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LOOKING PAST THE HUMAN RIGHTS COMMITTEE: 
AN ARGUMENT FOR DE-MARGINALIZING 
ENFORCEMENT

Makau wa Mutua

1. INTRODUCTION

The primary purpose of human rights law is to contain the predatory impulses of the state. The theory of human rights sharply encumbers traditional conceptions of state sovereignty which abusive states have historically used as a defense against the enforcement of international human rights norms. Just a mere fifty years after WWII, there is an impressive catalogue of universal and regional human rights instruments and institutions. Whether their mandate is simply to monitor, encourage compliance with, or enforce human rights norms, human rights bodies have now become part of the normal fabric of international topography. Sovereignty no longer affords states the same impunity for internal misconduct that it once did. It is the argument of this article, however, that many official international human rights bodies such as the Human Rights Committee (HRC), which is the focus here, are basically weak and ineffectual. Largely due


to the limitations placed on it at conception, the HRC has been unable to penetrate either the surface or the conscience of most states to meaningfully advance the ICCPR.

The official enforcement of human rights norms at the universal level has taken two basic approaches. The first approach is carried through treaty bodies and the various UN Charter-based organs, such as the HRC and the UN Commission on Human Rights. It is a vertical, top-down approach whose processes range from the quasi-judicial to the political. Its activities range from investigation to deliberation. Generally, its decisions are taken either consensually or by a simple majority of the body in question. This "vertical" approach is usually presented as being representative of major world traditions and is, therefore, the universally acceptable process for ensuring compliance with, or enforcement of, human rights norms. In contrast, the second approach mainly uses the economic -- but rarely the military -- power of one state against another ostensibly to force compliance. Although the vertical approach is cloaked in international legitimacy, it is very often captive to power politics and the influence of hegemonic states. The horizontal approach, on the other hand, is open to charges of self-interest since the enforcing state is only answerable to its internal processes.

In reality, both the vertical and horizontal processes are complexly intertwined. Sometimes, the vertical processes only seem to work because of the pressure or threat of horizontal enforcement. But it is the argument of this article that the ineffectiveness and inconsistency of the first approach opens the door to the second approach. The vacuum left by the former makes the latter possible. In other words, the impotence of the universally agreed or collective enforcement or compliance processes allows individual states to exploit the human rights idiom for their own foreign policy agendas. But objections to the horizontal approach pose a terrible dilemma: what should an individual state do


4 "Official" here refers to United Nations and other intergovernmental machineries, such as the regional systems in Africa, Europe, and the Americas, also known as "vertical" enforcement, as well as to bilateral or state to state enforcement, sometimes referred to as "horizontal" enforcement.
when another is violating rights, and the vertical processes are powerless to intervene? Such a dilemma, it would appear, calls for the establishment of a more effective universal system.

The horizontal approach is only available to a few powerful or hegemonic states. Given other competing national interests that drive foreign policy, it is simply unacceptable that the enforcement of human rights should be left to the whims of such states. An approach that excludes small and weak states aligns human rights with an unjust world order and provides stronger states with one more weapon against those who are less powerful. What is needed is international supervision and implementation processes that avoid the weaknesses of the vertical approach and the selectivity of the horizontal approach. The manipulation of bodies such as the UN Commission on Human Rights or the UN Security Council by dominant powers to advance their national goals under the guise of exercising "legitimate" international authority may never be eliminated but it can be made more difficult by the creation of more effective and impartial organs to act as the primary international arbiters in human rights questions.

Using the HRC as the basic laboratory, this article argues that supervision and enforcement strategies that either make concessions to traditional conceptions of sovereignty or encourage individual states to unilaterally sanction weaker ones outside the international framework harm the human rights project. Both strategies undermine the basic purpose of the corpus: that states internalize human rights norms and allow them to penetrate and transform their domestic legal and political cultures. Supervision or enforcement mechanisms that are ineffectual or are seen as selective or biased reduce the potency of the idea of human rights, and undermine the urgency of protecting basic freedoms. Thus states, who are the main targets of human rights, and are generally reluctant to be restrained, use these weaknesses as a pretext for non-compliance.

This article proposes, as one response to this crisis of the legitimacy of the enforcement of human rights, that the HRC be abolished and replaced with two prominent enforcement bodies, one judicial, the other policy-oriented. They would be organs with the power to censure domestic legal systems and to regulate the use of military force and economic power for human rights purposes. One of the primary objectives of such bodies would be to "de-politicize" the enforcement of human rights and prohibit powerful states from unilaterally "policing" the world. Such a drastic step may enhance the legitimacy of the corpus and make its application a matter of principle and legal obligation, and not merely of narrow national interests, morality, or convenience.
Otherwise, states will continue to eagerly ratify human rights instruments only to honor them in breach.

This article is not concerned with the private enforcement of human rights through "shaming" by international non-governmental organizations (INGOs) or other non-official actors. Nor does it address enforcement at the national level by domestic non-governmental organizations (NGOs) or national state organs such as courts or other country-specific fora. The article touches on, but does not discuss in depth, the role of regional intergovernmental organizations such as the Organization of African Unity, the Council of Europe, and the Organization of American States. Although these are important venues and structures, many of them, with the possible exception of the European system, either largely reproduce the power paradigms spelt out by the two basic approaches addressed in this article or operate within them.

The thesis of the article is supported by a critical evaluation of the history, work, achievements, and failures of the Human Rights Committee. Thus the assessment of the HRC draws heavily from an analysis of its work. In particular, the article looks closely at state reporting and the concluding observations on state reports, general comments, and views issuing from communications. These functions are not evaluated out of context but are related to the history of the HRC, its place in the human rights universe, and ultimately the raison d'etre of the human rights corpus.

The critical questions that the article returns to address the effectiveness of the HRC as conceived by the drafters of the ICCPR and the Optional Protocol. If the drafters did not intend a body that would "enforce" or "apply" the ICCPR, what did they have in mind? Was the HRC only primarily intended to "encourage" compliance with the ICCPR, or were there other plausible roles for it? Could the Committee members have done more to make the HRC more effective? How, and in what directions could Committee members have developed the Committee's work, and given it more depth?

II. THE HRC: PROBLEMS OF ORIGIN AND CONCEPTION

In the last fifty years, it has become a settled principle of international law that a state's treatment of its own citizens is not just a matter of domestic
Of course, human rights is not the only discourse that constrains the power of the state. In recent decades, the forces of globalization, the seeming triumph of markets, and the unprecedented predominance of global capitalism in the political and economic choices of states have further diminished the freedoms of the sovereign state. But arguably, human rights ideas have added an entirely new dimension to the understanding of the concept of state sovereignty. Where previously the state or the monarch representing it was the absolute sovereign, human rights norms now vest a large chunk of that sovereignty in the people. The new conception of sovereignty, which is expressed both in the Universal Declaration of Human Rights (UDHR) and the ICCPR, is termed popular sovereignty. It grew out of the liberal tradition, humanitarian law, international labor standards, and regimes for the protection of minorities. Such sovereignty derives from the people, not the state. The most poignant expression of this view sees political democracy, a government based on the free will of the citizenry, as an international legal obligation.

In the years immediately following WWII, the idea that the legitimacy and sovereignty of a state rested on its citizens and the rights enjoyed by them was a radical departure from existing paradigms in international law. Between 1948 and 1976 — the period between the adoption of the UDHR and the entry into force of ICCPR — the United Nations passed a number of specialized human

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7 The ICCPR buttresses the conception of popular sovereignty by its self-determination clause which can be read as giving citizens their right to "internal" self-determination, that is the right to a democratic state based on the freely expressed will of citizens. See ICCPR, supra note 3, art. 1. Further, the expressive and political participation rights provided in the ICCPR point to the idea of popular sovereignty. See id. arts. 19, 21, 22, and 25.
8 See generally John Locke, TWO TREATISES OF GOVERNMENT (Peter Laslett ed., 1988).
9 See E. C. STOWELL, INTERVENTION IN INTERNATIONAL LAW (1921).
10 See C. W. JENKS, INTERNATIONAL LABOR STANDARDS (1960).
rights treaties further limiting the power of the state towards its citizens. This initial rush of activity, which created a formal corpus of international human rights law, was spurred by the Holocaust. But the intensity of the activity must not, however, be confused with a zeal by states to be supervised by international bodies. Nowhere was this gulf between a theoretical commitment to international human rights, on the one hand, and the creation of robust and effective international supervisory bodies, on the other, more visible than in the drafting of the ICCPR and the Optional Protocol. The impressive catalogue of rights guaranteed by the ICCPR and the corresponding weaknesses of the HRC are a testament to a basic trade off in virtually all human rights instruments and institutions. As a general rule, states are reluctant to couple a strong instrument with a powerful and effective enforcement body.

Within the UN human rights universe, two types of bodies are charged with the promotion and protection of human rights. The first, chronologically, are the UN Charter-based organs which enjoy broad mandates "to promote awareness, to foster respect, and to respond to violations of human rights standards." The most important of these organs is the UN Commission on Human Rights. The second type are created pursuant to specific treaties, such as the ICCPR's HRC, and are meant "to monitor and encourage compliance" with the treaty in question. Most treaty bodies evaluate state reports and consider individual complaints.

In theory, treaty-based organs ought to be the most important fora for monitoring compliance with or enforcing human rights norms since they are mandated to specific treaties. In reality, however, such bodies have few powers, a fact which generally renders them weak. The maze of UN human rights bodies now includes eight treaty bodies, six of which monitor compliance with the most important human rights treaties. These are: the HRC, the Committee on the Elimination of Racial Discrimination (CERD), the Committee against Torture (CAT), the Committee on the Elimination of Discrimination Against Women (CEDAW), the Committee on Economic, Social and Cultural...
Rights (CESCR), and the Committee on the Rights of the Child (CRC). These committees monitor compliance with human rights through a state reporting system and, with the exception of the CESCR, the CRC, and CEDAW, consider complaints of violations from individuals. The proliferation of committees with virtually identical mandates places unnecessarily heavy burdens on states. States must prepare different reports to the different bodies, and respond to individual complaints in different fora. This flurry of duplicative activities saps the energy of states and squanders the force of the treaty bodies. A more effective and prudent course might be the unification of the reporting and complaints systems under one or two bodies. That probably would raise the visibility of the reconfigured bodies, lead to more comprehensive state reports, and generate more interest in the performance of states. One official UN study has suggested three options for addressing these problems: reduction in the number of treaty bodies, and hence the number of reports required; the preparation by states of one "global" report to be submitted to all bodies; and the replacement of comprehensive reports with specifically-tailored ones.

The weaknesses of the HRC appear to be related to the politics of the times during its conception. The deep ideological conflicts of the 1950s and

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17 See id. The CESCR is different from the others; it is not provided for in the International Covenant on Economic, Social and Cultural Rights. G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S., 3 (entered into force Jan. 3, 1976). It was formed by the Economic and Social Council (ECOSOC) "ostensibly to advise it on the implementation of the relevant treaty (the Covenant on Economic, Social and Cultural Rights), but in reality to perform all the Council's relevant treaty-based functions on its behalf." Alston, supra note 2, at 10-11. The two other treaty bodies were established to address apartheid. They are the Group of Three established under the Convention on the Suppression and Punishment of the Crime of Apartheid. G.A. Res. 3068 (XXVIII), Annex, (1973), and the Commission against Apartheid in Sports established under the International Convention against Apartheid in Sports. G.A. Res. 40/64, Annex, (1985).

18 An inter-bodies meeting called the Meeting of the Chairpersons of the Human Rights Treaty Bodies has been convened biennially since 1984 to "promote better co-ordination, to reduce overlapping, and to rationalize the burden on States that are parties to many of the treaties." Alston, Appraising the United Nations Human Rights Regime, in UNITED NATIONS AND HUMAN RIGHTS, supra note 2, at 11. So far the meetings do not appear to have produced concrete results to address these questions.

1960s when the ICCPR and the Optional Protocol were drafted may largely account for the HRC's lack of teeth. One human rights scholar has commented that during the cold war "it was inevitable that compromises over incompatible points of view took the form of terse and ambiguous provisions about institutional purposes and powers whose language lay unexplored." Perhaps so. But one could also take the less generous view that the ambiguity in the language was a pretext by states to create a weak body. States are less concerned about norms that orbit in space without an institutional anchor. No matter how penetrating norms may be, states are not threatened unless those norms are embedded in institutions that can exercise real scrutiny over internal state conduct.

No purpose will be served here by exploring the travaux preparatoires for the justifications of the powers and institutional purposes of the HRC. It will suffice to note the broadly accepted wisdom regarding its creation. The determination of the HRC's functions and powers followed intense negotiations between Western states, the socialist bloc, and the emergent Third World. Most states agreed during the drafting of the ICCPR that the primary obligation for implementation rested with states at the national level, leaving the duty for the enforcement of the covenant at the domestic level. This was consistent with extant international law. International law was not meant to displace national law or do away with the national implementation of international legal obligations. But disagreement arose when some states interpreted some proposals as departing from this tradition. Ideological and political differences emerged over the scope, nature, and types of international supervisory measures.

There is little sense in apportioning blame to the various blocs for the final outcome. The three blocs, and virtually all states, were opposed to intrusive and strong international supervisory, let alone implementation, measures.  

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21 For a more complete description of the travaux preparatoires of the ICCPR, see Manfred Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary (1993); see also M. J. Bossuyt, Guide to the "Travaux Preparatoires" of the International Covenant on Civil and Political Rights (1987).

While some states opposed all international measures, the majority obtained a compromise to establish an organ with sharply reduced powers. Jealousy over national sovereignty was the stumbling block. Prior to the compromise, some of the proposals for the enforcement body included an International Court of Human Rights; the creation of an Office of High Commissioner or Attorney General for Human Rights; and a procedure giving the HRC fact-finding powers as well as the authority to initiate inquiries. As it turned out, the HRC's only compulsory functions were to "study the reports submitted by States Parties" and to "transmit its reports, and such general comments as it may consider appropriate." Communications or complaints by one state against another were made completely optional and petitions by individuals charging violations were severed from the ICCPR and transferred to the Optional Protocol.

The HRC's three key functions -- examining state reports and commenting on them, producing general comments aimed at states parties, and considering individual complaints -- ostensibly allow it to penetrate the state and urge compliance or seek the enforcement of the ICCPR. According to Steiner, the HRC and other treaty bodies make the ratification of treaties more meaningful because norms embedded in institutions make international pressure to comply more realistic. He writes:

Anchoring norms in institutions, however, raises the cost of joining. Institutions make rights more effective by threatening or taking actions that may lead a state to comply. Institutions with real power cut to the bone of sovereignty. No wonder that intense fights over the provisions creating the new institutions became the rule.

The question, in the particular case of the HRC, is whether after the "intense fights," Steiner refers to, the body created could still "cut to the very bone of sovereignty," or whether states were happy to subscribe both to the ICCPR

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23 See, McGoldrick, supra note 22, at 13.
24 ICCPR, supra note 3, art. 40(4).
25 Id.
26 See id. art. 41.
28 Steiner, supra note 20 (see text immediately before n.5).
and the Optional Protocol, comfortable that they had blunted the HRC's sharp edge and had nothing to fear from it. This is an intriguing question in part because an overwhelming number of states have ratified both the ICCPR and the Optional Protocol, even though many of them remain serious violators of the instruments they have promised to honor. For instance, states as diverse as Zaire (now the Democratic Republic of Congo), Guatemala, Sri Lanka, Democratic People's Republic of Korea, Republic of Korea, Argentina, Bulgaria, Poland, Romania, the Russian Federation (the successor to the former Soviet Union), Iran, and Iraq, to mention a few of the more serious violators, signed many of the key human rights documents. Many of them appeared to have bought into a fashionable discourse in the belief that the effect, if any, on their sovereignty, was negligible.

Many liberal democratic states such as Finland, Switzerland, Sweden, Canada, Japan, and Costa Rica -- the "good" states -- have also ratified the major human rights instruments. These states appear to have relatively little fear of human rights instruments because their laws, policies, and practices do not vary greatly from human rights norms. In other words, the substance of international human rights is reflected in their domestic practices. In both cases -- of the "bad" and "good" states -- joining is not associated with real cost because of the general impotence of universal supervision or implementation measures. But anchoring norms in institutions is not enough. To be taken seriously by states across the board, and especially by those "middle" states which are neither gross violators nor those with impeccable credentials, institutions must have some power to cut to the bone of sovereignty.

The idea of the HRC as a body that could penetrate state sovereignty was a radical one at the time it was established because it departed from custom.

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29 As of August 1, 1997, 92 of the 138 parties to the ICCPR had also ratified the Optional Protocol (OP). See Report of the Human Rights Committee, U.N. GAOR 52nd Sess., Supp. No. 40, para. 1-4, U.N. Doc. A/52/40 (1997). It is important to note, however, that some of the most populous states, such as the Peoples' Republic of China, India, and the United States, which together have roughly half the world's population, have not ratified the OP.


31 See generally Makau Wa Mutua & Peter Rosenblum, Lawyers Comm. for Human Rights Zaire: Repression as Policy (1990). This publication documents and analyzes the systematic violation of human rights by the government of Zaire as a matter of official policy.
But that radical departure from tradition was not carried far enough in actual practice. Once states had agreed to the notion of international supervision in the implementation of the ICCPR, it was incumbent upon them to create a body capable of meeting that challenge. Otherwise they would take with the one hand what they appeared to have given with the other. In the event, they seem to have done just that: the functions that the HRC was empowered to routinize were disappointing when measured against the reach and scope of the ICCPR. Rather than become an effective supervisory organ over states, the HRC has done little to overcome or shake the intransigence of states to comply. Its failure to achieve more has certainly dimmed the aspirations of an earlier age. While the UN and regional organizations have dozens of other bodies that seek state compliance with and implementation of human rights, the powers given -- or denied -- to the HRC were not a good signpost for succeeding treaty bodies.

III. THE ORGANIZATION AND INSTITUTIONAL CULTURE OF THE HRC

Perhaps as important as the activities of the HRC are its organizational structure and institutional culture, the election and composition of its members, and its operational relationships with other UN agencies. These indicia define the character of the HRC and shape its personality, factors which ultimately help determine its relationship with the states it interacts with. These variables are all the more important because of the ambiguity of the text creating the HRC and defining its powers. They offer the HRC with a possible avenue for asserting itself more forcefully. HRC members could use these factors as a reason for inventiveness and boldness.

The basic structure and composition of the HRC is set by the ICCPR. The HRC is not a UN body as such; technically, it is a committee of eighteen "independent" experts who are elected by states parties and who work part-time. This formal independence is not what it appears upon further scrutiny. The Committee is tied in to the United Nations much more tightly than this language would suggest. The UN General Assembly provides the HRC members with their emoluments. The UN Secretary General provides the

32 See ICCPR, supra note 3, art. 28 (providing for the establishment of the HRC).
33 See id. See also Opsahl, supra note 22, at 369.
34 See ICCPR, supra note 3, art. 35.
HRC with staff and facilities, mostly through the UN Centre for Human Rights, now the Office of the High Commissioner for Human Rights. In reality, therefore, the HRC is part of the United Nations. These linkages make the Committee more dependent on the politics and the official bureaucracies of the UN, factors that import the legendary caution and self-restraint of the UN to one of its "independent" bodies.

The process and criteria for the election of members and its methods of work are additional problem areas that have had a deleterious effect on the work of the HRC. Although the ICCPR favors "persons having legal experience," the candidates must be nominated by their own states, and then voted on by all states parties. Thus, candidates are "appointed" by their states and quite frequently many have been close to their governments where they have held senior positions. It is difficult to see how, in the pre-1990 period, some of the Committee members, especially those from the socialist bloc, could have been independent of their governments. Some may even have served as instructed agents of their states. In any event, traditional cold war ideological differences were often reflected in the Committee's work, and tended to divide members into political blocs.

Another troubling issue is the absence of security of tenure for Committee members, or some other device for ensuring independence. The requirement that they be re-elected by states parties after the initial four-year term may chill their freedom to act forcefully. Perhaps members should only be elected for one terminal ten-year term. Otherwise, the close affinities and relationships between members and their states could adversely affect their independence. This, together with the HRC's determination to take many of its decisions on a consensual basis, instead of the ICCPR's provision for

35 See id. art. 36.
36 See Opsahl, supra note 22, at 385.
37 ICCPR, supra note 3, art. 28(2).
38 See Opsahl, supra note 22, at 375-76.
39 See id. at 376.
40 See id. at 375-77. See also Rosalyn Higgins, Opinion: Ten Years on the UN Human Rights Committee: Some Thoughts Upon Parting, 6 EUR. HUM. RTS. L. REV. 570, 572-73 (1996) [hereinafter "Ten Years on the UN Human Rights Committee"].
41 Taking decisions by consensus generally tends to lower the threshold of agreement, diluting the strength and boldness of the final outcome. Decisions taken through voting, on the other hand, would not be compromised by the pressure to bow to consensus. A clear and unambiguous outcome -- whether positive or negative -- would define the
voting,\textsuperscript{42} robbed the Committee of much boldness during the cold war period. The end of that ideological impasse has erased many of the political differences between members. There seems to be agreement among observers that the Committee membership today is more independent, highly qualified, and productive than at any other time in its history. These improvements notwithstanding, members have enjoyed little technical and secretarial support from the UN:

Thus, members of the Committee are left completely to their own devices, studying the documentation and preparing their interventions as best as they can in their hotel rooms. They have no secretarial assistance, nor office space, much less any advisors, researchers, or speech writers, as is otherwise usual in public life.\textsuperscript{43}

The lack of resources is matched by the historical neglect with which the UN General Assembly and the Secretary General have treated the HRC.\textsuperscript{44} Hampered by organizational and bureaucratic constraints -- which are legend in most UN offices -- the HRC appears to have chosen the UN institutional culture which emphasizes compromise, consensus, and diplomacy. For a body whose primary function is the application of norm to fact and ideally the elaboration of the ICCPR, such issues have more likely added to the weaknesses of the institution. Taken together, these factors have exacerbated, rather than alleviated, the conceptual and structural shortcomings of the HRC.

\begin{footnotes}
\item[42] See ICCPR, \textit{supra} note 3, art. 39(2).
\item[43] Opsahl, \textit{supra} note 22, at 380-81.
\item[44] \textit{See id.} at 386.
\end{footnotes}
The basic character of the HRC, its operational fingerprint, remains a matter of uncertainty and controversy among leading scholars and activists. For example, with respect to the individual complaint procedure under the Optional Protocol, both Steiner and Helfer and Slaughter have recently argued that the HRC should become more judicial and adjudicatory, like a court. The drafters of the ICCPR, however, do not appear to have had such a development in mind. Evaluations of the HRC’s three basic tasks have tended to consign it to the more "benign" functions of promotion, conciliation, and cooperation as opposed to the more contentious terrain of protection, adjudication, and supervision, which would give it a quasi-judicial or judicial personality. The ICCPR gives no direction in this regard when it ambiguously provides that the HRC "shall carry out the functions hereinafter provided." Historically, the Committee’s primary function, that of considering state reports, has taken the benign approach, emphasizing promotion and cooperation, although elements of a measure of supervision have been introduced.

The ICCPR binds states parties to "submit reports on the measures they have adopted to give effect" to the rights in the ICCPR, and the "progress made in the enjoyment of those rights." The reports are required to be evaluative, that is, to "indicate the factors and difficulties, if any, affecting the implementation" of the ICCPR. The Committee’s task here is spelt out tersely: "study the reports" and "transmit its reports, and such general comments, as it may consider appropriate," to the states. Initial state reports are due "[w]ithin one year of the entry into force" of the ICCPR, and "thereafter whenever the Committee so requests." In 1981, the HRC adopted a periodicity rule,

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45 See generally Steiner, supra note 20 (see section following n.40, entitled "Expounding the Covenant and Opening a Dialogue").
47 ICCPR, supra note 3, art. 28.
48 Id. art. 40(1).
49 Id.
50 Id. art. 40(2).
51 Id. art. 40(4).
52 Id.
53 Id. art. 40(1)(a).
54 Id. at art. 40(4)(b).
requiring subsequent reports to be submitted once every five years.\textsuperscript{55}

The ICCPR gave no direction to the HRC on the process of "studying" the reports. In the event, the Committee adopted the model employed by the Committee on the Elimination of Racial Discrimination.\textsuperscript{56} Under this model, states sent representatives to appear before the Committee.\textsuperscript{57} The Committee examines the reports by asking questions and clarifications of state representatives at open meetings. Beginning in 1992, the Committee, as a corporate body, has issued "Comments by the Committee,"\textsuperscript{58} which are evaluations of the state reports. These collective comments, which are drafted in closed sessions, do not replace the "concluding observations by individual members" which had been the practice since 1983.\textsuperscript{59}

Neither the ICCPR nor the internal rules of procedure of the HRC give it adversarial or inquisitorial authority over the state reporting process, although more recently some Committee members have boldly confronted state representatives during the examination of reports.\textsuperscript{60} Initially, however, the Committee was reluctant to construe its powers broadly with respect to the reporting process.\textsuperscript{61} But as noted by one of its scholars, the "HRC has largely been successful in achieving its stated aim of establishing and developing a 'constructive dialogue' with each State party in regard to the implementation of the Covenant."\textsuperscript{62} This "success" is due, in large part, to the Committee's faithful


\textsuperscript{56} See Opsahl, supra note 22, at 403.

\textsuperscript{57} See McGoldrick, supra note 22, at 82.


\textsuperscript{59} The Committee decided that the collective comments "would be in addition to, and would not replace, comments by members, at the end of the consideration of each State party report." \textit{Id.}

\textsuperscript{60} Justice Higgins of the International Court of Justice, formerly a member of the HRC, recalls "at least four occasions during my time on the Committee when the Committee has brought the examination to an abrupt halt, asking the State concerned to return to the next session with more qualified representatives and with more instructions to engage in a dialogue." Higgins, supra note 40, at 571. But as she points out, "Sometimes the technique works, and the resumed examination improves. Sometimes the Committee merely faces a resumed filibuster." \textit{Id.}


\textsuperscript{62} McGoldrick, supra note 22, at 82.
execution of its script which calls for the HRC to:

[a]ssist State parties in fulfilling their obligations under the Covenant, to make available to them the experience the Committee has acquired in its examination of other reports and to discuss with them various issues relating to the enjoyment of the rights enshrined in the Covenant.63

In the early years of the Committee’s work, members rejected the more restrictive interpretation under article 40, and opted for the more “liberal” approach. The restrictive view saw reporting merely as a vehicle for the HRC to exchange information with the states, and promote dialogue and cooperation among them. Otherwise the Committee would unjustifiably, it was argued, interfere in the internal affairs of states, breaching the veil of sovereignty. But the more liberal approach, which prevailed in the end, put the purpose of state reporting thus:

[t]o ascertain whether or not a State party had implemented the rights in the Covenant. The nature of this exercise was neither to be inquisitorial nor accusative and its end was neither condemnation nor approbation. Rather the dialogue was to be constructive and instructive, pointing to situations in which a State’s domestic provisions were at variance with the Covenant or made insufficient provision for the rights protected under the Covenant, with suggestions being made as to how States could overcome the factors and difficulties that hindered the full implementation of the Covenant.64

There, however, has been little practical difference between the two approaches. It certainly is disappointing that Committee members saw the two approaches as the only plausible polar extremes. That may in itself suggest that Committee members held a rather traditional view of state sovereignty, one that did not allow them to imagine a more robust role for the HRC. Since the text

64 McGoldrick, supra note 22, at 89-90.
of the ICCPR is vague in relation to state reporting, Committee members could have been bolder in formulating the scope and depth of the reporting process. The collegial comments, which the Committee now issues after examining each state report, are one example of deepening the reporting process, although they have become formulaic.

In practice, the HRC has adopted a conciliatory tone which favors the "dialogue" method. Members treat state representatives civilly in a tone that encourages and persuades -- with punctuations of pressure and criticism -- states to honor their treaty obligations without subjecting them to harassment or public ridicule. The one exception that clearly deviates from this pattern was the Committee's consideration of Iraq's third periodic report in July 1991, in the aftermath of the Gulf war.65 In unusually strong language, the Committee used the words "deplore," "very disturbing," "serious human rights violations," and "stonewalling" to describe the conduct of the Iraqi state and its representative.66 But during the same session the Committee was much more restrained in its consideration of the initial report from Sudan, another state with well attested and gross human rights violations.67 Although the Committee found some serious problems in Sudan, it was civil in its comments.68 Several months later, when the HRC met to complete its consideration of Iraq's third periodic report, its tone was substantially muted, perhaps signifying an ebb in the fervor over the Gulf War.69 To date, state reporting has remained largely lackluster and forgettable, although the new collective comments should add pressure on states to honor their obligations under the ICCPR. Given the Committee's limited powers, states seem inclined to do that which comes naturally to them. "Good" states will respond positively to the "dialogue" with the HRC while "bad" states will ignore its recommendations.

What happens after the reporting process raises some questions as well. The HRC is required to submit, through the Economic and Social Council

66 Id. at 157-58.
68 See id. at 127-28.
(ECOSOC), an annual report of its activities to the UN General Assembly. The report includes, among other things, summaries of the consideration of state reports. The report links the HRC to the states parties and the General Assembly. Both ECOSOC and the UN General Assembly have shown no interest in the work of the HRC. The one exception to this general apathy has been the General Assembly's Third Committee which has often made substantial comments on the work of the HRC, including suggestions to "deepen the reporting process and the follow-up action." The HRC has taken the Third Committee's views seriously, although the ICCPR does not provide a formal link between them.

There is no question that the quality of state reporting has improved markedly over the years, although the Committee has been helpless against states whose reports are long overdue. In addition to providing catalogues of laws and policies, many reports now give accounts of human rights practices and problems. Both the state representatives and the Committee members know what to expect; the process is so routine that in recent years both sides just seem to go through the motions, even when the particular state in question is a serious violator. Since there is virtually no follow-up until the next report five years hence, states now seem to think that the most important thing is the preparation of a "good" report, one that is comprehensive and admits to the problems well publicized for the state in question. A former member of the Committee is disturbed by a recent attitudinal change in states which see the reporting process as a "game."

I think that they [states with "dubious" human rights records] have now learned how to "play the game". They, and other countries, seem mainly concerned now with "treading water" during the dialogue, simply with "getting through" the two or three days of examination, so that these matters can be shelved again for another few years.

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70 See ICCPR, supra note 3, art. 45.
71 See id. art. 40(4).
72 See McGoldrick, supra note 22, at 97.
73 Id. at 98.
74 See id. at 97-98.
75 Higgins, supra note 40, at 581.
Justice Higgins points out that state disingenuousness is not limited to countries with questionable human rights records. Liberal democracies manifest a detrimental holier-than-thou attitude.

As for the liberal democracies, their approach has often been that the Covenant is a splendid document -- splendid, that is, for the Third World countries and Eastern Europe, where human rights are in urgent need of attention. Although they submit their reports and attend to public examination, the impression is often given that the Covenant is not really for them, because the observance of human rights is fully guaranteed in their countries. 76

Justice Higgins notes that liberal democracies do not, of course, fully guarantee human rights. 77 What these attitudes by different states seem to underscore is that governments of all political stripes tend to treat the Committee without seriousness, as a nuisance they have to put up with. Due to this mentality, it is also unclear, for example, whether collective comments actually affect a state's conduct on the ground, beyond revealing the displeasures of the Committee. It is very difficult to see how this increasingly predictable process, one that lacks bite and attracts little, if any publicity, can cut to the bone of sovereignty. States seem to have the "free" choice -- although they are bound by the ICCPR -- to either ignore the Committee or go along with it, depending on their political cultures. Non-state actors, such as NGOs, could give the Committee's work publicity, which should help raise its visibility.

V. GENERAL COMMENTS: ANOTHER LOST OPPORTUNITY

The ICCPR authorizes the HRC to transmit to states "such general comments as it may consider appropriate." 78 Strictly speaking, the issuing of general comments is not a separate Committee function but rather an optional continuation of the state reporting process. Debates within the Committee about the nature of general comments demonstrated the HRC's sensitivity to the

76 Id.
77 See id.
78 ICCPR, supra note 3, art. 40(4).
concept of sovereignty. The sparse provision invited controversy over the content and purposes of general comments. One faction argued that evaluative, critical general comments directed at individual states would be an abuse of the Committee's powers since it was limited to the exchange of information and the promotion of cooperation.\footnote{See Opsahl, supra note 22, at 408-09.} The other group wanted to conclude each state report with particularized comments, aimed at the specific state.\footnote{See id. at 102.} After intense debates -- and deadlock -- a compromised minimalist position resolved to direct general comments at all states rather than a particular state and its individual report.\footnote{See id. at 102.}

According to the HRC, general comments should: promote cooperation between states in the implementation of the ICCPR; summarize the experience of the HRC in studying state reports; and urge states to improve reporting.\footnote{See Statement on the Duties of the Human Rights Committee under Article 40 of the Covenant, adopted October 30, 1980, in Report of the Human Rights Committee, U.N. GAOR, 36 Sess., Supp. No. 40, Annex IV, at 101, U.N. Doc. A/36/40 (1981).} The comments could cover: the implementation of the reporting obligation; the implementation of rights in the ICCPR; the application and content of individual provisions in the ICCPR; and suggestions about cooperation between states in the application of the ICCPR.\footnote{See id. at 102.} Although nothing prevented it, the HRC chose not to give general comments a definite legal effect. For example, the HRC could have issued a general comment on the legal status of general comments. It could, for example, have defined them as the authoritative interpretations of the ICCPR. That may have attracted more attention from states parties and the public outside the UN system. Instead, the HRC opted for generality, preferring to work cautiously relative to the strong norms in the ICCPR.

General comments have tended to break down in two broad categories. The first category of general comments dealt with reporting obligations and procedures. Later general comments have explained the Committee's interpretation of particular articles and substantive rights. Some of the articles and issues addressed by general comments have included article 6 on

\footnote{See Opsahl, supra note 22, at 408-09.}

\footnote{See id. at 102.}

\footnote{The collective comments of the Committee, which since 1992 have been issued at the end of the consideration of state reports, but are different from general comments, are directed at particular states. While collective comments may note improvements, if any, in a state's human rights record, they usually address in some depth practical, legislative, and policy problems, and make recommendations.}


\footnote{See id. at 102.}
the right to life,84 article 9 on personal security,85 reservations,86 non-discrimination,87 and political participation.88 Many of the earlier general comments, especially those issued during the cold war, were generally not helpful either in elaborating the treaty or providing guidance for state practice. They tended to repeat, almost verbatim, the provisions of the ICCPR. One scholar who views the Committee's work positively has mixed feelings about the utility of this generation of general comments:

Some of these general comments have been of a high quality and represent valuable indications of the content of the respective rights and the steps that States parties could or should undertake to ensure the implementation of those rights. Other general comments have been much less helpful.89

Recently, general comments have been more articulate, highly reasoned, and increasingly useful signposts for states and others seeking a better jurisprudence of the ICCPR. In particular, the general comments on political participation and reservations are impressive texts. In both cases, the Committee either explicitly utilizes or alludes to jurisprudence elsewhere to develop its thinking. Still, the Committee could further improve the quality of general comments by making them more substantial arguments or interpretations of ICCPR provisions, including analyses and references to leading authorities. Such elaboration -- expounding -- of norms is more likely to spark the interest of scholars and advocates and raise the prestige of the Committee. Otherwise, general comments will remain suspended in space in their current formulation, ignored by states, and only of interest to a small group of specialists.

85 See id. at 95-96.
88 See UN Doc. CCPR/C/21/Rev. 1/Add.7 (1996).
89 McGoldrick, supra note 22, at 94.
One of the most perplexing functions of the Committee is the communications procedures. The first, which has never been used, and will not concern us here, is the inter-state complaint system. Though optional -- dependent upon a state’s separate acceptance of the competence of the HRC -- inter-state complaints are provided for in the ICCPR. In contrast, the individual complaints procedure against states, which is also optional (the procedure cannot be invoked against a state unless it is a party to the Optional Protocol), was not included in the ICCPR itself, even as an optional mechanism. The severing of the individual complaints procedure from the ICCPR was one indication of the fear by states of an intrusive enforcement body.

The communications procedure has a much more elaborate process than any of the other functions of the HRC, although it raises many difficult questions. For example, its use of the term "communications" to describe an action before the Committee by an alleged victim, instead of a "complaint" or "petition," is euphemistical and not realistic. Similarly, the term "views" is used to describe the Committee's final "decisions" or "findings" from communications. This evasive language was no doubt calculated to deny the Committee the properties of a judicial or an adjudicatory body, such as a national court or an international tribunal.

The drafters of the Optional Protocol imposed some interesting requirements on individual complainants. The Committee is not permitted to consider complaints under the following circumstances: unless the alleged victim has "exhausted all available domestic remedies," unless they are unreasonably prolonged; if the communication is made anonymously; when it considers the communication to be "an abuse of the right of submission of such communications or to be incompatible with the provisions of the Covenant," and where the same complaint is "being examined under another procedure of international investigation or settlement."

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90 See ICCPR, supra note 3, arts. 41-43.
91 See Optional Protocol, supra note 3, art. 1-2.
92 Id. art. 5(4).
93 Id. art. 5(2)(b).
94 See id. art. 3.
95 Id.
96 Id. art. 5(2)(a).
Some of these requirements may make the Committee inaccessible to many, especially if one considers the profile of the typical victim of human rights violations. Typical human rights victims are rarely members of the elite. The typical victim is an uneducated poor peasant or the jobless and underprivileged urban dweller. Many are women and children. Many of these victims cannot access -- let alone exhaust -- domestic legal processes, either because such processes are too complicated, unavailable, unaffordable, or too corrupted. Very likely most petitioners, as opposed to most victims, come from the "middle classes" and can individually negotiate the legal system or afford legal representation. While the revision of some of these requirements might make the Committee more accessible to the typical victim, it may add to its already crippling caseload.

The Committee is also unable to tell fact from fiction in assessing the claims of the alleged victim and the submissions of the state since it lacks an independent fact-finding capacity.\(^\text{9}\) This task is made all the more difficult because the Committee has chosen not to allow oral testimony by the parties or witnesses, a course that is not prohibited by the Optional Protocol.\(^\text{9}\) The consideration of communications takes place out of public view, in closed meetings.\(^\text{9}\) The Committee determines the admissibility of the claim, assesses it on the merits, and issues a view or a statement of its final findings in a process that seems judicial.\(^\text{10}\) Those views or findings include, if a violation is found, a statement of the obligations on the state to remedy the violation.\(^\text{10}\) These have included calls to release prisoners, compensate victims, take preventive measures to avoid a recurrence, and ensure a fair trial.\(^\text{10}\)

Both the drafting histories of the ICCPR and the Optional Protocol, as well as most commentators suggest that the views are not legally binding on the states parties.\(^\text{10}\) The texts are silent on this issue and seem to treat the matter as closed after the HRC forwards its "views to the State Party concerned and to the individual."\(^\text{10}\) At the end of views that find a violation, however, the HRC states that it expects states to "comply" with its findings. But this textual ambiguity

\(^9\) See Hefer & Slaughter, supra note 46, at 343.
\(^9\) See id. See also McGoldrick, supra note 22, at 143-44.
\(^9\) See Optional Protocol, supra note 3, art. 5(3).
\(^10\) See McGoldrick, supra note 22, at 151.
\(^10\) See id. at 152-53.
\(^10\) See id.
\(^10\) See id. at 151. See also Opsahl, supra note 22, at 421.
\(^10\) Optional Protocol, supra note 3, art. 5(4).
which leaves the legal status of the views open -- has not been fully exploited by members to expand the Committee powers.

The volume of communications received by the Committee has been impressive. This is interesting given the nebulous character of the views, and the absence of concrete and direct benefit to most applicants. In its twenty years of existence, between March 1977, when the Committee first sat, and August 1997, the HRC had registered some 765 petitions concerning an astounding 54 states. Two hundred sixty-three of those communications resulted in views, with 199 finding violations of the ICCPR. Two hundred forty-two communications were inadmissible and another 115 were either withdrawn or discontinued for any number of reasons. Forty-five admissible communications were yet to be decided while 100 awaited an admissibility determination. But these statistics could be misleading because the spread between states is far from even. Thirty-two percent or 247 of all the communications came from two states, Jamaica and Uruguay.

There is growing concern over the ability of the Committee to discharge its responsibilities under the ICCPR and Optional Protocol given the time and resource constraints that the members work under as well as the increase in the volume of communications. According to Steiner, some members have indicated that under current bottlenecks, the HRC can only issue a maximum of ten views a session, that is thirty for the entire year, a pace that has created a backlog of several years. Steiner estimates that the Optional Protocol covers ninety states with well over one billion people, with the potential to generate hundreds, if not thousands, of complaints a year. It is inconceivable that the Committee could respond to such a high volume of petitions. This fact alone is sufficient reason to re-think this function of the Committee.

There are no definitive studies on the impact of views on states and individual victims although available evidence suggests a disappointing record. As noted by McGoldrick:

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106 See id.
107 See id.
108 See id.
109 See id. Jamaica and Uruguay accounted for 168 and 79 communications, respectively. See id.
110 The Committee meets for three two-week sessions a year.
111 See Steiner, supra note 20 (see text following n.25).
112 See id.
The ultimate concern of an alleged victim is of course with the observance of the HRC's views in an individual case rather than with the procedural merits of the OP [Optional Protocol] system. It must be frankly admitted that compliance with the HRC's views by States parties has been disappointing. 113

Since views are non-binding, and compliance therefore depends on a state's moral character and willingness to cooperate, many states have chosen to ignore the Committee's recommendations. Uruguay and Jamaica, the two states against whom over half of all views have found a violation, have not had a good record of compliance. 114 Uruguay's record of cooperation with the HRC on its views has been characterized as "minimal to non-existent." 115 In 1985, a new democratic government in Uruguay freed many political prisoners, including incidentally some who had been declared victims by the HRC. 116 That occurrence was not evidence of a transformed government mentality toward HRC's views.

In 1990, the Committee started tracking state compliance out of concern that its views were generally ignored. 117 It appointed from among one of its members a special rapporteur for follow-up activities to monitor compliance with its views. 118 Responses by states on compliance have been spotty and largely unsatisfactory. 119 But there have been sporadic reports of views leading to legislative and policy changes. The most important cases cited in this regard are: Lovelace v. Canada, 120 in which the government of Canada

113 McGoldrick, supra note 22, at 202.
116 See id. at 203.
118 See id.
amended a law that violated article 27 of the ICCPR; *Shirin Aumeeruddy-Cziffra and Nineteen Mauritian Women v. Mauritius*,\(^{121}\) in which Mauritius amended legislation to remove discrimination based on sex; and *Hartikainen v. Finland*,\(^{122}\) in which Finland altered a statute to give added recognition to parental rights. But while these examples, and no doubt others since have been encouraging, they are too few and far between for the two decades of the Committee's existence. Beyond such cases, the impact of views on national courts, other international fora, and the development of human rights jurisprudence in general is doubtful.

In its present configuration, the Committee's communications procedure leaves a lot to be desired. Consider the three most important purposes that the communications procedure seems intended to serve. The first of these is the delivery of individual justice to victims of human rights violations in far flung corners of the earth. As Steiner aptly notes, that "ideal is as unrealizable as it is noble."\(^{123}\) The flood of complaints and the weaknesses of the Committee are important reality checks in this regard. The second purpose, that of inculcating in states a culture of respect for the rights in the ICCPR, is even more problematic. How can the views, which states readily ignore, and which receive no publicity, have this deterrent, educational, or even civilizational effect on states? The last purpose seems to be the elaboration of the ICCPR. Again, Steiner notes with clarity, that:

> The views written over two decades have created a considerable and important body of doctrine related to the Covenant. But the doctrine is little reported or organized outside the Committee's internal documents such as Annual Reports, and a handful of scholarly articles and books. Only occasionally do views figure in a discursive way in judicial opinions of state courts. Only rarely do they summon attention and provoke comment outside formal legal circles. The production over two decades of views of this character, however valuable for the relatively small number of individual beneficiaries, has not made a significant contribution to the

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121 See id. at 134.
122 See id. at 147.
Rather than raise the profile of the HRC, the difficulties associated with the three purposes of the communications procedure illuminate the Committee's weaknesses. It seems fair to ask, with regard to the individual complaints procedure, whether the HRC is a figment, an illusory body that, by its name, and the instrument it is supposed to advance, promises so much yet delivers so little? Can it be said that twenty years of the individual complaints procedure have yielded little to advance the ICCPR's purposes? Is it time to contemplate a different institution with different functions?

VII. THE REFORMIST AGENDA: TRICK OR TREAT?

The notion of fundamentally reforming the Human Rights Committee or replacing it with another body has not been a popular one in academic, political, intergovernmental, or activist circles. It is generally felt that the HRC, symbolizing as it does the idea of international accountability, is in itself a great advance, an epochal break-through in the reconstruction of state sovereignty. Moreover, among the legal fraternity, the prevailing wisdom suggests that it is better to build on what has been achieved, rather than risk a setback by reopening negotiations on new structures. In a sense, this is an age-old question: can work be done more effectively within existing institutions or should those institutions be reformed, restructured, or replaced by new ones? Are these polar extremes the only real options in the particular case of the HRC, or is there some viable middle road?

In this section, I will briefly examine the views of several scholars who have recently put forth some intriguing proposals for reforming the Human Rights Committee. In particular, I pay close attention to the recent works of Henry Steiner and Laurence Heifer and Ann-Marie Slaughter. Their proposals are imaginative, non-formulaic, and go beyond the usual "tinkering" so common among writers in the subject. Theirs are the nuanced approaches that suggest a middle road, short of a complete overhaul.

124 Id. at 17. (see first paragraph of section entitled "Expounding the Covenant and Opening a Dialogue).
125 See id.
126 See Helfer & Slaughter, supra note 46.
Although Steiner identifies three adjudicatory purposes that the HRC seeks to fulfill, he correctly rejects the notion that the HRC can systematically provide individual justice to victims or effectively protect human rights through deterrence. These functions, he suggests, are not the HRC's strengths. In its current format, he argues, the only purpose that the Committee can serve well is that of developing views that illuminate or expound the Covenant and therefore make the Committee a prestigious and influential body like the European Court of Human Rights, the Inter-American Court of Human Rights, constitutional courts of Europe and South Africa or the Supreme Court of the United States. These courts, of course, deliver individual justice and deter future misconduct. It is not these functions that Steiner wants the Committee to copy:

But they do more. There can be no doubt of the significance for other courts, for legislatures and executive officials, for the legal profession and the general public of their major opinions that expound the constitutions or law-making treaties before them. Such opinions generate discussion and reflection, praise and criticism. They inform and stimulate an ongoing legal, political, and moral debate on human rights issues.

Steiner suggests that the Committee can reconceptualize its views -- by reconsidering their format and content -- to become the leader in developing jurisprudence for the rights in the ICCPR. To do so, the Committee must depart from the traditionally formulaic presentations of its views which have been user-unfriendly, rigidly structured, disjunctive and difficult to read, and lack sharp legal argumentation and reasoning. Views, Steiner adds, "hardly summon the human rights community to debate and dialogue. They fail to educate their readership adequately about the Covenant in particular or about human rights in general." Secondly, Steiner suggests that the Committee abandon its mandatory jurisdiction, which binds it to consider all admissible communications, and adopt a discretionary jurisdiction, which would permit it to reduce its caseload and hear

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127 The three are: providing individual justice, protecting rights through deterrence and behavior modification, and expounding the ICCPR. See Steiner, supra note 20, at 12.
128 See id. at 13-17.
129 See id. at 19.
130 Id. at 20.
131 Id. at 21 (text following n.44).
only those cases with the potential to develop the Covenant.\textsuperscript{132}

Steiner hopes that these "internal" changes would raise the Committee's profile, remove it from the margins of international conversations, and make it a leading force for developing legal discourse for the human rights movement. It could be argued, however, that the obscurity of the Committee is not a result of the character of its views. While the content and form of those views certainly affect the standing of the Committee, it is factors that are external to it that have largely determined its lowly status. These factors include the absence of powers by the Committee to conduct independent fact-finding investigations, the lack of legal force to bind states with views, the impotence of the Committee before states because of the lack of any real authority, and the absence of any systemic linkages between it and relevant national organs and authorities.

Helfer and Slaughter, on the other hand, also argue for the Committee to become more "court-like" with respect to its communications procedure, although their proposals for its internal reformulation are less bold. They propose that the Committee place itself under the tutelage of the European Court of Justice, the European Commission of Human Rights, and the European Court of Human Rights (ECHR) in particular to develop the tools of a more effective organ of supranational adjudication.\textsuperscript{133} The project urged here is the identification of universally generalizable European experiences so that they can be transplanted to institutions outside Europe. While these authors acknowledge the specificity of European experiences, they are very impressed with the "remarkable and surprising success"\textsuperscript{134} of European institutions and declare them the superior models that others around the globe should emulate.\textsuperscript{135}

\textsuperscript{132} See id. at 23-25.

\textsuperscript{133} See Helfer and Slaughter, supra note 46, at 276-282. They write that:

\begin{quote}
We recommend that Committee [HRC] members engage in active dialogue with the ECHR and the European Commission of Human Rights (the Commission) as the first step toward a broader effort to increase communication with both national and supranational courts and tribunals over the interpretation and evolution of human rights norms. In particular, we propose that the Committee adopt a policy of thoughtful convergence from that jurisprudence based on specific and articulated reasons. Id. at 281.
\end{quote}

\textsuperscript{134} Id. at 276.

\textsuperscript{135} See id. at 277. They note that:

\begin{quote}
European tribunals have been at least the partial architects of their own success
\end{quote}
Helfer and Slaughter confront, but quickly dismiss, the view, which they consider extremist, that states should be urged to "amend the Covenant and the Optional Protocol to create two supranational institutions: a nonjudicial body charged with monitoring states' obligations under the treaty's reporting process and a separate International Court of Human Rights with investigatory powers and the authority to issue binding decisions as a matter of international law."

This proposition is not viable, they note, because states would probably not amend the Covenant, and because bodies with such powers may not function effectively outside Europe because of prevalence of immoral states and the lack of national institutions to safeguard the rule of law. Instead, they advocate a more restrained approach: deepening and enhancing the Committee's performance within its existing functions.

The authors identify the factors that they believe are responsible for the success of the European Court of Justice and the ECHR and organize them into a "checklist" of what makes for effective supranational adjudication. They break down the checklist into three clusters of factors. These are: factors that states parties to the treaty control (tribunal's membership or composition, caseload and the tribunal's functional capacity, independent investigative powers, and the legal status of the treaty and the tribunal's findings); factors within the control of the tribunal itself (questions of audience, degrees of autonomy from political interests, style and quality of decision-making and legal reasoning, and relationships with other tribunals); and factors beyond the control of both the tribunal and the states parties (nature of abuses monitored by tribunal, the degree of autonomy of national institutions and their commitment to the rule of law, and the cultural and political identities of states subject to the tribunal).

Helfer and Slaughter then attempt to apply the checklist to the HRC and identify some of the challenges it may face, particularly with the third cluster of

and that their experience can form the basis of a potentially generalizable model. What is needed is an actual theory of effective supranational adjudication, an effort to isolate the various factors that have contributed to the European success story and to identify those that can be replicated beyond Europe. Id.

Id. at 366.

See id. (noting that outside Europe there is a dearth of states with "autonomous domestic institutions responsive to citizen interests, the commitment by states parties to the rule of law within their respective national legal systems, and the grave human rights violations").

See id. at 298-337.

See id. at 336.
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factors. Ultimately, they make one concrete proposal which they see as the best starting point for implementing the checklist. This proposal is centered on both the convergences and divergences between the Committee and the regional European human rights system, particularly the ECHR and the European Commission of Human Rights. They argue here that the European Convention for the Protection of Human Rights and Fundamental Freedoms and the jurisprudence generated around it by the ECHR and the work of the European Commission of Human Rights provide the Committee with the path it must follow unless it can textually justify any divergent approaches. This view, however, casts both the Covenant and the Committee in the role of toddling works in progress, projects which must be reared by the more mature intellectual, spiritual, and institutional European parents.

While the checklist is useful and interesting as an anatomy of structural, institutional, cultural, and political factors that determine the character of an international tribunal, the authors do not argue convincingly why it would work if applied to the HRC. For one thing, as the authors acknowledge, the Committee is a radically different institution from either the European Commission or the ECHR, both in membership, duration of meetings, powers, and functions. The checklist might work if the Committee were a judicial body -- and the prestige associated with that status -- with the power to issue binding opinions or carry out independent fact-finding missions. The cultural and political diversity of states parties to the ICCPR and the Optional Protocol further diminishes the possibility that the checklist will work without amending the texts to create organizations similar to the European Commission and the ECHR. The checklist and the Committee seem too mismatched. It seems like a well-tailored suit that is too small -- or too big -- to fit its subject.

VIII. UN HUMAN RIGHTS BODIES: A HISTORY OF INFIRMITY

The United Nations human rights regime is a recent phenomenon, stretching back half a century. UN bodies that address human rights issues are either created by or pursuant to the UN Charter and specific treaties. The most

140 See id. at 373-386.
important human rights body within the UN system is the UN Commission on Human Rights, which was authorized by the UN Charter. Created in 1946, the Commission coordinates the UN's human rights work. In its early life, the Commission focused almost entirely on promotion and standard-setting, and drafted the UDHR, the ICCPR, and the International Covenant on Economic, Social and Cultural Rights (ICESCR), the trio of instruments referred to as the International Bill of Rights. For the first twenty years of its existence, the Commission took the position that it had no power to respond to complaints about human rights violations by a UN member state. Although this timidity, and defication of state sovereignty was later tempered, it nevertheless set a cautious and muffled tone for human rights work by UN bodies.

In the last thirty years, however, the Commission has steadily expanded its protection mandate. Since 1967, the Commission has established three important procedures for addressing human rights violations. These are: the 1503 procedure under which complaints are received and considered in confidence, and may lead to public "shaming"; the 1235 procedure which triggers a public debate and may lead to the appointment of an envoy of the Commission to investigate reports of violations; and the appointment of "thematic" rapporteurs or working groups to consider violations that fall into a theme, such as torture, disappearances, and arbitrary detention. But many commentators have criticized these procedures as too rudimentary and ineffective.

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142 See U.N. CHARTER art. 68, (providing that "The Economic and Social Council shall set up commissions in economic and social fields and for the promotion of human rights, and such other commissions as may be required for the performance of its functions"). See also INTERNATIONAL HUMAN RIGHTS IN CONTEXT, supra note 2, at 356.

143 See THOMAS BUERGENTHAL, INTERNATIONAL HUMAN RIGHTS, 80 (1995). He notes that:

The Commission has therefore become, together with the UN Human Rights Centre [now the Office of the High Commissioner for Human Rights] which serves as the human rights secretariat of the UN, the nerve center of the UN human rights apparatus. It acts as coordinator of the many existing UN human rights institutions and programs as well as the principal UN forum for addressing charges of human rights violations. Id. at 81.

144 Supra note 17.

145 List of Special Procedures of the UN Commission on Human Rights, 14 HUM. RTS. L.J. 131 (1993); David Weissbrodt, The Three "Theme" Special Rapporteurs of the UN Commission on Human Rights, 80 AM. J. INT'L L. 685 (1986); INTERNATIONAL HUMAN RIGHTS IN CONTEXT, supra note 2, at 374.
To a large extent, the Commission has been hamstrung by its composition. It consists of 53 member states elected for three-year terms by ECOSOC. The Commission representatives, who are named by their states, "serve as instructed government delegates and not in their personal capacities." Much of the criticism of the Commission, viewed by many commentators as justified, has accused it of being ineffective and for its politically motivated or selective approach in dealing with charges of human rights violations. But since the Commission is a "political" body, it has been argued, it can only do what the sum of its parts, the states, wish it to. Others recognize the Commission's path-breaking work in introducing new techniques for addressing violations, and for making human rights a major agenda for the UN and the international community. That said, the Commission does not, and cannot, dispassionately, definitively, and authoritatively act in human rights, especially in their enforcement.

In addition to the Commission on Human Rights and the HRC, there are a number of human rights bodies worthy of mention. These include the Office of the High Commissioner for Human Rights, created in 1993 by the UN General Assembly. Although the mandate of the High Commissioner was to be the UN's "official with principal responsibility for United Nations human rights activities under the direction of the Secretary General," the first occupant of the office, Jose Ayala Lasso, the Ecuadorian diplomat, was by all accounts a miserable failure. Although there has been jubilation in the human rights communities in the West over the appointment of Mary Robinson, the former President of Ireland, to the post left vacant by Ayala Lasso's resignation, the office lacks a clear mandate, authority, and resources to act effectively. According to a seasoned observer of the High Commissioner:

146 BUERGENTHAL, supra note 143, at 79.
147 Id. at 82.
149 See BUERGENTHAL, supra note 143, at 82.
150 See UN General Assembly Res. 48/141 (1993).
151 Id. at para 4.
The High Commissioner's mandate has always been the most contentious issue. At the end of the negotiations, the recipe that attracted consensus was a combination of vagueness and comprehensiveness. The former ensured that no specific independent fact-finding mandate was conferred, the coordination role remained limited and imprecise, responding to violations was only part of the broad mandate, and questions of staff and funding were left largely unaddressed. The latter resulted in the equal attention being given to both sets of rights -- economic, social and cultural, and civil and political -- as well as to the right to development, and an emphasis being placed upon "non-threatening" activities such as human rights education, public information programmes and the provision of technical assistance ("advisory services").

Mention should be made of one other UN body that addresses human rights issues. The Security Council, one of the six "principal" UN organs, has an important bearing on human rights when they constitute a threat to international peace and security, as was the case in apartheid South Africa, the former Rhodesia, Namibia, or in the Portuguese colonies of Angola and Mozambique. Although the Security Council is the only UN organ with the power to make decisions binding on all UN members, it has generally been unwilling, with a few exceptions, to act forcefully in human rights matters. When confronted with human rights problems, it has tended to "combine appeals to do better in the future with denunciations of past failures." In any case, no action can be taken if any one of the five permanent members -- the Peoples Republic of China, USA, France, UK, and Russia -- threaten a veto. Such paralysis and politicization of Security Council action leaves human rights enforcement at the mercy of the narrow national interests of big powers.

In sum, it is not too pessimistic to conclude that both UN-Charter and treaty-based human rights bodies lack the will, authority, and consistency to

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154 U.N. CHARTER, art. 7, para 1.


156 See U.N. CHARTER, art. 25.

enforce human rights norms impartially. As such, they leave a gaping lacunae of enforcement, which is often exploited by stronger states to use or abuse in the name of human rights. Donnelly has summed up these weaknesses well:

The international human rights regime is a relatively strong promotional regime, composed of widely accepted substantive norms, largely internationalized standard-setting procedures, some general promotional activity, but very limited international implementation, which rarely goes beyond information exchange and voluntarily accepted international assistance for the national implementation of international norms. There is no international enforcement. Such normative strength and procedural weakness, however, is the result of conscious political decisions.\footnote{158}

IX. UNILATERAL ENFORCEMENT: MORE ABUSE THAN USE

There is no state, culture, or serious scholarship today that rejects out of hand the idea of human rights. Disputes, however, rage over the content and philosophical basis of the human rights doctrine largely generated through the United Nations.\footnote{159} Questions abound about the doctrine’s fair uses, its cultural, political, and ideological orientation, and its thematic incompleteness.\footnote{160} But once accepted, the “characterization of a specific goal as a human right elevates it above the rank and file of competing societal goals, [and] gives it a degree of immunity from challenge and generally endows it with an aura of timelessness, absoluteness and universal validity.”\footnote{161} Henkin is even more forceful, declaring our era “the age of rights”\footnote{162} and “[h]uman rights is the idea of our time, the only
political-moral idea that has received universal acceptance." But just as important are disagreements about supervision or the enforcement of the human rights corpus. How and through what medium is the human rights corpus to be supervised or enforced, and under what circumstances?

The vertical approach of supervising or enforcing human rights, as argued in this article, is characterized by general impotence, vagueness, and inconsistency. It only seems to work when a big power, such as the United States, "mobilizes" the support of other states to take a particular action. In Haiti, for example, the junta led by Brigadier General Raoul Cedras continually frustrated both UN and OAS (Organization of American States) efforts to restore democracy and establish respect for human rights, until 1994 when the Clinton administration forced the strongman into exile with a military intervention. The decisive US action came only after a confluence of domestic concerns left the administration little choice. Similarly, there is little doubt that UN actions against Iraq, in the wake of the Gulf War, are driven primarily by American national interests. As noted by Ian Martin, a former Secretary

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163 Id.
166 Mandelbaum writes that:

the continuing exodus [Haitians fleeing to the US] of refugees, the insistence of the Congressional Black Caucus that the elected Haitian president Jean-Bertrand Aristide be restored to power, and a hunger strike protesting the failure to do this by American political activist Randall Robinson, persuaded the administration to use force. Id.
167 Mandelbaum notes that "a [nuclear] bomb in the hands of Iraqi dictator Saddam Hussein would jeopardize American interests in the Middle East and Europe." Id. In February 1998, senior American officials, including Secretary of State Madeleine Albright and US UN envoy Bill Richardson, repeatedly stated that the Clinton administration would reject any UN-brokered agreement with Iraq over arms inspections unless such an agreement was consistent with American interests. The US planned to unilaterally carry out massive air-strikes against Iraq regardless of world opinion. See Peter Ramjug, US Open to Proposal That Might End Iraq Crisis, AAP Newsfeed, Feb. 19, 1998, available in LEXIS, News Library, Curnws File; Anthony Goodman, Annan Briefs UN
General of Amnesty International:

[The] legitimacy of decisions of the UN Security Council -- the composition of which is simply not defensible in today's world -- has been undermined by their political selectivity since the lifting of Cold War restraints. The imposition of sanctions on Libya stands in stark contrast with the non-imposition of sanctions on Israel for refusal to comply with UN Security Council resolutions, and Security Council authority has been abused by allowing the US., Britain, and France to claim a UN mandate for military action against Iraq which they alone have decided upon.168

The second approach, the horizontal, state-to-state enforcement of human rights, bears critical scrutiny because it is usually backed by the threat of economic, and occasionally military, power. Unlike the vertical approach, which is characterized by anemia and impotence, horizontal enforcement is usually effective because it targets "vital" national interests. This approach, however, is primarily a default mechanism, permitted largely by the lacunae left by the vertical approach. Its adherents are opportunists and "political strategists or instrumentalists,"69 that is, "governments and institutions that selectively and inconsistently deploy human rights discourse for strategic and political ends."70

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169 Mutua, supra note 159, at 599.

170 Id.
These are mainly Western industrial democracies, the same states that dominate the global economy and politics, including the UN Security Council, and which, until recently, colonized most of the Third World.

The state that unilaterally deploys the human rights idiom to justify a foreign action combines elements of noblesse oblige, hypocrisy, and raw power. Such states also see themselves as the "guardians" of liberal democracy, rule of law, free markets, and respect for human rights, in other words, the key characteristics viewed as essential today to Western civilization. Thus human rights are seen "as designed to improve the condition of human rights in countries other than the United States (and a few like-minded liberal states)." \(^{171}\) Western European states have a similar missionary approach toward human rights, as is evident from their regional human rights system (applicable internally in European states), as well as their policies towards non-Western states. \(^{172}\)

In their role as donors, or capital-exporters, Western states have in the last decade worked with the World Bank and the International Monetary Fund (IMF) to link, however inconsistently, human rights to their operations. \(^{173}\)

Western, including American, support for states that notoriously violated human rights during the entire cold war period is well documented. Among the more repugnant regimes that enjoyed Western support were right-wing military dictatorships in Latin America, especially in Brazil, Chile, Guatemala, El Salvador, and Paraguay, as well as the Philippines, South Korea, Zaire (now the Democratic Republic of Congo), apartheid South Africa, and Iran. \(^{174}\) It is a plausible argument that a state that is party to human rights instruments violates its obligations when it provides conscious support to a violator state. In other words, becoming party to a human rights instrument prohibits a state from supporting another that is violating rights in that instrument. But should such

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\(^{171}\) HENKIN, supra note 162, at 74.


prohibition be stretched to include the formulation of affirmative, country-specific 
human rights policies by one state towards another? Are states parties under an 
obligation to unilaterally enforce human rights against violator states? What 
should an individual state do, in the face of massive violations by another, where 
universal processes are paralyzed and unable to intervene? If intervention in such 
circumstances is permissible, how can its faithful execution be assured, and abuse 
be prevented?

The history of the unilateral enforcement of human rights by one state 
against another is not encouraging, although leading international non-
governmental organizations concerned with human rights in the West have 
relentlessly advocated for such enforcement. Such policies have been 
characterized by a high degree of selectivity and inconsistency. Take for example 
American policies towards the Peoples Republic of China (PRC) and Cuba, two 
communist states with allegations of serious human rights problems. Whereas 
successive American administrations have pursued a policy of embargoes, 
isolation, and open hostility towards Cuba, they have sought the PRC's friendship 
and access to its markets. In 1994, the US, recognizing the PRC's huge market 
and growing clout internationally, dropped its linkage of human rights to the Most 
Favored Nation status.

These contradictions are replicated in the policies of the US, other 
donors, and the institutions they control (such as the World Bank and IMF), 
across the globe. In some states, for example, the US and its Western allies have 
pushed for political and economic reforms, and quite often such pressures have 
partially been justified on human rights grounds. The cases of Kenya, Malawi, 
and South Africa are illustrative. In 1991 and 1992, Western donors suspended 
aid to Kenya and Malawi, respectively, pending reforms towards political

175 See LAWYERS COMM. FOR HUMAN RIGHTS, HUMAN RIGHTS AND FOREIGN POLICY: 
LINKING SECURITY ASSISTANCE AND HUMAN RIGHTS (1989); LAWYERS COMM. FOR HUMAN 
RIGHTS, HUMAN RIGHTS AND FOREIGN POLICY: UNITED STATES POLICY TOWARD SOUTH 
AFRICA (1989); AFRICA WATCH, KENYA: TAKING LIBERTIES 362-82 (1991) (calling on the 
British and American governments to adopt policies that would push the Kenya 
government to create a more open society and respect human rights); ALICE JAY, ROBERT 
F. KENNEDY MEMORIAL CENTER FOR HUMAN RIGHTS, PERSECUTION BY PROXY: THE CIVIL 
PATROLS IN GUATEMALA 69-71 (1993) (asking the US government to press the 
Guatemalan government to abolish and disarm civil patrols accused of human rights 
violations).

176 See HUMAN RIGHTS WATCH, HUMAN RIGHTS WATCH WORLD REPORT 1995: EVENTS 
pluralism and more respect for human rights.\textsuperscript{177} It is interesting that no such pressure has been applied by the West on Saudi Arabia, a tightly controlled monarchy where virtually no political rights are permitted,\textsuperscript{178} Turkey with its gross human rights violations, especially those of the Kurds, and not to mention its corrupt and military-controlled political system.\textsuperscript{179} The strategic importance of the two states to the US and the West no doubt trumps human rights considerations.

The unilateral enforcement of human rights by states will necessarily be selective and even hypocritical at times, where states use human rights as a pretext for achieving other foreign policy objectives. For instance, states which are "vital" to the security of big powers either because of their location or the resources they control will be supported by the West, their human rights practices notwithstanding. In other cases, the West or particular Western states will employ the logic of human rights in foreign policy to advance other goals, such as opening up markets, encouraging more politically open societies as a way of avoiding state collapse with the predictable risk of enormous humanitarian catastrophes and the expenses involved, or to advance other national goals. Rarely will an abstract commitment to enforcing human rights trump "hard" interests in the calculus of foreign policy. Steiner and Alston provocatively raise the question of whether enforcement should be left at the level of unilateralism, given the pressures on states to advance their national interests:

If it is in the "national interest" to provide a given country with security (military) assistance or with development aid, does not making such aid dependent on the recipient's compliance with human rights norms impair that "interest"? Is not the United States (or any other country following similar policies) surrendering its practical and ideological concerns in order to

\textsuperscript{177} See Jane Perlez, \textit{On Eve of Talks Aid With Donors, Kenya is Under Pressure to Democratize}, \textit{New York Times}, November 25, 1991, at A9; See World Bank, Meeting of the Consultative Group for Kenya (Press Release), November 26, 1991 (noting that donors welcomed the Kenya government's intentions to move "towards greater pluralism, underlined the importance of the rule of law and respect human rights, notably the freedoms of expression and assembly, and called for firm action to deal with issues of corruption"); \textsc{Lawyers Comm. for Human Rights, Malawi: Ignoring the Calls for Change} 10 (1992).


\textsuperscript{179} See \textit{id. at 295}. 
act as a global policeman, to enforce human rights norms at a
cost to its own interests? Is not a purpose of the human rights
movement to lift the enforcement from the level of states to
that of international organizations in which many states
participate?¹⁸⁰

Whatever benefits accrue from unilateral enforcement -- and it must be
conceded there are many -- ultimately this approach raises more questions than
it answers. Its inconsistency is a matter of public record, as are the ire and
antagonism that it raises in states and cultures that may see human rights as a
neo-colonialist project. That will do more harm than good to the work of
standard-setting, which, though far from complete, has laid a foundation for the
reconstruction of a multi-cultural human rights corpus. What is needed is a
credible, effective, and consistent international body to spearhead the supervision
of the national implementation of human rights. The current status quo in which
powerful states exploit the international vacuum of enforcement left by impotent
UN bodies is unacceptable. For one thing, small, weaker states, who form the
majority of states, cannot use it. That gives a handful of powerful states yet one
more weapon to use against poor peoples and their states. Ian Martin's
admonition must be taken seriously:

The new world order seems to present the human rights
movement with a beguiling prospect. Powerful governments
no longer inhibited by powerful adversaries stand ready, it
appears, to make the promotion of human rights a centerpiece
of their foreign policies, to wield their economic power to
compel compliance with their agenda and to offer military
power through the UN to intervene in human rights crises.¹⁸¹

Martin correctly warns that such temptation on the part of the human
rights movement will be damaging. In his very understated manner, he argues
that this is not the way to go:

My contention is that this is a prospect which the human rights
movement should view coolly. It should avoid aligning itself

¹⁸⁰ INTERNATIONAL HUMAN RIGHTS IN CONTEXT, supra note 2, at 812.
¹⁸¹ MARTIN, supra note 168, at 21.
with the power relationships of an unjust world and it should recognize the ways in which the cause of human rights requires that those relationships be challenged.\textsuperscript{162}

X. A Proposal for Effective Enforcement

The proliferation of regional human rights mechanisms and systems in Africa, the Americas, and Europe is proof of the acceptance by the modern state that its conduct towards its own citizens is no longer an internal, domestic matter. Even in Asia, where states have been more resistant to the application and internalization of the human rights corpus -- and where as of yet there is no regional human rights system -- that resistance has considerably subsided. The question on the global agenda is not whether the enforcement of human rights should be supervised by an international body. It is how that supervision and implementation will be affected, and what powers the supervising or enforcing body will enjoy against states.

Both the European Court of Human Rights and the Inter-American Court of Human Rights have given the idea of international enforcement concreteness in a way that was not imaginable fifty years ago. Africa, a continent that has been plagued with serious human rights violations since colonial rule, recently provided new international momentum for the creation of institutions for the more effective protection of human rights. Since 1987, continental oversight over human rights questions has been exercised by the African Commission on Human and Peoples' Rights.\textsuperscript{163} But in December 1997, in a move to strengthen the protection of human rights on the continent, an Organization of African Unity (OAU) ministers meeting adopted a protocol on the establishment of an adjudicatory body, the African Court on Human and Peoples' Rights.\textsuperscript{164} At the adoption of the protocol, Salim Ahmed Salim, the OAU

\textsuperscript{162} Id.


Secretary General, stated that human rights "is a basic requirement in any society and a pre-requisite for human progress and development."

The proposed African Human Rights Court is a potentially significant development in the protection of rights on the continent in view of the reluctance of African states to create an effective regional human rights system. The problems of the African human rights system, which thus far have been anchored in the African Commission, are well documented. These include the normative weaknesses in the African Charter and the general impotence of its implementing body, the African Commission. But the distinctive contributions of the African Charter to the human rights corpus, which include the concept of duty and the inclusion of the "three generations" of rights in one instrument, have also been articulated by some scholars. The proposed African Human Rights Court is an attempt to address some of the weaknesses of the African system.

The proposal of an African Human Rights Court should have implications beyond Africa. Although the ECHR is recognized as an effective forum, and could provide useful lessons to others, the proposal for an institution

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in Africa could be an important step in the efforts to create more effective human rights bodies at the universal level. The fact that African states, whose human rights records have been dismal, are willing to establish a human rights court signifies a movement towards effective accountability. Aspects of the African Human Rights Court could inspire the form and powers of an international human rights court. The proposed court also provides ideas about where the pitfalls may lie.

The proposed African Human Rights Court, whose function would be protective, seeks to complement the work of the African Commission, whose work has been primarily promotional.188 Although the African Commission's mandate includes state reporting189 and the consideration of communications190 -- functions which are protective in character -- it is the promotional activities which have dominated its work.191 Both the state reporting and the communications procedures have been disappointing, partly due to the lack of powers and the textual absence of clarity of purpose for those functions. Proponents of the African Human Rights Court hope that it will address many of these problems and establish itself as an effective and credible forum for the protection of human rights.

The Draft Protocol proposes what appears to be a potentially important African Human Rights Court. The court's jurisdiction is not limited to cases or disputes concerning the African Charter; cases could be brought before it on the basis of any instrument, including international human rights treaties, which are ratified by the state in question.192 The court has the power to decide if it has

188 The Draft Protocol realizes this contrast -- in essence the weaknesses and the incompleteness of the African Commission -- when its states in its preamble that the African Human Rights Court will "complement and reinforce the functions of the African Commission on Human and Peoples' Rights." Draft Protocol, supra note 184, preamble. It adds, further, that the African Human Rights Court shall "complement the protective mandate of the African Commission." Id. art. 2.
189 See African Commission, supra note 183, art. 62.
190 These include state-to-state and "other" communications, which could come from individuals, groups, and organizations. See id. arts. 55-56.
191 The principal activities of the African Charter, which are promotional, are to collect documents, undertake studies, organize seminars, disseminate information, encourage national and local institutions concerned with human rights, formulate principles to resolve human rights problems, and interpret the African Charter. See id. art. 45.
192 Draft Protocol, supra note 184, art. 3(1).
jurisdiction in the event of a dispute. The court also can issue advisory opinions on "any legal matter relating to the Charter or any other relevant human rights instruments." One serious drawback of the Draft Protocol is the limitation of access to the court that it places on individuals and non-governmental organizations. The African Commission, states parties, and African intergovernmental organizations enjoy unfettered access to the court. In stark contrast, however, individuals and non-governmental organizations cannot sue a state unless at the time of ratification of the Draft Protocol or thereafter the state made a declaration accepting the jurisdiction of the court to receive such cases. This limitation, which may have been necessary to get states on board, is nevertheless disappointing because individuals and NGOs -- and not the African Commission, regional intergovernmental organizations, or states parties -- would be the primary beneficiaries, "customers," and users of the court.

The proposed court is independent of the African Commission although it may request the Commission's opinion with regard to a case brought by an individual or an NGO. It may also transfer cases to the African Commission. The court determines its own rules of procedure and uses the African Charter and any other human rights instruments ratified by the states concerned as sources of law. Proceedings would generally be conducted in public and parties would be entitled to legal representation of their own choice. Witnesses or parties to a case "shall enjoy all protection and facilities, in accordance with international law" in connection with their appearance before the court.

The eleven judges of the proposed court would be elected in their individual capacity by the OAU Assembly of Heads of States and Government from among "jurists of high moral character and of recognized practical, judicial or academic competence and experience in the field of human and peoples'
rights. Judges would serve for a six-year term and be eligible for re-election only once. It is a shortcoming that all judges, except the President of the court, serve on a part-time basis. But their independence is formally guaranteed and they are protected by the immunities of diplomats under international law. A judge who is a national of a state party to a case must be recused. A judge can only be removed by the unanimous decision of all the other judges of the court. It is an important consideration that the court appoints its own registrar and registry staff.

The proposed court is given wide latitude in conducting proceedings. Presumably, it has discretionary jurisdiction, and need not take all the cases that come before it. It hears submissions from all parties, including oral, written, and expert testimony. States are required to assist the court, and provide facilities for the efficient handling of cases. Once the court finds a violation, it may order remedies, including "fair compensation or reparation." In cases of "extreme gravity and urgency," the court may order provisional remedies, such as an injunction, to avoid irreparable harm to persons. The court's judgments, which are final and without appeal, are binding on states. In its annual report to the OAU, the court specifically lists states which have not complied with its judgments. There appears to be no other method of ensuring compliance with the court's decisions.

The chances for the adoption by the OAU Assembly of the Draft Protocol are good, particularly because it has already been adopted by an overwhelming majority of OAU attorneys general and ministers of justice. The important lesson for the rest of the world from this African effort is that even

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203 Id. art. 11(1).
204 See id. art. 15 (1).
205 See id. art. 15(4).
206 See id. art. 17.
207 See id. art. 22.
208 See id. art. 19.
209 See id. art. 24.
210 See id. art. 26.
211 See id. art. 26(1).
212 Id. art. 27(1).
213 Id. art. 27(2).
214 See id. art. 28.
215 See id. art. 30.
216 See id. art. 31.
states with some of the most egregious human rights histories are now willing to establish a more effective human rights enforcement body. The Europeans already have their own viable and effective regional system. States within the OAS have the Inter-American Court of Human Rights. The international community should take the proposed African Human Rights Court, which is largely a credible effort, as the floor for establishing a universal human rights court. The lessons of the other two regional human rights courts would be indispensable in crafting a universally acceptable structure.

At the international level, the world is as close as it has ever been to the establishment of a permanent international criminal court (ICC) to try suspects for war crimes, genocide, and other violations of humanitarian law. In effect a human rights court with limited subject-matter jurisdiction, the ICC has been made possible by the Rwanda and Yugoslav holocausts, and the ad hoc international tribunals set up to try perpetrators in those conflicts. These apparent breakthroughs in Africa and at the international level give support to the view that states may be willing to consider the establishment of an international human rights court. It seems futile to conclude — on the basis of conjecture — that states are unwilling to re-open discussions on the ICCPR and the Optional Protocol. Even if states were to resist the idea, it is the role of scholars and


activists to push the frontiers of possibility.\textsuperscript{219} This is one critical way that international law and institutions can keep pace with rapid global changes. Piecemeal reforms will not do.\textsuperscript{220}

Some critics may argue that rather than push for a more effective universal supervision and enforcement regime, a noble but an unrealizable goal, energies should be put towards strengthening regional mechanisms. Enforcement at the regional level may be viewed as likely to be more effective because of the historical, political, and cultural factors that bind states in a region. The European system is the best example for such an argument. While there is some truth to this view, it seems to be the case that the regional systems draw some inspiration and legitimacy from the universal processes. The universal mechanisms represent an ideal that is the basis for regional processes. Thus regional measures should not be seen as replacing the need for effective universal institutions; they should be a step towards true universality.

Consistent with the argument of this article, the Human Rights Committee, as well as the other human rights treaty bodies, should be abolished and replaced with two distinct but related institutions to supervise the implementation and enforcement of the ICCPR and other human rights treaties. Some scholars have suggested that the UN should form a global human rights enforcement body, patterned after the European model, to which only democracies are invited to join.\textsuperscript{221} The essential features of such an institution are put thus:

What is critical is that, as with the European system, the protections should be important and strict; countries should only be allowed to join if they are willing to accept formal legal surveillance, and there should be an effective enforcement mechanism that allows individuals to initiate cases and have at

\textsuperscript{219} See Nisuke Ando, The Future of Monitoring Bodies -- Limitations and Possibilities of the Human Rights Committee, 1991-1992 CAN. HUM. RTS. Y.B. 169, 172 (Ando, an HRC member, arguing that states are unlikely to authorize the HRC to issue legally binding decisions).


The institutions contemplated in this article are different, and would not be mere copycats of the European system, or be open only to democracies. It seems as though such a proposal would be self-defeating on a number of fronts. First, states and peoples in Asia, Africa, and Latin America are not anxious to simply copy or be led by European experiences or institutional examples, particularly if universality and legitimacy are important for such an institution. Second, keeping out non-democratic states would defeat the purpose of the institution for the simple reason that many of the worst human rights violators tend to be non-democratic. It is particularly those that must be reached, if the goal of international supervision and enforcement is to be achieved.

This article does not sketch in detail the structures, powers, and functions of the institutions it proposes. It only provides the basic framework for such institutions. First, the article proposes the establishment of an International Human Rights Court to enforce the ICCPR and the other principal human rights treaties. Such a court would have discretionary jurisdiction to hear cases from all states parties to the ICCPR and other treaties, and to issue binding decisions, including requiring the repeal of national legislation and granting compensatory as well as punitive damages. It would also have the power to subpoena witnesses, including state representatives, and compel them to testify. It would have the ability to conduct independent fact-finding investigations, if that was necessary. The court would also have the power to issue advisory opinions if a state required it. Judges would serve for life to guarantee their independence and impartiality, and could only be removed by the General Assembly for serious misconduct or on other strictly defined grounds. States not honoring the court’s opinions would be subject to specified international sanctions enforced through the United Nations.

The second body, which would be complementary to the International Human Rights Court, would be the International Human Rights Commission. It would be composed of independent experts and would replace the UN Commission on Human Rights. It would set human rights policy, evaluate compliance through state reporting under all the human rights treaties, work with domestic human rights bodies (governmental as well as non-governmental), carry out human rights fact-finding missions, and refer particular cases to the International Court. This policy and promotional body would be critical because

\[222 \text{ Id.}\]
only it alone would determine what human rights policies one state could pursue against another. It would, for example, have the power to declare US linkage, say, between human rights and trade towards the PRC, unacceptable. Its purpose would be to regulate and render less important unilateral, horizontal, state-to-state enforcement. It would also work with domestic bodies concerned with human rights to stimulate public debate, educate law enforcement agencies, and help internalize norms. The overriding goal here would be to penetrate the surface of the state and transform its political and legal culture.

XI. Conclusion

The inevitable charge to the proposal advanced here is that it is unrealistic and unattainable. Maybe so. But it is difficult to predict with certainty what the final outcome would be if substantial international opinion and advocacy coalesced around such a proposal. Twenty years after the establishment of the Human Rights Committee, and the acceptance by states that some form of international supervision for the enforcement of human rights was desirable, it is time to take stock. The ledger is not a flattering one. The HRC has accomplished little and supervision and enforcement remains in the hands of unreliable institutions and powers. The promise of the ICCPR itself, and indeed of all human rights treaties, that citizens should be protected internally in the enjoyment of basic human rights, has been dimmed by impotent institutions.

The twentieth century has been both a terrible and great period in the history of humankind. It has been terrible in the sense that it has witnessed some of the most abominable barbarities that humankind has ever been subjected to, but it has also been a great period because people have devised norms to enhance respect for others, and to protect them from the recurrence of those scourges. However, the timid institutions created to mediate those norms -- and deliver that promise -- have fallen short. The next century, the twenty-first, should see the actualization of that promise. A bold International Human Rights Court and a sister International Human Rights Commission would begin to give meaning to that promise, and turn a new leaf in the history of humanity.