

## **LEGAL OPTIONS FOR THE ESTABLISHMENT OF A UNIFIED TREATY BODY**

### **I. INTRODUCTION**

1. This paper focuses on the procedural implications relating to the establishment of a unified treaty body. It distinguishes between the option of establishing such a monitoring body by treaty amendment, as envisaged in the UN human rights treaties and their respective optional protocols, and that of creating a unified treaty body without amending these treaties.
2. Although there are numerous precedents for substantive and institutional reforms of human rights protection mechanisms, in particular in the regional context, these reforms rarely concerned the merger of different monitoring organs into one unified body, one exception being the establishment of the new European Court of Human Rights by amending Protocol No. 11 to the European Convention on Human Rights.
3. As will be seen, the procedure followed for establishing the new European Court, i.e. ratification by all member States of the Convention, differs from the amendment procedure foreseen in most UN human rights treaties, which do not require unanimity. Unlike in the case of Protocol No. 11, which entered into force in 1998 after ratification by the then 40 member States of the European Convention, unanimity would be difficult to secure in the context of an overall reform of the supervisory machinery of the UN human rights treaties, some of which have almost universal membership.
4. Against this background, the following two options (see sections II and III) for establishing a unified treaty body would seem feasible:

### **II. ESTABLISHMENT BY TREATY AMENDMENT**

#### **1. Regular Amendment procedure**

5. The ICCPR and its first Optional Protocol, ICESCR, CAT and OP CAT, CRC and OP-CRC-SC as well as OP-CRC-AC, the MWC, OP CEDAW and the Draft International Convention for the Protection of all Persons from Enforced Disappearance include detailed provisions on the procedure for amendment of these treaties.
6. ICERD and CEDAW provide for the possibility of treaty "revision", without specifying the exact procedure to be followed in such an undertaking. The second Optional Protocol to the ICCPR contains no provision on amendment. The draft texts of the Disability Convention and of OP CESCRC have not yet been completed.

7. The **ICCPR** (art. 51), the first<sup>1</sup> **OP ICCPR** (art. 11), **ICESCR** (art. 29)<sup>2</sup> and **OP CEDAW** (art. 18) provide for the following same amending procedure: Any State party to a treaty may propose an amendment and file it with the Secretary-General who communicates it to the other States parties to the treaty concerned requesting them to notify him whether they favour a conference of States parties for considering and voting on the proposed amendment. In the event that at least one third of the States parties favour such a conference, the SG convenes the conference. Any amendment adopted by a majority of the States parties present and voting at the conference shall be submitted to the GA for approval. Amendments enter into force upon approval by the GA and acceptance by a two-thirds majority of the States parties to the relevant treaty in accordance with their respective constitutional processes. Amendments are binding only on those States parties which have accepted them. The other States parties are still bound by the provisions of the treaty in its original form and by any earlier amendment which they have accepted.

8. The same procedure applies under **CRC** (art. 50), **OP-CRC-AC** (art. 12), **OP-CRC-SC** (art. 16), **MWC** (art. 90), and **CAT** (art. 29), with the difference that the notifications from one-third of the States parties favouring a conference of States parties for the purpose of considering and voting on a proposed amendment must be received within four months from the date of communication of the proposal by the SG to the States parties. No approval by the GA is required under **CAT**.<sup>3</sup>

9. The draft **Disappearances Convention** even contains a provision on the possible transfer of the monitoring functions of the Committee on Enforced Disappearances to "another body" (art. 27 of the draft Convention) – such as a unified treaty body. Art. 27 provides that a conference of States parties will take place at the earliest four years and at the latest six years following the entry into force of the Convention to evaluate the functioning of the Committee and to decide whether or not such transfer is appropriate. The procedure to be followed for any amendment of the Convention, including the transfer of monitoring functions to another body, is set out in article 44 which, like article 34 **OP CAT**, differs from the amending procedures described above. Instead of a simple majority, articles 34 **OP CAT** and 44(2) of the draft Disappearances Convention require that the proposed amendment is adopted by a majority of two-thirds of the States parties present and voting at the conference of States parties, before the amendment is submitted to all the States parties for acceptance. As in the case of the other human rights treaties (with the exception of **ICERD** and **CEDAW**), an

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<sup>1</sup> Although the **second OP ICCPR** remains silent on the issue of amendment, its provisions form integral part of the **ICCPR** (see art. 6(1) of the Protocol). It follows that any amendment of the Protocol will be governed by the procedure set out in art. 51 **ICCPR**.

<sup>2</sup> It should be noted that the **ICESCR** need not be amended for transferring the monitoring functions of **CESCR**, an organ which was established by **ECOSOC** Resolution rather than by the Covenant itself, to a new unified treaty body. A new resolution of **ECOSOC** would suffice to replace **CESCR** by another body. However, it may be considered desirable to seize the historic opportunity to amend **ICESCR** to the effect that the competence for considering State reports is assigned to a unified treaty body. Moreover, the entry into force of an **OP ICESCR** which vests **CESCR** with competence to consider individual (and collective and/or inter-State) complaints would require treaty amendment (in accordance with the amendment procedure set out in the **OP ICESCR**) if such competence were to be transferred to another body.

<sup>3</sup> The same is true of article 34 **OP CAT**.

amendment to OP CAT or to the Disappearances Convention enter into force when two-thirds of the States parties to the respective treaty have accepted it, in accordance with their constitutional processes. In the case of the Disappearances Convention, the two-thirds majority of the States parties present and voting at the conference should be replaced by the simple majority usually required, so as not unnecessarily to impede the amending process that would lead to the creation of a unified treaty body. Unfortunately, for OP CAT such a change is no longer possible, unless by amending art. 34 which would, itself, require a majority of two-thirds of the States parties present and voting at a conference of States parties. However, as OP CAT introduces a new monitoring body, i.e. the new Subcommittee on Prevention of Torture, amending this treaty would merely imply replacing all references to the Committee against Torture by a reference to the new unified treaty body. Such a formalistic exercise is unlikely to meet strong opposition by States parties.

10. As regards the proposed **Disabilities Convention** or an **OP ICESCR**, it would seem reasonable to include a provision similar to that of article 27 of the draft Disappearances Convention in these treaties. Unlike article 44(2) of the draft Disappearances Convention, the amending procedure under those treaties should only require a simple majority of the States parties present and voting at the conference of parties at which a decision on the transfer of the monitoring functions under these treaties to another body would be taken. Another possibility would be to assign the monitoring tasks only on a temporary basis to the respective Committees and to stipulate that the mandate of those Committees will cease once a unified treaty body takes up its functions.

11. Although **ICERD** and **CEDAW** contain similar provisions concerning the "revision" of these Conventions, the procedure for such revision is not spelled out in detail. Thus, both article 23 ICERD and article 26 CEDAW merely provide that a request for the revision of the Conventions may be made at any time by any State party by means of a notification addressed to the SG. Thereafter, the GA shall decide on the steps, if any, to be taken in respect of such a request. In the absence of any detailed provisions, one could assume that the GA would chose a procedure based on the residuary rules on the amendment of multilateral treaties in article 40 of the Vienna Convention on the Law of Treaties.<sup>4</sup> However, even if

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<sup>4</sup> Article 40 (Amendment of multilateral treaties) of the Vienna Convention provides:

"1. Unless the treaty otherwise provides, the amendment of multilateral treaties shall be governed by the following paragraphs.

2. Any proposal to amend a multilateral treaty as between all the parties must be notified to all the contracting States, each one of which shall have the right to take part in:

(a) the decision as to the action to be taken in regard to such proposal;  
(b) the negotiation and conclusion of any agreement for the amendment of the treaty.

3. Every State entitled to become a party to the treaty shall also be entitled to become a party to the treaty as amended.

4. The amending agreement does not bind any State already a party to the treaty which does not become a party to the amending agreement; article 30, paragraph 4(b), applies in relation to such State.

5. Any State which becomes a party to the treaty after the entry into force of the amending agreement shall, failing an expression of a different intention by that State:

(a) be considered as a party to the treaty as amended; and  
(b) be considered as a party to the unamended treaty in relation to any party to the treaty not bound by the amending agreement."

article 40 were applicable to a revision of ICERD or CEDAW,<sup>5</sup> it remains silent on the question of which majority is required for amending a multilateral treaty. It is far from certain that "revision" in arts. 23 ICERD, 26 CEDAW is synonymous with "amendment" within the meaning of the relevant provisions of the other UN human rights treaties, given that it is often asserted to be the rule of customary international law that a treaty may not be revised without the consent of all States parties.<sup>6</sup> On the other hand, article 90(1) MWC uses the terms "revision" and "amendment" synonymously. Ultimately, the decision on the procedural requirements for revising ICERD and CEDAW rests with the GA. Strong arguments speak in favour of harmonizing these requirements with the amending procedures set out in the other UN human rights treaties.

12. As a common denominator of the above outlined procedures, the following procedure for establishing a unified treaty body would seem feasible:<sup>7</sup> One or more States which are parties to all UN human rights treaties would take the lead in the treaty body reform process by requesting amendments which would seek to replace the monitoring bodies of the respective treaties by a unified treaty body (e.g. the "Committee on Human Rights"), which would assume all functions that were formerly assigned to the "old" treaty bodies. These requests should be made at the same time so that one common conference of States parties could be convened by the SG within four months from the date of communication of the requests to all States parties. At this conference, States would vote on the amendments pertaining to the treaties to which they are parties. These amendments would have the effect of harmonizing, among others, the following aspects with respect to all the treaties concerned: number, qualification, election, term and emoluments of experts on the unified monitoring body; number and venue of meetings of that body;<sup>8</sup> its monitoring functions; the periodicity of State reports; admissibility criteria for individual communications; and the addressees (GA/ECOSOC/States parties) of the unified treaty body's annual reports. Any amendment to a respective treaty adopted by a majority<sup>9</sup> of the States parties attending the conference would be submitted to all States parties to the treaty. Once accepted by a majority of two-thirds of the States parties to the respective treaty (and if approved by the GA, if necessary), the amendment to the respective treaty would enter into force.

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<sup>5</sup> This is highly problematic because of the non-retroactivity stipulated in article 4 of the Vienna Convention. The Convention entered into force in 1980 and is therefore not as such applicable to ICERD and CEDAW, which were adopted in 1965 and 1979, respectively. Moreover, certain rules set out in article 40 are considered to constitute progressive development rather than codification of existing customary international law. See Sinclair, Ian, *The Vienna Convention on the Law of Treaties*, 2<sup>nd</sup> ed., 1984.

<sup>6</sup> *Ibid.*

<sup>7</sup> Subject to the condition that arts. 23 ICERD, 26 CEDAW can be applied analogously to arts. 51 ICCPR, 11 OP ICCPR, 29 CAT, 29 ICESCR, 50 CRC, 12 OP-CRC-AC, 16 OP-CRC-SC, 90 MWC, and 18 OP CEDAW.

<sup>8</sup> In some Conventions, the number and venue of meetings of the treaty body is not specified (see, e.g., art. 18 CAT); in others, they are specified but not observed in practice (see, e.g., arts. 43(10) CRC, 75(4) MWC).

<sup>9</sup> A two-thirds majority of the States parties present and voting at the conference is required by art. 34 OP CAT and, unless this provision is to be redrafted, by art. 44(2) of the draft Disappearances Convention.

13. The requirement of acceptance of the amendment by a two-thirds majority of the States parties to the respective treaty has the following implications for the establishment of a unified treaty body: In the event that an amendment, which has not been accepted by all States parties, enters into force, the States parties which have not accepted the amendment will continue to be monitored by the "old" treaty body, while States parties having accepted the amendment will be monitored by the "new" unified treaty body. Given that the amendment will automatically enter into force, once it has been accepted by two-thirds of the States parties, the parallel existence of different monitoring bodies will inevitably become a reality until such time that all States parties have accepted the amendment, in accordance with their respective constitutional processes. This undesirable situation will continue, as long as only one State party refuses to accept the amendment.

14. As regards the relationship between States parties which have accepted the amendment and those which have not, the above treaties remain silent on the legal regime to be applied. This could lead to complications if, after the entry into force of the amendment on a unified treaty body, a State party which has accepted the amendment submits an inter-State complaint (art. 11 ICERD, art. 41 ICCPR, art. 21 CAT, art. 76 MWC, art. 33 of the Draft Disappearances Convention) against another State party which has not accepted it. In this case, one would have to resort to art. 40, paragraph 4, in conjunction with art. 30, paragraph 4(b), of the Vienna Convention on the Law of Treaties of 1969 (if applicable to the States parties concerned<sup>10</sup>), which provide that the provisions of the unamended treaty continue to govern the relationship between the State party which has not accepted the amendment and the State party to the amended treaty. The inter-State communication would therefore have to be considered by the "old" treaty body. However, in practice not a single inter-State complaint has been lodged under any of the UN human rights treaties, so that this problem is of little practical relevance.<sup>11</sup>

15. A more relevant problem that would arise under concurrent monitoring systems relates to the membership of the "old" treaty bodies on one hand and that of the new unified treaty body on the other hand. With the exception of ICESCR,<sup>12</sup> each of the UN human rights treaties provides for a certain number of members to be elected by the States parties to the respective treaties.<sup>13</sup> Although a

<sup>10</sup> This requires that both States parties are also parties of the Vienna Convention on the Law of Treaties and that the human rights treaty, under which the inter-State complaint is being lodged, was concluded after the entry into force of the Vienna Convention on 27 January 1980 (see art. 4 of the Vienna Convention; non-retroactivity of the Convention). In the absence of one or both of these prerequisites, the relevant provisions of the Vienna Convention would still apply if they have become customary international law.

<sup>11</sup> One way to ensure that no such conflict arises would be for all States parties having declared that they recognize the optional inter-State complaint jurisdiction of the HRC, CAT and the MWC (CERD has compulsory jurisdiction to deal with inter-State complaints, see art. 11(1) ICERD) to withdraw their respective declarations (see art. 41(2) ICCPR, art. 21(2) CAT, art. 76(2) MWC) and to transfer the competence to receive and consider inter-State complaints to a third body, such as the International Court of Justice or a future World Court of Human Rights.

<sup>12</sup> The membership and methods of work of CESCER are regulated in ECOSOC Resolution No. 1985/17.

<sup>13</sup> 10 for CAT, the MWC (14 after 41 ratifications) and the envisaged Committee on Enforced Disappearances (see art. 17 CAT; art. 72(1)(b) MWC; art. 26(1) Draft Disappearances Convention); 18 for CERD, the Human Rights Committee and, following the amendment of the Convention on the

new unified treaty body could act under two hats and sit as a (standing) unified body and, sessionally, as one or more of the "old" treaty bodies, such a fiction would require that States parties reach agreement on overlapping membership between these bodies and elect the members of the treaty bodies accordingly. The opposition of a few States parties would not frustrate such an undertaking, as long as a majority of States parties agrees to elect the members of the different treaty bodies in a way which ensures overlapping membership.<sup>14</sup>

## 2. Simplified amendment procedure

16. The requirement that the amendment introducing a unified treaty body be accepted by a majority of two-thirds of the States parties to the respective treaty, in accordance with their constitutional processes, would inevitably lead to significant delays in the establishment of this body. Therefore, the question arises whether "acceptance" necessarily implies the deposit of instruments of acceptance by at least two-thirds of the States parties to the respective treaty or whether their consent to be bound by the amending agreement can also be expressed by other means.

17. One example of how to avoid a lengthy amendment procedure is the Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea. The Convention entered into force on 16 November 1994, after it had been ratified by sixty States. None of the industrialized States, except for Iceland, figured among the sixty ratifying States because of their difficulties to accept the deep seabed mining regime contained in Part XI of the Convention. The Agreement, which was adopted by the GA on 28 July 1994 by 121 votes to none, with 7 abstentions, was opened for signature the same day. Despite its name, which purports that it is merely meant to implement the provisions of Part XI of the Convention, the Agreement modifies the legal regime of Part XI fundamentally. The unsatisfactory situation of a concurrent application of Part XI of the Convention in its original version and of Part XI as modified by the Agreement continued to exist, as long as the not all States which had ratified the Convention had also ratified or otherwise established their consent to be bound by the Agreement, or had applied it provisionally. Therefore, the lengthy amending procedure set out in article 314 of the Convention was circumvented by using a simplified procedure providing for tacit acceptance of the Agreement.<sup>15</sup>

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Rights of the Child upon approval by the GA and acceptance by a two-thirds majority of the States parties, also for CRC (see art. 8(1) ICERD; art. 28(1) ICCPR; art. 43(2) CRC, as amended); 23 for CEDAW (see art. 17(1) CEDAW)

<sup>14</sup> However, it should not be overlooked that, after the entry into force of the treaty amendments required for the establishment of a unified treaty body, only those States parties which have not accepted the respective amendments would participate in the elections of the members of the "old" treaty bodies. It remains to be seen whether those States would be willing to ensure overlapping membership.

<sup>15</sup> See Jaenicke, Günther, "The United Nations Convention on the Law of the Sea and the Agreement Relating to the Implementation of Part XI of the Convention: Treaty Law Problems in the Process of Revising the Deep Seabed Mining Regime of the Convention", in: Beyerlin, Ulrich/Bothe, Michael/Hofmann, Rainer/Petersmann, Ernst-Ulrich (ed.), *Recht zwischen Umbruch und Bewahrung: Festschrift für Rudolf Bernhardt*, Berlin/Heidelberg/New York etc. 1995, pp. 121-134.

18. Articles 3 to 7 provide for different ways for States to become bound by the Agreement; these provisions distinguish between States which have ratified the Convention before the adoption of the Agreement and those States which ratify the Convention after that date. Under the simplified procedure set out in article 5 of the Agreement, a State which has ratified the Convention before the adoption of the Agreement and which has signed the Agreement subject to the procedure set out in article 5, "shall be considered to have established its consent to be bound by this Agreement 12 months after the date of its adoption," unless such State notifies the depositary before that date that it is not availing itself of the simplified procedure set out in article 5. States thus retain the possibility of returning to the formal ratification procedure if required by domestic reasons. Under article 7 of the Agreement, a State which has consented to the adoption of the Agreement is bound to apply it provisionally, unless it has notified the depositary at a given time that it will not apply the Agreement provisionally. The mere positive vote for the Agreement in the GA thus has a legally binding effect on a State to apply the Agreement provisionally. This had the desired effect that even before the entry into force of the Agreement (i.e. after 40 States had established their consent to be bound by it), a large number of States applied it provisionally.<sup>16</sup>

19. Elements of the Agreement could be used for accelerating the procedure for establishing a unified treaty body. Thus, instead of accepting the relevant amendments to the human rights treaties concerned, in accordance with their respective constitutional processes, States could avail themselves of a simplified procedure<sup>17</sup> similar to that of article 5 of the Agreement Relating to the Implementation of Part XI to express their consent to be bound by those amendments which have been adopted by a majority of the States parties present and voting at the respective conference of States parties and which have been approved by the GA, if necessary. Similarly, States parties having consented to the adoption of the amendment to the human rights treaty concerned at the respective conference or within the GA could be considered to be bound to apply the amendment provisionally pending its entry into force, unless they notify the SG of their intention not to not apply the amendment provisionally.

20. While these procedural devices would allow for a more expeditious ratification process, as well as for a provisional application of amendments introducing a unified treaty body by those States which have consented to the adoption of such amendments and which are willing to apply the new monitoring regime provisionally, they could do little to change the fact that two concurrent monitoring systems would exist under each treaty, until all States parties to that treaty have accepted or otherwise expressed their consent to be bound by the relevant amendment. To avoid at least that new States parties to any of the human rights treaties would be bound by the "old" monitoring regime, a clause should be included in the amendment providing that a State which becomes a party to the respective treaty after the entry into force of the amending agreement shall be considered as a party to the treaty as amended, in the absence of an expression of a different intention by that State (art. 40, paragraph 5(a), of the Vienna Convention). However, such State would be considered as a party to the

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<sup>16</sup> *Ibid.*

<sup>17</sup> Such a procedure could be set out in the proposed amendments themselves.

unamended treaty in relation to any State party to the treaty not bound by the amendment (art. 40, paragraph 5(b), of the Vienna Convention).<sup>18</sup>

### 3. Treaty amendment with the consent of all States parties

21. The only way to amend a treaty in a manner that precludes the concurrent application, if only temporary, of different monitoring regimes under that treaty would be to revise the treaty with the consent of all States parties to the treaty.<sup>19</sup> This presupposes that any amendment introducing a new monitoring regime enters into force only after it has been accepted by all the States parties to the treaty concerned.<sup>20</sup> Such course of action would depart from the amending procedure set out in most of the UN human rights treaties, which require acceptance of the amendment by two-thirds of the States parties to the respective treaty. This raises the question whether requiring acceptance of the amendment by all States parties for its entry into force would itself require an amendment of the treaty's provision on acceptance by a two-thirds majority. However, replacing the two-thirds majority by a unanimity requirement would have the undesired effect that, in future, any other amendment to the treaty would necessitate the consent of all States parties to the treaty. It would therefore be preferable to include a clause in the amending agreement itself, providing that the entry into force of the amendment on the establishment of a unified treaty body requires the consent of all States parties to a treaty. Even if such a clause would depart from the amending procedures set out in the human rights treaties, it is unlikely that it would meet strong opposition from States parties.

22. The following scenario would seem feasible: One or more States which are parties to all UN human rights treaties could take the lead and request a common amendment to all UN human rights treaties seeking to replace the monitoring bodies of these treaties by a unified treaty body. The SG would thereupon take the necessary steps to convene a conference of States parties to all the treaties concerned. At this conference, States would vote on the common amendment, insofar as it relates to each of the treaties of which they are parties. The common

<sup>18</sup> Because of the integral structure of human rights treaties, which primarily seek to protect the individual rather than to create legal rights and obligations between the States parties, this aspect only has relevance in relation to inter-State complaints.

<sup>19</sup> The option of an amending rather than an optional protocol was chosen in the case of Protocol No. 11 to the European Convention on Human Rights (which established the new European Court of Human Rights, thereby replacing the former Court as well as the European Commission of Human Rights). The reason for this choice was precisely to prevent two different mechanisms of control from existing side by side. Such parallelism was considered undesirable because a homogenous and clearly consistent development of case law was deemed to constitute an important basis of human rights protection under the Convention. Furthermore, it was feared that the existence of two groups of States subject to different supervisory mechanisms would invariably cause considerable procedural complications, e.g. for the registry and the judges sitting in both the old and the new Courts. This was considered to run counter to the aim of the reform to increase efficiency. Finally, it was feared that the parallelism of two mechanisms of supervision could cause confusion for individual applicants, a result contrary to the aim of creating a more transparent system. See Council of Europe, Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby, *Explanatory Report*, at para. 55.

<sup>20</sup> Outside the framework of the amending procedures of the existing treaties, one could consider revising the monitoring regimes of these treaties by way of a procedural amending protocol similar to Protocol No. 11 to the European Convention, which would require ratification by all States parties to the respective human rights treaties.



amendment would have the same harmonizing effects as described above and would stipulate, with regard to each treaty, that the amendment only enters into force after ratification by all the States parties to that treaty. Once accepted by all States parties to a respective treaty, the amendment would replace the monitoring body of that treaty with the new unified treaty body. The result of such an undertaking would be the successive replacement of the "old" treaty bodies by a unified monitoring body.

23. The major disadvantage of requiring the consent of all States parties to a treaty is that it would impede the entry into force of any amendment for years, if not decades. It is at least arguable that this disadvantage can be outweighed by the positive effect of unanimous treaty amendment, namely the prevention of concurrent monitoring regimes. Furthermore, the ratification process could be accelerated by means of a simplified procedure as outlined above. A provisional application of the new monitoring regime with a unified treaty body by all States parties to a treaty would, however, seem unrealistic at the universal level.<sup>21</sup>

### III. ESTABLISHMENT WITHOUT TREATY AMENDMENT

#### 1. The Scheinin proposal

24. At a conference on justiciability of economic, social and cultural rights which was held in Nantes in early September 2005, Professor Martin Scheinin presented his blueprint for a human rights treaty body reform without amending the existing treaties.

25. The proposal suggests that States parties to the ICESCR should use the historical opportunity offered by the adoption of an OP ICESCR to assign the task of dealing with individual complaints under the ICESCR to the Human Rights Committee (HRC). During the transitional period between the adoption and entry into force of the OP ICESCR, the composition of the HRC should be changed to ensure broader expertise in the field of ESC rights. Thereafter, ECOSOC should adopt a new resolution, replacing its resolution 1985/17 which established the Committee on Economic, Social and Cultural Rights (CESCR), to abolish CESCR and also assign its task of examining State reports to the HRC,<sup>22</sup> thereby uniting the monitoring regimes of both Covenants, in accordance with the idea of interdependence and indivisibility of all human rights.

26. Members of the HRC who were elected as nationals of a State that is not a party to the ICCPR (Belize, Botswana, Haiti, Mozambique, South Africa, United States of America) would not participate in matters related to the ICESCR and would be replaced by a substitute or ad-hoc member of the HRC elected by the

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<sup>21</sup> At the regional level, the 1991 Protocol amending the European Social Charter is an example for the provisional application of an amending protocol prior to its entry into force. Despite the fact that the Protocol has not been ratified by all member States of the European Social Charter, its main provisions changing the reporting system under the Charter are already being applied in practice. See Harris, David/Darcy, John, *The European Social Charter*, 2<sup>nd</sup> ed., Ardsley (NY) 2001, at pp. 14-15.

<sup>22</sup> The HRC could thereafter request single consolidated reports from States parties to both Covenants.

States parties to the ICESCR whenever the HRC would deal with matters related to ICESCR. The HRC would operate in two or more chambers.

27. Without amending any of the other UN human rights treaties, governments and the HC would proclaim the aim of overlapping membership between the HRC and the other treaty bodies to reduce the total number of experts serving on the treaty bodies. The sessions of the specialized treaty bodies would directly precede or follow the sessions of the HRC, so as to accommodate members of the HRC who are also members of another treaty body. The sessions of this consolidated treaty body system would last for a minimum of six weeks, split up into e.g., a first week devoted to parallel meetings of three of the specialized treaty bodies (e.g. CAT, CRC and MWC), four weeks during which the HRC partly sits in parallel chambers to consider consolidated State reports and the admissibility of individual complaints under both Covenants, and a sixth week for parallel sessions of the other specialized treaty bodies (e.g., CERD, CEDAW). This would reduce the number of annual weeks of sessions from currently 39 to 18 weeks. Such reduction would be based on synergy effects and would need to be approved by the treaty bodies concerned. Any expenditure savings could be used to reintroduce the emoluments to members to compensate possible financial losses caused by prolonged sessions.

28. As a further step, Mr. Scheinin proposes the establishment of a World Court of Human Rights. For those States which accept the Court's binding jurisdiction, the possibility to submit complaints to the Court would automatically substitute their earlier acceptance of optional complaint procedures under the existing treaties. The consolidated treaty body system, in addition to examining State reports, would continue to deal with complaints in relation to those States which have not recognized the Court's binding jurisdiction.

## **2. Possible impediments to the establishment of a unified treaty body without treaty amendment**

29. In 1981, the UN Office of Legal Affairs (OLA) considered a proposal that the Human Rights Committee function as monitoring body of the proposed Convention against Torture. The view of the then Legal Counsel was that "this proposal presents serious legal obstacles and, if adopted, its legal validity could be challenged on the ground that it constitutes a modification of the terms of the Covenant which has established the Human Rights Committee and defined its terms of reference. Such modification can only be effected by the procedure specified in Article 51 of the Covenant."

30. In 2003, OLA reiterated this position in relation to a proposal that the envisaged Convention for the Protection of all Persons from Enforced Disappearance should assign monitoring tasks to the Human Rights Committee. The same legal obstacles and doubts as to the validity would seem to apply to a transfer without treaty amendment, in accordance with art. 51 ICCPR of the monitoring functions, of CESCR to the HRC, whether by way of an OP ICESCR (for individual complaints) or by ECOSOC resolution (for State reports).

31. As regards the overlapping membership between the HRC and the specialized treaty bodies, much would depend on the political will of the States parties to the respective human rights treaties. Although it would be sufficient if a majority of States parties to a treaty supported the idea of a consolidated treaty body system and elected the members of the different treaty bodies in a manner which would ensure an overlapping membership, such a fragile system (which would not be based on treaty law but rather on political will) may soon fall prey to the particular interests of States or alliances of States.<sup>23</sup> In sum, the establishment of a unified (or consolidated) treaty body without amending the existing treaties, albeit an innovative and appealing idea, would seem to stand on unsafe grounds.

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<sup>23</sup> One must only think of a scenario where a regional group wants to impose its candidate even though such candidacy would run counter to the aim of overlapping membership.

