



Swiss Initiative to Commemorate the 60th Anniversary of the UDHR

*Protecting Dignity: An Agenda for Human Rights*

RESEARCH PROJECT ON A WORLD HUMAN RIGHTS COURT:

**“Towards a World Court of Human Rights”**

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The year 2008 marked the 60th Anniversary of the Universal Declaration of Human Rights. To commemorate this occasion, and in order to make a meaningful contribution to the protection of human rights, the Swiss Government decided to launch "An Agenda for Human Rights". The initiative aims to explore new ways of giving human rights the weight and place they deserve in the 21st century. It is designed as an evolving and intellectually independent process.

The text *Protecting Dignity: An Agenda for Human Rights* was authored by a Panel of Eminent Persons, co-chaired by Mary Robinson and Paulo Pinheiro. This *Agenda* and the Swiss Initiative are designed to achieve two objectives: firstly, to set out some of the main contemporary challenges on the enjoyment of human rights, and secondly, to encourage research and discussion on a number of separate topics linked to the *Agenda*. These include: Human Dignity – Prevention – Detention – Migration – Statelessness – Climate Change and Human Rights – the Right to Health – and A World Human Rights Court.

The project is sponsored and financed by the Swiss Federal Department of Foreign Affairs. The Ministry of Foreign Affairs of Norway and the Ministry of Foreign Affairs of Austria have actively supported the project. The Geneva Academy of International Humanitarian Law and Human Rights is responsible for the coordination and organisation of the Initiative.

# **Towards a World Court of Human Rights**

Research report within the framework of the Swiss Initiative to commemorate the 60<sup>th</sup> anniversary of the Universal Declaration of Human Rights

by Professor Martin Scheinin (European University Institute)

“One future step which seems to us essential in addressing many of these issues is the establishment of a fully independent World Court of Human Rights. Such a court, which should complement rather than duplicate existing regional courts, could make a wide range of actors more accountable for human rights violations.”

*Protecting Dignity: An Agenda for Human Rights*

Swiss Initiative to commemorate the 60<sup>th</sup> anniversary of the Universal Declaration of Human Rights

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## FOREWORD

It is rare that the beginning of a long exercise of thinking, studying and writing can be afterwards identified with precision as to the time, place and participants. But in this case things are very clear. In September 2000 we had the constituent meeting of the Association of Human Rights Institute in Iceland. After the meeting, we traveled back to the Eurasian continent with my Austrian colleague and good friend, professor Manfred Nowak. We spent the whole flight and afterwards an hour or two more at Copenhagen airport by discussing the feasibility and modalities of a future World Court of Human Rights.

The idea has haunted me ever since. Quite soon I wrote a research project proposal on the topic but never published it, aiming at a real book. I gave a number of lectures and kept talking about the idea with colleagues, even late at night after dinner.

It is wonderful that the Swiss initiative to commemorate the sixtieth anniversary of the Universal Declaration of Human Rights now made me put on paper my thoughts in the form of a Draft Statute and accompanying explanations. What is even more intriguing is that Manfred Nowak is working on a parallel project, drafting his own version of the Statute. Over the years channels of communication have remained open between us but we did not exchange drafts.

Two important sources of inspiration that preceded September 2000 need to be mentioned. From January 1997 I served for eight years as a member of the Human Rights Committee, the treaty body under the International Covenant on Civil and Political Rights. My view that this body is the closest we now have, to a future World Court of Human Rights, has served as a major intellectual beacon for the evolution of my project. And by being a member, rather than a commentator, of that body, I got a sense of what it means to serve on the Bridge of a big ship. It is one thing to paint a nice picture of a four-masted sailing ship, and another to steer it through a narrow passage.

During my first year on the Committee, I started my academic sabbatical at the University of Toronto. There, professor Craig Scott was always eager to hear and comment my reflections on the work and role of the Committee, and of human rights law more generally. One day, I don't remember which one, he came with the slogan 'From Consent to Constitution' as an overall assessment where the world was moving, with 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. The project about the World Court is very much about that trend.

This report presented to the Swiss Initiative is not the end station of the project. In a year or two, there will also be an academic monograph which gives more room for the evolution so far in the process "from consent to constitution", and where the sources are properly documented. I save for that later occasion my thanks to academic environments, academic funders and research assistants.

In Geneva/Florence, 30 April 2009

Martin Scheinin

**ABSTRACT**

In the report, a proposal is made to establish a World Court of Human Rights. To that end, the report includes an elaborate Draft Statute of the Court. The proposal responds to several contemporary challenges in the international protection of human rights and comes with one coherent solution that addresses those challenges.

The proposed Statute would not include new substantive human rights norms. Instead, the jurisdiction of the World Court would be based on the existing normative catalogue of human rights treaties, interpreted on the basis of the principle of interdependence and indivisibility of all human rights and drawing inspiration from customary international law and general principles of law.

Primarily, the Court would exercise legally binding jurisdiction in respect of states that have ratified its Statute. In so doing, it would have the powers to issue binding orders on interim measures of protection, to determine the permissibility of reservations to human rights treaties and not to apply impermissible reservations, and to make concrete and binding orders on the remedies to be provided to a victim of a human rights violations. The Human Rights Council, as the main intergovernmental United Nations body dealing with human rights issues, would be mandated to oversee the effective implementation of the judgments by the Court.

All these proposals are radical, but they have their basis in the evolution of human rights law until now. The revolutionary proposals are elsewhere, and only they make the proposed Statute worthy of the name World Court of Human Rights, rather than just an international court.

Under the proposed Statute, the Court would exercise jurisdiction beyond the circle of States Parties to the Statute, hence responding to the challenges posed by the emergence and evolution of transnational actors that for their capacity to affect the enjoyment of human rights are comparable to states but that so far have not been accountable under existing human rights treaty regimes.

Entities other than states would be able to accept the legally binding jurisdiction of the Court. Technically, they would not be States Parties to the Statute. But cases could be brought against them, and they would be subject to the legally binding jurisdiction of the Court, including in the issue of remedies.

Intergovernmental organizations, transnational corporations, international non-governmental organizations, organized opposition movements exercising a degree of factual control over a territory and autonomous communities within one or more states would be the types of entities that could accept the jurisdiction of the Court.

For states that have not yet ratified the Statute, and for entities that have not yet accepted the general jurisdiction of the Court, there would be a possibility of accepting the Court's legally binding ad hoc jurisdiction in respect of a specific complaint.

Finally, the Court could receive complaints also in respect of states and entities that do not accept its legally binding jurisdiction. However, the Court could consider such complaints only upon a request by the United Nations High Commissioner for Human Rights. Instead of a legally binding judgment, it would in such cases issue an Opinion representing its interpretation of the issues of international human rights law raised by the complaint.

## I. TWENTY-TWO QUESTIONS AND TWENTY-TWO ANSWERS ABOUT THE PROPOSAL

### 1. *Why is a World Court of Human Rights needed?*

The proposal made in this report, of the establishment of a World Court of Human Rights, is a response to many of the most important challenges of the 21st century.

Although the 20th century was a breakthrough for the novel idea of the international protection of human rights, the realization of that idea remains far from complete. The adoption of the Universal Declaration of Human Rights in 1948 by the United Nations General Assembly was a milestone that has been followed up by the gradual elaboration of a web of legally binding human rights treaties. In the first decade of the 21st century, that piecemeal work is still continuing but in general terms one can assess that the promises made in the Universal Declaration have materialized in the form of human rights treaties.

On some other fronts the achievements are more meager. The central idea of human rights law, protecting the individual against States, including and even primarily his or her own State, has not systematically permeated the framework of public international law. International law is still primarily law between nations, i.e. law created by States and for States. For instance, consent by a State is still a precondition for legally binding human rights treaty obligations. True, the evolution in the understanding of customary international law, and within it the category of peremptory norms (*jus cogens*), renders the requirement of consent less absolute. Nevertheless, there are various ways in which States may try to resist their commitment to human rights by denying their consent, including by not ratifying a treaty, by entering extensive reservations or by not accepting optional monitoring mechanisms, such as a procedure for individual complaints under a specific human rights treaty. At times of emergency, States may also derogate from some of their otherwise legally binding human rights obligations.

Even where States have given their consent to be bound by a human rights treaty, there are failures in compliance. Under United Nations human rights treaties periodic reporting by States and the consideration of these reports by independent expert bodies (the treaty bodies) is the only mandatory monitoring mechanism. Many States are seriously in delay in submitting their periodic reports. And even where the reporting does occur, or a State has accepted optional procedures of individual complaint, there are all too many cases of non-compliance with the findings by the treaty bodies. This is largely because such findings have no legally binding authority of their own. Instead, their authority is derived from the powers of the treaty body to interpret the treaty in question, including as to whether the State violated the treaty and is under an obligation to provide an effective remedy. Findings by treaty bodies are authoritative and persuasive but strictly speaking not legally binding. Some States take the liberty of refusing their implementation on such grounds, ignoring the fact that the treaty provisions subject to the interpretive function of the treaty body are legally binding.

Non-enforcement is a major failure of the United Nations human rights treaty system. The treaty bodies themselves are usually left with the task of overseeing the implementation of their own findings. This situation is in stark contrast with the unconditional binding force of judicial decisions in national jurisdictions, or with the role of intergovernmental organs in the non-selective supervision of the implementation of rulings by regional human rights courts, such as the European Court of Human Rights within the Council of Europe framework.

A further shortcoming of the current status of human rights law within the broader framework of public international law is the exclusive focus of human rights treaties and their monitoring mechanisms upon States as the duty-bearers. This no longer corresponds to the realities of our globalized world where other actors besides States, such as international financial institutions and other intergovernmental organizations, transnational corporations and other 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.

## *2. How does the proposal respond to these challenges?*

The proposal includes the creation of a World Court of Human Rights. Instead of an 'international court', an expression that would reflect the consent-based and inter-state oriented nature of human rights law so far, the notion of a World Court signals the capacity of the proposal to respond to contemporary challenges in our globalized world. The Court 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' in the Draft Statute. They would include intergovernmental organizations, transnational corporations, and other non-state actors.

Consent - in the form of ratification of the Statute by a State, or the general acceptance of the Court's jurisdiction by an Entity - 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 (ad hoc). What is more important is that complaints against States and Entities could be submitted even in the absence of such ad hoc acceptance. However, the Court could entertain these complaints in the absence of a consent only on the basis of a request from the United Nations High Commissioner for Human Rights. In such cases not based on consent by the respondent, the Court would issue authoritative Opinions instead of legally binding Judgments.

The Court would have the power to determine the permissibility of reservations entered by States to human rights treaties, and to declare a case admissible even when its subject matter would be covered by an impermissible reservation.

The Judgments by the Court, as well as its orders for interim measures of protection, would be binding as a matter of international law. The United Nations Human Rights Council would be entrusted with a task to supervise the implementation of the Court's findings.

### *3. In what ways does the proposal build upon achievements so far?*

Although the overall proposal made in this report is radical, it has its foundation in the gradual evolution of human rights law towards a 'global constitution', i.e. a framework of norms that are considered legally binding beyond the explicit consent by states, and even beyond the circle of states. These piecemeal developments that have paved the way for the major leap of the creation of a World Court of Human Rights can be demonstrated with reference to the stages of evolution in the functioning and role of the Human Rights Committee, the treaty body monitoring compliance with the International Covenant on Civil and Political Rights (ICCPR). The Human Rights Committee can be seen as the closest that already exists, compared to a future World Court of Human Rights. The small steps listed below jointly represent a paradigm shift that already has occurred. Although the Human Rights Committee is referred to as a platform where that shift is particularly systematic, the same trends are in fact visible also in the operation of other treaty bodies which have adopted identical or similar solutions to many of the contemporary challenges facing the role of human rights law in an evolving world order. Within some regional systems of human rights protection, the trend has been even stronger, e.g. through the recognition of a regional human rights treaty as an instrument of constitutional significance across borders within the whole region.

Here, the broad trend 'from consent to constitution', from a state-centred world order to a new global order with focus on the individual endowed with rights, is demonstrated through a chronology of a number of separate small steps:

(a) In 1966, the United Nations General Assembly adopts the International Covenant on Civil and Political Rights, after a process of 18 years of drafting and negotiation since the adoption of the Universal Declaration of Human Rights in 1948. The texts of these treaties include many concessions to conservative states, such as the absence of legally binding powers for the Human Rights Committee, the separation of the procedure for individual complaints (called 'communications') from the Covenant itself to an Optional Protocol, and the ambiguous reference to the outcome of such cases as 'Final Views' by the Human Rights Committee, rather than judgments or decisions.

(b) In 1976 both the ICCPR and its Optional Protocol enter into force after a sufficient number of ratifications by States. Consequently, the Human Rights Committee is elected to monitor State compliance with the treaty, through the examination of periodic reports by states and through the consideration of complaints by individuals against states. By the standards of the time, the latter step is nothing short of radical.

(c) In its early years 1977-1982, the Human Rights Committee is confronted with a wave of individual cases from Uruguay, where a military coup has resulted in gross violations of human rights, including torture, disappearances and arbitrary detention. Despite of the Cold War that in many respects paralyses it, the Committee utilizes the Optional Protocol to develop a firm quasi-judicial approach to individual complaints. It establishes violations of the ICCPR by Uruguay in a long line of cases. In so doing, it refuses to follow a deferential attitude to the arguments or interests of a state but focuses on the human rights

of the individual. Perhaps most importantly, the Committee adopts a position that article 2, paragraph 3, of the ICCPR entails a right to an effective remedy in any case where the Committee has established a violation of the Covenant. That right translates into a legally binding state obligation to provide for an effective remedy. The Committee's practice transforms its Final Views to authoritative interpretations of the legal obligations of the state, rather than being mere 'recommendations'. In its Final Views on the very first Uruguayan case submitted to it (*William Torres Ramirez v. Uruguay, Communication No. 4/1977*), the Committee concluded:

The Committee, accordingly, is of the view that the State party is under an obligation to provide the victim with effective remedies, including compensation, for the violations which he has suffered and to take steps to ensure that similar violations do not occur in the future.

(d) During the years of the Cold War the Human Rights Committee is very cautious in its consideration of periodic reports by states. Instead of making collective findings on a state's compliance with the ICCPR, the Committee ends its consideration of a report with a round of individual remarks by its members. The shift comes only after the fall of the Berlin Wall in 1989 and after the outbreak of violence in then Yugoslavia. In its March 1992 session, the Committee finally adopts country-specific Concluding Observations on Algeria, Belgium, Colombia and Yugoslavia, identifying areas of concern but also 'widespread human rights violations'. Since, 1992, the practice of adopting Concluding Observations has been systematic and has resulted in a follow-up mechanism by the Committee itself.

(e) The next important step comes very soon, and is also triggered by the tragic events in former Yugoslavia. In its October-November session of 1992 the Human Rights Committee considers urgent special reports by the new or emerging entities Bosnia-Herzegovina, Croatia and Federal Republic of Yugoslavia (Serbia and Montenegro). Confronted with the challenge of the dissolution of two federal states that had been parties to the ICCPR - Yugoslavia and the Soviet Union - the Committee develops its position of human rights devolving with territory and the Covenant therefore being applicable in respect of any new sovereign entity that emerges from within a territory that formerly belonged to a State Party to the Covenant. This position is subsequently developed to its logical completion in 1997 when North Korea announces its denunciation of the ICCPR. In its General Comment No. 26, the Human Rights Committee concludes that as human rights belong to the population of a country, the Covenant cannot be denounced by a State that already was a party:

2. That the parties to the Covenant did not admit the possibility of denunciation ... was not a mere oversight on their part... It can therefore be concluded that the drafters of the Covenant deliberately intended to exclude the possibility of denunciation. The same conclusion applies to the Second Optional Protocol in the drafting of which a denunciation clause was deliberately omitted.

3. Furthermore, it is clear that the Covenant is not the type of treaty which, by its nature, implies a right of denunciation. Together with the simultaneously prepared and adopted International Covenant on Economic, Social and Cultural Rights, the Covenant codifies in treaty form the universal human rights enshrined in the Universal Declaration of Human Rights, the three instruments together often being referred to as the "International Bill of Human Rights". As such, the Covenant does not have a temporary character typical of treaties where a right of denunciation is deemed to be admitted, notwithstanding the absence of a specific provision to that effect.

4. The rights enshrined in the Covenant belong to the people living in the territory of the State party. The Human Rights Committee has consistently taken the view, as evidenced by its long-standing practice, that once the people are accorded the protection of the rights under the Covenant, such protection devolves with territory and continues to belong to them, notwithstanding change in government of the State party, including dismemberment in more than one State or State succession or any subsequent action of the State party designed to divest them of the rights guaranteed by the Covenant.

5. The Committee is therefore firmly of the view that international law does not permit a State which has ratified or acceded or succeeded to the Covenant to denounce it or withdraw from it.

(f) Meanwhile, in 1994, the Human Rights Committee adopts its General Comment No. 24 on reservations to the ICCPR and its two Optional Protocols. This 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. According to the Committee, it has the power, when exercising its functions of considering state party reports and individual complaints, to determine that a reservation is incompatible with the object and purpose of the Covenant and therefore impermissible. The normal consequence of such determination will be that the reservation is severable, i.e. the state is considered a party to the Covenant but without the benefit of the reservation. The paradigm shift represented in the move 'from consent to constitution' is clearly visible in some passages of the general comment:

8. ... Although treaties that are mere exchanges of obligations between States allow them to reserve inter se application of rules of general international law, it is otherwise in human rights treaties, which are for the benefit of persons within their jurisdiction...

17. ..., it is the Vienna Convention on the Law of Treaties that provides the definition of reservations and also the application of the object and purpose test in the absence of other specific provisions. But the Committee believes that its provisions on the

role of State objections in relation to reservations are inappropriate to address the problem of reservations to human rights treaties. Such treaties, and the Covenant specifically, are not a web of inter-State exchanges of mutual obligations. They concern the endowment of individuals with rights. 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. And because the operation of the classic rules on reservations is so inadequate for the Covenant, States have often not seen any legal interest in or need to object to reservations. The absence of protest by States cannot imply that a reservation is either compatible or incompatible with the object and purpose of the Covenant...

18. It necessarily falls to the Committee to determine whether a specific reservation is compatible with the object and purpose of the Covenant. This is in part because, as indicated above, it is an inappropriate task for States parties in relation to human rights treaties, and in part because it is a task that the Committee cannot avoid in the performance of its functions... Because of the special character of a human rights treaty, the compatibility of a reservation with the object and purpose of the Covenant must be established objectively, by reference to legal principles, and the Committee is particularly well placed to perform this task. The normal consequence of an unacceptable reservation is not that the Covenant will not be in effect at all for a reserving party. Rather, such a reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party without benefit of the reservation.

(g) The ceding over of the territories of Hong Kong and Macau from two States Parties to the Covenant, respectively the United Kingdom and Portugal, to the People's Democratic Republic of China which is not a party to the ICCPR, poses a new challenge to the Committee's application of the principle of continuity of obligations that are owed to the population once protected by the Covenant. In the benefit of the population, the Committee extends the continuity doctrine beyond States Parties, by attributing corresponding obligations both to the regional authorities and the central authorities of China. In its Concluding Observations on Hong Kong, it states, *inter alia*:

In 1995 (before the transition):

7. The Committee urges the United Kingdom of Great Britain and Northern Ireland (Hong Kong) Government to take all necessary steps to ensure effective and continued application of the provisions of the Covenant in the territory of Hong Kong in accordance with the Joint Declaration and the Basic Law.

8. The Committee reminds the United Kingdom of Great Britain and Northern Ireland Government of its continuing responsibility to ensure to the people of Hong Kong the rights protected by the

Covenant and to carry out its obligations under the Covenant including in particular article 40; in that regard, it requests the Government of the United Kingdom to report on the human rights situation in the territory of Hong Kong up to 30 June 1997.

In 1999 (after the transition):

230. The Committee expresses its appreciation to the delegation from HKSAR for the information it provided and for its willingness to submit further information in writing. It further welcomes the recognition given by the delegation to the contribution made by NGOs to the consideration of the HKSAR report.

231. The Committee thanks the Government of China for its willingness to participate in the reporting procedure under article 40 of the Covenant by submitting the report prepared by the HKSAR authorities and by introducing the HKSAR delegation to the Committee. The Committee affirms its earlier pronouncements on the continuity of the reporting obligations in relation to Hong Kong.

259. The Committee sets the date for the submission of the next periodic report at 31 October 2003. That report should be prepared in accordance with the Committee's revised guidelines and should give particular attention to the issues raised by the Committee in these concluding observations. The Committee urges that the text of these concluding observations be made available to the public as well as to the legislative and administrative authorities. It requests that the next periodic report be widely disseminated among the public, including civil society and non-governmental organizations operating in HKSAR.

(h) In its Final Views in the case of *Vladimir Petrovich Laptsevich v. Belarus* (Communication No. 780/1997), adopted in March 2000, the Committee continues on the path opened in the early Uruguayan cases by quantifying the amount of compensation to be paid by the respondent state. Instead of deciding on a fixed amount of money, however, the Committee gives a formula for the calculation of the compensation, including adjusting it to the inflation rate. This 'Laptsevich formula' has been applied in some subsequent cases as well, albeit not systematically.

(i) In July 2001, the Human Rights Committee adopts its General Comment No. 29 on states of emergency. This document represents a shift away from the traditional view that a situation of emergency triggers the sovereign right of a state to 'suspend' the application of a human rights treaty. Instead, the Committee emphasizes that the Covenant remains applicable during any type of emergency, including armed conflict, and that the power of the state to derogate from some of its provisions merely constitutes a specific form of restrictions on human rights, restrictions that must always be compatible with the other international obligations of the same state, necessary and proportionate.

(j) In 2002 the Human Rights Committee starts to tackle the problem of non-compliance with the obligation of periodic reporting. It moves to scheduling for consideration countries that have for a long time failed to submit a report. The new mechanism is aimed at encouraging the submission of overdue reports but the Committee is determined also to consider the human rights situation of the country even in the absence of a report. This has been done several times since 2002.

(k) In March 2004 the Human Rights Committee adopts its General Comment No. 31 on the nature of obligations of states under the Covenant. This document codifies the Committee's earlier approach of addressing conduct by non-state actors that affects the enjoyment of Covenant rights, albeit through the available monitoring mechanisms that are geared towards States Parties.

8. The article 2, paragraph 1, obligations are binding on States [Parties] and do not, as such, have direct horizontal effect as a matter of international law. The Covenant cannot be viewed as a substitute for domestic criminal or civil law. However the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities. There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities. States are reminded of the interrelationship between the positive obligations imposed under article 2 and the need to provide effective remedies in the event of breach under article 2, paragraph 3. The Covenant itself envisages in some articles certain areas where there are positive obligations on States Parties to address the activities of private persons or entities. For example, the privacy-related guarantees of article 17 must be protected by law. It is also implicit in article 7 that States Parties have to take positive measures to ensure that private persons or entities do not inflict torture or cruel, inhuman or degrading treatment or punishment on others within their power. In fields affecting basic aspects of ordinary life such as work or housing, individuals are to be protected from discrimination within the meaning of article 26.

As earlier case law upon which this doctrinal statement is based, reference can be made to the cases of *Delgado Paez v. Colombia* (Communication No. 195/1985; threats and violence from the side of private parties) *Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada* (Communication No. 167/1984; exploitation of natural resources by corporations), *Ilmari Länsman et*

*al. v. Finland* (Communication No. 511/1992; same issue), and *Cabal and Pasini v. Australia* (Communication No. 1020/2001; private prisons).

(l) The placing of Kosovo, through Security Council Resolution No. 1244 (1999), under international administration, poses a further challenge in the issue of continuity of obligations. When dealing in 2004 with a report by Serbia and Montenegro, the Committee takes the view that it is the United Nations that is now bound by the ICCPR to the benefit of the population of Kosovo and that is to submit a periodic report:

3. The State party explained its inability to report on the discharge of its own responsibilities with regard to the human rights situation in Kosovo, and suggested that, owing to the fact that civil authority is exercised in Kosovo by the United Nations Interim Administration Mission in Kosovo (UNMIK), the Committee may invite UNMIK to submit to it a supplementary report on the human rights situation in Kosovo. The Committee notes that, in accordance with Security Council resolution 1244 (1999), Kosovo currently remains a part of Serbia and Montenegro as successor State to the Federal Republic of Yugoslavia, albeit under interim international administration, and the protection and promotion of human rights is one of the main responsibilities of the international civil presence (para. 11 (j) of the resolution). It also notes the existence of provisional institutions of self-government in Kosovo that are bound by the Covenant by virtue of article 3.2 (c) of UNMIK Regulation No. 2001/9 on a Constitutional Framework for Provisional Self-Government in Kosovo. The Committee considers that the Covenant continues to remain applicable in Kosovo. It welcomes the offer made by the State party to facilitate the consideration of the situation of human rights in Kosovo and encourages UNMIK, in cooperation with the Provisional Institutions of Self-Government (PISG), to provide, without prejudice to the legal status of Kosovo, a report on the situation of human rights in Kosovo since June 1999.

Such a report is indeed submitted by UNMIK and considered by the Committee in 2006, creating a precedent for holding intergovernmental organizations, and not only states, to account for their compliance, or non-compliance with the Covenant.

The chronological account of developments over a period of 40 years presented above is by no means exhaustive. Nevertheless, it demonstrates a pattern of moving 'from consent to constitution' in the application of human rights law. All these developments have paved the way for the creation of a World Court of Human Rights.

*4. Is it not enough that we already have the International Court of Justice and the International Criminal Court?*

The creation by the United Nations Security Council of two international criminal tribunals (for former Yugoslavia and Rwanda) and ultimately the determination

of States to establish a standing International Criminal Court (ICC) were major revolutions in international law in the 1990s. Subject to the fairly complicated conditions for the exercise of the ICC's jurisdiction, individuals - including soldiers, civilians or political leaders - can now be held to account, prosecuted and tried, convicted and sentenced, directly at the level of international law, for the gravest international crimes. The jurisdiction of the ICC is (for the time being) restricted to three categories of core crimes, i.e. genocide, war crimes and crimes against humanity. The ICC does not directly address the question whether there was a human rights violation, or order remedies for such violations. But of course grave international crimes will invariably entail violations of the human rights of the victims of those crimes. Prosecuting and punishing, through the means of criminal law, the individuals who perpetrated those crimes will constitute an important element also in remedying the human rights violation. Still, the overlap with human rights adjudication is only partial. The possibility of individual criminal responsibility does not eliminate the need for mechanisms of accountability for attributing the action to a state or other entity for the assessment whether it is to be held responsible for a human rights violation, which usually is broader in scope, both in substantive and personal coverage, than the international crime committed within the broader context.

Therefore, the establishment of the ICC, or the advances within the broader framework of international criminal law, have not done away with the need for a World Court of Human Rights.

The International Court of Justice, in turn, has legally binding jurisdiction only in respect of states, only when seized by states, and only in respect of rights and obligations of states vis-a-vis each other. The individual and her human rights are not in focus. It is true that the procedure for advisory opinions by the ICJ opens a broader room for actors and issues, so that (primarily) the United Nations General Assembly can ask for an advisory opinion in any issue of international law. Some of the advisory opinions have, in fact, addressed human rights issues, such as an advisory opinion on the legality of the use of nuclear weapons, and another on the lawfulness of the Israeli separation barrier (or Wall) built within the occupied Palestinian territory.

Even so, the ICJ is primarily a court for disputes between states, and only in that role it has legally binding jurisdiction. It cannot decide, even upon the initiative of a state, a case against an international organisation, a transnational corporation or some other entity. And individuals have no power to initiate the advisory opinion procedure.

Therefore, the proposal made in this report is the establishment of a totally new institution, the World Court of Human Rights.

However, it should be mentioned that also another option was considered. Most human rights treaties include a clause according to which a dispute concerning the application or interpretation of the treaty can be submitted to the ICJ. Even in the case of treaties that do not include such a clause, the same outcome results from the ICJ Statute and the power of states to take any dispute related to international law - including an issue of interpretation under a human rights treaty - to the ICJ. Also the advisory opinion procedure could be utilized by the

General Assembly to submit selected legal issues of controversy under existing human rights treaties to the ICJ.

These features of the architecture of the ICJ explain why the other model considered in the writing of this report was the operation of the ICJ as an "appeal court" above the United Nations human rights treaty bodies. For instance, if the Human Rights Committee decides a case against Australia concerning its immigration detention practices and Australia does not like the decision, Australia or some other state could seek the determination of the disputed legal issue by a higher authority, the ICJ. This could take place under the legally binding (contentious) jurisdiction in the form of a dispute between Australia and another state (let's say, Norway). Alternatively, when the General Assembly considers the annual report by the Human Rights Committee, Australia could propose that the Assembly requests from the ICJ an advisory opinion on the proper interpretation of article 9 of the International Covenant on Civil and Political Rights.

This model might work in practice. In the short term it would relativize the authority of the human rights treaty bodies by subjecting them to review by a higher judicial authority. But in the long run it would strengthen the human rights system as a whole, because there would be a heavier counterpart to the unilateral exercise of sovereignty by states which today may just ignore the findings by the Human Rights Committee or exceptionally, as Australia did in respect of the Final Views by the Committee in the case of *A. v. Australia* (Communication No. 560/1993), openly contest them without resorting to any higher legal authority than their own Foreign Ministry lawyers.

There are two reasons why the model of transforming the ICJ into a human rights appeal instance above the treaty bodies is not proposed in this report. Firstly, states and the General Assembly have had 40 years to utilize this option if they thought it is a good idea. And they haven't. Secondly, this model 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. States and only states, either directly as states or as participants in the General Assembly, could transform the ICJ into a human rights court. This represents a contradiction in terms.

Again, the conclusion is that a World Court of Human Rights is needed. The proposal made in this report concerning its creation has benefited from the experiences of the ICJ and the ICC. In fact, the Rome Statute for the International Criminal Court, a highly advanced result of most skillful drafting and most intensive negotiation, has been the single most important source of inspiration in the drafting of the Statute proposed here.

##### *5. What will be the relationship between the World Court and the United Nations High Commissioner for Human Rights?*

The High Commissioner for Human Rights will remain as the leader of the United Nations human rights program, supported by the Office of the High Commissioner. The Court will have its own secretariat, the Registry. The two institutions will be linked through a new function of the High Commissioner,

namely her or his power to seek an Opinion from the Court, in respect of any human rights complaint and any state or other entity as respondent, provided that the Court will not have legally binding jurisdiction in the matter. 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.

The High Commissioner is best placed to trigger the Opinions function of the Court. She is independent from states and of the political organs of the United Nations. She is a recognized professional with experience, expertise and judgment. She is supported by staff capable of assisting her in the formulation of a request for an Opinion.

The Court will have discretion to accept or not to accept the High Commissioner's request for an Opinion.

#### *6. Who will be able to seize the Court?*

The power of the High Commissioner for Human Rights to request an Opinion from the Court will be only one of the channels through which the Court can be seized and invited to deal with an alleged human rights violation. This channel will be a complement to the more direct and regular methods of bringing a case before the Court.

Complaints by individuals, or groups of individuals, will be the main channel for taking cases before the Court. Such complaints can be submitted by persons claiming to be a victim of a human rights violation by the respondent which can be a State or an Entity. (For the notion of Entity, see the following answer.)

Also States can initiate cases, by alleging that another State, or an Entity, has committed a human rights violation.

#### *7. Who will be subject to the Court's jurisdiction?*

The Statute of the World Court of Human Rights will be an international treaty, drafted, adopted and ratified by States. Hence, ratifying States will be the primary category subject to the jurisdiction of the Court. 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.

However, there are three proposals that extend the jurisdiction of the Court beyond this core area that reflects traditional rules of public international law.

Firstly, while 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. This proposal transforms the Court from a traditional international court into a transnational court, or to a World Court of Human Rights as its name indicates.

As listed in article 6 of the Statute, the various actors that, besides States and jointly called 'Entities' in the Draft Statute, could accept the jurisdiction of the Court, are the following:

- a) International organizations constituted through a treaty between States, or between States and international organizations;
- b) Transnational corporations, i.e. business corporations that conduct a considerable part of the production or service operations in a country or in countries other than the home State of the corporation as a legal person;
- c) International non-governmental organizations, i.e. associations or other types of legal persons that are not operating for economic profit and conduct a considerable part of their activities in a country or in countries other than the home State of the organization as a legal person;
- d) Organized opposition movements exercising a degree of factual control of 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
- e) 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.

Of these categories of Entities, the last one is subject to a requirement that the territorial state(s) must give its consent to the declaration by an autonomous community to accept the jurisdiction of the Court (article 59, paragraph 4).

A second extension of the Court's jurisdiction is provided for by article 9 which allows both States that are not parties to the Statute, and Entities that have not generally accepted the jurisdiction of the Court, to accept that jurisdiction on an ad hoc basis in respect of a particular case (complaint) submitted to the Court. This model of ad hoc acceptance of jurisdiction is also applicable when a State or Entity has accepted the jurisdiction of the Court but excluded a particular human rights treaty, and now a complaint is submitted in respect of an issue not governed by the existing acceptance of jurisdiction.

All forms of exercise of jurisdiction described so far result in a legally binding judgment of the Court. In contrast, the third extension of the Court's jurisdiction, also applicable both in respect of States and Entities, results in an Opinion by the Court. The legal nature of such opinions is similar to the present Final Views by the Human Rights Committee or other United Nations human rights treaty bodies. While lacking legally binding force they represent the interpretation of international law by an expert body entrusted by States with such a function and hence carrying considerable weight. As the Court will be a fully judicial institution, it is expected that its Opinions will in fact be acknowledged as authoritative and definitive, even if lacking legally binding force. The Court will proceed to the issuing of an Opinion only through three preceding steps: (a) the receipt of a complaint in respect of a State or Entity that has not accepted the general jurisdiction of the Court, (b) the refusal of the State or Entity to accept the ad hoc jurisdiction of the Court in the case, (c) a request by the United

Nations High Commissioner for Human Rights that the Court will issue an Opinion. Even then, the Court will exercise discretion whether to grant the High Commissioner's request.

*8. Does it make sense to apply the Law of State Responsibility in respect of non-state actors?*

In 2001 the International Law Commission of the United Nations concluded its work on codifying the international law of state responsibility. Since then, the Articles on State Responsibility have been mildly endorsed by the General Assembly and the question of possible formalization of their status remains pending.

Traditionally, the law of state responsibility has been seen as one of the bastions of the state-centred approach to international law. The law of state responsibility is constituted by the secondary norms that apply when one state has committed an internationally wrongful act and another state - 'the injured state' - seeks to hold that other state to account for its wrongful conduct. This may take place primarily through unilateral counter-measures by the injured state. The law of state responsibility does not leave much space for other actors besides states, such as independent monitoring bodies, individuals or other third parties.

Despite these shortcomings in its point of departure, the law of state responsibility has evolved into highly technical and precise rules concerning the attribution of wrongful conduct to a state. In this area the achievements of the law of state responsibility overshadow the rather modest developments in the field of human rights law related to the nature of state obligations and concepts such as 'jurisdiction' or 'extraterritorial scope'. For this reason international courts and tribunals, as well as human rights treaty bodies, increasingly refer to the law of state responsibility in attributing allegedly wrongful conduct to a respondent state.

According to article 5, paragraph 2, of the proposed Draft Statute, the World 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 it 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'. This provision demonstrates how the rules of the international law of state responsibility will 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. The Court can be expected to refer directly to the Articles on State Responsibility when addressing such issues. 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.

*9. Why is international humanitarian law not included in the jurisdiction of the Court?*

There is considerable overlap between the substantive norms of human rights law and international humanitarian law, codified into the 1949 Geneva Conventions and their two Protocols of 1977 but also reflecting norms of customary international law. As the rapid progress in the field of international criminal law in the 1990s and thereafter constitute a qualitative leap in the implementation and enforcement of international humanitarian law, and as human rights law remains applicable also in times of armed conflict, the proposal restricts itself to creating a World Court for human rights law. The Court would exercise jurisdiction also in times of emergency or armed conflict. It would need to address the question to what extent the exigencies of a situation of armed conflict provide proper justification for a State derogating from some of its human rights obligations. Further, in cases related to alleged human rights violations in the course of an armed conflict, the Court 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 treaties. Such an approach of harmonizing interpretation is reflected in article 5, paragraph 3, of the Draft Charter, according to which the Court shall seek inspiration from customary international law when exercising its jurisdiction.

*10. Why is the Refugee Convention included in the material jurisdiction of the Court?*

The 1951 Convention on the Status of Refugees and its Protocol of 1967 are part and parcel of the normative code of international human rights law. They fulfill the promise made in article 14 of the Universal Declaration of Human Rights. Largely because of the urgency of the refugee issue in the post World War Two situation, this particular child in the family of human rights treaties was born prematurely. Hence, it lacks proper mechanisms of international monitoring, such as the establishment of an international treaty body composed of independent experts. Only later on have the creation of such a body, and gradually also of a procedure for individual complaints, become standard elements of United Nations human rights treaties.

In our world of today, the need to upgrade the monitoring of the Refugee Convention is more burning than ever before. 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.

While other options to create proper monitoring mechanisms under the Refugee Convention regime may need to be discussed, this proposal includes the idea of individuals and states obtaining the possibility to submit complaints of violations of the Refugee Convention to the World Court of Human Rights.

*11. What about remedies, and their enforcement?*

The judgments by the Court, which will be legally binding, will also include an order for the remedies the victims of the human rights violation are entitled to. Under the terms of article 47 of the Draft Statute, the Court will, in a Judgment

that establishes a human rights violation, make an order directly against the respondent specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. Similarly, 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

Where appropriate, the Court may in its judgment or opinion order that the award for reparations be made through the Trust Fund provided for in article 35 of the Draft Statute.

Proposed article 48 will address one of the main shortcomings of the current United Nations human rights system. It will establish an intergovernmental mechanism for the implementation of the judgments and opinions by the Court by entrusting the Human Rights Council with the function of supervising such implementation. For this purpose, the Human Rights Council may appoint subsidiary bodies. The proposal draws inspiration from the monitoring of the European Convention of Human Rights where the unconditional and nonselective duty of the main political body of Council of Europe, the Committee of Ministers, is to supervise the implementation of the judgments by the European Court of Human Rights.

*12. Will the Court be able to intervene in ongoing or imminent human rights violations?*

The proposed Statute includes a clause on the power of the World Court to issue legally binding orders on interim measures of protection. They can be addressed to any state or entity in relation to which the Court exercises jurisdiction. This proposal builds upon the practice of the International Court of Justice, regional human rights treaties and the United Nations treaty bodies. The exercise of this power will be in the hands of the three-person Presidency of the Court, a solution that signals the exceptional nature of such an order. As soon as the case is assigned to a Chamber of the Court, the Chamber will also decide on interim measures. The institution will be applicable only in cases where an individual or a group of individuals faces a real risk of death or other grave and irreversible consequence. (Article 16.)

*13. Will it take several years for the Court to decide a case?*

The experience of the ad hoc criminal tribunals and the International Criminal Court has been surprising and troubling, in that the duration of the proceedings is often very long. This will not be the case at the World Court of Human Rights. It is not a criminal court and need not engage in the painful task of collecting, hearing and assessing hard evidence beyond any reasonable doubt. That task is difficult even for a domestic court sitting in the same village where the crime was committed, not to speak of the additional difficulties an international court sitting thousands of kilometers away will confront.

The task of the World Court of Human Rights is very different. It 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.

It can reasonably be expected that the Court will seek to decide every case within one year from submission. It will secure equal treatment of the parties, their chance to be heard, and their real possibility to comment each others' submissions. But it will not tolerate delaying tactics by any of the parties involved.

#### *14. Who will be the Judges of the Court?*

The World Court will be composed of 18 full-time judges, serving a non-renewable nine-year term. According to article 17, paragraph 2, of the Draft Statute, the judges shall be chosen from among persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. As every State wishing to nominate a candidate would be obliged to nominate one male and one female candidate (article 18), it is expected that the gender balance within the Court will be better than amongst the judges of many other international courts or tribunals.

Pursuant to article 19, paragraph 4, States shall, in the selection of judges take into account the need, within the membership of the Court, for the representation of the principal legal systems of the world, equitable geographical representation, expertise on specific issues, including, but not limited to, rights of women, rights of the child, rights of persons with disabilities, and rights of members of minorities and indigenous peoples, and a fair representation of female and male judges. However, similarly to the rules on elections for United Nations human rights treaty bodies this provision is addressed to individual States for the consideration of casting their own votes, and no actual quotas are proposed for any of the diverse factors mentioned in article 19.

#### *15. Is it not an impossible task to amend all existing human rights treaties, through cumbersome procedures, to pave the way for a World Court?*

The proposed Statute of the World Court of Human Rights is a new international treaty and does not require amending any existing treaties. Both the substance and the monitoring mechanisms under existing treaties will remain intact. However, the proposed Statute does include a provision according to which an instrument of ratification of or accession to the Statute by a state shall be understood as a notification of its withdrawal from those individual complaint procedures that the same state has accepted under existing United Nations human rights treaties and now subjects to the jurisdiction of the Court (Article 61, paragraph 2).

#### *16. What will happen to United Nations human rights treaty bodies?*

Through the solution explained under the previous question the proposal avoids the duplication of procedures and launches a gradual process where the quasi-

judicial function of treaty bodies to deal with individual complaints is replaced by the Court's fully judicial function. The pace of this process will depend on how quickly and how extensively states accept the jurisdiction of the Court. The treaty bodies, however, will continue to exercise their other functions, including the handling of individual complaints in respect of states that have not yet accepted the jurisdiction of the Court. 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.

In the course of preparing this proposal on the establishment of a World Court of Human Rights also another option for upgrading the United Nations human rights treaty monitoring system was considered. While the more ambitious plan of establishing a World Court was ultimately chosen, also the other option needs to be presented here. This is particularly because it not only represents an alternative to the World Court project but could also be pursued parallel to the establishment of the Court, in order to improve the operation of the treaty bodies and their monitoring functions.

This other option makes use of the name of the treaty monitoring body under the International Covenant on Civil and Political Rights as the 'Human Rights Committee' and the absence of a treaty body in the text of the sister Covenant, the International Covenant on Economic, Social and Cultural Rights. Originally, the ICESCR was to be monitored by an intergovernmental body, the Economic and Social Council of the United Nations. Only some ten years after the entry into force of the Covenant, ECOSOC by way of a resolution established an independent expert body, the Committee on Economic, Social and Cultural Rights (CESCR) to consider periodic state reports under the ICESCR. These features open a window for a merger of the two Covenant bodies, simply through a decision by ECOSOC to entrust the Human Rights Committee to monitor states' compliance with the ICESCR. Such a reform of a merger of the two Covenant bodies would mean a boost to the principle of interdependence and indivisibility of all human rights and result in the creation of a true Human Rights Committee. Naturally, the composition of the merged Committee would need to reflect the need for expertise on both Covenants. To this end it would be natural that several members of the CESCR would run as candidates and be elected to the Human Rights Committee.

Subsequent to this merger of the two Covenant bodies, better integration of the work by other treaty bodies into the overall framework of human rights treaty monitoring would be achieved through the election of some of their members to the new Human Rights Committee, or, conversely, through the election of some Human Rights Committee members to serve simultaneously on the more specialized committees. The specialized treaty bodies would thereafter operate as 'satellite' bodies of the new Human Rights Committee.

The treaty body reform as outlined here would have many advantages. It would result in the professionalization of treaty body membership and the better integration of the work of all treaty bodies with each others. Moving towards

better coordination of state reporting to the various treaty bodies would be greatly enhanced, inter alia through joint reporting guidelines or, where appropriate, even joint reports.

The partly merged and partly integrated new treaty body structure could very well be coupled with the creation of a fully judicial World Court of Human Rights. 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.

The creation of a World Court of Human Rights is not dependent on a reform of the United Nations human rights treaty body system. But the two processes should be seen as mutually supportive.

#### *17. Why would States ratify the Statute of the Court?*

There are at least four reasons why States should ratify the Statute. Firstly, many States wish to demonstrate their unwavering commitment to human rights, and elevating the global protection of human rights to a qualitatively new level by establishing the Court will be an important way to demonstrate that commitment.

Secondly, many States wish to see more consistency in the application of human rights law. Bringing all United Nations human rights treaties within the jurisdiction of a single human rights court that will simultaneously apply all treaties accepted by the State in question, and in so doing, where necessary, resolve any tensions between the various human rights treaties, will greatly enhance the coherence and consistency in the application of human rights treaties.

Thirdly, this will improve foreseeability and legal certainty, as the World Court will be a fully judicial institution with highly qualified full-time judges.

And fourthly, States should welcome the initiative of expanding the binding force of human rights norms beyond States only, to cover also international organizations, transnational corporations and other Entities subject to the jurisdiction of the Court.

#### *18. Why would international organizations accept the jurisdiction of the Court?*

Within international organizations, including among their chief officials, staff and governmental representatives serving on their decision-making bodies, there is growing uncertainty about the proper place of human rights norms in the operation of intergovernmental organizations. These organizations, their organs and operations, are subject to increasing criticism as to their lack of commitment to or compliance with human rights norms. International financial institutions and the United Nations Security Council, for instance, are receiving their part of the criticism. There are increasing calls for subjecting international organizations to some sort of judicial, or at least independent, review as to their compliance with human rights. Domestic courts and regional human rights

courts, in turn, may hold individual States to account for their action within international organizations, or for the implementation of decisions by international organizations, at least as long as there is no regime of equivalent protection of human rights in respect of the acts of the organization itself.

A much discussed issue is the practice of the United Nations Security Council to list individuals as Taliban, Al-Qaida, or 'associated' terrorists under Security Council Resolution No. 1267 (1999). This listing is done with reference to the Security Council's powers under Chapter VII of the United Nations Charter, resulting in a legal obligation for all Member States to subject the listed individuals to sanctions such as a travel ban and the freezing of all assets. As this obligation is generally seen as an obligation under the UN Charter, it is said to enjoy, under Article 103 of the Charter, primacy in respect of the same states' human rights obligations. Growing hesitation by states to grant such primacy in the absence of any international or domestic judicial review, and repeated calls for the Security Council itself to introduce fair and clear procedures to its listing and delisting of terrorists, have resulted in piecemeal reforms of the listing regime, most recently the adoption of Security Council Resolution No. 1822 (2008). Despite the reforms, the listing of individuals remains a diplomatic, rather than judicial, procedure and delisting takes place only by consensus. In the case of *Sayadi and Vinck v. Belgium* (Communication No. 1472/2006) the Human Rights Committee already established that the listing of two individuals constituted a violation of the International Covenant on Civil and Political Rights, attributable to Belgium because of its role as initiator of the listing by the Security Council.

If the United Nations were to accept the jurisdiction of the World Court of Human Rights as an Entity under article 5 of the Draft Statute, the Court could 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. However, when accepting the Court's jurisdiction the United Nations could specify what remedies need to be exhausted before seizing the Court. If 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. 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.

Irrespective of such considerations, it is of fundamental importance that the acceptance by the United Nations of the jurisdiction of the World Court would in principle open a prospect for judicial review over Security Council decisions. Such review would be limited in the sense that it would only relate to the question whether the human rights of one or more individuals were violated by the Security Council. Nevertheless, the finding of a violation and the order of a remedy would be legally binding upon the United Nations. While such a prospect

may appear as radical, an easy solution for the Security Council would be to defer from making such decisions that directly affect the enjoyment of human rights by individuals. In fact, there is wide agreement that the role, composition and procedures of the Security Council are not appropriate for making decisions that have such far-reaching consequences for specific individuals.

By accepting the jurisdiction of the Court, international organizations will subject themselves to highly qualified and fully independent judicial review. In so doing, they will under article 8, paragraph 4, of the Statute be able to identify internal procedures of redress that need to be exhausted before seizing the Court. It is expected that this proposed architecture will be well received within many an international organization.

#### *19. Why would corporations accept the jurisdiction of the Court?*

Analogous considerations apply in respect of transnational business corporations. They, too, are under criticism for being insensitive to human rights. At the same time they have no say in the formulation of human rights treaties and no way of subjecting themselves to professional and external human rights review.

Similarly to international organizations, also transnational corporations will be able, when accepting the jurisdiction of the Court, to identify mechanisms of redress that need to be exhausted before taking a case to the World Court. This arrangement will enable corporations to take a proactive approach by designing their own mechanisms for human rights accountability but nevertheless also demonstrating to the world their commitment to external and independent judicial review of the outcome.

It is expected that article 8, paragraph 3 of the Draft Statute will be of particular relevance to business corporations. The provision allows that an Entity accepting the jurisdiction of the Court may extend that jurisdiction through the inclusion of human rights instruments that do not take the form of an international treaty. If work progresses on normative instruments specifically drafted for the purpose of addressing human rights responsibilities of business corporations, it is expected that many of them will acknowledge the jurisdiction of the Court to base its decisions on such instruments. One candidate for such acceptance by corporations is the document entitled 'Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights', adopted by the former Sub-Commission on the promotion and protection of human rights in 2003.

Finally, the creation of the World Court and the inclusion of the possibility of business corporations accepting the jurisdiction of the Court under article 8, will greatly enhance the possibilities of consumer, labour, environmental and human rights organizations to campaign for corporations to accept the jurisdiction of the Court. Once certain key businesses accept the Court's jurisdiction, such acceptance will become a competitive advantage for any corporation. An assessment of competitive business advantage will be a driving force for corporations gradually accepting the jurisdiction of the Court.

*20. Why are 'autonomous communities' within nation States included among Entities that can accept the jurisdiction of the Court?*

Indeed, the list of article 6 of the Draft Statute, of Entities that in addition to States may accept the jurisdiction of the Court, includes also autonomous communities within a State, or within a group of States. Such communities may be regional, ethnic, linguistic or religious in nature. They may include, for instance, indigenous peoples with their own legal traditions. The reference in the said provision to groups present in a group of States, is particularly relevant for indigenous or minority groups who reside in an area divided by an international border but nevertheless wish to perceive of themselves as one community. According to the proposed provision, it is a precondition for a community being able to accept the jurisdiction of the Court that it exercises 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. The Saami people inhabiting the northernmost parts of Finland, Norway and Sweden would be an illustrative example of a cross-border community exercising a degree of public powers.

The inclusion of autonomous communities within the range of Entities that may accept the jurisdiction of the Court, would enable international adjudication by highly qualified independent judges as to whether a group violates the human rights of its members. Such concerns may be among the chief obstacles for States delegating or recognizing the exercise of powers by autonomous groups. The proposal would at the same time secure accountability for human rights violations and avoid giving the final say to the organs of the State. It is expected that in many cases relevant groups would, in agreement with the nation State in question, designate courts of the State as remedies that need to be exhausted before taking a case to the World Court. Nevertheless, 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.

*21. What will happen to regional human rights courts?*

In preparing the Draft Statute, two options were on the drawing board. In the first option, regional human rights courts would belong to the remedies that need to be exhausted before taking a case to the World Court. The World Court would, in a sense, become a court of appeals in respect of the regional human rights systems. This would have the benefits of reducing the potential case load of the World Court and of implementing the principle of subsidiarity in the meaning that complainants would be obliged to try to reach a remedy on the regional level first, taking their case to the global level only if that effort fails.

Despite these advantages, however, a different model was chosen. Article 13, paragraph 1 (d), of the Draft Statute includes among the admissibility conditions before the World Court that the same matter is not pending before any other human rights complaints body and has not been finally decided by a regional human rights court with legally binding jurisdiction. Hence, the initiation of a case before the African Court of Human and Peoples' Rights, the European Court of Human Rights or the Inter-American Court of Human Rights will automatically and indefinitely close the access to the World Court in the same matter. In line

with the jurisprudence under existing human rights treaties, 'same matter' refers to a case where both the legal issues and the parties are the same.

The advantages of the proposed model are that it 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.

What is of course lost in the proposed model is the role of the World Court to secure overall coherence into the application of human rights across the world and irrespective of regional particularities. Human rights are, and should remain, universal in nature. It is realistic to expect that a satisfactory and gradually close to perfect degree of coherence will be possible to reach through close interaction between the World Court and regional human rights courts. This interaction may take many forms but real-time exchange of jurisprudence and regular colloquia both on judicial and on registry level will be key elements to success. It is submitted that in the long run the outcome for the coherence and universality of human rights law will be better through the proposed model of interaction between parallel 'pillars' of human rights protection, than what hierarchical subordination of regional human rights courts to the World Court as a higher instance would deliver.

## *22. How will the plan evolve from here?*

This report was prepared as part of the Swiss Initiative to commemorate the 60th anniversary of the Universal Human Rights and written in the course of five months. However, the research behind the particular design proposed here dates much further back and will continue beyond the current report that represents one important phase of the overall project.

The backbone of the proposal for a World Court of Human Rights is the Draft Statute annexed already to this report. It will also be included in the next phase of the project, to be published as an academic book that will also more thoroughly explain the legal developments paving the way for the creation of the Court and provide detailed commentary of the provisions of the Draft Statute.

## II. STATUTE OF THE WORLD COURT OF HUMAN RIGHTS (DRAFT)

### Preamble

*The States Parties to this Statute,*

*Faithful* to the goals and principles of the Universal Declaration of Human Rights adopted by the United Nations General Assembly on 10 December 1948 and the aspiration to make the universal protection of human rights subject to judicial oversight on the international level,

*Deploring* that human rights violations are ongoing in many parts of the world and affect every day the lives of hundreds of millions of children, women and men,

*Determined* to put an end to the lack of international enforcement of human rights and thus to contribute to the prevention of such violations,

*Reaffirming* the purposes and principles of the Charter of the United Nations,

*Determined* to these ends and for the sake of present and future generations, to establish an independent permanent World Court of Human Rights in relationship with the United Nations system, with jurisdiction over human rights violations committed by States and other actors,

*Inviting* in that spirit all States and other public and private actors that due to their position or powers are capable of violating human rights, to accept the jurisdiction of the World Court of Human Rights,

*Emphasizing* that the World Court of Human Rights established under this Statute shall be complementary to national courts, regional human rights courts and existing international courts and tribunals,

*Resolved* to guarantee lasting respect for human rights and their international enforcement,

*Have agreed as follows:*

### Part I. Establishment of the Court

#### *Article 1. The Court*

A World Court of Human Rights ('the Court') is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over States and Entities for violations of human rights. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.

#### *Article 2. Relationship of the Court with the United Nations*

The Court shall be brought into a 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.

*Article 3. Seat of the Court*

1. The seat of the Court shall be established in Geneva in Switzerland ('the host State').
2. The Court shall enter into a headquarters agreement with the host State, to be approved by the Assembly of States Parties and thereafter concluded by the President of the Court on its behalf.
3. The Court may sit elsewhere, whenever it considers it desirable.

*Article 4. Legal status and powers of the Court*

1. The Court shall have international legal personality. It shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.
2. The Court may exercise its functions and powers, as provided for in this Statute, on the territory of any State Party and, by special arrangement, on the territory of any other State.

**Part II. Jurisdiction, Admissibility and Applicable Law**

*Article 5. General clause on the jurisdiction of the Court*

1. The Court shall have jurisdiction in respect of human rights violations committed by any State or by any other Entity referred to in article 6 pursuant to the provisions of this Part II.
2. 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 it 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. The Court shall determine the wrongfulness of an act or omission by a State or Entity through the interpretation of international human rights law.
3. In exercising its jurisdiction, the Court shall be guided by the principle of the interdependence and indivisibility of all human rights and shall seek inspiration from customary international law and general principles of law.

*Article 6. Entities*

The reference to 'Entity' in article 5 and elsewhere in this Statute includes the following types of legal persons that may under the provisions of this Part II come under the jurisdiction of the Court:

- a) International organizations constituted through a treaty between States, or between States and international organizations;
- b) Transnational corporations, i.e. business corporations that conduct a considerable part of the production or service operations in a country or in countries other than the home State of the corporation as a legal person;
- c) International non-governmental organizations, i.e. associations or other types of legal persons that are not operating for economic profit and conduct a considerable part of their activities in a country or in countries other than the home State of the organization as a legal person;
- d) 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
- e) 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.

*Article 7. Judgments in respect of States Parties*

1. The Court shall issue judgments in respect of States Parties. These judgments shall be legally binding.
2. Unless otherwise specified in the instrument of ratification or accession by the State Party, or any subsequent notification modifying it, the material jurisdiction of the Court shall extend to determining violations of the following human rights treaties, provided the State Party is a party to the treaty in question:
  - a) The Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948;
  - b) The Convention relating to the Status of Refugees of 28 July 1951 and the Protocol relating to the Status of Refugees of 16 December 1966;
  - c) The International Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965;
  - d) The International Covenant on Economic, Social and Cultural Rights of 16 December 1966;
  - e) The International Covenant on Civil and Political Rights of 16 December 1966 and its Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, of 15 December 1989;
  - f) The Convention on the Elimination of All Forms of Discrimination against Women of 18 December 1979;
  - g) The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984;

h) The Convention on the Rights of the Child of 20 November 1989 and its two Optional protocols on the involvement of children in armed conflict and on the sale of children, child prostitution and child pornography, both of 25 May 2000;

i) The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families of 18 December 1990;

j) The Convention on the Rights of Persons with Disabilities of 13 December 2006; and

k) The International Convention for the Protection of All Persons from Enforced Disappearance of 20 December 2006.

3. The specifications and modifications referred to in paragraph 2 may extend the jurisdiction of the Court to human rights treaties not mentioned in paragraph 2, or to human rights treaties to which the State in question is not a party. They may also exclude from the jurisdiction of the Court human rights treaties to which the State is a party.

*Article 8. Judgments in respect of Entities that have accepted the jurisdiction of the Court*

1. The Court shall issue judgments in respect of Entities that have accepted the jurisdiction of the Court. These judgments shall be legally binding.

2. Unless otherwise specified in the instrument of acceptance by the Entity, or any subsequent notification modifying it, the material jurisdiction of the Court shall extend to determining violations of the following human rights treaties:

a) The Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948;

b) The Convention relating to the Status of Refugees of 28 July 1951 and the Protocol relating to the Status of Refugees of 16 December 1966;

c) The International Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965;

d) The International Covenant on Economic, Social and Cultural Rights of 16 December 1966;

e) The International Covenant on Civil and Political Rights of 16 December 1966 and its Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, of 15 December 1989;

f) The Convention on the Elimination of All Forms of Discrimination against Women of 18 December 1979;

g) The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984;

h) The Convention on the Rights of the Child of 20 November 1989 and its two Optional protocols on the involvement of children in armed conflict and on the sale of children, child prostitution and child pornography, both of 25 May 2000;

i) The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families of 18 December 1990;

j) The Convention on the Rights of Persons with Disabilities of 13 December 2006; and

k) The International Convention for the Protection of All Persons from Enforced Disappearance of 20 December 2006

3. The specifications and modifications referred to in paragraph 2 may extend the jurisdiction of the Court to human rights treaties not mentioned in paragraph 2, or to human rights instruments that do not take the form of an international treaty. They may also exclude from the jurisdiction of the Court human rights treaties mentioned in paragraph 2.

4. In its specifications and modifications under paragraph 2, the Entity may declare what internal or other remedies must be exhausted before a complaint in respect of the Entity can be submitted to the Court.

5. The jurisdiction of the Court in respect of autonomous communities referred to in article 6, sub-paragraph e, is subject to consent by the territorial State, as specified in article 59, paragraph 4.

#### *Article 9. Jurisdiction ad hoc*

1. On the basis of ad hoc acceptance of jurisdiction by a State or Entity, the Court shall issue judgments in respect of States that are not parties to the Statute, or in respect of Entities that have not deposited an instrument accepting the jurisdiction of the Court.

2. When the Court receives a complaint in respect of a State that is not a party to the Statute or in respect of an Entity that has not deposited an instrument accepting the jurisdiction of the Court, the Court shall bring the complaint into the attention of the State or Entity and seek ad hoc acceptance of the jurisdiction of the Court in respect of the specific complaint.

3. The Court may seek ad hoc acceptance of its jurisdiction also when a complaint is brought in respect of a State that is a party to the Statute or an entity that has accepted the jurisdiction of the Court but the complaint falls outside the material jurisdiction of the Court as determined by articles 7 and 8.

#### *Article 10. Opinions*

1. When the Court seeks ad hoc acceptance of its jurisdiction under the terms of article 9, it shall inform also the United Nations High Commissioner for Human Rights.

2. If the State or Entity does not accept the ad hoc jurisdiction of the Court within three months from the date of receipt, the United Nations High Commissioner for

Human Rights may, within a period of six months, request that the Court proceeds to issuing an opinion in the matter raised in the complaint.

3. The Court will exercise discretion as to whether to grant the request of an Opinion.

*Article 11. Jurisdiction ratione temporis*

1. The Court has jurisdiction only in respect of human rights violations that occur or continue after the entry into force of this Statute.

2. If a State becomes a party to this Statute, or if an Entity accepts the jurisdiction of the Court, after the entry into force of this Statute, the Court shall exercise jurisdiction only in respect of human rights violations that occurred or continued after the accession or acceptance took effect.

3. The provisions of paragraphs 1 and 2 are without prejudice to the jurisdiction of the Court under articles 9 and 10.

*Article 12. Exercise of jurisdiction*

1. The Court may exercise its jurisdiction in any case initiated before it through:

a) a complaint submitted pursuant to article 7, 8 or 9, by or on behalf of an individual or a group of individuals who claim to be a victim of a human rights violation committed by a State or Entity ('individual complaint');

b) a complaint submitted pursuant to article 7, 8 or 9, by a State Party to the Statute, claiming that a human rights violation has been committed by a State or Entity ('State complaint'); or

c) a request by the United Nations High Commissioner for Human Rights, based on a complaint submitted pursuant to subparagraph a or b and made under article 10 ('request by the High Commissioner').

2. Provided that a case is declared admissible by the Court, pursuant to the provisions of article 13, the Court will then move to conducting hearings in the case under the terms of Part IV of this Statute.

*Article 13. Admissibility requirements*

1. The Court shall declare an individual complaint submitted in respect of a State inadmissible when:

(a) All available domestic remedies have not been exhausted, except where the application of such remedies is unreasonably prolonged;

(b) It is not submitted within one year after the exhaustion of domestic remedies, except in cases where the author can demonstrate that it had not been possible to submit the complaint within that time limit;

(c) The facts that are the subject of the complaint submitted under article 7 occurred prior to the entry into force of the present Statute for the State concerned unless those facts continued after that date;

(d) The same matter has already been examined by the Court or a regional human rights court or has been or is being examined under another procedure of international investigation or settlement;

(e) It is incompatible with the provisions of the human rights treaties within the jurisdiction of the Court in the case under consideration;

(f) It is manifestly ill-founded or not sufficiently substantiated;

(g) It constitutes an abuse of the right to submit a complaint; or when

(h) It is anonymous or not in writing.

2. The admissibility requirements of paragraph 1 will apply to complaints in respect of a State submitted under articles 7 and 9, with the exception of subparagraph c) which is applicable only in respect of complaints under article 7.

3. The Court shall declare an individual complaint submitted in respect of an Entity inadmissible when:

(a) All available remedies that under the terms of the acceptance of the jurisdiction of the Court by the Entity need to be exhausted, have not been exhausted, except where the application of such remedies is unreasonably prolonged;

(b) It is not submitted within one year after the exhaustion of such remedies, except in cases where the author can demonstrate that it had not been possible to submit the complaint within that time limit;

(c) The facts that are the subject of the complaint submitted under article 8 occurred prior to the entry into force of the acceptance of the jurisdiction of the Court for the Entity concerned unless those facts continued after that date;

(d) The same matter has already been examined by the Court or has been or is being examined under another procedure of international investigation or settlement;

(e) It is incompatible with the provisions of the human rights treaties or other human rights instruments within the jurisdiction of the Court in the case under consideration;

(f) It is manifestly ill-founded or not sufficiently substantiated;

(g) It constitutes an abuse of the right to submit a complaint; or when

(h) It is anonymous or not in writing.

4. The admissibility requirements of paragraph 3 will apply to complaints in respect of an Entity, submitted under articles 8 and 9, with the exception of subparagraph c) which is applicable only in respect of complaints under article 8.

5. In cases initiated before the Court through a request by the High Commissioner under article 10, the applicable admissibility requirements as

defined by paragraphs 2 and 4 will be examined in respect of the original complaint that gave rise to the High Commissioner's request.

*Article 14. Effect of reservations by States on admissibility*

1. In the application of article 13, paragraph 1 (e), the Court shall determine whether a reservation entered by a State Party to any of the human rights treaties within the material jurisdiction of the Court and relevant in the case is permissible pursuant to the provisions of the treaty and the principles of the international law of treaties.

2. A permissible reservation precludes the admissibility of a complaint to the extent covered by the reservation. If the Court determines that a reservation is impermissible, it shall exercise its jurisdiction in respect of the State Party without being barred by the reservation.

*Article 15. Decisions regarding admissibility and their reconsideration*

1. After determining the admissibility of a case, the Court shall issue a reasoned decision declaring the case admissible or inadmissible, or partly admissible. The Court shall thereafter proceed to preparing its hearings in the case pursuant to the provisions of Part IV of this Statute.

2. The Court may postpone the determination of an issue pertaining to the admissibility requirements to be addressed in the hearings.

3. An issue pertaining to the admissibility requirements and decided by the Court in its decision on admissibility can be, on the initiative of the parties or the Court itself, be addressed for reconsideration in the hearings.

*Article 16. Interim measures of protection*

1. At any time after the receipt of a complaint and before a final decision has been reached, the Court may transmit to the State or Entity concerned an order that the State or Entity take such interim measures as may be necessary in exceptional circumstances to avoid possible irreparable damage to the victim or victims of the alleged human rights violations.

2. Before a case is assigned to a Chamber, the Presidency will exercise the Court's powers under paragraph 1.

3. Where the Court exercises its discretion under paragraph 1 of the present article, this does not imply a determination on admissibility or on the merits of the complaint.

4. The Court's orders under paragraph 1 are legally binding.

### **Part III. Composition and Administration of the Court**

*Article 17. Qualifications of judges*

1. There shall be 18 judges of the Court. All judges shall serve as full-time members of the Court and shall be available to serve on that basis from the commencement of their terms of office.
2. The judges shall be chosen from among persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices.
3. Every candidate for election to the Court shall have established competence in the law of human rights and extensive experience in a professional legal capacity which is of relevance for the judicial work of the Court.

*Article 18. Nomination of candidates*

1. Nomination of candidates for election to the Court may be made by any State Party to this Statute, and shall be accompanied by a statement specifying how the candidate fulfils the requirements of article 17, paragraphs 2 and 3. Nominations shall be made either:

a) By the procedure for the nomination of candidates for appointment to the highest judicial offices in the country in question; or

b) By the procedure provided for the nomination of candidates for the International Court of Justice in the Statute of that Court.

2. Each State Party wishing to nominate candidates for any given election shall put forward two candidates, one female and one male. The candidates need not be nationals of that State Party.

*Article 19. Election of judges*

1. The judges shall be elected by secret ballot at a meeting of the Assembly of States Parties convened for that purpose under article 49. Subject to paragraph 3, the persons elected to the Court shall be the 18 candidates who obtain the highest number of votes and a two-thirds majority of the States Parties present and voting.

2. In the event that a sufficient number of judges are not elected on the first ballot, successive ballots shall be held in accordance with the procedures laid down in paragraph 1 until the remaining places have been filled.

3. No two judges may be nationals of the same State. A person who, for the purposes of membership of the Court, could be regarded as a national of more than one State shall be deemed to be a national of the State in which that person ordinarily exercises civil, political and social rights.

4. The States shall, in the selection of judges, take into account the need, within the membership of the Court, for:

a) the representation of the principal legal systems of the world;

b) equitable geographical representation;

c) expertise on specific issues, including, but not limited to, rights of women, rights of the child, rights of persons with disabilities, and rights of members of minorities and indigenous peoples; and

c) a fair representation of female and male judges.

*Article 20. Term of office*

1. Subject to paragraph 2, judges shall hold office for a term of nine years and, subject to paragraph 3, shall not be eligible for re-election.

2. At the first election, one third of the judges elected shall be selected by lot to serve for a term of three years; one third of the judges elected shall be selected by lot to serve for a term of six years; and the remainder will serve for a term of nine years.

3. A judge who is selected to serve for a term of three years under paragraph 2 shall be eligible for re-election for a full term.

4. Notwithstanding the preceding paragraphs of this article, a judge assigned to a Chamber in accordance with article 23, shall continue in office to complete any trial the hearing of which has already commenced before that Chamber.

*Article 21. Judicial vacancies*

1. In the event of a vacancy, an election shall be held in accordance with article 19 to fill the vacancy.

2. A judge elected to fill a vacancy shall serve for the remainder of the predecessor's term and, if that period is three years or less, shall be eligible for re-election for a full term under article 19.

*Article 22. The Presidency*

1. By an absolute majority of the judges, the Court shall elect its President and the First and Second Vice-Presidents. They shall each serve for a term of three years or until the end of their respective terms of office as judges, whichever expires earlier. They shall be eligible for re-election once.

2. The First Vice-President shall act in place of the President in the event that the President is unavailable or disqualified. The Second Vice-President shall act in place of the President in the event that both the President and the First Vice-President are unavailable or disqualified.

3. The President, together with the First and Second Vice-Presidents, shall constitute the Presidency, which shall be responsible for:

a) the proper administration of the Court; and

b) the other functions conferred upon it in accordance with this statute.

*Article 23. Chambers*

1. The judicial functions of the Court shall be carried out by three Chambers of six judges.
2. The judges will be allotted to the Chambers by the plenary Court, so that they will be presided, respectively, by the President and the First and Second Vice-Presidents of the Court.
3. Judges will serve in a Chamber for a period of three years, and thereafter until the completion of any case the hearing of which has already commenced in the Chamber concerned.

*Article 24. Independence of the judges*

1. The judges shall be independent in the performance of their functions.
2. Judges shall not engage in any other occupation of a professional nature, or in any other activity which is likely to interfere with their judicial functions or to affect confidence in their independence.
3. Any question regarding the application of paragraph 2 shall be decided by an absolute majority of the judges. Where any such question concerns an individual judge, that judge shall not take part in the decision.

*Article 25. Excusing and disqualification of judges*

1. The Presidency may, at the request of a judge, excuse the judge from the exercise of a function under this Statute, in accordance with the Rules of Procedure.
2. A judge shall not participate in any case in which his or her impartiality might reasonably be doubted on any ground. A judge shall be disqualified from a case in accordance with this paragraph if, inter alia, that judge has previously been involved in any capacity in that case before the Court or at the national level. A judge shall also be disqualified on such other grounds as may be provided for in the Rules of Procedure.
3. A party to a case before the Court may request the disqualification of a judge under paragraph 2.
4. Any question as to the disqualification of a judge pursuant to paragraph 2 shall be decided by an absolute majority of the judges. The challenged judge shall be entitled to present his or her comments on the matter, but shall not take part in the decision.

*Article 26. The Registry*

1. The Registry shall be responsible for the non-judicial aspects of the administration and servicing of the Court.
2. The Registry shall be headed by the Registrar, who shall be the principal administrative officer of the Court. The Registrar shall exercise his or her functions under the authority of the President of the Court.

3. The Registrar and the Deputy Registrar shall be persons of high moral character, be highly competent and have an excellent knowledge of and be fluent in at least one of the working languages of the Court.

4. The judges shall elect the Registrar by an absolute majority by secret ballot. If the need arises and upon the recommendation of the Registrar, the judges shall elect, in the same manner, a Deputy Registrar.

5. The Registrar shall hold office for a term of five years, shall be eligible for re-election once and shall serve on a full-time basis. The Deputy Registrar shall hold office for a term of five years or such shorter term as may be decided upon by an absolute majority of the judges, and may be elected on the basis that the Deputy Registrar shall be called upon to serve as required.

#### *Article 27. Staff*

1. The Registrar shall appoint such qualified staff as may be required to their respective offices.

2. In the employment of staff, the Registrar shall ensure the highest standards of efficiency, competency and integrity, and shall have regard, *mutatis mutandis*, to the criteria set forth in article 19, paragraph 4.

3. The Registrar, with the agreement of the Presidency, shall propose Staff Regulations which include the terms and conditions upon which the staff of the Court shall be appointed, remunerated and dismissed. The Staff Regulations shall be approved by the Assembly of States Parties.

4. The Court may, in exceptional circumstances, employ the expertise of gratis personnel offered by States Parties, international organizations or non-governmental organizations to assist with the work of any of the organs of the Court. Such gratis personnel shall be employed in accordance with guidelines to be established by the Assembly of States Parties.

#### *Article 28. Solemn undertaking*

Before taking up their respective duties under this Statute, the judges, the Registrar and the Deputy Registrar shall each make a solemn undertaking in open court to exercise his or her respective functions impartially and conscientiously.

#### *Article 29. Removal from office*

1. A judge, a Deputy Prosecutor, the Registrar or the Deputy Registrar shall be removed from office if a decision to this effect is made in accordance with paragraph 2, in cases where that person:

(a) Is found to have committed serious misconduct or a serious breach of his or her duties under this Statute, as provided for in the Rules of Procedure; or

(b) Is unable to exercise the functions required by this Statute.

2. A decision as to the removal from office of a judge, under paragraph 1, shall be made by the Assembly of States Parties, by secret ballot and by a two-thirds majority of the States Parties upon a recommendation adopted by a two-thirds majority of the other judges.

3. A decision as to the removal from office of the Registrar or Deputy Registrar shall be made by an absolute majority of the judges.

4. A judge, Registrar or Deputy Registrar whose conduct or ability to exercise the functions of the office as required by this Statute is challenged under this article shall have full opportunity to present and receive evidence and to make submissions in accordance with the Rules of Procedure. The person in question shall not otherwise participate in the consideration of the matter.

#### *Article 30. Disciplinary measures*

A judge, Registrar or Deputy Registrar who has committed misconduct of a less serious nature than that set out in article 29, paragraph 1, shall be subject to disciplinary measures, in accordance with the Rules of Procedure.

#### *Article 31. Privileges and immunities*

1. The Court shall enjoy in the territory of each State Party such privileges and immunities as are necessary for the fulfillment of its purposes.

2. The judges and the Registrar shall, when engaged on or with respect to the business of the Court, enjoy the same privileges and immunities as are accorded to heads of diplomatic missions and shall, after the expiry of their terms of office, continue to be accorded immunity from legal process of every kind in respect of words spoken or written and acts performed by them in their official capacity.

3. The Deputy Registrar and the staff of the Registry shall enjoy the privileges and immunities and facilities necessary for the performance of their functions, in accordance with the agreement on the privileges and immunities of the Court.

4. Counsel, experts, witnesses or any other person required to be present at the seat of the Court shall be accorded such treatment as is necessary for the proper functioning of the Court, in accordance with the agreement on the privileges and immunities of the Court.

5. The privileges and immunities of:

(a) A judge may be waived by an absolute majority of the judges;

(b) The Registrar may be waived by the Presidency;

(c) The Deputy Registrar and staff of the Registry may be waived by the Registrar.

#### *Article 32. Salaries, allowances and expenses*

The judges, the Registrar and the Deputy Registrar shall receive such salaries, allowances and expenses as may be decided upon by the Assembly of States

Parties. These salaries and allowances shall not be reduced during their terms of office.

*Article 33. Official and working languages*

1. The official languages of the Court shall be Arabic, Chinese, English, French, Russian and Spanish. The judgments of the Court, as well as other decisions resolving fundamental issues before the Court, shall be published in the official languages. The Presidency shall, in accordance with the criteria established by the Rules of Procedure, determine which decisions may be considered as resolving fundamental issues for the purposes of this paragraph.
2. The working languages of the Court shall be English, French and Spanish. The Rules of Procedure shall determine the cases in which other official languages may be used as working languages.
3. At the request of any party to a proceeding or a State allowed to intervene in a proceeding, the Court shall authorize a language other than a working language be used by such a party or State, provided that the Court considers such authorization to be adequately justified.

*Article 34. Rules of Procedure*

1. The Court shall adopt its Rules of Procedure.
2. After the adoption of the Rules of Procedure, in urgent cases where the Rules do not provide for a specific situation before the Court, the judges may, by a two-thirds majority, draw up provisional Rules to be applied until adopted for inclusion in the Rules of Procedure.
4. The Rules of Procedure, amendments thereto and any provisional Rule shall be consistent with this Statute.

*Article 35. Trust Fund*

1. A Trust Fund shall be established by decision of the Assembly of States Parties for the benefit of victims of human rights violations established by Court, and of the families of such victims.
2. The Trust Fund shall be managed according to criteria to be determined by the Assembly of States Parties.

*Article 36. Regulations of the Court*

1. The judges shall, in accordance with this Statute and the Rules of Procedure and Evidence, adopt, by an absolute majority, the Regulations of the Court necessary for its routine functioning.
2. The Prosecutor and the Registrar shall be consulted in the elaboration of the Regulations and any amendments thereto.
3. The Regulations and any amendments thereto shall take effect upon adoption unless otherwise decided by the judges. Immediately upon adoption,

they shall be circulated to States Parties for comments. If within six months there are no objections from a majority of States Parties, they shall remain in force.

#### **Part IV. Hearings before issuing Judgments or Opinions**

##### *Article 37. Place and public nature of hearings*

1. Unless otherwise decided, the place of the trial shall be the seat of the Court.
2. The hearings shall be held in public. The Court may, however, determine that special circumstances require that certain proceedings be in closed session for the purposes set forth in article 39, or to protect confidential or sensitive information to be presented in the hearings.

##### *Article 38. Preparation of the hearings through written submissions*

The Court shall secure that prior to convening the hearings in a case, the parties, and in the case of an Opinion, also the United Nations High Commissioner for Human Rights, are given adequate opportunity make their full submissions in writing and to comment each others' submissions.

##### *Article 39. Order of documents and information and protection of confidential information and of persons*

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.

##### *Article 40. Hearings in the presence of the parties*

1. The Court shall invite the complainant and the respondent to be present during the hearings. If the Court has granted a request for issuing an Opinion, also the United Nations High Commissioner for Human Rights shall be invited to the hearings.

2. The parties or the High Commissioner may be represented through their duly authorized legal representatives.

3. The absence of one or both parties shall not prevent the Court from proceeding with the hearings but the Court shall take pertinent measures to secure the adequate presentation of the submissions and arguments by the party that remains absent. Absence by the High Commissioner from hearings for an Opinion shall result in striking off the matter in the Court's list of cases.

*Article 41. Witnesses and submissions*

1. Before testifying, each witness shall, in accordance with the Rules of Procedure, give an undertaking as to the truthfulness of the evidence to be given by that witness.

2. The testimony of a witness shall be given in person, except to the extent provided by the measures set forth in article 39. The Court may also permit the giving of viva voce (oral) or recorded testimony of a witness by means of video or audio technology, as well as the introduction of documents or written transcripts, subject to this Statute and in accordance with the Rules of Procedure. These measures shall not be prejudicial to or inconsistent with the equality of the parties.

3. The parties may make submissions relevant to the case, in accordance with article 38. The Court shall have the authority to request the submission of all documents and information that it considers necessary for the determination of the matter.

4. The Court may rule on the relevance or admissibility of any information.

5. The Court shall respect and observe privileges on confidentiality as provided for in the Rules of Procedure.

6. The Court shall not require proof of facts of common knowledge but may take judicial notice of them.

7. Information obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible, except for the purpose of addressing the wrongfulness of the conduct through which the information was obtained.

*Article 42. Sanctions for misconduct before the Court*

1. The Court may sanction persons present before it who commit misconduct, including disruption of its proceedings or deliberate refusal to comply with its directions, by administrative measures, such as temporary or permanent removal from the courtroom, a fine or other similar measures provided for in the Rules of Procedure. Such fines and similar measures may be imposed also upon States or Entities appearing as respondents before the Court, in particular for failure to comply with requests made pursuant article 41, paragraph 3.

2. The procedures governing the imposition of the measures set forth in paragraph 1 shall be those provided for in the Rules of Procedure.

*Article 43. Other powers of the Court when conducting hearings*

1. The Court shall have the power to direct its own proceedings, inter alia, the power on application of a party or on its own motion to:
  - (a) Rule on the admissibility or relevance of evidence; and
  - (b) Take all necessary steps to maintain order in the course of a hearing.
2. The Court shall ensure that a complete record of the hearings, which accurately reflects the proceedings, is made and that it is maintained and preserved by the Registrar.

**Part V. Judgments and Opinions***Article 44. Requirements for the decision*

1. After the hearings the Court shall proceed with its internal closed deliberations for reaching a decision that is in the form of a Judgment, or in cases brought before it through a request under article 10, an Opinion.
2. All the judges of a Chamber shall be present at each stage of the hearings and deliberations. The Presidency may, on a case-by-case basis, designate, as available, one or more alternate judges to be present at the hearings and to replace a member of the Chamber if that member is unable to continue attending.
3. The Chamber's decision shall be based on its evaluation of the submissions by the parties and of the entire proceedings. The Court may base its decision only on submissions presented and discussed before it at the hearings.
4. The judges shall attempt to achieve unanimity in their decision, failing which the decision shall be taken by a majority of the judges.
5. The deliberations of the Chamber shall remain secret.
6. The decision shall be in writing and shall contain a full and reasoned statement of the Chamber's findings on the submissions and conclusions. The Chamber shall issue one decision.

*Article 45. Judgments and Opinions*

1. The Judgment or Opinion shall be pronounced in public and allowing the presence of the parties.
2. Judgments of the Court shall be legally binding.
3. Opinions of the Court represent the interpretation by the Court of the legal obligations of the respondent.

*Article 46. Individual opinions*

When there is no unanimity behind the Judgment or Opinion of the Chamber, the judges who did not vote for the decision by the majority may append their concurring or dissenting individual opinions.

*Article 47. Reparations to victims of human rights violations*

1. The Court shall establish principles relating to reparations to, or in respect of, victims of human rights violations, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.
2. 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.
3. 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.
4. Where appropriate, the Court may in its Judgment or Opinion order that the award for reparations be made through the Trust Fund provided for in article 35.
5. Before making an order or recommendation under this article, the Court may invite and shall take account of representations from or on behalf of the respondent, the complainant, or other interested persons.
6. Nothing in this article shall be interpreted as prejudicing the rights of victims of human rights violations under national or international law.

*Article 48. Supervision of implementation*

1. The United Nations Human Rights Council shall be entrusted with the function of supervising the implementation of the Judgments and Opinions by the Court.
2. The Human Rights Council may appoint subsidiary bodies for the purpose of exercising its functions under paragraph 1, if necessary one such body in respect of States and another in respect of Entities.

**Part VI. Assembly of States Parties**

*Article 49. Assembly of States Parties*

1. An Assembly of States Parties to this Statute is hereby established. Each State Party shall have one representative in the Assembly who may be accompanied by alternates and advisers. Other States which have signed the Statute, as well as Entities which have accepted the jurisdiction of the Court, may participate as observers in the Assembly.

2. The Assembly shall:

(a) Elect the Judges of the Court, as provided by article 19;

(b) Provide management oversight to the Presidency, the Prosecutor and the Registrar regarding the administration of the Court;

(c) Consider and decide the budget for the Court; and

(d) Perform any other function consistent with this Statute and the Rules of Procedure.

3. The Assembly may establish such subsidiary bodies as may be necessary, including an independent oversight mechanism for inspection, evaluation and investigation of the Court, in order to enhance its efficiency and economy.

4. The President of the Court, the Prosecutor and the Registrar or their representatives may participate, as appropriate, in meetings of the Assembly and of its subsidiary bodies.

5. The Assembly shall meet at the seat of the Court or at the Headquarters of the United Nations once a year and, when circumstances so require, hold special sessions.

6. Each State Party shall have one vote. Entities that have accepted the jurisdiction of the Court have the right to attend the meetings of the Assembly and to speak. Every effort shall be made to reach decisions by consensus.

7. A State Party which is in arrears in the payment of its financial contributions towards the costs of the Court shall have no vote in the Assembly if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years. The Assembly may, nevertheless, permit such a State Party to vote in the Assembly if it is satisfied that the failure to pay is due to conditions beyond the control of the State Party.

8. The Assembly shall adopt its own rules of procedure.

9. The official and working languages of the Assembly shall be those of the General Assembly of the United Nations.

## **Part VII. Financing**

### *Article 50. Financial Regulations*

Except as otherwise specifically provided, all financial matters related to the Court and the meetings of the Assembly of States Parties, including its subsidiary bodies, shall be governed by this Statute and the Financial Regulations and Rules adopted by the Assembly of States Parties.

### *Article 51. Payment of expenses*

Expenses of the Court and the Assembly of States Parties, including its subsidiary bodies, shall be paid from the funds of the Court.

*Article 52. Funds of the Court and of the Assembly of States Parties*

The expenses of the Court and the Assembly of States Parties, including its subsidiary bodies, as provided for in the budget decided by the Assembly of States Parties, shall be provided by the following sources:

- (a) Assessed contributions made by States Parties;
- (b) Contributions made by Entities that have accepted the jurisdiction of the Court; and
- (c) Funds provided by the United Nations, subject to the approval of the General Assembly.

*Article 53. Voluntary contributions*

Without prejudice to article 52, the Court may receive and utilize, as additional funds, voluntary contributions from Governments, international organizations, individuals, corporations and other entities, in accordance with relevant criteria adopted by the Assembly of States Parties.

*Article 54. Assessment of contributions*

The contributions of States Parties shall be assessed in accordance with an agreed scale of assessment, based on the scale adopted by the United Nations for its regular budget and adjusted in accordance with the principles on which that scale is based.

*Article 55 Annual audit*

The records, books and accounts of the Court, including its annual financial statements, shall be audited annually by an independent auditor.

## **Part VIII. Final Clauses**

*Article 56. Settlement of disputes*

1. Any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court.
2. Any other dispute between two or more States Parties relating to the interpretation or application of this Statute which is not settled through negotiations within three months of their commencement shall be referred to the Assembly of States Parties. The Assembly may itself seek to settle the dispute or may make recommendations on further means of settlement of the dispute, including referral to the International Court of Justice in conformity with the Statute of that Court.

*Article 57. Reservations to this Statute*

No reservations may be made to this Statute.

*Article 58. Amendments*

1. After the expiry of seven years from the entry into force of this Statute, any State Party may propose amendments thereto. The text of any proposed amendment shall be submitted to the Secretary-General of the United Nations, who shall promptly circulate it to all States Parties.
2. No sooner than three months from the date of notification, the Assembly of States Parties, at its next meeting, shall, by a majority of those present and voting, decide whether to take up the proposal.
3. The adoption of an amendment at a meeting of the Assembly of States Parties on which consensus cannot be reached shall require a two-thirds majority of States Parties.
4. Except as provided in paragraph 5, an amendment shall enter into force for all States Parties one year after instruments of ratification or acceptance have been deposited with the Secretary-General of the United Nations by seven-eighths of them.
5. Any amendment extending the list of human rights treaties subject to jurisdiction of the Court in articles 6 and 7 of this Statute and adopted by the Assembly of States Parties in accordance with paragraph 3, shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance.
6. If an amendment has been accepted by seven-eighths of States Parties in accordance with paragraph 4, any State Party which has not accepted the amendment may withdraw from this Statute with immediate effect, notwithstanding article 62, paragraph 1, but subject to article 62, paragraph 2, by giving notice no later than one year after the entry into force of such amendment.
7. The Secretary-General of the United Nations shall circulate to all States Parties any amendment adopted at a meeting of the Assembly of States Parties.

*Article 59. Signature, ratification, accession or acceptance*

1. This Statute shall be open for signature by all States in New York, at United Nations Headquarters, on 10 December 2010. Thereafter, it shall remain open for signature in New York, at United Nations Headquarters, until 10 December 2011.
2. This Statute is subject to ratification by signatory states. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.
3. This Statute shall be open to accession by all States. Instruments of accession shall be deposited with the Secretary-General of the United Nations.
4. The jurisdiction of the Court is open to acceptance by any Entity referred to in article 6 of the Statute. However, such acceptance by an autonomous community

referred to in paragraph e) of that provision requires the consent by the State within the territory of which the community is located, or by all the relevant States if it is a cross-border community. Such consent by States shall be expressed through a notification to the Secretary-General.

*Article 60. Entry into force*

1. This Statute shall enter into force on the first day of the month after the 60th day following the date of the deposit of the 30th instrument of ratification or accession by States with the Secretary-General of the United Nations.
2. For each State ratifying or acceding to this Statute after the deposit of the 30th instrument of ratification or accession, the Statute shall enter into force on the first day of the month after the 60th day following the deposit by such State of its instrument of ratification or accession.
3. For each Entity accepting the jurisdiction of the Court, the acceptance shall take effect on the first day of the month after the 60th day following the deposit by such Entity of its instrument of acceptance, provided that the Statute has by that date entered into force under the terms of paragraph 1.

*Article 61. Effect in respect of other treaties*

1. The ratification of or accession to this Statute does in no way reduce the substantive human rights obligations by a State under the human rights treaties to which it is a party, or affect the periodic reporting obligations pursuant to those treaties.
2. The ratification of or accession to this Statute by a State shall be treated by the Secretary-General of the United Nations as a notification of a State's withdrawal from the complaint procedures under the human rights treaties covered by the Court's jurisdiction, in respect of the acceptance by the State of the Court's jurisdiction. The withdrawal shall take effect on the day of entry into force of this Statute in respect of the State in question.
3. Ad hoc acceptance by a State of the Court's jurisdiction pursuant to article 9 or a request for an Opinion by the Court under article 10 shall have no effect on the continued acceptance by the same State of complaint procedures under human rights treaties.

*Article 62. Withdrawal*

1. A State Party may, by written notification addressed to the Secretary-General of the United Nations, withdraw from this Statute. The withdrawal shall take effect one year after the date of receipt of the notification, unless the notification specifies a later date.
2. Any other Entity that has accepted the jurisdiction of the Court, may withdraw its acceptance by written notification addressed to the Secretary-General of the United Nations. The withdrawal shall take effect one year after the date of receipt of the notification, unless the notification specifies a later date.

3. The withdrawal of a State or Entity is merely jurisdictional in nature and shall not reduce or affect its substantive human rights obligations.

4. A State or Entity shall not be discharged, by reason of withdrawal, from the obligations arising from this Statute, including any financial obligations which may have accrued, while a State was a Party to the Statute or an Entity had accepted the jurisdiction of the Court. Withdrawal shall not affect any cooperation with the Court in connection with proceedings which were commenced prior to the date when the withdrawal became effective, nor shall it prejudice in any way the continued consideration of any matter which was already under consideration by the Court prior to the date on which the withdrawal became effective.

*Article 63. Authentic texts*

The original of this Statute, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations, who shall send certified copies thereof to all States and to anyone requesting such a copy.

## EXECUTIVE SUMMARY

### *A response to real challenges*

The proposal made in this report, of the establishment of a World Court of Human Rights, is a response to many of the most important challenges of the 21st century. As properly assessed in the agenda for the Swiss initiative to commemorate the 60th anniversary of the Universal Declaration of Human Rights, 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.

Although the 20th century was a breakthrough for the novel idea of the international protection of human rights, the realization of that idea remains far from complete. The adoption of the Universal Declaration of Human Rights in 1948 by the United Nations General Assembly was a milestone that has been followed up by the gradual elaboration of a web of legally binding human rights treaties. In the first decade of the 21st century, that piecemeal work is still continuing but in general terms one can assess that the promises made in the Universal Declaration have materialized in the form of human rights treaties.

On some other fronts the achievements are more meager. The central idea of human rights law, protecting the individual against States, including and even primarily his or her own State, has not systematically permeated the framework of public international law. International law is still primarily law between nations, i.e. law created by States and for States. For instance, consent by a State is still a precondition for legally binding human rights treaty obligations. True, the evolution in the understanding of customary international law, and within it the category of peremptory norms (*jus cogens*), renders the requirement of consent less absolute. Nevertheless, there are various ways in which States may try to resist their commitment to human rights by denying their consent, including by not ratifying a treaty, by entering extensive reservations or by not accepting optional monitoring mechanisms, such as a procedure for individual complaints under a specific human rights treaty. At times of emergency, States may also derogate from some of their otherwise legally binding human rights obligations.

Even where States have given their consent to be bound by a human rights treaty, there are failures in compliance. Under United Nations human rights treaties periodic reporting by States and the consideration of these reports by independent expert bodies (the treaty bodies) is the only mandatory monitoring mechanism. Many States are seriously in delay in submitting their periodic reports. And even where reporting does occur, or a State has accepted optional procedures of individual complaint, there are all too many cases of non-compliance with the findings by the treaty bodies. This is largely because such findings have no legally binding authority of their own. Instead, their authority is derived from the powers of the treaty body to interpret the treaty in question, including as to whether the State violated the treaty and is under an obligation to provide an effective remedy. Findings by treaty bodies are authoritative and

persuasive but strictly speaking not legally binding. Some States take the liberty of refusing their implementation on such grounds, ignoring the fact that the treaty provisions subject to the interpretive function of the treaty body are legally binding.

Non-enforcement is a major failure of the United Nations human rights treaty system. The treaty bodies themselves are usually left with the task of overseeing the implementation of their own findings. This situation is in stark contrast with the unconditional binding force of judicial decisions in national jurisdictions, or with the role of intergovernmental organs in the non-selective supervision of the implementation of rulings by regional human rights courts, such as the European Court of Human Rights within the Council of Europe framework.

A further shortcoming of the current status of human rights law within the broader framework of public international law is the exclusive focus of human rights treaties and their monitoring mechanisms upon States as the duty-bearers. This no longer corresponds to the realities of our globalized world where other actors besides States, such as international financial institutions and other intergovernmental organizations, transnational corporations and other 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.

### *The proposal*

In the report, a proposal is made to establish a World Court of Human Rights. To that end, the report includes an elaborate Draft Statute of the Court. The proposal responds to several contemporary challenges in the international protection of human rights and comes with one coherent solution that addresses those challenges.

The Statute of the World Court of Human Rights will be an international treaty, drafted, adopted and ratified by States. Hence, ratifying States will be the primary category subject to the jurisdiction of the Court. 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.

The proposed Statute would not include new substantive human rights norms. Instead, the jurisdiction of the World Court would be based on the existing normative catalogue of human rights treaties (see articles 7 and 8), interpreted on the basis of the principle of interdependence and indivisibility of all human rights and drawing inspiration from customary international law and general principles of law (see article 5).

Primarily, the Court would exercise legally binding jurisdiction in respect of states that have ratified its Statute (article 7). In so doing, it would have the powers to issue binding orders on interim measures of protection (article 16), to determine the permissibility of reservations to human rights treaties and not to

apply impermissible reservations (article 14), and to make concrete and binding orders on the remedies to be provided to a victim of a human rights violations (article 47). The Human Rights Council, as the main intergovernmental United Nations body dealing with human rights issues, would be mandated to oversee the effective implementation of the judgments by the Court (article 48).

All these proposals are radical, but they have their basis in the evolution of human rights law until now (see Q&A 3). The revolutionary proposals are elsewhere, and only they make the proposed Statute worthy of the name World Court of Human Rights, rather than just an international court.

The proposal includes the creation of a World Court of Human Rights. Instead of an 'international court', an expression that would reflect the consent-based and inter-state oriented nature of human rights law so far, the notion of a World Court signals the capacity of the proposal to respond to contemporary challenges in our globalized world. The Court 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' in the Draft Statute. They would include intergovernmental organizations, transnational corporations, and other non-state actors.

Under the proposed Statute, the Court would exercise jurisdiction beyond the circle of States Parties to the Statute, hence responding to the challenges posed by the emergence and evolution of transnational actors that for their capacity to affect the enjoyment of human rights are comparable to states but that so far have not been accountable under existing human rights treaty regimes.

Entities other than states would be able to accept the legally binding jurisdiction of the Court. Technically, they would not be States Parties to the Statute. But cases could be brought against them, and they would be subject to the legally binding jurisdiction of the Court (article 8), including in the issue of remedies. Intergovernmental organizations, transnational corporations, international non-governmental organizations, organized opposition movements exercising a degree of factual control over a territory and autonomous communities within one or more states would be the types of entities that could accept the jurisdiction of the Court (article 5).

For states that have not yet ratified the Statute, and for entities that have not yet accepted the general jurisdiction of the Court, there would be a possibility of accepting the Court's legally binding ad hoc jurisdiction in respect of a specific complaint (article 9).

The Court could also receive complaints also in respect of states and entities that do not accept its legally binding jurisdiction, generally or even ad hoc for a specific case (article 10).

Consent - in the form of ratification of the Statute by a State, or the general acceptance of the Court's jurisdiction by an Entity - 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 (ad hoc). What is more important is that complaints against States and Entities could be submitted even in the absence of such ad hoc acceptance. However, the Court

could entertain these complaints in the absence of consent only on the basis of a request from the United Nations High Commissioner for Human Rights. In such cases not based on consent by the respondent, the Court would issue authoritative Opinions instead of legally binding Judgments.

Although the overall proposal made in this report is radical, it has its foundation in the gradual evolution of human rights law towards a 'global constitution', i.e. a framework of norms that are considered legally binding beyond the explicit consent by states, and even beyond the circle of states. These piecemeal developments that have paved the way for the major leap of the creation of a World Court of Human Rights can be demonstrated with reference to the stages of evolution in the functioning and role of the Human Rights Committee, the treaty body monitoring compliance with the International Covenant on Civil and Political Rights (ICCPR). The Human Rights Committee can be seen as the closest that already exists, compared to a future World Court of Human Rights. The small steps listed below jointly represent a paradigm shift that already has occurred. Although the Human Rights Committee is referred to as a platform where that shift is particularly systematic, the same trends are in fact visible also in the operation of other treaty bodies which have adopted identical or similar solutions to many of the contemporary challenges facing the role of human rights law in an evolving world order. Within some regional systems of human rights protection, the trend has been even stronger, e.g. through the recognition of a regional human rights treaty as an instrument of constitutional significance across borders within the whole region.

The power of the High Commissioner for Human Rights to request an Opinion from the Court will be only one of the channels through which the Court can be seized and invited to deal with an alleged human rights violation. This channel will be a complement to the more direct and regular methods of bringing a case before the Court. The legal nature of such opinions is similar to the present Final Views by the Human Rights Committee or other United Nations human rights treaty bodies. While lacking legally binding force they represent the interpretation of international law by an expert body entrusted by States with such a function and hence carrying considerable weight. As the Court will be a fully judicial institution, it is expected that its Opinions will in fact be acknowledged as authoritative and definitive, even if lacking legally binding force. The Court will proceed to the issuing of an Opinion only through three preceding steps: (a) the receipt of a complaint in respect of a State or Entity that has not accepted the general jurisdiction of the Court, (b) the refusal of the State or Entity to accept the ad hoc jurisdiction of the Court in the case, (c) a request by the United Nations High Commissioner for Human Rights that the Court will issue an Opinion. Even then, the Court will exercise discretion whether to grant the High Commissioner's request.

Complaints by individuals, or groups of individuals, will be the main channel for taking cases before the Court. Such complaints can be submitted by persons claiming to be a victim of a human rights violation by the respondent which can be a State or an Entity. (For the notion of Entity, see the following answer.)

Also States can initiate cases, by alleging that another State, or an Entity, has committed a human rights violation.

### *Substantive scope of jurisdiction*

The proposed Statute is primarily institutional and procedural in nature. Therefore, it does not include a catalogue of human rights that will be covered by the Court's substantive jurisdiction, or new definitions of the contents of each human right. Instead, articles 7 and 8 of the Draft Statute refer back to existing human rights treaties by listing them as the basis for the substantive scope of the Court's jurisdiction.

The 1951 Convention on the Status of Refugees and its Protocol of 1967 are part and parcel of the normative code of international human rights law. They fulfill the promise made in article 14 of the Universal Declaration of Human Rights. Largely because of the urgency of the refugee issue in the post World War Two situation, this particular child in the family of human rights treaties was born prematurely. Hence, it lacks proper mechanisms of international monitoring, such as the establishment of an international treaty body composed of independent experts. Only later on have the creation of such a body, and gradually also of a procedure for individual complaints, become standard elements of United Nations human rights treaties.

While other options to create proper monitoring mechanisms under the Refugee Convention regime may need to be discussed, this proposal includes the idea of individuals and states obtaining the possibility to submit complaints of violations of the Refugee Convention to the World Court of Human Rights.

### *Interim measures*

The proposed Statute includes a clause on the power of the World Court to issue legally binding orders on interim measures of protection. They can be addressed to any state or entity in relation to which the Court exercises jurisdiction. This proposal builds upon the practice of the International Court of Justice, regional human rights treaties and the United Nations treaty bodies. The exercise of this power will be in the hands of the three-person Presidency of the Court, a solution that signals the exceptional nature of such an order. As soon as the case is assigned to a Chamber of the Court, the Chamber will also decide on interim measures. The institution will be applicable only in cases where an individual or a group of individuals faces a real risk of death or other grave and irreversible consequence. (Article 16.)

### *Remedies and Trust Fund*

The judgments by the Court, which will be legally binding, will also include an order for the remedies the victims of the human rights violation are entitled to.

Under the terms of article 47 of the Draft Statute, the Court will, in a Judgment that establishes a human rights violation, make an order directly against the respondent specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. Similarly, 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

Where appropriate, the Court may in its judgment or opinion order that the award for reparations be made through the Trust Fund provided for in article 35 of the Draft Statute.

### *Enforcement*

Proposed article 48 will address one of the main shortcomings of the current United Nations human rights system. It will establish an intergovernmental mechanism for the implementation of the judgments and opinions by the Court by entrusting the Human Rights Council with the function of supervising such implementation. For this purpose, the Human Rights Council may appoint subsidiary bodies.

### *The composition of the World Court*

The World Court will be composed of 18 full-time judges, serving a non-renewable nine-year term. According to article 17, paragraph 2, of the Draft Statute, the judges shall be chosen from among persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. As every State wishing to nominate a candidate would be obliged to nominate one male and one female candidate (article 18), it is expected that the gender balance within the Court will be better than amongst the judges of many other international courts or tribunals.

The Draft Statute does not propose any strict quotas within the composition of the Court, although the proposed method of nominating candidates will facilitate gender balance and although article 19, paragraph 4, mentions a number of dimensions of diversity that states shall take into account in the selection of the judges.

### *Relationship with existing human rights treaties and treaty bodies*

As explained above, the substantive scope of the jurisdiction of the World Court will be based on existing United Nations human rights treaties, including the Refugee Convention.

The proposed Statute of the World Court of Human Rights is a new international treaty and does not require amending any existing treaties. Both the substance

and the monitoring mechanisms under existing treaties will remain intact. However, the proposed Statute does include a provision according to which an instrument of ratification of or accession to the Statute by a state shall be understood as a notification of its withdrawal from those individual complaint procedures that the same state has accepted under existing United Nations human rights treaties and now subjects to the jurisdiction of the Court (Article 61, paragraph 2).

Through this solution the proposal avoids the duplication of procedures and launches a gradual process where the quasi-judicial function of treaty bodies to deal with individual complaints is replaced by the Court's fully judicial function. The pace of this process will depend on how quickly and how extensively states accept the jurisdiction of the Court. The treaty bodies, however, will continue to exercise their other functions, including the handling of individual complaints in respect of states that have not yet accepted the jurisdiction of the Court. 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.

As explained in Q&A 16, the creation of the World Court would be an opportunity for a parallel reform of the treaty bodies. Here, a proposal of the merger of the two bodies monitoring compliance with the Covenants of 1966 is proposed. Subsequent to this merger of the two Covenant bodies into one Human Rights Committee with expertise across the range of all human rights, better integration of the work by other treaty bodies into the overall framework of human rights treaty monitoring would be achieved through the election of some of their members to the new Human Rights Committee, or, conversely, through the election of some Human Rights Committee members to serve simultaneously on the more specialized committees. The specialized treaty bodies would thereafter operate as 'satellite' bodies of the new Human Rights Committee.

The treaty body reform as outlined in the report would have many advantages. It would result in the professionalization of treaty body membership and the better integration of the work of all treaty bodies with each others. Moving towards better coordination of state reporting to the various treaty bodies would be greatly enhanced, inter alia through joint reporting guidelines or, where appropriate, even joint reports.

The partly merged and partly integrated new treaty body structure could very well be coupled with the creation of a fully judicial World Court of Human Rights. 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.

*Why States will ratify the Statute of the World Court of Human Rights*

There are at least four reasons why States should ratify the Statute. Firstly, many States wish to demonstrate their unwavering commitment to human rights, and elevating the global protection of human rights to a qualitatively new level by establishing the Court will be an important way to demonstrate that commitment.

Secondly, many States wish to see more consistency in the application of human rights law. Bringing all United Nations human rights treaties within the jurisdiction of a single human rights court that will simultaneously apply all treaties accepted by the State in question, and in so doing, where necessary, resolve any tensions between the various human rights treaties, will greatly enhance the coherence and consistency in the application of human rights treaties.

Thirdly, this will improve foreseeability and legal certainty, as the World Court will be a fully judicial institution with highly qualified full-time judges.

And fourthly, States should welcome the initiative of expanding the binding force of human rights norms beyond States only, to cover also international organizations, transnational corporations and other Entities subject to the jurisdiction of the Court.

#### *Extending the jurisdiction of the World Court to 'Entities'*

As listed in article 6 of the Statute, the various actors that, besides States and jointly called 'Entities' in the Draft Statute, could accept the jurisdiction of the Court, are the following:

- a) International organizations constituted through a treaty between States, or between States and international organizations;
- b) Transnational corporations, i.e. business corporations that conduct a considerable part of the production or service operations in a country or in countries other than the home State of the corporation as a legal person;
- c) International non-governmental organizations, i.e. associations or other types of legal persons that are not operating for economic profit and conduct a considerable part of their activities in a country or in countries other than the home State of the organization as a legal person;
- d) Organized opposition movements exercising a degree of factual control of 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
- e) 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.

Of these categories of Entities, the last one is subject to a requirement that the territorial state(s) must give its consent to the declaration by an autonomous community to accept the jurisdiction of the Court (article 59, paragraph 4).

For each type of Entities, there are very real reasons why they can be expected to accept the jurisdiction of the Court, hence making their operation accountable when it affects the enjoyment of human rights to a degree that is by those affected considered a violation of their human rights. Within international organizations, including among their chief officials, staff and governmental representatives serving on their decision-making bodies, there is growing uncertainty about the proper place of human rights norms in the operation of intergovernmental organizations. These organizations, their organs and operations, are subject to increasing criticism as to their lack of commitment to or compliance with human rights norms. International financial institutions and the United Nations Security Council, for instance, are receiving their part of the criticism. There are increasing calls for subjecting international organizations to some sort of judicial, or at least independent, review as to their compliance with human rights. Domestic courts and regional human rights courts, in turn, may hold individual States to account for their action within international organizations, or for the implementation of decisions by international organizations, at least as long as there is no regime of equivalent protection of human rights in respect of the acts of the organization itself.

For business corporations, the ultimate driving force for making the acceptance of the Court's jurisdiction attractive, will be the comparative competitive advantage it will provide for companies that accept external human rights review. The creation of the World Court and the inclusion of the possibility of business corporations accepting the jurisdiction of the Court under article 8, will greatly enhance the possibilities of consumer, labour, environmental and human rights organizations to campaign for corporations to accept the jurisdiction of the Court. Once certain key businesses accept the Court's jurisdiction, such acceptance will become a competitive advantage for any corporation.

The inclusion of autonomous communities within the range of Entities that may accept the jurisdiction of the Court, would enable international adjudication by highly qualified independent judges as to whether a group violates the human rights of its members. Such concerns may be among the chief obstacles for States delegating or recognizing the exercise of powers by autonomous groups. The proposal would at the same time secure accountability for human rights violations and avoid giving the final say to the organs of the State. It is expected that in many cases relevant groups would, in agreement with the nation State in question, designate courts of the State as remedies that need to be exhausted before taking a case to the World Court. Nevertheless, 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.

#### *Relationship with regional human rights courts*

According to the proposal, the World Court would not replace regional human rights courts, compete with them, or become an appeal instance with them. The strengthening of regional human rights systems, including by the creation and

through the work of regional human rights courts, serves a genuine need of human rights protection in the regions.

The proposed model is based on the 'same matter' rule, i.e. on the necessity of the complainant to choose whether to submit a case to a regional human rights court or the proposed World Court. Hence, Article 13, paragraph 1 (d), of the Draft Statute includes among the admissibility conditions before the World Court that the same matter is not pending before any other human rights complaints body and has not been finally decided by a regional human rights court with legally binding jurisdiction. Therefore, the initiation of a case before the African Court of Human and Peoples' Rights, the European Court of Human Rights or the Inter-American Court of Human Rights will automatically and indefinitely close the access to the World Court in the same matter. In line with the jurisprudence under existing human rights treaties, 'same matter' refers to a case where both the legal issues and the parties are the same.

The advantages of the proposed model are that it 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.

What is of course lost in the proposed relationship of subsidiarity in respect of regional human rights courts is the role of the World Court to secure overall coherence into the application of human rights across the world and irrespective of regional particularities. Human rights are, and should remain, universal in nature. It is realistic to expect that a satisfactory and gradually close to perfect degree of coherence will be possible to reach through close interaction between the World Court and regional human rights courts. This interaction may take many forms but real-time exchange of jurisprudence and regular colloquia both on judicial and on registry level will be key elements to success.

Human rights: The Office of the High Commissioner for Human Rights should be strengthened with more resources and staff, and should play a more active role in the deliberations of the Security Council and of the proposed Peacebuilding Commission. The human rights treaty bodies of the UN system should also be rendered more effective and responsive. Democracy: A Democracy Fund should be created at the UN to provide assistance to countries seeking to establish or strengthen their democracy. 4. Scheinin, M. Towards a World Court of Human Rights. 2009 - European University Institute. In-text: (Scheinin, 2009). Your Bibliography: Scheinin, M. (2009). Towards a World Court of Human Rights. European University Institute. [online] Available at: <http://www.eui.eu/Documents/DepartmentsCentres/Law/Professors/Scheinin/WorldCourtReport30April2009.pdf> [Accessed 30 Dec. 2015]. Journal. Schick, K. Beyond Rules: A Critique of the Liberal Human Rights Regime. 2006 - International Relations. Your Bibliography: The United Nations Human Rights System: How to Make it Work For You. (2008). Office of the High Commissioner for Human Rights, [online] 08-51359(2). Available at: [http://www.un-ngls.org/IMG/pdf/Final\\_logo.pdf](http://www.un-ngls.org/IMG/pdf/Final_logo.pdf) [Accessed 30 Dec. 2015]. E-book or PDF. of Human Rights, all indications suggest that the continent is moving towards creating such a judicial body.<sup>11</sup> The African Charter on Human and Peoples' Rights entered into force on October 21, 1986.<sup>12</sup> Even more encouraging was the adoption on June 9, 1998, of a Protocol to the African Charter on Human and Peoples' Rights establishing an African Court on Human and Peoples' Rights. Next, I want to turn to a very pragmatic question: is there a chance for a world court of human rights to come into existence? C. Does a World Court for Human Rights Stand a Chance? ¶ 11 I confess that I have rather serious doubts as to whether, at the present time, the idea of creating a new world court for human rights stands much of a chance.