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**Discussing the Draft Statute of the World Court of Human Rights (2010) as a
Replacement for the UN Treaty Bodies' Individual Communications Procedures**



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BA Thesis

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DECLARATIONS

I hereby declare that I am the sole author of this thesis and it is the product of my own research.

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It is hereby confirmed that in my judgement this thesis meets the requirements for a B.A. degree in Law at the Faculty of Law and Social Science.

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ABSTRACT

A few of the main arguments for a World Court of Human Rights are the geographic void in international human rights protection, the need to strengthen the law on the responsibility of Transnational Corporations to respect human rights, and the weak enforceability of international human rights. Recent global issues such as the financial crises and the Arab Spring have caused international human rights protection to come under increasingly intense scrutiny.

In addition to the various existing international human rights instruments, Julia Kozma, Manfred Nowak, and Martin Scheinin have drafted a Consolidated Statute to establish a World Court of Human Rights with an indicative preamble and seven provisional chapters. Analysis of the effectiveness and usefulness of the World Court constitutes the core focus of this research project in light of individual communications within the UN human rights treaty system. In particular, this discussion will assess the World Court's potential impact as a replacement for the current UN treaty based communications procedures.

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Alan Omogbai*

1. Introduction

This paper concerns the implementation of international human rights. It will analyse the proposed World Court's procedure¹ as a replacement for the UN treaty bodies' communication procedures². The central question is as follows: To what extent does the Consolidated Draft Statute of the World Court of Human Rights (2010) present itself as a suitable replacement for the current individual communications procedures under the UN treaty bodies? This discussion is timely because various treaty system reforms have been proposed recently but none have given sufficient attention to the specific change required in the communications procedures.³ Since the Draft Statute's consolidation, literature in this area has been scarce.⁴ Trechsel⁵ argued against the establishment of a World Court;⁶ following the Arab Spring and financial crises, this is an appropriate time to reassess his view.⁷

Methodology

Background reading on the international human rights and international law principles was

* 220919914079; Many thanks to Dr Rachael Lorna Johnstone for her supervision. The errors are entirely the author's own.

1 (Draft) Statute of the World Court of Human Rights 2010; Kozma J., Nowak M., & Scheinin M. 'A World Court of Human Rights: Consolidated statute and commentary' (2010) NWV, Neuer Wissenschaftlicher Verlag.

2 See annex 1

3 Pillay, N., 'Strengthening the United Nations Human Rights Treaty Body System' (June 2012) UNHCHR Report, p.4, para.4

4 Kirkpatrick, J, 'A Modest Proposal: A Global Court for Human Rights', J. Hum. Rts. (forthcoming) p.2, para.2

5 Stefan Trechsel, ICTY judge

6 Trechsel, S. 'World Court for Human Rights' (2004) A. Nw. Univ. J. Int'l Hum. Rts., 1, i., para. 70: "neither desirable, nor necessary, nor probable"

7 Bassiouni M. C., Schabas W. A., 'New Challenges for the UN Human Rights Machinery: What Future for the UN Treaty Body System and the Human Rights Council Procedures?' (2011) Intersentia Uitgevers N.V.: Nowak, M. 'It's Time for a World Court of Human Rights', p.27, para. 2

followed by studies into the various international human rights systems. Subsequent research into UN human rights highlighted the role of the treaty system's communications procedures. The Human Rights Council, the Security Council, and other international⁸ and regional systems⁹ outside the UN treaty system will not be covered.

Hypothesis: In summary

Regarding the World Court as a replacement for the UN treaty system's individual communications procedures, the key arguments are as follows: The Committees have improved domestic implementation of human rights but are inherently restricted by their political and compartmentalised nature.¹⁰ They were not intended to carry out judicial functions but rather given a mere supervisory role so that States parties appear willing to satisfy international human rights objectives and often final views conflict or overlap with each other.¹¹ Treaty body views inevitably lack the legal weight to enforce States' human rights obligations.¹² The World Court procedure would consolidate all the Committee communication procedures into one and provide added legal weight through Court judgements.¹³ However, it does not tackle completely the domestic implementation gap and political nature of the current system. Therefore, the WCHR is desirable but it is an impractical and unnecessary substitute.¹⁴

2. UN Treaty Bodies' Individual Communications Procedures

There are nine main UN human rights treaties.¹⁵ Each of them has their own monitoring body.¹⁶ Eight of the ten Committees can hear individual communications.¹⁷ Any individual can bring complaints to these Committees for a violation of their right provided in the respective UN human rights treaty.¹⁸ With exceptions, communications can be on behalf of another, with his or her consent;¹⁹ they must concern States parties who recognise the relevant Committee's competence to hear individual communications.²⁰

In all cases, States parties can prohibit individual petitions for human rights violations and,

8 International Criminal Court and Tribunals

9 Human Rights instruments: European and American Conventions, and the African Charter and their mechanisms

10 Bassiouni M. C., Schabas W. A., *'New Challenges for the UN Human Rights Machinery: What Future for the UN Treaty Body System and the Human Rights Council Procedures?'* (2011) Intersentia Uitgevers N.V.: Bassiouni, M. C., *'A Critical Introduction Assessment of the UN Human Rights Mechanisms'*, p.6, para. 3

11 Johnstone, R. L., *'Cynical Savings or Reasonable Reform? Reflections on a Single Unified UN Human Rights Treaty Body'* (OUP, 2007) HRLR 7:1, p.175, para.3; p.181

12 Bassiouni M. C., Schabas W. A., *'New Challenges for the UN Human Rights Machinery: What Future for the UN Treaty Body System and the Human Rights Council Procedures?'* (2011) Intersentia Uitgevers N.V.: Schabas W. A., *'On the Binding Nature of the Findings of the Treaty Bodies'*, p.105, para. 2

13 Kozma J., Nowak M., & Scheinin M. *'A World Court of Human Rights: Consolidated statute and commentary'* (2010) NWV, Neuer Wissenschaftlicher Verlag., p.35, para.3

14 See n.6

15 See annex 1

16 Ibid.

17 See annex 2

18 Example: OP-ICCPR 1966, Article 2

19 Complaints Procedures <<http://www2.ohchr.org/english/bodies/petitions/#communications>> accessed 1 April 2013, section entitled 'Individual Communications'

20 Example: OP-ICCPR 1966, Article 1

thus, continually restrict domestic implementation of certain rights according to the extent of their political will.²¹ This has been a contributing factor to reform proposals which have intensified since the 2009 Dublin Meeting.²² The proposals' potential to improve domestic implementation is limited by the subjection of international human rights law to national political will.²³ Therefore, international changes are insufficient to address the failed domestic implementation which is beyond treaty body competence.²⁴ Committees primarily function in supervisory roles monitoring States parties whom submit reports.²⁵ Several UN human rights treaties also allow inter-State complaints but these procedures have not been used.²⁶ Nonetheless, States receive an information overload (recommendations, concluding observations and final views) which hinders the ease of domestic implementation.²⁷

Process Overview

As a prerequisite, the communication must be considered admissible. In order to be considered admissible, the main criteria are that the communication must have exhausted all available domestic remedies, the alleged violation must concern a right related to the respective treaty, and the State party must recognise the treaty's competence to hear individual communications.²⁸ The relevant Committee then informs the accused State and requests a written response on the admissibility and merits of the case. If necessary, the complainant may then send more information before the Committee decides on the admissibility and merits. Subsequently, the treaty body decides whether the right enshrined in the respective treaty has been violated and then determines the required State remedies. Written submissions are kept confidential but the Committee's final views are published.²⁹

Major developments of the treaty body individual communications procedures include: firstly, manoeuvring the inter-state nature of public international law; secondly, its impact on the role and status of Committees, *vice versa* and the Human Rights Committee's success (HRCttee); finally, the entry into force of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR).

Key Achievements

The individual communications procedures have added legal weight to the treaty system by extending public international law, beyond inter-state relations, in an attempt to make States accountable for their human rights obligations.³⁰ A complaints procedure restricted to inter-state complaints is detrimental to the human rights implementation and enforcement.³¹ Inter-state complaints are rare in human rights systems; they are generally politically motivated and have never been used within the UN treaty system.³² The lack of

21 See n.20; n.4, p.11, para. 4

22 Ibid.; also see n.3

23 See n.4

24 Bayefsky, A. *'The UN Human Rights Treaty System: Universality at the Crossroads'* (2001) Bayefsky Report conducted in collaboration with the Office of the UN High Commissioner for Human Rights; p.92, para.6

25 Smith R. K. M., *'Textbook on international human rights'* (2007) Oxford: Oxford University Press., p.139, para.2

26 Ibid. p.140

27 Ibid. p.141; p.156 – 7

28 See n.20, article 3-6

29 See n.19

30 See n.12

31 Ibid.

32 See n.26

inter-state complaints implies that without the possibility of individual communications, victims would be unable to enjoy their right to an effective remedy for a violation of their UN human rights.³³ Moreover, apart from low frequency periodic reports,³⁴ specific supervision for State implementation of the human rights treaties would be debilitated.³⁵ Therefore, the introductions of individual communications to treaty bodies have been necessary for stronger implementation of the UN human rights treaties.³⁶

Scheinin and Langford argue that individual communications have helped Committees, which are competent to hear individual communications, to evolve into quasi-judicial organs.³⁷ Committee decisions comprise the case law on the respective treaty which ought to be binding on all States party to the treaty, regardless of whether they recognise the Court's competence to consider individual communications.³⁸ However, final views lack strict binding power and their usefulness is limited to the political will of the States parties, also enforcement of final views is restricted by the void of national human rights institutions.³⁹

Recent domestic case-law has held that a quasi-judicial body has the power to exercise judgement and discretion; the power to hear and determine or to ascertain facts and decide; the power to make binding orders and judgements; the power to affect the personal or property rights of private persons; the power to examine witnesses, to compel the attendance of witnesses, and to hear the litigation of issues on a hearing; and the power to enforce decisions or impose penalties.⁴⁰ Therefore, Committees should not be regarded as quasi-judicial bodies because they do not satisfy the criteria completely. Final views are not binding and the Committees lack the capacity to enforce their views or impose penalties.⁴¹ Most importantly, international law stipulates that States can only be bound by what they agree to so it is asserted that treaty bodies have not acquired quasi-judicial status.⁴² Rather the eight Committees, which have competence to consider individual communications, remain administrative bodies and it is their views which are becoming increasingly quasi-judicial as they sporadically gain persuasive authority in domestic legal proceedings.⁴³

33 Nowak, M. *The Need for a World Court of Human Rights* (2007) 7 Hum. Rts. L. Rev. 251, p.5, para.2

34 See annex 3

35 Johnstone, R. L., *'Cynical Savings or Reasonable Reform? Reflections on a Single Unified UN Human Rights Treaty Body'* (OUP, 2007) HRLR 7:1, p.175, para.3: State reports constitute most of a Committee's monitoring work

36 Ibid. para.1

37 Scheinin, M., Langford M., *'Evolution or Revolution? - Extrapolating from the Experience of the Human Rights Committee'* (2009) Vol. 27, NR 1, S. 97–113, p.108, para.3

38 Nollkaemper, A., van Alebeek, R., *'The Legal Status of Decisions by Human Rights Treaty Bodies in National Law'* (2011) ACIL No. 2011-02, p.56, paras.2-3

39 Ibid; Kozma J., Nowak M., & Scheinin M. *'A World Court of Human Rights: Consolidated statute and commentary'* (2010) NWV, Neuer Wissenschaftlicher Verlag., p.29

40 *Perdue, Brackett, Flores, Utt & Burns v. Linebarger, Goggan, Blair, Sampson & Meeks, L.L.P.*, 291 S.W.3d 448 (Tex. App. 2009)

41 Evidence: OP-ICCPR 1966, Article 5 (4): may forward views but no mention of binding power or enforcement;

Kavanagh v Governor of Mountjoy Prison [2002] IESC 11 (1 March 2002)(Supreme Court of Ireland):

“Neither the Covenant nor the Protocol at any point purports to give any binding effect to the views expressed by the Committee.”

42 Smith R. K. M., *'Textbook on international human rights'* (2007) Oxford: Oxford University Press., p.146

43 Viljoen, F. *'Fact-Finding by UN Human Rights Complaints Bodies – Analysis and Suggested Reforms'* (2005) A. von Bogdandy and R. Wolfrum, (eds.), Max Planck UNYB 8, 49-100, p.62, para. 1: “quasi-judicial working methods”; Johnstone, R. L., *'Cynical Savings or Reasonable Reform? Reflections on a Single Unified UN Human Rights Treaty Body'* (OUP, 2007) HRLR 7:1, p.190, para.3: “quasi-judicial judgements”

Thanks to individual communications, the Committees have found over 600 violations in the face of unsynchronised introductions of the procedure to various treaty bodies.⁴⁴ By early 2010, the average amount of decided violations had improved by 17% from the 2009 average.⁴⁵ This cannot be credited solely to the Committees' ability to find violations because the total number of complaints in 2010, submitted to the HRCtee alone, was 41% greater than that of 2009.⁴⁶

Although individual communications do not necessarily lead to remedies,⁴⁷ the persuasive authority given to final views increases the influence of Committees' human rights interpretations which contributes towards the 'universal respect' objective.⁴⁸ Australian case-law remarked that final views should be regarded as the opinions of the expert body empowered to monitor the fulfilment of the rights enshrined in the respective treaty and these opinions are to be considered when constructing that treaty.⁴⁹ Consequently, the procedure adds legal weight which supports domestic implementation of the human rights treaties.⁵⁰ Although the consideration of individual communications is the Committees' youngest and most ancillary role, its introduction should be considered as a significant achievement in itself.⁵¹

The HRCtee has decided over 500 of the estimated 600 violations of UN human rights treaties.⁵² Its success can be attributed to its jurisprudence which has helped to clarify what constitutes sufficient proof for reported violations.⁵³ Developing a body of jurisprudence is impossible without the competence to hear individual complaints so the success can also be explained by the fact that it has the highest number of States parties allowing it to hear individual complaints.⁵⁴ Furthermore, the ICCPR covers the most basic and commonly held rights such as the right to life and freedom of expression.⁵⁵

The HRCtee's success could inspire the Committee on Economic, Social and Cultural Rights (CESCR) which requested the competence to consider individual communications over 22 years ago.⁵⁶ The ratification of the OP-ICESCR gives greater symmetry to the treaty system; this is important because it begins to reflect the progressive full realisation

44 HRC, CERD, CAT, CEDAW; Nollkaemper, A., van Alebeek, R., *The Legal Status of Decisions by Human Rights Treaty Bodies in National Law* (2011) ACIL No. 2011-02 p.8, para.2

45 Kjørsum, A., *The Treaty Body Complaint System* (October, 2010) Hum Rts. Q., p.1, para.3

46 Individual Human Rights Complaints Handled by the UN: Few and Very Far Between
<http://www.humanrightsvoices.org/EYEontheUN/un_101/facts/?p=54> accessed 1 May 2013

47 Johnstone, R. L., *Cynical Savings or Reasonable Reform? Reflections on a Single Unified UN Human Rights Treaty Body* (OUP, 2007) HRLR 7:1, p.176, para.1

48 Ibid. p.190, para.2

49 *Minister for Immigration and Multicultural and Indigenous Affairs v B* [2004] HCA 20, at paras 147-155. Kirby J.

50 See n.12

51 See n.47

52 Nollkaemper, A., van Alebeek, R., *The Legal Status of Decisions by Human Rights Treaty Bodies in National Law* (2011) ACIL No. 2011-02 p.8, para.2

53 See n.45

54 United Nations Treaty Collection <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&lang=en> accessed 1 May 2013: OP-ICCPR has 114 ratifications

55 Individual Human Rights Complaints Handled by the UN: Few and Very Far Between
<http://www.humanrightsvoices.org/EYEontheUN/un_101/facts/?p=54> accessed 1 May 2013

56 Melish, T. J., *Introductory Note to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* (2009) 48 ILM 256 p.258 (3), para. 2

of rights which underpins the ICESCR's existence.⁵⁷ Furthermore, this development complies with the equality of rights doctrine which is central to the ideal of human dignity.⁵⁸ Preventing communications for alleged violations of certain rights does not reflect the universality, indivisibility, interdependence, interrelation or equality of rights so the OP-ICESCR is a monumental development in international human rights.⁵⁹ This change implies that all generations of rights will be able to receive some protection under the treaty system.

Conclusion

In summary, the introduction of the individual communications procedure itself is a key development for the treaty system's ability to encourage stronger implementation of the human rights treaties but it does not escape the system's political nature. The HRCtee's success has not been, and most probably will not be repeated by any other committee. The overdue ratification of the OP-ICESCR will not be useful if the mechanism lacks an effective model to replicate so more attention must be given specifically to the individual complaints procedures. The status of treaty bodies and the communication procedures must be clarified because confusion over the judicialisation or quasi-judicialisation of Committees may prevent effective implementation of human rights. Nonetheless, the complaints procedure has had important developments which help to encourage State implementation of the UN human rights treaties. The next question to be answered is whether these achievements outweigh the problems caused by the nature of the treaty system.

3. Current Problems

Overview

The main problems of the individual communications are present throughout the complaints process. They include inadequate accessibility, lack of coherence and cohesion, and ineffective remedies. Inadequate accessibility problems include inadmissibility rates, caseload backlogs, and unsatisfactory interaction. The lack of coherence and cohesion are mainly exhibited in the compartmentalised design of the treaty system. Ineffective remedies relate to the implementation of final views, as well as the need for non-repetition measures and clearer follow-up procedures.

Inadequate accessibility

A. Inadmissibility

The inadmissibility rate remains relatively high at 34% because the admissibility criteria are unclear so victims lack awareness and understanding of the complaints procedures.⁶⁰ Although 34% is not as high as the European Court of Human Rights (ECtHR) inadmissibility rate,⁶¹ in each of the past few consecutive years, the ECtHR has been able to deliver over a thousand judgements notwithstanding its increasing inadmissibility rate.⁶² Therefore, the effect of inadmissibility is more visible with the Committees' low number of

⁵⁷ Ibid. p.1, para.6

⁵⁸ Affirmed by the 1993 Vienna World Conference on Human Rights, U.N. Doc. A/CONF.157/PC/62/Add.5

⁵⁹ Ibid.

⁶⁰ Kjærsum, A., *'The Treaty Body Complaint System'* (October, 2010) Hum Rts. Q., p.1, para.3

⁶¹ Registry of the European Court of Human Rights, 'European Court of Human Rights: Annual Report 2012' (Strasbourg, 2013), p.6 Table 1 (3): 70%

⁶² Ibid, p.9, figure 6

complaints.⁶³ If such inadmissibility rates continued, the effectiveness of the treaty-based complaints system will be depleted significantly because Committees already lack the power to enforce their decisions and impose penalties, unlike the ECtHR.⁶⁴

A webpage has been proposed to publicise all the relevant information and create a treaty system database which should increase the visibility of the procedure and, thus, decrease inadmissibility rates as the public's understanding of the procedure improves.⁶⁵ To further improve the understanding of the procedure, this proposal requires some synchronisation of Committee jurisprudence which has been somewhat non-existent because it goes against treaty bodies' compartmentalised design.⁶⁶ To that extent, the database is impractical, and more specific change is required to address high inadmissibility rates. Committees should utilise all opportunities in their jurisprudence to clarify the interpretation of admissibility criteria.⁶⁷ Otherwise, inadmissibility rates will remain at detrimental levels and would increase as the number of States parties rises.⁶⁸

B. Caseload

Under-resourcing is a key contributing factor to a severe backlog of cases.⁶⁹ On average, complainants wait 45 months before their communications are considered which limits efficiency and restricts the availability of the complaints procedure.⁷⁰ Adjacently, whilst the HRCtee and CAT suffer from such backlogs of cases, other treaty bodies including the CERD and CEDAW are unable to utilise the procedure.⁷¹ Ideally, all the main treaty bodies should be able to handle the same number of complaints but this is not the case. The HRCtee meets three times a year for three weeks which is more than any other Committee and it has eighteen experts which is second only to the CEDAW. However, the CEDAW meets only once a year for two weeks, and the CAT has only 10 members and meets for two four week sessions.⁷² Therefore, it is unrealistic to expect these less developed treaty bodies to handle the same amount of complaints as the HRCtee because they are restricted by low ratification figures, less broad rights, younger communication procedures, and they either have less time to meet or substantially less personnel.⁷³

Nonetheless, States parties should work harder to increase awareness of the mechanism's increasing availability. Failure to do so will result in persistent underutilisation of the procedure before treaties other than the HRCtee, and could cause a continual void of protection for the rights governed by those less established mechanisms.⁷⁴ Availability of

63 See n.46

64 Public Relations Unit, 'The ECHR in 50 questions' (July, 2012) pp.9-10

65 Pillay, N., '*Strengthening the United Nations Human Rights Treaty Body System*' (June 2012) UNHCHR Report, p.71, para.1 (4.33.)

66 See n.10

67 See n.60

68 Johnstone, R. L., '*Cynical Savings or Reasonable Reform? Reflections on a Single Unified UN Human Rights Treaty Body*' (OUP, 2007) HRLR 7:1, p.179, para.2

69 Kjærum, A., '*The Treaty Body Complaint System*' (October, 2010) Hum Rts. Q., p.1, para.2

70 Ibid. para.4

71 See n.55

72 Human rights bodies <<http://www.ohchr.org/en/hrbodies/Pages/HumanRightsBodies.aspx>> accessed 1st April 2013

73 Individual Human Rights Complaints Handled by the UN: Few and Very Far Between <http://www.humanrightsvoces.org/EYEontheUN/un_101/facts/?p=54> accessed 1 May 2013

74 Bassiouni M. C., Schabas W. A., '*New Challenges for the UN Human Rights Machinery: What Future for the UN Treaty Body System and the Human Rights Council Procedures?*' (2011) Intersentia Uitgevers N.V.: Bassiouni, M.

the procedure before treaty bodies which are not provided with the capacity to hear a substantial amount of complaints renders the procedure ineffective. Such availability should be regarded as superficial attempts by States parties to appear concerned about improving domestic implementation of international human rights.⁷⁵ It reflects a lack of political will to promote certain rights due to the nature of increased positive obligations which they impose upon States.⁷⁶ Consequently, though States parties agree to recognise treaty body competence to hear individual petitions under such treaties, in practice, complete state cooperation may not be forthcoming without fully fledged judicial enforcement at the domestic level which is beyond the capacity of the treaty bodies.⁷⁷

C. Interaction

The Committee and State

The relationship between the Committee and the State, specifically regarding the individual communications procedure, is not conducive for effective implementation and enforcement of the UN human rights treaties.⁷⁸ Committees operate as administrative entities because they have no enforcement powers to impose sanctions, fines or award damages.⁷⁹ As administrative bodies they are responsible for the implementation of their respective human rights treaty but they lack the required capacity which ultimately rests with the State parties.⁸⁰ The classification of Committees as quasi-judicial bodies conflicts with the theoretical universal standard of implementation according to which they have no decision-making powers.⁸¹ In practice however, their views are acquiring quasi-judicial status as they gain persuasive authority in some domestic courts so they begin to look similar to judgements.⁸² Evidently, although the Committees are responsible for implementation of the human rights treaties, both implementation and enforcement of those rights depends on the will of the States parties.

Inevitably, however, the legal capacity and political will to engage in full cooperation with treaty bodies varies between States which impedes 'universal respect' for human rights provided in the UN treaties.⁸³ The dependence on political will prevents effective implementation and enforcement, and this Committee-State relationship limits the victim's involvement in the process.⁸⁴ This could have a detrimental effect on the complete

C., 'A Critical Introduction Assessment of the UN Human Rights Mechanisms', p.5, para.2

75 Smith R. K. M., 'Textbook on international human rights' (2007) Oxford: Oxford University Press., p.159

76 Ibid.

77 Berlin Conference, 'Final Report on the Impact of Findings on the United Nations Human Rights Treaty Bodies' (2004) International Law Association, p.3, para.8

78 Bassiouni M. C., Schabas W. A., 'New Challenges for the UN Human Rights Machinery: What Future for the UN Treaty Body System and the Human Rights Council Procedures?' (2011) Intersentia Uitgevers N.V.: Bassiouni, M. C., 'Strengthening of the UN Treaty Bodies Complaint Procedures: Elements for a reform Agenda from an NGO Perspective', p.223, para.4

79 See n.41

80 Johnstone, R. L., 'Cynical Savings or Reasonable Reform? Reflections on a Single Unified UN Human Rights Treaty Body' (OUP, 2007) HRLR 7:1, p.175-6, p.190

81 See n.43

82 Johnstone, R. L., 'Cynical Savings or Reasonable Reform? Reflections on a Single Unified UN Human Rights Treaty Body' (OUP, 2007) HRLR 7:1, p.190

83 Berlin Conference, 'Final Report on the Impact of Findings on the United Nations Human Rights Treaty Bodies' (2004) International Law Association, p.6, para.1 (21)

84 Bassiouni M. C., Schabas W. A., 'New Challenges for the UN Human Rights Machinery: What Future for the UN Treaty Body System and the Human Rights Council Procedures?' (2011) Intersentia Uitgevers N.V.: Bassiouni, M. C., 'Strengthening of the UN Treaty Bodies Complaint Procedures: Elements for a reform Agenda from an NGO Perspective', p.223, para.3

reparation for harm caused by the violation of a right contained in the respective treaty.⁸⁵ Therefore, the Committee-State relationship must be more victim-focused.⁸⁶

The Committee, State and victim

Inequality of arms between the State and the victim contributes to the inadequacy of accessibility to the complaint procedures.⁸⁷ It is argued that the procedures have communication and cost barriers.⁸⁸ Legal representation is not necessary but it usually enhances the quality of complaints, although legal aid is not provided.⁸⁹ In practice, almost all applicants are usually afforded representation through an NGO, but the other complainants without legal representation usually lack knowledge of the legal language capable of forming a successful communication.⁹⁰ Therefore, the void of legal representation can create a communication barrier because the communications of complainants without access to a lawyer are less likely to reach the merits stage.⁹¹ The lack of legal aid can also form a cost barrier as access for an effective legal remedy would be more available to those who can afford legal representation.⁹² Subsequently, more should be done to address these barriers in such a way that will increase the treaty system's capacity to address as many human rights violations as possible.

The inequality of arms is aggravated by the predominantly written rather than oral form of procedures because the State enjoys superior financial resources and access to information especially within the written procedures.⁹³ The immediacy of oral hearings gives the Committee and the victim a greater chance to inform each other directly, which provides the Committee with more information to determine effectively whether violations have occurred.⁹⁴ Subsequently, oral hearings are the more effective tool to improve the victim's accessibility to the procedure and balance out the inequality of arms between victims and the State.⁹⁵

Civil society participation

It is submitted that the introduction of public oral hearings could pose an additional advantage because they increase civil society's accessibility to treaty bodies, and enhance the procedure's transparency and visibility.⁹⁶ In addition to the independent restorative effect that an oral hearing can have by granting victims a judicial audience, public oral hearings make the States parties accountable to the international civil society as a whole which also helps to balance out the inequality of arms.⁹⁷ This could prove to be a very

85 Ibid.

86 Ibid. p.197

87 Ibid. p.197

88 Ibid. p. 202

89 Ibid. p.201

90 Bassiouni M. C., Schabas W. A., 'New Challenges for the UN Human Rights Machinery: What Future for the UN Treaty Body System and the Human Rights Council Procedures?' (2011) Intersentia Uitgevers N.V.: Bassiouni, M. C., 'Strengthening the Role of Stakeholders (Civil Society)', p.174, para.1

91 Bassiouni M. C., Schabas W. A., 'New Challenges for the UN Human Rights Machinery: What Future for the UN Treaty Body System and the Human Rights Council Procedures?' (2011) Intersentia Uitgevers N.V.: Bassiouni, M. C., 'Strengthening of the UN Treaty Bodies Complaint Procedures: Elements for a reform Agenda from an NGO Perspective', p.199, para.3

92 Ibid.

93 Ibid. p. 205, para.3

94 Ibid. p.207, para.1

95 Ibid. para.2

96 Ibid. p.208, para.1

97 Ibid. p.207-8, para.3; HRCtee, General Comment No. 13, op. Cit., para. 6

powerful encouragement for complainants who may otherwise feel intimidated.⁹⁸

Lack of coherence

Much debate surrounds the current system's lack of cohesion but the lack of coherence is a major problem also. The treaty bodies should be more coherent so that the Committees can benefit from each other in order to improve the implementation and enforcement of their respective human rights treaties, and draw closer to universal respect for human rights.⁹⁹ However, it is submitted that single treaty body proposals for greater cohesion can be problematic because the treaty system's design is inherently compartmentalised; the treaty bodies are autonomous and merely connected by location and value-oriented goals.¹⁰⁰ Major reform proposals have called for a great deal of deliberation which has failed to produce any relevant development to date.¹⁰¹

Inconsistency and legal uncertainty are created by the Committees' incoherence and lack of cohesion which are exhibited in the lack of procedural rules or common guidelines for the communications procedures.¹⁰² This threatens the effective implementation and enforcement of human rights treaties because differences in what constitutes good practice will determine the extent to which each Committee will protect the rights guaranteed under its respective treaty. Such discretion may be in place to allow flexibility to cover unprecedented violations but the inconsistency conflicts with the universality, interdependence and indivisibility of rights. The treaty bodies must be held accountable to a certain standard in order to ensure that they perform their own duties effectively as governing bodies of the UN human rights treaties, and as monitors for their implementation by States parties.

The introduction of the individual communication procedure to the CESCR is a significant development because it brings symmetry to international human rights law.¹⁰³ However, not all states which have ratified the first protocol to the ICCPR have ratified the OP-ICESCR, so States continue to imply by conduct that there are different generations of rights which deserve different levels of protection.¹⁰⁴ Therefore, the development fails to address completely the indivisibility and interdependence of rights. Furthermore, the formal introduction of the friendly settlement procedure to the individual communications procedure demonstrates the inconsistency between treaty bodies because this procedure is available before no other treaty body.¹⁰⁵ In cases where this procedure is utilised before

98 Ibid.

99 Pillay, N., *'Strengthening the United Nations Human Rights Treaty Body System'* (June 2012) UNHCHR Report, p.25, para.4 (2.3.5.)

100 Bassiouni M. C., Schabas W. A., *'New Challenges for the UN Human Rights Machinery: What Future for the UN Treaty Body System and the Human Rights Council Procedures?'* (2011) Intersentia Uitgevers N.V.: Bassiouni, M. C., *'A Critical Introduction Assessment of the UN Human Rights Mechanisms'*, p.5, para.2

101 Pillay, N., *'Strengthening the United Nations Human Rights Treaty Body System'* (June 2012) UNHCHR Report, p.10, para.3

102 See n.99

103 Melish, T. J., *'Introductory Note to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights'* (2009) 48 ILM 256 p.256 (1), para. 1

104 OP-ICESCR, <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3-a&chapter=4&lang=en> accessed 1st of May 2013; OP1-ICCPR, <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&lang=en> accessed 1st of May 2013

105 OP-ICESCR 2008, article 7; Bassiouni M. C., Schabas W. A., *'New Challenges for the UN Human Rights Machinery: What Future for the UN Treaty Body System and the Human Rights Council Procedures?'* (2011) Intersentia Uitgevers N.V.: Bassiouni, M. C., *'Strengthening of the UN Treaty Bodies Complaint Procedures:*

other treaty bodies, it may cause uncertainty as to how best to use an unfamiliar mechanism to bring about an effective remedy.¹⁰⁶

Ineffective remedies

With regard to the effectiveness of remedies, on the one hand is the incapacity of Committees to provide effective remedies in practice. On the other hand, is the capacity and political will of States parties.¹⁰⁷ Effective remedies include interpretation of rights in Committee final views, follow-up measures, non-repetition measures and reparations.¹⁰⁸

A. The role of Treaty bodies

It is difficult for Committees to institute completely effective reparation measures in their final views because they lack the authority to do so. Consequently, the communication procedures fail to uphold the legal principles of certainty and clarity which have a significant impact on the establishment of a clear follow-up process.¹⁰⁹ Guidelines provided in final views are often insufficient to ensure implementation even where the State is willing though general recommendations could be used to provide uniformity of interpretation and, therefore, increase the possibility of domestic implementation.¹¹⁰ The poor quality of decisions shows that Committees are restricted to their mandate to monitor implementation and lack the capacity to enforce human rights themselves.

In relation to non-repetition measures, for example, the inter-American Court of Human Rights ordered that all necessary legislative and administrative measures be taken to ensure that a person sentenced to death can ask for penalty commutation.¹¹¹ On the same issue, the HRCtee was inherently restricted to a generic decision because it had no treaty-based power to give such an order.¹¹² This demonstrates the lack of actual authority vested in treaty bodies and their intended role as mere monitoring bodies rather than enforcement bodies.

Although some committees have adopted follow-up procedural rules, none have established written comprehensive procedural guidelines.¹¹³ Treaty bodies have also placed time limits on the submission of information on steps taken by States parties to comply with Committees' Views.¹¹⁴ The time limits vary between treaty bodies which may

Elements for a reform Agenda from an NGO Perspective, p.220, para.1

106 Ibid. para.2

107 Ibid. p.3, para.2

108 Human Rights Committee, General Comment 31, 29 March 2004, para.16

109 Bassiouni M. C., Schabas W. A., *'New Challenges for the UN Human Rights Machinery: What Future for the UN Treaty Body System and the Human Rights Council Procedures?'* (2011) Intersentia Uitgevers N.V.: Bassiouni, M. C., *'Strengthening of the UN Treaty Bodies Complaint Procedures: Elements for a reform Agenda from an NGO Perspective'*, p.223, para.3

110 Ibid. p.211, para.3

111 Ibid. p.216, para.3; IACHR, *Hilaire Constantine and Benjamin et al. v. Trinidad and Tobago*, June 21 2002, para. 212

112 Bassiouni M. C., Schabas W. A., *'New Challenges for the UN Human Rights Machinery: What Future for the UN Treaty Body System and the Human Rights Council Procedures?'* (2011) Intersentia Uitgevers N.V.: Bassiouni, M. C., *'Strengthening of the UN Treaty Bodies Complaint Procedures: Elements for a reform Agenda from an NGO Perspective'*, p.218, para.2

113 Ibid. p.224, para. 2; HRI/ICM/2011/3-HRI/MC/2011/2

114 Bassiouni M. C., Schabas W. A., *'New Challenges for the UN Human Rights Machinery: What Future for the UN Treaty Body System and the Human Rights Council Procedures?'* (2011) Intersentia Uitgevers N.V.: Bassiouni, M. C., *'Strengthening of the UN Treaty Bodies Complaint Procedures: Elements for a reform Agenda from an NGO Perspective'*, p.225-7; Note by the Secretariat, *Follow-up procedures on individual complaints*, 16 December 2010, op. cit., para.12

cause inconsistency in implementation of the human rights treaties but it reflects an attempt to hold States parties accountable for implementation of final views.

Attempts to legitimise Committee decisions have been made also such as interim follow up reports and the establishment of “Rapporteurs”, with various functions.¹¹⁵ These attempts highlight the benefit of the treaty system’s supervisory nature by following through to the follow-up stage. Nonetheless, continuous supervision may be rendered inadequate because it is accompanied by a lack of action, and insufficient involvement of the victim and civil society at the follow-up stage.¹¹⁶ Additionally, the follow-up procedures are inadequate because it is difficult to identify the indicators used to assess actual levels of state compliance.¹¹⁷ This causes more uncertainty which challenges the credibility of the follow-up procedures and limits the successful implementation of Committee views as it is unclear what is required to satisfy them. Furthermore, the uncertainty obstructs full participation by civil society who could assist treaty bodies in holding States parties accountable.¹¹⁸ Committees could use periodic reports more actively to follow-up on State compliance by highlighting specific problem areas or requesting evidence of compliance.¹¹⁹ Additionally, greater utilisation of oral hearings and public meetings would encourage the participation of the victim and civil society in holding the State accountable for implementation of the final views.¹²⁰

B. The role of States parties

1) State capacity

The geographic void of human rights mechanisms also weakens human rights enforcement and implementation by having the potential to hinder final views from being implemented uniformly and universally because the resources available to States in different regions vary.¹²¹ The Americas and Europe have developed their own human rights systems whilst the African system is still very young.¹²² This demonstrates how treaty body decisions can comprise measures that States have no way of implementing. Many States lack adequate expertise and knowledge domestically which is compounded by a lack of assistance from other stakeholders because final views often lack clear and concrete orders which would help them hold States parties accountable.¹²³

115 Ibid.

116 Ibid. p.228, para.2

117 Bassiouni M. C., Schabas W. A., *'New Challenges for the UN Human Rights Machinery: What Future for the UN Treaty Body System and the Human Rights Council Procedures?'* (2011) Intersentia Uitgevers N.V.: Bassiouni, M. C., *'Strengthening of the UN Treaty Bodies Complaint Procedures: Elements for a reform Agenda from an NGO Perspective'*, p.231, para.3

118 Ibid. p.228, para.2

119 Ibid. p.229, para.1

120 Ibid.

121 Evidenced in the CERD reporting system: Bassiouni M. C., Schabas W. A., *'New Challenges for the UN Human Rights Machinery: What Future for the UN Treaty Body System and the Human Rights Council Procedures?'* (2011) Intersentia Uitgevers N.V.: Peter, C., M., *'Accessing Justice by All Means: Individual communications before UN Treaty Bodies – A Case Study of CERD'*, p.127, paras.3 - table

122 African Charter on Human and Peoples' Rights 1981; American Convention on Human Rights 1969; European Convention on Human Rights and Freedoms, and its Protocols 1950 (as amended in 2010)

123 Evidenced in the CERD reporting system: Bassiouni M. C., Schabas W. A., *'New Challenges for the UN Human Rights Machinery: What Future for the UN Treaty Body System and the Human Rights Council Procedures?'* (2011) Intersentia Uitgevers N.V.: Peter, C., M., *'Accessing Justice by All Means: Individual communications before UN Treaty Bodies – A Case Study of CERD'*, p.127, paras.3 – table; Bassiouni, M. C., *'Strengthening of the UN Treaty Bodies Complaint Procedures: Elements for a reform Agenda from an NGO Perspective'*, p.229, para.1

II) Political will

Treaty bodies are intended to monitor State implementation of their respective human rights obligations. Particularly regarding the communications procedures, States parties must agree to allow individual petitions.¹²⁴ This points to the fact that the ability of the Committees to perform their functions is dependent on political will which fails to sufficiently consider the interest of the affected individual.¹²⁵ Subsequently, the Committees' influence on the form of domestic implementation is limited also by the dependence on political will.¹²⁶ It is suggested that Committees should request implementation roadmaps to demonstrate a strong probability of State compliance with final views.¹²⁷ This would also improve the follow-up procedures by exposing the State's performance to civil society scrutiny and will, therefore, encourage greater political will to implement final views.¹²⁸

Conclusion

Summarily, the challenges of the individual communication procedures evidently outweigh the achievements but inadequate accessibility and ineffective remedies should be observed more closely. The next question is whether the key developments proposed by the Draft Statute for the World Court of Human Rights could solve the problems of the current system.

4. The Consolidated Draft: The Replacement

Introduction

The Consolidated Draft Statute (the Consolidated Draft or Draft Statute) establishing a World Court of Human Rights (the Court or WCHR) is a collaborated effort based on two earlier drafts by Martin Scheinin (MS), and Manfred Nowak and Julia Kozma (NK).¹²⁹ Both independent research projects were commissioned as part of a Swiss initiative to celebrate the 60th anniversary of the Universal Declaration of Human Rights. Key compromises were necessary to agree on the contents of the Consolidated Draft and they include the obligation for states to establish national human rights courts.¹³⁰ The preamble states that the Court is intended to plug the domestic implementation gap and the authors highlight Article 7 (3) of the Consolidated Draft as central to the Court's jurisdiction.¹³¹ The provision stipulates that individual complaints to the Court would replace the treaty system's individual communications procedures for a ratifying State party to a UN human rights treaty.¹³²

124 See ch.1

125 Bassiouni M. C., Schabas W. A., 'New Challenges for the UN Human Rights Machinery: What Future for the UN Treaty Body System and the Human Rights Council Procedures?' (2011) Intersentia Uitgevers N.V.: Bassiouni, M. C., 'A Critical Introduction Assessment of the UN Human Rights Mechanisms', p.3, para.3

126 Ibid, p.5, para.4

127 Bassiouni M. C., Schabas W. A., 'New Challenges for the UN Human Rights Machinery: What Future for the UN Treaty Body System and the Human Rights Council Procedures?' (2011) Intersentia Uitgevers N.V.: Bassiouni, M. C., 'Strengthening of the UN Treaty Bodies Complaint Procedures: Elements for a reform Agenda from an NGO Perspective', p.234, para.4

128 Ibid.

129 (Draft) Statute of the World Court of Human Rights 2010; Kozma J., Nowak M., & Scheinin M. 'A World Court of Human Rights: Consolidated statute and commentary' (2010) NWV, Neuer Wissenschaftlicher Verlag.

130 Kozma J., Nowak M., & Scheinin M. 'A World Court of Human Rights: Consolidated statute and commentary' (2010) NWV, Neuer Wissenschaftlicher Verlag., p.29, para.2

131 Ibid. p.35, para.3

132 (Draft) Statute of the World Court of Human Rights 2010, Article 7

Overview

Article 6 provides the general principles: State responsibility and international human rights law form the basis for the Court's interpretative approach in respect of complaints against States as well as entities.¹³³ Other principles include the “universality, interdependence, and indivisibility of all human rights”, general international law,¹³⁴ general principles of law and international and regional jurisprudence.¹³⁵ The complementarity principle also appears in the preamble.

The WCHR procedure has three main stages: entry into force, application of the Court's jurisdiction *ratione materiae* (subject matter jurisdiction) and *ratione personae* (jurisdiction over persons), and the Court's process and remedies.

A. Entry into force

According to articles 49 and 50, the Draft Statute requires 30 State ratifications to enter into force. The Court shall have a close relationship with the UN¹³⁶ through adoption of the Draft Statute by the UN General Assembly or a special agreement similar to Article 2 of the International Criminal Court Statute if adopted by a Conference of States.¹³⁷ The States parties must make all reservations at the time of ratification or accession.¹³⁸ At any time it can withdraw its reservations¹³⁹ and declare that it recognises the Court's jurisdiction over other UN human rights treaties not listed in Article 5 (1).¹⁴⁰

At any time, an entity may declare that it accepts the Court's jurisdiction under Article 7.¹⁴¹ At the time of the declaration, the entity may specify which treaty provisions shall be subject to the Court's jurisdiction.¹⁴² In relation to post-commencement observer entities and States parties, the Court shall exercise jurisdiction only in respect of violations that occurred or continued after the accession or acceptance took place.¹⁴³

B. Jurisdiction

Once a complaint is brought against a State party or observer entity, the Court then applies its jurisdiction.¹⁴⁴

Ratione materiae: Subject to any permissible reservations under Article 11,¹⁴⁵ complaints must be based on a violation of a human rights treaty listed in article 5 (1).¹⁴⁶ By a two-thirds majority in the Assembly of States parties, any additional treaty proposed by a State

133 Ibid. Article 6 (1)

134 In some countries, “international law” is defined as including Committee final views; Human Rights Act 2004 s.31 (Australian Capital Territory), Dictionary (definition of “international law”, para (b))

135 (Draft) Statute of the World Court of Human Rights 2010, Article 6 (2)

136 Kozma J., Nowak M., & Scheinin M. 'A World Court of Human Rights: Consolidated statute and commentary' (2010) NWV, Neuer Wissenschaftlicher Verlag., p.30, para.5

137 Ibid. p.32

138 (Draft) Statute of the World Court of Human Rights 2010, Article 50 (1), (3)

139 Ibid. Article 50 (2)

140 Ibid. Article 50 (4)

141 Ibid. Article 51 (1)

142 Ibid. Article 51 (2)

143 Ibid. Article 10 (3)

144 Trechsel, S., . 'World Court for Human Rights' (2004) A. Nw. Univ. J. Int'l Hum. Rts., 1, i. pp.7-11

145 (Draft) Statute of the World Court of Human Rights 2010, Article 11

146 Ibid. Article 5 (1)

party may be added to the list.¹⁴⁷ The complaint must have exhausted domestic remedies subject to availability, effectiveness and due process.¹⁴⁸ An entity may also identify its internal remedies at the time of its declaration.¹⁴⁹ The Court shall not deal with any complaint which is anonymous or manifestly ill-founded, constitutes an abuse of the right to an individual complaint, is incompatible with the provisions of the invoked human rights treaty or substantively identical to one already examined by the WCHR, international procedure or regional court.¹⁵⁰

Ratione personae: The Court may consider complaints against States as well as entities for a violation of an Article 5 (1) human rights treaty.¹⁵¹ Entities include any inter-governmental organisation, business corporation or other non-State actor under Article 4.¹⁵² The individual making a complaint must be the victim of a violation by a State party or observer entity. The individual may be a person, non-governmental organisation or group of individuals claiming to be the victim of the violation.¹⁵³ Ratification of the Draft Statute by a State party to a human rights treaty under the Court's jurisdiction (including those governed by treaty bodies) constitutes suspension of its treaty body complaints procedure.¹⁵⁴ Additionally, the UN Secretary-General and UN High Commissioner for Human Rights (UNHCHR) may consult the Court for advisory opinions on the interpretation of the Article 5 (1) treaties. Any UN Member-State may request and receive advisory opinions on the compatibility of its domestic law with the human rights treaties.¹⁵⁵

C. Process and Remedies

The WCHR is an independent and permanent institution whose judgements are final and binding under international law for all complaints in accordance with the Draft Statute.¹⁵⁶ All respondent parties including States parties are bound by the Court's judgement, in a case to which they are party, to give the victim adequate reparation for the harm suffered, generally within a three month period from the delivery of the judgement.¹⁵⁷ States parties agree to directly enforce WCHR judgements, and compliance is supervised by the UNHCHR who may take necessary measures to enforce the judgement.¹⁵⁸

In order to gather relevant evidence and information sufficient to support a decision on an admissible individual complaint, the Court may carry out an investigation or fact finding mission with complete State and entity cooperation.¹⁵⁹ Generally, hearings shall be public and the Plenary Court shall always hold hearings before delivering the judgement but Chambers are free to decide whether or not to hold a hearing.¹⁶⁰ The Court has the power to summon witnesses other than the applicant and respondent party. Witnesses include experts if necessary, and both witnesses and victims will receive appropriate protection

147 Ibid. Article 5 (2)

148 Ibid. Article 9 (1), (2)

149 Ibid. Article 51; article 9: state may identify at the time of ratification or accession the exhaustible judicial remedies

150 (Draft) Statute of the World Court of Human Rights 2010, Article 10

151 Ibid. Articles 6; 7

152 Ibid. Article 4

153 Ibid. Article 7 (1) (2)

154 Ibid. Article 7 (3)

155 Ibid. Article 8 (1) (2)

156 Ibid. Articles 1; 18 (1)

157 Ibid. Article 18

158 Ibid. Article 18 (3-5)

159 Ibid. Article 14

160 Ibid. Article 16 (1) (2)

under a Victims and Witnesses Unit which is supplemented by binding interim measures of protection for the victims.¹⁶¹ Additionally, documents published with the Registrar shall be publicly accessible unless otherwise decided by the President.¹⁶²

All Court judgements shall be pronounced orally and shall be published in all the Court's official languages: Arabic, Chinese, English, French, Russian and Spanish;¹⁶³ these are the official languages of the UN and, therefore, similar to those of the HRCttee.¹⁶⁴ However, the Consolidated Draft takes a “fairly radical departure from present UN practice”.¹⁶⁵ The drafters aim to increase efficiency by restricting translation into all official languages to the important official documents and leading judgements of a Chamber as well as all judgements of the Plenary Court.¹⁶⁶ However, if many cases reach the Plenary Court then this measure would not be sufficient to improve efficiency and decrease translation costs. Nonetheless, the potential of domestic implementation is increased by allowing the Plenary Court to decide which of the official languages will be used as the working language or languages, and by allowing the Court to hold hearings in any other language which is requested by a party to the case.¹⁶⁷ All Court judgements must be in written form and where a violation is found the Court must demand or, by virtue of its office, order the respondent party to afford the victim adequate reparation for the harm suffered.¹⁶⁸ The list of available remedies is non-exhaustive and under article 15 it includes the possibility of a friendly settlement for individual complaints brought before the Court.¹⁶⁹

The solutions proposed within the Draft Statute will be assessed in light of their ability to address the current problems highlighted in the previous chapter: accessibility; coherence; and remedies. The two most notable developments are, on the one hand, the replacement of the UN treaty system individual communications procedures with the WCHR procedure under Article 7 of the Consolidated Draft. On the other hand, making entities accountable under international law for violations of UN human rights treaties also has a significant impact on human rights implementation and enforcement. Both of these developments touch on accessibility related solutions which cover a vast amount of the following WCHR discussion.

WCHR Solutions

I. Accessibility

Victims

It is asserted that the individual complaints procedure under the Draft Statute is more victim-oriented than the treaty system's procedures and its key features appear to address most of the problems associated with the current system. The omission of inter-State complaints contributes to the depoliticisation of the mechanism and demonstrates that the new procedure's main aim and central purpose is to protect the rights of the individual. As Trechsel observes, restricting the World Court to inter-state complaints would undermine

¹⁶¹ Ibid. Articles 16; 19

¹⁶² Ibid. Article 16 (3-5)

¹⁶³ (Draft) Statute of the World Court of Human Rights 2010, Article 38

¹⁶⁴ Kozma J., Nowak M., & Scheinin M. 'A World Court of Human Rights: Consolidated statute and commentary' (2010) NWV, Neuer Wissenschaftlicher Verlag., p.58, para.1

¹⁶⁵ Ibid. para.3

¹⁶⁶ Ibid. para.1

¹⁶⁷ (Draft) Statute of the World Court of Human Rights 2010, Article 38 (2)

¹⁶⁸ Ibid. Article 17

¹⁶⁹ Ibid. Article 17 (2)

the creation of the World Court itself, and the Consolidated Statute takes this further by abandoning inter-State complaints completely.¹⁷⁰

The WCHR is more capable of catering to the most vulnerable victims than the current system because it provides protection as well as assistance to Victims.¹⁷¹ This is evidenced by the provision of public oral hearings,¹⁷² a victims and witnesses unit,¹⁷³ binding immediate effect interim measures of protection,¹⁷⁴ and a Trust Fund to improve domestic protection and support victims and their families.¹⁷⁵ Additionally, article 37 addresses the inequality caused by the lack of legal aid in the current system as WCHR applicants are entitled to legal representation and legal aid is made available for those without sufficient means, if the interest of justice so requires.¹⁷⁶ These new features indicate that the WCHR procedure is more victim-focused than that of the current system.

Entities

The Consolidated Draft would improve the accessibility of the individual complaints mechanism by expanding the passive aspect of *ratione personae* so that the WCHR can hear complaints against entities.¹⁷⁷ This allows duty-bearers other than States to be held accountable for their violations of human rights which is a major void in the current UN system.¹⁷⁸ This development could be advantageous because it shows an attempt to address some of the problems associated with the increasing contribution of non-State actors.¹⁷⁹ Additionally, where an entity violates a UN human rights treaty, the victim may be able to bring a claim directly against the entity or against the respective State for failing to exercise due diligence or other forms of indirect responsibility.¹⁸⁰ The Court will decide on a case by case basis whether the human right invoked can be applied to the respective non-State actor.¹⁸¹ This causes legal uncertainty because the list of non-State actors is non-exhaustive so the applicable law is difficult to predict and, thus, human rights protection is undermined.¹⁸² Considering the general cost and duration of litigation, this could discourage or limit the submission of individual complaints against entities because the chances of success and the applicable substantive law would be unclear.

Scheinin argues that the procedure is required to deal with groups, as well as States, who equally have the power to destruct or negate human rights.¹⁸³ These groups include multinationals, international non-profit organised movements and autonomous

170 Trechsel, S., 'World Court for Human Rights' (2004) A. Nw. Univ. J. Int'l Hum. Rts., 1, i. p.8, para.31

171 Article 39 (4) &

172 Ref point: additional value to V – gives them an audience; Article 16

173 Article 16 (4)

174 Article 19

175 Article 39 (4)

176 (Draft) Statute of the World Court of Human Rights 2010, Article 37

177 Trechsel, S., . 'World Court for Human Rights' (2004) A. Nw. Univ. J. Int'l Hum. Rts., 1, i. p.7, para.26

178 Martin Scheinin, 'We need a World Court of Human Rights' (Commonwealth Secretariat, 3 June 2009) <http://www.thecommonwealth.org/news/205483/030609un_special_rapporteur.htm> accessed 7 March 2013

179 Ibid.

180 Kozma J., Nowak M., & Scheinin M. 'A World Court of Human Rights: Consolidated statute and commentary' (2010) NWV, Neuer Wissenschaftlicher Verlag., p.36, para.1

181 Ibid.

182 Pillay, N., 'Strengthening the United Nations Human Rights Treaty Body System' (June 2012) UNHCHR Report, pp.69-70

183 Martin Scheinin, 'We need a world Court of Human Rights' (Commonwealth Secretariat, 3 June 2009) <http://www.thecommonwealth.org/news/205483/030609un_special_rapporteur.htm> accessed 7 March 2013

communities.¹⁸⁴ This list can be interpreted to include any duty-bearer who is willing to accept the Court's jurisdiction.¹⁸⁵ According to the Draft Statute, the Court's jurisdiction must be accepted voluntarily though Global Compact members (mostly transnational corporations) will be explicitly encouraged to recognise the Court's jurisdiction under Article 51.¹⁸⁶

This *ratione personae* development may place excessive focus on transnational corporations though non-State actors as a whole have played substantial roles in current issues concerning human rights such as the Arab Spring and increased globalisation. Nowak claims that non-State actors would want to accept the Court's jurisdiction in order to uphold ethical standards (corporate social responsibility¹⁸⁷), enhance marketing, or protect their corporate identity and some entities may have a genuine interest in strengthening human rights.¹⁸⁸ The drafters argue that it would provide observer business corporations, in particular, with a competitive advantage over their competitors who choose not to recognise the Court's jurisdiction.¹⁸⁹ This shows that most of the arguments persuading entities to recognise the Court's jurisdiction are directed towards business corporations, which implies that there is an emphasis on ensuring that they, amongst all entities, are especially made accountable. Nonetheless, these reasons can also be applied to media enterprises and rebel groups *inter alia*; two types of non-State actors which have come under public scrutiny recently.¹⁹⁰

As Alston highlights, the roles have changed: other non-State actors including the UN itself are becoming the subject of alleged human rights violations similar to those brought against transnational corporations (TNCs).¹⁹¹ Therefore, the Draft Statute's explicit reference to business corporations may not be as applicable to the current and upcoming problems as it is intended to be.¹⁹² Rather, Article 4 (1) should remain a non-exhaustive list whilst also highlighting other major offenders such as media enterprises and rebel groups in the wake of the Arab Spring and phone hacking scandal. The variety of these examples highlight the need for the Consolidated Draft to consider how the types of violations differ across the regions of the world, and the focus on business corporations should not detract from that. It is important that all duty-bearers have a genuine interest in strengthening human rights but, in practice, each State and entity's interest is determined by its own objectives which rarely comprise the protection of human rights.¹⁹³ The number of ratifications for some of the human rights treaties conveys that even influential States

184 Kozma J., Nowak M., & Scheinin M. 'A World Court of Human Rights: Consolidated statute and commentary' (2010) NWV, Neuer Wissenschaftlicher Verlag., pp.33-4

185 (Draft) Statute of the World Court of Human Rights 2010, Article 4

186 Kozma J., Nowak M., & Scheinin M. 'A World Court of Human Rights: Consolidated statute and commentary' (2010) NWV, Neuer Wissenschaftlicher Verlag., p.36, para.1; UN Global Compact <<http://www.unglobalcompact.org/ParticipantsAndStakeholders/index.html>> accessed 1st of May: 7,000 businesses out of 10,000 participants

187 CSR

188 Nowak, M. 'The Need for a World Court of Human Rights' (2007) 7 Hum. Rts. L. Rev. 251, p.257, para.1

189 Kozma J., Nowak M., & Scheinin M. 'A World Court of Human Rights: Consolidated statute and commentary' (2010) NWV, Neuer Wissenschaftlicher Verlag., p.36, para.1

190 Kozma J., Nowak M., 'A World Court of Human Rights' (2009) Swiss Initiative to Commemorate the 60th Anniversary of the UDHR, p.59, para.1

191 Reinisch, A. 'The Changing International Legal Framework for Dealing with Non-State Actors' in Alston, P., 'Non-State Actors and Human Rights' (2005) OUP p.62, para.3

192 (Draft) Statute of the World Court of Human Rights 2010, Article 4 (1)

193 Kirkpatrick, J. 'A Modest Proposal: A Global Court for Human Rights', *J. Hum. Rts.* (forthcoming), p.13, para.2

maintain that it is neither their duty nor in their interest to protect certain human rights.¹⁹⁴ Therefore, some of the reasons suggested by Nowak are not enough to persuade entities to recognise the Court's jurisdiction.

The Draft Statute grants observer-status to any entity which accepts the Court's jurisdiction, so entities have no voting powers.¹⁹⁵ In comparison to the powers and status of the Assembly of States Parties, the entities are attributed a weaker role which is the drafters' intention: to hold accountable those entities with a comparable capacity to affect the enjoyment of human rights without giving them comparable status to states.¹⁹⁶ This is necessary to maintain the world's legal and social orders but it is unlikely that entities would be equally willing to submit to such a World Court. This is due to the fact that the WCHR, governed by an Assembly of States parties with full and exclusive competence over budget and finance, election of judges and statutory amendments, would be empowered to judge on both States and entities.¹⁹⁷

States

It is important to consider what makes the Consolidated Statute so desirable to receive the required 30 State ratifications or adoption by the UN General Assembly.¹⁹⁸ Complaints for violations are low within the UN treaty system and many procedures were traditionally restricted to inter-state complaints which have never been brought.¹⁹⁹ Gradually, through the European System's influence, individual communication procedures under the current system have been formalised and accompanied by backlogs of cases.²⁰⁰ The Draft Statute has reasonably clear admissibility criteria which also draws influence from the European Convention.²⁰¹ However, the extent to which the backlog of cases is addressed by a world human rights court is uncertain. The European Court of Human Rights (ECtHR), for example, receives over 50,000 applications per year, each of which can take up to three years to be heard.²⁰² Consolidating the current treaty system procedures as well as other human rights treaties previously not given an international stage into one judicial world procedure could cause unprecedented backlog. In practice, it is difficult to see how more cases will be settled domestically without an obligation on States to establish national human rights courts.²⁰³

Part V of the Consolidated Draft regards obligations; its comparatively short length and repetitive language emphasises the demand for "full cooperation" with the Court.²⁰⁴ This term would allow the human rights treaties to permeate the domestic legal orders as

194 See n.104

195 (Draft) Statute of the World Court of Human Rights 2010, Article 43 (5)

196 Scheinin, M., *'Towards A World Court of Human Rights'* (2009) Swiss Initiative to Commemorate the 60th Anniversary of the UDHR, p.5, para.5

197 (Draft) Statute of the World Court of Human Rights 2010, Article 43

198 Trechsel, S. *'World Court for Human Rights'* (2004) A. Nw. Univ. J. Int'l Hum. Rts., 1, i., para. 70: "neither desirable, nor necessary, nor probable"

199 Smith R. K. M., *'Textbook on international human rights'* (2007) Oxford: Oxford University Press., p.140

200 See ch.3

201 Kozma J., Nowak M., & Scheinin M. *'A World Court of Human Rights: Consolidated statute and commentary'* (2010) NWV, Neuer Wissenschaftlicher Verlag., p.35, para.3

202 Public Relations Unit, *'The ECHR in 50 questions'* (July, 2012), p.11, question 45

203 Kozma J., Nowak M., *'A World Court of Human Rights'* (2009) Swiss Initiative to Commemorate the 60th Anniversary of the UDHR, pp.61-2

204 (Draft) Statute of the World Court of Human Rights 2010, Article 41

States parties are required to enact special laws in order to ensure domestic implementation.²⁰⁵ Therefore, they must amend their domestic law to comply with the respective human rights treaties and implement all of the Court's judgements in cases to which they are parties.²⁰⁶ This part of the text aims to address the lack of capacity and political will but it cannot be avoided or denied that ultimately implementation of the human rights treaties is dependent on State acquiescence.²⁰⁷

The WCHR is desirable because it would be an independent and permanent judicial body providing universal remedies for violations of human rights across the world but its heavy obligations will make States reluctant to ratify and financially contribute to such a development. The Draft Statute does provide for reservations²⁰⁸ but this power is exclusively curtailed according to the discretion of independent judges.²⁰⁹ In an extreme scenario, therefore, under Article 11 a State Party could be held liable for a violation of a UN human rights treaty over which it does not recognise the Court's jurisdiction. This ignores the reality that the power to implement international human rights rests ultimately with the State so the only other perceivable way to force a State to implement a human right would be to take force. The UN Security Council, a political body, may authorise the use of force to maintain or restore international peace and security or may resort to sanctions or expulsion as less drastic measures.²¹⁰ The question then arises as to when failed domestic implementation should be considered a threat to international peace and security. Although that debate goes beyond the scope of this paper, it is worth bearing in mind because ultimately, it is the State's prerogative whether it chooses to follow the norms prescribed by an international organisation and any other approach to domestic implementation would bear grave political consequences.²¹¹

General principles

Reluctant States may be encouraged by the presence of general international law principles, general law principles, and international and regional court jurisprudence as the Court's interpretative guides.²¹² As the most developed regional system, it is possible that the European system's margin of appreciation jurisprudence could influence the Court's interpretation of the UN human rights treaties.²¹³ However, in theory such doctrine conflicts with the universality, interdependence and indivisibility of all human rights so it will be interesting to see how the Court applies all the general principles referred to in Article 6.²¹⁴

It is submitted that the ECHR and the ICC Statute (Rome Statute) are two main systems which influence the appearance and operation of the World Court.²¹⁵ In light of this, the principle of complementarity in paragraph 10 of the ICC Statute's preamble is mirrored in

205 Ibid. Article 41 (3)

206 Kozma J., Nowak M., & Scheinin M. 'A World Court of Human Rights: Consolidated statute and commentary' (2010) NWV, Neuer Wissenschaftlicher Verlag., pp.60-1

207 Kirkpatrick, J, 'A Modest Proposal: A Global Court for Human Rights', J. Hum. Rts. (forthcoming) p.11, para.4

208 (Draft) Statute of the World Court of Human Rights 2010, Article 50

209 Ibid. Article 11; 31

210 UN Charter, Article 42

211 Smith R. K. M., 'Textbook on international human rights' (2007) Oxford: Oxford University Press., p.156

212 (Draft) Statute of the World Court of Human Rights 2010, Article 6

213 Ulfstein, Geir, 'Do We Need a World Court of Human Rights?' (2008). Law at War – the Law as it was and the Law as it should be, Ch. 18, pp. 261-272 p.270, para.3

214 Ibid. p.269, para.3: "universality of coverage..."; General Assembly Resolution 60/251 Human Rights Council, para. 5(e)

215 Kozma J., Nowak M., & Scheinin M. 'A World Court of Human Rights: Consolidated statute and commentary' (2010) NWV, Neuer Wissenschaftlicher Verlag., p.30, para.5; 35, para.3

paragraph 10 of the World Court Draft Statute's preamble.²¹⁶ In accordance with the application of the Rome Statute, the principle stipulates accessibility to the World Court would be limited as the national jurisdiction comes first before access to the World Court is available.²¹⁷ However, complainants in areas with regional mechanisms would then have a choice between the ECtHR for example and a World Court which can hear complaints against entities.²¹⁸ Therefore, the World Court is desirable in both regions with and without human rights systems because it would be a substantial attempt to fill geographic voids and supplement existing systems at international level.

II. Coherence

The Court is not a single unified treaty body so its changes relate more to coherence than to cohesion problems. If it was 'practically reasonable', then the WCHR procedure would be an ideal replacement because it streamlines all the procedures into one and would extend the procedure to the CRC which lacks this mechanism.²¹⁹ Replacing the current procedures appears beneficial and simple because it does not require any amendment to the existing structure of the UN system and 30 ratifications are sufficient for the entry into force of such a significant development.²²⁰ The new procedure solves the potential problems regarding differences in admissibility criteria, procedure and remedies. In particular the delivery of judgements from one body simplifies the procedure and increases the possibility of State compliance. Furthermore, the WCHR procedure would replace the current procedures without obstructing the potential of other treaty system reform proposals.²²¹

However, this development could backfire because although one of its objectives would be to increase the efficiency of the communications procedure, the possible vast amounts of applications could be detrimental to the efficiency of the Court. A World Court with only 21 judges,²²² one Plenary Court and 3 Chambers²²³ fails to present itself as one capable of handling the 50,000 complaints that the ECtHR receives each year.²²⁴ Dissimilar to the ECtHR, the World Court would have jurisdiction over multiple treaties and it would have jurisdiction to hear complaints against entities.²²⁵ The additional geographical reach of the *World Court* is incomparable to any present international or regional system; this could cause the Court's caseload to reach 'practically unreasonable' amounts.²²⁶ The World Court's inability to handle the overwhelming caseload could undermine the improvements it provides. Therefore, it is argued that the coherence within the treaty system complaints procedure would be improved but the proposed replacement is impractical due to the envisaged masses of caseload which would accompany a World Court addressing human rights violations worldwide.

216 ICC Rome Statute, preamble, para.10

217 On the principle of complementarity in the Rome Statute of the International Criminal Court
<<http://chinesejil.oxfordjournals.org/content/4/1/121.full>> accessed 1st of May 2013

218 Ulfstein, Geir, 'Do We Need a World Court of Human Rights?' (2008). *Law at War – the Law as it was and the Law as it should be*, Ch. 18, pp. 261-272 p.267, para.4

219 (Draft) Statute of the World Court of Human Rights 2010, Articles 5; 7

220 Ibid. Article 7; 49

221 Nowak, M. *The Need for a World Court of Human Rights* (2007) 7 Hum. Rts. L. Rev. 251, p.255

222 (Draft) Statute of the World Court of Human Rights 2010, Article 20

223 Ibid. articles 26; 27

224 See n.202

225 (Draft) Statute of the World Court of Human Rights 2010, Articles 4; 5; 7

226 Smith R. K. M., *Textbook on international human rights* (2007) Oxford: Oxford University Press., 138, para.2

III. Remedies

The World Court's non-exhaustive list of remedies includes 'adequate reparation', a system of enforcement which draws influence from the regional systems such as the Inter-American Human Rights jurisprudence.²²⁷ Similarly, the WCHR's remedies comprise orders for the respondent parties to afford the victim adequate reparation.²²⁸ Therefore, to a certain extent the rendering of remedies is out of the Court's hands and it is still dependent on State acquiescence. Following the regional system's example, however, this has not limited the effectiveness of the individual communications in any substantial way.²²⁹ Rather, it demonstrates the significant degree of legal weight carried by the judgements of international human rights courts.²³⁰ Consequently, it is submitted that the Court's judgements would provide the ideal replacement for the ineffective remedies suggested in final views especially because it tackles problems specific to the current communications procedures.

The added legal weight is emphasised by the binding force and supervised execution of judgements.²³¹ Final views are essentially judgements in practice but they lack the judicial nature which is crucial to effective enforcement of human rights obligations.²³² The legal obligations imposed by the Draft Statute, particularly Part V, address the lack of legal capacity and political will. This is partly achieved by introducing the friendly settlement procedure²³³ to all treaty bodies and special laws (enabling legislation)²³⁴ to ensure greater implementation of their human rights obligations under the Draft Statute. This places higher demands on States and entities to ensure that they fulfil their human rights obligations as duty-bearers. However, such demands make State ratification and entity recognition less probable.

Supervision by the High Commissioner²³⁵ is desirable because it sets a limited time frame for compliance which demonstrates seriousness in the proposed complaints procedure.²³⁶ The High Commissioner's treaty-based power to take necessary measures where compliance is not forthcoming exemplifies the legal weight which would be added to treaty-based complaints by the replacement of the current system with the WCHR procedure.²³⁷ The procedure would become more credible and encourage States to be more proactive in implementing the human rights treaties.

Moreover, the power to give advisory opinions to the UN Secretary-General and UN Member States ensures that the Court's influence is not limited to States-parties and observer-entities.²³⁸ This grants the Court persuasive authority beyond its jurisdiction,

227 Kozma J., Nowak M., & Scheinin M. 'A World Court of Human Rights: Consolidated statute and commentary' (2010) NWV, Neuer Wissenschaftlicher Verlag., p.46; p.52, para.3; *Velasquez Rodriguez v. Honduras* of 29 July 1998, (Ser C.) no. 4 (1988), para. 172.

228 (Draft) Statute of the World Court of Human Rights 2010, Article 17 (2)

229 See n.227

230 Bassiouni M. C., Schabas W. A., 'New Challenges for the UN Human Rights Machinery: What Future for the UN Treaty Body System and the Human Rights Council Procedures?' (2011) Intersentia Uitgevers N.V.: Schabas W. A., 'On the Binding Nature of the Findings of the Treaty Bodies', p.105, para. 2

231 (Draft) Statute of the World Court of Human Rights 2010, Article 18

232 See n.43

233 (Draft) Statute of the World Court of Human Rights 2010, Article 15

234 Ibid. Article 41 (3)

235 Ibid. Article 18 (5)

236 See n.109

237 Article 18 (5); Also see n.230

238 Article 8

which can be used to further guarantee universal respect for human rights and encourage appropriate implementation by non-party States.

The role of elected independent and sufficiently qualified judges is useful for the availability of effective remedies from the World Court and the introduction of high calibre legal expertise strengthens the credibility of the WCHR procedure.²³⁹ Replacing independent experts with legally qualified independent judges provides the procedure with the resources to skilfully draw on the international, regional and other relevant bodies of jurisprudence to ensure more effective enforcement of the human rights treaties.²⁴⁰

Conclusion

There is room for more assessments of the Draft Statute's benefits and challenges. The WCHR would address most of the current system's problems and voids but could face unmanageable backlog of cases which highlights the impracticality of a World Court with an individual complaints procedure. The WCHR remedies are based on 'orders' which implies greater and more effective enforcement with a clear and stricter follow-up procedure. However, the Draft Statute places heavy obligations on States-parties and observer-entities so it is desirable for victims but not for the States and entities who are invited to ratify the Statute.

5.WCHR Problems

Overview

The following discussion will determine the Court's practicality and necessity by analysing the extent to which the Court fails to plug the domestic implementation gap. The main problems include the inherent detachment of the World Court from the most vulnerable victims, and the new problems regarding coherence.

Problems

Detachment

By definition, a World Court cannot be as accessible as a regional or national system.²⁴¹ Modern communication technology is not available to complainants in all parts of the world and inter-continental travel is generally more expensive than intra-continental or domestic travel. Consequently, access to the Court will be restricted for those who do not qualify for legal aid, reside in countries with limited availability of communication technology, or lack NGO assistance.²⁴²

Political concern with the expanding domestic role of international human rights has come at the cost of actual political will to bridge the domestic implementation gap. This contributes to Trechsel's claim that a World Court with an individual complaints procedure would be unreasonable in practice.²⁴³ The presence of national human rights courts could

239 (Draft) Statute of the World Court of Human Rights 2010, Articles 21; 22

240 Kozma J., Nowak M., & Scheinin M. 'A World Court of Human Rights: Consolidated statute and commentary' (2010) NWV, Neuer Wissenschaftlicher Verlag., p.49, para. 4

241 Smith R. K. M., 'Textbook on international human rights' (2007) Oxford: Oxford University Press., p.80

242 Pillay, N., Strengthening the United Nations Human Rights Treaty Body System (June 2012) UNHCHR Report, p.91, para. 4.6.2.: implies awareness of distance and geographical barriers to accessibility and visibility

243 Trechsel, S., . 'World Court for Human Rights' (2004) A. Nw. Univ. J. Int'l Hum. Rts., 1, i., p.9, para. 32

have filled the geographic void completely.²⁴⁴ Also, it could have addressed the distance between the World Court and victims facing communication or transport barriers. On the one hand, absence of national human rights courts could reduce the number of applications to the WCHR but, on the other hand, it could result in a failure to hold States and entities accountable for their non-compliance.²⁴⁵ It is difficult to address the lack of effective judicial and non-judicial national institutions and the implementation of international obligations without States agreeing to establish national human rights courts.²⁴⁶ The absence of this essential balance at the domestic level would result in impractical centralisation and a lack of human rights enforcement which decreases the need for this WCHR.

Coherence

The coherence problems are more subtle as they concern the impact of the WCHR on international human rights protection as a whole. Considering recent human rights developments and proposals, other international and regional bodies, and the continuance of treaty bodies, the WCHR should do more to clarify how all these bodies would work together and use each other's procedures to strengthen their own.²⁴⁷ Although, the WCHR proposal addresses the overlap between treaty procedures, it brings a new complication regarding its relationship with other international bodies and courts.²⁴⁸ It is argued that this complication undermines the legal certainty principle as it would confuse complainants who need to understand how the available mechanisms work in order to exercise their right to an effective remedy.

Another problem related to coherence is the Statute's failure to indicate how the World Court, when exercising its jurisdiction, can utilise the Committees' findings and *vice versa*. This reflects a reluctance of the WCHR's drafters to build on the treaty system's successes and could weaken domestic implementation of the human rights treaties.²⁴⁹ Bodies of jurisprudence have already been developed by the treaty bodies, abandoning their work would disregard their existence and call into question the current implementation of final views and treaty body interpretations of rights which have been respected by States parties to the respective treaties.²⁵⁰ Therefore, where in the interest of justice, equal regard should be given to treaty body jurisprudence as is given to the guiding principles of the World Court,²⁵¹ and WCHR jurisprudence should be available to guide treaty body consideration of State reports.²⁵²

Conclusion

Overall, it is asserted that the solutions provided by the Draft Statute and its WCHR

244 Asia-Pacific and Arab regions

245 Kozma J., Nowak M., 'A World Court of Human Rights' (2009) Swiss Initiative to Commemorate the 60th Anniversary of the UDHR, p.21, para. 1: both dimensions must be addressed in order for the WCHR procedure to work effectively

246 Ibid.

247 Pillay, N., Strengthening the United Nations Human Rights Treaty Body System (June 2012) UNHCHR Report, p.68; (Draft) Statute of the World Court of Human Rights 2010, preamble; Article 6; Also see n.217; n.218

248 Ibid. Also see Johnstone, R. L., 'Cynical Savings or Reasonable Reform? Reflections on a Single Unified UN Human Rights Treaty Body' (OUP, 2007) HRLR 7:1, p.181, para.2

249 Johnstone, R. L., 'Cynical Savings or Reasonable Reform? Reflections on a Single Unified UN Human Rights Treaty Body' (OUP, 2007) HRLR 7:1, p.1, p.179, para.2

250 See n.247

251 (Draft) Statute of the World Court of Human Rights 2010, Article 6

252 See n.119. Also see Scheinin, M., 'Towards A World Court of Human Rights' (2009) Swiss Initiative to Commemorate the 60th Anniversary of the UDHR, p.24

individual complaints procedure go to great lengths to solve the failures and challenges of the UN treaty body individual complaints procedure. However, a World Court which fails to show an ability to be accessed by victims anywhere in the world cannot live up to its title and is therefore unnecessary if it causes more complication. On the other hand, no other international judicial body proposes to hold entities accountable; such a development would be extremely desirable but it is difficult to prove that this is the type of Court which entities would want to submit to. Additionally, a World Court aiming to enforce the UN human rights treaties should do more to utilise the success of the treaty bodies and build on that. The main problem with treaty bodies is the lack of enforcement and legitimacy because they are political bodies intended for monitoring purposes. A World Court provides more legal weight to the enforcement of human rights but domestic implementation remains ultimately dependent on State acquiescence. The lack of a clear means of enforcement, where compliance is not forthcoming, also undermines the Court's legitimacy. Therefore, it is argued that the World Court established by the Draft Statute is desirable but lacks the essential necessity and practicality to attract ratification by States and recognition by entities.

6. Final Remarks

Change is necessary for the individual communications procedure to become more effective and useful because it is clear that its challenges and failures outweigh its achievements. Although the communications mechanism has made important developments which help to ensure State implementation of the rights contained in the UN treaties, enforcement must improve and address pressing challenges. Pressing challenges include the increasing influence of all non-State actors, the lack of judicial authority in politically influenced treaty bodies, and the dependence on State capacity and political will for effective domestic implementation. Furthermore, accessibility and the right to an effective remedy must be reinforced in order for individuals to enjoy the rights contained in the UN human rights treaties.

More discussion is required for adequate assessment of the solutions and challenges presented by the Draft Statute which appears to be too optimistic about the Court's authority to attract State-ratification and entity-recognition. Additionally, it is difficult to see how the WCHR would handle its caseload but if the ECtHR is anything to go by, then it is possible that it could improve human rights enforcement through its orders for remedies. Although its faults are few, they are too significant to ignore. It fails to show how it can substantially improve geographic accessibility and should demonstrate a greater intent to build on the success of the treaty bodies rather than ignore it. Therefore, as desirable as the WCHR may be, it narrowly fails to present itself as a suitable replacement for the current system.

Bibliography

Cases:

- *Hilaire Constantine and Benjamin et al. v. Trinidad and Tobago*, June 21 2002
- *Ireland v United Kingdom* (1978) Series A, No. 25 (ECHR)
- *Kavanagh v Governor of Mountjoy Prison* [2002] IESC 11 (1 March 2002)(Supreme

- Court of Ireland)
- *Kiobel v. Royal Dutch Petroleum* 2010 (United States Supreme Court)
- *Minister for Immigration and Multicultural and Indigenous Affairs v B* [2004] HCA 20
- *Open Door Counselling and Dublin Well Woman v Ireland* Ser. A, No. 246 (1992) (ECHR)
- *Perdue, Brackett, Flores, Utt & Burns v. Linebarger, Goggan, Blair, Sampson & Meeks, L.L.P.*, 291 S.W.3d 448 (Tex. App. 2009)
- Case C-159/90 *Society for the protection of the Unborn child v Grogan* [1991] ECR I-4685

Texts:

- African Charter on Human and Peoples' Rights 1981
- American Convention on Human Rights 1969
- Arab Charter on Human Rights 2004
- ASEAN Human Rights Declaration 2012
- Commonwealth of Independent States Convention on Human Rights and Fundamental Freedoms 1995
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984
- Convention on the Elimination of All Forms of Discrimination against Women 1979
- Convention on the Rights of Persons with Disabilities 2006
- Convention on the Rights of the Child 1989
- Declaration on the right and responsibilities of individuals, groups and organs of society to promote and protect universally recognised human rights and fundamental freedoms (Declaration on Human Rights Defenders) G.A. res.53/144, annex, 53 U.N. GAOR Supp., U.N. Doc. U.N. Doc. A/RES/53/144 (1999) 1998
- European Convention on Human Rights and Freedoms, and its Protocols 1950 (as amended in 2010)
- European Convention on Human Rights 1950
- First Optional Protocol to the International Covenant on Civil and Political Rights 1966
- Human Rights Act 2004 (Australian Capital Territory)
- International Covenant on Civil and Political Rights 1966
- International Covenant on Economic, Social and Cultural Rights 1966
- International Convention for the Protection of All Persons from Enforced Disappearances 2006
- International Convention on the Elimination of All Forms of Racial Discrimination 1965
- International Convention on the Protection on the Protection of the Rights of All Migrant Workers and Members of Their Families 1990
- Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or

Degrading Treatment or Punishment 2002

- Optional Protocol to the Convention on the Rights of Persons with Disabilities 2006
- Optional Protocol to the International Covenant on Economic, Social and Cultural Rights 2008
- Rome Statute of the International Criminal Court 1998
- (Draft) Statute of the World Court of Human Rights 2010
- Treaty of Lisbon 2007 (Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union and the Charter of Fundamental Rights of the European Union as to be amended in 2013)
- United Nations Charter 1945
- Universal Declaration of Human Rights 1948
- US Alien Tort Claims Act 28 U.S.C. § 1350
- World Court of Human Rights Draft Statute 2010

Books:

- Alston, P. *'Non-State Actors and Human Rights (Collected Courses of the Academy of European Law)'* (2005) Oxford University Press, USA.
- Alston P., Crawford J. *'The Future of UN Human Rights Treaty Monitoring'* (2000) Cambridge University Press.
- Bassiouni M. C., Schabas W. A., *'New Challenges for the UN Human Rights Machinery: What Future for the UN Treaty Body System and the Human Rights Council Procedures?'* (2011) Intersentia Uitgevers N.V..
- Kozma J., Nowak M., & Scheinin M. *'A World Court of Human Rights: Consolidated statute and commentary'* (2010) NWV, Neuer Wissenschaftlicher Verlag.
- Nowak M., *'U.N. Covenant on Civil and Political Rights: CCPR commentary'* (2005) Kehl, Germany: N.P. Engel.
- Smith R. K. M., *'Text and materials on international human rights'* (2007) Routledge-Cavendish
- Smith R. K. M., *'Textbook on international human rights'* (2007) Oxford: Oxford University Press.
- Steiner H. J., Alston P., Goodman R. (2008) *International Human Rights in Context: Law, Politics, Morals*, : Oxford University Press.
- Symonides, J., *'Human Rights: International Protection, Monitoring and Enforcement'* (Aldershot: Ashgate, 2003)
- White R. C. A., Ovey C. (2010) *Jacobs, White and Ovey: The European Convention on Human Rights*, : Oxford University Press.

Articles and Reports:

- Alejandro Teitelbaum, 'Observations on the Final Report of the Special Representative of the UN Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie' [2011] TJSGA/TLWNSI Brief/HR (B013)
- Reinisch, A. *'The Changing International Legal Framework for Dealing with Non-*

- State Actors*' in Alston, P., '*Non-State Actors and Human Rights*' (2005) OUP
- Annan, K. 'In larger freedom, towards development, security and human rights for all' UN Doc. A/59/2005
 - Baruchello, G., Johnstone, R. J. 'Comment on Rights and Value: The Committee on Economic, Social and Cultural Rights Addresses the Environment' (2013) *Studies in Social Justice* Volume 7, Issue 1, 175-179
 - Bayefsky, A. '*The UN Human Rights Treaty System: Universality at the Crossroads*' (2001) Bayefsky Report conducted in collaboration with the Office of the UN High Commissioner for Human Rights
 - Berlin Conference, 'Final Report on the Impact of Findings on the United Nations Human Rights Treaty Bodies' (2004) International Law Association
 - Craven, M. 'Humanitarianism and the Quest for Smarter Sanctions' (2002) 13(1), *European Journal of International Law* 43-61
 - Crook, J.R. (2004). International Court of Justice and Human Rights, *The. Nw. Univ. J. Int'l Hum. Rts.*, 1, 2.
 - Dublin Statement on the Process of Strengthening of the United Nations Human Rights Treaty Body System (Nov. 19, 2009), reprinted (2010) *Neth. Q. Hum. Rts* 116, 121
 - Dublin II Outcome Document, 'Strengthening the United Nations Human Rights Treaty Body System' (10 – 11 November 2011)
 - European Court of Human Rights, 'Analysis of Statistics 2012' (January, 2013)
 - Forsythe, D. P., 'The UN Security Council and Human Rights: State Sovereignty and Human Dignity' (2012) Friedrich Ebert Stiftung
 - Human Rights Committee, General Comment No. 13
 - Human Rights Committee, General Comment 31, 29 March 2004
 - Human Rights Council, 'Contribution of parliaments to the work of the Human Rights Council and its universal periodic review' UN Doc. (March 19, 2013) A/HRC/22/L.21
 - Human Rights Council, 'Mainstreaming human rights into the post-2015 development agenda' UN Doc. (March 21, 2013) A/HRC/22/L.56
 - HRI/ICM/2011/3-HRI/MC/2011/2
 - Renucci, J. (2005) *Introduction générale à la Convention européenne des Droits de l'Homme: droits garantis et mécanisme de protection*, : Council of Europe.
 - Johnstone, R. L., '*Cynical Savings or Reasonable Reform? Reflections on a Single Unified UN Human Rights Treaty Body*' (OUP, 2007) HRLR 7:1
 - Kjærum, A., 'The Treaty Body Complaint System' (October, 2010) *Hum Rts. Q.*
 - Kjærum, A., 'The Treaty Body Complaint System' (2011) *Hum. Rts. Mon. Q.*, Issue 3
 - Kirkpatrick, J, 'A Modest Proposal: A Global Court for Human Rights', *J. Hum. Rts.* (forthcoming)
 - Kozma J., Nowak M., '*A World Court of Human Rights*' (2009) Swiss Initiative to Commemorate the 60th Anniversary of the UDHR
 - Melish, T. J., '*Introductory Note to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*' (2009) 48 ILM 256
 - NGO Joint Statement, 'Informal Hearing for Civil Society: Intergovernmental Process on Treaty Body Strengthening' (February 26, 2013)
 - Nollkaemper, A., van Alebeek, R., *The Legal Status of Decisions by Human Rights Treaty Bodies in National Law* (2011) ACIL No. 2011-02
 - Nowak, M. '*A World Court of Human Rights in Light of the UN Treaty Bodies' Reform*' (2012) Annual Conference, Norwegian Centre for Human Rights, University of Oslo

- Nowak, M. 'The Need for a World Court of Human Rights' (2007) 7 Hum. Rts. L. Rev. 251
- Note by the Secretariat, *Follow-up procedures on individual complaints*, 16 December 2010
- O'Connell, M. 'Debating the Law of Sanctions' (2002) 13(1) *European Journal of International Law* 63-79
- Pillay, N., Strengthening the United Nations Human Rights Treaty Body System (June 2012) UNHCHR Report
- Public Relations Unit, 'ECHR Overview 1959-2011' (February, 2012)
- Public Relations Unit, 'The ECHR in 50 questions' (July, 2012)
- Registry of the European Court of Human Rights, 'European Court of Human Rights: Annual Report 2012' (Strasbourg, 2013)
- Reinisch, A. 'The Changing International Legal Framework for Dealing with Non-State Actors' in Alston, P., 'Non-State Actors and Human Rights' (2005) OUP
- Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework (Final report, A/HRC/17/31, 2011)
- Salama, I., 'The Treaty Body Strengthening Process Enters a New Phase: Time for Implementation', (2012) Human Rights Treaties Division, 16-17
- Scheinin, M. 'The Proposed Optional Protocol to the Covenant on Economic, Social and Cultural Rights: A Blueprint for UN Human Rights Treaty Body Reform-Without Amending the Existing Treaties' (2006) 6 Hum. Rts. L. Rev. 133
- Scheinin, M., 'Towards A World Court of Human Rights' (2009) Swiss Initiative to Commemorate the 60th Anniversary of the UDHR
- Scheinin, M., Langford M., 'Evolution or Revolution? - Extrapolating from the Experience of the Human Rights Committee' (2009) Vol. 27, NR 1, S. 97–113
- Secretary-General, 'Implementation of Human Rights Instruments' UN Doc. (July 22, 2011) A/66/175
- Smith, A. 'The Unique Position of National Human Rights Institutions: A Mixed Blessing' (2006) 28(4) Human Rights Quarterly 904-46
- Shirane, D., 'ICERD and CERD: A Guide for Civil Society Actors' (2011) IMADR
- Sorensen, B., 'The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT): Articles 22 and 20*' (2007) *Torture Volume 17, Number 2*
- Stratton, J., 'Human Rights' (Sydney, N.S.W.: Legal Information Access Centre, 2008) *Hot topics (Sydney, N.S.W.); no. 65*
- Trechsel, S., . 'World Court for Human Rights' (2004) A. Nw. Univ. J. Int'l Hum. Rts., 1, i.
- Ulfstein, Geir, 'Do We Need a World Court of Human Rights?' (2008). Law at War – the Law as it was and the Law as it should be, Ch. 18, pp. 261-272
- U.N. Doc. A/CONF.157/PC/62/Add.5
- Viljoen, F. 'Fact-Finding by UN Human Rights Complaints Bodies – Analysis and Suggested Reforms' (2005) A. von Bogdandy and R. Wolfrum, (eds.), Max Planck UNYB 8, 49-100

Websites:

- African Commission on Human and Peoples' Rights <www.achpr.org-the> accessed 15 March 2013
- Complaints Procedures <<http://www2.ohchr.org/english/bodies/petitions/#communications>> accessed 1 April 2013
- Human rights bodies <<http://www.ohchr.org/en/hrbodies/Pages/HumanRightsBodies.aspx>> accessed 1st April 2013
- Individual Human Rights Complaints Handled by the UN: Few and Very Far Between <http://www.humanrightsvoices.org/EYEontheUN/un_101/facts/?p=54> accessed 1 May 2013
- Martin Scheinin, 'We need a World Court of Human Rights' (*Commonwealth Secretariat*, 3 June 2009) <http://www.thecommonwealth.org/news/205483/030609un_special_rapporteur.htm> accessed 7 March 2013
- On the principle of complementarity in the Rome Statute of the International Criminal Court <<http://chinesejil.oxfordjournals.org/content/4/1/121.full>> accessed 1st of May 2013
- OP1-ICCPR, <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&lang=en> accessed 1st of May 2013
- OP-ICESCR, <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3-a&chapter=4&lang=en> accessed 1st of May 2013
- Organisation for American States <www.oas.org> accessed 15 March 2013
- UN Global Compact <<http://www.unglobalcompact.org/ParticipantsAndStakeholders/index.html>> accessed 1st of May

Annex 1ⁱ

Committees	Constitutive Treaties
Human Rights Committee (HRCttee): <ul style="list-style-type: none"> • Independent experts • States must submit regular ICCPR implementation reports: 1 year after accession and then at Committee's request or every four years. Committee gives concluding observations following implementation report. • Convenes in Geneva/New York three times per year. • Methods of work/General comments on thematic issues: publishes its interpretation of the content of human rights provisions. 	International Covenant on Civil and Political Rights (ICCPR): <ul style="list-style-type: none"> • ICCPR Article 41 allows Committee to consider Inter-state complaints • ICCPR First Optional Protocol: Committee has competence to examine individual complaints against States-parties to the Protocol. • Second optional Protocol: Committee's competence is extended to ensuring that States-parties to this Protocol uphold the abolition of the death penalty.
Committee on Economic, Social and Cultural Rights (CESCR)	International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966) and

<ul style="list-style-type: none"> Independent experts body: meets in Geneva and holds two sessions per year est. by ECOSOC resolution 1985/17 to carry out the monitoring functions of ECOSOC (Part IV) States must submit regular ICESCR implementation reports: 2 years after accession and every five years thereafter. Committee gives concluding observations. 10 December 2008, General Assembly unanimous adoption of an Optional Protocol (GA resolution A/RES/63/117): gives CECSCR competence to receive and consider individual complaints against States-parties to the Optional Protocol (entered into force on the 5th May 2013). General Comment: publishes its interpretation of the content of human rights provisions. 	the Optional Protocol (OP-ICESCR) (2008; entered into force on the 5 th May 2013)
Committee on the Elimination of Racial Discrimination (CERD)	International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)
Committee on the Elimination of Discrimination against Women (CEDAW)	Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)
Committee on the Rights of the Child (CRC)	Convention on the Rights of the Child (CRC)
Committee on Migrant Workers (CMW)	International Convention on Protection of the Rights of all Migrant Workers and Members of their Families (ICMW)
Committee against Torture (CAT)	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (CAT) (1984)
Committee on the Rights of Persons with Disabilities (CRPD)	International Convention on the Rights of Persons with Disabilities (CRPD) (2006)
Committee on Enforced Disappearances (CED)	International Convention for the Protection of All Persons from Enforced Disappearance (ICED) (2006)
Subcommittee on Prevention of Torture and other cruel, inhuman or degrading treatment or punishment (SPT)	Optional Protocol of the Convention against Torture (OPCAT) (2002)

Annex 2ⁱⁱ

Treaty	Individual petition
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International Convention for the Elimination of all forms of Racial Discrimination	Yes, Article 14
International Covenant on Economic, Social and Cultural Rights	Yes, optional protocol (OP-ICESCR entered into force on the 5 th May 2013)
International Covenant on Civil and Political Rights	Yes, first protocol (entered into force 1976)
Convention on the Elimination of Discrimination against Women	Yes, optional protocol
Convention against Torture	Yes, Article 22
UN Convention on the Rights of the Child	No: OP3-CRC awaiting 6 more ratifications to enter into force
International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families	Yes, Art 77
International Convention on the Rights of Persons with Disabilities (2006)	Yes, Optional Protocol
International Convention for the Protection of All Persons from Enforced Disappearance (2006)	Yes, Article 31

Annex 3ⁱⁱⁱ

Frequency of periodic reports	Treaty
Not specified	<ul style="list-style-type: none"> • International Covenant on Economic, Social and Cultural Rights • Convention on Enforced Disappearances • Optional Protocol of the Convention against Torture (OPCAT)
Not specified, but generally every 5 years	<ul style="list-style-type: none"> • International Covenant on Civil Political Rights
Every 2 years	<ul style="list-style-type: none"> • International Convention on the Elimination of all Forms of Racial Discrimination
Every 4 years	<ul style="list-style-type: none"> • Convention on the Elimination of Discrimination against Women • Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (1984) • International Convention on the Rights of Persons with Disabilities
Every 5 years	<ul style="list-style-type: none"> • UN Convention on the Rights of the Child • International Convention on the Protection of the Rights of all Migrant

	Workers and Members of Their Families.
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- i Smith R. K. M., '*Text and materials on international human rights*' (2007) Routledge-Cavendish, p.173
- ii Ibid.197
- iii Ibid. p.189