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Protecting Dignity: *An Agenda for Human Rights*

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 and of equal and inalienable rights
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 and peace in the world...

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2011 Report | Protecting Dignity: An Agenda for Human Rights

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2011 Report

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PREFACE BY MICHELINE CALMY-REY President of the Swiss Confederation

In 2008, the 60th anniversary of the Universal Declaration of Human Rights was an opportunity to take stock of human rights in the world and consider new challenges requiring greater joint action. We saw this symbolic anniversary as an invitation to work for a better future, to strive to realize more fully the principles enshrined in the Declaration and the human rights conventions, and to define new objectives and new approaches, so as to ensure that human rights are given due prominence in the 21st century.

This was the basis for the 2008 initiative – Protecting Dignity: An Agenda for Human Rights (www.udhr60.ch). This initiative should encourage us to look to the future and take up the challenges that face us. Its leadership was entrusted to a group of eminent persons known now as the ‘Panel on Human Dignity’.

Eight topics were initially chosen by the Panel as priority areas for further research and action: human dignity, prevention through education, detention, migration, statelessness, the right to health, climate change, and the World Court of Human Rights. Earlier in 2011, the Panel agreed to focus their continued efforts on the following topics: the World Court of Human Rights, general conditions of detention (in particular for common law prisoners and minors), access to justice and legal empowerment (in particular for poorer segments of the population), and the effects of climate change on human rights.

As recent events demonstrate, there is no denying that fact that today – three years after the Agenda was drawn up – multiple human rights challenges remain. Far too many people continue to be denied the opportunity to exercise their fundamental rights and freedoms. Media reports remind us all of horrific wars with their attendant litany of victims, disappearances, suicide bombings and distress. Each day brings its share of fresh victims of intolerance, discrimination and serious violations of the rights the Universal Declaration of Human Rights and other international instruments affirm for all people.

That is why we must continue to strive to protect and promote human rights and that we redouble our efforts in this field. The ideas developed by the Panel on Human Dignity build on the research projects that have been commissioned, and provide important recommendations that should be widely studied and discussed as part of our continuing support for this Agenda for Human Rights.

Since the Agenda for Human Rights was instituted, the panel has worked tirelessly to encourage respect for human rights – and for human dignity. I would like to express my sincere thanks to all the participants. I wish the Panel, and everyone involved, the greatest possible success.



FOREWORD BY MARY ROBINSON

Honorary President of the Panel
on Human Dignity

My colleagues and I who were invited in 2008 by the Government of Switzerland to develop *Protecting Dignity: An Agenda for Human Rights* are pleased to present this latest report focused on four thematic issues identified in our original publication.

Although we recognize that a much broader range of human rights challenges continue to require urgent attention by the international community, we have selected a limited number of issues, which we believe highlight the importance of addressing long term structural and institutional shortcomings as part of strategies aimed at ensuring protection of human dignity and equal rights for all.

As we said in 2008 at the time of the Universal Declaration's 60th anniversary, the gap between the high aspirations of human rights and the sobering realities of life for millions of people around the world, between human rights law and its implementation, between the lofty rhetoric of governments and their lack of political will to keep their promises, is our most persistent problem, and bridging that gap the major challenge of our time.

In this report, we seek to reflect not only on what we have learned and heard about issues we identified in our 2008 Agenda, but also to look ahead to where real progress could be made before the end of this decade. Of course, moving from recommendations to implementation requires not only a clear strategy, but also the development of new alliances and partnerships between governments and all other actors in society committed to a fairer and more peaceful world.

On behalf of my colleagues on the Panel, we hope the analysis and recommendations in this report will serve as inspiration for further dialogue and action aimed at protecting the dignity of people everywhere.



INTRODUCTION BY HINA JILANI AND PAULO SÉRGIO PINHEIRO

Co-chairs of the Panel on Human Dignity

Identifying human rights challenges and setting the agenda for action to mitigate the potential for violation of rights is far less challenging than the achievement of conditions, political, economic and social, that would allow the realization of rights. Repeated and prolonged periods of political crises and economic instability in many parts of the world have restrained progress towards a stable environment in which respect for human rights finds the best guarantees.

Some countries show visible signs of reversal of the initial advancements and are trapped in a perpetual state of transition. While states have progressively enhanced their powers of control, the role of the state in protection has diminished. These trends continue to impede prospects for democracy, respect for human rights and the rule of law, and the potential for development.

An intelligent and creative choice of national and international mechanisms is now vital not only to strengthen democracy and the rule of law, but also to effectively counter trends that pose a threat to these prospects. Informed electoral processes that ensure genuinely representative democracies with ample space for citizen participation and credible accountability systems need to be promoted.

Effective judicial systems must be supported by complete judicial independence if people are to draw real benefit from protections that are normally available under a constitutional framework. Initiatives for legal empowerment of the poor to relieve social exclusion and discrimination, exploitation of labour, eviction from land and displacement, and for conferring the right to control over natural resources would contribute towards bringing peace to communities.

Such a move forward requires a creative relationship between states and civil society so that people's dignity and security is placed at the centre of any approach towards governance. The Panel on Human Dignity places an emphasis on building this relationship and has affirmed its support for closer cooperation and continuous dialogue between the two in order to identify the challenges as well as the remedies for better protection and the promotion of human rights.

Panel on Human Dignity



Mary Robinson
Honorary President

President of the Mary Robinson Foundation-Climate Justice, former President of Ireland and former UN High Commissioner for Human Rights.



Hina Jilani
Co-chair

Human rights lawyer and co-founder of the Human Rights Commission of Pakistan. Former Special Representative of the UN Secretary-General on Human Rights Defenders.



Paulo Sérgio Pinheiro
Co-chair

Commissioner and Rapporteur on Children, Inter-American Commission on Human Rights, Organization of American States, 2004-2011. Former Independent Expert of the UN Secretary-General for the study on violence against children, 2003 to 2007 and former Secretary of State for Human Rights, Brazil.



Theodor Meron
Member

President of the International Criminal Tribunals for former Yugoslavia (ICTY) and Presiding Judge of the ICTY/ICTR Appeals Chambers, Charles L. Denison Professor Emeritus and Judicial Fellow at New York University Law School.



Pregs Govender
Member

Writer, educator and feminist activist. Author of «Love and Courage, A Story of Insubordination». An activist against apartheid since 1974, she served as an MP in South Africa's first democracy from 1994 until 2002, chaired the Independent Review of Parliament and is currently full-time Commissioner and Deputy Chair of the South African Human Rights Commission.



Vitit Muntarbhorn
Member

Professor of Law, Chulalongkorn University, Bangkok. Former UN Special Rapporteur on the sale of children, child prostitution and child pornography and on the Situation of Human Rights in Democratic People's Republic of Korea. Awarded the UNESCO Prize for Human Rights Education, 2004. Appointed Chairman of the UN Commission of Inquiry on the Ivory Coast, 2011. Member of the Committee of Experts, International Labour Organization, and member of the Advisory Board, (UN) Human Security Fund.



Saad Eddin Ibrahim
Member

Professor of political sociology. Founder and first Secretary-General of the Arab Human Rights Organization. Secretary General of Egypt's Independent Election Review Committee and President of the Egyptian Sociological Association. He plays a leading role in Egypt's civil society movement.



Manfred Nowak
Member

Professor of International Law and Human Rights at Vienna University. Director of the Ludwig Boltzmann Institute of Human Rights. Former UN Special Rapporteur on Torture and Swiss Chair of Human Rights at the Geneva Academy of International Humanitarian Law and Human Rights.

Protecting Dignity: *An Agenda for Human Rights*

To mark the 60th anniversary of the Universal Declaration of Human Rights, the Government of Switzerland asked eight individuals with extensive human rights experience to reflect on contemporary human rights challenges and develop an 'Agenda for Human Rights'. The work of this Panel was also supported by the Governments of Norway, Austria and Brazil as well as the National Human Rights Committee of Qatar, through meetings in Oslo, Vienna, São Paulo and Doha.

The Panel's text *Protecting Dignity: An Agenda for Human Rights* was presented to the Government of Switzerland and to the wider international community in 2008. At the same time the Panel commissioned eight research projects based on themes identified in the Agenda which are now published on the Panel's website. Summaries of the research projects have been published in a companion volume to this report.

The research on human dignity prompted further careful study and dialogue on this aspect of the Agenda and indeed the Panel is now known as the Panel on Human Dignity. Furthermore, the Panel has chosen to take forward a number of the ideas developed in the research through four separate initiatives. The first relates to the proposal for a World Court of Human Rights; the second relates to legal empowerment and access to justice; the third relates to new forms of protection for those in detention; and the last relates to the impacts of climate change on human rights and the need for climate justice. All four initiatives are explained in greater detail in separate annexes to the present publication.

The Panel looks forward to working with others from all sectors in taking this Agenda and the separate initiatives forward.

Sixty years ago, the Universal Declaration of Human Rights proclaimed that « recognition of the inherent dignity and of the equal and inalienable rights of the human family is the foundation of freedom, justice and peace in the world ».

Since the Declaration's adoption, the vast majority of governments have formally incorporated international human rights standards into their national law and constitutions, and an ever widening circle of organizations and civil society networks from across the globe have called for accountability. These organizations have themselves increasingly integrated human rights principles into their own policies and practices.

Yet today the dignity of millions of people continues to be violated as a result of weak or ineffective governance, corruption, poverty, oppression, and war. From the ill-treatment of those in detention to the situations of many more lacking access to adequate food, basic health care, and opportunities for decent work, from the failure to protect civilians in danger to the lack of effective action to confront human trafficking, from the plight of migrants and stateless persons to the devastating impact of violence against children, these and other affronts to the dignity and rights of our fellow human beings shame us all.

As a group of independent individuals asked to identify major challenges and to offer proposals for future action, we believe it is essential to return to what binds the human family together – recognition of our shared humanity and dignity. Doing so is the best way to forge a new consensus around a long term vision and strategy – one which recognizes that sustained protection of human rights requires both effective national institutions and enhanced global accountability.

Human Rights Today

The gaps between recognition of human dignity and the realization of human rights remain wide – and have arguably grown even wider in recent years.

Cold War divisions have given way to new forms of polarisation between North and South in key areas of policy, including trade, aid, and the environment.

The emergence of a more security-driven political environment in reaction to horrible terrorist attacks has been accompanied by acts of arbitrary detention, torture and enforced disappearance, and other serious assaults on human dignity. We emphasise that all measures taken to combat terrorism must comply with international human rights, refugee and humanitarian law.

Despite the fact that the Universal Declaration has been affirmed and reaffirmed by every government, it is regrettable that a shared understanding of human rights globally remains elusive. Rights are still sometimes perceived as embodying western rather than universal values. Some affirm civil and political liberties but do not recognize economic, social and cultural rights. Others degrade civil and political rights and respect for the rule of law, claiming the need to secure economic and social stability first.

The Universal Declaration was conceived as a careful balance of individual freedoms, social protection, economic opportunity and duties to community. This holistic vision is as relevant today as it was sixty years ago.

Meeting the Challenge of Poverty

Today, more than one billion people – one in every six human beings – live in conditions of extreme poverty. The vast majority are women. A human rights strategy for the decades ahead must effectively address the challenge of poverty. Poverty is an immensely complex phenomenon, rooted in exploitation, discrimination, unequal access to assets, location, capacity, alienation from public institutions, and the legacies of history. No one need be destined to this fate. Poverty can be eliminated by protecting and empowering the most marginalized.

The United Nations Millennium Development Goals (MDGs) mark progress in this regard because governments have made concerted commitments and set an unusually long time horizon for achieving results.

How humbling it is therefore to realize that in 2008, after the immense efforts that have been made to bring the MDGs forward and encourage public and official support for them, at the half-way point to the target date of 2015 we already know that most of the poorest countries will not be close to halving poverty or to achieving the other goals which governments solemnly committed to achieving at the start of this century.

This is not to say that rapid progress can never be made. The vast sums that have been recently invested to combat inequities in global health, notably by multi-stakeholder alliances of governments, the private sector, civil society actors and private philanthropy, have had a demonstrable impact on the global vaccine market, on the incidence of tropical diseases, and on health services and immunisation programmes: millions of people have benefited. Yet these initiatives and the organizations involved have been among the most outspoken in stressing that lack of institutional capacity at national level represents the greatest obstacle to further progress.

Access to Justice and the Rule of Law

Strengthening national capacities to combat poverty in turn requires effective institutions which ensure respect for the rule of law. The reality is that billions of people are excluded from enjoying legal rights and protections. In many states judicial and law enforcement systems remain too weak, under-resourced or corrupt to carry out the tasks assigned to them. Efforts to support governments to build and reform their institutions too often assume that this monumental task can be accomplished in a few years.

The consistent reiteration of unrealistic targets merely nourishes disappointment and failure. It is therefore crucial to invest in building

effective national protection systems for human rights. By this, we mean institutional arrangements that function under a national constitutional and legal order to ensure that human rights – based on the international commitments of states – are protected. That includes the courts, police, prisons, social ministries, legislature, as well as national human rights institutions and other official monitoring bodies.

Human rights cannot be realized in the absence of effective and accountable institutions. Where courts are corrupt, over-burdened and inefficient, basic civil rights will be violated. Where social ministries are under-resourced, disempowered or lack qualified staff, basic rights to adequate health care, education and housing will remain unfulfilled. Effective national protection systems, including properly constituted national human rights institutions, must be complemented by space for civil society and human rights defenders, and support for their relationship with the formal system of promoting and protecting human rights.

A Global Fund for National Human Rights Protection Systems

It is true that reforming and building sound national institutions is a long, complex and expensive process that is rarely newsworthy. But it is essential. Though important work is being done to strengthen institutions, for example, in the fields of health and education, far too little emphasis has been placed on ensuring access to a well-functioning justice system.

We therefore call for the establishment of a new Global Fund for National Human Rights Protection Systems. This new Global Fund should draw on lessons learned from initiatives in health and other areas, and build on the recognition of the importance of preventive strategies and the need for effective and accountable justice systems.

Recognizing Shared Responsibilities

Though national action is fundamental, states also need to develop more effective international arrangements for addressing global problems. In this context, international human rights law must be developed so that it can more effectively regulate issues of accountability and cooperation between states, and define the responsibilities and accountability of non-state actors.

Consider the urgent human rights dilemmas posed by climate change. Few dispute that climate warming is likely to undermine the realization of a broad range of internationally protected human rights: rights to health and even life; rights to food, water, shelter and property; the rights of indigenous and traditional peoples; rights associated with livelihood and culture; with migration and resettlement; and with personal security in the event of conflict.

Responsibility for human rights abuses linked to climate change often lies not with the government nearest to hand, but with diffuse actors, both public and private. This means recognizing shared responsibilities for human rights.

A World Court of Human Rights

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

We are convinced that progress towards the establishment of a World Court of Human Rights, together with a new Global Fund dedicated to strengthening national justice systems, would constitute constructive initiatives to protect human dignity in the 21st century.

Report of the *Panel on Human Dignity*

By Manfred Nowak, Panel member and rapporteur

1. Achievements, Problems and Challenges: Human Rights In Crisis

[1]

We know what human rights are, we know the obligations of states and other duty-bearers to respect, protect and fulfil these human rights, and we know that these human rights are systematically violated, disregarded and non-fulfilled in all regions of our planet. Universal standard setting by means of legally binding treaties and universal monitoring of states' compliance with their human rights obligations constitute important achievements from the last sixty years. *The gap between the high aspirations of human rights and its sobering realities on the ground, between human rights law and its implementation, between the lofty rhetoric of governments and their lack of political will to keep their promises is the major problem, and bridging this gap the major challenge of our time.* We know what needs to be done to empower the people of our globalized world to live in dignity, enjoying freedom from want and freedom from fear, and we have the global resources and powers to fulfil this dream.

[2]

Nevertheless, *we lack a clear agenda for action and the political leadership to put this knowledge and these resources to use.* The commitment of governments to take effective action to protect people in other countries suffering from gross and systematic human rights violations has weakened since the turn of the century. For various reasons, including a lack of empathy in rich countries for the billions of people suffering from poverty, a North-South divide, and recurring tensions between East and West, *the international community now finds itself in a veritable human rights crisis.*

[3]

The experience of the last 60 years teaches us that much can be achieved, and actually has been achieved, in the implementation of human rights, even if a common political will has not always

been apparent. When the Universal Declaration was drafted, many peoples in Africa, Asia, the Pacific and Caribbean regions were still living under colonial rule and oppression. On the basis of the right of peoples to self-determination, many peoples around the world gained independence and joined the United Nations as equal members. Fascism was eradicated in Western Europe, apartheid in Southern Africa, military dictatorships were overthrown in Latin America, authoritarian Communist regimes in Eastern Europe, and one party dictatorships in Africa. After the end of the Cold War, the leaders of the world assembled in 1993 at *the Vienna World Conference on Human Rights*, reaffirmed the universality, indivisibility and interdependence of all human rights, adopted the Vienna Declaration with a comprehensive Programme of Action and agreed to create the Office of the *High Commissioner for Human Rights* as the UN official with principal responsibility for facilitating the implementation of the Vienna Programme of Action, which still constitutes the main basis for UN activities in the field of human rights.

[4]

For the first time in history, the importance of human rights for the maintenance of *international peace and security* was recognized by the Security Council, and human rights were included as essential civilian components in newly designed peacekeeping and peace-building operations, as well as in UN transitional administrations, such as those established in Kosovo and East Timor. In cases of gross and systematic human rights violations, the Security Council even took enforcement action in accordance with Chapter VII of the UN Charter by imposing economic sanctions, authorizing military force and establishing *ad hoc* international criminal tribunals for the former Yugoslavia and Rwanda. These tribunals led to the rapid finalization of the Rome Statute of the *International Criminal Court* in 1998. In addition to war crimes, these and other criminal tribunals, such as those in Sierra Leone, East Timor and Cambodia, are competent to deal with the most serious and systematic human rights violations, such as

genocide and crimes against humanity, committed both during armed conflict and in times of peace.

[5]

Human rights were also linked with the *development discourse*. In 1986, the General Assembly proclaimed the right to development as an "inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized"^①.

The United Nations Development Programme gradually moved from an essentially macro-economic notion of development to the concept of human development, which in fact bridged the gap between economic development and the legal human rights discourses. By the end of the century, poverty reduction was regarded by the international donor community, including the World Bank and the International Monetary Fund, as the overarching goal of development cooperation. This process culminated in the unanimous adoption of the UN Millennium Declaration in September 2000 with the *Millennium Development Goals* as a series of time-bound targets for the realization of essential human rights, such as freedom from extreme poverty and the related rights to food, health, education and gender equality. The MDGs and the fundamental values they seek to protect have come to form a major input into the development philosophy: they provide the framework of the development discourse and the rationale guiding the development activities of many states. Regrettably, the normative force of the MDGs has not, however, been translated into any significant progress in eradicating poverty and realizing essential human rights.

[6]

Poverty remains the gravest human rights challenge in the world, with more than one billion people living in conditions of extreme poverty, and a further three billion people around the world robbed of the chance to better their lives and climb out of poverty. All of the targets, such as halving the proportion of people whose income is less than one dollar a day and the proportion of people who suffer from hunger, or achieving universal primary education, were to be fulfilled by 2015. Whilst some limited progress has been achieved during the first eight years of implementing the MDGs, in particular in East and South Asia, we unfortunately must realize that none of these ambitious global goals and targets will actually be reached in the remaining seven years. Indeed, in the face of a global economic slowdown and the food security and oil crisis, these goals have become even less attainable^②.

The recent food crisis illustrated clearly that the number of people suffering from hunger is on the increase rather than decreasing: various policies of states, in particular biofuel substitution policies, have had a most negative impact on the realization of the right to food^③ and on poverty eradication. The same holds true for access to education, health care, justice and other services essential to enable the poor to lift themselves out of poverty. With the process of urbanization and the growth of megacities, the number of slum-dwellers is rapidly increasing, as is the prevalence of HIV/AIDS and environmental degradation. Sub-Saharan Africa is at the epicentre of this current development crisis.

[7]

The plight of the poor is aggravated because they are denied access to justice^④.

① Declaration on the Right to Development, A/RES/41/128 of 4 December 1986.

② United Nations, 'The Millennium Development Goals Report 2008' (United Nations, New York, 2008), p. 3.

③ Resolution on the Negative Impact of the Worsening of the World Food Crisis on the Realization of the Right to Food for All, HRC Res. S-7/1 of 22 May 2008.

④ Commission on Legal Empowerment of the Poor, 'Making the Law Work for Everyone: Report of the Commission on Legal Empowerment of the Poor, Vol. I' (United Nations, New York, 2008).

Other major challenges are security-related, including ethnic and religious tensions and systematic discrimination on various grounds, armed conflicts, organized crime, terrorism and counter-terrorism. In addition, demographic growth, urbanization, climate change, migration, recent developments in science and technology, including biomedicine, and human rights violations by non-state actors represent new challenges which need to be taken into account in a future-oriented agenda for human rights.

2. Human Dignity

[8]

The Preamble of the UN Charter makes an explicit link between human rights and human dignity when reaffirming “faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small”. Even though this link can be interpreted as a reaction to the systematic denial of human dignity during the Nazi Holocaust, it was and remains relevant to the experiences of people in all parts of the world as a consequence of colonialism, slavery and racism.

The Declaration emphasized this link in its assertion that “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”. Dignity was and still is widely perceived to be the essential feature distinguishing human beings from other creatures. Philosophers grounded the claim of human dignity and the uniqueness of human beings in *human free will, in the capacity for moral choice and individual autonomy*.

[9]

Human dignity, which is inherent in all human beings, is the moral and philosophical justification for equality and other universal human rights. At the same time, only certain violations of human rights constitute an attack on human dignity. If a journalist has to pay a fine for having published a critical article, this might constitute a violation of her freedom of expression, but it does not

necessarily have any effect on her dignity. If she is put into jail, the situation might change. If she is subjected to rape or any other form of torture aimed at extracting a confession or changing her opinion, this constitutes a direct attack on the core of her dignity. This restricts her free will, autonomy and moral choice, making her powerless by means of humiliation and dehumanization.

The ultimate form of powerlessness is slavery as it legally deprives people of their capacity as human beings, including human dignity and autonomy. Trafficking is a modern manifestation of this. As the World Bank study “Voices of the Poor” has shown, powerlessness is also the central theme of poverty. More than suffering from hunger and ill-health, poor people whose rights are not respected suffer from the lack of power to change their situation and lift themselves out of poverty. That is why pushing people into poverty constitutes an attack on human dignity as much as slavery or torture does. The same holds true for discrimination. If human beings are deprived of certain rights only because they are different from other human beings on the grounds of their ethnic origin, colour, gender, religion, age, sexual orientation or physical or mental disability, they feel powerless, humiliated and deprived of human dignity. Such an attack on human dignity is aggravated if systematic practices of discrimination lead to apartheid, ethnic cleansing or even genocide, as occurred during the Nazi Holocaust, and more recently in Bosnia and Herzegovina and Rwanda.

[10]

The notion of *human dignity* as an essential feature of human beings is a *universal concept*. Indeed, the concept of dignity transcends cultural difference and can be found in all major religions of the world. As with the Universal Declaration and most core UN human rights treaties, all major regional human rights instruments are based on the concept of human dignity⁵. It follows from a combined reading of various international and regional human rights instruments that, although human dignity serves as a moral and philosophical justification for all

human rights, only certain human rights are directly linked to the concept of human dignity. Typical examples of threats to human dignity are poverty and starvation, genocide and ethnic cleansing, slavery, trafficking in human beings, torture, enforced disappearance and other forms of arbitrary detention, racism and similar forms of discrimination, colonialism and foreign occupation and domination. *Powerlessness, humiliation and dehumanization are the essential dimensions of such attacks on human dignity. The present Agenda primarily aims at addressing human rights issues directly linked to human dignity*⁶.

3. Shared Responsibility: the 21st Century Approach

[11]

In 1948 the General Assembly proclaimed the Universal Declaration of Human Rights “as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance...” According to Article 28, “Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.” *Under international human rights treaty law, it is primarily states that have direct international obligations to respect, fulfil and protect human rights. The obligation to respect requires states to refrain from arbitrary or unjustified interference with human rights.*

[12]

This traditional human rights law approach no longer responds to the actual threats to human rights in the globalized world of the 21st century. There are many reasons why *human rights abuses by non-state actors are on the increase*. Policies of deregulation and privatization have led to an erosion of governmental power and responsibilities and the taking over of essential governmental functions by private business, such as in the fields of education, health services, water management, social security, internal security, policing or prison administration. Transnational corporations operate on budgets which by far exceed those of smaller states and are so powerful that they can no longer be effectively controlled by governmental authorities of the home state or the states in which they operate. Internal armed conflicts and transnational organized crime lead to a weakening of governmental power and in some states, above all in Africa, to the phenomenon of fragile or failed states where various non-state actors exercise power without any direct accountability for human rights violations.

⁵ See, for example, the following major human rights instruments from all regions of the world: Preamble of the American Declaration of the Rights and Duties of Man 1948; Article 5(2) of the American Convention on Human Rights 1969/78; Preamble and Article 5 of the African Charter on Human and Peoples' Rights 1981/86; Preamble and Articles 2(3), 17, 20(1), 33(3) and 40(1) of the Revised Arab Charter on Human Rights 2004/08; Preamble and Chapter I (Articles 1 to 5) of the Charter of Fundamental Rights of the European Union 2005; Council of Europe Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine 1997/99 with two Additional Protocols on the Prohibition of Cloning and on Transplantation of Organs and Tissues of Human Beings.

⁶ Although genetic engineering, reproductive cloning and similar practices in biomedicine may have consequences directly linked to human dignity, the present Agenda cannot address these problems.

In post-conflict situations, the United Nations and relevant regional inter-governmental organizations, by means of highly sophisticated peace-building operations or transitional administrations, in effect exercise governmental functions without being directly accountable under international treaty law. The same holds true for the military, financial and economic power exercised respectively by NATO, the World Bank, the World Trade Organization and similar inter-governmental organizations. The international community must look for ways to make international institutions accountable under international human rights law standards.

[13]

International law, therefore, must move from the model of exclusive state responsibility to a 21st century approach of shared responsibility. Shared responsibility means, first of all, that non-state actors can be held directly accountable for actions that violate human rights. If a transnational corporation, for example, violates international labour standards, resorts to forced labour, child labour, forced evictions of the local population or arbitrary killings by private security forces, it should be held directly accountable, not only under international criminal law, but also under other fields of international law. In addition, it should avoid complicity in human rights violations committed by governments. But *responsibility also includes positive actions aimed at progressively fulfilling human rights.* If a transnational corporation engages in business in an area where the local population is starving and living under conditions of extreme poverty, it has a responsibility to address this situation. This could be done, for example, by means of community development projects in the fields of education, health care or food production.

[14]

In a globalized world, it is no longer sufficient to rely exclusively on national and local governments for the protection and fulfilment of human rights, as they are either unable or unwilling to address human rights violations that their populations suffer because of the actions or policies of entities beyond their control. All of us, the international

community, i.e. intergovernmental and non-governmental organizations, civil society, business, the media, the donor community and other organs of society, foreign governments as well as private individuals, have a shared responsibility to find effective ways to facilitate the implementation of human rights for all. This 21st century approach is what the Universal Declaration envisaged 60 years ago when it created the entitlement to a social and international order in which all human rights can be fully realized. Although the progressive realization of human rights through international assistance and cooperation forms part of international treaty law⁷, the international community is extremely reluctant to interpret these provisions as legal obligations of specific duty-bearers. In 2005, world leaders agreed on their joint “responsibility to protect” populations from genocide, war crimes, ethnic cleansing and crimes against humanity⁸. *It is high time to create a similar international responsibility to protect human beings against other attacks on their dignity, above all extreme poverty and consistent violations of economic, social and cultural rights.*

4. Freedom from Want: Eradicating Poverty

4.1 The Millennium Development Goals

[15]

Today, more than one billion people – one in every six human beings – live in conditions of extreme poverty without adequate access to food, health, education, shelter, clothing, water and justice, and without protection from discrimination, violence and environmental hazards. Four billion people – almost two thirds of the present world population – are robbed of the chance to better their lives and climb out of poverty because they are excluded from the rule of law⁹. *Poverty is not simply a fate, it is made by human beings and it can be eradicated by human beings.* Poverty is by far the most systematic and dramatic violation of essential human rights, both in the sphere of economic,

social and cultural rights as well as in the sphere of civil and political rights. But poverty cannot be eradicated solely by actions taken by national governments of the poor countries in which most poor people live. Eradicating poverty is the most striking example of a human rights obligation which can only be undertaken and implemented effectively by the international community as a whole. It is the most urgent responsibility of all of us.

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Poverty eradication has been accepted as the overarching goal of international development by the World Bank, the International Monetary Fund, the United Nations Development Programme, the Organisation for Economic Co-operation and Development and bilateral donors. To halve by 2015 the proportion of people who suffer from hunger and who live under conditions of extreme poverty constitutes the most prominent of the *Millennium Development Goals* solemnly proclaimed by the world’s leaders during the Millennium Summit of September 2000.

In 2005, a practical plan to achieve the Millennium Development Goals was presented by the Millennium Project¹⁰. In his report “In larger freedom”, the Secretary-General of the United Nations presented a series of far-reaching recommendations to Heads of State and Government on how to reach this ambitious goal, taking into account the development consensus agreed on in 2002 at the International Conference on Financing for Development held in Monterrey, Mexico, and the World Summit on Sustainable Development held in 2002 in Johannesburg, South Africa¹¹. None of these recommendations, addressed both to developing and developed countries and to the international community

as a whole, has lost any significance three years later. Now we are more than half way from 2000 to 2015. But the political will to take the action necessary for the effective implementation of the Millennium Development Goals continues to be lacking in both rich and poor countries, and the progress in achieving these goals after eight years is highly disappointing: while the number of people living in extreme poverty decreased in Asia and overall between 1990 and 2005, it rose by 100 million in sub-Saharan Africa; in addition, recent high food prices may have had the effect of increasing the number of poor by over 100 million¹².

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Although the Millennium Development Goals are formulated as precise time-bound targets that address many dimensions of poverty and exclusion, including hunger, lack of education and disease, the international human rights framework has not yet played a central role in supporting and influencing development planning to meet the Goals by 2015. Each Millennium Development Goal should be interpreted in the context of human rights and the existing legal obligations of states to progressively realize rights to food, education and health among others. Increased efforts should be made to ensure that the MDG targets and indicators effectively correspond to economic, social and cultural rights, that gender equality is mainstreamed and that marginalized and disadvantaged groups are prioritized. *We must, therefore, transform the goal of eradicating poverty from a merely voluntary development target into a legally binding human rights obligation of poor and rich countries and other actors of the international community alike.*

⁷ See, for example, Articles 2(1) and 11 of the International Covenant on Economic, Social and Cultural Rights. ⁸ 2005 World Summit Outcome, A/RES/60/1 of 24 October 2005. ⁹ Commission on Legal Empowerment of the Poor, supra note 4. ¹⁰ UN Millennium Project, ‘Investing in Development: A Practical Plan to Achieve the Millennium Development Goals’ (Earthscan, London, Sterling Va, 2005). ¹¹ United Nations Secretary-General, ‘In larger freedom: towards development, security and human rights for all: Report of the Secretary-General’ of 21 March 2005 on the occasion of the Follow-up to the outcome of the Millennium Summit, UN Doc. A/59/2005, pp. 55 et seq. ¹² United Nations Secretary-General, ‘MDG Action Points: Addendum to the background note by the Secretary-General on Committing to Action: Achieving the Millennium Development Goals’ (New York, 18 September 2008), p. 2.

Such an obligation should equally be incorporated into the national laws of states, whether as a constitutional right or through ordinary legislation, in order that courts and other domestic organs can apply and uphold the international standards in practice.

4.2 A Human Rights Based Approach to Poverty Reduction

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One way of achieving this aim is by adopting a *human rights based approach to development and poverty eradication*. In 2006, the UN High Commissioner for Human Rights adopted Principles and Guidelines for a Human Rights Based Approach to Poverty Reduction Strategies¹⁵. These Principles and Guidelines define poverty from a human rights perspective as “the denial of a person’s rights to a range of basic capabilities – such as the capability to be adequately nourished, to live in good health, and to take part in decision-making processes and in the social and cultural life of the community”. The denial of certain human rights is related to poverty when two conditions are met. First, the human rights involved must be those that relate to the capabilities that are considered basic by a given society. Secondly, inadequate command over economic resources must play a role in the causal chain leading to the non-fulfilment of human rights¹⁶. According to the Principles and Guidelines, the most fundamental way in which empowerment occurs is through the introduction of the very concept of rights in the context of poverty reduction policy-making. Underpinned by universally recognized moral values and reinforced by legal obligations, international human rights provide a compelling normative framework for the formulation and implementation of poverty reduction strategies. The Principles and Guidelines propose that *human rights principles should inform both the process of formulating, implementing and monitoring a poverty reduction strategy as well as the content of such a strategy*.

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The key components of the Guidelines are: the identification of the poor and the participation of all; use of the framework of national and international human rights as a basis for a poverty reduction strategy; equality and non-discrimination; monitoring and accountability of states; and international assistance and cooperation. The content of a human rights-based poverty reduction strategy consists in the integration of specific human rights standards concerning rights which are particularly relevant to the context of poverty reduction: the rights to work, to adequate food and housing, health, education, personal security and privacy, equal access to justice, and political rights and freedoms.

4.3 Access to Justice and the Rule of Law

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Another way of empowering the poor to lift themselves out of poverty is a *rule of law approach*. At the end of the Cold War, one of the main conclusions that the Conference on Security and Cooperation in Europe (CSCE) was able to reach at the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE was that human rights are the foundation of freedom, peace and justice, which in turn forms the basis of the rule of law and democracy. The rule of law meant not merely a formal legality which assures regularity and consistency in the achievement and enforcement of democratic order, but justice based on the recognition and full acceptance of the supreme value of the human personality and guaranteed by institutions providing a framework for its fullest expression¹⁷.

The rule of law approach has since developed and today informs the international community’s understanding of empowering the poor. According to the recently published report of the Commission on Legal Empowerment of the Poor, “in the 21st century, legal empowerment of the four billion excluded is the key to unlocking vital energies needed to end poverty and build a more stable and peaceful world¹⁸”.

The reasons for legal exclusion of the majority of the world’s population are numerous and vary from country to country. However, the Commission identified four major common grounds: Poor people are denied access to a well-functioning justice system; they lack effective property rights; they suffer unsafe working conditions because their employers often operate outside the formal system; and they are denied economic opportunities because their property and businesses are not legally recognized. Consequently, they cannot access credit, investment, global or local markets.

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On the basis of these findings, and having conducted national consultations in 22 countries around the world, the Commission developed a comprehensive agenda for legal empowerment encompassing four crucial pillars that must be central in national and international efforts to give the poor protection and opportunities: *access to justice and the rule of law, property rights, labour rights and business rights*¹⁹.

In practical terms, the Commission suggests that the United Nations Development Programme should take the lead and work with other UN agencies, such as the World Bank, the International Labour Organization, the Food and Agriculture Organization, and UN-HABITAT (the United Nations Human Settlements Programme), to develop a coherent multilateral agenda for the legal empowerment of the poor. This agenda should also become a core mission for regional organizations, regional banks, civil society and community-based organizations, the business community, religious communities and professional associations.

Strengthening democracy is considered essential to legal empowerment of the poor: no democracy has experienced famine. Similar to the High Commissioner’s human rights based approach to poverty reduction strategies, the Commission concludes that “It is time for a renewed anti-poverty agenda aimed at including the vast majority of the world’s population in the systems of rights and obligations that have shown their ability to foster prosperity over the past 60 years²⁰”.

4.4 Preventable Poverty

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With almost two thirds of the world’s population living in poverty, the elimination of poverty is clearly not achievable in the near future. In light of this, an approach to addressing the actual situation of poverty in which the majority of the world’s population live is to *work on creating social security safety nets and to focus on preventable poverty*. Preventable poverty refers to that poverty which could be avoided using the resources already available to the state. Policies of preventable poverty have an essential role to play in protecting against violations of economic, social and cultural rights.

States should scrutinize and review what can be done to prevent and reduce poverty by using all available national resources. Moreover, this is not a responsibility which lies with national governments alone. The international community should also accept its responsibility to protect against gross violations of economic, social and cultural rights and to manage preventable poverty. *The international community as a whole should have arrangements and institutions in place to detect and act on situations of consistent patterns of gross violations of economic, social and cultural rights*.

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¹⁵ OHCHR, ‘Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies’ (OHCHR, Geneva, 2006). ¹⁶ See OHCHR, ‘Human Rights and Poverty Reduction: A Conceptual Framework’ (United Nations, New York, Geneva, 2004), p. 10. ¹⁷ Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (Copenhagen, 29 June 1990) para 2. ¹⁸ Commission on Legal Empowerment of the Poor, supra note 4. ¹⁹ Ibid., pp. 38-9. Business rights consist of rights to vend, and to have a workspace and related infrastructure and services. ²⁰ Ibid., p. 11.

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As a corollary of this obligation of national governments and of the international community, those responsible where parts of the population are suffering from preventable poverty must be held to account. Accordingly, *national courts should be vested with the competence to hear claims from victims of poverty* in situations where the government could have acted to prevent this but failed to do so.

For this to occur, relevant international human rights obligations must be incorporated into domestic legal systems, either at a constitutional level or through ordinary legislation. Jurisprudence of the Constitutional Court of South Africa¹⁹ and the Indian Supreme Court²⁰ illustrate the role judicial determinations can play in developing a human rights based approach to tackling poverty as a violation of human rights.

4.5 The Global Economy

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Whilst historically the connection between international trade and finance and human rights has not always been apparent, the impact on poverty and powerlessness in a globalized world of international trade agreements and the policies of international financial institutions can no longer be ignored. The issue is partly one of *policy coherence*: the World Commission on the Social Dimension of Globalization noted that different international institutions are assigned responsibility for international finance, development, trade and social policy, and no adequate coordination mechanism between these has been created²¹. This issue can be addressed both at the level of the international institutions, and at a national level, through regular national reviews of the social implications of economic, financial and trade policies²².

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The incorporation of international human rights principles into international trade and finance laws and agreements has the potential both to mitigate the negative effects of globalization on the poor and to contribute to the eradication of poverty. The responsibility to protect human rights in the context of acceptable trade practices and policies lies not only with states but also with the international institutions involved.

4.6 Migration and Urbanization

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In a globalized world, and often as a result of the negative impacts of globalization on the poor, recent times have witnessed an *increase in migration as a response to poverty*. In this regard, there is a responsibility of states to not only seek to eradicate poverty in all parts of the world, but to mitigate the effects of poverty through their migration policies. *Migration policies should be adopted and implemented in accordance with international human rights obligations*, including principles of non-discrimination and due process, procedural safeguards, and the obligation to ensure that those at risk of persecution not be returned. As migration has an impact on all countries, whether as origin, transit or destination countries, the international community has a shared responsibility in addressing this issue. Related to this phenomenon of global migration is the *growing issue of urbanization and the growing number of slum-dwellers*.

By 2030, the level of urbanization in the world is anticipated to increase to 59.9% of the world's population, 13.2% above the level in 2000²³. Research based on current trends shows that by 2050, parallel to rapid urbanization and the growth of megacities, the world slum population is expected to triple from its current level of 1 billion to 3 billion²⁴. A human right based approach should also be applied by states in formulating policies to manage urban problems.

5. Freedom from Fear: Enhancing Human Security by Preventing Violence

5.1. Sources and Manifestations of Violence

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Human beings – from early childhood until old age – have a deeply ingrained desire to be protected against violence. We only feel secure if we live in a society where most of the obvious sources of violence, whether emanating from nature or from our fellow human beings, are well under control. *Some groups of human beings are more vulnerable to violence than others*.

For example, women and children are more often victims of domestic violence than men; the elderly or persons with disabilities are easier targets of violent crime than others; aliens and persons belonging to political, ethnic or sexual minorities are more frequently subjected to police violence than other citizens; the poor and homeless are more vulnerable to natural and environmental disasters than the rich; indigenous communities are particularly vulnerable to forced evictions in the interest of business; groups of persons who are discriminated against on ethnic or religious grounds might more easily become victims of internal armed conflicts, ethnic cleansing and genocide than the majority population; and citizens of weak and fragile states are more often targets of organized crime, aggression, international and domestic armed conflicts, occupation and foreign domination than citizens of powerful states. From a human rights perspective, comprehensive anti-discrimination policies, democratic governance and measures aimed at providing special protection to vulnerable groups, therefore, significantly contribute to the prevention of violence and the strengthening of human security.

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Despite being one of the most clearly condemned forms of violence, *violence against children* is possibly one of the most invisible and prevalent forms of violence²⁵. This violence remains unregistered and unpunished, sometimes even condoned by society under the guise of discipline or tradition. The inadequacy of justice and security systems and the pretexts of privacy or incontestable adult authority over children are used to shield perpetrators and keep violence against children insulated by walls of silence. Violence against children, in the settings of

the home, school, institutions, workplace and community, takes a variety of forms and is influenced by a wide range of factors, from the personal characteristics of the victim and perpetrator to their social, cultural, and physical environments. Economic development, social status, age, sex and gender are among the many factors associated with the risk of violence. Although the consequences of violence may vary according to its nature and severity, the short- and long-term repercussions are very often grave and damaging.

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Some of the sources of violence and threats to human security, such as natural disasters, armed conflicts, ordinary crime, state repression, torture, slavery and domestic violence, have existed for a long time. Those of a more recent nature include genocide, enforced disappearances and threats emanating from weapons of mass destruction. But there are also threats to human security which emerged only or at least increased dramatically during the age of globalization: transnational organized crime including trafficking in human beings and similar slavery-like practices, global terrorism and human-made disasters, such as those emanating from nuclear power plants and climatic change.

The fight against major threats to human security, in particular international and internal armed conflicts, is at the centre of the traditional security agenda of the United Nations. Since some of the worst human rights violations occur during wartime, preventing international and internal armed conflicts and controlling threats from nuclear, biological and chemical weapons must also become part of a comprehensive agenda for human rights. Other sources of violence, such as state repression, torture, slavery, genocide, racism, colonialism and enforced disappearances have traditionally been at the centre of the struggle for human rights.

¹⁹ See, for example, *Government of Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC). ²⁰ See, for example, *Kapila Hingorani v State of Bihar* 2003 (6) SCC 1. ²¹ World Commission on the Social Dimension of Globalization, 'A Fair Globalization: Creating Opportunities for All' (ILO, Geneva, February 2004), para 509. ²² *Ibid.*, paras 605-6. ²³ UN-HABITAT, 'Enhancing Urban Safety and Security: Global report on human settlements 2007' (Earthscan, London, Sterling Va, 2007), p. 337. ²⁴ United Nations Secretary-General, 'Committing to action: achieving the Millennium Development Goals, Background note by the Secretary-General' (New York, 25 July 2008), para 50. ²⁵ See Paulo Sérgio Pinheiro, 'World Report on Violence against Children: United Nations Secretary-General's Study on Violence against Children' (United Nations, Geneva, 2006).

Most threats emanating from non-state actors, in particular organized crime, trafficking, terrorism and domestic violence, have only recently been recognized as human rights problems triggering obligations for states and the international community to protect victims against such types of violence. Finally, there are threats to human security which are global in nature and which can only be combated by global action, such as the rising sea level caused by global warming and climate change. Irrespective of the nature of such threats, it is essential that we combat them preventively, *by addressing the root causes with effective early warning systems and early action strategies making use of the full range of instruments available as part of the security, development and human rights agendas.* In the following, we will focus on some of the major threats to human security from a human rights perspective.

5.2. Armed Conflicts and Weapons of Mass Destruction

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Since human rights are seriously violated during armed conflicts, reducing the risk and prevalence of international and internal tensions and armed conflicts is essential for preventing human rights violations. Efforts have been made in recent years to protect the human rights of vulnerable groups in the context or aftermath of armed conflict, including the adoption of the Optional Protocol to the Convention on the Rights of the Child banning the use of child soldiers, and of the Guiding Principles on Internal Displacement. However, human rights principles equally have a role in conflict prevention, as human rights abuses themselves constitute some of the root causes of armed conflict. For example, racism, nationalism, xenophobia and religious intolerance often lead to ethnic and religious tensions which can easily escalate into armed conflicts.

Article 20 of the International Covenant on Civil and Political Rights, therefore, requires states parties to prohibit by law any propaganda for war and any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. This important preventive provision has been subject

to criticism and reservations for unduly interfering with freedom of expression. This criticism is ill-conceived and has led to a lack of political will to take early and effective criminal action against individuals and groups inciting to racial or religious violence.

Despite the fact that freedom of expression is an important human right and a cornerstone of democratic governance, it carries with it special duties and responsibilities and may be subject to certain restrictions necessary for the protection of national security, public order or the rights and reputation of others. Recent experiences have shown the need for a better understanding of the principle of tolerance and the need to demonstrate religious sensitivity in relation to this right. The concerns of the international community expressed at the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance in 2001 reflect this tension, recognizing at the same time the contribution the exercise of the right to freedom of expression can make to fighting intolerance and promoting respect for human dignity, and the use to which such a right can be put for purposes contrary to respect for human values, equality, non-discrimination, respect for others and tolerance²⁶.

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In general, experience shows that *democratic governance* based on the rule of law, human rights and protection of minorities is one of the best safeguards against armed conflict. Democratic governments usually dispose of effective national capacities to manage conflict without resorting to violent means of suppressing dissent and minority movements. Other means of reducing the risk of armed conflict are combating poverty, exclusion and discrimination, controlling the sale and possession of arms and various mediation efforts.

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During armed conflicts, whether international or internal, human rights continue to be applicable alongside international humanitarian law, unless the respective government derogates from certain obligations in accordance with the procedures foreseen in international human

rights treaties for states of emergency. It is not correct to hold that human rights law only applies in times of peace and is simply replaced by international humanitarian law in times of war.

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In post-conflict situations, human rights play an increasingly important role for establishing sustainable peace. Peace can only be achieved on the basis of reconciliation between the different parties to the conflict and between victims and perpetrators of violence, war crimes and gross human rights violations.

Reconciliation demands restorative justice, which in turn must be based on the full recognition of the truth by all parties. Impunity for the crimes committed during armed conflict stands in the way of sustainable peace. The widely held opposite view that accountability for human rights violations during armed conflicts constitutes an obstacle to peace negotiations rather than a necessary element of peace agreements is short-sighted.

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In addition to contributing to dealing with the past and the right of victims to know the truth about past human rights violations, human rights and democratization also constitute essential civilian components of contemporary *peace-building operations* under the authority of the United Nations and the respective regional organizations. It is particularly important for post-conflict societies to quickly develop, with the assistance of the international community, effective democratic structures including free and fair elections and media freedom as well as a well-functioning system for the administration of justice, including independent judges and lawyers, professional law enforcement agencies and humane prison conditions. In addition, non-judicial structures for the promotion and implementation of human rights, such as national human rights institutions, equal

opportunity commissions, ombuds-institutions and truth and reconciliation commissions, should be developed in post-conflict societies.

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Finally, *weapons of mass destruction* (nuclear, biological and chemical) as well as landmines and cluster bombs constitute particularly grave threats to human security during armed conflicts. From a human rights perspective, it is not only the actual use, but also the production, testing, trade and proliferation of such weapons, especially in violation of international treaties, which constitute a grave threat to the rights to life and physical integrity of many millions of human beings who might possibly be affected.

5.3 Racism, Genocide, War Crimes, Ethnic Cleansing and Crimes against Humanity

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Genocide, war crimes, ethnic cleansing and crimes against humanity, which include murder, enslavement, deportation, arbitrary detention, torture, rape and other forms of grave sexual violence, enforced disappearance and apartheid if committed as part of a widespread or systematic attack directed against any civilian population, constitute the most serious violations of human rights. Incitement to racial and religious hatred and discrimination affront human dignity and frequently fuel the commission of these most serious human rights violations.

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The *International Criminal Court* and the *ad hoc* international criminal tribunals play an important role in deterring the commission of genocide, crimes against humanity and war crimes by bringing individual perpetrators to justice.

²⁶ 'Report of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, 31 August – 8 September 2001' UN Doc. A/CONF.189/12, paras 88-92.

Moreover, the establishment of the International Criminal Court as a global institution independent from national governments is a major step forward in the enforcement of criminal justice and the establishment of accountability for the most serious crimes of concern to the international community. These courts and tribunals must be given full political and financial support by the international community.

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In 2005, the United Nations World Summit, on the basis of a report by the International Commission on Intervention and State Sovereignty²⁷, adopted the concept of the “Responsibility to Protect” with regard to these crimes. The concept was subsequently endorsed by both the General Assembly and the Security Council²⁸. It rests on three pillars: the legal obligation of states to protect their populations from these crimes; the commitment of the international community to assist states in meeting these obligation by taking early, preventive steps; and the responsibility of other states to intervene by all appropriate means, including enforcement measures authorized by the Security Council under Chapter VII of the UN Charter, in order to protect populations against these human rights violations if the respective government is not able or willing to adequately protect them.

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The “Responsibility to Protect” is an important new task of the Security Council in the field of human rights, which underscores the fact that gross and systematic human rights violations are no longer considered internal state matters. But the Security Council still has to prove that it lives up to this new task and responsibility within its current structure with five permanent members having the right to veto any enforcement action.

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In addition to the political will required from governments of UN member states, above all from the five permanent members of the Security Council, much still needs to be done to implement fully the concept of the “Responsibility to Protect”. In particular, *the UN should enhance its early warning mechanisms by fully integrating the system’s multiple channels of information and monitoring*, including the human rights treaty bodies, the special procedures of the Human Rights Council and its own Universal Periodic Review mechanism. In addition, *the UN should establish military standby capacities as a first step for a standing rapid deployment force as an early action mechanism*.

5.4 Terrorism and Counter-Terrorism

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Global terrorism constitutes one of the most serious universal threats to human security and the right of human beings to live in freedom from fear. Terrorist attacks are intended to cause death or serious bodily harm to civilians with the purpose of intimidating a population or compelling a government or an international organization to do or abstain from doing any act²⁹, so undermining the international world order and the rule of law. They violate fundamental principles of human rights. The victims are usually human beings who have nothing to do with the political purpose behind the terrorist attack, yet whose rights and dignity are inevitably threatened and violated. The growth in global terrorism is emblematic of the increase in recent years in human rights violations and threats to peace and security emanating from non-state actors: it is typically non-state actors who are responsible for terrorist attacks.

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In fighting terrorism, governments and the international community have so far primarily addressed the symptoms rather than the *root causes of this global phenomenon*. Even though the UN General Assembly in September 2006 adopted a Global Counter-Terrorism Strategy

with a Plan of Action³⁰ which calls upon member states to undertake measures aimed at addressing the conditions conducive to the spread of terrorism, such as prolonged unresolved conflicts, poverty, discrimination, political exclusion and socio-economic marginalization, as well as lack of good governance, rule of law and human rights, the international community, in reaction to the horrible attacks of 11 September 2001, adopted and still maintains a security-dominated counter- terrorism strategy which fails to address the real causes of global terrorism.

While the plan of action speaks about promoting dialogue, tolerance and understanding among civilizations, cultures, peoples and religions, promoting a culture of peace, justice and human development, of ensuring the timely and full realization of the Millennium Development Goals by eradicating poverty and promoting sustainable development and global prosperity for all, this lofty rhetoric is in contrast with the way states act in practice. None of the prolonged conflicts in the Middle East has been resolved by any genuine dialogue based on tolerance and mutual understanding, and the eradication of poverty agenda of the Millennium Declaration has in fact been replaced by an eradication of terrorism agenda by military, intelligence and similar security-dominated means.

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The same holds true for the *role of human rights and the rule of law in the fight against terrorism*. While the UN Global Counter-Terrorism Strategy recognizes that “effective counter-terrorism measures and the protection of human rights are not conflicting goals, but complementary and mutually reinforcing”, and though

repeated resolutions of the Security Council, General Assembly, the former Commission on Human Rights and the present Human Rights Council stressed that *any measure taken to combat terrorism must comply with state obligations under international human rights, refugee and humanitarian law*³¹, in practice the security-dominated counter-terrorism strategy seriously undermines core principles of the international rule of law and protection of human rights.

The rights most obviously affected by this strategy are the rights to personal liberty and integrity, to fair trial and equal access to justice, to privacy and above all the right not to be subjected to torture and enforced disappearance. By using the military rhetoric of fighting a “war on terror”, by keeping suspected terrorists in secret places of detention and placing them outside the protection of the rule of law and international human rights, governments in fact play into the hands of terrorists.

It is high time to fundamentally change this security-dominated strategy and to take seriously what the Secretary-General so convincingly expressed in his report “In larger freedom”³²: “Terrorists are accountable to no one. We, on the other hand, must never lose sight of our accountability to citizens all around the world. In our struggle against terrorism, we must never compromise human rights. When we do so we facilitate achievement of one of the terrorist’s objectives. By ceding the moral high ground we provoke tension, hatred and mistrust of Governments among precisely those parts of the population where terrorists find recruits.”

²⁷ International Commission on Intervention and State Sovereignty, ‘The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty’ (International Development Research Centre, Ottawa, 2001). ²⁸ A/RES/60/1 of 24 October 2005; S/RES/1674 (2006) of 28 April 2006. ²⁹ See UN Doc. A/59/2005 of 21 March 2005, supra note 11, para 91. So far, the international community has failed to adopt a universally agreed definition of terrorism. ³⁰ A/RES/60/288 of 20 September 2006. This strategy is based on the report of the Secretary General of 2 May 2006 entitled ‘Uniting against Terrorism: Recommendations for a Global Counter-Terrorism Strategy’, UN Doc. A/60/825 of 27 April 2006. ³¹ See, for example, S/RES/1456(2003) of 20 January 2003, A/RES/59/191 of 10 March 2005, 60/158 of 28 February 2006, 61/171 of 1 March 2007 and HRC Res. 7/7 of 27 March 2008. ³² UN Doc. A/59/2005 of 21 March 2005, supra note 11, para 94.

5.5 Organized Crime and Human Trafficking

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With the dramatic increase of *transnational organized crime* in the age of globalization, the links between the crime prevention and criminal justice programme and the human rights programme of the United Nations intensified. Typical examples of gross violations of human rights and human dignity by transnational criminal groups which need to be addressed globally from both a criminal justice and a human rights perspective are the illegal smuggling of refugees and migrant workers, as well as *trafficking in human beings*, in particular women and children, for the purposes of sexual exploitation, forced prostitution, child labour, bonded labour, servitude, forced domestic work, child pornography, the removal of organs and similar slavery-like practices. Trafficking in human beings is one of the most widespread phenomena of transnational organized crime which constitutes a direct attack on the core of human dignity of powerless victims, above all poor women and children in search of a better life abroad as a means of lifting themselves out of poverty.

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In 2000, the United Nations adopted the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*, which combines the criminal justice approach directed against perpetrators with the human rights approach of protecting and assisting victims of trafficking. The main human rights concern and desire of victims of trafficking, namely to feel secure and be enabled to live without fear or want, is, however, not adequately addressed. Although the Protocol rightly recognizes that poverty, underdevelopment and lack of equal opportunity constitute the main factors that make persons, especially women and children, vulnerable to trafficking⁴³, it nevertheless places the focus of inter-country cooperation on the return of the victims to their country of origin.

Further, receiving states shall only “in appropriate cases” consider permitting victims to remain on their territory, “temporarily or permanently”⁴⁴, and return shall only “preferably” be voluntary⁴⁵. Notwithstanding that these two provisions form part of chapter II entitled “Protection of Victims of Trafficking in Persons”, they do not in fact provide protection to the victims but rather protect the interests of the receiving states to expel the victims. For the victims, return means going back to the conditions of poverty and desperation from which they were trying to escape. In addition, return includes the risk of reprisals from those who originally recruited them. As long as the victims have reason to fear forced deportation, they will mistrust the authorities, they will not fully cooperate with the police and the prosecutors in order to find and punish the traffickers, and they will not be able to enjoy any means of protection offered, including medical, psychological and material assistance.

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Trafficking in persons is exacerbated by the gap between rich and poor countries and by the policies of rich states seeking to combat voluntary migration from poor countries. By closing their borders to migrants, rich countries open the doors to the horrible criminal practices of traffickers, who make business by exploiting the vulnerability of the poor. In the long run, a policy of granting proven victims of trafficking permanent residence, assistance and legal employment in the receiving states together with new migration policies, improved international cooperation and prevention efforts in countries of origin could succeed in effectively combating trafficking and thus serving both the interests of criminal justice and of human rights. Since trafficking in human beings is the most widespread practice of modern slavery which directly attacks the dignity of the victims, governments and the international community are urged to *shift their focus from an anti-migration to an anti-trafficking policy* by fully applying a human rights based approach and effectively protecting the victims of trafficking.

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Identifying and addressing the root causes of trafficking through a *policy of prevention* would ultimately be the most effective means of managing this human rights challenge. Vulnerability to trafficking is increased by: *economic factors* including poverty, unemployment and indebtedness; *social and cultural factors* including violence against women, gender discrimination and other forms of discrimination in both countries of origin and destination; *legal factors* such as inadequate legislation and public sector corruption; and *international factors* such as, on the one hand, the increased feminization of labour migration, and, on the other hand, increasingly restrictive immigration policies in destination countries, combined with demands for cheap, unprotected and exploitable migrant labour services⁴⁶.

5.6 Inhuman Prison Conditions, Arbitrary Detention, Torture and Enforced Disappearance

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The *right to personal liberty* is one of the oldest human rights and corresponds to a fundamental desire of human beings, since being detained severely restricts free will and autonomy. That is why many human beings, above all indigenous peoples, regard deprivation of personal liberty as an attack on their dignity. Nevertheless, deprivation of liberty is lawful under international law for a variety of purposes such as imprisonment of an offender after conviction by a competent court, pre-trial detention of persons suspected of having committed an offence, detention of aliens for the purpose of securing their deportation or quarantining of persons to prevent the spread of infectious diseases. In all these cases, the fundamental right to personal liberty needs to be balanced against legitimate state interests in terms of the necessity and appropriateness of such measures.

Detention should only be permitted if no less intrusive measure serves the purpose of achieving the particular legitimate goal, should be subject to judicial control and should be for no longer than absolutely necessary. Nevertheless, millions of human beings in a great variety of countries around the world are victims of *arbitrary detention* for various reasons. They may be prisoners of conscience, i.e. individuals who are punished for non-violent expression of political ideas and targets of political persecution by governments, often based on discriminatory grounds.

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Most of the victims of arbitrary detention are, however, human beings who spend many years behind bars for the simple reason that the *administration of justice in their countries is not functioning*. They are arrested by police officers without sufficient reasons, held in police custody for excessive periods, often subjected to torture for the purpose of extracting a confession, and charged by corrupt prosecutors solely on the basis of their statements made during police interrogation. Many are held for many years in pre-trial detention because judges are not independent, and because criminal trials proceed with long delays. They are treated by the police, prosecutors, judges and detention officials as criminals in flagrant violation of the right of accused persons to be presumed innocent until convicted by a competent, impartial and independent court. It is routine practice that judges finally sentence them to prison for exactly the period of time they have already spent in police custody and pre-trial detention.

Poor people are much more vulnerable to arbitrary detention than rich people, since they lack the means to afford a lawyer, to initiate *habeas corpus* proceedings, to bribe corrupt police officers, prosecutors, judges or prison personnel.

⁴³ A/RES/55/25 of 8 January 2001, Article 9(4). ⁴⁴ Ibid., Article 7. ⁴⁵ Ibid., Article 8(3). ⁴⁶ European Commission, ‘Report of the Experts Group on Trafficking in Human Beings’ (Brussels, 22 December 2004), p. 142.

In addition, they are subjected to the most *inhuman prison conditions* since adequate food, medicine and proper hygienic facilities are often only affordable for those who pay or who are provided with those services by their families.

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There are over 9 million detainees and prisoners worldwide, whether arbitrarily detained or not⁵⁷. A large proportion of these are kept in conditions which amount to inhuman or degrading treatment and which are in violation of various civil, political, economic, social or cultural rights. In many countries of the world, not only in the South, prisons are constantly overcrowded, filthy, infected with tuberculosis and other highly contagious diseases and lack the minimum facilities necessary to satisfy a dignified existence. Inter-prisoner hierarchy and violence are common features of many prisons, and prison directors in fact often delegate their responsibility to protect detainees against discrimination, exploitation and violence to privileged detainees. It is not surprising that vulnerable groups, such as juveniles, persons with disabilities, gays and lesbians, aliens or members of ethnic and religious minorities suffer most under these appalling conditions. *One of the major human rights challenges we face is to improve prison conditions, through national action and with international cooperation, such that detainees can live in dignity.*

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In many states, detainees are subject to excessive periods of *solitary confinement*, for preventive and investigative purposes, as disciplinary punishment or as an aggravating condition for persons sentenced to death, life or long-term imprisonment despite the fact that long periods of solitary confinement have serious consequences for the mental health of most detainees. In addition, governments resort to the practice of *incommunicado detention* and, particularly in cases of political prisoners, of enforced disappearance. Any act of *enforced disappearance*, i.e. deprivation of personal liberty followed by refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, is a serious attack on human dignity, as it places the victims in a powerless position outside the protection of the

law and makes them particularly vulnerable to torture, arbitrary killings or similar grave abuses.

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Torture is one of the most serious human rights violations and, like slavery and enforced disappearance, constitutes a direct attack on the core of human dignity. Nevertheless, it is practiced in many countries of the world, both against political prisoners and in the course of the normal criminal justice system. It constitutes the most serious form of ill-treatment and can be defined as intentionally inflicting severe pain or suffering on a powerless person, usually a detainee, for such purposes as extracting a confession or other information, or as punishment, intimidation or discrimination. The prohibition of torture or other cruel, inhuman or degrading treatment or punishment is one of the few absolute and non-derogable rights, even under exceptional circumstances, such as a state of war, internal political instability, terrorism or any other public emergency. Although torture has been practiced on an alarming scale in a great many countries, governments and the responsible officials usually deny such practices and try to obstruct any meaningful investigations. Since torture is usually practiced behind closed doors without any independent witnesses, it is very difficult for the victims to prove such practice. Rather than investigating allegations of torture, officials in many countries resort to the habit of blaming the victims for making false allegations.

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For the first time in many years, the *absolute prohibition of torture and other cruel, inhuman or degrading treatment or punishment under international law has been challenged by governments*, including those of highly democratic states, in the context of the *fight against terrorism* after the terrorist attacks of 11 September 2001. On the basis of the “ticking bomb” or similar scenarios, the right of suspected terrorists to personal integrity, humanity and dignity is balanced against national security interests. In order to extract intelligence information on terrorist activities and networks, suspected terrorists are put outside the protection of the law by being detained in special detention centres, often outside the territory of the detaining states,

for unlimited periods of time without any criminal charges, by subjecting them to harsh interrogation methods often amounting to torture and by sending them by means of so-called “rendition flights” to countries known for their practice of torture.

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The human rights not to be subjected to arbitrary detention, torture and enforced disappearance and the minimum standards for the treatment of detainees are well defined in international human rights treaty law and the humanitarian law of armed conflict. If practiced in a widespread or systematic manner, imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, torture and enforced disappearance also constitute crimes against humanity⁵⁸. In addition to the respective provisions of the International Covenant on Civil and Political Rights⁵⁹, the United Nations adopted special treaties on torture and enforced disappearances. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984 and the International Convention for the Protection of All Persons from Enforced Disappearance of 2006 contain various obligations for states parties to prevent torture and enforced disappearance, to criminalize both these practices under domestic law and bring the perpetrators to justice under various types of jurisdiction, including universal jurisdiction, and to provide victims with the right to a remedy and adequate reparation. In addition, various soft law instruments provide important minimum standards relating to the rights to personal liberty and treatment of detainees⁶⁰. Finally, the Optional Protocol to the Convention against Torture of 2002 requires states parties

to establish *national preventive mechanisms*, i.e. *independent domestic bodies entrusted with the task of carrying out unannounced visits to all places of detention and speaking in private with any detainee*.

[55]

If these obligations were taken seriously by governments and properly implemented, the practices of arbitrary detention, torture and enforced disappearance could easily be eradicated. Since these practices constitute direct attacks on human dignity and particularly serious crimes and human rights violations, their eradication must receive top priority in the years ahead. As long as governments and non-state actors continue to resort to these horrendous practices, human beings under their jurisdiction cannot enjoy freedom from fear.

The international community as a whole has a responsibility to ensure that there exists no safe haven for perpetrators of such practices and for those under whose military or political responsibility such practices are tolerated.

6. Climate Change: A Global Challenge to Security, Development, Human Rights and Human Dignity in the 21st Century

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At the beginning of the new millennium, scientists were still discussing whether or not climate change was taking place, and whether or not it was human-induced.

⁵⁷ International Centre for Prison Studies, ‘World Prison Population List’ (London, 7th Ed., 2007). ⁵⁸ See, for example, Article 7 of the Rome Statute of the International Criminal Court. ⁵⁹ Articles 7, 9 and 10 of the International Covenant on Civil and Political Rights. ⁶⁰ Such as the Standard Minimum Rules for the Treatment of Prisoners, ECOSOC Res. 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977; the Basic Principles for the Treatment of Prisoners, A/RES/45/111 of 14 December 1990; the Code of Conduct for Law Enforcement Officials, A/RES/34/169 of 17 December 1979; the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, A/RES/43/173 of 9 December 1988; the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol) (OHCHR, Geneva, 2001); the Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, A/RES/55/89 of 22 February 2001; the United Nations Rules for the Protection of Juveniles Deprived of their Liberty, A/RES/45/113 of 14 December 1990; and the Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, A/RES/37/194 of 18 December 1982.

Politicians used this climate change skepticism as an excuse for not taking action. Today, this debate is over. The fourth assessment review of the International Panel on Climate Change has established an overwhelming *scientific consensus that climate change is both real and human-made*⁴¹.

[57]

Since the advent of the industrial era in the 19th century, world temperatures have increased by around 0.7°C⁴². There is overwhelming scientific evidence linking global warming to increases in the concentration of greenhouse gases in the Earth's atmosphere. Beyond a threshold of 2°C the risk of irreversible ecological catastrophes leading to unimaginable human suffering will increase sharply. But reversing the effects of climate change is a long-term endeavour. Once emitted, carbon dioxide and other greenhouse gases stay in the atmosphere for a long time. People living at the start of the 22nd century will have to live with the consequences of our emissions, just as we are living with the consequences of emissions from the time of the industrial revolution⁴³.

The situation is urgent: at least from 2020, total global emissions will need to fall dramatically until 2050 if we wish to avoid the dangerous climate change threshold of 2°C global warming. Achieving this target will require immediate action and unparalleled international cooperation. So far, the world lacks a clear, credible and long-term multilateral framework that charts a course for avoiding dangerous climate change. With the expiry of the current commitment period of the Kyoto Protocol in 2012, the international community has an opportunity to put that framework in place.

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Environmental degradation and climate change are widely seen to be one of many challenges to *human development* and, therefore, part of the development agenda⁴⁴. But the recent increase in environmental disasters, which are at least partly caused by climate change, such as floods, droughts, hurricanes and food crises, brought to light that climate change is as much a challenge

to *human security* as it is to human development. For poor people living in ecologically - sensitive areas - including low-lying and other small island states, low-lying coastal zones, arid and semi-arid zones, Arctic regions, countries with fragile mountainous ecosystems and areas liable to floods, drought and desertification - the increased risk of environmental disasters poses a major threat to both their aspirations to live in freedom from want and freedom from fear.

[59]

Since the anthropogenic causes of climate change are no longer disputed, this major challenge to humanity is also slowly entering the *human rights discourse*⁴⁵. There are several reasons why climate change urgently needs to be addressed using a human rights based approach. First of all, *climate change causes violations of various human rights, including the rights to food, water, shelter, property, health and life. Secondly, climate change raises major concerns about equality and global social justice.*

While rich industrialized countries and their people are primarily responsible for climate change, it is the poor communities who suffer most from its effects: poor slum dwellers in low-lying coastal zones, subsistence farmers in arid regions, indigenous communities, people who were displaced because of environmental disasters and who seek protection as environmental refugees and those migrating to escape the negative consequences of climate change. Finally, *climate change is a global problem that requires a global solution.* International human rights provide a convincing normative framework based on universally accepted values, with legally binding rights of human beings, corresponding obligations of duty-bearers, and mechanisms for accountability and redress. As the United Nations' Human Development Report 2007/2008 rightly stresses, allowing the tragedy of climate change to evolve would be a political failure that merits the description of an "outrage to the conscience of mankind"⁴⁶.

[60]

*A human rights based approach to climate change will sharpen the focus on the human rights effects of both mitigation and adaptation policies*⁴⁷. *Mitigation policies* will necessarily have to reduce dependence on fossil fuels. Industrialized countries have started, for example, comprehensive biofuel substitution programmes, i.e. the conversion of crops for use as fuel rather than food. The effect has been to encourage farmers in rich and in poor countries to switch from food to biofuel production. Since biomass productivity is highest in tropical environments and the production costs of biofuels, notably ethanol, are lower in poor countries, this policy has led to considerable changes in the agriculture of these countries with notable negative effects on food security, as became evident during the recent food crisis⁴⁸. A human rights based approach would help to assess the effects of these policies on food security, in particular in poor countries.

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Adaptation policies refer to actions taken to adjust lives and livelihoods to the new conditions brought about by global warming and climate change. It is obvious that rich countries, such as the Netherlands, are in a better position to protect their population from rising sea levels than small island states in the Pacific. So far, climate change adaptation has been treated as a peripheral concern, and the additional funds promised by rich to poor countries in the United Nations Framework Convention on Climate Change have been made available only to a very limited extent.

As the United Nations Human Development Report has rightly, though somewhat sardonically, observed, "the world's poor cannot be left to sink or swim with their own resources while rich countries protect their citizens behind climate-defence fortifications. Social justice and respect of human rights demand stronger international commitment on adaptation⁴⁹."

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Much *more research needs to be done on the effects of climate change and the various mitigation and adaptation policies on the enjoyment of human rights*, above all by vulnerable people in poor countries.

While rich countries continue to reject the right to development and, in particular, any legal claims of poor people and poor countries against the industrialized world to provide development cooperation, this lack of global responsibility can no longer be sustained in the light of the dramatic present and future effects of climate change on the right of poor people to have access to food, water, housing, health, life and other human rights.

It is evident that climate change has been caused primarily by rich countries, while poor people suffer most from its negative human rights consequences. It is, therefore, not just a question of ethics and global justice, but an obligation of rich countries deriving from international human rights to share the major burden of mitigating the causes of climate change and of assisting poor countries in their efforts to adapt to the negative conditions brought about by climate change.

⁴¹ See Intergovernmental Panel on Climate Change, Susan Solomon et al (Eds.), 'Climate Change 2007: The Physical Science Basis', Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change (Cambridge University Press, Cambridge, New York, 2007). ⁴² For the following, see ibid and UNDP, 'Human Development Report 2007/2008: Fighting climate change: Human solidarity in a divided world' (Palgrave Macmillan, New York, 2007). ⁴³ To have a 50:50 chance of limiting temperature increase to 2°C above preindustrial level will require stabilization of greenhouse gases at concentrations around 450 parts per million (ppm) of carbon dioxide equivalent, compared to current concentrations of 380 ppm and preindustrial concentrations of less than 280 ppm. See UNDP's 'Human Development Report 2007/2008', supra note 42, pp. 1-18. ⁴⁴ See, for example, UNDP's 'Human Development Report 2007/2008', supra note 42. ⁴⁵ See, for example, International Council on Human Rights Policy, 'Climate Change and Human Rights, A Rough Guide' (International Council on Human Rights Policy, Geneva, 2008). See also Res. 7/23 of the UN Human Rights Council of 28 March 2008, entitled 'Human rights and climate change', which requests the High Commissioner for Human Rights to conduct a detailed study of the relationship between climate change and human rights. ⁴⁶ UNDP, 'Human Development Report 2007/2008', supra note 42, p.10. ⁴⁷ See, for example, International Council on Human Rights Policy, supra note 45, p. 17 et seq. ⁴⁸ The first special session of the Human Rights Council on a thematic issue was held in May 2008 in reaction to the world food crisis: see HRC Res. S-7/1 of 22 May 2008. ⁴⁹ UNDP, 'Human Development Report 2007/2008', supra note 42, p.13.

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The human rights effects of climate change reveal the urgent need to move from traditional human rights law with states as the primary duty-bearers to a global human rights regime with many other duty-bearers, including international organizations, the corporate sector and global civil society. Climate change is a major threat to our common global society in the 21st century, and shared responsibility of all has been characterized above as the human rights approach of the 21st century.

But climate change is not only a threat, it also constitutes a major challenge and a window of opportunity for rich and poor countries alike to set aside their disputes about human rights, development and security policies and to join their forces in a truly global spirit to protect our planet and humanity against global warming and climate change by effective preventive, mitigating and reactive measures in line with universal human rights, above all those concerning the human rights and dignity of the poor.

7. Addressing the Implementation Gap: Towards a Global Culture of Human Rights

7.1. From Standard Setting and Monitoring to Implementation, Protection, Enforcement and Prevention

[64]

During the second half of the 20th century, much progress has been made in promoting the idea of human rights, in developing a universal normative framework with legally binding rights of human beings and corresponding obligations of states, and in creating effective monitoring bodies and procedures able to assess the actual state of human rights implementation in all countries of our globe. It is exactly our improved monitoring capacity exercised jointly by inter-governmental bodies, independent human rights expert bodies, non-governmental organizations, the media, the academic community and other civil society actors which enables us to realize how large is the gap between legal commitments and the factual situation on the ground.

[65]

The big challenge of the 21st century is to close or at least significantly narrow this implementation gap which clearly undermines the validity and legitimacy of the legally binding universal human rights framework. We urgently have to move from standard setting and monitoring to genuine protection, implementation and enforcement of human rights and to the effective prevention of human rights violations. At the same time we are in the process of moving from the traditional model of exclusive state responsibility to the 21st century approach of shared responsibility. If human beings are denied enjoyment of the rights to food, housing, property, education, privacy, health, justice, physical integrity or life because of poverty or the effects of climate change, it would be futile and unfair to hold only the state in which they live accountable. Their being displaced from their traditional lands, property and home might have been caused by business practices of transnational corporations, by the rising sea levels due to global warming or by ethnic cleansing policies of rebel groups. Although implementation of international human rights standards remains primarily a task and responsibility of national governments, we must address the implementation gap with remedies that are applicable to all duty-bearers.

[66]

In principle, implementation efforts take place at the domestic, regional and international levels by courts, non-judicial expert bodies and political bodies. Courts are important for dealing with individual complaints against the respective duty-bearers and for providing victims with adequate reparation. At the domestic level, only very few specialized human rights courts exist. However, in various countries specialized courts or panels with special powers, or even government administrative bodies have been created to deal with claims of discrimination, or pertaining to asylum, immigration and employment. Such bodies address claims concerning denial of equal employment opportunities, voting rights, civil rights and denial of equal protection. Human rights litigation usually takes place before ordinary courts or, as far as they exist, before constitutional

courts. But for many victims, judicial protection is difficult to access, and even in successful cases of human rights litigation, victims are not provided with adequate reparation for harm suffered.

It is therefore important that states should establish effective specialized bodies with judicial powers in matters important for the realization of civil and economic rights. At the regional level, there are human rights courts in the Council of Europe, the Organization of American States and recently also in the African Union. However, apart from the European Court of Human Rights, access to these courts is very difficult. Individuals have no direct access to the Inter-American Court of Human Rights and currently hardly any access to the African Court on Human and Peoples' Rights. In addition, these Courts primarily deal with civil and political rights, have only limited powers to provide adequate reparation and cannot be addressed with complaints against non-state actors. Human rights litigation at the UN level takes place before a number of quasi-judicial treaty monitoring bodies with no power to hand down legally binding judgments and to award reparation to victims.

[67]

Judicial protection and enforcement constitutes, however, only one method of inducing states and other duty-bearers to implement their international human rights obligations. It is always reactive and only attempts at providing some reparation for harm which has already been suffered by the victims. In the final analysis, the ultimate goal must be prevention. In order to achieve this noble goal, a broad variety of implementation measures are required, which are of a non-judicial nature and should be taken primarily at the domestic level with the proper assistance of regional and international bodies. The central bodies for non-judicial implementation are *national human rights institutions* with broad powers, including reaching out to non-state duty-bearers, which ought to be established in every state.

[68]

Finally, effective human rights implementation demands a clear division of labour between courts, non-judicial bodies and political bodies with the necessary enforcement powers. At the domestic level, parliaments and governments, including law enforcement organs, are the political bodies with the primary responsibility for ensuring that international human rights obligations are implemented and enforced. At the regional level, political bodies such as the Committee of Ministers of the Council of Europe, the General Assembly of the Organization of American States, the Assembly of Heads of State and Government of the African Union, the Ministerial Council and Summit of the OSCE, the ASEAN Summit and the Council of the League of Arab States are responsible for ensuring that the respective decisions and recommendations of judicial, quasi-judicial and non-judicial expert bodies are implemented in practice.

At the universal level, this responsibility is entrusted to the Human Rights Council, but the General Assembly and the Security Council have also taken up certain human rights implementation and enforcement functions.

7.2. Non-Judicial Human Rights Implementation Bodies^⑩

[69]

Proactive and preventive human rights implementation means taking or facilitating action aimed at creating general conditions conducive to the respect, protection and fulfilment of human rights. Effective implementation of all international human rights obligations is a huge, demanding and complex task which requires political will and strategic planning at the local, national, regional and global level. While the political will must come from governments, international organizations, transnational corporations and other powerful actors, the precise development of Human Rights Action Plans and the supervision of their implementation requires the widest possible input from civil society, including independent experts.

[70]

That governments need to be assisted and supervised in their function of implementing human rights at the local, national, regional and global level by independent non-judicial human rights implementation bodies has increasingly been recognized by the international community. In 1993, the General Assembly, by adopting the *Paris Principles*, called upon all states to establish, by constitutional or ordinary legislation, independent and pluralistic *national human rights institutions* with as broad a mandate as possible aimed at preventing and combating human rights violations and ensuring the domestic implementation of international human rights obligations^⑪. In recent years, international treaties have been adopted which require states parties to establish special independent domestic monitoring and implementation bodies, such as national preventive mechanisms under the Optional Protocol to the Convention against

Torture entrusted with the task of carrying out preventive visits to all places of detention, and special independent mechanisms to promote, protect and monitor the domestic implementation of the Convention on the Rights of Persons with Disabilities.

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Although more than 100 governments in all regions of the world responded favourably to the call of the General Assembly to set up national human rights commissions or similar non-judicial mechanisms, only approximately half of these institutions were accredited by the International Coordinating Committee as having fulfilled all the criteria of the *Paris Principles*^⑫. Often, these institutions lack independence or some of the key competences of a national human rights institution. Only a handful of countries have adopted a National Human Rights Action Plan. Much more needs to be done in order to effectively address the implementation gap at the local and national level. *It is high time that all states establish truly independent and well-resourced national human rights institutions and adopt a comprehensive National Human Rights Action Plan* with clear goals, priorities, time-bound targets, indicators and benchmarks. These action plans should be oriented at the various obligations under the respective international human rights treaties and establish their goals on the basis of a thorough and independent analysis of the overall situation of human rights in the country concerned. After adoption, national human rights institutions should be fully involved in facilitating and monitoring the implementation of the goals, targets and benchmarks established in the action plans. They may be assisted in this task by the international community.

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Rather than increasing the number of non-judicial human rights bodies at the regional and universal level, it is imperative that the implementation of international human rights standards is strengthened by the creation and development of truly independent and effective national institutions for the protection of human rights and by assistance provided to these institutions.

The implementation of international human rights obligations in the state depends to a large extent on the effectiveness of the state's national protection systems – the institutional arrangements that function under the national constitutional and legal order to ensure that human rights are protected. In the absence of effective and accountable institutions, including the police, courts, prisons, national human rights institutes and commissions, human rights cannot be realized. Such institutions are frequently overburdened, under-resourced or inefficient.

The UN High Commissioner for Human Rights, international development agencies and the bilateral donor community should define assistance to well-functioning national human rights institutions as a priority of their technical cooperation activities. *A Global Fund for National Human Rights Protection Systems should be established which supports and strengthens human rights implementation*, not only by national human rights institutions, but by all of these relevant national institutions. This Fund would constitute *a 21st century, multi-stakeholder approach to strengthening national capacities to make human rights a reality for all*. In light of our shared responsibility to protect against attacks on dignity, funding could come from a range of actors including governments, the private sector and civil society, as has occurred in the context of initiatives to combat inequalities in global health.

[73]

In order to fulfil the 21st century approach of shared responsibility, it is not enough that only national governments address the implementation gap. In the context of their corporate responsibility policies, transnational corporations and other powerful business enterprises should adopt action plans with clear targets and benchmarks relating to the fulfilment of their human rights responsibilities. National

human rights institutions should play an active role in encouraging and facilitating a human rights based approach to corporate responsibility. Regional and global inter-governmental organizations also need a clear vision of how to address the implementation gap. The present Agenda for Human Rights aims at providing the United Nations with guidance in this respect.

7.3. The Need for a World Court of Human Rights

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The idea of a World Court of Human Rights is not new. As early as 1947, the Australian Government strongly argued for the establishment of an International Court of Human Rights. In 1946, the Commission on Human Rights established three working groups to draft a Declaration of Human Rights, a binding Convention and measures of implementation. For lack of consensus, only the Declaration Group succeeded in agreeing within a relatively short period of time on the text of the Universal Declaration of Human Rights which was adopted by the General Assembly on 10 December 1948. The drafting of a binding Convention was soon submerged into the ideological debates of the Cold War, which finally led to the adoption of two International Covenants with weak implementation measures in 1966.

Further reaching structural proposals, such as the Australian initiative of an International Court of Human Rights, the Uruguayan idea of a High Commissioner for Human Rights or the establishment of an International Penal Tribunal as envisaged in Article VI of the Genocide Convention of 1948 had no chance of realization during the Cold War. But soon after the fall of the Berlin Wall, these ideas were revitalized.

^⑩ For national judicial bodies, see para 66 supra. ^⑪ A/RES/48/134 of 20 December 1993. ^⑫ See International Coordinating Committee, Chart of the Status of National Institutions.

The need for a High Commissioner for Human Rights was agreed upon during the Vienna World Conference on Human Rights in 1993 and established soon thereafter by resolution of the General Assembly. The International Criminal Court was created by the Rome Statute of 1998 after two ad hoc criminal tribunals for the former Yugoslavia and Rwanda had been set up by the Security Council in 1993 and 1994, respectively. Only the World Court of Human Rights is still considered by many as a utopian idea notwithstanding the fact that regional human rights courts have been established in Europe, the Americas and Africa.

[75]

The proposition that where there is no remedy there is no right was one justification for the early proposal for an International Court of Human Rights and is a notion found in most legal systems. This idea was later confirmed by the General Assembly when it adopted in 2005 the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law⁵³. The term “human rights” with its corresponding obligations of duty-bearers implies accountability, i.e. the rights-holders should have the legal possibility in case of an alleged violation of such obligation to hold the duty-bearer accountable before an independent national, regional or international court. If the court finds a violation, it must have the power to order adequate reparation, including restitution, rehabilitation, compensation, satisfaction and guarantees of non-repetition. This is the general legal approach to civil wrongs. Why should it be different for violations of human rights? Needless to say, binding judgments of human rights courts need to be enforced by the competent law enforcement agencies.

[76]

Like the International Criminal Court, the World Court of Human Rights could be a *permanent court with professional full time judges to be established by a multi-lateral treaty under the*

*auspices of the United Nations*⁵⁴. It should be *competent to decide in a final and binding manner on any 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 duty-bearer. Such complaints could be lodged against states which have ratified the Statute of the Court and the respective human rights treaty. Taking into account the global responsibilities of inter-governmental organizations, such as the United Nations and its specialized agencies, the World Bank and NATO, such organizations should also be subject to the jurisdiction of the Court. The Court should also have jurisdiction over transnational corporations and other business enterprises, faith-based organizations and any other legal entities which have their seat or operate in the territory of a state party.

[77]

Individual complaints should only be admissible after exhaustion of all available domestic remedies. In order to avoid flooding of the court with thousands of complaints, as has happened with the European Court of Human Rights, states could be encouraged to establish or design domestic human rights courts competent to directly apply all human rights treaties subject to the jurisdiction of the World Court for the state concerned. If domestic remedies do not provide satisfactory relief to the victim, he or she should have the right to submit a complaint to an international human rights court, either at the regional or global level. It is up to the victim to choose which international remedy seems to be the most effective, but the cumulative use of international remedies should be excluded. No appeal from a regional human rights court should, therefore, be admissible. It would, however, be desirable if regional human rights courts were entrusted with similar broad powers, including the power to order appropriate reparation for harm suffered.

[78]

We consider the establishment of a World Court of Human Rights a major goal in the human rights agenda in the coming period and

call for a more detailed study by an expert group to be commissioned by the Secretary-General of the United Nations on ways of advancing towards the establishment of a World Court of Human Rights.

8. Conclusions and Recommendations

8.1 Achievements, Problems and Challenges: Human Rights in Crisis

[79] Despite significant achievements since the adoption of the Universal Declaration of Human Rights in 1948, and in particular since the end of the Cold War, the international community today finds itself in a veritable human rights crisis in the absence of a clear agenda for action.

[80] The gap between the high aspirations of human rights and its sobering realities on the ground, between human rights law and its implementation, between the lofty rhetoric of governments and their lack of political will to keep their promises is the major problem, and bridging this gap the major challenge of our time.

8.2 Human Dignity

[81] Human dignity is the essential feature which distinguishes human beings from other creatures. Human dignity and the uniqueness of the human being are grounded in human free will, in the capacity for moral choice and individual autonomy. Inherent in all human beings, human dignity is the moral and philosophical justification for equality and other universal human rights.

[82] While all human rights find their moral and philosophical rationale in human dignity, not every violation or denial of human rights also constitutes an attack on human dignity. The present Agenda aims primarily at addressing

those core human rights issues directly linked to human dignity, which is characterized by powerlessness, humiliation and dehumanization. This core is composed of fundamental civil, political, social, economic and cultural rights.

8.3 Shared responsibility: The 21st century approach

[83] International law should move from a model of exclusive state responsibility to a 21st century approach of shared responsibility of all actors in order to respond both to the increase in human rights abuses being committed by non-state actors and to the need to involve non-state actors, including international institutions, transnational corporations and faith-based institutions in the international protection of human rights.

[84] Shared responsibility includes not only accountability for actions that violate human rights, but also positive actions aimed at progressively fulfilling human rights.

[85] The international community has a joint responsibility to find effective ways to facilitate the implementation of all human rights for all. The responsibility to protect should therefore extend to all attacks on human dignity, and above all, to extreme poverty, consistent patterns of violations of economic, social and cultural rights and the negative effects of global climate change.

8.4 Freedom from want: Eradicating poverty

[86] The goal of eradicating poverty must be transformed from a merely voluntary development target into a legally binding human rights obligation of rich and poor countries and of other actors in the international community alike.

⁵³ FA/RES/60/147 of 21 March 2006. ⁵⁴ Manfred Nowak, 'The Need for a World Court of Human Rights' (2007) 7(1) Human Rights Law Review 251 at 255-6.

[87] Eradicating poverty is a human rights obligation which can only be undertaken and implemented effectively by the international community as a whole; national governments of the developing countries in which most poor people live need solidarity to help eradicate poverty.

[88] Poverty can be eliminated by adopting and implementing a human rights based approach to development and poverty eradication. Human rights principles should inform both the process of creating, implementing and monitoring a poverty reduction strategy, as well as the content of such a strategy.

[89] The poor must be empowered to lift themselves out of poverty through a rule of law and access to justice approach. Access to justice, equal and fair property rights, labour rights and business rights, as well as the strengthening of democracy are essential to enable the legal empowerment of the poor.

[90] Poverty should be addressed preventively – states should reduce poverty by creating social security nets and employing all available national resources, and national courts should be vested with the competence to hear claims from victims of poverty where the government could have acted preventively but failed to do so. Moreover, the international community should take responsibility to protect against gross violations of economic, social and cultural rights.

[91] International human rights principles should be incorporated into international trade and finance laws and agreements to mitigate the negative effects of globalization on the poor. A human rights based approach should also be applied in formulating policies relating to the problems of urbanization, the growing number of slum-dwellers and global migration flows.

8.5 Freedom from fear: Enhancing human security by preventing violence

[92] Threats to human security should be combated preventively, by addressing the root causes of such threats with effective early warning

systems and early action strategies making use of the full range of instruments available as part of the security, development and human rights agendas.

[93] During and following armed conflicts, the applicability and relevance of human rights protection must be maintained by the international community. In particular, human rights principles should inform the development of post-conflict societies in the establishment of effective democratic structures and systems for the administration of justice.

[94] More should be done to implement the 'responsibility to protect'. In the context of genocide, war crimes, ethnic cleansing and crimes against humanity, the United Nations should enhance its early warning mechanisms by fully integrating the system's multiple channels of information and monitoring. In addition, the United Nations should establish military standby capacities as a first step towards the creation of a standing rapid deployment force as an early action mechanism. The United Nations should support the prosecution of the perpetrators of gross violations of human rights and humanitarian law by international and national criminal courts and tribunals.

[95] Terrorism undermines core human rights values and the international rule of law. Much more needs to be done in taking concerted efforts to address the root causes of global terrorism, including poverty, global injustice and unresolved conflicts, as well as the reasons for increasing religious fundamentalism and intolerance. The security-dominated strategy for addressing terrorism should be tempered by consideration of the obligations of states under international human rights, refugee and humanitarian law.

[96] Trafficking in human beings, which directly affects human dignity as the most widespread modern day manifestation of slavery, should be addressed by governments and the international community through the application of a human rights based approach and by shifting the focus from anti-migration to anti-trafficking policies.

[97] The use of imprisonment as a punishment for crime, pre-trial detention and other forms of lawful deprivation of personal liberty must balance the right to personal liberty against legitimate state interests and such measures must be necessary and appropriate. Detention should only be permissible if no less intrusive measures serve the purpose of achieving a legitimate goal, the detention must be subject to judicial control, must be for no longer than absolutely necessary, and must be under conditions that ensure dignity and justice for detainees.

[98] Millions of detainees and prisoners worldwide are kept in conditions amounting to inhuman or degrading treatment. Prison conditions in violation of civil, political, economic, social or cultural rights should be improved through national and international efforts so that prisoners can live in dignity.

[99] Arbitrary detention, inhuman conditions of detention, torture and enforced disappearance constitute direct and serious attacks on human dignity. States should take preventive measures by opening up places of detention to inspection and unannounced visits by national preventive mechanisms. Moreover, the international community has a responsibility to ensure that there exists no safe haven for perpetrators of these practices, or for those under whose military or political responsibility such practices are tolerated.

8.6 Climate change: A global challenge to security, development, human rights and human dignity in the 21st century

[100] Climate change is a global problem requiring a global solution. Climate change causes human rights violations – particularly concerned are the rights to food, water, shelter, property, health and life; and climate change raises major concerns about equality and global social justice – having a greater impact on the poor.

[101] Thus, a human rights based approach to climate change is needed, which will sharpen the focus of climate change policies on their effects on the fulfilment of human rights, and which will acknowledge not only the role of states, but also the roles of international organizations, the corporate sector and global civil society as duty-bearers.

[102] Mitigation policies – in particular biofuel substitution policies – should assess the effects of crop conversion on food security, in particular in poor countries.

[103] Adaptation policies should be focussed on supporting poor countries less able to protect their populations from the effects of climate change.

[104] More research must be conducted on the effects of climate change and consequent mitigation and adaptation policies on the enjoyment of human rights.

8.7 Addressing the implementation gap: Towards a global culture of human rights

[105] It is imperative that the international community close, or at least significantly narrow, the implementation gap between the legal and political commitments of governments and the international community to respect, protect and fulfil human rights, and the contrasting situation on the ground. This is the biggest challenge of the 21st century.

[106] We must urgently move from standard setting and monitoring to genuine protection, implementation and enforcement of human rights, and to the effective prevention of human rights violations.

[107] Non-judicial as well as judicial human rights implementation bodies, and national human rights institutions in particular, should be established in all states, and should be independent and have as broad a mandate as possible in order to prevent and combat human rights violations and to ensure the domestic implementation of international human rights obligations.

[108] To build an effective national protection system for human rights, a Global Fund should be established to support and strengthen all national human rights protection systems, ranging from national human rights institutions to the police, prisons and courts.

[109] Transnational corporations should adopt action plans, with clear targets and benchmarks, aimed at respecting and fulfilling human rights.

[110] A fully independent World Court of Human Rights should be created, as a counterpart to the newly established Human Rights Council, entrusted with the judicial protection of human rights against all duty-bearers.

[111] The World Court of Human Rights should be a permanent court established by a multilateral treaty under the auspices of the United Nations. It should be competent to decide in a final and binding manner on complaints of human rights violations committed by state and non-state actors alike and provide adequate reparation to victims.

[112] The United Nations Secretary-General is requested to commission an expert study on ways to advance towards the establishment of a World Court of Human Rights.

A World Court of Human Rights

Manfred Nowak, Panel Member

Certain innovative ideas for the strengthening of the international protection of human rights have to wait patiently until the time comes for them to be realized. Two of the three main global institutions envisaged by the international community in the aftermath of the Nazi Holocaust could see the light of the day only after the end of the Cold War. The implosion of the Soviet Union and other Communist regimes in Europe, which for four decades had obstructed any meaningful global developments in the field of human rights, all of a sudden created a momentum for visions of a new world order.

This short window of opportunity during the 1990s led to a number of new pillars in the architecture of the United Nations. With the Vienna World Conference on Human Rights of 1993, an old idea of Uruguay dating back to the 1940s could be implemented: the creation of the Office of a UN High Commissioner for Human Rights in Geneva, which today is the focal point for a broad range of human rights activities carried out by many different actors within the entire United Nations family. In the same year, the Security Council created the International Criminal Tribunal for the former Yugoslavia which opened the doors for the adoption of the Rome Statute of 1998 for a permanent International Criminal Court in the Hague, another dream of the late 1940s when some of the main war criminals of World War II had been brought to justice by ad hoc Military Tribunals.

The fact that the Security Council has created international tribunals, which have brought in the meantime the main human rights criminals in the former Yugoslavia and Rwanda to justice, underlines that the two UN goals of promoting peace and human rights have joined forces. Human rights have moved to the field, and form today an essential component of new generations of peace-keeping and peace-building operations. The concept of human security is much more than the mere absence of war. It means creating a world order in which human beings will be able to enjoy freedom from fear and violence. This vision has found its institutional foundation

in a re-definition of the old concept of State sovereignty, called the Responsibility to Protect (R2P). Similarly, the gap between two parallel UN aspirations and discourses of promoting development and human rights has been bridged during the 1990s. On the basis of the new concept of human development, which reaches far beyond the traditional ideas of economic growth and industrialization, human beings will be empowered by comprehensive international development and poverty reduction strategies to enjoy freedom from want and poverty. This vision found its most visible expression in the Millennium Development Goals (MDGs).

Unfortunately, the progress achieved during the 1990s towards establishing a new world order based on freedom from fear and want, on freedom from violence and poverty, on human security and human dignity, on the implementation of Responsibility to protect and the MDGs, has been followed by a period of stagnation during the first decade of the 21st century. In reaction to the tragic terrorist attacks of 11 September 2001, an ill-conceived 'global war on terror' dominated the international political agenda for many years and diverted most of the urgently needed financial resources and political priorities from poverty reduction and peace-building to costly and highly dangerous military adventures which undermined some of the major achievements of human rights, democracy and the international rule of law. Furthermore, global market forces, unleashed by the neo-liberal ideology of unlimited privatization, deregulation and an almost naïve trust in the regulatory competences of global capitalism, led to unprecedented economic, financial, food and ecologic crises of global dimensions.

The current global economic and political crisis demands a radical re-orientation of international politics. The only answer to the destructive forces of global markets is an effective system of global governance based on the foundations and values of the United Nations and its institutional architecture. Time has come to adapt the United Nations architecture, which still reflects the political situation of 1945, to the global realities

and challenges of the 21st century. The High Commissioner for Human Rights and the International Criminal Court are important pillars of an emerging system of global governance beyond the powers of the nation-State. But these institutions need to be complemented by a standing United Nations military and police force, by a structural reform of the Security Council reflecting the political realities of our contemporary world, by global institutions capable of controlling the power of international market forces, by global judicial and political mechanisms capable of holding powerful governments, international organizations and trans-national corporations accountable to international minimum standards of decent and responsible behaviour. An effective World Court of Human Rights with broad jurisdiction is only one new pillar in the emerging architecture of global governance and global constitutionalism reflecting the important constitutional principle of checks and balances.

Why is the time ripe to revive the old idea of a World Court of Human Rights which had been presented to the United Nations by Australia already in 1947? Important changes and developments are ongoing in a world region which until recently was dominated by some of the most repressive, undemocratic and corrupt political regimes. As the dismantling of the military dictatorships in Latin America during the 1980s and the collapse of the Communist regimes in Europe soon thereafter have led to important changes towards a new world order during the 1990s, the revolutionary movements in the Arab and Islamic world have an enormous potential for global change today. The power of the 'Arab spring' has much in common with the 'velvet revolutions' of 1989 in Central and Eastern Europe. In Libya, the brutal repression of the people's demand for democratic change even led to the suspension of its membership in the UN Human Rights Council, to a referral of the situation by the Security Council to the International Criminal Court, and to the successful enforcement of the new concept of R2P by the international community. Other repressive governments might learn from this experience.

This recent experience shows that there is a new window of opportunity which needs to be used for long overdue institutional reforms towards global governance. Furthermore, trans-national corporations and international organizations have emerged as powerful global economic and political actors next to the traditional nation-States with the capacity to violate human rights, but also to take responsibility for the promotion and protection of human rights. Nevertheless, they cannot be held accountable for their actions or omissions before any effective international mechanisms. The future World Court of Human Rights provides a long needed opportunity to integrate powerful non-State actors into the emerging architecture of global governance with respective rights and obligations.

The present draft of a Statute for a World Court of Human Rights was developed within the framework of the 'Swiss Initiative'. In 'Protecting Dignity: An Agenda for Human Rights', the Panel of Eminent Persons included the call for a World Court of Human Rights as one of two far-reaching institutional reform proposals, together with the idea of a Global Fund for National Human Rights Protection Systems. In fact, both proposals are complementary. The universally agreed minimum standards of human rights, reflected in a broad variety of legally binding international human rights treaties, suffer from a lack of effective implementation and enforcement mechanisms.

The main responsibility for granting victims of human rights violations access to an effective remedy and adequate reparation for the harm suffered rests with national governments. But in reality, billions of human beings are excluded from any access to justice and the rule of law, including access to institutions for the protection of their most fundamental human rights. A Global Fund for National Human Rights Protection Systems, following the model of the Global Health Fund, would constitute a 21st century, multi-stakeholder approach to strengthening national capacities to make human rights a reality for all.

The World Court of Human Rights would only have a supplementary role if domestic or regional protection mechanisms are not providing effective redress or are not functioning at all. This is reflected in the principle that all domestic remedies must be exhausted before victims may lodge a human rights complaint before the World Court. Article 9 of the draft Statute goes even beyond this general principle of subsidiarity and requires all future States parties to 'ensure that all applicants have access to effective judicial remedies in relation to all human rights enshrined in the applicable human rights treaties'.

In order to assist States parties to improve their domestic judicial remedies, the draft Statute in Article 39 also envisages the creation of a special Trust Fund. In other words, the acceptance of the jurisdiction of the World Court by States would also serve as an incentive for States to strengthen their national capacities for human rights protection with the assistance of the international community. Similarly, the creation of a World Court may also lead to an improvement of regional human rights protection mechanisms.

If victims know that their right to an effective remedy and reparation can be satisfied by a well-functioning regional human rights court, they will see no need to lodge a complaint with the World Court. But they will have to make a choice as the World Court will not serve as an appeals court from regional human rights courts.

Future Action

The present consolidated draft Statute for a World Court of Human Rights is the result of a long process of discussions within the Panel of Eminent Persons and beyond. It is now for the international community, including governments, international and non-governmental organizations, the UN High Commissioner for Human Rights, academics, the corporate sector and other stakeholders to jointly work towards the adoption of this important pillar of the emerging architecture of global governance by the competent United Nations decision making bodies.

A World Court of Human Rights Consolidated Draft Statute

By Julia Kozma, Manfred Nowak
and Martin Scheinin Commentary

Preamble

The States Parties to this Statute,

Reaffirming the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and fundamental freedoms,

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby all human beings may enjoy their civil and political rights, as well as their economic, social and cultural rights,

Noting, in particular, that according to Article 28 of the Universal Declaration of Human Rights everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized,

Considering that a solid legal framework of international human rights treaties has been established by the United Nations and its specialized agencies,

Recalling that human rights entail legal obligations of States and other duty bearers to respect, protect and fulfil such rights, and that legal obligations demand accountability of duty bearers,

Deeply concerned about the fact that, notwithstanding the comprehensive legal obligations of all States and other duty bearers to respect, protect and fulfil international human rights, large numbers of human beings in all parts of the world are suffering every day of violations of their human rights,

Equally concerned about the fact that the vast majority of human beings around the world have no access to any effective domestic, regional or universal remedy against violations of their human rights and have no chance of being provided with adequate reparation for the harm suffered through these human rights violations,

Determined to address effectively this enormous implementation gap and the lack of effective international enforcement of human rights, and to this end to establish an independent permanent World Court of Human Rights, with comprehensive jurisdiction to decide in a final and binding manner about violations of human rights by States and relevant non-State actors and to provide the victims with adequate reparation,

Inviting in that spirit all States and other public and private actors that exercise power over people, to accept the jurisdiction of the World Court of Human Rights,

Emphasizing that the World Court of Human Rights established under this Statute shall be complementary to national human rights jurisdiction and shall not serve as an appeals court to regional human rights courts.

Have agreed as follows:

1. Establishment of the Court

Article 1: The Court

A World Court of Human Rights (“the Court”) is hereby established. It shall be a permanent institution and shall have the power to decide in a final and binding manner on all complaints about alleged human rights violations brought before it in accordance with this Statute.

Article 2: Seat of the Court

[1] The seat of the Court shall be established in Geneva in Switzerland (“the host State”).

[2] The Court shall enter into a headquarters agreement with the host State, to be approved by the Assembly of States Parties and thereafter concluded by the President of the Court on its behalf.

[3] The Court may sit elsewhere, whenever it considers it desirable.

Article 3: Legal status and powers of the Court

[1] The Court shall have international legal personality. It shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.

[2] The Court may exercise its functions and powers, as provided for in this Statute, on the territory of any State Party and, by special arrangement, on the territory of any other State.

Article 4: Definitions

For the purposes of the present Statute:

[1] The term “Entity” refers to any inter-governmental organization or non-State actor, including any business corporation, which has recognized the jurisdiction of the Court in accordance with Article 51.

[2] The term “Court” refers to the World Court of Human Rights, which can act through its different organs as specified in Article 20.

[3] The term “human rights treaty” refers to any of the treaties listed in Article 5.

2. Jurisdiction

Article 5: Applicable law

[1] Pursuant to the provisions of this Statute, the Court shall have jurisdiction in respect of violations committed by any State Party or Entity of any human right enshrined in any of the following United Nations treaties in the field of human rights:

[a] International Covenant on Civil and Political Rights 1966;

[b] Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty 1990;

[c] International Covenant on Economic, Social and Cultural Rights 1966;

[d] Slavery Convention 1926;

[e] Protocol Amending the Slavery Convention 1953;

[f] Convention on the Prevention and Punishment of the Crime of Genocide 1948;

[g] Convention Relating to the Status of Refugees 1951 and Protocol Relating to the Status of Refugees 1967;

[h] Convention on the Political Rights of Women 1952;

[i] Convention relating to the Status of Stateless Persons 1954;

[j] Supplementary Convention on the Abolition of Slavery 1956;

[k] Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages 1962;

[l] International Convention on the Elimination of All Forms of Racial Discrimination 1965;

[m] Convention on the Elimination of All Forms of Discrimination against Women 1979;

[n] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984;

[o] Convention on the Rights of the Child 1989;

[p] Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts 2000;

[q] Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography 2000;

[r] International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families 1990;

[s] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (Palermo Protocol) 2000;

[t] Convention on the Rights of Persons with Disabilities 2006;

[u] International Convention for the Protection of All Persons from Enforced Disappearance 2006.

[2] On the proposal of a State Party any additional treaty can be included in the list of treaties specified in paragraph 1 by decision of two-thirds of the Assembly of States Parties.

Article 6: General principles

[1] In exercising its jurisdiction, the Court shall determine whether an act or omission is attributable to a State or Entity for the purposes of establishing whether it committed a human rights violation. In so doing, the Court shall be guided by the principles of the international law of State responsibility which it shall apply also in respect of Entities subject to its jurisdiction, as if the act or omission attributed to an Entity was attributable to a State. The Court shall determine the wrongfulness of an act or omission by a State or Entity through the interpretation of international human rights law.

[2] In exercising its jurisdiction, the Court shall be guided by the principles of universality, interdependence and indivisibility of all human rights, by general international law, general principles of law and by the jurisprudence of other international and regional courts.

Article 7: Individual complaints by applicants

[1] The Court may receive and examine complaints from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the States Parties to the present Statute of any human right provided for in any human rights treaty to which the respective State is a Party.

[2] The Court may also receive and examine complaints from any person, non governmental organization or group of individuals claiming to be the victim of a violation of any human right provided for in any human rights treaty by any Entity, which has made a declaration under Article 51 that it recognizes the jurisdiction of the Court in relation to human rights enlisted in such treaties.

[3] The ratification of or accession to this Statute by a State shall be treated by the Secretary-General of the United Nations as a notification by a State of the suspension of the operation of complaint procedures accepted by the State in question under the human rights treaties covered by the Court's jurisdiction. The suspension shall take effect on the day of entry into force of this Statute in respect of the State in question and remain effective as long as the State remains subject to the Court's jurisdiction under the treaty in question.

Article 8: Advisory opinions

[1] The Secretary-General of the United Nations and the United Nations High Commissioner for Human Rights may consult the Court regarding the interpretation of this Statute or of any human rights treaty listed in Article 5 (1).

[2] The Court, at the request of a Member State of the United Nations, shall provide that State

with an opinion regarding the compatibility of any domestic law with the aforesaid international instruments.

3. Procedure Concerning Individual Complaints

Article 9: Exhaustion of domestic remedies

[1] The Court may only deal with any individual complaint if the complaint has first been submitted to the highest competent domestic court in the respective State Party and the applicant is not satisfied with the judgment of this court, including the reparation afforded. Each State Party has an obligation to ensure that all applicants have access to effective judicial remedies in relation to all human rights enshrined in the applicable human rights treaties. Each State Party may identify, in its instrument of ratification, in relation to the applicable human rights treaties the judicial remedies which applicants must exhaust under their domestic system before they can lodge a complaint with the Court. Any subsequent changes in the required domestic remedies shall be notified to the Court.

[2] This admissibility requirement does not apply if, in the view of the Court, the relevant domestic remedy is not available or effective or does not afford due process of law for the protection of the right or rights that have allegedly been violated. In exercising its discretion the Court shall pay particular attention to the following criteria:

[a] Whether the competent domestic courts have the competence to order interim measures necessary to avoid irreparable damage to a victim or victims of an alleged human rights violation.

[b] Whether such courts when finding a human rights violation, can afford the victim adequate reparation for the harm suffered, including restitution, rehabilitation, compensation and satisfaction.

[3] Without prejudice to the application of paragraphs 1 and 2, an Entity may in its declaration submitted pursuant to Article 51 identify what internal remedies exist within its own structures.

Article 10: Other admissibility criteria

[1] The Court shall not deal with any individual complaint that

[a] is anonymous; or

[b] is substantially the same matter that has already been examined in substance by the Court or by another procedure of international investigation or settlement, including before a regional court of human rights; or

[c] is incompatible with the provisions of the human rights treaty invoked; or

[d] is manifestly ill-founded; or

[e] constitutes an abuse of the right to individual complaint.

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

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

[4] The Court shall reject any complaint which it considers inadmissible under this Article. It may do so at any stage of the proceedings.

Article 11: Effect of reservations by States on admissibility

[1] In the application of Article 10, paragraph 1 (c), the Court shall determine whether a reservation entered by a State Party to any of the human rights treaties within the material jurisdiction of the Court and relevant in the case is permissible pursuant to the provisions of the treaty and the principles of the international law of treaties.

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

Article 12: Amicus curiae and third-party intervention

[1] The Court may, in the interest of the proper administration of justice, admit written comments by any amicus curiae interested in the case. The Court may also invite specific third parties to take part in hearings.

[2] If the respondent party is an Entity, the State, under the jurisdiction of which the alleged human rights violation has been committed, has the right to participate in the proceedings as a third party.

[2] If the Court decides to undertake an in depth investigation of the facts of a case, the respondent party and, in cases concerning any Entity, the State Party under the jurisdiction of which the alleged human rights violation has been committed, shall cooperate and furnish all required documents and necessary facilities.

[3] If the Court decides to carry out a fact finding mission, the respondent party and, in cases concerning any Entity, the State Party concerned, shall provide all necessary cooperation and facilitate the investigation, including by granting access to all places of detention and other facilities. In carrying out fact finding missions, the Court may be assisted by international experts.

[4] Decisions on admissibility may be joined with the judgment on the merits.

Article 15: Friendly settlement

[1] At any stage of the proceedings the Court shall place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter on the basis of respect for human rights.

[2] If a friendly settlement is effected, the Court shall strike the case out of its list by means of a decision which shall be confined to a brief statement of the facts and of the solution reached.

Article 16: Public hearings

[1] The Plenary Court shall always hold hearings before rendering a judgment on a complaint. Chambers are free to decide whether or not to hold a hearing.

[2] Hearings shall be public unless the Court in exceptional circumstances decides otherwise.

[3] In addition to the applicants and the respondent parties, the Court shall hear such witnesses and experts as it deems necessary. Witnesses may be summoned to appear before the Court.

[4] The Court shall take appropriate measures to protect the safety, physical and psychological

well-being, dignity and privacy of victims and witnesses. For this purpose, it shall establish a Victims and Witnesses Unit within the Office of the Registrar.

[5] Documents deposited with the Registrar shall be accessible to the public unless the President of the Court decides otherwise.

Article 17: Judgments of the Court

[1] The Court shall decide by a written judgment whether or not the respondent party has violated an obligation to respect, fulfil or protect any human right provided for in any applicable human rights treaty.

[2] If the Court finds a human rights violation, it shall also order the respondent party, ex officio or upon request, to afford the victim adequate reparation for the harm suffered, including restitution, rehabilitation, compensation, guarantees of non-repetition, or any other form of satisfaction.

[3] The Court shall give reasons for its judgments as well as for decisions declaring complaints admissible or inadmissible or for striking them off the list of cases.

[4] If a judgment, an admissibility or strike-out decision does not represent, in whole or in part, the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.

[5] Judgments shall be pronounced orally and shall be published in the languages indicated in Article 38.

Article 18: Binding force, execution and supervision of judgments

[1] The judgments of the Court shall be final and binding under international law.

[2] The States Parties and all other respondent parties are bound to abide by the judgment of the Court in any case to which they are parties. In particular, they are bound to grant the victim adequate reparation for the harm suffered, as decided by the Court, within a period of no

longer than three months from the delivery of the judgment, unless the Court specifies a different deadline.

[3] The States Parties undertake to directly enforce the judgments of the Court by the respective bodies.

[4] Any judgment of the Court shall be transmitted to the UN High Commissioner for Human Rights who shall supervise its execution. The States Parties, other respondent parties and the applicants shall report to the High Commissioner within a time limit specified by the Court all measures taken to comply with the judgment and to enforce its execution.

[5] If the High Commissioner concludes that any State Party or other respondent party fails to abide by or enforce any judgment of the Court, he or she shall seize the Human Rights Council or, if he or she deems it necessary, through the Secretary-General the Security Council with a request to take the necessary measures that will bring about the enforcement of the judgment.

Article 19: Interim measures of protection

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

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

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

[4] Such orders for interim measures are binding with immediate effect upon the respondent party and shall be enforced and supervised in the same manner as judgments in accordance with Article 18.

Article 13: Striking out complaints

[1] The Court may at any stage of the proceedings decide to strike a complaint out of its list of cases where the circumstances lead to the conclusion that:

- [a] the applicant does not intend to pursue his or her complaint; or
- [b] the matter has been resolved; or
- [c] for any other reason established by the Court, it is no longer justified to continue the examination of the complaint.

[2] However, the Court shall continue the examination of the complaint if respect for human rights so requires.

[3] The Court may decide to restore a complaint to its list of cases if it considers that the circumstances justify such a decision.

Article 14: Examination on the merits

[1] If the Court declares a complaint admissible, it shall pursue the examination of the case, together with the representatives of the parties to the case.

[5] The Court shall periodically review and withdraw orders for interim measures if they are no longer necessary to avoid irreparable damage to persons.

4. Composition, Organization and Administration of the Court

Article 20: Composition and organs of the Court

[1] The Court shall consist of 21 judges, nationals of the States Parties to the Statute, elected in an individual capacity. All judges shall serve as full-time members of the Court and shall be available to serve on that basis from the commencement of their terms of office.

[2] The Court shall be composed of the following organs:

- [a] Plenary Court
- [b] Chambers and Committees
- [c] Presidency
- [d] Registry

Article 21: Qualification of judges

[1] The judges shall be chosen from among persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices.

[2] Every candidate for election to the Court shall have established competence in the law of human rights and extensive experience in a professional legal capacity which is of relevance for the judicial work of the Court.

Article 22: Nomination of candidates

[1] Nomination of candidates for election to the Court may be made by any State Party to this Statute, and shall be accompanied by a statement specifying how the candidate fulfils the requirements of Article 21.

[2] In the nomination procedure States Parties shall invite applications of candidates and the selection shall be carried out by an independent panel of experts with utmost transparency.

[3] Each State Party wishing to nominate candidates for any given election shall put forward two candidates, one female and one male. The candidates shall be nationals of that State Party.

Article 23: Election of judges

[1] The judges shall be elected by secret ballot at a meeting of the Assembly of States Parties convened for that purpose under Article 43. Subject to paragraph 3, the persons elected to the Court shall be the 21 candidates who obtain the highest number of votes and a two-thirds majority of the States Parties present and voting.

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

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

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

- [a] the representation of the principal legal systems of the world;
- [b] equitable geographical representation;
- [c] expertise on specific issues, including, but not limited to, rights of women, rights of the child, rights of persons with disabilities, and rights of members of minorities and indigenous peoples; and
- [d] a balanced representation of female and male judges.

Article 24: Term of office

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

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

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

[4] The judges shall stay in office until the expiration of their term. However, they shall continue to serve with regard to cases where a hearing has taken place and that are still pending, for which purposes they shall not be replaced by the newly elected judges.

Article 25: Judicial vacancies

[1] In the event of a vacancy, an election shall be held in accordance with Article 23 to fill the vacancy.

[2] A judge elected to fill a vacancy shall serve for the remainder of the predecessor's term and, if that period is three years or less, shall be eligible for re-election for a full term under Article 23.

Article 26: The Plenary Court

The Plenary Court shall:

- [a] Elect its President, its first and second Vice-President for a period of three years. They may be re-elected.
- [b] Set up three Chambers, constituted for a fixed period of time.
- [c] Adopt the Rules of Procedure of the Court and other Regulations as deemed necessary.
- [d] Elect the Registrar and two Deputy Registrars.
- [e] Take a decision in accordance with Articles 31 (3) and 33.
- [f] Take a decision to remove a judge, the Registrar or a Deputy Registrar from office in accordance with Article 34.

[g] Take a decision to waive the privileges and immunities of a judge, the Registrar or a Deputy Registrar in accordance with Article 35 paragraph 2.

[h] Exercise judicial functions in accordance with Article 27 paragraphs 7 and 8.

[i] Issue advisory opinions in accordance with Article 8.

Article 27: Chambers and Committees

[1] The Court shall establish three Chambers of seven judges each.

[2] Chamber 1 shall be chaired by the President of the Court, Chamber 2 by the first Vice-President, and Chamber 3 by the second Vice-President.

[3] Each Chamber shall establish two Committees of three judges each. The President and the Vice-Presidents of the Court shall not be members of a Committee.

[4] Each Committee shall elect its own chairperson.

[5] A Committee may, by a unanimous vote, declare inadmissible or strike out of the list of cases an individual complaint where such a decision can be taken without further examination. The decision shall be final and binding.

[6] If no decision is taken by a Committee in accordance with the preceding paragraph, the respective Chamber shall decide on the admissibility and merits of individual complaints.

[7] Where a case pending before a Chamber raises a serious question affecting the interpretation of any provision of a human rights treaty under consideration or where the resolution of a question before it might have a result inconsistent with a judgment previously delivered by the Court, the Chamber may, at any time before it has rendered its judgment, relinquish jurisdiction in favour of the Plenary Court.

[8] Within a period of three months from the date of the judgment of a Chamber, any party to the case may, in exceptional cases, request that the case be referred to the Plenary Court.

This request shall be submitted to another Chamber of the Court which shall accept the request only if the case raises a serious question affecting the interpretation or application of any provision of a human rights treaty under consideration, or a serious issue of general importance. If this Chamber accepts the request, the Plenary Court shall decide the case by means of a judgment.

Article 28: Final judgments

[1] The judgment of the Plenary Court shall be final.

[2] The judgment of a Chamber shall become final:

[a] when the parties declare that they will not request that the case be referred to the Plenary Court; or

[b] three months after the date of the judgment, if reference of the case to the Plenary Court has not been requested; or

[c] when another Chamber of the Court rejects the request of a party to refer the case to the Plenary Court.

Article 29: The Presidency

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

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

[3] The President, together with the First and Second Vice-Presidents, shall constitute the Presidency, which shall be responsible for the proper administration of the Court and all other functions conferred upon it in accordance with this Statute.

[4] The President shall also function as chair of the first Chamber, the First Vice-President as chair of the second Chamber, and the Second Vice-President as chair of the third Chamber. As chairs of the Plenary Court and the three Chambers, the President and the two Vice-Presidents may adopt orders for interim measures in accordance with Article 19. As soon as the Plenary Court or the respective Chamber is in session, it shall either confirm or withdraw such orders.

Article 30: The Registry

[1] The Registry shall be headed by the Registrar, who shall be the principal administrative officer of the Court. The Registrar shall exercise his or her functions under the authority of the President of the Court.

[2] The Registrar and the two Deputy Registrars shall be persons of high moral character and be highly competent in the field of human rights law. They shall be elected by an absolute majority of the judges for a period of five years and shall be eligible for re-election. They shall serve on a full-time basis.

[3] The Registrar shall appoint such qualified staff as may be required. In the employment of staff, the Registrar shall ensure the highest standards of efficiency, competency and integrity and shall take into account the need for the representation of the principal legal systems of the world.

[4] The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide protective measures and security arrangements, counseling and other appropriate assistance for witnesses and victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses. The Unit shall include staff with expertise in trauma.

[5] The Registrar shall set up a Domestic Remedies Unit within the Registry. This Unit shall engage with States Parties with the aim of strengthening national protection systems.

In case a State Party applies to the Trust Fund for assistance under Article 39 (4) (b), the State Party shall provide the Unit with the information on domestic judicial remedies as outlined in Article 9 (1).

Article 31: Independence of the judges

[1] The judges shall be independent in the performance of their functions.

[2] Judges shall not engage in any other occupation of a professional nature, or in any other activity which is likely to interfere with their judicial functions or to affect confidence in their independence.

[3] Any question regarding the application of paragraph 2 shall be resolved by the President. If it cannot be resolved it shall be decided by an absolute majority of the judges. Where any such question concerns an individual judge, that judge shall not take part in the decision.

Article 32: Solemn undertaking

Before taking up their respective duties under this Statute, the judges, the Registrar, the Deputy Registrars and other staff of the Court, as defined in the Rules of Procedure, shall each make a solemn undertaking in open court to exercise his or her respective functions impartially and conscientiously.

Article 33: Exclusion of judges

A judge shall not participate in any case in which his or her impartiality might reasonably be doubted. At the request of a judge or any party to the proceedings, a judge may be excluded from participating in a case by a decision of a majority of the judges in the respective Committee, Chamber or in the Plenary Court.

Article 34: Removal from office

In case of a serious breach of his or her duties under this Statute or inability to exercise the respective functions under this Statute, a judge, the Registrar or a Deputy Registrar shall be

removed from office by a decision of the Plenary Court taken by a two-thirds majority of all judges. The person whose conduct is challenged shall have full opportunity to present and receive evidence and to make submissions in accordance with the Rules of Procedure of the Court.

Article 35: Privileges and immunities

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

[2] The judges, the Registrar and the Deputy Registrars, shall, when engaged on or with respect to the business of the Court, enjoy the same privileges and immunities as are accorded to heads of diplomatic missions and shall, after the expiry of their terms of office, continue to be accorded immunity from legal process of every kind in respect of words spoken or written and acts performed by them in their official capacity. These privileges and immunities may be waived by a decision of the Plenary Court taken by an absolute majority of all judges.

[3] The staff of the Registry shall enjoy the privileges and immunities and facilities necessary for the performance of their functions, in accordance with the agreement on the privileges and immunities of the Court. These privileges and immunities may be waived by a decision of the Presidency.

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

Article 36: Salaries, allowances and expenses

The judges, the Registrar and the Deputy Registrars shall receive such salaries, allowances and expenses as may be decided upon by the Assembly of States Parties. These salaries and allowances shall not be reduced during their terms of office.

Article 37: Representation before the Court

[1] Applicants have the right to appear before the Court in person or to be represented by legal counsel or by any other duly authorized person or organization.

[2] If the interest of justice so require, the Court, upon request of the applicant or another party, shall grant legal aid to the applicant or another party without sufficient means to pay for legal counsel.

Article 38: Official and working languages

[1] The official languages of the Court shall be Arabic, Chinese, English, French, Russian and Spanish. Important official documents of the Court, including its Rules of Procedure, all judgments of the Plenary Court and leading judgments of the Chambers shall be published in all official languages of the Court. The Presidency shall determine which documents and judgments fall in this category.

[2] The Court shall decide in its Rules of Procedure which of the official languages will be used as working language or languages. If requested by a party to the case, the court may decide to hold hearings in any other language.

[3] Any decision declaring a complaint admissible or inadmissible or striking it out and any judgment shall be published in the working language or languages. If requested by a party to the case, the Court may also issue its decision or judgment in any other language.

Article 39: Trust Fund

[1] A Trust Fund shall be established by decision of the Assembly of States Parties.

[2] All States Parties and Entities are invited to provide voluntary contributions.

[3] The Trust Fund shall be managed according to criteria to be determined by the Assembly of States Parties.

[4] The Trust Fund shall be used for the following purposes:

[a] to assist victims of human rights violations and their families

[b] to assist States Parties to improve their domestic judicial remedies in accordance with Article 9.

5. Obligations of States Parties and Entities

Article 40: Cooperation with the Court

[1] States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its examination of complaints.

[2] If the Court conducts a fact finding mission to the territory of a State Party in accordance with Article 14 paragraph 3, the authorities shall fully cooperate with the Court. In particular, the Court shall enjoy full freedom of movement and inquiry throughout the territory of the State Party, unrestricted access to State authorities, documents and case files as well as the right of access to all places of detention and the right to hold confidential interviews with detainees, victims, experts and witnesses.

[3] The Court shall have the authority to make special requests to States Parties for cooperation and judicial assistance, and the requested States Parties shall provide such assistance and cooperation to the best of their abilities.

Article 41: Compliance with and enforcement of judgments and provisional measures

[1] States Parties shall fully comply with any judgments and orders for interim measures in any proceedings to which they are a party. States Parties shall ensure that any judgments and orders for interim measures of the Court can be directly enforced by their domestic authorities in the same way as any judgments and binding decisions of any domestic court.

[2] With respect to the enforcement of binding judgments against any Entity, States Parties shall provide full cooperation and judicial assistance, as requested by the Court.

[3] States Parties shall enact special laws for the implementation of their obligations under this Statute.

Article 42: Compliance by Entities

Any Entity, which has made a specific declaration recognizing the jurisdiction of the Court in accordance with Article 51, shall fully cooperate with the Court in any proceedings to which it is a party and shall comply with any judgment and order for interim measure issued by the Court.

6. Assembly of States Parties

Article 43: Assembly of States Parties

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

[2] The Assembly shall:

[a] Elect the judges, as provided by Article 23;

[b] Consider and decide the budget for the Court in accordance with the provisions in Part VII;

[c] Establish the Trust Fund and determine criteria for its management in accordance with Article 39;

[d] Decide upon the salaries, allowances and expenses of the judges, the Registrar and the Deputy Registrars, as provided by Article 36;

[e] Decide on amendments to the Statute in accordance with Articles 5(2) and 53; and

[f] Perform any other function consistent with this Statute and the Rules of Procedure.

[3] The President of the Court and the Registrar or their representatives may participate, as appropriate, in meetings of the Assembly.

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

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

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

[7] The Assembly shall adopt its own Rules of Procedure.

[8] The official and working languages of the Assembly shall be those of the General Assembly of the United Nations.

7. Financing

Article 44: Funds of the Court and of the Assembly of States Parties

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

[a] Assessed contributions made by States Parties;

[b] Contributions made by Entities that have accepted the jurisdiction of the Court; and

[c] Funds provided by the United Nations, subject to the approval of the General Assembly.

Article 45: Voluntary contributions

Without prejudice to Article 44, the Court may receive and utilize, as additional funds, voluntary contributions from governments, international organizations, individuals, corporations and other entities, in accordance with relevant criteria adopted by the Assembly of States Parties.

Article 46: Assessment of contributions

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

Article 47: Annual audit

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

8. Final clauses

Article 48: Signature, ratification, accession and succession

[1] The present Statute is open for signature, ratification, accession and succession by all States.

[2] Signatures as well as any instruments of ratification, accession and succession shall be deposited with the Secretary-General of the United Nations.

Article 49: Entry into force

[1] The present Statute shall enter into force on the thirtieth day following the date of deposit with the Secretary-General of the United Nations of the thirtieth instrument of ratification, accession or succession.

[2] For each State ratifying the present Statute or acceding or succeeding to it after the deposit of the thirtieth instrument of ratification, accession or succession, the present Statute shall enter into force on the thirtieth day after the deposit of its own instrument of ratification, accession or succession.

Article 50: Reservations and Declarations by States Parties

[1] Each State may, at the time of ratification of this Statute or accession thereto, declare that it does not recognize the jurisdiction of the Court in relation to certain human rights treaties or certain provisions thereof.

[2] Any State Party having made a reservation in accordance with paragraph 1 of this Article may, at any time, withdraw this reservation by notification to the Secretary General of the United Nations.

[3] Other reservations shall not be made to this Statute.

[4] Each State may declare at any time that it recognizes the jurisdiction of the Court also in relation to UN human rights treaties not listed in Article 5 (1).

Article 51: Declaration by Entities

[1] Any Entity may at any time declare under this Article that it recognizes the competence of the Court to receive and examine complaints from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by the respective Entity of any human right provided for in any human rights treaty listed in Article 5 (1).

[2] When making such a declaration, the Entity may also specify which human rights treaties and which provisions thereof shall be subject to the jurisdiction of the Court.

[3] Such declaration shall be deposited with the Secretary-General of the United Nations.

Article 52: Withdrawal

[1] A State Party may, by written notification addressed to the Secretary-General of the United Nations, withdraw from this Statute. The withdrawal shall take effect one year after the date of receipt of the notification, unless the notification specifies a later date.

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

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

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

Article 53: Amendments of the present Statute

[1] After the expiry of seven years from the entry into force of this Statute, any State Party may propose amendments thereto. The text of any proposed amendment shall be submitted to the Secretary-General of the United Nations, who shall promptly circulate it to all States Parties.

[2] No sooner than three months from the date of notification, the Assembly of States Parties, at its next meeting, shall, by a majority of those present and voting, decide whether to take up the proposal.

[3] The adoption of an amendment at a meeting of the Assembly of States Parties on which consensus cannot be reached shall require a two-thirds majority of States Parties.

[4] An amendment shall enter into force for all States Parties one year after instruments of

ratification or acceptance have been deposited with the Secretary-General of the United Nations by seven-eighths of them.

[5] If an amendment has been accepted by seven-eighths of States Parties in accordance with paragraph 4, any State Party which has not accepted the amendment may withdraw from this Statute with immediate effect, notwithstanding article 52, paragraph 1, but subject to article 52, paragraphs 3 and 4, by giving notice no later than one year after the entry into force of such amendment.

[6] The Secretary-General of the United Nations shall circulate to all States Parties any amendment adopted at a meeting of the Assembly of States Parties or at a Review Conference.

Article 54: Authentic texts

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

A World Court of Human Rights
Commentary on the Draft Statute

Introduction

The present draft of May 2010 is a consolidated text, based on two earlier drafts prepared by Martin Scheinin on the one hand (hereinafter referred to as MS), and by Manfred Nowak and Julia Kozma, on the other (hereinafter referred to as NK). Both drafts of June 2009 had been elaborated independently from each other in the course of research projects within the framework of the Swiss initiative Protecting Dignity: An Agenda for Human Rights to commemorate the 60th anniversary of the Universal Declaration of Human Rights. On 5 December 2008, the Swiss Initiative, on the basis of a report by a Panel of Eminent Persons, called for the establishment of a World Court of Human Rights^①. At the same time, it commissioned two research projects on this topic to further elaborate on this proposal. On 22 June 2009, the Panel of Eminent Experts welcomed and discussed both draft Statutes and requested the authors to prepare a consolidated draft as a basis for further discussion and adoption by the Swiss Initiative.

The respective meeting between the three authors took place on 6 and 7 October 2009 in Florence in the framework of a COST Action aimed at supporting European research directed at United Nations human rights reform^②. The discussions between the three authors were also informed by earlier discussions during the annual conference of the Association of Human Rights Institutes (AHRI), which had taken place in Nottingham on 18 and 19 September 2009.

In Florence, a number of difficult compromises had to be agreed upon in order to reach the goal of a consolidated draft adopted unanimously by all three authors. Some of the more innovative ideas contained in both drafts were eliminated for the purpose of reaching easier agreement by academics, the NGO community and, finally, among States, first within the Swiss Initiative, and later within the United Nations as a whole. Although these more innovative, far-reaching and controversial ideas were dropped in this consolidated draft, they should be kept in mind for future discussions on the World Court. They include, inter alia, the obligation of States to establish national human rights courts (Article 10 NK), the possibility of inter-State and other third-party complaints (Article 12 (b) MS and Article 8 NK), the possibility to lodge complaints against the United Nations and its specialized agencies without an explicit declaration (Article 7 (2) NK), the possibility of lodging complaints against Entities on the sole basis of ratification by the respective State (Article 7 (3) NK), the selection of English as the only working language (Article 30 (2) NK), the inclusion of certain ILO and UNESCO treaties (Annex 1 NK), the requirement of holding public hearings in all cases (Article 12 (2) and Part IV MS), far-reaching competencies of the Assembly of States Parties (Part VI MS), a dispute settlement role of the ICJ (Article 56 (2) MS), certain functions of the UN Human Rights Council and the Security Council (Articles 8, 9 and 18 NK), certain functions of the UN High Commissioner for Human Rights (Articles 10 and 12 (c) MS) and detailed Rules of Procedure within the Statute (Parts IV and V MS). The following comments will also reflect why certain of these changes were deemed useful in a consolidated draft to be submitted to the Swiss Initiative.

The consolidated draft was further discussed during a conference at the University of Berkeley on 8 and 9 November 2009, at which also three members of the Panel of Eminent Persons (Theodor Meron, Bertrand Ramcharan and Manfred Nowak) participated. The conference was organized by the Berkeley Project 2048, which also promotes the idea of an International Court of Human Rights.

In September 2010, the Panel of Eminent Persons, comprised of Mary Robinson (co-chair), Paulo Sergio Pinheiro (co-chair), Pregs Govender, Saad Eddin Ibrahim, Hina Jilani, Theodor Meron, Vitit Muntarbhorn, Manfred Nowak (rapporteur), and Bertrand Ramcharan, fully endorsed the present joint Statute of the World Court of Human Rights.

Preamble

The text of the Preamble is primarily based on the NK draft. It focuses strongly on the enormous gap between the legally binding international human rights framework and the lack of domestic implementation as the main reason for establishing a World Court of Human Rights. The principle of complementarity was kept in the Preamble but no longer in Article 1.

Article 1: The Court

Although the Statute is a treaty between States^③, the World Court of Human Rights (hereinafter referred to as “the Court”), as the International Court of Justice (ICJ) and the International Criminal Court (ICC), shall be an independent and permanent institution in close relationship with the United Nations. The Statute shall be adopted by the General Assembly of the United Nations or, if adopted by a Conference of States, the Court shall be brought into relationship with the United Nations through a special agreement similar to Article 2 ICC Statute. The ICJ is the main judicial organ of the United Nations deciding upon disputes between States on the basis of their obligations under general international law.

The ICC is a permanent court holding individual perpetrators of war crimes, genocide and crimes against humanity accountable under international criminal law. The World Court of Human Rights shall be the main judicial organ on the international level and in close relation with the United Nations holding States and certain non-State actors (hereinafter referred to as “Entities”) accountable for violations of international human rights law and providing victims of such human rights violations with the right to a remedy and reparation for the harm suffered.

The judgments of the Court shall be final and binding and will be enforced by domestic law enforcement bodies in the same way as judgments of domestic courts.

Article 2: Seat of the Court

The Hague in the Netherlands has established a reputation of becoming the “judicial capital of the world”.

^① Swiss Confederation, Federal Department of Foreign Affairs DFA, Protecting Dignity: An Agenda for Human Rights, www.udhr60.ch; Id., Progress Report of the Eminent Persons Panel by Manfred Nowak, panel member and rapporteur, www.udhr60.ch/agenda.html [19 January 2010].

^② COST Action IS0702, “The Role of the EU in UN Human Rights Reform”, http://www.cost.esf.org/domains_actions/isch/Actions/IS0702 The Role of the EU in UN Human Rights Reform-End-date-February-2013 [19 January 2010].

^③ On the declaration of other entities to recognize the competence of the Court see Article 51, *infra*.

In addition to hosting the ICJ and various arbitration courts, the Hague also became the seat of the ICC and of certain ad hoc criminal tribunals, such as the International Criminal Tribunal for the former Yugoslavia (ICTY), the Appeals Chamber of the International Criminal Tribunal for Rwanda (ICTR) and the ad hoc seat of the Special Court for Sierra Leone during the trial of former Liberian President Charles Taylor. It would, therefore, be only consequent to also establish the seat of the World Court of Human Rights in the Hague, as originally proposed by NK.

However, equally convincing arguments may be cited in favour of Geneva in Switzerland, which functions as “human rights capital of the world”. In addition to being the second seat of the United Nations, Geneva hosts the Office of the UN High Commissioner for Human Rights, the Human Rights Council as the main political UN body dealing with human rights, and all UN human rights treaty monitoring bodies. Furthermore, the Office of the UN High Commissioner for Refugees and some of the relevant specialized agencies, such as the International Labour Organization (ILO) and the World Health Organization (WHO), have their seat in Geneva. The consolidated draft, in this respect, follows the MS draft.

Similarly to Article 3 of the ICC Statute, which was not subject of serious discussions during the drafting of the Rome Statute, the present article is divided into three parts: First, the location of the Court is identified. Before including this provision into the Statute it will obviously be necessary to negotiate an agreement with the Swiss Government. The headquarters agreement (or host agreement or seat agreement) between the Court and the host State will contain – similar to other agreements concluded between international organizations and host States – inter alia provisions on the inviolability of the premises of the Court; on the control and authority of the Court over the premises; on measures taken by the government to ensure the security, safety and protection of the Court; on privileges and immunities of the Court, of judges, registrars and officials of the Court, as well as of persons

taking part in the proceedings before the Court; on privileges regarding the Court’s communication facilities; and on the allocation of public services for the premises of the Court⁶⁴.

According to paragraph 3, the Court may also sit elsewhere whenever it considers it desirable. For the purpose of establishing the facts of certain cases in the most effective manner, it may be useful to hold public hearings in the country where the alleged human rights violations were committed. Furthermore, the holding of a hearing in a certain State might also enhance the Court’s profile in this country and foster the implementation of its judgments. On the other hand, holding public hearings in the country where the alleged human rights violation took place also bears certain risks, such as security concerns for the judges, the staff or witnesses. For these reasons, the International Law Commission, commenting on the ICC draft statute, recommended that “trials may take place in a State other than the host State only when it is both practicable and consistent with the interests of justice to do so”⁶⁵.

According to this provision the Court can choose to sit in the territory of States Parties or even in the territory of States not parties to the Statute, by special cooperation arrangement. Apart from the Rome Statute, similar provisions can also be found in the statutes of the ICJ, the ICTY and the ICTR. None of the mentioned courts, however, has ever conducted a trial outside of their court seat⁶⁶.

According to the UN human rights treaties, the respective treaty bodies shall normally meet at the Headquarters of the United Nations or at the United Nations Office at Geneva or at any other convenient place as determined by the Committee⁶⁷. In reality, for practical purposes, most meetings take place at the Office of the UN High Commissioner for Human Rights in Geneva. Only in exceptional cases treaty bodies have decided to meet outside Geneva or New York⁶⁸.

Article 3: Legal status and powers of the Court

Article 3 deals with two issues: the status of the Court as subject of international law and the scope of the Court’s powers. As the ICC, the World Court shall have international legal personality. Its legal status and powers shall follow the model of the ICC, as laid down in Article 4 of the ICC Statute.

Based on this provision, States Parties to the Statute are obliged to recognize the Court as a subject of international law, which can act independently and autonomously in international relations, independent of the will of the States. However, since treaties have binding force only inter partes and cannot create obligations erga omnes, a treaty provision is not sufficient to create an international legal person. The Statute does therefore not automatically create a new subject of international law but rather obliges the States Parties to establish preconditions for the Court’s fullest autonomy. It will ultimately depend on the number of ratifications of the Statute as well as on the manner third States will interact with the Court whether the Court will acquire international legal personality⁶⁹.

In the second sentence of paragraph 1, the Statute provides that the Court shall “have such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes”.

This provision, modeled after Article 104 of the United Nations Charter, is commonly interpreted as recognition of legal capacity of an entity in the domestic legal order of the States Parties.

Finally, paragraph 2 of the present article determines that, once the Court has established its jurisdiction over a certain human rights violation, it can exercise its powers on the territory of any of the States Parties to the Statute and is not limited to the State where the alleged violation took place.

Article 4: Definitions

Certain terms are used regularly throughout the draft Statute and are, therefore, in need of a definition. Since the jurisdiction of the World Court of Human Rights shall not only apply to States but also to certain other actors, the term “Entity” was introduced to encompass both inter-governmental organizations, such as the United Nations, its specialized agencies and regional organizations, and certain non-State actors, including business corporations. The consolidated draft refrains from providing an exhaustive list of “Entities”, as originally provided for in Article 6 MS⁷⁰. This means that any inter-governmental or non-governmental organization is, in principle, invited to recognize the jurisdiction of the Court by making the respective declaration under Article 51.

⁶⁴ Cf. Basic principles governing an agreement to be negotiated between the International Criminal Court and the Kingdom of the Netherlands regarding the headquarters of the Court, UN Doc. PCNICC/2001/WGHQA/L.1 of 16 July 2001. ⁶⁵ Report of the International Law Commission on the work of its forty-sixth session, 2 May-22 July 1994, UN Doc. A/49/10, p. 52. ⁶⁶ Adriaan Bos, “Seat of the Court”, in Antonio Cassese, Paola Gaeta, John R.W.D. Jones (Eds.), *The Rome Statute of the International Criminal Court*, Volume 1, Oxford 2002, pp. 200ff. ⁶⁷ See, e.g., Art. 37(3) CCPR, Art. 20(2) CEDAW, Art. 43(10) CRC. ⁶⁸ For example, the Human Rights Committee has held one of its earliest sessions in Bonn, Germany: See Manfred Nowak, *U.N. Covenant on Civil and Political Rights. CCPR-Commentary*, 2nd revised edition, Kehl/Strasbourg/Arlington 2005, p. 701. ⁶⁹ Cf. Francesca Martines, “Legal Status and Powers of the Court”, in Antonio Cassese et al., *The Rome Statute* (note 6), pp. 205-212, 217.

⁷⁰ Martin Scheinin proposed the possibility of extending the jurisdiction of the Court to certain types of entities that are not necessarily legal persons. His draft statute of 30 April 2009 included the following classification of Entities: “Article 6. Entities. The reference to “Entity” in article 5 and elsewhere in this Statute includes the following types of legal persons that may under the provisions of this Part II come under the jurisdiction of the Court:

a) International organizations constituted through a treaty between States, or between States and international organizations;
b) Transnational corporations, i.e. business corporations that conduct a considerable part of the production or service operations in a country or in countries other than the home State of the corporation as a legal person;
c) International non-governmental organizations, i.e. associations or other types of legal persons that are not operating for economic profit and conduct a considerable part of their activities in a country or in countries other than the home State of the organization as a legal person;
d) Organized opposition movements exercising a degree of factual control over a territory, to the effect that they carry out some of the functions that normally are taken care of by the State or other public authorities; and
e) Autonomous communities within a State or within a group of States and exercising a degree of public power on the basis of the customary law of the group in question or official delegation of powers by the State or States.”

But there is no doubt that this provision primarily aims at transnational corporations, international non-profit organizations, organized opposition movements and autonomous communities within States or within a group of States. An “Entity” does not necessarily have to be a juridical person recognized under domestic or international law. Finally, it is up to the Court to decide whether it has jurisdiction in relation to a particular “Entity” or not.

The term “Court” refers to the World Court of Human Rights which can, however, act through different organs as specified in Article 20 (2). It follows from the respective provisions of the Statute and its Rules of Procedure, whether the Court acts through the Plenary Court of 21 judges, Chambers of seven judges, Committees of three judges, the Presidency consisting of the President of the Court and two Vice-Presidents, or the Registrar and two Deputy Registrars.

Article 5 (1) contains a list of all human rights treaties subject to the jurisdiction of the Court, which, however, can be extended by the procedure foreseen in Article 5 (2). The term “human rights treaty” consequently refers to this list. For further comments see below, Article 5.

Article 5: Applicable law

The list of human rights treaties subject to the jurisdiction of the Court in Article 5 (1) is smaller than the list originally proposed in Annex 1 NK, but more comprehensive than the list originally suggested in Article 7 MS. According to paragraph 2, new treaties may be added to the list in Article 5 (1) by a simplified amendment procedure requiring only a decision of two-thirds of the Assembly of States Parties. If a State ratifies the Statute, it accepts the jurisdiction of the Court in relation to all human rights treaties listed in Article 5 (1) to which it is a party. However, by means of a reservation provided for in Article 50 (1), the government may declare at the time of ratification or accession that it does not recognize the jurisdiction of the Court in relation to certain human rights treaties or certain provisions thereof (opting out).

On the other hand, the government may also declare in accordance with Article 50 (4) that it recognizes the jurisdiction of the Court also in relation to human rights treaties not listed in Article 5 (opting in). Upon reflection over the various solutions, this “opting in” possibility was restricted to UN treaties. Such treaties include human rights treaties of specialized agencies of the UN, such as ILO and UNESCO, and other universal human rights treaties. Whether a certain treaty shall be considered as a UN human rights treaty is finally to be decided by the Court.

By virtue of a declaration under Article 51, Entities may also accept the jurisdiction of the Court in relation to human rights treaties listed in Article 5 (1). Since not all treaties might be easily applicable to Entities, they shall specify in this declaration which human rights treaties and which provisions thereof shall be subject to the jurisdiction of the Court (opting in). Finally, it is up to the Court to decide in a given case which provisions lend themselves to be applied in relation to an inter-governmental organization, a transnational corporation or other non-State actor.

The provision of Article 5 (2) is based on Article 39 NK. The list of human rights treaties contained in Article 5 (1) can be amended by a simplified procedure in order to take into account the elaboration of future treaties for the protection of human rights. If, e.g., a new treaty on the human rights of detainees will be adopted by the United Nations, the Assembly of States Parties, on the proposal of any State Party to the Statute, by a two-thirds majority can include this treaty in the list contained in Article 5 (1). As outlined above, even without such decision, any State Party to, for instance, a future Convention on the Rights of Detainees may accept the jurisdiction of the Court by depositing a declaration with the Secretary General of the United Nations in accordance with Article 50 (4).

Article 6: General principles

This provision is based on Article 5 MS. It specifies that the Court shall not only apply the respective human rights treaties invoked by

the applicant but shall be guided and seek inspiration as well by general international law (which includes customary international law and broadly ratified treaty law), the general principles of law and, in particular, the principles of the international law of State responsibility. These principles shall, *mutatis mutandis*, also be applied to Entities. Furthermore, the universality, interdependence and indivisibility of civil, political, economic, social and cultural rights shall always be kept in mind. On the proposal of participants in the Berkeley conference, a reference to the jurisprudence of other international and regional courts was added.

Article 7: Individual complaints by applicants

This is the central provision establishing the contentious jurisdiction of the Court. It shall have the power to decide about individual complaints (emanating from any person, non-governmental organization or group of individuals similar to Article 34 of the European Convention on Human Rights (ECHR) and Article 44 of the American Convention on Human Rights (ACHR)) against States Parties and Entities, such as the United Nations and other global or regional inter-governmental organizations, non-governmental organizations, business corporations and other non-State actors that have made a declaration in accordance with Article 51. The applicants must claim to be a victim of a violation of a human right provided for in one of the human rights treaties of the United Nations, as listed in Article 5 (1) of the Statute.

States which ratify the Statute recognize the competence of the Court to examine individual complaints directed against themselves in relation to those human rights treaties to which they are parties. But Article 50 (1) provides for an “opting out” reservation at the time of ratification or accession.

In other words: States may specify those human rights treaties to which they are a party or specific provisions thereof which nevertheless shall not be invoked before the Court by any individual applicant. On the other hand, States are provided in Article 50 (4) with the positive opportunity to specify in a special declaration which other UN human rights treaties not listed in Article 5 (1) they wish to submit to the jurisdiction of the Court (“opting in”, see below, Article 50).

Entities, i.e. inter-governmental organizations, transnational corporations and other non-State actors, can be held accountable before the Court for alleged human rights violations only if they have made a declaration under Article 51, explicitly recognizing the jurisdiction of the Court in relation to certain treaties as specified in the respective declaration. Members of the Global Compact shall be explicitly encouraged to make a declaration under Article 51 recognizing the jurisdiction of the Court. Such a step might provide them with a competitive advantage in comparison to other trans-national corporations and might serve as best practice to be followed by others.

A transnational corporation, which is a member of the Global Compact, may voluntarily accept the jurisdiction of the Court in relation to specific human rights, such as the right of its employees to form and join trade unions or the prohibition of forced labour or the worst forms of child labour. The victims of such practices have the choice of either bringing an individual complaint directly against the business corporation or against the respective State Party for not having taken the necessary steps, according to the due diligence principle, aimed at preventing the exploitation of forced or child labour by the respective business corporation. The same holds true for other non-State actors, such as media enterprises, trade unions, political parties, religious associations, paramilitary organizations, rebel groups and other non-governmental organizations. Again, the Court will have to decide on a case by case basis whether the human rights invoked can by their very nature be applied to the respective non-State actor.

For a State that becomes a party to the Statute, the operation of the respective optional complaints procedures before human rights treaty monitoring bodies of the United Nations will be suspended as long as the Court has jurisdiction to entertain complaints against the same State under the human rights treaties in question. This solution applies the model envisaged in Article 59 of the 1969 Vienna Convention on the Law of Treaties.

According to paragraph 2 of that provision, the conclusion of a later treaty may imply the suspension of an earlier one when it is clear that the parties intended that the matter shall be governed by the subsequent treaty and that the intended consequence is the suspension rather than termination of the operation of the earlier treaty. According to United Nations human rights treaties, individual communication procedures are never mandatory but require additional optional declarations or even ratification of a separate instrument which can also be withdrawn.

For example, if a State Party to the 1st Optional Protocol to the CCPR ratifies the Statute, the operation of this Optional Protocol will be suspended. Likewise, if a State Party to the Statute made a declaration in accordance with Article 14 of the Convention on the Elimination of Racial Discrimination (CERD) or Article 22 of the Convention Against Torture (CAT), the operation of such declarations will be suspended.

This legal assumption, which the Secretary General has to apply as official depository of the ratification and accession of UN treaties, as well as of relevant declarations, reservations, denunciations and withdrawals, and which follows Article 61 (2) MS with modifications, seems to be an easier solution than the obligation of States Parties to take the respective steps, as originally envisaged in Article 7 (5) of the NK-draft. However, as Article 52 allows for the withdrawal of a State from the Statute, the provision makes the said legal assumption conditional upon the continued jurisdiction of the World Court. For a State that withdraws from the Statute, its earlier acceptance of optional complaint procedures under existing human rights treaties would automatically be “reactivated”.

This is why the provision is in Article 7 (3) of the consolidated version formulated as referring to the suspension of the operation of earlier complaint procedures, rather than as withdrawal from them.

The suspension of the operation of individual complaint procedures under other human rights treaties will affect neither the substantive treaty obligations of the State in question nor the operation of other monitoring mechanisms, such as the mandatory reporting procedure or some optional mechanisms such as the inquiry procedure under the CEDAW Optional Protocol. This demonstrates that the suspension of the individual complaint procedures does not affect the treaty relationship between a State that ratifies the Statute of the Court and those States that have not ratified the Statute.

The provisions of paragraphs 2 and 3 of Article 7 in NK, which aimed at holding the United Nations and its specialized agencies, as well as non-State actors subject to the jurisdiction of States Parties to the Statute directly accountable even in the absence of an explicit declaration, were deleted in the consolidated version.

Article 8: Advisory Opinions

In addition to its contentious jurisdiction, the advisory jurisdiction of an international court is of great importance for the uniform interpretation and development of its legal basis as well as of the substantive laws it applies. The present article constitutes a compromise between Article 9 NK and Articles 10 and 12 (1) (c) MS and is inspired by Article 64 of the ACHR, which gives the Inter-American Court of Human Rights (IACtHR) much broader powers in this respect than, e.g., the ECHR. While the IACtHR may be consulted for an advisory opinion by Organization of American States (OAS) Member States and its political bodies, the present draft is more cautious in order to avoid that the World Court might be misused for political purposes. Consequently, only the Secretary-General of the UN and the UN High Commissioner for Human Rights shall be entrusted to request an advisory opinion regarding the interpretation of the Statute or of any human rights treaty listed in

Article 5 (1). According to Article 26 (i), advisory opinions shall be issued by the Plenary Court.

Similarly to Article 64 (2) ACHR, Article 8 (2) of the Statute also empowers the Court to give advice on domestic laws and proposed legislation, and to clarify whether or not they are compatible with provisions of the Statute or those contained in any of the human rights instruments in Article 5 (1). This advisory jurisdiction is available to all Member States of the United Nations, not only those that have ratified the Statute and accepted the Court’s adjudicatory function. The Court’s replies to these consultations are published separately from its judgments, as advisory opinions.

The original version of MS also proposed the inclusion of a clause on ad hoc acceptance of binding jurisdiction, as a third option in addition to general acceptance and advisory opinions. His version of the Statute included the following provision:

“Article 9. Jurisdiction ad hoc

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

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

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

Article 9: Exhaustion of domestic remedies

Some of the more recent UN human rights treaties require States Parties to establish specific national human rights monitoring bodies in addition to supervision by the respective international treaty monitoring bodies. For example, the Convention on the Rights of Persons with Disabilities (CRPD) of 2006 provides for an international expert committee as well as national monitoring mechanisms to supervise States Parties’ compliance with the respective obligations of the Convention.

Similarly, the Optional Protocol to CAT (OPCAT) of 2002 created a UN Subcommittee for the Prevention of Torture and at the same time requires States Parties to establish so called National Preventive Mechanisms (NPMs). Both bodies carry out preventive visits to places of detention and conduct confidential interviews with detainees. They function in a complementary manner. If an NPM is fully independent and conducts its visits to places of detention in a comprehensive and effective manner, the Subcommittee will usually refrain from carrying out missions to this country and restrict its function to cooperation with and monitoring of the NPM. If the domestic counterpart fails, however, to perform its functions properly, the Subcommittee may decide to visit this country more frequently.

This principle of complementary jurisdiction is more formally expressed in Articles 1 and 17 of the ICC Statute. The ICC is only competent to try a person for a particular crime if the respective State authorities are either unwilling or unable to prosecute the person concerned. This principle serves a double function. It respects State sovereignty and prevents the ICC to become overloaded with cases. At the same time, it shall serve as an incentive for the domestic criminal justice authorities to prosecute persons suspected of having committed war crimes, genocide and crimes against humanity¹¹.

¹¹ See John T. Holmes, “Complementarity: National Courts versus the ICC”, in Antonio Cassese et al., *The Rome Statute* (note 6), pp. 667-686, 667.

The draft Statute of the World Court of Human Rights follows this model by requiring States Parties to ensure that complainants have access to effective judicial remedies in relation to all human rights enshrined in the applicable human rights treaty. This obligation is underlined by the emphasis in the Preamble that the World Court shall be complementary to national human rights jurisdiction, similar to the ICC Statute. Although the consolidated draft has eliminated the obligation of States Parties to establish specific national courts of human rights as envisaged in Article 10 of the NK-draft¹², States Parties are required to ensure that all applicants have access to effective domestic judicial remedies.

In the consolidated version agreed upon by the three authors in October 2009, States Parties would also have had an obligation to identify all relevant judicial remedies which applicants must exhaust under their domestic system before they can lodge a complaint to the Court. This requirement could have had an important effect on the domestic implementation of international human rights treaties.

Many States ratify international human rights treaties without incorporating them into domestic law and/or ensuring that the respective human rights can be applied before domestic courts and that victims have an effective domestic remedy against violations of their human rights. This leads to the consequence that such treaties are in effect ignored by domestic courts and administrative authorities, and victims often have no other opportunity than directly complaining to international courts or expert monitoring bodies. This may lead to overloading of international or regional bodies, such as the European Court of Human Rights (ECtHR), with too many cases.

Nevertheless, upon suggestion of participants at the Berkeley conference and reflection over the various solutions, the authors agreed to replace the word “shall” with the word “may”, as such an obligation would have put a heavy burden on States Parties. But governments should seriously consider, when becoming a Party to the Statute, to incorporate most of the relevant treaties into

their domestic law, to strengthen their judicial systems for the protection of human rights, and to submit the requested information in their instruments of ratification and thereafter to the UN and the Court.

Paragraph 2 of Article 9 requires that the competent domestic courts shall afford due process of law, have the competence to order interim measures and, when finding a human rights violation, shall afford the victim adequate reparation for the harm suffered. If these requirements are not fulfilled, the admissibility requirement of exhaustion of domestic remedies does not apply and the World Court may declare the complaint admissible. These provisions should serve as an incentive for States Parties to take the provision of Article 9 (1) seriously and establish effective domestic courts and procedures for dealing with individual human rights complaints. At the same time, effective domestic procedures shall have the effect of preventing the World Court from becoming overloaded with cases by transferring human rights adjudication to highly qualified national courts. The better the domestic courts apply international human rights treaties and thereby provide an effective remedy and reparation to victims of human rights violations, the fewer cases will be submitted to the World Court. This will not only relieve the World Court from becoming the “victim of its own success”, as is often stated with respect to the 100.000 cases presently pending before the European Court of Human Rights; it will also strengthen national human rights monitoring and implementation, which is the ultimate goal of international human rights protection.

The relationship between the World Court of Human Rights and national courts is one of complementarity that can thus be compared to the relationship between the ICC and domestic criminal courts, as laid down in Articles 1 and 17 (1) of the ICC Statute. If a State Party is unwilling or unable to provide adequate protection against human rights violations because it failed to establish competent domestic courts dealing with human rights or because the procedure before the national court is not effective or does not afford due process of law,

this domestic remedy does not have to be exhausted, as stipulated in Article 9 (1), and the victim can directly lodge a complaint with the World Court. If the national court, however, provides effective protection by following the respective case law of the World Court and by providing the victims with adequate reparation for the harm suffered, only few cases will be submitted to the World Court and even fewer cases will be decided in favour of the applicants.

For the purpose of assisting States in their efforts to improve their domestic judicial remedies in accordance with Article 9, the draft Statute provides in Article 39 for the establishment of a Special Trust Fund. In case a State Party applies to the Trust Fund for financial assistance to improve its domestic judicial system (Article 39 (4) (b)), the identification of the judicial remedies an applicant has to exhaust becomes according to Article 30 (5) mandatory.

Paragraph 3 of Article 9 enables also Entities that accept the jurisdiction of the Court to identify what internal remedies exist within their own structures. This provision does not affect the general obligation of States to provide under paragraph 1 effective remedies also against human rights violations by non-State actors. The Court would have the competence to assess the effectiveness of such remedies that are identified by Entities pursuant to paragraph 3.

Article 10: Other admissibility criteria

The most important admissibility criterion for individual complaints is the requirement that the applicant first must submit a complaint to the highest competent domestic court in the respective State Party, as required by Article 9. This is usually the court in the country where the alleged human rights violation, whether committed by a governmental authority or by a non-State actor, has occurred. If governmental agents commit a human rights violation outside their own territory, i.e. by occupying forces, the local courts may also be competent. However, it will be up to the World Court to decide on a case by case basis relevant questions concerning the extraterritorial applicability of the respective human rights treaties. The requirement to first lodge a complaint with a national court does not apply to complaints directed against inter-governmental organizations unless these organizations can be sued before national courts.

The admissibility criteria in Article 10 follow those applied by the European and Inter-American Courts of Human Rights and the relevant United Nations treaty monitoring bodies. Article 10 (1) (b) makes clear that no appeal shall be permissible from a regional human rights court to the World Court. This rule applies, however, only to the same matter, i.e. the same facts and the same human rights issue between the same parties.

¹² Article 10 of the NK draft reads as follows: “Article 10: National court of human rights

1. Each State Party shall maintain, designate or establish, at the latest one year after the entry into force of the present Statute or of its ratification or accession, a national court of human rights. The functions of the national court of human rights as described thereafter can also be carried out by more than one domestic court. The national court shall be competent to receive and examine complaints from any individual, non-governmental organization or group of individuals claiming to be the victim of a violation of any human right provided for in any human rights treaty listed in Annex 1 by any authorities of the respective State Party or by any non-State actor subject to the jurisdiction of that State Party, provided that the State Party is also a party to the human rights treaty concerned and that the human right invoked lends itself to a violation by the respective non-State actor.
2. The national court of human rights shall decide in a final domestic manner whether there has been any violation of any human right provided for in any human rights treaty listed in Annex 1 by the respondent party.
3. The national court of human rights shall be granted the competence to order interim measures as it considers necessary to avoid irreparable damage to a victim or victims of an alleged human rights violation.
4. If the national court of human rights finds a human rights violation, it shall afford the victim adequate reparation for the harm suffered, including restitution, rehabilitation, compensation and satisfaction.
5. The judgments of the national court of human rights shall be enforced by the respective domestic law enforcement bodies as any other binding judgment of a domestic court.
6. Each State Party shall regulate the organization and procedure before the national court of human rights, ensure that the international human rights treaties listed in Annex 1 can be directly applied before the national court of human rights, and establish the respective domestic remedies that need to be exhausted before a complaint can be submitted to the national court of human rights.”

Concerning the same matter, applicants must make up their mind whether they prefer to submit their case to the World Court or to the respective regional human rights court.

The provision that only cases that have been examined “in substance” shall be excluded from examination by the Court shall clarify that only if a case has been decided on the merits or if the Court or another procedure has found the claim to be manifestly ill-founded the Court shall not deal with this complaint. On the other hand, an examination of the case by the Court is not excluded if another procedure has found a complaint inadmissible e.g. due to *ratione loci* or because of a six-month rule for applications as foreseen by Article 35 (1) ECHR.

The specific provisions of paragraphs 2 and 3 of Article 10 are based on Article 11 MS and clarify a controversial issue in human rights jurisprudence. Alleged human rights violations which occurred between the entry into force of the respective substantive human rights treaty invoked by the applicant and the entry into force of the Statute of the World Court (in general or with regard to the State or Entity concerned) shall not be subject to the jurisdiction of the Court. This rule does not apply, however, to violations that continue after the entry into force of the Statute, such as ongoing arbitrary detention, enforced disappearances or denial of equal access to schools, health services or courts. It will be up to the Court to decide on a case-by-case basis difficult questions of interpretation arising in this context.

Article 11: Effect of reservations by States on admissibility

Article 11 is based on Article 14 MS and aims at solving another highly controversial legal matter. It follows the respective jurisprudence of the European Commission and Court of Human Rights, of the Inter-American Court of Human Rights, and General Comment No. 24 of the UN Human Rights Committee¹⁵. The Court shall have binding jurisdiction to decide whether a specific reservation entered by a State Party to any applicable human rights

treaty is permissible pursuant to the provisions of the treaty and the Vienna Convention on the Law of Treaties (VCLT).

If it arrives, e.g., at the conclusion that a reservation is against the object and purpose of the respective treaty, it shall declare it null and void and apply the treaty to the State Party without being barred by such reservation.

Article 12: Amicus curiae and third-party intervention

This provision is based on Article 12 NK with slight changes proposed by participants in the Berkeley conference. As with proceedings before the European Court of Human Rights (Article 36 ECHR) and other courts, amicus curiae interventions by interested third parties are welcome. Often, other States Parties, inter-governmental organizations or non-governmental organizations can provide additional information or have a special interest to participate in the proceedings, either on the side of the applicant or the respondent party, or as a neutral third party.

Usually, amicus curiae briefs are submitted in writing, but the Court may also invite specific third parties to orally intervene during its hearings which normally are public hearings. In cases against non-State actors, the respective States Parties, under the jurisdiction of which the non-State actors concerned fall, have a right to take part in the written and oral proceedings. Since human rights complaints against non-State actors constitute a new development in international law, it seems important that the respective States Parties take part in order to help clarifying the precise human rights obligations of States and non-State actors under their jurisdiction.

Article 13: Striking out complaints

This provision is based on Article 13 NK and modeled on Article 37 ECHR. In practice, quite a few cases remain pending for quite a long time, usually in the pre-admissibility stage, because the applicant has lost the interest after a certain period of time, because the matter somehow can

be considered as resolved thanks to new legislation or other developments, or for various other reasons. It is easier and simply less time-consuming to resolve these cases by means of short striking out decisions than by means of inadmissibility decisions, friendly settlements or similar alternatives. Strike out decisions will usually be taken by Committees of three judges in accordance with Article 27 (5).

A request to strike out a complaint can be put forward by the applicant, or the respondent State Party or Entity. In addition, the Court has the *proprio motu* powers to strike a case off the list, if it becomes aware of circumstances, which lead it to conclude that it is no longer justified to continue the examination of the complaint. On the other hand, even in cases where both parties agree to strike out a complaint, the Court must continue *ex officio* with its examination if respect for human rights in general so requires.

The Court has the possibility to restore a case to the list if this is justified by the circumstances. This might be for example the case if an applicant can prove that he or she was not failing to respond to the Court due to a lack of interest but because his or her lawyer has died¹⁶.

Article 14: Examination on the merits

The proceedings on the merits must be distinguished from the admissibility stage although in practice both decisions may often be joined, as provided for in Article 14 (4). Such proceedings are usually conducted in writing only, but the Court may also hold public hearings in accordance with Article 16 whenever it deems this necessary. If the facts are disputed, the Court

may also undertake an investigation which may even include a fact finding mission on the spot. Experience, e.g. with the European Court of Human Rights, shows, however, that such in depth investigations and fact finding missions only take place in exceptional cases¹⁷.

Fact finding missions shall not only be permitted in case of a consistent pattern of human rights violations. On the other hand, the authors accepted the proposal by participants of the Berkeley conference to include a specific clause which authorizes the Court to be assisted during its fact finding missions by international experts, such as forensic experts or police interrogators.

All proceedings must be conducted in accordance with the principle “*audiatur et altera pars*”. All parties are requested to provide relevant information, and all information before the Court shall be made available to the respective other parties. The same holds true for information received during an in-depth investigation and fact finding mission on the spot. If the respondent party is a non-State actor, it is important that the State Party under the jurisdiction of which the alleged human rights violation was committed, equally participates in the proceedings. If an Entity is alleged to have committed a human rights violation on the territory of a State that is not a Party to the Statute, specific *ad hoc* cooperation agreements can be entered between the State concerned and the Court. In any case, the State has a right to participate in the proceedings in accordance with Article 12 (2).

All parties to the proceedings, above all the respective States Parties, have an obligation to fully cooperate with the Court during the various stages of the proceedings.

¹⁵ Human Rights Committee, General Comment No. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, CCPR/C/21/Rev.1/Add.6 of 4 November 1994; see European Commission of Human Rights, *Temeltasch v. Switzerland*, Application no. 9116/80, 5 May 1982; ECtHR, *Belilos v. Switzerland*, Application no. 10328/83, 29 April 1988; *Loizidou v. Turkey* (Preliminary Objections), Application no. 15318/89, 23 March 1995; IACtHR, Advisory Opinion OC-3/83, *Restrictions to the Death Penalty* (Arts. 4(2) and 4(4) American Convention on Human Rights of 8 September 1983; *Hilaire v. Trinidad and Tobago*, Series C No. 80, 1 September 2001.

¹⁶ Cf., e.g., the case of *M v. Italy* before the European Commission of Human Rights, Application No. 13549/88.

¹⁷ Cf. the recent study by Philip Leach et al. on “International Human Rights & Fact Finding. An analysis of the fact-finding missions conducted by the European Commission and European Court of Human Rights”, Human Rights and Social Justice Research Institute, London Metropolitan University, February 2009.

Non-cooperation by the applicant might lead to a decision to strike out the complaint in accordance with Article 13. Non-cooperation by the respondent party might lead to the practice that certain allegations by the applicant, if not refuted properly by the respondent party, are accepted as evidence and may lead to a judgment finding a human rights violation. Full cooperation by all parties is most important during fact finding missions. States Parties are required to facilitate such fact finding missions by all means, including unrestricted access to all places of detention and the possibility to conduct private interviews with victims, witnesses, experts and detainees, as explicitly provided for in Article 40 (2) of the Statute. Again, non-cooperation by the respective State Party might be interpreted as an indication that the government wishes to hide or cover up certain human rights violations.

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Article 15: Friendly settlement

Friendly settlements play a traditional, albeit limited role in most human rights complaints proceedings. It is up to the parties to offer a friendly settlement, and the Court shall place itself at the disposal of the parties as a mediator. It shall also ensure that friendly settlements do not simply reflect power relationships, but are based on respect for human rights. Friendly settlements usually are offered by States Parties at a late stage of the proceedings when the risk of a judgment finding a human rights violation becomes evident. But in principle, they can be agreed upon already at the pre-admissibility stage.

Friendly settlements shall be agreed upon by both parties and lead to fairly short strike out decisions with a brief statement of the facts and the solution reached.

Article 16: Public hearings

This provision is based on Article 16 NK and departs from the requirement of public hearings in all cases, as proposed by Article 12 (2) and Part IV MS. While the complaints proceedings before UN human rights treaty monitoring

bodies are only written, court proceedings must provide for the possibility of public hearings, in full accordance with the human right to a fair and public trial before an independent and impartial tribunal. Nevertheless, for capacity reasons, most proceedings before the European Court of Human Rights and other regional courts are restricted to an exchange of relevant written information which usually are sufficient for the court to establish the facts and decide the case. Public hearings are only scheduled when the complexity of the case and/or disputes concerning the facts or the law so requires¹⁶. Important cases shall, however, be decided on the basis of a public hearing. This is the reason why Article 16 (1) requires that the Plenary Court shall render judgments on those individual complaints that were submitted to it only after having conducted a respective hearing. This corresponds to the practice of the Grand Chamber of the European Court of Human Rights¹⁷.

Usually, hearings are held in public but the Court may in exceptional circumstances exclude the public. Typical reasons for the exclusion of the public are the need to protect victims and/or witnesses, concerns for the protection of the right to privacy or of juvenile rights. Apart from these exceptional cases, hearings shall be public and the relevant documents deposited by the parties with the Registrar shall also be accessible to the public. This rule derives from the principle “Justice must not only be done; it must be seen to be done”, which shall, of course, fully apply to international human rights procedures.

The practice of international criminal tribunals and regional human rights courts illustrate the need to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses appearing before the Court. For this purpose, the Court shall be required to establish a Victims and Witnesses Unit, similar to the one established by the ICC pursuant to Article 68 of the Rome Statute. Further requirements to be followed by the Registrar when establishing a Victims and Witnesses Unit are contained in Article 30 (4).

Article 17: Judgments of the Court

This provision follows Article 17 NK with some amendments. Judgments of the World Court shall serve two important purposes. First of all, the Court shall assess, on the basis of all evidence available, whether or not the facts of the case amount to a human rights violation attributable to the respondent party, and the Court shall secondly, in case it found a violation, afford the victim with adequate reparation for the harm suffered.

Strictly speaking, the World Court shall function both as a classical human rights court and as an international civil court providing redress for victims against State, inter-governmental and non-State actors alike.

The respondent party commits a human rights violation if it fails to respect, fulfil or protect any human right provided for in any applicable human rights treaty listed in Article 5 (1). These rights go beyond the civil and political rights usually subject to litigation before regional human rights courts and also include economic, social and cultural rights. This means that the positive obligations of States to fulfil and protect human rights, which also apply to civil and political rights, are becoming increasingly important¹⁸. Violations are only attributable to States if the respective authorities failed to meet the “due diligence” test, i.e. failed to take the necessary legislative, administrative, judicial or political measures that can reasonably be expected for the domestic fulfilment of the human rights concerned or for the protection of the victim against undue interference by private parties. Although there does exist

international case law on the “due diligence” test¹⁹, it will be up to the World Court of Human Rights to develop further jurisprudence in relation to the obligations deriving from economic, social and cultural rights.

Similarly, the right of victims of human rights violations to adequate reparation for the harm suffered is in urgent need of further development through international case law²⁰. Guidance can be sought in the case law of the Inter-American Court of Human Rights²¹ or the former Human Rights Chamber for Bosnia and Herzegovina²², as well as in the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (the so-called van Boven/Bassiouni Guidelines), which were finally adopted after a long and difficult drafting process by the UN General Assembly in 2005²³.

These Guidelines provide for the following types of reparation: restitution, rehabilitation, compensation, satisfaction and guarantees for non-repetition. The part of the judgment dealing with reparation shall be formulated as a judicial order to be implemented by the respondent party within a certain period of time. Any delay on the part of the respondent party would lead to the payment of default interest.

In addition to the holding (violation of any human right and adequate reparation to the victim), the judgments of the Court shall contain detailed legal reasons which led to the respective findings.

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¹⁶ Cf. Pieter van Dijk, Fried van Hoof, Arjen van Rijn, Leo Zwaak (Eds.), *Theory and Practice of the European Convention on Human Rights*, 4th edition, Antwerpen/Oxford 2006, pp. 215 et seq.; according to the ECHR's Annual Report 2008, the First Section delivered 346 judgments and held oral hearings in two cases; the Second Section delivered 372 judgments and held oral hearings in three cases; the Third Section delivered 286 judgments and held an oral hearing in one case; the Fourth Section delivered 261 judgments and held an oral hearing in one case; and the Fifth Section delivered 260 judgments and held oral hearings in three cases. The Grand Chamber, delivering 16 judgments in 2008, held 18 oral hearings. See http://www.echr.coe.int/NR/rdonlyres/D5B2847D-640D-4A09-A70A-7A1BE66563BB/0/ANNUAL_REPORT_2008.pdf [12 June 2009]. ¹⁷ Ibid. ¹⁸ Cf. Manfred Nowak, *Introduction to the International Human Rights Regime*, Leiden/Boston 2003, pp. 48ff. ¹⁹ Starting with the judgment of the Inter-American Court of Human Rights in *Velasquez Rodriguez v. Honduras* of 29 July 1988, (Ser. C) No. 4 (1988), para. 172. ²⁰ Cf. Koen de Feyter, Stephan Parmentier, Marc Bossuyt, Paul Lemmens (Eds.), *Out of the Ashes. Reparations for Victims of Gross and Systematic Human Rights Violations*, Antwerpen/Oxford 2005. ²¹ See Douglas Cassel, “The Expanding Scope and Impact of Reparations awarded by the Inter-American Court of Human Rights” in Koen de Feyter et al., *Out of the Ashes*, (note 20), pp. 191-223. ²² See Manfred Nowak, “Reparations by the Human Rights Chamber for Bosnia and Herzegovina” in Koen de Feyter et al., *Out of the Ashes*, (note 20), pp. 245-288. ²³ GA Res. 60/147 of 16 December 2005.

Judgments on all different issues shall be arrived upon by majority vote, but any judge shall be entitled to deliver a separate (dissenting or concurring) opinion. This right not only applies to judgments, but also to admissibility and strike out-decisions.

Judgments shall be issued in writing, pronounced orally in public session of the Court and published in the languages indicated in Article 38.

Article 18: Binding force, execution and supervision of judgments

This provision is based upon Article 18 NK with slight amendments. The lack of binding force of final and provisional decisions on human rights complaints and the lack of any effective supervision of State compliance with such decisions represents one of the most serious shortcomings of the present human rights treaty monitoring system of the United Nations. To narrow the wide implementation gap and to strengthen State compliance with their legally binding obligations under UN human rights treaties is, therefore, one of the principle reasons for demanding the establishment of a World Court of Human Rights.

The judgments of the Chambers and the Plenary Court shall be final and binding on the parties in accordance with Article 28. States Parties shall be obliged to secure their enforcement by the respective domestic law enforcement bodies as any binding judgment of a domestic court. In particular, the respondent parties are bound to grant the victim within three months from the delivery of the judgment adequate reparation for the harm suffered, as specified in the holding of the judgment. If the reparation ordered includes more time consuming measures, such as legislative amendments, the Court may also grant a longer period for their implementation.

While the existing human rights treaty monitoring bodies of the United Nations feel themselves responsible for the follow up and supervision of the implementation of their own decisions, this function shall be entrusted to the High Commissioner for Human Rights in relation to

judgments of the World Court. On the basis of follow up reports by the respondent parties and the applicants, within time limits specified by the Court, the High Commissioner shall assess whether or not the judgments of the Court have in fact been complied with. If there are doubts, they shall be referred to the Court for clarification.

Cases of non-compliance shall be reported by the High Commissioner to the Human Rights Council with a request to take the necessary measures that will bring about the enforcement of the judgment. The Universal Periodic Review is one but certainly not the only procedure in which the Human Rights Council may deal with States that fail to comply with judgments of the World Court. If the Human Rights Council fails to take the necessary measures or the State concerned fails to comply with the measures taken, the High Commissioner may also request through the Secretary-General the Security Council to take action.

Article 19: Interim measures of protection

This provision is based on Article 16 MS and Article 19 NK. As other human rights courts²⁹, the World Court shall have the power to order the respondent party to take binding interim or provisional measures in urgent cases when necessary to avoid irreparable damage. This will, e.g., be the case if persons who have been sentenced to death or whose expulsion to another State has been ordered, lodge a complaint with the Court. The respective proceedings before the Court would not provide an effective remedy if the applicant was in the meantime executed or deported. Orders for interim measures are binding with immediate effect and shall be directly enforced by the respondent parties in the same manner as final judgments.

When the Court is not in session or before a case is assigned to a Chamber, the Presidency shall order interim measures of protection. As soon as the Plenary Court or the respective Chamber is in session, it shall either confirm or withdraw such orders in accordance with Article 29 (4).

On the other hand, complaints to the Court shall not be misused by applicants for the sole purpose of delaying the execution of lawful domestic decisions. The Court shall, therefore, be bound to periodically review the legitimacy and further necessity of orders for interim measures in force. If they are no longer necessary, they shall be withdrawn.

Article 20: Composition and organs of the Court

This provision is based upon Articles 5 and 20 NK with certain modifications. While the European Court of Human Rights consists of a number of judges equal to the number of States Parties to the ECHR (presently 47), the Inter-American Court of Human Rights only consists of seven judges, and the African Court of Human and Peoples' Rights of eleven judges. The present human rights treaty monitoring bodies of the United Nations are composed of individual experts numbering between ten and 25 experts. The proposed number of 21 judges for the World Court of Human Rights takes into account the expected global ratification of the Statute and the growing workload of the Court. It enables the Court to establish three Chambers of seven judges and six Committees of three judges, excluding the President and the two Vice-Presidents of the Court (Article 27).

The NK draft originally foresaw a procedure modeled after Article 36 (2) of the ICC Statute, according to which the Presidency, acting on behalf of the Court, may propose an increase in the number of judges, indicating the reasons why this is considered necessary and appropriate. The consolidated draft rather followed the provisions of the UN treaty bodies and regional human rights courts, establishing a fixed number of judges.

However, there might be the need to have additional judges in order to deal with the workload, in which case the Statute would have to be amended in accordance with Article 53.

As full-time judges, the members of the Court shall not engage in any other activity during their term of office which is incompatible with their independence and impartiality, as specified in Article 31. They shall receive professional salaries, similar to those of the judges of the ICJ and the ICC. According to Article 36, these salaries, allowances and expenses shall be decided upon by the Assembly of States Parties.

The organization of the World Court in Article 20 (2) follows partly the organizational structure of the European Court of Human Rights and partly that of the ICC and other courts. In order to effectively deal with the case load reasonably to be expected, the Court shall consist of 21 judges who shall be divided into three Chambers of seven judges and six Committees of three judges each. The power of the Committees pursuant to Article 27 (5) to declare, by a unanimous vote, individual complaints inadmissible follows Article 28 ECHR. Apart from this quick procedure, Chambers shall usually deal with the admissibility and the merits of individual complaints. The Chamber may, however, relinquish jurisdiction to the Plenary Court which shall also function, in exceptional cases, as Appeals Chamber, similar to the functions of the Grand Chamber of the European Court of Human Rights, in accordance with Articles 30 and 43 ECHR. For further comments see below, Article 27.

The Registrar, as the highest administrative officer of the Court, shall function as Registrar of the Plenary Court and Chamber 1, the two Deputy Registrars of Chambers 2 and 3. All three of them shall be elected by the judges, other staff appointed by the Registrar.

²⁹ Cf. Article 63(2) ACHR; Rule 39 of the Rules of Court, ECHR; Article 27 (2) of the Protocol to the AfCHPR on the Establishment of an African Court on Human and Peoples' Rights; Article X (1) Annex 6 of the General Framework Agreement for Peace in Bosnia and Herzegovina (Dayton Peace Agreement).

Article 21: Qualification of judges

While the present human rights treaty monitoring bodies of the United Nations, taking into account the need for diverse backgrounds required to examine State reports, are composed of experts from different professions, the World Court of Human Rights as the highest judicial body deciding on human rights complaints, shall be composed only of jurists with the required competence in the field of human rights and the qualifications for the exercise of the highest judicial functions in their respective countries.

If the judges need assistance by other professions that goes beyond the expertise provided by the Court's staff, they may invite experts to public hearings and amicus curiae interventions in accordance with Articles 12 and 16 (3). They may also be assisted by forensic and other experts during fact finding missions, as explicitly provided for in Article 14 (3).

Article 22: Nomination of candidates

This provision is based on Article 18 MS and Article 5 NK with modifications concerning the nomination procedure discussed during the AHRI conference in Nottingham and the Berkeley conference. In order to achieve gender balance, each State Party has an obligation to nominate two candidates, one female and one male. Since Article 23 (3) requires that no two judges may be nationals of the same State it is essential that States Parties may only nominate their own nationals.

In order to avoid purely political nominations, Article 22 (2) specifies that States Parties conduct a transparent selection procedure by inviting applications and by delegating the selection procedure to an independent panel with a sufficient number of experts (at least three) with utmost transparency. Furthermore, the nomination of the two candidates shall be accompanied by a statement how they fulfil the high qualification requirements of Article 21.

Article 23: Election of judges

This provision is based on Article 19 MS and follows in principle the election procedure of human rights treaty monitoring bodies of the United Nations, such as Articles 28 to 34 of the Covenant on Civil and Political Rights (CCPR). Judges shall be elected by secret ballot at a meeting of the Assembly of States Parties by a two-thirds majority, taking into account certain criteria such as gender balance, equitable geographical representation, the representation of the principal legal systems of the world and specific expertise on vulnerable and discriminated groups.

Article 24: Term of office

This provision follows Article 20 MS and favours the principle of rotation rather than continuity of membership. In order to guarantee the independence of judges, they shall be elected for a term of nine years without the possibility of re-election (with the exception of those judges who first serve for only three years). Paragraph 4 of Article 24 is based on Article 6 (8) NK and shall ensure that judges who have participated in a public hearing shall continue to deliberate and decide on such cases.

Article 25: Judicial vacancies

This provision follows Article 21 MS and establishes the normal procedure for filling judicial vacancies.

Article 26: Plenary Court

This provision follows Article 21 NK with modifications. The Plenary Court has to fulfil certain functions which are included in an exhaustive list.

These functions on the one hand entail organizational tasks, such as the election of the President and the Vice-Presidents (lit. a), as well as the Registrar and the two Deputy Registrars (lit. d); the exclusion or removal of a judge or Registrar (lit. e and f) or the waiving of privileges and immunities (lit. g); and the adoption of the

Rules of Procedure, where also organizational issues not provided for in the Statute shall be regulated (lit. c). Furthermore, the Plenary Court is responsible to set up three Chambers and provide for a fixed allocation of duties of the Chambers. Similar tasks for the Plenary Court of the ECtHR can be found in Article 26 ECHR.

On the other hand, the Plenary Court also acts as a guarantor of consistency in cases where a Chamber before rendering a judgment decides that a case raises a serious question affecting the interpretation of a provision of a human rights treaty under consideration, or where the Chamber wishes to depart from the findings of an earlier judgment in a similar case (Article 27 (7)). The decision whether such a situation has arisen lies with the respective Chamber, who may relinquish jurisdiction in favour of the Plenary Court *proprio motu* without giving reasons⁵⁵.

Different than under Article 30 ECHR, which contains a comparable provision, the parties to a case are not given the right to object to the decision of the Chamber.

After a Chamber has issued a judgment, a party to the dispute can eventually appeal to the Plenary Court, which in these cases acts as last instance. Within three months from the date of a judgment of a Chamber, any party can request a referral of the case to the Plenary Court.

However, this provision does not allow for a general appeal in all cases, but rather limits them to exceptional cases that raise serious questions affecting the interpretation or application of any provision of a human rights treaty under consideration, or a serious issue of general importance similar to Article 43 (1) ECHR. According to the Explanatory Report to Protocol No. 11 to the ECHR, "serious questions affecting the interpretation of the Convention are raised

when a question of importance not yet decided by the Court is at stake, or when the decision is of importance for future cases and for the development of the Court's case-law.

Moreover, a serious question may be particularly evident when the judgment concerned is not consistent with a previous judgment of the Court. A serious question concerning the application of the Convention may be at stake when a judgment necessitates a substantial change to national law or administrative practice but does not itself raise a serious question of interpretation of the Convention. A serious issue considered to be of general importance could involve a substantial political issue or an important issue of policy"⁵⁶. Whether a case meets this condition, which has to be applied strictly in order to avoid overburdening the Court, has to be decided by another Chamber than the one that issued the judgment (Article 27 (8)).

Finally, the Plenary Court is also assigned to issue advisory opinions requested by the Secretary-General of the UN, the UN High Commissioner for Human Rights or a Member State of the United Nations in accordance with Article 8.

Article 27: Chambers and Committees

This provision follows Article 22 NK with certain modifications. In order to effectively deal with the case load reasonably to be expected, the Court shall consist of 21 judges who shall be divided into three Chambers of seven judges and six Committees of three judges each. It is the responsibility of the Plenary Court to set up the Chambers (Article 26 (b)). In turn, the Chambers shall establish two Committees within their own ranks, excluding the President and the two Vice-Presidents, who are each chairing one of the Chambers.

⁵⁵ Cf. Rule 72 (1) of the ECtHR's Rules of the Court.

⁵⁶ Explanatory Report to Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery [sic] established thereby (ETS No. 155), paras. 100-102.

In paragraphs 5 and 6, the distribution of functions to the Committees and Chambers is regulated. The Committees' function is to dispose of applications that are clearly inadmissible, while the Chambers are mainly designated to deliver judgments on the merits.

The power of the Committees to declare, by a unanimous vote, individual complaints inadmissible or to strike out an application of the list follows Article 28 ECHR²⁷. The Committees' decision is final. Apart from this quick procedure, which is supposed to greatly relieve the Court²⁸, Chambers shall deal with both the admissibility and the merits of individual complaints. The Chambers may relinquish jurisdiction to the Plenary Court which shall also function, in exceptional cases, as Appeals Chamber, similar to the functions of the Grand Chamber of the European Court of Human Rights, in accordance with Articles 30 and 43 ECHR (see above, Article 26).

Article 28: Final judgments

In accordance with the functions of the Plenary Court and the Chambers described above, a judgment of the Plenary Court becomes final immediately after its delivery, while a judgment of a Chamber only becomes final when the parties explicitly waive their right to request a referral of the case to the Plenary Court; or three months after the date of the judgment if the parties have not requested a referral within this time frame; or when the parties have requested a referral but the respective Chamber has not found the case to meet the condition of raising a serious question affecting the interpretation or application of any provision of a human rights treaty under consideration, or a serious issue of general importance in accordance with Article 27 (8).

Once a judgment has become final, it is subject to oral and written publication, under the responsibility of the chair of the Chamber (President or one of the two Vice-Presidents) and the Registrar respectively. This provision follows Article 23 NK which is based on Article 44 ECHR.

Article 29: The Presidency

This provision is based on Article 24 NK with significant changes. Another Court organ is the Presidency, whose election procedure, responsibilities and functions are modeled slightly modified after Article 38 of the ICC Statute. The President of the Court and the first and second Vice-Presidents constitute the Presidency. They shall be elected by an absolute majority of all judges for a term of three years and are, differently to the ICC's model provision, eligible for re-election more than once.

The Presidency functions as an administrative as well as a judicial body. On the one hand, it is responsible for the proper administration of the Court. On the other hand, the Presidency also fulfils certain judicial functions (para. 4). The President of the Court is at the same time also chair of the Plenary Court and the first Chamber, the two Vice-Presidents are chairing the second and third Chamber respectively. In general, the Chamber assigned to a certain case is also responsible for ordering States Parties to take interim measures in accordance with Article 19. However, in cases of extreme urgency, the President or the Vice-Presidents, acting as chairpersons of the respective Chambers, may adopt an order for an interim measure also outside the session of the Chamber. The Chamber or the Plenary Court – depending on which organ meets for a session earlier – has to confirm or withdraw such a measure.

Article 30: The Registry

This provision is based on Article 25 NK and on Article 43 ICC Statute. However, the Statute does not limit the Registry to non-judicial aspects of the administration, as Article 43 (1) ICC Statute. Thus, concerns that were voiced after the establishment of the ICC regarding the lack of support for the Presidency in its judicial tasks are rectified²⁹. The Registrar, as the highest administrative officer of the Court, shall function as support organ of the Plenary Court and Chamber 1, the two Deputy Registrars of Chambers 2 and 3.

All three of them shall be elected by the Plenary Court; other staff is to be appointed by the Registrar. Again, this provision departs from Article 43 of the ICC Statute, which states that a Deputy Registrar shall only be elected if the need arises. Candidates for the posts of Registrar and Deputy Registrars must be persons of high moral character and highly competent in the field of human rights law. A Registrar or Deputy Registrar can also be removed from office according to the procedure foreseen in Article 34 of the Statute.

The tasks of the Registry are not enlisted exhaustively in the Statute, since they include a myriad of functions: the Registry of an international court "combines elements of the diverse roles played in a national system by a [...] legal aid board, court registry and diplomatic corps"³⁰. However, an important function is mentioned explicitly in the Statute: the Registrar is responsible to set up a Victims and Witnesses Unit within the Registry, similar to the one established at the ICC.

Similarly, the Registrar shall also set up a special unit within the Registry that deals with domestic remedies. This innovation was inserted at a later stage of the discussions: since the NK proposal on national human rights courts was not included in the joint draft, the authors agreed as a compromise to require States Parties to identify at the time of ratification the judicial remedies which applicants have to exhaust before they can lodge a complaint with the Court (Article 9 (1)). Upon further reflection, however, such an obligation was considered to put an unfeasible burden on States wishing to ratify the Statute.

Thus, the authors rephrased Article 9 (1) and altered the obligation to identify national judicial remedies to a mere recommendation to States

Parties. Nevertheless, since one of the main objectives of the Statute is to strengthen national judicial implementation of international human rights, an obligation of States Parties applying for funds under Article 39 (4) (b) was created to provide the Domestic Remedies Unit within the Registry with information on available domestic judicial remedies.

Article 31: Independence of the judges

This specific provision on the independence of the judges is based on Article 24 MS and Article 40 ICC Statute with a slight modification. The Court is a permanent institution with full-time professional judges, similar to the ICJ, the ICC and the European Court of Human Rights, but different from other regional human rights courts and the UN human rights treaty monitoring bodies. Consequently, judges receive an adequate salary in accordance with Article 36 and shall therefore not engage in any other occupation of a professional nature, or in any other activity which is likely to interfere with their judicial functions or to affect confidence in their independence. Whether a specific activity interferes with the judicial function of a judge or not shall be resolved by the President in cooperation with the judge concerned. If it cannot be resolved, the matter shall be decided by the Plenary Court in accordance with Article 26 (d) by a simple majority without the participation of the judge concerned.

Article 32: Solemn undertaking

A similar provision can be found in Article 38 CCPR, Article 38 African Charter on Human and Peoples' Rights (AfCHPR) and Article 45 of the ICC Statute, all of which were based on Article 20 of the ICJ Statute.

²⁷ Note that with the entry into force of Additional Protocol no. 14 to the ECHR the procedure will change considerably, making a single judge responsible for a declaration of inadmissibility or striking an application out of the list.

²⁸ E.g., in 2008, 93% of all applications to the ECtHR have been declared inadmissible or struck out of the list by the Committees. See the ECtHR's Annual Report 2008, available at http://www.echr.coe.int/NR/rdonlyres/D5B2847D-640D-4A09-A70A-7A1BE66563BB/0/ANNUAL_REPORT_2008.pdf [15 June 2009].

²⁹ See John R.W.D. Jones, "Composition of the Court", in Cassese et al., *The Rome Statute* (note 6), p. 262.

³⁰ Third Annual Report of the ICTY 1996, para. 96, available at <http://www.un.org/icty/rappannu-e/1996/index.htm> [16 June 2009].

Although other human rights treaties do not explicitly impose on the members of their organs any such duty, most of these organs' Rules of Procedure foresee a similar obligation to make a solemn declaration.

The solemn undertaking in open court is intended to stress the importance and seriousness of the Court's tasks. The declaration must not only be made by the judges, but by all organs and staff of the Court, thereby underlining the responsibility of all persons involved in the Court's proceedings to act impartially and conscientiously.

Article 33: Exclusion of judges

This provision is based on Article 27 (1) NK, Article 25 MS and Article 41 ICC Statute. In principle, a judge should withdraw him- or herself from a case where his or her impartiality is doubtful. However, a request for exclusion can also be put forward by any other judge or by any party to the proceedings, if the impartiality of the judge in question is seriously doubted. The decision to exclude the judge has to be taken by a majority of the judges of the Committee, Chamber or Plenary Court, depending before which forum the case is supposed to be heard.

Different than Article 27 (2) ECHR, which foresees that in each Committee, Chamber or the Grand Chamber "there shall sit as an ex officio member a judge elected in respect of the State Party concerned", no such rule applies to the World Court, for the fact alone that not every nationality of States Parties will be represented by the judges. On the contrary, the fact that a judge holds the nationality of, e.g., the respondent State could cast a doubt on his or her impartiality. In this case, a decision as outlined above has to be taken. Nevertheless, an automatic exclusion of judges who have the nationality of a party to the procedure is not foreseen, as is the case with, e.g., Article 22 of the Protocol to the AfCHPR establishing the African Court and Rule 84 (1) (a) of the Rules of Procedure of the UN Human Rights Committee. A judge might, however, be excluded

if he or she has any personal interest in the case or has participated in any capacity in any domestic decision related to the case^①.

Article 34: Removal from office

This provision follows Article 27 (2) NK, Article 29 MS and Article 46 ICC Statute. While Article 46 of the ICC Statute foresees the removal from office by a decision of the Assembly of States Parties, Article 34 of the present draft Statute reserves this exceptional power to a majority vote of two thirds of all judges in the Plenary Court, similar to Article 24 ECHR. While Article 26 (e), in conjunction with Articles 31 and 33, authorizes the Plenary Court to decide by simple majority that one of the judges shall be prevented from engaging in a certain activity or shall refrain from participating in a particular case for the purpose of upholding the independence and impartiality of the Court, Article 34 deals with a much more serious matter, the dismissal of a judge. This exceptional power shall only be exercised in case of a serious breach of a judge's duties or inability to exercise judicial functions. It shall also apply to the Registrar or a Deputy Registrar. The respective decision of the Plenary Court under Article 26 (f), therefore, requires a two-thirds majority of all judges, i.e. at least 14 judges voting in favour. The procedure for submissions and evidence presented by the affected person shall be regulated by the Rules of Procedure.

Article 35: Privileges and immunities

The provision on privileges and immunities follows Article 28 NK, Article 31 MS and Article 48 of the ICC Statute. Similar provisions are also foreseen for the members of the diverse UN human rights treaty monitoring mechanisms, as for example by Article 43 CCPR, Article 23 CAT and Article 34 (13) CRPD, all of which refer to the Convention on the Privileges and Immunities of the UN^②. Furthermore, the ECHR provides for privileges and immunities for the ECtHR's judges (Article 51), as does the ACHR for judges and members of the Commission

(Article 70), and the AfCHPR for members of the Commission (Article 43). The mentioned regional statutes, however, do not entitle the Registrars or other persons involved in the Court's proceedings to any privileges or immunities.

Article 35 is therefore considerably broad, as it confers privileges and immunities to the Court as such and all judges, the Registrar and the Deputy Registrars. The first paragraph, which provides for privileges and immunities of the Court, is based on Art. 48 (1) of the ICC Statute, which in turn uses similar terms as Article 105 of the UN Charter. Privileges of international organizations entail exemption from taxation, while immunities encompass jurisdictional immunity before national courts, e.g. in employment related cases, and from acts of execution^③. This provision underlines the independent legal personality status of the Court as outlined in Article 3 of the Statute. The exact terms of these privileges and immunities have to be included in an agreement on the privileges and immunities of the Court indicated in paragraphs 3 and 4. Such agreement shall be negotiated between the Court and the States Parties, above all the host State (Switzerland or, possibly, the Netherlands).

The judges, Registrar and Deputy Registrars are provided with the same immunities as heads of diplomatic missions; they continue to be immune from legal process even after their terms have expired. The detailed entitlements are regulated in Articles 26 et seq. of the Vienna Convention on Diplomatic Relations of 1961. However, unlike diplomatic agents, the immunities and privileges are limited to acts performed by the judges and Registrar and Deputy Registrars in their official capacity. Thus, the provision follows a functional approach rather than providing absolute privileges and immunities to the persons in question^④. The waiver of privileges and

immunities of judges, the Registrar or Deputy Registrars requires a decision of the Plenary Court in accordance with Article 26 (g).

Staff members of the Registry are accorded with a lower level of privileges and immunities, which is again linked to the tasks they have to fulfil for the proper functioning of the Court. Detailed provisions regarding this category of Court officials have to be decided upon in a special agreement between the Court and the Member States, in particular the host State.

A third category of specifically protected persons include counsel, experts, witnesses or any other person required to be present at the seat of the Court. Again, the scope of the "treatment" they shall be accorded is to be articulated in the agreement mentioned above. At a minimum, this "treatment" includes providing facilities to travel for the purpose of participating in proceedings, and judicial immunity for statements and documents^⑤.

Article 36: Salaries, allowances and expenses

This provision is based on Article 32 MS and Article 49 ICC Statute. Since the Court is a permanent Court with full-time professional judges, similar to the ICJ, the ICC and the European Court of Human Rights, the judges shall be based at the seat of the Court and receive appropriate salaries, allowances and expenses. While Article 2 (2) NK was based on the assumption that the expenses of the Court, as an institution of the United Nations, should be borne by the regular budget of the United Nations and decided upon by the General Assembly, Article 43 (2) (b) and (d) of the present draft entrusts the Assembly of States Parties to decide the budget for the Court and the salaries, allowances and expenses of the judges, the Registrar and the Deputy Registrars, similar to Article 112 (2) (d) of the ICC Statute.

^① Cf. in this respect Rule 15 of the Rules of Procedure of the ICTY. ^② Convention on the Privileges and Immunities of the United Nations, adopted by the General Assembly of the United Nations on 13 February 1946. See also Vienna Convention on Diplomatic Relations of 18 April 1961. ^③ John R.W.D. Jones, "Duties of Officials", in Cassese et al., *The Rome Statute* (note 6), pp. 290-291. ^④ Ibid., pp. 291-292. ^⑤ Ibid. p. 294.

Article 37: Representation before the Court

This provision is based on Article 29 NK. Regarding comparable regional courts, the question of legal representation of the applicant, the respondent State or, in the case of the ACHR, of the Inter-American Commission on Human Rights in proceedings before the Court, is regulated by the courts' Rules of Procedure³⁶. Differently, the Statute of the ICC explicitly foresees the right to have legal assistance for persons during an investigation (Article 55 (2) (c)), for an accused (Article 67 (1) (d)), as well as for victims (Article 68 (3)). However, there is no obligation of the concerned parties to be represented by a lawyer. Also the Protocol to the AfCHPR establishing the African Court on Human and Peoples' Rights contains a clause on legal representation, which entitles the parties to be legally represented; free legal representation may be provided where the interests of justice so require³⁷.

Before the World Court of Human Rights, there is no requirement to be represented by legal counsel, as applicants can also argue their case before the Court themselves. If they do not have the means to afford legal counsel, they are entitled to request legal aid which shall be granted by the Court if the interests of justice so require. The same applies, in principle, to private respondent parties. States will have to be represented by their authorized agents, as foreseen for example by the ECtHR's Rules of Court and the Rules of Procedure of the Inter-American Court of Human Rights.

Article 38: Official and working languages

This provision is a compromise between Article 30 NK and Article 33 MS. The statutes of regional courts as well as international human rights treaties remain silent on the question of the official and working languages of the courts or committees. The use of language and the language of decision or judgment are principally contained in their Rules of Procedure. Only Article 50 of the Statute of the ICC provides in its primary document a regulation on the official and working languages.

The official languages of the Court shall be the same as the six official languages of the United Nations. However, in order to avoid excessive interpretation and translation costs, Article 30 (2) of the NK-draft proposed a fairly radical departure from existing UN practice. While for example the Rules of Procedure of the UN Human Rights Committee foresee that Arabic, English, French, Russian and Spanish are the working languages of the Committee, i.e. all official languages except Chinese³⁸, the NK-draft proposed English as the only working language of the Court. Article 33(2) MS, on the other hand, proposed English, French and Spanish as working languages. But Article 30 (2) NK also contained the innovative provision that public hearings can also be conducted in the official language of the State Party on the territory of which the alleged human rights violation took place, if requested by a party to the case. In practice, for financial and personnel reasons, the United Nations radically reduced its interpretation and translation services, and many documents are no longer translated but exist only in the language in which they were drafted.

Similarly, the judgments, inadmissibility decisions and decisions striking out a case of the Court should, according to the NK-draft, be published in English only and the relevant State language, if requested.

The compromise in Article 38 (2) delegates the decision as to which of the official languages will be used as working language (e.g. English) or languages (e.g. English, French and Spanish) to the Plenary Court. Since the parties to a case should be enabled to use their own languages in hearings before the Court and since the judgments of the World Court shall be widely understood in the country concerned in order to be directly enforced by domestic law enforcement bodies in accordance with Article 18 (3) and to serve as precedent for the respective national courts, it is essential to provide for a possibility to translate them into the respective national language or any other language spoken in the country concerned (e.g. a minority language), if so requested by the applicant and/or the respondent party. This constitutes a fairly radical

departure from present UN practice. Only very important official documents and leading judgments of a Chamber as well as all judgments of the Plenary Court shall be translated in all official languages.

Article 39: Trust Fund

This provision is based on Article 35 MS and Article 79 of the ICC Statute. It has two main purposes: to assist victims of human rights violations and their families; and to assist States Parties to improve their domestic judicial remedies.

The first objective is similar to the one of the Trust Fund established in accordance with Article 79 of the ICC Statute. While the ICC may order money and other property collected through fines or forfeiture to be transferred to the Trust Fund for the benefit of victims of crime, the World Court of Human Rights, according to Article 17 (2), shall order the respondent party responsible for a human rights violation to afford the victim adequate reparation for the harm suffered, including monetary compensation. The Trust Fund provides an additional opportunity to assist victims and their families through voluntary contributions made by States Parties, transnational corporations and other donors.

The second objective goes beyond reparation to the victims. One of the main aims of establishing a World Court of Human Rights is to improve the domestic systems of judicial remedies for human rights violations. This principle of complementarity is stressed in the Preamble and underlined by the obligation of States Parties under Article 9 (1) to ensure that all complainants have access to effective judicial remedies in relation to all human rights enshrined in the applicable human rights treaties. If States Parties lack the financial resources to establish effective judicial structures for the protection

of human rights, they shall be assisted by means of the Trust Fund. In case States Parties apply for financial support in order to improve their domestic judicial remedies, they shall in accordance with Article 30 (5) provide information on the domestic system as outlined in Article 9 (1).

The creation of a Global Fund for the strengthening of domestic human rights implementation systems is also one of the essential recommendations of "Protecting Dignity: An Agenda for Human Rights"³⁹.

All States Parties and other donors are invited to contribute to the Trust Fund, which might develop into a Global Fund for the strengthening of domestic human rights implementation systems, similar to the Global Fund on Health. It shall be established by decision of the Assembly of States Parties pursuant to Article 43 (2) (c). This Assembly shall also determine the criteria for the management of the Trust Fund.

Article 40: Cooperation with the Court

This provision is based on Article 31 NK. Certainly the most extensive obligations for States to cooperate with an international court are contained in the Statute of the ICC, which dedicates a whole part of its Statute to this issue (Part 9), starting with a general obligation to cooperate. However, the ICC has to deal with criminal cases and is therefore in need of its Member States' cooperation in a multitude of matters, from the arrest and surrender of a suspect to all kinds of investigative measures and eventually enforcement of sentences of imprisonment. The statutes of the regional human rights courts, on the other hand, do not contain a general obligation to cooperate; nevertheless, the vital importance of cooperation between the Courts and the Member States has been frequently stressed by the regional mechanisms⁴⁰.

³⁶ Cf., e.g., Rules 35 and 36 of the ECtHR's Rules of Court, Articles 21 and 22 of the Rules of Procedure of the Inter-American Court of Human Rights.

³⁷ Article 10 (2) Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.

³⁸ With the ratification of the CCPR by China the Rules of Procedure of the Committee will probably be amended in order to include Chinese as working language.

³⁹ See note 1. ⁴⁰ See, e.g., Council of Europe, Committee of Ministers, States' obligation to co-operate with the European Court of Human Rights, Resolution ResDH(2006)45, available at <https://wcd.coe.int/ViewDoc.jsp?id=1017111&Site=CM&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogg=FFAC75> [16 June 2009].

Explicit obligations to cooperate can be found mainly in more recent human rights treaties, which establish national mechanisms acting as counter-parts for the respective international bodies, namely in Article 12 OPCAT and Article 37 CRPD.

Similarly, Article 9 (1) of the Statute provides that any State Party has an obligation to ensure that all complainants have access to effective judicial remedies in relation to all human rights enshrined in the applicable human rights treaties. They might be assisted in these endeavours through the Trust Fund to be established by the Assembly of States Parties in accordance with Article 39.

In addition, two areas particularly necessitating cooperation between the Court and the States Parties are highlighted: On the one hand, States Parties shall fully cooperate with regard to individual complaints. A similar obligation can be found in Article 38 (1) (a) ECHR or Article 48 (1) (d) ACHR. According to the ECtHR's jurisprudence on this matter, the obligation to cooperate in the examination of cases includes submission of documentary evidence relating to the case, identifying, locating and ensuring the attendance of witnesses, commenting on documents submitted to the Court, and replying to questions posed by the Court^①. These obligations also apply in relation to proceedings against other States Parties, inter-governmental organizations and non-State actors.

The second field of importance mentioned in the present article regards the Court's powers to conduct on-site investigations, as outlined in Article 14 (3)^②. The obligations of the concerned States Parties to "provide all necessary cooperation and facilitate the investigation" of said provision is complemented by Article 40 (2), which lists in greater detail the obligations to grant the Court representatives carrying out the mission and experts assisting the Court full freedom of movement and inquiry, unrestricted access to authorities and documents as well as the right of access to all places of detention and the right to hold confidential interviews with relevant persons. A State Party can thus not refer to domestic legislation that, e.g., prohibits access and private conversation with detainees.

Article 41: Compliance with and enforcement of judgments and orders for interim measures

This provision is based on Article 32 NK. As a specific form of the obligation to cooperate, States Parties shall ensure their full cooperation regarding the domestic enforcement of judgments, orders for interim measures and reparation orders. This provision explicitly obliges States Parties to enact domestic laws that allow for implementation of judgments and orders (para. 3).

In case the Court awards reparation to a victim of a human rights violation by a State Party, the concerned State would be obliged, e.g., to pay the respective compensatory sum to the victim.

If a non-State actor falling under the jurisdiction of a State Party is found to have violated an individual's right, the State in question is also called upon to assist the Court in enforcing the judgment by means of national legal procedures. Regarding the enforcement of judgments within an inter-governmental organization, it is up to the organization's executive body to comply with the Court's findings. For further details on judgments of the Court and their binding force, execution and supervision see the commentary to Articles 17 and 18.

Article 42: Compliance by Entities

The present article complements the provisions on jurisdiction of the Court over inter-governmental organizations, non-governmental organizations, and other non-State actors, including business corporations, as outlined in Articles 4 (1) and 7 (2). Similar to the obligation of States to comply with judgments and orders of the Court, inter-governmental organizations and non-State actors which have made a declaration to recognize the Court's jurisdiction under Article 51 and are a party to any proceedings have a direct obligation to fully cooperate with the Court and implement its judgments and decisions. National implementation laws that are required by Article 41 (3) govern the details regarding execution of judgments and cooperation.

Article 43: Assembly of States Parties

This provision follows Article 49 MS, which is based on Article 112 of the ICC Statute. However, the consolidated draft of the Statute for a World Court of Human Rights significantly reduces the powers of the Assembly of States Parties as compared to the ICC Statute. In particular, the Assembly of States Parties shall not provide management oversight to the Presidency and the Registry regarding the administration of the Court, as provided for in Article 112 (2) (b) of the ICC Statute.

The most important functions of the Assembly of States Parties are financial ones. It shall decide upon the budget of the Court, the salaries, allowances and expenses of the judges, the Registrar and the Deputy Registrars pursuant to Article 36, and establish the Trust Fund and determine the criteria for its management in accordance with Article 39. In addition, it shall elect the judges, as provided by Article 23, and decide on amendments of the Statute in accordance with Articles 5 (2) and 53.

The procedural provisions concerning the session of the Assembly of States Parties in paragraphs 3 to 8 of Article 43 follow closely those in Article 112 of the ICC Statute.

Article 44: Funds of the Court and the Assembly of States Parties

While Article 2 (2) NK proposed that the expenses of the Court be borne by the regular budget of the United Nations and decided upon by the General Assembly, the consolidated version of the Statute follows Part VII MS, which is based on Part 12 of the ICC Statute. Consequently, the budget shall be decided by the Assembly of States Parties in accordance with Article 43 (2) (b) and be financed from assessed contributions by States Parties and Entities that have accepted the jurisdiction of

the Court in accordance with Article 51, funds provided by the regular budget of the United Nations and voluntary contributions, as provided for in Article 45. The assessment of contributions by States Parties follows the scale for the regular UN budget, as provided for in Article 46. The assessment of contributions by Entities shall be decided by the Assembly of States Parties in close cooperation with the Entities concerned.

Article 45: Voluntary contributions

This provision is based on Article 53 MS and Article 116 of the ICC Statute. In addition to assessed contributions by States Parties and Entities and funds from the general budget of the United Nations, the expenses of the Court shall also be financed through voluntary contributions from governments, international organizations, individuals, corporations and other sources, in accordance with criteria adopted by the Assembly of States Parties. The Trust Fund established by the Assembly of States Parties pursuant to Article 39 shall not be used for covering the expenses of the Court and/or the Assembly of States Parties.

Article 46 Assessed contributions

This provision follows Article 54 MS and Article 117 of the ICC Statute. It only refers to the assessment of contributions by States Parties under Article 44 (a), which shall be based on the scale adopted by the United Nations for its regular budget. According to the scale of assessments for the contributions of Member States to the regular budget of the United Nations for 2007, 2008 and 2009^③, the UN Member States are called upon to contribute between 0.001 and 22 percent to the budget.

This scale would form the point of departure for application and adjustment by the Assembly of States Parties to the particular situation of the Court and its States Parties in accordance with the principles on which that scale is based.

^① See Leach et al., Human Rights & Fact Finding (note 15), p. 13. ^② See, further, Leach et al., Human Rights & Fact Finding (note 15). ^③ Scale of assessments for the apportionment of the expenses of the United Nations, GA Res. 61/237 of 13 February 2007.

As long as the Statute would not enjoy universal ratification, the actual percentages of individual States would of course need to be higher than in the scale applied for the UN regular budget. However, the relative shares of participating States would be based on the UN scale.

The contributions of Entities which have accepted the jurisdiction of the Court in accordance with Article 51 shall be assessed by the Assembly of States Parties in close cooperation with the Entities concerned.

Article 47: Annual audit

This provision follows Article 55 MS which is literally based on Article 118 of the ICC Statute. The need for an annual audit by an independent auditor follows from the fact that the World Court of Human Rights is an independent institution with international legal personality, as provided for in Article 3 (1), and not an organ of the United Nations.

Article 48: Signature, ratification, accession and succession

The final clauses, in principle, follow Articles 34 to 41 NK. While some of the international human rights treaties, e.g. CERD, CAT and the Convention on the Rights of the Child (CRC), contain two separate provisions for signature and ratification on the one hand and accession on the other, the CCPR, the Covenant on Economic, Social and Cultural Rights (CESCR), the Convention on the Elimination of Discrimination Against Women (CEDAW), and the Convention on Enforced Disappearance (CED) regulate the respective procedures in one single article. Again differently, the CRPD provides two separate articles: one on signature by States and regional integration organizations, and one on ratification by signatory States and formal confirmation by signatory regional integration organizations or accession by States or named organizations who have not signed the Convention. This new procedure makes possible the inclusion of non-State entities in the obligations deriving from the Convention.

On the regional level, the ECHR only speaks of ratification, while the ACHR and the AfCHPR both contain provisions on signature, ratification and adherence.

The present article combines both the regulations on signature and ratification as well as accession; in addition, it goes one step further and adds to the list also the possibility of becoming State Party to the Statute by succession. The Statute is open for signature by all States, not limited to Member States of the United Nations, as for example both Covenants and CERD. According to Article 18 (a) VCLT, the signature creates an obligation for the State to “refrain from acts which would defeat the object and purpose of the treaty”. By way of ratification, which in most States has to be preceded by an approval of the domestic legislative power, the State expresses its consent to be bound by the treaty. Accession, as an alternative to signature and subsequent ratification, leads to the same end.

Despite the fact that the major international and regional human rights treaties are silent on the question of succession, in practice a considerable number of States have become Parties to diverse human rights treaties by way of succession⁴⁴. Therefore, succession is explicitly mentioned as one possible means of becoming a State Party to the Statute.

The Secretary-General of the United Nations is designated depository for signatures and all instruments of ratification, accession and succession. The functions of a depository are regulated in Article 77 VCLT.

Article 49: Entry into force

This provision is based on Article 60 MS. Comparable statutes or international instruments deal with the question of entry into force differently. For example, the Statute of the ICC came into force on the first day of the month after the 60th day following the date of deposit of the 60th instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations (Article 126 ICC Statute). Regarding UN human rights treaties, the CERD

foresaw the 30th day after deposit of the 27th instrument; the two Covenants entered into force after three months of the deposit of the 35th instrument; all the other UN human rights treaties, namely CEDAW, CAT, CRC, CED and CRPD, entered or will enter into force on the 30th day after the deposit of the 20th instrument of ratification or accession. A similar model was originally also suggested by Article 35 (1) NK for the World Court of Human Rights; however, since the NK draft foresees 21 judges from each Member State to the Statute, the number of States had to be altered to 30.

On the regional level, there is also no consistency regarding the number of deposited instruments and the time that has to elapse before entry into force. The ECHR, providing for the lowest threshold regarding the number of ratifications, entered into force on the day after the deposit of ten instruments. The AfCHPR foresaw its entry into force three months after reception by the Secretary-General of the African Union (formerly: Organization of African Unity) of the instruments of ratification or adherence of a simple majority of the Member States of the Organization, whereas the Protocol establishing the African Court on Human and Peoples’ Rights entered into force thirty days after the deposit of 15 instruments. Again differently, the ACHR, which also provides for a relatively low threshold and does not foresee any time period, states that the Convention shall enter into force as soon as eleven States have deposited their instruments of ratification or adherence with the General Secretariat of the Organization of American States.

The consolidated version follows Article 60 MS by requiring 30 instruments of ratification, accession or succession. Taking into account that the Court will be composed of 21 judges (Article 20 (1)), this requirement seems reasonable. Since Article 7 (3) provides that the ratification or accession by a State shall be treated as a notification of a State’s withdrawal from the complaint

procedures under the human rights treaties covered by the Court’s jurisdiction, the World Court will soon receive a considerable number of complaints emanating from the first 30 States Parties. In addition, the Court will need sufficient time to draft and adopt its Rules of Procedure in accordance with Article 26 (c) and other procedural regulations necessary for the professional performance of its functions.

Article 50: Reservations and Declarations by States Parties

With regard to the choice of treaties which should fall under the jurisdiction of the Court for each State Party, two different alternatives were proposed by the NK-draft: an “opting out” clause by means of a reservation or an “opting in” clause. States Parties to the Statute may, of course, only accept the jurisdiction of the Court in relation to human rights treaties to which they are a party. “Opting in” means that a State which becomes a party to the Statute may choose from the different human rights treaties listed in Article 5 (1) to which it is already a party. For example, if a State which is a party to both Covenants ratifies the Statute of the World Court, it may, e.g., choose only to subject the CCPR to the jurisdiction of the World Court, but not the CESCR, or vice versa. But it may declare at any later stage that it also accepts the jurisdiction of the Court in relation to other treaties to which it is a party.

“Opting out” relates to a presumption that by becoming a State Party to the Statute of the World Court, the respective State, in principle, accepts the jurisdiction of the Court in relation to all human rights treaties listed in Article 5 (1) to which it is a party. But it may, by means of a special reservation, exclude certain treaties from the jurisdiction of the Court. To stay with our example: The State Party, which from the two Covenants only wishes the CCPR to be subject to the jurisdiction of the Court, may enter a reservation to exclude the CESCR.

⁴⁴ Cf., e.g., Manfred Nowak and Elizabeth McArthur, *The United Nations Convention Against Torture. A Commentary*, Oxford 2008, pp. 825 et seq.

At any later stage, it may withdraw this reservation and, thereby, accept the jurisdiction of the Court in relation to the CESC.

The consolidated version of the draft Statute, in principle, follows the “opting out” model. This means that States Parties, at the outset, accept the jurisdiction of the Court in relation to all human rights treaties listed in Article 5 (1) to which they are a party.

If they wish to exclude certain treaties from the jurisdiction of the Court, they must enter a reservation in accordance with Article 50 (1). This reservation may be withdrawn at any time.

But the draft also contains an “opting in” possibility for States Parties in relation to human rights treaties not listed in Article 5 (1). Whether the respective treaty can be considered a “human rights treaty” shall be decided by the Court. Upon reflection, the “opting in” possibility was, however, restricted to UN treaties, including those of specialized agencies.

Entities, on the other hand, may accept the jurisdiction of the Court by means of “opting in” declarations in accordance with Article 51.

Article 51: Declaration by Entities

Other actors than States, such as inter-governmental and non-governmental organizations, including business corporations, can be brought into a relationship with the Statute insofar as they explicitly declare that they wish to subject certain rights contained in one of the human rights treaties listed in Article 5 (1) to the jurisdiction of the Court. In other words, Entities are invited to make an “opting in” declaration in relation to any human rights treaty listed in Article 5 (1). But they may even specify which provisions of the respective human rights treaties shall be subject to the jurisdiction of the Court. This possibility is based on the consideration that not all provisions of human rights treaties are easily applied to inter-governmental organizations or non-State actors. But even if an Entity accepts the jurisdiction of the Court in relation to all provisions of all treaties listed in

Article 5 (1), it is finally up to the Court to decide to which extent these provisions are capable of being applied to the respective Entity.

Members of the Global Compact should be specifically encouraged to make such a declaration and accept, e.g., the Court’s jurisdiction over certain economic rights. In addition, these Entities should declare the extent of their competence with respect to matters governed by the provisions they wish to confer to the jurisdiction of the Court. Subsequently, they shall inform the UN Secretary-General, who is acting as depositary, of any substantial modification of their competence.

The MS draft proposed that Entities would be able to accept the jurisdiction of the Court also in respect of non-treaty instruments, such as an instrument specifically drafted to address human rights obligations of business corporations. The relevant provision in the MS draft Statute read as follows: Entities... “may extend the jurisdiction of the Court to human rights treaties not mentioned in paragraph 2, or to human rights instruments that do not take the form of an international treaty” (Article 8, paragraph 3).

Article 52: Withdrawal

According to Article 56 VCLT, States Parties may denounce a treaty in the following cases: if the treaty in question explicitly provides for the possibility of denunciation; if the Parties to the treaty permit denunciation despite the absence of an explicit provision; or if a right to denunciation can be derived from the nature of the treaty.

The existence or omission of a denunciation clause in a human rights treaty has given rise to discussion⁴⁵. On the one hand, a number of human rights treaties provide explicitly for the possibility to denounce the respective treaty⁴⁶. On the other hand, the Human Rights Committee, in its General Comment on issues relating to the continuity of obligations, has taken the standpoint that at least the two Covenants, which do not contain an explicit norm on denunciation, do “not have a temporary character typical of treaties

where a right of denunciation is deemed to be admitted”⁴⁷. This argument, however, could be applied also to all the other human rights treaties.

Whereas Article 38 NK proposed that States should be explicitly prevented from withdrawing from the Statute, the final version of the consolidated text follows Article 62 MS. Consequently, both States Parties and Entities may withdraw from their obligations under the Statute at any later time. They may withdraw from the Statute in general or from certain “opting in” declarations.

But a withdrawal shall not affect or reduce their substantive human rights obligations, or the consideration of any pending cases. In situations where the ratification of the Statute replaced earlier acceptance by the State in question of the right of individual complaint under one or several human rights treaties, those procedures would be automatically reactivated.

Article 53: Amendments of the Statute

This provision is based on Article 58 MS, with few adaptations. In particular, the procedure for amending the list of human rights treaties contained in Article 5 (1) was taken out of the general provision regulating amendments. Instead, a simplified procedure for such an extension of the list of treaties was inserted in a new paragraph 5 (2).

While the NK draft foresaw that any decision on amendments of the Statute would have to be reached by consensus, and consequently that no withdrawal of a State from the Statute be possible, the more traditional form of amendments modeled after Article 121 of the ICC Statute was chosen in the end.

The procedure is divided into three steps. First, the proposal for an amendment can be brought forward by any State Party or group of States

Parties seven years after the entry into force of the Statute. This State or these States submit the proposed text to the Secretary-General of the United Nations, who, acting as depositary of the Statute, has to circulate it to all States Parties.

Secondly, the Assembly of States Parties at one of its next meetings decides by a simple majority of those present and voting, if the proposal is taken up for discussion. Between the notification of the proposed amendment by the Secretary-General and this decision a time period of at least three months is anticipated in order to give States the opportunity to internally review the proposal and come to a decision whether they wish to support the proposal or not.

Thirdly, the Assembly of States Parties, after having discussed the proposal – possibly also supported by a working group, which prepares a basis for decision – has to adopt the proposal at least by a two-third majority, but preferably by consensus.

An amendment enters into force thirty days after the deposit of the instruments of ratification of seven-eighths of all States Parties. A State who wishes to become Party to the Statute after the adoption of an amendment has to ratify or accede to the amended treaty.

In contrast to the NK draft, States are given the opportunity to withdraw from the Statute altogether if they cannot agree to the amendment in question.

Naturally, States Parties also have the possibility to adopt an additional protocol to the Statute. However, since the Statute does not contain any substantive provisions but is merely concerned with procedural articles, such a protocol would also have to be adopted by all States Parties to the Statute⁴⁸. For its entry into force, the ratification by a qualified majority could be sufficient.

⁴⁵ See, e.g., Nowak/McArthur, CAT-Commentary (note 44), pp. 866 et seq. ⁴⁶ Cf., e.g., Art. 58 ECHR, Art. 78 ACHR, Art. 21 CERD, Art. 31 CAT, Art. 52 CRC, Art. 48 CRPD. ⁴⁷ Human Rights Committee, General Comment 26/61 of 29 October 1997. ⁴⁸ Cf. the procedural Additional Protocols Nos. 2, 3, 5, 8, 9, 10, 11 and 14 to the ECHR, which provide for ratification by all States parties as a prerequisite for entry into force.

Article 54: Authentic texts

Article 54 is based on Article 41 NK and reflects a common final clause included in all United Nations human rights treaties as well as the Statute of the ICC⁴⁹. It provides that the six official UN languages are equally relevant for the interpretation of the Statute. It can be assumed that the terms in the Statute have the same meaning in each authentic text⁵⁰. However, in case terms in the authentic texts should have a different meaning, the general rules of interpretation as contained in Articles 31, 32 and 33 (4) VCLT have to be applied.

In accordance with Article 102 (1) of the UN Charter and Article 80 VCLT, the UN Secretary-General is designated to act as depositary of the Statute. He or she is required to send certified copies of the Statute to all States, i.e. not only UN Member States or States Parties to the Statute.

⁴⁹ Art. 128 Rome Statute, Art. 25 CERD, Art. 53 CCPR, Art. 31 CESC, Art. 30 CEDAW, Art. 33 CAT, Article 54 CRC; cf. Art. 59 (4) ECHR, which provides that the French and English texts are equally authentic, while the ACHR and the AfCHPR are silent on the question of authentic texts and language in general.

⁵⁰ Cf. Art. 33 VCLT.

Outline for Action on Detention

Theodor Meron and Manfred Nowak, Panel Members

A large proportion of the world's roughly 10 million detainees and prisoners do not enjoy minimum standards of human rights and are denied human dignity on a daily basis^①. This is one of the main contemporary human rights challenges stressed by the Panel on Human Dignity in their work (2008-2011). Already in their 2008 Report Protecting Dignity: An Agenda for Human Rights, the Panel stated: 'One of the major human rights challenges we face is to improve prison conditions, through national action and with international cooperation, such that detainees can live in dignity.' The Panel were concerned about prison conditions in general as well as specific problems related to vulnerable groups of prisoners (persons with disabilities, gays and lesbians, aliens, members of ethnic and religious minorities). The denial of human dignity in this context is not only related to prison conditions, but also to the rule of law, access to justice, and questions of fair trial. In many parts of the world, the prison population is growing^② and solutions are urgently needed to improve the situation of all types of detainees.

'Common' prisoners

The worst situations are mainly faced by the poor. In particular the conditions for those who have not been convicted, but are simply waiting for their trial in places of detention tends to go unnoticed. As most cases are not political prisoners these prisoners can be considered the new 'forgotten prisoners'.

In the mid-19th century, from the time of the battle of Solferino and the celebrated work of Henry Dunant and the International Committee of the Red Cross, the plight of the wounded on the battlefield created a consciousness of the need of humanisation of war. There were later efforts to improve the situation of prisoners of war and the procedures and norms were concretized in international conventions, most recently in the Geneva Conventions of 1949 and the two Protocols of 1977. They cover prisoners of war and other detainees from the time they are captured and offer a detailed set of rules and rights of visitation. The impact of these rules has been considerable.

In the latter part of the 20th Century NGOs have campaigned for prisoners of conscience and political prisoners, and taken up cases of arbitrary detention and solitary confinement, as well as working on

fair trial and the fight against torture and other forms of ill-treatment. What the Panel is calling for now is for specific attention to be focused on those in police custody and remand centres awaiting their trial and 'common' criminals serving their time. The Panel is calling for a similar awareness raising to that which occurred after Solferino when humanitarian law was developed to ensure protection of the dignity of victims of armed conflict. There is a need for the humanisation of detention.

Future Action

To address this situation, the Members of the Panel have considered the need for new instruments covering detainees in general. As already stated, prisoners of war and other detainees in times of armed conflict are covered by detailed rules. The approach to any new articulation of standards has to be broad and has to include issues related to periods of pre-trial, access to justice questions, the conditions of detention, remedies where detainees have been insufficiently protected (including problems of violence between prisoners, rape etc), and where there has been a failure to provide for the basic needs of detainees (food, water, basic medication etc). Any new instruments should cover not only prisons but also other places of detention such as police stations.

The Panel is aware that to make any process effective in this realm there is a need to make conditions of detention better known and to raise public consciousness of the inhumanity being suffered every day. Solutions are not easy to find but any new initiative could have an impact on a large part of the almost 10 millions of people who should live in human dignity. In this spirit the Panel supports the initiative of the former Special Rapporteur on Torture to call for the speedy preparation and adoption of a UN Convention on the Rights of Detainees.

^① International Centre for Prison Studies, World Prison Population List (8th edn 2009) and Report of the UN Special Rapporteur on torture and other forms of cruel, inhuman or degrading treatment, Study on the phenomena of torture, cruel, inhuman, or degrading treatment or punishment in the world, including an assessment of conditions of detention, submitted on 5 February 2010 to the UN Human Rights Council, UN Doc. A/HRC/13/39/Add.5.

^② International Centre for Prison Studies, World Prison Population List (8th edn 2009): Updated information on countries included in previous editions of the World Prison Population List shows that prison populations have risen in 71% of these countries (in 64% of countries in Africa, 83% in the Americas, 76% in Asia, 68% in Europe and 60% in Oceania).

Outline for Action on Legal Empowerment of the Poor

By Vitit Muntarbhorn, Panel Member

Background

A central theme of the Panel's December 2008 Report – Protecting Dignity: An Agenda for Human Rights – stressed that human rights cannot be implemented in the absence of effective and accountable institutions. The Panel stressed that capacity constraints remain a key stumbling block in advancing protection of human rights around the world and proposed that one way forward was to develop new funding mechanisms that could build on the concept of 'legal empowerment', which is increasingly viewed as crucial to improving governance and the rule of law.

The UN High Commissioner for Human Rights has welcomed increasing requests from governments for technical assistance, for example requesting support for building the capacity of civil society; training police, security services and judiciaries; advising on the drafting of laws and improvements of constitutions¹. As the High Commissioner has pointed out, these activities, while generally not newsworthy, are a vital component in improving human rights and potentially preventing abuses and conflict.

Yet despite these encouraging signs, lack of resources remains a key concern. Of the UN Secretariat's regular assessed budget of over \$5.1 billion, only 2.8 percent is devoted to human rights. For the Office of the United Nations High Commissioner for Human Rights, that translates to approximately \$70.5 million dollars per year in 2010 and 2011, and comprises 35 percent of the Office's total budget. Voluntary contributions make up the remainder of the budget and these have not kept pace with growing demands. Addressing these and other capacity related shortfalls should be viewed as a key priority for the remainder of this decade and beyond.

Achieving improvements in human rights requires a series of enabling factors, which overlap and dynamically interact. Rights realization contributes to strengthening the rule of law, but improvements in rule of law standards in turn facilitate rights realization. Likewise, improving human rights and respect for the rule of law will foster economic development, including economic opportunity for individuals, while

greater economic development helps support reform and sustain state institutions. Under proper conditions, these factors interrelate to create a virtuous cycle, whereby improvements along one dimension will drive improvements in others. One promising conceptual framework with which to understand these complex circumstances is the notion of legal empowerment.

Legal Empowerment

Legal empowerment emphasizes the importance of strengthening the capabilities of the individual by fostering efforts to support citizens as social and legal agents, and as bearers of rights and responsibilities. Implicit within the notion of legal empowerment is the idea that rights must be acted upon and defended, a concept with affinities to the notion of rights realization in international human rights law. The concept goes beyond merely protecting negative rights (freedom from) to encompass positive rights (freedom to) as well. In this respect, the legal empowerment concept links up with the human capabilities approach to development.

Legal empowerment is a holistic paradigm that integrates law and human rights with development and economic growth strategies. Its focus on a range of activities including grassroots legal services to assist people in protecting their rights and pursuing their own interests, as well as efforts to strengthen accountability and responsive governance at every level merit much stronger support from governments and all sectors of society.

Thanks in significant part to the efforts of the UN Commission on Legal Empowerment of the Poor and its 2008 report Making the Law Work for Everyone this approach is gaining support. Following a detailed report of the UN Secretary-General in 2009 drawing attention to the substantial international efforts underway to advance legal empowerment, the UN General Assembly adopted Resolution 64/215 reaffirming that 'the rule of law at the national and international levels is essential for sustained economic growth, sustainable development and

the eradication of poverty and hunger' and encouraging all states to 'continue their efforts in the area of legal empowerment of the poor, including access to justice and the realization of rights related to property, labour and business, addressing both formal and informal settings'.

Although many agencies and civil society organizations are contributing to legal empowerment programs and capacity building efforts in countries around the world, a great deal of work remains to be done to make tangible improvements in this area.

Existing challenges, possible solutions

Recent years have seen greater attention amongst donor and partner governments, multilateral organizations and other stakeholders to facilitate effective access to justice, build well functioning institutions at local and national levels and take steps to meet the special needs of the most vulnerable. However, there remains a clear shortfall in resources to achieve significant results in these areas.

The OECD estimates that \$30 billion is currently dedicated annually to governance related capacity efforts, but only \$2.5 billion is focused on access to justice and human rights support according to a 2010 report by the International Development Law Organization prepared for the Panel. The report highlights the proliferation of actors in this space and the multiple projects being undertaken each year, and concludes that continuing ad hoc and uncoordinated approaches will hamper achieving more significant results. Examples of steps towards more coordinated approaches in this area can be seen in the UNDP trust funds and the new UN democracy fund, amongst others, but more efforts to improve coordination are vital to effective improvements.

To address capacity related challenges to legal empowerment and effective human rights implementation, the Panel's 2008 report recommended that:

The UN High Commissioner for Human Rights, international development agencies and the bilateral donor community should define assistance to well-functioning national human rights institutions as a priority of their technical cooperation activities.

A Global Fund for National Human Rights Protection Systems should be established which supports and strengthens human rights implementation...

This Fund would constitute a 21st century, multi-stakeholder approach to strengthening national capacities to make human rights a reality for all. In light of our shared responsibility to protect against attacks on dignity, funding could come from a range of actors including governments, the private sector and civil society, as has occurred in the context of initiatives to combat inequalities in global health.

Future Action

A. Ensuring more effective coordination of existing initiatives

In addition to promoting initiatives to foster legal empowerment, greater attention should be paid to increasing resources and enhancing coordination focused on support for the justice sector. It should be noted that even this relatively narrow area could be addressed through many possible entry points, formal and informal, in any given national context. It should also be pointed out that within national judicial structures, many courts and tribunals not traditionally associated with human rights jurisdiction may exert significant impacts upon human rights outcomes, for example cadastral commissions (significantly influencing land, cultural and livelihood rights), commercial courts, family courts, and so forth. Furthermore the justice sector includes not only courts but also the police, prisons, probation services etc.

¹ UN High Commissioner for Human Rights, Navi Pillay, 30 June 2011.

Although National Human Rights Institutions and the formal justice system might meet most people's preconceptions of the core elements of any 'national human rights protection system' there are obviously many other institutions and organisations capable of promoting legal empowerment and protecting human rights in any given country. Examples include community legal centres, associations of paralegals (helping people bring claims to service providers and government agencies), public interest lawyers and advocacy associations (which have been instrumental in life-saving socio-economic rights litigation in India, South Africa and elsewhere), public audit bodies (monitoring public expenditure at national and local levels in connection with social programmes), not to mention professional associations, religious bodies and the media.

In the consultations which the Panel sponsored during 2009 and 2010 on this subject, it was suggested that instead of looking to new global mechanisms of support and coordination, more thought should be given to how best to strengthen existing country level coordination and impact on projects relating to the rule of law, access to justice and legal empowerment. The need for the UN system to play a leadership role in such efforts at the national level was stressed.

The Panel agrees with the proposals made by numerous experts that an annual report on regional or worldwide efforts on rule of law, access to justice and legal empowerment could be helpful to provide detail on modalities of support for human rights related capacity development at country level.

Such a report could potentially serve as a peer review mechanism – a 'tool for mutual accountability' – for donor and partner governments as well as other stakeholders. The experiences of other global funds and the ways they report on country level activities should also be studied for lessons that could apply in developing such an annual report on projects related to the rule of law, access to justice, and legal empowerment.

The Panel recognizes that donors seem increasingly willing to pursue multi-donor approaches and funding mechanisms in some areas but there are clear problems associated with such approaches including long lead times in approvals and implementation. Justice sector coordination efforts are widely viewed as being inherently difficult given diverse legal and cultural traditions as well as the need to attract legal skills. Diverse and less coordinated approaches to projects and strategies are still widely viewed as being valuable in determining what works and why.

At the same time, examples of coordination initiatives such as the Rule of Law Coordination and Resource group chaired by the UN Deputy Secretary-General and the recent launch of new UN rule of law indicators by OHCHR and DPKO² are important efforts, which should be encouraged. Accelerating investment and resources dedicated to building on such existing initiatives should be the short-term priority. There is also a need to improve knowledge of what works in legal reform and to ensure that reforms are consistent with international standards.

B. Linking advocacy for capacity building resources with coordination

The Panel also believes that linking advocacy and coordination of efforts between justice sector reform and access to justice issues is vital to achieving scale in this area. An example of where this approach has produced results in another policy domain involves the health sector where universal access to health services is increasingly seen as a fundamental right for all people. Yet there is no similar popular notion of the urgency in ensuring justice services to all.

While right to counsel under human rights treaties is well established in the criminal law context, the concept has not been extended to key areas of administrative and civil law where legal assistance can make the difference for individuals seeking to uphold their rights. The idea, for example, that legal aid should be easily accessible for all people is rarely heard in justice

sector reform or development conversations. The challenge now is to identify the pressing and compelling legal needs of people in developing and developed countries not addressed by existing efforts. Identification of such needs could form the basis for the development of larger scale support that would not necessarily involve increasing aid to governments directly, but might operate through different channels such as through community level paralegal services.

In the case of the health sector, the existence of funds for strengthening health systems has played an important role in raising awareness about the need for increased government capacity to make health care accessible for all and has encouraged private funders to contribute to these efforts, including through the development of innovative funding models. Similarly, scaled up funding and coordination mechanisms in the health sector have made health ministers and ministries more important players within their own governments, and created more opportunities for health ministers from around the world to meet and learn from each other.

A similar effort, which would focus on the roles of justice ministries, is a key area requiring further collaborative efforts. It might involve gathering and promoting success stories from different countries in justice sector capacity development and reform. It could provide a framework for a forum of justice ministers to dialogue on those issues that may serve both as an advocacy platform for increased funding and interaction with other actors, including civil society, and as a healthy form of peer pressure.

Finally, mechanisms to ensure the involvement of civil society in discussions around access to justice and legal empowerment strategies will also be critical. In many countries, civil society groups simply don't have the capacity to engage their own governments effectively, and are, in addition, too often excluded from debates around this topic at national and international levels.

Future work in this area must actively support and involve civil society organizations. There is an ongoing need to balance capacity development for governments and civil society, and donors must constantly guard against making themselves more important to partner governments than their own citizens.

Further steps should include piloting innovative approaches – involving government and civil society – to justice related capacity building and reform. Such a focus would allow for greater attention to testing, learning from other sectors, gathering evidence, filling gaps in existing efforts, and developing more rigorous impact indicators amongst other priorities.

Outline for Action
on Climate Justice

Mary Robinson, Honorary President of the Panel

In its 2008 report, the Panel pointed out that few dispute that climate change is likely to undermine the realization of a broad range of internationally protected human rights: rights to health and even life; rights to food, water, shelter and property; the rights of indigenous and traditional peoples; rights associated with livelihood and culture; with migration and resettlement; and with personal security in the event of conflict.

The Panel's report stressed that responsibility for human rights abuses linked to climate change often lies not with the government nearest to hand, but with diffuse actors, both public and private. Protecting the inherent dignity of all people therefore means recognizing shared responsibilities for human rights, including the responsibility of rich countries to share the major burden of mitigating the causes of climate change and of assisting poor countries in their efforts to adapt to the negative conditions brought about by climate change.

To achieve this aim, the Panel called for new efforts to link the international human rights regime more closely with the international climate change regime. The concept of 'Climate Justice' can be helpful in this context. It emphasises the links between human rights, development and climate change that have been deepening in recent years, a trend that is likely to continue.

A number of developments in this regard should be noted since the Panel's 2008 report which indicate that some steps towards greater linkages are being taken:

The International Human Rights Regime^①

UN Human Rights Council Resolution 7/23 on 'Human Rights and Climate Change', adopted on March 28 2008 with 78 co-sponsors stated explicitly that climate change 'poses an immediate and far-reaching threat to people and communities around the world and has implications for the full enjoyment of human rights'. The resolution requested OHCHR to prepare 'a dedicated analytical study on the relationship between climate change and human rights'.

The OHCHR report on the relationship between climate change and human rights^② concluded that:

Climate change-related impacts, [...] have a range of implications for the effective enjoyment of human rights. The effects on human rights can be of a direct nature, such as the threat extreme weather events may pose on the right to life, but will often have an indirect and gradual effect on human rights, such as increasing stress on health systems and vulnerabilities related to climate change induced migrations.

The report was considered by the Human Rights Council and led to Resolution 10/4 adopted on 25 March 2009 by consensus, with 89 co-sponsors. The Resolution states that 'climate change-related impacts have a range of implications, both direct and indirect, for the effective enjoyment of human rights.' On 15 June 2009, the Human Rights Council held a half day panel discussion on the relationship between climate change and human rights. The Deputy High Commissioner pointed out a link with the UN Framework Convention on Climate Change (UNFCCC) process, and that 'the adverse effects of climate change will be felt most acutely by those segments of the population who are already in vulnerable situations owing to such factors as geography, poverty, gender, age, indigenous or minority status and disability'.

It had been stated in both Resolution 7/23 (para 5) and Resolution 10/4 (para 2) that actions of the Human Rights Council should complement and support (not duplicate) progress under the UNFCCC Framework.

In November 2009, the Office of the United Nations High Commissioner for Human Rights transmitted both resolutions together with a summary of the June 2009 panel debate to the Conference of Parties to the UNFCCC 'for its consideration' ahead of the Copenhagen COP 15.

The report of the Ad Hoc Working Group on Long Term Co-operation Action (AWG-LCA) referred to human rights in para 9: 'Mindful that adverse effects of climate change have a range of

direct and indirect implications for the full enjoyment of human rights, including living well and that the effects of climate change will be felt most acutely by those parts of the population that are already vulnerable owing to youth, gender, age or disability'.

In addition to these developments, UN Special Procedures mechanisms, as independent human rights experts, are increasingly including the issue of climate change in relevant mandates, such as on the right to adequate housing, the right to food, access to safe drinking water, poverty, and internally displaced persons. The UN's treaty monitoring bodies are also beginning to raise issues relating to climate change in communications to state parties, and there is potential in the Universal Periodic Review for issues relating to climate change to be raised when a state is being reviewed.

Most recently, on 12 April 2011, the Human Rights Council adopted Resolution 16/11 on Human rights and the environment. Reference is made to Resolutions 7/23 and 10/4 and to the UNFCCC process as follows:

Taking note of decisions 1/C. 16 and 1/ CMP. 6 made at the United National Climate Change Conference held in Cancun, Mexico in 2010, and in particular the seventh preamble paragraph X and paragraphs 7, 8 and 12 of decision 1/CP.16, and subparagraphs 2(c) and (d) of appendix 1 to decision 1/CP.16 and decisions to contribute positively to a successful outcome of the United Nations Climate Change Conference, to be held in Durban, South Africa, in 2011, the Resolutions requests OHCHR, in consultation with and taking account of appropriate views 'to conduct, within existing resources, a detailed analytical study on the relationship between human rights and the environment, to be submitted to the Human rights Council prior to its nineteenth session.

The Panel also takes note of the 2010 Social Forum which focused on climate change and human rights and concluded as follows:

Social Forum recommends that:

[a] The Human Rights Council establish a new mechanism, which could take the form of a special rapporteur or independent expert, dedicated to human rights and climate change. The mandate of this mechanism should include addressing the human rights aspects of climate change and elaborating a study on the responsibilities of States, and other actors, in the area of climate change adaptation, mitigation, technology transfer, technical cooperation and funding, vis-à-vis the urgent need for adaptation and commitments with sustainable development, bearing in mind the negative impacts of climate change on different human rights and its amplification in the case of vulnerable groups, including the reality of persons displaced as a result of climate change. It could lead to a non-binding instrument of guiding principles for human rights and climate change;

[b] The Human Rights Council continue holding an annual discussion with the view to tracking the rapidly evolving impacts of climate change on human rights;

[c] The sixteenth Conference of the Parties in Cancun be informed of the deliberations of the 2010 Social Forum with the view to: ensuring that the agreed outcome texts are consistent with the obligations contained in international human rights instruments; integrating social dimension, a gender perspective and the human rights-based approach in United Nations Framework Convention on Climate Change negotiations; respecting intergenerational equity, and addressing extraterritorial State obligations; ensuring that safeguards and measures are

① Marc Limon, 'Human Rights and Climate Change: Constructing a Case for Political Action', 33 Harv. Envtl L. Rev. 439 (2009) McInerney-Lankford, Mac Darrow, Rajamani, Human Rights and Climate Change: A Review of the International Legal Dimensions A World Bank Study, (2011) Edward Cameron, 'Development, climate change and human rights: From the Margins to the Mainstream?', Paper No 123 March 17 (2011).

② UN Doc A/HCR/10/61 of January 15 2009 (note 9.92).

put in place to avoid side effects, such as trade protectionism; and ensuring that specific attention is paid to the situation of mountainous countries, small island States and other countries which are particularly exposed to the impact of climate change;

[d] Climate change be taken into account in the elaboration of the draft guiding principles on extreme poverty and human rights, and also in other human rights reports, such as those on water, food, health, housing or development.

[e] Governments involve local communities and organizations, including meaningful participation of vulnerable groups, in developing objectives, policies and strategies for the upcoming Cancun and following negotiations, as well as for ensuring the success of longer-term strategies.

[f] The situation of persons displaced as a result of climate change be addressed, and that national Governments in disaster-prone countries invest in disaster risk reduction planning, mechanisms and procedures, as well as in other adaptation measures in the face of the already present negative impacts of climate change, and that the members of the international community increase their efforts in responding to international disasters and in investing in preparedness, adaptation and mitigation through sustainable development options, which may imply the transfer of best available technologies. The gaps in the legal protection of those displaced across borders should be addressed, including through international law related to refugees.

[g] REDD and REDD+ programmes adopt a more rights-based approach, create legal awareness programmes along with other support programmes for indigenous peoples that may be affected by REDD programmes, and improve participatory and access-to-justice provisions. These programmes on avoiding deforestation need to be complemented with broader sustainable development programmes all over the world.

The International Climate Change Regime

As the World Bank study Human Rights and Climate Change observes, 'although the UNFCCC seeks to 'protect the climate system for the benefit of present and future generations of humankind,' it is not designed to provide human rights protections, humanitarian aid or redress to individuals or communities consequent upon environmental harms. The UNFCCC is instead an agreement between states to 'anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects'. The nascent interest in human rights in the climate change context can perhaps be attributed to some degree to widely felt frustrations with the pace and directions of multilateral diplomacy.

In order to develop an effective relationship between the human rights and climate change regimes, it is necessary to bear in mind what Ed Cameron has emphasised:

Human rights are as much about ethical demands, calls for social justice, public awareness, advocacy, and political action as they are concerned with legal norms and rules. Sen has pointed out a 'theory of human rights cannot be sensibly confined within the juridical model in which it is frequently incarcerated'⁹.

To bridge this gap and strengthen the links there is a need to engage with both approaches to human rights – this is in essence the climate justice approach.

Expectations before COP 15 in Copenhagen were too high, and as a result, a fair, ambitious and binding deal failed to emerge. The conference produced a non-binding political declaration 'the Copenhagen Accord' negotiated by 28 states, which others subsequently agreed to. COP 16 in Cancun brought the Copenhagen Accord into the UNFCCC process with the Cancun Agreements, but postponed some of the tough decisions that need to be made.

There are two main tasks for COP 17 in Durban, which will take place in late 2011. The first relates to the emissions reduction targets and actions

which would allow the world to stay below the maximum two degree Celsius temperature rise agreed in Cancun. Governments need now to resolve fundamental issues over the future of the Kyoto Protocol as the first period of commitments under the protocol expires at the end of 2012.

The second task is to advance work to complete the institutions, which were agreed in Cancun, including a Green Climate Fund, a Technology Mechanism to promote clean technologies and an Adaptation Framework to allow developing countries to protect themselves from climate change impacts.

Future Action

There is great potential for further action in seeking to align the regimes of International Human Rights and Climate Change. The recommendations in the Reports of OHCHR, the outcome of the Social Forum and other studies such as the World Bank study 'Human Rights and Climate Change: A Review of the International Legal Dimensions' can be drawn upon.

Given the wide-ranging implications of climate change for the enjoyment of human rights, any meaningful action necessitates greater policy coherence and collaboration between relevant global institutions. This calls for careful and imaginative thought regarding institutional architecture and the most effective methodology for promoting aligned concerns and solutions. To this end, it is critical to engage not only the UN Human Rights Council but potentially also the UN Secretary General and the Office of the High Commissioner for Human Rights. Thus a basket of measures should be considered.

The appointment of a Special Rapporteur on Climate Change and Human Rights with a mandate to monitor and track the human rights impacts of climate change is one potentially valuable initiative. However, given that climate change concerns cut across many already existing human rights mandates such as food, migration, extreme poverty, and indigenous peoples among others, the Human Rights Council should also consider the constitution of a parallel Expert Mechanism that would focus on policy development on the subject (both procedures exist in the case of indigenous peoples, for example). The Expert Mechanism could draw on knowledge and resources from other key UN institutions and enable greater interaction and coherence.

At the same time, at an operational level, the formation of an UN inter-agency group on climate justice could also greatly enhance coherence. For instance, the Global Migration Group, brings together the OHCHR, ILO, UNHCR, IOM, UNDP, the World Bank and other agencies under rotating leadership to promote the wider application of norms relating to migration and to 'encourage the adoption of more coherent, comprehensive and better co-ordinated approaches to the issue of international migration.'

Clearly, the issue of climate change could also benefit from a more holistic, coordinated approach, rather than the fragmented, even conflicting actions sometimes emanating from different agencies at present. The UN Development Group, designed to harmonize and align UN development activities, is a slightly different model, as one of three pillars of the UN Chief Executives' Board, which brings together agency heads to further coordination and cooperation. The Secretary-General should also consider forming a similar group on climate change as a fourth pillar of the Chief Executives' Board.

⁹ Cameron, Edward, 'Development, climate change and human rights: From the Margins to the Mainstream?', Social Development Working Papers, Paper No. 123, The World Bank, March 17, 2011.

Research Projects selected by the Panel

The Panel chose to highlight **8** themes to be prioritized and further researched.

01 Human Dignity

This concept transcends cultural difference and can be found in major religions. Protecting dignity requires dedication to human flourishing, to valuing equally each individual, and a recommitment to the importance of solidarity among all people.

■ Human Rights and Human Dignity

By Jack Donnelly, University of Denver, United States of America, June 2009

■ Dignity: A Special Focus on Vulnerable Groups

By Frédéric Mégret (coordinator), McGill University, Canada and Florian Hoffmann (coordinator), London School of Economics, United Kingdom, June 2009

02 Prevention

The implementation of human rights depends to a large extent on the effectiveness of national protection systems – the institutions that comprise the national legal order. New strategies are needed to build effective and accountable police forces, courts, prisons and national human rights institutions.

■ Prevention is Better than Cure: The UN and Human Rights Education

By Paula Gerber, Monash University, Australia, June 2009

Following a call for proposals, the Panel selected **10** research projects which relate to these themes.

03 Detention

There are over 9 million detainees and prisoners worldwide with a large proportion kept in inhuman and degrading conditions. Many are arrested without sufficient reasons, held in pre-trial detention for excessive periods and often subjected to torture. More must be done to address the forgotten human rights abuses experienced by people in detention.

■ Democracy, Human Rights and Prison Conditions in South America

By Fernando Salla (coordinator), University of São Paulo, Brazil, June 2009

04 Migration

As population and poverty trends continue to further divide the world between overpopulated, young and poor states on one hand, and wealthy, aging and declining population states on the other, migratory pressures will only intensify. There is an urgent need for a human rights approach to migration which protects the rights of migrants and the victims of trafficking.

■ Protection of People Outside their State A Comprehensive Analysis

By Mike Hayes (coordinator), Mahidol University, Thailand, June 2009

05 Statelessness

The plight of people lacking legally enforceable claims on any state has not been given adequate international attention. The injustices of not being able to vote, travel, send children to school, or receive protection from a state are clear. We need to understand how citizenship can make a difference to the enjoyment of human rights.

■ Statelessness and the Benefits of Citizenship: A Comparative Study

By Brad K. Blitz and Maureen Lynch (coordinators), Oxford Brookes University, United Kingdom, June 2009

06 Right to Health

Millions of people living in poverty, the majority of which are women, are denied access to adequate housing, food, decent work and basic education, and even the most basic health services. We need policies based on principles of equity and social justice, and the human right to the highest attainable standard of health.

■ Realising the right to health in the Universal Declaration of Human Rights after 60 years: addressing the reproductive health rights of women living with HIV in Southern Africa

By Karen Stefiszyn, Mmatsie Mooki and Yohannes Tesfagabir, Centre for Human Rights, University of Pretoria, South Africa, June 2009

The research projects are available on the following link:

<http://www.udhr60.ch/research.htm>

07 Climate Change and Human Rights

The most dramatic impacts of climate change occur in the world's poorest countries, where human rights protections are often weak. We need more attention to how human rights could contribute to assessing future harms, identifying areas of likely vulnerability and evaluating potential policy measures.

■ Climate change and Human Rights: The Status of Climate Refugees in Europe

By Margit Ammer, Ludwig Boltzmann Institute of Human Rights (BIM), Austria, June 2009

08 A World Human Rights Court

The idea for such a court was already discussed in the 1940s alongside proposals for a High Commissioner and an International Criminal Court. Human rights violations require remedies. With legal accountability comes protection and prevention. We now need concrete proposals to elaborate how such a World Court might ensure greater accountability for all in the 21st Century.

■ A World Court of Human Rights Consolidated Statute and Commentary

By Julia Kozma, Manfred Nowak and Martin Scheinin, 2010

■ Towards a World Court of Human Rights

By Martin Scheinin, European University Institute, Florence, Italy, June 2009

■ A World Court of Human Rights

By Manfred Nowak and Julia Kozma, University of Vienna, Austria, June 2009

Summaries of the research projects is available as companion of this publication.