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## TOWARDS A WORLD COURT OF HUMAN RIGHTS: QUESTIONS AND ANSWERS

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## **TOWARDS A WORLD COURT OF HUMAN RIGHTS: QUESTIONS AND ANSWERS**

The founding of the United Nations in 1945, with the promotion of universal observance of human rights as a principle objective under its Charter, launched an era of international human rights institution-building and standard-setting. The impressive human rights architecture developed over the following seven decades includes the UN Human Rights Council and its wide-ranging mechanisms. States have elaborated and adopted nine major universal human rights treaties, and numerous declaratory standards. An independent Office of the High Commissioner for Human Rights (OHCHR) exists to carry out human rights work on a global scale. There has been established an International Criminal Court (ICC) to try persons suspected of war crimes and crimes against humanity.

There remains, however, a glaring gap in this impressive human rights architecture: a World Court of Human Rights, that would make available a judicial mechanism to provide enforceable and effective justice to individual victims of human rights violations.

It is a fundamental principle of law that rights must be accompanied by remedies. In the area of human rights, victims of violations may have their rights rendered meaningless if they are not able to gain access to justice through effective remedies and reparation. Because human rights are legal rights, their violation should be addressed through the availability of judicial remedies, even if those remedies are complemented by non-judicial remedies.

Although human rights have long been the subject of international law and standards, individual States retain the primary responsibility for providing access to remedies at the national level. However, the promise of universal human rights protection is not likely to be fulfilled unless and until victims of human rights violations are able to have access to effective remedies at both the national and international levels. A complimentary system of remedies at the international level is necessary to address instances where a State is unable or unwilling to provide remedies for violations or where such remedies are ineffective.

The principle that rights require national and international judicial remedies is not simply an abstract platitude. It is compelling because the international human rights standards that States have accepted are so often honoured in their breach rather than their observance. Under the Rule of Law, it is the essential role of the judiciary to ensure that breaches are repaired. It is therefore time to renew the drive to establish a universal judicial mechanism. With the establishment of a World Court of Human Rights, the last major piece would be in place for the realization of an effective and comprehensive international human rights system.

## A Longstanding Idea: Some historical background

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While generally now forgotten, the United Nations almost at its inception seriously considered the possibility of establishing a World Court of Human Rights, an international judicial body that would be empowered to adjudicate complaints by individuals alleging human rights violations perpetrated by States. Indeed, the establishment of a World Court was among the first items of business taken up in 1947 by the newly inaugurated UN Human Rights Commission (Commission).<sup>1</sup> The Commission, established in 1946, was the UN's principal body concerned with the promotion and protection of human rights. During the Commission's second session, Australia introduced a draft resolution to establish an international court of human rights.<sup>2</sup> Under the Australian proposal, such a court would have had jurisdiction over complaints of human rights violations made by citizens of States parties to a proposed International Covenant on Human Rights (Covenant).<sup>3</sup> This early idea for a human rights Covenant would eventually be realized in 1966, but as two separate instruments, one on civil and political rights (the International Covenant on Civil and Political Rights (ICCPR)) and one on economic, social and cultural rights (the International Covenant on Economic, Social and Cultural Rights (ICESCR)). States parties to the proposed Covenant would have been under an obligation to effectively enforce any judgement of the Court.<sup>4</sup>

A Working Group of the Commission, made up of Australia, Belgium, Iran and India, considered favourably this draft resolution in the context of discussions on the effective supervision and enforcement of the Covenant. The Working Group recommended that there be a standing committee composed of independent permanent members to review petitions alleging violations of the Covenant, which would act as a body of first instance.<sup>5</sup> This committee would attempt to remedy violations, but where efforts proved fruitless, a judicial mechanism would be called on to administer justice.<sup>6</sup> The Working Group stressed that the protection of human rights needed an international court in order to 'round off' the general machinery for the protection of human rights.<sup>7</sup> The Working Group then voted unanimously that an international court should be empowered to make final and binding decisions on human rights violations. Three members of the Working Group (Australia, Belgium and Iran) supported the recommendation that the Court should be a self-standing and independent institution, while India favoured establishing the court as a separate chamber of the International Court of Justice.<sup>8</sup> In considering the question as to how to ensure the implementation of decisions of the international court of human rights, the Working Group determined that the UN General Assembly would be best placed to perform this oversight function.<sup>9</sup>

During the Commission's third session, those States that had not supported the international court project, including the United States and China, presented counterproposals. A number of States took the view that the time was not yet opportune to establish such a court, at least until some experience had been gained with regards to the operation of the proposed Covenant.<sup>10</sup> Some of these States preferred that the Commission set up *ad hoc* committees to address violations only in instances where States were unable to negotiate solutions.<sup>11</sup> Other proposals included

one by France advocating that a non-judicial petitions unit be created under the auspices of the Commission,<sup>12</sup> and another by Guatemala proposed the establishment of a “conciliation committee” to be presided over by the Chairman of the Commission.<sup>13</sup> Each of these proposals foresaw the International Court of Justice playing the central judicial role,<sup>14</sup> arguing that the time had not yet come for a new institution.<sup>15</sup> In addition to the argument that the time was not yet ripe, the objection was also raised that an international court of human rights would represent an intrusion on national sovereignty.<sup>16</sup> Signalling the emergence of fault lines of post-World War II political alignment, the Soviet Union’s representative insisted that granting jurisdiction to an international court of human rights represented an “inadmissible interference in the domestic affairs of any State.”<sup>17</sup>

Following the Commission’s third session, a questionnaire was distributed to States seeking views on methods of implementing the proposed human rights Covenant, including questions relating to the establishment of an international court. The responses to this questionnaire were reviewed at the Commission’s sixth session in 1950. Not all States responded and not all States that did respond addressed the question of the international court. India, the Philippines, Denmark and the Netherlands all reacted positively to the establishment of an international judicial mechanism, the former preferring a special chamber in the International Court of Justice. The United Kingdom considered that it was not yet desirable to establish a court “before it has been seen in practice how much there will be for such a court to do.”<sup>18</sup>

During the 1950s and 1960s, the international focus turned away from an international court towards setting legally binding human rights standards, including the International Convention on the Elimination of Racial Discrimination (ICERD), the ICCPR and the ICESCR. At the regional level, the European Court of Human Rights was established under the (European) Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

A number of human rights proponents continued to argue that international human rights standards required an international mechanism for effective enforcement and implementation. The International Commission of Jurists (ICJ) made the establishment of a World Court of Human Rights one of its central advocacy objectives at the First World Conference on Human Rights held in Tehran in 1968, a global event at which the question was addressed.<sup>19</sup> During the lead-up to the Tehran Conference, ICJ Secretary-General and future Nobel Peace Prize winner Sean MacBride<sup>20</sup> addressed the question in numerous public speeches, seminars and conferences, including at the UNESCO International NGO Conference on Human Rights in Paris in September of 1968. In his public advocacy, Sean Macbride insisted that while the elaboration of binding treaties was critical, the treaties must be subject to judicial enforcement in order to represent an effective contribution to international justice. As he saw it:<sup>21</sup>

“the great defects of present efforts of the United Nations to provide implementation machinery are that it is piecemeal and disjointed and that it is likely to be political rather than judicial. Effective implementation machinery should conform to judicial norms, it should be objective and

automatic in its operation, and it should not be ad hoc nor dependent on the political expediency of the moment... If we are serious about the protection of Human Rights, the time has surely come to envisage the establishment of a Universal Court of Human Rights... The reasons for the need of international judicial machinery in the field of human rights are many, the most important is to ensure objectivity and independence... We all know only too well that often the political authorities – particularly in periods of stress – are not above using patronage, pressures and even coercion against judges to secure their subservience.”

The ICJ brought two additional priority objectives to Tehran in 1968: the establishment of the post of a UN High Commissioner for Human Rights; and the creation of an international criminal court to try individuals for serious crimes under international law. Both of these objectives would come to fruition, in 1993 and 1998 respectively.<sup>22</sup>

There are a number of reasons why the World Court proposal never gained substantial traction after 1949. For one, the bipolarisation of the international community during the Cold War made the development of robust international human rights institutions and mechanisms unfeasible. Notwithstanding the political climate, highly successful normative standard setting was achieved, with the elaboration of the ICCPR and ICESCR and other human rights treaties and declaratory instruments. With respect to individual justice, the ensuing decades saw the progressive development of optional communication procedures established under human rights treaties or protocols thereto. These mechanisms allowed for complaints to be considered by non-judicial treaty bodies. Although no judicial mechanism could be established at the universal level, there were courts established for regional human rights systems, notably the European Court of Human Rights, the Inter-American Court of Human Rights and most recently the African Court on Human and People’s Rights.

Over the last 20 years, the international human rights system has been strengthened in a number of ways. The Special Procedures mandates of the Commission were established to cover a wide array of themes, as well as the human rights situations in individual countries and territories.<sup>23</sup> The 1993 World Conference on Human Rights in Vienna produced a series of progressive human rights commitments, and resulted in the establishment of the OHCHR. At that Conference, the World Court was again discussed peripherally, but the issue did not make it into the outcome document.

## **The resurgence of the World Court on the international agenda**

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In December 2008, the drive for a World Court gained renewed momentum when the Foreign Minister of Switzerland, Micheline Calmy-Rey, declared it as one of eight projects constituting a new Swiss *Agenda for Human Rights*, which was launched in commemoration of the 60<sup>th</sup> anniversary of the Universal Declaration of Human Rights (UDHR). The Swiss Federal Department of Foreign Affairs established a Panel of Eminent Persons, co-chaired by Mary Robinson and Paulo Sérgio Pinheiro, to

implement the new *Agenda*.<sup>24</sup> Panel member Manfred Nowak took the lead on the World Court project. He and external expert Martin Scheinin, whose assistance was enlisted, each drew up proposals for a World Court.<sup>25</sup> The two experts, assisted by Julia Kozma, then combined their efforts to produce a consolidated draft proposed statute, which was published in 2010.<sup>26</sup> The Panel of Eminent Persons endorsed the proposal in September 2010.

The draft proposal is far more detailed than the proposal by Australia more than 60 years earlier, with the extensive development of international standards and mechanisms informing the draft. The statute envisions a World Court of Human Rights as a permanent standing institution. Judges would be competent to decide on complaints brought by individuals, groups or legal entities alleging a violation of any human right found in an international human rights treaty binding on the State. The judgments would be final and binding. Such complaints could be lodged against States that had become party to the statute of the World Court and the respective human rights treaties that formed the Court's subject matter. Taking into account the international personality and global responsibilities of inter-governmental organisations, such as the UN and its specialised agencies, the World Bank and NATO, the statute would make such organisations subject to the jurisdiction of the Court. Under the proposal, other legal entities, such as business enterprises, might be able to accept the jurisdiction of the Court.

As with regional courts and non-judicial treaty body communications mechanisms, individual complaints would be admissible only after the complainant had exhausted all available domestic remedies. In order to maintain a manageable caseload and avoid duplication of remedies, States would be encouraged to establish domestic human rights courts competent to directly apply all human rights treaties subject to the jurisdiction of the World Court to which the State was party. If domestic remedies did not provide adequate relief to the victim, he or she would have the right to submit a complaint to an international human rights court, either at the regional or global level. It would be up to the victim to choose only a single international avenue of redress, should more than one be available. There could be no appeal from a regional human rights court to the World Court.

A Statute for a World Court will ultimately have to be negotiated by States. Generating the necessary political momentum now requires a full debate by all stakeholders, including States, civil society, independent experts and academics. Some of these discussions have already begun. For instance, at the 16<sup>th</sup> session of the Human Rights Council in February-March 2011, the ICJ, Switzerland, the Maldives, Uruguay and the Geneva Academy of International Humanitarian Law and Human Rights, co-convened a parallel event aimed to launch a wider discussion at the UN on the World Court. Panellists included Manfred Nowak and Martin Scheinin, Theodor Meron and Philippe Texier, and the Maldivian Ambassador to the UN, Iruthisham Adam. The event garnered substantial interest, eliciting comments from a number of State delegations.

## Questions and Answers

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*What would be the purpose and function of a World Court of Human Rights?*

A World Court of Human Rights would be designed first and foremost to provide access to justice and effective redress to victims of human rights violations throughout the world. Individuals alleging violations would have recourse to an international judicial mechanism, composed of independent and impartial judges of the highest standard of competence, to bring complaints against States that are parties to the Court's statute.

While victims of human rights violations seeking a remedy would, in the first instance, be expected to make use of their own States' national procedures and mechanisms, the World Court would be available to them where the national mechanisms are unavailable, ineffective, or have failed to deliver justice.

The precise jurisdictional scope and structure of the World Court will ultimately have to be negotiated by States. However, certain identifiable features will be essential for a credible and effective judicial mechanism. The Court would be a permanent standing institution established through a multilateral treaty under the auspices of the United Nations. It would be composed of highly qualified and independent full-time judges elected by the States parties. It would have the power to take final and legally binding decisions on applications of alleged human rights violations committed by States parties, in breach of their international human rights obligations.

The statute of a World Court of Human Rights would be unlikely to contain any fresh enumeration of substantive human rights standards. Rather, the Court would assume jurisdiction for rights contained in the existing universal human rights treaties, including the International Covenant on Civil and Political Rights and its Second Optional Protocol; the International Covenant on Economic, Social and Cultural Rights; the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination against Women; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Convention on the Rights of the Child and its First and Second Optional Protocols; the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families; the Convention on the Rights of Persons with Disabilities; and the International Convention for the Protection of All Persons from Enforced Disappearance.

Not all States are party to all of the universal human rights treaties, nor may all States be immediately prepared to accept the jurisdiction of a World Court for all of the treaties to which they are party. Therefore, there is the possibility that a future Court statute might allow for States to opt out of jurisdiction for certain treaties. Any opt out procedures would have to be sufficiently flexible to allow for States to eventually accept jurisdiction, since universal adherence to the Court's jurisdiction over all human rights violations must be the ultimate objective.

Individual complainants would likely have to exhaust domestic remedies with regards to their claim before being able to bring the matter to the World Court. To minimise incidence of conflicting international jurisprudence and to prevent an overload of cases, jurisdiction would probably not be available for a complaint that is substantially similar to one already examined or being examined by a regional human rights court. In these circumstances, a complainant would have to choose between either a regional court or the World Court and would not be able to access both bodies with regards to the same alleged violation.

Because the World Court would be issuing a legally binding judgment, it would need to be supported by a body charged to ensure the effective execution of its judgments. This body could take the form of a political organ of States parties, such as the role played by the European Committee of Ministers with respect to the European Court of Human Rights. Another possibility would be for this function to be carried out by an independent United Nations organ, such as the Office of the High Commissioner for Human Rights.

*Why is the World Court needed?*

An international judicial body is necessary if the promise of the universal realization of human rights is to be achieved.

Rights may easily be rendered illusory and meaningless if they are not accompanied by effective remedies. This premise was well understood by many of the early architects of the international human rights system even before the Universal Declaration of Human Rights had been negotiated and adopted in 1948. Australia, in introducing its draft resolution in 1946, explained:<sup>27</sup>

“[T]he remedy is to us as important as the right, for without the remedy there is no right. Our basic thesis is that individuals and associations as well as states must have access to and full legal standing before some kind of international tribunal charged with supervision and enforcement of the [proposed covenant on human rights]. In our view, either a full and effective observance of human rights is sought, or it is not.”

The right of a victim of a human rights violation to a remedy includes the right to hold States, which have the duty to guarantee the enjoyment of human rights to persons within their jurisdiction, to account before an independent and impartial body that is capable of adjudicating the complaint and issue a binding decision. Such a body must be empowered to prescribe reparation for the injury suffered. This is fundamental to international human rights law, and is set out in numerous international instruments, including the UDHR, the universal and regional human rights treaties, and the jurisprudence of mechanisms established by those treaties.<sup>28</sup> All States reaffirmed this principle at the UN General Assembly in 2005, when adopting the Basic Principles and Guidelines on the Right to Remedy and Reparation. Those principles affirm that “the obligation to respect... and implement international human rights law... includes... the duty to provide those who claim to be victims of a... violation with equal and effective access to justice... and... to provide effective remedies to victims...”<sup>29</sup>

The interplay between national and international institutions would be governed by the principle of complementarity, with a World Court functioning in tandem with national judiciaries and regional human rights courts.

The primary responsibility to ensure the right to a remedy lies with the State concerned. However, States are not always able or willing to provide effective remedies for human rights violations, even when such remedies are ordered by courts or non-judicial mechanisms at the domestic level. In certain cases where some access of remedy is provided, the result may not be in line with international human rights law and standards.

A World Court of Human Rights would be not only for the direct benefit of victims of human rights violations, but also for States. An international judicial body, issuing authoritative interpretations, would help to ensure that international rights are better implemented at the domestic level. Judgments from the World Court would help to provide predictability and consistency in the interpretation of international standards. In this respect, the existing regional human rights courts have already played a significant role in encouraging States to better meet their human rights obligations.

*Existing human rights treaties have optional communications mechanisms to allow the treaty bodies to consider and decide on individual complaints of violations. What value would a World Court add to these existing procedures?*

Most of the existing international human rights treaties do indeed allow for individual complaints to be reviewed, provided that the State concerned has formally declared its acceptance of the individual communication mechanism or ratified the optional protocol establishing such a procedure. Some treaties, such as the Convention on the Elimination of Racial Discrimination, the Convention against Torture, and the International Convention for the Protection of all Persons from Enforced Disappearances have optional communications procedures included in the main treaty. Others, such as the ICCPR, ICESCR, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities are supplemented by optional protocols allowing for the consideration of communications.

Complaints of human rights violations under these optional communications procedures are reviewed by treaty bodies, which are expert committees established under each of the respective human rights treaties. Decisions rendered by the treaty bodies are characterised as “views”, and they consist of the conclusions by the committees as to whether a violation has occurred and, if so, the kind of remedy that should be provided to the victim(s). These views often carry substantial normative impact and States should in good faith respect them in order to discharge their obligations under the relevant human rights treaty. After all, States parties to the relevant optional protocols and treaty provisions have chosen to recognise the competence of the committees to determine whether a right has been violated and they have undertaken to give effect to the provisions therein, and provide effective

remedies for violations. Committee determinations therefore enjoy normative and institutional legitimacy, and a justifiable expectation of compliance.<sup>30</sup> As the Human Rights Committee has explained:<sup>31</sup>

“While the function of the Human Rights Committee in considering individual communications is not, as such, that of a judicial body, the views issued by the Committee under the Optional Protocol exhibit some important characteristics of a judicial decision.” [...]

“The views of the Committee under the Optional Protocol represent an authoritative determination by the organ established under the Covenant itself charged with the interpretation of that instrument. These views derive their character, and the importance which attaches to them, from the integral role of the Committee under both the Covenant and the Optional Protocol.”

The communications procedures have been invaluable as the only international forum for redress of human rights violations. However, as important as they are, treaty bodies are no substitute for courts of law. These committees, typically composed of both lawyers and non-lawyers, do not consider cases under a full judicial process, involving, for example, adversarial or inquisitorial evidentiary hearings. Critically, they are not really able to deliver legally enforceable decisions. The treaty bodies were not devised to operate as judicial mechanisms adjudicating individual claims, but rather as expert bodies evaluating the general compliance, law, policy and practice by States with their international obligations. Because they are not judicial bodies, many States are disinclined to treat their views to be as compelling as a court ruling. Indeed, compliance rates are far lower than those of regional human rights courts, the decisions of which have generally been respected by States.

Of course, it remains essential that States respect the decisions of the treaty bodies. Even when a court is established, the treaty bodies will continue to function in respect of States until they are prepared to accept the jurisdiction of a World Court.

*There are already international judicial bodies in existence. Why can those courts not serve as a World Court of Human Rights?*

The principal global judicial bodies are the International Court of Justice and the International Criminal Court. Neither of these courts allow for individuals to bring complaints of human rights violations. The International Court of Justice is limited in jurisdiction to addressing complaints from one State to another. The International Criminal Court is responsible for trying individuals in criminal cases for specific egregious offences,<sup>32</sup> not for the adjudication of individual petitions for redress of human rights violations. The only judicial fora in which citizens can bring claims against their State for human rights violations are national legal systems, and, for certain States, a regional human rights court.

*A number of States are already subject to a regional human rights court? How would a World Court benefit people in those States?*

In Europe, Africa and the Americas, regional human rights courts have been established to adjudicate complaints of human rights violations under the general human rights treaties in the region. Asia and the Middle East region do not have regional courts.

The regional courts that have been established only have jurisdiction in respect of the rights contained in the corresponding regional treaties: the European Convention for Human Rights, the American Convention of Human Rights, and the African Charter on Human and Peoples Rights. However, a large number of the rights contained in the nine universal treaties are not contained in these regional treaties. Whole areas of rights, such the rights of the child; rights of disabled persons; rights of migrant workers; and economic, social and cultural rights are outside the ambit of some or all of the regional treaties. In some instances, while elements of rights might be provided for in a regional treaty, the detailed scope of the right and obligations of States are spelled out in a universal instrument, such as the ICERD and CEDAW in respect of racial discrimination and discrimination against women. In addition, even where particular rights seem to be similarly construed in international and regional human rights treaties, their precise content is not necessary identical.

To take an example, the right to education is protected under regional human rights treaties, including the First Protocol to the European Convention on Human Rights, which provides that "No person shall be denied the right to education."<sup>33</sup> Article 13 of the ICESCR ensures the same right,<sup>34</sup> but additionally provides extensive detail on the State's obligation to fulfil the right to free education, including by providing to individuals at least primary and secondary education.<sup>35</sup>

By way of further example, the rights of the child are also protected under regional treaties. The American Convention on Human Rights ensures in Article 19 that "Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state." In contrast, the Convention on the Rights of the Child, contains 41 substantive articles, including survival rights (including the child's right to life and the needs that are most basic to existence, such as nutrition, shelter, an adequate living standard, and access to medical services); protection rights (ensuring children are safeguarded against all forms of abuse, neglect and exploitation, including special care for refugee children; safeguards for children in the criminal justice system; protection for children in employment; protection and rehabilitation for children who have suffered exploitation or abuse of any kind); development rights (including the right to education, play, leisure, cultural activities, access to information, and freedom of thought, conscience and religion); and participation rights (encompassing children's freedom to express opinions, to have a say in matters affecting their own lives, to join associations and to assemble peacefully).

The African Charter on Human and Peoples' Rights protects the right to health in Article 16, providing that "Every individual shall have the right to enjoy the best attainable state of physical and mental health. States Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they

receive medical attention when they are sick.” In contrast, the ICESCR elaborates on the right to health in Article 12, by providing that “[t]he steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for: (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child; (b) The improvement of all aspects of environmental and industrial hygiene; (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases; (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness”.<sup>36</sup>

A World Court would be empowered to adjudicate complaints of violations of human rights that are contained in universal treaties.

*Would a World Court of Human Rights be able to handle the large number of cases it might receive? The European Court is functioning under a considerable backlog because of its heavy caseload, and it covers only Europe, not the whole world.*

The European Court of Human Rights does have a heavy caseload, and may be considered to be a victim of its own success. The fact that the Court is so frequently accessed is an indication that it is very much needed, just as a World Court is needed.

There will certainly be very real challenges to be confronted in administering and ensuring adequate resources for a World Court. Concretely, the Court will likely need a filtering mechanism in order to streamline procedures in respect of certain cases. The experience of the European Court is instructive in this regard.

The European Court has implemented a number measures to address the sources of its backlog. Presently, more than 90 percent of applications received by the Court are found to be manifestly ill-founded under admissibility criteria.<sup>37</sup> In 2010, Protocol 14 of the European Convention entered into force, facilitating a process by which a single judge, rather than the previous three-judge panel, is able to reject plainly inadmissible applications. It also empowers a three-judge committee to declare applications admissible and decide on their merits in clearly well-founded cases and those in respect of which there is well-established case law. Previously, three-judge committees could only declare applications inadmissible by unanimity but not decide on the merits. The European Court may now also declare inadmissible applications where the applicant has not suffered a significant disadvantage and which, in terms of respect for human rights, do not require an examination of the merits by the Court or do not raise serious questions affecting the application or the interpretation of the European Convention or important questions concerning national law. Early indications are promising for the Protocol 14 processes. The European Court is estimating an elimination of the backlog by 2015, with an annual reduction of one quarter of the backlog until that time.<sup>38</sup>

Another cause of backlog is the huge volume of ‘repeat’ cases.<sup>39</sup> The response to this has been the adoption of a ‘pilot judgment process’. Instead of dealing with each individual case, the European Court now singles out one or a small number of applications for priority treatment and adjourns all other applications until the pilot

case has been decided. In the judgment concerning the pilot case, the European Court gives advice to the Government on how to solve the systemic problem.

There are a number of other proposals under consideration which could reduce the backlog in the European Court of Human Rights further.

The Inter-American system has confronted similar challenges. The system retains a two-tiered structure, with the Inter-American Commission on Human Rights carrying out the initial review and possible settlement of a petition, only referring select cases to the Inter-American Court. The main backlog has occurred not at the Court, but at the Commission. To tackle this problem, the Commission has increased its resources, as well as restructured itself to include a new registry, a protection group and five regional sections. It has also developed working methods and procedures based on a specialisation by procedural stage and by theme. According to the President of the Commission, these steps have resulted in a reduction in the backlog.<sup>40</sup>

As with both of these regional courts,<sup>41</sup> any number of solutions might prove successful in moderating the caseload of the World Court. Those elaborating a World Court statute, rules of procedure, and working methods will have the benefit of experience from the regional courts and can already build in procedures to minimize the caseload pressures.

*With all of the other international human rights challenges and priorities, is the time right for a World Court?*

The historical record demonstrates that States were already prepared seriously to consider the creation of a World Court of Human Rights in the 1940s. During the debates in 1947-1948, many of the unsupportive States did not object to the concept, but rather were reticent to undertake such efforts at a time when international standards had not yet been adopted. It is also worth noting that endeavours to establish the OHCHR and the ICC were very cautiously received up until a few years before being established.

The time is now to move towards the realization of the vision of 1945 of universal observance of human rights. The project of establishing a universal judicial body toward that end, which was begun but interrupted for 60 years, should be renewed. While the process of elaborating, negotiating, adopting, gaining sufficient ratifications, and bringing into operation a World Court would take place over the period of a number of years, serious and concentrated discussions by States, civil society, academics, experts and all concerned persons should commence presently.

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<sup>1</sup> The Commission was replaced in 2006 by the UN Human Rights Council, pursuant to General Assembly Resolution 60/251 of 15 March 2006.

<sup>2</sup> Australia tabled the draft resolution for an international court of human rights on 5 February 1947. E/CN.4/15.

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- <sup>3</sup> Additionally, the draft resolution foresaw that the Court would assume jurisdiction over future treaties.
- <sup>4</sup> E/CN.4/15. Para 6
- <sup>5</sup> p. 53
- <sup>6</sup> P. 55
- <sup>7</sup> P. 58
- <sup>8</sup> P. 62
- <sup>9</sup> P. 63
- <sup>10</sup> E/CN.4/145, 16 June 1948, Commission on Human Rights, Third Session 'China And The United States: Proposal On Implementation For The Covenant On Human Rights', 'India: Amendment To China-United States Of America Proposal On Implementation For The Covenant On Human Rights'
- <sup>11</sup> Yearbook of the United Nations, 1948-1949 'V. Social, Humanitarian and Cultural Questions: A. Human Rights'. P. 539
- <sup>12</sup> E/CN.4/82/Add.10, 17 May 1948, Commission on Human Rights, Third Session 'comments by governments on the draft international declaration on human rights, the draft international covenant on human rights, and implementation: communication received from the French government'
- <sup>13</sup> Yearbook of the United Nations, 1948-1949 'V. Social, Humanitarian and Cultural Questions: A. Human Rights'. P. 539
- <sup>14</sup> Yearbook of the United Nations, 1948-1949 'V. Social, Humanitarian and Cultural Questions: A. Human Rights'. P. 539
- <sup>15</sup> See, e.g., comments made by Rene Cassin, Representative of France, during a meeting 15 June 1948 during the Third Session of the Commission on Human Rights, E/CN.4/147. P.7; refer to comments made by Mr. Loutfi, Representative of Egypt, E/CN.4/SR.81 Third Session of the Commission on Human Rights, summary record of the 81<sup>st</sup> meeting, Friday 18 June 1948. P. 17-18
- <sup>16</sup> See, e.g., comments made by Mrs. Mehta, Representative of India, E/CN.4/SR.81 Third Session of the Commission on Human Rights, summary record of the 81<sup>st</sup> meeting, Friday 18 June 1948. P. 11.
- <sup>17</sup> Comment made by Mr. Pavlov, Representative of the USSR, E/CN.4/SR.81 Third Session of the Commission on Human Rights, summary record of the 81<sup>st</sup> meeting, Friday 18 June 1948. P. 14.
- <sup>18</sup> Compilation of comments of governments on measures of implementation. E/CN.4/366, 22 March 1950. P. 10
- <sup>19</sup> UN Conference on Human Rights, Tehran, April 22 to May 13, 1968, Proclamation of Tehran. 63 Am. J. Int'l L. 674 1969. Para. 4
- <sup>20</sup> Sean MacBride was a renowned international politician and human rights defender. To list a few of his accomplishments, he was the Minister for External Affairs in Ireland from 1948-1951, Vice-President of the OECD (then called the OEEC) from 1948-1951, President of the Committee of Ministers of the Council of Europe in 1950, Secretary-General to the ICJ from 1963-1971, a founding member and Chairman of Amnesty International from 1961-1975, and recipient of the Nobel Peace Prize in 1974, the Lenin Peace Prize in 1975-1976, and the UNESCO Silver Medal for Service in 1980.
- <sup>21</sup> MacBride, Sean. "The Strengthening of International Machinery for the Protection of Human Rights." Nobel Symposium VII: The International Protection of Human Rights. Oslo, 25-27 September 1967. P. 16-17
- <sup>22</sup> Journal of the ICJ, Vol. VIII, No. 2, December 1967. P. IV
- <sup>23</sup> While many of these mechanisms could receive individual communications, only one, the Working Group on Arbitrary Detention, reviewed communications with a view to ruling on alleged violations.
- <sup>24</sup> The Geneva Academy of International Humanitarian Law and Human Rights Law (Geneva Academy) also is involved in such efforts, being responsible for organizing and coordinating the initiative.
- <sup>25</sup> See <http://www.udhr60.ch/research.html>
- <sup>26</sup> Julia Kozma, Manfred Nowak and Martin Scheinin, A World Court of Human Rights - Consolidated Statute and Commentary, 2010
- <sup>27</sup> Statement made by the Australian representative on an International Court of Human Rights, quoted in Devereux, Annemarie. "Australia and the International Scrutiny of Civil and Political Rights: An Analysis of Australia's Negotiating Policies, 1946 - 1966," *Australian Yearbook of International Law*. Volume 22, 2003. P. 56.

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<sup>28</sup> E.g. Universal Declaration of Human Rights Article 8; International Covenant on Civil and Political Rights Article 2(3)(a); Human Rights Committee General Comment 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant; International Convention on the Elimination of All Forms of Racial Discrimination Article 6; Committee on the Elimination of Racial Discrimination General Recommendation 26: Article 6 of the Convention; Convention on the Elimination of All Forms of Discrimination against Women Article 2; Committee on the Elimination of Discrimination against Women General Recommendation 19: Violence Against Women; Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment Article 14; Convention on the Rights of the Child Article 39; Committee on the Rights of the Child General Comment 5: General measures of implementation of the Convention on the Rights of the Child; International Convention for the Protection of All Persons from Enforced Disappearance Article 8(2); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families Article 83; Hague Convention with Respect to the Laws and Customs of War on Land Article 3); Additional Protocol to the Geneva Conventions of 1949 relating to the Protection of Victims of International Armed Conflicts Article 91; Rome Statute of the International Criminal Court Articles 68 and 75; European Convention on Human Rights Articles 13 and 41; American Convention on Human Rights Articles 10 and 25; Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa Article 25.

<sup>29</sup> Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of Human Rights Law and Serious Violations of International Humanitarian Law.

<sup>30</sup> Burgenthal, Thomas. "The U.N. Human Rights Committee." *Max Planck Yearbook of United Nations Law*, Volume 5, 2001. P 397.

<sup>31</sup> Human Rights Committee General Comment No 33: The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights. Paragraphs 11, 13-15.

<sup>32</sup> See Rome Statute of the International Criminal Court Article 5.

<sup>33</sup> First Protocol to the European Convention on Human Rights Article 2.

<sup>34</sup> ICESCR Article 13:

1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:

(a) Primary education shall be compulsory and available free to all;

(b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;

(c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;

(d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;

(e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.

<sup>35</sup> The scope of the right is further developed by the Committee on Economic, Social and Cultural Rights in its General Comment 13 on the Right to Education.

<sup>36</sup> See also ICESCR General Comment 14: Right to the Highest Attainable Standard of Health.

<sup>37</sup> See "Protocol 14: The reform of the European Court of Human Rights." *Council of Europe Factsheet*. Available at:

<http://www.echr.coe.int/NR/rdonlyres/57211BCC-C88A-43C6-B540-AF0642E81D2C/0/CPProtocole14EN.pdf>

<sup>38</sup> See Council of Europe, Steering Committee for Human Rights (CDDH), Report of the 73<sup>rd</sup> meeting (Strasbourg, 6-9 December 2011), CDDH (2011) R73, item 4.1, para. 7.

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<sup>39</sup> These are cases arising from a systematic problem existing in the State, which is the cause of a violation affecting a whole class of individuals, each of which is entitled to bring an application before the Court. The Department for the Execution of Judgments was called upon to examine over 1,500 new cases decided by the European Court in 2009 and found that almost 90% of them were repeat cases (Baluarte, David C. and Christian M. De Vos. "From Judgment to Justice: Implementing International and Regional Human Rights Decisions." *Open Society Foundations*. November 2010. P 36).

<sup>40</sup> Speech by the President of the Inter-American Commission on Human Rights, Felipe González. "Presentation of the 2009 annual report of the Inter-American Commission on Human Rights to the Committee on Juridical and Political Affairs of the Permanent Council of the Organization of American States." Washington, D.C., 15 April 2010. Available at <http://www.cidh.oas.org/Disursos/04.15.10eng.htm>

<sup>41</sup> The African Court on Human and Peoples Rights' procedures are not addressed here because of the small number of cases it has received so far, as a result of only five States having declared to accept the jurisdiction of the Court with regard to individual applications.