of procedure.[410] It is worth noting that the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families creates no obligation concerning substantiation. According to Art.77(2), the Committee on Migrant Workers (CMW Committee) shall declare inadmissible any communication which it considers to be an abuse of the right of submission of such communications or to be incompatible with the provisions of the Convention. Neither do the Rules of Procedure of the CMW Committee make any mention of this obligation.

Accordingly, for the purposes of admissibility, the author of the communication must provide the HRC with specific information that all the claims in their complaint are credible. The absence of such information in their submissions may lead the HRC to regard the case as inadmissible. 'Emotional language, bald assertions without supporting evidence, and assumptions will detract from the credibility of the account.'[411]

A general reference to the inconsistency of the legislation or practices in the

[409] See: HRC: "Rules of procedure of the Human Rights Committee", CCPR/C/3/Rev.8, 22 September 2005, Rule 96 (b); HRC: "Rules of procedure of the Human Rights Committee", CCPR/C/3/Rev.9, 13 January 2011, Rule 96 (b); HRC: "Rules of procedure of the Human Rights Committee", CCPR/C/3/Rev.10, 11 January 2012, Rule 96 (b); Committee on the Elimination of Racial Discrimination (CERD Committee): "Rules of Procedure of the Committee on the Elimination of Racial Discrimination", CERD/SP/2/Rev.1 and CERD/C/35/Rev.3, 10 November 1987 and 1 January 1986, Rule 91(d); CAT Committee: "Rules of Procedure", CAT/C/3/Rev.3, 13 July 1998, Rule 75(1); CAT Committee: "Rules of Procedure", CAT/C/3/Rev.4, 9 August 2002, Rule 75(1); CAT Committee: "Rules of Procedure", CAT/C/3/Rev.5, 21 February 2011, Rule 81 (1); CAT Committee: "Rules of Procedure", CAT/C/3/Rev.6, 1 September 2014, Rule 81 (1); CED Committee: "Rules of Procedure", CED/C/1, 22 June 2012, Rule 91(1).

[410] See: Art.3 (2)(3) of OP-ICESCR; CESCR Committee: "Provisional rules of procedure under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, adopted by the Committee at its forty-ninth session (12-30 November 2012), Procedures for the consideration of individual communications received under the Optional Protocol", E/C.12/49/3, 5 January 2013, Rule 26; Art.4 (2)(c) of OP-CEDAW; CEDAW Committee: "Rules of Procedure", HRI/GEN/3/Rev.3, 28 May 2008, Rule 82; Art.7(f) of OP (on a communications procedure)-CRC; CRC Committee: "Rules of procedure under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure", CRC/C/62/3, 16 April 2013, Rules 16 and 34; Art.2(3) of OP-CRPD; CRPD Committee: "Rules of Procedure", CRPD/C/1, 5 June 2014, Rule 82(1); CRPD Committee: "Rules of Procedure", CRPD/C/4/2/Rev.1, 16 December 2013, Rule 82(1); CRPD Committee: "Rules of Procedure", CRPD/C/4/2, 13 August 2010, Rule 82(1).

[411] Joseph, *et al.*, *supra* note 280, p.85.

respondent state with regard to the rights protected under ICCPR cannot serve as such evidence. In the case of *Hickey v. Australia*, for example, the author claimed that the respondent state had violated the Covenant because of its failure to conduct an independent police investigation into her son's death. The HRC found the author had failed to substantiate this claim because she had formulated her claim regarding the lack of independence of the police investigation in general terms, rather than substantiating it with concrete facts and evidence.[412] She did not 'lodge an appeal against any aspect related to this aspect related to the police investigation or the coroner's inquest at the national level, nor does she claim before the Committee that the coroner was not independent'.[413] The HRC therefore decided that this communication was inadmissible.[414] Conversely, in a case where the respondent state expresses their response to a challenge in general terms without submitting concrete evidence, the WCHR may likewise make it clear that this challenge does not suffice to refute an applicant's well-founded allegations.

The author must make sure that their allegation is not based on groundless conjecture or fear. In the case of *S.V. et al. v. Canada*, the author of the communication, a citizen of Moldova, claimed that Canada's denial of his refugee status and his deportation to Romania as a result of this decision had constituted a violation of Art.7 of ICCPR, because he was likely to be deported back to Moldova from Romania, and ultimately tortured. The HRC agreed with the Canadian government that, although the author might be tortured if he returned to Moldova, there was no credible evidence to demonstrate that the Romanian government would deport him to that country.[415] Given this, the HRC declared the communication inadmissible on the grounds that the claims of the author were insufficiently substantiated.[416] In cases involving non-refoulment protection under Art.3 of CAT, the CAT Committee requires the applicants to submit all pertinent information according to General Comment No. 1 of the Committee.[417] In the case of *I.M. and V.Z.*

---

[412] See: *Hickey v. Australia*, Communication No. 1995/2010, CCPR/C/111/D/1995/2010, 20 October 2014, para.8.4.
[413] *Ibid*.
[414] See: *Ibid*., para.9(a). See also: *O.K. v. Latvia*, Communication No. 1935/2010, CCPR/C/110/D/1935/2010, 28 May 2014, para.7.4; *Huseynov v. Azerbaijan*, Communication No. 2042/2011, CCPR/C/111/D/2042/2011, 26 August 2014, para.6.4; *E.Z. v. Kazakhstan*, Communication No. 2021/2010, CCPR/C/113/D/2021/2010, 1 June 2015, paras.7.5 – 7.8; and *etc*.
[415] See: *S.V. et al. v. Canada*, Communication No. 1827/2008, CCPR/C/105/D/1827/2008, 15 May 2001, paras.8.3 – 8.8.
[416] See: *Ibid*., para.9(a). See also: *S.Y.L. v. Australia*, Communication No. 1897/2009, CCPR/C/108/D/1897/2009, 11 September 2013, paras.8.4; *Kouidis v. Greece*, Communication No.1070/2002, CCPR/C/86/D/1070/2002, 26 April 2006, para.6.2; and *etc*.
[417] The CAT Committee enumerates at least 7 types of information in this respect. They are:

*(represented by counsel) v. Denmark*, for example, the applicants claimed that the decision by Denmark to extradite them to Romania had constituted a breach of Art.3 of CAT because they would risk persecution and be subjected to torture if they were deported to Romania.[418] However, the CAT Committee considered that the authors of the communication had failed to present substantiation of any of their claims under Art.3 of the Convention. The Committee noted that none of the arguments presented by the complainants were specifically related to allegations of violations under the Convention, as they referred only to claims relating to their conditions of detention without describing these conditions;[419] they therefore declared the communication inadmissible.[420]

The actions of an applicant may also result in non-substantiation. In the case of *X v. Denmark*, the author of the communication was a Syrian citizen who had been recognised as a refugee with the right to work legally in Greece, where he had lived from 2007 to 2010.[421] He subsequently returned to Syria voluntarily in 2010.[422] He claimed that his deportation would constitute a violation of Art.7 of the ICCPR because 'he would risk being targeted by neo-Nazis there, due to his prior assault',[423] and 'he would not be able to avail himself of the protection of the Greek authorities'.[424] In addition, 'his deportation would expose him to substandard living conditions, lack of social assistance from the authorities and no prospect of finding a durable humanitarian solution, thus subjecting him

a) Is the State concerned one in which there is evidence of a consistent pattern of gross, flagrant or mass violations of human rights (see article 3, paragraph 2)?
b) Has the author been tortured or maltreated by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity in the past? If so, was this the recent past?
c) Is there medical or other independent evidence to support a claim by the author that he/she has been tortured or maltreated in the past? Has the torture had after-effects?
d) Has the situation referred to in (a) above changed? Has the internal situation in respect of human rights altered?
e) Has the author engaged in political or other activity within or outside the State concerned which would appear to make him/her particularly vulnerable to the risk of being placed in danger of torture were he/she to be expelled, returned or extradited to the State in question?
f) Is there any evidence as to the credibility of the author?
g) Are there factual inconsistencies in the claim of the author? If so, are they relevant?

CAT: General Comment No. 1: Implementation of Article 3 of the Convention in the Context of Article 22 (Refoulement and Communications), Adopted at the Sixteenth Session of the Committee against Torture, on 21 November 1997 (Contained in Document A/53/44, annex IX), para.8.

[418] *I.M. and V.Z. (represented by counsel) v. Denmark*, Communication No.593/2014, CAT/C/57/D/593/2014, 12 August 2016, para.3.1.
[419] *Ibid*., para.6.3.
[420] *Ibid.*, para.7(a).
[421] *X v. Denmark*, Communication No.523/2015, CCPR/C/113/D/2523/2015, 11 May 2015, para.2.1.
[422] See: *Ibid*.
[423] *Ibid*., para.3.1.
[424] *Ibid*.

to inhuman and degrading treatment'.[425] However, the CAT Committee observed that the applicant had the right to work legally in Greece as a refugee, and he had not reported any violation of his rights during his stay.[426] At the same time, 'within a period of seven months, he managed to travel from the Syrian Arab Republic to Greece, pay for a residence permit there and travel to Norway and Denmark by air'.[427] In the light of the above observation, the CAT Committee decided that this communication was inadmissible.[428] In the case of *M.P.M. v. Canada*, the author of the communication maintained 'that her deportation to Mexico, where she is at risk of being detained in inhumane conditions or even being killed or assaulted by her former spouse, would entail a violation of her fundamental rights'.[429] However, the CEDAW Committee found that the author had returned to Mexico of her own accord, and she had not provided any explanation of her reasons for this action.[430] Given this, the CEDAW Committee declared the communication to be inadmissible.[431]

The existing regional human rights courts also highlight the importance of this obligation. In the proceedings on admissibility, the EComHR's Rules of Procedure allow for the requesting of relevant information on matters connected with the application from the applicant, rather than making its provision mandatory.[432] Before deciding upon the admissibility of the application, the EComHR may invite the parties to submit further observations in writing, or convene an oral hearing of issues of admissibility.[433] Art.35(3) of ECHR stipulates that the ECtHR must declare inadmissible any individual application that it considers to be manifestly ill-founded. Accordingly, the ECtHR's Rules of Court go into further details as regards the content of this obligation. According to the latest Rules of Court, an application shall set out a succinct statement of the facts, a succinct statement of the alleged violation(s) of the Convention and the relevant arguments, as well as the object of the application, and it must also be accompanied by copies of any relevant documents, in particular any decisions – whether judicial or not – relating to the object of

[425] *Ibid*., para.3.
[426] *Ibid*., para.4.4.
[427] *Ibid*.
[428] See: *ibid*., para.5(a)
[429] *M.P.M. v. Canada*, Communication No. 25/2010, CEDAW/C/51/D/25/2010, 13 April 2012, para.3.2.
[430] *Ibid*., paras.6.3 – 6.4.
[431] See: *ibid*., paras.6.3 – 6.5.
[432] See: 'European Commission of Human Rights – Rule of Procedure (as in force at 28 June 1993)', Rules 47(2)(a) and 48(2), available at: http://www.hrcr.org/docs/Eur_Commission/commrules.html.
[433] *Ibid*., Rule 50.

the application.[434] Failure to comply with these requirements 'may result in the application not being examined by the Court'.[435] Within the scope of the Inter-American human rights system, Art.47(b) of ACHR stipulates that the IAComHR should consider inadmissible any petition or communication submitted to it if the petition or communication does not state facts that tend to establish a violation of rights guaranteed by ACHR. A petition or communication should also be declared inadmissible if the statements of the petitioner indicate that this petition or communication is manifestly groundless. In addition to reiterating the content of this Article,[436] the Rules of Procedure of the IAComHR require a communication to include the State which the complainant considers to be responsible, by act or omission, for the violation of any of the human rights recognised in ACHR and other applicable instruments.[437] The same holds true for the African human rights system. Art.56 of AfCHPR sets out seven conditions to be met by a communication. 'As a matter of principle, all the conditions must be met for a communication to be declared admissible. Otherwise, if one has not been met, the communication will be declared inadmissible and the case closed'.[438] One of these conditions is that a communication should not be based exclusively on news disseminated through the mass media.[439]

---

[434] See: ECtHR: "Rules of Court", Registry of the Court, Strasbourg, 14 November 2016, Rule 47(1).
[435] *Ibid*., Rule 47(4).
[436] See: IAComHR: "Rules of Procedure of the Inter-American Commission on Human Rights", Art.34(b). This instrument was approved by the IAComHR at its 137th regular period of sessions, held from October 28 to November 13, 2009, and modified on September 2nd, 2011 and during the 147th Regular Period of Sessions, held from 8 to 22 March 2013, for entry into force on August 1st, 2013.
[437] See: *ibid*., Art.28(6). There are a number cases that are relevant in this respect. See: for example, *Rómulo Jonás Ponce Santamaría v. Peru*, Petition No. 932-03, IAComHR Report on Admissibility No. 26/16, 15 April 2016; *Gustavo Haroldo Horta Muñoz v. Chile*, Petition No. 125-07, IAComHR Report on Admissibility No.70/15, 28 October 2014; Germán Cristino Granados Caballero, Petition No. 180-03, IAComHR Report on Admissibility No. 66/14, 25 July 2014; International abductions v. the United States, Petition No. 11.082, IAComHR Report on Admissibility No. 100/14, 7 November 2014; *Demétrios Nicolaos Nikolaidis*, Petition No. 86-07, IAComHR Report on Admissibility No. 117/12, 13 November 2012; *Valentina de Andrade v. Brazil*, Petition No. 885-03, IAComHR Report on Admissibility No. 21/12, 20 March 2012; *Márcia Cristina Rigo Leopoldi v. Brazil*, Petition No. 1.996, IAComHR Report on Admissibility No. 9/12, 20 March 2012; *Bernarda Lilian Gómez García y Rolando Ernesto Gómez García v. Honduras*, Petition No.764-03, IAComHR Report on Admissibility No. 121/12, 13 November 2012; *María Elena Macedo García de Uribe (Widowed) v. Mexico*, Petition No. 859-03, IAComHR Report on Admissibility No. 24/12, 20 March 2012; *Edilberto Temoche Mercado v. Peru*, Petition No. 12.297, IAComHR Report on Admissibility No. 118/12, 13 November 2012; *José Hernán Susanivar Susanivar et al. v. Peru*, Petition No.170-00, IAComHR Report on Admissibility No. 28/12, 20 March 2012; *Unified Water and Sewer Service Workers' Union of Arequipa v. Peru*, Petition No. 12.222, IAComHR Report on Admissibility No. 27/12, 20 March 2012; *Hernán Alberto Chumpitaz Vásquez v. Peru*, Petition No. 736-03, IAComHR Report on Admissibility No. 26/12, 20 March 2012; *Teófilo Sánchez Minaya v. Peru*, Petition No. 55-05, IAComHR Report on Admissibility No.120/11, 22 July 2011; *René José Sánchez Rivera v. Peru*, Petition No. 182-03, IAComHR Report on Admissibility No. 118/11, 22 July 2011; *Luis Alberto Ruesta Adrianzén v. Peru*, Petition No. 222-03, IAComHR Report on Admissibility No. 15/11, 23 March 2011; and *etc*.
[438] AfComHPR, *supra* note 269, p.6.
[439] 'Media reports can be used, though not exclusively, and must be accompanied/substantiated by other

As mentioned in **Section 1**, the individual complaints procedure of the WCHR is adversarial in nature. Given this, after an applicant had made a *prima facie* complaint before the WCHR and sufficiently substantiated their allegations, the burden will shift to the State concerned to provide evidence that the applicant's claims have not been adequately substantiated. In this way, the WCHR can determine admissibility in the light of all the information made available to it by both parties. In addition, no respondent state would be permitted to stall, or even block, the WCHR's consideration of the merits of the complaint by the delayed or inadequate provision of the information required. Moreover, if that were to happen, the WCHR would simply proceed to the consideration of admissibility.

Once more taking the HRC as an example, at the international level, the UN human rights treaty bodies have long adopted the allocation of the burden of proof in this way. Any state party to the OP-ICCPR is required implicitly by Art.4(2) to submit to the HRC written explanations or statements clarifying this matter in good faith within six months.[440] According to Nowak's observation, the HRC first confirmed this requirement in the cases of *Edgardo Dante Santullo Valcada v. Uruguay* and *Ann Maria Garcia Lanza de Netto v. Uruguay*.[441] The HRC developed this confirmation as jurisprudence, and has repeatedly recalled it in many cases. But even in the event of a State Party's failure to cooperate,[442] or to furnish the Committee with such information, the HRC would still consider the issue of substantiation. As the Committee pointed out:

> In cases where the author has submitted allegations to the State party that are corroborated by credible evidence and where further clarification depends on information that is solely in the hands of the State party, the Committee may consider the author's allegations substantiated in the absence of satisfactory evidence or explanations to the contrary presented by the State party'.[443]

---

material. Evidence substantiating the allegations should be annexed to communication, including affidavits, court judgments, eyewitness/expert reports, reports of NGOS and international organisations (AU, UN, EU *etc*.).' "Filing a Communication before the African Commission on Human and Peoples' Rights: A complainant's manual", 2013, p.10. This manual is available at: http://eipr.org/sites/default/files/pressreleases/pdf/1307_manual_to_the_african_commission.pdf.

[440] See also: HRC: "Rules of procedure of the Human Rights Committee", *supra* note 409, Rule 97.

[441] *Santullo v. Uruguay*, Communication No. 9/1977, CCPR/C/8/D/9/1977, 26 October 1979, para.10; *Ann Maria Garcia Lanza de Netto v. Uruguay*, Communication No. 8/1977, CCPR/C/9/D/8/ 1977, 3 April 1980, para.15. See: Nowak, CCPR Commentary, *supra* note 62, p.873.

[442] The State Party's failure to cooperate includes 'any action that would prevent or frustrate the Committee in its consideration and examination of the communication, and in the expression of its Views'. HRC: "Consideration by the Human Rights Committee at its 111th, 112th and 113th sessions of communications received under the Optional Protocol to the International Covenant on Civil and Political Rights", CCPR/C/113/4, 8 September 2015, para.61.

[443] *Ibid*., para.17.

It should be noted, however, that the absence of a reply from the respondent state does not necessarily lead to the conclusion that the claims in a communication have been substantiated in domestic proceedings.[444] 'It remains vital to substantiate claims very carefully to reduce the risk that the Committee will dismiss the complaint'.[445]

At the regional level, within the European human rights system, the former EComHR may also request relevant information on matters connected with the application from the High Contracting Party concerned as well as the applicant.[446] As mentioned above, the EComHR may invite both parties to submit further observations in writing or convene an oral hearing of issues of admissibility before deciding upon the admissibility of the application.[447] However, there is no legal consequence of a failure by the High Contracting Party to fulfil their obligation to cooperate. By contrast, the latest Rules of Court of the ECtHR stipulates the duty of the respondent state to cooperate. The

[444] The HRC declared some communications inadmissible due to the lack of substantiation of the author's claims or the insufficient substantiation. See: for example, *Surgan v. Belarus*, Communication No. 1969/2010, CCPR/C/114/D/1969/2010, 19 November 2015, paras.8.5 – 8.6; *Mikhalchenko v. Belarus*, Communication No. 1982/2010, CCPR/C/114/D/1982/2010, 21 September 2015, paras.7.4 – 7.6; *Burdyko v. Belarus*, Communication No. 2017/2010, CCPR/C/114/D/2017/2010, 25 September 2015, paras.7.5 – 7.6; *N.D.M. v. Democratic Republic of the Congo*, Communication No. 1971/2010, CCPR/C/113/D/1971/2010, 6 May 2015, paras.5.4 – 5.7; *Pavel Kozlov et al. v. Belarus*, Communication No. 1986/2010, CCPR/C/111/D/1986/2010, 27 August 2014, paras.6.3 – 6.5; *Leonid Sudalenko v. Belarus*, Communication No. 1354/2005, CCPR/C/100/D/1354/2005, 1 November 2010, paras.7.5 – 7.6; *Oleg Grishkovtsov v. Belarus*, Communication No. 2013/2010, CCPR/C/113/D/2013/2010, 19 May 2015, paras.7.4 – 7.5; *Vasily Yuzepchuk v. Belarus*, Communication No. 1906/2009, CCPR/C/112/D/1906/2009, 17 November 2014, paras.7.5 – 7.6; *Sergey Lozenko v. Belarus*, Communication No. 1929/2010, CCPR/C/112/D/1929/2010, 21 November 2014, paras.6.4 – 6.5; *Vitaly Symonik v. Belarus*, Communication No. 1952/2010, CCPR/C/112/D/1952/2010, 18 November 2014, paras.6.4 – 6.7; *E.V. v. Belarus*, Communication No. 1989/2010, CCPR/C/112/D/1989/2010, 8 December 2014, paras.6.7 – 6.8; *Sergey Kalyakin v. Belarus*, Communication No. 2153/2012, CCPR/C/112/D/2153/2012, 20 November 2014, paras.8.4 – 8.5; *Natalya Pinchuk v. Belarus*, Communication No. 2165/2012, CCPR/C/112/D/2165/2012, paras.7.4 – 7.5; *Mufteh Younis Muftah Al-Rabassi v. Libya*, Communication No. 1860/2009, CCPR/C/111/D/1860/2009, 4 September 2014, paras.6.4 – 6.5; *A.M.H. El Hojouj Jum'a et al. v. Libya*, Communication No. 1958/2010, CCPR/C/111/D/1958/2010, 25 August 2014, paras.5.3 – 5.4; *Petr Kuznetsov et al. v. Belarus*, Communication No. 1976/2010, CCPR/C/111/D/1976/2010, 30 September 2014, paras.8.5 – 8.6; *Marina Koktish v. Belarus*, Communication No. 1985/2010, CCPR/C/111/D/1985/2010, 26 August 2014, paras.7.4 – 7.5; *Pavel Kozlov v. Belarus*, Communication No. 1986/2010, CCPR/C/111/D/1986/2010, 27 August 2014, paras.6.4 – 6.5; *Tatyana Yachnik v. Belarus*, Communication No. 1990/2010, CCPR/C/111/D/1990/2010, 28 August 2014, para.8.4; *Denis Turchenyak et al. v. Belarus*, Communication No. 1948/2010, CCPR/C/108/D/1948/2010, 10 September 2013, paras.6.4 – 6.6; *Khaled Il Khwildy v. Libya*, Communication No. 1804/2008, CCPR/C/106/D/1804/2008, 25 January 2013, para.6.4; *Lyubov Kovaleva and Tatyana Kozyar v. Belarus*, Communication No. 2120/2011, CCPR/C/106/D/2120/2011, 27 November 2012, paras.10.5 – 10.6; *Pavel Levinov v. Belarus*, Communication No. 1812/2008, CCPR/C/102/D/1812/2008, 25 August 2011, paras.9.5 – 9.8; *Aleksei Pavlyuchenkov v. Belarus*, Communication No. 1226/2003, CCPR/C/105/D/1226/2003, 29 August 2012, paras.9.6 – 9.8; *Munarbek Torobekov v. Kyrgyzstan*, Communication No. 1547/2007, CCPR/C/103/D/1547/2007, 21 November 2011, paras.5.3 – 5.8; and *etc.*

[445] Joseph, *et al.*, *supra* note 280, p.68.

[446] See: 'European Commission of Human Rights – Rule of Procedure (as in force at 28 June 1993)', *supra* note 432, Rules 47(2)(a) and 48(2).

[447] *Ibid*., Rule 50.

respondent state has to 'cooperate fully in the conduct of the proceedings and, in particular, to take such action within their power as the Court considers necessary for the proper administration of justice'.[448] This duty includes adducing evidence or providing information requested by the ECtHR or on its motion.[449] Nevertheless, the failure of the respondent state to perform this duty in the proceedings 'shall not, in itself, be a reason for the Chamber to discontinue the examination of the application'.[450] According to the Rules of Procedure of the IAComHR, the Commission 'shall forward the relevant parts of the petition to the State in question',[451] which shall submit its response concerning the considerations on or challenges to the admissibility of the petition within a designated time period from the date the request is transmitted.[452] 'The request for information made to the State shall not constitute a prejudgment pertaining to any decision the Commission may adopt on the admissibility of the petition'.[453] Within the scope of the African human rights system, the AfComHPR transmits the text of the communication or a summary thereof to the respondent state, and gives it the opportunity to make its observations, on which the author of the communication may subsequently submit their comments.[454] 'After studying the arguments presented by both parties, and bearing in mind the principles of international human rights law, which is basically aimed at protecting the individuals from State's encroachment, the Commission may then make a decision.'[455] It should be noted that, as the International Justice Resource Center pointed out, 'the failure of the State to meet its burden of proof does not, however, mean that complainants are free to make "unsubstantiated statements." The complainant must still convince the Commission that a violation has taken place.'[456]

Undoubtedly, for an applicant, fulfilment of the obligation to substantiate the claims presented before the WCHR will determine the Court's decision on admissibility. The WCHR must, therefore, create appropriate rules of evidence and case law to determine the

---

[448] See: ECtHR, *supra* note 434, Rule 44A.
[449] See: *ibid*., Rules 44A and 44C.
[450] *Ibid*., Rule 44C(2).
[451] IAComHR: "Rules of Procedure of the Inter-American Commission on Human Rights", *supra* note 436, Art.30(2).
[452] See: *ibid*., Art.30(2) – (7).
[453] *Ibid*., Art.30(2).
[454] See: AfComHPR, *supra* note 269, pp.6 – 7.
[455] See: AfComHPR, *supra* note 269, p.7.
[456] International Justice Resource Center: "Advocacy before the African Human Rights System: A Manual for Attorneys and Advocates", November 2016, p.81. This manual is available at: http://www.ijrcenter.org/wp-content/uploads/2016/11/Advocacy-before-the-African-Human-Rights-System.pdf.

burden and standard of proof necessary to substantiate individual complaints. Once their claims have been sufficiently substantiated, the applicant must proceed to raising the substance of these claims before the domestic courts.

### 3.2.2 The obligation to raise the substance of the claims before domestic courts

According to the rule of prior exhaustion of local remedies, an applicant is also under a legal obligation to bring the substance of their claim(s) to the adjudication of the courts in the respondent state. The claims brought to the domestic courts must encompass the substance of those presented before the WCHR. That is to say, in the case under examination, for the purposes of admissibility, the applicant has to convince the WCHR that the claims they have brought before the Court have been investigated and adjudicated by the domestic courts. A failure to fulfil this obligation is in sharp contrast to the requirement of the rule of prior exhaustion of local remedies. The rationale behind this obligation is well established: a state must be given the opportunity to remedy the alleged violations before these allegations are presented before international jurisdictions. To substantialise this rationale, the situation claimed before the international jurisdiction must be the same as that which was brought before the domestic legal system, otherwise, the state concerned would have no chance to remedy the situation, and domestic remedies would not have been utilised and exhausted.

This obligation is not written into the relevant legal documents. At a regional level, within the scope of the European human rights system, neither the ECHR nor the Rules of Court contains a clear regulation concerning this obligation. According to Art.35 (1) of ECHR, the ECtHR may only deal with a matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law.[457] For the purposes of admissibility, an applicant shall submit to the Court the copies of documents and decisions showing that the applicant has complied with the requirement for the exhaustion of domestic remedies.[458] Basic documents in the Inter-American human rights System do not explicitly mention this obligation either. Art.46 (1) (a) obliges an applicant to pursue and exhaust the remedies under domestic law in accordance with generally

[457] See: Ex-Art.26 of ECHR. The EComHR's Rules of Procedure do not even mention the rule of prior exhaustion of local remedies in the proceedings on admissibility.
[458] See: ECtHR, *supra* note 434, Rule 47 (3.1)(b).

recognised principles of international law. The Statute and Rules of Procedure of the IAComHR reiterate this point.[459] Under the African human rights system, AfCHPR and the AfComHPR's Guidelines for the Submission of Communications require in general that an individual complainant must have exhausted all available domestic legal remedies.[460] The same situation can be found at fora of the existing UN human rights treaty bodies. In common with the regional mechanisms mentioned above they also have no clearly defined rules obliging an applicant to raise the substance of the claims before domestic courts.[461]

Nevertheless, in practice, the existing human rights mechanisms (at both regional and international level) contain repeated references to this obligation. Whether an applicant had formulated their assertion in substance before the domestic authorities and/or courts serves as an important indicator in the examination of the admissibility of an individual complaint. The stand has long been taken that the situation claimed before a court must be the same as that which was brought before the domestic system. If it is not the same, the respondent state has not had a chance to remedy the situation and domestic remedies have not been utilised and exhausted. This means that the assertion submitted to the existing human rights systems must be such that it at least meets the domestic requirements as regards the degree of substance.

Take, for example, the European human rights system. The EComHR and ECtHR have repeatedly stated that a complaint must first be made in substance to the appropriate national courts. In the case of *Miguel Castells v. Spain*, the applicant, an opposition Member of Parliament, published an article complaining of inactivity on the part of the authorities with regard to numerous attacks and murders that had taken place in the Basque

---

[459] See: Statute of the IAComHR, approved through Resolution No 447 adopted by the OAS General Assembly during its ninth period of sessions, held in La Paz, Bolivia, in October 1979, Art.20(c); Rules of Procedure of the IAComHR, *supra* note 436, Art.31.

[460] See: Arts.50 and 56(5)(6) of AfCHPR; AfComHPR: "Guidelines for the Submission of Communications", Information Sheet No.2, p.6.

[461] See: for example, Art.5 (2)(b) of OP- ICCPR; HRC: "Rules of procedure of the Human Rights Committee", *supra* note 409, Rule 96(f); Art.3(1) of OP-ICESCR; CESCR Committee, *supra* note 410, Rule 42(c); Art.14 (7)(a) of ICERD; Art.4(1) of OP-CEDAW; Art.22(5)(b) of CAT; CAT Committee: "Rules of Procedure", *supra* note 409, Rules 97(c) and 113(e); Art.7(e) of OP (on a communications procedure)-CRC; CRC Committee, *supra* note 410, Rule 16; Art.2(d) of OP-CRPD; Art.31(2)(d) of ICED; CED Committee, *supra* note 409, Rule 65(3)(e), and Art.77(3)(b) of ICMW. It should be pointed out that, in its Provisional Rules of Procedures, the ICMW Committee stated that it has not yet considered the rules relating to individual communications because the procedure under Art.77 of ICMW has not yet entered into force. See: UN: "compilation of rules of procedure adopted by human rights treaty bodies", HRI/GEN/3/Rev.1/Add.1, 7 May 2004, IV. Procedure for the Consideration of Communications Received under Article 77 of the Convention.

Country, and accusing the police of collusion with the guilty parties.[462] Criminal proceedings were subsequently instituted against the applicant for insulting the Government, and the applicant was convicted by the Supreme Court and sentenced to conditional imprisonment.[463] The applicant then filed an appeal in the Constitutional Court, alleging a violation of his right to freedom of expression.[464] However, his appeal was dismissed by the Constitutional Court.[465] Before the EComHR, the applicant complained that the criminal proceedings brought against him and the penalties imposed on him for defaming the Government constituted an infringement of his right to freedom of expression within the meaning of Art.10 of ECHR.[466]

During the proceedings, the respondent state raised 'an objection alleging non-exhaustion of domestic remedies'[467] and argued that 'the applicant did not validly refer to the Constitutional Court … the complaint based on the violation of the right to freedom of expression'.[468] Given this, 'the Constitutional Court was not, therefore, able to decide explicitly whether the conviction of the applicant constituted an infringement of his freedom of expression',[469] or at any rate, the applicant had not referred directly to Art.20 of the Constitution directly alleging that the provision in question had been violated.[470]

The EComHR dismissed the objection of the respondent state. According to the Commission, although the applicant had not developed the arguments bearing directly on the violation of his freedom of expression, he did expressly mention that Art.20 of the Spanish Constitution protects the right to freedom of expression.[471] 'Furthermore, the judgment of the Supreme Court … against which the constitutional appeal was in fact directed, had convicted the applicant on the ground that the impugned magazine article contained defamatory accusations exceeding the bounds of what is allowed by freedom of expression'.[472] The Constitutional Court also considered the question of the extent to which Art.161 of the Penal Code relating to the offence of defaming the Government was

[462] *Miguel Castells v. Spain*, application no.11798/85, Decision on the admissibility of the application, 7 November 1989, para.1.
[463] See: *Ibid*., paras.1 – 4.
[464] See: *Ibid*., para.4.
[465] See: *Ibid*., para.4.
[466] See: *Ibid*.
[467] *Ibid*.
[468] *Ibid*.
[469] *Ibid*.
[470] See: *Ibid*.
[471] See: *Miguel Castells v. Spain*, Decision on the admissibility of the application, *supra* note 462.
[472] See: *ibid*.

compatible with Art.20 of the Spanish Constitution guaranteeing freedom of expression.[473]

Under the circumstances, the EComHR concluded that the applicant had, in substance, raised the complaint based on violation of Art.10 of ECHR before the domestic courts.[474] In other words, the respondent state had been given the opportunity to put right the violations alleged against them.[475] Given that the applicant had fulfilled the obligation to raise the substance of the claim(s) before domestic courts, the EComHR declared his complaint admissible.[476]

The case of *Ahmet Sadik v. Greece* serves as a counter-example. In this case, the applicant was accused by the public prosecutor of contravening Arts.162 and 192 of the Greek Criminal Code against distributing printed material referring to the Moslem population of Western Thrace as Turks.[477] The applicant was then found guilty of disturbing the citizens' peace by the Rodopi Criminal Court.[478] In 1990, the applicant appealed against the judgment in the Patras Court of Appeal, which upheld the Criminal Court's judgment.[479] After his release, the applicant lodged the charges against him with the Court of Cassation, which dismissed the case.[480] The applicant applied to the EComHR in 1991, submitting that his conviction for disturbing the peace by distributing printed material referring to the Moslem population of Western Thrace as Turks amounted to a violation of his freedom of thought and expression under Art.10 of ECHR.[481]

To the EComHR, the applicant's use of the words 'Turk(s)' or 'Turkish' to identify the Moslems of Western Thrace in itself indicated an issue falling within the scope of freedom of expression under Art.10 of ECHR, even though the applicant did not rely expressly on this Article, which is directly applicable under Greek law.[482] Nor did he invoke the provisions of Art.14 of the Greek Constitution, which also guarantees the right to freedom of expression.[483] Accordingly, the EComHR considered that the applicant had invoked before the Greek courts, at least in substance, the complaints relating to Art.10 of

---

[473] See: *ibid*.
[474] See: *ibid*.
[475] See: *ibid*.
[476] See: *ibid*.
[477] See: *Ahmet Sadik v. Greece*, application no.18877/91, Court (Chamber), Judgment, Strasbourg, 15 November 1996, paras.8 – 9.
[478] See: *ibid*., paras.10 – 12.
[479] See: *ibid*., paras.15 – 16.
[480] See: *ibid*., paras.17 – 18.
[481] See: *Ahmet v. Greece*, application no.18877/91, Commission (Plenary), Decision as to the admissibility, 1 July 1994, para.4.
[482] See: *ibid*., para.4.
[483] See: *ibid*.

ECHR which he put to the Commission.[484] The applicant could 'therefore be said to have exhausted domestic remedies'.[485] However, the ECtHR did not echo this decision. Given that the ECHR 'forms an integral part of the Greek legal system, where it takes precedence over every contrary provision of the law',[486] the ECtHR opined that the applicant could have relied on Art.10 of ECHR in the Greek courts and complained of the violation of this article in his case.[487] 'At no time, however, did the applicant rely on Article 10 of the Convention (art. 10), or on arguments to the same or like effect based on domestic law, in the courts dealing with his case.'[488] The ECtHR added:

> Even if the Greek courts were able, or even obliged, to examine the case of their own motion under the Convention, this cannot have dispensed the applicant from relying on the Convention in those courts or from advancing arguments to the same or like effect before them, thus drawing their attention to the problem he intended to submit subsequently, if need be, to the institutions responsible for European supervision.[489]

Accordingly, the ECtHR declared the case inadmissible due to the non-exhaustion of domestic remedies.

The case law of the UN human rights treaty bodies also echoes the obligation of applicants to raise the substance of their claims before domestic courts. In the case of *Yassin v. Canada*, for example, the applicant deserted the Iraqi military service and left Iraq for Canada, where he immediately filed an application for refugee protection in the respondent state in 1996.[490] However, in 1997, he was excluded from refugee protection by virtue of Art.1(f) of the 1951 Convention relating to the Status of Refugees.[491] The author's subsequent application for leave to apply for judicial review was denied by the Federal Court.[492] In 1998, the applicant 'applied for permanent residence on the basis of humanitarian and compassionate grounds, alleging that his life and physical security would be in danger if was returned to Iraq'.[493] His application was dismissed by the respondent

---

[484] See: *ibid*.
[485] *Ibid*.
[486] Ahmet Sadik v. Greece, supra note 477, para.31.
[487] *Ibid*.
[488] *Ibid*., para.32.
[489] *Ibid*., para.33.
[490] See: *Yassin v. Canada*, Communication No. 307/2006, CAT/C/43/D/307/2006, 10 December 2009, paras.2.1 – 2.2.
[491] See: *ibid*., paras.2.3 – 2.4.
[492] See: *ibid*., para.2.5.
[493] *Ibid*., para.2.6.

state.[494] This time, on the advice of his counsel, the author 'did not request leave to apply to the Federal Court for judicial review of the decision on his humanitarian and compassionate application'.[495] After marrying a Canadian citizen, his sponsor tried without success to help him obtain permanent residence. This was refused because the Canadian authorities thought that the applicant 'was inadmissible to Canada, since there were reasonable grounds to believe that he had participated in crimes against humanity'.[496] An appeal submitted by the applicant's wife to the Immigration Appeal Division was also dismissed because of the jurisdictional problem.[497]

In 2004, the applicant filed for a Pre-Removal Risk Assessment (PRRA), claiming that he was at risk of being sentenced to imprisonment because of his Sunni Muslim identity.[498] His application was rejected by the respondent state in 2005, and, on the advice of his counsel, he did not request leave to apply to the Federal Court for judicial review of this decision.[499] In the same year, the applicant received a removal order issued by the respondent state.[500] The applicant was facing deportation from the respondent state to Iraq at the time of the introduction of the application.[501] A request was made to defer his removal on the day before his deportation, but this request was denied by the respondent state.[502] He immediately 'applied for leave to apply to the Federal Court for judicial review of the decision not to defer his removal'.[503] The application was still pending at the time of the submission of the communication.[504]

In this communication, the author claimed that his return to Iraq would constitute a violation by Canada of Art.3 of CAT.[505] As regards domestic remedies, the respondent state submitted that judicial review in Canada would constitute an effective remedy.[506] 'In the instant case, before raising the case before the CAT Committee, the author should, but has failed to, apply for leave to apply for judicial review on the decision on his humanitarian and compassionate application and the PRRA decision respectively in 1999

494 See: *ibid*.
495 *Ibid*., para.2.7.
496 *Ibid*., para.2.8.
497 See: *ibid*.
498 See: *ibid*., para.2.9.
499 See: *ibid*., paras.2.10 – 2.11, 7.1.
500 See: *ibid*., paras.2.12.
501 See: *ibid*., para.1.1.
502 See: *ibid*., paras.2.12.
503 *Ibid*., paras.2.13.
504 See: *ibid*.
505 See: *ibid*., paras.1.1, 3.1, 3.2.
506 See: *ibid*., para.4.3.

and 2005'.[507] In this case, the author's failure was indeed directly related to errors on the part of his privately retained legal advisor. Nevertheless, as the respondent state argued, these errors were not attributable to the State party.[508] As for the latest application for leave to apply for judicial review of refusing to defer his removal, the respondent state argued that the author had failed to submit the required documents to complete his application.[509] As a result of the failures mentioned above, it was decided his communication should be declared inadmissible due to non-exhaustion of local remedies.[510]

Apart from noting the argument of the respondent state that judicial review in Canada is an effective remedy, the CAT Committee found that the author did not 'challenge the effectiveness of the remedy of judicial review, although he had an opportunity to do so'.[511] There is no general implication that applications for leave or judicial review in Canada are mere formalities that need not be exhausted by an author for the purpose of admissibility.[512] Recalling its own jurisprudence that an appeal against a negative decision to a humanitarian and compassionate application is not a remedy that needs to be exhausted, the CAT Committee held that the judicial review on the decision in 1997 did not *de facto* need to be exhausted.[513] However, this jurisprudence did not apply to the judicial review concerning the humanitarian and compassionate decision of 1999 and the PRRA decision of 2005.[514] In addition, the CAT Committee appreciated the respondent state's suggestion that errors on the part of a privately retained legal advisor should be attributed to the author.[515] In conclusion, the CAT Committee held that the complainant had indeed failed to diligently exhaust remedies with regard to these two negative decisions.[516] As far as the incomplete application for leave to apply for judicial review of the decision with regard to his request to defer his removal was concerned, the CAT Committee held that the author had failed to satisfy the rule of prior exhaustion of local remedies, as he had provided insufficient reasons for this incompletion.[517]

---

[507] See: *ibid*.
[508] See: *ibid*., para.7.1.
[509] See: *ibid*., para.4.3.
[510] See: *ibid*.
[511] *Ibid*., para.9.3.
[512] See: *ibid*.
[513] See: *ibid*.
[514] See: *ibid*.
[515] See: *ibid*., para.9.4.
[516] See: *ibid*.
[517] See: *ibid*.

This obligation can also be noted in a number of other cases. In the case of *Grant v. Jamaica*, for example, the plaintiff complained that the unsanitary and extremely overcrowded conditions of detention on death row had violated his fundamental rights under Arts.7 and 10 of the ICCPR.[518] However, the HRC noted that the author 'had not indicated what steps, if any, he had taken to submit his grievances to the competent prison authorities, and what investigations, if any, had been carried out. Accordingly, the Committee found that in this respect domestic remedies had not been exhausted'.[519] In the case of *Rahime Kayhan v. Turkey*, the applicant was dismissed by the Turkish government and her status as a civil servant was terminated simultaneously.[520] She contended that she had been laid off because she wore a headscarf.[521] She had alleged violations related, among other things, to freedom of expression and religion in domestic proceedings before submitting her communication to the CEDAW Committee.[522] However, the CEDAW Committee found that, in the communication received, the author claimed that the Turkish government had violated Art.11 of the Convention, which protects her from sex discrimination in the field of employment; not the same complaints as those she had presented at the domestic level.[523] The CEDAW Committee concluded that the author had failed to 'put forward arguments that raised the matter of discrimination based on sex in substance … in Turkey before the administrative bodies that she addressed before submitting a communication to the Committee'.[524] Given this, this communication should be declared inadmissible.[525]

As mentioned in **Section 1**, the judicial nature of domestic remedies has long been stressed by international and regional human rights jurisprudence, without prejudice to remedies other than those of an essentially judicial nature. Accordingly, these claims should be addressed in substance under the jurisdiction of the respondent state through an action brought before the appropriate court of the first instance, followed by an appeal, where applicable, and possibly a further appeal to a higher court such as the supreme court

---

[518] *Grant v. Jamaica*, Communication No. 353/1988, CCPR/C/50/D/353/1988, 4 April 1994, para.5.1.
[519] *Ibid*., para.5.1.
[520] See: *Rahime Kayhan v. Turkey*, Communication No. 8/2005, CEDAW/C/34/D/8/2005, 27 January 2006, para.2.8.
[521] See: *ibid*.
[522] See: *ibid*., paras.2.9 – 2.12.
[523] *Ibid*., para.7.5.
[524] *Ibid*., para.7.7.
[525] See: *Ibid*., para.7.9(a). See also: *N.S.F. v. United Kingdom*, Communication No. 10/2005, CEDAW/C/38/D/10/2005, 12 June 2007, para.7.3; *Zhen Zhen Zheng v. The Netherlands*, Communication No. 15/2007, CEDAW/C/42/D/15/2007, 14 November 2008, para.7.3; and *etc.*

or constitutional court, if there is one. In this way, the competent domestic authorities would be enabled to deal with the alleged violations in substance and provide appropriate relief for the applicant. It is clear that the substance of the claim should be presented at every stage of domestic proceedings. The failure of an applicant to raise their claim in appeals to higher courts may lead to the finding that local remedies regarding this claim have not been exhausted. Furthermore, in a case involving multiple claims, effective litigation strategies must consider, as Sullivan rightly pointed out, 'whether to abandon one (or more) of several claims considered by the courts of first instance when taking the others forward to the appellate level'.[526] For example, in the case of *X v. Federal Republic of Germany*, given that the applicant acknowledged that he had not raised the issues in question on appeal before the *Bundesgerichtshof* (federal court) following the end of the proceedings before a *Landgericht* (regional court), the EComHR noted that the applicant had failed to exhaust the remedies available to him under German law.[527]

The obligation to raise the substance of the claims before domestic courts does not require an applicant to raise the matters before these local instances in an identical form to that which it would later take before the WCHR. That is to say, they do not specifically need 'to invoke the relevant international provision so long as the substance of the complaint is addressed'.[528] Crawford and Grant uncovered the theory behind this jurisprudence:

> … there is no requirement that the international basis of claim (in common law terminology, the cause of action) should have been at stake in the domestic proceedings. If the local courts give a remedy, it does not matter that it is not based on international law. If they fail to give a remedy, the fact that they purport to apply international law is likewise irrelevant to the admissibility of an international claim.[529]

This jurisprudence has been widely recognised by regional and international human rights mechanisms. In the case of *Austria* v. *Italy*, for example, '[t]he argument raised in

---

[526] Sullivan, *supra* note 259, p.10.

[527] See: for example, *X v. Federal Republic of Germany*, application no.627/59, Commission (Plenary), Decision, 14 December 1961. See also: *X v. Austria*, application no.3001/66, Commission (Plenary), Decision, 30 May 1968; *Kamma v. The Netherlands*, application no.4771/71, Commission (Plenary), Report (31), 14 July 1974; *X v. Austria*, application no.5560/72, Commission (Plenary), Decision (Final), 18 December 1973; *Ringeisen v. Austria*, application no.2614/65, Commission (Plenary), Decision, 18 July 1968; and *etc*.

[528] Joseph, *et al.*, *supra* note 280, p.64.

[529] James R. Crawford and Thomas D. Grant: "Local Remedies, Exhaustion of", *Max Planck Encyclopedia of Public International Law*, January 2007, para.11.

the Italian court was based on a section which stated that criminal responsibility was personal. The argument raised in international proceedings related to the presumption of innocence'.[530] According to the EComHR, the substance of the claim brought to the adjudication of the Italian courts is essentially the same as the claim brought before it by Austria, because 'the former in substance covered the latter'.[531] The Commission finally held that '… only the non-utilisation of an "essential" recourse for establishing the merits of a case before the municipal tribunals led to non-admissibility of the international complaint'.[532] The ECtHR follows this jurisprudence. It is not necessary for the rights protected under the ECHR 'to be explicitly raised in domestic proceedings provided that the complaint is raised "at least in substance"'.[533] 'This means that if the applicant has not relied on the provisions of the Convention, he or she must have raised arguments to the same or like effect on the basis of domestic law, in order to have given the national courts the opportunity to redress the alleged breach in the first place',[534]

The UN human rights treaty body system also echoes this jurisprudence. In the case of *Lassaad v. Belgium*, for example, the HRC held that:

> While complainants are not required to invoke specifically the provisions of the Covenant which they believe have been violated, they must set out in substance before the national courts the claim which they later bring before the Committee.[535]

In the case of *B.d.B. v. the Netherlands*, the applicant claimed that a violation of Arts.14 (1) and 26 of the ICCPR had been committed by the Dutch government. The respondent state argued that the authors of the communication had failed to exhaust domestic remedies because they did not invoke these Articles during the domestic proceedings.[536]

It is possible that the proposal for establishing, maintaining or designating the national human rights courts in the NK Statute might introduce a major change to the obligation to raise the substance of a claim before domestic courts. According to the NK Statute, an

---

[530] Amerasinghe, *supra* note 262, p.321.
[531] *Ibid*.
[532] *Austria v. Italy*, application no. 788/60, Decision of the Commission as to the Admissibility, 11 January 1961, p.43.
[533] CoE/ECtHR, *supra* note 263, para.51.
[534] *Ibid*.
[535] *Lassaad v. Belgium*, Communication No. 1010/2001, CCPR/C/86/D/1010/2001, 17 March 2006, para.8.3.
[536] *B.d.B. v. the Netherlands*, Communication No.273/1989, Supp. No. 40 (A/44/40), 30 March 1989, para.4.4.

applicant has to refer to alleged violations of those international human rights treaties which the respective State has ratified in the proceedings of the national human rights court. It is expected that these treaties will be applied directly by national human rights courts. In this way, the national human rights court in the respective state could remedy the alleged violations before the applicant lodges the same issue with the WCHR. With the coming into being of national human rights courts, the WCHR should, apart from considering whether the claim is the same in substance as that which was raised at a domestic level, examine whether a claim has been raised in identical form before the national human rights courts in the respective State Party. In such a case, an applicant would have had to articulate which international human rights treaty or certain provisions thereof under the WCHR's jurisdiction *ratione materiae* the alleged violations concerned. A complaint would be considered inadmissible by the WCHR if no reference had been made to the violation of the treaty or certain provisions thereof under the Court's jurisdiction *ratione materiae* in the domestic proceedings.

By contrast, the Consolidated Statute requires only that the States Parties establish, maintain or designate the competent courts dealing with human rights. An applicant may have only to present the substance of their claim at every level of the domestic courts, ranging from the court of first instance to the higher courts, and ultimately to the highest competent court. Unlike the NK Statute, the applicant would not be required to have raised the claim in a form identical to that in which it was later presented before the WCHR. All that would be required is that the domestic authorities had been given an opportunity to remedy the issue within their jurisdiction. Put another way, it would not be seen as a defect that the arguments had not been raised before the WCHR in the same form as that in which the applicant had brought them before the domestic courts, since the municipal court applies the domestic law of the respondent state, whereas the WCHR applies international human rights treaties.

It should be noted that the rule of prior exhaustion of local remedies is designed to guarantee States Parties the opportunity to test the substance of a claim. However, this rule cannot in itself be a guarantee that national courts will reach the right verdict in the light of the applicable laws under the WCHR's jurisdiction *ratione materiae*.

### 3.2.3 The obligation to observe procedural requirements according to domestic laws

According to the rule of prior exhaustion of local remedies, an applicant is expected to 'comply with all reasonable procedural requirements regarding the availability of domestic remedies'.[537] 'If a person makes a genuine and reasonable yet unsuccessful attempt to comply with local procedural requirements and exhaust domestic remedies, such attempts may satisfy the domestic remedies rule'.[538] Accordingly, the failure of an applicant to meet these procedural requirements is likely to result in their case being unsuccessful in the competent domestic courts, thus preventing the claims from being dealt with in substance by means of domestic proceedings. It can, therefore, be said that the failure to fulfil this obligation falls foul of the rule of prior exhaustion of local remedies, and would lead the WCHR to declare a complaint inadmissible.

Some scholars called this obligation the obligation to make 'normal use'.[539] According to Amerasinghe, it is part of the enduring case law of the EComHR and the ECtHR that the obligation to exhaust domestic remedies requires an applicant to make normal use of any remedies which are effective, sufficient and accessible.[540] The term

---

[537] Joseph, *et al.*, *supra* note 280, p.64.
[538] *Ibid*., p.65.
[539] See: Amerasinghe, *supra* note 262, p.318. Sullivan similarly said: 'If a domestic remedy is covered by the exhaustion rule (i.e., it meets the requirement of effectiveness and other conditions), a victim is obliged to make "normal use" of that remedy.' Sullivan, *supra* note 259, p.8.
[540] Amerasinghe cited *Austria v. Italy* and *Ringeisen v. Austria*, as examples. In the former case, the EComHR stated that the rule of prior exhaustion of local remedies 'confines itself to imposing the "normal" use of remedies "likely to be effective and adequate" (resolution adopted at Granada in 1956 by the Institute of International Law)'. *Austria v. Italy*, *supra* note 532, p.43. In the *Ringeisen v. Austria* case, the EComHR reiterated that the applicant must use and exhaust the remedies which seem effective and sufficient and which are open to an individual within the legal system of the respondent State in the normal way. See: *Ringeisen v. Austria*, application 2614/65, Court (Chamber), Judgment, Strasbourg,16 July 1971, para.88. In the case of *Akdivar and others v. Turkey*, for example, the ECtHR held that:

> [To meet the exhaustion requirement] normal recourse should be had by an applicant to remedies which are available and sufficient to afford redress in respect of the breaches alleged.

*Akdivar and others v. Turkey*, *supra* note 265, para.66. See also: *Balogh v. Hungary*, application no.47940/99, Second Section, Judgment, Strasbourg, 20 July 2004, para.30; *Vučković and others v. Serbia*, applications nos. 17153/11, 17157/11, 17160/11, 17163/11, 17168/11, 17173/11, 17178/11, 17181/11, 17182/11, 17186/11, 17343/11, 17344/11, 17362/11, 17364/11, 17367/11, 17370/11, 17372/11, 17377/11, 17380/11, 17382/11, 17386/11, 17421/11, 17424/11, 17428/11, 17431/11, 17435/11, 17438/11, 17439/11, 17440/11 and 17443/11, Grand Chamber, Judgment (preliminary objection), Strasbourg, 5 March 2014, para.71; *Pikić v. Croatia*, application no.16552/02, First Section, Judgment, Strasbourg, 18 January 2005, para.28; *Topić v. Croatia*, application no.51355/10, First Section, Judgment, Strasbourg, 10 October 2013, para.32; and *etc*.

'normal use' can also be found within the Inter-American human rights system.[541] Like the European human rights system, the Inter-American system also requires the observance of procedural requirements established under domestic law when pursuing domestic remedies. In the case of *Fransisco José Magi v. Argentina*, for example, the IAComHR held that:

> [I]n order to give the State the opportunity to correct alleged violation of rights under the American Convention before an international proceeding is brought, judicial remedies pursued by alleged victims must meet reasonable procedural requirements established under domestic law. … [I]t has said that the existence and application of reasonable admissibility requirements, prior to examination of the merits of a judicial action, are not incompatible with the right protected in Article 25 of the American Convention.[542]

In the case of *Dismissed Congressional Employees (Aguado-Alfaro et al.) v. Peru*, the IACtHR reiterated the legality and rationality of this requirement:

> The Court considers that, in any proceeding or process that exists under the State's domestic system there should be extensive judicial guarantees, which should include the formalities that must be observed in order to guarantee access to these guarantees. To ensure legal certainty, for the proper and functional administration of justice and the effective protection of human rights, the States may and should establish admissibility principles and criteria for domestic recourses of a judicial or any other nature. Thus, although these domestic recourses must be available to the interested parties and result in an effective and justified decision on the matter raised, as well as potentially providing adequate reparation, it cannot be considered that always and in every case the domestic organs and courts must decide on the merits of the matter filed before them, without verifying the procedural criteria relating to the admissibility and legitimacy of the specific recourse filed.[543]

---

[541] See: for example, *Fairén-Garbi and Solís-Corrales v. Honduras*, Judgment of the Inter-American Court of Human Rights (Merits), 15 March 1989, para.92; *Luis Edgar Vera Flores vs Peru*, Petition 4416-02, 24 October 2005, IAComHR Report on Admissibility No.86/05, para.37; *José Adrián Mejía Mendoza et al. v. El Salvador*, Petition 185-03, 13 November 2012, IAComHR Report on Admissibility No.119/12, para.30; and *etc*.

[542] *Fransisco José Magi v. Argentina*, Petition 951-01, 5 November 2013, IAComHR Report on Admissibility No.106/13, para.33. See also: *Víctor Eladio Lara Bolívar v. Peru*, Petition 871-03, 23 March 2011, IAComHR Report on Admissibility No.18/11, para.27; *Workers of the Empresa Nacional de Telecomunicaciones (ENTEL) v. Argentina*, Petition 374-97, 13 November 2012, IAComHR Report on Admissibility No.116/12, para.33; and *etc*.

[543] *Dismissed Congressional Employees (Aguado-Alfaro et al.) v. Peru*, Judgment of the Inter-American Court of Human Rights, 24 November 2006, para.126. The IACtHR recalled this statement in the *Castañeda Gutman v. Mexico* case. See: *Castañeda Gutman v. Mexico*, Judgment of the Inter-American Court of Human Rights (Preliminary objections, merits, reparations and costs), 6 August 2008, para.94, note.30.

At international level, the UN human rights treaty bodies have also imposed a duty of diligence on applicants wishing to submit individual communications. As Joseph, *et al.* pointed out:

> [I]n order for a complaint to be considered by either Committee, it must be shown that the complainant has genuinely attempted (by carefully observing the procedural requirements) to utilize all the available venues prescribed within the relevant State to gain a remedy which is designed to bring effective and sufficient redress.[544]

The obligation of an applicant to observe the procedural requirements for domestic remedies is multi-faceted. For example, Amerasinghe referred to this obligation with regard to such matters as time limits and capacity.[545] Sullivan suggested that the procedural requirements in domestic law include 'time limits, and formal requirements, such as subject matter jurisdiction and standing to bring the action'.[546] Harris, *et al*. pointed out that the formal requirements also include paying the mandatory filing fees.[547]

Take, for example, the time limits laid down in domestic law. The case law of the regional human rights systems reveals that the complainants are consistently required to comply with the time limits laid down in domestic law. Within the scope of the European human rights system, where failure to respect procedural rules constitutes the reason for the refusal of a remedy, neither the former EComHR nor the existing ECtHR were able to consider that the requirement as to the exhaustion of domestic remedies had been satisfied. In the case of *Cunningham v. the United Kingdom*, the applicant was found guilty of conspiracy to cause explosions and was sentenced to 20 years' imprisonment in 1975.[548] While in prison, in 1976 to be exact, he was charged by the Board of Visitors at Hull Prison for various disciplinary offences arising out of a prison riot,[549] and 'was found guilty and sentenced *inter alia* to a total of 342 days' loss of remission'.[550] In 1977, the applicant 'commenced proceedings before the High Court, seeking a declaration *inter alia* that the adjudication against him was in breach of the rules of natural justice'.[551]The High

[544] Joseph, *et al.*, *supra* note 280, p.59.
[545] Amerasinghe, *supra* note 262, p.319.
[546] Sullivan, *supra* note 259, p.8.
[547] See: David J. Harris, Michael O'Boyle, Colin Warbrick, *et al*.: *Law of the European Convention on Human Rights* (3rd edition), Oxford: Oxford University Press, 2014, p.50.
[548] *Cunningham v. the United Kingdom*, application no.10636/83, Commission (Plenary), Decision, 1 July, 1985.
[549] See: *ibid*.
[550] *Ibid*.
[551] *Ibid*.

Court subsequently adjourned these proceedings *sine die* 'pending the outcome of similar cases where writs had been issued'.[552] These cases were terminated by the Court of Appeal in 1979 and 1982 respectively.[553] The applicant 'then applied to the Divisional Court for leave to seek judicial review of the adjudication'.[554] The Divisional Court, however, refused his application 'under Section 31 (6) of the Supreme Court Act 1981 on grounds of undue delay in making the application',[555] disregarding the applicant's argument that the delay was attributable to the adjournment of the proceedings before the High Court.[556] The Divisional Court affirmed that, notwithstanding this adjournment, the applicant had had more than three years (since 1979) to make an application for leave to apply for judicial review.[557] The applicant appealed against this decision, but the Court of Appeal refused his appeal.[558]

In the complaint lodged with the EComHR, the applicant complained that the adjudication against him amounted to the determination of a criminal charge and was in breach of Arts.6, 13 and 14 of ECHR.[559] When examining the admissibility of this case, the EComHR pointed out: '… where failure to respect procedural rules constitutes the reason for the refusal of a remedy, the Commission cannot consider that the requirement as to the exhaustion of domestic remedies has been satisfied'.[560] In this case, the EComHR held that the applicant should have made an application for leave to apply for judicial review promptly after the Court of Appeal had terminated the case earlier in 1979.[561] Furthermore, they found no special circumstance which could absolve the applicant from exhausting the remedies at his disposal according to the correct procedures.[562]

The same jurisprudence can be found in the case law of the Inter-American human rights system. The IAComHR has frequently rejected complaints for the non-exhaustion of local remedies where the applicant had clearly sought to exhaust domestic remedies but has, through their own negligence, failed to observe the procedural requirements of

---

[552] *Ibid*.
[553] See: *ibid*.
[554] See: *ibid*.
[555] *Ibid*.
[556] See: *ibid*.
[557] See: *ibid*.
[558] See: *ibid*.
[559] *Ibid*.
[560] *Ibid*.
[561] *Ibid*.
[562] *Ibid*. Some similar cases: *X. v. The Federal Republic of Germany*, application no.3897/68, Commission (Plenary), Decision (Final), 17 July, 1970; *I. and C. v. Switzerland*, application no.10107/82, Commission (Plenary), Decision, 12 July 1984; and *etc*.

domestic law. In the case of *Alfredo Arresse et al. (former employees of the raceways divisions of the national lottery) v. Argentina*, the IAComHR declared the petition inadmissible on the grounds that 'the petitioners did not exhaust judicial remedies in a timely fashion …, and therefore, have not properly exhausted domestic remedies'.[563] In the case of *Mayra Espinoza Figueroa v. Chile*, the IAComHR found that the petitioner had failed to exhaust the remedies under domestic law according to which the request for protection stipulated in the Chilean Constitution 'must be filed within the administrative time-limit of 15 days after the alleged infringement of rights occurred'.[564]

The UN human rights treaty bodies have also stressed the obligation of an applicant to observe the time limits according to the law of the respondent state. For example, the author of a communication may have a limited time in which to appeal. If he or she fails to do so, 'it is likely that any subsequent complaint will be deemed inadmissible due to a failure to exhaust domestic remedies'.[565] In the case of *A.P.A. v. Spain*, for example, the author had been arrested in 1985 and charged with the robbery of several grocery shops.[566] The District Court (Audiencia Provincial) of Salamanca found the applicant guilty of robbery and sentenced him to imprisonment in the subsequent year.[567] The author argued that there were various procedural defects in the proceedings before the District Court and appealed to the Supreme Court of Spain, which confirmed the judgment of first instance on 2 June 1989.[568] Spanish law allows an applicant to file a constitutional motion against a decision *(recurso de amparo*) rendered by the Supreme Court within 20 working days, but the author was not notified of the Supreme Court's decision until 11 September 1989.[569] In January 1990, the applicant appealed to the Constitutional Tribunal, alleging a breach of Art.24 of the Spanish Constitution, which guarantees the right to a fair trial.[570] The Constitutional Tribunal, however, declared the appeal inadmissible, 'as statutory deadlines for the filing of the motion had expired'.[571]

The author claimed that the respondent state had violated his rights under Art.14 (1)(2)

---

[563] Alfredo Arresse et al. (former employees of the raceways divisions of the national lottery) v. Argentina, Petition No. 89-00, IAComHR Report on Admissibility No.107/13, 5 November 2013, para.45.
[564] *Mayra Espinoza Figueroa v. Chile*, Petition No.537-03, IAComHR Report on Inadmissibility Report No.71/14, 25 July 2014, para.30.
[565] Joseph, *et al.*, *supra* note 280, p.64.
[566] *A.P.A. v. Spain*, Communication No. 433/1990, CCPR/C/50/D/433/1990, 25 March 1994, para.2.1.
[567] See: *ibid*.
[568] See: *ibid*., paras.2.2 – 2.3.
[569] See: *ibid*., para.2.3.
[570] See: *ibid*., para.2.4.
[571] *Ibid*.

and (3)(a)(b)(c)(e) of the ICCPR.[572] The respondent state contended that the communication should be inadmissible because the applicant had not exhausted the domestic remedies available to him with due diligence.[573] As the Spanish government argued, the prosecutor, who was notified by the Supreme Court of the decision on 24 July 1989, had immediately forward the decision to the author's legal representative.[574] A written submission to the Constitutional Tribunal prepared and signed by the applicant himself and dated 20 September 1989 confirmed this notification.[575] Therefore, the applicant himself should be deemed responsible for the delay in the submission of the request for the *recurso de amparo*.[576] This means that, for the purposes of the OP-ICCPR, domestic remedies had not been exhausted.[577] In response, the applicant argued that according to the relevant law governing the institution of criminal proceedings, the respondent state had failed to notify him of the final judgments on the day of release, or at the very latest the day thereafter.[578] To him, the inaction or the neglect of his counsel could not exonerate the judicial authorities from their obligations vis-à-vis himself.[579]

According to the HRC, it was the applicant's failure that had led the Constitutional Tribunal to declare his *recurso de amparo* inadmissible on the grounds of the expiration of the statutory proceedings deadline.[580] Furthermore, the HRC noted that the it was the counsel who had failed to forward the Supreme Court's decision to his client, the author. In the absence of evidence to the contrary, the lawyer must be regarded as being privately retained by the applicant, who is therefore responsible for his counsel's inaction or neglect.[581] The HRC finally decided that the communication was inadmissible under Art.5 (2)(b) of the OP-ICCPR.[582]

It is worth noting that in this case the failure to observe the time limits was caused by the negligence of the applicant's privately retained legal counsel. This did not, however, exempt him from the obligation to meet this procedural requirement of domestic law, because these errors could in no event be attributed to the respondent state, but to the

[572] See: *ibid*., paras.1, 3.
[573] See: *ibid*., para.4.1.
[574] See: *ibid*.
[575] See: *ibid*., para.4.3.
[576] See: *ibid*., para.4.1.
[577] See: *ibid*., para.4.2.
[578] See: *ibid*., paras.5.1, 5.3.
[579] *Ibid*., para.5.1.
[580] See: *ibid*., para.6.3.
[581] See: *ibid*.
[582] See: *ibid*., para.7(a).

applicant himself. The UN human rights treaty bodies have established and maintained a consistent jurisprudence whereby errors or negligence on the part of any lawyer privately hired by a complainant cannot normally be imputed to the State party. In the case of *Soo Ja Lim, Shon Hui Lim and Hyung Joo Scott Lim v. Australia*, for example, the HRC observed that according to its jurisprudence, 'an author is required to abide by reasonable procedural requirements such as filing deadlines, and that the default of an author's representative cannot be held against the State party, unless in some measure due to the latter's conduct'.[583] In the case of *Calle Sevigny v. France*, for example, the HRC stated that the author's failure to avail herself of the internal remedies available under the criminal and civil law could be attributed to the lawyer assigned to her under the legal aid system, and the HRC found the complaints inadmissible for that reason.[584] In the case of *Gilberg v. Germany*, the HRC pointed out that, under Art.5 (2)(b) of the ICCPR, 'any failure of the author's privately retained counsel to inform him of the requirement … to exhaust domestic remedies must be attributed to the author rather than to the State party'.[585] In the *H. E-M. v. Canada* case, the CAT Committee noted that the author 'was on several occasions during the domestic procedures requested to provide proof that he continued to be personally at risk of torture in the event of his expulsion to Lebanon'.[586] However, the author failed to submit his case file to the Federal Court in support of his application owing to negligence on the part of his lawyer.[587] The CAT Committee endorsed the respondent party's opinion that 'the complainant cannot use his lawyer's negligence as a pretext for eschewing his responsibility to exhaust domestic remedies'.[588]

However, lack of diligence on the part of a lawyer assigned by the respondent state may absolve the victim of their responsibility to meet the requirements of domestic law.[589] In the case of *Griffin v. Spain*, for example, the author and his acquaintance (R.L.) were arrested by the Spanish police for the concealment of hashish in a rented campervan.[590] The interrogation was held in Spanish, which the author was not able to understand, and

---

583 *Soo Ja Lim, Shon Hui Lim and Hyung Joo Scott Lim v. Australia*, Communication No. 1175/2003, CCPR/C/87/D/1175/2003, 25 July 2006, para.6.2.
584 See: *Calle Sevigny v. France*, Communication No.1283/2004, 28 October 2005, Report of the Human Rights Committee, Volume II, A/61/40 (Vol. II), p.581, para.6.3.
585 *Erich Gilberg v. Germany*, Communication No. 1403/2005, CCPR/C/87/D/1403/2005, 25 July 2006, para.6.5.
586 *H. E-M. v. Canada*, Communication No. 395/2009, CAT/C/46/D/395/2009, 23 May 2011, para.6.4.
587 *Ibid*., para.4.8.
588 *Ibid*., para.6.3.
589 See: Sullivan, *supra* note 259, p.8.
590 See: *Griffin v. Spain*, Communication No. 493/1992, CCPR/C/53/D/493/1992, 5 April 1995, para.2.3.

the police did not provide him with an interpreter during the interrogation.[591] After being brought before an examining magistrate, the author was incarcerated at the prison of Melilla, where he was able to obtain the services of a barrister and a solicitor through the mediation of a prisoner.[592] However, as the author allegedly stated, the barrister had failed to discharge her responsibilities, as a result of which the court had pronounced him guilty.[593] In addition, she refused the author's request to appeal.[594] In 1992, the author was informed that the respondent state had assigned him a legal-aid lawyer, who had filed an appeal to the Supreme Court on his behalf.[595] However, as the author submitted, this court-appointed lawyer had not contacted him at any point during the proceedings, nor did this lawyer inform him of the dismissal of the appeal by the Supreme Court.[596] Moreover, the author argued that the Supreme Court had not given any reasons for its decision.[597] The author subsequently wrote letters to several instances in Spain, including the Constitutional Court, the Ombudsman (*Defensor del Pueblo*), the judge and public prosecutor and the Prosecutor General (*Fiscal General del Estado*), seeking a remedy,[598] but none of these had dealt with the author's case.[599]

The author alleged that his rights under Art.14 of ICCPR had been violated because the lawyer assigned to him had not sought to contact him to discuss the case during the appeal procedure, and 'he was denied the opportunity to defend himself on appeal, as the hearing was held in his absence'.[600] The respondent state submitted that the communication should be inadmissible, since the author had failed to fulfil the procedural requirements that should have been met if he wanted to avail himself of the remedy provided by the Constitutional Court of Spain.[601] As the respondent state argued, the author had been clearly informed by the respondent state that his case could only be raised by the Prosecutor General within 20 days of notification of a decision which allows no

[591] See: *ibid*.
[592] See: *ibid*., paras.2.4 – 2.5.
[593] See: *ibid*., paras.2.5 – 2.6.
[594] See: *ibid*., para.2.7.
[595] See: *ibid*., para.2.9.
[596] See: *ibid*.
[597] See: *ibid*.
[598] See: *ibid*., para.2.11.
[599] See: *ibid*.
[600] *Ibid*., para.3.6. Apart from alleging a violation of Art.14 of ICCPR, the author also claimed that the respondent state has violated his fundamental rights under Arts.7, 9(1)(2), 10, 17 and 26 of ICCPR. See: *ibid*., paras.3.1 – 3.3, 3.7 and 3.8.
[601] See: *ibid*., paras.2.11, 4.1, 5.

further appeal.[602]

The author's allegation was upheld by the HRC. The Committee held that the *amparo* against the Supreme Court's decision before the Constitutional Court was not a remedy available to the author.[603] In the case in question, the Supreme Court had dismissed the author's appeal on 15 June 1992,[604] but the author was not formally notified by the lawyer assigned by the respondent state of this decision until he heard of the decision in an informal way at the end of June 1992.[605] Moreover, he did not receive any of the court documents required for an appeal to the Constitutional Court in his case, and the lawyer appointed to him had not contacted him at all.[606] 'It was not apparent that the responsibility for this situation was attributable to the author.'[607] As a result, the HRC did not find itself precluded from considering the communication under Art.5 (2)(b) of OP-ICCPR.[608]

Some special circumstances may also lessen or absolve an applicant from the obligation to observe the time limits. It is well-established jurisprudence maintained by the existing human rights mechanisms at both regional and international levels that the rule of prior exhaustion of local remedies should be applied with some degree of flexibility and without excessive formalism in any examination of whether this rule has been observed. As a result, in any given case, the relevant human rights mechanism has the discretion to assess and decide whether special circumstances exist. To exercise this discretion properly, this mechanism must take realistic account of the general legal and political context of the respondent state in which the formal remedies operate and the facts of each case, as well as the personal circumstances of the applicant.

In the case of *Bahaddar v. The Netherlands*, for example, the authorities in the Netherlands refused an application from the complainant for asylum and a residence permit on humanitarian grounds in 1991.[609] They 'also denied suspensive effect to the applicant's subsequent request for a review (herziening) of this decision'.[610] The applicant

---

602 See: *ibid*.
603 See: *ibid*., para.6.1.
604 See: *ibid*.
605 See: *ibid*.
606 See: *ibid*.
607 *Ibid*.
608 *Ibid*.
609 See: *Bahaddar v. The Netherlands*, application no. 25894/94, Commission (Plenary), Decision, 22 Nay 1995.
610 *Ibid*.

subsequently obtained an injunction on his expulsion pending review proceedings.[611] In 1993, the authorities in the Netherlands rejected the applicant's request for a review of the decision,[612] and the applicant filed an appeal against this decision with the Judicial Division of the Council of State in the same year, in which it was mentioned that 'the grounds for the appeal would be submitted as soon as possible'.[613] The applicant obtained another injunction on his expulsion pending the review proceedings.[614] In the meantime, the applicant's lawyer was required by the Judicial Division to supplement the grounds for the appeal with the Judicial Division before the stipulated deadline.[615] She failed to make this submission on time, providing no explanation for the delay.[616] In 1994, 'the President of the Judicial Division in simplified proceedings (vereenvoudigde procedure) declared the applicant's appeal inadmissible for not having complied with a formal requirement'.[617] The applicant subsequently filed an objection against this decision with the Judicial Division, arguing that it had not been possible to meet the deadline to submit grounds for the appeal.[618] His argument was not accepted by the Judicial Division, which therefore rejected the applicant's objection.[619]

The applicant filed new requests for asylum and a residence permit with the 'newfound' facts 'which the Deputy Minister of Justice had not been able to take into account when deciding on the applicant's first requests for asylum and a residence permit'[620] but the Deputy Minister of Justice declared the new requests inadmissible.[621] In his opinion, according to Section 15b para. 1 (b) of the Dutch Aliens Act (Vreemdelingenwet), the facts presented by the applicant were not new.[622] Appeal proceedings against the decision were subsequently initiated.[623]

In the complaint lodged with the EComHR, the applicant complained that the expulsion decision by the Netherlands authorities had constituted a violation of Arts. 2 and

611 See: *ibid*.
612 See: *ibid*.
613 *Ibid*.
614 See: *ibid*.
615 See: *ibid*.
616 See: *ibid*.
617 *Ibid*.
618 See: *ibid*.
619 See: *ibid*.
620 *Ibid*.
621 See: *ibid*.
622 See: *ibid*.
623 See: *ibid*.

3 of ECHR.[624] During the proceedings, the Dutch government contended that the applicant had not complied with the requirement of exhaustion of domestic remedies, since he had omitted to substantiate his appeal before the Judicial Division of the Council of State in time.[625] The applicant maintained that, on the contrary, the domestic remedies had been exhausted, as hehad instigated the appeal proceedings within the time limit.[626]

The EComHR noted the applicant's failure to respect procedural rules laid down in the domestic law of the Netherlands.[627] In this case, the rule of prior exhaustion of local remedies 'cannot be considered to have been satisfied, unless special circumstances exist which absolve the applicant from exhausting the remedies at his disposal according to the correct procedures'.[628] To the EComHR, such special circumstances did exist in this case. The ECtHR, however, overturned the EComHR decision, holding that the special circumstances did not absolve the applicant from complying with the time-limit for submitting grounds for appeal.[629] For one thing, the applicant's lawyer had not stated any grounds when lodging the appeal against the decision of the Deputy Minister of Justice to the Judicial Division.[630] For another, the respondent state had offered the applicant's lawyer ample opportunity to remedy this failure, and the applicant had not contested the time-limits.[631] In addition, the applicant's lawyer had disregarded the expiration of the time-limit, given no explanation of the delay and made no request for the extension of the time-limit which was available to her.[632]

An applicant may also be relieved or exempted from the obligation to observe self-contradictory or incorrect procedural requirements. In the case of *J.R.T. and the W.G. Party v. Canada*, for example, the Canadian authorities had curtailed the author's telephone service, which he repeatedly used to warn callers of 'the dangers of international finance and international Jewry leading the world into wars, unemployment and inflation and the collapse of world values and principles'.[633] [634] Given a number of letters filed by

---

[624] See: *ibid*.
[625] See: *ibid*.
[626] See: *ibid*.
[627] See: *ibid*.
[628] *Ibid*.
[629] See: *Bahaddar v. The Netherlands*, application no. 25894/94, Court (Chamber), Judgment (Preliminary Objection), Strasbourg, 19 February 1998, para.46.
[630] See: *ibid*.
[631] See: *ibid*.
[632] See: *ibid*.
[633] *J.R.T. and the W.G. Party v. Canada*, Communication No. 104/1981, CCPR/C/18/D/104/1981, 6 April 1983, para.2.1.
[634] In fact, this communication has *J.R.T.* (Mr. T) as the only author. Given that the W. G. Party is an

Jewish groups and individual Jews complaining about the author's behaviour, the Canadian Human Rights Commission initiated complaint Proceedings against the author, and decided to appoint a Human Rights Tribunal to inquire into the complaints and determine whether the author's actions had constituted a violation of Section 13(1) of the Canadian Human Rights Act.[635] The Tribunal subsequently decided that the behaviour in question had been a discriminatory practice on the part of the author because it was 'likely to expose a person or persons to hatred or contempt by reason of the fact that the person or those persons are identifiable on the basis of a prohibited ground of discrimination'.[636]

At the same time, Section 42 (1) of the Canadian Human Rights Act allows an appeal as the result of a decision of the *ad hoc* human rights tribunal to be lodged with a Review Tribunal on any question of law or fact, or a combination of law and fact, within a time-limit of 30 days.[637] The time-limit for seeking judicial review of a Tribunal order under section 28(2) of the Federal Court Act, however, is only 10 days.[638] The author 'was, therefore, convinced that he would have 30 days to launch an appeal and, in consequence, failed to appeal within the 10 days set out in section 28 (2) of the Federal Court Act'.[639] Although the author brought a Notice of Motion according to the Federal Court Rule to extend the time for such appeal, the extension was refused by the Federal Court on the grounds that 'the material filed in support of the application did not disclose any serious grounds for challenging the validity of the Decision which the applicants wished to attack'.[640] During this period, the author did not desist from the actions that were deemed to be in contravention of the order of the Human Rights Tribunal appointed by the Canadian Human Rights Commission.[641] Given this, the Canadian Human Rights Commission made an application to the Federal Court to enforce the Tribunal order.[642] The Federal Court decided that the author was guilty of contempt of court and sentenced him to a one-year imprisonment and ordered the W. G. Party to pay a fine of $5,000.[643] The author subsequently appealed against this decision to the Federal Court of Appeal and

association and not an individual, and as such cannot submit a communication to the HRC under the OP-ICCPR, the Committee declared the communication inadmissible insofar as it concerned the W. G. Party. See: *ibid*., para.8(a).

635 See: *ibid*., para.2.4.
636 *ibid*., para.2.2.
637 See: *ibid*.
638 See: *ibid*., para.2.5.
639 *Ibid*.
640 *Ibid*.
641 See: *ibid*., paras.2.6 – 2.7.
642 See: *ibid*., para.2.7.
643 See: *ibid*., para.2.8.

the Supreme Court of Canada respectively, but these appeals failed.[644]

The author then lodged the case with the HRC, claiming that the Canadian authorities had violated Arts.19 of the ICCPR which protects the right to hold and maintain opinions without interference, the right to freedom of expression and the right to seek, receive and impart information and ideas of all kinds through the media of choice.[645] The author of the communication also stated that all domestic remedies had been exhausted.[646] However, the respondent state contended that the communication should be declared inadmissible because the author, by his own inaction and negligence, had failed to exhaust domestic remedies by failing to 'file their application for judicial review within the time-limits prescribed by law, to seek review of the order of the Tribunal within the time frame provided by law, or to succeed in convincing the Federal Court of Appeal to extend this time by showing that their appeal had some merit'.[647] Nor had the author 'challenged the validity of the legislation which they were found to have contravened'.[648]

The HRC noted the author's failure to file his application for judicial review within the time limit prescribed by law.[649] However, in view of the ambiguity ensuing from the different time limits laid down in the laws in question, the Committee considered that the author had indeed made a reasonable effort to exhaust domestic remedies. Therefore, the HRC did not consider that, as to this claim, the communication should be declared inadmissible under article 5 (2) (b) of OP-ICCPR.[650]

Provided they are reasonable, an applicant is under an obligation to comply with all domestic laws governing procedural requirements diligently and rigorously. As Sullivan indicated, exemption from the exhaustion requirement may be argued on the grounds that this requirement is 'unreasonable in the particular circumstances of the case or rendered the remedy unavailable'.[651] This has been discussed in **Sections 3.1.1** and **3.1.2**.

### 3.2.4 The obligation to obtain a final judgment/decision

According to the rule of prior exhaustion of local remedies, domestic remedies are not

644 See: *ibid*., para.2.9.
645 See: *ibid*., para.1.
646 See: *ibid*., para.3.
647 *Ibid*., para.6.2.
648 *Ibid*.
649 See: *ibid*., para.8(b).
650 See: *ibid*.
651 Sullivan, *supra* note 259, p.8.

considered exhausted if a case is still ongoing in domestic legal systems. This typically happens when a national court is examining the application. Generally speaking, the term 'final decision' refers to that made by the highest level of jurisdiction in the State concerned. Many states have a system of review for decisions composed of courts set up at different levels. In such a system, the higher courts supervise the lower courts by nullifying or rectifying their decisions. As Amerasinghe said: '[I]t is necessary that there be a decision of a court which is the highest in the hierarchy of courts to which the applicant can have resort in the domestic legal system, provided he is not exempted on the recognised grounds from proceeding to such highest court.'[652]

When there has been no final decision in a case, regional and international human rights mechanisms will regard that case as inadmissible. At the regional level, the European human rights system endorses the view that 'an applicant must have recourse to all competent domestic courts and obtain a final decision from the highest court before the Commission may pronounce on his case'.[653] As Amerasinghe pointed out, 'where a final decision has been given by the highest court and no further recourse is available, local remedies will be regarded as having been exhausted'.[654] The IAComHR has stated in many petitions that domestic remedies have been exhausted with a judgment in the Supreme Court. As Pasqualucci said: 'If the Commission receives a petition before domestic remedies have been exhausted, it may not begin its consideration of the matter. It may, however, hold the petition until the final judgment is made in the State and then process it'.[655] The AfComHPR have declared communications inadmissible in the event of an ongoing or unconcluded trial. In the case of *The Kenya Human Rights Commission v. Kenya*, for example, the AfComHPR declared the communication inadmissible because the complainants themselves admitted that the communication was pending before the courts of Kenya.[656] In the case of *Tsatsu Tsikata v. Republic of Ghana*, the respondent state submitted that the matter of the complainant's communication was still pending in the High Court of Justice, Ghana, with further unexplored rights of appeal to the Court of

[652] Chittharanjan F. Amerasinghe: "The Rule of Exhaustion of Domestic Remedies in the Framework of International Systems for the Protection of Human Rights", in: *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (ZaöRV), Vol. 28, 1968, pp.257 – 300, at 288 – 289.
[653] See: Amerasinghe, supra note 262, p.322. See also: Tom Zwart: The Admissibility of Human Rights Petitions: The Case Law of the European Commission of Human Rights and the Human Rights Committee, Dordrecht; Boston; London: Martinus Nijhoff Publishers, 1994, p.220.
[654] Amerasinghe, *supra* note 262, p.322.
[655] Pasqualucci, *supra* note 189, p.93.
[656] *Kenya Human Rights Commission v. Kenya*, Communication No. 135/94, AfComHPR 18th Ordinary Session, 11 October 1995, para.16.

Appeal and Supreme Court of Ghana, in accordance with Arts.137 and 131 respectively of the Ghanaian Constitution.[657] The AfComHPR recalled its findings in the *Kenya Human Rights Commission v. Kenya* case, concluding that the complainant had yet to exhaust all the local remedies available to him,[658] finally declaring the communication inadmissible for non-exhaustion of local remedies.[659] At the international level, the existing UN human rights system also requires a complainant to obtain a final decision from the judicial system at the highest possible level. According to Sullivan's study, communications before the UN human rights treaty bodies 'should include information confirming that a final judgment has been obtained from the highest possible court about all aspects of the claims brought before the Committee.'[660]

The current statutes of the WCHR have also established the obligation of the applicants to obtain a final decision. As mentioned above, Art.10 (6) of the NK Statute stipulated the exhaustion of an appeal to the national human rights court as a precondition for the admissibility of a complaint by the WCHR. This Article implicitly suggests the obligation of the applicants to obtain a 'final decision', which refers to a final judgment or decision made by the national court of human rights. The Consolidated Statute also stipulates the prerequisite of a decision made by 'the highest competent domestic court' for its jurisdiction.[661] For the States Parties to the future WCHR Statute, the question of which competent court is the highest hierarchically depends on national legislation.[662]

All in all, as the ILC puts it, 'if the municipal law in question permits an appeal in the circumstances of the case to the highest court, such an appeal must be brought in order to secure a final decision in the matter'.[663] It further states that 'failure to resort to local remedies, in the sense that, so long as these remedies have not been exhausted, an international claim will not lie and the duty to make reparation will not be enforceable'.[664] A final decision of the highest domestic court is therefore a necessary prerequisite to lodging a case with the WCHR.

---

[657] See: Tsatsu Tsikata v. Republic of Ghana, supra note 381, para.38.
[658] *Ibid*., paras.35 – 36.
[659] *Ibid*., para.53.
[660] Sullivan, *supra* note 259, p.9.
[661] See: Art.9 (1) of the Consolidated Statute.
[662] See: *ibid*.
[663] ILC: "Second report on diplomatic protection by Mr. John Dugard, Special Rapporteur", A/CN.4/514, 28 February 2001, para.13.
[664] ILC: "International responsibility: Report by F. V. Garcia Amador, Special Rapporteur", A/CN.4/96, 20 January 1956, in: ILC: *Yearbook of the International Law Commission 1956 (Vol.2)*, A/CN.4/SER.A/1956/Add.1, United Nations, New York, 1957, p.220.

## Concluding Remarks

This **Chapter**, following the current statutes of the proposed World Court of Human Rights (WCHR), namely, the NK Statute, the MS Statute and the Consolidated Statute, is focused on the WCHR's jurisdiction over state actors.

The WCHR's jurisdiction over state actors is composed of a contentious jurisdiction and a non-contentious jurisdiction. **Section 1** consists of a thorough discussion of the WCHR's contentious jurisdiction, with **Section 1.1** being divided into the jurisdiction *ratione persone* (**Section 1.1.1**) and the jurisdiction *ratione materiae* (**Section 1.1.2**).

The jurisdiction *ratione persone* addresses the *locus standi* of states before the WCHR. As can be seen in this part, the authors of the current statutes had hoped to grant States Parties a full *locus standi* (both as plaintiff and defendant). As regards the plaintiff status, the inter-state complaints procedure enables one State Party to take action against another before the WCHR for failure to fulfil a human rights treaty obligation. The inter-state complaints procedure can be found in many human rights mechanisms, at both regional and international levels. But for all that, the inter-state complaints procedure is by definition not a judicial procedure, but rather a mediatory or conciliatory one. In addition, such inter-state dispute resolution has rarely been invoked in practice. As indicated by **Section 1.1.1**, the NK Statute and the MS Statute both included the inter-state procedure. More than that, they hoped to transform this procedure into a much more effective system. Firstly, the NK Statute and the MS Statute prohibited States Parties from announcing the reservation to the WCHR's competence in respect of the inter-state complaints. Secondly, it asserted that, in principle, all inter-state complaints should be heard by the WCHR in public. Moreover, the authors of the statute strove to transform the inter-state complaints procedure from a non-judicial procedure into a judicial one in which the inter-state complaints procedure before the proposed WCHR culminating in a judgment with legally binding force. However, the Consolidated Statute does away with the procedures for inter-state complaints, and the authors did not expound upon their reasons for this deletion.

With regard to the defendant status, the individual complaints procedure 'means that anyone may bring a complaint against a State party alleging a violation of treaty rights to the body of experts monitoring the treaty'.[665] This procedure is characterised by the 'wider

[665] OHCHR: "Individual Complaint Procedures under the United Nations Human Rights Treaties", Fact Sheet No. 7, Rev. 2, United Nations, New York and Geneva, 2013, p.1.

access of litigants'.[666] According to the NK Statute, any person, NGO and group of individuals claiming to be the victim of a human rights violation are eligible to appeal against states before the WCHR. In addition, the NK Statute also suggested the introduction of '*actio popularis*' – the third party complaints procedure – within the framework of the future WCH, which would enable cases to be submitted by a third party (*e.g.* the Human Rights Council, the OHCHR and the UN Security Council). However, this suggestion was not adopted by the Consolidated Statute. In light of the MS Statute, complaints lodged by individuals or groups of individuals claiming to be the victim of a human rights violation by the States Parties will be the main channel for taking cases before the future WCHR. Like Nowak and Kozma, Scheinin also tried to introduce some innovations to augment the WCHR's jurisdiction. He proposed *ad hoc* jurisdiction, which would enable the WCHR to hear a case where the respondent state had not accepted the Court's jurisdiction. In Scheinin's opinion, an *ad hoc* acceptance of the WCHR's jurisdiction would enable the state concerned to test the wisdom of withdrawing such a reservation at a later stage. Unfortunately, the Consolidated Statute does not favour this proposal either. The Consolidated Statute ultimately remains an individual complaints procedure.

As **Section 1.1.2** revealed, the jurisdiction *ratione materiae* of the WCHR determines whether, and to what extent, the Court can adjudicate on the conduct of States Parties. The authority of the proposed WCHR to hold states accountable for human rights violations is based on their breach of their conventional obligations as established by the applicable laws in this list. At the same time, the authors of the current statutes hold to the opinion that the scope of the WCHR's jurisdiction *ratione materiae* should be dynamic in nature. That is to say, new treaties may be added to the category of the WCHR's jurisdiction *ratione materiae*.

More importantly, the current statutes do not require the States Parties to accept the WCHR's jurisdiction over the list of applicable laws in its entirety. The authors of the current statutes have obviously anticipated that some, or even many, of the states may argue that not every right under the WCHR's jurisdiction *ratione materiae* is appropriately subject to judicial determination by the Court. Given this, they introduced an 'opt-out' clause, allowing each State Party to manipulate the scope of the WCHR's jurisdiction *ratione materiae*. Accordingly, a State Party may announce a revocable reservation at the

[666] Keohane, Moravcsik and Slaughter, *supra* note 28, p.95.

time of ratification of or accession to the future Statute of the WCHR, preventing the WCHR from adjudicating complaints relating to certain treaties in the applicable-law list. This may warrant the conclusion that they endorse a distinction between 'justiciability' in law and 'justiciability' in practice: all human rights treaties under the WCHR's jurisdiction *ratione materiae* are justiciable in law. This does not, however, mean that the Court can, in practice, synchronously adjudicate every right. Gibney expressed criticism on the opt-out clause, since this clause does in fact give States Parties 'the ability to determine whether the law will be made applicable to them'.[667] He worried that the opt-out clause would undermine the whole point of the Court. In his view, 'becoming a state party to an international human rights treaty means that a country already has decided to be bound by international law – not that it might think about it'.[668] As Kirkpatrick said:

> These approaches, like Gibney's, do open up the possibility that fewer states would become party to the statute, thereby potentially delaying the Court's entry into force and concomitantly limiting the scope of Court's jurisdiction vis-à-vis state parties.[669]

The final part of **Section 1.1** (**Section 1.1.3**) explored the relationship of the WCHR and the relationship of the WCHR's jurisdiction to regional human rights courts and the UN human rights treaty bodies. The establishment of the WCHR would not bring about any institutional change to the contentious jurisdiction of the existing regional human rights courts. There would be no hierarchical link between the regional courts and the WCHR: The future WCHR would not become the appellate court of the human rights courts at the regional level; the latter will continue to wield adjudicatory power to hold state actors accountable for failure to fulfil their human rights obligations, without having to be concerned about review by the WCHR. By contrast, the role of the communications procedure under the present UN human rights will be gradually weakened and eventually superseded by the future WCHR.

There were two completely opposing attitudes among the authors of the current statutes with regard to the non-contentious jurisdiction of the WCHR, namely, the WCHR's advisory jurisdiction. As can be seen in **Section 1.2,** according to the NK Statute, the WCHR would exercise its advisory jurisdiction by giving advice on domestic laws and

---

667 Mark Gibney: *International Human Rights Law: Returning to Universal Principles* (2nd edition), Lanham: Rowman & Littlefield Publishers, 2015, p.130.
668 *Ibid*.
669 Kirkpatrick, *supra* note 2, p.242.

proposed legislation and clarifying whether or not they are compatible with those contained in any of the human rights treaties under its jurisdiction *ratione materiae*. The UN Human Rights Council and the OHCHR are also entitled to ask for an advisory opinion regarding the interpretation of this Statute and the human rights treaties in the applicable law list. It can be found that, in the sense of the NK Statute, the invocation of the WCHR's advisory jurisdiction does not depend on a specific complaint, and the opinions have a purely consultative nature. By contrast, the advisory jurisdiction under the MS Statute only refers to the Court's function of issuing opinions on specific complaints. Specifically, in, and only in, a situation where the WCHR seeks *ad hoc* acceptance of its jurisdiction from the non-party to the Statute, and this state does not accept this *ad hoc* jurisdiction within three months, can the Court issue its opinion on the request of the OHCHR. Accordingly, in the sense of the MS Statute, these opinions are of a quasi-judicial nature. The Consolidated Statute, to a great extent, echoed the advisory jurisdiction as proposed by the NK Statute.

In order to convince as many states as possible to ratify the WCHR Statute, it will be imperative for the future drafters to ensure that the WCHR's jurisdiction is complementary to national jurisdictions. Considering the experiences of current human rights mechanisms, the key to this complementary nature is the inclusion of admissibility criteria. As mentioned in the introductory remarks, the exhaustion rule, which subordinates the presentation of an international claim to such exhaustion, usually requires the most attention among these criteria. 'Nowadays, the rule of exhaustion of domestic remedies is an admissibility criterion of most, and surely every major, human rights adjudicative procedure'.[670] In the case of a WCHR, this rule will serve as an important admissibility criterion whereby States Parties must be given the opportunity to redress an alleged violation of the international human rights treaty under the WCHR's jurisdiction *ratione materiae* within the framework of their own domestic legal system prior to its international responsibility being called into question before the Court. Although being proposed under the same rationale, the contents of the exhaustion rule under the current statutes of the WCHR are in fact different. Moreover, different content refers to different legal issues. **Section 2** explores and analyses the content and related legal issues of this rule under the different statutes.

As discussed in **Section 2.1**, the rule of prior exhaustion of domestic remedies in the

[670] Romano, *supra* note 293, p.562.

NK Statute mainly applies to the individual complaints procedure. The NK Statute would require States Parties to establish, maintain or designate a national human rights court within their own territory. As an admissibility criterion, an applicant would first have to appeal to this court and obtain a final decision before they could submit the complaint to the WCHR. According to Nowak and Kozma, these national courts of human rights would operate separately, or function as part of more than one domestic court. In directly applying the international treaties that the States Parties have ratified, they would adjudicate the complaints against the States Parties. With the coming into being of such national human rights courts, the form of claims presented before the national human rights courts in the respective respondent state would be identical to those brought before the WCHR. By functioning in this way, the national human rights courts, in Nowak and Kozma's opinion, should act as an incentive for the domestic justice authorities to fight against human rights violations, thus enhancing the protection to those rights at the national level. In brief, in the sense of the NK Statute, the term domestic remedies refers only to judicial remedies, which should be provided by, and only by, the national human rights courts.

**Section 2.1** reveals that the Commentary of the NK Statute demonstrates a self-contradictory attitude towards the applicability of the exhaustion rule in third party complaints. Namely, the explanation of Art.8 excludes the application of the exhaustion rule in such situations; yet the explanation of Art.11 states clearly that the exhaustion rule should apply equally to individual and third party complaints. Considering the fact that Nowak and Kozma had made full reference to Arts. 1 and 17 of the ICC Statute, which emphasise the primary role of the domestic jurisdiction, they seem to believe that the exhaustion rule applies to third party complaints.

In addition, this part found that for many states which have a national human rights court the obligation to establish or designate such a court may raise a pressing constitutional problem: they will have to determine the legal status of such a court within their own legal system, and particularly its relationship to the highest domestic courts. More than that, this constitutional problem will have to be addressed within one year of the entry into force of the current Statute or of a state's ratification or accession. In this case, many states may choose not to ratify the statute, or will, at the very least, reconsider their positions.

Like the NK Statute, the MS Statute also included the rule of prior exhaustion of local remedies. As indicated in **Section 2.2**, the exhaustion rule applies equally to the individual

complaints and inter-state complaints in respect of the States Parties. It is worth noting that the application of this rule also covers cases where the WCHR needs to seek *ad hoc* acceptance of jurisdiction. However, the MS Statute did not expatiate the content of this rule further.

It can be found in **Section 2.3** that Nowak and Kozma subsequently gave up the idea of national human rights courts for pragmatic reasons.[671] In the Consolidated Statute, the authors agreed upon a concession, replacing the term 'national human rights courts' with the more modest 'highest competent domestic court'. Accordingly, although no longer requiring States Parties to establish, maintain or designate a national human rights court, the Consolidated Statute insists that the qualifying domestic remedies shall be judicial. It seems that this regulation is seeking to start an adventurous reform of the existing rule concerning the type of local remedies, which encompasses not only judicial remedies, but also non-judicial ones, as long as they are legal in nature. However, as this part revealed, the present human rights mechanisms at both a regional and international level have, directly or indirectly, emphasised the role of these judicial remedies in domestic remedies. It can be followed that limiting domestic remedies exclusively to judicial remedies would not increase the difficulty of gaining support from states for the current proposal for establishing the WCHR that much. In other words, codifying domestic remedies as exclusively judicial remedies does not seem a worse option than regulating this admissibility criterion in broader terms. Moreover, while the exhaustion rule as interpreted within the Consolidated Statute refers principally to ordinary judicial remedies, it does not disqualify those judicial remedies provided by special courts.

**Section 3** subsequently discusses the application of the rule of prior exhaustion of local remedies within the framework of the WCHR. In fact, the exhaustion rule necessitates both the States Parties and the applicants to fulfil their respective obligations under this rule. The authors of the currently proposed Statute only mentioned the obligations of the States Parties and described these obligations in general terms. Given this, **Section 3.1** describes how, having made full reference to the current regional and international human rights mechanisms, the authors consolidated these obligations into three aspects: the obligation to provide available domestic remedies; to ensure that these domestic remedies are effective, and that they are provided in a timely manner without unreasonable prolongation.

[671] See: Kozma, *et al.*, *supra* note 31, p.4.

As for the first of these, namely, the obligation to provide available domestic remedies, this requires that States Parties to the future WCHR Statute provide judicial remedies through ordinary courts of general jurisdiction, which have unlimited jurisdiction, both civil and criminal, within their jurisdictional area. Judicial remedies provided by special courts should also be characterised as exhaustible remedies in the sense of the future WCHR Statute, as long as they are directly accessible to individuals. Secondly, the States Parties must ensure that all applicants have access to the courts. To be specific, they are under a legal obligation to ensure the availability of all the information about established judicial remedies as well as the suitability of the channel through which the information can be accessed. The States Parties must also protect applicants from unwarranted exposure to hardship or inappropriate impediment in seeking recourse to these judicial remedies. According to **Section 3.1.1**, excessively high fees for filing complaints and depriving applicants of the right to assistance from the legal counsel of their choice serve as two convincing examples.

In addition, **Section 3.1.1** suggests that the situation of a consistent pattern of gross human rights violations will not necessarily lead to the conclusion that domestic remedies are not available. This section delineated this situation with two phrases: the occurrence of gross human rights violations and the consistent occurrence of such violations. In the first phrase, the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (also known as the van Boven/Bassiouni Principles) clearly indicated that states must provide remedies for gross violations of international human rights law. These remedies include the victim's right to equal and effective access to justice; to adequate, effective and prompt reparation for harm suffered; and to relevant information concerning violations and reparation mechanisms. The van Boven/Bassiouni Principles do not explicitly mention whether this is also applicable in the event of consistently occurring gross human rights violations. The consistent occurrence of gross violations of international human rights law may constitute crimes under international law, and may trigger intervention by international actors, such as the ICC and the R2P, to halt such violations. Both the ICC and the R2P emphasise the primary responsibility of states to protect those within their territory. It will therefore be necessary for the future WCHR to be cautious in determining the availability of the established judicial remedies in a party state where the consistent occurrence of gross human rights violations has been reported.

The obligation to provide effective domestic remedies means that the States Parties

must ensure that applicants have effective and sufficient means to obtain the remedies at their disposal. **Section 3.1.2** does not and cannot, however, provide an exhaustive list of all the factors that may affect the result of the 'effectiveness' test. As this section indicates, in practice, the existing human rights mechanisms have used the phrases 'reasonable prospect of success' and 'reasonable possibility of an effective remedy' to formulate the object of the effectiveness test. Under the former phrase, as adopted by the 2001 Articles on Responsibility of States for Internationally Wrongful Acts, the burden of proof is primarily on the respondent state. All the applicants need to do is to prove the existence of an identical claim that has already been dismissed by the domestic courts, and such unpromising case law may be sufficient to indicate that there is no real prospect of success. By contrast, the ILC Draft Articles on Diplomatic Protection adopted the phrase 'reasonable possibility of an effective remedy', which imposes a heavy burden on the claimant by requiring that they prove that in the circumstances of the case, and having regard to the legal system of the respondent state, there is no reasonable possibility of an effective remedy. The future WCHR will have some room for manoeuvre over the effectiveness test, which will be conducted *bona fide* on a case-by-case basis in the context of local law and the prevailing circumstances. At the same time, there is a dire need for the future WCHR to clarify the exact object of the effectiveness test.

In addition to assurances as to the availability and effectiveness of established remedies in the domestic judicial system, the States Parties to the WCHR Statute must also ensure that these judicial remedies are provided within a reasonable time. As **Section 3.1.3** clearly points out: even where the established domestic remedies are available to the applicants and are capable of providing means of redress, the unreasonable, undue or unwarranted delay or prolongation of domestic processes may also exempt the applicants from the obligation to exhaust these remedies. However, these adjectives are relative and abstract. It is not possible to indicate a future universally applicable criterion of how long the national judicial procedure will have to take to be seen as unreasonable delay, nor whether or not the delay in administering justice will, as with the effectiveness test, be determined on a case-by-case basis. Be that as it may, as the section in question reveals, there are some criteria that have been adopted by the existing human rights mechanisms which may be useful as a reference for the future WCHR.

Although not mentioned in the current statutes, the exhaustion rule *per se* connotes the obligation of applicants to exhaust all established judicial remedies with due diligence where they are likely to be available, effective and provided within a reasonable time.

**Section 3.2** expounded on this issue. First, an applicant must try to sufficiently substantiate their complaint in a particular case. A complaint may be regarded by the WCHR as inadmissible if the applicant is unable to sufficiently demonstrate that the facts of their complaint tend to establish a violation of the rights guaranteed in the pertinent human rights instrument or certain provisions thereof. The obligation concerning substantiation has a two-fold meaning: establishment of the facts, and the provision of sufficient supporting proof. To be specific, the future WCHR would not, in any event, draw implicit facts from the claims as presented before it. For the purpose of admissibility, an applicant will have to convince the WCHR that the facts in their claim would amount to a breach either of the treaty or certain provisions thereof under the WCHR's jurisdiction *ratione materiae*. As by **Section 3.2.1** reveals, the more salient the detail in a complaint, the greater the likelihood that it will be considered credible. At the same time, on a preliminary examination of the complaint, the applicant must submit sufficient evidence and legal argument to convince the WCHR to proceed to an examination of its merits at this stage. Accordingly, for the future WCHR, the creation of appropriate evidentiary rules and case law to determine the burden and standard of proof necessary to substantiate individual complaints may prove to be a necessity.

In light of **Section 3.2.2**, in a particular case under examination and for the purpose of admissibility, the applicant has to convince the WCHR that the claims they have presented before the Court have been investigated and adjudicated by the domestic courts. Recalling the rationale of the rule of prior exhaustion of local remedies that each State Party to the future WCHR Statute must be given an opportunity to redress an international wrong by means of its own machinery of justice, it may be easily understood that a failure to fulfil this obligation is in sharp contrast to this rationale. The codification of this obligation can claim support from the case law of existing human rights mechanisms, even though it is not written into the relevant legal documents. It should be noted that it is a long-standing jurisprudence of the existing human rights mechanisms that the obligation to raise the substance of the claims before domestic courts does not require an applicant to raise the matters before the local instances in the particular form in which it would later be brought before the WCHR. However, the idea of national human rights courts put forward in the NK Statute might change this jurisprudence. With the national human rights courts coming into being, as **Section 3.2.2** puts it, the WCHR should, apart from considering whether the claim is the same in substance as the one raised at the domestic level, examine whether this claim had been raised in identical form before the national human rights courts in the

respective State Party. In that case, an applicant would have to articulate which international human rights treaty, or specific provisions thereof under the WCHR's jurisdiction *ratione materiae,* the alleged violations concern. Taking it a step further, this might be one of the reasons why Nowak and Kozma no longer adhered to the idea of national human rights courts. Additionally, as discussed in **Sections 3.2.3** and **3.2.4**, within the framework of a future WCHR, the exhaustion rule would require applicants to follow the procedural requirements according to domestic law and to obtain a final judgment/decision.

# Chapter Four The Jurisdiction of the World Court of Human Rights over other Entities: the UN as an example

## Introductory Remarks

With regard to state-actors, few would deny that breaches of human rights on their part, in whatever form, may constitute damage to the interests shared not only by a state or group of states, but also by the community as a whole, which is composed of individuals who are the main beneficiaries of the observance of human rights norms. As **Chapter Three** has revealed, a future WCHR will transform the nature of existing procedures of individual communications at an international level from a quasi-judicial to a judicial one, which would be in conformity with that originally put forward in the Australian proposal. Without question, international human rights law has given rise to 'a radical development in international law because of its challenge to that discipline's traditional public/private dichotomy between states and individuals'.[1]

According to the current statutes, the WCHR would exercise jurisdiction not only in respect of state actors, but also in respect of a wide range of other actors, jointly referred to as 'non-state actors' or 'entities'. Non-state actors were included in the NK Statute; according to Art.7 (3) and (4) of the NK Statute, the term 'non-state actors' firstly referred to the non-state actor subject to the jurisdiction of a State Party who had made a declaration/not entered a reservation in accordance with Art.36 of the same statute regarding the human rights treaty being invoked, and that the human right invoked lends itself to a violation by the respective non-state actor. This term also included inter-governmental and non-governmental organisations (NGOs) and business corporations. The term 'entities' was put forward by Scheinin. In the MS Statute, entities other than states would be able to accept the legally binding jurisdiction of the WCHR.[2] According to Art.4(1) of the Consolidated Statute, 'The term "Entity", which are different from states, refers to any inter-governmental organization or non-State actor, including any business corporation, …'.

Among these entities, international organisations have a certain level of organisational

---

[1] Henry J. Steiner, Philip Alston and Ryan Goodman: *International Human Rights in Context: Law, Politics, Morals: Text and Materials* (3rd edition), Oxford: Oxford University Press, 2008, p.170.

[2] Martin Scheinin: Towards a World Court of Human Rights", *Protecting Dignity: An Agenda for Human Rights*, Swiss Initiative to Commemorate the 60th Anniversary of the UDHR, p.5. This document is available at: http://www.enlazandoalternativas.org/IMG/pdf/hrCourt_scheinin0609.pdf.

capacity, which can 'affect or even deny the enjoyment of human rights by people'.[3] International organisations exhibit great diversity among themselves 'with regard to their powers and functions, size of membership, relations between the organization and its members, procedures for deliberation, structure and facilities, as well as the primary rules including treaty obligations by which they are bound'.[4] There is no doubt that establishing a corresponding accountability regime concerning these international organisations is not only an open theoretical problem, but also an issue of immediate practical need.

Among these international organisations, the United Nations (UN) has the most important purpose. The UN has long enjoyed an excellent reputation as a global guardian of human rights.[5] As McDougal and Bebr observed:

> It is in response to the ever increasing demands of people everywhere for greater access to, and wider sharing of, basic values, of the kind so impressionistically indicated above, that the United Nations program for human rights is being framed and implemented.[6]

The past few decades have also witnessed the UN's considerable contribution to the advancement of human rights in setting international human rights standards. The UN has long been entrusted with a positive role in supervising the human rights performance of its Member States. The Organisation has 'lectured Governments on how to best go about their business'.[7] In effect, the UN operates as more than a rule maker; the Organisation is indeed 'involved in human rights activities, mostly taking place in a peace and security context, such as within peacekeeping and peace-building operations whereby the primary aim is not the promotion of human rights but maintenance of peace and security'.[8] The

---

[3] *Ibid*., p.8.

[4] United Nations: "Draft articles on the responsibility of international organizations, with commentaries", 2011, p.3. This document is available at: http://legal.un.org/ilc/texts/instruments/english/commentaries/9_11_2011.pdf.

[5] For example, the United Nations Refugee Agency (UNHCR) has had some success in protecting and supporting refugees. This has, in turn, earned it two Nobel Peace Prizes, one in 1954 and the other one in 1981. Like the UNHCR, the UN's peacekeeping operations (UN PKOs) have long been considered laudable. To honour their contribution to the maintenance of international peace and security, the Norwegian Nobel Committee awarded the 1988 Nobel Peace Prize to UN PKOs.

[6] Myres S. McDougal and Gerhard Bebr: "Human Rights in the United Nations", in: *American Journal of International Law*, Vol. 58, 1964, p.603 – 641, p. 605.

[7] Samantha Power: *Sergio: One Man's Fight to Save the World*, New York: Penguin Books, 2010, Fifteen – Holding Power, Holding Blame.

[8] Noëlle Quénivet: "Binding the United Nations to Human Rights Norms by Way of the Laws of Treaties", in: *The George Washington International Law Review*, Vol. 42, No. 3, pp.587 – 621, at 596. Cohen similarly observed that:

> Since the end of the cold war, human rights violations have been invoked as a justification for the

UN has also, at times, had some considerable successes in tackling the ongoing human rights crisis.

There was, therefore, something of an assumption that the UN would always protect human rights. Of late this view has become open to dispute. The routine business of the UN has increasingly referred to human rights through an act that binds individuals qua international law on the international plane and an act that is directly applicable to an individual in the domestic sphere of states.[9] Many concerns have been raised about the UN's non-compliance with internationally recognised human rights standards in the routine business of the Organisation, and although it seems hardly conceivable that the UN might have been a perpetrator of human rights violations in the name of the protection of these very rights, there has been an upsurge of calls to make the UN more accountable for those of its activities which impact individuals' human rights. However, whether and to what extent the UN itself is going to be held accountable is still not clear. Likewise, the question of who is competent, and in what ways, to oversee the UN's human rights record remains unanswered.

With regard to the UN, Nowak, Scheinin and Kozma suggested that provisions should be made for a permanent mechanism that is amenable to individual complaints from any part of the world in which a UN mission is deployed, and that this mechanism should be the World Court of Human Rights (WCHR). The current statutes (the NK statute, the MS statute and the consolidated statute) represent the basic rules of international law which direct that, no matter who the perpetrator, remedies are to be made available to individual victims. The human rights violations committed by the UN will also come under the jurisdiction of the WCHR.

With the coming into being of the WCHR, and with its acceptance of the Court's jurisdiction, the UN will become subject to a highly qualified and fully independent judicial review.[10] **Section 1** of the forthcoming Chapter firstly provides an overview of the WCHR's jurisdiction over the UN. As will be seen in **Section 1.1**, the Court's jurisdiction

---

imposition of debilitating sanctions, military invasions, and authoritarian occupation administrations by multilateral organizations and/or states acting unilaterally, under the rubric of "humanitarian intervention" justified as "enforcement" of international human rights law.

Jean L. Cohen: "Rethinking Human Rights, Democracy, and Sovereignty in the Age of Globalization", in: *Political Theory*, Vol. 36, No. 4, 2008, pp.578 – 606, at 580.

[9] See: Markus Benzing: "International Organizations or Institutions, Secondary law", in: Rudiger Wolfrum: *The Max Planck Encyclopedia of Public International Law*, Vol. VI, Oxford [u.a.]: Oxford University Press, 2013, p.77.

[10] See: Scheinin, *supra* note 2, p.26.

over the UN consists of a contentious part and a non-contentious part. The remainder of this section then clarifies three junctures which constitute a solid legal foundation for the WCHR's jurisdiction over the UN: the UN's *locus standi* in international law; the juridical articulation between the WCHR's jurisdiction and the UN, and the attribution of an alleged human rights violation to the UN. **Section 1.2** discusses the UN's *locus standi* in international law and attempts to answer the question of whether the UN could be accorded defendant status as a counterpart to its plaintiff status as established by the case of *Reparation for Injuries Suffered in the Service of the United Nations*. The discussion of the juridical articulation between the WCHR's jurisdiction and the UN in **Section 1.3** is divided into the juridical articulation in law and the juridical articulation in practice. The discussion in this section is intended to address uncertainty about the proper place of human rights norms in the operation of the UN, because this issue is a necessary preliminary to addressing any problems in the determination of responsibility. **Section 1.4** addresses the possibility of attributing an alleged human rights violation to the UN according to the Draft Articles on the Responsibility of International Organisations, adopted by the International Law Commission (ILC) in 2011.

In practice, claims by individual persons against the UN for human rights violations do not occur as often as those against states, but they have nevertheless occurred. Due to the complementary nature of international jurisdictions, the international human rights regime that currently exists requires the applicant to exhaust domestic remedies before lodging their case with the relevant mechanism. This will also be the case with the WCHR when it determines the admissibility issues of the complaints levelled against States Parties.[11] In the case of a complaint lodged with the WCHR in which the UN is the defendant, the complementary nature of the WCHR's jurisdiction is embodied in the rule of 'prior exhaustion of internal remedies'. As explained in **Section 2.1**, the authors of the current statutes throw particular light on the distinction between this rule and the rule of exhaustion of domestic remedies, and the UN's jurisdictional immunity may constitute a primary concern with regard to this distinction. Following a review of the UN Charter and the Convention on the Privileges and Immunities of the United Nations (CPIUN) concerning the UN's jurisdictional immunity in legal circles in **Section 2.2**, the case

[11] As Nowak and Kozma said, for example: 'In relation to the national courts, the World Court acts in a complementary manner, similar to the International Criminal Court (ICC) and national criminal courts'. Manfred Nowak and Julia Kozma: "A World Court of Human Rights", Swiss Initiative to Commemorate the 60th Anniversary of the UDHR: *Protecting Dignity: An Agenda for Human Rights*, June 2009, p.6. This report is available at: http://bim.lbg.ac.at/sites/files/bim/World%20Court%20of%20Human%20Rights_BIM_0.pdf.

studies (*Manderlier v. United Nations and Belgium*, *Association of Citizens Mothers of Srebrenica v. the State of the Netherlands and the United Nations* and *Delama Georges et al. v. United Nations et al.*) constitute the bulk of **Section 2.3**. These cases studies reveal that the UN's jurisdictional immunity might have prevented complaints being brought before domestic courts. Moreover, it seems that expanding the jurisdiction of domestic courts cannot change this situation due to certain insurmountable legal barriers.

Based on the conclusion of **Section 2**, **Section 3** discusses the application of the rule of prior exhaustion of internal remedies in the context of the UN's jurisdictional immunity. The rule of prior exhaustion of internal remedies is an important step to 'enhance the relevance, effectiveness, efficiency, accountability and credibility of the United Nations system'.[12] However, existing international law does not provide any clear indication of a pragmatic way to apply this rule. By reference to the doctrine of exhaustion of domestic remedies, the discussion in this section mainly covers: the two 'points-in-time' of the established internal remedies, the concrete forms of the internal remedies, and the temporary restriction of the rule of prior exhaustion of internal remedies on the admissibility of complaints. Emphasis is placed on the special circumstances which may absolve the applicants from prior exhaustion of internal remedies. **Section 3** ends with the discussion of a potential concern about latent conflicts between the rule of prior exhaustion of internal remedies and the doctrine of exhaustion of domestic remedies.

[12] World Summit Outcome Document, U.N. Doc. A/60/L.1, 15th Sep. 2005, para.15.

## Section 1 The WCHR's Jurisdiction over the UN and its Legal Foundation

The establishment of the WCHR would bridge the vacuum in procedures for the judicial settlement of disputes to which the UN is a party. This section begins with an overview of the WCHR's jurisdiction over the UN. Through this overview, this section explores the following three junctures which constitute a solid legal foundation for the WCHR's jurisdiction over the UN. These are: the UN's *locus standi* in international law, the juridical articulation between the WCHR's jurisdiction *ratione materiae* and the UN, and the attribution of an alleged human rights violation to the UN.

### 1.1 Overview of the WCHR's jurisdiction over the UN

As with the jurisdiction over states, the current statutes are also dedicated to integrating non-state actors as an additional component of the WCHR's jurisdiction. As regards the WCHR's jurisdiction over the UN, the two statute drafted respectively by Nowak, Scheinin and Kozma (hereinafter referred to respectively as the NK Statute and MS Statutes) displayed very different attitudes towards this issue, and the final Consolidated Statute reflects the result of a compromise.

#### 1.1.1 The contentious jurisdiction of the WCHR over the UN

Retrospectively, the Australian proposal for establishing the International Court of Human Rights (ICHR) would have the jurisdiction over no one but only state actors. According to Nowak and Kozma, this proposal 'left open whether the proposed court should give "judgment only against States, or whether employers or other individuals might be adjudged violators of human rights".'[13] The future WCHR may achieve a revolutionary development in this respect by exercising the jurisdiction *ratione persone* over state actors and to the UN in equal terms.

The contentious jurisdiction of the WCHR over the UN in the NK Statute had the following characteristics. Firstly, only an individual complaint could invoke the WCHR's

[13] Nowak and Kozma, *supra* note 11, p.22.

jurisdiction over the UN. As provided for in Art.7 (2) of the NK Statute, the WCHR may receive and examine complaints from any person, NGO or group of individuals claiming to be the victim of a violation of any human right by the UN or by any of its specialised agencies. In theory, the WCHR would also receive and examine complaints from entities other than individuals which related to alleged systematic human rights violations by state and non-state actors. It can be found, however, that reading Art.8 in conjunction with Art.7 of the NK Statute, Nowak and Kozma seemed unconvinced that the UN was at all likely to commit systematic human rights violations. According to Art.8 (1) of the NK Statute, the WCHR may receive and examine complaints by State Parties, the Office of the United Nations High Commissioner for Human Rights (OHCHR) and the UN Human Rights Council. Admittedly, the alleged human rights violations' mentioned in this Article can have been committed by an inter-governmental organisation, and the UN is an inter-governmental organisation. However, Art.7 of the NK Statute distinguished the UN as a subject to be sued by individual complaints from single individuals, groups of individuals and NGOs. Consequently, Art.8 of the NK Statute, which prescribes such third party complaints, does not apply in the case of the UN.

Secondly, it is the WCHR that will exercise compulsory jurisdiction over the UN. This compulsory nature can be reflected in the WCHR's jurisdiction *ratione persone* and jurisdiction *ratione materiae*. For the WCHR's jurisdiction *ratione persone*, the NK Statute showed no intention of making the flexible ways that state actors can accept the WCHR's jurisdiction applicable to the UN. Instead, it appears to Nowak and Kozma that a future WCHR will encompass the UN and its specialised agencies regardless of their consent. It should be noted that this does not hold true for other global or regional inter-governmental organisations. According to Art.37 (1) of the NK Statute, this type of organisation may at any time declare its recognition of the WCHR's competence to receive and examine complaints. As Nowak and Kozma said:

> Other global or regional *inter-governmental organizations*, such as the WTO, NATO, the OAS, African Union or the European Union, can only be held accountable before the World Court for alleged violations of international human rights treaties if the respective organization has made an explicit declaration recognizing the jurisdiction of the Court in relation to human rights enlisted in such treaties.[14]

[14] Nowak and Kozma, *supra* note 11, p.58.

The WCHR's jurisdiction *ratione materiae* in the NK Statute also implies this compulsory nature. As mentioned in Chapter Three, in designing the WCHR's jurisdiction over state actors, the NK Statute tried to introduce a 'membership criterion', which requests that in adopting the WCHR's contentious jurisdiction, states must, at a minimum, adopt one treaty in Annex 1. By contrast, Nowak and Kozma seemed to have found it unnecessary to set this criterion for the UN. With entry into force of a future statute for the WCHR, all the applicable laws under the WCHR's jurisdiction *ratione materiae* will naturally apply to the UN and its specialised agencies. For other global or regional inter-governmental organisations, Nowak and Kozma have suggested that the WCHR shall decide on a case by case basis whether the specific human rights invoked by an individual complaint can be applied to these organisations.[15] As provided for in Art.37 (2) of the NK Statute, when making such a declaration they may specify which human rights treaties and which provisions thereof shall be subject to the jurisdiction of the WCHR.

The MS Statute also included the UN as one of the possible respondents before the WCHR. According to Scheinin, there is a shortcoming of the current status of human rights law within the broader framework of public international law that the human rights treaties and their monitoring mechanisms are exclusively focusing upon States as the duty-bearers.[16] This situation could no longer correspond to the realities of the globalised world where non-state actors enjoy increasing powers that affect the lives of individuals irrespective of national borders, and therefore possess also the capacity to affect or even deny the enjoyment of human rights by people.[17]

However, the MS Statute chose a different way to invoke the WCHR's jurisdiction over the UN from the NK Statute. Art.12 (1) of the MS Statute stipulated that a case levelled against the UN may be initiated through an individual complaint, a state complaints and a request by the OHCHR. The MS Statute differed from the NK Statute in the nature of the WCHR's jurisdiction. In Scheinin's opinion, the WCHR's jurisdiction over the UN should be an optional rather than a compulsory one. As to the WCHR's jurisdiction *ratione persone*; when designing the WCHR's jurisdiction, the MS Statute did not give the same priority to the UN and its specialised agencies as did the NK Statute. Art.6 of the MS Statute used the term 'entities' to include intergovernmental organizations,

[15] See: *ibid*. As Nowak and Kozma said: 'It is difficult to imagine that NATO might be held accountable for a violation of the right to marry whereas such a violation could be claimed in relation to a United Nations interim administration.' *Ibid*.
[16] See: Scheinin, *supra* note 2, p.8.
[17] *Ibid*.

transnational corporations, NGOs, and other non-state actors[18] as potential respondents under the jurisdiction *ratione persone* of the WCHR. Among these potential defendants are international organisations constituted through a treaty between states, or between states and international organizations, and it is into this category that the UN falls.[19] Concerning the way in which the UN and its specialised agencies might accept the jurisdiction of the WCHR, the MS Statute stipulated an explicit declaration of acceptance by the UN as a prerequisite for the WCHR assuming its jurisdiction. In doing so, the UN 'would be subject to the legally binding jurisdiction of the Court, including in the issue of remedies'.[20]

In addition, to Scheinin, it is possible for the UN to accept the WCHR's jurisdiction in respect of a single case. The MS Statute stipulated the following two situations where the WCHR may exercise *ad hoc* jurisdiction over the UN: firstly, if the UN has not deposited an instrument accepting the jurisdiction of the WCHR; secondly, if the UN has specified in its instrument of acceptance that certain human rights treaties or specific provisions thereof shall not be invoked before the WCHR by any individual complaint. In either of these two situations, according to Art.9 of the MS Statute, the WCHR shall, *ex officio,* bring the complaint to the attention of the UN to seek *ad hoc* acceptance of the jurisdiction in respect of this complaint, under Art.8 (3) in the first instance. As far as the jurisdiction *ratione materiae* is concerned, Art.8 (2) of the MS Statute stipulates that the UN may specify in the instrument of acceptance, or in any subsequent notification which modifies it, the scope of the WCHR's jurisdiction over it. The UN is also permitted to exclude any human rights treaty from the jurisdiction of the WCHR human rights treaties mentioned in Art.8 (2).

In an attempt at compromise, the Consolidated Statute does not, as suggested by the NK Statute, place the UN and its specialised agencies in a prominent position. Nor does it preserve the content of the *ad hoc* jurisdiction according to the MS Statute. According to

---

[18] According to this Article, 'other non-state actors' included international organized opposition movements exercising a degree of factual control over a territory, to the effect that they carry out some of the functions that normally are taken care of by the State or other public authorities, and autonomous communities within a State or within a group of States and exercising a degree of public power on the basis of the customary law of the group in question or official delegation of powers by the State or States. See also: Scheinin, *supra* note 2, pp.5, 8, 19.

[19] The term 'entities' in this Article also refers to international organisations constituted through a treaty between states and international organisations, transnational corporations, international non-governmental organisations (NGOs) or organised opposition movements exercising a degree of factual control over a territory, to the extent that they carry out some of the functions that are normally taken care of by the State or other public authorities and autonomous communities within a state or within a group of states, and exercise a degree of public power on the basis of the customary law of the group in question or through an official delegation of powers by the State or States.

[20] Scheinin, *supra* note 2, p.5.

the Consolidated Statute, the future WCHR will apply individual complaints procedures to any case in which the UN is being sued. To be specific, the Consolidated Statute adopts the term 'entity' introduced by the MS Statute. As provided for in Art.4 (1) of the Consolidated Statute, the term 'entity' refers to an inter-governmental organisation or non-state actor, including the UN, if it has recognised the jurisdiction of the Court in accordance with Art.51 of the Consolidated Statute. This Article stipulates the exercise of the jurisdiction, *ratione persone,* over international organisations on the premise of the declared acceptance of the UN. Concerning the WCHR's jurisdiction *ratione materiae*, the Consolidated Statute notes that not all the provisions of human rights treaties can easily be applied to the UN.[21] If this is the case: 'the UN may specify which provisions of the respective human rights treaties shall be subject to the jurisdiction of the Court',[22] or may declare to the subjection of certain rights contained in one of the human rights treaties under the WCHR's jurisdiction *ratione materiae*.[23] Even if an exception were to occur, Art.51 of the Consolidated Statute authorises the WCHR to decide to what extent these provisions are capable of being applied to the UN.[24]

### 1.1.2 The non-contentious jurisdiction of the WCHR over the UN

The NK Statute gives the advisory jurisdiction of the WCHR equal standing with its contentious jurisdiction in the formulation of 'the uniform interpretation and development of its legal basis as well as of the substantive laws it applies'.[25] Art.9 of the NK Statute suggests authorising the UN Human Rights Council and the OHCHR to consult the Court regarding the interpretation of this Statute or any human rights treaty under the WCHR's jurisdiction *ratione materiae*. According to Art.9 (2) of the NK Statute, the WCHR may, at the request of all Member States of the UN, issue opinions regarding the compatibility of any of its domestic laws with the future WCHR statute or the existing human rights treaties under its jurisdiction *ratione materiae*. This jurisdiction, however, does not refer to the review of UN-made instruments.

The MS Statute contains a slight variation from the NK Statute with regard to the

[21] Julia Kozma, Manfred Nowak and Martin Scheinin: *A World Court of Human Rights – Consolidated Draft Statute and Commentary*, Neuer Wissenschaftlicher Verlag Recht 2010, p.65.
[22] See: *ibid*.
[23] See: *ibid*.
[24] *Ibid*.
[25] Nowak and Kozma, *supra* note 11, p.61.

WCHR's advisory jurisdiction. Scheinin based the WCHR's advisory jurisdiction on its *ad hoc* jurisdiction. As mentioned above, Art.9 of the MS Statute provides that the WCHR shall, *ex officio,* bring the complaint to the attention of the UN in order to seek an *ad hoc* acceptance of the jurisdiction. When seeking this acceptance, the WCHR shall inform the OHCHR. Scheinin also noted the possibility of the UN's refusal to accept this *ad hoc* jurisdiction. Given this, Art.10 of the MS Statute stipulates that, within three months of the date of the receipt of the WCHR's notification, the OHCHR may request that the WCHR proceeds to the issuing of an opinion on the matter raised in the complaint within a period of six months, with the WCHR having the discretion as to whether or not to issue such an opinion.

In this respect, the Consolidated Statute also presents a compromise between the NK Statute and the MS Statute. The Consolidated Statute makes the same recognition of the importance of the WCHR's advisory jurisdiction 'for the uniform interpretation and the development of its legal basis as well as the substantive laws it applies'[26] as did the NK Statute. However, according to the Consolidated Statute, the UN Human Rights Council is not entitled to request an advisory opinion regarding the interpretation of the future statute, or of any human rights treaty under the WCHR's jurisdiction *ratione materiae*. According to Art.8 of the Consolidated Statute, the UN Secretary-General and the OHCHR are entrusted with the making of such a request.

It should be noted that there are three junctures on the basis of which the WCHR's jurisdiction, and particularly its contentious jurisdiction over the UN, whether specified or implied, could be established. They are: the UN's *locus standi* in international law, the juridical articulation between the WCHR's jurisdiction *ratione materiae* and the UN, and the attribution of an alleged human rights violation to the UN. These three junctures, in turn, constitute a solid legal foundation for the WCHR's jurisdiction over the UN.

### 1.2 The UN's *locus standi* in international law

The first juncture relevant to the WCHR's contentious jurisdiction over the UN is the UN's *locus standi* in international law. The authors of the current statutes assume that the UN has *locus standi* and is therefore a potential defendant which can be sued before the

[26] See: Kozma, *et al.*, *supra* note 21, p.37.

WCHR. However, this assumption should be given careful consideration, because current international law does not explicitly bestow such a defendant status on the UN. Identifying the UN as having the status of a defendant can be achieved by resort to the UN's status as a plaintiff before international tribunals.

The case of *Reparation for Injuries Suffered in the Service of the United Nations* (hereinafter referred to as the *Reparation* case) established the UN's status as a plaintiff before international tribunals. In 1948, the General Assembly received an appeal for the provision of special protection for any of its personnel suffering death or injury in the pursuance of their duties.[27] However, the General Assembly did not see itself as 'a fact-finding body or judicial tribunal for determining the facts in these matters, or for the assessment of responsibility in individual cases'.[28] In this context, at the suggestion of the UN Secretary-General, the General Assembly could either assign an appropriate organ to negotiate directly with the State or authority concerned, or refer the dispute to an appropriate tribunal for arbitration.[29] The General Assembly subsequently opted for the latter, and adopted a resolution to request an advisory opinion from the International Court of Justice (ICJ).[30] In this resolution, the General Assembly asked the ICJ to consider the capacity of the UN, with regard to it being an international organisation,[31] to bring an international claim rather than a national one[32] against the responsible *de jure* or *de facto*

---

[27] In a memorandum prepared by the UN Secretary-General for the third session of the General Assembly, held in 1948, the UN Secretary-General presented a tragic list of those in the service of the UN who had been killed while carrying out their official duties in Palestine. See: Memorandum by the Secretary-General: "Reparation for Injuries Incurred in the Service of the United Nations", A/674, 1 October 1948, pp.1 – 2. One of the most notable cases was the death of Count Bernadotte, who was the mediator appointed by the UN General Assembly to deal with the volatile situation in the Middle East in 1948. He was assassinated by the members of Lohamei Herut Yisrael (LEHI) that same year. More details of the assassination of Count Bernadotte can be found, for example, at: http://www.jewishvirtuallibrary.org/jsource/History/folke.html. In this context, what lay ahead the General Assembly was an intense request of special protection for those UN personnel who are 'subject to unusual danger to which ordinary persons are not exposed'. Gerhard Niedrist: "The United Nations and Human Rights – The Necessity of Being Part of It", p.19. This paper is available at: http://paperroom.ipsa.org/papers/paper_8564.pdf.

[28] A/674, *supra* note 27, p.3.

[29] *Ibid*.

[30] "Resolution Adopted by the General Assembly of the United Nations on December 3rd, 1948", "Request for Advisory Opinion and Documents of the Written Proceedings", p.9. This resolution is available at: http://www.icj-cij.org/docket/files/4/10815.pdf.

[31] According to the explanation of Ivan Kerno, who was the Assistant Secretary-General of the United Nations in charge of the Legal Department, 'the phrase "*the United Nations, as an Organization*" is intended to make it quite clear that the question asked of the Court involves the capacity of the United Nations as such, and not the capacity of any individual Member acting through the Organization'. See: "Statement by M. Kerno (United Nations)", Mémoires, Plaidories et Documents, 1949, Réparation des Dommages Subis au Service des Nations Unies, Avis Consultatif Du II Avril 1949, p.66.

[32] Kerno recalled that a proposal that the UN should proceed through national courts had not been adopted by the Sixth Committee or the General Assembly. See: *ibid*. Given that, 'the General Assembly was concerned here with receiving the advice of the Court as to the capacity of the United Nations to act on the

government with a view to obtaining the reparation[33] due in respect of damage to the UN[34] and its agents in the service of the UN.[35]

In this case, the ICJ first defined the term 'capacity to bring an international claim':

> Competence to bring an international claim is, for those possessing it, the capacity to resort to the customary methods recognized by international law for the establishment, the presentation and the settlement of claims. Among these methods may be mentioned protest, request for an enquiry, negotiation, and request for submission to an arbitral tribunal or to the ICJ insofar as this may be authorized by the ICJ Statute.[36]

---

international rather than national plane'. *Ibid*., p.67. See also: "Statement by Mr. Feller (Counsel for the Secretary-General of the United Nations)", at the public sittings of March 7th and 8th, 1949, Mémoires, Plaidories et Documents, 1949, Réparation des Dommages Subis au Service des Nations Unies, Avis Consultatif Du II Avril 1949, p.72. In the opinion of the UK representative, the merit of this case was in essence directed to the capacity of the UN under international law to make a claim at an international level, rather than under the domestic laws of the various Member States, to bring claims and proceedings to their courts. See: "Written Statement Presented by the Government of the United Kingdom under Article 66 of the Statute of the Court and Order of the Court Dated 11th December, 1948", Mémoires, Plaidories et Documents, 1949, Réparation des Dommages Subis au Service des Nations Unies, Avis Consultatif Du II Avril 1949, p.24. See also: "Statement by Mr. Fitzmaurice (Representative of the United Kingdom Government)", at the Public sittings of March 9, 1949, Mémoires, Plaidories et Documents, 1949, Réparation des Dommages Subis au Service des Nations Unies, Avis Consultatif Du II Avril 1949, p.112.

[33] The UN Secretary-General opined that the forms of "reparation" should not only be of a pecuniary nature, but also function as an insurance against any repetition of the injury. See: "Statement by M. Kerno (United Nations)", *supra* note 31, p.67.

[34] To Kerno, the damage "to the United Nations" would include both pecuniary loss (e.g. payment made to ..., cost for hospitalisation or funeral expenses paid by the UN, premiums on insurance policies taken out by the UN for the benefit of the injured agent, necessary expenditures incurred in replacing or training a valuable agent, and *etc*.) and non-pecuniary loss (e.g. the loss of security for other personnel in the area). See: *ibid*., p.68. See also: A/674, *supra* note 27, p.5; "Statement by Mr. Feller (Counsel for the Secretary-General of the United Nations)", *supra* note 32, pp.82 – 84; "Statement by Mr. Fitzmaurice (Representative of the United Kingdom Government)", *supra* note 32, p.120; "Written Statement Presented by the Government of the United Kingdom under Article 66 of the Statute of the Court and Order of the Court Dated 11th December, 1948", *supra* note 32, p.25.

[35] See: "Letter from the Secretary-General of the United Nations to the President of the International Court of Justice, the Hague", available at: http://www.icj-cij.org/docket/files/4/10815.pdf. Kerno defined the term "an agent of the United Nations" on behalf of the UN as all persons, whether paid or not, acting on behalf of the UN or any of its organs, whether paid or not. See: "Statement by M. Kerno (United Nations)", *supra* note 31, pp.64 – 65. 'These persons include officials and employees of the Secretariat, observers detailed by Member Governments for service under orders of the United Nations, Members of the United Nations Commissions or Committees, or persons who are themselves organs of the United Nations'. *Ibid*., p.64. Kerno also argued that the term "damage" would 'obviously comprise such elements as loss of property**,** loss of life or corporeal injury. It might also, under certain circumstances, include the damage caused by suffering and perhaps even loss of reputation or dignity'. *Ibid*., p.69. In the light of Kerno's understanding, it is for the International Court of Justice (ICJ) to concern itself with the question of whether the UN has the capacity to bring an international claim if it assumes that the State or authority concerned is responsible for the death of or injury to the foregoing persons. See: *ibid*, p.65. The UK representative went along with this point of view, but submitted that the UN possesses the necessary capacity to make claims directly on behalf of its servants or their dependents under the following two circumstances: firstly that the injured party was a regular member of the permanent staff of the UN, and secondly that the injured party was temporarily employed in his personal capacity and/or solely on behalf of the UN, and not acting, as the representative of his own country. See: "Written Statement Presented by the Government of the United Kingdom under Article 66 of the Statute of the Court and the Order of the Court Dated 11th December 1948", *supra* note 32, p.39.

[36] Reparation for injuries suffered in the service of the United Nations, Advisory Opinion: I.C.J. Reports

To the ICJ, it was beyond dispute that the UN was competent to make international claims for the damage caused to the interests of the UN itself, its administrative machine, its property and assets, and any other interests of which it is the custodian.[37]

The ICJ then explained the legal basis for this opinion. To the ICJ, this capacity arises from the UN's international personality.[38] Put another way, the ICJ regarded the possession of legal personality as a *condicio sine qua non* of this capacity. According to the ICJ, the UN Charter refers to the UN's international personality,[39] the Court, however, agreed the Feller's submission that 'the provisions of the Charter as a whole make it clear beyond doubt that the Organization of the United Nations possesses an international juridical personality'.[40] Given this personality, the UN should not be merely a centre for harmonising the actions of nations in the attainment of these common ends. It was, instead, 'intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane'.[41] As the ICJ held:

> (The UN Charter) has defined the position of the Members in relation to the Organization by requiring them to give it every assistance in any action undertaken by it (Article 2, para. 5), and to accept and carry out the decisions of the Security Council; by authorizing the General Assembly to make recommendations to the Members; by giving the Organization legal capacity and privileges and immunities in the territory of each of its Members; and by providing for the conclusion of agreements between the Organization and its Members.[42]

---

1949, p.177.

[37] See: *ibid*., p.180. The Court further illustrated some of the types of damage the UN itself might sustain: '[T]his damage would include the reimbursement of any reasonable compensation which the Organization had to pay to its agent or to persons entitled through him. Again, the death or disablement of one of its agents engaged upon a distant mission might involve very considerable expenditure in replacing him.' *Ibid*., p.181.

[38] It should be pointed out that the ICJ noted that the UN's international personality is not identical to that of a state. In other words, the UN is never, in any event, the same entity as a state or a super-state. See: *Ibid*., p.179.

[39] *Ibid*., p.178.

[40] "Statement by Mr. Feller (Counsel for the Secretary-General of the United Nations)", *supra* note 32, p.70.

[41] The ICJ Advisory Opinion on the *Reparation* case, *supra* note 36, p.178. See also: "Individual Opinion by Judge Alvarez", Mémoires, Plaidories et Documents, 1949, Réparation des Dommages Subis au Service des Nations Unies, Avis Consultatif Du II Avril 1949, p.190.

[42] The ICJ Advisory Opinion on the *Reparation* case, *supra* note 36, p.178. On this issue, the ICJ in effect appreciated the statement of Feller, Counsel for the Secretary-General of the United Nations. He argued that the UN is 'endowed with the capacity to enter into international agreements; with the authority to administer territory, including the rights and obligations which would arise therefrom; with the extraordinary power in certain circumstances to make decisions binding upon States; with authority to enforce certain of its decisions by the use of armed force against States; and with express recognition of legal capacity in the

In other words, the UN 'could not carry out the intentions of its founders if it were devoid of international personality'.[43] With this personality, the UN possesses both the procedural capacity to present an international claim, and certain substantive rights.[44] As the UK representative stated, the UN, as a juristic entity, shall have the capacity to make claims in respect of damage done directly to itself as a necessary and self-evident legal attribute.[45]

The UN's capacity to bring an international claim also stemmed from the need for a response to the breach of obligation, governed not by domestic law, but by international law, on the part of the State or the authority concerned.[46] Art.2 (5) of the UN Charter requires all Member States to give the UN every assistance in any action the UN takes in accordance with, and refrain from giving assistance to any state against which the UN is taking preventive or enforcement action. This Article indicates that the UN may invoke this capacity to complain and to claim their fulfilment – or, where appropriate, reparation for their non-fulfilment if it is deemed that a Member State, or a plurality of Member States, have failed to carry out these duties.[47]

The ICJ further equated the losses and damage to any agent of the UN, and to any persons entitled through that agent, to the damage suffered by the UN as an organisation, notwithstanding the controversy over this issue[48] and the absence of an express conferment in by the UN Charter.[49] In the light of the advisory opinion, the UN's capacity to bring an international claim should be granted, without prejudice, to the protection of

territory of Member States and of the privileges and immunities necessary for the fulfillment of its purposes'. "Statement by Mr. Feller (Counsel for the Secretary-General of the United Nations)", *supra* note 32, p.74.

[43] The ICJ Advisory Opinion on the *Reparation* case, *supra* note 36, p.179.

[44] See: "Statement by Mr. Feller (Counsel for the Secretary-General of the United Nations)", *supra* note 32, p.70.

[45] See: "Statement by Mr. Fitzmaurice (Representative of the United Kingdom Government)", *supra* note 32, p.120.

[46] See: The ICJ Advisory Opinion on the *Reparation* case, *supra* note 36, pp.180, 188.

[47] See: "Written Statement Presented by the Government of the United Kingdom under Article 66 of the Statute of the Court and Order of the Court Dated 11th December, 1948", *supra* note 32, p.31.

[48] For example, according to the statement of the US Department of State, the UN should be without capacity to bring the same claim on behalf of the victim or the persons entitled through him. See: *ibid*., p.22. Some judges similarly argued that the UN has no such a capacity to make an international claim for reparation on behalf of these persons. Judge Hackworth, for example, expressed that there is nothing to suggest the UN's capacity in this field, nor is there provision in any other agreement conferring upon the UN authority to assume the role of a state and to represent its agents in the espousal of diplomatic claims on their behalf. Therefore, granting the UN this capacity has nothing more than moral support. See: Dissenting Opinion by Judge Hackworth, *ibid*, pp.197 – 198. Judge Krylov observed that the capacity in question would have to be created by the drafting of a new convention, since it was something unknown in existing international law. See: Dissenting Opinion by Judge Krylov, *ibid*, pp.217 – 218.

[49] See: The ICJ Advisory Opinion on the *Reparation* case, *supra* note 36, p.182.

the agent of the UN and persons entitled through him, including their respondents.[50] In the ICJ's view, the obligations owed by the State to the UN are undertaken in various ways, not only in the interest of the UN as an international organisation, but also in the interest of its agents.[51] The ICJ supported Feller's statement that the independent and satisfactory performance of the duties by such persons required direct and immediate protection to be due from the UN.[52] The ICJ also informed the General Assembly that if no, or inadequate, protection could be provided for its agents, the UN could neither ensure the efficient and independent performance of these missions nor afford effective support to its agents.[53]

To add weight to its opinion, the ICJ described the UN's capacity to make an international claim on behalf of its agent and persons entitled through him as being analogous to the State's capacity to claim diplomatic protection. In the first place, diplomatic protection applies to claims brought by a state. By contrast, the UN's capacity to make an international claim on behalf of its agent and the persons entitled through him belongs to the UN. What the ICJ faced in this case was a different and new type of international claim that would be brought by the UN.[54] In the second place, the relationship of a state with its nationals serves as an important attribute of diplomatic protection. However, the practice of diplomatic protection has provided an important exception to this relationship. As the ICJ noted, the relationship between a state and a foreign person who represents this State constitutes another attribute of diplomatic protection. As he stated:

> A State has made a claim on behalf of persons who are not its nationals but who stand in some other relation to it, for example, alien seamen, inhabitants of mandated territories, and other protégés, and cases of consuls who have a nationality different from that of the State which they represent.[55]

---

[50] See: *ibid*.
[51] See: *ibid.*, pp.182, 184.
[52] See: *ibid.*, p.183; "Statement by Mr. Feller (Counsel for the Secretary-General of the United Nations)", *supra* note 32, p.87.
[53] See: The ICJ Advisory Opinion on the *Reparation* case, *supra* note 36, p.183; General Assembly: "Reparation for injuries incurred in the service of the United Nations", A/RES/258, 3 December 1948, in: "Request for Advisory Opinion and Documents of the Written Proceedings", *supra* note 30, p.9.
[54] See: The ICJ Advisory Opinion on the *Reparation* case, *supra* note 36, p.181.
[55] On this issue, Feller cited the view of Jessup, who said:

> Various situations in the history of international claims reveal that in addition to the rights of its nationals a State has, in its relations with other States, certain rights which appertain to it in its collective or corporate capacity. The typical cases are those in which injury is done to an official of the State, particularly a consular or diplomatic official. The recognition accorded to their special status in traditional international law is extended because of their representative character

In other words, a person who is operating on behalf of a state may also become the beneficiary of diplomatic protection. These two attributes, which underlie the right of a state to diplomatic protection, should apply with equal force in the case of the UN. To be specific, the state-national relationship does not exist between the UN and its agent or persons entitled through him, but the absence of this relationship does not automatically lead to a negative answer in the question of whether the UN has the capacity to make an international claim on behalf of the abovementioned persons. This is because the UN's capacity to make an international claim is based on the organisation-agent relationship, rather than the state-national relationship.[56] In the third place, the rule of diplomatic protection is based on two premises. The first is that the State has broken an obligation towards the requesting State in respect of its nationals, and the second is that it is only this State to whom an international obligation is due. To the ICJ, this is precisely what happens when the UN brings an international claim for damage suffered by its agent and persons entitled through him.

The ICJ doubted that diplomatic protection – typically a nationality-based mechanism – could ultimately satisfy the requirements for special protection for UN agents and the persons entitled through them.[57] In practice, in some cases the UN entrusts its agents and persons entitled through them 'with important missions to be performed in disturbed parts of the world',[58] which, 'from their very nature, involve the agents in unusual dangers to which ordinary persons are not exposed'.[59] In the light of this, the ICJ voiced its concerns:

> The injuries suffered by its agents in these circumstances will sometimes have occurred in such a manner that their national State would not be justified in bringing a claim for reparation on the ground of diplomatic protection, or, at any rate, would not feel disposed to do so.[60]

---

> and not because of their status as individuals, although a supplementary claim may lie for the injury to the individual as such.

Philip C Jessup: *A Modern Law of Nations*, New York: Macmillan, 1948, pp.118 – 119. Cited in: "Statement by Mr. Feller (Counsel for the Secretary-General of the United Nations)", *supra* note 32, p.88.

[56] See: The ICJ Advisory Opinion on the *Reparation* case, *supra* note 36, p.181.

[57] See: *ibid*.

[58] *Ibid*., p.183. See also: "Consideration of the memorandum of the Secretary-General relating to reparation for injuries incurred in the service of the United Nations", Records of Sixth Committee of the General Assembly, Hundred and Twelfth Meeting, A/C.6/SR.112, 1 January 1948, p.519. This record is available at: http://documents-dds-ny.un.org/doc/UNDOC/GEN/NL4/832/06/pdf/NL483206.pdf?OpenElement.

[59] The ICJ Advisory Opinion on the *Reparation* case, *supra* note 36, p.183.

[60] *Ibid*.

For a single individual in the service of the UN, it is the protection assured by the UN rather than by his state of nationality that guarantees the satisfactory and independent performance of duties. This protection is also extended to those persons entitled through him.[61] To the ICJ, furthermore, 'this assurance is even more necessary when the agent is stateless'.[62] Indeed, the UN Charter does not confer upon the UN 'the capacity to claim for reparation, damage caused to the victim or to persons entitled through him'.[63] However, the UN Charter necessarily implies that the UN has the 'power to afford its agents the limited protection that would consist in the bringing of a claim on their behalf for reparation for damage suffered in such circumstances'.[64]

The *Reparation* case is a major milestone in international law in that it confirms the UN's plaintiff status before an arbitral tribunal, or to the ICJ, insofar as this may be authorised by the ICJ Statute. This status encompasses content such as the UN's capacity to make an international claim against any other juristic entity for damage done directly to the UN as an organisation, the UN's agent and persons entitled through him. Besides to this plaintiff status, the UN's legal personality entails the UN's *locus standi*, especially the defendant status as the counterpart to its plaintiff status. In this case, the ICJ did nothing to the UN's defendant status and even less to UN's *locus standi* with generality, since the ICJ was not authorised to deal with the legal dispute beyond the scope of the submitted request.

Moreover, despite the *Reparation* case, the UN's *locus standi* has enjoyed no positive response in practice and no arbitral tribunal at an international level before which the UN has *locus standi* has been established. Nor has the ICJ, *per se,* taken any further steps in this respect, and Art.34 (1) of the ICJ Statute confines the qualification to submit contentious cases to the court to states. International law circles have made considerable efforts to revising this Article so as to strengthen the ICJ's 'functions in respect of its role as the central judiciary body of the international community'.[65] For example, in 1954, the Institute of International Law (Institut de Droit International) adopted a resolution to the effect that the UN should be a party to contentious proceedings before the ICJ:

---

[61] See: *ibid*.
[62] See: *ibid.*, p.184.
[63] See: *ibid.*, p.182.
[64] See: *ibid.*
[65] Francisco Orrego Vicuña and Christofer Pinto: The Peaceful Settlement of Disputes: Prospects for the Twenty-First Century, Preliminary Report Prepared for the 1999 Centennial of the First International Peace Conference, C.E. Doc. CAHDI (98), p.110. Cited in: Pierre-Marie Dupuy: "The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice", in: International Law and Politics, Vol.31, 1999, pp.791 – 807, at 799.

> It is a matter of urgency to widen the terms of Article 34 of the Statute so as to grant access to the Court to international organizations of States of which at least a majority are Members of the United Nations and Parties to the Statute of the Court.[66]

In 1956, the International Law Association (ILA) adopted a similar resolution, proposing that Art.34 of the ICJ Statute should be amended to make the ICJ accessible to the UN and its specialised agencies in contentious cases.[67] A study by the US Department of State also suggested that the ICJ should be granted jurisdiction over the UN's engagement in contentious proceedings as a defendant under certain circumstances.[68]

In addition to this plaintiff status, the UN's *locus standi* is composed of a defendant status; a counterpart to its plaintiff status. Two types of relationship exist in relation to this status: state actors vis-à-vis the UN and non-state actors vis-à-vis the UN. The first type of relationship would be established in a situation where the UN engaged in disputes with states, and it is certainly possible for the UN to be sued in this relationship. The second type of relationship is the dispute between non-state actors and the UN. From Arts.7 and 8 of the NK Statute discussed earlier, the WCHR would refer only to the relationship between non-state actors (single individuals, group of individuals and NGOs) and the UN. In a similar vein, the MS Statute stipulated, according to Art.12, that only single individuals (or groups of individuals), who claim to have suffered a human rights violation committed by the UN, may submit a complaint before the WCHR. As provided for by Art.7 of the Consolidated Statute, the complaints levelled against the UN shall come from individual persons, NGOs or groups of individuals. In practice, as will be discussed in **section 2**, some private-law claims for harm caused by the UN have been lodged at a domestic level, some of them with the merits of observance of human rights law. However, a similar practice has not yet come into existence at a regional and international level.

The ambiguity in the UN's defendant status does not matter the WCHR in exercising the jurisdiction over the UN. The UN's acceptance of the WCHR's jurisdiction means that the UN will acknowledge its defendant status, which is built upon the second type of

---

[66] Institute of International Law: *Annuaire de l'Institut de droit international*, Vol.45, 1954, p.298. Cited in: Jerzy Sztucki: "International Organisations as Parties to Contentious Proceedings Before the International Court of Justice?", in: Alexander S. Muller, David Raič and Johanna M. Thuránszky: *The International Court of Justice: Its Future Role After Fifty Years*, Hague; London: Martinus Nijhoff Publishers, 1997, p.152.
[67] See: International Law Association: Report of the forty-seventh Conference, London: International law association, 1956, p.viii.
[68] See: United States: "Department of State Study on Widening Access to the International Court of Justice", in: *International Legal Materials*, Vol.16, No.1, 1977, pp.187 – 206, at 201.

relationship, namely, non-state plaintiffs vis-à-vis the UN.

### 1.3 The juridical articulation between the WCHR's jurisdiction and the UN

The authors of the current statutes assume that the UN has obligations to individuals who are protected by human rights treaties. Nowak and Kozma based the WCHR's jurisdiction vis-à-vis the UN on the assumption that the UN, together with its subsidiary bodies and specialised agencies, is already legally bound to all international human rights treaties adopted by themselves.[69] 'If the UN in exercising power … violates a human right guaranteed by any of the human rights treaties'[70] within the scope of the jurisdiction of the WCHR, 'it can be held accountable by the alleged victim before the WCHR.'[71] On this issue, Scheinin pointed out that, on the one hand, the impact of the UN's operational activities on human rights has get a lot of publicity and the UN is 'subject to increasing criticism as to their lack of commitment to or compliance with human rights norms'.[72] On the other hand, there is 'growing uncertainty about the proper place of human rights norms in the operation of intergovernmental organizations'.[73] While not explicitly mentioning it, Scheinin also appreciated this assumption.[74]

---

[69] See: Nowak and Kozma, *supra* note 11, p.[23].
[70] *Ibid*., p.58.
[71] *Ibid*.
[72] Scheinin, *supra* note 2, p.25. See also: Frederic Mégret and Florian Hoffmann: "The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities", in: *Human Rights Quarterly*, Vol. 25, No. 2, May 2003, pp.314 – 342, at 325; Jan Klabbers, Anne Peters and Geir Ulfstein: *The Constitutionalization of International Law*, Oxford; New York: Oxford University Press, 2009, pp.77 – 80; Mac Darrow and Louise Arbour: "The Pillar of Glass: Human Rights in the Development Operations of the United Nations", in: *The American Journal of International Law*, Vol. 103, No. 3, July 2009, pp.446 – 501, at 446; Committee on Economic, Social and Cultural Rights (CESCR Committee): "Concluding observations of the Committee on Economic, Social and Cultural Rights: Iraq", Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant, E/C.12/1/Add.17, 12 December 1997, para.8; Human Rights Committee (HRC): "Concluding observations of the Human Rights Committee: Iraq", Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, Sixty-first session, CCPR/C/79/Add.84, 19 November 1997, para.4.
[73] Scheinin, *supra* note 2, p.25. More examples of a similar recognition of this uncertainty are to be found: for example, Quénivet said: '[i]t is unclear what the international legal source of its obligations to abide by human rights law is.' Quénivet *supra* note 8, p.587.
[74] Similarly, while not explicitly mentioning, the International Law Association (ILA) Committee, which began operation from 1996 and finished its mandate in 2004, favoured the applicability of international human rights law to the UN. At the 70th Conference (the ILA New Delhi Conference) in 2002, the ILA Committee pointed out:

In order to place the UN under the jurisdiction of the WCHR, a juridical articulation has to be established with the UN's involvement in human rights, and this juridical articulation will, in turn, define the route to accountability in relation to human rights violations. Put differently, the issue of the identity of the set of international human rights law applicable to the UN is a necessary preliminary to any determination of responsibility problems. The key to setting up this articulation lies in the answer to the question of whether the applicable laws under the WCHR's jurisdiction, *ratione materiae*, together with their internationally recognised human rights standards, apply equally to the UN. This issue can be considered in both its legal and practical aspects.

### 1.3.1 The juridical articulation in law

In essence, the juridical articulation of the WCHR with the UN refers to the relationship of the UN with human rights treaties as the primary rules of international law under the WCHR's jurisdiction *ratione materiae*. The primary rules of international human rights law are embodied in the relationship between the right holders and duty bearers. As Black's Law Dictionary reads, 'wherever there exists a right in any person, there also rests a corresponding duty upon some other person or upon all persons generally'.[75] In the case of the UN in particular, this relationship means the coexistence of the human rights enjoyed by individuals and the corresponding duty of the Organisation.

With the adoption of the Universal Declaration of Human Rights (UDHR) and the entry into force of other human rights treaties derivate from the UN Charter,[76] the treaty

---

> As part of the process of the humanisation of international law, human rights guarantees are increasingly becoming an expression of the common constitutional traditions of States and can become binding upon IO-s as general principles of law.

Committee on Accountability of International Organisations: "Third Report Consolidated, Revised and Enlarged Version of Recommended Rules and Practices ("RRP-S")", International Law Association New Delhi Conference (2002), p.11. For more information of the ILA Committee, see: http://www.ila-hq.org/en/committees/index.cfm/cid/9.

[75] Black's Law Dictionary Free Online, 2nd edtion, available at: http://thelawdictionary.org. This understanding has often been cited by academia. See: for example, Henry S. Matteo: *Denationalization V. "the Right to Have Rights": The Standard of Intent in Citizenship Loss*, Lanham; New York; Oxford: University press of America, 1997, p.105; Jona Razzaque: *Public Interest Environmental Litigation in India, Pakistan, and Bangladesh*, The Hague; New York: Kluwer Law International, 2004, p.74, note.43; George Radosevich: *Western Water Laws and Irrigation Return Flow*, Ada, Okla.: Robert S. Kerr Environmental Research Laboratory, Office of Research and Development, U.S. Environmental Protection Agency, 1978, p.95; and *etc.*

[76] This point of view is widely accepted in international-law circles. For example, Rehman observed that

law of human rights and the implementation mechanisms thereof have been dedicated to elevating human rights from inspired rhetoric to well-crafted standards. States have long been recognised as the principal duty bearer of human rights by virtue of their having ratified the various UN human rights treaties. Some scholars have further argued that the scope of this duty bearing should gradually branch out from state entities to non-state ones.[77] As Nowak and Kozma, two leading advocates of the WCHR, said:

> All of us, the international community, i.e. inter-governmental and non-governmental organizations, civil society, business, the media, the donor community and other organs of society, foreign governments as well as private individuals, have a shared responsibility to find effective ways to facilitate the implementation of human rights for all.[78]

Like those who yearn to compel the UN to be the duty bearer of human rights, the NK Statute faced a technological obstacle in that the UN is not a signatory to any of these treaties. Seen overall, the treaty law system is 'premised on the classical and … obsolete

---

Cassin believed that the Universal Declaration of Human Rights (UDHR) could be considered as an authoritative interpretation of the UN Charter. See: Javaid Rehman: *International Human Rights Law* (2nd edition), Harlow, Essex: Pearson Education, 2010, p.58. Brownlie suggested that the UDHR has status as an authoritative guide and is accepted as part of the law of the UN. See: Ian Brownlie: *The Rule of Law in International Affairs*, The Hague; Boston: Martinus Nijhoff Publishers; Cambridge, MA: Sold and distributed in North, Central and South America by Kluwer Law International, 1998, p.69. Abraham regarded human rights conventions as being in fact the expansion and development of the principles of the UN Charter. See: Elizabeth Abraham: "The Sins of the Savior: Holding the United Nations Accountable to International Human Rights Standards for Executive Order Detentions in Its Mission in Kosovo", in: *American University Law Review*, Vol. 52, No. 5, pp.1291 – 1337, at 1319.

[77] For example, Kent argued the whole international community is subject to human rights obligations similar to those of States. See: George Kent: "The Human Rights Obligations of Intergovernmental Organizations", in: United Nations, Department of Public Information: *UN Chronicle*, No. 3, 2005, pp.32 – 33, at 33. This paper is available at: http://www2.hawaii.edu/~kent/HumanRightsObligationsofIGOs.pdf. Fassbender further pointed out:

> It was already anticipated by the drafters of the Universal Declaration of Human Rights that the respect for and observance of human rights and fundamental freedoms called for by the Declaration would not only be demanded from States but also from other bodies and institutions exercising elements of governmental authority, including international organizations.

Bardo Fassbender: "Targeted Sanctions and Due Process: The responsibility of the UN Security Council to ensure that fair and clear procedures are made available to individuals and entities targeted with sanctions under Chapter VII of the UN Charter", Study commissioned by the United Nations Office of Legal Affairs, 20 March 2006 (final), p.7. This paper is available at: http://www.un.org/law/counsel/Fassbender_study.pdf. See also: Quénivet, *supra* note 8, pp.587 – 621. Cameron seconded this viewpoint, saying: '*De lege ferenda*, it would seem that the time has arrived to create a clear mechanism through which the UN and other international organisations can participate in human rights treaties.' Lindsey Cameron: "Accountability of International Organisations Engaged in the Administration of Territory", 13 February 2006, University Centre for International Humanitarian Law, p.42. This paper is available at: http://www.prix-henry-dunant.org/wp-content/uploads/2006b_LCameron.pdf.

[78] Nowak and Kozma, *supra* note 11, p.4.

principle that … only states are admitted as parties'[79] because the drafters write conventions from the perspective of states and expressly recognise states as signatories.[80] At the same time, 'the essence of the law of treaties, encapsulated in the *pacta sunt servanda* tenet, posits that treaties are only binding upon entities that consent to them'.[81] This obstacle may have an impact on the ability to hold the UN accountable for human rights violations to some extent.[82]

As early as 1962, the case of *Certain Expenses of the United Nations* indicated the capacity of the UN for concluding treaties.[83] To the ICJ, this capacity is necessary for the exercise of its functions and fulfillment of its purposes.[84] In the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* case, the ICJ once more confirmed the UN's contractual capacity for concluding international agreements with other subjects of international law, holding that in this case, international organisations 'are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or to which they are parties'.[85] According to this advisory opinion, although not conferring upon the UN a general treaty-making competence, the UN Charter does not exclude the possibility of the UN entering into treaty relations with other subjects of international law and being held liable for violations of treaties that they have ratified.[86] In practice, the UN has, to date, signed many international agreements up.[87]

In the field of human rights, however, as Quénivet said: '[I]t is currently impossible for the United Nations, notwithstanding its capacity to enter into treaty relationships, to

---

[79] Quénivet, *supra* note 8, p.591. See also: Mark Gibney, Katarina Tomaševski and Jens Vedsted-Hansen: "Transnational State Responsibility for Violations of Human Rights", in: *Harvard Human Rights Journal*, Vol. 12, 1999, pp.267 – 295, at 267.
[80] See: Abraham, *supra* note 76, p.1318, note.188.
[81] Quénivet, *supra* note 8, p.592.
[82] See: Quénivet, *supra* note 8, p.589.
[83] "Certain expenses of the United Nations (Article 17, paragraph 2, of the Charter)", Advisory Opinion of 20 July 1962: I.C.J. Reports 1962, pp.151 – 181.
[84] *Ibid*. p.168.
[85] "Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt", Advisory Opinion, I.C.J. Reports, 1980, pp. 89–90, para.37.
[86] See: Jan Klabbers: *An Introduction to International Institutional Law*, Cambridge University Press: Cambridge, United Kingdom, 2002, p.278; Chittharanjan F. Amerasinghe: *Principles of the institutional law of international organizations*, Cambridge; New York: Cambridge University Press, 2005, p.400. For example, Art.43 of the UN Charter authorises the UN Security Council to conclude with the Members or groups of Members of the Organsation agreements concerning the armed forces and other forms of assistance to be contributed for the maintenance of international peace and security.
[87] See: for example, J.P. Dobbert: "Evolution of the Treaty-Making Capacity of International Organizations", in: Food and Argiculture Organization of the United Nations: *The Law and the Sea: Essays in memory of Jean Carroz*, Roma: Food and Agriculturre Organization of the United Nations, 1987, pp.21 – 102; Niedrist, *supra* note 27, p.21.

accede to human rights treaties'.[88] Having considered this, some have suggested crafting *lex specialis*, i.e. a human rights document proclaiming a distinct set of rules to which UN organs should conform by crafting binding upon itself. For example, White suggested that the UN should formally recognise, 'in a single instrument, the application of human rights law to its activities'.[89] Quénivet similarly suggested that the UN could issue a formal declaration, with normative power, stating that it is bound by specific human rights treaties and capable of being submitted to human rights treaty mechanisms.[90] Nevertheless, 'if such declarations lack binding force', she added, '[the human rights treaty mechanisms] remain political rather than legal commitments'.[91] To her, this formal recognition 'would clear up any doubts as to the applicability of human rights norms to the United Nations'.[92] By accepting that it is bound by these human rights treaties, the UN 'would not only take on legal commitments that are similar to those of its member states but it would also make huge strides in its legitimacy'.[93]

Taken together, the MS Statute and the Consolidated Statute constitute an eclectic package. That is, while not functioning as a sovereign state, the UN may still be bound by the standards of international human rights law with other forms of consent. They do not require the UN to accede to human rights treaties as a full party. Instead, according to the MS Statute and the Consolidated Statute, a unilateral declaration by the UN, stating that the UN is bound by specific treaties under the WCHR's jurisdiction *ratione materiae,* would be sufficient to resolve this obstacle. This package also speaks for the vast majority of authors who urge the UN to be bound by the human rights treaties as mentioned above.

This kind of package may find support from those treaties relating to human rights which allow for regional and international organisations to become parties. At the regional level, for example, Art.59 of the Convention for the Protection of Human Rights and Fundamental Freedoms (also known as the European Convention on Human Rights, ECHR) provides the European Union (EU) with access to this convention.[94] Art.42 of the

[88] Quénivet, *supra* note 8, p.592.
[89] Nigel D. White: "Towards a Strategy for Human Rights Protection in Post-Conflict Situations", in: Nigel D. White and Dirk Klaasen: *The UN, Human Rights and Post-Conflict Situations*, Manchester: Manchester University Press, 2005, pp. 463 – 493, at 461, 465.
[90] See: Quénivet, *supra* note 8, p.608, 611.
[91] *Ibid*., p.611.
[92] *Ibid*., p.612.
[93] *Ibid*., p.620.
[94] To Kaczorowska, for example, 'the accession of the EU to the ECHR constitutes the best way of enhancing the legal protection of [human rights] in the EU legal order and is a sign of self-confidence and maturity on the part of the EU, as it shows the world the EU's readiness for its institutions to be monitored, by an outside body, on [human rights] issues'. Alina Kaczorowska: *Public International Law*, Abingdon,

Council of Europe Convention on Action against Trafficking in Human Beings (CATHB) also stipulates that this Convention shall be open for signature by the EU. At the international level, the General Assembly adopted the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities in the form of a resolution in 1992. Although with no binding force, Art.9 of this declaration requires the UN specialised agencies and other organisations in the UN system to, within their respective fields of competence, contribute to the full realisation of the rights and principles outlined in this declaration.[95] Art.42 of the Convention on the Rights of Persons with Disabilities (CRPD) allows regional integration organisations to accede to it.[96]

This assumption that the UN has obligations to individuals who are governed by human rights treaties is also built on the foundation of international law. This foundation lies firstly in the UN Charter, which consists of general principles, regulations, rules, guidelines, and *etc*. The UN Charter establishes a link between the UN and human rights obligations. Art.1(3) stipulates the achievement of international cooperation in encouraging respect for human rights and fundamental freedoms for all, without distinction as to race, sex, language, or religion, as one of the purposes of the UN. The term 'purpose' in this Article appears to impose upon the UN an obligation of some kind. However, there is no evidence to show that the UN Charter stipulates this 'purpose' as a legal term. In other words, whether this term should be applied in a jurisprudential sense is not clear. At the United Nations Conference on International Organization (UNCIO), the term 'purposes' in Art.1 (3) was defined as:

> The "purposes" constitute the *raison d'être* of the Organization. They are the aggregation of the

Oxon [UK]; New York: Routledge, 2010, p.565. In Quénivet's words, 'the aim of accession is to subject the European Union and its institutions to external human rights monitoring, thereby ensuring the coherent and uniform interpretation of human rights treaty provisions as well as compliance therewith.' Quénivet, *supra* note 8, p.618. In 2014, as the European Commission required in 2013, the Court of Justice of the European Union delivered its opinion as to whether the draft agreement on the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, which was finalised by negotiators from the 47 Council of Europe (CoE) countries and the European Union (EU) Commission in April 2013, is compatible with the EU treaties. In this opinion, the Court ruled this agreement not compatible with EU law. See: Court of Justice of the European Union: "The Court of Justice delivers its opinion on the draft agreement on the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms and identifies problems with regard to its compatibility with EU law", Opinion 2/13, Court of Justice of the European Union, PRESS RELEASE No 180/14, Luxembourg, 18 December 2014.

[95] General Assembly: Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, A/RES/47/135, 18 Dec. 1992, Article 9.

[96] Art.42 of Convention on the Rights of Persons with Disabilities (CRPD) provides: "The present Convention shall be open for signature by all States and by regional integration organizations at United Nations Headquarters in New York as of 30 March 2007."

> common ends on which our minds met; hence, the cause and object of the Charter to which member states collectively and severally subscribe.[97]

Accordingly, the term 'purposes' in this Article could not be interpreted as a legal obligation. 'Art.1 (3) has been invoked with respect to the improvement generally within the UN System of the effective enjoyment of human rights and fundamental freedoms'.[98] In other words, the UN Charter 'is limited to setting out a program of action for the Organization of the United Nations to pursue, in which the Members are pledged to co-operate'.[99] At the same time, etymologically, the term "purpose" in this Article refers to a desired goal, which allows an uncertainty of realisation.

It seems not to be the case that the use of the word 'purpose' in Art.1 (3) of the UN Charter indicates an obligation with legally binding force. Rather, it is solely intended to express a political objective in the form of shared values, interests, or desires and uncertain hopes. It can also be said that, in the sense of this Article, 'promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion' is associated with high moral standards and motivations rather than with concrete acts.

By contrast, Art.55 (c) of the UN Charter, as an operative Article of the UN Charter to which Art.1 (3) refers,[100] embraces a different rhetoric. Art.55 (c) 'gave to the main organs of the UN the power to … elaborate a general obligation of the Organization to show respect for and to observe human rights'.[101] This Article, standing in sharp contrast to Art.1 (3), stipulates the intention of the UN to achieve this 'purpose' by using the term 'shall'. According to Black's Law Dictionary, '[i]n common, or ordinary parlance, and in its ordinary signification, the term "shall" is a word of command, and one which has always, or which must be given a compulsory meaning; as denoting obligation.'[102] Literally, when used in statutes, contracts, or the like, the nature of the term 'shall' is imperative or mandatory, and the duty-bearer who fails to fulfil the obligation can then be

---

[97] UNCIO VI, 447, Doc 944. Cited in: Rüdiger Wolfrum: "Ch.I Purposes and Principles, Article 1", note 3. In: Bruno Simma, Daniel-Erasmus Khan, Georg Nolte, *et al*., *The Charter of the United Nations: A Commentary*, Volume I, (3rd edition), Oxford, United Kingdom: Oxford University Press, 2012.
[98] Wolfrum, *supra* note 97, p.120.
[99] Manley O. Hudson: "Integrity of International Instruments", in: *The American Journal of International Law*, Vol. 42, No. 1, 1948, pp.105 – 108, at 107.
[100] See: Wolfrum, *supra* note 97, p.115.
[101] Rüdiger Wolfrum and Eibe Riedel: "Ch.IX International Economic and Social Cooperation, Article 55 (c)", In: Bruno Simma, Daniel-Erasmus Khan, Georg Nolte, *et al*., *The Charter of the United Nations: A Commentary*, Volume II, (3rd edition), Oxford, United Kingdom: Oxford University Press, 2012, p.1570.
[102] Black's Law Dictionary Free Online, 2nd edtion, available at: http://thelawdictionary.org.

held accountable. Lauterpacht thus regarded the UN Charter as a legal document with the language of international law, and argued that Art.55 (c) of the UN Charter recognises the promotion of universal respect for, and the observance of, human rights as a legal obligation.[103] In Schwelb's words, the Charter provisions are neither hortatory nor programmatic.[104] Similarly, Klabbers, *et al.* said: '[I]t follows from the UN Charter that the UN shall promote human rights and therefore should also be under an obligation to respect such standards'.[105] To McDougal, the human-rights Articles in the UN Charter 'are no mere embellishment of a historic document but add up to legal obligation'.[106] Buergenthal also said:

> The Charter ushered in a worldwide movement in which states, intergovernmental, and nongovernmental organizations are the principal players in an ongoing struggle over the role the international community should play in promoting and protecting human rights.[107]

Rodley observed that, in the Namibia Case, the ICJ also agreed that 'the human rights clauses of the UN Charter contain binding legal obligation'.[108]

In effect, the divergence in the wording of Art.1 (3) and Art.55 (c) is far from preventing the UN from being a duty bearer of human rights. As Wolfrum and Riedel observed, this divergence can be attributed to the fact that the references to human rights in the UN Charter were largely drafted by two separate bodies,[109] and it was the pressure of time which rendered the Coordination Committee unable to ensure the uniformity of that

---

[103] See: Hersch Lauterpacht: "The Subjects of the Law of Nations", in: Elihu Lauterpacht: *International Law: Being the Collected Papers of Hersch Lauterpacht*, Vol. 2, The law of peace, Cambridge: Cambridge University Press 1975, p.515. In effect, Lauterpacht has, on many occasions, repeated this viewpoint. He regarded the conclusion that the Charter provisions on the subject are a mere declaration of principle devoid of any element of legal obligation as being 'no more than a facile generalisation'. Hersch Lauterpacht: *International Law and Human Rights*, London: Stevens & Sons Limited, 1950, p.147.

[104] See: Egon Schwelb: "The International Court of Justice and the Human Rights Clauses of the Charter", in: *The American Journal of International Law*, Vol. 66, No. 2, April 1972, pp.337 – 351, at 350 – 351.

[105] Klabbers, Peters & Ulfstein, *supra* note 72, p.79.

[106] See: Myres S. McDougal: "Reviews: *International Law and Human Rights* By H. Lauterpacht. London: Stevens & Sons Limited, 1950", in: *The Yale Law Journal*, Vol. 60, 1951, pp.1051 – 1056, at 1053.

[107] Thomas Buergenthal: "The Normative and Institutional Evolution of the International Human Rights", in: *Human Rights Quarterly*, Vol. 19, No. 4, November 1997, pp.703 – 723, at 703 – 704. It should be noted that Buergenthal seemed not believe that the above Articles 'establish an immediate obligation to guarantee or observe human rights, nor did they define what was meant by "human rights and fundamental freedoms"'. *Ibid*., p.707. Instead, 'they imposed the much vaguer obligation to "promote … universal respect for, and the observance of, human rights" and to take "joint and separate action in co-operation with the Organization" to achieve this purpose'. *Ibid*.

[108] Nigel S. Rodley: "Human Rights and Humanitarian Intervention: The Case Law of the World Court", in: *International and Comparative Law Quarterly*, Vol.38, No. 2, April 1989, pp.321 – 333, at 326.

[109] Committee 1 of Commission I and Committee 3 of Commission II were respectively responsible for these two Articles. See: Wolfrum and Riedel, *supra* note 101, p.1571.

drafting.[110] The UN's obligation to protect and promote human rights illustrates the inherent and necessary attribute of the UN's international personality. In the *Reparation* case, the UN acknowledged that its possession of an international legal personality means that the UN is a right-and-duty-bearing unit in international law. As Feller, who served as the Counsel for the UN Secretary-General, stated:

> (The UN) was endowed with specific capacity to exercise functions and undertake rights and obligations on a parity with similar functions, rights and obligations exercised or possessed by States which are recognised personalities under international law. … The essence of legal personality is the capacity of enjoy legal rights and assume legal obligations.[111]

The ICJ was obviously a proponent of this idea, regarding the UN as a subject of international law and capable of possessing international rights and duties.[112]

The constitutional nature of the UN Charter may strengthen the persuasiveness of the inference that the UN is a duty bearer of human rights. In some cases, the ICJ used the terms 'constitution' and 'constitutional' when interpreting the aims and purposes of the UN and their pursuance in a changing global context. For example, in the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* case, the ICJ held that:

> International organizations are subjects of international law and, as such, are bound by any obligations *incumbent upon them* under general rules of international law, under *their constitutions* or under international agreements to which *they are parties*.[113]

The ICJ believed that the UN is bound by the UN Charter, which, as a 'constitution' in its own right, requires the UN to carry out its functions and exercise its powers in accordance with the UN Charter.[114]

The UN Charter represents a codification of the apex of the UN human rights treaties, especially those nine core UN human rights treaties which fall under the WCHR's

---

[110] See: *ibid*.

[111] "Statement by Mr. Feller (Counsel for the Secretary-General of the United Nations)", *supra* note 32, p.71, 76. As early as 1945, Kelsen proposed that the UN should be regarded as "a bearer of the rights and duties". Hans Kelsen (ed.), Anders Wedberg (trans.): *General Theory of Law and State*, 20th Century Legal Philosophy Series: Volume I, Harvard University Press, Cambridge, 1945, p.93.

[112] See: The ICJ Advisory Opinion on the *Reparation* case, *supra* note 36, p.179.

[113] "Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt", Advisory Opinion, I.C.J. Reports 1980, pp.89 – 90.

[114] Art.2(1)(j) of the Vienna Convention on the Law of Treaties(VCLT) between States and International Organisations or between International Organisations defines the "rules of the Organisation" in terms of the constituent instruments, decisions and resolutions adopted in accordance with them and established practice of the organisation.

jurisdiction *ratione materiae*.[115] Accordingly, non-compliance with human rights treaties is hardly consistent with the expressed aim and constant preoccupation of the UN Charter. As the ICJ held in the case of *The Legal Consequences for States of the Continued Presence of South-Africa in Namibia (South West Africa)*: 'a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter'.[116] Some scholars have thus argued that, as a result of being tasked to promote human rights by the UN Charter as the internal and constitutional legal order of the UN itself, the UN should be bound by international human rights standards without any added juridical finesse.[117]

This argument has steadily gained ground with many scholars. To Abraham, for example, although not a signatory to all the human rights treaties in existence, the UN must abide by these treaties, which enumerate internationally adopted human-rights standards in accordance with the UN Charter, and should further be held accountable to these standards which it helped create and universalise.[118] Quénivet similarly added 'if the UN is bound to promote and encourage respect for human rights, such an obligation certainly contains an

[115] The International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR) share the same preamble on this issue: 'Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, …'. The preamble to the ICERD reads: 'Considering that the Charter of the United Nations is based on the principles of the dignity and equality inherent in all human beings, …'. According to the preamble to CEDAW, '[n]oting that the Charter of the United Nations reaffirms faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women, …'. Apart from repeating the preamble to the ICCPR and ICESCR as mentioned above, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (CAT) adds the following text: 'Considering the obligation of States under the Charter, in particular Article 55, to promote universal respect for, and observance of, human rights and fundamental freedoms, …'. Likewise, the preamble to the the Convention on the Rights of the
Child (CRC) adds: 'Bearing in mind that the peoples of the United Nations have, in the Charter, reaffirmed their faith in fundamental human rights and in the dignity and worth of the human person, and have determined to promote social progress and better standards of life in larger freedom, …'. Although not referring to the UN Charter in its preamble, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW) mentions many basic instruments of the UN human rights treaties: 'Taking into account the principles embodied in the basic instruments of the United Nations concerning human rights, in particular the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, ICCPR, ICERD, the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child, …'. The preamble to CPED provides: 'Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and fundamental freedoms, …'. The preamble to the CRPD recalls 'the principles proclaimed in the Charter of the United Nations which recognize the inherent dignity and worth and the equal and inalienable rights of all members of the human family as the foundation of freedom, justice and peace in the world, …'.

[116] Legal Consequencesfor States of the Contitiued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Adrisory Opinion, I.C.J. Reports 1971, p.57.

[117] See: Mégret and Hoffmann, *supra* note 72, p.317.

[118] See: Abraham, *supra* note 76, pp.1312 – 1313, 1319.

obligation not to violate human rights itself'.[119] It is difficult to imagine that the UN, whose aim is to promote human rights law and assist states in their endeavours to obey human rights norms, can claim not to be bound by these norms on the basis that this is not specifically imparted in the UN Charter.[120] In other words, the UN cannot 'flout the very basic principles on which it is founded'.[121] It should be pointed out that this argument is without prejudice to the same obligations set forth in other sources of international law, such as customary international law and *jus cogens*.

### 1.3.2 The juridical articulation in practice

The UN's practice may reinforce the juridical articulation of the WCHR with the UN. The UN has made clear on many occasions that its operations must obey internationally recognised human rights standards. Kofi Atta Annan, the former UN Secretary-General, once pointed out that the UN has committed to respecting human rights law as it is intimately related to long-lasting peace and sustainable development.[122]

Take, for example, the United Nations Peacekeeping Operations (UN PKOs). The UN PKOs 'are often mandated by the Security Council to play a catalytic role in ... protection and promotion of human rights'[123] and may have a significant influence on the local population. This kind of influence also 'means increased chances that individuals in the host state will suffer damage or injury from the operation's conduct'.[124] The UN Department of Peacekeeping Operations and the UN Department of Field Support regard the UN Charter, human rights, international humanitarian law and the UN Security Council mandates as the normative framework for the UN's PKOs.[125] It should be noted that this

[119] Quénivet, *supra* note 8, p.594.
[120] *Ibid*., pp.595 – 596.
[121] *Ibid*., p.596.
[122] See: Kofi A. Annan: "Strengthening United Nations Action in the Field of Human Rights Prospects and Priorities", in: *Harvard Human Rights Journal*, Vol. 10, No. 1, 1997, pp. 1 – 9.
[123] United Nations, Department of Peacekeeping Operations, Department of Field Support: UN PKOs: Principles and Guidelines, 2008, p.26. See also: United Nations: Peacekeeping Best Practices Unit and Department of Peacekeeping Operations: Handbook on United Nations Multidimensional Peacekeeping Operations, United Nations, December 2003, p.2. This Handbook also provides details for this "catalytic role". See: *ibid*., p.101. See also: United Nations, Department of Peacekeeping Operations and Department of Field Support: Civil Affairs Handbook, Policy and Best Practices Service Department of Peacekeeping Operations United Nations, 2012, p.44.
[124] Marten Zwanenburg: "UN Peace Operations Between Independence and Accountability", in: *International Organization Law Review*, Vol. 5, No. 1, 2008, pp.23 – 47, at 24.
[125] See: United Nations, Department of Peacekeeping Operations, Department of Field Support, *supra* note 123, p.14.

framework is an open list, which includes all the principal human rights instruments in addition to the UDHR. The UN peacekeeping personnel, whether military, police or civilian, 'should act in accordance with international human rights law and understand how the implementation of their tasks intersects with human rights'[126] and 'should strive to ensure that they do not become perpetrators of human rights abuses'.[127] Furthermore, 'where they commit abuses, they should be held accountable'.[128]

The UN has expounded a similar stance in other settings, and the UN Interim/Transitional Administrations may also serve as a useful point of reference.[129] The UN Interim/Transitional Administration in a collapsed or failed state, where the *lex loci* and the judicial system are malfunctioning, has mirrored the essential attribute of sovereign states.[130] There is an argument that the UN Interim/Transitional Administration must uphold the same standards that bind sovereign states when it waives a governing power

[126] *Ibid*., pp.14 – 15. See also: United Nations Department of Peacekeeping Operations Training Unit: *We Are United Nations Peacekeepers*, available at: http://www.un.org/en/peacekeeping/documents/un_in.pdf; UN Secretary-General: Secretary-General's bulletin Staff Regulations, ST/SGB/2003/5, 7 February 2003, 1.2(a) at 24; United Nations Department of Peacekeeping Operations: Ten Rules: Code of Personal Conduct for Blue Helmets. This document is available at: http://www.un.org/en/peacekeeping/documents/ten_in.pdf; Peacekeeping Best Practices Unit and Department of Peacekeeping Operations, *supra* note 123, p.84; UN Secretary-General: "In Larger Freedom: Towards Development, Security and Human Rights for All: Report of the Secretary-General", A/59/2005, 15 March 2005, para.113; UN Secretary-General: "Report of the Panel on United Nations Peace Operations", A/55/305–S/2000/809, 21 August 2000; General Assembly Official Records, Fifty-sixth Session: Report of the International Civil Service Commission for the Year 2001, A/56/30(SUPP), 1 January 2001, ¶ 3; and *etc.*

[127] United Nations, Department of Peacekeeping Operations, Department of Field Support, *supra* note 123, p.15.

[128] *Ibid*., pp.14 – 15.

[129] The United Nations Transitional Administration in East Timor (UNTAET) operated from October 25, 1999 until the independence of East Timor on May 20, 2002. For more details about the UNTAET, see: http://www.un.org/en/peacekeeping/missions/past/etimor/etimor.htm. The UNMIK, led by the Special Representative of the Secretary-General (SRSG), was established according to the UN Security Council Resolution 1255 in 1999. The UNMIK's day-to-day functions are relatively minor since Kosovo declared independence from Serbia in February 2008 as a partially recognised state and adopted a new constitution, which entered into force and effect on 15 June 2008. By allowing the European Union Rule of Law Mission in Kosovo (EULEX) to take on an increasing role in the rule of law sector, the UNMIK terminated its rule of law operations and concluded its reconfiguration by June 2009. For more details about the UNMIK since 2008, see: for example, http://www.un.org/en/peacekeeping/missions/unmik/background.shtml.

[130] For example, Sergio Vieira de Mello, who served as the Transitional Administrator of the United Nations Transitional Administration in East Timor (UNTAET) between 1999 and 2002, compared UNTAET to a 'benevolent despotism'. Joel C Beauvais: "Benevolent despotism: a critique of U.N. state-building in East Timor", in: *New York University journal of international law and politics*, Vol. 33, No. 4, 2001, pp.1101 – 1178, at 1104. Chesterman similarly regarded the (UNTAET) as a 'pre-constitutional monarch in a sovereign kingdom'. Jarat Chopra: "The UN's Kingdom of East Timor", in: *Survival*, Vol. 42, No. 3, Autumn 2000, pp.27 – 39, at 29. The Ombudsperson Institution in Kosovo similarly compared the UNMIK to a 'democratic state operating under the rule of law accords itself total immunity from any administrative, civil or criminal responsibility'. See: Ombudsperson Institution in Kosovo, Special Report No.1 On the compatibility with recognised international standards of UNMIK Regulation No. 2000/47 on the Status, Privileges and Immunities of KFOR and UNMIK and Their Personnel in Kosovo (18 August 2000) and on the Implementation of the above Regulation (hereinafter "Special Report No.1"), 26 April 2001, to be found on http://www.ombudspersonkosovo.org/repository/docs/E4010426a_874491.pdf, p.8, para.23.

within the designated territory.[131] If a particular action by a national government would be viewed as a human rights violation, then a similar action by the UN Interim/Transitional Administration should likewise be viewed as a human rights violation.[132]

The United Nations Transitional Administration in East Timor (UNTAET) was 'endowed with overall responsibility for the administration of East Timor empowered to exercise all legislative and executive authority, including the administration of justice …'.[133] The UN Security Council resolution 1272 underlined 'the importance of including in United Nations Transitional Administration in East Timor (UNTAET) personnel with appropriate training in international humanitarian, human rights and refugee law'.[134] The UNTAET Regulation 1999/1 stipulated a list of human rights conventions that the mission planned to observe.[135] A similar situation can be found in the case of the United Nations Interim Administration Mission in Kosovo (UNMIK). The UNMIK was mandated to guarantee democracy by establishing a governing administration and justice system premised on respect for the rule of law and the protection of human rights.[136] The UN Security Council Resolution 1244 'created UNMIK as a surrogate state, with all ensuing obligations, including affirmative obligations to secure human rights to everyone within UNMIK jurisdiction'.[137] At the same time, it imposed upon the UNMIK an obligation of 'protecting and promoting human rights'.[138] Accordingly:

> In exercising their functions, all persons undertaking public duties or holding public office in Kosovo will be required to observe internationally recognized human rights standards ….
>
> …

---

[131] See: for example, Carla Bongiorno: "A Culture of Impunity: Applying International Human Rights Law to the United Nations in East Timor", in: *Columbia Human Rights Law Review*, Vol. 33, No. 3, 2002, pp.623 – 692, at 692; International Law Association, Committee on Accountability of International Organisations, *supra* note 74, p.12; International Law Association, Committee on Accountability of International Organizations: Final Report of the Berlin Conference (2004), p.23. This document is available at: file:///C:/Users/Administrator/Downloads/final_report_2004.pdf.

[132] See: for example, George Kent: *Freedom from Want: The Human Right to Adequate Food*, Washington: Georgetown University Press, 2005, p.223. Mégret and Hoffmann, *supra* note 72, p.334.

[133] See: On the Authority of the Transitional Administration in East Timor, Regulation No.1999/1, UNTAET/REG/1991/1.

[134] UN Security Council: Resolution 1272(1999), S/RES/1272 (1999), 25 October 1999.

[135] See: Regulation No.1999/1 on the Authority of the Transitional Administration in East Timor, UNTAET/REG/1991/1, 27 November 1999, Section.2.

[136] See: David Marshall and Shelley Inglis: "The Disempowerment of Human Rights–Based Justice in the United Nations Mission in Kosovo", in: *Harvard Human Rights Journal*, Vol. 16, 2003, pp.95 – 146, at 96.

[137] Ombudsperson Institution in Kosovo, Special Report No.2 on Certain Aspects of UNMIK Regulation No. 2000/59 Amending UNMIK Regulation No. 1999/24 on the Law Applicable in Kosovo (27 October 2000), 30 May 2001, to be found on: http://www.ombudspersonkosovo.org/repository/docs/E4010530a_588907.pdf., p.3, para.7.

[138] See: UN Security Council resolution 1244 (1999), S/RES/1244 (1999), 10 June 1999, para.11 (j).

> In assuming its responsibilities, UNMIK will be guided by internationally recognized standards of human rights as the basis for the exercise of its authority in Kosovo. UNMIK will embed a culture of human rights in all areas of activity, and will adopt human rights policies in respect of its administrative functions.[139]

Some regulations of the UNMIK encompassed human rights obligations.[140] There was also 'a senior human rights adviser'[141] whose role was to 'ensure a proactive approach on human rights in all UNMIK activities and ensure the compatibility of regulations issued by UNMIK with international human rights standards'.[142] The Ombudsperson Institution in Kosovo also claimed that the UNMIK assumes 'all ensuing obligations, including affirmative obligations to secure human rights to everyone within UNMIK jurisdiction'.[143]

In addition, the functional treaty succession by the UNMIK to the position of its Member States was likely to happen when the UNMIK was substituting for its Member States in the performance of certain acts.[144] While not being the successor of the former Federal Republic of Yugoslavia (FRY), the UNMIK still should have been bound by the International Covenant on Civil and Political Rights (ICCPR) to which the FRY was a signatory. In a concluding observation, the Human Rights Committee (HRC) held that the ICCPR continued to remain applicable in Kosovo, which at that time remained a part of Serbia and Montenegro as successor state to the FRY, albeit under the UNMIK.[145] Accordingly, the UNMIK was invited by the HRC to submit to it a supplementary report on the human rights situation in Kosovo.[146]

The reinforcement of the juridical articulation of the WCHR with the UN can also be found in the UN sanction regimes, which have had a growing influence on human rights.[147]

---

[139] UN Security Council: "Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo", S/1999/779, 12 July 1999, paras.38, 42.
[140] See: for example, Regulation no.1999/24 on the Law Applicable in Kosovo, UNMIK/REG/1999/24, 12 December 1999, §1.3; Regulation No. 1999/1 on the Authority of the Interim Administration in Kosovo, UNMIK/REG/1999/1, 25 July 1999, Sec.2. The UNMIK Regulation 1999/1 was later amended by the UNMIK Regulation No.1999/25 and the UNMIK Regulation No.2000/54.
[141] UN Security Council: "Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo", S/1999/779, 12 July 1999, para.49.
[142] *Ibid*.
[143] Ombudsperson Institution in Kosovo, Special Report No. 2, On Certain Aspects of UNMIK Reg. No. 2000/59 Amending UNMIK Reg. No. 1999/24 on the Law Applicable in Kosovo (27 Oct. 2000), para.7.
[144] See: for example, Quénivet, *supra* note 8, p.607, 620; Mégret & Hoffmann, *supra* note 72, p.318; August Reinisch: "Securing the Accountability of International Organizations", in: *Global governance: a review of multilateralism and international organizations*, Vol. 7, No. 2, 2001, pp.131 – 149, at 137 – 138.
[145] See: HRC: Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, Concluding observations of the Human Rights Committee: Serbia and Montenegro, CCPR/CO/81/SEMO, 12 August 2004, para.3.
[146] See: *ibid*.
[147] As one of the non-military forms of humanitarian intervention, the UN sanctions regimes, according to

According to Cohen's study:

> Since the end of the cold war, human rights violations have been invoked as a justification for the imposition of debilitating sanctions, military invasions, and authoritarian occupation administrations by multilateral organizations and/or states acting unilaterally, under the rubric of 'humanitarian intervention' justified as 'enforcement' of international human rights law.[148]

The UN sanctions regimes can be divided into comprehensive economic and trade sanctions and smart sanctions targeted at specific actors (also known as targeted sanctions).[149]

The original purpose of the comprehensive sanctions was to end human rights violations by the political and military leadership of a State who 'had most threatened international peace and security'[150], 'by depriving the entire population of economic resources and even of their livelihood'.[151] However, these comprehensive sanctions have generally tried to achieve this end by 'depriving the entire population of economic

Art.41 of the UN Charter, have operated since 1963 and have proliferated since the 1990s. According to Art.29 of the UN Charter and Rule 28 of the Provisional Rules of Procedure of the UN Security Council, the Sanction Committees are subsidiary organs of the UN Security Council for the purpose of administering sanctions regimes. There are 15 ongoing sanctions regimes which focus on supporting the political settlement of conflicts, nuclear non-proliferation, and counter-terrorism. Each regime is administered by a sanctions committee chaired by a non-permanent member of the UN Security Council. See: https://www.un.org/sc/suborg/en. More details of the background on UN sanctions regimes can be found in: "Special Research Report on the general issue of UN sanctions", November 2013, pp.2 – 3. This report is available at: http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/special_research_report_sanctions_2013.pdf.

[148] Cohen, *supra* note 8, p.580.

[149] Before 1990, comprehensive sanctions were only implemented twice: first against Rhodesia in 1966, and then against South Africa in 1977. Since the 1990s, comprehensive sanctions have respectively been applied to Iraq from 1990 to 2003; to the former Yugoslavia from 1991 to 1996; and to Haiti during 1993 and 1994.

[150] "Special Research Report on the general issue of UN sanctions", *supra* note 147, p.3. The logic of the UN sanction regimes is that, as Sohn pointed out, 'gross violations of human rights are now considered to be matters of international rather than domestic concern, and to represent possible threats to the peace, thus allowing the United Nations to go beyond mere condemnation and to impose sanctions against a violator if necessary'. Louis B. Sohn: "The New International Law: Protection of the Rights of Individuals Rather Than States", in: *The American University Law Review*, Vol. 32, No. 1, 1982, pp.1 – 64, at 7. In this context, the nonintervention principle should not be applicable because such violations are not essentially within the domestic jurisdiction of states. See: Jean-Pierre L. Fonteyne: "The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity Under the UN Charter", in: *California Western International Law Journal*, Vol. 4, 1973 – 74, pp.203 – 270, at 240. Chibundu regarded the comprehensive sanctions 'as a legal tool to address or forestall threats to the international order'. Maxwell O. Chibundu: "Assessing the High-Level Panel Report: rethinking the causes and consequences of threats to collective security", in: Peter G. Danchin and Horst Fischer: *United Nations Reform and the New Collective Security*, Cambridge, UK; New York: Cambridge University Press, 2010, p.118. The United Nations Secretary-General's High-Level Panel (HLP) compared the UN sanctions regimes to 'an important symbolic purpose" and be "a powerful means of deterrence'. United Nations Secretary-General's High-Level Panel on Threats, Challenges and Change: "A More Secure World: Our Shared Responsibility", A/59/565, 2 December 2004, para.178.

[151] Guglielmo Verdirame: *The UN and Human Rights: Who Guards the Guardians?*, Cambridge, UK; New York: Cambridge University Press, 2011, p.301.

resources and even of their livelihood',[152] and past decades have witnessed an adverse humanitarian impact in the targeted states, which have constituted a dramatic discrepancy between this original purpose and the approach adopted.[153] Having considered the whirlwind of 'humanitarian emergency', in 1997, the General Assembly adopted a resolution specifying the minimisation of the 'unintended adverse side effects on the civilian population',[154] 'especially with regard to the humanitarian situation and the development capacity that has a bearing on the humanitarian situation'.[155]

In this context, targeted sanctions (financial, travel, aviation or arms embargos) are adopted by the UN Security Council more frequently as a substitute for comprehensive

[152] *Ibid*.

[153] Comprehensive sanctions have given rise to a widespread economic damage against vulnerable civilian populations and the collateral effects on third states. Take, for example, Iraq. In this country, 'war had systematically destroyed Iraq's modern infrastructure, while sanctions prevented its reconstruction and caused the collapse of Iraq's import-dependent economy'. Roger Normand and Sarah Zaidi: *Human Rights at the UN: The Political History of Universal Justice*, Bloomington: Indiana University Press, 2008, p.xxiii. 'Sanctions which have the foreseeable and documented effect of killing civilians on a large scale are illegal, illegitimate, and immoral – especially when they have a relatively minor impact on the offending government and an enormously harmful impact on children and other vulnerable groups.' *Ibid*., p.xxiv. See also: "Impact of the economic blockade on the health, nutritional and environmental situation in Iraq; its repercussions on development, democracy and human rights", World Conference on Human Rights, Vienna, 14 – 25 June 1993, Item 10 of the provisional agenda, Consideration of the relationship between development, Democracy and the Universal Enjoyment of All Human Rights, Keeping in View the Interrelationship and Indivisibility of Economic, Social, Cultural, Civil and Political Rights, Note verbale dated 1 June 1993 from the Permanent Mission of Iraq to the UN Office at Geneva addressed to the Secretary-General of the World Conference on Human Rights, A/CONF.157/4, 11 June 1993. The HRC and the Committee on the Rights of the Child (CRC Committee) also expressed their concerns and worries in respect of the human rights emergency in Iraq. See: HRC: *Concluding Observations of the Human Rights Committee: Iraq*, CCPR/C/79/Add.84, 19 November 1997; CRC Committee: *Concluding Observations of the Committee on the Rights of the Child: Iraq*, CRC/C/15/Add.94 26/10/1998; E/C.12/1/Add.17, *supra* note 72; The sanction set a ban on all imports and exports, including, especially, food, medicines and essential supplies, which has yielded a significant human suffering. See: "Report of the second panel established pursuant to the note by the president of the UN Security Council of 30 January 1999 (S/1999/100), concerning the current humanitarian situation in Iraq", Annex II of S/1999/356, 30 March 1999; Marc Bossuyt: "The adverse consequences of economic sanctions on the enjoyment of human rights", United Nations Sub-Commission on the Promotion and Protection of Human Rights, 21 June 2000. Similar situations also occurred in the former Yugoslavia and Haiti, when the UN began the comprehensive sanctions against the military coups in these two states in the 1990s. See: for example, Verdirame, *supra* note 151, p.310; David Miller: "Holding Nations Responsible", in *Ethics*, Vol. 114, No. 2, January 2004, pp. 240 – 268.

[154] "Supplement to an Agenda for Peace", resolution adopted by the General Assembly, Annex II of this resolution contains a number of recommendations, A/RES/51/242, 26 September 1997, p.7.

[155] A/RES/51/242, *supra* note 154, p.7. Firstly, the UN Security Council must 'give as thorough consideration as possible to the short-term and long-term effects of sanctions'. *Ibid*, p.6. Secondly, the UN Security Council should seriously consider the time-frame of sanctions 'in connection with the objective of changing the behaviour of the target party while not causing unnecessary suffering to the civilian population.' *Ibid*. Thirdly, sanctions regimes must 'ensure that appropriate conditions are created for allowing an adequate supply of humanitarian material to reach the civilian population'. *Ibid*., p.7. In addition, the UN sanctions regimes should make 'an assessment of the humanitarian needs and the vulnerabilities of target countries at the time of the imposition of sanctions and regularly thereafter while they are being implemented', with 'the assistance of concerned international financial and other intergovernmental and regional organizations'. *Ibid*., p.8.

sanctions.[156] These UN targeted sanctions 'aim to narrow the range of persons, products or services covered and may reduce the interest groups that are affected'.[157] Unlike the comprehensive economic and trade sanctions, the targeted sanctions have been a success to a certain extent that the entire country and the innocent people living in its territory are no longer the indiscriminate victims of the sanction regimes. However, this kind of sanction also poses a problem for human rights, especially in the course of the listing and de-listing procedures.[158]

From human-rights and rule-of-law perspectives, the principle of due process and the derivative procedural rights – such as the right to be informed without delay, the right to be heard, the right to claim against the sanctions committee concerned a violation of rights and freedoms, the right to an effective remedy from an effective review mechanism, the right to be assisted or represented by counsel, and *etc*. – protect individuals from arbitrary or unfair treatment by the sanctions regimes.[159] Each UN sanctions regime should meet the requirement of due process principle and guarantee procedural rights when the UN is taking any action that adversely affects, or has the potential of adversely affecting, the targeted entities. In this sense, a particularly targeted sanction containing no equivalent safeguards of due process and procedural rights may contravene the promise of human rights that the UN consistently makes to the international community.

In recent years, the UN has gradually incorporated human rights standards into the work of sanctions regimes. The High Level Panel on Threats, Challenges and Change of the United Nations rightly once pointed out:

---

[156] See: A/59/565, *supra* note 150, paras.80, 151.
[157] Chibundu, *supra* note 150, p.140.
[158] See: for example, the Watson Institute Targeted Sanctions Project, Brown University: "*Strengthening Targeted Sanctions through Fair and Clear Procedures*", 30 March 2006, available at: http://watsoninstitute.org/pub/Strengthening_Targeted_Sanctions.pdf.; Colin Warbrick: "The European Response to Terrorism in an Age of Human Rights", in: *The European Journal of International Law*, Vol. 15, No. 5, 2004, pp.989 – 1018; Lain Cameron: "UN Targeted Sanctions, Legal Safeguards and the European Convention on Human Rights", in: *Nordic Journal of International Law*, Vol. 72, No. 2, 2003, pp.159 – 214; Peter L. Fitzgerald: "Managing Smart Sanctions Against Terrorism Wisely", in: New England Law Review, Vol. 36, No. 4, 2002, pp.957 – 983; Human Rights Watch, "U.N.: Sanctions Rules Must Protect Due Process", 4 March 2002, available at: https://www.hrw.org/news/2002/03/03/un-sanctions-rules-must-protect-due-process; Michael Bothe: "Security Council's Targeted Sanctions against Presumed Terrorists: The Need to Comply with Human Rights Standards", in *Journal of International Criminal Justice*, Vol. 6, No. 3, 2008, pp.541 – 555. The Parliamentary Assembly of the CoE admitted that the procedural and substantive standards currently applied by the UN Security Council 'in no way fulfills the minimum standards … and violate the fundamental principles of human rights and rule of law'. CoE: United Nations Security Council and European Union blacklists, Resolution 1597 (2008); S/2005/572, para.37.
[159] See: Targeted Individual Sanctions: Fair and Clear Procedures for Listing and De-listing, Letter dated 15 June 2006 from Secretary General Kofi Annan to the President of the Security Council, Proceedings of 5474th Meeting, S/PV.5474, 22 June 2006.

> … the way entities or individuals are added to the terrorist list maintained by the [Security] Council and the absence of review or appeal for those listed raise serious accountability issues and possibly violate fundamental human rights norms and conventions.[160]

In 2004, the United Nations Secretary-General's High-Level Panel (HLP) proposed some broad and sweeping changes to the UN's targeted sanctions. In this report, the HLP suggested that the UN Security Council should proceed with targeted sanctions with caution.[161] UN sanctions committees were suggested, as a way of improving procedures for maintaining accurate lists of the intended targets of sanctions, and to establish review procedures for those claiming to have been incorrectly placed or maintained on sanctions target lists.[162] 'Where sanctions involve lists of individuals or entities',[163] the HLP report added, 'sanctions committees should establish procedures to review the cases of those claiming to have been incorrectly placed or retained on such lists'.[164] To the HLP, '… the absence of review or appeal for those listed raises serious accountability issues and possibly violates fundamental human rights norms and conventions'.[165] the Committee of Accountability of International Organisations of the International Law Association (hereinafter referred to as 'the ILA Committee') suggested that the UN Security Council should make a human rights impact assessment when implementing comprehensive sanctions, and ensure that the scope and modalities of those measures would not prejudice respect for basic human rights.[166] At the subsequent 2005 World Summit, the UN Member States suggested that the procedure for placing individuals and entities on sanctions lists should be 'equitable and transparent, with equally clear guidelines for removing individuals and entities, as well as for granting humanitarian exemptions'.[167] In 2006, the UN Security Council adopted standardised procedures for listing and delisting individuals and entities on consolidated lists created for the purposes of applying travel bans and

---

[160] United Nations: "A More Secure World, Our Shared Responsibility", Report of the High-Level Panel on Threats, Challenges and Change, 2004, para.153. This report is available at: http://www.un.org/en/peacebuilding/pdf/historical/hlp_more_secure_world.pdf.
[161] See: A/59/565, *supra* note 150, para.152.
[162] See: *ibid.*, paras.180(b), 182.
[163] See: *ibid.*, paras.182.
[164] *Ibid.*
[165] See: *ibid.*, para.152.
[166] International Law Association, Committee on Accountability of International Organisations, *supra* note 74, p.12; International Law Association, Committee on Accountability of International Organisations, *supra* note 131, p.23.
[167] A/59/2005, *supra* note 126, para.109.

freezing assets.[168] In the same year, at the UN Security Council's request,[169] the UN Secretary-General established within the Secretariat a Focal Point for De-listing (hereinafter referred to as the Focal Point) to receive de-listing requests from a petitioner (individuals, groups, undertakings, and/or entities) other than those whose names are inscribed on the Al-Qaida Sanctions List.[170]

The Focal Point is aimed at ensuring that fair and clear procedures exist for placing individuals and entities on sanctions lists, and for removing them, as well as for granting humanitarian exemptions. Specifically, after receiving a request and verifying it admissible,[171] the Focal Point will acknowledge receipt of the request to the petitioner, who will be informed of the general procedure for processing that request.[172] At the same time, the Focal Point will forward the request to the designating government(s), and to the government(s) of citizenship and residence for consultations, for their information and possible comments.[173] All the communications from the above government(s) will be conveyed by the Focal Point to the Committee, which will make a decision as to whether the petitioner will be delisted or remain on the list.[174] The mandate of the Focal Point was extended in the subsequent practice.[175]

The Office of the Ombudsperson to the Al-Qaida Sanctions Committee was established in 2010.[176] A petitioner whose name is inscribed on the Committee's List can

---

[168] See: UN Security Council Resolution 1730, S/RES/1730 (2006), 19 December 2006.
[169] See: UN Security Council Resolution 1730 (2006), S/RES/1730, 19 December 2006.
[170] For more details of the Focal Point for de-listing, see: https://www.un.org/sc/suborg/en/sanctions/delisting/resolutions/.
[171] The Focal Point should verify whether the request is new or is a repeated request. If it is a repeated request and if it does not contain any additional information, it should be returned to the petitioner. See: S/RES/1730, *supra* note 168, p.2.
[172] See: *ibid*.
[173] See: *ibid.*, pp.2 – 3.
[174] See: *ibid.*, p.3.
[175] For example, on 17 December 2012, the UN Security Council adopted resolution 2083 (2012) by which it authorised the Focal Point to receive travel ban and frozen assets exemption requests in relation to individuals, groups, undertakings or entities on the (then) Al-Qaida Sanctions List. On 17 June 2014, the Council adopted resolution 2161 (2014), further authorising the Focal Point to receive communications from individuals removed from the Al-Qaida Sanctions List and those claiming to have been mistakenly subjected to the sanctions measures. On 17 December 2015, the Council adopted resolution 2253 (2015), reaffirming the aforementioned provisions and having decided that the Al-Qaida Sanctions List would henceforth be known as the ISIL (Da'esh) and Al-Qaida Sanctions List. On 21 December 2015, the Council adopted resolution 2255 (2015), also authorising the Focal Point to receive travel ban and frozen assets exemption requests in relation to the 1988 Sanctions List. See: https://www.un.org/sc/suborg/en/sanctions/delisting. As of 20 January 2016, the total number of the de-listing request that the Focal Point has received has amounted to 85 and the number of travel ban and frozen assets exemption requests (ISIL (Da'esh) & Al-Qaida and 1988 sanctions regimes only) is 3. See: https://www.un.org/sc/suborg/en/sanctions/delisting/de-listing-request-stats; https://www.un.org/sc/suborg/en/sanctions/delisting/travel-ban-assets-freeze.
[176] Later renamed as the "Office of the Ombudsperson to the ISIL (Da'esh) & Al-Qaida Sanctions

submit their de-listing requests through, and only through, the Ombudsperson. Specifically, after a request for delisting submitted to the Office of the Ombudsperson, the subsequent procedure consists of the following three phases: information gathering,[177] dialogue[178] and committee discussion and decision.[179] A request for delisting submitted to the Ombudsperson will be approved if, and only if, it has received a delisting recommendation from the Ombudsperson and there is unanimity with regard to this recommendation within the Committee.[180] It is entirely at the Committee's discretion to decide whether a delisting can proceed. In 2013, the Al-Qaida Sanctions Committee amended the guidelines for the conduct of its work. These were adopted in 2002, and include an elaborate procedure by which individuals can be delisted.[181]

Despite this, critics have argued that the principle of due process and the derivative procedural rights in the work of the UN sanction regimes could have been bolder still. As Cameron, for example, said: 'The individual has no right of access to a court or a quasi-judicial body at the UN level. UN blacklisting thus does not fit into the traditional pattern of due process'.[182] Therefore, UN blacklisting violates 'the right of access to court as well as the right to effective remedies'.[183] In Fassbender's words: 'the present situation amounts to a "denial of legal remedies" for the individuals and entities concerned, and is untenable under principles of international human rights law'.[184] To Farrall:

---

Committee". The Al-Qaida Sanctions List is henceforth known as the ISIL (Da'esh) and Al-Qaida Sanctions List. For more details of the Office of the Ombudsperson to the Al-Qaida Sanctions Committee, see: https://www.un.org/sc/suborg/en/ombudsperson.

[177] In this phase, the Ombudsperson, in addition to conducting their own research, sends the petition to the UN Security Council Al-Qaida Sanctions Committee, relevant States and UN bodies and requests information from them. At the same time, the petitioner will be informed of the steps of the procedure and the information gathered.

[178] In this phase, the petitioner has an opportunity to be heard, address the information gathered and answer questions. The Ombudsperson will then prepare and submit a report, in all official UN languages, to the Committee with a summary and a recommendation on the delisting request.

[179] The Committee will review this report after the Ombudsperson has presented it in person.

[180] If the Ombudsperson recommends retaining the listing, the Petitioner remains on the list. In the situation where the Ombudsperson recommends delisting, the Committee may nevertheless decide by consensus to retain the listing. If there is no consensus, the request concerned will be referred to the Security Council for a vote. For more details of this procedure, see: https://www.un.org/sc/suborg/en/ombudsperson/procedure.

[181] See: Security Council Committee pursuant to resolution 1267 (1999) and 1989 (2011) concerning Al-Qaida and Associated Individuals and Entities: Guidelines of the Committee for the Conduct of its Work, 15 April 2013, para.7. These guidelines are available at: https://www.un.org/sc/suborg/sites/www.un.org.sc.suborg/files/1267_guidelines_1.pdf.

[182] Committee of Legal Advisors on Public International Law, CoE: "The European Convention on Human Rights, Due Process and UN Security Council Counter-Terrorism Sanctions", Report prepared by Professor Iain Cameron, CAHDI (2006) 22, Strasbourg, 17/08/06, p.2. See also: Klabbers, "Reflections on the politics of institutional reform", in: Danchin and Fischer, *supra* note 150, p.89.

[183] Cameron, *supra* note 182., p.5.

[184] Fassbender *supra* note 77, p.5.

> The listing and delisting process for individual sanctions currently operates in such a way that the presumption is of guilt rather than innocence, with individuals possessing no as-of-right opportunity to hear, let alone contest, the accusations levelled against them. Instead, they must rely upon the good will of their own government to bring their case before the relevant sanctions committee and then they must convince all committee members, including the member responsible for listing them, that they should be delisted.[185]

As a result, attention should in particular be paid to the absence of any provision for the listed individuals to address the relevant sanction committee directly in order to present their concerns and protest their innocence.

The above discussion illustrates the existence of the juridical articulation between the WCHR's jurisdiction and the UN. It should be pointed out that this discussion does not cover the entire gamut of the juridical articulation between the WCHR's jurisdiction and the UN. In effect, this juridical articulation is an open category. As the ILA Committee suggests:

> Human rights obligations, which are increasingly becoming an expression of the common constitutional traditions of States, can become binding upon IO-s in different ways: through the terms of their constituent instruments; as customary international law; or as general principles of law or if an IO is authorised to become a party to a human rights treaty. The consistent practice of IO-s points to a recognition of this. Moreover, certain human rights obligations may have attained the status of peremptory norms.[186]

Human rights law is, as the ILA Committee found, vulnerable to be violated by the UN, as a result of the kind and scope of acts adopted or operational activities undertaken.[187] The enjoyment of human rights may be encumbered with the UN's fallacy in undertaking the operational activities. Therefore, attention must be paid to whatever measures, legal, administrative or otherwise, should be adopted to ensure the accountability of the UN.[188] In this context, there have been calls for a well-functioning accountability regime through which the UN's compliance with human rights law can be

---

[185] Jeremy M. Farrall: *United Nations Sanctions and the Rule of Law*, Cambridge: Cambridge University Press, 2007, p.237.
[186] International Law Association, Committee on Accountability of International Organisations, *supra* note 131, p. 22.
[187] See: International Law Association, Committee on Accountability of International Organisations, *supra* note 74, p.11; International Law Association, Committee on Accountability of International Organisations, *supra* note 131, p.22.
[188] International Law Association, Committee on Accountability of International Organisations, *supra* note 131, p.4.

empowered. Under this regime, it should be possible to attribute any type of breach of human rights law to the UN.

### 1.4 The attribution of an alleged human rights violation to the UN

International responsibility 'may arise from non-compliance with any of the applicable bodies of law'.[189] In the case of the UN, international responsibility should occur where an act that might be deemed illegal can be attributed to this organisation, regardless of the nature and character of the given action. That being said, a regime of international responsibility requires the attaching of particular conduct, which might consist of acts or omissions, to the UN. Given that the function of the rules of attribution is to establish that there is a given act or omission of the UN in order to determine its international responsibility, rules defining the circumstances in which such attribution is justified are essential.

The current statutes have more or less involved the attribution of conduct to the UN. Based on all available evidence, Art.17 of the NK Statute requires the WCHR to determine whether or not the facts of a given case amount to a human rights violation attributable to the respondent party.[190] According to Art.5 (2) of the MS Statute, to establish whether the act in question amounts to a human rights violation by the UN, the WCHR shall determine whether it is attributable to this organisation. Having recognised that the Articles on Responsibility of States for Internationally Wrongful Acts (the 2001 Articles) have 'evolved into highly technical and precise rules concerning the attribution of wrongful conduct to a State', Scheinin considered the issue of applying this instrument in respect of non-state actors.[191] Scheinin feels that this would indeed be possible. As he pointed out, Art.5 (2) has demonstrated the way in which the 2001 Articles could be applied for the purpose of making non-state actors accountable for conduct that results in the denial of the enjoyment of human rights by individuals or groups of individuals: as if the conduct in question attributed to an entity was attributable to a state.[192] As Scheinin said:

---

[189] International Law Association, Committee on Accountability of International Organisations, *supra* note 74, p.9.
[190] See: Nowak and Kozma, *supra* note 11, p.68.
[191] More details about the 2001 Articles can be found at: http://legal.un.org/avl/ha/rsiwa/rsiwa.html.
[192] See: Scheinin, *supra* note 2, p.20.

> In particular, the provisions of Chapter II on attribution, Chapter IV on shared or joint responsibility of more than one duty-bearer, and Chapter V on circumstances precluding wrongfulness will be instructive for the Court in extending the application of substantive human rights norms to Entities subject to its jurisdiction.[193]

It can be inferred that, in Scheinin's opinion, the principles of the 2001 Articles would provide guidelines for the attribution of wrongful conduct to the UN. The Consolidated Statute seconds the MS Statute.[194] As Art.6 of the Consolidated Statute provides:

> In exercising its jurisdiction, the Court shall determine whether an act or omission is attributable to a State or Entity for the purposes of establishing whether it committed a human rights violation. In so doing, the Court shall be guided by the principles of the international law of State responsibility which its shall apply also in respect of Entities subject to its jurisdiction, as if the act or omission attributed to an Entity was attributable to a State.

Accordingly, for any given conduct, which might consist of acts or omissions, to be characterised as a human rights violation, it must first be attributable to the UN qua a real organised entity, a legal person with full authority to operate under international law. Instead, to Kozma, *et al*., the 2001 Articles 'shall, *mutais mutandis*, also be applied to Entities'.[195] Firstly, this instrument stipulates 'in what circumstances conduct is to be attributed to the State as a subject of international law'.[196] Secondly, the provisions of the 2001 Articles 'are without prejudice to any question of the responsibility under international law of an international organization, or of any State for the conduct of an international organization'.[197] However, it should be noted that the Consolidate Statute gives no further details about the rules of attribution. It must be pointed out that when the current statutes came out there was no single comprehensive legal instrument governing all relevant questions concerning the attribution of conduct to the UN and other international organisations. This situation did not change until the promulgation of the Draft Articles on the Responsibility of International Organisations, adopted by the ILC in 2011 (hereinafter referred to as the 2011 Draft Articles).[198]

---

[193] *Ibid*.
[194] Kozma, *et al.*, *supra* note 21, p.35.
[195] *Ibid*.
[196] Report of the International Law Commission, Fifty-third session, 2001, A/56/10, p.60.
[197] United Nations: "Draft articles on the responsibility of international organizations, with commentaries", *supra* note 4, p.2.
[198] The 2011 Draft Articles was adopted by the International Law Commission (ILC) at its sixty-third session in 2011 and submitted to the General Assembly as a part of the Commission's report covering the

Before the promulgation of the 2011 Draft Articles, the international community had a long history of working towards comprehensive rules on this issue. For example, immediately following the accomplishment of the 2001 Articles, the ILA Committee called for a well-functioning regime of accountability for international organisations which would complement the internationally adopted standards of human rights.[199] On the issue of the legal responsibility of international organisations, the ILA Committee introduced the following general rules and recommended practices:

> 1) Every internationally wrongful act of an IO entails the international responsibility of that IO.
> 2) There is an internationally wrongful act of an IO when conduct consisting of an action or omission is attributable to the IO under international law and constitutes a breach of an applicable international legal rule.
> 3) The characterisation of an act of an IO as internationally wrongful is governed by international law. 4) An act of an IO does not constitute a breach of an international legal rule unless the Organisation is bound by the rule in question at the time the act occurs.[200]

Accordingly, particular conduct constitutes an internationally wrongful act of the UN if it is attributable to the UN under international law and constitutes a breach of an applicable international legal rule.[201] The ILA Committee further enumerated some scenarios in which the UN could be held responsible for human rights violations. Firstly, the UN's responsibility may come into being when its imposition of economic-coercive measures is not in conformity with the general international humanitarian law principles of proportionality and not of necessity.[202] The UN may also incur responsibility if its peacekeeping forces operate based on an error of judgement which, in analogous circumstances, an administrative or executive authority exercising ordinary care and

work of that session. See: United Nations: "Report of the International Law Commission", Sixty-third session (26 April–3 June and 4 July–12 August 2011), General Assembly Official Records, Sixty-sixth session Supplement No. 10 (A/66/10).

[199] See: International Law Association, Committee on Accountability of International Organisations, *supra* note 74, p.2; International Law Association, Committee on Accountability of International Organisations, *supra* note 131, p.6.

[200] International Law Association, Committee on Accountability of International Organisations, *supra* note 74, p.14; International Law Association, Committee on Accountability of International Organisations, *supra* note 131, p.27.

[201] Specifically, an internationally wrongful act refers to conduct not in compliance with the general principles of law, such as the principles of good faith, unjust enrichment, estoppel, equality, non-discrimination, proportionality and fair hearing. See: International Law Association, Committee on Accountability of International Organisations, *supra* note 74, p.15.

[202] See: *ibid*.

diligence would not have committed. [203] In addition, the UN may be held responsible 'if the exercise of discretionary powers entails a sufficiently serious breach of a superior rule of law such as the right to life, food and medicine of the individual or guarantees of due process of law'.[204] The last situation that may be deemed to be the UN's responsibility is one in which the UN's activities carry the risk of infringing the rights of third parties and the UN 'has failed to take all precautionary measures as required by law to avoid such injury'.[205] The ILA Committee followed the above points, with some slight variation, at the Berlin conference.[206]

Concerning the attribution of wrongful acts, the ILA Committee provided the following four principles:

1. The conduct of organs, officials, or agents of an IO shall be considered an act of that IO under international law if the organ, official, or agent was acting in its official capacity, even if that conduct exceeds the authority granted or contravenes instructions given (ultra vires).
2. An IO is responsible for the conduct of its organs or officials acting in their official capacity regardless of the place where the conduct occurs.
3. The responsibility of an IO does not preclude any separate or concurrent responsibility of a State or of another IO which participated in the performance of the wrongful act or which has failed to comply with its own obligations concerning the prevention of that wrongful act. There is also an internationally wrongful act of an IO when it aids or assists a State or another IO in the commission of an internationally wrongful act by that State or other IO.
4. A State is responsible for wrongful acts committed by one of its organs which has been placed at the disposal of an IO and over which the State has retained effective control (operational command and control).[207]

However, the ILA Committee did not draw up comprehensive rules on the issue of attribution.

---

[203] See: *ibid*.
[204] *Ibid*.
[205] *Ibid*.
[206] In the final report of the Berlin conference, the following point, i.e., "IO-s incur responsibility if their conduct was based on a error of judgement which, in analogous circumstances, an administrative or executive authority exercising ordinary care and diligence would not have committed" was deleted by the ILA Committee. See: International Law Association, Committee on Accountability of International Organisations, *supra* note 131, p.28.
[207] International Law Association, Committee on Accountability of International Organisations, *supra* note 74, pp.15 – 16; International Law Association, Committee on Accountability of International Organisations, *supra* note 131, p.28.

As the latest development of the responsibility regime of international organisations, the 2011 Draft Articles represents one of the core norms of international law: that international responsibility is to be attributed for violations of the obligation under international law, no matter who is the perpetrator.[208] On the issue of the attribution of conduct to international organisations, the 2011 Draft Articles follow the same approach adopted by the 2001 Articles. Unlike judicial practice, which often focuses on attribution of responsibility rather than on attribution of conduct, the 2011 Draft Articles provide positive criteria of attribution of conduct, rather than responsibility, to international organisations.[209] In the case of the UN, as Arts.4 and 5 of the 2011 Draft Articles provides, the UN should be held responsible if an impugned conduct attributable to it was found to be internationally wrongful and constituted non-fulfilment of the UN's obligation governed by international law. According to Art.10 (1), when an act of the UN is not in conformity with what is required by the UN Charter and international human rights laws, it may constitute a breach of an international obligation.

According to the 2011 Draft Articles, two forms of attribution may result in the UN being held responsible. A given act or omission that is entirely attributable to the UN is the first, and a given act or omission concurrently attributable to the UN is the other.

### 1.4.1 A given act or omission entirely attributable to the UN

According to the 2011 Draft Articles, the starting point of attribution lies with the authority and power of the UN over the given conduct. As Art.6 of the 2011 Draft Articles stipulates:

> 1. The conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered an act of that organization under international law, whatever position the organ or agent holds in respect of the organization.
> 2. The rules of the organization shall apply in the determination of the functions of its organs and agents.

The term 'organ of an international organisation' refers to 'any person or entity which

[208] See: Arts.1(1) and 3 of the 2011 Draft Articles.
[209] See: "Draft articles on the responsibility of international organizations, with commentaries", *supra* note 4, p.16.

has that status in accordance with the rules of the organization'.[210] With regard to the meaning of 'agent of an international organization', the 2011 Draft Articles, following the ICJ's advisory opinion in the *Reparation* case,[211] and stipulates:

> "… agent of an international organization" means an official or other person or entity, other than an organ, who is charged by the organization with carrying out, or helping to carry out, one of its functions, and thus through whom the organization acts.[212]

Accordingly, any persons or groups of persons, acting under the UN's instructions, direction or control, would have to be regarded as 'agents of the UN' according to the definition given in Art.2 (d) of the 2011 Draft Articles. In the sense of Arts.2 (d) and 6, attributing given conduct to the UN is premised on the characterisation of the acting person or entity as the organ or agent of the UN. According to the above provisions, the UN remains legally responsible for the exercise of its powers even if it has delegated the exercise of such powers to its organs or agents. As an earlier report of the ILC showed:

> The conduct of both organs and agents is attributable to the organization. When persons or entities are characterized as organs by the rules of the organization, there is no doubt that the conduct of those persons or entities has to be attributed, in principle, to the organization.[213]

The principle of constitutionality requires the organs and agents of the UN, in whatever official capacity they act, to ensure that no act would exceed the scope of their functions. As the ICJ held in *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* case (hereinafter referred to as the *Cumaraswamy* case):

> [I]t need hardly be said that all agents of the United Nations, in whatever official capacity they

---

[210] Art.2(c) of the 2011 Draft Articles.

[211] In this case, the ICJ gave a very liberal interpretation of the term "agent": '[A]ny person who, whether a paid official or not, and whether permanently employed or not, has been charged by an organ of the organization with carrying out, or helping to carry out, one of its functions – in short, any person through whom it acts'. The ICJ Advisory Opinion on the *Reparation* case, *supra* note 36, p.177. A similar interpretation can be found the later advisory opinion on the *Applicability of article VI, section 22, of the Convention on the Privileges and Immunities of the United Nations* and the case of *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*. See: I.C.J. Reports 1989, para.48; I.C.J. Reports 1999, para. 66.

[212] Art.2(d) of the 2011 Draft Articles.

[213] "The Report of the International Law Commission", General Assembly Official Records, 56th session, Supplement No.10 A/59/10 (2004), p.106. See also: Report of the Special Rapporteur on the Responsibility of International Organisations, UN, Official Documents, A/CN.4/541, 2 April 2004, p.10.

> act, must take care not to exceed the scope of their functions, and should so comport themselves as to avoid claims against the United Nations.[214]

However, despite the quality of constitution, the UN Charter *per se* does not and cannot eliminate the possibility of the conduct of the UN being wrongful under international law. Operational activities that are lawful under the rules of the UN, the UN Charter in particular, as well as decisions, resolutions and other acts of the UN adopted in accordance with the established practice of this Organisation,[215] cannot help the UN to exempt itself from international responsibility. It stands to reason that, in theory, the compliance of the above instruments and the established practice of this UN could yet prevent this kind of activity from being internationally wrongful.

The relationship between the UN and its organs or agents, operating within the framework of the validity of the former, but possibly extending beyond its range of functions, is also pivotal in terms of attribution. Any act beyond the limits of the constitutional powers conferred upon them, either explicitly or implicitly, will constitute *ultra vires* acts which represent a violation of the principle of constitutionality. The same holds true for an act not in conformity with the operational policies, procedures and practices of the UN. More importantly, this kind of conduct is likely to be found internationally wrongful whenever it breaches both a rule of the UN and rule of international human rights law and thus entails the international responsibility of the UN.

The ILA Committee divided *ultra vires* acts into internal *ultra vires* acts and external *ultra vires* acts. Internal *ultra vires* acts are those 'arising or performed in the context of the institutional relations between the IO and its organs or between organs and bodies'.[216] For instance, in the case of the UN, an *ultra vires* act in the relationship between the UN and its

---

[214] Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, *supra* note 211, para.66.

[215] According to Art.2 (b) of the 2011 Draft Articles, '"rules of the organization" means, in particular, the constituent instruments, decisions, resolutions and other acts of the international organization adopted in accordance with those instruments, and established practice of the organization.' The Institute of International Law gave a similar definition of this term:

> "Rules of the organization" means the constituent instruments of the organization and any amendments thereto, regulations adopted thereunder, binding decisions and resolutions adopted in accordance with such instruments and the established practice of the organization.

Institute of International Law: "The Legal Consequences for Member States of the Non-fulfilment by International Organisations of their Obligations toward Third Parties", Annuaire de l'Institut de Droit International, Vol.66-II, 1996, Art.2(c).

[216] International Law Association, Committee on Accountability of International Organisations, *supra* note 74, p.15; International Law Association, Committee on Accountability of International Organisations, *supra* note 131, p.28.

organs or agents can be understood as an internal *ultra vires* act. Any such conduct should be, in the view of the ILA, considered as an act of the UN under international law if the organs or agents were acting in their official capacity.[217] The ILA Committee had support from the ILC on this issue. Arts. 6 and 8 of the 2011 Draft Articles stipulate that the UN is responsible for any reprehended conduct of its organs or agents, even in the event of this behaviour being deemed to have been *ultra vires*.[218] Art.8 also put forward two scenarios in which internal *ultra vires* acts might exist. The first scenario is an internal *ultra vires* act that may be within the competence of the UN, but exceed the authority granted by the UN to the acting organ or agent.[219] An internal *ultra vires* act that exceeds the competence of the UN represents the second scenario.[220]

As far as the attribution of internal *ultra vires* conduct to the UN is concerned, the ILC resorted to the ICJ and quoted its advisory opinion in the case of *Certain expenses of the United Nations*:

> If it is agreed that the action in question is within the scope of the functions of the Organization but it is alleged that it has been initiated or carried out in a manner not in conformity with the division of functions among the several organs which the Charter prescribes, one moves to the internal plane, to the internal structure of the Organization. If the action was taken by the wrong organ, it was irregular as a matter of that internal structure, but this would not necessarily mean that the expense incurred was not an expense of the Organization. Both national or international law contemplate cases in which the body corporate or politic may be bound, as to third parties, by an *ultra vires* act of an agent.[221]

Inspired by this advisory opinion, the ILC believes that the validity of internal *ultra vires* conduct is not relevant in attributing it to the UN.[222]

---

[217] See: International Law Association, Committee on Accountability of International Organisations, *supra* note 74, p.15.
[218] See: "Draft articles on the responsibility of international organizations, with commentaries", *supra* note 4, p.26.
[219] *Ibid.*, p.28.
[220] *Ibid*.
[221] Certain Expenses of the United Nations, Advisory Opinion, I. C. J. Reports 1962, p.168.
[222] See: A/66/10, *supra* note 198, p.27. In addition, the ILC also quoted the following statement of the General Counsel of the International Monetary Fund (IMF):

> Attribution may apply even though the official exceeds the authority given to him, he failed to follow rules or he was negligent. However, acts of an official that were not performed in his official capacity would not be attributable to the organization.
>
> Cited in: International Law Commission: "Responsibility of international organizations, Comments and observations received from international organizations", A/CN.4/545, 25 June

The ILA Committee also introduced 'external *ultra vires* acts' as a counterpart to 'internal *ultra vires* acts'. External *ultra vires* acts refers to those 'arising or performed in the context of the relations between international organisations and other, state or non-state entities or having an effect on such relationships, breaches of fundamental procedural rules and *détournement de pouvoir*.'[223] In the context of external *ultra vires* acts, a distinction in kind has to be made between the UN's relationship with its organs or agents and the UN's relationship with other state or non-state entities. It may be that the UN may incur no responsibility 'when States have acted *ultra vires* the powers delegated to them'.[224]

The ILC does not adopt the concept of '*ultra vires* acts', but introduced the term 'off-duty conduct' instead. For the attribution of this kind of conduct, the rule stated in Art.8 of the 2011 Draft Articles appears to underline the position taken by the Office of Legal Affairs of the United Nations in a memorandum concerning claims involving the off-duty acts of members of peacekeeping forces:

> United Nations policy in regard to off-duty acts of the members of peacekeeping forces is that the Organization has no legal or financial liability for death, injury or damage resulting from such acts [...] We consider the primary factor in determining an 'off-duty' situation to be whether the member of a peacekeeping mission was acting in a nonofficial/non-operational capacity when the incident occurred and not whether he/she was in military or civilian attire at the time of the incident or whether the incident occurred inside or outside the area of operation [...] [W]ith regard to United Nations legal and financial liability a member of the Force on a state of alert may nonetheless assume an offduty status if he/she independently acts in an individual capacity, not attributable to the performance of official duties, during that designated 'state-of-alert' period. [...] [W]e wish to note that the factual circumstances of each case vary and, hence, a determination of whether the status of a member of a peacekeeping mission is on duty or off duty may depend in part on the particular factors of the case, taking into consideration the opinion of the Force Commander or Chief of Staff.[225]

According to this memorandum, the off-duty conduct of a member of a national contingent should not be attributed to the UN. To Verdirame, this position 'necessitates

---

2004, p.27.

[223] International Law Association, Committee on Accountability of International Organisations, *supra* note 74, p.15; International Law Association, Committee on Accountability of International Organisations, *supra* note 131, pp.27 – 28.

[224] International Law Association, Committee on Accountability of International Organisations, *supra* note 74, p.17.

[225] United Nations: *United Nations Juridical Yearbook (1986)*, New York: United Nations, 1994, p.300. Cited in: A/66/10, *supra* note 198, p.28.

some caveats'.[226] In an unpublished opinion of this office 'conduct taken by an organ or agent off duty does not necessarily exclude the responsibility of the international organization if the latter breached an obligation of prevention that may exist under international law'.[227]

### 1.4.2 A given act or omission concurrently attributable to the UN

The problem may be complicated when applying the general rules of attribution to those cases where the UN is the actor and its Member State is said to be responsible by virtue of its involvement in the conduct of the UN. Apparently, this problem refers to the relationship between the UN and its Member States. In this relationship, specifically, the State concerned may be subject to the obligations of the UN, of which it is a member. Membership of the UN could in no event suspend, terminate or reduce the obligation of any state for the continuing compliance with international human rights law applicable to that state. Nor does a transfer of powers to the UN necessarily exempt an individual state from being responsible for an act or omission that constitutes a human rights violation. On this issue, the 2001 Articles have addressed the problem that, as the Institute of International Law observed, 'no general rule of international law whereby States members are, due solely to their membership, liable concurrently or subsidiarily, for the obligations of an international organization of which they are members'.[228] The observation of the Institute of International Law can be quoted with slight differences: the general rule of international law whereby the UN is responsible, concurrently or subsidiarialy for the non-fulfilment of the obligation of its Member States, which is for the purposes of the UN and under its control, has ever yet existed. There is an argument that a delegation of powers to individual states could not constitute a circumstance precluding the international responsibility of the UN when an individual state commits an internationally wrongful act as a delegate in the exercise of a delegated power. This act, of course, could not be removed from the ambit of control mechanisms established by particular treaties.

A UN PKO, as a kind of UN-authorised mission, serves as an example in point. In particular peacekeeping missions, in order to achieve a result that the UN could not

[226] Verdirame, *supra* note 151, p.126.
[227] A/66/10, *supra* note 198, p.29.
[228] Institute of International Law, *supra* note 215, Art.6(a).

lawfully achieve directly, the UN has no choice but to subcontract the contributing states, which are indispensable to the operations of the UN, for particular functions.[229] Two international legal persons are engaged in this type of mission: a troop-contributing state, to which the peacekeeping forces belong, and the UN, at whose disposal the peacekeeping forces are placed. The State concerned contributes military contingents to the UN, putting them at the UN's disposal so that they may act for the purposes of and under the control of the UN. According to the agreement that the UN concludes with the troop-contributing state, while remaining in their national service, the personnel shall be under the command of the UN for the period of their assignment.[230] By appointing a Head of Mission responsible to it, the UN Secretary-General exercises full authority over the deployment, organisation, conduct and direction of the entire mission, including the personnel made available by the troop-contributing state.[231] It can be found that the UN has, or at least intends to have, *une volonté distincte* (a separate will) in particular missions. As the UN Secretariat stated:

> As a subsidiary organ of the United Nations, an act of a peacekeeping force is, in principle, imputable to the Organization, and if committed in violation of an international obligation entails the international responsibility of the Organization and its liability in compensation. The fact that any such act may have been performed by members of a national military contingent forming part of the peacekeeping operation does not affect the international responsibility of the United Nations vis-à-vis third States or individuals.[232]

Therefore, 'the acts of these subcontractors are potentially attributable to the UN and could engage its international responsibility'.[233]

Attribution of conduct is clearly linked to whoever retains the powers over the peacekeeping forces and thus possesses control in the relevant respect. It is an inconsistency acknowledged by the UN that the organisation is, *ipso facto,* unable to exercise exclusive control over the military contingents. In other words: in practice, there do not seem to be any convincing examples of personnel who have been *de facto* placed at

---

[229] "Draft articles on the responsibility of international organizations, with commentaries", *supra* note 4, p.22.
[230] See: General Assembly: "Comprehensive Review of the Whole Question of Peace-Keeping Operations in All Their Aspects, Report of the Secretary-General", A/46/185, 23 May 1991, para.7.
[231] See: General Assembly: "Comprehensive Review of the Whole Question of Peace-Keeping Operations in All Their Aspects, Report of the Secretary-General", A/46/185, 23 May 1991, para.7.
[232] A/CN.4/545, *supra* note 222, p.17.
[233] Verdirame, *supra* note 151, p.101.

the disposal of the UN. In some cases, the UN Secretary-General has indicated that in the context of the joint and combat-related operation, the attribution of responsibility was based on the arrangements establishing the modalities of cooperation between the State contributing the troops and the UN, rather than on the assumption that the UN had exclusive command and control of the operation.[234] According to the United Nations Model Memorandum of Understanding (MoU), the UN expresses an incentive for the State contributing the troops to discipline and prosecute members of the military in national peacekeeping contingents.[235] Take, for example, Opération Turquoise, a French-led military operation in Rwanda under the mandate of the UN. In a letter addressed to the Prime Minister of Rwanda, the UN Secretary-General said:

> [...] insofar as 'Opération Turquoise' is concerned, although that operation was 'authorized' by the Security Council, the operation itself was under national command and control and was not a United Nations operation. The United Nations is, therefore, not internationally responsible for acts and omissions that might be attributable to 'Opération Turquoise'.[236]

The ILC gives the following explanation for this inconsistency:

> While it is understandable that, for the sake of efficiency of military operations, the United Nations insists on claiming exclusive command and control over peacekeeping forces, attribution of conduct should also in this regard be based on a factual criterion.[237]

On the issue of attribution, the UN Secretariat stated:

> The question of attribution of the conduct of a peacekeeping force to the United Nations or to contributing States is determined by the legal status of the force, the agreements between the United Nations and contributing States and their opposability to third States.[238]

---

[234] See: General Assembly: "Financing of the United Nations Protection Force, the United Nations Confidence Restoration Operation in Croatia, the United Nations Preventive Deployment Force and the United Nations Peace Forces headquarters: Administrative and budgetary aspects of the financing of the United Nations peacekeeping operations: financing of the United Nations peacekeeping operations", Report of the Secretary-General, A/51/389, 20 September 1996, paras.17 – 18.

[235] General Assembly: "Manual on Policies and Procedures Concerning the Reimbursement and Control of Contingent-Owned Equipment of Troop/Police Contributors Participating in Peacekeeping Missions (COE Manual)", A/C.5/66/8, 27 October 2011, pp.187 – 188.

[236] Unpublished letter. Cited in: "Draft articles on the responsibility of international organizations, with commentaries", *supra* note 4, p.42.

[237] "Draft articles on the responsibility of international organizations, with commentaries", *supra* note 4, p.23.

[238] A/CN.4/545, *supra* note 222, p.17. See also: United Nations: *United Nations Juridical Yearbook (2004)*, New York: United Nations, 2007, p.354. This statement has been frequently applied to particular missions in

The MoU appears to deal with distribution of responsibility between the UN and the State contributing troops. Art.7 quarter of the MoU stipulates the responsibility of both the troop-contributing state and the UN for investigation when any acts of misconduct, particularly severe misconduct, has been committed by a member of the national contingent. The forms of investigation could include fact-finding proceedings and/or an administrative investigation initiated by the UN under certain circumstances.[239] According to Art.7 sexiens, as soon as it is established that suspicions of misconduct are well founded, the troop-contributing State shall assure the UN that the case will be forwarded to its appropriate authorities for due action. In principle, the MoU also regulates the responsibility of the UN for dealing with claims by third parties where the loss of or damage to their property, or death or personal injury, was caused by misconduct or serious misconduct. According to Art.9 of the MoU, gross negligence or wilful misconduct of the personnel provided by the contributing state enables third parties to hold this state to account. However, although distributing the responsibility between the UN and the troop-contributing state, the MoU appears not to deal with attribution of conduct.[240] Even so, this kind of agreement has no legal effect on the aggrieved third parties. As the ILC has pointed out:

> At any event, this type of agreement is not conclusive because it governs only the relations between the contributing State or organization and the receiving organization and could thus not have the effect of depriving a third party of any right that that party may have towards the State or organization which is responsible under the general rules.[241]

According to the 2011 Draft Articles, in principle, the conduct of any organ of a state that is placed at the disposal of the UN shall be considered as an act of the UN under international law, provided that the UN exercises effective control over that conduct.[242] Accordingly, 'where the Secretary-General assumes the command and control of military forces, the Organization is responsible under international law for the acts of those

such countries as Congo, Cyprus and later ones. See: "Draft articles on the responsibility of international organizations, with commentaries", *supra* note 4, p.21, notes. 100 – 102.

[239] A/C.5/66/8, *supra* note 235, p.189.

[240] See: "Draft articles on the responsibility of international organizations, with commentaries", *supra* note 4, p.20. The same viewpoint is held by Verdirame. See: Verdirame, *supra* note 151, p.101.

[241] "Draft articles on the responsibility of international organizations, with commentaries", *supra* note 4, p.20.

[242] See: Art.7 of the 2011 Draft Articles.

forces'.[243] However, the ILC is not in disagreement with the single fault liability theory, which attributes solely exclusive or primary responsibility for any given conduct either to the UN or to an individual state. While not frequently occurring in practice, dual or multiple attributions of conduct to the UN cannot be excluded.[244] Attribution of a certain act to the UN does not imply that the same conduct cannot be attributed to a state; nor does attribution of conduct to a state rule out attribution of the same conduct to the UN.[245] In this context, Art.7 of the 2011 Draft Articles adopts the term 'effective control'. The term 'control', in the sense of this Article, concerns to whom this conduct should be attributed: the troop-contributing state or the UN.[246] To the ILC, 'when applying the criterion of effective control, "operational" control would seem more significant than "ultimate" control since the latter hardly implies a role in the act in question'.[247]

As to the particular rules of attribution, the 2011 Draft Articles seem to make the UN responsible in any of the following circumstances. Firstly, if the UN aids or assists a state in committing an internationally wrongful act.[248] Art.14 of the 2011 Draft Articles deals with the attribution of conduct in this situation.[249] Accordingly, an internationally wrongful act by a state could also be attributable to the UN if the latter did not cease its aid or assistance in the commission of this act even though it believed that this act violated human rights. In other words, the UN may bear responsibility for an internationally wrongful act committed by a state under its aid or assistance if the UN has aided or assisted this act with intentional unawareness of the circumstances, and with the knowledge that this act is internationally wrongful. Secondly, if the UN directs and controls a state in the commission of such an act or if the UN coerces this state to commit an act that would, but for the coercion, be an internationally wrongful act.[250] According to Art.15 of the 2011 Draft Articles, an internationally wrongful act by a state may be attributed to the UN, if the latter directs and controls this state in the commission of this

[243] "UN Peacekeeping and The Model Status of Forces Agreement", Background Paper Prepared for the Experts' Workshop, 26 August 2010, London, UK, Hosted by the New Zealand High Commission, United Nations Peacekeeping Law Reform Project, School of Law, University of Essex, para.44.
[244] See: 'Draft articles on the responsibility of international organizations, with commentaries', *supra* note 4, p.16. See also: "UN Peacekeeping and The Model Status of Forces Agreement", *supra* note 243, para.45.
[245] See: 'Draft articles on the responsibility of international organizations, with commentaries', *supra* note 4, p.16.
[246] *Ibid*., p.21.
[247] *Ibid*., p.23.
[248] *Ibid*., p.4.
[249] See: *ibid*., p.37.
[250] *Ibid*., p.4.

act.[251] The UN may also incur international responsibility under Art.16 of the 2011 Draft Articles if the UN coerces a state in the commission of an act that would be wrongful for this state and the UN does so with knowledge of this circumstance.[252]

In addition, the UN's circumvention of human rights obligations, either by adopting a decision or with an authorisation, may incur international responsibility in the sense of Art.17 of the 2011 Draft Articles. Specifically, if the UN adopts a decision binding a Member State to commit an act that would be internationally wrongful if committed by the UN, or the UN authorises the Member State to commit the same act and this act is committed because of that authorisation, the UN may incur international responsibility. This Article deliberately distinguishes the 'authorisation' from the 'decision'. In the ILC's view, when using the term decision, 'compliance by members with a binding decision is to be expected'[253] and the State concerned could be said to have little room for discretion. The attribution of the same act may appear to be slightly different in the context of authorisation because 'the authorisation may not prompt any conduct which conforms to it'.[254] Given this, Art.17 (2) imposes an additional condition for the UN to incur international responsibility: that the act in question is committed because of that authorisation. It is equally important to note that, as the ILC points out, this condition requires a contextual analysis of the role that the authorisation has played in determining the conduct of the contributing states or the UN.[255]

According to the 2011 Draft Articles, the responsibility of the UN may also arise in certain cases when conduct is not attributable to it. As Art.9 of the 2011 Draft Articles mirrors, attribution could also be based on the attitude taken by the UN concerning a certain conduct that may not have been attributable to the UN. Conduct which at first and *prima facie* is not attributable to the UN shall nevertheless be considered as an act of the UN under international law if, and to the extent that, the UN acknowledges and adopts the

[251] See: *ibid*., p.39.
[252] See: *ibid*.
[253] *Ibid*., p.41.
[254] *Ibid*., p.42.
[255] See: *ibid*. The ILA Committee had a similar yet slightly different stance on this issue. In the case of an authorisation granted by the UN to a state or a group of states volunteering to carry out particular tasks or operations, the primary responsibility for any illegal act committed in the course of the execution of such authorisation rests with those states. This does not, of course, exclude any secondary responsibility attaching to the UN for any illegal act committed in the course of the execution of such authorisation. See: International Law Association, Committee on Accountability of International Organisations, *supra* note 74, p.18. Put another way, the UN 'cannot avoid its international legal responsibility through a process of delegation, authorisation or sub-contracting'. International Law Association, Committee on Accountability of International Organisations, *supra* note 131, p.31.

conduct in question as its own.[256] This is likely to be the case if the UN appropriately recognised this conduct as engaging its responsibility.[257]

It follows from the above discussion that, as the ILC points out, 'attribution of conduct to the contributing State is clearly linked with the retention of some powers by that State over its national contingent and thus on the control that the State possesses in the relevant respect.'[258] However, attributing a particular conduct to the UN is not only based on the criteria set by international law, but also on the recognition of a link of factual causality. In this connection, the 2011 Draft Articles neither exclude nor impose any particular way of attribution in particular cases. 'As with any determination on attribution'[259], Verdirame added, 'the analysis of the facts is pivotal'.[260] Hence, a determination as to whether the act in question should be attributable to, and the extent to which it can be attributed to, the UN may in a certain sense depend on the factual circumstances of each case. And above all, a competent body should be established to determine, in any given case, the issue of attribution. As Gray pointed out, fundamental changes in the law of organisational responsibility cannot take place without (judicial) remedies being affected.[261]

[256] See: International Law Association, Committee on Accountability of International Organisations, *supra* note 74, p.18.
[257] See: General Assembly: "Responsibility of international organizations: Comments and observations received from international organizations", A/CN.4/637/Add.1, 17 February 2011, p.15. Cited in: "Draft articles on the responsibility of international organizations, with commentaries", *supra* note 4, p.29.
[258] *Ibid*., p.21.
[259] Verdirame, *supra* note 151, p.111.
[260] *Ibid*.
[261] See: Christina D. Gray: *Judicial Remedies in International Law*, Oxford: Clarendon Press, 1987, p.224.

## Section 2 The Complementary Jurisdiction of the WCHR and the UN's Jurisdictional Immunity before the Domestic Jurisdictions

**Section 1** included a detailed discussion of the legal foundation, which has long been argued by human rights defenders, for placing the UN under the jurisdiction of the WCHR. The previous section also discussed the UN's involvement in human rights, and the resulting significant effects on individuals, which may in some cases be found to be in violation of internationally adopted human rights standards.

Another thorny legal issue concerning the jurisdiction of the WCHR is the admissibility criteria. Among these criteria, the most important is the exhaustion of domestic remedies.[262] Over the years, the rule of exhaustion of local remedies has predominated in human rights instruments,[263] and has finally been adopted as one of the principles of general international law.[264] The authors of the current statutes have paid close attention to retaining the complementary nature of the WCHR's jurisdiction. This complementary nature of international jurisdiction is designed to 'provide reparation solely for damage suffered by those concerned to the extent that such events constitute a consequence of the violation that cannot otherwise be remedied'.[265]

However, the application of the 'exhaustion' requirement raises a new legal problem when it comes to the WCHR's jurisdiction over the UN. As can be seen in the MS Statute and the Consolidated Statute, there is a distinction between the 'exhaustion of domestic remedies' and the 'exhaustion of internal remedies' in the current statutes. This section will first describe this distinction.

### 2.1 The 'exhaustion of domestic remedies' clause and the 'exhaustion of internal remedies clause in the current statutes'

[262] See: Art.11 of the NK Statute, Art.13 of the MS Statute and Art.9 of the Consolidated Statute.
[263] See: A. O. Adede: "A Survey of Treaty Provisions on the Rule of Exhaustion of Local Remedies", in: *Harvard International Law Journal*, Vol. 18, No. 1, pp.1 – 17, at 5, 6.
[264] Silvia D'Ascoli and Kathrin Maria Scherr: "The Rule of Prior Exhaustion of Local Remedies in the International Law Doctrineand its Application in the Specific Context of Human Rights Protection", European University Institute (EUI) Working Papers, Law/2007/02, pp.9, 15. This paper is available at: http://cadmus.eui.eu/bitstream/handle/1814/6701/LAW_2007_02.pdf.
[265] *Scozzari and Giunta v. Italy*, application nos.39221/98 and 41963/98, Judgment, Strasbourg, 13 July 2000, para.250.

It should be pointed out that the NK Statute did not make any distinction between the 'exhaustion of domestic remedies' and the 'exhaustion of internal remedies'. As expounded in **Chapter Three**, the NK Statute stipulated that States Parties should establish 'national courts of human rights' in their respective territories. A national human rights court is usually the court 'in the country where the alleged human rights violation, whether committed by a governmental authority or by a non-state actor, has occurred'.[266] Accordingly, such national courts of human rights would be competent to hear any case in relation to the UN.[267] Applicants could appeal with regard to the same matter, i.e. the same human rights issue between the same parties, to the WCHR, if they were not satisfied with the judgment rendered by their national human rights court.[268] However, they would have to make up their mind whether to submit their case to the respective regional human rights court or the WCHR, because no appeal shall be permissible from a regional human rights court (the European Court of Human Rights (ECtHR), ACtHR and African Court of Human and Peoples' Rights (AfCtHPR)) to the WCHR.[269] An exception to the exhaustion requirement is that, according to the NK Statute, the State Party concerned 'is unwilling or unable to provide adequate protection against human rights violations because it failed to establish a national human rights court or because the procedure before the national court is not effective or does not afford due process of law'.[270]

Unlike the NK Statute, the MS Statute made a distinction between the exhaustion of internal remedies and the exhaustion of domestic remedies. According to Scheinin, the UN may declare what internal, or other, remedies must be exhausted before a complaint can be submitted to the WCHR.[271] It should, however, be noted that in the case of the UN, the MS statute does not require an individual complaint levelled against the UN to first be heard by domestic courts before the complainant(s) may resort to the WCHR.[272] Instead, Scheinin has suggested that a complaint in respect of the UN can be submitted to the WCHR provided the following two conditions are met. First, the requirement that all available remedies that need to be exhausted under the terms of the acceptance of the

[266] Nowak and Kozma, *supra* note 11, p.63.
[267] See: *ibid*.
[268] See: Art.11 (1) of the NK Statute, Nowak and Kozma, *supra* note 11, p.64.
[269] See: Art.11 (2) (b) of the NK Statute, Art.13 (1) (d) of the MS Statute and Art.10 (1) (b) of the Consolidated Statute.
[270] Nowak and Kozma, *supra* note 11, p.63.
[271] See: Art.8 (4) of the MS Statute; Scheinin, *supra* note 2, pp.26, 27.
[272] See: Art.13 (1) (2) of the MS Statute.

jurisdiction of the WCHR by the UN has been satisfied.[273] Second, that the application of such remedies has been unreasonably prolonged.[274] Scheinin took UN sanctions as an example. He considered 'a mechanism of independent expert review as a part of its listing and delisting procedures'[275] and as 'a remedy that needs to be exhausted'.[276] In doing so, the WCHR 'would pay due attention to the procedure and outcome of such an independent review'.[277]

The Consolidated Statute largely adopted Scheinin's approach to formulating the admissibility criteria through making a distinction between domestic remedies and internal remedies. As the authors pointed out, the requirement to first lodge a complaint with a national court would not apply to complaints directed against the UN unless the UN could be sued before national courts.[278] The Consolidated Statute allows the UN to identify those internal remedies which exist within its own structure.[279]

One may wonder why the authors of the current statutes throw particular light on this distinction. The UN's jurisdictional immunity may constitute a primary concern with regard to this question. However, the authors of the current statutes did not specify their reasons for making this distinction. As will be discussed further below, the UN's jurisdictional immunity before domestic courts may be an important attribute.

### 2.2 The UN's jurisdictional immunity before domestic courts

Since the earliest days of the Organisation, the UN's privileges and immunities have been solidly founded on the law of treaties. As provided for in Art.105 of the UN Charter:

> (1). The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes.
> (2). Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connexion with the Organization.
> (3). The General Assembly may make recommendations with a view to determining the details

[273] See: Art.8 (4) and Art.13 (3) (a) of the MS Statute.
[274] See: Art.8 (4) and Art.13 (3) (a) of the MS Statute.
[275] Scheinin, *supra* note 2, p.26.
[276] *Ibid*.
[277] *Ibid*.
[278] See: Kozma, *et al*., *supra* note 21, p.41.
[279] See: Art.9 (3) of the Consolidated Statute.

> of the application of paragraphs 1 and 2 of this Article or may propose conventions to the Members of the United Nations for this purpose.

The direct goal of inserting rules about privileges and immunities for the UN into the UN Charter was 'to enable its efficient functioning'[280] and reflected 'the necessity to preserve the independence of the Organization'.[281] It should be noted that Art.105 of the UN Charter covers many aspects of the privileges and immunities of the UN.[282] One of the most important aspects is the organisation's jurisdictional immunity from civil lawsuits against it before national courts, as this type of action 'might be classified as *acta iure gestionis*'.[283] For the drafters of the UN Charter, the granting of jurisdictional immunity to the UN had the purpose of preventing Member States from hindering in any way the working of the UN, or taking any measures the effect of which might be to increase the burdens, financial or otherwise, on the UN.[284] Moreover, the 'immunity of the UN would be jeopardised if precedence of scrutiny and decision had to be left to national courts'.[285]

The jurisdictional immunity of the UN and that of UN personnel are inseparable.[286] Art.105 of the UN Charter also benefits officials of the UN. The term 'officials' in Art.105 (2) of the UN Charter refers to 'all UN staff members (employed by any principal or subsidiary organ) who are engaged on a full-time or substantially full-time basis and who have been registered in this capacity with host States'.[287] Field service officers, including those recruited locally, would also qualify as UN staff members, and therefore officials, within the meaning of the CPIUN.[288]

Art.105 of the UN Charter also introduced the principle of the functional necessity of privileges and immunities, which has become 'a fundamental rule of the entire system of international privileges and immunities'.[289] Despite this, the terms of Art.105 of the UN Charter 'are phrased in a very general and wide way'[290] and do not specify limits to the

---

[280] Simma, Khan, Nolte, *et al. supra* note 101, p.2161.
[281] UNCIO, XIII, p.772. See: Simma, Khan, Nolte, *et al. supra* note 101, p.2161.
[282] For example: the UN premises and property, archives and documents, tax exemption and customs duties.
[283] Simma, Khan, Nolte, *et al. supra* note 101, p.2161.
[284] See: Cf. the drafting history of Article 105 of the UN Charter in Report of the Rapporteur of Committee IV/2, as approved by the Committee, 13 UNCIO Doc. 933, IV/2/42(2) (1945), p.704.
[285] Simma, Khan, Nolte, *et al. supra* note 101, p.2170.
[286] See: Charles H. Brower: "International Immunities: Some Dissident Views on the Role of Domestic Courts", in: *Virginia Journal of International Law*, Vol. 41, No. 1, pp. 1 – 92, at 27, 31.
[287] Simma, Khan, Nolte, *et al. supra* note 101, p.2169.
[288] See: *ibid*.
[289] *Ibid*., p.2161.
[290] *Ibid*.

UN's immunity.[291] In a sense, it can be said that Art.105 of the UN Charter 'leaves [a] room for the diversity of the contents of host nation as well as multilateral agreements'.[292] To clarify the meaning of this Article, one must resort to the principle of interpreting a treaty in the light of its object and purpose according to Art.31 (1) of the Vienna Convention on the Law of Treaties (VCLT).[293] However, as Gerster and Rotenberg have pointed out, 'taking into account the importance and the scope of its activity, the immunities of the UN should be widely interpreted'.[294]

Likewise, the founders of the UN also expected the CPIUN to formulate that no Member State may hinder the working of the UN in any way, or take any measures the effect of which might be to increase its burdens, financial or otherwise.[295] It is therefore arguable that the UN's immunity under Art.105 of the UN Charter was detailed by the CPIUN adopted in 1946. Art.2 (2) of CPIUN provides that:

> The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution.

According to Gerster and Rotenberg, this Article makes the UN, as a legal person, absolutely immune from every form of legal proceedings, not only before national courts, but also authorities.[296] Besides, 'the prohibition of "every form of legal process" includes the issuing of garnishment orders and service of writs and documents by courts and administrative authorities'.[297] At the same time, the CPIUN 'requires all parties to the Convention to be in a position, as far as their domestic law is concerned, to give effect to the terms of the Convention'.[298] In this sense, Rawski suggested that, while Art.105 of the UN Charter explicitly limits the UN's immunities to a functional necessity standard, the CPIUN seems to expand the UN's immunity.[299]

---

[291] See: *ibid*.
[292] *Ibid*.
[293] See: *ibid*., p.2162. As provided for in Art.31 (1) of the VCLT: 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'
[294] See: Simma, Khan, Nolte, *et al. supra* note 101, p.2162.
[295] See: UN: Documents of the United Nations Conference on International Organization, San Francisco 1945, Vol. XIII, p.780.
[296] See: Simma, Khan, Nolte, *et al. supra* note 101, p.2165.
[297] *Ibid*., p.2166.
[298] *Ibid*.
[299] See: Fredrick Rawski: "To Waive or Not To Waive: Immunity and Accountability in U.N. Peacekeeping

Given the elementary principle that the UN's immunity automatically extends to the official acts of their agents[300], the UN officials are also the beneficiaries of the CPIUN. Unlike the UN Charter, the CPIUN stipulates the waiver of immunity. According to Art.5 (20) of CPIUN:

> … The Secretary-General shall have the right and the duty to waive the immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations. …

It can be found that the UN Secretary-General has exclusive authority to waive the immunity of UN officials,[301] and this Article seems to be unrelated to the immunity of the organisation. However, as a matter of fact, the UN acts only through its agents. In the *Reparation* case, the UN has admitted retrospectively that all persons, whether paid or not, acting on behalf of the UN or any of its organs, whether paid or not, should be classified as agents of the UN.[302]

According to Art.8 (29) of CPIUN, if immunity has not been waived by the UN Secretary-General in a particular case, the UN is required to make provisions for appropriate modes of settlement of the following two kinds of disputes. First, disputes arising out of contracts, or other disputes of a private law character, to which the UN is a party. Second, disputes involving any official of the UN who enjoys immunity by reason of their official position.

The UN's absolute immunity had 'never been a matter of dispute'[303] until the problem entered the human rights arena. Notwithstanding being of a distinguished procedural nature, the UN's jurisdictional immunity may incorporate more elements, in the sense of substantive law, in this arena, in which a potential tension between UN jurisdictional immunity and human rights might be found. In particular, Art.105 (3) of the UN Charter has been 'the object of some polemic discussions and setbacks when carried

---

Operations", in: Connecticut Journal of International Law, Vol. 18, No. 1, 2002, pp.103 – 132, at 111.

[300] See: for example, Hans Kelsen: The Law of the United Nations: a critical analysis of its fundamental problems, New York: F.A. Praeger, 1950, p.339; John K. King: International Administrative Jurisdiction: with special reference to the domestic laws and practices of the United States of America, Brussels: International Institute of Administrative Sciences, 1952, p.79; John Kerry King: The Privileges and Immunities of International Organizations, Odense: Strandberg, 1949, pp.103, 182.

[301] The only exception to this authority is, as Art.5 (20) stipulates, 'In the case of the Secretary-General, the Security Council shall have the right to waive immunity'.

[302] See: "Statement by M. Kerno (United Nations)", **section 1**, *supra* note 31. See also: The ICJ Advisory Opinion on the *Reparation* case, *supra* note 36, p.177.

[303] Simma, Khan, Nolte, *et al. supra* note 101, p.2165.

out through the establishment of a comprehensive system of privileges and immunities over more than six decades'.[304] The same holds true for Art.5 (20) of CPIUN. This system is under suspicion of being transformed into a wounded 'psychology of privilege',[305] which probably represents 'an arrogant sense of being above all law'.[306] The case studies in **Section 2.3** serve to illustrate this tension.

## 2.3 Case studies

In the following cases, namely, *Manderlier v. United Nations and Belgium*,[307] *Association of Citizens Mothers of Srebrenica v. the State of the Netherlands and the United Nations*,[308] and *Delama Georges et al. v. United Nations et al.*,[309] all claimants would have faced the common procedural obstacle of the jurisdictional immunity of the UN before domestic courts.

### 2.3.1 *Manderlier v. United Nations and Belgium*

In this case, the plaintiff, a Belgian national, charged the Ethiopian troops belonging to the Opération des Nations Unies au Congo (ONUC) with the ransacking and burning of his own property in the Congo in 1962.[310] His claim for compensation gained the support of the Belgian government, who subsequently concluded a compensation agreement with the UN.[311] According to this agreement:

---

[304] *Ibid*., p.2162.
[305] See: Clarence W. Jenks: *International Immunities*, London, Stevens; New York, Oceana Publications, 1961, p.151.
[306] Michael Singer: "Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns", in: *Virginia Journal of International Law*, Vol. 36, No. 1, 1995, pp.53 – 165, at 89.
[307] Hereafter referred to as the *Manderlier* case.
[308] Later called the *Srebrenica* case.
[309] Hereinafter referred to as the *Georges et al.* case.
[310] For the fact finding of this case, see: *Manderlier v. United Nations and Belgium*, Court of First Instance of Brussels, 2nd May, 1966, 81 *Journal des Tribunaux* No. 4553 (1966) and *Manderlier v. United Nations and Belgium*, Court of Appeals of Brussels, September 15, 1969, 69 ILR 139.
[311] For the settlement of the Manderlier's claim, see: "Exchange of letters constituting an Agreement between the United Nations and Belgium relating to the settlement of claims filed against the United Nations in the Congo by Belgian nationals", New York, 20 February 1965, in: United Nations Juridical Yearbook (1965), pp.39 – 40. See also: United Nations: *Treaty Series, Treaties and international agreements registered or filed and recorded with the Secretariat of the United Nations*, Vol. 535, United Nations, New York, 1966, No.7780, pp. 197 – 203.

> The United Nations has agreed that the claims of Belgian nationals who may have suffered damage as a result of harmful acts committed by ONUC personnel, and not arising from military necessity, should be dealt with in an equitable manner.[312]

In conformity with this agreement, 'it would not evade responsibility where it was established that United Nations agents had in fact caused unjustifiable damage to innocent parties'.[313] However, the UN does not assume liability for damage to persons or property which, although caused by third parties, has given rise to claims against the organisation.[314] Therefore, Manderlier's claims should have been excluded from the proposed compensation.[315] As a result of the consultations between the Belgian Government and the UN, the latter should have paid a lump sum payment 'without prejudice to the privileges and immunities enjoyed by the United Nations'.[316] This payment was to be distributed by the Belgian government with the supply of the UN Secretary-General.[317] Furthermore, it was stated that 'this payment shall constitute the outright and final settlement between Belgium and the United Nations'.[318]

Manderlier, however, was not satisfied with his share of the lump sum and 'instituted proceedings with a view to obtaining compensation from the UN or the Belgian Government, or from both jointly, for the damage he claimed to have suffered'.[319] According to Manderlier's claims, the UN had firstly, according to Art.8 (29) of CPIUN, failed to make appropriate modes of settlement when becoming a party to a private-law dispute, and thus constituted an exception to Art.2 (2) of the same convention.[320] Secondly, the ONUC's behaviour was not in compliance with Art.105 of the UN Charter, which conferred on the UN such privileges and immunities as were necessary for the fulfilment

---

[312] *Ibid*., p.199.
[313] *Ibid*.
[314] See: *Ibid*.
[315] See: *Ibid*.
[316] *Ibid*.
[317] See: *Ibid*., pp.200 – 201.
[318] *Ibid*., p.201. At the same time, according to "Exchange of Letters Constituting an Agreement between the United Nations and Belgium Definitively Settling the Financial Questions Outstanding as Regards the Former Belgian Military Bases in the Congo", Belgium had made a commitment not to bring any financial claims against the UN. See: United Nations: *Treaty Series, Treaties and international agreements registered or filed and recorded with the Secretariat of the United Nations*, Vol. 535, United Nations, New York, 1966, No.7779, p.193.
[319] Brussels Court of First Instance: *Manderlier v. United Nations and Belgium*, Judgment of 11 May 1966, in: *United Nations Juridical Yearbook* 1966, Part Three (Judicial decisions on questions relating to the United Nations and related inter-governmental organizations), Chapter VIII (Decisions of national tribunals), p.283.
[320] *Ibid*.

of its purposes.[321] Thirdly, Art.10 of the UDHR authorised the hearing of his claim before the Belgian courts and 'had the force of law in Belgium'.[322] As Manderlier argued, 'in the absence of an international tribunal competent to adjudicate his case, he should be able to sue the United Nations in a domestic court'.[323]

The Brussels Court of First Instance rejected the plaintiff's claim concerning the admissibility of this action.[324] According to the court, firstly, Art.8 (29) of CPIUN had no bearing on the applicability of Art.2 (2), and it found the immunity of the UN absolute in this case.[325] This general immunity protected the UN from legal process and was 'not limited to the minimum strictly necessary for the fulfilment of the purposes stated in the Charter'.[326] Secondly, apart from having an equal status to the UN Charter, the scope of CPIUN dated from 13 February 1946, meaning it could not be limited by the UN Charter, which was dated 26 February 1945. With regard to Art.10 of the UDHR: although entitling every case to be heard by a tribunal, the Court maintained that the UDHR 'was not legally binding and could not have abrogated, either conditionally or absolutely, the immunity proclaimed in' Art.2 (2) of CPIUN.[327] The Brussels Court of First Instance finally rejected Manderlier's claims against the UN on the grounds that, under Art.2 (2) of CPIUN, the organisation enjoyed immunity from every form of legal process. As the judgment reads:

> The United Nations enjoys immunity from every form of legal process under section 2 of the Convention on the Privileges and Immunities of the United Nations. This immunity is unconditional and is not limited either by section 29 of the Convention in question or by article 10 of the Universal Declaration of Human Rights.

The Brussels Appeals Court subsequently received the appeal from Manderlier and dismissed Manderlier's appeal *pari ratione*.[328] The Court maintained, as the Court of First Instance, that the CPIUN in no way made the immunity from every form of legal process

---

[321] *Ibid*.
[322] Brussels Appeals Court: *Manderlier v. United Nations and Belgian State*, Decision of 15 September 1969) in: *United Nations Juridical Yearbook* 1969, Part Three (Judicial decisions on questions relating to the United Nations and related inter-governmental organizations), Chapter VIII (Decisions of national tribunals), p.236. It should be noted that this argument did not exist in the United Nations Judicial Yearbook (1966), but was written in the United Nations Judicial Yearbook (1969). As it reads: 'The Appeals Court rejected the arguments already invoked by the appellant in the Court of First Instance, pointing out ….' *Ibid.*
[323] Brussels Court of First Instance, *supra* note 319.
[324] See: Brussels Appeals Court, *supra* note 322.
[325] See: Brussels Court of First Instance, *supra* note 319.
[326] See: *ibid.*
[327] *Ibid*.
[328] See: Brussels Appeals Court, *supra* note 322.

granted to the UN conditional upon the UN's respect for the obligations imposed upon it by other provisions of the same Convention, more particularly Art.8 (29).[329] The Court also held that it was somewhat far-fetched to find evidence directly and solely from Art.10 of the UDHR sufficiently convincing to alter the rule of positive law constituted by the principle of immunity from every form of legal process formulated in the CPIUN.[330]

As for Art.105 of the UN Charter, the Brussels Appeals Court did not deny that this Article limits the UN's jurisdictional immunity to the minimum necessary to enable the UN to fulfil its purposes. However, arrogating the right to determine whether the jurisdictional immunity granted to the UN was or was not necessary would be considered *ultra vires*. As the Brussels Appeals Court found:

> [Belgium] had defined the necessary privileges and immunities and that the courts would be exceeding their authority if they were to arrogate to themselves the right of determining whether the immunities granted to the United Nations by that Convention were or were not necessary.[331]

As a conclusion, the Brussels Appeals Court made the following decision:

> ... it must be admitted that in the present state of international institutions there is no court to which the appellant can submit his dispute with the United Nations; and although this situation, which does not seem to be in keeping with the principles proclaimed in the Universal Declaration of Human Rights, may be regrettable, it must be recognized that the judge of first instance was correct in declaring that the action brought against the United Nations was inadmissible.[332]

### 2.3.2 *Association of Citizens Mothers of Srebrenica v. the State of the Netherlands and the United Nations*

The case of *The Association of Citizens Mothers of Srebrenica v. The State of the Netherlands and the Organization having the legal personality The United Nations* (hereinafter referred to as the *Srebrenica* case) may facilitate a much more complete assessment of the application of the UN's jurisdictional immunity in a similar situation.[333]

---

[329] See: *ibid*.
[330] See: *ibid.*
[331] *Ibid*.
[332] *Ibid*.
[333] This case was heard three times at a domestic level. See: Judgment in the incidental proceedings, 10 July 2008, in the case of Mothers of Srebrenica *et al. v*. State of The Netherlands and the United Nations, District Court of The Hague, The Netherlands, Judgment in the Incidental Proceedings, Case Number/Cause List

In 2007, an association called Mothers of Srebrenica (hereinafter to be referred to as 'the Association'), and ten other individual plaintiffs, initiated litigation against the Dutch government and the UN as co-defendants before the District Court of the Hague (hereinafter referred to as the Hague DC), accusing them of failure to protect victims from the impending genocide in Srebrenica in 1995, as well as other obligations in which they failed.[334] Without participating in the proceedings before the Hague DC or making any response to the charges levelled against it, the UN wrote a letter to the Dutch Permanent Representative, invoking jurisdictional immunity in 2007 (hereinafter referred to as the UN's 2007 letter).[335]

In the principal proceedings, the plaintiffs moved that the UN and the United Nations Protection Force (UNPROFOR) Dutch battalion (hereinafter referred to as Dutchbat) had failed imputably and had acted wrongfully towards them.[336] In addition, they claimed that the UN and the Dutchbat had 'violated their obligations to prevent genocide as laid down in the Genocide Convention'.[337] As a result, they requested the Dutch court to order the defendants, jointly or severally, to pay compensation for the losses they had suffered and the costs of these proceedings.[338] The Dutch court, in this case, noted that particular attention should be paid to the UN's jurisdictional immunity, and a series of incidental proceedings outside of the principal proceedings were dedicated to addressing this issue.

#### 2.3.2.1 The procedure of first instance before the DC of the Hague

Number: 295247 / HA ZA 07-2973. (hereinafter called the 2008 judgment). This judgment is available at: http://www.asser.nl/upload/documents/20120420T023627-Decision%20District%20Court%20The%20Hague%2010%20July%202008%20(English).pdf. Judgment in the first civil law section, March 30, 2010, in the case of The Association of Citizens Mother of Srebrenica, *et al. versus* The State of The Netherlands, Ministry of General Affairs and the United Nations, Appeal Court in The Hague, Case number / cause-list number: 200.022.151/01. (hereafter referred to as the 2010 judgment). This judgment is available at: http://www.haguejusticeportal.net/Docs/Dutch%20cases/Appeals_Judgment_Mothers_Srebrenica_EN.pdf. Judgment in the case of The Association of Citizens Mother of Srebrenica, *et al. versus* The State of The Netherlands, Ministry of General Affairs and the United Nations, Supreme Court of the Netherlands, 13 April 2012. (hereafter referred to as the 2012 judgment). This judgment is available at: http://www.asser.nl/upload/documents/20120905T111510-Supreme%20Court%20Decision%20English%2013%20April%202012.pdf. Judgment of July 16th 2014 in the Case of The Association of Citizens Mother of Srebrenica, *et al. versus* The State of The Netherlands, Ministry of General Affairs and the United Nations, The Hague District Court, Case Number/Cause List Number: / C/09/295247 / HA ZA 07-2973. (hereafter referred to as the 2014 judgment) The English translation of this judgment is available at: http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2014:8748.

[334] The motivation of the plaintiffs, see: the 2008 judgment, *supra* note 333, 2.2.

[335] See: *ibid.*, 1.1.

[336] *Ibid.*, 2.1 (1), (2).

[337] *Ibid.*, 2.1 (3).

[338] See: *ibid.*, 2.1.

In the incidental proceedings, the Dutch Government, on the UN's side, requested that the Hague DC disqualify itself as a competent body to hear the claims by the Association *et al*. with regard to the UN.[339] In other words, the Hague DC had no jurisdiction over this case. The Dutch Government submitted that the UN's immunity under Art.2 (2) of CPIUN, in conjunction with the Art.105 of the UN Charter, protected the UN from the legal process at a domestic level, unless the UN Secretary-General expressly waived this immunity.[340] The Dutch courts 'must grant this immunity *ex facto*'.[341] The Dutch government also contested the plaintiffs' argument that the seriousness of the facts put forward by the Association *et al*. provided the foundation on which the reproaches were based.[342] The defendant argued that neither the ICCPR nor the ECHR provided 'a statutory basis' for an 'infringement of the UN's immunity in this case'.[343]

The Association *et al.* argued firstly that the UN should have deliberately appeared before the Hague DC to invoke this immunity in person, but had failed to do so. The submitted cause of the Defendant's request for disqualification could not equate to a formal invocation of jurisdictional immunity by the UN itself. Secondly, no further relevant interest of the Dutch Government could be found in its motions towards the UN. Therefore, the Dutch Government should not be allowed to intervene either as a third party, or alternatively, to join with the interests of the UN. Thirdly, the fact that the Hague DC had granted leave to proceed in default of an appearance against the UN in 2007 meant that the Hague DC had *de facto* exercised jurisdiction over the UN in that case.[344] Also, Art.14 of ICCPR and Art.6 of ECHR precluded the UN's jurisdictional immunity in this case. As the Association *et al.* argued, given that 'the UN, unlike a state, cannot be brought before its own (independent) court,[345] there is no effective alternative legal course of proceedings open to the Association *et al.* – as required by the ECHR – in order to submit their actions to a court of law'.[346] At the same time, the UN's jurisdictional immunity is functional, and therefore limited in nature, and should be subordinated to human rights, especially those protected by the peremptory provisions of international law.[347] In this case, the violation of the prohibition on genocide or the toleration of genocide as the highest standard of

[339] See: *ibid.*, 3.1, 3.2.
[340] See: *ibid.*, 3.3.
[341] *Ibid*.
[342] See: *ibid*.
[343] *Ibid*.
[344] See: *ibid.*, 3.4.
[345] *Ibid*.
[346] *Ibid*.
[347] See: *ibid*.

international law, belonging to *jus cogens* or peremptory law, transcended the boundaries of this functional immunity.[348]

In this context, to the Association *et al*.:

> Such violation cannot be "necessary" – as required for immunity in article 105 sub 1 of the UN Charter for the realization of the UN objectives. The importance of this standard prevails over the interest pertaining to immunity.[349]

The assessment of the Hague DC was strictly limited to 'the Court's jurisdiction concerning the action by the Association *et al.* against the UN'.[350] Central to this issue was 'the question whether this case offers grounds or reasons to make an exception to the immunity enjoyed by the UN under international law'.[351] What is not controversial in this case is that, as the Hague DC also found, Art.105 of the UN Charter detailed by Art.2 (2) of CPIUN was applicable.[352]

Before determining the possession of the Court's jurisdiction, the DC Hague dealt with the legal effect of the decision to grant leave to proceed in default of appearance against the UN. The DC Hague dismissed the assertion of the Association *et al.*, holding that this decision meant nothing with substantial sense except, from the procedural perspective, the fact that 'non-appearing defendant was summoned in a legally valid manner'.[353] That being said, the decision as the Association *et al.* was 'not on its own jurisdiction in the case against the UN'.[354]

In the assessment, the Hague DC appreciated the motion by the Dutch Government that it had no jurisdiction concerning the action against the UN as a co-defendant. The motion by the Dutch Government also represented a judicially relevant interest of its own with regard to a decision rendered by the Court supporting it.[355] This interest 'follows particularly from its obligation under international law by virtue of article 105 subsection 1 of the UN Charter'.[356] According to the Hague DC, Art.105 (1) of the UN Charter obliged the Dutch Government 'to warrant as much as possible the immunity laid down in the UN

[348] See: *ibid*.
[349] *Ibid*.
[350] *Ibid.*, 5.1. See also: *ibid*, 1.1.
[351] *Ibid.*, Inhoudsindicatie.
[352] See: *ibid.*, 5.11.
[353] *Ibid.*, 5.2.
[354] *Ibid*.
[355] *Ibid.*, 5.5.
[356] *Ibid.*, 5.6.

Charter, irrespective of how far it extends'.[357] Accordingly, '[t]he assertion by the Association et al. that only the UN itself could have invoked immunity if it had appeared fails already by virtue of the State's own interest established here'.[358] On the question of whether the UN enjoyed jurisdictional immunity; in this case, the Hague DC found that the granting of immunity had long been considered an established practice of the UN,[359] with the absolute immunity of the UN widely acknowledged and respected in international law practice.[360] At the same time, the UN's 2007 letter should be deemed to be a clear indicator of an invocation of immunity.[361] Taken together, the Hague DC disagreed that the interpretation of Art.105 of the UN Charter offered grounds for restricting that immunity.[362]

The Hague DC refused to determine whether the immunity invoked in this case was necessary for the realisation of the UN's objectives.[363] In the view of the Hague DC, if it endorsed this request, the Court would have to make a comprehensive testing on the merits of the case. This testing should not be, in principle, at the discretion of the Court, as it was not in conformity with the manner according to Art.105 (1) of the UN Charter and Art.2 (2) of CPIUN.[364] The Hague DC recalled the *Cumaraswamy* case, in which the ICJ opined that wrongful acts possibly committed by the UN should not be open to assessment by national courts, but should take place in the context of settlement of a specific dispute as provided for in Art.8 (29) of CPIUN.[365] At the same time, the Hague DC found no legal grounds for the assertion that the lack of adequate provision within the meaning of this Article warranted an infringement of the principal rule of Art.105 (1) of the UN Charter.[366] On this issue, the Hague DC took note of the ECHR's acknowledgment of the restriction of the immunity enjoyed by the European Space Agency (ESA) in the cases of *Beer and Regan v. Germany* and *Waite and Kennedy v. Germany.*[367] In both of these cases, the ECHR had ruled that available alternative remedies provided by the ESA were the

[357] *Ibid.*
[358] *Ibid.*, 5.8.
[359] See: *ibid.*, 5.13.
[360] See: *ibid.*, 5.13, 5.15.
[361] See: *ibid.*, 5.13.
[362] See: *ibid.*, 5.16.
[363] See: *ibid.*, 5.14;
[364] See: *ibid.*
[365] See: Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, *supra* note 211, para.66; the 2008 judgment, *supra* note 333, 5.15.
[366] See: the 2008 judgment, *supra* note 333, 5.15.
[367] See: *Beer and Regan v. Germany*, application no. 28934/95, Judgment, Strasbourg, 18 February 1999; *Waite and Kennedy v. Germany*, application no.26083/94, Judgment, Strasbourg, 18 February 1999.

prerequisite for its immunity being respected. However, the Hague DC did not think that the same prerequisite was applicable in the case of the UN. From a chronological perspective, the UN had been founded before the ECHR came into force. Therefore, the ECHR – adopted in 1950 – could not set any exceptions to the CPIUN; a convention passed in 1946.[368] As far as the coverage of membership is concerned, the UN, with an almost universal membership, has its special position among other international organisations, and the ESA in particular.[369] By comparison, the ESA has only 'a restricted – European – membership'.[370]

Nor did any other standards of international law outside of the UN frame of reference promote a different opinion.[371] The Association *et al.* once claimed that, in the event of a conflicting obligation to prohibit genocide according to *jus cogens*, or, at the very least, conflicting human-rights obligations, the UN should bring relief to the plaintiffs.[372] In addition, the Netherlands, as a signatory of the Genocide Convention, was obliged to punish all acts defined by this convention and also bound to prevent and refrain from committing genocide themselves. The Hague DC did not agree with the Association *et al.* that the UN was at fault for failing to protect the safety of the victims and permitting the genocide – a crime under international law – from taking place right in front of it, and found that neither the UN nor the Dutchbat could have prevented or stopped the genocide.[373] Moreover, according to the ICJ's judgment in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* case, the application of the Genocide Convention via a civil law action was ruled out.[374] As the DC Hague concluded:

> Neither the text of the Genocide Convention or any other treaty, nor international customary law or the practice of states offer scope in this respect for the obligation of a Netherlands court enforce the standards of the Genocide Convention by means of a civil action.[375]

The Hague DC justified this conclusion by quoting the case of *Al-Adsani v. the United*

[368] See: the 2008 judgment, *supra* note 333, 5.22.
[369] See: *ibid.*, 5.24.
[370] *Ibid*.
[371] See: *ibid.*, 5.16.
[372] See: *ibid*.
[373] See: *ibid.*, 5.9.
[374] See: Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007, paras.155 – 179; the 2008 judgment, *supra* note 333, 5.19.
[375] The 2008 judgment, *supra* note 333, 5.19.

*Kingdom* before the ECtHR. In this case, the ECtHR had held that there was no scope for an infringement of the immunity, which existed in principle, of a national state with regard to a civil action, even in the case of an alleged breach of the prohibition on torture laid down in Art.3 of ECHR.[376] It is the jurisprudence conveyed by the above cases which indicates a hierarchical clue that no link between the protection of human rights and the guarantee of state immunity in civil actions exists. The jurisprudence of the above cases had equally to be applied in the *Srebrenica* case.[377] For this reason, the Hague DC found no legal grounds for the Association *et al*. to take this civil action.[378]

The same conclusion was drawn by the Hague DC concerning the relationship between the right of access to a court as a fundamental element of the right to a fair trial under Art.6 of ECHR, and the UN's jurisdictional immunity. The Hague DC decided to emulate the ECtHR's ultra-cautious attitude with regard to the UN's jurisdictional immunity in the *Behrami and Behrami v. France and Saramati v. France, Germany and Norway* cases. According to the Hague DC, the ECHR had made the utmost effort to safeguard itself against becoming an impediment to the effective implementation of duties by international missions under the responsibility of the UN.[379] Therefore, these two cases offered 'insufficient grounds for an interpretation of Article 6 ECHR in the sense that in this respect it prevails over international immunities'.[380] Just as with Art.6 of ECHR, the interpretation of Art.14 of the ICCPR does not necessarily lead to an exception to the UN's jurisdictional immunity.[381]

In view of the above assessment, the Hague DC declared that it had no jurisdiction to hear the action against the UN.[382] The Association *et al*. subsequently filed an appeal to the Appeal Court in The Hague (hereinafter referred to as the Hague AC) against both the judgment re the incident and that re the principal case.[383]

#### 2.3.2.2 The procedure of appeal before the Appeal Court of the Hague

The main thrust of this appeal was that the Hague DC should exercise its jurisdiction

[376] See: *ibid*., 5.20.
[377] See: *ibid*.
[378] See: *ibid*., 5.21.
[379] See: *ibid*., 5.22.
[380] *Ibid*.
[381] See: *ibid*., 5.25.
[382] See: *ibid*., 6.1.
[383] See: the 2010 judgment, *supra* note 333, 1.1.

to hear the claims of Association *et al.* However, the Hague AC did not share the Appellants' view, and ruled that the findings of the Hague DC should be upheld.

Specifically, the appellants appealed that the Hague DC was wrong in 'finding that the non-appearance granted against the UN does not mean that the Hague DC rendered a (positive) decision on its international jurisdiction'.[384] This appeal was based on the notion that non-appearance could only be granted against the UN after official testing by the Hague DC of its international public-law jurisdiction.[385] The Hague AC disagreed with this view. The action of the Hague DC had been a due observance of the long established terms and formalities for granting non-appearance against the defendant. As the Hague AC held:

> The question whether non-appearance can be granted against a defaulting defendant precedes and is independent of whether a court has no jurisdiction because the defendant is entitled to immunity from prosecution. If a court of law establishes that the terms and formalities for granting non-appearance against the defendant have been duly observed, than it must grant leave to proceed against the defendant in default of appearance irrespective of the question of jurisdiction. In other words, international jurisdiction to hear a claim is not part of the formalities that must be satisfied for a court of law to grant leave to proceed against a defendant who is in default of appearing.[386]

The assessment of the Hague AC appeared to be quite opposite to the appellants' position that the question of whether the UN had immunity from prosecution should not be assessed on the basis of Art.2 (2) of CPIUN, but on the basis of Art.105 of the UN Charter.[387] To the appellants, Art.105 of the UN Charter, which set more restrictions on the UN's jurisdictional immunity than Art.2 (2) of CPIUN, should be regarded as the provision with the greater force.[388] However, to the Hague AC, a proper interpretation of Art.105 of the UN Charter and of Art.2 (2) of CPIUN in strict accordance with Art.31 of the VCLT would compel the conclusion that no other interpretation than that the UN has been granted the most far-reaching immunity could be allowed.[389] In addition, from a practical point of view, it would in any case be of no avail to the appellants if the invocation of the UN's immunity was tested strictly on the basis of Art.105 of the UN

[384] *Ibid.*, 3.4.
[385] See: *ibid*.
[386] *Ibid*.
[387] See: *ibid.*, 4.3.
[388] See: *ibid*.
[389] See: *ibid.*, 4.2, 4.4.

Charter.[390]

Nor had the right of access to a court as laid down in Art.6 of ECHR and Art.14 of the ICCPR been violated because of the UN's jurisdictional immunity. The appellants argued that the failure of the Dutch Government to uphold the possibility of holding the UN liable for the genocide which had occurred in Srebrenica had been legally, humanly and morally unacceptable.[391] '[H]aving kept the UN outside of the proceedings as a result of the interlocutory claim concerning the court's jurisdiction'[392] had deprived the surviving relatives of the genocide victims of 'any recourse to legal redress'.[393] The Hague AC did not see a violation of Art.6 of the ECHR and Art.14 of the ICCPR in this case. It did not find the assertion that the appellants had been granted no access whatsoever to a court of law concerning what had occurred in Srebrenica to be well established. The deprivation of any opportunity to bring the perpetrators of the genocide and whosoever had been responsible for them before a court of law, which is exactly what Art.6 of the ECHR prohibits, had not emerged clearly from their arguments.[394] Although not sweeping away the testing of the immunity of international organisations from prosecution against Art.6 of the ECHR,[395] the Hague AC endorsed the findings of the Hague DC concerning the jurisprudence of the ECtHR in the cases of *Beer and Regan* and *Waite and Kennedy*.[396] Setting restrictions on the ESA's jurisdictional immunity derives from the ECHR's concern that high-profile contracting parties to the ECHR could evade their responsibilities under the convention by transferring powers to the ESA, which would be incompatible with the objectives of the ECHR.[397] However, the Hague AC believed that, from a chronological perspective, the jurisprudence in these two cases could in no way be copied in the present case, as the UN is an international organisation that has existed longer than the ECHR.[398]

The problem therefore became whether Art.103 could be regarded as a restriction on the UN's jurisdictional immunity. Art.103 of the UN Charter provides that in the event of a conflict between the obligations of the Member States of the UN under the Charter and their obligations under any other international agreement, their obligations under the

[390] See: *ibid.*, 4.5.
[391] See: *ibid.*, 3.2.
[392] *Ibid.*
[393] *Ibid.*
[394] See: *ibid.*, 5.11.
[395] See: *ibid.*, 5.5.
[396] See: *ibid.*, 5.7.
[397] See: *ibid.*, 5.4.
[398] See: *ibid.*

Charter shall prevail. The Hague AC highlighted the significance of this Article with regard to the recognition and realisation of fundamental rights.[399] However, the Hague AC believed that such a conflict does not exist if this immunity serves a legitimate goal.[400] To the Hague AC, the UN's jurisdictional immunity is necessary for the realisation of the objectives of the organisation, namely, maintaining peace and safety in the world.[401] It would be contrary to the rationale of the immunity of the UN as enshrined in international law if the appellants' claims were upheld, since it might put the UN at risk of being overwhelmed by domestic civil litigation.[402] At the same time, the UN's special position among other international organisations, as rightly noted by the Hague DC, rules out the possibility of a conflict like this.[403] Even the seriousness of the genocide was not a sufficiently compelling reason to necessarily lead to a waiver of immunity or obstruct the UN's invocation of immunity.[404]

In the appellate proceedings, the appellants insisted that the UN's failure to fulfil the obligation under Art.8 (29) of CPIUN to provide appropriate modes of settlement for disputes of private law nature to which it is a party[405] had resulted in the appellants having no other way of obtaining redress than to summon the UN before the Dutch courts.[406] It seemed to the appellants that, if this recourse was obstructed, a procedure which sufficiently safeguards access to a court of law would never become a reality. The appellants also reasoned that the 'Agreement on the Status of UNPROFOR' does not offer a realistic opportunity to the Association *et al*. to sue the UN.[407] Despite an acknowledgment made – not as a decision of the Hague AC, but with regret – that the UN had not instigated alternative remedies under Art.8 (29) of CPIUN, the Hague AC still found no question of such far-reaching restrictions of this right.[408] In the opinion of the Hague AC, the Association *et al.* could hold either or both of two categories of parties liable for the damages incurred by them: namely the perpetrators of the genocide and the State. Furthermore, the civil action against the Dutchbat and the UN were separate

[399] See: *ibid.*, 5.5.
[400] See: *ibid.*, 5.6, 5.7.
[401] See: *ibid.* , 4.5, 5.7.
[402] See: *ibid.*, 5.7.
[403] See: *ibid*.
[404] See: *ibid.*, 5.10.
[405] See: *ibid.*, 5.8.
[406] See: *ibid*.
[407] See: *ibid.* 5.11.
[408] See: *ibid.*, 5.13.

proceedings which had to be assessed on their own merits respectively.[409] As a corollary, the option of bringing the Dutch Government before a court of law in the Netherlands was never closed, and was indeed followed by the appellants.[410] For the appellants, meanwhile, this civil action would not be affected or even hindered by the state immunity of the Netherlands.[411] As a result, no violation of the right of access to a court could be found by the Hague DC in the event of granting the UN jurisdictional immunity[412] and 'the Association et al. do have access to an independent court of law'.[413]

2.3.2.3 The appeal procedure before the Supreme Court of the Netherlands

Owing to their deep dissatisfaction with the judgments rendered by the Hague DC and AC, the Association *et al*. lodged a cross-appeal in cassation to the Supreme Court of the Netherlands (hereinafter referred to as SC Netherlands) in 2012. In this appeal, the appellants challenged all the major elements of the reasoning that had led the Hague DC and AC to accept the plea of immunity. As with the previous hearings, the question of 'whether the appeal court was right to rule that the UN is entitled to immunity from jurisdiction' was disputed.[414] The SC Netherlands once again dismissed the appeal and underlined the findings of the AC Hague that the UN 'is entitled to immunity from jurisdiction, such that the Dutch courts are not competent to hear the action in so far it is directed against the UN'.[415]

The SC Netherlands recognised that the question of whether the UN was entitled to immunity was a decision on a matter of law.[416] In this connection, the SC Netherlands highlighted the conventional basis of the UN' jurisdictional immunity and followed the DC Hague in ruling that Art.2 (2) of CPIUN implements Art.105 (3) of the UN Charter.[417] Taking into consideration Art.31 of the VCLT, the UN being entitled to the most far-reaching jurisdictional immunity was the only possible interpretation of Art.2 (2) of CPIUN.[418]

---

409 See: *ibid.*, 3.3.
410 See: *ibid.*, 5.12.
411 See: *ibid.*, 5.12.
412 See: *ibid.*, 5.14.
413 *ibid.*, 5.12.
414 The 2012 judgment, *supra* note 333, 3.1.
415 *Ibid.*, 4.1.1.
416 *Ibid.*, 4.1.2.
417 See: *ibid.*, 4.1.1.
418 See: *ibid.*, 4.1.1, 4.2.

Nor did the SC Netherlands uphold the application for the jurisprudence of the *Beer and Regan* and *Waite and Kennedy* cases, in which the ECtHR prevailed on the right of access to an independent court enshrined in Art.6 of the ECHR and Art.14 of the ICCPR over the UN's jurisdictional immunity, to be applied the *Srebrenica* case.[419] The legitimacy of the UN's jurisdictional immunity originates from its aim – to ensure the proper functioning of the organisation – defined in Art.42 of the UN Charter.[420] The SC Netherlands found that, without prejudice to the UN's jurisdictional immunity, the appellants would have been able to take the perpetrators and those responsible for them to court.[421] Furthermore, the SC Netherlands noted the term 'international organisations' to which the ECtHR referred without any qualification in the *Waite and Kennedy* case.[422] However, the SC Netherlands thought that there was evidence that the ECHR had considered the relationship between Art.6 ECHR on the one hand and Arts.103 and 105 of the UN Charter, as well as Art.2 (2) of CPIUN on the other hand.[423]

As a result, the SC Netherlands held:

> There are no grounds for assuming that the ECtHR's reference to "international organisations" also included the UN, in any event not in relation to the UN's activities in the context of Chapter VII of the Charter (Action with respect to threats to the peace, breaches of the peace, and acts of aggression).[424]

With regard to the serious accusation of the Association *et al*. against the UN that the latter was culpable of negligence in failing to prevent genocide, the SC Netherlands found this accusation not so compelling as to prevail over the UN's jurisdictional immunity.[425]

---

[419] See: *ibid.*, 4.1.1, 4.3.1 – 4.3.3.
[420] See: *ibid.*, 4.1.1, 4.2.
[421] *Ibid.*, 4.1.1.
[422] The relevant part of judgment reads as follows:

> The Court is of the opinion that where States establish international organisations in order to pursue or strengthen their cooperation in certain fields of activities, and where they attribute to these organisations certain competences and accord them immunities, there may be implications as to the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention, however, if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution. It should be recalled that the Convention is intended to guarantee not theoretical or illusory rights, but rights that are practical and effective. This is particularly true for the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial (...)

Waite and Kennedy v. Germany, *supra* note 367, para.67.
[423] See: the 2012 judgment, *supra* note 333, 4.3.3.
[424] *Ibid*.
[425] See: *ibid.*, 4.1.1, 4.3.14.

As a consequence of the above rationale, the SC Netherlands finally found the submitted appeal in cassation untenable. That being said, none of the Dutch courts appreciated the requests of the Association *et al.*

As mentioned in **section 2.3.2**, the association *et al.* argued that the UN's immunity should be weighted in the balance with Art.6 (1) of the ECHR, Art.6 of the Genocide Convention and Art.8 (29) of CPIUN in this case. To their opinion, any immunity which the UN invoked has gone further than was necessary for it to carry out its tasks. This invocation has simultaneously violated their right of access to a court that was guaranteed by, in particular, Art.6 (1) of the ECHR. The plaintiffs also argued that the UN's immunity which is grounded in a political interest should be overridden by Art.6 of the Genocide Convention being a rule of *ius cogens*. What the association *et al.* sought is the recognition of the UN's responsibility for failing to prevent the genocide. A judicial declaration to that effect could be made only with the UN as defendant. More than that, the UN had failed to, as required by Art.8 (29) of CPIUN, institute some form of settlement mechanism for disputes of a private nature to which it was a party. The Dutch courts (the DC Hague, the AC Hague and the SC Netherlands) dismissed their claims, holding that it was for the Netherlands courts to recognise the UN's immunity *ex officio* unless it was explicitly waived. At the same time, neither the Genocide Convention nor any other rule of international law, whether defined by treaty, by customary law or by State practice, obliged the Netherlands to enforce the prohibition of genocide through its civil law. Instead, this Convention obliges only its Party States, including the Netherlands, to ensure that genocide was punished.

### 2.3.3 *Delama Georges et al. v. United Nations et al.*

*Delama Georges et al. v. United Nations et al.* (hereafter referred to as the *Georges* case) is another example in point.[426] In October 2010, Haiti confirmed the outbreak of a cholera epidemic while the United Nations Stabilization Mission in Haiti (UNSTAMIH) was in operation. The cholera epidemic infected over 700,000 people and resulted in more than 8,000 deaths. It was reported that the Nepalese soldiers of the UN Peacekeeping Forces had carried the disease from Nepal to Haiti. The faulty construction of sewage

[426] The whole litigation at process is available at: http://www.ijdh.org/cholera/cholera-litigation/#.UyF6m9zZ5U8.

disposal facilities in the Haitian town of Méyè was later confirmed to have been the principal contributor to the outbreak and transmission of the cholera epidemic. The UN was also blamed for the delay in initiating an investigation and taking effective measures to avoid further expansion of the epidemic and thereby the infection of additional persons.

In 2011, the Bureau des Avocats Internationaux (BAI) and the Institute for Justice & Democracy in Haiti (IJDH), filed a petition for relief to the UN on behalf of 5,000 Haitian cholera victims.[427] In this petition, the BAI and IJDH required the UN to install a national water and sanitation system to control the epidemic; to compensate individual victims of cholera for their losses and to issue a public apology for its wrongful acts.[428] Alternatively, at the very least, the UN should be obliged to provide modes of settlement by establishing a standing claims commission for harms arising out of its operations in Haiti.[429] However, in 2013, after months of silence, the UN refused to accept this petition for the sole reason that these claims 'would necessarily include a review of political and policy matters'.[430] This refusal was later confirmed by the UN Secretary-General in an interview.[431] In 2013, Delama Georges *et al.* filed a class action lawsuit before the US District Court • Southern District of New York (SDNY), individually and on behalf of all others similarly situated, according to the relevant US law.[432] In this action, the plaintiffs requested the SDNY to hold the UN responsible for such behaviours as the recruiting of Nepalese troops infected with cholera, the release of harmful waste into the environment, the contamination of the Artibonite River with cholera bacteria and exposing the locals to and infecting them with this bacteria, and *etc*.[433]

The UN has never appeared before the SDNY. With the entry into the judicial process, the U.S. Department of Justice twice filed a Statement of Interest in 2014, asserting on the

---

[427] Bureau des Avocats Internationaux (BAI) and Institute for Justice & Democracy in Haiti (IJDH): "Petition for Relief", available at: http://ijdh.org/wordpress/wp-content/uploads/2011/11/englishpetitionREDACTED.pdf.

[428] See: *ibid.*, p.3.

[429] See: US District Court • Southern District of New York (SDNY): "Memorandum of Law in Opposition to the Government's Statement of Interest" (hereinafter, the first opposition of the plaintiffs), Civil Action No. 1:13-cv-07146-JPO, Memorandum of Law, Oral Argument Requested, p.2. This response is available at: http://www.ijdh.org/wp-content/uploads/2014/05/Georges-v.-UN-Ps-Opposition-Brief-Submitted-05152014.pdf.

[430] Letter by Under Secretary-General of Legal Affairs on 21 Feb. 2013, p.2. This letter is available at: http://www.ijdh.org/wp-content/uploads/2011/11/UN-Dismissal-2013-02-21.pdf. See also: Letter from the United Nations Legal Counsel to Cholera Victims' Lawyers, July 5, 2013, p.1. This letter is available at: http://www.ijdh.org/wp-content/uploads/2013/07/20130705164515.pdf.

[431] See: SDNY: "Class Action Complaint Jury Trial Demanded" (later, the Class Action Complaint), 9 October 2013. The full version of this complaint is available at: http://www.ijdh.org/wp-content/uploads/2013/10/Cholera-Complaint.pdf.

[432] See: *ibid.*, p.7.

[433] See: *ibid.*, pp.52 – 66.

part of the UN that the UN had immunity from suit and service in the case.[434] These statements were followed by the plaintiffs' response through a stated objection without incident.[435] During this period, some scholars of international and European law submitted two *amicus curiae* in support of the plaintiffs.[436] Rather than addressing whether there should be declaratory relief and actual injunctive, compensatory and punitive damage to remedy the injuries sustained by the plaintiffs, the hearings dealt with a rather different question following the submission of the first U.S. Department of Justice statement: that of whether the UN is entitled to absolute immunity from suit.[437]

#### 2.3.3.1 The approach to interpreting the text of the CPIUN

It was the view of the U.S. Department of Justice that the UN's immunity from suit under Art.2 (2) of CPIUN is absolute and with no attached conditions, including the obligation to provide access to alternative methods of dispute resolution under Art.8 (29) of the same Convention. This argument was not going to deny this obligation, but sought to indicate that no convincing evidence could be found directly from the CPIUN text that a link between these two Articles had been established. To the U.S. Department of Justice, it would be sufficient for the SDNY to solely consider Art.2 (2) and grant the UN absolute immunity from being sued, and there should be no alternative reading of the CPIUN's text.

---

[434] See: SDNY: "Re: *Georges v. United Nations, et al.*, 13 Civ. 7146(JPO)" (hereinafter the first reply of the U.S. Department of Justice), March 7, 2014, p.1. This statement is available at: http://www.ijdh.org/wp-content/uploads/2011/11/Georges-v.-UN-13-Civ.-7146-SDNY-Statement-of-Interest.pdf; SDNY: "Re: *Georges v. United Nations, et al.*, 13 Civ. 7146(JPO)" (latter called the second reply of the U.S. Department of Justice), 7 July 2014, available at: http://www.innercitypress.com/us1unimmunity070714.pdf.

[435] SDNY: the first opposition of the plaintiffs, *supra* note 429; SDNY: "Memorandum of Law in Further Opposition to the Government's Statement of Interest" (later called the second opposition of the plaintiffs), Civil Action No. 1:13-cv-07146-JPO, Memorandum of Law, Oral Argument Requested. This response is available at: http://www.ijdh.org/wp-content/uploads/2014/09/Surreply-Final.pdf.

[436] See: SDNY: "Brief of *Amici Curiae* Fanm Ayisyen nan Miyami, inc. [Haitian Women of Miami] and the Haitian Lawyers Association in Support of Plaintiffs' Motion for Affirmation that Service Has been Made on Defendants" (hereinafter, the *amici curiae* of the FANM and HLA), No. 1:13-cv-07146 (JPO), 21 February 2014, available at: http://www.ijdh.org/wp-content/uploads/2011/11/DE-19-1-Proposed-Amicus-Brief.pdf; SDNY: "Memorandum of Law of *Amici Curiae* International Law Scholars and Practitioners in Support of Plaintiffs' Opposition to the Government's Statement of Interest" (hereinafter, the *amici curiae* of Spizz and Quigley), Civil Action No. 1:13-cv-07146-JPO, 15 May 2014, available at: http://www.ijdh.org/wp-content/uploads/2014/05/Dkt31-1_Amicus-Brief-Intl-Law-Scholars.pdf; SNDY: "Memorandum of Law of *Amici Curiae* European Law Scholars and Practitioners in Support of Plaintiffs' Opposition to Government's Statement of Interest", (hereinafter, the *amici curiae* of Kupferman *et al.*), Civil Action No. 1:13-cv-07146-JPO, 15 May 2014, available at: http://www.ijdh.org/wp-content/uploads/2014/05/Dkt32-2-Amicus-Brief-European-Scholars.pdf.

[437] The plaintiffs have not made a special mention of the UN's jurisdictional immunity until the U.S. Department of Justice filed the first statement. As the plaintiffs stated: 'they assert a novel proposition of law that …'. SDNY: the first opposition of the plaintiffs, *supra* note 429, p.1.

Firstly, the provision for the UN's immunity and the provision for dispute resolution mechanisms were written in separate sections of the CPIUN.[438] As the U.S. Department of Justice observed, throughout the drafting history of the CPIUN, the provisions for the immunity and dispute resolution mechanisms had always been in separate sections, and there was no indication that the drafters had formulated any kind of link, or had ever envisaged doing so.[439]

Secondly, the drafting history of the CPIUN was 'with the understanding … that the UN would be absolutely immune from the jurisdiction of all of its members'.[440] According to Art.105 (1) of the UN Charter, the UN 'shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes'. The work of building this Article 'was undertaken with the understanding – at least as far as the United States was concerned – that the UN would be absolutely immune from the jurisdiction of all of its members'.[441] The U.S. Department of Justice also recalled the persistent position of the United States on the UN's jurisdictional immunity 'from the date that the UN Charter was signed'[442]:

> The United Nations, being an organization of all of the member states, is clearly not subject to the jurisdiction or control of any one of them …. The problem will be particularly important in connection with the relationship between the United Nations and the country in which it has its seat.[443]

This position has had its manifestations in US case law. For example, in the *Cynthia Brzak and Nasr Ishak v. United Nations et al.* (06 Civ. 3432 (RWS)) case, the SDNY held that the UN's absolute immunity from the suit under Art.2 (2) of CPIUN, which 'mandates dismissal of Plaintiffs' claims against the United Nations for lack of subject matter jurisdiction'.[444] The US District Court • Eastern District of New York (EDNY) made similar findings in the *Boimah v. United Nations General Assembly* case (664 F. Supp.69, 71 (E.D.N.Y. 1987)).[445] The US courts had also issued similar rulings in some other cases

[438] See: the second reply of the U.S. Department of Justice, *supra* note 434, p.8.
[439] See: *ibid*.
[440] *Ibid*., p.7.
[441] *Ibid*.
[442] *Ibid*., p.6.
[443] *Ibid*., p.7.
[444] SDNY: the first reply of the U.S. Department of Justice, *supra* note 434, pp.4, 5.
[445] See: *ibid*., p.4.

on similar grounds.[446]

In addition, the drafting history of the CPIUN did not indicate that providing access to alternative methods of dispute resolution was a critical pre-condition to immunity.[447] Indeed, the Executive Committee to the Preparatory Commission of the United Nations (hereinafter referred to as ExCom) once pointed out: 'It should be a principle that no immunities and privileges, which are not really necessary, should be asked for'.[448] It is also true that the first draft CPIUN 'was entitled "a control of privileges and immunities of officials"'.[449] However, it is far-fetched to equate this control to any pre-condition to the UN's immunity.[450] As the U.S. Department of Justice stated:

> [This entitlement] does not state, or even suggest, that the UN's immunity is contingent upon providing a mechanism for dispute resolution, nor does it suggest that the UN can implicitly waive its immunity.[451]

Even if that were the case, this requirement was to apply only to UN specialist agencies operating independently of the UN, rather than to the UN itself.[452] The language regarding 'control' had also disappeared and was consistently replaced by the content 'shall enjoy immunity from every form of judicial process except to the extent it expressly waives its immunity'[453] in subsequent drafts.[454]

As far as the plaintiffs were concerned, the way in which the U.S. Department of Justice was interpreting the Articles of the CPIUN in isolation was untenable. According to the intention of the drafters the text of the CPIUN must also be interpreted fairly so as to carry out their manifest purpose.[455] The word 'immunity' in particular, should be given 'a meaning, if reasonably possible, and rules of construction may not be resorted to render it meaningless or inoperative'.[456] Built on this understanding, the plaintiffs regarded the compliance with Art.8 (29) as a conditional precedent to the UN's enjoyment of immunity

---

[446] For example, *Askir v. Boutres-Ghali* (933 F. Supp.368 (S.D.N.Y. 1996)), *Shamsee v. Shamsee* (74 A.D.2d 357 (N.Y. App. Div. 1980)); *Bisson v. United Nations* (06 Civ. 6352(PAC)(AJP)) and *Hunter v. United Nations* (800 N.Y.S.2d47, 2004 WL 3104829). See: *ibid*.
[447] *Ibid*., p.6. See also: SDNY: the second reply of the U.S. Department of Justice, *supra* note 434, pp.6, 8, 9.
[448] "Report by the Executive Committee to the Preparatory Commission of the United Nations", PC/EX/113/REV.1, 12 November 1945, p.70.
[449] SDNY: the second reply of the U.S. Department of Justice, *supra* note 434, p.8.
[450] See: *ibid*.
[451] *Ibid*., p.7.
[452] See: *ibid*.
[453] *Ibid*., p.8.
[454] See: *ibid*.
[455] See: SDNY: the first opposition of the plaintiffs, *supra* note 429, pp.10 – 12, 18 – 19.
[456] See: *Factor v. Laubenheimer* (290 U.S. 276, 303-04 (1933)), Cited in: *ibid.*, p.24.

under Art.2 (2).

The plaintiffs asserted that, according to the rules of treaty interpretation established by the VCLT, Art.2 (2) should be interpreted in conjunction with Art.8 (29) and these two Articles should be read in the context of the CPIUN as a whole.[457] Accordingly, the UN's immunity under Art.2 (2) of CPIUN had 'never been intended to protect the UN from its obligations to individuals claiming harm from its operations'[458] and Art.8 (29) explicitly linked Art.2 (2) with the duty to provide modes of settlement.[459] In accordance with this link, the UN had a duty to assure a reciprocal obligation owing to the plaintiffs to establish a mode of settlement to be honoured whenever the UN sought the protection of immunity.[460] The UN has *per se* long acknowledged this obligation. As the UN stated in the *Cumaraswamy* case, for example:

> [T]he immunity accorded to the United Nations by Article II of the Convention on the Privileges and Immunities of the United Nations, … is offset by an obligation in Article VIII to make remedies available to private parties who might otherwise be harmed by the immunity of the Organization ….
>
> …
>
> … in the event that immunity is asserted, a claimant seeking a redress against the Organization shall be afforded an appropriate means of settlement. The immunity of the United Nations, or its agents, does not leave a plaintiff without remedy ….[461]

As far as a concrete form of settlement is concerned in this case, the Status of Forces Agreement (SOFA) Between the United Nations and the Government of Haiti Concerning the Status of the United Nations Operation in Haiti (UN-Haiti SOFA) required the UN to establish a standing claims commission for harms arising out of its operations in Haiti.[462]

The drafting history of the CPIUN may serve as an endorsement of a comprehensive and interdependent interpretation of the CPIUN. As the plaintiffs pointed out, 'in interpreting a treaty, a court should first look to the "text of the treaty and the context in

---

[457] See: SDNY: the first opposition of the plaintiffs, *supra* note 429, pp.1, 19; SDNY: the second opposition of the plaintiffs, *supra* note 435, pp.5 – 6.
[458] SDNY: the first opposition of the plaintiffs, *supra* note 429, pp.16 – 17.
[459] See: *ibid*., p.19; SDNY: the Second opposition of the plaintiffs, *supra* note 435, pp.5 – 7.
[460] See: SDNY: the first opposition of the plaintiffs, *supra* note 429, pp.1, 3 – 4.
[461] ICJ: "Public sitting held on Thursday 10 December 1998, at 10 a.m., at the Peace Palace, President Schwebel presiding, in the case concerning the Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights" (Request for Advisory Opinion), verbatim record, CR/1998/17, ¶¶5, 13. Cited in: SDNY: the first opposition of the plaintiffs, *supra* note 429, p.21.
[462] See: the Class Action Complaint, *supra* note 431, pp. 3 – 4; SDNY: the first opposition of the plaintiffs, *supra* note 429, pp.17 – 18.

which the written words are used."'[463] Moreover, '[t]his Court's interpretation of a treaty should be guided by the history and negotiations from which the treaty arose, subsequent practice in relation to the treaty, and relevant rules of international law.'[464] In the view of the plaintiffs, 'an unequivocal obligation to settle claims' could be found 'in every draft of the treaty, including the final version now in force'.[465] The term 'shall', used in the final text of Art.8 (29), should be neither hortatory nor discretionary, but mandatory.[466]

The drafters further regarded the UN as a party to the convention.[467] This status was later confirmed in the *Reparation* case and *Cumaraswamy* case. In the *Reparation* case, the ICJ agreed with the UN, stating that 'it is a party to the CPIUN' and 'acknowledging the UN's rights and duties under the treaty'.[468] The *Cumaraswamy* case confirmed that the CPIUN is binding for the UN.[469] In the light of the *pacta sunt servanda* principle, the UN should be 'bound by the legal obligations contained therein, and especially to those clauses expressly imposing obligations on it'.[470] Specific to this case, 'the UN's promise to provide alternative mechanisms of dispute resolution, must be kept'.[471]

The drafters also introduced a bargain between the UN and its Member States.[472] In this bargain, in exchange for Art.2 (2) of CPIUN, establishing the UN's absolute immunity, the UN, in Art.8 (29) of the same Convention, agreed to provide for dispute resolution mechanisms for third-party claims.[473] Art.8 (29) was designed by the drafters to be the linchpin 'to secure an appropriate balance and to prevent an otherwise unjustifiably broad immunity'.[474]

Art.8 (29) also 'preserves the CPIUN's object and purpose of enabling an immunity regime that carefully balances immunities from national courts with the need to meet the UN's legal liabilities and ensure respect for victims' fundamental rights to due process and to effective remedies'.[475] In the case under discussion, this preservation took the form of the UN-Haiti SOFA, which 'explicitly requires the UN and MINUSTAH to establish a

[463] SDNY: the first opposition of the plaintiffs, *supra* note 429, p.11.
[464] *Ibid*.
[465] SDNY: the second opposition of the plaintiffs, *supra* note 435, p.8.
[466] See: *ibid*.
[467] See: Final Article, Sec.35 of the Convention on the Privileges and Immunities of the United Nations (CPIUN).
[468] SDNY: the first opposition of the plaintiffs, *supra* note 429, p.16.
[469] See: *ibid*.
[470] *Ibid*.
[471] See: *ibid*., p.25.
[472] See: *ibid*., p.8.
[473] SDNY: the second opposition of the plaintiffs, *supra* note 435, p.8.
[474] SDNY: the first opposition of the plaintiffs, *supra* note 429, p.32.
[475] *Ibid*. See also: *ibid.*, p.17.

"standing claims commission" to settle "claims for personal injury, illness, and death arising from or directly attributed to MINUSTAH"'.[476] Non-compliance with this Article thus undermined the objective of the CPIUN, and was contrary to its purpose of granting the UN broad immunities while ensuring that such immunities did not amount to impunity.[477] In this sense, the UN's immunity should be unenforceable in a situation where it has not complied with its obligations under Art.8 (29), since the non-compliance may effectively nullify the bargain implicit in the CPIUN.[478] It can thus be followed that the line taken by the U.S. Department of Justice was apparently at odds with the original intention of the drafters. According to Art.60 (3) of the VCLT, a breach of Art.8 (29) would rise to the level of material violation of the CPIUN.

In a sense, Art.8 (29) of CPIUN was regarded by the plaintiffs as having a higher hierarchical status than that of Art.2 (2). This status made compliance with Art.8 (29) a prerequisite for the UN's enjoyment of immunity under Art.2 (2).[479] In other words, the UN could not simply ignore Art.8 (29), because this Article imposes a mandatory obligation upon the UN, without any exception under the plain text of the CPIUN.[480] More importantly, this Article 'constitutes an essential provision because it concerns dispute settlement, and such terms are, by nature, essential'.[481]

The views of international law experts can also be invoked to reinforce the plaintiffs' argument. For instance, Muller said: '[T]he availability of proper alternative means of redress for private parties dealing with the organization can be considered a precondition for granting immunity from suit.'[482] 'An international organization which deals with private parties cannot use its jurisdictional immunity to hide from its responsibilities ... to create alternative and adequate means of redress in case disputes arise.'[483] According to Verdirame, 'courts should deny immunity to the UN where it has failed to provide alternative means of dispute settlement.'[484] In the opinion of Gaillard and Pingel-Lenuzza, 'according to the dominant theory, it is the existence of these alternative means of dispute

[476] *Ibid*., p.2.
[477] See: SDNY: the second opposition of the plaintiffs, *supra* note 435, pp.8 – 9.
[478] See: *ibid*., p.8.
[479] See: SDNY: the first opposition of the plaintiffs, *supra* note 429, p.18.
[480] See: SDNY: the second opposition of the plaintiffs, *supra* note 435, pp.1, 2.
[481] SDNY: the first opposition of the plaintiffs, *supra* note 429, p.32.
[482] Alexander S. Muller: *International Organizations and Their Host States: aspects of their legal relationship*, The Hague; London; Boston: Kluwer Law International, 1995, p.176. Cited in: SDNY: the first opposition of the plaintiffs, *supra* note 429, p.22.
[483] Muller, *ibid.*, p.177.
[484] Verdirame, *supra* note 151, p.359. Cited in: SDNY: the first opposition of the plaintiffs, *supra* note 429, p.22.

resolution that justifies maintaining the absolute character of the immunity of international organisations'.[485] Reinisch and Weber even observed that there is a 'clearly discernible trend in recent immunity decisions … to consider the availability of alternative fora when deciding whether to grant or deny immunity'.[486] As Cheng suggested, 'under international law, no one should be allowed to reap advantages from his or her own wrong'.[487]

Cases before the national courts in other countries have similarly established a rule that the availability of immunity to the UN and other international organisations depends on whether they have afforded access to alternative remedies. For example, in the case of *Drago v. International Plant Genetic Resources Institute* (No. 3718/07, ILDC 827 (It.) (Feb. 19, 2007)), the Italian courts found the defendant 'not entitled to immunity when it failed to provide an independent and impartial extrajudicial remedy in violation of its headquarters agreement'.[488] As the plaintiffs summarised:

> [S]atisfaction of the remedy provision in the international organization's statute is a prerequisite to the immunity provision of the same statute, and, as such, that immunity was not applicable where the organization had failed to provide an adequate remedy.[489]

In the *Stavrinou v United Nations and Commander of the United Nations Force in Cyprus* case (CLR 992, ILDC 929 (CY 1992) (Sup. Ct. Cyprus 17 July 1992)), the Cypriot courts confirmed that the applicant 'had access to internal dispute settlement system before according immunity to UN peacekeepers in Cyprus'.[490] In the *UNESCO v. Boulois* case (Cour d'Appel, Paris, June 19, 1998), the court 'refused to adhere to an arbitration clause

---

[485] Emmanuel Gaillard and Isabelle Pingel-Lenuzza: "International Organizations and Immunity from Jurisdiction, to Restrict or to Bypass", in: *International and Comparative Law Quarterly*, Vol. 51, No. 1, January 2002, pp.1 – 15, at 3.

[486] August Reinisch and Ulf A. Weber: "In the Shadow of Waite and Kennedy: the jurisdictional immunity of international organizations, the individual's right of access to the courts and administrative tribunals as alternative means of dispute settlement", in: *International Organizations Law Review*, Vol. 1, No. 1, 2004, pp.59 – 110, at 72. Cited in: the first opposition of the plaintiffs, *supra* note 429, p.23.

[487] The second opposition of the plaintiffs, *supra* note 435, p.15. See: Bin Cheng: *General Principles of Law as Applied by International Courts and Tribunals*, Cambridge: Grotius Publications, 1994, pp. 149 – 158.

[488] The second opposition of the plaintiffs, *supra* note 435, p.10. The plaintiffs pointed out in particular that the defendant – International Plant Genetic Resources Institute – in this case, 'now renamed Biodiversity International, is an international organization and cooperative institute of the UN's Food and Agriculture Organization'. *Ibid*. According to its constitution, the defendant 'shall be entitled to "the same rights, privileges and immunities as customarily accorded to other international organizations...."'. *Ibid*.

[489] SDNY: the first opposition of the plaintiffs, *supra* note 429, p.23.

[490] See: Riccardo Pavoni, "Human Rights and the Immunities of Foreign States and International Organizations", in: Erika De Wet and Jure Vidmar: *Hierarchy in International law: the place of human rights*, Oxford; New York: Oxford University Press, 2012, pp.71 – 113, at 104; SDNY: the first opposition of the plaintiffs, *supra* note 389, p.23. See also: SDNY: the second opposition of the plaintiffs, *supra* note 435, p.10.

on the basis that granting immunity would result in a denial of justice'.[491] In the case of *Maida v. Administration for International Assistance* (RDI 575, 23 ILR 510 (Court de Cassazione) [Supreme Court] (It.) (May 27, 1955)), the Italian courts held that:

> [T]here is undeniably a tendency in domestic courts to make the immunity of an international organization dependent on its putting in place effective internal complaints mechanisms, or making recourse to administrative tribunals available.[492]

These cases reveal 'a broader point that when international organizations have refused to provide an alternative settlement mechanism, national courts have upheld the right to a remedy notwithstanding any immunity agreements'.[493] Although the views of these foreign courts were not binding on the SDNY, they were seen as being 'entitled to considerable weight' by the tribunal.[494]

It would thus be incorrect for anyone to look only to the language of Art.2 (2) and Art.8 (29) in isolation.[495] As the plaintiffs argued, 'the systematic structure of a treaty is of equal importance to the ordinary linguistic meaning of the words used'.[496] The full text of the CPIUN thus compels an understanding of Art.2 (2) as being conditional on the existence of the dispute settlement mechanisms required by Art.8 (29).[497] In failing to accord the plaintiffs a remedy to which they are entitled under this Article, the UN has also failed to meet the conditions necessary for it to enjoy immunity under Art.2 (2).[498] The plaintiffs' interpretation of the CPIUN gained the support of Spizz and Quigley, who submitted *amici curiae* to the SDNY:

> [Art.2 (2) of CPIUN] cannot be read in isolation. A more comprehensive review of the immunity question, one that includes the United Nations ("UN") Charter itself, along with other binding documents and decades of organizational statements and institutional practice, reveals that this

---

[491] See: SDNY: the first opposition of the plaintiffs, *supra* note 429, pp.22 – 23; SDNY: the second opposition of the plaintiffs, *supra* note 435, pp.10 – 12.
[492] See: August Reinisch: *The Privileges and Immunities of International Organizations in Domestic Courts*, Oxford, United Kingdom: Oxford University Press, 2013, p.160; Cedric Ryngaert: "The Immunity of International Organizations Before Domestic Courts: Recent Trends", in: *International Organizations Law Review*, Vol. 7, No. 1, 2010, pp.121 – 148, at 144. Cited in: SDNY: the first opposition of the plaintiffs, *supra* note 429, p.23. See also: SDNY: the second opposition of the plaintiffs, *supra* note 435, p.12.
[493] SDNY: the second opposition of the plaintiffs, *supra* note 435, pp.9 – 10.
[494] *Ibid*., p.9.
[495] See: SDNY: the first opposition of the plaintiffs, *supra* note 429, p.19.
[496] *Ibid*.
[497] See: *ibid*.
[498] *Ibid*., p.21.

immunity is a privilege with limitations.[499]

2.3.3.2 The exception to the UN's immunity

As mentioned above, the U.S. Department of Justice argued that it would be sufficient for the SDNY to consider solely Art.2 (2), and grant the UN absolute immunity from being sued, and that there should be no alternative reading of the CPIUN's text. It was this interpretation that led the U.S. Department of Justice to believe that the only possible exception to the UN's immunity is an express waiver made by the UN Secretary-General based on a clear and unambiguous manifestation of this kind of intent, and that it is not possible for this to be otherwise.[500] At the same time, any purported inadequacies in the claims resolution process referred to in Art.8 (29) of CPIUN, or even the absence of such a process, would fail to establish that the UN had expressly waived its immunity from suit.[501]

As the U.S. Department of Justice observed, the UN Charter, the CPIUN and the UN-Haiti SOFA require an express waiver of immunity to be made.[502] None of these instruments indicates that the provision of access to alternative methods of dispute resolution connects the waiver of the UN's immunity. Specific to this case, firstly, the UN has not expressly waived, but rather has expressly asserted, jurisdictional immunity in this case.[503] Secondly, the UN-Haiti SOFA did not refer to whether the UN has established a claims commission or other means by which aggrieved persons can seek compensation is relevant to the question of waiver or not.[504] Nor does the alleged non-compliance with this SOFA amount to an express waiver of immunity.[505]

Again, the drafting history of the CPIUN can be invoked in support of this argument. The drafters had studied precedents with regard to immunity from judicial process of other

[499] SDNY: the *amici curiae* of Spizz and Quigley, *supra* note 436, p.1.
[500] See: SDNY: the first reply of the U.S. Department of Justice, *supra* note 434, pp.1, 3 – 4, 6; SDNY: the second reply of the U.S. Department of Justice, *supra* note 434, pp.2, 3.
[501] See: SDNY: the first reply of the U.S. Department of Justice, *supra* note 434, p.5; SDNY: the second reply of the U.S. Department of Justice, *supra* note 434, p.4.
[502] See: SDNY: the second reply of the U.S. Department of Justice, *supra* note 434, pp.2 – 4.
[503] The U.S. Department of Justice referred to two letters from Under-Secretary-General for Legal Affairs and United Nations Legal Counsel to the Permanent Representative of the United States to the United Nations, which stated that, *inter alia*, 'the UN, including MINUSTAH, is entitled to immunity from suit pursuant to the UN Charter and the General Convention'. These two letters are available at: SDNY: the first reply of the U.S. Department of Justice, *supra* note 434, Exhibits A and B.
[504] See: SDNY: the first reply of the U.S. Department of Justice, *supra* note 434, p.6.
[505] See: *ibid*., p.5; SDNY: the second reply of the U.S. Department of Justice, *supra* note 434, p.4.

international and regional organisations.[506] They found themselves 'presented with a choice between absolute immunity subject only to waiver, and immunity subject to exceptions that would permit lawsuits in the national courts under various circumstances'.[507] Ultimately, the drafters chose to use language identical to that used by the International Monetary Fund (IMF) in the draft of Art.2 of CPIUN:

> The Fund, its property and its assets, wherever located and by whomsoever held, shall enjoy immunity from every form of judicial process except to the extent that it expressly waives its immunity for the purpose of any proceedings or by the terms of any contract.[508]

The final text of Art.2 of CPIUN followed the above draft with one minor difference.[509] At the same time, the drafting history of the CPIUN does not indicate that the absolute immunity of the UN could be waived implicitly. As the U.S. Department of Justice pointed out:

> Nor is there any suggestion in the drafting history that the UN's immunity may be waived implicitly if the UN does not comply with another provision of the General Convention. To the contrary, the drafters made clear in the Convention that any waiver of the UN's immunity must be "express."[510]

It can be found that the drafting history does not provide evidence that the failure to provide access to alternative methods of dispute resolution constitutes an implicit waiver of immunity.[511] Quite the reverse, the clear and consistent intent of the drafters was that any waiver should be express.[512]

US case law has also construed the CPIUN to mean that any waiver of the UN's immunity must be express, and that there is no such thing as an implicit waiver. For example, in the *Brzak et al.* case and the *Boimah* case, the US courts held that the UN enjoys absolute immunity from suit unless it has expressly waived its immunity.[513] The

---

[506] See: "Report of the Preparatory Commission of the United Nations", PC/20, 23 December 1945, p.64.
[507] SDNY: the second reply of the U.S. Department of Justice, *supra* note 434, p.4.
[508] Art.9 (3) of Articles of Agreement of the International Monetary Fund; PC/20, *supra* note 506, p.73. Cited in: SDNY: the second reply of the U.S. Department of Justice, *supra* note 434, p.9.
[509] *Ibid*.
[510] *Ibid*., p.8.
[511] See: *ibid*.
[512] See: *ibid*.
[513] See: SDNY: the first reply of the U.S. Department of Justice, *supra* note 434, p.4; SDNY: the second reply of the U.S. Department of Justice, *supra* note 434, p.3. See also: *Sadikoglu v. United Nations Development Programme* (11 Civ. 0294(PKC)), in: SDNY: the first reply of the U.S. Department of Justice,

same holds true for a situation in which the UN has informed the relevant courts or US authorities that it had not waived its immunity from suit and the plaintiff has 'presented no evidence of such a waiver'.[514] On the waiver of immunity, the U.S. Department of Justice quoted the SDNY findings in the *Brzak et al.* case:

> Although the plaintiffs argue that purported inadequacies with the United Nations' internal dispute resolution mechanism indicate a waiver of immunity, crediting this argument would read the word 'expressly' out of the [General Convention].[515]

In the *Bisson* case, the U.S. Department of Justice also observed, that the SDNY disagreed that the plaintiff's dissatisfaction with certain features of the UN's compensation policy for injuries sustained by an employee of the United Nations World Food Programme (WFP) might constitute an express (or implied) waiver of immunity.[516] In addition, the UN's immunity is absolute, whatever the relationship of the plaintiff with the UN. In the above cases, the employment relationship between the plaintiffs and the UN, which would seem to mean that the plaintiffs would have been able to avail themselves of the staff compensation system, was not material to the question of waiver.[517] As the SDNY found in one case, 'Even if she were not an employee of the WFP or the UN,[518] both organizations would still be immune from suit by her, and [any failure to comply with] § 29(a) still would not constitute an express waiver'.[519]

To the U.S. Department of Justice, the UN's immunity is absolute and can in no way be affected by any alleged breach of the above instruments. That is to say, the UN has not waived its immunity, even in the event of its failing to establish any mechanism for plaintiffs to pursue legal remedies.[520] In addition, in the view of the U.S. Department of

---

*supra* note 434, p.4; The *Askir*, *Bission*, *Emmanuel* and *Boimah* cases, in: SDNY: the second reply of the U.S. Department of Justice, *supra* note 435, p.3.

[514] See: for example, *United States v. Chalmers, et al.* case (05 Cr. 59 (DC) (S.D.N.Y. Feb. 26, 2007)), *Baley v. United Nations* case (No. 97-9495 (2d Cir. June 29, 1998)), *Van Aggelen v. United Nations* (06 Civ. 8240 (LBS) (S.D.N.Y. Apr. 12, 2007)) and *De Luca v. United Nations* (841 F. Supp. 531 (S.D.N.Y. 1994)), *Klyumel v. United Nations* (92 Civ. 4231 (PKL) (S.D.N.Y. Dec. 4, 1992)), *Susana Mendaro v. The World Bank, a/k/a International Bank for Reconstruction and Development*, (717 F.2d 610 (1983)) and *D'Cruz v. Annan* (05 Civ. 8918 (DC) (S.D.N.Y. Dec. 22, 2005)). See: SDNY: the second reply of the U.S. Department of Justice, *supra* note 434, pp.3 – 4.

[515] SDNY: the first reply of the U.S. Department of Justice, *supra* note 434, p.6. See also: SDNY: the second reply of the U.S. Department of Justice, *supra* note 434, p.4.

[516] See: SDNY: the second reply of the U.S. Department of Justice, *supra* note 434, p.5.

[517] See: *ibid*.

[518] *Ibid*.

[519] *Ibid*.

[520] See: SDNY: the first reply of the U.S. Department of Justice, *supra* note 434, p.5.

Justice, it was up to the plaintiff 'to demonstrate that the UN has waived its immunity'.[521] However, they have not presented – and cannot present – any evidence that the UN has expressly waived its immunity.[522] As a result, where there is no evidence, or the evidence is not sufficient to prove that the UN has expressly waived its immunity, the plaintiffs must bear the adverse consequences. That is to say, the argument that the UN's immunity from suit under the CPIUN is conditional on its providing a mechanism to resolve the plaintiffs' tort claims is erroneous.[523]

The plaintiffs also struck back at the argument that the only exception to the UN's immunity is an express waiver made by the UN Secretary-General. To them, the case was 'wholly unrelated to whether Defendants have or have not waived immunity'.[524] They asserted that the UN had no immunity from suit and service of process in this case, but not that the alleged breach of Art.8 (29) and the UN-Haiti SOFA by the UN constituted a waiver of immunity.[525] In the view of the plaintiffs, an 'express waiver' should be considered to be 'an established legal concept defined as the intentional relinquishment of a known and otherwise enforceable legal right'.[526] There was, however, no such legal right – jurisdictional immunity – for the UN to relinquish in this case. To the plaintiffs, Art.2 (2) of CPIUN only excludes something – 'express waiver' – from the scope of the UN's immunity, while Art.8 (29) may completely prevent the UN's immunity from being invoked.[527] They argued that non-compliance with this Article should result in the forfeiture of the UN's benefit of immunity and its right to shield itself from responsibility in the instant situations.[528] In this case, whether the UN had relinquished the protection of immunity was not the same as whether the UN was entitled to benefit from enforcing this protection when it had breached its obligation under Art.8 (29) to provide appropriate modes of settlement.[529]

The UN's invocation of immunity in this case runs counter to the principle of 'operational necessity'. The drafters of the CPIUN had always stressed that the introduction of the operational necessity principle was important for regulating the invocation of immunities. As was raised by the plaintiffs, the ExCom had *ab initio*

[521] SDNY: the second reply of the U.S. Department of Justice, *supra* note 434, p.4.
[522] See: *ibid*.
[523] See: *ibid.*, pp.2, 3.
[524] *Ibid.*, p.4.
[525] See: *ibid.*, pp.1, 3.
[526] *Ibid.*, p.3.
[527] See: *ibid.*, p.5.
[528] See: SDNY: the first opposition of the plaintiffs, *supra* note 429, p.3.
[529] See: SDNY: the second opposition of the plaintiffs, *supra* note 435, pp.5 – 6.

recognised excess or abuse of immunity and privilege as being detrimental to the interests of the international organisation itself, as well as to the countries asked to grant such immunities.[530] Based on this recognition, the ExCom established the principle of operational necessity as the foundation of the UN's immunity framework. That is: 'It should be a principle that no immunities and privileges, which are not really necessary, should be asked for'.[531] The principle of operational necessity was subsequently integrated into Art.105 of the UN Charter, which stipulates that: 'The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes'.[532] Reading this in conjunction with the preamble to and Art.1 (3) of the UN Charter, the invocation of jurisdictional immunity must be consistent with the UN's purpose in promoting human-rights.[533] The UN charter 'requires that UN immunity be applied carefully and only to the extent that it furthers the UN's purposes of promoting human rights, the rule of law, and justice'.[534] In this sense, the defendant was seeking an extreme version of immunity beyond the limited and contingent one authorised by the UN Charter as its founding document.[535] This groundwork also influenced those drafting the CPIUN when they did their best to ensure that the UN's immunity would be invalidated if it disregarded its obligations to provide alternative means for the resolution of disputes.[536]

The defence of 'political and policy matters' had no basis in the case at bar, in the sense of the plain text of the CPIUN, the relevant case law, or UN resolutions and statements. For one thing, none of the above instruments had created, either expressly or implicitly, any political and policy exception to the obligation to provide some mode of settlement.[537] The UN gave no further explanation with regard to how the claims necessarily entailed a review of political and policy matters, nor did it refer to any international or domestic law authority which supported this contention.[538] As for the other charge of 'discharging contaminated sewage from broken pipes and disposal pits into

[530] See: PC/EX/113/Rev.1, *supra* note 448, p.70.
[531] *Ibid*.
[532] See: SDNY: the first opposition of the plaintiffs, *supra* note 429, pp.14 – 15.
[533] See: *ibid*.
[534] *Ibid*., p.28.
[535] See: *ibid*.
[536] See: *ibid*., pp.10, 20.
[537] See: *ibid*., pp.2, 27.
[538] See: SDNY: the *amici curiae* of the FANM and HLA: *supra* note 436, p.9. Furthermore, 'the UN's position on the issue has undermined its moral credibility and its commitment to the rule of law'. *Ibid*.

Haiti's central river system',[539] this could in no sense be understood as being in any way related to 'political and policy matters'.[540] Viewed from virtually every possible perspective, the claims of the plaintiffs holding the UN responsible for their loss in this action had nothing to do with a review or revision of UN policies or political decisions in Haiti.[541] In addition, as the plaintiffs argued that:

> A narrow, fact-specific ruling that limits UN exposure to liability for private law tort claims in a case where the UN refuses to provide any alternative remedies would not impact the UN's core functions or undermine the underlying policy considerations that have justified courts' protection of UN immunity in the past.[542]

The plaintiffs then went further, asserting that the UN should not enjoy immunity when in breach of its well-established obligation to provide redress to victims of harm caused by acts or omissions attributable to it under the CPIUN and the UN-Haiti SOFA.[543]

---

[539] SDNY: the first opposition of the plaintiffs, *supra* note 429, p.27.
[540] See: *ibid*.
[541] See: *ibid*. This argument is also endorsed by the *amici curiae* of Spizz and Quigley, which suggested that this class action did not invoke 'operational necessity': 'The UN has not asserted, nor could it credibly assert, that these actions rise to the level of operational necessity as that exception has been self- defined by the organization.' SDNY: the *amici curiae* of Spizz and Quigley, *supra* note 436, p.11. A similar conclusion is also drawn by the *amici curiae* of Kupferman *et al.*, which suggested that 'operational necessity' 'is grounds for immunity, but at the same time is also a limitation thereof, since an IO's immunity is intended to cover only conduct that is necessary for it to carry out its functions'. SDNY: the *amici curiae* of Kupferman *et al.*, *supra* note 436, p.5. On this issue, Kupferman *et al.* analogised the immunity of international organisations in the nature of 'operational necessity' to the state immunity bound by the *iure imperii* doctrine. According to the *iure imperii* doctrine, a state can rely on its immunity before the courts of another state, only if the conduct in question conforms to this doctrine can be qualified as an exercise of public authority, rather than a private entity. See: *ibid*., p.6. For the international organisations case, a similar distinction must be drawn between conduct closely related to the core of an IO's functions, which should be entailed an exercise of public authority, and conduct touching upon the functions of the IO in a more peripheral manner, which cannot be distinguished from conduct of a private entity. See: *ibid*. Kupferman *et al.* cautiously approved of the judgment of the Dutch courts that the UN enjoys absolute immunity under those particular circumstances. As they said:

> [T]he conduct complained of in regard to the inaction of the UN peacekeeping force in Srebrenica touches upon the core of the UNSC's mandate carried out during active armed conflict. [T]he present case rather concerns conduct that was at a mere mission support level, as a part of the UN's routine, non-battle time decisions outside of its core public functions.

*Ibid.*, p.8. Through a comparison with the *Srebrenica* case, Kupferman *et al.* suggested that the conduct complained of – the faulty construction of sewage disposal facilities and the illegal waste disposal – in the *Georges et al.* case could hardly be 'ancillary to the UN's mandate of supporting political stability in Haiti'. *Ibid.*, pp.7, 8. The alleged tortious conduct in the present case 'did not involve the use of public authority or any of the UNSC's special powers. Rather it was peripheral to the discharge of its function'. *Ibid.*, p.9. As a result, Kupferman *et al.* suggested the SDNY to draw a careful balance between the interests at stake. See: *ibid.*, p.12.
[542] SDNY: the first opposition of the plaintiffs, *supra* note 429, pp.3 – 4.
[543] The Class Action Complaint, *supra* note 431, p.41; SDNY: the first opposition of the plaintiffs, *supra* note 429, pp.17 – 18. Spizz and Quigley expressed their support on this argument in their *amici curiae*:

As mentioned above, the CPIUN had introduced a bargain between the UN and its Member States, in which the UN agreed to provide for dispute resolution mechanisms for third-party claims in exchange for the enjoyment of jurisdictional immunity.[544] At the same time, '[i]t is a well-established principle under both U.S. and international law that a party which has failed to perform its side of the bargain is no longer able to reap the benefits of that bargain'.[545] Based on the comprehensive and interdependent interpretation of the CPIUN, the failure of the UN, as a right-and-duty-bearing unit in international law and a party to the CPIUN, to comply with a conditional precedent in the CPIUN may prevent it from taking advantage of a right provided under the same convention.[546] A failure to fulfil this obligation would, in turn, generate a duty on the UN Secretary-General to waive immunity when it might impede the course of justice according to Art.5 (20) of CPIUN.[547]

The so-called precedents upon which the U.S. Department of Justice relied could not be called upon to decide the disputes in the case in question because they had, by and large, arisen from claims brought by current or former UN employees with access to the UN's internal dispute resolution system.[548] As a result, '[n]one of those suits addressed the

---

> In agreeing to this process, the UN evidenced a clear intent to avoid establishing or claiming full immunity for itself for claims based on personal injury, illness, or death arising out of negligence. Instead, it only chose its preferred venue for receiving and responding to such claims.

SDNY: the *amici curiae* of Spizz and Quigley, *supra* note 436, p.6.

[544] According to observation of Spizz and Quigley, this agreement 'is consistent with the organization's long-standing institutional practice, as evidenced by its official resolutions, statements, and settlements of private law claims arising out of peacekeeper actions'. SDNY: the *amici curiae* of Spizz and Quigley, *supra* note 436, pp.7 – 8. Examples of this agreement include, but are not limited to General Assembly resolution 52/247 (General Assembly: "Third-Party Liability: Temporal and Financial Limitations", A/RES/52/247, 17 July 1998); A/51/389, *supra* note 234; "Letter dated August 6, 1965 from the Secretary-General addressed to the Permanent Representative of the Union of Soviet Socialist Republics", S/6597, 6 August 1965; "Payment of settlement claims—Liabilities of a private law nature—Procedures for settlement—Budget considerations, Memorandum to the Controller", 23 February 2001, in: *United Nations Judicial Yearbook* (2001), pp.381 – 385. According to the *amici curiae* of Kupferman *et al.*, in return for granting immunity, the European courts require international organisations, including the UN, to provide reasonable alternative means for the adversely affected individuals to protect their rights. See: SDNY: the *amici curiae* of Kupferman *et al.*, *supra* note 436, p.1. The jurisprudence on this topic in the European courts demonstrates that the lack of a remedy is, in effect, similar to the lack of a right. See: *ibid*.

[545] SDNY: the first opposition of the plaintiffs, *supra* note 429, p.31. See also: SDNY: the second opposition of the plaintiffs, *supra* note 435, pp.1, 3.

[546] See: SDNY: the second opposition of the plaintiffs, *supra* note 435, p.3. Kupferman *et al.* similarly suggested the SDNY to deny the UN's immunity for its cholera-related torts and afford the plaintiffs access to a court in law, given the UN's complete denial of access to reasonable alternative means in the present case. See: the *amici curiae* of Kupferman *et al.*, *supra* note 436, p.1.

[547] See: SDNY: the first opposition of the plaintiffs, *supra* note 429, p.15. Spizz and Quigley seconded the plaintiffs that this waiver should be issued by the Secretary-General, with a view to preserving the broad mandates of justice. See: SDNY: the *amici curiae* of Spizz and Quigley, *supra* note 436, p.3.

[548] SDNY: the first opposition of the plaintiffs, *supra* note 429, p.8.

complete unavailability of a mechanism for redress, though some questioned the adequacy or efficacy of the mechanism that was available to the plaintiffs'.[549] The plaintiffs in these cases would have had access to the UN's internal dispute resolution system, whereas the plaintiffs in the case in question here had been denied access to any form of dispute settlement.[550] From another point of view, these cases can also be seen as reinforcing the view that making provisions for alternative methods of dispute settlement under Art.8 (29) can be seen as part and parcel of the UN's enjoyment of immunity from national courts.[551]

In the *Georges et al.* case, the answer to the question of whether the UN had refused to fulfil its obligations under Art.8 (29) of CPIUN and the UN-Haiti SOFA, thereby violating the legal obligations established by Art.8 (29) of CPIUN should thus be a resounding 'Yes'; and it seems that the U.S. Department of Justice did not dispute this fact. The UN's failure to fulfil the obligation under Art.8 (29) and the UN-Haiti SOFA should have triggered the application of the 'unclean hands' doctrine. According to this doctrine, 'a party is barred from obtaining relief from a court after engaging in unconscionable conduct or acting in bad faith in relation to the subject matter of a litigation'.[552] The unclean hands doctrine has been applied primarily in equity under U.S. law.[553] Conduct consistent with the application of this doctrine is described by the US courts as '"unconscionable," "unfair," "immoral," or "transgress[ing] equitable standards of conduct"'.[554] This doctrine also serves as a general principle of international law and applies to a situation where a state has acted in bad faith with respect to its obligations under an international treaty.[555] As the plaintiffs in the case in question never tired of arguing, the UN, as a party to the CPIUN and seeking the protection of immunity under it,

---

[549] *Ibid*.
[550] See: *ibid*., p.44; SDNY: the second opposition of the plaintiffs, *supra* note 435, p.17. In the *Brzak et al.* case, for example, the plaintiffs' claims were rejected by US Court of Appeals for the Second Circuit because the court did not follow that purported inadequacies with the [UN's] internal dispute resolution mechanism does not indicate a waiver of immunity. See: SDNY: the first opposition of the plaintiffs, *supra* note 429, p.9. Nor do the cases, such as *Sadikoglu v. United Nations Development Programme* and *Askir v. Boutres-Ghali*, brought by non-employees of the UN serve as the precedents of the present case. In these actions, the US courts dealt nothing with the relation between the complete lack of any mechanism for redress and the UN's ability to assert absolute immunity. See: *ibid*., pp.9 – 10.
[551] See: *ibid*., p.21.
[552] *Ibid*., pp.32 – 33.
[553] See: *ibid*., p32.
[554] See: *ibid*., p.33.
[555] See: For example, "Report of the International Law Commission", Fifty-seventh session (2 May-3 June and 11 July-5 August 2005), A/60/10, ¶ 236; The case of *Diversion of Water from the Meuse (Netherlands v. Belgium)*, 1937 P.C.I.J. (ser. A/B) No. 70, ¶ 321. See: SDNY: the first opposition of the plaintiffs, *supra* note 429, p.33.

must itself have completely fulfilled the obligations of that convention.[556] At the same time, the UN's entire course of evading responsibility for both the cholera epidemic and the handling of the plaintiffs' claims demonstrated 'a pattern of bad faith that surpasses any threshold necessary to invoke unclean hands'.[557]

What the UN had done should have rendered its jurisdictional immunity void and unenforceable.[558] In other words, the UN's 'failure to perform means that immunity is not enforceable here, and there is thus no immunity to waive'.[559] Yet the Justice Department, standing *de facto* on the side of the UN, asked the SDNY to disregard the legal consequences of the UN's breach of this obligation. Worse still, in the *Georges et al.* case, the U.S Department of Justice seems to have attempted to help the UN to avoid its direct responsibility for the plaintiffs' loss 'by stretching the bounds of their immunity beyond any reasonable formulation'.[560] As a result, the plaintiffs were told: 'Immunity is not expressly mentioned there because it would be unnecessary to do so, given that the CPIUN grants the UN immunity for all claims provided that it complies with [Art.8 (29)]'.[561]

2.3.3.3 The status of plaintiffs' as a party to the CPIUN and their right of access to a court

The U.S. Department of Justice argued that the plaintiffs were not qualified to invoke any alleged breach of the CPIUN or the UN-Haiti SOFA.[562] Such a qualification was dependent on their having the status of a 'party' with regard to the CPIUN. 'Even where a treaty provides certain benefits for nationals of a particular state',[563] the U.S. Department of Justice added, 'it is traditionally held that any rights arising out of such provisions are, under international law, those of the states and … individual rights are only derivative through the states'.[564] In this case, the Department argued, the claims of the plaintiffs derived from the misconception that the plaintiffs were parties to the CPIUN and the

[556] See: *Diversion of Water from the Meuse*, Permanent Court of International Justice: Judgments, Orders and Advisory Opinions, Fascicule No. 70, 1937, para.323. Cited in: SDNY: the first opposition of the plaintiffs, *supra* note 429, p.33.
[557] *Ibid*., p.34.
[558] See: *ibid*., p.29; SDNY: the second opposition of the plaintiffs, *supra* note 435, p.4.
[559] SDNY: the second opposition of the plaintiffs, *supra* note 435, p.3.
[560] SDNY: the first opposition of the plaintiffs, *supra* note 429, p.1. See also: *ibid*., p.2.
[561] SDNY: the second opposition of the plaintiffs, *supra* note 435, p.7.
[562] See: the second reply of the U.S. Department of Justice, *supra* note 434, p.11.
[563] *Ibid.*, p.12.
[564] *Ibid*.

UN-Haiti SOFA.[565] However, the facts showed that the plaintiffs did not have this kind of 'party' status. Instead, it was the States Parties to the CPIUN, and the Haitian Government to the UN-Haiti SOFA, to whom the UN owed an obligation in this case.[566] It thus followed that the plaintiffs did not have any right to assert a breach of either agreement independently, let alone to determine their own preferred remedies.[567]

The plaintiffs maintained that to say that they were not a party to the CPIUN and UN-Haiti SOFA, and therefore lacked the standing to assert an alleged breach of the CPIUN or the UN-Haiti SOFA, was too sweeping a statement.[568] This argument was raised on the basis of the standpoint of Hathaway *et al.*, which suggested: 'an individual may generally raise a treaty defensively, even if the treaty does not confer a private right of action or private right, so long as the individual's underlying cause of action is independent of the treaty'.[569] The plaintiffs also cited Vazquez's point of view: 'A right of action is not necessary to invoke a treaty as a defense'.[570]

As the plaintiffs argued, US case law did not prevent private litigants from asserting a breach of international conventions, treaties or agreements to which they were not a party.[571] A set of cases confirmed their *locus standi* in this regard. In the case of *Mora v. New York* (524 F.3d 183), for instance:

> [T]he plaintiffs sued and sought damages for the breach of the Vienna Convention on Consular Relations , and the Court expressly limited its holding to the "narrow question of whether a detained alien may vindicate in an action for damages the failure of the detaining authority to inform him of the availability of consular notification and access.[572]

In addition, in the *United States ex rel. Lujan v. Gengler* case (510 F.2d 62), the plaintiff sought to invoke an alleged violation of the UN Charter as the substantive basis for his claims.[573] The case of *Ackermann v. Levine* (788 F.2d 830 (2d Cir. 1986)) reached 'the merits of a private litigant's defense that the plaintiff violated the Hague Convention on

---

[565] See: *ibid.*, p.12.
[566] See: *ibid.*, p.11.
[567] See: *ibid*.
[568] See: SDNY: the second opposition of the plaintiffs, *supra* note 435, p.14.
[569] See: Oona A. Hathaway, Sabria McElroy and Sara A. Solow: "International Law at Home: Enforcing Treaties in U.S. Courts", in: *Yale Journal of International Law*, Vol. 37, No. 1, 2012, pp.51 – 106, at 83 – 87.
[570] Carlos M. Vazquez: "Treaty-Based Rights and Remedies of Individuals", in: *Columbia Law Review*, Vol. 92, 1992, pp.1082 – 1163, at 1143. See: SDNY: the second opposition of the plaintiffs, *supra* note 435, p.15.
[571] See: SDNY: the second opposition of the plaintiffs, *supra* note 435, p.15.
[572] *Ibid.*, p.14.
[573] See: *ibid.*, p.14. Similar findings can be found in the *Indemnity Insurance Company of North America v. Pan- American Airways, Inc., et al.* case (58 F. Supp. 338 (1944)). See: *ibid.*, p.15.

Service Abroad, without requiring that the treaty provide a private right of action'.[574] In the case of *Cook v. United States* (288 U.S. 102 (1933)), the plaintiff was allowed 'to invoke a treaty between the United States and Britain to challenge the court's jurisdiction, without requiring that the treaty provide a right of action'.[575] As the Ninth Circuit Court of Appeals found in the *Chuidian v. Philippine National Bank* (912 F.2d 1095 (9th Cir. 1990)), 'an individual was covered by the Foreign Sovereign Immunities Act, despite the government's statement of interest presenting its view that the statute does not apply to individuals'.[576]

More importantly, the *Georges et al.* case 'presents an as-applied challenge to the unprecedented way in which enforcing immunity under the CPIUN would completely deprive Plaintiffs of any mechanism for redress'.[577] This was with regard to the plaintiffs' right of access to a court. For the plaintiffs, the SDNY was the last court to which the plaintiffs and victims of the cholera epidemic were able to resort in this case.[578] If Art.8 (29) of the CPIUN and the UN-Haiti SOFA had been fully respected, the UN would have been able to 'fulfil its responsibilities to innocent third parties harmed by UN operations, and further its aims of promoting human rights, including the right to due process and effective remedies'.[579] However, as mentioned above, the UN refused to do so. In this sense, 'their extrajudicial options for pursuing a remedy for their injuries and damages'[580] had been exhausted, and they had no choice but to turn to the SDNY.[581] As far as the

---

[574] *Ibid.*, p.16.
[575] *Ibid*.
[576] See: SDNY: the first opposition of the plaintiffs, *supra* note 429, p.12. As a sign of support, Kupferman *et al.* enumerated some seminal cases in which the European courts attached great importance to the right to an effective remedy and the right of access to a court by applying a balancing approach to the immunity of international organisation and required international organisations to, in return for granting immunity, provide reasonable alternative means for the adversely affected individuals to protect their rights. For example: the case of *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities* (Joined Cases C-402/05 P and C-415/05 P) before the ECJ, *A & Others v. United Kingdom* (Application no. 3455/05) and *Waite and Kennedy v. Germany* before the European Court of Human Rights (ECtHR) and *Secretary of State for the Home Department v. AF (FC) & Another* (UKHL 28) before the UK domestic courts, as well as *Maida v. Administration for International Assistance*, *Piette v European University Institute* and *Drago v. International Plant Genetic Resources Institute* before the Italian courts, and *etc.* See: SDNY: the *amici curiae* of Kupferman *et al*., *supra* note 436, pp.1 – 5. These cases also established that the immunity of an international organisation would be unlawful in cases where the procedures for an alternative remedy are inadequate. See: *ibid.*, p.3.
[577] See: SDNY: the second opposition of the plaintiffs, *supra* note 435, p.17.
[578] See: SDNY: the first opposition of the plaintiffs, *supra* note 429, pp.3, 7, 38 – 48.
[579] *Ibid*., p.14.
[580] The Class Action Complaint, *supra* note 431, p.42. See also: SDNY: the first opposition of the plaintiffs, *supra* note 429, pp.7 – 8.
[581] This situation was echoed by the *amici curiae* of Spizz and Quigley. Georges *et al.* have tried to make claims before this kind of *lex specialis* regimes but without success, due to the UN's failure of fulfilling

plaintiffs were concerned, the UN's malfeasance could in no event be justified 'under relevant international law, comparative law, or the UN's own treaties and documents that establish its legal obligations'[582] and constituted 'a complete denial of due process and justice'.[583] Moreover, in the absence of a dispute resolution system, granting the UN immunity would turn out to have been a constitutional infringement of the plaintiffs' right of access to a court of law.[584] This argument fully absorbed Reinisch's standpoint that the CPIUN's obligation to provide for alternative dispute settlement in the case of the UN's immunity from the legal process can be regarded as an acknowledgment of the right of access to a court as contained in all major human rights instruments.[585]

2.3.3.4 The SDNY's deference to the interpretation of the Executive Branch as regards the immunity of the UN

According to the U.S. Department of Justice, the SDNY had to defer to the interpretation of the Executive Branch on the meaning of the CPIUN text. For one thing, the U.S. Executive Branch 'is charged with maintaining relations with the United Nations'.[586] These 'relations' require the Member States, solely on the basis of their membership of the CPIUN, to ensure the proper functioning of the UN free from their

---

obligations under Art.8 (29) of CPIUN and the UN-Haiti SOFA. See: SDNY: the *amici curiae* of Spizz and Quigley, *supra* note 436, p.6.

[582] The Class Action Complaint, *supra* note 431, p.41.

[583] *Ibid*., p.42.

[584] See: SDNY: the second opposition of the plaintiffs, *supra* note 435, p.17.

[585] See: August Reinisch: "Convention on the Privileges and Immunities of the United Nations, Convention on the Privileges and Immunities of the Specialized Agencies", United Nations Audiovisual Library of International Law, available at: http://legal.un.org/avl/pdf/ha/cpiun-cpisa/cpiun-cpisa_e.pdf. Spizz and Quigley also noticed that, in addition to being enshrined in the existing human rights instruments, such as Art.25 of UDHR, Art.2 of ICCPR, Art.39 of CRC, Art.14 of CAT, Art.6 of ICERD, the right to an effective remedy is also embodied in General Assembly resolution 60/147 and some widely-cited cases, such as *Beer and Regan v. Germany*; *Waite and Kennedy v. Germany*; *Brzak v. United Nations* and *Mendaro v. World Bank*, and *etc*. From the perspective of this right, an overemphasis on the UN's jurisdictional immunity might do more harm than good in this case. Kupferman *et al*. regarded this right as not only a basic human rights, but also a mechanism for ensuring the observance of other human rights. See: SDNY: the *amici curiae* of Kupferman *et al.*, *supra* note 436, p.1. Kupferman *et al.* further pointed out:

> Since encouraging respect for human rights is one of the purposes of the UN, obligations following from the UN's immunity should be interpreted from the perspective that it is not the intention of the UN to deny individuals' right to access to justice, or to shield itself from responsibility in instances not concerning the exercise of the core of the UNSC's special powers under Chapter VII.

*Ibid.*, p.11.

[586] *Ibid*.

unilateral interference. For example, in the *Mendaro* case, the Court of Appeals for the District of Columbia Circuit 'upheld the immunity of international organizations in employee suits because in that context immunity uniquely protects against interference with the organizations' internal administration'.[587] If the plaintiffs' claims had been upheld by the SDNY, a set of relevant precedents would have been overthrown, rendering the UN's immunity meaningless.[588] For another thing, deference to the views of the Executive Branch was warranted because the opinion of the U.S. Executive Branch was reasonable.[589] US case law had established that the views of the US Executive Branch should be entitled to 'great weight' if they were supported by the treaty's text and its drafting history, as well as the relevant precedents.[590]

Nevertheless, the plaintiffs requested the SDNY not to yield to the interpretation of the U.S. Executive Branch concerning the CPIUN. The plaintiffs argued that maintaining relations with the UN was a critical priority for the U.S. Executive Branch, but not for the SDNY. This kind of deference is not always a necessity in every case. Although US courts 'may generally afford "great weight", to the Government's interpretation of a treaty', that does not necessarily mean that this interpretation should be conclusive in all cases.[591] The cases of *Shamsee v. Shamsee* (74 A.D.2d 357 (N.Y. App. Div. 1980)) and *Sanders v. Szubin* (828 F. Supp. 2d 542 (E.D.N.Y. 2011)) serve as perfect examples. In the former case, the Supreme Court of the State of New York held:

> The question of immunity from legal process under treaties and statutes of the United States lies within the province of the courts .... [C]laims of immunity must be resolved by the court on the basis of the facts properly before it.[592]

The latter case established that the US courts 'need not defer to the Executive Branch's disposition of constitutional issues and instead must engage in its own *de novo* review'.[593]

Furthermore, such deference is due only when that interpretation is reasonable.[594] In

---

[587] SDNY: the first opposition of the plaintiffs, *supra* note 429, p.9.
[588] See: SDNY: the second reply of the U.S. Department of Justice, *supra* note 434, pp.13 – 14.
[589] See: SDNY: the first reply of the U.S. Department of Justice, *supra* note 434, p.4.
[590] For example, *Ehrlich v. American Airlines, Inc.* (360 F.3d 366 (2d Cir. 2004)) and *Fund for Animals v. Norton* (365 F. Supp. 2d 394 (S.D.N.Y. 2005)). See: SDNY: the second reply of the U.S. Department of Justice, *supra* note 434, p.2.
[591] See: *ibid*., p.6.
[592] SDNY: the first opposition of the plaintiffs, *supra* note 429, p.11.
[593] See: *ibid*. Similar findings can be found in *Samantar v. Yousuf*, (560 U.S. 305 (2010)) and *Sarei v. Rio Tinto, Plc.* (487 F.3d 1193 (9th Cir. 2007)). See: *ibid*., p.13.
[594] Precedents supporting this point can be found in the *Sumitomo Shoji America, Inc. v. Avagliano* (457 U.S.

some cases, US courts had 'disregard the Executive's position when they found [sic] that position to be unreasonable'. For example, in the *American Civil Liberties Union v. Department of Defense* case (543 F.3d 59 (2d Cir. 2008)), the Second Circuit Court of Appeals held: '[R]espect is ordinarily due the reasonable views of the Executive Branch concerning the meaning of an international treaty ….'[595] In the case of *Katingo Hadjipatera*, (40 F. Supp. 546, 548 (S.D.N.Y. 1941)), the SDNY overruled 'the government's argument in favor of immunity and denying its request for dismissal'.[596] *Sumitomo Shoji Am., Inc. v. Avagliano* (457 U.S. 176 (1982)) and *the United States v. A Granelli* (U.S. 1042 (2009)) also serve as cases in point, in which the US courts held that no deference was due when the Government's interpretation was unreasonable.[597]

Obviously there were two conflicting ways of interpreting the same convention in this case. The plaintiffs felt that 'an interpretation which gives a reasonable, lawful, and effective meaning to all the terms'[598] should be preferred to one leaving a part 'unreasonable, unlawful, or of no effect'.[599] Preference should also be given to an interpretation aimed at enlarging or supporting individual rights under the CPIUN rather than one which would restrict or even completely vitiate these rights.[600] Such an interpretation, as in the *amici curiae* of Spizz and Quigley, Art.5 (20), together with the general duty imposed on the UN Secretary-General and Art.8 (29) and more explicit examples, constitute an acknowledgment of the right of an injured or aggrieved person to access a process by which they can seek a remedy.[601] In the *Georges et al.* case, the given interpretation of the U.S. Department of Justice was not reasonable because it was based on an unreasonably decontextualised and fragmented reading of the CPIUN.[602] This explanation enables the UN to 'selectively choose among the CPIUN's benefits and

176 (1982)), and *Medellin v. Texas* (552 U.S. 491 (2008)). See: *ibid*., p.12.

[595] SDNY: the second opposition of the plaintiffs, *supra* note 435, p.6. See also: SDNY: the first opposition of the plaintiffs, *supra* note 429, p.12.

[596] SDNY: the first opposition of the plaintiffs, *supra* note 429, p.13.

[597] See: SDNY: the second opposition of the plaintiffs, *supra* note 435, pp.6 – 7.

[598] *Galli et al. v. Metz et al.* case (973 F.2d 145, 149 (2d Cir. 1992)). Cited in: SDNY: the first opposition of the plaintiffs, *supra* note 429, p.24.

[599] *Ibid*., p.24.

[600] *Asakura v. City of Seattle* (265 U.S. 332, 342 (1924)) and *Nielsen v. Johnson* (279 U.S. 47, 52 (1929)). See: *ibid*.

[601] See: SDNY: the *amici curiae* of Spizz and Quigley, *supra* note 436, p.3. Spizz and Quigley further pointed out that this kind of duty is persuasively reinforced by the UN-Haiti SOFA, which contains the UN's stated commitment to provide a remedy for private law claims by a standing claims commission. See: *ibid*., pp.5 – 6.

[602] See: SDNY: the first opposition of the plaintiffs, *supra* note 429, pp.12 – 13, 24.

obligations to evade accountability for private law torts'[603] and 'does not comport with these rules of interpretation, and ignores the legal consequences of the UN's breach'.[604] In effect, a basis such as holding that the UN's immunity is enforceable despite its breach of Art.8 (29) of CPIUN, to which the U.S. Department of Justice could resort, has never existed.[605]

This deference would have meant that the SDNY, turning a blind eye to the UN's misconduct, would have been applying the CPIUN in an unequal manner and ratifying the UN's transgressions by awarding it the protection of immunity despite its breach of the reciprocal obligations.[606] If this deference had won the approval of the SDNY, the constitutional right of the victims, as US citizens, to access the courts, which has traditionally been afforded the highest level of protection, would simultaneously have been violated.[607] Given these arguments, the plaintiffs requested the SDNY not to recognise this unfair deference, but to consider the meaning of the CPIUN cautiously and in view of the particular circumstances in the case in question.[608] Only through such consideration could the SDNY determine whether the statement of the U.S. Department of Justice was entitled to any weight.[609]

In 2015, the SDNY dismissed the plaintiffs' claims, concluding that the UN's immunity from lawsuits divests its jurisdiction *ratione persone*.[610] Given the self-executing nature of the CPIUN[611], the SDNY must, as Wickremasinghe suggested, take judicial notice of immunities *proprio motu* whether or not the UN appeared to plead it.[612] The UN enjoys this absolute immunity from suit unless it has expressly waived its immunity.[613] At the same time, the UN has failed to materially provide any alternative remedy as contemplated by Art.8 (29) of CPIUN, and the UN-Haiti SOFA does not

[603] SDNY: the second opposition of the plaintiffs, *supra* note 435, p.1.
[604] SDNY: the first opposition of the plaintiffs, *supra* note 429, p.25. See also: SDNY: the second opposition of the plaintiffs, *supra* note 435, p.6.
[605] See: SDNY: the second opposition of the plaintiffs, *supra* note 435, p.4.
[606] See: SDNY: the first opposition of the plaintiffs, *supra* note 429, pp.1, 30.
[607] See: *ibid*., pp.38, 40.
[608] See: *ibid*., pp.10, 13.
[609] See: *ibid*., p.13.
[610] See: SDNY: "*Delama Georges, et al., v. United Nations, et al.*" (hereinafter referred to as the SDNY's opinion and order), 13-CV-7146 (JPO), Opinion and Order, 9 January 2015, pp.1, 3. This document is available at: http://www.ijdh.org/wp-content/uploads/2011/11/Dkt62_Opinion_and_Order_01_09_15.pdf.
[611] See: *ibid*., p.4.
[612] See: Chanaka Wickremasinghe: "International Organizations or Institutions, Immunities before Nation Courts", in: *Oxford Public International Law*, Oxford University Press, 2013, para.8. This paper is available at: http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e502?rskey=v0AXm6&result=1&prd=OPIL.
[613] See: the SDNY's opinion and order, *supra* note 610, pp.4 – 5.

constitute an exception to its enjoyment of jurisdictional immunity.[614] Moreover, nothing in the text of the CPIUN suggests that the absolute immunity of Art.2 (2) is conditional on the UN's providing alternative modes of settlement as contemplated by Art.8 (29).[615] The plaintiffs subsequently sought the right to appeal to the United States Court of Appeals,[616] and the Second Circuit Court of Appeals began to hear the oral arguments in 2016.[617]

### 2.4 The limitations of the doctrine of 'exhaustion of domestic remedies' in the future statute of the WCHR

The obstacle of jurisdictional immunity will surface whenever proceedings are instituted against the UN before domestic courts. As the *amici curiae* of Kupferman *et al.* pointed out, the cases discussed in **Section 2.3** raise the question of how to balance the immunity necessary for the UN to conduct its work without interference with the fundamental need to protect the individuals' right against abuse.[618] From a legal perspective, any effective remedy would mean that the rights-holder, as an independent, neutral body, was able to sue the duty-bearer before a court with the power to decide in a binding manner whether or not the duty-bearer had violated their obligations. If such a court were to find that the duty-bearer had violated certain obligations, it would have the power to order the duty-bearer to provide reparation to the rights-holder.[619] In the sense of human rights law, nation states play a vital role in giving individual victims access to effective and enforceable remedies where violations have occurred. However, 'many national systems do not provide access to effective domestic protection systems for human rights'.[620] Perhaps one conclusion which can be drawn from **Sections 2.2** and **Section 2.3**

[614] See: *ibid*., p.5.
[615] See: *ibid*.
[616] SDNY: "Delama GEORGES, individually and on behalf of the Estate of Desilus GEORGES and all others similarly situated; Alius JOSEPH, individually and on behalf of the Estate of Marie-Claude LEFEUVE and all others similarly situated; Lisette PAUL, individually and on behalf of the Estate of Fritznel PAUL and all others similarly situated; Felicia PAULE, individually and on behalf of all others similarly situated; Jean-Rony SILFORT, individually and on behalf of all others similarly situated, (Plaintiffs), v. United Nations; United Nations Stabilization Mission in Haiti(UNSTAMIH); Ban Ki-Moon, Secretary-General of the United Nations; and Edmond Mulet, former Under-Secretary-General for the United Nations Stabilization Mission in Haiti", Civil Case No. 1:13-CV-07146 (JPO), Notice of Appeal, 12 February 2015, available at: http://www.ijdh.org/wp-content/uploads/2011/11/Dkt.64.pdf.
[617] Given that the appellate procedure is still a work in progress at the time this dissertation was written, this case study is limited to the procedure of first instance.
[618] See: the *amici curiae* of Kupferman *et al.*, *supra* note 436, p.1.
[619] Nowak and Kozma, *supra* note 11, p.15.
[620] Nowak and Kozma, *supra* note 11, p.3.

is that this kind of immunity would make the WCHR's complementary jurisdiction meaningless if the WCHR were to rely solely on a clause requiring exhaustion of domestic remedies.

### 2.4.1 A dilemma for the domestic courts: whether to respect the UN's jurisdictional immunity or protect the right of access to a court?

According to the exhaustion requirement, individuals claiming harm from the operation of the UN must first exhaust all possibilities for domestic remedy before referring the case to regional or international human rights mechanisms. As a result, they have no means to access justice without first pursuing it through their national court. The right to an effective remedy forces the Member States to provide access for individual victims to effective and enforceable remedies where violations have occurred.[621]

Although the claims in the above cases differ widely, they have cumulatively raised intense concerns about the UN's immunity from legal process and the obligations of states with regard to human rights. On the one hand, each Member State, as a party to the CPIUN, has to guarantee the immunity that allows the UN to fulfil the functions it was established to conduct. On the other hand, each Member State, as the principal duty-bearer for human rights, must protect its nationals from human rights violations in whatever form, and regardless of the perpetrator, to the fullest extent of its capacity. To fulfil this obligation, a state must uphold the right of access to the courts as a prerequisite for materialising the right to an effective remedy. Accordingly, in the case of the UN, a Member State must enable individuals to bring an action against the UN before the domestic courts.

In the cases discussed above, the states concerned faced a dilemma: they could either respect the UN's immunity at the expense of an individual litigant's right of access to a court, or prioritise the right of access to a court over the UN's immunity. If the UN 'violates human rights, the state may be unable to fulfil both obligations simultaneously and must violate one or the other'.[622] The *Srebrenica* case, for instance, graphically demonstrated this binary choice. As the AC Hague found in the *Srebrenica* case: 'In this

[621] An argument emphasises the role of human rights mechanisms in implementing the right to an effective remedy from a procedural aspect, considering that they are concerned, "not with the substance of human rights, but its processes – that is, with the place and the way in which victims … can have a remedy." See: British Columbia, Legislative Assembly, Hansard Vol. 9, No. 5 (23 October, 2002) at 3985 (Hon. Geoff Plant).

[622] Singer, *supra* note 306, pp.97 – 98.

field of tension the pros and cons must be balanced between two very important principles of law in their own right, of which in the end only one can be deciding.'[623] According to Brockman-Hawe's study, the Dutch courts 'potentially faced the difficult choice of either forcing the Netherlands to violate its UN Charter responsibilities or setting the stage for a claim before the ECHR that the Netherlands violated its international law obligation to provide access to a court'.[624]

To some scholars, the existence of this kind of dilemma partly reflects a deep-seated ambivalence of the State Parties to the CPIUN. As Singer pointed out:

> On the one hand, the state has a stake in the international organization and therefore wants to see the organization fulfill its purposes. … On the other hand, the state wants its laws to be obeyed within its territory. Furthermore, it wants to maintain public order and respect for the rights of persons within its territory.[625]

At the same time, however, these courts would do their utmost 'to avoid the conclusion that the state has assumed conflicting international obligations'.[626]

For individuals, domestic remedies have effectively been exhausted if the domestic courts which would have the power to approve or reject their claims have chosen to stand on the side of the UN. This may amount to the denial of justice (*denegatio justitiae*), which 'has been regarded in the treaty law as a legitimate condition for waiving the local remedies rule'.[627] In this context, individual applicants may seek legal remedies at either a regional or an international level.

In the European context, for example, applicants are no longer permitted to name the UN as a defendant before the ECtHR, because the ECtHR's contentious jurisdiction has been kept within strict boundaries. According to Arts.32 – 34 of the ECHR, the ECtHR is only competent to examine inter-state complaints and applications by individuals against the Contracting States. The ECHR does not authorise the ECtHR to hear any case to which the Organisation is a party. Therefore, applicants may only challenge a judgment rendered by the State, which has granted the UN jurisdictional immunity from being sued before it.

The ECtHR has developed the jurisprudence about the responsibility of Contracting

---

[623] The 2010 judgment, *supra* note 333, 5.9.
[624] Benjamin E. Brockman-Hawe: "Questioning the UN's Immunity in the Dutch Courts: Unresolved Issues in the Mothers of Srebrenica Litigation", in: *Washington University Global Studies Law Review*, Vol. 10, Issue 4, 2011, pp.727 – 748, at 732.
[625] Singer, *supra* note 306, p.55.
[626] *Ibid*., p.98.
[627] Adede, *supra* note 263, p.11.

States for violations of the Convention rights committed through acts of the UN. However, it has long taken an ultra-cautious attitude on the UN's jurisdictional immunity, so as to prevent itself from being an impediment to the UN's appropriate fulfilment of its respective functions. According to Verdirame's observation, marked by the *Matthews v. United Kingdom* case, the ECtHR gradually shaped firm belief that it has no jurisdiction *ratione personae* in individual complaints directly against international organisations.[628]

The *Stichting Mothers of Srebrenica and Others* v. *the Netherlands* case before the ECtHR gives rise to a more elaborate argument. In this case, the ECtHR did not see itself as a competent body to 'consider whether the UN Secretary-General was under any moral or legal obligation to waive the UN's immunity'.[629] Instead, the ECtHR devoted a large part of its judgment to determining whether the defendant State had violated the applicants' right of access to a court, as guaranteed in Art.6 (1) of the ECHR, by granting the UN immunity from domestic jurisdiction.[630] In 2013, the Association *et al*. submitted an individual complaint against the Netherlands to the ECtHR. Concerning the granting of immunity to the UN, the applicants firstly complained that under Art.6 of the ECHR, the immunity thus granted had violated their right of access to a court.[631] Secondly, according to the text of Art.105 of the UN Charter, the term 'functional' should not in any event be equated with that of 'absolute'.[632] The Dutch courts had thus failed to establish whether a functional need for such immunity existed.[633] Thirdly, the Dutch courts had failed to take into account Art.8 (29) of CPIUN.[634] This Article, argued the applicants, demonstrated 'a perceived need to avoid situations in which the immunity of the United Nations would give rise to a *de facto* denial of justice'.[635] In addition, under Art.13 of the ECHR, they argued that the granting of immunity to the UN allowed the Netherlands to evade its liability towards the applicants by laying all the blame on the UN, and thus depriving their claims of all their substance.[636]

In the first place, the ECtHR found Art.6 (1) of the ECHR to be applicable in this

[628] See: Guglielmo Verdirame: "Breaches of the European Convention on Human Rights resulting from the conduct of international organizations", in: *European Human Rights Law Review*, Vol. 2, 2008, pp.209 – 213, at 209.
[629] *Stichting Mothers of Srebrenica and Others v. the Netherlands*, application no. 65542/12, Third Section Decision, 11 June 2013, para.137.
[630] See: *ibid.*, paras.135 – 170.
[631] See: *ibid.*, paras.112, 121, 132.
[632] See: *ibid.*, para.122.
[633] See: *ibid*.
[634] See: *ibid.*, paras.122, 133 – 134.
[635] *Ibid.*, para.125.
[636] See: *ibid.*, paras.113, 166.

case,[637] and ruled that where immunity from jurisdiction is granted to the UN, the right of access to court guaranteed by this Article is affected.[638] However, the Court later found that, according to the principles established by itself in case law, the right of access to a court is not absolute, but may be subject to inherent limitations.[639] These limitations must be permitted because the right of access, by its very nature, calls for regulation by the Netherlands, and the Netherlands enjoys a certain margin of appreciation (MoA) in this respect.[640] Of course, the requirement that no limitation should be applied to restrict or reduce the access left to the Associations *et al.* or to impair the very essence of the right of access must be satisfied,[641] but at the same time, each limitation must pursue a legitimate aim and should not amount to an unreasonable relationship of proportionality between the means employed and the aim sought to be achieved.[642]

Secondly, it is a long-standing and important recognition by the ECtHR that the immunity from jurisdiction accorded by the Netherlands to the UN under the UN Charter and the CPIUN was established in the interests of the good working of the Organisation.[643] The immunity from domestic jurisdiction afforded to the UN, in this case, has a legitimate objective.[644] To the ECtHR, at the root of the *Srebrenica* case is a dispute between the applicants and the UN based on the use by the UN Security Council of its powers under Chapter VII of the UN Charter, which is fundamental to the mission of the UN to secure international peace and security.[645] Approving the Association *et al.*'s claims would create the illusion that the ECtHR *de facto* could interpret the ECHR in a manner which would subject the acts and omissions of the UN Security Council to domestic jurisdiction without the accord of the UN.[646] Bringing the operations of the UN under domestic jurisdiction would, in turn, be to allow the Netherlands, through its courts, to interfere with the fulfilment of the key mission of the UN, including the effective conduct of its operations.[647]

As far as the ECtHR was concerned, the argument of the Association *et al.* that the

[637] See: *ibid.*, paras.119 – 120.
[638] See: *ibid.*, paras.138.
[639] See: *ibid.*, paras.139 (b), (e).
[640] See: *ibid.*, para.139 (b).
[641] See: *ibid*.
[642] See: *ibid*.
[643] See: *ibid*, para.139(c).
[644] See: *ibid*.
[645] See: *ibid*, paras.152, 154.
[646] See: *ibid*, para.154.
[647] See: *ibid*.

cloak of immunity protecting the UN should be removed because of the alleged breach of the prohibition of genocide as a rule of *jus cogens* by the UN lacked legal basis. According to resolution 60/147 of the General Assembly, while recalling the provisions providing a right to a remedy for the victims of violations of international human rights law found in numerous international instruments,[648] the guarantee of this right should be under existing international law.[649] However, the *Srebrenica* case does not concern criminal liability, but rather immunity from domestic civil jurisdiction.[650] What is more, '[i]nternational law does not support the position that a civil claim should override immunity from suit for the sole reason that it is based on an allegation of a particularly grave violation of a norm of international law, even a norm of *ius cogens*'.[651]

With respect to the UN's obligations under Art.8 (29) of CPIUN, the ECtHR admitted that, in the case at bar, reasonable alternative means to effectively protect the right of access to a court under the ECHR was not available to the Association *et al.,* either under Dutch law or the law of the UN.[652] However, it may seem far-fetched that, in the absence of an alternative remedy, immunity given to the UN by the Dutch courts would be *ipso facto* constitutive of a violation of the right of access to a court.[653] This state of affairs was not imputable to the Netherlands, and Art.6 (1) of the ECHR did not compel the Netherlands to provide a remedy against the UN in its own courts.[654] Nor would the ECtHR create, by way of interpretation of Art.6 (1) of the ECHR, a substantive right which had no legal basis in the Netherlands because this Article did not guarantee any particular content for the right, as such, in the substantive law of the Contracting States.[655]

The ECtHR did not issue a ruling on the possibility that the Netherlands was attempting to evade its own accountability towards the applicants for the failure to prevent the Srebrenica massacre from happening.[656] The ECtHR finally concluded that the granting of immunity to the UN by the Dutch courts served a legitimate purpose and was not disproportionate, and that the plea was accordingly ill-founded and must be rejected.[657]

---

[648] See: General Assembly: "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law", A/RES/60/147, 16 December 2005, Preamble.
[649] See: Stichting Mothers of Srebrenica and Others v. the Netherlands, *supra* note 629, para.161.
[650] See: *ibid*, para.154.
[651] See: *ibid*, para.158.
[652] See: *ibid*, para.163.
[653] See: *ibid*, para.164.
[654] See: *ibid*, para.165.
[655] See: *ibid*, para.168.
[656] See: *ibid*, para.167.
[657] See: *ibid*, paras.169, 170.

It can be said that, in a sense, the judgments rendered by the domestic courts in relation to the UN's jurisdictional immunities also affect the judgments of the regional human rights courts.[658] According to Brockman-Hawe:

> Because the ECHR obliges States only to extend ECHR protections to everyone within their jurisdiction, granting immunity to an international organization removes the acts of that organization from the scope of national jurisdiction and, therefore, removes the UN from the subject matter jurisdiction, or *ratione materiae*, of the European Convention.[659]

It may also be sufficient to draw the conclusion that, within the current international human rights system, neither the domestic courts nor the existing regional human rights courts is competent to dismiss the UN's jurisdictional immunity in particular cases.

### 2.4.2 Reinforcing the competence of domestic courts by expanding their jurisdiction

After years of practice, the UN has, more often than not, been deemed to be acting within the scope of its duties, and absolute immunity has been granted to the UN in almost all circumstances. Most, if not all, of the cases examined reveal that the self-executing nature of the CPIUN means that domestic courts are, to a certain extent, not capable of addressing 'whether it is necessary for the realization of those objectives that the UN is granted immunity from prosecution *in general*'.[660] As Wickremasinghe said:

> [t]he national court should take judicial notice of immunities *proprio motu* whether or not the international organization in question appears to plead it. Where an international organization files a response to suit, or makes an appearance solely for the purposes of asserting its immunity, it will not be deemed to have submitted to the jurisdiction.[661]

On many occasions, national courts might have had no choice but to find *ab invito* the UN's jurisdictional immunity applicable.

The decision to invoke or waive immunity is usually left to the discretion of the UN.

---

[658] See: Aurel Sari: "Jurisdiction and International Responsibility in Peace Support Operations: The Behrami and Saramati Cases", in: *Human Rights Law Review*, Vol. 8, No. 1, 2008, pp.151 – 170, at 166.
[659] Brockman-Hawe, *supra* note 624, p.740.
[660] The 2010 judgment, *supra* note 333, 4.4.
[661] See: Wickremasinghe, *supra* note 612, para.8.

As the ICJ held in the *Cumaraswamy* case, with the exception of 'the most compelling reasons', the UN Secretary-General remains the ultimate arbiter regarding what constitutes official duties.[662] In theory, however, this discretion could be suspected of impeding the course of justice.[663] On the one hand, jurisdictional immunity for the UN and its personnel has contributed to the safeguarding of the UN's ability to function. On the other hand, it has, in effect, served as a sort of amulet for potential or actual human rights violations to hide behind. Bekker also recognised the danger that international immunities might leave claimants without a forum for the enforcement of legitimate claims.[664]

If this suspicion were to be confirmed, the UN's immunity 'would be contrary to the values that support a United Nations'[665] and inimical 'to the countries that are asked to grant such immunities.'[666] Given this, some suggest expanding the jurisdiction of the domestic courts to enable them to make a substantial review of the UN's immunity in certain cases. In the opinion of these people, no one will ever be able to guarantee that the UN's immunity is always in conformity with human rights standards unless the competence of domestic jurisdiction is strengthened.

Firstly, the broad granting of immunity may violate an individual's right to an effective remedy and even to the whole cluster of human rights. In this regard, Paust's viewpoint is plain-spoken:

> For the victims of human rights violations, immunity can continue the suffering from violations and result in one more form of oppression, one less measure of human dignity. All forms of immunity ultimately threaten the dignity and worth of each human being addressed in the preamble to the UN Charter, the preamble to and Art.1 of the UDHR, and the preamble to the ICCPR.[667]

---

[662] Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, *supra* note 211, paras.60, 61.
[663] See: for example, Brower, *supra* note 286, p.31; Peter H. F. Bekker: The Legal Position of International Organizations: a functionary necessity analysis of their legal status and immunities, The Hague: T.M.C. Asser Instituut, 1994, p.192, and Jenks, *supra* note 305, p.45.
[664] See: Bekker, *supra* note 663, p.184.
[665] Jordan J. Paust: "The U.N. Is Bound By Human Rights: Understanding the Full Reach of Human Rights, Remedies, and Non-immunity: Responding to Tom Dannenbaum, Translating the Standard of Effective Control into a System of Effective Accountability", in: *Harvard International Law Journal Online*, Vol. 51, 2010, pp.1 – 12, at 9.
[666] Study on Privileges and Immunities Transmitted by the Preparatory Commission of the United Nations to the First Part of the First Session of the General Assembly (Annex V), in: *Report of the Preparatory Commission of the United Nations* (Preparatory Commission of the United Nations, 1945), Chapter VII, p.64. Cited in: Martin Hill: *Immunities and Privileges of International Officials: The Experience of the League of Nations*, Washington: Carnegie Endowment for International Peace, 1947, p.208.
[667] See: Paust, *supra* note 665, p.9.

As a result, limiting such immunity is in conformity with the human rights obligations of the State in each case. International human rights instruments also 'envisaged the local remedies role as directly related to the State's duty to provide effective domestic remedies'.[668] According to the HRC General Comment No.20, 'States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible.'[669]

Secondly, the granting of jurisdictional immunity under the CPIUN should be interpreted carefully. The advocates for strengthening the competence of domestic courts obviously believe in the existence of a link between Art.2 (2) and Art.8 (29) of CPIUN. It is their view that the UN's immunity has no higher status in the hierarchy than the relation between the UN's jurisdictional immunity and the right to access to the court. For example, as Zwanenburg, said: 'There is no reason why the obligation for a state to respect the immunity of an international organization should automatically prevail over its obligation to grant access to court.'[670]

It can be found, however, that the key point in this argument is that Art.8 (29) should be regarded as a provision of a higher order and that non-fulfilment of the obligation contained therein may lead domestic courts to ignore the UN's immunity. In Muller's eyes, the development of a system which provides adequate means of redress should prevail over the functional needs of an international organisation.[671] Based on this understanding, the concern that if they are allowed to remain unaware of the reciprocal obligation of immunity UN elites might tend to prefer a common immunity for themselves at the expense of human rights, seems justifiable. The lack of an appropriate remedial mechanism within the framework of the UN to carry out the legality test leaves individuals without any direct means of protection.[672] To Seyersted, a successful claim for jurisdictional immunity, combined with the absence of adequate alternative methods of protection, could easily amount to a denial of justice.[673] In this sense, establishing a

[668] See: D'Ascoli and Scherr, *supra* note 264, p.15.
[669] HRC: CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), Adopted at the Forty-fourth Session of the Human Rights Committee, on 10 March 1992 [Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment], 10 March 1992, para.15.
[670] Zwanenburg, *supra* note 124, p.38.
[671] Muller, *supra* note 482, p.282.
[672] See: Karel Wellens: *Remedies Against International Organizations*, Cambridge: Cambridge University Press 2004, p.89.
[673] See: Finn Seyersted: "Settlement of Internal disputes of intergovernmental Organisations by Internal and external Courts", in: *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (ZaöRV), Vol. 24, 1964, pp. 1 – 121, at 79.

competent body to examine whether the UN has fulfilled its obligation under Art.8 (29) of CPIUN and other relevant international instruments is a necessity. As a basic international human rights standard, this kind of system is essential for each to obtain relief for the rights violated.[674]

The ILA Committee also noted the potential role of domestic courts. At the Berlin conference, the ILA Committee pointed out that two considerations should be duly taken into account when assessing this role. There is an obligation for the UN to make provision for appropriate methods of settlement under Art.8 (29) of CPIUN, and there is an obligation under human rights instruments for states to provide access to court in certain situations.[675] States may be violating their human rights obligations if they grant immunity to the UN in the absence of adequate alternative remedial mechanisms.[676] The ILA Committee was inclined to support the argument that the role of domestic courts should be reinforced to take account of the human rights imperative.[677]

In addition, they were inclined to recognise that the UN's absolute jurisdictional immunity may have conveyed the impression that the UN remains entirely above the law and has provided itself with an excessive shield that blurs the judicial accountability for human rights violations. Put another way: invoking jurisdictional immunity indiscriminately in all cases would further generate an amulet for human rights violations to hide behind, meaning they could be committed with impunity, thus sullying the reputation of the UN. Reinforcing the competence of domestic courts may keep the UN's immunity from continuing to infantilise the judicial, and even the remedial, function of the domestic courts, and prevent this immunity from helping to create an air of impunity. In doing so, the UN 'can only act within the scope of their functional personality [and] there is no room left for non-functional acts for which immunity would be denied'.[678] Worse still, the UN would be presumed 'to be illegitimate if its practice or procedures predictably undermine the pursuit of the very goals in terms of which it justifies its existence'.[679]

The introduction of a system of national courts of human rights by the NK Statute can be viewed as an attempt to reinforce the competence of domestic courts. These courts, in

---

[674] See: *ibid.*
[675] International Law Association, Committee on Accountability of International Organisations, *supra* note 131, p.48.
[676] *Ibid*.
[677] *Ibid*., pp.48 – 49.
[678] Reinisch and Weber, *supra* note 486, p.63.
[679] Allen E. Buchanan and Robert O. Keohane: "The Legitimacy of Global Governance Institutions", in: *Ethics & International Affairs*, Vol. 20, Issue 4, 2006, pp.405 – 437, at 423.

the opinion of Nowak and Kozma, are expected to bring about 'a more effective domestic implementation of international human rights treaties and act as last instance before a complaint can be brought before the World Court'.[680] In other words, these courts would in principle be vested with the same powers as the WCHR[681] and 'the exhaustion of an appeal to the national human rights court is a precondition for the admissibility of a complaint by the World Court'.[682] The national human rights courts would be required to make the respective human rights treaties directly applicable within the territory of the State Party.[683] In the eyes of Nowak and Kozma, 'the functions of the national court of human rights can also be carried out by more than one domestic court.'[684] Specifically, with regard to complaints against the UN under the jurisdiction of a State Party, the national court of human rights would have the same competences as the WCHR.[685] The NK Statute would require the national court of human rights to decide cases in a final, domestic manner and afford adequate reparation to the victim.[686]

### 2.4.3 Legal barriers to expanding the jurisdiction of domestic courts

For States, reinforcing the competence of domestic jurisdiction as such would urge the domestic courts to promptly abandon the long practice of acknowledging the UN's absolute immunity and turning against this practice instead. This kind of 180-degree change as such seems too dramatic to accomplish in a short period. To the advocates for strengthening the competence of domestic courts, the approach to interpret and apply the UN's jurisdiction immunity has posed a stumbling block to accountability of the UN. They arrived at a conclusion that UN's jurisdictional immunity has indeed resulted in its impunity of human rights violations. Some go so far as to say that the UN's immunity from any scrutiny from national jurisdiction are facing various critics in relation to the proper protection of human rights of claimants.

In fact, the thought of reinforcing the competence of domestic courts is not an innovative attempt to establish a system of accountability for the UN. The international

---

680 Nowak and Kozma, *supra* note 11, p.8. See also: Art.10 of the NK Statute.
681 See: Nowak and Kozma, *supra* note 11, pp.6, 21.
682 Nowak and Kozma, *supra* note 11, p.21. See also: *ibid.*, pp.6, 62; Arts.1 (2), 11 (1) of the NK Statute.
683 See: Nowak and Kozma, *supra* note 11, p.8.
684 *ibid*., p.5. See also: Art.10 (1) of the NK Statute.
685 See: Nowak and Kozma, *supra* note 11, pp.5 – 6.
686 See: *ibid*., p.6.

community has long noted a need for the creation of adequate remedies to allow individuals to seek redress from the UN where this has not already been done, and the absence of direct access to an international dispute settlement body. The advocates for strengthening the competence of domestic courts seem to believe that the real problem lies in the lack of a firm line beyond which the interference of the domestic jurisdiction would not apply. From the *lex ferenda* perspective, precise boundaries between the UN Secretary General and its Member States concerning the granting of organisational immunity could be delineated. As a result, they suggest envisaging a more positive role for domestic courts.

In a sense, the system of national human rights courts introduced by the NK Statute embodies the concept of strengthening the competence of domestic courts. As a complementary system of remedies, the future WCHR should not play the role of the appellate court of national courts. Instead, the role of the WCHR is 'to address instances where a State is unable or unwilling to provide remedies for violations or where such remedies are ineffective'.[687] At the same time, to avoid overburdening the future WCHR, strengthening domestic jurisdiction is certainly a good idea.

As for the purpose of reinforcing the competence of domestic jurisdiction, this is to prompt the UN to apply its immunity in an appropriate manner and to waive its jurisdictional immunity under certain conditions, which is what Singer called the 'voluntary waiver'.[688] Art.105 (3) of the UN Charter authorises the General Assembly to make recommendations on the application of jurisdictional immunity, so as to prevent unjustifiably broad claims to this immunity. To the extent that the implementation of this Article usually falls within UN Secretary-General's competence, this discretion could be interpreted in the following way: the UN Secretary-General is also encouraged, according to the functional necessity doctrine, to waive the immunity if doing so is without prejudice to the interests of the UN. The *bona fides* principle, as one of the general principles of international law, 'requires the waiver of unnecessary immunities even if not mandated by an express treaty provision'.[689] However, the waiver of immunity has been very rare in practice. The case studies in **Section 2.3** have shown that the UN Secretary-General was not prepared to consider whether the UN's conduct in a given question complied with the

[687] International Commission of Jurists: "Towards a World Court of Human Rights: Questions and Answers", Supporting Paper to the 2011 Report of the Panel on Human Dignity, December 2011, p.2. This paper is available at: http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2013/07/World-court-final-23.12-pdf1.pdf.
[688] See: Singer, *supra* note 306, pp.73 – 74.
[689] Brower, *supra* note 286, p.33.

functional necessity principle and, without exception, jurisdictional immunity was invoked.

At the same time, the advocates for strengthening the competence of domestic courts believe that the granting of jurisdictional immunity must yield to the superior claim of human rights in the UN Charter. For example, as Singer has said: 'If the human rights norms can be derived from the UN Charter, then it must prevail because Charter obligations are preeminent.'[690] According to Art.103 of the UN Charter, in the event of a conflict between the obligations of the Members of the UN under the Charter and their obligations under any other international agreement, their obligations under the Charter shall prevail. The granting to the UN of jurisdictional immunity may result in a deprivation of the right to an effective remedy, and thus constitute a deviation from the human rights clauses laid down in the UN Charter, and in Art.1 (3) and Art.55 (c) in particular. It should be noted, however, that the guarantee of immunity to the UN can also be found in Art.105 of the UN Charter. From this perspective, the hierarchical relationship between the obligation to protect human rights and that of guaranteeing the UN jurisdictional immunity is not clear enough.

Seen from the perspective of legal consequences, reinforcing the competence of domestic jurisdiction would mean that the UN's immunity might possibly be overruled by domestic courts. However, in law, no provision has explicitly stipulated under what conditions the domestic courts could exercise jurisdiction over the UN, or in what circumstances the UN must waive its jurisdictional immunity. There has been no comprehensive statement from the Secretary General about when a waiver is obligatory. In this context, the argument that extending the jurisdiction of domestic courts may amount to an undue encroachment on the autonomy of the UN, and thus undermine the significance of the UN's jurisdictional immunity, seems to be reasonable. As Brower pointed out, 'any attempt to expand the jurisdiction of domestic courts would upset the General Convention's deliberate structure'.[691] To Dekker and Schechinger, this expansion would mean 'the essence of functional immunity would be lost for all practical purposes'.[692] Brockman-Hawe were also of the opinion that: 'If the UN's immunity is not absolute, there

[690] Singer, *supra* note 306, p.97.
[691] Brower, *supra* note 286, p.34.
[692] Guido den Dekker and Jessica Schechinger: "The Immunity of the United Nations Before the Dutch Courts Revisited", in: *The Hague Justice Portal* 2 (June 4, 2010), p.3. This paper is available at: http://www.haguejusticeportal.net/Docs/Commentaries%20PDF/HJJ_Immunity_of_UN_EN.pdf.

is nothing to prevent national courts from exploring the limits of that immunity.'[693]

Reconciling the maximising of justice for individual complaints from any part of the world where a UN mission has been deployed by expanding domestic jurisdiction with the maintenance of the UN's organisational interest under the current legal framework, without prejudice to human rights treaties, is proving difficult. In view of this, the authors of the current statutes have put forward a proposal, as the MS Statute and the Consolidated Statute indicate, of establishing a new UN-WCHR circuit outside of the long-established UN-States box. This brand new circuit would come into being under the 'exhaustion of internal remedies' clause. This will be elaborated upon in **Section 3**.

[693] Brockman-Hawe, *supra* note 624, p.737.

## Section 3 The Application of the Rule of Prior Exhaustion of Internal Remedies in the Context of the UN's Jurisdiction Immunity

The rule requiring the prior exhaustion of internal remedies can be understood from two perspectives: that of the UN and that of the applicants. In terms of the UN, the rule of prior exhaustion of internal remedies represents a basic requirement of good governance. In the context of the UN's jurisdictional immunity, providing remedies for damages incurred as a result of acts performed by the UN or by its agents, acting in their official capacity under Art.8 (29) of CPIUN, might have been defined as nothing more than a voluntary commitment. According to this rule, despite its jurisdictional immunity, the UN 'remains bound by its obligation to provide adequate alternative procedures for settling the dispute, and should faithfully comply with this obligation'.[694] The requests for redress or applications for remedies should, as a general rule, first be addressed to the UN itself, since the Organisation remains fully accountable for the actions and omissions` of all of its constituent organs.[695] By the same token, the imperative of justice also requires that measures be taken to protect all those potentially or actually affected by undue exposure to loss and damage flowing from the acts, conduct or omission of the UN. The formulation of the rule of prior exhaustion of internal remedies will entail a legal obligation for the UN to respond to requests for redress, or applications for remedies, for the harms arising from a UN operation.

From the point of view of the applicants, the imperative of justice calls for innovative procedures which will allow those individuals actually or potentially affected by the operations of the UN to have their claims heard before a competent body. By opening the doors of international courtrooms to the UN, the formulation of this rule will ensure that those who are actually or potentially affected by the operation of the UN can have their claims adjudicated before the WCHR, and get espousal from the Court once the internal remedies established by the UN have been exhausted.

### 3.1 Two point-in-time of the established 'internal remedies'

[694] International Law Association, Committee on Accountability of International Organisations, *supra* note 131, p.48.
[695] See: Wellens, *supra* note 672, p.50.

As mentioned above, the rule of prior exhaustion of internal remedies would turn the UN's voluntary commitment into a legal obligation incumbent upon the UN. However, this rule is also designed by and for the benefit of the UN. As with the rule of prior exhaustion of local remedies, the rule of prior exhaustion of internal remedies provides the necessary preconditions for any serious attempt at remedial action against it to be submitted to the WCHR. By reference to the rule of exhaustion local remedies, the rule of prior exhaustion of internal remedies will give the UN an opportunity to redress an alleged wrong through the establishment and maintenance, or the designation of, appropriate self-correcting and remedial mechanisms, before its international responsibility can be called into question.

### 3.1.1 The originally declared 'internal remedies' when the UN accepts the jurisdiction of the WCHR

'Originally declared internal remedies' refers to the remedies declared by the UN when it accepts the jurisdiction of the WCHR. According to the authors of the current statutes, the UN may stipulate which internal or other remedies must be exhausted before a complaint can be submitted to the WCHR. The complainants, in general, are entitled to submit complaints about the UN to the WCHR if they have exhausted all the internal remedies declared by the UN. A major concern behind this rule is the concrete forms of these internal remedies in the sense of the future WCHR statute. None of the current statutes contains any detailed provisions on this issue, and reference should be made with regard to the rule of exhaustion of domestic remedies.

As stipulated in Art.9 (3) of the Consolidated Statute, the declared internal remedies of the UN should not operate with prejudice to the application of paragraphs 1 and 2 of the same Article concerning the exhaustion of domestic remedies. According to this Article, the rule of exhaustion of internal remedies should not be applied in such a way as to compete with that governing the exhaustion of domestic remedies, at least literally. Be that as it may, this Article may also mean that the well-developed rule of exhaustion of domestic remedies', which has long been an overwhelming majority of international jurisprudence collectively represented by the existing human rights mechanisms, could be a significant reference.

As mentioned in **Chapter Three**, **Section 2**, the rule of exhaustion of domestic remedies in the sense of the NK Statute and the Consolidated Statute limiting domestic

remedy exclusively to the judicial remedies provided by the national courts.[696] Under the NK Statute, it is an admissibility criterion for a complaint to the WCHR to have first exhausted the domestic remedy provided for by the national court of human rights.[697] Judicial remedies were not mentioned specifically as 'domestic remedies' in the sense of Art.13 (1) (a) of the MS Statute. On this issue, the Consolidated Statute seconds the NK Statute. As provided for in Art.9 (1):

> The Court may only deal with any individual complaint if the complaint has first been submitted to the highest competent domestic court in the respective State Party ... Each State Party has an obligation to ensure that all applicants have access to effective judicial remedies in relation to all human rights enshrined in the applicable human rights treaties. Each State Party may identify … the judicial remedies which applicants must exhaust under their domestic system ….

The pivotal role of judicial remedies needs not be questioned. Judicial remedies represent a court-to-court connection between the two legal realms: the domestic judicial procedures and such international proceedings as may be instituted. As Romano said: 'Practically, domestic courts are generally better placed to determine the facts of, and the law applicable to, any given case, and, where necessary, to enforce an appropriate remedy'.[698] He went further, saying that:

> The rule of prior exhaustion of domestic remedies (also known as the ''domestic remedies'' rule) essentially stipulates that claims of violations of an individual's rights cannot be brought before an international adjudicative body or procedure unless the same claim has first been brought before the competent tribunals of the alleged wrongdoing State, and these judicial remedies have been pursued, without success, as far as permitted by local law and procedures.[699]

Undoubtedly, seeking judicial remedies within the UN system could prove to be a form of 'internal remedies' worth considering. A system of judicial review for the legality of organisational acts and operational activities is a necessity through which individual complainants 'may be given the right to sue the organisation before … internal courts'.[700]

---

[696] See: Chapter Three, Section 2, pp.173 – 179, 180 – 187.
[697] See: Art.10 of the NK Statute, Nowak and Kozma, *supra* note 11, pp.6, 21.
[698] Cesare P. R. Romano: "The Rule of Prior Exhaustion of Domestic Remedies: Theory and Practice in International Human Rights Procedures", in: Nerina Boschiero, Tullio Scovazzi, Cesare Pitea, *et al.* (eds.): *International Courts and the Development of International Law: Essays in Honour of Tullio Treves*, The Hague: Berlin; Heidelberg: Asser Press; Springer, 2013, pp.561 – 572, at 564.
[699] *Ibid*., p.561.
[700] Seyersted, *supra* note 673, p.41.

As the Institut de Droit International expressed in 1957:

> [F]or every particular decision of an international organ or organization which involves private rights or interests, there be provided appropriate procedures for settling by judicial or arbitral methods juridical differences which might arise from such a decision.[701]

To the ILA Committee, international organisations have the inherent power to establish their own internal courts, which would have jurisdiction to deal with such cases, and there is no alternative jurisdiction which could reasonably contest the acts of the international organisation.[702]

In the case of the UN, however, the court-to-court connection that has been established in the relationship between the national courts and the existing human rights mechanisms (certainly the regional human rights courts concerned) is unlikely to be applicable. There is an interest in pursuing remedial actions to establish the basis of liability that the Organisation might incur as a result of its default in human rights.[703] **Sections 1 and 2 of this Chapter** have indicated the proliferation of the UN' activities and the ensuing variety of disputes involving the Organisation as a respondent party. It is therefore unwise to advocate a 'one-size-fits-all' formula since requests for redress or applications for remedies vary in different cases. As Wellens has pointed out, 'it would be unwise and unrealistic to attempt and to expect to accommodate the diversity of claims adequately by providing one single, comprehensive, all-encompassing remedial mechanism'.[704]

Wellens based this viewpoint on a division of the three levels of the UN's accountability, and was of the opinion that different remedial actions would be appropriate for those respective levels of accountability. Specifically, the remedial mechanisms for the first level of accountability should take place 'irrespective of potential and subsequent liability and/or responsibility'.[705] At this level, the UN is subject to forms of internal and external scrutiny and monitoring when fulfilling its responsibilities as laid down in the UN

---

[701] Institut de Droit International: Final Resolution on "Judicial Redress against the Decisions of International Organs", Amsterdam Session, 24 September 1957, III, 1. This resolution is available at: http://www.justitiaetpace.org/idiE/resolutionsE/1957_amst_02_en.pdf.

[702] See: International Law Association, Committee on Accountability of International Organisations, *supra* note 131, p.35; Seyersted, *supra* note 673, pp.28, 40 – 41.

[703] Wellens, *supra* note 672, p.17.

[704] *Ibid*., p.170.

[705] *Ibid*., p.28.

Charter and other relevant instruments.[706] The second level of accountability refers to the tortious liability for injurious consequences arising from the UN's institutional acts. These institutional acts are not, in principle, directly addressed to non-state entities, but this does not prevent individuals and others from potentially having their interests or rights affected by such acts.[707] At the same time, the damage at this level of accountability may be caused 'without violation of any rule or norm of international and/or institutional law'.[708] The third level of accountability may arise from the operational activities undertaken by the UN. This type of act will, in some circumstances, be specifically addressed to non-state entities, such as refugees or victims of armed conflict.[709]

Wellens believed that the existence of these three levels of UN accountability require an ultra-cautious approach to designing a system for remedial action. He maintained, in conclusion, that an expected system of internal remedies should be tailor-made for each different level of accountability of the UN concerned, the category of the claimant, and thus also for the interests in need of remedial protection.[710] The UN 'should take the necessary measures to disseminate the information on the availability and potential outcome of remedial mechanisms on the three levels of accountability'.[711] Accordingly, Wellens put forward several scenarios of alternative remedial action against international organisations. These are: pre-remedial action, non-legal alternative remedial action, amendment of existing judicial remedies, and an inevitable role for the ICJ.[712]

Wellens regarded pre-remedial action as a vital precondition for successfully resorting to non-legal remedial mechanisms.[713] The pre-remedial action 'should include mechanisms early on as part of the planning process, enabling those put at risk … to protest at the adequacy or opportunity of the undertaking or to demand alternative, less damaging means of implementing the goals sought'.[714] The expert panel to review

[706] See: *ibid*.
[707] See: *ibid*., p.29.
[708] *Ibid*., p.28.
[709] See: *ibid*.
[710] See: *ibid*., p.170.
[711] *Ibid*., p.175.
[712] In Wellens's opinion, the accountability of the UN could be maximised only through the simultaneous or successive use of various non-legal and judicial remedial mechanisms. See: *ibid*., p.198. Based on this idea, Wellens suggested some amendments to existing judicial remedies and the strengthening of the inevitable role for the ICJ. For present purposes, it is not necessary to indicate these two alternative remedial actions below, since they are beyond the scope of the rule of prior exhaustion of internal remedies. In other words, the forms of the declared internal remedies in the future framework of the WCHR refer to the first two scenarios.
[713] See: *ibid*., p.176.
[714] *Ibid*., p.172.

de-listing within UN sanctions regimes and investigations about its conduct at the request of complainants may serve as examples of such pre-remedial action. An individual whose interests or rights would be affected by the decision of a particular sanctions committee should be entitled to be heard before decisions are taken.

Scheinin regarded pre-remedial action as a form of 'internal remedy'. If the UN is going to accept the WCHR's jurisdiction, the WCHR may 'exercise jurisdiction in respect of the listing of individuals as terrorists under Resolution 1267 (1999), or the refusal by the Security Council to delist persons'.[715] At the same time, '[i]f the Security Council were to develop a mechanism of independent expert review as a part of its listing and delisting procedures, this could constitute a remedy that needs to be exhausted'.[716] Scheinin went further, saying that:

> Perhaps more importantly, it can also be expected that when addressing the complaint after the exhaustion of those remedies, the World Court would pay due attention to the procedure and outcome of such an independent review before assessing the case on the merits. If it were to found that the Security Council's internal mechanisms of independent review in fact provided for an equivalent level of human rights protection, the Court might very well exercise deference and decide that the listing, or refusal to delist, in the particular case did not constitute a human rights violation.[717]

Non-legal alternative remedial action addresses those 'situations where the non-performance of non-legal obligations results in mere interests potentially or actually being affected, harm being caused but without there being any form of liability or responsibility on the part of the international organization'.[718]

> [I]ndeed, these non-legal alternative remedial actions could be instituted at "the instance of private interests which, without being in a position to claim that a legally vested right has been violated, may be adversely affected" by a decision or a course of action of an international organisation.[719]

According to Wellens, both the ombudsman model and the inspection panel model[720] are

---

[715] Scheinin, *supra* note 2, p.26.
[716] *Ibid.*
[717] *Ibid*.
[718] Wellens, *supra* note 672, p.177.
[719] *Ibid*., p.178.
[720] See: *ibid*., pp.181 – 190. The ILA Committee once suggested that the UN should consider the possibility of establishing, where appropriate, particular inspection panels to investigate individual complaints about

open to individual claimants or requesters, while the Commissions of Inquiry[721] are bound to fulfil a remedial function, as candidates of non-legal alternatives.[722]

The ombudsman system provides a complaint-handling mechanism which attempts to 'improve the accountability of public bodies and authorities',[723] and acts 'in an extra-judicial capacity alongside the traditional role of the courts'.[724] According to Wellens' study, 'the establishment of ombudsman offices has been rapidly proliferating',[725] and the 'remedial role of an ombudsman within the accountability regime of international organisations becomes more important'.[726] Take, for example, the European Ombudsman. The European Ombudsman is mandated to investigate complaints from any citizen or resident of the EU, or business, association, or any other body with a registered office in the EU, about maladministration in EU institutions, bodies, offices, and agencies, except the Court of Justice of the European Union.[727] In short, this Ombudsman is 'an independent and impartial body that holds the EU administration to account'.[728] In the human rights arena, the European Ombudsman would inform the body concerned about the complaint, and the latter 'may decide to settle the case of maladministration to the satisfaction of the complainant'.[729] Otherwise, the Ombudsman may draft non-binding recommendations addressed to the institution concerned if it is established that the alleged human rights violations did take place.

Wellens found that there are direct jurisdictional links between the EU and private individuals, which are coupled with a fully-fledged system of judicial protection. Even so,

---

those rights or interests likely to, or which have, been adversely affected by the UN's failure to comply with its own policies and procedures in the course of operational activity. These inspection panels would be able to issue recommendations for remedial action to the Executive Head, such as the UN Secretary-General, or to other competent organs of the UN. See: International Law Association, Committee on Accountability of International Organisations, *supra* note 131, p.45.

721 See: Wellens, *supra* note 672, pp.190 – 197. According to the ILA Committee, if necessary, the independent expert investigation of international commissions of inquiry into any matter that has become the subject of serious public concern should be established. See: International Law Association, Committee on Accountability of International Organisations, *supra* note 131, p.45. 'The formulation of recommendations by a Commission of Inquiry may very well correspond to the preventive, persuasive and prospective functions of remedial action'. Wellens, *supra* note 672, p.191. 'Normally the punitive element of remedial action is not included in the terms of reference of a Commission of Inquiry', Wellens added, 'it is left to domestic and international criminal tribunals, although the Commission may clearly mention this aspect'. *Ibid*.

722 *Ibid*., p.178.

723 *Ibid*.

724 *Ibid*.

725 *Ibid*.

726 *Ibid*., p.181.

727 See: European Ombudsman: 'Problems with EU? Who can help you?', European Union, 2015, p.5.

728 *Ibid*.

729 Wellens, *supra* note 672, p.179.

it is nonetheless 'necessary and appropriate to establish an ombudsman as an additional alternative non-legal remedial mechanism'.[730] Wellens also believed that there seemed to be sufficient reason to argue in favour of other international organisations following the example of the European Ombudsman.[731] Similar jurisdictional links can be found between the UN and private individuals, which, coupled with the WCHR, represent a fully-fledged system of judicial protection. Retrospectively, **Section 1** of this Chapter has contributed an in-depth study of the legal articulation between the WCHR's jurisdiction and the UN. There seems to be sufficient reason to expect a mechanism similar to that of the European Ombudsman in the framework of the UN.

In practice, an ombudsman to consider the grievances of the local population against the mission or its staff was once suggested as a system to monitor the compliance of UN PKOs with human rights standards.[732] This monitoring function was deemed to be necessary 'as much to protect the organisation from false or inflated charges of Human Rights abuses as to ensure that if these occur they are properly investigated and reported'.[733] However, as Linda pointed out, this model 'lacks the power to make binding decisions, but uses persuasion to obtain changes in the conduct of the public body or authority through the implementation of recommendations issued by the office'.[734]

Some attention can also be devoted to the Ombudsperson Institution in Kosovo (latterly called the Kosovo Ombudsperson). The Kosovo Ombudsperson was established in 2000 by UNMIK as an international body, and was mandated to 'ensure that all persons in Kosovo are able to exercise effectively the human rights and fundamental freedoms safeguarded by international human rights standards'.[735] The ECHR was 'used as the main reference instrument for the Kosovo Ombudsperson in cases related to UNMIK'.[736]

---

[730] *Ibid*., p.178.
[731] See: *ibid*., p.179.
[732] See: Erskine Childers and Brian E. Urquhart: *Renewing the United Nations System*, Uppsala: Dag Hammarskjöld Foundation, 1994, p.111. The ILA Committee similarly suggested that the UN should establish, where appropriate, ombudsperson offices to deal with claims of maladministration by its organs or agents by issuing recommendations addressed to the UN. See: International Law Association, Committee on Accountability of International Organisations, *supra* note 131, p.45.
[733] Wellens, *supra* note 672, p.181.
[734] Linda C. Reif: *The International Ombudsman Anthology: Selected Writings from the International Ombudsman Institute*, The Hague, London and Boston: Kluwer Law International, 1999, p.xxiii. Cited in: Wellens, *supra* note 672, p.178. See also: International Law Association, Committee on Accountability of International Organisations, *supra* note 131, p.46.
[735] Regulation on the Establishment of the Ombudsperson Institution in Kosovo, UNMIK/REG/2000/38, 30 June 2000.
[736] Wolfgang Benedek: "Kosovo – UNMIK accountability: Human Rights Advisory Panel Finds Discrimination in Privatization Cases", in: *Austrian Law Journal*, No. 2, 2015, pp.277 – 284, at 283. In 2006, the Kosovo Ombudsperson was 'nationalised' by UNMIK as an entirely local body in 2006. In this year, the

The Standing Claims Commissions for harms arising out of the UN PKOs serves as another convincing example. This type of remedial mechanism operates at the third level of accountability. 'Peacekeeping agreements always have allowed for a formal arbitral tribunal, made up of several "judges"'.[737] A standing claims commission of this type might also provide immediate, easy access to parties claiming that a UN force was in violation of their rights and interests.

'By granting individual persons direct access to a particular mechanism or office',[738] Wellens added, 'non-legal alternative remedies could provide suitable alternatives to the lack or insufficiency of mechanisms of redress'.[739] The non-legal remedial action can be seen as an intermediary between the international communities and the UN. The UN may nominate the non-legal remedial action to be a kind of established internal remedy when it decides to accept the WCHR's jurisdiction.

It should be noted that, in the framework of the future WCHR, the concrete forms of internal remedies are not decisively determined by the level to which the UN's accountability theoretically belongs. Nor does a distinction have to be drawn between institutional acts and operational acts of the UN. As Wellens pointed out, apart from providing remedial opportunities at the first level of accountability, the non-legal remedial action also trigger mechanisms at the second and third levels.[740] In effect, he suggested establishing a variety of remedial mechanisms:

> In some areas the institution of an ombudsman may be appropriate, while other areas may call for the establishment of an Inspection Panel or a Commission of Inquiry, followed by resorting to quasi-judicial or judicial organs possessing the power to issue binding decisions addressed to the respondent international organisation or official.[741]

Also, the complementary nature of the jurisdiction of the WCHR also prevents the

UNMIK replaced the Kosovo Ombudsperson with a national ombudsperson appointed by the Kosovo Assembly, who had jurisdiction only over the institutions of Kosovo, and not over UNMIK. This "nationalisation" deprived *de facto* the Kosovo Ombudsperson of the jurisdiction over the international civil presence, which caused the gap in human rights accountability. See: the Human Rights Advisory Panel (HRAP) Annual Report (2008), p.2. Given this, the HRAP in Kosovo was then established in the same year to fill the gap owing to the nationalisation of the Kosovo Ombudsperson, according to the UNMIK Regulation 2006/12.

[737] Mahnoush H. Arsanjani: "Claims Against International Organizations: Quis custodiet ipsos custodes", in: *Yale Journal of World Public Order*, Vol. 7, 1981, pp.131 – 176, at 162.

[738] Wellens, *supra* note 672, p.177.

[739] *Ibid*.

[740] See: *ibid*., p.198.

[741] *Ibid*., p.170. See also: International Law Association, Committee on Accountability of International Organisations, *supra* note 131, p.45.

Court from prescribing one or more detailed provisions for the concrete forms of internal remedies. This complementary nature assumes *arguendo* that the UN is capable of elaborating the optimal forms of internal remedies, and thus requires that the autonomous decision-making power of the UN be respected. For the operation of the WCHR, all that has to be done is to articulate some general principles that will allow for more certainty as to those internal remedies which must be exhausted in the case with regard to the UN, rather than which of these remedies the UN must take.

### 3.1.2 The newly created 'internal remedies' following the acceptance of the WCHR's jurisdiction

As mentioned above, if the UN decides to accept the jurisdiction of the WCHR, the rule of prior exhaustion of internal remedies will oblige the UN to specify exactly which internal remedies an individual complainant is required to exhaust before lodging their case with the WCHR. As with the doctrine of exhaustion of domestic remedies, the rule of prior exhaustion of internal remedies should also be applied with 'some degree of flexibility and without excessive formalism'[742] in certain circumstances.

With regard to the UN, the Human Rights Advisory Panel (HRAP), which was established in 2006[743] and ceased operation in June 2016,[744] may provide a considerable reference for the newly created internal remedies.[745] The HRAP was designed to respond

[742] William A. Schabas: *The European Convention on Human Rights: A Commentary*, Oxford, United Kingdom: Oxford University Press, 2015, p.764.

[743] See: UNMIK: Regulation No. 2006/12 on the Establishment of the Human Rights Advisory Panel, UNMIK/REG/2006/12 23 March 2006; UNMIK: Regulation No. 2007/3 Amending UNMIK Regulation No.2006/12 on the Establishment of the Human Rights Advisory Panel. In 2004, the European Commission for Democracy through Law (better known as the Venice Commission) of the CoE adopted a report on possible review mechanisms, which led to the establishment of the HRAP by UNMIK in 2006. See: Benedek, *supra* note 736, p.278.

[744] From 1 July 2016 the HRAP, as well as its Secretariat in UNMIK, seised its operation. See: HRAP website: http://www.unmikonline.org/hrap/Eng/Pages/default.aspx.

[745] The HRAP was designed to be a provisional short-term solution for a special and provisional Human Rights Court for Kosovo. See: Didier Pacquée and Steven Dewulf: "International Territorial Administrations and the Rule of Law: The Case of Kosovo", in: *Essex Human Rights Review*, Vol. 4, No. 1, 2007, pp.1 – 14, at 12. The Venice Commission once suggested the establishment of a special and provisional Human Rights Court for Kosovo, after the example of the Human Rights Chamber for Bosnia and Herzegovina. See: Venice Commission: "Opinion on Human Rights in Kosovo: Possibile Establishment of Preview Mechanisms", CDL-AD (2004)033, 11 October 2004, para.101. The Human Rights Chamber for Bosnia and Herzegovina 'had jurisdiction to consider complaints about violations of the ECHR and its Protocols, including discrimination in the enjoyment of rights and freedoms under fifteen other human rights treaties'. *Ibid*., para.103. As for the jurisdiction *ratione persone* of this Chamber, the Venice Commission summarised:

to the 'calls for the establishment of a mechanism to consider the compliance of the UNMIK, which is immune from legal proceedings before the national courts of Kosovo,[746] with international human rights standards in its role as the interim transitional administration of Kosovo'.[747] The Panel was also set up to address the lack of jurisdiction of the ECtHR over the UNMIK.

The HRAP confirmed the UNMIK's duty to observe human rights through the task of examining complaints lodged by persons alleging that their fundamental rights and freedoms had been breached by UNMIK. The jurisdiction of the Panel is of a complementary nature. As for the jurisdiction *ratione persone*, the HRAP took 'a model of individual complaint from victims of alleged violations of human rights attributable to UNMIK'.[748] As a quasi-judicial body similar to the UN human rights treaty bodies, and a

---

Applications could be submitted by the Ombudsperson, any natural or legal person or group of persons, and either one of the entities (the Federation of Bosnia and Herzegovina and the Republika Srpska) against either of the entities or against the State itself. The judgments of the Chamber were binding and irrevocable, and could also provide for friendly settlements of disputes.

*Ibid*. A similar concern regarding establishing a human rights court for Kosovo was also expressed by the CoE in 2005. See: Parliamentary Assembly of the Council of Europe, resolution 1417 (2005) on Protection of human rights in Kosovo, available at: http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17291&lang=en. See also: the HRAP Annual Report (2008), p.2. According to the Venice Commission, the Human Rights Court for Kosovo would be mandated to examine cases lodged by individuals, or by the Ombudsperson on their behalf with their agreement. See: Venice Commission, *supra* note 745, paras.104, 105.

[746] According to the Regulation 2000/247, the scope of the UNMIK's immunities 'covers both criminal and civil matters, and can only be waived by the Secretary General in cases where, in his opinion, the immunity would impede the course of justice, and can be waived without prejudice to the interest of UNMIK'. Regulation No. 2000/47 on the Status, Privileges and Immunities of KFOR and UNMIK and their Personnel in Kosovo, UNMIK/REG/2000/47, Section 6.1. With the Declaration of Independence of Kosovo in 2008, 'the UNMIK had ceased to perform executive functions in Kosovo, limited its ability to provide full and effective reparation and its responsibility regarding the judiciary ended in the same year, when the EU Rule of Law Mission (EULEX) assumed operational control in that area'. Benedek, *supra* note 736, p.282. However, this did not relieve UNMIK from its obligation to redress as far as possible the effects of the violation of human rights for which it was responsible. See: *ibid*.

[747] The HRAP Annual Report (2008), p.4. The Venice Commission also advised the establishment of an advisory board to review all cases of detention by KFOR troops, and possibly even all allegations of serious violations of fundamental rights by those troops, and to provide redress or compensation. See: Pacquée and Dewulf, *supra* note 745, p.12.

[748] Christine Chinkin: "International Law Meeting Summary: The Kosovo Human Rights Advisory Panel", 26th January 2012, p.5. This summary is available at: www.chathamhouse.org. However, the HRAP has no jurisdiction *ratione persone* over the alleged human rights violations by KFOR (See: for example, *Brahim SAHITI v. UNMIK*, Case No. 03/08), Organization for Security and Co-operation in Europe (OSCE) (See: for example, *Dejan JOVANOVIĆ v. UNMIK*, Case No. 39/08), the NATO peacekeeping force in Kosovo (See: for example, *Slavica Grubić-Milutinović v. UNMIK*, Case No. 21/10), Other authorities (See: for example, Todor *Veselinović v. UNMIK*, Case No. 65/10; *Deposit Insurance Agency v. UNMIK*, Case No. 59/10; *Jugobanka Under Receivership I v. UNMIK*, Case No.57/10 and *Krasniqi v. UNMIK*, Case No. 08/10) and even private individuals (See: for example, *Svetlana NIKOLIĆ v. UNMIK*, Case No. 37/08). See also: the HRAP Annual Report (2008), p.9.

substitute for the Kosovo Ombudsperson, the HRAP served as an independent instrument for the review of complaints from any person or group of individuals claiming to be the victims of a violation by UNMIK of their human rights. The Regulation 2006/12 also granted the HRAP an extensive jurisdiction *ratione materiae*, which covers the ECHR and the Protocols thereto, and some major UN human rights conventions.[749] 'In practice, complainants base their complaints primarily upon the Articles of the European Convention on Human Rights (ECHR) and its Protocols'.[750] The jurisprudence of the HRAP orientated the Panel closely towards the ECtHR.[751]

On completion of an examination of a complaint, the HRAP shall submit its findings to the Special Representative of the Secretary-General (SRSG).[752] In cases where the HRAP determines that a human rights violation has occurred, it will make public recommendations to the SRSG on the remedial measures to be taken'.[753] This type of recommendation shall be of an advisory nature and with no capacity for enforcement.[754] The UNMIK 'should commit itself to accepting the finding should its own panel express the view that UNMIK is violating human rights'.[755]

With regard to admissibility issues; upon receipt of a complaint, the HRAP 'must first determine if it is competent to deal with the complaint and whether the complaint is admissible'.[756] According to Section 3 of the Regulation 2006/12, after all known or obviously available remedies or avenues for review of the alleged violation in the territory of Kosovo had been exhausted, individuals may lodge complaints with the HRAP.[757] The procedure before the HRAP consisted of two stages:

> [F]irst, the examination of the admissibility of the complaint; and, second, if the complaint is declared admissible, the examination of the merits of the complaint. The admissibility is determined by a formal decision, containing the reasoning for the decision. In some cases the Panel has taken a partial decision on the admissibility first, and then determined the remaining

[749] They are: ICCPR, ICESCR, ICERD, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), CAT, CRC. See: Section 1.2 of the Regulation 2006/12.
[750] The HRAP Annual Report (2008), p.8. For example, in the cases of *Fillim GUGA v. UNMIK* (Case No. 47/08) and *Nevenka RISTIĆ v. UNMIK* (Case No. 319/09), the HRAP applied Art.14 of ECHR on the prohibition of discrimination in conjunction with Art.6 of the same Convention on the fair trial in the light of relevant jurisprudence of the ECtHR.
[751] Benedek, *supra* note 736, p.282.
[752] See: sections 1.3, 17.1 of the Regulation 2006/12.
[753] The HRAP Annual Report (2008), p.3.
[754] See: section 1.3, 17.1 of the Regulation 2006/12. See also: Chinkin, *supra* note 748, p.5.
[755] Venice Commission, *supra* note 745, para.116.
[756] See: the HRAP Annual Report (2008), p.9.
[757] Section 3.1 of the Regulation 2006/12.

> admissibility issues by a final decision.[758]

As provided for in section 11.2 of the Regulation 2006/12:

> If the information provided with the complaint does not allow such determination to be made, the Advisory Panel shall request additional information from the complainant. If the Advisory Panel determines that the complaint is inadmissible, it shall render a determination by which the complaint is dismissed.

In addition:

> In some cases, where the Panel found that the admissibility of the complaint was closely linked to the merits, *e.g.* in cases where the complaint was about the ineffectiveness of a remedy or an investigation, or about the lack of access to a court, it has in its decision on the admissibility joined the admissibility issue to the examination of the merits.[759]

The promulgation of the Administrative Direction No.2009/1 (hereinafter referred to as the 2009 Direction) altered the way in which the HRAP examined the admissibility of the complaint through legalising the United Nations Third Party Claims Process as a UNMIK-decreed 'available remedy'. According to this Direction, at any stage of the proceedings of a human rights complaint before it, the HRAP shall examine all issues of admissibility of the complaint before examining the merits.[760] In the event of a new admissibility issue that is raised or arises after the complaint has been declared admissible, the HRAP must suspend its deliberations on the merits and determine the admissibility issue by a separate decision.[761] Before the promulgation of this Direction, with regard to third party claims, Section 7 of the UNMIK Regulation 2000/47 provided that:

> Third party claims for property loss or damage and for personal injury, illness or death arising from or directly attributed to KFOR, UNMIK or their respective personnel and which do not

[758] The HRAP Annual Report (2010), p.9; The HRAP Annual Report (2011), p.10; the HRAP Annual Report (2012), p.7; the HRAP Annual Report (2013), p.6; Chinkin, *supra* note 748, p.5.
[759] The HRAP Annual Report (2009), p.10.
[760] See: section 2.1 of the Administrative Direction No.2009/1 Implementing UNMIK Regulation No.2006/12 on the Establishment of the Human Rights Advisory Panel, UNMIK/DIR/2009/1, 17 October 2009.
[761] See: section 2.3 of the Administrative Direction No.2009/1 Implementing UNMIK Regulation No.2006/12 on the Establishment of the Human Rights Advisory Panel, UNMIK/DIR/2009/1, 17 October 2009. According to this section, comments on the merits of an alleged human rights violation shall only be submitted after the HRAP has completed its deliberation on and determined the admissibility of such complaint.

> arise from "operational necessity" of either international presence, shall be settled by Claims Commissions established by KFOR and UNMIK, in the manner to be provided for.[762]

As well as turning the UNMIK's voluntary commitment to internal remedies into a legal obligation, the 2009 Direction raised a new admissibility issue for the HRAP as regards those complaints which had been declared admissible before the promulgation of this Direction. According to Rule 33 of the Rules of Procedure,[763] in the event of a new admissibility issue being raised or arising after the complaint has been declared admissible, the HRAP shall, in accordance with Section 2.3 of Administrative Direction No. 2009/1, suspend its deliberation on the merits and determine the admissibility issue by a separate decision.

Following the adoption of the 2009 Direction, complaints about violations of human rights attributable to UNMIK might be deemed inadmissible under Section 2.2 of this Direction to the extent that they had resulted either in personal injury, illness or death, or in loss of or damage to property.[764] More importantly, given that the provisions of the 2009 Direction 'form part of the basis of the Panel's functioning',[765] the HRAP did not regard itself as a competent body 'to examine the compatibility of the legal basis of its own functioning with human rights standards'.[766] As the HRAP pointed out in its 2010 Annual Report, the 2009 Direction divested the Panel of the 'jurisdiction to determine whether the United Nations Third Party Claims Process was an available remedy that must be exhausted and/or that is effective within the meaning of Article 13 of the ECHR'.[767] Moreover, as it were, at any stage before the adoption of the HRAP's decision on the merits of a complaint, the UNMIK could raise a new admissibility objection which would then require a 'suspension' of the examination of the merits of this complaint.[768] Given its

---

[762] UNMIK: Regulation 2000/47 on the Status, Privileges and Immunities of KFOR and UNMIK and Their Personnel in Kosovo, UNMIK/REG/2000/47, 18 August 2000. However, neither the UNMIK nor the KFOR has established any such Claims Commission. Such Commissions have indeed been established, and one of them is the Detention Review Commission for Extra-Judicial Detentions based on Executive Orders, which may review extra-judicial detentions based on executive orders by the SRSG. See: Pacquée and Dewulf, *supra* note 745, p.8.

[763] Section 18.1 of the Regulation 2006/12 required the HRAP to adopt rules of procedure for its proceedings, which may assign powers and responsibilities to the secretariat of the HRAP. These Rules of Procedure were based on the Rules of the ECtHR and contained detailed provisions for the handling of complaints and the deliberative processes of the HRAP. See: the HRAP Annual Report (2008), p.8.

[764] The HRAP Annual Report (2010), p.21.

[765] Kadri Balaj (on behalf of Mon Balaj), Shaban Xhelandini (on behalf of Arben Xhelandini), Zenel Zemeli and Mustafa Nerjovaj, Case no. 320/09, Decision, 12 February 2010, para.15.

[766] *Balaj et al. v. UNMIK*, Case no. No. 04/07, para.40.

[767] The HRAP Annual Report (2010), p.20.

[768] See: the HRAP Annual Report (2010), p.16.

significant limitation on the role of the HRAP and the mode of its functioning, the HRAP did not welcome the 2009 Direction.[769]

The case of *Kadri Balaj (on behalf of Mon Balaj), Shaban Xheladini (on behalf of Arben Xheladini), Zenel Zemeli and Mustafa Nerjovaj v. UNMIK* (hereinafter referred to as the *Balaj et al*. case)[770] serves as a typical example. The *Balaj et al.* case arose out of the killing and serious wounding of four participants in a demonstration against the UNMIK in Pristina in February 2007. During the demonstration, the UNMIK police, who had been deployed to maintain order, lost control and, in their attempts to regain control, used rubber bullets. The use of rubber bullets resulted in the death of two protestors and caused injury to many others.[771] A UNMIK investigation was promptly opened, which found that 'the evidence to date leads to the conclusion that deaths of Mon Balaj and Arben Xheladini were unnecessary and avoidable'.[772] The fatal and almost-fatal rubber bullet shots were not in accordance with the goals of the operational plan to protect the buildings and effectively control the crowd.[773] However, the UNMIK found itself unable to initiate formal criminal proceedings against those who had fired the shots because 'the state of the evidence gathered … does not meet the threshold of reasonable suspicion of criminal activity committed by any particular person'.[774] Despite this, the UNMIK declared that it might 'consider initiating appropriate procedures for compensation for the surviving family members of those fatally shot and for those seriously wounded'.[775] The report, dated 29 June 2007, concluded that 'there have been various flaws with respect to the legal framework and the planning, operation and decision making process'.[776] The HRAP noted

[769] See: the HRAP Annual Report (2009), p.2.
[770] Kadri Balaj (on behalf of Mon Balaj), Shaban Xheladini (on behalf of Arben Xheladini), Zenel Zemeli and Mustafa Nerjovaj v. UNMIK, Case No. 04/07.
[771] In February 2007, an NGO named "Vetevendosje" (Movement for Self-Determination, today a parliamentary party in opposition) organised a demonstration in Pristina. In the course of this event, two people – Kadri Balaj's son Mon, and Shaban Xheladini's son Arbën – were killed by a Romanian-constituted Police Unit, part of UNMIK Police at the time. Others were injured, including Zenel Zeneli and Mustafë Nerjovaj. Thirty other demonstrators were injured in addition to the victims listed in the case. See also: *Balaj et al. v. UNMIK*, Case No. 04/07, Decision, 6 June 2008, paras.1, 2; *Balaj et al. v. UNMIK*, Case No. 04/07, Decision, 31 March 2010, paras.1, 2; *Balaj et al. v. UNMIK*, Case No. 04/07, Opinion, 27 February 2015, paras.30 – 56.
[772] *Balaj et al. v. UNMIK*, Case No. 04/07, Decision, 6 June 2008, para.3. See also: *Balaj et al. v. UNMIK*, Case No. 04/07, Decision, 31 March 2010, para.4.
[773] See: *Balaj et al. v. UNMIK*, Case No. 04/07, Decision, 6 June 2008, para.3.
[774] *Balaj et al. v. UNMIK*, Case No. 04/07, Decision, 6 June 2008, para.3. See also: *Balaj et al. v. UNMIK*, Case No. 04/07, Decision, 31 March 2010, para.4.
[775] *Balaj et al. v. UNMIK*, Case No. 04/07, Decision, 6 June 2008, para.3. See also: *Balaj et al. v. UNMIK*, Case No. 04/07, Decision, 31 March 2010, para.4.
[776] *Balaj et al. v. UNMIK*, Case No. 04/07, Decision, 6 June 2008, para.3. See also: *Balaj et al. v. UNMIK*, Case No. 04/07, Decision, 31 March 2010, para.5. For more details about the findings and conclusions of the Special Prosecutor, see: *Balaj et al. v. UNMIK*, Case No. 04/07, Opinion, 27 February 2015, paras.88 – 97. It

that the UNMIK had established a Claims Review Board, under the UNMIK Director of Mission Support, which reviewed the compensation claims filed by the families of the complainants.[777] However, 'no payments have been made to any of the complainants or their families'.[778]

In 2007, the complainants filed a complaint before the HRAP, claiming that the killing of the complainants' relatives and serious injury of the complainants constituted violations of the following rights:[779] the right to life,[780] prohibition of torture,[781] the right to effective remedy,[782] the right to fair trial,[783] and the right to peaceful assembly.[784]

According to section 3.1 of the UNMIK Regulation No. 2006/12, the HRAP first examined whether all available avenues for review had been pursued. According to the complainants, the UNMIK had not initiated any criminal investigation against those responsible.[785] Besides, the immunity of UNMIK and its personnel had made other avenues of review unavailable to them.[786] The complainants went further, claiming that no appropriate mode of settlement of disputes had been implemented, as required by Art.8 (29) of CPIUN in circumstances where there is a dispute involving an official of the UN who enjoys immunity because of his official position.[787] Before the proceedings started, the HRAP also communicated the case to the SRSG, giving him the opportunity to provide comments on behalf of the UNMIK on this issue.[788] However, '[t]he SRSG did not avail himself of this opportunity'.[789]

The HRAP opined that, in the *Balaj et al.* case, the question of whether the

---

should be noted that, apart from the two reports, the Police Inspectorate of Kosovo also conducted an inquiry in 2007 at the invitation of the UNMIK Police Commissioner. See: *Balaj et al. v. UNMIK*, Case No. 04/07, Opinion, 27 February 2015, paras.101 – 105. In the meantime, at the UNMIK's request, the Romanian judicial authorities conducted a criminal investigation into the death of, and the injuries to the victims. See: *Balaj et al. v. UNMIK*, Case No. 04/07, Opinion, 27 February 2015, paras.106 – 109.

[777] See: *Balaj et al. v. UNMIK*, Case No. 04/07, Decision, 6 June 2008, para.4; *Balaj et al. v. UNMIK*, Case No. 04/07, Decision, 31 March 2010, para.6; *Balaj et al. v. UNMIK*, Case No. 04/07, Decision, 11 May 2012, para.20.

[778] *Balaj et al. v. UNMIK*, Case No. 04/07, Decision, 6 June 2008, para.4.

[779] See: *Balaj et al. v. UNMIK*, Case No. 04/07, Decision, 6 June 2008, para.5; *Balaj et al. v. UNMIK*, Case No. 04/07, Decision, 31 March 2010, para.8; *Balaj et al. v. UNMIK*, Case No. 04/07, Opinion, 27 February 2015, paras.114 – 116.

[780] See: Art.3 of UDHR; Art.2 of ECHR; Art.6 of ICCPR.

[781] See: Art.5 of UDHR; Art.3 of ECHR; Art.7 of ICCPR; Arts.2, 10, 12 – 14 and 16 of CAT.

[782] See: Art.8 of UDHR; Art.13 of ECHR; Art.2 of ICCPR.

[783] See: Art.10 of UDHR; Art.6 of ECHR

[784] See: Art.20 of UDHR; Art.11 of ECHR; Art.21 of ICCPR.

[785] *Balaj et al. v. UNMIK*, Case No. 04/07, Decision, 6 June 2008, para.9.

[786] *Balaj et al. v. UNMIK*, Case No. 04/07, Decision, 6 June 2008, para.9.

[787] *Balaj et al. v. UNMIK*, Case No. 04/07, Decision, 6 June 2008, para.20.

[788] See: *Balaj et al. v. UNMIK*, Case No. 04/07, Decision, 6 June 2008, para.7.

[789] *Balaj et al. v. UNMIK*, Case No. 04/07, Decision, 6 June 2008, para.7.

requirement to exhaust remedies had been satisfied was 'closely linked to the complaints concerning the procedural aspect of the right to life and the prohibition of ill-treatment and the existence of an effective remedy'.[790] The HRAP believed that an overall analysis was a necessity to address this issue more appropriately.[791] At the same time, such issues as the means of redress available to the complainants, the scope of the obligations arising in this context under the international human rights instruments invoked by the complainants, and the response given by the authorities to the complainants' use of remedies should be taken into account.[792] These issues 'should be joined to the merits of the case'.[793] Finally, the HRAP unanimously declared the complaint admissible.

The SRSG soon raised an objection to this decision by reason of the non-exhaustion of available avenues.[794] The HRAP decided to join the admissibility issue raised by the SRSG to the consideration of the merits.[795] Before the subsequent proceedings resumed, the 2009 Direction was issued by the UNMIK, and the HRAP decided to consider this issuance in the course of the forthcoming proceedings.[796] During the proceedings, the complainants filed a complaint directed against the 2009 Direction, invoking a violation of Art.6 (1) of the ECHR by this Direction. [797] As they asserted:

> [T]he Administrative Direction purports to have the effect of reopening the issue of admissibility, determining the live issue of admissibility and preventing the Panel from considering the merits of the complaint, preventing adversarial proceedings, and undermining the independence and impartiality of the Panel.[798]

The UNMIK contended that, according to section 2.2 of the 2009 Direction, the case was 'the subject of the UN Third Party Claims Process under UNMIK Regulation No. 2000/47'.[799]

The HRAP dismissed the complainants, holding that the 2009 Direction applied to all complaints submitted to the HRAP, including those currently pending before the Panel.[800]

---

[790] *Balaj et al. v. UNMIK*, Case No. 04/07, Decision, 6 June 2008, para.10.
[791] *Balaj et al. v. UNMIK*, Case No. 04/07, Decision, 6 June 2008, para.10.
[792] *Balaj et al. v. UNMIK*, Case No. 04/07, Decision, 6 June 2008, para.10.
[793] *Balaj et al. v. UNMIK*, Case No. 04/07, Decision, 6 June 2008, para.10.
[794] See: *Balaj et al. v. UNMIK*, Case No. 04/07, Decision, 31 March 2010, para.7.
[795] See: *Balaj et al. v. UNMIK*, Case No. 04/07, Decision, 31 March 2010, para.14.
[796] See: *Balaj et al. v. UNMIK*, Case No. 04/07, Decision, 31 March 2010, para.28.
[797] See: *Balaj et al. v. UNMIK*, Case No. 04/07, Decision, 31 March 2010, paras.29, 38.
[798] *Balaj et al. v. UNMIK*, Case No. 04/07, Decision, 31 March 2010, para.38.
[799] *Balaj et al. v. UNMIK*, Case No. 04/07, Decision, 31 March 2010, para.37.
[800] *Balaj et al. v. UNMIK*, Case No. 04/07, Decision, 31 March 2010, paras.32, 34.

As the HRAP held:

> [I]t is within the discretion of the SRSG to determine the regulatory scheme of the complaint system before the Panel, and the Panel has no jurisdiction to examine the compatibility of the legal basis of its own functioning with human rights standards.[801]

As a result, Section 2.2 of the 2009 Direction had 'the effect of obliging the Panel to consider the UN Third Party Claims Process as an accessible and sufficient avenue'.[802] As long as the claim fell *prima facie* within the ambit of the UN Third Party Claims Process, the mere fact of UNMIK raising an objection based on this section would inevitably lead to the conclusion that the complaint be deemed inadmissible.[803] In this case, the substantive complaints, which referred to the use of force by UNMIK Police resulting in personal injury or death, fell *prima facie* within the ambit of the UN Third Party Claims Process. Given this, these complaints had to be deemed inadmissible.[804]

By contrast, the procedural aspect of the complaints[805] should not be covered by this process because they had clearly not resulted in personal injury, illness or death, nor in loss of or damage to property.[806] In the opinion of the HRAP, on the one hand, the promulgation of Administrative Direction No.2009/1 generated an artificial separation of these complaints.[807] On the other hand, as indicated by its 2008 Decision, substantive and procedural complaints pending before the HRAP are interlinked.[808] The HRAP finally overturned the 2008 decision, and declared the entire complaint inadmissible.[809]

The case of *N.M. and others v. UNMIK* is another convincing example. This case concerned the situation of Roma residing in five camps for internally displaced persons (IDP) operated under the auspices of UNMIK.[810] In 2008, 143 members of the Roma, Ashkali, and Egyptian (RAE) community in Kosovo claimed that the UNMIK had violated their human rights[811] by knowingly placing them in IDP camps on badly contaminated

---

[801] *Balaj et al. v. UNMIK*, Case No. 04/07, Decision, 31 March 2010, para.40.
[802] *Balaj et al. v. UNMIK*, Case No. 04/07, Decision, 31 March 2010, para.46.
[803] See: *Balaj et al. v. UNMIK*, Case No. 04/07, Decision, 31 March 2010, para.47.
[804] See: *Balaj et al. v. UNMIK*, Case No. 04/07, Decision, 31 March 2010, para.48.
[805] Such as the complaints about violations of the procedural aspects of the right to life and the prohibition of inhuman or degrading treatment, as well as about violations of the right to a fair trial and the right to an effective remedy. See: *Balaj et al. v. UNMIK*, Case No. 04/07, Decision, 31 March 2010, para.51.
[806] See: *Balaj et al. v. UNMIK*, Case No. 04/07, Decision, 31 March 2010, para.51.
[807] See: *Balaj et al. v. UNMIK*, Case No. 04/07, Decision, 31 March 2010, para.52.
[808] See: *Balaj et al. v. UNMIK*, Case No. 04/07, Decision, 31 March 2010, para.52.
[809] See: *Balaj et al. v. UNMIK*, Case No. 04/07, Decision, 31 March 2010, para.53.
[810] *N.M. and Others v. UNMIK*, Case No. 26/08, Decision, 5 June 2009, para.23.
[811] The complainants allege, on account of various UNMIK actions and failures to act, multiple violations of

land and failing to move them to a safe location.[812]

During the proceedings, the complainants asserted that 'all avenues for review of the alleged violations have been exhausted in the sense that there were no existing or effective remedies available to the complainants'.[813] According to the complainants, the UN is immune from legal proceedings instituted against it in domestic jurisdictions under the CPIUN unless a decision is taken by the UN Secretary-General to expressly waive that immunity.[814] In this context, there were 'no institutions in Kosovo with jurisdiction to hear this matter, or which are in a position to provide an effective remedy'.[815] Moreover, 'the local legal system is not independent of UNMIK and … they had serious and justified fears of using the local court system for fear of reprisal attacks'.[816] This situation was in violation of the right to an effective remedy established by Art.6 (1) of the ECHR. The UNMIK took the opposite view: that the complainants had failed to exhaust the avenues available for review as there were pending third-party claims for personal injury or death with the UN in New York in relation to this matter.[817] As with the *Balaj et al.* case, the HRAP believed that 'the question of exhaustion of remedies should be joined to the merits of the case',[818] and declared the complaint admissible in part.

The 2009 Direction was promulgated following the SRSG's objection to the admissibility of the complaint based on the non-exhaustion of available avenues.[819] The HRAP then made the same decision as it had with its 2010 decision in the *Balaj et al.* case. Following assessment, the HRAP had ascertained that the nature of the substantive parts of this complaint could reasonably can be dealt with through the UN Third Party Claims Process.[820] The procedural parts of the complaint which had clearly not resulted in personal injury, illness or death, nor in the loss of or damage to property, such as the

various international human rights instruments, in particular of the ECHR (Arts.2, 3, 6.1, 8, 13 and 14) and the Protocol No. 12 to the ECHR (Art.1); UDHR (Art.25(1)); ICCPR (Arts.2, 3, 6, 7, 14 and 17); CAT (Art.2); ICESCR (Arts.2 (2), 11 and 12); ICERD (Arts.2 and 5); CRC (Arts.2, 3, 5, 6, 16, 19, 23, 24, 27 and 37), and CEDAW (Arts. 2, 3, 5.2, 12 and 14).

[812] See: *N.M. and others v. UNMIK*, Case No. 26/08, Decision, 5 June 2009, para.2. For a more detailed description of the facts of the case, see: *ibid*., paras.1 – 13; *N.M. and others v. UNMIK*, Case No. 26/08, Decision, 31 March 2010, paras.1 – 7; *N.M. and others v. UNMIK*, Case No. 26/08, Decision, 10 June 2012, paras.16 – 17; *N.M. and others v. UNMIK*, Case No. 26/08, 26 February 2016, paras.37 – 89. The complainants also included another three NGOs employees working in the camps.

[813] *N.M. and others v. UNMIK*, Case No. 26/08, Decision, 5 June 2009, para.44.

[814] See: *N.M. and others v. UNMIK*, Case No. 26/08, Decision, 5 June 2009, para.44.

[815] *N.M. and others v. UNMIK*, Case No. 26/08, Decision, 5 June 2009, para.45. See also: *ibid*., para.76.

[816] *N.M. and others v. UNMIK*, Case No. 26/08, Decision, 5 June 2009, para.45.

[817] See: *N.M. and others v. UNMIK*, Case No. 26/08, Decision, 5 June 2009, para.43.

[818] *N.M. and others v. UNMIK*, Case No. 26/08, Decision, 5 June 2009, para.46.

[819] See: *N.M. and others v. UNMIK*, Case No. 26/08, Decision, 31 March 2010, para.14.

[820] See: *N.M. and others v. UNMIK*, Case No. 26/08, Decision, 31 March 2010, paras.39 – 40.

complaints about violations of the procedural aspects of the right to life and the prohibition of inhuman or degrading treatment, should not be covered by the UN Third Party Claims Process.[821] To avoid an artificial separation between these two interlinked parts of the current complaint, the view of the HRAP was that the entire case should be deemed inadmissible.[822]

The fact that the 2009 Direction removed, *de facto,* jurisdiction over the legality of this Direction from the HRAP can largely be attributed to the HRAP's subordination to the UNMIK.[823] The HRAP was set up to investigate UNMIK; but it was set up *by* UNMIK, making it subject to the decisions of UNMIK with regard to the limits of its parameters.[824] The WCHR would be in a different position because of its relationship with the UN. Specifically, Art.2 of the NK Statute emphasised that the WCHR should be a permanent institution of the UN similar to the ICJ.[825] More importantly, this Article stipulated that, in common with the existing treaty monitoring bodies of human rights treaties and the International Criminal Court (ICC), the WCHR must be independent of the UN.[826] As Nowak and Kozma said:

> If the United Nations, e.g. in exercising power in the context of an Interim Administration as UNMIK in Kosovo, violates a human right guaranteed by any of the human rights treaties enumerated in Annex 1, it can be held accountable by the alleged victim before the World Court of Human Rights.[827]

The MS Statute indicated the WCHR's independence by answering the question of why international organisations would accept the jurisdiction of the WCHR. Scheinin recalled the 'increasing calls for subjecting international organizations to some sort of judicial, or at least independent, review as to their compliance with human rights'.[828] According to the Consolidated Statute, the WCHR, in common with the ICJ and the ICC, should be an independent and permanent institution in close relationship with the UN.[829] The WCHR should be brought into relationship with the UN through a special agreement

---

[821] See: *N.M. and others v. UNMIK*, Case No. 26/08, Decision, 31 March 2010, para.41.
[822] See: *N.M. and others v. UNMIK*, Case No. 26/08, Decision, 31 March 2010, paras.42 – 43.
[823] See: *Balaj et al. v. UNMIK*, Case No. 04/07, Decision, 31 March 2010, para.46.
[824] See: Matthew Saul and James A. Sweeney: *International Law and Post-Conflict Reconstruction Policy*, London; New York: Routledge, 2015, p.61.
[825] See: Nowak and Kozma, *supra* note 11, p.51.
[826] See: *ibid*., pp.51, 52.
[827] *Ibid*., p.58.
[828] Scheinin, *supra* note 2, p.25.
[829] See: Kozma, *et al*., *supra* note 21, p.30.

similar to Art.2 of the ICC Statute.[830] In this sense, there is no legal obstacle to the WCHR integrating the newly created internal remedies of each particular complaint into the examination of the compliance with the rule of prior exhaustion of internal remedies because of its independence of the UN.

Under some exceptional circumstances, the internal remedies created by the UN after the acceptance of the jurisdiction of the WCHR might offer more rapid redress, while at the same time easing the burden on the Court. However, due caution would be required to prevent the UN 'from relying on an internal rule to escape its responsibility'.[831] The WCHR may have to consider the nature of any newly created internal remedies, and the context in which such new remedies had been created. It is for the WCHR to decide whether the grounds for departing from the general principle whereby the assessment of the requirement of exhaustion of internal remedies has been satisfied can be fully justified.

### 3.2 The temporary restriction on the admissibility

According to the rule of prior exhaustion of internal remedies, the WCHR should, in each particular case, examine the internal remedies established by the UN with all due caution. In principle, a complaint submitted to the WCHR must contain a concise and legible statement of compliance with the rule of prior exhaustion of internal remedies. If the UN did claim non-exhaustion, it would then be incumbent on the Organisation to indicate to the WCHR, with sufficient clarity, the remedies which the applicant had not attempted to access. The UN would also have to satisfy the Court that the remedies were accessible to the claimant, were capable of providing redress in respect of the applicants' complaints, and offered a reasonable prospects of success.[832] Once the UN had established the existence of a feasible remedy, the burden of proof would shift to the applicant to show that the remedy proposed by the UN had either been exhausted or was inadequate and ineffective, or that there were special circumstances making it unnecessary to meet this requirement.[833] An individual complaint might be deemed to be inadmissible by the WCHR if it were found that the complainant had failed to exhaust the established internal

[830] See: *ibid*. Art.2 of the ICC Statute provides that: 'The Court shall be brought into relationship with the United Nations through an agreement to be approved by the Assembly of States Parties to this Statute and thereafter concluded by the President of the Court on its behalf'.
[831] Verdirame, *supra* note 151, p.139.
[832] See: Schabas, *supra* note 742, p.766.
[833] See: *ibid*.

remedies available to him.

In a situation where a complaint is declared inadmissible, the rule of prior exhaustion of internal remedies can be seen as a restriction on admissibility. Under the rule of exhaustion of domestic remedies, this kind of restriction has only a suspensive effect. The jurisprudence of the existing human rights mechanisms has established that, as Vandenhole said, '[i]f domestic remedies have not been exhausted, the complaint will be declared admissible, but this decision can be reviewed later'.[834]

With the entry into force of the future WCHR statute, the complainant could request the Court to re-examine the same application if they believed that the available internal remedies had been exhausted.[835] Once the standard requiring the complainant to have exhausted all the originally declared internal remedies had been satisfied, the WCHR could decide to allow the complaints to be re-opened, and the Court could move to an assessment of the merits of the complaint.

The same holds true for the case of the newly created internal remedies: as long as the newly created remedies were complete, the complainant could request the WCHR to reopen the case. Take again, for example, the case of *Balaj et al. v. UNMIK*. The HRAP declared the complaint inadmissible due to the non-exhaustion of remedies established by the UN according to the 2009 Direction. The Panel explained the effects of this decision simultaneously. It was the view of the Panel that 'requirements of exhaustion of available avenues are by their very nature only temporary restrictions on admissibility'.[836] Specific to that case:

> The effect of a declaration of inadmissibility on account of non-exhaustion of an available remedy is in principle of a dilatory nature only, not of a peremptory nature. This means that a complainant may resubmit his or her complaint once all required processes have been concluded.[837]

According to Rule 49 of the Panel's Rules of Procedure, once the UN Third Party Claims Process has been concluded, the complainants can file a fresh complaint with the

---

[834] Wouter Vandenhole: *The Procedures Before the UN Human Rights Treaty Bodies: Divergence Or Convergence?*, Antwerp and Oxford: Intersentia, 2004, p.261. See also: Antônio A. C. Trindade: "Origin and Historical Development of the Rule of Exhaustion of Local Remedies in International Law", in: *Revue belge de droit international* (Belgian Journal of International Law), Vol. 12, 1976, pp.499 – 527, at 526.

[835] Donna Gomien: *Short guide to the European Convention on Human Rights* (3rd edition), Strasbourg: Council of Europe Publishing, 2005, pp.169 – 170.

[836] *Balaj et al. v. UNMIK*, Case No. 04/07, Decision, 31 March 2010, para.55.

[837] *Balaj et al. v. UNMIK*, Case No. 04/07, Decision, 31 March 2010, para.55.

HRAP, and the Panel will then decide whether to accept such a request.[838] In other words, the possibility for the applicants to have their complaint further examined by the Panel upon completion of the UN Third Party Claims Process must be preserved.[839] '[I]n certain special circumstances',[840] the HRAP added, 'applicants may seek to obtain the reopening of proceedings that have been closed, where new circumstances arise and where the reopening of those proceedings is in the interests of justice'.[841]

In December 2010, the complainants in the *Balaj et al.* case informed the HRAP that they had completed the UN Third Party Claims Process,[842] and requested that the HRAP 'proceed with the complaint as originally presented to the Panel, in particular with the procedural parts of it'.[843] Specifically, in the weeks after the demonstration, the UNMIK had invited the complainants to file claims for compensation, and all four complainants filed such claims between April and August 2007.[844] The UNMIK Local Claims Review Board would usually examine such claims, and the recommendation made by this Board would be forwarded to the Headquarters Claims Review Board in New York for review.[845] In this case, after a preliminary review of the compensation claims, the UN Controller asked the UNMIK to negotiate with the complainants concerning the amount of compensation to be paid.[846] 'Once a settlement amount was agreed upon, the claims had to be resubmitted to the UNMIK Local Claims Review Board'.[847]

In addition to apologising for 'the acts that had led to the tragic events',[848] the SRSG also set up a negotiation team which proposed substantial amounts of compensation to the complainants in 2009 and 2010 respectively.[849] During the process of negotiation, the negotiation team hoped that the UNMIK's liability could be waived if the complainants accept the pending offer.[850] However, the complainants wished to continue with the proceedings pending before the HRAP, irrespective of whether they accepted the

[838] See: *Balaj et al. v. UNMIK*, Case No. 04/07, Decision, 31 March 2010, para.56.
[839] See: *Balaj et al. v. UNMIK*, Case No. 04/07, Decision, 31 March 2010, para.57.
[840] See: *Balaj et al. v. UNMIK*, Case No. 04/07, Decision, 31 March 2010, para.58.
[841] See: *Balaj et al. v. UNMIK*, Case No. 04/07, Decision, 31 March 2010, para.58.
[842] See: *Balaj et al. v. UNMIK*, Case No. 04/07, Decision, 11 May 2012, para.8.
[843] *Balaj et al. v. UNMIK*, Case No. 04/07, Decision, 11 May 2012, para.8. The summary of the original complaint, see: *ibid*., paras.18, 19, 31.
[844] See: *Balaj et al. v. UNMIK*, Case No. 04/07, Decision, 11 May 2012, para.20.
[845] See: *Balaj et al. v. UNMIK*, Case No. 04/07, Decision, 11 May 2012, para.20.
[846] See: *Balaj et al. v. UNMIK*, Case No. 04/07, Decision, 11 May 2012, para.21.
[847] *Balaj et al. v. UNMIK*, Case No. 04/07, Decision, 11 May 2012, para.21.
[848] *Balaj et al. v. UNMIK*, Case No. 04/07, Decision, 11 May 2012, para.22.
[849] See: *Balaj et al. v. UNMIK*, Case No. 04/07, Decision, 11 May 2012, paras.23, 29.
[850] See: *Balaj et al. v. UNMIK*, Case No. 04/07, Decision, 11 May 2012, para.23.

compensation.[851] As Balaj and Xheladini asserted:

> [T]hey did not only seek compensation, but also other forms of redress, in particular the opening of a criminal investigation. Therefore, they considered that acceptance of compensation could not preclude the Panel from continuing with its examination of the case and recommending further measures.[852]

The complainants ultimately refused to enter into an agreement with the UNMIK on the issue of compensation.[853] In spite of this refusal, the negotiation team did not suspend the compensation procedure.[854] Subsequently, the UNMIK Local Claims Review Board confirmed the compensation offers, later approved by the Assistant Secretary-General of the United Nations.[855] However, as a prerequisite for obtaining the compensation, the complainants were required to sign a release from with the following statement: 'I understand that this offer is in full and final settlement of all claims of every nature and kind whatsoever resulting from the above loss'.[856] Eventually, as per the UNMIK's requirements, the complainants signed these release forms,[857] But despite signing the release forms, the complainants still requested the HRAP to reopen the proceedings and resume the examination of the merits of their complaint.[858]

At this stage, the HRAP ruled that the UN Third Party Claims Process had been completed.[859] During the proceedings, the SRSG decided to regard the complainants' request as a new complaint, which thus fell foul of the HRAP's jurisdiction *ratione temporis*.[860] The complainants argued that, on the contrary, upon completion of the UN Third Party Claims Process the legal obstacles of inadmissibility or ineligibility to reopening the proceedings commenced by the complaints in 2007 no longer applied.[861]

The HRAP appreciated the complainants' argument. In its assessment, the Panel reiterated its decision of 2010 that 'the effect of a declaration of inadmissibility on account of non-exhaustion of an available remedy is in principle of a dilatory nature only, not of a

---

[851] See: *Balaj et al. v. UNMIK*, Case No. 04/07, Decision, 11 May 2012, para.23.
[852] *Balaj et al. v. UNMIK*, Case No. 04/07, Decision, 11 May 2012, para.23.
[853] See: *Balaj et al. v. UNMIK*, Case No. 04/07, Decision, 6 June 2008, para.25.
[854] See: *Balaj et al. v. UNMIK*, Case No. 04/07, Decision, 11 May 2012, para.25.
[855] See: *Balaj et al. v. UNMIK*, Case No. 04/07, Decision, 11 May 2012, para.27.
[856] *Balaj et al. v. UNMIK*, Case No. 04/07, Decision, 11 May 2012, para.27.
[857] See: *Balaj et al. v. UNMIK*, Case No. 04/07, Decision, 11 May 2012, paras.27 – 30.
[858] *Balaj et al. v. UNMIK*, Case No. 04/07, Decision, 11 May 2012, para.31.
[859] See: *Balaj et al. v. UNMIK*, Case No. 04/07, Decision, 11 May 2012, para.45.
[860] See: *Balaj et al. v. UNMIK*, Case No. 04/07, Decision, 11 May 2012, para.47. According to section 5 of the 2009 Direction, the cut-off date for submission of complainants is 31 March 2010.
[861] *Balaj et al. v. UNMIK*, Case No. 04/07, Decision, 11 May 2012, para.49.

peremptory nature'.[862] The HRAP further confirmed the point of view that the strict application of the jurisdiction *ratione temporis* of the HRAP would generate unacceptable effects:

> [T]he requirement of going through the UN Third Party Claims Process would … in effect extinguish the complaint without the possibility of the complainants resubmitting it to the Panel …. Such a result would offend basic notions of justice.[863]

Accordingly, the HRAP concluded that the complainants could ask the Panel to reopen the proceedings, 'without the cut-off deadline of 31 March 2010 being an obstacle to a continued examination of their complaint'.[864]

Another legal issue closely related to the temporary restriction on admissibility during proceedings is the stipulation that accepting the internal remedies established by the UN may in no event mean that the applicant has waived the fundamental rights they have invoked in their complaint. The SRSG argued that the complainants had waived their rights by signing release forms on receipt of compensation from the UNMIK, and had therefore exempted the UNMIK from its liability for wrongdoing.[865] The complainants contested that, firstly, the right to life and the right not to be tortured respectively under Arts.2 and 3 of the ECHR 'are not capable of being waived in any circumstances'.[866] The SRSG's argument 'would offend the vital public interest in ensuring that complaints about violations of fundamental rights are heard by the Panel, accountability is upheld, and confidence is maintained among the population'.[867] Secondly, 'the complainants have at no time conducted themselves in a way which demonstrates their unequivocal acquiescence to the waiver of their rights'.[868] Nor did the terms of the release forms state that they represented a waiver of the complainants' rights.[869] Thirdly, the complainants had no choice but to sign the release forms, because they were informed by the UNMIK that their signature was the prerequisite for being compensated.[870]

The HRAP approved the complainants' request to reopen the proceedings. According

---

[862] *Balaj et al. v. UNMIK*, Case No. 04/07, Decision, 31 March 2010, para.55; *Balaj et al. v. UNMIK*, Case No. 04/07, Decision, 11 May 2012, para.52.
[863] *Balaj et al. v. UNMIK*, Case No. 04/07, Decision, 11 May 2012, para.52.
[864] *Balaj et al. v. UNMIK*, Case No. 04/07, Decision, 11 May 2012, para.53.
[865] See: *Balaj et al. v. UNMIK*, Case No. 04/07, Decision, 11 May 2012, paras.74, 76.
[866] *Balaj et al. v. UNMIK*, Case No. 04/07, Decision, 11 May 2012, para.75.
[867] *Balaj et al. v. UNMIK*, Case No. 04/07, Decision, 11 May 2012, para.75.
[868] *Balaj et al. v. UNMIK*, Case No. 04/07, Decision, 11 May 2012, para.75.
[869] See: *Balaj et al. v. UNMIK*, Case No. 04/07, Decision, 11 May 2012, para.75.
[870] See: *Balaj et al. v. UNMIK*, Case No. 04/07, Decision, 11 May 2012, para.75.

to the ECtHR's case law,[871] the effective waiver of a right 'must be established in an unequivocal manner and be attended by minimum safeguards commensurate to its importance'.[872] From the nature of the complaints and the arguments of the complainants, the HRAP found it highly unlikely that the complainants 'would have accepted an offer for compensation that would result in impunity for the perpetrators of the alleged killing and wounding of the victims'.[873] As a result, the HRAP rejected the SRSG's objection, and concluded that:

> [E]ven if the signing of the release forms implies a waiver on the part of the complainants, it cannot be considered to imply an unambiguous waiver of their right to obtain an opinion from the Panel on the merits of their complaint.[874]

The HRAP was satisfied that the complainants had exhausted other remedies and decided to allow the proceedings to be re-opened.

---

[871] *Anthony Jones v. the United Kingdom*, application no. 30900/02, Fourth Section, Decision as to the Admissibility, pp.11 – 12; *Ananyev v. Russia*, application no. 20292/04, First Section, Judgment, Strasbourg, 30 July 2009 (Final 21/02/2011), §38; *Salduz v. Turkey*, application no. 36391/02, Judgment, Strasbourg, 27 November 2008, §59; *Sejdovic v. Italy*, application no. 56581/00, Grand Chamber, Judgment, Strasbourg, 1 March 2006, §86; *Pishchalnikov v. Russia*, application no. 7025/04, First Section, Judgment, Strasbourg, 24 September 2009 (Final 24/12/2009), §77; *Idalov v. Russia*, application no. 5826/03, Grand Chamber, Judgment, Strasbourg, 22 May 2012, §172; *Poitrimol v. France*, application no. 14032/88, Court (Chamber), Judgment, Strasbourg, 23 November 1993, §31; *Panovits v. Cyprus*, application no. 4268/04, First Section, Judgment, Strasbourg, 11 December 2008 (Final 11/03/2009), §68; *Sanader v. Croatia*, application no. 66408/12, First Section Judgment, Strasbourg, 12 February 2015 (Final 06/07/2015), §72; *Zachar and Čierny v Slovakia*, applications nos. 29376/12 and 29384/12, Third Section, Judgment, Strasbourg, 21 July 2015 (Final 21/10/2015), §60; *Colozza v. Italy*, application no. 9024/80, Court (Chamber), Judgment, Strasbourg, 12 February 1985, §28; *Sharkunov and Mezentsev v. Russia*, application no. 75330/01, First Section, Judgment, Strasbourg, 10 June 2010 (Final, 10/09/2010), §106; *Bortnik v. Ukraine*, Application no. 39582/04, Fifth Section, Judgment, Strasbourg, 27 January 2011 (Final 27/04/2011), §40; *Demebukov v. Bulgaria*, application No. 68020/01, Fifth Section, Judgment, Strasbourg, 28 February 2008 (Final 07/07/2008), §47; *Scoppola v. Italy (No.2)*, application no. 10249/03, Grand Chamber, Judgment, Strasbourg, 17 September 2009, §135; *Plonka v. Poland*, application no. 20310/02, Fourth Section, Judgment, Strasbourg, 31 March 2009, §37; *Borisov v. Russia*, application no. 12543/09, First Section, Judgment, Strasbourg, 13 March 2012, §34; *Dilipak and Karakaya v. Turkey*, application nos. 7942/05 and 24838/05, Second Section, Judgment [Extract], Strasbourg, 4 March 2014, §79; *Stoyanov-Kobuladze v. Bulgaria*, application no. 25714/05, Fourth Section, Judgment, Strasbourg, 25 March 2014 (Final 25/06/2014), §39; *Pavlenko v. Russia*, application no. 42371/02, Judgment, Strasbourg, 1 April 2010 (Final 04/10/2010), §102; *Natsvlishvili and Togonidze v. Georgia*, application no. 9043/05, Third Section, Judgment, Strasbourg, 29 April 2014 (Final 08/09/2014), §91; *Hakansson and Sturesson v. Sweden*, application no. 11855/85, Court (Chamber), Judgment, Strasbourg, 21 February 1990, §66; *Hermi v. Italy*, application no. 18114/02, Grand Chamber, Judgment, Strasbourg, 18 October 2006, §72; and *etc.*

[872] *Balaj et al. v. UNMIK*, Case No. 04/07, Decision, 11 May 2012, para.78.

[873] *Balaj et al. v. UNMIK*, Case No. 04/07, Decision, 11 May 2012, para.81.

[874] *Balaj et al. v. UNMIK*, Case No. 04/07, Decision, 11 May 2012, para.82.

### 3.3 Special circumstances absolving the applicants from prior exhaustion of internal remedies

As mentioned above, the rule of prior exhaustion of internal remedies is intended to afford the UN the opportunity to put right the alleged violations of applicable laws under the WCHR's jurisdiction. However, this rule should not be an absolute condition to proceding with an application; it is not meant to be an unreasonable obstacle course that requires individual complainants to jump every possible hurdle before resorting to the WCHR. The inherent and unilateral right of the UN to establish internal remedies should not be unfettered. In its stead, this right must be subject to an external review of availability, effectiveness, and adequacy. The requirement for the applicant to exhaust the established internal remedies may be subject to exceptions, which may exist due to the remedial action in question being unavailable, ineffective, or inadequate.

#### 3.3.1 The unavailability remedies

In cases where the UN claims that there are established internal remedies to which the applicants have not had recourse, the burden of proof lies with the UN to indicate to the WCHR with sufficient clarity that these remedies were 'available in theory and practice at the relevant time'.[875] Due notice should be taken of issues such as transparency and accessibility in the course of the availability review.

With regard to transparency, when the Organisation submits to the Court's jurisdiction the Consolidated Statute will make it obligatory for the UN to specify in exactly what circumstances an individual complainant must exhaust what kind of internal remedies before lodging the case with the WCHR. At the same time, the UN must provide the information to the applicants in a timely fashion and 'on a wide scale and through appropriate channels of communication'.[876] The relevant information should include adequate publicity on the availability, the filing period, the relevant parties to be notified, and the potential outcomes.[877] The UN must also make sure that the applicants understand exactly which part of the Organisation affected or violated their rights as guaranteed by the

[875] The HRAP Annual Report (2008), p.14.
[876] Wellens, *supra* note 672, p.175.
[877] See: *ibid*.

WCHR, and from whom they can expect the established internal remedies. The UN should not conduct itself in such a way as to leave the above information vague or open.

As mentioned in **Chapter Three**, **Section 2**, the requirement of 'available domestic remedies' is often described in terms of 'accessibility'.[878] The accessibility review of the established internal remedies must focus on whether the applicants were able to pursue the established internal remedies without undue hardship or inappropriate impediment. As mentioned above, if the UN makes a non-exhaustion claim, it 'must demonstrate that the remedy was accessible, capable of providing redress in respect of the individual's complaints and offered reasonable prospects of success'.[879]

Firstly, in a situation where the internal remedies identified by the UN are found not to have been accessible *ab initio* to the individual, such internal remedies do not have to be exhausted. An established internal remedy which is not accessible to the complainant means an inability to exhaust this remedy, and the WCHR should declare an individual complaint admissible without regard to the exhaustion of internal remedies as there were no such remedies open to the complainants. Such a situation, if it has resulted in a total lack of available/accessible remedies, would amount to a denial of justice. For example, if the UN was found to have failed to establish the remedial mechanism as it had declared it would do when accepting the WCHR's jurisdiction, or had failed to initiate the relevant proceedings of the newly created remedies, the victim would be eligible to lodge the complaint directly with the WCHR.

Secondly, the applicant should be absolved from the obligation to exhaust the established internal remedies if the circumstances of the case make access to the internal remedies unduly difficult. Inappropriate impediments to the applicants' access to the established internal remedies may constitute this kind of undue difficulty. According to the MoA doctrine, the UN should be allowed, as with state actors, to attach some impediments to the accessibility of the established internal remedies. However, in no event should an impediment violate the existing human rights standards concerning the right to an effective remedy, which is widely considered to be 'a norm of customary international law'[880] or 'a general principle of law'.[881] For example, no impediment should be raised upon any

[878] See: Chapter Three, Section 2, p.189.
[879] The HRAP Annual Report (2008), p.14.
[880] International Law Association, Committee on Accountability of International Organisations, *supra* note 131, p.33; Interhandel (Switzerland v. United States), Judgment, I.C.J. Reports 1959, p.27; Elettronica Sicula S.p.A. (ELSI) (United States v. Italy), Judgment I.C.J. Reports 1989, para.50.
[881] International Law Association, Committee on Accountability of International Organisations, *supra* note

grounds relating to sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, or other status.[882] At the same time, this list of grounds is open-ended.[883]

It is worth pointing out here that reasons behind the unavailability of an established internal remedy vary in different cases. It will be at the discretion of the WCHR to determine whether the circumstances of the particular case in question have constituted such factors as undue hardship and inappropriate impediment, and thus made the relevant remedial mechanisms inaccessible. According to Amerasinghe, 'availability entails not only that the remedy be accessible to the particular individual affected, if such remedy existed, but also that that remedy be available as a possible remedy in the specific context of the individual's case'.[884]

### 3.3.2 The ineffectiveness remedies

It has often been the case, under the rule of exhaustion of domestic remedies, that the existing human rights mechanisms have found the domestic remedies provided by state-actors to be ineffective *ab initio*. As D'Ascoli and Scherr observed:

> Generally speaking, very often the ECHR and the HRC have found that in cases of gross and systematic violations of human rights there is a presumption of non-effectiveness of domestic remedies given that the rules of law are no longer internally respected when human rights are

131, p.33. See: also: Dinah Shelton: *Remedies in International Human Rights Law*, Oxford: Oxford University Press, 1999, p.182; Chittharanjan F. Amerasinghe: *Local Remedies in International Law* (2nd edition), Cambridge; New York: Cambridge University Press, 2004, p.19.

[882] The list of grounds differs across these instruments. See: for example, Art.2 of UDHR, Art.26 of ICCPR, Art.2 of ICESCR, Art.2 of CRC, Art.5 of ICERD, Art.16 of CEDAW, Art.12 of ICPRD, Art.14 of ECHR and No.12 of the Protocol thereto, Art.1 of American Convention on Human Rights (ACHR), Art.2 of African Charter on Human and Peoples' Rights (AfCHPR), and *etc.*

[883] For example, Skjelten enumerated such reasons as might make a remedy unavailable, such as age, mental capacity, language difficulties, the absence of legal assistance, indigence, a general fear of the legal community, or that the petitioner had been deported from the State. KB Skjelten: "The Principle of Exhaustion of Domestic Remedies in the Inter-American System of Human Rights: A reasonable obstacle or an impossible barrier?", University of Oslo, Faculty of Law, pp.38 – 39. This paper is available at: https://www.duo.uio.no/bitstream/handle/10852/42762/695.pdf?sequence=1.

[884] Amerasinghe, *supra* note 881, p.182. He took, for example, the issues of impecuniosity. He suggested that indigence (the issues of impecuniosity) *per se* may not be a sufficient exception to the rule of the prior exhaustion of internal remedies on the grounds that they are inaccessible. Instead, it 'depends on a variety of circumstances, such as whether the proceeding is civil or criminal, whether legal representation is required or necessary for the case, whether court costs are payable and how much, and whether there is available legal representation free of charge as through legal aid, among others'. Amerasinghe, *supra* note 881, p.331.

systematically violated.[885]

However, experts are convinced that this situation makes it almost impossible for the UN under the rule of prior exhaustion of internal remedies. As mentioned in **Section 1**, some authors, such as Nowak and Kozma, have suggested that it seemed unconvincing that the UN was at all likely to commit systematic human rights violations. Therefore, the effective review of the established internal remedies should be conducted in each individual case.

The established internal remedies must be able to offer a sufficiently certain prospect of success (*soit efficace et offre des chances raisonnables de succès*) to relieve the harm suffered. 'The test of effectiveness of a remedy, is to avoid exhaustion becoming a senseless formality, where it has no likelihood of success'.[886] Where the pursuit of such remedies is futile, the complainants are left defenceless. Under the rule of exhaustion of domestic remedies, if the domestic remedies in question did not offer a reasonable prospects of success, then there is no need for the complainant to have exhausted these remedies for a case to be admissible. This rationale is embodied in the case law of the existing human rights mechanisms mandating receiving and considering individual complaints.

The rationale behind the rule of exhaustion of domestic remedies could apply to the rule of prior exhaustion of internal remedies. The WCHR may consider a complaint inadmissible if the established internal remedies have not been exhausted, particularly when the requests or applications for remedies are still pending before the relevant remedial mechanisms. However, if an established internal remedy does not in fact offer any reasonable prospects of success, for example, in light of the UN's declaration when it accepts the WCHR's jurisdiction, the fact that the applicant has used it is no bar to admissibility.

The case law of the HRAP has touched on the issue of the 'prospect of success'. In the case of *N.M. and others v. UNMIK*, the HRAP declared the complaint inadmissible given the promulgation of the 2009 Direction. Nevertheless, the Panel also held that the previous 'declaration of inadmissibility on account of non-exhaustion of an available remedy is in principle of a dilatory nature only, not of a peremptory nature'.[887] The

[885] D'Ascoli and Scherr, *supra* note 264, p.14.
[886] Skjelten, *supra* note 883, p.38.
[887] *N.M. and others v. UNMIK*, Case No. 26/08, Decision, 31 March 2010, para.45.

complainants are entitled to resubmit or refresh their complaints once all required processes have been concluded.[888]

In 2011, the complainants in the *N.M and others* case informed the HRAP that they had completed the UN Third Party Claims Process, which was filed by the complainants in 2006.[889] Unlike *the Balaj et al.* case, the UN Third Party Claims Process declared the claims of the complainants non-receivable, for the reason that the complaints had gone beyond the 'claims of a private law character'.[890] Given this, the complainants requested the HRAP to reopen the proceedings.[891]

With regard to whether the UN Third Party Claims Process had been completed, the HRAP noted, as the SRSG submitted, that 'there may be at least 24 complainants in the present case who are at the same time represented in separate UN Third Party Claims Process proceedings by Leigh Day & Co.',[892] which was still negotiating with the UN.[893] Nevertheless, the Panel found that the UNMIK had shown no indication that the Third Party Claims Process would be reopened, let alone that the decision of this process could be reversed.[894] To the HRAP, '[t]he submissions by the clients of Leigh Day & Co., therefore, do not affect the conclusion that the Third Party Claims Process has come to an end'.[895] As a result, the HRAP considered that the decision made by the Under-Secretary-General had put 'an end to the UN Third Party Claims Process, which therefore must be considered completed'.[896] At the complainants' request, the HRAP decided to 're-open the complaint in its entirety and proceed with the examination of the merits of the whole complaint as initially presented to it'.[897]

The lack of adequacy is also a sufficient excuse for not exhausting the established internal remedies. Review of adequacy is closely connected to that of effectiveness. In its 1956 resolution, the Institut de Droit International referred to the need for exhaustible

---

[888] See: *N.M. and others v. UNMIK*, Case No. 26/08, Decision, 31 March 2010, paras.45, 46.
[889] See: *N.M. and others v. UNMIK*, Case No. 26/08, Decision, 10 June 2012, para.8.
[890] See: *N.M. and others v. UNMIK*, Case No. 26/08, Decision, 10 June 2012, paras.8, 19, 32; *N.M. and others v. UNMIK*, Case No. 26/08, Opinion, 26 February 2016, para.94.
[891] See: *N.M. and others v. UNMIK*, Case No. 26/08, Decision, 10 June 2012, paras.8, 19, 32; *N.M. and others v. UNMIK*, Case No. 26/08, Opinion, 26 February 2016, para.94.
[892] In October 2009, some 864 members of the Roma, Ashkali, and Egyptian (RAE) community in Kosovo, including 24 complainants of the present case, represented by a law firm in the United Kingdom named Leigh Day & Co., lodged similar claims before the UN Third Party Claims Process. See: *N.M. and others v. UNMIK*, Case No. 26/08, Decision, 10 June 2012, para.20.
[893] See: *N.M. and others v. UNMIK*, Case No. 26/08, Decision, 10 June 2012, para.30.
[894] *N.M. and others v. UNMIK*, Case No. 26/08, Decision, 10 June 2012, para.36.
[895] *N.M. and others v. UNMIK*, Case No. 26/08, Decision, 10 June 2012, para.36.
[896] *N.M. and others v. UNMIK*, Case No. 26/08, Decision, 10 June 2012, para.35.
[897] *N.M. and others v. UNMIK*, Case No. 26/08, Decision, 10 June 2012, para.48.

remedies to be 'efficaces et suffisants'.[898] According to the rule covering the exhaustion of domestic remedies 'there is general agreement in respect of human rights protection that local or domestic remedies must be exhausted when they are adequate for the object sought or are effective'.[899] Nor did Amerasinghe make any distinction between these two types of review either. He suggested that the requirements of adequacy and effectiveness were 'related to the limitation or exception which operates to make the rule inapplicable and based on the obvious futility or ineffectiveness of the remedy'.[900] 'Where the remedies available clearly will not satisfy the object sought by the claimant, they need not be resorted to because they are ineffective'.[901]

According to the rule of prior exhaustion of internal remedies, the UN must ensure the substantive outcomes of the internal remedies to be taken will be arbitrarily close to the desired result. Retrospective remedies such as the award of responsibility are inadequate. Take, for example, the Commissions of Inquiry (CoI) and Fact-Finding Mission (FFM), which are said to be 'a key tool in the United Nations response to situations of violations of international human rights law and international humanitarian law, including international crimes'.[902] Some CoI and FFMs in places such as Darfur, Sri Lanka and Libya have referred to the reparation element of accountability.[903] The UN is also, at least in theory, a potential subject of the CoI and FFMs, because the findings of CoI and FFMs can 'meet the need for establishing separate and individual responsibility on the part of all the actors involved'.[904]

---

[898] Institut de Droit International: "La règle de l'épuisement des recours internes", Session de Grenade – 1956, 18 avril 1956, available at: http://www.justitiaetpace.org/idiF/resolutionsF/1956_grena_01_fr.pdf.
[899] Amerasinghe, *supra* note 881, p.318. See also: *ibid*, p.337.
[900] *Ibid*., p.190.
[901] *Ibid*., p.336.
[902] United Nations, OHCHR: Commissions of Inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law: Guidance and Practice, New York, NY; Geneva United Nations, 2015, p.v.
[903] See: *ibid*., p.7.
[904] Wellens, *supra* note 672, p.190. Wellens also pointed out that, normally, the punitive element of remedial action is not included in terms of reference of a CoI, even though the Commission may clearly mention this aspect. See: *ibid*., p.191. The Office of the United Nations High Commissioner for Human Rights (OHCHR) similarly indicated that the COI and FFMs 'have proved to be valuable in countering impunity by promoting accountability for such violations'. United Nations, OHCHR, *supra* note 902, p.v. Wellens went further:

An interim or a final report, as the most visible outcome of a CoI or FFM investigations, marks the conclusion of the relevant investigations.[905] The outcomes of the CoI or FFM are mainly 'fact-finding and the reconstruction of the chronological unfolding of events',[906] which 'may accommodate the right to know on the part of the victims'.[907] According to Wellens' observation, The work of a CoI or FFM may also 'very well correspond to the preventive, persuasive and prospective functions of remedial action'.[908] Many of their reports have contained reparations-related recommendations.[909] In these reports, the CoI and FFMs may, for example, explicitly call upon 'the main actors, individually and collectively, to express remorse and regret, eventually calling upon them … to redesign their relationship with the population affected by the events'.[910]

The potential remedial effect of CoI and FFMs cannot be overestimated, as 'the actual remedial action has to be taken by the organisation's executive authorities'.[911] Take, for example, the reports on the fall of Srebrenica and on the actions of the UN during the 1994 genocide in Rwanda.[912] According to these two reports, the responsibility for the genocide in both Srebrenica and Rwanda should rest with both the UN and with individual states contributing troops.[913] With regard to possible remedial action, the UN Secretary-General

---

> The findings of a Commission of Inquiry which has been established and which has been conducting its activities outside the context of judicial proceedings could be useful for determining facts that became public knowledge, but not as evidence for judicial purposes. On the other hand, when an international court or tribunal decides to order a preparatory inquiry as the inquisitorial aspect of the judicial proceedings, its outcome will occupy a different role in the further proceedings in accordance with that court's rules. Inquiries such as those into the fall of Srebrenica and the events in Rwanda could thus, for instance, very well have been ordered by the ICJ within the context of relevant pending cases.

Wellens, *supra* note 672, p.192.

[905] See: United Nations, OHCHR, *supra* note 902, p.89.

[906] Wellens, *supra* note 672, p.190.

[907] *Ibid.*

[908] *Ibid*., p.191.

[909] *Ibid*., p.32.

[910] *Ibid*., p.191.

[911] *Ibid*., p.184.

[912] See: General Assembly: "Report of the Secretary-General pursuant to General Assembly resolution 53/35", A/54/549, 15 November 1999; Security Council: "Report of the Independent Inquiry into the actions of the United Nations during the 1994 genocide in Rwanda", S/1999/1257, 16 December 1999.

[913] According to the Srebrenica Report:

> The international community as a whole must accept its share of responsibility for allowing this tragic course of events by its prolonged refusal to use force in the early stages of the war. This responsibility is shared by the Security Council, the Contact Group and other Governments which contributed to the delay in the use of force, as well as by the United Nations Secretariat and mission in the field.

A/54/549, *supra* note 912, para.501. According to the Report on Rwanda:

in the Srebrenica Report expressed the deepest regret and remorse that the UN had failed to do its part to help save the people of Srebrenica from the Serbian campaign of mass murder.[914] The Rwanda Report stated that the established responsibility of the UN 'warrants a clear apology by the Organisation and by Member States concerned to the Rwandese people'.[915]

According to the rule of prior exhaustion of established internal remedies, mere findings and the admission of responsibility can hardly be said to be n adequate remedies, since they are lacking any competence to grant redress for specific grievances arising from the violation of human rights. Furthermore, they are often 'an injunction or a declaration that may provide little comfort to individuals who have suffered considerable losses'.[916]

*Ex gratia* payments are also worth considering. This kind of remedial action had been deployed in earlier UN PKOs, such as the ONUC and the United Nations Operation in Somalia II (UNOSOM II). From a remedial point of view, *ex gratia* payments are a speedy and alternative means of remedial action for individuals claiming harm from the operations of the UN.[917] However, this kind of remedial action is, as Wellens pointed out:

> designed to accommodate the legitimate concerns of private claimants without there being a legally sound basis – by way of admitting unilaterally or accepting the outcome of a judicial or quasi-judicial remedy – for contractual or non-contractual liability or organisational responsibility.[918]

In the light of the General Assembly resolution 52/247, no compensation would be paid 'for pain and suffering, moral anguish, punitive or moral damages or other types of loss which are not directly related to the injury'.[919] Wellens went further, saying that:

> Private claimants may settle for the *ex gratia* payment either because otherwise they would face the mounting costs of a hearing, or because they acknowledge perhaps that their claim was a

---

> The responsibility for the failings of the UN to prevent and stop the genocide in Rwanda lies with a number of different actors, in particular the Secretary-General, the Secretariat, the Security Council, UNAMIR and the broader membership of the United Nations.

S/1999/1257, *supra* note 912, p.30.

914 See: A/54/549, *supra* note 912, para.503.

915 S/1999/1257, *supra* note 912, p.30.

916 Wellens, *supra* note 672, p.170.

917 See: International Law Association, Committee on Accountability of International Organisations, *supra* note 131, p.33.

918 Wellens, *supra* note 672, p.142.

919 *Balaj et al. v. UNMIK*, Case No. 04/07, Opinion, 27 February 2015, para.113.

> weak one anyway, which would not have any real chance before a quasi-judicial or judicial mechanism.[920]

*Ex gratia* payments were often made by the UNMIK through the UN Third Party Claims Process. In the case law of the HRAP, however, this type of remedy was not deemed to be effective, being 'instrumental in the organisation's refusal to acknowledge liability or responsibility once this has been clearly and objectively established'.[921] In the *Balaj et al.* case, for example, the HRAP regarded the compensation paid to the complainants through the UN Third Party Claims Process as an *ex gratia* payment, which 'was not based on any acknowledgement of a violation of the victims' human rights'.[922] Given that the exact degree of responsibility on the part of the UNMIK would probably never be precisely determined, neither in law or in fact, *ex gratia* payments cannot be regarded as an adequate redress.

To sum up; the HRAP jurisprudence on *ex gratia* payments should be applied to the rule of prior exhaustion of internal remedies in the framework of the future WCHR. According to this rule, each internal remedy should be provided on an acknowledgement of a violation of the victims' human rights. This means that the criteria of the adequacy review cannot be satisfied merely through *ex gratia* payments, as these are instrumental in the UN's 'refusal to acknowledge liability or responsibility once this has been clearly and objectively established'.[923]

### 3.3.3 The unwarranted delay of the remedies

Another situation which may absolve the applicants from prior exhaustion of internal remedies is where there is an unwarranted delay or an unreasonable prolongation in producing a final result. 'In the field of human rights protection, undue delay has been acknowledged to be a reason for excusing the applicant from exhausting remedies'.[924] Most of the UN human rights treaty bodies in existence, such as ICCPR, International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the

[920] Wellens, *supra* note 672, p.142.
[921] *Ibid.*
[922] *Balaj et al. v. UNMIK*, Case No. 04/07, Opinion, 27 February 2015, para.113.
[923] Wellens, *supra* note 672, p.142.
[924] Amerasinghe, *supra* note 881, p.339.

Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), CAT, the Convention on the Rights of the Child (CRC), the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW), CRPD, the International Convention for the Protection of All Persons from Enforced Disappearance (ICED) and the Human Rights Council, have stipulated the exception to the rule of exhaustion of local remedies where there is an unwarranted delay in the application of remedies.[925] In the future framework of the WCHR, the established internal remedies should handle the requests or applications for redress correctly, and produce a final result in a timely fashion, or at least within a reasonable time.

By reference to the rule of exhaustion of domestic remedies, an exception may occur if it is obvious to the WCHR that the length of the relevant proceedings has been unwarrantably delayed or unreasonably prolonged, and this situation can be fully attributed to the UN without justification. In such a case, the WCHR may, in turn, declare the complaint admissible, regardless of the proceedings not yet concluded.

The case law of the WCHR in this respect does not yet exist. Be that as it may, the HRAP has set the precedent that unwarranted delay might occur in both criminal and civil matters. For criminal matters, and particularly for cases in relation to investigations underway as regards the fate of a missing person, the applicants have often accused the UNMIK of violating the right to life laid down in Art.2 of the ECHR. In such a situation, the SRSG has often contended that, given that the investigation is ongoing, the complainants have failed to exhaust their available remedies and should thus wait for the investigation to conclude.[926] However, a view has been taken by the Panel that, 'where a criminal investigation into a missing person or murder case has been ongoing for many years, the argument that the complainant has yet to exhaust remedies because the investigation is still ongoing will be rejected by the Panel'.[927] With regard to the length of proceedings in civil matters, the HRAP maintained that reasons determining whether the issue of unwarranted delay should be assessed *ex abundanti cautela* in the light of the

[925] See: Art.41 (1) (c) of the ICCPR and Art.5 (2) (b) of OP-ICCPR; Arts.3 (1) and 10 (1) (c) of OP-ICESCR; Arts.11 (3) and 14 (7) (a) of ICERD; Art.4 (1) of the OP-CEDAW; Arts.21 (1) (c) and 22 (4) (b) of CAT; Art.7 (5) of Optional Protocol to the Convention on the Rights of the Child on a communications procedure (OP (on a communications procedure)-CRC); Arts.76 (1) (c) and 77 (3) (b) of ICMW; Art.2 (d) of Optional Protocol to the Convention on the Rights of Persons with Disabilities (OP-CRPD) and, Art.31 (2) (d) of the International Convention for the Protection of All Persons from Enforced Disappearance (ICED); Human Rights Council: "Institution-Building", A/HRC/RES/5/1, 18 June 2007, para.87 (g). See also: for example, Vandenhole, *supra* note 834, pp.215, 257, 261, 276, 290;

[926] See: the HRAP Annual Report (2009), p.23.

[927] The HRAP Annual Report (2010), p.19.

circumstances of the case include 'the complexity of the case, the conduct of the complainant and the relevant authorities and what was at stake for the complainant in the dispute'.[928]

### 3.4 Are there latent conflicts between the rule of prior exhaustion of internal remedies and the rule of prior exhaustion of domestic remedies?

One potential problem concerning the rule of prior exhaustion of internal remedies in the context of the UN's jurisdictional immunity is that the UN and a state party are sued as co-defendants before the WCHR. It is possible that the WCHR's application of the rule of prior exhaustion of internal remedies may pose a latent conflict with the rule of prior exhaustion of domestic remedies. This possibility is a real one, especially in the case of UN PKOs where responsibility is shared between the Organisation and individual troop-contributing states.

It is possible for the applicants to request redress, or apply for remedies, severally from the individual troop contributors and the UN before a complaint is lodged with the WCHR. The applicants could make the requests or applications to be dealt with before the domestic jurisdiction and through the internal remedial mechanisms established by the UN respectively. In this situation, the applicants could appeal to the WCHR if they were not satisfied with the judgment rendered by their national court, and their efforts to seek justice through the established internal remedies had been unsuccessful.

It would also be possible for the individual complainants to bring an action before domestic courts simultaneously against the individual troop contributors and the UN. One fact which should be duly noted is that the possibility of the national courts exercising their jurisdiction over the UN always exists. Despite the Organisation being, according to the CPIUN, immune from every form of legal proceedings at a domestic level, contemporary international law does not rule out the possibility of the applicants filing lawsuits against the UN before national jurisdictions, nor would the WCHR seek to deprive applicants of the right to seek justice before national jurisdictions. As long as the UN can be sued before a national human rights court, as Nowak and Kozma explained, the requirement for the exhaustion of domestic remedies would be applicable.[929] In principle, a waiver of

[928] The HRAP Annual Report (2010), pp.33 – 34.
[929] See: Nowak and Kozma, *supra* note 11, pp.63 – 64.

jurisdictional immunity by the UN Secretary-General would place the Organisation under domestic jurisdiction in certain cases, however, the diametrically opposite practice might be found in some cases, with the UN allowing itself to be sued before national courts by answering the plaintiffs' claim without invoking jurisdictional immunity.[930] At the same time, domestic courts have not fully acknowledged the self-executing nature of the CPIUN.

The case of *Defamation charges against Takeshi Kashiwagi* (hereinafter referred to as the *Kashiwagi* case) sets a fairly typical example. The plaintiff Takeshi Kashiwagi, a Japanese freelance journalist, was arrested by the United Nations Civilian Police Force (CIVPOL) on the instruction of Dili District Court in 2000, pursuant to the defamation provisions of the Indonesian Criminal Code.[931] Kashiwagi was released in accordance with an executive order issued by the Transitional Administrator. The relevant provisions in the Indonesian Criminal Code should no longer have been the basis of criminal charges against him, because these provisions might have gone against internationally recognised human rights standards. However, the criminal charges against Kashiwagi were not withdrawn on his release.

Subsequently, Kashiwagi engaged the Justice Minister and Human Rights Unit within the UNTAET regarding the nullification of the provisions applied to him and the withdrawal of the criminal charges against him. After failing in addressing those two points, Kashiwagi brought an action against the Judiciary (including the Investigating Judge, General Prosecutor and Deputy General Prosecutor for Ordinary Crime), the Minister of Justice and the Transitional Administrator of the UNTAET before the Dili District Court. Apart from the demands in the course of the previous negotiation, Kashiwagi also claimed material compensation for his damages. In this case, the Transitional Administrator did not invoke jurisdictional immunity and assigned the Deputy Minister for Justice as his representative to present the hearings instead. Moreover, the Deputy Minister of Justice admitted in a written submission that the Transitional Administrator could be found liable to pay damages for illegal detention as a result of issuing the executive order that secured the claimant's release. Finally, the Judiciary was found liable for Kashiwagi's damages and was ordered to pay material compensation.

The *Kashiwagi* case may have involved the issue of implied waiver of the UN's

---

[930] See: Reinisch, *supra* note 492, pp.18 – 19.

[931] The United Nations Civilian Police Force (CIVPOL) was responsible for maintaining law and order in East Timor and was replaced by an East Timorese Police Service established in April 2000.

jurisdictional immunity. The contemporary international law on this issue is uncertain: neither the UN Charter nor the CPIUN reveals whether the UN's appearance before a domestic court constitutes an express waiver. Neither of these two instruments indicates what class of action does amount to an implied waiver that may be maintained against the UN. The significance of analysing the issue of implied waiver is beyond question, but such an analysis will be left untouched here, as it is beyond the scope of the current discussion of the application of the two exhaustion rules in the same complaint.

If the complainant is dissatisfied with the judgment rendered by the national courts, they will have to decide whether to then submit their case to the respective regional human rights court or to the WCHR. The decision to lodge the complaint with the WCHR may present the Court with an innovative admissibility issue: it is likely that the WCHR will have to decide whether to accept the case, taking into consideration the compliance with both exhaustion rules before considering the case on its merits.

The co-existence of these two exhaustion rules *per se* eliminates the likelihood of equating the exhaustion of domestic remedies to the exhaustion of the established internal remedies. It seems that the domestic proceedings would not make it obligatory for the applicants to exhaust the internal remedies established by the UN. Given this, the WCHR will still need to examine the compliance with the rule of prior exhaustion of internal remedies.

The applicants' failure to exhaust the established internal remedies may result in that part of the complaint which is against the State concerned being deemed admissible, while the part against the UN is deemed to be inadmissible. It should be noted that this kind of complaint often refers to the shared or joint responsibility of the UN and the individual state which contributed troops. There would thus be an artificial separation of the merits of the particular complaint. In order to prevent this situation from happening, the WCHR could, by reference to the experience of the HRAP, consider determining this issue during the merits stage of the proceedings. In many cases, the HRAP has established that the question of whether the requirement to exhaust remedies has been satisfied should be linked to the merits of the case. According to the Panel, this issue is more appropriately addressed in an overall analysis. Many factors, for example, the means of redress available to the complainants, the scope of the obligations arising in this context under the international human rights instruments invoked by the complainants, and also the response given by the authorities to the complainants' use of remedies, will have to be taken into

account.[932] Whenever non-exhaustion claims are confirmed after the HRAP has commenced its considerations of the merits, the HRAP should suspend its deliberations on the merits until it has fully re-assessed and determined anew the claims as mentioned above.

However, no matter how the rule of prior exhaustion of internal remedies is applied, the prerequisite for applying this rule is that the UN has accepted the jurisdiction of the WCHR. According to Art.7 (2) the Consolidated Statute, the UN 'can be held accountable before the Court for alleged human rights violations only if (the Organisation has) made a declaration under Article 51, explicitly recognizing the jurisdiction of the Court in relation to certain treaties as specified in the respective declaration'.[933] The applicants cannot have the case against the UN adjudicated before the WCHR, let alone getting the espousal from the Court, if the latter has made no declaration under Art.51 of the same statute that it recognises the jurisdiction of the Court. It should be recalled here that the MS Statute once tried to introduce flexible ways in which states could accept the Court's jurisdiction, namely, a general acceptance and an *ad hoc* acceptance. **Chapter Three** has abundantly illustrated that, when designing the jurisdiction of the WCHR over states, the MS Statute aimed to provide states with more options by means of which they can take positive steps and measures to facilitate access to the WCHR's jurisdiction, and encourages states to accept the WCHR's jurisdiction. The same design should also become available to the Court's jurisdiction over the UN. As mentioned in **Section 1** of this Chapter, the WCHR may exercise *ad hoc* jurisdiction over the UN in situations where, firstly, the UN has not deposited an instrument accepting the jurisdiction of the WCHR, and secondly, the UN has specified in its instrument of acceptance that certain human rights treaties or specific provisions thereof shall not be invoked before the WCHR by any individual complainant. According to Scheinin, the applicants are not barred from lodging their complaints with the Court in either of these two situations. The WCHR should, *ex officio,* bring the complaint to the attention of the UN to seek *ad hoc* acceptance of the Court's jurisdiction in respect of each complaint, and simultaneously inform the OHCHR. If the UN refuses to accept this *ad hoc* jurisdiction, the OHCHR might request that the Court proceeds to the issuing of an opinion on the matter raised in the complaint.

This kind of jurisdiction, however, was deleted in the Consolidated Statute. As

[932] The procedural aspect of the right to life, the prohibition of ill-treatment, the existence of an effective remedy.
[933] Kozma, *et al*., *supra* note 21, pp.35 – 36.

provided for in Art.51 (1) of this statute, the UN may at any time declare under this Article that it recognises the competence of the Court to receive and examine complaints. It is sufficiently certain that the efforts to establish such a World Court of Human Rights would produce an expected result if the future statute demonstrates a genuine willingness to introduce flexible ways in which the UN and other non-state actors can accept the Court's jurisdiction.

## Concluding Remarks

With regard to who will be subject to the jurisdiction of the WCHR, the authors of the current statutes have adopted a dichotomy of States and Entities. These two terms refer respectively to state actors and non-state actors. By reference to the state actors, entities should also be held accountable for human rights violations. This is certainly true in the case of the UN, which has received many honours and awards for its outstanding contribution to the advance of human rights.

Whilst this **Chapter** has not attempted to deny the contribution of the UN in this regard, respect for the UN should in no event be allowed to amount to wilful blindness when it comes to the reality that questions have increasingly been asked with regard to the UN's human rights record. As Chinkin said: 'the UN's accountability for human rights violations is too costly to ignore as the culture of accountability within the broader framework of the international order and international law continues to strengthen'.[934] It is possible that the UN itself has been, or might become, one of the perpetrators of human rights violations in the name of the protection of these very rights. Given this, the current **Chapter**, following Nowak, Scheinin and Kozma, advocates a competent judicial body, namely, a World Court of Human Rights (WCHR), to determine this kind of accountability.

**Section 1** firstly provided an overview of the current statutes concerning the WCHR's jurisdiction over the UN. It can be found that the UN is exemplified in the work undertaken, directly or indirectly, by all of these statutes. The authors of the current statutes have displayed very different attitudes towards the contentious matter of jurisdiction. As this section has indicated, Nowak and Kozma did not set an explicit declaration of acceptance as a prerequisite for the WCHR exercising its jurisdiction over the UN. In other words, the jurisdiction of the WCHR is of a compulsory nature for the UN. With the entry into force of a future WCHR Statute, the WCHR's jurisdiction will automatically include the UN regardless of that body's consent. By contrast, the position of state actors, other global or regional inter-governmental (e.g. WTO, NATO, the Organisation of American States (OAS), African Union (AU) or the European Union (EU)) and other non-state actors in the NK Statute is different. The MS Statute also considered

[934] Chinkin, *supra* note 748, p.10.

the UN as one of the potential respondents before the WCHR. Unlike the NK Statute, the MS Statute made no distinction between the UN and other non-state actors as did the NK statute. As with other 'entities' in the sense of his draft statute, Scheinin seemed to believe that the exercise of jurisdiction over the UN should premise on the UN's declared acceptance. At the same time, the MS Statute indicates that this acceptance could be declared either in a general way, or by the Organisation stating that it wishes to be sued before the WCHR in respect of an individual case. The Consolidated Statute reflects the result of a compromise between the NK Statute and the MS Statute. Briefly speaking, the Consolidated Statute invites the UN 'to recognize the jurisdiction of the WCHR, by making the respective declaration'.[935]

**Section 1** found that three junctures are essential to the establishment of the WCHR's jurisdiction over the UN. Firstly, the UN must qualify as a defendant before the Court. This question refers to the UN's *locus standi*, which is composed of the plaintiff status and defendant status of the Organisation. The international law that currently exists has not given a clear indication concerning the basis for the UN being sued before international tribunals.

The *Reparation* case is a major milestone in international law, in that it confirms that the UN has the capacity to bring an international claim against the responsible *de jure* or *de facto* government with a view to obtaining the reparation due in respect of damage. The case study also confirmed the UN's plaintiff status before an international tribunal, or to the ICJ, insofar as this may be authorised by the ICJ Statute. The plaintiff status of the UN could, to some extent, help to quell the fears of its personnel and retain their loyalty and fidelity to the UN. It should be admitted that this case study altered nothing with regard to the UN's defendant status, and even less to UN's *locus standi* in general. Notwithstanding its long-accepted plaintiff status in international law, the UN's defendant status has yet to be established. This situation might, in turn, have led to a disturbance of the balance between the UN and the rights of individuals who are directly affected by the UN's operation.

Nevertheless, the UN's legal personality as established by the *Reparation* case has been recognised as a general principle of international law. This personality conveys a bundle of rights, competencies and obligations. In practice, the UN has played a vital role in the international system in a number of ways as a right-and-duty-bearing unit. This type

[935] See: Kozma, *et al.*, *supra* note 21, p.33.

of unit has constituted, *sine qua non,* capability for suing and being sued at law.[936] International law circles have also made considerable efforts to prove that there is no inherent legal reason why individuals may not be accorded the right to petition international tribunals in an action against the UN. Moreover, the ambiguity in the UN's defendant status does not matter in terms of the WCHR exercising jurisdiction over the UN. The UN's acceptance of the WCHR's jurisdiction will mean that the UN acknowledges its own defendant status.

The juridical articulation of the WCHR with the UN constitutes the second juncture. **Section 1.3** formulated this articulation from the perspectives of law and practice respectively.

From the law perspective, this articulation is embodied in the applicability of the primary rules of human rights in the UN's activities. According to the current statutes, the UN would be beholden to all existing human rights treaties. In their opinions, from the *lex ferenda* perspective, the belief that the UN must be bound by human rights norms is beyond dispute. As Verdirame said: 'In an era where a victim-centred approach is cherished, it cannot be accepted that an entity, especially as powerful as the United Nations, can simply be freed of any human rights obligations'.[937] At the same time, 'the urgency of binding the United Nations to treaties containing human rights provisions has certainly increased'.[938] However, in order to satisfy this articulation fully, it must be ascertained whether the UN is bound by human rights norms in the sense of *lex lata*. It seems that the authors of the current statutes have also realised that the UN is as yet not a signatory to any of the existing human rights treaties under the WCHR's jurisdiction. This situation may constitute a technical obstacle to the Court exercising its jurisdiction over the Organisation.

The core of this obstacle lies in the UN's contractual capacity for concluding international agreements with other subjects of international law. Discussion has revealed that the UN has, *de jure,* this capacity, and has, to date, signed up to many international agreements. Although it is currently impossible for the UN to accede to most of the human rights treaties because only states who have signed these treaties are ruled by the obligations thereof, this technical obstacle is not insurmountable, as the current statutes do not set membership criteria for the UN. A unilateral declaration by the UN, stating that the UN is bound by specific treaties under the WCHR's jurisdiction, *ratione materiae,* would

[936] See: Kelsen, *supra* note 300, p.329. See also: Kelsen (ed.), Wedberg (trans.), *supra* note 111, p.93.
[937] Quénivet, *supra* note 8, p.621.
[938] *Ibid*., p.589.

be sufficient to remove this obstacle.

The juridical articulation of the WCHR with the UN is reinforced by the UN's practice. The UN is indeed 'involved in human rights activities, mostly taking place in a peace and security context, such as within peacekeeping and peace-building operations whereby the primary aim is not the promotion of human rights but maintenance of peace and security'.[939] On many occasions, the Organisation has stated its position as having to fulfil the relevant obligations set by human rights treaties despite not being a party to those treaties. The frequent citations of human rights law in practice can also be understood as a kind of tacit commitment to fulfilling these human rights obligations. It can be found that the rapid expansion of the activities of the UN constantly widens the range of substantive primary rules of international human rights law becoming applicable to the Organisation.

With the discussion of the judicial articulation of the WCHR with the UN comes the point that the UN, *de jure* and *de facto*, 'is bound by international human rights standards as a result of being tasked to promote them by its own internal and constitutional legal order, without any added juridical finesse'.[940] Also, this judicial articulation will, in turn, define the road to accountability.

The last part of **Section 1 (Section 1.4)** focused on the issue of attribution as the third juncture between the WCHR jurisdiction and the UN. The determination of attribution plays a pivotal role in the framework of the future WCHR; it prevents the legal proceedings of the WCHR from being a fiction. In addition, all redress may be denied unless conduct can be attributed to a particular entity. To establish whether the act in question amounts to a human rights violation by the UN, the WCHR shall determine whether or not it is attributable to this organisation. **Section 1.4** has observed that the current statutes have more or less addressed this issue, but with no further details about rules of attribution. On this issue, the Draft Articles on the Responsibility of International Organisations, adopted by the ILC in 2011 (the 2011 Draft Articles) and constituting the latest development in the responsibility regime of international organisations, follow the same approach as that adopted by the Articles on Responsibility of States for Internationally Wrongful Acts (the 2001 Articles) adopted in 2001. According to the 2011 Draft Articles, two forms of attribution may result in the UN being held responsible: a given act or omission that is entirely attributable to the UN, and a given act or omission

[939] *Ibid*., p.596.
[940] Mégret and Hoffmann, *supra* note 72, p.137. See also: Quénivet, *supra* note 8, pp.588 – 589.

concurrently attributable to the UN.

For the future WCHR, the issue of attribution should be determined case by case, taking into consideration the particular circumstances of each case. Due to the absence of a system of judicial review of acts of the UN, a case-law development of comprehensive rules of attribution is not feasible.

This international judicial review system must be in conformity with the nature of complementarity. Under contemporary international human rights law, the complementary nature of international jurisdiction requires applicants to exhaust domestic remedies before lodging their case with the relevant human rights mechanism. The doctrine of 'exhaustion of domestic remedies' has long been adopted in the work of the UN human rights treaty bodies and well developed by the regional courts of human rights, however, the authors of the current statutes do not believe that this doctrine could apply to the jurisdiction of the WCHR over the 'entities'. They introduced the rule of 'prior exhaustion of internal remedies' instead of importing the doctrine of exhaustion of domestic remedies directly. The rule of prior exhaustion of internal remedies is a cardinal principle governing the admissibility of a complaint against the UN, and is that the complainant must have exhausted all the established internal remedies before bringing a claim before the WCHR.

According to **Section 2**, although not stated explicitly, the main reason for the authors of the current statutes throwing particular light on the distinction between the rule of prior exhaustion internal remedies and the doctrine of exhaustion of domestic remedies is the UN's jurisdictional immunity before domestic jurisdictions. The jurisdictional immunity of the UN before domestic courts was designed to favour the UN by preventing its Member States from using litigation as a tool to interfere with UN operations thereby compromising the organisation's independence. However, from a remedial point of view, the UN's jurisdictional immunity can also be identified as the common procedural obstacle facing non-state claimants when they attempt to raise and implement the accountability of the UN. The case studies of *Manderlier*, *Srebrenica* and *Georges* in **Section 2.3** demonstrate that the UN has invoked jurisdictional immunity in many cases involving third party claims for personal injury, illness or death arising from or directly attributed to the UN.

Worse still, as discussed in **Section 2.4**, the *pacta sunt servanda* principle, which 'lies at the core of the law of international agreements and is perhaps the most important principle of international law',[941] places the domestic courts of the Contracting States in

[941] Restatement of the Law, Third, Foreign Relations Law of the United State, § 321.

an either-or situation when it comes to managing this tension. On the one hand, this principle requires the Contracting States of the CPIUN to grant such immunities as the UN's jurisdictional immunity as a contractual obligation. On the other hand, the human rights treaties under the WCHR's jurisdiction *ratione materiae* to which the Contracting States are party make the same requirement. In this context, the domestic courts would have no choice but to grant the UN jurisdictional immunity at the expense of the guarantee of the right to an effective remedy, or *vice versa*. In other words, this either-or situation presents the domestic courts with an endless cycle of no solution. For the applicants who have suffered damage or injury caused by the UN, in a situation where 'the principle of absolute jurisdictional immunity for the United Nations is now firmly established',[942] their recourse to reparations from the UN would be totally dependent on the UN's benevolence. There is, therefore, an over-arching concern that the UN's jurisdictional immunity before domestic courts might have amounted to an over-protection of the interests of the UN at the expense of the protection of the individual.

**Section 3** focused on the application of the rule of prior exhaustion of internal remedies in the context of the UN's jurisdiction immunity. For the applicants, relying on domestic courts has proved to be ineffective when the UN invokes its jurisdictional immunity, which absolves the UN of any subjection to domestic legal proceedings. However, it does not mean that the same complaint cannot be brought, if appropriate, before another court – one which is not bound by that immunity – or at another time when the immunity need no longer be taken into account.[943] The rule of prior exhaustion of internal remedies is intended to address the availability of an effective avenue for redress in cases involving the UN in light of the UN's general immunity from domestic legal proceedings.

The rule of prior exhaustion of internal remedies is supposed to maintain the balance between preserving the necessary autonomy of the UN and preventing the Organisation from being able to avoid accountability for human rights violations. As with the doctrine of exhaustion of domestic remedies, the rule of prior exhaustion of internal remedies affords the UN an opportunity of quashing or setting right the alleged violations before those allegations are submitted to the WCHR. This rule urges the UN to exert its best efforts to realise the individual's right to effective remedies for those whose interests or rights have

[942] *Ibid*.
[943] Arrest Warrant of 1I April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002, p.3, para.48.

been adversely affected by the operations of the Organisation. In the framework of the future WCHR, internal remedies can either be established at the time of accepting the jurisdiction of the WCHR or created after the acceptance of the WCHR's jurisdiction. In addition, this rule also grants the UN the flexibility necessary to formulate the concrete forms of those internal remedies. The established internal remedies could consist of 'the simultaneous or successive use of various non-legal and judicial remedial mechanisms'.[944] According to the rule of prior exhaustion of internal remedies, the applicants on whose behalf a complaint is being lodged with the WCHR must exhaust these remedies wherever possible. The WCHR should act with regard to the circumstances of the individual case when reviewing whether the rule of prior exhaustion of internal remedies has been complied with.

For the UN, the rule of prior exhaustion of internal remedies requires the established internal remedies to be operated in compliance with the existing principles, rules and norms of human rights law as drawn from different sources and layers. Observance of the internal remedies rule should be determined both in procedural and substantial aspects, in terms of availability, effectiveness and adequacy. If there is sufficient reason to believe that the established internal remedies in a particular case are unavailable, ineffective or inadequate for the complainant, the relevant remedies need not be exhausted.

The experience of HRAP should be taken into account in the application of the rule of prior exhaustion of internal remedies. For one thing, before the creation of the HRAP, the UN had barely appreciated the implications of what the establishment and functioning of an independent complaints mechanism with respect to alleged human rights violations raised by complainants would entail. With the establishment of the HRAP, the UNMIK could no longer shield itself from the scrutiny of the Panel. 'The work of the HRAP raises wider issues of accountability of international missions like UNMIK, to which it makes an important contribution'.[945] For another, the rule of prior exhaustion of internal remedies should be applied with some degree of flexibility and without excessive formality. The personal circumstances of the complainant must be taken into account, because the surrounding circumstances and the modalities of the alleged human rights violations may vary. The case law of this Panel has inspired the application of the rule of prior exhaustion of internal remedies in this regard.

---

[944] Wellens, *supra* note 672, p.198.
[945] Benedek, *supra* note 735, p.277.

# Chapter Five Conclusion: The Dispute surrounding the Establishment of the WCHR in Academia and the Response to Opponents

## Section 1 Opposition to the Proposal to Establish the WCHR

The current proposal to establish a WCHR enjoyed extensive support at the 'Vienna+20: Advancing the Protection of Human Rights – Achievements, Challenges and Perspectives 20 Years after the World Conference' (hereafter referred to as the 'Vienna+20 Conference'). This Conference reached consensus on the desirability and feasibility of establishing a court of human rights at a global level. Experts participating in the first theme of the Conference (The Rule of Law: The Right to an Effective Remedy for Victims of Human Rights Violations) expressed support for the idea of the establishment of the WCHR.[1]

The Vienna+20 CSO Conference similarly called on all stakeholders, including states and civil society, to accelerate discussions with regard to the establishment of a World Court of Human Rights.[2] To Frouville, all interested stakeholders (states, non-governmental organisations (NGOs), experts, academics and others) might consider creating a world coalition of Friends of the World Court of Human Rights with the aim of promoting the project and drafting the Court's statutes.[3] Particularly worthy of mention is the conversion of Pillay, the former High Commissioner for Human Rights. She had formerly refused to take up the proposal of establishing a WCHR.[4] '[N]ew accountability courts', she added, 'are certainly possibilities for the future, but they should not be developed at the expense of the existing mechanisms, which have served us well and could

[1] See: Vienna+20: Advancing the Protection of Human Rights: "Achievements, Challenges and Perspectives 20 Years after the World Conference", Conference Report, International Expert Conference Vienna Hofburg, 27-28 June 201, p.3. The other two themes that the Vienna+20 Conference chose for discussion were "Realising Human Rights of Women Universally: Tackling the Implementation Gap" and "Mainstreaming Human Rights: A Human Rights Based Approach to the Post-2015 Development Agenda".

[2] See: "The Vienna+20 CSO Declaration", adopted in Vienna on June 26, 2013, para.67. This declaration is available at: https://viennaplus20.files.wordpress.com/2013/07/vienna-20-cso-declaration-final-post2.pdf.

[3] See: Olivier De Frouville: "Strengthening the Rule of Law: The Right to an Effective Remedy for Victims of Human Rights Violations", in: Julia Kozma, Anna Müller-Funk and Manfred Nowak (eds.): *Vienna+20, advancing the protection of human rights: achievements, challenges and perspectives 20 years after the world conference*, Mortsel (Antwerpen): Intersentia; Wien: NWV Verlag, 2014, p.131.

[4] See: Manfred Nowak: "The Right of Victims of Human Rights Violations to a Remedy: The Need for a World Court of Human Rights", in: *Nordic Journal of Human Rights*, Vol.32, No.1, 2014, p.9.

serve us better'.[5] Nowak thought that this statement implied that she might be ready to reconsider her position on this proposal.[6]

It must also be conceded that there is still some opposition within international legal circles. In this section and that which follows, the opposition of two main opponents of the current proposal to establish the WCHR – Stefan Trechsel and Philip Alston – is highlighted.

### 1.1 Stefan Trechsel

Trechsel, the former president of the European Commission on Human Rights (EComHR), is sceptical about the establishment of a World Court for Human Rights, and has made detailed critical commentaries on the potential issues surrounding the establishment of such a court.[7] He extracted three questions at the core of the foundations on which a WCHR would be built: desirability, necessity and the chances of realisation.

The first question is whether a WCHR is Desirable. Trechsel is of the opinion that, in this regard, opposing views can be found between human rights lawyers and human rights activists. Human rights lawyers may be happy about a WCHR because they 'know the human rights law and try to apply it in a correct way'.[8] By contrast, human rights activists may be inimical to such a court.[9] They 'fight for a specific cause to which – rightly or wrongly – they attach the label "human rights"'[10] and 'decide themselves whether, in a particular situation, such rights are at issue'.[11] For human rights activists, the WCHR would decide not only in their favour, but also against them, as the case may be.[12] For example, the Court would 'limit the scope of human rights, possibly in areas where human rights activists reject the limitation'.[13] This might well arouse resentment among human

[5] The Office of the United Nations High Commissioner for Human Rights (OHCHR): "The Vienna+20 conference looks to the future of the global human rights movement for the next two decades", available at: http://www.ohchr.org/EN/NewsEvents/Pages/Vienna20ConferencelookstotheglobalHR.aspx.
[6] See also: Nowak, *supra* note 4, note 6.
[7] See: Stefan Trechsel: "A 'World Court for Human Rights'?", in: *Northwestern Journal of International Human Rights*, Vol.1, Issue 1, 2004, pp.1 – 18. It can be inferred from the date of publication that Trechsel's opposition is not specifically aimed at the current proposal for establishing the WCHR.
[8] *Ibid*., ¶ 3.
[9] *Ibid*.
[10] *Ibid*.
[11] *Ibid*.
[12] See: *ibid*., ¶ 4.
[13] *Ibid*.

rights activists.[14] Many governments may similarly not regard the WCHR as being 'desirable at all'.[15]

As a human rights lawyer, Trechsel believes that a WCHR is a good thing.[16] This, however, does not infer that this court is definitely desirable or would be worth the effort.[17] The answer to the question of desirability 'will finally depend on the level of abstraction one intends to adopt'.[18] As he said:

> If one imagines an ideal world, certainly a WCHR is desirable, or an independent institution, be it a section of the (general) World Court. If one looks at the world today, one will have very serious doubts. The conflicts which we read about every day are not of a kind that could be solved by judicial proceedings.[19]

However, 'desirability would not, in itself, be a sufficient reason to justify the creation of a new institution on a universal level'.[20]

It must therefore be examined whether establishing a WCHR is really necessary. According to Trechsel, the necessity and pressing social need for the judicial protection of human rights on a universal scale must be confirmed before pursuing such an important project.[21] Several human rights courts have been established at a regional level. At the international level, there is already quite an impressive list of bodies which deal in one way or another with the protection of human rights within the framework of the United Nations (UN).[22] This list contains numerous committees under specialised human rights treaties, the former United Nations Commission on Human Rights (UNCHR, replaced by the UN Human Rights Council in 2006), the Office of the United Nations High Commissioner for Human Rights (OHCHR), and international criminal courts.[23] It should be noted that these are either non-judicial bodies or do not deal directly with human rights issues,[24] however, this situation does not automatically lead to the conclusion that a similar institution on a global level – parallel, as it were, to the regional and world treaties – ought to be

[14] See: *ibid*.
[15] See: *ibid*., ¶ 5.
[16] *Ibid*., ¶ 3.
[17] See: *ibid*., ¶ 6.
[18] See: *ibid*.
[19] See: *ibid*.
[20] *Ibid*., ¶ 7.
[21] See: *ibid*.
[22] See: *ibid*.
[23] See: *ibid*.
[24] See: *ibid*., ¶ 8.

established.[25]

Is there any chance that a WCHR could be established? This is the third question. On a practical level, Trechsel seriously doubted that such a court would have any chance of success because the powers in this world that actually care about human rights are rare.[26] To him, the success in establishing the International Criminal Court (ICC) could not be compared to the issue of creating a WCHR, as the latter is an entirely different matter.[27] States approved the establishment of the ICC because they were convinced that the ICC would be called upon to try individual villains who were not their nationals.[28] In addition, states were also prepared to dissociate themselves from such criminals, even if those individual villains were in possession of a passport of their state.[29] By contrast, it is the governments of those states, rather than individuals, that would be sued before the WCHR.[30] Nor is the existence of regional human rights courts a compelling reason for establishing a WCHR. Trechsel took the ECtHR as an example. A study of the history of the ECtHR may indicate that the High Contracting Parties to the ECHR were in error in believing that the ECHR 'would be of little relevance to themselves'.[31] As a result:

> Today, States will be aware of the fact that none of them are immune from allegations of violations of fundamental rights. The process of being publicly accused of having violated human rights is something that States wholeheartedly dislike. They may, today, be much more reluctant to agree to submit to such a system of control.[32]

Trechsel added: 'Furthermore, countries adhering to a regional system may see little purpose in joining an additional universal one'.[33]

The high financial cost of establishment may also significantly reduce the likelihood of success in establishing the WCHR.[34] The WCHR would find itself beset by a lack of resources because, 'in view of the fact that the criminal tribunal will already be a rather costly affair',[35] the difficulty in convincing states to pay a further contribution to an

[25] See: *ibid*., ¶¶ 9, 10.
[26] See: *ibid*., ¶ 11.
[27] See: *ibid*., ¶ 12.
[28] See: *ibid*.,
[29] See: *ibid*.
[30] See: *ibid*., ¶ 13.
[31] *Ibid*.
[32] *Ibid*., ¶ 14.
[33] *Ibid*., ¶ 15.
[34] See: *ibid*., ¶ 17.
[35] *Ibid*.

international organisation will continue to increase.[36] As a result, the case for creating the WCHR is regarded by Treschel as a weak one with bleak prospects.[37]

Up to this point in his argument, Trechsel suggested that it is sensible to point out that 'the case for a WCHR is a rather weak one and the prospects of creating such an institution are bleak'.[38] To verify his scepticism, Trechsel examined some possible scenarios for the WCHR if it were to be established. His speculation was divided into three aspects: competencies, proceedings, and the relationship with other institutions.[39] Before starting his speculations, Trechsel indicated that the status of the WCHR would have to be determined. According to his study, the status of the WCHR, if it were to be established, could follow one of three different models: the pyramid model, the ICC model and the sibling model.[40]

The pyramid model is relatively solid and simple,[41] Indeed, Trechsel himself once ventured to propose that a world court could be established according to this model.[42] Under this model, the WCHR should be established as the ultimate court of appeals, with a mandate for unifying the interpretation of world human rights law.[43] This model would require the system of regional instruments for the protection of human rights to be expanded throughout Asia, the Pacific region and the entire world according to the European standard.[44] In addition, 'there would have to be codification of the world human rights law which would take as a starting point the international covenants, in particular the ICCPR, adjusting it here and there, as the case may be, with elements taken from regional instruments'.[45] In Trechsel's opinion, this model 'is certainly not a short-term project … as it is meant to grow from the bottom up'.[46] The 'straightness' is also a flaw in this model, which 'follows the plan of organic and harmonic growth'.[47] To Trechsel, the WCHR should not be established according to the model of the ICC. The ICC model would mean that the WCHR would be a product of diplomatic negotiations among states, and would finally make its appearance as an international treaty, rectified by states, at an international

[36] See: *ibid*.
[37] *Ibid*., ¶ 18.
[38] *Ibid*.
[39] See: *ibid*., ¶ 19.
[40] See: *ibid*., ¶ 20.
[41] *Ibid*., ¶ 22.
[42] See: *ibid*., ¶ 21.
[43] *Ibid*.
[44] See: *ibid*.
[45] See: *ibid*.
[46] *Ibid*., ¶ 22.
[47] *Ibid*.

conference convened by states.[48] In this sense, a court established in accordance with this model would be an 'international' rather than a 'World' Court.[49] As far as the sibling model is concerned, Trechsel pointed out that this model would necessitate an amendment to the UN Charter, which could be a very convoluted and arduous process, as a two-thirds majority would be required.[50] However, 'this road would provide the highest authority for a human rights court, authority that might be dearly needed'.[51]

After consulting these three models, Trechsel suggested that the pyramid model could hardly be construed successfully. At the same time, there would not be significant differences between the ICC Model and the sibling model. Trechsel assumed that the establishment of the WCHR would probably refer to the sibling model, and his speculation on the competencies, proceedings and relationship with other institutions is based on this model.[52] In Trechsel's opinion, the sibling model would also make the WCHR parallel to the International Court of Justice (ICJ), so that these two bodies could enjoy equal status and be closely connected at an organisational level, sharing one administrative support body and one registry.[53] It would also mean that these two courts could 'transfer cases to each other if they were brought to the institution which is not competent to deal with the matter'.[54] None of these can be achieved by either the 'ICC-Model' or the 'Pyramid Model'.[55]

In terms of the competence/jurisdiction of the WCHR, Trechsel divided the jurisdiction *ratione persone* of this court into active and passive aspects. The active aspect refers to who would be entitled to bring applications alleging violations of human rights before this court,[56] and the passive aspect is about who would have *locus standi* as a defendant before the WCHR.[57]

According to Trechsel, 'the problem of who should have the right to apply to the WCHR might be one of the most difficult problems to be solved'.[58] He found that the

[48] See: *ibid*., ¶ 23.
[49] See: *ibid*.
[50] See: *ibid*., ¶ 24.
[51] *Ibid*.
[52] See: *ibid*., ¶ 25.
[53] See: *ibid*., ¶ 54. Trechsel's original reads '…the relationship between the WCHR and the ICC …'. I believe this to be an error. It seems more logical that he was referring to the International Court of Justice (ICJ).
[54] *Ibid*.
[55] See: *ibid*., ¶ 55.
[56] *Ibid*., ¶ 37.
[57] See: *ibid*., ¶ 26.
[58] *Ibid*., ¶ 37.

applications, whether submitted by states or individuals, would inevitably be grounded on a grave conflict between the applicant and the defendant State,[59] making it worrisome in the extreme that only states would have *locus standi* before the Court. In practice, at a regional level, the inter-state application as 'an instrument of collective responsibility for the collective protection of human rights … has happened only rarely'.[60] Although there would be 'considerably more problems between States which could lead to a larger number of inter-state applications'[61] on the universal level, restricting access to the WCHR to states 'would not justify the creation of such an institution'.[62] If the marginalisation of the inter-state applications at regional level were to be repeated at an international level, the WCHR would be seen and not heard. The right of individuals to apply in the European and Inter-American systems can be seen as the opposite extreme, and to Trechsel, 'the recent European experience must serve as a warning'.[63] It is this right that has generated a steady and alarming increase in applications, with the resulting increase in pending cases.[64] Worse still, the ongoing efforts 'to reform the system so as to reduce the back-log and process the avalanche of incoming applications'[65] have so far been much less successful than was hoped. It is suggested that the key to the success of these efforts lies largely with the severe limitation of the practical scope of the right to individual applications.[66] Trechsel predicts that the WCHR is, sooner or later, also likely to become overwhelmed by a flood of petitions from individuals. As a result, he does 'not envisage a "World Court for Human Rights" with a right to individual applications as being practically reasonable'.[67]

In Trechsel's opinion, the states' right to apply should be regarded as the backbone of the WCHR.[68] At the same time, the enlargement of the court's competence cannot be achieved by allowing the right to apply to be granted to individual persons in this tribunal. Alternatively, it seems that the right to apply may have to be granted additionally to a limited number of NGOs, according to strict criteria.[69] However, Trechsel argued that this

[59] See: *ibid*., ¶ 29.
[60] See: *ibid*.
[61] *Ibid*., ¶ 31.
[62] See: *ibid*.
[63] *Ibid*., ¶ 32.
[64] See: *ibid*.
[65] *Ibid*.
[66] See: *ibid*.
[67] *Ibid*.
[68] *Ibid*., ¶ 33.
[69] *e.g.* Amnesty International, the International Helsinki Foundation for Human Rights, or the International Commission of Jurists. See: *ibid*., ¶ 36.

approach *per se* conceals a significant danger:[70] there would be a problem of coordination, because individuals have easy access to NGOs. As Trechsel pointed out: 'Individuals could approach the organizations and implore them to bring applications in their case. They might write to several or all NGOs who are able to apply.'[71] The NGOs, having *locus standi* before the WCHR, 'would probably have to develop some sort of rules as to which cases they would take to the WCHR'.[72] In this case, these NGOs would probably 'assume a role similar to that of the European Commission of Human Rights during its existence'.[73] To Trechsel, such a mixed set-up for the worldwide protection of human rights is not very desirable.[74]

As mentioned above, the passive aspect of the jurisdiction *ratione persone* of the WCHR refers to who should have *locus standi* as a defendant before this court. Trechsel regards including major economic entities in this list of defendants as an innovation which cannot entirely be justified.[75] As he said, to realise such an innovation: 'specific and detailed criteria would have to be established in order to identify those corporations which could be a target for applications to a World Court for Human Rights'.[76] He does not, however, think that the prospect of expanding the competence of the court to that field is particularly realistic.[77]

As for the WCHR's jurisdiction *ratione materiae*, Trechsel envisaged a world human rights court with extensive jurisdiction *ratione materiae*, arguing that the rights that can be adjudicated by a court should no longer be limited to civil and political rights.[78] Many other rights, such as the economic, social and cultural (ESC) rights, racial discrimination, religious discrimination, discrimination against women, the rights of the child, the prohibition of torture, and *etc.*, that have been included in the special instrument, should fall within the scope of the jurisdiction *ratione materiae* of the WCHR.[79]

However, Trechsel also suggested that the jurisdiction *ratione materiae* of the WCHR should be designed with caution. 'One of the particularly difficult questions is the issue of

[70] See: *ibid*.
[71] *Ibid*.
[72] *Ibid*.
[73] *Ibid*.
[74] See: *ibid*.
[75] See: *ibid*., ¶ 38.
[76] *Ibid*., ¶ 39.
[77] See: *ibid*., ¶¶ 38 – 39.
[78] *Ibid*., ¶ 41.
[79] See: *ibid*.

justiciability.'[80] The extensive jurisdiction *ratione materiae* means that the applicable laws may consist of references to various human rights instruments. Trechsel opined that the WCHR should adjudicate only those rights that can be regarded as justiciable.[81] In consequence, the identification of those rights, the violation of which could be alleged in judicial proceedings, is a necessity.[82] According to Trechsel's observation, not all rights should be eligible for adjudication by an international court. Some rights, such as the right to self-determination, the right to work, the right of assistance to the family, the right to enjoy physical and mental health, could hardly be regarded as justiciable.[83] To Trechsel, leaving this problem to the court to solve case by case might lead to acceptable results in law, because the judges would be human rights lawyers rather than human rights activists, however, it is worrisome that the same results may disappoint 'consumers' of human rights and human rights activists as far as the substance is concerned.[84] Such disappointment, as Trechsel indicated, 'could have a very negative effect on the reputation of the court'.[85] Given this, Trechsel envisaged a comprehensive code which would make a clear distinction between rights which could be invoked before the WCHR and others which could not.[86]

Trechsel subsequently discussed the proceedings of a WCHR. The principle of the proceedings should follow those of the ICJ, with a few exceptions.[87] Firstly, the WCHR should be authorised to take the decision to carry out a fact-finding mission through a special commission of inquiry in cases where the facts are contested, and the regulations in this respect should be established in advance.[88] Secondly, the WCHR would have the competence to issue advisory opinions,[89] however, this jurisdiction should be 'somewhat limited'.[90] It seems that Trechsel does not feel so optimistic about these advisory opinions producing convincing outcomes, given 'the fact that [sic] very often the details of a specific case determine the outcome of the proceedings'.[91] As a result, the WCHR should be given wide discretion to decide whether a question is fit to be answered with such an

[80] *Ibid*., ¶ 42. See also: *ibid*., ¶ 40.
[81] See: *ibid*., ¶ 40.
[82] See: *ibid*., ¶ 42.
[83] See: *ibid*., ¶¶ 40, 42.
[84] See: *ibid*., ¶ 42.
[85] *Ibid*.
[86] See: *ibid*.
[87] See: *ibid*., ¶ 46.
[88] See: *ibid*., ¶ 47.
[89] See: *ibid*., ¶ 49.
[90] *Ibid*.
[91] *Ibid*., ¶ 50.

opinion.[92] Thirdly, a WCHR would have the authority to take provisional measures which are obligatory and legally binding.[93] The experiences of the former EComHR and the current ECtHR could be consulted on this issue. As Trechsel said: 'The Commission or the Court would indicate to the parties "any interim measure the adoption of which seems desirable in the interest of the parties for the proper conduct of the proceedings before it"'.[94] However, '[i]t might not be easy to convince States on a world level to accept a similar clause'.[95]

Trechsel's opposition also derives from the potential competitive relationship of the WCHR with other existing institutions concerned with human rights. As mentioned above, if the sibling model were to be followed, the WCHR and the ICJ would become two parallel bodies of equal status at an international level, and would also be closely connected at an organisational level.[96] It is not possible for the WCHR to be the appellate court of the ICC.[97] 'The Statute of the ICC was certainly not drafted with such a possibility in mind'.[98] Placing this court under the supervision of the WCHR would make the ICC proceedings more complicated, as well as somewhat diminishing its authority.[99] It would also certainly not be acceptable if the standards of the ICC were inferior to those of the WCHR, except making an analogy in which the ICC is compared with a supreme court, while the WCHR would correspond to a constitutional court.[100] Trechsel suggested, however, that the WCHR should stand above the existing UN human rights treaty bodies.[101] In this case, this court could have either an alternative competence or a cumulative competence.[102] Alternative competence would mean that the WCHR 'would only be accessible where a specialized body is not available'.[103] This would, however, hardly be acceptable to Trechsel,[104] who assumes that the protection of the WCHR would be stronger and more valuable than that of the existing UN human rights treaty bodies.[105] As a result, '[i]t would not make any sense to reserve this protection for cases where the

[92] See: *ibid*.
[93] See: *ibid*., ¶ 52.
[94] See: *ibid*.
[95] *Ibid*.
[96] See: *ibid*., ¶ 54.
[97] See: *ibid*., ¶ 56.
[98] *Ibid*.
[99] See: *Ibid*.
[100] See: *ibid*.
[101] See: *ibid*., ¶ 57.
[102] See: *ibid*.
[103] See: *ibid*.
[104] See: *ibid*.
[105] See: *ibid*.

"weaker protection" is not available'.[106] The cumulative competence means that the WCHR would become something like a second instance at a global level, while the UN human rights treaty bodies would then always be the first remedy.[107] 'This would give them a position similar to that which the European and American Commissions of Human rights held or hold.'[108] However, this competence requires that the various UN human rights treaty bodies be merged into a one.[109] This task would be difficult to accomplish 'in view of the fact that the list of States having ratified the different Conventions is not uniform'.[110]

At a regional level, the WCHR would be the ultimate appellate court of the regional human rights courts if the pyramid model were chosen.[111] In effect, no matter which model were finally selected, there would be significant hesitation among those states having accepted the jurisdiction of the regional human rights courts to subject themselves to additional supervision by a WCHR.[112] To Trechsel, this hesitation might derive from a fear of global standards being considerably lower than those of Europe.[113]

Furthermore, Trechsel suggested that only a court established in such a way as to guarantee its efficient functioning is worth creating.[114] In other words, '[i]t is preferable not to have a 'World Court for Human Rights' at all than to have a half-hearted patched-up institution with insufficient competence and feeble authority'.[115] In Trechsel's opinion, 'efficient functioning' means that the Court's judgments would actually be honoured.[116] The judgments of the WCHR might be limited to finding a violation, as is the case for the ECtHR,[117] and 'a mechanism of implementation which clearly goes beyond making sure that compensation is actually paid to the victims'[118] must likewise be put in place. Trechsel argued, however, that while not denying the success of the ECtHR, the inefficient implementation of its judgments has had an adverse influence on the effectiveness of the

[106] *Ibid*.
[107] See: *ibid*., ¶ 59.
[108] *Ibid*.
[109] See: *ibid*.
[110] *Ibid*.
[111] See: *ibid*., ¶ 60.
[112] See: *ibid*., ¶ 61.
[113] See: *ibid*.
[114] See: *ibid*., ¶ 63.
[115] *Ibid*.
[116] See: *ibid*.
[117] See: *ibid*.
[118] *Ibid*.

European system.[119] As a result, he was 'particularly worried about the execution of judgments on the universal level'.[120]

In conclusion, Trechsel argued that the establishment of this kind of court is 'neither desirable, nor necessary, nor probable'.[121] As he said: 'The more likely a State is to be found in violation of human rights by a WCHR, the less probably it is that it will comply with its judgments.'[122]

### 1.2 Philip Alston

Philip Alston is also a firm opponent of the proposal to establish a WCHR, and has criticised this proposal on many occasions.[123] He feels himself to be far more thorough than Trechsel in this regard. As he said: 'Trechsel's concerns were based on pragmatic or feasibility grounds, rather than on principle'.[124] Alston also cited Antonio Cassese, the first President of the International Criminal Tribunal for the former Yugoslavia (ICTY), who entertained doubts about pursuing a universal international court of human rights to ensure the respect for *jus cogens* rules on human rights.[125] Cassese opined that the notion of establishing such a court 'should be discarded because it is simply naive to think that states will submit their own domestic relations with individuals living on their territory to binding international judicial scrutiny'.[126] According to Alston, 'Cassese's criticism was

[119] See: *ibid*., ¶¶ 64 – 68.
[120] *Ibid*., ¶ 68.
[121] *Ibid*., ¶ 70.
[122] *Ibid*., ¶ 69.
[123] See: Philip Alston: "Against a 'World Court for Human Rights'", in: *Ethics & International Affairs*, Vol.28, No.2, 2014, pp.197 – 212; Philip Alston and John Tessitore: "EIA Interview with Philip Alston on a 'World Court for Human Rights'", 10 November 2014, pp.2 – 3. This interview is available at: https://www.ethicsandinternationalaffairs.org/2014/eia-interview-with-philip-alston-on-a-world-court-for-human-rights/; Philip Alston: "A 'World Court for Human Rights' is Not a Good Idea", available at: http://justsecurity.org/2796/world-court-human-rights-good-idea/; Philip Alston: "A truly bad idea: a 'World Court for Human Rights'", available at: https://www.opendemocracy.net/openglobalrights-blog/philip-alston/truly-bad-idea-world-court-for-human-rights.
[124] Alston: "Against a 'World Court for Human Rights'", *supra* note 123, p.200. According to Alston, '[Trechsel] was concerned about whether states would accept such a project, how much it would cost, how the court would be able to secure enforcement of its judgments, and what the relationship would be with other existing bodies, such as the regional human rights courts, the International Criminal Court, and the International Court of Justice'. *Ibid*.
[125] See: Antonio Cassese: "A Plea for a Global Community Grounded in a Core of Human Rights", in Antonio Cassese: *Realizing Utopia: The Future of International Law*, Oxford: Oxford University Press, 2012, p.141. See: Alston: "Against a 'World Court for Human Rights'", *supra* note 123, p.200.
[126] Cassese, *supra* note 125, p.141; Alston: "Against a 'World Court for Human Rights'", *supra* note 123, p.200.

based less on principle or on a different vision of the international legal order than on a realpolitik assessment of how far governments could be expected to go in limiting their own sovereignty'.[127] Alston argues that the time for taking the WCHR from an idea to a reality has not yet come.[128] Moreover, this proposal 'fundamentally misconceives the nature of the challenges confronting an international community dedicated to eliminating major human rights violations'.[129] He finds it worrisome in the extreme that frighteningly broad powers would be concentrated 'in the hands of a tiny number of judges without the slightest consideration of the implications for the legitimate role of the state'.[130]

Before furthering his opposition, Alston firstly summarised some fundamental assumptions on which the current proposal for establishing the WCHR is based:

> (1). It is desirable that there should be a comprehensive, universal, and binding scheme for ensuring rights for all individuals.
> (2). Existing international mechanisms are highly selective in their coverage and are generally ineffectual.
> (3). The universal availability of judicial remedies for otherwise unredressed human rights violations is a (or perhaps the) central element in building an optimal global regime.
> (4). The European Court of Human Rights provides the most advanced model for this purpose, and its most appealing features should be replicated on a global scale.
> (5). At the same time, the WCHR provides an ideal opportunity to correct some of the shortcomings and limitations built into the European sys- tem, and thus to fill some of the major lacunae that weaken the existing global regime.[131]

Alston regarded political feasibility as a major stumbling block to the proposal for establishing the WCHR coming into being.[132] The protracted and bruising effort to develop an ASEAN-based human rights system serves as a stark example, which illustrates 'the continuing deep reluctance of states to create new institutions endowed with any significant capacity to restrict their freedom of manoeuvre in relation to human rights-related policies'.[133] The same holds true for the Arab region.[134]

---

[127] Alston: "Against a 'World Court for Human Rights'", *supra* note 123, pp.200 – 201.
[128] See: *ibid*., p.197.
[129] See: *ibid*., p.197. Alston argued that these challenges are not primarily of judicial nature. See: Alston and Tessitore, *supra* note 123, p.5. The reason why governments are violating human rights on a grand scale is not because there is an absence of a world court, but is because that human rights culture has not taken off sufficiently in a great many countries. See: *Ibid*.
[130] Alston: "Against a 'World Court for Human Rights'", *supra* note 123, p.197.
[131] *Ibid*., pp.199 – 200.
[132] See: *ibid*., p.201.
[133] *Ibid*.

According to Alston, the proposal to establish a WCHR raises three significant concerns which respectively relate to the scale of the proposed Court, the powers to be granted to the WCHR as a global judiciary, and the vision that this proposal reflects the future of human rights.[135]

Alston has indicated that the project to establish a WCHR is daunting purely by virtue of its sheer scale. This concern consists of at least three aspects.[136] The first aspect 'relates to the range of standards that will form the basis of the court's jurisdiction.'[137] Alston appreciates the current proposal in the sense that it tries to avoid any formulation of a new, comprehensive set of global standards, which 'would not only be immensely controversial and time-consuming but would likely result in a much-diluted set of norms reflecting a real regression from the agreements reached in previous decades'.[138] However, this objective certainly cannot be accomplished through giving the WCHR a far-ranging jurisdiction *ratione materiae*.[139] To Alston, this approach could not minimise the inevitable national debate 'over the acceptance of standards not hitherto endorsed by the state concerned'.[140] On the contrary, 'the prospect that every right in every one of the treaties that a given state has ratified would be subject to binding international adjudication would, in fact, provoke hugely contentious debates in any society that takes the rule of law seriously'.[141] In addition, the proposal to establish a WCHR would taste the 'bitter fruit' of its pursuit of elitism. On the one hand, the proposal vests ultimate power in the hands of a tiny coterie of judges,[142] on the other hand, 'a far-ranging jurisdiction would give rise to very difficult tough challenges for judges in terms of reconciling complex, diverse, overlapping, and perhaps inconsistent treaty provisions'.[143]

The second aspect concerns the competence of the proposed WCHR to deal with the tremendously varied domestic legal systems of every state in the world.[144] If the proposal for establishing the WCHR were ever realised, the Court would 'hand down binding judgments on domestically controversial and contested issues to a large group of states

---

[134] See: *ibid*.
[135] See: *ibid*.
[136] See: *ibid*.
[137] *Ibid*.
[138] *Ibid*., p.201.
[139] See: *ibid*., p.202.
[140] See: *ibid*., pp.201, 202.
[141] *Ibid*., p.202.
[142] See: Alston: "A 'World Court for Human Rights' is Not a Good Idea", *supra* note 123, p.2.
[143] See: Alston: "Against a 'World Court for Human Rights'", *supra* note 123, p.202.
[144] See: *ibid*.

with hugely diverse legal systems'.[145] Given that the legal systems of every state worldwide are in a high degree of particularity and that neither the European nor the Inter-American courts confront anything like this degree of heterogeneity, the WCHR could in no event obtain this competence.[146]

As far as the third aspect is concerned, Alston argues that the procedures envisaged in the proposal for establishing the WCHR would be too costly by the standards of any funds currently devoted to human rights protection at the international level.[147] The experience of the ICC and the ICTY has shown that, as Alston says, 'states are already proving increasingly reluctant to fund large-scale human rights initiatives, and especially those that might hold them meaningfully to account'.[148] The ECtHR is in a similar situation to that of the ICC and ICTY.[149]

As for the second concern raised by the current proposal, Alston argues that the procedure of the WCHR concerning individual complaints, which by and large follows that applied by existing regional human rights courts and UN treaty monitoring bodies, cannot withstand scrutiny.[150] To Alston, this is 'a maximalist approach in relation to many of the most controversial procedural dimensions of international human rights adjudication' and pursuing it ' would produce a radically more powerful tribunal than any that currently exists'.[151] Alston suggests that the power of the proposed WCHR involves five separate issues: fact-finding powers, exhaustion of domestic remedies, interim measures, binding nature and advisory opinions, and it is these issues that lead to his argument.

Addressing the first issue, Alston said: 'The vesting of comprehensive investigative powers plus very extensive judicial authority in a single body would be without precedent at the international level.'[152] The proposed WCHR would be empowered to 'undertake an investigation which may even include a fact finding mission on the spot'.[153] Accordingly,

---

[145] *Ibid*.
[146] See: *ibid*. As for the African Court of Human and Peoples' Rights, which must confront substantial diversity across the fifty-five potential national jurisdictions within Africa, Alston argued that whether that is in fact a viable undertaking remains to be seen. See: *ibid*.
[147] See: Alston, "A 'World Court for Human Rights' is Not a Good Idea", *supra* note 123, p.1; Alston and Tessitore, *supra* note 123, p.3.
[148] Alston: "Against a 'World Court for Human Rights'", *supra* note 123, p.202.
[149] See: *ibid*.
[150] See: Manfred Nowak, "It's Time for a World Court of Human Rights", in: Mahmoud C. Bassiouni and William A. Schabas: *New Challenges for the UN Human Rights Machinery*, Antwerp: Intersentia, 2011, pp.17 – 33, at 29.
[151] Alston: "Against a 'World Court for Human Rights'", *supra* note 123, p.203.
[152] Ibid.
[153] Julia Kozma, Manfred Nowak and Martin Scheinin: *A World Court of Human Rights – Consolidated Draft Statute and Commentary*, Neuer Wissenschaftlicher Verlag Recht 2010, p.43. See also: Manfred

the relevant state would be under an obligation to 'provide all necessary cooperation and facilitate the investigation, including by granting access to all places of detention and other facilities'.[154] 'In particular, the Court shall enjoy full freedom of movement and inquiry throughout the territory of the State Party, unrestricted access to State authorities, documents and case files as well as the right of access to all places of detention and the right to hold confidential interviews with detainees, victims, experts and witnesses.'[155] However, the European experience offers little cause for optimism in this respect. The power to undertake fact-finding missions in the ECtHR context is rather inchoate since 'the resources available to the ECtHR and the correlative obligations of states parties are such that the technique has not proved particularly useful in most situations'.[156] Moreover, in Alston's opinion, the extension of the fact-finding power to any rights violation and the inclusion of unrestricted access 'constitutes a huge leap in terms of powers that states would see as infringing on their sovereignty'.[157]

The second issue is exhaustion of domestic remedies. Alston criticised the current proposal for establishing the WCHR for its dramatic extension of 'the range of situations in which such recourse can be had'.[158] In so doing, the rule of prior exhaustion of local remedies is no longer 'a standard clause requiring that all available domestic legal remedies be exhausted before recourse can be had to the international court'.[159] To Alston, this proposal requires every right in all of the applicable laws under the WCHR's jurisdiction *ratione materiae* to be justiciable at a national level.[160] An international appeal would consequently be permitted in the case where 'the applicant is "not satisfied" either with the judgment of the national court or with the reparation granted, as well as in any situation in which a national court cannot order interim measures in cases where it is argued that irreparable damage might otherwise ensue'.[161]

As a human rights proponent, Alston also seemed to regard 'the capacity of human rights bodies to order states to take interim protection measures pending the examination of

---

Nowak and Julia Kozma: A World Court of Human Rights: *Protecting Dignity an Agenda for Human Rights*, Swiss Initiative to Commemorate the 60th Anniversary of the UDHR, 2009, p.66. This report is available at: http://bim.lbg.ac.at/sites/files/bim/World%20Court%20of%20Human%20Rights_BIM_0.pdf.

[154] Art.14 (3) of the Consolidated Statute. See also: Art.14 (3) of the NK Statute.

[155] Art.40 (2) of the Consolidated Statute. See also: Art.31 (2) of the NK Statute; Nowak and Kozma, *supra* note 153, pp.80 – 81.

[156] Alston: "Against a 'World Court for Human Rights'", *supra* note 123, p.203.

[157] *Ibid*.

[158] *Ibid*.

[159] *Ibid*.

[160] See: *ibid*., p.204.

[161] *Ibid*.

the allegation … to be a vital dimension of the international human rights regime, especially, but not only, in cases involving the death penalty'.[162] However, few issues have proved to be more controversial on this matter.[163]

On the binding nature of court decisions, Alston admits that the enforcement measures have been drawn up for the proposed WCHR which go well beyond any existing form of implementation.[164] However, to him, in practice it would be impossible to implement these measures, because 'the veto-wielding members of the Security Council would be effectively immune from any such initiative, unless they choose to submit themselves to it'.[165]

As for the WCHR's advisory jurisdiction, Alston argues that the Article in the current proposal which allows the UN Member States, the UN Secretary-General and the OHCHR to request advisory opinions of the ICJ in relation to the future statute of the WCHR and the applicable laws under its jurisdiction *ratione materiae* is in strong contrast with Art.96 of the UN Charter.[166]

Having considered these five issues, Alston concludes that States would be reluctant to cede authority to the future WCHR. To him, these issues may well illustrate that the

---

[162] *Ibid*.

[163] See: *ibid*. To Alston, the case of Brazil's furious reaction to interim measures proposed by the Inter-American Commission of Human Rights in relation to the construction of the Belo Monte hydroelectric power plant might well illustrate this point. However, he gave no further details about this case. See: *ibid*.

[164] See: *ibid*. Apart from characterising its judgments as being binding on the state concerned, the current proposal for establishing the WCHR introduces some extra enforcement measures. For example, the NK Statute suggests entrusting the function of supervision of the implementation of the Court's judgment to the OHCHR. See: Art.18 (4) and (5) of the NK Statute. According to Nowak and Kozma: 'Cases of non-compliance shall be reported by the High Commissioner to the Human Rights Council with a request to take the necessary measures that will bring about the enforcement of the judgment.' Nowak and Kozma, *supra* note 153, p.70. 'If the Human Rights Council fails to take the necessary measures or the State concerned fails to comply with the measures taken, the High Commissioner may also request the Security Council to take action.' *Ibid*. According to the MS Statute, the UN Human Rights Council would be mandated to oversee the effective implementation of the judgments by the Court. See: Art.48 (1) of the MS Statute. The Consolidated Statute follows the NK Statute. See: Art,18 (4) and (5) of the Consolidated Statute; Kozma, *et al.*, *supra* note 153, p.47.

[165] Alston, *supra* note 123, p.204.

[166] See: *ibid*., p.205. Art.96 of the UN Charter provides:

> The General Assembly or the Security Council may request that the International Court of Justice give an advisory opinion on any legal question.
> Other organs of the United Nations and specialised agencies, which may at any time be so authorised by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities.

Alston might have made a mistake on this issue. According to the current statutes (Art.9 of the NK Statute, Arts.9 and 10 of the MS Statute and Art.8 of the Consolidated Statute), the advisory jurisdiction belongs to the WCHR, rather than to the ICJ.

political prognosis for this proposal is gloomy.[167] In addition, the concerns of scale and the concerns of power relate 'to the political feasibility, magnitude, and expansiveness of the proposed WCHR',[168] and 'many if not all of these concerns could be dealt with by adjusting the model in various ways'.[169] By contrast, it is his concerns about the vision itself which serve to root his critique of the proposal to establish a WCHR more deeply.[170] Alston finds 'the basic assumptions underlying the statute to be problematic and misconceived'.[171] He delivers a harsh assessment that 'the very act of putting forward a WCHR as a major stand-alone initiative skews and distorts the debate, and pursuing such a vision distracts attention, resources, and energy from more pressing endeavors'.[172] Alston explains four reasons for offering this assessment: legalism, hierarchy, 'entities' and universality.

First, the proposal to establish a WCHR 'privileges justiciability over all other means by which to uphold human rights'.[173] It is 'an assumption not shared in many domestic legal systems'[174] that 'every right in all of the treaties is appropriately subject to judicial determination'.[175] In addition, this proposal might have overstated the role of a court with immense authority in dealing with human rights violations. In other words, this proposal takes 'a highly legalistic route',[176] assuming in a very American way[177] that 'every violation of "an obligation to respect, fulfil, or protect any human right" is best dealt with by a court'.[178] In addition, it is the 'issues of accessibility by victims in terms of the costs involved, the language barriers, the cultural appropriateness, and so on'[179], rather than the issue of justiciability, that should be addressed in the first place.[180] More than that, 'the

[167] See: Alston: "Against a 'World Court for Human Rights'", *supra* note 123, p.204.
[168] *Ibid*., p.205.
[169] *Ibid*. As Alston said: 'Costs could be reduced by eliminating on-site investigations and the calling of witnesses, the range of standards or treaties covered could be reduced, interim measures could be made optional, judgments could be made nonbinding, and so on.' *Ibid*.
[170] See: *ibid*.
[171] *Ibid*.
[172] *Ibid*. Alston said in an interview: 'The problem I have, first of all, is that it's a bit like saying we really need to eradicate poverty, … Now, if we've not been able to do anything much more basic and rudimentary to the point where we still have a couple of billion people living in extreme poverty, it doesn't make much sense to jump from that point to say, "Let's give some extremely generous handout."'. See: Alston and Tessitore, *supra* note 123, p.3.
[173] Alston: "Against a 'World Court for Human Rights'", *supra* note 123, p.205.
[174] *Ibid*., p.206.
[175] *Ibid*.
[176] Alston and Tessitore, *supra* note 123, p.3.
[177] See: *ibid*.
[178] Alston: "Against a 'World Court for Human Rights'", *supra* note 123, p.206.
[179] *Ibid*.
[180] See: *ibid*.

real problem is',[181] Alston added, 'the intellectual leap from diagnosing the continued existence of massive human rights violations … to a vision in which courts in general … offer the best hope of resolving complex and contested problems'.[182] Consequently, as currently envisaged, the WCHR would probably function in a vacuum if it left aside this leap.[183] As Alston said:

> To be seen as legitimate and to aspire to effectiveness they must be an integral part of a broader and deeper system of values, expectations, mobilizations, and institutions. They do not float above the societies that they seek to shape, and they cannot meaningfully be imposed from on high and be expected to work.[184]

Secondly, because of the appellate jurisdiction of the proposed WCHR over judgments at a national level, it has a remarkably hierarchical nature. According to this jurisdiction, 'any national-level judgment with which an applicant is not "satisfied" can be appealed to the World Court, and the latter's judgments are definitive'.[185] This hierarchical nature is, however. also troubling in itself. To Alston, an immediate consequence of this jurisdiction is that the workload of the WCHR would soon become overwhelming.[186] More importantly, he sees it as dangerous to grant the WCHR with 'the authority to issue determinative interpretations on every issue of human rights on a global basis'.[187] This power 'defies any understandings of systemic pluralism, diversity, or separation of powers'.[188] The resulting jurisprudence of such vast power 'would be potentially disastrous for human rights'.[189]

With regard to the WCHR's jurisdiction over 'entities', Alston acknowledges that one of the most critical gaps in the current international human rights regime is the inability to regulate the activities of non-state actors in the first place.[190] The current proposal, at first glance, would enable the WCHR to rectify the 'poor human rights records' of these 'entities' by placing them on virtually the same footing as states.[191] There seems, however,

---

181 *Ibid*.
182 *Ibid*.
183 See: *ibid*.
184 *Ibid*.
185 *Ibid*.
186 *Ibid*.
187 *Ibid*.
188 *Ibid*.
189 *Ibid*.
190 See: *ibid*., p.207.
191 See: *ibid*.

to be a significant paradox in this proposal. As Alston points out, on the one hand, for an entity, declaring itself subject to the jurisdiction of the WCHR will create the obligation for the entity to implement the judgment against it. On the other hand, the proposal expects the entities to accept the WCHR's jurisdiction, to fund the Court, and to make voluntary donations as well.[192] At the same time, even if those formulating the proposal were aware of these issues, this ground-breaking suggestion blurs the differences among the various entitles that should have *locus standi* as defendants before the WCHR,.[193] Alston states: 'This wholesale according of status and personality to "entities," very broadly defined, comes with radical implications that seem not to have been thought through or even considered.'[194] Furthermore, he criticises the current proposal for establishing the WCHR for its attempt to wish away the basic rule of prior exhaustion of domestic remedies, replacing it with calling upon 'entities to identify their own "internal remedies" for addressing alleged violations of human rights'.[195]

According to Alston, the WCHR's approach to the question of universality is also problematic.[196] He argues that the approach adopted by the WCHR to achieve universality must, *per se,* be in compliance with the principle of universality. As a foundational goal and principle of global, and more particularly, of UN human rights doctrine, universality has rarely spelled out its precise implications 'beyond a clear commitment to ensuring that every state and ideally every individual is a part of the overall system that is being developed'.[197] The existing forms of universality include 'the obvious reliance on regional and sub regional mechanisms to undertake or to filter much of the work, or the measures, such as the margin of appreciation doctrine, designed to ensure that national perspectives are taken into account in certain circumstances'.[198] They also include 'various techniques that are implicitly designed to allow states leeway in the ways in which they apply international standards and respond to international assessments'.[199] In Alston's words: 'There is, in short, some scope for diversity, as opposed to a strict uniformity, and for the

[192] See: Art.53 of the MS Statute, Arts.44 (b) and 45 of the Consolidated Statute. According to Art.2(2) of the NK Statute, the expenses of the WCHR would be borne by the regular budget of the UN. The budget plan should be drafted by the President of the Court, and its approval rests in the UN General Assembly.
[193] See: Alston: "Against a 'World Court for Human Rights'", *supra* note 123, p.207.
[194] *Ibid*., p.207.
[195] See: *ibid*., pp.206 – 207.
[196] See: *ibid*., p.208.
[197] *Ibid*.
[198] *Ibid*.
[199] *Ibid*.

necessary interplay between politics and law.'[200] The current proposal for establishing the WCHR, by contrast, accepts 'the notion that there should be a single, universally valid answer to complex questions involving competing rights, and that those answers should be uniformly and strictly enforced, both by domestic law enforcement agencies and by the Security Council'.[201] This notion, in Alston's view, would throw the relationship between universality and diversity that has long been built into the existing system off balance.[202]

Worse still, neither the principle of complementarity between the international and national levels nor the principle of deference to regional human rights courts constitutes a convincing response to concerns about the vision.[203] Alston points out that, although the principle of complementarity does seek to ensure the primacy of the protection at national level, it is only to be found in the preamble to the current statutes of the WCHR.[204] No direct expression concerning the principle of complementarity can be found in the operative provisions of the current statutes.[205] The principle of deference to regional human rights courts raises two problems: first, for those regions (*e.g.* Asia and the Middle East) where a corresponding human rights system has not yet been established, the proposed WCHR would in effect be a new regional court.[206] The reality, however, is that these regions 'have thus far proved resistant to substantive initiatives in this field',[207] And 'It is difficult to envisage the circumstances under which they might be expected to embrace a WCHR in the decades ahead'.[208] Second, notwithstanding this principle, the proposed WCHR would still have an impact on or even marginalise the established

---

[200] *Ibid*.
[201] *Ibid*.
[202] See: *ibid*.
[203] See: *ibid*., p.209.
[204] See: the NK Statute, Preamble, para.8; the MS Statute, Preamble, para.7 and Art.13 (1)(d); the Consolidated Statute, Preamble, para.10.
[205] See: Alston: "Against a 'World Court for Human Rights'", *supra* note 123, p.209.
[206] See: *ibid*.
[207] See: *ibid*., p.209. As Alston points out: 'Asian governments, which account for 57 percent of the world's population, have been determinedly lukewarm toward almost every actual and proposed international human rights institution with even the slightest authority.' *Ibid*., p.210. According to Alston, the situation in Africa is no more optimistic: 'African governments have made minimal progress toward setting up a regional court for human rights, and have become increasingly antipathetic toward the ICC.' *Ibid*. It has to be acknowledged that Alston's fear is partly coming true. In October 2016, Burundi, Gambia and South Africa announced their withdrawal from the International Criminal Court (ICC) in rapid succession. Furthermore, The WCHR proposal is also certain to be met with unremitting resistance by a range of key states not located in the regions mentioned above. They stand out as the countries 'that have very assiduously and consistently resisted involvement in any strong human rights mechanisms at the international level'. Alston and Tessitore: *supra* note 123, pp.2 – 3. According to Alston, these states 'would have no interest in this, and would certainly take no part in it'. *Ibid*.
[208] Alston: "Against a 'World Court for Human Rights'", *supra* note 123, p.210.

regional human rights courts.[209] Alston spoke highly of the achievements of the existing regional human rights courts. He said: 'Regional courts have played a major role in addressing the challenges of reconciling the protection of national security and respect for human rights',[210] however, owing to 'the broader jurisdiction, the greater accessibility, and the far stronger enforcement powers',[211] the proposed WCHR 'would quickly persuade complainants to file before the World Court rather than before one of the regional courts',[212] and the latter would thus become 'gradually marginalised'.[213] In addition, 'the range of rights subject to binding adjudication in each of those regions would be dramatically expanded'.[214]

In conclusion, Alston admitted that significant reforms of international human rights protection are possible. As he said: 'Behind any vision for a future system of international human rights protection lies a theory of change, a set of assumptions as to the dynamics that make significant reforms possible'.[215] He noted that the proponents of the current WCHR proposal are probably inspired by the successful experiences of the ICC and the ECtHR,[216] however, these experiences are not entirely encouraging.

Regarding the experience of the ICC, Alston believes that the momentum of the reform determines how long it will take. To Alston, the proposal for establishing the WCHR may pose a threat to the deepest interests of the state,[217] 'But the prosecution of a handful of individuals for heinous crimes is a radically less ambitious proposal than is the WCHR'.[218] Nevertheless, the creation of the ICC still went through a process by which the international community moved 'from close to zero (in terms of crimes that could be adjudicated by international courts) to close to a maximalist vision (in which dozens of crimes are now subject to the court's jurisdiction)'.[219]

The ECtHR does not seem to work as a model for the WCHR proposal either.[220] Alston observes that what the current proposal seeks is more than the extension of the

---

[209] *Ibid*., p.209.
[210] Alston, "A 'World Court for Human Rights' is Not a Good Idea", *supra* note 123, p.1.
[211] Alston: "Against a 'World Court for Human Rights'", *supra* note 123, p.209.
[212] *Ibid.*
[213] *Ibid*.
[214] *Ibid*.
[215] *Ibid*.
[216] *Ibid*.
[217] See: *ibid*.
[218] *Ibid.*
[219] *Ibid*.
[220] See: *ibid*., p.210.

system already functioning well in Europe to the rest of the world.[221] This proposal 'goes far beyond that of the European Court in many crucial respects, and it would establish a regime with much greater reach and impact than the existing European system'.[222] Alston argues that this extension is a dramatic leap and a plausible theory of change is required to explain how such a dramatic leap could be achieved.[223] No such theory has yet been construed. On the issue of state engagement with human rights regimes, Alston considers himself a staunch proponent of incrementalism. He argues that the history, in this regard, 'is one of determined incrementalism, not one of dramatic leaps forward'.[224] According to his study, it is the following three factors which have facilitated significant new initiatives to reform international human rights protection:

1) a conviction that a proposal is largely toothless (in the sense that it will not soon return to bite the governments that voted for it);
2) a coherent geo-political or ideological bloc that comes together to provide strong support for it;
3) a sense of overwhelming public concern or unrest over the failure of governments or the international community to act in a given situation.[225]

He finds none of these three factors in the campaign to create the WCHR. The time for establishing the WCHR will only be right when '[p]ublic opinion is prepared, forms of mobilisation occur, pressures on elites are crystallised, and proposals are relatively manageable, at least in their initial form'.[226] As a result, from a pragmatic point of view, 'the very notion of a WCHR and the very effort to promote it are, at least for the foreseeable future, a bad idea'.[227]

Nevertheless, to Alston, rejection is one thing and developing alternatives is another. Instead of creating 'an all-powerful global court',[228] Alston suggests:

> In a nutshell, a culture of human rights needs to be nurtured at all levels. Effective but tailored national accountability mechanisms are needed, regional systems (not just courts) must be developed, mechanisms for holding corporations to account should be established, international

[221] See: *ibid*.
[222] *Ibid*.
[223] See: *ibid*.
[224] *Ibid*.
[225] *Ibid*.
[226] See: *ibid*.
[227] Alston: "A 'World Court for Human Rights' is Not a Good Idea", *supra* note 123, p.1.
[228] Alston: "Against a 'World Court for Human Rights'", *supra* note 123, p.210.

organizations must acknowledge an obligation to abide by human rights in all of their activities, the UN Human Rights Council's Universal Periodic Review should be transformed into a more targeted and demanding process, and the unwieldy and unsustainable UN system of treaty monitoring bodies needs to be reformed.[229]

[229] *Ibid*., pp.210 – 211.

## Section 2 The Response to Opponents of the Proposal to Establish the WCHR

The opposition to this proposal is entirely understandable, and this section will respond to the two opponents.

### 2.1 The proposal to establish the WCHR: a proposal deeply rooted in history

The chronological account of the development of the human rights legal system confirms that the proposal to establish a WCHR has its roots deep in history. This proposal can be traced back to the first sessions of the UNCHR in the 1940s, and the Australian proposal for establishing an International Court of Human Rights (ICHR) is also worthy of attention. The Australian proposal is credited with offering the first institutional project of human rights at the level of international law. This proposal was groundbreaking, as it initiated the course of global human rights institutionalisation and had far-reaching effects on the human rights regime as it exists in its present form. However, the Australian proposal is frequently overlooked, and its significance is somewhat underestimated.

Firstly, at the time, the Australian proposal introduced the concept of an entirely new system of petitions by establishing a human rights court at the level of international law. As was discussed in **Chapter Two**, this new system of petitions contained two pioneering mechanisms: the individual complaint procedures and the inter-state complaint procedures. Despite the withdrawal of the Australian proposal, these two procedures later became the principal constituent parts of the current international human rights regime.

Specifically, the individual complaint procedures in the Australian proposal assumed that anyone may bring an alleged violation of human rights to the attention of the UN. The Australian representative believed that this mechanism could materialise the rights of individuals to petition the UN as a means of initiating a formal judicial process. Individuals would, therefore, be raised to the status of subjects of international human rights law, which might endow individuals with the full procedural capacity for the enforceability of rights inuring to their benefit, and would restore their faith in human justice 'when it appeared to fade away at domestic-law level'.[230] In Trindade's words, 'the old ideal of the

[230] Antônio A. C. Trindade: "The Merits of Coordination of International Courts on Human Rights", in: *Journal of International Criminal Justice*, Vol. 2, Issue 2, 2004, pp.309 – 312, at 310.

*realisation of international justice* is finally seeing the light of day'.[231]

The individual complaint procedures have been used quite extensively. So far, individuals have been entitled to lodge complaints/communications before regional human rights courts, with UN treaty bodies, and with the Human Rights Council. The OHCHR evaluates this significant procedural development highly:

> It is through individual complaints that human rights are given concrete meaning. In the adjudication of individual cases, international norms that may otherwise seem general and abstract are put into practical effect. When applied to a person's real-life situation, the standards contained in international human rights treaties and their most direct application. The resulting body of decisions may guide States, civil society and individuals in interpreting the contemporary meaning of these treaties.[232]

**Chapter Two** revealed that the inter-state complaints procedure was less controversial than the individual complaints procedure and gained majority support among the representatives of the UNCHR.[233] The UN Charter provided a legal rationale for the inter-state complaint procedure. Under Art.33 of the UN Charter, states must settle their

---

[231] *Ibid*.

[232] OHCHR: "Individual Complaint Procedures under the United Nations Human Rights Treaties", Fact Sheet No. 7/Rev.2, United Nations: New York and Geneva, 2013, p.1.

[233] Many representatives to the UNCHR considered this right somewhat self-evident. See: for example, UNCHR: "Comments of Governments on the Draft International Covenant on Human Rights and Measures of Implementation", sixth session, E/CN.4/353/Add.1, 4 January 1950, p.11; UNCHR: "Comments of Governments on the Draft International Covenant on Human Rights and Measures of Implementation", sixth session, E/CN.4/353/Add.2, 7 January 1950, p.12; UNCHR, "Comments of Governments on the Draft International Covenant on Human Rights and Measures of Implementation", sixth session, E/CN.4/353/Add.3, 16 January 1950, p.11; UNCHR: "Comments of Governments on the Draft International Covenant on Human Rights and Measures of Implementation", sixth session, E/CN.4/353/Add.4, 23 January 1950, p.4; UNCHR: "Comments of Governments on the Draft International Covenant on Human Rights and Measures of Implementation", sixth session, E/CN.4/353/Add.5, 15 February 1950, p.2; UNCHR: "Comments of Governments on the Draft International Covenant on Human Rights and Measures of Implementation", sixth session, E/CN.4/353/Add.6, 23 February 1950, p.5; UNCHR: "Comments of Governments on the Draft International Covenant on Human Rights and Measures of Implementation", sixth session, E/CN.4/353/Add.8, 10 March 1950, pp.10 – 11; UNCHR: "Comments of Governments on the Draft International Covenant on Human Rights and Measures of Implementation", sixth session, E/CN.4/353/Add.9, 16 March 1950, pp.2, 7; UNCHR: "Draft International Covenant on Human Rights, United Kingdom – United States: Draft proposal for implementation of International Covenant on Human Rights", sixth session, E/CN.444, 22 April 1950, p.1; UNCHR: "Summary Record of the Hundred and Sixty-Eighth Meeting", sixth session, E/CN.4/SR.168, 4 May 1950, p.7; UNCHR: "Summary Record of the Hundred and Seventy-Sixth Meeting", sixth session, E/CN.4/SR.176, 10 May 1950, p.9. The UNCHR finally 'unanimously approved the principle that the measures of implementation to be included in the first draft covenant should include provisions for the consideration of State to State complaints'. "Commission on Human Rights Report of the Sixth Session (27 March – 19 May 1950)", E/1681-E/CN.4/507, 29 May 1950, p.7. At its fifth session, the UNCHR 'decided that … in principle signatory States would have the right to enter complaints initiating proceedings under whatever form of implementation was finally adopted'. Commission on Human Rights: Report of the Fifth Session of the Commission on Human Rights to the Economic and Social Council, Annex. III, E/1371-E/CN.4/350, 23 June 1949, p.15.

international disputes by peaceful means, including negotiation, inquiry, mediation, conciliation, arbitration or international courts. There was a kind of unspoken agreement among many representatives to the UNCHR that the role of law would become more important than political considerations. Accordingly, the inter-state complaint procedures would resolve the dispute on the basis of international law.

The inter-state complaint procedures involve 'the filing of a formal application by a state or group of states against a state alleging noncompliance with the norms contained in a human rights instrument to which all states concerned are legally bound'.[234] The inter-state complaint mechanism can be found in some other proposals on implementation, such as the proposal for incorporating a new special chamber in the ICJ, as well as the French and UK – US proposals for establishing a special and permanent commission and an *ad hoc* committee of inquiry respectively. Finally, the UNCHR decided that some permanent machinery of implementation, whose function was limited to the consideration of state-to-state complaints, should be included in the draft International Covenant on Human Rights, which was later divided into the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

As with the individual complaint procedures, the inter-state complaint procedures also 'enshrines the idea that human rights are not to be seen as solely domestic affairs but as universal concerns of all states'.[235] At an international level, the ICJ has the competence to deal with inter-state disputes on human rights.[236] 'However, a few types of cases have provided much of its work'.[237] In addition to the ICCPR and ICESCR, several other UN human rights treaties also contain such provisions, allowing for one state party to complain to the relevant monitoring bodies about alleged violations of the treaty by another, although these procedures have never been used. At a regional level, ECHR, American Convention on Human Rights (ACHR) and African Charter on Human and Peoples' Rights (AfCHPR) contain similar provisions.[238] Moreover, the utility of this procedure by

---

[234] Scott Leckie: "The Inter-State Complaint Procedure in International Human Rights Law: Hopeful Prospects or Wishful Thinking?", in: *Human Rights Quarterly*, Vol. 10, No. 2, 1988, pp.249 – 303, at 249.
[235] *Ibid*., p.298.
[236] As Crook pointed out: 'There are no limits on the sorts of inter-State legal disputes the Court can hear.' John R. Crook: "The International Court of Justice and Human Rights", in: *Northwestern Journal of International Human Rights*, Vol. 1, Issue 1, 2004, pp.1 – 7, at 3.
[237] *Ibid*.
[238] See: Art.33 of the Convention for the Protection of Human Rights and Fundamental Freedoms (also known as the European Convention on Human Rights, ECHR), Art.45 of American Convention on Human Rights (ACHR) and Art.47 of African Charter on Human and Peoples' Rights (AfCHPR).

the regional human rights courts at present indicates a slightly more optimistic vision than the UN human rights treaty bodies.

Secondly, it is the Australian proposal that established the principle of complementarity concerning the role of international human rights courts. As **Chapter Two** indicated, from the very start the UNCHR had recognised that the State has a dominant position in human rights protection – which is of domestic concern in the first place – and that international tribunals have only a complementary function. The complementary nature of the ICHR was established in the introduction of the doctrine of exhaustion of local remedies. According to the Australian proposal, the ICHR, as a kind of court of appeal, would require that before lodging the case before the ICHR the complainant must first seek a remedy through the municipal courts, up to the highest possible level of jurisdiction.

The doctrine of prior exhaustion of local remedies guarantees the subsidiarity of the international machinery of protection to the national systems which safeguard human rights. This doctrine 'is linked to the respect of sovereignty of the respondent State which after all has to be given an opportunity to do justice in its own way through its internal means of jurisdiction'.[239] Accordingly, the respondent states should first be given the chance to implement immediately available remedies with a view to correcting their wrongdoing. As for individual applicants, they must have had recourse to all the means available to them at a local and national level before referring their case to an international body. If individuals were permitted to bring international claims without first attempting to rely on local remedies as a prerequisite, the international body receiving the complaint could have no way of knowing whether local remedies would have been adequate or effective. In short, '[a]s long as the individual has not exhausted local remedies, the internationally wrongful act does in fact not yet exist or has at least not been completed and it follows that so far international responsibility has not been created'.[240]

With long and constant evolution, the rule of exhaustion of local remedies has become one of the cardinal admissibility criteria for complaints/communications, both at regional and international level. Moreover, compared with the Australian proposal, this rule 'has undergone numerous exceptions and rightly appears not as a strict admissibility

[239] Silvia D'Ascoli and Kathrin Maria Scherr: "The Rule of Prior Exhaustion of Local Remedies in the International Law Doctrineand its Application in the Specific Context of Human Rights Protection", European University Institute (EUI) Working Papers, Law/2007/02, p.4. This paper is available at: http://cadmus.eui.eu/bitstream/handle/1814/6701/LAW_2007_02.pdf.
[240] *Ibid*.

condition of an absolute content, but as a rule which needs to be applied with flexibility'.[241]

The Australian proposal pointed to the persistent problem of the relationship between state sovereignty and international jurisdictions that must be addressed throughout the whole process of global human rights institutionalisation. In theory, there are two dramatically different tendencies in this respect: idealism/internationalism and realism/nationalism. Although these two terms are not easily defined, their conflicting attitudes towards international jurisdictions seems to be overwhelmingly obvious. Realists/nationalists stress the role of power and sovereignty in the actual operation of the international human rights regime.[242] This is precisely opposite to the idealists/internationalists, who are aware that human rights are no longer an issue when it comes to unilateral efforts within their respective boundaries, but remain a kind of shared interest and objective across national boundaries. According to Donnelly, idealists/internationalists stress the remarkable degree of general normative consensus.[243] In effect, they view human rights as the common ground of being, and therefore the common interest of all the people in the world, and believe that states should devote themselves entirely to advancing this interest. Apart from a greater cooperation among states, advancing human rights also relies upon a universal implementation of human rights operated by a reputable international organisation. The UN is, undoubtedly, a decent candidate. However, in practice, none of this can come about without some degree of surrender of state sovereignty.

As **Chapter Two** revealed, Evatt, the former head of External Affairs in Australia, adopted an internationalist approach.[244] He was 'a believer in the UN as a means of

---

[241] *ibid*., p.12.
[242] See: Jack Donnelly: "International Human Rights: a regime analysis", in: *International Organizations*, Vol. 40, No. 3, Summer 1986, pp.599 – 642, at 640.
[243] See: *ibid*.
[244] Annemarie Devereux: "Australia and the International Scrutiny of Civil and Political Rights: An Analysis of Australia's Negotiating Policies, 1946-1966", in: *Australian Year Book of International Law*, Vol. 22, 2002, pp.47 – 75, at 46. Evatt was labelled 'internationalist' by many political historians, biographers and contemporaries. See: for example, Michael D. Kirby: "H. V. Evatt: Libertarian Warrior, Inaugural HV Evatt Memorial Address Evatt Foundation: Parliament House Sydney, 30 August 1991", available at: http://www.michaelkirby.com.au/images/stories/speeches/1990s/vol24/900-H_V_Evatt_-_Libertarian_Warrior_-_Inaugural_H_V_Evatt_Memorial_Address.pdf; Christine de Matos: "Encouraging 'Democracy' in a Cold War Climate: The Dual-Platform Policy approach of Evatt and Labor toward the Allied Occupation of Japan 1945-1949", Pacific Economic Papers No. 313 (March 2001); Emma Ede: "Internationalist Vision for a Post-war World: H. V. Evatt, Politics & the Law", A thesis submitted in partial fulfilment of the requirements for the degree of B.A. (Hons) in History, University of Sydney, October 2008; Gareth Evans: "Herbert Vere Evatt: Australia's First Internationalist", 1995 Daniel Mannix Memorial Lecture by Senator the Hon Gareth Evans QC, Minister for Foreign Affairs, Melbourne, 31 August 1995, available at:

avoiding war and precursors to war, such as human rights violations'.[245] The Australian proposal for establishing an ICHR was to complement the UN Human Rights Commission, the Criminal Tribunal, and the high Commissioner for human rights. According to Devereux, this proposal was, therefore, a product of his 'individual- and internationalist-centred view of implementation of human rights guarantees'.[246] However, the majority of representatives to the UNCHR expressed dissatisfaction with the Australian proposal and its contentious jurisdiction in particular. The representatives from the Union of Soviet Socialist Republics (USSR) and other Soviet republics might have chosen to embrace a more realist/nationalist approach. They insisted on the inalienability of state sovereignty, and trenchantly criticised all the drafts and proposals regarding the issue of implementation. It is difficult to clearly identify which approach was favoured by the many other representatives, including the other four permanent members of the UN Security Council. While accepting the concept that absolute sovereignty must, to some extent, be relinquished, as well as the right of the UN to intervene to varying degrees, they suggested that the UN's intervention should be moderate, and that the Australian proposal was unlikely to have any chance of immediate acceptance. It can be said that, on the one hand, the debate on the Australian proposal revealed the superficiality of the enthusiasm of many representatives to the UNCHR in the issue of implementation, and the substantive disagreements over the strength of the international human rights regime on the other.

As indicated by **Chapter Two**, widespread, vociferous, and effective claims of national sovereignty were outweighing the universal implementation of human rights as the common interests of those in the post-war era. The changing domestic political situation in Australia also altered the political landscape, effectively 'killing off' the proposal.[247] The Australian proposal, to borrow a phrase from Donnelly, did not 'rest on any perceived material interest of a state or coalition willing and able to supply it'.[248] In a sense, this inevitable denouement was presaged at the Dumbarton Oaks Conference in 1944, when the great powers decided to incorporate human rights in a weak manner, or in

---

http://www.gevans.org/speeches/old/1995/310895_herbert_vere_evatt.pdf; Kenneth D. Buckley, Barbara Dale, Wayne Reynolds: *Doc Evatt: Patriot, Internationalist, Fighter, and Scholar*, Melbourne, Australia: Longman Cheshire, 1994; David Day: *Brave new world: Dr. H.V. Evatt and Australian foreign policy, 1941-1949*, St Lucia, Qld.: University of Queensland Press, 1996. Evatt's successor, Spender 'argued that as an internationalist, Evatt failed to be an Australian'. Ede, *ibid.*, p.10.

[245] Devereux, *supra* note 244, p.61.

[246] *Ibid*.

[247] See: Jesse Kirkpatrick: "A Modest Proposal: A Global Court of Human Rights", in: *Journal of Human Rights*, Vol. 3, No. 2, 2014, pp.230 – 248, at 232.

[248] Donnelly, *supra* note 242, 616.

an international moral sense, into the reconstruction of the international order in the post-war era. They did not want the UN Charter to have the capacity to impose actively upon them the obligation to protect and promote human rights and freedoms.

Throughout the Cold War era, there existed only a weak international capacity to monitor and supervise human rights. Donnelly describes how, during the time of Cold War (more precisely, 1945 – 1985), 'procedures beyond norm creation, promotion, and information exchange are largely absent'.[249] In other words, 'national performance is subject to only minimal international supervision'.[250] Nevertheless, realism did not completely prevail over idealism, so the process of global human rights institutionalisation did not cease completely.

It must be admitted that the emphasis on state sovereignty continued to hold sway, notwithstanding the end of the Cold War. On some occasions, the overemphasis of the notion of state sovereignty has been recognised as a serious, worldwide barrier to the development of international human rights law.[251] Nevertheless, the course of international human rights institutionalisation appears to have been characterised more by deference to ideas of sovereignty than by the overall normative and organic subordination of states to international jurisdictions according to human rights instruments. Ongoing global human rights institutionalisation has never advanced beyond establishing a stronger promotional regime 'with extensive, coherent, and widely accepted norms but extremely limited international decision-making powers'.[252] In this sense, the current proposal for establishing the WCHR represents a first step towards changing this situation.

### 2.2 The jurisdiction of the WCHR over State actors: a buffer of antithetical dualism between idealism and realism

As regards those states that may not truly desire a stronger human rights regime, their reluctance, or even hostility, towards the current proposal probably remains much the same

[249] *Ibid*., p.609.
[250] *Ibid*., p.608.
[251] For example, Before the Vienna World Conference on Human Rights in 1993, the preparatory committee noticed the repercussions of state sovereignty, as may have been the case in the past and as defined by Art.2 (7) of the UN Charter, on international measures of implementation, and tried to prevent continuous stress on state sovereignty from ruining the whole conference. See: World Conference on Human Rights, Preparatory Committee, Fourth Session, Report on other Meetings and Activities, Report of the Secretary-General (Addendum), A/CONF.157/PC/42/Add.1, 30 April 1993, p.37.
[252] Donnelly, *supra* note 242, p.633.

as it was during the Cold War era. Having been affected deeply by East-West rivalry, the preservation of regime legitimacy is probably considered by these states to be a core national interest. As mentioned above, judging by the strength of international decision-making activities put forward by Donnelly, the Australian proposal is largely categorised by such states as a kind of schedule of international enforcement activities, and the same may well hold true for the current proposal for establishing the WCHR. As a result, these states may well have serious doubts about the impact of the WCHR's judgments, and particularly those judgements not in their favour, on their international reputation. Having observed the operation of the complaint procedures in the other human rights mechanisms, they may wholeheartedly dislike the idea of being accused of having violated human rights, no matter where this accusation comes from, not least because this might lead to the making public of oral debate and trial by judges in open court. Furthermore, any judgment or decision upholding such an accusation would put them at risk of falling into disrepute.

It seems that these states are assuming that the WCHR would inevitably be hyper-meritocratic and politicised, and that its judges would either be human rights activists or would, at the very least, side with that group. However, in effect, the establishment of the WCHR could actually help to prevent the states concerned from defaming one another through the politicising of human rights issues. The judges of the future WCHR would be human rights lawyers with a sound knowledge of human rights law and how to apply it correctly. Unlike human rights activists themselves, the judges of a future WCHR would not only rule in favour of human rights activists, but also against them, sometimes limiting 'the scope of human rights, possibly in areas where human rights activists reject the limitation'.[253]

Obviously, this is not a persuasive enough reply to mitigate such reluctance or hostility towards the complaint procedures of the future WCHR on the part of states, and it will not be simply a matter of time until previously resistant governments are ready to concede the need for a WCHR. In this context, formulating jurisdiction will have to be done with extreme caution. As indicated in **Chapter Three**, in addition to diversifying the jurisdiction of the WCHR and the doctrine of exhaustion of local remedies, the current statutes of the WCHR have made clear that the contentious jurisdiction of the future WCHR would be a kind of optional compulsory jurisdiction. That is to say; whatever route

[253] Trechsel, *supra* note 7, ¶ 4.

may be chosen to open access to the WCHR to potential applicants – individual person, states parties, NGOs and group of individuals – will require the consent of states from the outset. The future statute of the WCHR would not strip states of their autonomy to decide to what extent they will participate in the Court, nor increase their commitment to particular rights. In the words of Ssenyonjo:

> In any case the decision whether or not to become a party to a statute creating the World Court of Human Rights, should one be adopted in the future, would be optional. Those states that might be reluctant to be held accountable for human rights violations by an independent international judicial body would be free not to become parties.[254]

As in **Chapter Three**, the current proposal for establishing the WCHR has noted that, in practice, not many domestic legal systems share the assumption that every right under the WCHR's jurisdiction *ratione materiae* is appropriately subject to judicial determination. Undoubtedly, there will be some, or even quantities of, states would argue that the proposed WCHR would not be a competent body to adjudicate over many rights in the applicable laws under its jurisdiction *ratione materiae*.

To solve this problem, the current proposal for establishing the WCHR includes a concession to these states, which makes a distinction between 'justiciability' in law and 'justiciability' in practice. According to the authors of the current statutes, all human rights treaties under the WCHR's jurisdiction *ratione materiae* are justiciable in law. This does not, however, mean that the Court can synchronously adjudicate every right in practice. According to Art.36 of the NK Statute, State parties may exclude a particular human rights treaty, or certain provisions thereof, at the time of ratification or the accession to it, by declaring a reservation. This 'opt-out' clause was adopted by Art.50 of the Consolidated Statute. Accordingly, states may accept the WCHR's scrutiny, while reserving the rights they might consider to be 'not justiciable' temporarily outside of the Court's jurisdiction. The *ad hoc* acceptance of the WCHR's jurisdiction, according to Art.9 of the MS Statute, may also achieve a similar effect. Scheinin enumerated the following three circumstances in which the WCHR would be able to exercise its *ad hoc* jurisdiction. They are: a state is not party to the WCHR Statute but has ratified a certain human rights treaty on the applicable law list; a State party to the WCHR Statute has entered a reservation to a certain

[254] Manisuli Ssenyonjo: *Economic, Social and Cultural Rights in International Law*, Oxford and Portland, Oregon: Hart Publishing, 2009, p.402.

human rights treaty in the applicable law list or certain provisions thereof; and a state is not party to the WCHR Statute and neither is the human rights treaty applicable to this case on the applicable law list.

The current proposal is inclined to believe that if 'justiciability' in practice' could be left to states to decide, this would generate no detriment to 'justiciability in law'. At the same time, **Chapter Three** further suggested that the authors of the future statute of the WCHR might be wise to reconsider the significance of the WCHR's *ad hoc* jurisdiction. The more options provided to enable states to access the WCHR, the more it might encourage them to accept the Court's jurisdiction, and the more likely the WCHR would be to succeed.

The original version of Chapter Three took the perspective of the doctrine of margin of appreciation (MoA). However, this perspective was finally dropped in the current version. For the first reason, the MoA doctrine is only stipulated in Protocol No.15 to the ECHR and has not came into effect yet. For the second reason, after months of research the researcher finds that the MoA doctrine as a judging method has little to do with the WCHR's jurisdiction design. Admittedly, the MoA doctrine, as with the jurisdiction of the proposed WCHR, embodies the principle of complementarity. The inclusion of this doctrine in the future WCHR's Statute may further lessen the states' longstanding wariness of a stronger international human rights regime, and thus increasing the likelihood of success. Therefore, although this dissertation dropped the perspective of the MoA doctrine in the end, it is worthy of research when a researcher intends to further explore the complementary nature of the WCHR's jurisdiction. It should be noted that Alston, one of the main opponents of the current proposal, also highly appreciated the role of the MoA doctrine, because this doctrine could 'ensure that national perspectives are taken into account in certain circumstances'.[255]

The contentious jurisdiction of the WCHR over state actors also refers to the relationships of the WCHR with the regional human rights courts and the UN human rights treaty bodies. For the first, the relationship between the WCHR and the regional human rights courts, Trechsel hoped that the WCHR would be the ultimate appellate court of the regional human rights courts, in accordance with the pyramid model. However, he suggested that, both now and in the foreseeable future, the pyramid model could hardly be construed successfully. Likewise, the current proposal for establishing the WCHR tends to

[255] See: Alston: "Against a 'World Court for Human Rights'", *supra* note 123, p.208.

utilise the current system fully, with minimal reform. As discussed in **Chapter Three**, the authors of the current statutes of the WCHR have clearly stressed that the future Court should not serve as an appeals court to the existing regional human rights courts.[256]

Alston argued that the establishment of such a court would quickly persuade complainants to file before the WCHR rather than before one of the regional courts, because the WCHR would have a broader jurisdiction, greater accessibility and far stronger enforcement powers. This 'forum-shopping' might result in the gradual marginalisation of the existing regional human rights courts. This argument seems to be unfounded. **Chapter Three** have indicated that, despite these advantages over the existing regional human rights courts, the current proposal has no motive for persuading the potential applicants lodge their complaints with the WCHR rather than seeking justice in the regional human rights courts. Instead, it envisages that 'applicants should make up their mind whether they prefer to submit their case to the World Court or the respective regional human rights court'.[257] The proposed WCHR 'would not replace regional human rights courts, compete with them, or become an appeal instance with them'.[258]

As for the relationship of the WCHR with the UN human rights treaty bodies, Trechsel anticipated that a WCHR would stand above the existing UN human rights treaty bodies.[259] He did not believe that it would be an alternative to each of the specialised bodies when the latter were not available simply because it implies that protection by a mere committee is weaker than that of a World Court of Human Rights.[260] Trechsel suggested that the UN human rights treaty bodies should retain the competence to receive individual complaints, something which would not be the case for the WCHR.[261] Neither did Trechsel agree with the proposal to imitate the position which the former European Commission of Human Rights once held and the current American Commissions of Human rights currently holds.[262] To his mind, this would not be feasible unless the various treaty bodies could be merged into one.[263] The merger of the existing UN human rights

---

[256] See: the NK Statute, Preamble, para.8 and Art. 11(2)(c); the MS Statute, Preamble, para.7 and Art.13 (1)(d); the Consolidated Statute, Preamble, para.10 and Art.10 (1)(b).
[257] Nowak and Kozma, *supra* note 153, p.64.
[258] Martin Scheinin: Towards a World Court of Human Rights", *Protecting Dignity: An Agenda for Human Rights*, Swiss Initiative to Commemorate the 60th Anniversary of the UDHR, p.61. This document is available at: http://www.enlazandoalternativas.org/IMG/pdf/hrCourt_scheinin0609.pdf.
[259] Trechsel, *supra* note 7, ¶ 57.
[260] *Ibid*.
[261] *Ibid*., ¶ 58.
[262] *Ibid*., ¶ 59.
[263] *Ibid*.

treaty bodies 'might be difficult in view of the fact that the list of States having ratified the different Conventions is not uniform'.[264]

Trechsel's concerns do not apply to the current proposal for establishing the WCHR. The proposed WCHR would not stand above the present UN human rights treaty bodies. No hierarchical relationship between these institutions is about to be established. Establishing such a relationship would inevitably lead to a substantive reform of the UN treaty monitoring system. Any proposals to this effect, including the consolidation of existing treaty bodies, would be 'faced with the considerable challenge of amending UN human rights treaties'.[265] Given the complexity and the cumbersome process that this would entail, such an amendment procedure would have very little chance of success.[266] By contrast, the current proposal for establishing the WCHR would make no amendments to the existing human rights treaties at UN level, because the statute of the future WCHR – the constituent instrument of the Court – would be concluded as a new treaty, following either the example of existing UN human rights treaties or that of the Rome Statute of the ICC.

This proposal would not result in the abolition of the current UN human rights treaty bodies either. Rather, the proposed WCHR would gradually take over the functions of the treaty monitoring bodies, namely by examining individual and inter-State complaints. In other words, there would be no duplication of the function of examining individual and inter-state complaints in the WCHR in competition with the existing UN human rights treaty body system. Accordingly, states having formally (not *ad hoc*) accepted the WCHR's jurisdiction would have to take the necessary action to ensure that individual and inter-state complaints could no longer be lodged with the respective UN human rights treaty monitoring bodies. Such an arrangement might have some additional positive effect on these treaty monitoring bodies; given the opportunity to neglect their quasi-judicial function, the UN human rights treaty bodies could put more effort into their other monitoring functions, such as the consideration of periodic reports by states. To be sure, the role of the UN human rights treaty bodies on these fronts is not fungible, and this institutional arrangement would contribute to reducing the considerable backlogs and delays in the state reporting procedure, given the very limited time and resources.[267]

---

[264] *Ibid*.
[265] Nowak and Kozma, *supra* note 153, p.19.
[266] *Ibid*.
[267] See: Nowak and Kozma, *supra* note 153, p.19.

Moreover, all proposals for strengthening the UN human rights treaty body system could still be pursued, parallel to the campaign to create a WCHR.[268] The existing human rights treaty bodies are facing the challenges of workload and resource requirements resulting from the expansion of this system.[269] 'Considerable efforts have been made by the treaty bodies to harmonize and improve their working methods and increase their efficiency and effectiveness'.[270] In a certain sense, these two campaigns can even be regarded as a mutually supportive process. As Scheinin pointed out, 'shirking' the quasi-judicial function would open up the opportunity to strive for a new, fully or partly merged, treaty body structure at UN level, which would result in 'the better integration of the work of all treaty bodies with each others'.[271] As he said:

> While the consideration of complaints through a judicial procedure would gradually shift from the treaty bodies to the World Court, the former would in an integrated manner continue to consider State Party reports, to elaborate separate or joint general comments under the respective human rights treaties, and to exercise the other functions of the treaty bodies.[272]

### 2.3 The jurisdiction of the WCHR over other 'Entities': some added value as compared to existing regional human rights courts and the UN human rights treaty bodies

International human rights law has so far been concerned mainly with the relationship between states and individuals. Nevertheless, few would deny that not only sovereign states, but also many non-state actors, should be brought under the rule of law through

---

[268] Scheinin, *supra* note 258, p.25.
[269] See: Report of the Secretary-General on "Measures to improve further the effectiveness, harmonization and reform of the treaty body system", A/66/344, 7 September 2011, para.6. According to an evaluation of the use of additional meeting time by the human rights treaty bodies, "[R]equests for additional meeting time are symptomatic of the increasing workload faced by the human rights treaty body system as a whole." Evaluation of the use of additional meeting time by the human rights treaty bodies, Note by the Secretary-General, A/65/317, 27 August 2010, para.37.
[270] A/66/344, *supra* note 269, para.3. OHCHR has conducted some activities 'to increase the efficiency of the treaty bodies within existing resources and constraints'. They are including: enhancing its flow of information towards the treaty body experts, special procedures mandate holders, UN partners, national human rights institutions and non-governmental organizations, with a view to increasing coherence and consistency of the outputs of the different human rights mechanisms; contributing to the effective implementation, at the national level, of treaty body and other human rights mechanism recommendations by responding to requests from States parties for trainings on reporting to the treaty bodies and follow-up to concluding observations, often in partnership with other organizations. See: A/66/344, *supra* note 269, Summary.
[271] Scheinin, *supra* note 258, p.24.
[272] *Ibid*., p.25.

institutional and legal reform. The current proposal for establishing the WCHR integrates the relationship between 'entities' other than state actors and individuals into the future statute of the Court. As Nowak and Kozma said:

> A fully independent World Court of Human Rights should be created, entrusted with the judicial protection of human rights against all duty bearers. … It should be competent to decide in a final and binding manner on complaints of human rights violations committed by state and non-state actors alike and provide adequate reparation to victims.[273]

In Scheinin's words, the creation of the WCHR would 'make a wide range of actors more accountable for human rights violations'.[274] At the 'Vienna+20 Conference', the experts participating in the first theme of the Conference recognised the added value of the WCHR in this respect:

> It was pointed out in particular, that the lack of accountability for human rights violations today goes beyond States and increasingly applies to other powerful actors, including inter-governmental organisations, transnational corporations and other non-state duty bearers.[275]

According to the current proposal for establishing the WCHR, the term 'entities', in the sense of the current proposal, includes intergovernmental organisations, transnational corporations, international NGOs, organised opposition movements exercising a degree of factual control over a territory and autonomous communities within one or more states. It is fair to say, however, that the responsibility of the entities in terms of a human rights court with global reach is something which has previously been altogether unknown.

As mentioned above, Trechsel regarded a further extension of the jurisdiction *ratione persone* from states to major economic entities as an innovation. Such an innovation, however, would not be entirely justified. He took the multinational corporations as an example, and realised that these corporations 'have an enormous amount of power which in many ways is likely to interfere with human rights'.[276] However, in his opinion, the idea of expanding the competence of the WCHR to that field is not particularly realistic. Trechsel did not, however, discuss this question in detail.

By contrast, Alston makes far more detailed critical comments on this extension. He

---

[273] Nowak and Kozma, *supra* note 153, p.3.
[274] Scheinin, *supra* note 258, p.53.
[275] Vienna+20: Advancing the Protection of Human Rights, *supra* note 1, p.3.
[276] Trechsel, *supra* note 7, ¶ 39.

criticises the current proposal for blurring or even overlooking these differences by seeking the uniformity of particular solutions, given that the present state of entities presents an extremely complex picture in terms of their objectives, powers, legal structure, scope, and *etc*. This criticism is perhaps wide of the mark, because this is less likely to be the case owing to the establishment of such a court. The distinction between the justiciability in law and in practice also applies to the Court's jurisdiction in that field. As with state actors, the entities are also allowed to retain such rights as they consider to be not justiciable temporarily outside of the WCHR's jurisdiction. As Nowak and Kozma said: 'For example, it is difficult to imagine that NATO might be held accountable for a violation of the right to marry whereas such a violation could be claimed in relation to a United Nations interim administration.'[277] Furthermore, the future WCHR 'shall decide on a case by case basis whether the specific human rights invoked by an individual complaint can by their very nature be applied in relation to an inter-governmental organization'.[278] Specific to this dissertation, space does not permit **Chapter Four** to cover the responsibility of each entity before the proposed WCHR, however, this chapter did touch upon the UN, and delved into many of the salient issues surrounding the WCHR's jurisdiction over the Organisation.

To identify the UN as a target for applications to the proposed WCHR, the UN's *locus standi*, particularly the defendant status, before the Court must be established. It should be admitted that the solution to this problem is still ambiguous. The *Reparation* case established the UN's status as a plaintiff before international tribunals. This status makes the UN competent to make international claims for the damage caused to the interests of the UN itself, its administrative machine, its property and assets, and any other interests of which it is the custodian. In theory, the UN's legal personality in international law also entails the Organisation with a defendant status counterpart to its plaintiff status. However, the UN's defendant status has enjoyed no positive response in practice. While a number of private claims for harm caused by the UN have been lodged at a domestic level, some of them with the merits of observance of human rights law, no arbitral tribunal at a regional or an international level before which the UN has *locus standi* as a defendant has been established. Nevertheless, the ambiguity of the UN's defendant status does not matter to the WCHR in terms of exercising the jurisdiction over the UN. The UN's acceptance of the WCHR's jurisdiction means that the UN will acknowledge its defendant status.

---

[277] *Ibid*.
[278] Nowak and Kozma, *supra* note 153, p.58.

**Chapter Four** also clarified the established juridical articulation between the WCHR's jurisdiction and the UN, which can be understood both from legal and practical perspectives. The juridical articulation in law refers to the relationship of the UN with human rights treaties as the primary rules of international law under the WCHR's jurisdiction *ratione materiae*. According to this chapter, the UN has no need to accede to the human rights treaties under the WCHR's jurisdiction *ratione materiae* as a full party; a unilateral declaration stating that a specific treaty is binding for the Organisation would be sufficient. At the same time, the UN's practice may reinforce the juridical articulation of the WCHR with the UN. The UN has made clear on many occasions that its operations must obey internationally recognised human rights standards. **Chapter Four** used the UN's peacekeeping operations, the UN interim/transitional administrations and the UN sanction regimes to illustrate this point. More than that, as a regime of international responsibility, the WCHR would require the attaching of particular conduct to the UN according to the Draft Articles on the Responsibility of International Organisations. According to the 2011 Draft Articles, two forms of attribution may result in the UN being held responsible: a given act or omission that is entirely attributable to the UN, and a given act or omission concurrently attributable to the UN.

Nor would it be necessary, as Alston has suggested, to worry that the doctrine of exhaustion of domestic remedies would be wished away by the rule of prior exhaustion of internal remedies. Over the years, the doctrine of exhaustion of domestic remedies has predominated in human rights instruments, and has finally been adopted as one of the principles of general international law. However, this doctrine cannot perform its usual role in the case of the UN, because the Organisation enjoys jurisdictional immunity from lawsuits against it before national courts. For individual applicants, this immunity might have constituted a primary legal obstacle to seeking a remedy at the domestic level. The case studies of Chapter Four (*Manderlier v. United Nations and Belgium*, *Association of Citizens Mothers of Srebrenica v. the State of the Netherlands and the United Nations*, and *Delama Georges et al. v. United Nations et al*.) have proved this to be the case. In these cases, the states concerned have chosen to respect the UN's immunity at the expense of the individual litigant's right of access to a court. From a procedural perspective, domestic remedies have effectively been exhausted if the domestic courts have chosen to stand on the side of the UN, and the applicants may seek legal remedies in neither regional nor international systems. However, in the sense of substantive law, a violation is one which can never be rectified at a domestic level, and the resulting workload of the proposed

WCHR would soon be overwhelming.

**Chapter Four,** on the jurisdiction of the WCHR over the UN, is not of course the final word in the study of the Court's jurisdiction over other entities. By including other entities alike under the jurisdiction, the current proposal for establishing the WCHR may become far more hopeful prospect than wishful thinking. The Court's jurisdiction over other entities and the surrounding legal issues have to be addressed respectively through future studies.

### 2.4 Final conclusion

In retrospect, '[h]uman rights had served its purpose well, mobilizing public and state support in the war against the Axis powers'.[279] Human rights have been regarded as cosmopolitan orthodoxy since the end of the World War II. There has long been a consensus in international law circles that human rights should be taken seriously through establishing proper machinery with the mandate to supervise the observance of internationally adopted human rights standards.

The development of international human rights law is fuelled by the proliferation of a variety of human rights treaties, procedures and institutions. As an important part of this development, the global institutionalisation of human rights has brought about the transformation of human rights from moral orthodoxy into a legal discipline concerned with the practical application of law. According to Donnelly's analysis, the evolution of the international human rights regime is largely dominated by incrementalism. Moreover, there seems to have been a discontinuity in efforts to realise international enforcement activities since the withdrawal of the Australian proposal. In a sense, the current proposal for establishing the WCHR is a new attempt to revive the Australian proposal for establishing an ICHR. The current statutes of the WCHR provide a brand new version in greater detail and with untrammelled ambition.[280]

Whether the current proposal for establishing the WCHR eventually becomes a reality 'will ultimately depend on the number of ratifications of the Statute as well as on the

[279] Roger Normand and Sarah Zaidi, *Human rights at the UN: the political history of universal justice*, Bloomington: Indiana University Press, 2008, p.107.
[280] Alston: "Against a 'World Court for Human Rights'", *supra* note 123, p.197.

manner third States will interact with the Court'.[281] In a sense, the more states that accept the WCHR's jurisdiction, the closer human rights can come to approaching the goal of depoliticisation. It should be admitted that a major qualitative increase in the commitment of states to subject themselves to judicial scrutiny at the international level remains somewhat lacking. More than that, the political prospect of the entities other than states, including the UN, being prepared to subject themselves to the jurisdiction of the WCHR would also seem to be far from bright. Nowak also acknowledged that the realistic analysis of the current international climate is not conducive to realising the proposal of the creation of the WCHR.[282] However, saying that the setting up of an international court would be a veritable challenge 'in a world where international courts have rarely enjoyed unanimous confidence'[283] is no longer a sufficient excuse.

The idea of establishing a WCHR is not a utopian idea departing in a far too revolutionary manner from traditional international law concepts.[284] The current proposal attempts to grant rights holders the ability to hold state actors and those entities other than states – the two categories of duty bearers in the sense of the WCHR's jurisdiction – accountable for 'not living up to their legally binding human rights obligations before a fully independent international human rights court with the power to render binding judgments and to grant adequate reparation to the victims of human rights violations'.[285] In addition, the purpose of the WCHR should not be understood narrowly, or even be misinterpreted, as a judicial body for finding, denouncing or punishing violations of human rights. In addition to serving as a genuine programme of universal enforcement of human rights against all abusers, the future WCHR will strive to realise the right to an effective remedy. As early as the 1940s, the Australian representative stressed that, in English law, the remedy is as important as the right, for without the remedy there is no right.[286] Realising effective remedies depends on 'a continuous, effective and just system of

[281] Kozma, *et al.*, *supra* note 153, pp.32 – 33.
[282] See: Nowak, *supra* note 4, p.14.
[283] Rodolfo Mattarollo: "The Role and Functioning of International Machinery", in: Council of Europe: "Human Rights at the Dawn of the 21st Century", Addendum to the Report from the Interregional meeting organized by the Council of Europe in advance of the World Conference on Human Rights, Palais de l'Europe Strasbourg, 28 – 30 January, 1993, Introductory Presentations, p.7. Cited in: World Conference on Human Rights, Preparatory Committee, Fourth session, Report on Other Meetings and Activities, Note by the Secretariat (Addendum), Contribution by the Council of Europe, A/CONF.157/PC/66/Add.1, 16 April 1993.
[284] See: Nowak, *supra* note 4, p.12.
[285] Ssenyonjo, *supra* note 254, p.37.
[286] Devereux, *supra* note 244, note 7, p.56.

international supervision'.[287] This system of international supervision should be assumed by 'some kind of international tribunal charged with supervision and enforcement of the covenant'.[288]

This study has also illustrated that gaining wider acceptance of the establishment of the WCHR a widely accepted idea among international legal circles is not an easy process; converting this idea into reality will not be an overnight process either. On this point, Alston was right in saying that the current proposal for establishing the WCHR 'should not really be seen on its own merits, but rather as an opening gambit in a prolonged negotiation'.[289] No doubt the difficulties in setting up such a court will be considerable. 'To the extent that the proposal to create such a court is a heuristic device, public debate about it might arguably help in identifying some of the major challenges that confront the building of a more effective international human rights regime.'[290] Given this, a serious discussion should start as soon as possible 'if the goal remains to theorize an institution that has a real chance of actually coming to fruition'.[291] It is thus hoped that this dissertation may help state actors and those entities other than states to summon up their courage to start this discussion. In Nowak's words: 'If we wish to address the major challenges of the twenty-first century effectively, we therefore have to start by taking human rights seriously.'[292]

This dissertation is an exploratory study, rather than an attempt to be definitive. It is to be hoped that this study will highlight opportunities for future research.

---

[287] *Ibid*.
[288] *Ibid*.
[289] See: Alston: "Against a 'World Court for Human Rights'", *supra* note 123, p.199.
[290] *Ibid*.
[291] Kirkpatrick, *supra* note 247, p.244.
[292] Nowak, *supra* note 4, p.15.

## Summary / Zusammenfassung

The birth and development of international human rights law and monitoring mechani sms give the post-war international law a humanised character. The last decades have witn essed a remarkable trend of judicialisation in human rights. This trend has not, however, go ne as far as the creation of a permanent and specialised human rights court with global reac h. This dissertation indicates that the creation of a World Court of Human Rights (WCHR), a proposal put forward by Manfred Nowak, Martin Scheinin and Julia Kozma in 2008, may further promote this trend. By using documentary study, comparative study and case study, this dissertation intends to answer the following questions:

(1) Is there any effort to establish a dedicated human rights court at international level in history? If this question has gained a positive reply, what about the result of these previous efforts?

(2) Is the well-established principle of complementarity embodied in the current statutes for the proposed WCHR, and if so, how?

(3) Can the proposed WCHR exercise its jurisdiction over various entities other than sovereign states, and if so, how?

In answering these questions, this dissertation contains three substantial Chapters apart from the introduction (**Chapter One**) and the conclusion (**Chapter Five**), and each Chapter explores answers to each of the above-mentioned questions respectively. To be specific, **Chapter Two** finds that there were indeed some efforts to establish a human rights court at the international level. However, these efforts ended unsatisfactorily. Thus, this Chapter also explores the reasons to this unsatisfactory result. **Chapters Three** and **Four** concentrate on the current proposal for establishing a WCHR, in particular, on the articles regarding the form of the Court's jurisdiction. Two main subjects, namely, state actors and non-state actors, are highlighted respectively in these two Chapters. Having noticed the well-established principle of complementarity in the international human rights regime and the current proposal of the WCHR, **Chapter Three** addresses the question: whether and how this principle is embodied in this proposal. Having found that the current proposal represents an advance with the inclusion of non-state actors in the jurisdiction of

the WCHR, **Chapter Four** chooses the UN as its research subject, and discusses the legal foundation of the WCHR's jurisdiction over this Organisation. Having noticed its complementary nature, this Chapter observes that the current proposal introduces the rule of prior exhaustion of internal remedies yet does not provide full details about the application of this rule. The end of this Chapter, therefore, formulates possible ways in which this rule might be applied.

---

Die Entstehung und Entwicklung internationaler Menschenrechts- und Überwachungsmechanismen verliehen dem Nachkriegs-Völkerrecht einen humanen Charakter. In den letzten Jahrzehnten kam es zu einer bemerkenswerten Verrechtlichung im Bereich der Menschenrechte, welche jedoch nicht zur Schaffung eines ständigen und spezialisierten Menschenrechtsgerichtshofs mit globaler Zuständigkeit führte. Diese Dissertation zeigt, dass die Schaffung eines „Weltgerichtshofes der Menschenrechte" (World Court of Human Rights - WCHR), wie von Manfred Nowak, Martin Scheinin und Julia Kozma im Jahr 2008 vorgeschlagen, diesen Trend weiter fördern könnte. Durch rechtliche Analysen sowie, Vergleichs- und Fallstudien will diese Dissertation folgende Fragen beantworten:

(1) Gab es in der Vergangenheit Bemühungen, einen eigenen Menschenrechtsgerichtshof auf internationaler Ebene zu gründen? Wenn ja, was war das Ergebnis dieser bisherigen Bemühungen?

(2) Ist das etablierte Komplementaritätsprinzip in den Statuten für den vorgeschlagenen WCHR verkörpert, und wenn ja, inwiefern?

(3) Kann der vorgeschlagene WCHR Jurisdiktion über verschiedene Entitäten, abgesehen von souveränen Staaten, ausüben, und wenn ja, wie?

Bei der Beantwortung dieser Fragen wurde diese Dissertation neben der Einleitung (Kapitel 1) und der Schlussfolgerung (Kapitel Fünf) in drei wesentliche Kapitel unterteilt, und jedes Kapitel untersucht jeweils die oben genannten Fragen. Kapitel 2 stellt fest, dass es in der Tat einige Bemühungen gab, einen Menschenrechtsgerichtshof auf internationaler Ebene zu gründen, allerdings mit unbefriedigendem Ergebnis. Die dafür maßgeblichen Ursachen werden in diesem Kapitel ebenfalls erörtert. Die Kapitel Drei und Vier

konzentrieren sich auf den derzeitigen Vorschlag zur Gründung eines WCHR, insbesondere auf die Artikel über die Art der Jurisdiktion des Gerichtshofes. In diesen beiden Kapiteln werden jeweils die Völkerrechtssubjekte der staatlichen und nichtstaatlichen Akteure hervorgehoben. Nach Betonung des bewährten Komplementaritätsprinzips im internationalen Menschenrechtsregime und im aktuellen Vorschlag der WCHR widmet sich Kapitel 3 der Frage ob und wie das Komplementaritätsprinzip in diesem Vorschlag ausgestaltet ist. Nach der Feststellung, dass der derzeitige Vorschlag mit der Einbeziehung nichtstaatlicher Akteure unter die Jurisdiktion des WCHR einen Fortschritt darstellt, wendet sich Kapitel 4 den Vereinten Nationen als Forschungsgegenstand zu und erörtert die rechtliche Grundlage der Zuständigkeit der WCHR gegenüber dieser Organisation. Nachdem die komplementäre Natur des WCHR festgestellt wurde, betont dieses Kapitel, dass der vorliegende Vorschlag das vorherige Ausschöpfen des innerstaatlichen Rechtsbehelfes verlangt, aber keine Details über die Anwendung dieser Regel enthält. Am Ende dieses Kapitels werden daher verschiedene Möglichkeiten aufgezeigt, wie diese Regel angewendet werden könnte.