UNITED NATIONS TREATY BODY REFORM: HUMAN RIGHTS ARE NOT OPTIONAL

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This in-depth analysis of the effectiveness of the UN system has generated four main thematic areas requiring major reforms: (1) budgetary, (2) procedural limitation, (3) inherent weaknesses and (4) difficulty with implementation and enforcement. Issues under discussion herein, to name a few are: the political will of States, the reservation system, the individual complaints system, the non-binding nature of the decisions and inaccessibility of the system to those most vulnerable. Recommendations for reforms in these areas as well as additional ones are proposed. The four thematic areas are interconnected.

Introduction

A brief overview of the legal and political mechanisms of the UN system that exist to protect Human Rights will be given. After extensive fieldwork, work experience and a critical literature review of both primary and secondary sources in the UN system spanning a combined time frame of two years, which integrated field research consisting of interviews and participant observation, the collected data was analysed using thematic analysis and grounded theory from which four major areas in need of reform emerged and were identified. These areas are grouped by themes:

(1) Budget and financial limitations.
(2) Inherent weaknesses: the political will of States, the non-neutrality of the experts, the non-binding nature of the treaties, the reservation system, the non-interventionist attitude of States (putting State Sovereignty and 'National Security' over and above Human Rights, and the lack of participation of all States.
(3) Procedural limitations: problems with the lack of standardisation or harmonisation of the language and terminology of UN Human Rights instruments, the inaccessibility of the mechanisms to the general public or those most vulnerable to Human Rights abuses, the cumbersomeness of the individual complaints system, the limitation of using only one convention.
(4) Implementation and enforcement problems.

Based on the four identified thematic areas of weakness leading to the ineffectiveness of the United Nations' mechanisms for the protection of Human Rights, recommendations to facilitate reforms addressing these problems will be made. It is important to note the interconnectedness of the problems facing the United Nations Human Rights protection mechanisms. The four aforementioned themes rendering the UN ineffective: budgetary, inherent weaknesses, procedural limitations and problems with implementation and enforcement were noted by the UN itself shortly after its founding. The need for reform is long overdue. At its inception, the United Nations has maintained a frank and transparent stance regarding its weaknesses, particularly those related to the inner workings of the Treaty Bodies that were set up largely for the protection of Human Rights. Accordingly,

> "The United Nation's Commission of Human Rights already in 1947 declared itself incompetent to adopt

> any measures regarding any type of complaint concerning Human Rights when confronted by the overwhelming flow of allegations from victims and non-governmental organizations; it refused to deal with individual petitions. Instead, the Commission confined itself to promotional activities providing guidelines to be followed by the secretariat.

At a later point in its early history, "unfortunately, during the greatest part of the 'cold war', the United Nations remained deaf and mute to the grave violations occurring in the world."[1]

More current to our generation, "according to the 2002 report by the UN Secretary General, *Strengthening the United Nations: An agenda for further change*, he identified modernisation together with crafting a more coordinated approach to treaty body activities, standardising their various reporting requirements, allowing each State to produce a single report on its adherence to all Human Rights treaties to which it is a party."[2]

The themes of budget problems, problems with procedure in terms of lack of accessibility and problems of inherent weaknesses in terms of political will of States, have been previously identified:

> "Several weaknesses exist in the follow up procedure, lack of publicity, lack of budget, lack of recognition as part of the treaty bodies' activities, lack of clarity if the recommendations and replies indicate

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[1] Prado, Jose L. Gomez, Extra Conventional Protection of Human Rights, in Isa, Felipe Gomez and de Feyter, Koen (eds) (2006) International Protection of Human Rights: Achievements and Challenges, Bilboa: Deusto, pp. 285-356, at p. 285.

[2] OHCHR 1996-2006. Office of the United Nations High Commissioner for Human Rights. Enhancing the Human Rights treaty body system. http://www.ohchr.org/english/bodies/treaty/reform.htm.

> compliance or non compliance, lack of planning regarding schedules, lack of domestic policies to support UN treaty bodies."[3]

Additionally, "there is consensus among the treaty bodies that the follow up to their concluding observations by State parties is seriously flawed."[4] The problem with the follow up encompasses and overlaps several of the identified themes, namely; implementation and enforcement, procedure and inherent weaknesses. The lack of follow-up could be attributed to a number of causes, not limited to the political will of States and inherent problems with the system and procedural ambiguity.

The need for Treaty Body reform is thus an established fact; therefore it is now more productive to set forth a discussion outlining the ways and means towards reforming the United Nations Treaty Body system by providing recommendations that address the major Treaty Body weaknesses.

Reforms are proposed in the areas of: standardising language and streamlining the terminology, States' reports, independent experts, and the non-binding nature of decisions.

1. Reform (1): Language; Standardise terminology

Our starting point will be with language. The terminology of the Human Rights instruments and mechanisms outlined in the Treaty Bodies are confusing. There are several terms with slightly different connotations referring to the same general principles. Several examples abound. The terms 'applicant', 'author', 'complainant', 'petitioner' all designate an identical

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[3] Alfredsson, Gudmundur *et al.* (eds). *International Human Rights Monitoring Mechanisms: Essays in Honour of Jakob Th. Möller.* 2001 Kluwer Law International. Markus G. Schmidt. p.211.

[4] *Ibid.*

concept: someone who wishes to make a complaint with the treaty bodies. The Convention against Torture uses the term 'complainant'. The terms 'application', 'communication', 'complaint' and 'petition' are used for the act of complaining, on paper. This is confusing. The terms change depending upon which Convention is referred to. It is proposed herein that only one term be chosen from each category, for example, 'complainant', and 'complaint', the two words that are the closest in meaning to the actual act and intent of the Treaty Body complaints system, and to maintain these two terms throughout all of the Treaty Body Conventions and Commissions.

Another set of confusing terms are 'Declaration', 'Declarations of Competence', and 'Reservation', referring to when a State party to a Convention makes legal definitions of certain provisions. The word 'Reservation' should suffice and is closest in meaning to the intent and action of the State; that the State has certain Reservations (against), or limitations of law of certain Convention provisions. Thus, the word 'Reservation' should be the only term used, and it should be the same term used throughout each Convention.

When a Committee has findings on the merits of individual complaints, they may be called a 'Decision', or an 'Opinion', or a 'View', depending on if it is for CAT (Convention against Torture), CERD (International Covenant on the Elimination of All Forms of Racial Discrimination), or ICCPR (International Covenant on Civil and Political Rights) and CEDAW, (Convention on the Elimination of All Forms of Racial Discrimination Against Women), respectively. "Follow up procedures to individual complaints are a mandate of a Special Rapporteur (SPR) for the follow up on views were created by the Committee in July 1990.[5] These mandated follow-ups with different terminologies are not clear to those people outside of the UN system. One word with the intended

[5] *Ibid.*

connotation should be chosen, and it should be chosen for all of the Conventions, throughout, perhaps, 'decision', as that term has a stronger and more binding connotation than the word 'view.' According to Professor Bayefsky, "A treaty may go by many different names, such as 'Convention', 'Covenant', and 'Protocol'."[6] Why? It is confusing. If they have the same legal effects why use different names? All of these documents are legally binding in International Law. Thus, reform is recommended to the entire United Nations system by choosing one designated term for all legally binding contracts between States of a similar nature, for example, the use of the term 'Treaty', for any economic, legal, or security agreement, and 'Convention' for all Human Rights instruments to which States are signatories to, and have ratified. Or even better, designating as 'Treaty' for every inter-State legally binding document and eliminating other terms such as 'Convention', and so forth.

2. Reform (2): State Reports; isn't this naive?

The Convention obliges States parties to submit to the Secretary-General a report on the legislative, judicial, administrative or other measures that they have adopted to implement the Convention within a year after its entry into force and then at least every four years thereafter or whenever the Committee on the Elimination of Discrimination against Women (CEDAW) so requests. These reports, which may indicate factors and difficulties in implementation, are forwarded to the CEDAW for its consideration. Since 1990, second and subsequent reports have been reviewed by a pre-session working group of five Committee members. The working group draws up questions to guide the full

[6] Bayefsky, Anne F. (2003) How to Complain to the UN Human Rights Treaty System. The Hague: Kluwer Law International. Introduction to Professor Bayefsky's Book.

Committee's examination of the report. These questions are submitted to the country's representative in advance. The representative then meets with the Committee to respond to these questions and any others that members may wish to ask. Following consideration of each State Party report, the CEDAW Committee formulates concluding comments which outline factors and difficulties affecting the implementation of the Convention for that State party, positive aspects, principal subjects of concern and suggestions and recommendations to enhance implementation of the Convention.[7]

> "State parties have to report to treaty bodies according to Art.40 of ICCPR, Art. 16 of the ICESCR, Art. 9 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), Art. 18 of CEDAW, Art. 19 of the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (CAT), Art. VI of the International Convention on the Suppression and Punishment of the crime of Apartheid and Art. 44 of the Convention of the Rights of the Child (CRC)."[8]

In the ICERD,

> "State parties undertake to submit... a report on the legislative, judicial, administrative or other measures which they have adopted and which gave effect to the provisions of this convention. (Art. 9.1.)"[9] Furthermore, "to the same wording CEDAW adds: 'Reports may include factors and difficulties affecting the degree of fulfilment of obligations'. (Art. 18.2.)"[10]

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[7] United Nations Division for the Advancement of Women Department of Economic and Social Affairs. Homepage: http://www.un.org/womenwatch/daw/

[8] *Ibid, Supra, No.* 3, at p. 189

[9] *Ibid.* p.190.

[10] *Ibid.* p191

In the CRC,

> "Reports shall also contain sufficient information to provide the committee with a comprehensive understanding of the implementation of the convention in the country concerned. (Art. 44.2.)"[11]

All State parties must submit regular reports to the Committee on the status of Human Rights in their respective countries. States must report initially after one year and every four years thereafter. The Committee examines each report and responds to the State with concerns; recommendations in the name of concluding observations. "Many problems are encountered by the Committee in the State reports submitted to it: 'incomplete coverage, abstraction and formality that leads States to stress their formal constitutional or statutory provisions rather than to offer a realistic description of practices; and great delays in filing reports."[12]

Additionally,

> "The great weakness of the reporting system lies in the failure of certain States, frequently the biggest violators of Human Rights, to submit their reports to the Committee in a timely fashion."[13] "Counter-reports to the State reports attempt to be made public but States may keep them from reaching the media and in confidential government files."[14] "For a treaty body to determine the veracity of the State reports, its members must use other sources for verification, such as "media reports, scholarly works,

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[11] *Ibid.* p191

[12] Treaty Organs: The ICCPR Human Rights Committee, in Steiner and Alston (2000) (2nd ed), International Human Rights in Context: Law, Politics, Morals, Oxford: Oxford University Press, at p. 710.

[13] Ibid, at p. 713.

[14] *bid, Supra, No.* 3 at p. 196.

> and above all, reports of international governmental and non-governmental organizations, but this has sometimes been met with resolute objections from government representatives and some members of the treaty bodies, including admonitions by the Chair declaring the official use of non governmental material to be out of order. Additionally, experts in the treaty bodies collect their information on their own."[15] The Committee lacks any power to force or only induce governments to submit their reports on time, to cooperate in a proper manner and to comply with its recommendations resulting from the examination of State reports or with its final views relating to individual communications. These decisions are neither legally binding nor politically enforceable. The inter-State complaints procedure, which is primarily designed to respond to gross and systematic Human Rights violations, provides even fewer prohibitions for effective action."[16]

Sometimes States submit the same reports as in previous years, and this does not represent an accurate view of the Human Rights situation in their country, especially when the report does not necessarily contain the entire picture. Also, States can submit a separate report for each treaty that they have signed and ratified. This further prevents an accurate picture of the Human Rights situation in their country from being clearly expounded, because it is submitted piecemeal. One reform already recommended by the UN is to make States submit one report for all of the Human Rights treaties they are signatories too. This will streamline the process and give a precise and comprehensive view of the Human Rights situation in their country. When States' reports are reformed

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[15] *Ibid*

[16] Nowak, Manfred, The International Covenant on Civil and Political Rights by Manfred in Felipe Gomez Isa *et al* (eds) (2006) International Protection of Human Rights: Achievements and Challenges. Bilboa: Deusto, pp. 138-153, at p. 152-153.

such that each State must write a single report for all Human Rights treaties to which it is a signatory, a truer depiction of its Human Rights record as a whole will come into view, and this will lend to a more powerful impetus for State reforms.

Relying on State reports is not enough. NGOs[17] are also faced with serious limitations and thus other sources need to be integrated as well. Other sources of information should inform knowledge of Human Rights practices in States, including that provided by NGOs and field missions, for example:

> "Field missions are a catalyst in raising awareness in civil society among NGO's, churches, political parties, national Human Rights institutions, academic circles and the media. The likelihood to implement the recommendations elaborated by the mandate holders (geographic or thematic) after the mission to ameliorate the situation are extremely low despite the fact that the description of the Human Rights situation in the country constitute a valuable tool for the UN and the international community to lead their action. In this connection, it should be underlined that a number of field mission reports of experts contained valuable indicators for early warning. One could cite reports such as the one of the Special Rapporteur on summary executions

[17] For an example of the vulnerability of person who suffers Human Rights violations at the hands of their government, when a person is tortured in a police station, the odds of reporting these Human Rights abuses are limited because they will be less likely to file a police report when it was the police against whom they seek a grievance, particularly in a State in which the government turns a blind eye or even encourages torture tactics by the police forces, therefore, if a particular NGO needs to rely on official police reports on the number of citizens tortured by the police, how likely are they to 1) locate such information and 2) publicise it. Additionally, anyone tortured by the police is not likely to report it out of fear and therefore, first hand accounts shared by those who experienced police torture are likely to be limited, with maybe only some NGOs knowing about these cases, and only NGOs that are able to work in the face of governmental suppression.

> regarding the situation in Rwanda before the 1994 genocide had started."[18]

Thus, any problem in implementation will naturally obstruct the effectiveness of the system. Fact finding missions are also recommended but it is important to keep in mind that any measures taken need to have follow-up mechanisms insuring implementation and enforcement. This point will be discussed further under the last recommendation in this paper. NGOs are also an important source of country information, especially if they are able to release information about the country or the country's government that is more truthful; thus supplementing or substituting State reports. However, because of constraints on NGOs, it is recommended that the UN set up a special body for the sole purpose of investigating Human Rights issues in countries. State reports are not enough, and independent experts as will be discussed in subsequent paragraphs are not necessarily enough, and fact finding or field missions oftentimes do face limitations.

Although it is the NGOs and not the United Nations that are more in touch with what is happening in a country, there are still limitations to relying solely on NGOs. When a UN expert receives Human Rights complaints regarding a particular country, he or she has to phone the NGOs, or organizations like Human Rights Watch, and Amnesty International to get specific country information to validate a complaint. They need for the information that they receive to be confirmed by an NGO. Another procedural weakness is in communications. Complaints maybe sent in by email and confidentiality of victims should be protected but in many cases there is a risk that the name of the sender gets forwarded along with the complaint.

A special body to research Human Rights situations in countries rather than relying on NGOs solves the problem

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[18] *Ibid, Supra, No.* 1, at p. 323.

caused by slowing down the process of following through on a complaint because the time spend on communicating with the NGO is excessive, and if there is political repression in the country in which the NGO is reporting on, the NGO may not be politically free to confirm if the complaint that it is being asked about by the UN Expert is in fact an issue. Since many NGOs are working against their own governments, there may be constraints against them. Much of the information they submit back to the UN Expert may be politicised or 'politically correct'. Thus, a special UN body to investigate Human Rights situations in countries, rather than relying on other flawed sources, needs to be created.

Another aspect of limitations is manifest by major gaps in the State reports submitted to treaty organs, for example, "Many problems are encountered by the Committee in the State reports submitted to it: 'incomplete coverage, abstraction and formality that leads States to stress their formal constitutional or statutory provisions rather than to offer a realistic description of practices; and great delays in filing reports."[19] Additionally, "the great weakness of the reporting system lies in the failure of certain States, frequently the biggest violators of Human Rights, to submit their reports to the Committee in a timely fashion."[20]

The issue of political will of States has negative implications for the reliability of State reports such that:

> "The Committee lacks any power to force or only induce governments to submit their reports on time, to cooperate in a proper manner and to comply with its recommendations resulting from the examination of State reports or with its final views relating to individual communications. These decisions are neither legally binding nor politically enforceable. The inter-State complaints procedure,

[19] *Ibid, Supra*, No. 12, at p. 710

[20] *Ibid*, at p. 713.

> which is primarily designed to respond to gross and systematic Human Rights violations, provides even fewer prohibitions for effective action."[21]

The reform of State reports is interconnected with the non-binding clauses of Human Rights instruments, making them seem optional and this point will be discussed further in the section on the political will of States.

3. Reform (3): 'Independent' (government representatives) Experts

Either a Special Rapporteur, Independent Expert or a working group of five members are affiliated with Special Procedures. The Commission deals with resolutions and is assisted by the Sub-Commission on the Promotion and Protection of Human Rights, a working group and individual experts, representatives and Rapporteurs mandated to report on, examine and monitor on countries or Human Rights violations (thematic mandates). These are the Special Procedures of the Commission on Human Rights.[22]

> "The mandates given to special procedures mechanisms vary, but they usually are to examine, monitor, advise, and publicly report on Human Rights situations in specific countries or territories, known as country mandates, or on major phenomena of Human Rights violations worldwide, known as thematic mandates. Various activities can be undertaken by special procedures, including responding to individual complaints, conducting studies, providing advice on technical cooperation, and engaging in general promotional activities.[23]

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[21] *Ibid, Supra, No.* 16, at p. 153.
[22] *Ibid, Supra,* No. 2.
[23] *Ibid.*

> 'Special Procedures' are the mechanisms of the Commission on Human Rights that deal with two separate categories, specific country situations or thematic issues throughout the globe. According to the OHCHR, there are currently 28 thematic and 13 country mandates. The OHCHR supplies the personnel and logistical aid to help them fulfil their mandates. The mandates generally examine, monitor, advise, and publicly report on Human Rights situations either by country or by theme. Special Procedures may respond to individual complaints, conduct studies, provide advice on technical cooperation and engage in general promotional activities. Resolutions create and define the mandates. These people do not receive salaries. Challenges confronting the system are delays in submission or consideration of reports, non-reporting, and duplication of reporting requirements among treaty bodies. These special *Rapporteurs*, representatives, envoys, experts are individuals of recognized international standing in the field of Human Rights. They serve in their personal capacity for a maximum period of six years during which they do not receive salaries or compensation for their work."[24]

Many hold government jobs and are not independent of their governments' positions on given issues. Another example of the so-called independence of the experts is the following, "The Human Rights Committee for the ICCPR has 18 experts nominated and elected by State parties to the ICCPR who examine State reports."[25] A reform-minded committee should be created at once to investigate the so-called neutrality of State elected representatives. "A minority of members have continued to hold government (diplomatic and other) posts,

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[24] *Ibid, Supra, No.* 1 at p. 287.
[25] *Ibid, Supra, No.* 6 at p. 14.

again qualifying the degree of possible independence from their governments' positions on given issues."[26] How can they be objective when they are elected by the State and represent the State? This must be reformed. They should be chosen not by the State but by a separate committee created especially for the purpose of examining State reports. They must not be government officials of States as this is clearly a conflict of interest. They should also be from countries different from the country of the State report which they will investigate, to further insure impartiality, neutrality, objectivity and fairness, as official State report examiners, not as country governmental officials.

State parties elect members or the UN Economic and Social Council (ECOSOC) elects member experts to perform functions in an independent capacity.[27] When it is the State parties doing the electing, is it not naïve to trust them? Wouldn't they choose someone who follows the status quo and makes their country look good? If this is the case, which much evidence supports, then how can they be independent? Especially when they are government officials? It is thus recommended to establish a reform minded committee which will oversee and carry out independent elections of an independent body of experts, along the same criteria as that set out in the above paragraph on State report examiners. According to Dr. Redondo, sometimes the experts cut and paste reports. Often, Special Rapporteurs use the media. By going to a country and finding and advertising violations of Human Rights and reporting them to the media in the official capacity as a UN Expert, the governments of States become upset. "For a treaty body to determine the veracity of the State reports, its members must use other sources for verification, such as "media reports, scholarly works, and above all, reports of international governmental and non-governmental organizations, but this has sometimes been met

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[26] *Ibid, Supra,* No. 12, at p. 707.
[27] *Ibid, Supra, No.* 6, at p. 5.

with resolute objections from government representatives and some members of the treaty bodies, including admonitions by the Chair declaring the official use of non governmental material to be out of order. Additionally, experts in the treaty bodies collect their information on their own."[28]

The risks of relying on State censored media are real because "counter-reports to the State reports attempt to be made public but States may keep them from reaching the media and in confidential government files."[29]

4. Reform (4): Non-Binding nature; Human Rights are not Optional

One of the first implementation weaknesses of the United Nations in terms of protecting Human Rights has to do with the non-binding aspects of mechanisms in that, for example, a State has to be part of a treaty and has to have voluntarily agreed to bind itself with a protocol.

A State that is not a signatory to a treaty is thus not bound beyond the doctrine of *jus cogens*, understood as a general principle adhered to by all 'civilised nations'. Although this doctrine should be legally binding, in the international community it is taken rather lightly by States, particularly in the area of Human Rights. A State that is not a signatory to a treaty is thus not technically legally bound although it may wish to appear to conform without the binding effect in order to simply save face, as the principle of *jus cogens* does factor in influencing the behaviour of States at times. Many States who are in gross violation of Human Rights are not signatories to the documents that would hold them accountable. Additionally, the system has many non-binding aspects.

A State may also be a member of a treaty, but not a signatory to an Optional Protocol. An Optional Protocol is "a

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[28] *Ibid, Supra, No.* 3 at p. 196.

[29] *Ibid*, at p. 196

separate treaty associated with a parent treaty, under which State parties to the parent treaty may choose to undertake additional obligations. Not all States which have ratified the original treaty may have ratified the Optional Protocol."[30] Additionally, to treaties the CERD and CAT give States the option of being obliged to individual complaints. This means States not declaring their wish to be legally obligated are free from having individual complaints made against them. This should be reformed. Giving citizens the right to make individual complaints should not be optional, but should be enforced upon the State. Another case in point is the Second Optional Protocol for the ICCPR which allows States to ratify it if they want to abolish the death penalty. This means States can use the death penalty, a violation of Human Rights, with impunity, so long as they do not ratify the SOP. This must be reformed, as Human Rights are not optional. Many States who are in gross violation of Human Rights are not signatories to the documents that would hold them accountable." For example: "In 1993, Canada, (a State party which abolished the death penalty exposed someone to the real risk of execution by means of extradition to the United States), was found in violation of Article 7 of the Covenant of the CCPR. However, since the United States has not ratified the First Optional Protocol to the Covenant, no individual complaints can be lodged directly against the US government."[31]

The existence of the Optional Protocol is a major problem. In a sense, the protection of Human Rights is a zero sum equation. It is an all or nothing situation in that every State must comply, or else everyone loses. Although having some Human Rights protection is clearly better than none, it is not enough to have some because the existence of loopholes by some States undermines Human Rights protection for all States. This means that the involvement of more than one State in

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[30] *Ibid, Supra,* No. 6, at p. 5.

[31] *Ibid, Supra*, No. 16, at p. 138-139

violation of either the Covenant or the Optional Protocol, or is not a party to one or either seems to create dangerous loopholes that limit individual complaints. This was clearly proven by the example of the above quote. Furthermore, "many States in which gross and systematic Human Rights violations occur are not (yet) parties to the Covenant or the First Optional Protocol, and only a minority of State parties actually make convincing efforts to comply with their obligations under the Covenant and with the legally non-binding decisions of the Committee."[32] Another issue regarding the Optional Protocol is that "delays in considering and disposing of cases under the Optional Protocol have become more common... by 1993, the average time taken from the initiation to the conclusion of a case was about three years."[33] Perhaps the major lacuna of UN Human Rights individual complaints procedures remains the absence of binding and legally enforceable decisions."[34] We all know well the validity of 'justice delayed is justice denied.'

The system has many non-binding aspects. For example,

> "There is no provision setting forth the precise legal effect of 'views', surely no provision stating that the 'views' are binding, or setting forth what follow-up should take place if the committee's views indicating that a State should take particular action (such as payment of compensation or release of a prisoner) are ignored by that State... The Committee is the only competent organ and its procedure is not very elaborate. Its 'views' are not to be understood as strictly binding in law and cannot be enforced."[35]

One of the weaknesses of the reporting system is that the reports can only make recommendations that are not

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[32] *Ibid*, at p. 140.
[33] *Ibid, Supra, No.* 12, at p. 742.
[34] *Ibid, Supra, No.* 16 at p. 201.
[35] *Ibid, Supra*, No. 12 at p. 739.

binding. "Control through individual complaints has been successful on the regional plane, most notably in Europe, but it has remained an exception at the universal level. The competence of relevant universal organs to receive individual complaints is optional and the examination results in non-binding decisions, such as 'suggestions and recommendations' or 'views'.[36] The final decision only offers 'views'. It is non-binding, unless a country has made it binding for its national court. A final comment regarding the non-binding nature of views, "there is no provision setting forth the precise legal effect of 'views', surely no provision stating that the 'views' are binding, or setting forth what follow-up should take place if the Committee's views indicating that a State should take a particular action (such as payment or compensation or release of a prisoner) are ignored by that State."[37]

The non-binding nature of Human Rights protection is problematic for another reason:

> "Many States in which gross and systematic Human Rights violations occur are not (yet) parties to the Covenant or the First Optional Protocol, and only a minority of States parties actually make convincing efforts to comply with their obligations under the Covenant and with the legally non-binding decisions of the Committee."[38]

Another limitation related also to the politisation of the system is that: "Moreover, the system offers in most cases the possibility for State parties to introduce reservations which weaken the application of a given international instrument."[39]

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[36] *Ibid, Supra,* No. 3 at p. 186.
[37] *Ibid, Supra,* No. 12 at p. 739.
[38] *Ibid, Supra,* No 16, at p. 140.
[39] *Ibid, Supra,* No. 1 at p. 286.

Additionally:

> "The international system of conventional mechanisms is slow and leaves outside its scope not only a number of States which are not parties to the two covenants and other international conventions but also types of violations which have not been foreseen in those instruments. Moreover, the optional quasi-judicial procedures in addition of being voluntarily are not foreseen in all the international Human Rights treaties. The Conventional mechanisms constitute a limited and imperfect system which improves progressively throughout the years but which still has a long way to go before it becomes truly universal."[40]

The implications of the Optional Protocol, with the Reservation system lead to an overall situation of non-binding obligations which undermine the effectiveness of the UN system for the protection of Human Rights as well as lowering the incentive of States to remain accountable to Human Rights protection.

Another inherent weakness is demonstrated in an example of the Commission on Human Rights, now the Council on Human Rights, which has a sub commission composed of 26 experts, and functions to denounce Human Rights violations. For example, accordingly to the council dealt with the Tiananmen Square Massacres in China. It is limited as a think tank only. It has its own set of internal rules which are considered random. This is an expert body that can give ideas to the commission but who cannot and do not adopt resolutions to countries. This is a commission dealing with gross violations of Human Rights. Additionally, communications are sent to the appropriate committee or the special Rapporteur which has no legal basis, thus the non-

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[40] *Ibid*, at p. 286.

binding nature of these communications is also an inherent weakness. It is also a well known fact that the competence of relevant entities to receive individual complaints is optional and review of these complaints can only result in what are usually called 'recommendations' or 'views', decisions which are in effect non-binding.

5. Reform (5): Being a Tattletale is good for Human Rights

Countries should simply be obliged to become signatories to Human Rights Conventions; to write reports and complain about each other. "A fourth mechanism permitting States to complain of violations of the treaties by one another has never been used."[41] Thus, it is recommended that not only this fourth mechanism be employed forthwith, but also that its neglect shall carry sanctions against the State in some manner.

Undeniably, it is strikingly obvious that one of the deepest inherent weaknesses in the UN system and its ineffectiveness in protecting Human Rights has to do with the lack of use by States of complaints against each other. When States do not hold each other accountable and complain formally via UN mechanisms against each other the accountability of State governments to actively enforce Human Rights is weakened and swept away by other agendas. Thus, it is clear that the effectiveness of UN mechanisms for the enforcement of Human Rights becomes greatly undermined. It is recommended that States should police each other, but within the United Nations formal mechanisms for Human Rights.

The UN system should be the means through which States hold each other accountable. To illuminate this point further, it is recommended that not only should States complain against each other, but that it should be incumbent upon them, nay forced on them, that if they are signatories to a Treaty of Human Rights and are aware of Human Rights violations in another

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[41] *Ibid, Supra,* No. 6 at p. 3.

State, and do not complain, they *will* be held accountable for being accomplices, and negligent. The same principles that apply in criminal law against an individual who acts to incite a crime or assist in its execution, or to obstruct the investigation of justice, may consistently apply when that individual is also a 'State' especially if it is committing a crime. Violations of Human Rights are crimes, such as the crime of genocide, for example. Why should a State be exempt when an individual is not? Why should States be allowed to commit crimes? When a State is a party to a treaty it is bound by law to the provisions of that treaty. Thus if another State violates a treaty that the first State is bound by and to, the first State has a moral duty to demand accountability. This moral duty should become also a legal duty and be held enforceable. Additionally, it is important for all States to comply with the UN system, rather than try to 'take the law in their own hands' by holding another State accountable for Human Rights by going about it independently and without the consensus of the Security Council or official UN mechanisms. The analogy with criminal law holds again. An individual may not take the law in their own hands; they must refer the investigation and the question of justice to the appropriate enforcement agency. In this case the UN should be the enforcement agency of States.

Countries are afraid to intervene in other countries internal affairs because they do not want other countries to interfere with them. It then becomes a case of covering up for each other:

> "The Human Rights Commission on Human Rights has double standards. Many countries do not want to change because of geographical issues or the number of members. If a country violates Human Rights and the General Assembly decides by a two-thirds vote that this is the case, they can suspend the country. However, because of politics, this is not always the case. The prime cause of the present crisis is the 'crisis of multilateralism', in other words

> the 'lack of political will' of member States. Thus, a change in the political climate is needed before a real revitalization of the UN can be achieved."[42]

If all countries are bound to complain about each other, knowing in turn that this opens the door to other countries complaining about them, the entire 'covering-up' dynamic and political games will cease, and Human Rights will finally have a real chance to be enforced, while investing the United Nations system with real authority and real legitimacy. This suggesting may appear naïve, but in fact it is not. What is naïve is to think that covering for each other will ever change Human Rights protection. If States were to report on each other, accountability would increase and our world would experience real changes in the area of Human Rights protection. It is naïve to think that not holding States accountable is satisfactory and it is naïve to think that holding States accountable would not succeed. It would create a real opportunity for Human Rights situations to be dealt with justly.

The politics affecting Human Rights implementation are related to relations between States in order to cover for each other or to prevent each other from interfering:

> "The entitlements of individuals are formally not international: technically, if a signatory State denies a right, it "violates" a provision of the relevant treaty. Strictly speaking, this State is not internationally responsible to the victim of the violation but rather to other State parties. Under many national legal systems, the individual does not derive his/her rights from the treaty itself, but from the provision of internal law that conforms

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[42] Bertrand, Maurice, Chapter 9, at pp. 193-208, in Roberts, Adam and Kingsbury, Benedict (eds) (1998) United Nations: Divided World. The UN's Roles in International Relations, Oxford: Clarendon Press, Oxford, at p. 199.

> in its content to the international norm. From the point of view of the beneficiaries this arrangement is not fully satisfactory. Namely, it is expected that the protectors of human beings in a given country are other, foreign States that have no links with them. As a rule, other contracting States will not spontaneously move to protest the violations of the provisions of a Human Rights treaty. More precisely, they will do so only if the stimulus is very strong and if action against another State party appears to coincide with other interests, or does not run counter to any of them. This is why foreign States will normally not make frequent use of their right under general international law or under Human Rights treaties, to insist on the international responsibility for violations of Human Rights qua violations of inter-State obligations. In other words, States have seldom been inclined to view the treatment of individual human beings as a breach of obligations towards other States, and not only the individual."[43]

Thus, because of the inherent nature of the system, unless States take responsibility for protecting Human Rights, individuals have fewer remedies available for them to protect each other. It is the State that must protect.[44]

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[43] *Ibid, Supra*, No. 3, at pp. 185-186

[44] The need for State protection is even more evident when the complaints system is analysed, for example, in, *ibid, Supra*, No. 1, "Furthermore, complaints cannot meaningfully be lodged if the relevant treaty or treaty provision is clearly only programmatic or provides for gradual implementation, where it is left to the discretion of the State party to determine at what pace the scope of the right and the circle of its beneficiaries will be expanded until the optimum is eventually reached," and "Finally, many States are still reluctant to accept complaint mechanisms, with the result that concerned individuals have no means to raise the point of the respect of the relevant Human Rights treaty. Without this, the international community, i.e., the United Nations, can act only in drastic cases of gross and systematic violations of Human

The confidential sessions that take place with governments, especially governments who are implicated in gross Human Rights violations, are in need of reform. In cases of gross Human Rights violations there are confidential dialogues with the accused government. However, there are no other parties present and because the dialogue is confidential it may allow the State to admit more in terms of Human Rights violations but consequently because it is confidential it may go no further than admittances. This process still undermines accountability. Governments are given a chance to speak to other governments in a confidential session about what happens in their country. In being confidential, it may allow a county to 'confess' more, but also in being confidential, it provides for nothing more than 'naming and shaming', and since it is done in an atmosphere where most of the States are in the same boat it is doubtful that there is any shame occurring.

Rights." Thus, States are still able to control the rate of Human Rights reforms within their countries, as the sovereign entities, regardless of the need for reform. State protection is crucial. Another example: "How can an individual lodge a complaint because he/she has been the target of national, racial or religious hatred incitement to which State parties of the ICCPR are, under it Art.20.2, obligated to prohibit by law, if the State has failed to enact appropriate laws or if they have been ineffective because of strong social resistance?" State legislation, or enforcement of Human Rights, if not in conformity with Human Rights will remain an obstacle to effectiveness. The role of the State is critical. Yet another example: "It will be observed here that the bearer of the obligation is not only the State, but also society as Art. 24 of ICCPR provides that 'measures of protection required by his (the child's) status as a minor are expected from his 'family, society, and the State". "Along the theme of social responsibility, "most painful and degrading practices to women are still imposed by religious and social groups, frequently in the face of strong opposition and criminalization by the State, as demonstrated by several Acts meant to protect women against harmful social practices which were passed by Indian legislature." In many of the examples we can thus see how the issues of State sovereignty and politics stand as impediments to the effectiveness of monitoring and implementing Human Rights internationally. Additionally, we see how procedural weaknesses in the State Reports system are caused by or influenced by politics.

> "Historically, the 1503 confidential procedure represented when it was established a considerable advance in the protection of Human Rights. For the first time a mandate permitted an international permanent mechanism to examine individual complaints, in spite of the fact that the procedure was incomplete and had a number of limitations due to its confidential character and the strong criteria of admissibility. However, governments soon started to utilise this confidential procedure while at the same time they continue to violate Human Rights. Theo Van Boven, while responsible of the UN Division of Human Rights, did not hesitate to raise the question as to whether certain procedures were not in 'danger of becoming screens of confidentiality to prevent cases discussed thereunder from being aired in public?"[45]

The confidential sessions are in need of reform. There are mixed aspects of positive and negative factors, it may well provide a forum to promote honesty, but no reports are made of the sessions and no one can go inside. It has been recommended to make the procedure public. The confidential sessions occur after a pattern of gross violations has been established and this could take more than a year and a half to be established.

Related to this idea of State obligation to inform on each other is an even more important idea, the obligations of State parties themselves. Many of the 'views' are not legally binding. In fact, it is always up to the State if Human Rights will be enforced in any given country or not. Domestic laws and policy as well as social forces determine how far Human Rights will be protected in a country. Ideally, the system should be legally binding on all States; all States should become member States with a willingness to deal with Human Rights issues in their

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[45] *Ibid, Supra*, No. 3, at p. 299.

countries. Some of the United Nations mechanisms are legal-treaties which are legally binding. Some of the mechanisms are political, such as the 'views' of the follow-up committee, or the idea that countries want to appear 'civilised' in front of the world and this is usually motivation enough for them to put into effect the non-legally binding 'views' of a committee. Even being a signatory to a treaty has been demonstrated insufficient due to the existence of tools like reservations or the flexibility given by the Optional Protocol.

Indeed, there is no superstructure above State sovereignty that can function as a world policeman, and no single country or group of countries should ever play this role. One needed reform connected to making the treaties legally binding means putting in place one United Nations mechanism that has the power to supersede countries' domestic laws and policies when they are clearly in violation of Human Rights. This means resolving the existing political crisis in the United Nations. Human Rights situations have sometimes reached crisis levels before UN Charter Bodies have been able to intervene. Thus it is recommended that the treaties be legally binding both upon individual States who sign a particular treaty and are in violation, as well as another State signatory to a treaty who is aware of another States' violation and thereby is not reporting it.

Another procedural weakness which could also be considered an inherent weakness has to do with politisation. Politisation has been discussed in terms of NGOs and UN Experts dealing with the media, but also has to do with relations between countries. Members of the Security Council may hamper the efficiency, particularly because of the power of the votes/ vetoes they have. Also, countries are afraid to intervene in other countries internal affairs because they do not want other countries to interfere with them. It once again becomes a case of covering up for each other. The Human Rights Commission on Human Rights has double standards. Many countries do not want to change because of geographical issues or the

number of members. If a country violates Human Rights and the General Assembly decides by a two-thirds vote that this is the case, they can suspend the country. However, because of politics, this is not always the case. Accordingly, "The prime cause of the present crisis is the 'crisis of multilateralism', in other words the 'lack of political will' of member States. Thus, a change in the political climate is needed before a real revitalisation of the UN can be achieved."[46]

Another dimension of the complexity of politics in affecting the UN mechanisms is highlighted by Vojin Dimitrijevic in saying,

> "The entitlements of individuals are formally not international: technically, if a signatory State denies a right, it "violates" a provision of the relevant treaty. Strictly speaking, this State is not internationally responsible to the victim of the violation but rather to other State parties. Under many national legal systems, the individual does not derive his/her rights from the treaty itself, but from the provision of internal law that conforms in its content to the international norm. From the point of view of the beneficiaries this arrangement is not fully satisfactory. Namely, it is expected that the protectors of human beings in a given country are other, foreign States that have no links with them. As a rule, other contracting States will not spontaneously move to protest the violations of the provisions of a Human Rights treaty. More precisely, they will do so only if the stimulus is very strong and if action against another State party appears to coincide with other interests, or does not run counter to any of them. This is why foreign States will normally not make frequent use of their right under general international law or under Human Rights treaties, to insist on the

[46] *Ibid, Supra*, No. 42, at p. 199

> international responsibility for violations of Human Rights qua violations of inter-State obligations. In other words, States have seldom been inclined to view the treatment of individual human beings as a breach of obligations towards other States, and not only the individual."[47]

Another way of viewing the lack of legally binding ethos:

> "this sort of immunity comes from the system itself which serves to denounce violations occurring in certain countries but at the same time protects from a sanction some given countries with strong political allies. The system operates in several stages as a sieve which excludes given country situations... The sieve eliminates the great powers, and the regional powers but not the small and medium sized countries, which in the opinion of Dag Hammarskjold should be protected."[48]

Another weakness in implementation due to politicisation is that sometimes special rapporteurs disappear.

6. Reform (6): Accessibility

"Justice begins with access to justice."[49] Professor Anne Bayefsky has attempted to make clear the intricate complexity of the workings of the UN Treaty Bodies to the general public, based on the premise that unless the Treaty Bodies mechanisms are understood by laypeople, they lose their effectiveness. As Professor Bayefsky succinctly explains,

> "The successful implementation of the Human Rights treaty standards, whether at the international or national level, depends on their accessibility to

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[47] *Ibid, Supra*, No. 3 at. pp. 185-186.
[48] *Ibid, Supra*, No. 1, at pp. 326-327.
[49] *Ibid, Supra*, No. 6, at p. 3.

> the victims of Human Rights abuse. This means both familiarity with the standards and access to remedial mechanisms."[50]

Human Rights protection cannot exist in reality if it is not available at the grassroots level to the very people it is intended to protect. When it is not, its value as an abstract concept is only on paper alone. It must be made accessible to those people most vulnerable and sadly, it is oftentimes those people who are most in need of Human Rights protection who have the least access to it, due to lack of education, poverty, political repression, lack of awareness, war conditions, and other reasons. Several reforms to counteract these forces and make Human Rights more accessible via the Treaty Bodies will be proposed and recommended. The importance of the treaties bodies is stressed by the fact that not only "are the UN Human Rights treaties at the core of the international system for the promotion and protection of Human Rights, but that every UN member State is a party to one or more of the seven major Human Rights treaties. It is a universal Human Rights legal instrument which applies to virtually every child, woman or man in the world."[51] It must be emphasised that without Treaty Body reform, Human Rights cannot reach the people who they most need to protect.

The limited availability or accessibility of information on the UN Treaty Body mechanisms for Human Rights protection for individuals, laypeople and victims of Human Rights violations is in need of serious reform.

Several recommendations to this end are proposed to reform this lack of availability of information:

(1) International multimedia campaigns using T.V., radio, and newspapers advertisements should be

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[50] The United Nations Human Rights Treaties. Bayefsky.com. http://www.bayefsky.com/.

[51] *Ibid.*

created to distribute information about Human Rights in general and Treaty Body mechanisms to which those in need may avail themselves to.

(2) Distribution of pamphlets to NGOs, including places of worship, community centres, schools, universities and grocery stores, (places that the 'average' person would have access to), should be put in place to provide the necessary information.

(3) Volunteers giving presentations in outreach programs to local communities on a global scale, to raise awareness of Human Rights making the mechanisms for Human Rights protection accessible.

(4) Simple, clearly written and unambiguous information on the procedures for reporting a Human Rights violation should be presented in brochures, advertisements, presentations and media clips world-wide, especially in developing countries disadvantaged by issues that impact quality of life and education negatively, such as conflict, war, poverty, and political repression.

(5) Resource booklets with contact names, numbers, a local NGO directory and a basic outline of procedures for filing a complaint should be distributed globally.

These basic recommendations can be carried out by both NGOs and UN volunteers for very little financial and time costs, but with far-reaching effects if done systematically, consistently, thoroughly, and globally, with a concentration on the more vulnerable global areas. These recommendations, if implemented by a newly created UN body headed by a competent expert; one who understands fully the challenges as described herein, and one possessing strong diplomatic ability and the highest integrity and moral standards, will

make the UN system fully accessible at grassroots level and can also weaken the political blockages of States suppressing Human Rights.

Another example of a procedural weakness has to do with reforming treaty bodies. The case of Bayefsky illustrates this point. Bayefsky received one million US dollars from the Ford Foundation to study and reform the treaty bodies. Her report was heavily criticised because it was written by an outsider to the UN system. The obviousness of the need for Treaty Body reform is even more pronounced: if one can only understand the Human Rights mechanisms of the Treaty Bodies by working inside, then it is clear the mechanism is flawed and the very critique of Bayerfsky's report confirms that, "the successful implementation of the Human Rights treaty standards, whether at the international or national level, depends on their accessibility to the victims of Human Rights abuse. This means both familiarity with the standards and access to remedial mechanisms."[52] Additionally, understanding of the process of Human Rights should be made assessable to the very people to whom Human Rights protection by the UN serves to protect. When the average person cannot understand the mechanisms, then how can someone in a poor, underdeveloped, war-torn country and lacking educational and economic resources ever appeal to the United Nation's system for Human Rights protections? This is also another reason why NGOs have tremendous power and value; they have insight of the procedures.

7. Reform (7): The Reservation System

The question of reservations is a point for further exploration. In what way and to what extent do reservations limit the scope of a treaty's obligations upon a State party?

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[52] *Ibid.*

> "A complaint cannot be brought alleging the breach of an obligation under the relevant treaty if the State has indicated, through a reservation, that it does not consent to be bound by that obligation. Such complaints will be declared inadmissible."[53]

Do they allow a State to evade responsibility by greatly limiting the obligations of a treaty to it? A fact finding commission should be created forthwith to analyse the full impact of the reservation system to see if it would be better to cancel it completely.

For example, what is known now about the reservation system is the following: "No reservation has yet been rejected by virtue of the objection of other State parties."[54] What an astounding statistic. It thus appears that States are simply giving each other license to make reservations freely. Perhaps they are afraid to intervene because they do not want intervention in their own affairs, as has been mentioned in previously in this paper. Essentially this is creating a situation in which all of them are going along with each other's Human Rights violations in guilty complicity and this must be reformed.

When State parties introduce reservations this weakens greatly the Human Rights protection instruments. Additionally,

> "The international system of conventional mechanisms is slow and leaves outside its scope not only a number of States which are not parties to the two covenants and other international conventions but also types of violations which have not been foreseen in those instruments. Moreover, the optional quasi-judicial procedures in addition of being voluntarily are not foreseen in

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[53] *Ibid, Supra*, No. 6, at p. 41.

[54] *Ibid*, at p.13.

> all the international Human Rights treaties. The Conventional mechanisms constitute a limited and imperfect system which improves progressively throughout the years but which still has a long way to go before it becomes truly universal."[55]

8. Reform (8): Manipulations of 'Public Emergency', 'Public Security' and National Security to Suppress Human Rights

Restrictions on rights due to national security are frequently misused. This should be reformed. To expand the argument further clear distinctions must be made in the provisions that allow restrictions of certain rights. These restrictions can only occur due to legitimate instances in which national security is threatened. However, there are instances where States invoke national security as the name under which Human Rights violations are committed, with impunity. The reality may rather be that it is more of an issue of State repression for reasons other than legitimate national security protection. In these cases, emergency or other laws are in place, undermining treaties which legally should supersede domestic law. In fact, these emergency laws are used by countries to justify the sovereignty of emergency laws and place them even over their own domestic laws and constitutions which have laws protecting civil rights. This is a highly debated area but it is possible to maintain national security and State sovereignty without undermining Human Rights protection. It is therefore important to make refined distinctions. The first distinction is between a real state of emergency in which national security is truly threatened, in contrast to a situation of either political repression or maintaining the status quo using any means possible. The second distinction requires defining clearly between the means to uphold national security, or to create

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[55] *Ibid, Supra*, No 1. at p. 286.

a state of fear among the citizens to maintain status quo or a political agenda. It is naïve to think otherwise. It is possible to defend national security without violating Human Rights. It is possible to employ legitimate legal means to prosecute in a fair manner those who threaten national security without suppressing an entire population and forcing them to live in fear of 'the government'.

For example, the ICCPR allows for derogeable[56] rights, for example, in a state of emergency. However, some governments may declare a 'public emergency' for reasons that have absolutely nothing to do with national security. Other governments will hide under cover of 'public emergency' and 'national security' in order to gain impunity from acts which violate Human Rights and do nothing to protect the public or the nation's security.

9. Reform (9): Finances. It's all about the Money, Honey: hiring a good accountant

Previously mentioned was the fact that at its inception the United Nations suffered from budgetary and financial constraints. Several different sources in the literature attest to this fact. "The United Nations has not lived up to the ideal envisioned at its origin... its financial crisis, in large part the result of the anti-UN mood in the American congress, has encouraged the need for reform."[57]

There is a serious lack of resources and programme reform is needed.

> "Serious financial problems at the United Nations have reduced the Committees' Professional Support Staff and resulted in substantial delays in the translation of State reports, all of which affects

[56] *Ibid, Supra*, No. 6 at p. 13.
[57] *Ibid, Supra*, No. 42 at, p. 193.

> the Committees' ability to discharge its mandate expeditiously."[58]

Additionally, to emphasize this point further,

> "The UN suffers from some structural deficiencies, mostly in the Secretariat and in some subsidiary intergovernmental organs which deal with programme and budget, which could be greatly ameliorated by the creation of a special committee to deal with these problems."[59]

The United Nations financial situation is in need of reform. As a result of under funding, limited staff and resources, with cumbersome procedures, the complaints process takes more time and this needs to be reformed. It is thus recommended to create an entirely new Treaty Body called the Reform Treaty Body. This new Treaty Body will be a volunteer-based Body with its own commission to carry out the reform recommendations. It is important to note that thousands of college and even high school students dream of participating in an internship or volunteering with the United Nations. These energetic and inspired young people can implement the Reform Treaty Body's mandate. Several well-known mechanisms exist in the monitoring and implementation of Human Rights, for example, reporting, interstate complaint, and individual complaints. "However, while the activities have been growing, the regular budget resources to finance such activities have not kept pace. Thus, the office has had to resort to voluntary contributions to support its core functions stipulated in the UN Charter."[60]

Thus, financial constraints hinder the effectiveness of the UN system. "Only 1.8 percent of the United Nations budget

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[58] *Ibid, Supra,* No. 12, at p. 714.
[59] *Ibid, Supra,* No. 42, at p. 199.
[60] *Ibid, Supra,* No. 1, at p. 339.

goes toward Human Rights."[61] This is another staggering statistic. Even a small stipend to offer them compensation will cost the UN less than funding for wars and peace keeping missions when Human Rights violations escalate into war situations.

Another budgetary weakness, according to Dr. Redondo, is the fact that "there is only one unpaid expert who works on all torture cases with one assistant in Geneva. The committee consists of 'ten experts of high moral standing and recognised competence in the field of Human Rights, who shall serve in their personal capacity', Article 17, par. 1)." This was written when the committee was established.

According to Dr. Redondo, there is only one expert who covers all the Human Rights cases within a certain theme. This means that not only all the torture cases, to name just one common Human Rights violation (that occurs practically worldwide), of a single given country, but all torture cases world wide. This is a tremendously huge amount of case work that far exceeds the capacities of any single person to handle alone.

For example, in a case involving torture:

> "In each single case the committee designates a rapporteur who most often together with the Secretariat will go over all documents in a case. Such documents are most often fairly extensive and not always written in one of the official UN languages. The Rapporteur then presents his view to the committee, which is seldom a divided view... The process leading to a decision on views takes time and may be painful to both the Rapporteur and to the Committee."

So, if in fact there is only one expert on torture the matter is

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[61] Dr. Elvira Dominguez Redondo, former UN employee

further complicated and the process and resources are further limited.[62]

There is a serious lack of resources and programme reform is needed. "Serious financial problems at the United Nations have reduced the Committees' Professional Support Staff and resulted in substantial delays in the translation of State reports, all of which affects the Committees' ability to discharge its mandate expeditiously."[63] Additionally, to elucidate further on this point, "the UN suffers from some structural deficiencies, mostly in the Secretariat and in some subsidiary intergovernmental organs which deal with programme and budget, which could be greatly ameliorated by the creation of a special committee to deal with these problems."[64] Here, the problem is not only finances but also 'structural' issues which require reform. Indeed, reform of the procedural weaknesses could in turn lend to a more effective system, leading to a streamlined use of the budgetary resources which previously have not kept pace with the activities, as established in previously sections of this article.

Another area for reform is when communications are sent to a working group. After establishing a pattern of gross Human Rights violations the working group forwards the communications to the plenary of Human Rights. The earliest response is one and one half years after the report is sent and no updates of the report in this time period are possible. The passage of this much time can allow severe Human Rights violations to occur before the plenary is aware of it, unless other measures are also undertaken.

10. Reform (10): Use of single conventions

Only one convention can be appealed to for any single case,

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[62] Sorensen, Bent, in, *Ibid, Supra*, No. 3, at pp. 181-182.
[63] *Ibid, Supra*, No. 12, at p.714.
[64] *Ibid, Supra*, No. 42, at p. 199.

thus, if one convention does not offer a strong case, all other paths are blocked, as one cannot appeal to another convention. A case can only go through one organ, except for one exception. Another procedural weakness is that each expert establishes his or her own method of work. The regulation that a complaint may appeal to only one single convention should be reformed. Many rights protected by some of the differing conventions also overlap in other conventions. Just because a case does not succeed in one convention does not mean that it would not have merit through another convention. A single complaint should be allowed to appeal to several conventions and their respective committees, at the same time, to increase the likelihood that their case will have a favourable outcome.

11. Reform (11): Individual Complaints

In addition to the seeming lack of accessibility of information, the process of individual complaints itself is difficult. Some of the problems of the complaints procedure:

> "may be frustrating for individual users. Complaints may not be acknowledged quickly because of backlogs at UN offices. The limited number of languages which Complainants may use can delay the submission or registration of complaints. The process is entirely in writing; complainants are not entitled to explain their circumstances in person. Three to five years may pass before a decision is rendered. When the decision is made, States may not be willing to implement a result which indicates a violation of Human Rights."[65]

Another problem with the individual complaints system is that:

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[65] *Ibid, Supra*, No. 6 at p. 3.

> "Procedures based on individual complaints, although very important and laudable, cannot ensure full overview and control of the implementation of international norms on Human Rights. They cannot even give a true picture of the Human Rights record of a given State. The basic reasons for this are the following, individual complaints are pointless if the right provided is not justiciable. Traditionally, economic, social and cultural rights have been believed to belong to this category and this explains why there is no complaint mechanism provided for in the International Covenant on Economic, Social and Cultural Rights. (ICESCR)."[66]

Although of course Human Rights are justicible, if a State does not make the domestic law in accord with Human Rights, protection is limited and it is the States' role to provide protection. Please also see footnote number forty one for a discussion of the role of the State in protecting individuals.

It is therefore recommended to create internship positions with volunteers to help with the backlog and to help translate the documents into UN languages, as well as to make in-person interviews with complainants. Pressure on States to implement the views of the committee should be enforced, as mentioned in previous paragraphs.

12. Reform (12): The most important reform.

Full participation of all States as members to all the treaties and protocols must be the ultimate goal. The only way to ensure the full protection of Human Rights for every single global citizen is to ensure the full participation of each of citizens' respective States in the UN system for Human Rights protection. This means the United Nations needs to create an entire campaign to bring every single nation as a

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[66] *Ibid, Supra*, No. 3 at p. 186.

member State and party to all existing Human Rights treaties and protocols.

This can be done by making efforts specifically with the aim of educating government officials, ministers and heads of State in a Human Rights culture with an awareness campaign done by UN volunteers and employees. Other United Nations organs can cooperate with the Treaty Bodies to set up at least mandatory training targeting every country's government. Trainings that are powerful, effective and morally and intellectually moving and transformative, in order to expose government officials to a Human Rights culture that will influence and convince them to be bound by all the treaties without opting out of 'Optional Protocols' or maintaining reservations. Without such an active campaign, directed at the governments of States, with the aim of transforming their consciousness as well as their conscience to instil or indoctrinate them with a baseline of ethics and morality to underpin a foundation for Human Rights protection and the dignity of their citizens, many counties will either not be signatories to treaties, or will not ratify the optional protocols, and many, many citizens will be left out of the UN system for the protection of Human Rights, without recourse to protection. Further, in the absence of engaging their conscience, these leaders will not protect Human Rights even if they have signed treaties. Education and awareness are always extremely powerful tools, and now it is government officials; policy makers who are in need of such urgent training and a paradigm transformation. The United Nations system can only be fully effective if all States are members and if all States are legally bound to protect Human Rights. This is a noteworthy aim in the service of Treaty Body reform. This is also a well known method used by NGOs on the grassroots level. What is needed now is also to do advocacy and awareness education and training at the governmental levels of all countries.

There is another dimension to this weak ability to implement Human Rights mechanisms, in that rights which

are seen as having a lower status than other rights, such as economic, social and cultural rights wrongly ranking below civil and political rights render the individual complaint process as moot because if the right in question is 'unenforceable' in the eyes of the State, it is difficult to protect and even more difficult to monitor the abuses of those rights by the State. This is why there is no complaint mechanism provided for in the International Covenant on Economic, Social and Cultural Rights (ICESCR). When the treaty to which a State is party to leaves discretion of implementation up to the State in terms of the scope of the right and to whom is the designated recipient, complaints are therefore again rendered moot. It should never be up to the State to decide 'if and when' but rather, 'now and how'. Clearly States who engage in Human Right violations would therefore decline to volunteer to accept complaint mechanisms, preventing vulnerable people from being able to benefit from the treaty or gain international intervention. Therefore, the decision should never be left to the State parties themselves. The political will of States is a dangerous prohibition to the enjoyment of Human Rights protection. When States fail to create legislation prohibiting discrimination, and when the social climate goes against a Human Rights culture, it is very difficult for an individual to complain against the State. It is incumbent on States to enforce Human Rights protection on themselves and on the society if the society is also violating Human Rights. However, this is the very dilemma in question, to ask someone who is doing something wrong to also legislate against it is extremely naïve. Other forces must be imposed on the State in the interests of Human Rights, otherwise, Human Rights protection will always remain an elusive and illusory dream.

Along the theme of social responsibility many Human Rights abuses occur in the name of 'religion' and 'culture' and it is also the duty of the State to see that Human Rights protection is sovereign.

13. Reform (13): Implementation and Enforcement

Beyond making every State an *accountable* member, the issue of implementation and enforcement must be addressed. By only having Human Rights on paper, and not having a binding system in place, Human Rights are not really accessible. So it is not enough for all States to be members, there must be a real system for implementation and enforcement of Human Rights. This can be achieved by creating a court or further empowering the existing international courts that deal with international law and Human Rights. A supervisory administrative body with quasi-judicial or full judicial powers must be put into place in order to ensure implementation and enforcement of the treaties.

In non-European countries Human Rights are sometimes seen as a way to control domestic policies, as neo-colonialism. This erroneous view makes the protection of Human Rights via the United Nations difficult. An example of this may be taken from the case of Rwanda, in which the UN officers were not wanted because they were part of the UN system. African officers of the Peace Keeping Unit were accepted whereas United Nations officers in general were viewed with suspicion:

> "On Rwanda, from the Human Rights point of view, the Human Rights Commission met in special session in May 1995 and adopted a resolution in which it established the mandate of a Special Rapporteur on the situation of Human Rights in Rwanda and requested the High Commissioner to put into place a team of Human Rights field officers to assist him in the discharge of his mandate. Public criticism of the start up of the operation has been severe. There was no pre-existing capacity or experience to recruit and deploy a large number of Human Rights Field Officers and the pace of deployment was constrained by lack of logistical support. The High Commissioner

> did not receive funding but appealed for voluntary contributions from governments which were slow in being paid, logistic assistance took too long, and field training was inadequate. In fact, the question of access by Special Rapporteurs is central to the success of the programme and one of the principle challenges of the future."[67]

Implementation weaknesses are found as well. The final decision only offers 'views'. It is non-binding, unless a country has made it binding for its national court.

The most serious implementation weakness can be demonstrated by the following case. The United Nations has no mandate because of the lack of permission to use force, as was the case in the Rwandan killings of the Tutsi by the Hutus. On the ground, when the Hutus were killing Tutsis in front of UN Peace Keeping Forces, the Tutsis were imploring the Peace Keepers to do something, to save them, but because there was no mandate for the Peace Keepers to use force in the case of Rwanda, the Tutsis were killed right in front of Peace Keeping officers who could do nothing, since the only mandate it had was to keep peace, but not to interfere. In the case of Rwanda, according to the point of view of those on the ground who were killed in front of UN Peacekeeping forces, these people feel the United Nations failed them in that it was unable to do what it was supposed to do, to protect Human Rights, and to prevent one of the biggest causes of Human Rights violations, war. Even as far back as 1988, eight years before the Hutu/Tutsi crises, Maurice Bertrand wrote, "The United Nations has not lived up to the ideal envisioned at its origin: its role in the maintenance of peace is minor and its influence on the solution of global economic and social problems very limited."[68]

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[67] Mukherjee, Bhaswati in, Ibid, Supra, No. 3, at p. 399.

[68] *Ibid, Supra*, No. 42 at p. 194.

Constraints in procedure and budget are most likely a major reason why field missions are limited, to the detriment of prevention of Human Rights abuses:

> "Field missions are a catalyst in raising awareness in civil society among NGO's, churches, political parties, national Human Rights institutions, academic circles and the media. The likelihood to implement the recommendations elaborated by the mandate holders (geographic or thematic) after the mission to ameliorate the situation are extremely low despite the fact that the description of the Human Rights situation in the country constitute a valuable tool for the UN and the international community to lead their action. In this connection, it should be underlined that a number of field mission reports of experts contained valuable indicators for early warning. One could cite reports such as the one of the Special Rapporteur on summary executions regarding the situation in Rwanda before the 1994 genocide had started."[69]

14. Conclusion

It is an established fact that reform of the UN Treaty Bodies is in need. As the thematic analysis clearly established in this article, the interrelationship of several important factors, namely budgetary, procedural, implementation and political factors play an interrelated role in hampering the overall effectiveness of the United Nations system for Human Rights monitoring. It has been set forth clearly within the analysis of procedural weaknesses, how the Individual Complaints process as it now stands and the non-binding aspects of several procedures contribute to ineffectiveness, as well as the State reporting system. That the United Nations mechanisms in terms of protecting Human Rights are ineffective is clear.

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[69] *Ibid, Supra*, No. 1.

The United Nations system has developed tremendously in the course of its existence and has made a difference; this is valued and cannot be denied. However, in the final analysis, the ineffectiveness remains a reality towards which serious reform in the future will hopefully remedy. In the view of the Rwandan victims of Genocide, it was not effective, but in other conflicts across other nations it has made a considerable difference in spite of its weaknesses.

In addition to streamlining the procedures and changing the political attitude of States, a system for enforcement and implementation is needed, as well as a body for fact finding. Political *naïveté* is one aspect of the problem that also needs to be addressed. Budget issues can be dealt with easily with volunteerism. The nature of the entire system needs also to be made binding so that people can really have their Human Rights, in fact and not only on paper.

Many of these weaknesses in the UN system have been already identified by the United Nations, for example.[70]

This study found that the four emergent themes of budget issues, inherent weaknesses in the system, procedural dilemmas, and problems with implementation and enforcement cover the major areas of the problems facing the United Nations Human Rights protection mechanisms. The recommendations set out herein, if implemented would bring about significant reform to the system. The recommendations themselves are not optional, they are necessary. It is beyond the scope of this article to fully enumerate the steps needed to prevent Human Rights violations, although the section covering the political will of States has given practical suggestions, which,

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[70] *Ibid, Supra*, No. 2: According to the 2002 report by the UN Secretary General, Strengthening the United Nations: an agenda for further change, he identified modernization together with crafting a more coordinated approach to treaty body activities, standardizing their various reporting requirements, allowing each State to produce a single report on its adherence to all Human Rights treaties to which it is a party.

if implemented would indeed put a dent in the frequency of Human Rights abuses.

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APPENDIX A

The Mechanisms

The United Nations mechanisms for the protection of Human Rights may be divided according to whether they are classified as Charter bodies or Treaty Bodies.

There are four Charter Bodies: the Human Rights Council, the Commission on Human Rights, the Special Procedures established by the Commission on Human Rights, and the Sub-Commission for the Promotion and Protection of Human Rights. There are seven Treaty Bodies.

In addition to these and the seven Treaty Bodies there are other instruments. They are: the United Nations General Assembly, the Third Committee of the General Assembly, the Economic and Social Council and the International Court of Justice. Additionally, many United Agencies and Partners are responsible for promoting Human Rights.

The Commission deals with resolutions and is assisted by the Sub-Commission on the Promotion and Protection of Human Rights, a working group and individual experts, representatives and *Rapporteurs* mandated to report on, examine and monitor on counties or Human Rights violations (thematic mandates). These are the Special Procedures of the Commission on Human Rights. The importance of the treaties bodies is stressed by the fact that not only, "are the UN Human Rights treaties at the core of the international system for the promotion and protection of Human Rights, but that every UN member State is a party to one or more of the seven major Human Rights treaties. It is a universal Human Rights legal

instrument which applies to virtually every child, woman or man in the world."

It is important to include a brief overview of the Treaty Bodies. According to the OHCRH, "the Human Rights treaty bodies are committees of independent experts that monitor implementation of the core international Human Rights treaties. They are created in accordance with the provisions of the treaty that they monitor. The Human Rights Committee (HRC), which monitors implementation of the International Covenant on Civil and Political rights and its protocols, The Committee on Economic, Social and Cultural Rights (CESCR), which monitors implementation of the International Covenant on Economic, Social and Cultural Rights, The Committee on the Elimination of Racial Discrimination, which monitors implementation of the International Covenant on the Elimination of All Forms of Racial Discrimination (CERD), The Committee on the Elimination of Discrimination Against Women, (CEDAW), which monitors implementation of the Convention on the Elimination of All Forms of Discrimination Against Women, The Committee Against Torture (CAT), which monitors implementation of the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment, The Committee on the Rights of the Child (CRC), which monitors the implementation of the Convention on the Rights of the Child and its Optional Protocols, and the Committee on Migrant Workers (CMW), which monitors the implementation of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. These Treaty Bodies perform a number of functions in accord with the provisions laid out in their treaties including: consideration of State parties' reports, consideration of individual complaints or communications, and the publication of general comments on the treaties and organized discussions on related themes. In addition to the reporting procedure some of the treaty bodies may perform additional monitoring functions through three other mechanisms: the inquiry procedure, the examination

of inter-State complaints and the examination of individual complaints. The committees publish general comments and the treaty bodies hold annual meetings of chairpersons of Human Rights treaty bodies and inter-committee meetings." (From OHCHR 1996-2006 Office of the United Nations High Commissioner for Human Rights.) Http://www.ohchr.org/english/bodies/treaty/index.htm.