

**THE AVAILABILITY OF INTERNATIONAL
JUDICIAL REVIEW OF GOVERNMENT BREACHES
OF HUMAN RIGHTS**

T h e s i s

By

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In memory of my beloved mother.

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Abstract

The main objectives of this thesis are to provide a description, analysis and criticism of the existing international instruments for the promotion of respect and protection of human rights, as well as to provide suggestions for the adoption of an additional legal instrument through the United Nations mechanism as a complementary procedure in order to strengthen judicial review of state actions and legislation. This, in turn, should serve to increase pressure upon State governments to bring their internal legal systems into line with international standards for the protection of human rights.

While there is some limited degree of international “review” of States’ compliance with their international human rights obligations, it is argued in this work that the current international procedures available to individuals alleging that their human rights have been abused by a State are no longer sufficient, and therefore it is appropriate to discuss whether another procedure should be introduced.

The thesis considers this issue of increased judicial review by focusing on one of Australia’s closest neighbours, Indonesia, as an example of a State whose conduct remains largely “untouchable” under current international mechanisms. Despite gross and systematic violations of human rights, one could argue that the Indonesian government is still immune due to its “executive-heavy” legislative system, restricted judicial review as a result of a corrupt judiciary, and high level of impunity of the government and other state agencies.

The thesis firstly concentrates on the procedures available at an international level for dealing with individual complaints alleging human rights violations. Different procedures both under Charter and Treaty provisions are analysed in an attempt to describe their advantages and disadvantages. Two Charter-based procedures dealt with in the discussion cover the communication procedure under the United Nations Economic and Social Council (ECOSOC) which includes the “1503” procedure. Treaty-based procedures, including the procedure before the Human Rights Committee (HRC), the Committee on the Elimination of Racial Discrimination

(CERD), the Committee against Torture (CAT) and the Committee on the Elimination of Discrimination against Women (CEDAW) are given special attention in this thesis.

There follows a critical appraisal of these procedures which highlights their limitations and weaknesses, followed by the suggestion that an additional procedure to complement the current mechanisms available to individuals seeking remedies for human rights violations would be highly desirable – both theoretically and in practice. Among the most prominent limitations of these procedures are the non-binding nature of most of the decisions involved and the real obstacle that the admissibility requirement of “exhaustion of domestic remedies” presents.

Finally, the thesis considers the possibility, as has started to be discussed among some international scholars, of an “International Judicial Review” procedure by which a State’s legislation could be examined in order to determine whether or not it is in conformity with international human rights standards and norms. It will be suggested that this power of review be given to the International Court of Justice (ICJ) as the “principal judicial organ of The United Nations”.

Chapter 1
GENERAL INTRODUCTION

1. Introductory Remarks

The real test of the effectiveness of any legal system for the protection of human rights is whether judicial review procedures are available to control legislation¹ or acts by a state official for violation of these rights. Such procedures entitle individuals who believe that their rights have been violated to seek remedy either from a national or, where possible, from an international institution.

The interests of individuals are supposed to be protected by the State of which they are nationals. However, many studies and commentators have noted that this does not always work satisfactorily- especially in the area of human rights, where the great majority of cases in which the rights of individuals have been and might still be violated are the direct result of legislation or actions of government officials or agencies.

Effective control over government activities and legislation not only serves to protect human rights from being abused but also maintains public confidence in the legal order. Moreover, this control is also in the interests of the government itself. The awareness that the government too is bound by the law and is subject to supervision nationally and, under certain conditions, internationally, strengthens confidence in the governmental apparatus and thus enhances the efficiency of its administration.

¹ Although reference will be made throughout this thesis to the judicial review of legislation, this is also meant to include the possible revision of constitutional provisions.

Problems will arise if a State does not include in its constitution any provisions for the protection of human rights and fundamental freedoms, which should form the basis of review of the legality and constitutionality of government activities. Problems are also likely to arise if there are provisions regarding the protection of human rights that are inconsistent with those of international legal norms or principles as set out in, for instance, the International Bill of Rights.²

Another situation might be that a State's legislation – or its constitution – is in line with the international legal norms on human rights in some respects, but in others does not make provisions for judicial review. There is now a very urgent need to make available international judicial review procedures by which all legislation of a State may be examined in terms of its conformity with international legal norms. Such international procedures would enable a determination of whether or not a particular State violates the international provisions for the protection of human rights and fundamental freedoms.

It is therefore very important to study the possibility of making available such procedures in order to provide better legal protection for individuals against activities which abuse human rights, and against a government's excessive use of power. Besides, as a member of the international community of “civilised nations” under the United Nations system, every Member State has pledged itself “to achieve, in cooperation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms.”³

² In major human rights literature, it is widely accepted that this refers to the Universal Declaration of Human Rights, the International Covenant on Civil and Political rights (ICCPR) along with its Protocol and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

³ *Preamble* of the Universal Declaration of Human Rights.

Many commentators may think that such procedures for control of government activities and legislation are not really necessary. Some may even think that this could weaken the powers of the government and interfere with State sovereignty to such an extent that the function and duties of the government would be distorted and unduly restricted.

However, both common sense and the ultimate goals of maintaining legal order as well as the international legal obligation of States to promote and encourage respect for and protection of human rights, dictate that it is clearly necessary to adopt a constructive and positive attitude to the question of an individual's access to international remedies. Failure to fulfil this obligation means failure to fulfil one of the principal functions of the State at the national level, and the glorious duty of the United Nations at the international level.

This thesis does not attempt the impossible task of proving that an international judicial review mechanism is currently feasible – clearly that is still a distant evolutionary step, given that States generally jealously try to preserve their sovereignty. Its objectives are far more modest: to underline some of the reasons why, from a legal point of view, such a development is desirable for reasons illustrated with the example of Indonesia, and why the idea must be the object of consideration in order for this possibility to become part of discussions amongst various segments of society.

It should also be remembered that while this sort of mechanism may seem outlandish given that many, maybe even most, States would not eagerly embark on the creation of an international judicial review mechanism because of the potential effects on their own sovereignty, the development of international law does not require prior approval of all or

a majority of States: binding legal instruments such as the protocol which established the African Court of Human Rights only required a rather small number of ratifications (15) before entering into force. If it was possible in Africa, there is no reason why an initially small number of states could not be motivated to proceed with an international tool of judicial review in the area of human rights.

The example of Indonesia, one of Australia's closest neighbours, where individuals by law have no adequate access to an international remedy system in cases of human rights violations, demonstrates fairly clearly that the ability to have recourse to some sort of compliance mechanism at an international level is a crucial need. With the ratification of treaties such as the International Covenant on Civil and Political Rights (ICCPR) in 2005, it is hoped that Indonesia will continue down this path and also accept the complaints mechanism, thereby subjecting itself to further scrutiny.⁴

2. Theoretical Overview and the Purpose of International Judicial Review

One of the principles of the Rule of Law states that everybody, including the government, is bound by the law and subject to legal supervision exercised by the court⁵. For this reason, the legality and validity of government acts and indeed legislation must be subjected to some type of review.

Apart from any other incidental proceedings, the judicial review of government acts for the breach of human rights can only be carried out upon application (i.e. a lawsuit)

⁴ Ratified September 2005. As at 30 June 2006, Indonesia had not acceded to the additional protocol that would permit individuals to send a complaint of a violation of the ICCPR to the UN Human Rights Committee.

⁵ P. van Dijk, 1980. *Judicial Review of Governmental Action and the Requirement of an Interest to Sue*. Sijthoff & Noordhoff, The Hague, p. 1

brought by individuals who believe that their rights have been violated, or by an organisation acting on their behalf (e.g. an NGO).

Two types of judicial review are recognised in mainstream law literature: formal or procedural review, and content-based or substantive judicial review. In formal judicial review, the validity of a government act is reviewed based on the procedure taken as it is stipulated in the law.

An Indonesian parliamentary act or *Undang-Undang* (UU), for example, is considered inconsistent with the nation's 1945 Constitution if it is enacted only by either the Parliament or the President. Article 20(1) of the Constitution requires that all acts must be approved by the Parliament *and* enacted by the President. So, by examining the enactment procedures, it can be determined whether or not the law is valid.

Unlike the formal or procedural review, the purpose of the contents-based or substantive judicial review is to determine whether or not a law, in terms of its substance or content, is consistent with the constitution or other higher regulations. If all necessary procedures taken in producing the law have been duly followed, but it is found that its content is inconsistent with the provisions of the constitution, then the law must be declared illegal and revoked.

The emphasis of this study is on substantive judicial review, though one which covers legislation as well as State activities in general. Procedural judicial review will not be dealt with since it is less important in relation to the discussion of breaches of

international treaties such as human rights provisions. Additionally, a clear distinction has to be made between national and international judicial review.

Under the Indonesian legal system, judicial review primarily concerns itself with examining the government's administrative decisions. Broadly speaking, this means any governmental project or action (e.g. building a railroad, establishing a new department or service, etc.) that is carried out by government agencies or bodies. There is no consideration at this level of judicial review in light of Indonesia's international or treaty-based human rights provisions.

National control of administrative actions occurs in the first instance through a range of systems that operate and derive their authority solely from within the confines of government bodies. This control is normally exercised by the higher-ranking government officials; and functions as supervision towards the lower-ranking officials.

In the discussion of international judicial review of government acts and legislation for breaches of human rights, on the other hand, the emphasis is on the non-implementation and non-application of the international provisions for the protection of human rights and fundamental freedoms within the national law and law courts. Provisions like those set forth in the International Covenant on Civil and Political Rights (ICCPR), if a State is a party to it, will be used to test the conformity of government acts and the practices of national judicial bodies in the area of the protection of human rights. In general, and in relation to the international review procedure, the widely recognised International Bill of Rights will be used as benchmark for testing the validity of a State government's act or legislation.

Admittedly, judicial review does not sit comfortably with the classical conception of international law; which does not permit individual claims to be brought to the International Court of Justice (ICJ) under the Statute of the International Court of Justice.⁶ Still, a number of procedures have now been developed in which the activities and legislation of a State can be reviewed if they are in breach of its international obligations. These procedures, such as those contained under the auspices of the European Court of Human Rights, have the features of a national judicial review. There are also review procedures that have a quasi-judicial character. These can be found in cases handled by the International Arbitration Tribunal, which not only deals with the omissions of the State, but also the legality of the State's acts.

The main purpose of making procedures available at the international level is to provide individuals with greater access to an international system that protects them against breaches of their human rights and fundamental freedoms. Another equally important purpose is to put State governments under sufficient "pressure" to cause them to bring their internal laws into conformity with international legal norms for the protection of human rights.

3. Questions and Issues

There are several questions and issues that need to be addressed in this study. The first and most crucial is the question of how and when individuals whose rights and fundamental freedoms have been violated by government acts or legislation can find

⁶ *Article 34(1)* of the Statute of the ICJ states "only States may be parties in cases before the Court".

suitable redress at the international level. The most obvious solution involves the First Protocol to the ICCPR⁷, which has made it possible for individuals to bring their petitions to the Human Rights Committee (HRC) – at least for those States that have accepted this Protocol. If all the conditions of admissibility of the petition have been met as provided for in Article 40(4) of the Covenant, the Committee will then consider the case. While this procedure is a pioneer for other similar mechanisms allowing individual communications to be heard, it remains still a weak one since the views made by the Committee are not legally binding on the State Party.

This study will suggest a more progressive approach to the handling of individual communications, a concept which could be referred to as international judicial review. The review procedure would involve a decision that would have a legally binding character, and as such, could indeed only be made by an international judicial body to which such competence was entrusted.

The International Court of Justice is by far the most important international tribunal with worldwide jurisdiction. In accordance with Article 34(1) of the Statute of the ICJ, only States may be parties in cases brought before the Court. This rule, however, cannot be maintained without any changes for several reasons: the ever-increasing need of individuals for more protection of their interests, the demands of international cooperation which are constantly on the move in this era of globalisation at the beginning of a new millennium, and also the need for real accountability for crimes against human rights.⁸

⁷ Entered into force 23 March 1976.

⁸ Mary Robinson, the UN High Commissioner for Human Rights in her speech at the Rome Conference on 15 June 1998, for instance, admitted that the international community, through the United Nations, has a poor record in preventing and stopping systematic acts of violation of human rights. In her address she also stated that: “In the fifty years since the Universal Declaration of Human Rights set out the basic standards of human rights there has been almost systematic violation of every one of the 30 articles. The

This study, therefore, needs to address a number of important issues, namely:

- a) Do the present international instruments already provide sufficient protection against abuses by governments that breach the human rights and fundamental freedoms of individuals?
- b) Is it really necessary to make procedures for control of government acts and legislation available at the international level?
- c) What form will such procedures take and how will they work?

4. Purpose and Method of the Study

This study has two aims: firstly, to reveal the limitations or weaknesses of the present international instruments and provisions for the protection of human rights, and secondly, to suggest a relatively new and more progressive international judicial review procedure for dealing with human rights violation cases involving individuals and States.

In order to achieve these aims the following methods of research have been employed:

- *Case study.* This thesis contains an in-depth study of Indonesian cases where the human rights and fundamental freedoms of individuals have allegedly been violated. The cases discussed here involved prominent political figures and academics as well as religious and press personalities. These cases exemplify the sort of State conduct that violates human rights, partially as a result of the nature of Indonesia's legislation and court system, and the impunity that sometimes characterises it. It can further be said that the Indonesian legal system and court practices have been deliberately systematised to protect government agencies from being held responsible for their breaches of human rights and abuse of power. The fact that such breaches of human

lack of real accountability for such crimes has only encouraged the perpetrators, fueled resentment and perpetuated cycles of violence.”

rights and abuse of power have never been brought to court for examination of their legality and constitutionality has resulted in State impunity. Hence, this study is conducted specifically to explore the possibility of legally testing the validity of those government activities and legislation which have led to impunity of those responsible for the violation of human rights.

- *Field research.* Research activity conducted in the location concerned was considered very important for this work, enabling the collection of first-hand information relating to violation cases and court rulings and procedures. Much of the information could only be obtained through paying visits to a number of research centres. The crucial data was not available elsewhere. Information on the details of human rights violations by high-level Indonesian government authorities, for instance, are normally not accessible to the public in Indonesia (although that is starting to change), nor are they readily available on library shelves. Several field trips were therefore necessary, including visits to the University of Ottawa and the Canadian Human Rights Committee in Ottawa, Canada. Several Indonesian law faculties and non-governmental organisations working in the area of human rights have also been contacted to obtain data to support this study.
- *Document research.* This is the most exhaustive means of research used in this study. A large number of legal documents such as international treaties, law books, court orders and other legal literature have been studied extensively in order to gain comprehensive and impartial information. Some personal communications with individuals or authorities have also been undertaken, but due to Indonesian privacy

laws, the sources of such input cannot be disclosed. Input of this nature, however, is still very helpful in making analyses and drawing conclusions.

Since this is a qualitative study there is no statistical data treatment to be found, and all analysis and conclusions in this thesis are made using induction - the inference of generalised conclusions from particular instances, and deduction - the deriving of conclusions by reasoning, namely the type of inference in which the conclusion about particulars follows necessarily from general or universal premises.⁹

5. The Arrangement of the Work

In order to present a clear and systematic report, this thesis has been arranged in seven chapters, beginning with a general introduction and ending with a conclusion and recommendations. At the beginning of every chapter there is a brief note containing preliminary remarks, serving as an introduction to the entire contents of the chapter. Several appendices are also attached as part of the work.

Chapter 1, a general introduction, serves as background notes or remarks. It contains reasons for the topic being chosen (part 1), a theoretical overview of judicial review (part 2), the questions and issues which are dealt with in this study (part 3), and the purpose and method of the study (part 4). Part 5 outlines the order and arrangement of the thesis.

In Chapter 2, the three fundamental issues of this thesis i.e. judicial review, government acts and legislation, and finally human rights are addressed comprehensively. Part 1 deals

⁹ Merriam Webster. 1993. *Merriam Webster's Collegiate Dictionary*. 10th ed., Springfield, Massachusetts: Merriam Webster Inc., pp. 301 & 594.

with the definition, notion and purpose of judicial review. Government acts and legislation are dealt with in part 2, and the major concepts of human rights in part 3, while part 4 covers human rights violations. The purpose of presenting these subjects at the beginning of this work is to serve as a theoretical basis for the analysis that follows in subsequent chapters.

The title of Chapter 3 is "Executive-heavy Legislation, Restricted Judicial Review and State Impunity: the Case of Indonesia". Accordingly, there are three main parts in this chapter: the Indonesian legal system (part 2), Indonesian judicial review (part 3), and a short list of records of human rights violations to demonstrate the impunity of the State (part 4). In addition to this, part 5 deals with attempts made by individuals or organisations to seek redress or remedies in relation to these issues at the national and international levels (part 5). This chapter provides basic case material to demonstrate why an international judicial review is deemed necessary.

As a sequel to the previous chapter, the content of Chapter 4 explores the potential for individual access to an international remedy system. This chapter covers issues such as an overview of the United Nations Human Rights System (part 2), functions and powers of Charter-based bodies (part 3), as well as communications procedures and an individual's access under international human rights instruments (part 4). This chapter provides a detailed explanation of the United Nations bodies and other internationally recognised instruments for the protection of human rights, and the access available to individuals claiming that their rights have been violated.

The next issue that has to be addressed is the need for an international judicial review of government acts and legislation for breaches of human rights. This is dealt with in Chapter 5. This chapter contains analyses of, and answers to, questions such as: ‘Why is international judicial review needed?’ (part 2), ‘What are the powers and competences of the International Criminal Court?’ (part 3), ‘What are the international practices which are similar to judicial review?’ (part 4), ‘What function would the international judicial review serve?’, ‘Who should possess this power?’, and ‘Where should this power be based?’ (part 5). This chapter is proposed as a response to the previous chapter in which an alternative procedure was offered.

As a logical sequence, Chapter 6 proposes a new international judicial review procedure. In this chapter, basic issues relating to court proceedings are addressed, such as who can bring a case, (part 2), stages of the procedure (part 3) and the critical appraisals and prospects of the procedure (part 4). This chapter closes the study and analysis prior to conclusions being drawn and recommendations made.

Chapter 7 contains the conclusions that are derived from the entire study (part 1). On the basis of these conclusions, some recommendations are made in relation to the subject matter of the study as well as to areas of possible further research (part 2).

Chapter 2

JUDICIAL REVIEW, GOVERNMENT ACTS AND HUMAN RIGHTS

Since this study focuses on the judicial control of government acts and legislation for breaches of human rights, it is necessary to discuss the three basic elements which make up the title of this thesis: judicial review, government acts and legislation, and human rights. This last element will be dealt with by investigating the ideals and ideologies which underpin contemporary concepts of human rights. The discussion in this chapter will be concluded with a brief explanation of what constitutes a violation of human rights. The subject of international judicial review will be examined in Chapters 5 and 6.

1. Judicial Review

Clive B. Lewis defined judicial review as:

...the process by which the courts exercise a supervisory jurisdiction [or control] over the activities of public authorities in the field of public law.¹⁰

This control is exercised primarily through the application for judicial review of regulations and policies made by those public authorities. Lewis further emphasizes that judicial review jurisdiction only operates in the field of public law; and

[The] procedure is generally regarded as public law remedy. More accurately, the application for judicial review is a specialized procedure by which an applicant can seek one or more of the existing prerogative remedies which can now only be claimed by way of an application for judicial review and, in appropriate circumstances, declarations and injunctions and damages.¹¹

¹⁰ Lewis, Clive B. 2000. *Judicial Remedies in Public Law*. 2nd ed., London: Sweet & Maxwell, p. 7.

¹¹ Lewis, *Id.*

Supperstone and *Goudie* assert that “judicial review is the process by which the High Court exercises its supervisory jurisdiction over the proceedings and decisions of inferior courts, tribunals and other bodies or persons who carry out quasi-judicial functions or who are charged with the performance of public acts and duties.”¹² In this connection, it is important to distinguish between application for judicial review and appeal, bearing in mind the suggestion of *Ian McLeod* that “appeal is a means of challenging a [court] decision, while [judicial] review is a means of challenging the way in which the decision was made.”¹³ And furthermore,

One major practical consequence of the distinction is that in the case of an appeal the appellate body is not only being asked to say whether the decision was right or wrong, but can also generally substitute its own decision. Whereas in the context of [judicial] review, the supervisory body is not called upon to say whether it agrees with the merits of the decision, and therefore, even if it upholds the challenge, it cannot substitute its own decision, compel it to be re-made in a lawful fashion, and make an order prohibiting future illegality.¹⁴

In the case *Chief Constable of the North Wales Police v Evans*, Lord Brightman expresses himself in similar vein:

Judicial review, as the words imply, is not an appeal from a [court] decision, but a review of the manner in which the decision was made. [It] is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will, in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power.¹⁵

A United States-oriented definition of judicial review is put forward by *Tate* and *Jackson* in the book they edited, entitled “Comparative Judicial Review and Public Policy”. This book states that:

¹² Supperstone, Micahel & Goudie, James (Eds.). 1992. *Judicial Review*. London: Buttersworth, p. 24.

¹³ McLeod, Ian T. 1993. *Judicial Review*. Chichester: Barry Rose, p. 1.

¹⁴ McLeod, *Id.*

¹⁵ See, Supperstone & Goudie (Eds.). *Ibid.*, at p. 24.

... judicial review refers to the ability of a court to determine the acceptability of a given law or other official action on grounds of compatibility with constitutional forms.”¹⁶

In relation to *McLeod*'s term “fashion”, the word “forms” refers to procedural matters and the substance or matter of the law. From this perspective, judicial review can be categorized into two major types, namely procedural and substantial judicial review. In the procedural review, the object of examination or review is the "fashion", the way or the procedure by which a decision or law was issued. Thus, it concerns itself with whether or not all the necessary formalities have been met. That is why this type of review is also called formal judicial review. The procedure by which the constitutionality and legality of the substance or the subject matter of the decision or law are tested is called substantive or material judicial review.¹⁷

Neal C. Tate goes even further when he divides judicial review into five different types:

- a. Constitutional and Administrative Review
- b. Direct and Indirect Review
- c. A Priori / A Posteriori and Abstract / Concrete Review
- d. All Courts and Constitutional Court Review
- e. Coerciveness of Review.¹⁸

In the book mentioned above, co-editor *Neal C. Tate* provides comprehensive explanations for these types of review, which can be summarised as follows:

¹⁶Jackson, Donald W. & Tate, C, Neal (Eds.). 1992. *Comparative Judicial Review and Public Policy*. Westport: Greenwood Press, p, 4.

¹⁷Sri Soemantri. 1982. *Hak Menguji Material di Indonesia (Substantive Judicial Review in Indonesia)*. Bandung: Penerbit Alumni, p. 6.

¹⁸Jackson & Tate (Eds.). *Ibid.*, at pp. 4-8.

- a) Constitutional review occurs when the courts are assigned to examine and to declare whether state laws, legislation and actions of government (including legislative and judicial agencies) are constitutional or unconstitutional. Administrative review occurs when the courts are assigned to examine and to declare whether the actions of government agencies (other than the courts) are legally appropriate or not.
- b) Direct review is basically the same as constitutional review, while indirect review occurs where, in the process of interpretation of laws, a court considers whether or not the issuing body or legislature actually has the legislative power it claims.
- c) A priori / a posteriori review is an examination procedure exercised by the courts before (a priori) or after (a posteriori) laws or actions take effect. The former is identical to abstract, the latter to concrete.
- d) Coerciveness of review was introduced by William Kitchin in 1990. This has to do with the effectiveness of the procedure. At one extreme, the ability of courts to declare official laws void on grounds of unconstitutionality is very limited (like in Indonesia); at the other extreme, the power of courts is unlimited (coercive). It is therefore important to determine in which instance the power of courts exercising judicial review may be coercive and those in which it may be advisory¹⁹.

For the purpose of the discussion in this thesis, however, *Brewer-Carias*' formulation asserting that judicial review is "[the] power of court to decide upon the constitutionality of legislative acts; in other words, the judicial control of the constitutionality of [all] legislation"²⁰, is considered the more accurate one. And in order to sharpen the focus of

¹⁹ Jackson and Tate, *Ibid.*, p. 8

²⁰ Brewer-Carias, Allan R. 1989. *Judicial Review in Comparative Law*. Cambridge: Cambridge University Press, pp. 4-8.

this discussion as it unfolds, neither procedural judicial review nor the divisions mentioned above will be considered further in this study.

It should be noted that not all decisions or laws that are disliked by citizens or groups of citizens, are reviewable. Three main factors are used to decide whether aggrieved persons can challenge decisions: firstly, whether or not the particular body or agency that made the decision is the appropriate body to be subject to a review procedure, secondly, assuming that the body is appropriate and subject to review, whether or not it is possible to review the particular decision or law that is subject to complaint, and thirdly, whether or not the person who is submitting application for review has *locus standi* to do so. Moreover, the procedural relevance for the applicant of answers to the above questions must also be considered. Must the applicant proceed in a particular way depending on whether or not review is available? What will the consequences be for the applicant's case if, in challenging the decision in question, he or she uses a procedure deemed to be inappropriate by the court? Due to limited space and in order to maintain a focussed discussion, these issues will not be dealt with in this thesis.²¹

To sum up, judicial review is the procedure whereby the court is able, in certain cases, with or without application, to review the legality (and constitutionality) of legislation or decisions affecting the public made by a wide variety of bodies, ranging from government

²¹ For details on this subject matter, *see*, among others, *Report of the Administrative Review Council Australia to the Attorney-General No. 0026 (1986)*, published by the Australian Government Publication Centre, Canberra and several other reports in the years 1991, 1995, 1999 published by the AGPS and Administrative Review Council; also *see* Grahame Aldous & John Alder (1993). *Application for Judicial Review: Law and Practice of the Crown Office*. 2nd ed., London: Buttersworth; Sue Arrowsmith (1988). *Government Procurement and Judicial Review*. Toronto: Carswell; Stanley A. de Smith, Harry Woolf, A.P. LeSeur & Jeffrey Jowell (Eds.) (1995). *Judicial Review of Administrative Action*. 5th. Ed., London: Sweet & Maxwell; and C.T. Emery & B. Smythe (1986). *Judicial Review: legal limits of official power*. London: Sweet & Maxwell.

or state institutions, ministers and officials exercising prerogative or statutory powers, and other powerful self-regulating bodies.

1.1. *The Notion of Judicial Review*

From an historical viewpoint, the notion of judicial review emerged as a companion of the idea of the *Rechtsstaat* (Rule of Law), which dates back to the late nineteenth century in Europe.²² Since then, this concept has been developed and reached its evolutionary apex shortly after World War II. From then on, despite differences in interpretation, the concept seemed to be suitable for every country in the world.

A closer examination of history helps to trace the notion of judicial review back to its origin. It was the Magna Carta, decreed by King John of England in June, 1215, which was regarded as the birth of the Rule of Law.²³ The Great Charter, as it is popularly referred to, guaranteed that citizens would be protected against arbitrary decisions and sentences - these were, up to that time, made at the Crown's discretion and considered part of its prerogative. With this Charter, the King recognised the authority of the law over his own power to govern (although retaining some of his prerogatives), and placed himself on the same footing as his subjects before the law. The Magna Carta thus established the principles of supremacy of the law and equality before the law: two main "pillars of the Rule of Law", as Dicey termed it.²⁴ Later on in history, the principle of the Rule of Law became an effective means of controlling the performance of governments,

²² See, for instance, Gneist R. 1958. *Der Rechtsstaat und die Verwaltungsgerichte in Deutschland*. 2nd ed., Darmstadt: reprint and Informationen zur politischen Bildung, der Rechtsstaat. Bonn: published by Bundeszentrale fuer politischen Bildung (1991), particularly at pp. 3-6 and 13-15.

²³ Dassault, Rene & Borgeat, Louis. 1990. *Administrative Law: A Treatise*. Vol. 4, 2nd ed., Toronto: Carswell Student Edition, pp. 25-26.

²⁴ A.V. Dicey's "Introduction to the Study of the Law of Constitution", edited by E.C.S. Wade, 10th ed., as quoted by Dassault and Borgeat, *Id.*

whose power was thus limited by the duty to guarantee the rights and freedoms of individuals and, at the same time, regulated by the functions and duties of the government.

In the eighteenth century, the French commentator *Montesquieu* introduced the doctrine of separation of powers (Trias Politica), which requires that the three main State functions (legislative, executive and judicial) should each be exercised by different agencies. Although the strict separation of powers has never actually occurred, the basic principles of this doctrine emphasize that every exercise of power must happen through the proper channels and must be in accordance with the law.

Basically, the legislative bodies make the laws, the executive agencies implement and perform the duty and competence prescribed by those laws, and the judicial agencies (courts) supervise or monitor the implementation of those laws and, where necessary, force the other agencies to abide by the laws if there is a violation or inconsistency.

Notwithstanding the values it upholds, the concept of the Rule of Law will remain a buried relic unless, as *van Dijk* asserts:

...procedures are made available by which it is possible to control the observance by the government of the legal rules it has itself laid down. Such control of governmental action not only serves to protect the individual against the government; it serves the public interest in the maintenance of the legal order. Moreover, this control is in the interest of the government itself. The awareness that the government too is bound by the law and is subject to supervision under certain guarantees, in combination with the fact that for most legal communities this supervision will show that the government generally acts legally, strengthens confidence in the governmental apparatus and thus enhances the efficiency of the administration.²⁵

²⁵ van Dijk, P. 1980. *Judicial Review of Governmental Action and the Requirements of an Interest to Sue*. The Hague: Sijthoff & Noordhoff, p. 2.

One of the above-mentioned procedures is unarguably the judicial review.

In accordance with *van Dijk's* assertion, the notion of Rule of Law is part of, or rather, derived from the principle that no one may exercise power unless that power has been granted to them by law. This premise can also be used in formulating the notion of judicial review of government acts; that is, no government can exercise power unless that power has been granted by law. Furthermore, the legality of that exercise of power must constantly be subject to a review procedure prescribed by the law.

1.2. *The Purpose of Judicial Review*

In relation to their function as law enforcers, and in the context of English public law, *Lewis* summarises that the courts will review an exercise of power by the government and other public bodies in order to ensure that they:

- a) have not made an error of law;
- b) have considered all relevant factors, and not taken into account any irrelevant factors;
- c) have acted for a purpose expressly or implicitly authorised by statute;
- d) have not acted in a way that is so unreasonable that no reasonable public body would act in that way;
- e) have observed statutory procedural requirements and the common law principles of natural justice or procedural fairness.²⁶

Although these review criteria were only meant to be applicable in judicial practices based on the common law, they are, in fact, also suitable for most, if not all, national court systems and practices. The words “common law”, for example, can be replaced with

²⁶ Lewis, Clive B. *Ibid*, at p. 1.

“constitutional law” in the European-continental system to make the term more general, or “our Constitution” to make it more specific to a particular country.²⁷

While the aim of judicial review may vary somewhat in emphasis from country to country, nevertheless, the general purpose of all judicial proceedings in the courts is to ensure that the law is enforced and upheld as the law itself requires. Judicial review is no different; with the only exception being, as the definition confines, the purpose of judicial review is to test, to question, or to challenge the lawfulness of acts, decisions or laws of the government and other public bodies.

In Japan, for example, the principal purpose of judicial review is the protection of individual rights,²⁸ whereas in the United States and Canada, which represent the American-style of judicial review, the main purpose is to “measure legislation against the requirements of a written constitution.”²⁹ In the United Kingdom and other countries whose legal systems have common law foundations, the purpose of judicial review is primarily, although not only, to “exercise a supervisory jurisdiction over public bodies to ensure that they observe the substantive principles of public law.”³⁰

2. Government Acts and Legislation

Prior to examining the nature of government activities or legislation that can be subjected to judicial review, it is first necessary to define the term “government”. It is generally, if

²⁷ Such a deduction is meant to provide law students studying different constitutional systems with a simple approach, as has been the case in Indonesian law schools. *See*, Padmo Wahyono, *Kuliah Perdana Pengantar Hukum Tata Negara Indonesia (Inaugural Lecture on the Indonesian Constitutional Law)*, University of Indonesia in 1979.

²⁸ Jackson & Tate, *Ibid.*, at p. 29.

²⁹ *Ibid.*, at p. 30.

³⁰ Lewis, *Ibid.*, at p. 3.

not universally, recognised that a State is an abstract entity which finds its real, concrete expression in the government³¹. In other words, it is through the actions of government that one can comprehend and even “taste” whether the State is a monstrous power or a good caring parent. As an abstract conception, the State cannot be “sensed”. The government makes it real. “State” is thus a generic term whereas “government” is a specific term.

In every democratically governed country, the classical conception is to have the power of the State apportioned among the legislative, executive and judicial branches of the government. In theory, these three branches should work harmoniously together and avoid encroaching on one another's domain, but in practice, this is not always the case.

This thesis is not aimed at making an in-depth analysis of the function of these three branches. Rather, the focus is centred on the “government” as a whole, of which the three branches constitute a “tripod” of State apparatus. In spite of variations in the understanding of government branches, the legislative-executive-judicial model of state or “government” for our purposes remains the basic conception of government in this world.³²

With that perspective in mind, it can be concluded that when one talks about government acts (and legislation), one must inevitably talk about the acts of the three branches of government: legislative, executive and judicial. In conclusion, the term “government act”

³¹ More on the theory and conceptions of state, see, among others, Harold Plaskitt & Percy Jordan .1991. *Government of Britain and the Commonwealth*. London: University Tutorial Press Ltd., pp. 1-22; David Held (Ed.). 1983. *State and Societies*. New York: New York University Press; Alex N. Dragnich & John C. Wahlke (Eds.). 1996. *Government and Politics, an Introduction to Political Science*. New York: Random House; also Dassault & Borgeat, *Ibid.*, pp. 5-35.

³² More details on the forms of government, see, among others, Dragnich & Wahlke (Eds.), *Ibid.*, especially at pp. 25-212.

in its broadest sense comprises any act of one or more persons or agencies discharging a State function, irrespective of whether they are government employees, officials or private persons.³³

As will be discussed at a later point in relation to Indonesia, the approach in that country is much more restricted. Courts in Indonesia can only examine the legality and constitutionality of administrative acts or decisions (this is limited to a very narrow definition of “government”) and the lawfulness of state legislation (a judicial control of legislative power).

3. Major Concepts of Human Rights

The term “major concepts” in relation to human rights means the more widely discussed concepts in the literature examined in this study, but does not in any way imply that the “major concepts” are more genuine or more valuable than the “minor” ones.³⁴ It is not appropriate – nor indeed feasible – to discuss all human rights concepts in this study. Generally speaking, it has been argued by some that there are four major systems³⁵ of human rights in the world: Asian³⁶, European, American and African. All four will be

³³ Compare, P. van Dijk, *Judicial Review of Governmental Action and the Requirement of an Interest to Sue*, *Ibid.*, at p. 4. He sees the “governmental action” as executive acts only, while in this study an executive action is seen, in narrow sense, as part of a government act which includes also legislative and judicial actions, especially in relation to discussing international judicial review. Thus, the term used here by van Dijk is “administrative action”.

³⁴ Some authors suggest that there are several new emerging human rights concepts or systems in several regions such as in Arabian region (Cairo Declaration on Human Rights, 1990) and Asian Region (Bangkok Declaration, 1993). For these, *see*, among others, Henry J. Steiner & Philip Alston. 2000. *International Human Rights in Context: Law, Politics and Morals*. Oxford, New York: Clarendon Press, at p. 780.

³⁵ Most authors use the term “concept”, but some others “system”. Steiner & Alston, *Ibid.*, for instance, at pp. 779-786 uses the term “system”. In this work both terms are regarded as the same and used interchangeably.

³⁶ According to Steiner & Alston, one of the new emerging concepts is the Asian system; albeit still in the form of a proposal compared to that of the European, Inter-American and African systems. *See*, Steiner & Alston, *Id.*, in particular at p. 780.

dealt with in the following sections and the discussion will be concluded with an examination of the Universal Declaration of Human Rights, which in this respect can be regarded as a fundamental doctrine.

3.1. *Asian Concept of Human Rights*

The modern concept of human rights is relatively new to Asia. It has been introduced and developed over less than four decades,³⁷ but the Asian concept of human rights has yet to be fully formulated. *James Tang* observed that a region-wide system of human rights protection does not exist in the Asian region³⁸. *Steiner* and *Alston* note that “although Chapter VIII of the United Nations Charter makes provision for regional arrangements in relation to peace and security, it is silent as to human rights cooperation at that level.”³⁹ More recently, regional concepts and systems of human rights have begun to emerge as a reaction to the active encouragement of the United Nations through a resolution adopted by General Assembly⁴⁰.

Dating back to the ancient world, mainly in East Asian region, one strong influence upon the concept of human rights is seen by some commentators as closely related to

³⁷ *Batra, T.S. 1979. Human Rights, A Critique. New Delhi: B.V. Gupta, p. 41.*

³⁸ *Tang, James T.H. (Ed.). 1995. Human Rights and International Relations in the Asia Pacific. London, New York: Pinter, p. 3.* The Asian Charter of Human Rights is not considered as the ‘official’ concept of human rights; it is mainly the position or view taken by a large number of human rights NGOs, community organisations, concerned persons and groups. As a matter of fact, there are several documents relating to basic principles of human rights adopted within several Asian countries, e.g. Kuala Lumpur Declaration on Human Rights, Larrakia Declaration, Bangalore Declaration, Declaration of ASEAN Accord. All these documents can be accessed in a collection compiled by F. de Varennes in *Asia-Pacific Human Rights Documents and Resources*, Vol. 1, published by Martinus Nijhoff, 1998.

³⁹ *Steiner & Alston, Ibid.*

⁴⁰ An appeal was made by the United Nations through *General Assembly Resolution 32/127* to States in areas where regional arrangements in the field of human rights do not yet exist “to consider agreements with a view to the establishment within their respective regions of suitable machinery for the promotion of human rights.”

Confucianism. W. Theodore de Barry makes the following comments about the core values of Confucianism:

From this [public and private tension] it may seem again that the Confucian ideal was a balance of public and private, not an assertion of one over the other. In fact, from the Confucian point of view the state's responsibility for the public interest was to encourage legitimate private initiative. How to define what was legitimate remained an issue, and the state, historically, was not slow to assert its own authority in this respect (any more than it is today), but Confucians were just as ready to challenge any such claim on the part of the state bureaucracy (*guan*), asserting instead that the public interest (*gong*) consists in serving the legitimate desires and material needs of the people. A balance of public and private (*gongsi yiti*), not the person or individual subordinated to the collectivity or state, remained the Confucian ideal.⁴¹

A human right in Confucianism is therefore none other than a balance of public interest on one side and individual desire for freedom on the other. A true human right can only be appreciated in the light of the continuing tension that results from efforts to achieve a balance between the two.

Using another style of speech, but with essentially the same meaning, *Michael Freeman* observes that “there was no explicit concept of human rights in East Asian culture before the reception of Western political ideas at the end of the nineteenth century”, and asserts that:

Confucianism laid the foundations of ethics in certain social relations and the mutual obligations that were inherent in them.⁴²

With regard to the infiltration of Western ideas into Asian values, Freeman further suggests that:

⁴¹ de Barry, Theodore W. 1998. *Asian Values and Human Rights*. Cambridge; Harvard University Press, p. 29; cf., James C. Hsiung (Ed.). 1985. *Human Rights in East Asia, a Cultural Perspective*. New York: Paragon House Publisher, pp. 1-30.

⁴² Freeman, Michael. 1995. “Human Rights: Asia and the West” in James Tang (Ed.), *Human Rights and the International Relations in the Asia Pacific*. *Ibid.*, at p. 15.

...the embrace of Western ideas and of rights into Asian values was mainly caused by the dissatisfaction of the indigenous with the old order and the fact that Western ideas of rights and democracy have helped Asian protesters to articulate their goals and principles.⁴³

Yet, as time has passed and changes have occurred, such an embrace has not been without objections. Objections to the application of Western ideas of human rights are based on the argument that such ideas and values are alien to Asian traditions. These objections gained considerable currency in the East when governments of Asian countries were so “unfairly” stamped as human rights violators by the West, while at the same time Western countries practiced imperialism and colonialism.

The Asian response to this criticism was straightforward. The Asians argued that despite its social and technological achievements, there was no justification for the West to preach morality to Asia, let alone push Asia into implementing ‘westernized’ human rights. The difference here lies within the basic concept of human rights held by East and West respectively: the West sees them as the equal civil and political rights of every individual, whereas Asia views them more in the context of economic and social development for the nation as a collective entity.

This polarisation of perception also leads to the other common Asian argument against criticism from the West:⁴⁴ that stability, and therefore authoritarianism and respect for traditional cultural values, are necessary to facilitate development, including that of economic and social rights.

⁴³ Freeman, *Id.*

⁴⁴ Freeman, *Ibid.*, at p. 16.

For example, summarizing the debate with respect to Western and Asian human rights perspectives, *Yash Gai* asserts:

... it is generally assumed that there is one Asian view or concept of human rights, and that it is opposed to the tradition of individual human rights that first developed in the West. ... The gist of this position is that human rights as propounded in the West are based on individualism and therefore have no relevance to Asia in societies which are based on the primacy of the community.⁴⁵

Onuma Yasuaki, commenting on the “universal” versus “relative” perceptions of human rights, argues that such controversy goes beyond the realm of human rights and behind it one can see fundamental problems, namely:

- 1) contradictions between the globalisation of economic and information activities and the national state system;
- 2) contradictions between the emergence of non-Western powers in Asia and the persistence of Westcentric power structures of information and culture in international society, and
- 3) contradictions between a sincere quest for a more humane and less violent world and a deep resentment against the colonial past and present inequality among nations and international society.⁴⁶

However, there is clear evidence that there is no link between economic growth and the negation of human rights. Some authoritarian governments may have succeeded in their economic development, but many such regimes have failed to achieve stability or economic growth.

In 1993 a common understanding of human rights was reached when Asian governments came together in Thailand’s capital, Bangkok, for the preparation of the United Nations sponsored World Conference on Human Rights, to be held in Vienna. The Asian

⁴⁵ Gai, Yash. 2000. “Human Rights and the Governance: The Asia Debate”, in *Asia-Pacific Journal on Human Rights and the Law*, Vol. 1, Issue 1, 2000. The Hague: Kluwer Law International, pp. 16-17. For additional readings, see also John Girling (Ed.). 1991. *Human Rights in the Asia-Pacific Region*. Canberra: Dept. of International Relations, Research schools of Pacific Studies, Australian National University.

⁴⁶ Yasuaki, Onuma. 2000. “In Quest of Intercivilizational Human Rights: “Universal” vs. “Relative”, in *Asia-Pacific Journal on Human Rights and the Law*, *Ibid.*, p. 53.

governments that were present in Bangkok adopted a declaration at the conference in Vienna. The document, then known as the Bangkok Declaration, recognises the universality of human rights with a special note that those rights have to be interpreted in the context of religious, historical, cultural and regional particularities.

Amidst accusations that such qualifications could be used by Asian governments as a cover for human rights violations⁴⁷, thus betraying the universal validity of human rights⁴⁸, one thing at least was established; namely, the Asian concept of human rights.

The argument that human rights are “none of Asia’s business” is therefore no longer valid, since the adopted common position expressed in that Declaration partly, if not largely, reflects the universally recognised principles of human rights. This, to some degree, opens the avenue for the establishment of an international mechanism for promotion and protection of human rights in national government policies, in partial conformity with the United Nations’ encouragement and appeal to all States. As one human rights activist says, “Human rights do not belong to the West, they are ours too”⁴⁹.

3.2. *European Concept of Human Rights*

⁴⁷ Many Indonesian NGOs for human rights protection disagree with this and express their criticisms toward this concept and perception, including the *Yayasan Lembaga Bantuan Hukum Indonesia* (Indonesian Legal Aid Foundation) as can be seen in its annual report on the human rights situation in Indonesia “*Catatan Keadaan Hak Asasi manusi di Indonesia 1994*”, 1st ed. published in Jakarta by YLBHI, 1995; also, in a similar vein, T. Mulya Lubis, one of Indonesia’s leading human rights advocates in his “Human Rights Standard Setting in Asia: Problems and Prospects”, in *CSIS-Indonesian Quarterly*, 1st Quarter, 1993 and in his “In Search of Human Rights: Legal-Political Dilemmas of Indonesia’s New Order”, published by PT Gramedia Pustaka Utama, Jakarta, 1993.

⁴⁸ Susumu Awanohara, Machael Vatikiotis & Shada Islam. 1993. “Vienna showdown”, in *Far Eastern Economic Review*, June 17, 1993, p. 17.

⁴⁹ Quoted from the opening note made by *Dr. F. de Varennes* in the *Asia-Pacific Journal on Human Rights and the Law*, Vol. 1, Issue 1, 2000.

The European concept of human rights has been well documented in the European Convention on Human Rights and Fundamental Freedoms, which was signed on 4 November 1950 and entered into force on 3 September 1953. As of 1 June 1993, ten protocols were agreed upon as supplementary documents to the original text. The Convention is considered the most advanced and developed framework and structure for the international protection of human rights in the world. In relation to the promotion of respect for international human rights standards, the Convention is of particular importance for several reasons:

- It was the first comprehensive treaty in the world in this field
- It established the first international complaints procedure and the first international court for the determination of human rights matters
- It remains the most judicially developed of all human rights systems
- It has generated a more extensive jurisprudence than any other part of the international system.⁵⁰

Yet, despite the reputation that the Convention has gained for covering the full spectrum of human rights, the European Convention on Human Rights and Fundamental Freedoms and its protocols only deal with certain rights. *Alpha Connelly* observes:

... the Preamble to the Convention explicitly states that the signatory governments are enforcing only certain rights proclaimed by the United Nations General Assembly in the 1948 Universal Declaration of Human Rights. The rights guaranteed by the Convention are mainly civil and political rights: rights such as the right to life, to freedom from torture and from inhuman and degrading treatment or punishment, to personal liberty, to fair trial, to respect for private and family life, to freedom of religion, freedom of expression, freedom of assembly and freedom of association. The right to vote, a right essential to representative democracy, is guaranteed not in the original text but in [article 3 of the First Protocol]. Economic and social rights, such as the right to work and the right to social welfare, are the subject of separate treaty, the 1961 European Social Charter [which entered into force on January 26, 1965].⁵¹

⁵⁰ Steiner & Alston, *Ibid.*, at p. 786.

⁵¹ Connelly, Alpha. 1994. "Ireland and the European Convention on Human Rights: An Overview", in Liz Heffernan, *Human Rights: A European Perspective*, Dublin: The Round Hall Press, p. 35.

Human rights in the European perspective are considered as “the rights of the individual and the freedom of the citizen.”⁵² In 1981 *Wiarda*, who was the president of the European Human Rights Court, wrote an essay on the *Ringeisen* case in which the Court tried to give its own interpretation of the expression “determination of civil rights and obligations” in Article 6 (1). He argued that:

... the Court must have given a much broader scope than what was intended when the provision was drafted. Indeed, in reality, the terms “civil rights and obligations” is an equivalent of “private or individual rights and obligations”.⁵³

One might of course argue that there was no necessity for the Court to give an abstract definition of “civil rights and obligations”, but, in fact, the notion of the guarantee of individual rights has been a prevailing feature of the concept of human rights in Europe.

3.3. Inter-American Concept of Human Rights

The Inter-American Human Rights System is a gradual development from fundamental principles for a peaceful coexistence among the American states. The principles include regional solidarity, collective security, non-intervention, democracy and human rights. These primary and collectively accepted norms were given legal status at the ninth Inter-American Conference held in Bogota in May 1948, when the American states adopted a Charter establishing the Organization on American States (OAS). At the same time, the

⁵²van Dijk, P. 1987. *Protecting Human Rights: The European Dimension*. Koeln: Carl Heymans Verlag KG, p. 133. He commented on the wording of the article which leads to that conclusion, especially when one considers the text in French, which is more clearly, “*contestations sur ses droits et obligations de caractere civil*”.

⁵³*Id.*, at p. 134.

Bogota Conference also adopted the American Declaration of the Rights and Duties of Man.⁵⁴

Thus, the Americans already had a commitment to human rights in the form of a declaration seven months before the United Nations had adopted the Universal Declaration of Human Rights, and two and a half years before the European Convention on Human Rights and Fundamental Freedoms was adopted.

Nevertheless, the establishment of a regional treaty whereby the principles set forth in the Declaration would have a legally binding power only came much later.⁵⁵ That treaty is the American Convention on Human Rights, which was adopted in 1969 and entered into force in 1978. Prior to the adoption of the Convention, the Inter-American Commission on Human Rights was established in 1959. The Commission became an organ of the OAS only after the amendment of the Charter by the Protocol of Buenos Aires 1967. The principal function of this Commission is “to promote the observance and protection of human rights, and to serve as a consultative organ of the OAS in this matter.”⁵⁶

On the basis of the rights which are protected and the freedoms which are guaranteed in the American Declaration on the Rights and Duties of Man, and the Convention on Human Rights, one might hastily conclude that the Inter-American concept of human

⁵⁴ About the debate on the legally binding quality of the Declaration’s provisions relating to human rights, see W. van Thomas and A. Thomas. 1963. *The Organisation of American States*. Dallas: Southern Methodist University Press, p. 223.

⁵⁵ The reason for this is that in the face of massive and widespread human rights violations in many *coup d’etat* attempts in Latin American countries, the progress towards an established human rights system in the region proceeded slowly. J.S. Davidson observes the phenomenon in his books *Inter-American Human Rights System*, published by Dartmouth, 1997, particularly at pp. 1-99 and 259-260, and, more generally in *Human Rights*, published by Open University Press, 1993.

⁵⁶ Chapter XVI, *Article 111* of the Charter. This broad mandate was further amplified by the Commission Statute and Rules of Procedure according to which, as the work progressed, the Commission became an organ of the American Convention on Human Rights.

rights has an individualistic focus, just like the European one. Article 1 of the Convention, for example, requires the States “to ensure to all persons subject to their jurisdiction the free and full exercise” of the rights and freedoms recognised therein.

The American Convention on Human Rights contains twenty-six rights and freedoms, twenty-one of which are included in the United Nations Covenant on Civil and Political Rights. They are: the right to life, the right to liberty and security, the right to a fair trial, the right to free election, the right to an effective remedy if one’s rights are violated, the right to recognition as a person before the law, the right to compensation for miscarriage of justice, the right to a name, the right of the child, the right to a nationality, the right to equality before the law, freedom from torture and inhuman treatment, freedom from slavery and servitude, freedom from retroactivity of the criminal law, freedom of conscience and religion, freedom of thought and expression, freedom of assembly, freedom of association, freedom to marry and found a family, and freedom of movement. Meanwhile, there are five rights and freedoms included in the Convention which are not part of the United Nations Covenant: the right to property, freedom from exile, prohibition of the collective expulsion of aliens, the right of reply, the right of asylum.⁵⁷

However, taking this view is not entirely true, especially in conjunction with the provision contained in Article XXXVIII of the Declaration, which provides that “the rights of man are limited by the rights of others, by the security of all, and by the just demands of the general welfare and advancement of democracy.”

⁵⁷ For further comparison of the rights protected in the Inter-American system, the European Convention on Human Rights and in the U.N. Covenant on Civil and Political Rights, see N.R. Sharma. 1999. *Human Rights in the World*, Jaipur: Pointer Publishers, especially at pp. 35-117.

In conclusion, the American concept of human rights can be pictured as a freeway of rights where civic duties function as road signs that remind individuals of the speed limits while exercising their rights.

3.4 *African Concept of Human Rights*

The African system is the newest, least developed and effective, the most distinctive and also the most controversial human rights concept of all.⁵⁸ This is not surprising when one considers the problems faced by the African Commission on Human and People's Rights, which is the sole active organisation in the whole African human rights system. The African Commission is a relatively inexperienced organ (fifteen years old), with few powers, and for the most part it has been hesitant in exercising or creatively interpreting its existing powers, or developing further powers. Moreover, the basic structure and tasks undertaken by the Commission have not shown innovation in terms of inter-governmental human rights institutions.

Regardless, the region's sincerity in striving for a common perception of human rights was at least proven genuine when the heads of States and governments of the Organisation of African Unity (OAU) met in 1981 and eventually adopted the African Charter on Human and People's Rights. This Charter entered into force in 1986. The Charter that established the OAU itself was adopted in 1963. Today, all African States are member of the OAU and, as for the African Charter, 53 States are now parties to it.

Human rights in the African perspective are by and large a communal matter. Contrary to the European perspective, which distinguishes individuals, the African view on human

⁵⁸ Steiner & Alston, *International Human Rights in Context, Ibid.*, at p. 920.

rights emphasizes communality. *Lone Lindholt* articulates this African perspective as follows:

...the focus is the group and on obligations rather than on the rights of the individual, contained in the statement ‘in African culture it is the community (consisting of unitary, or extended, families) that has priority’. Indeed, we may not even find many examples of forms of traditional governments fulfilling the requirements of European democratic ideals, which again rest on the equality, autonomy and ability of representation of each member of the community.⁵⁹

Yet this does mean that in traditional Africa there has never been a universally recognised conception of rights. Some human rights recognised by most “civilised” societies have long been part of the African culture, such as: the right to membership, freedom of thought, speech, belief and association, and the right to enjoy property. In contrast to European human rights, which stemmed from a *Grundnorm* or constitutional basis, these rights and freedoms were originally derived from natural law and the dignity of man. In Lindholt’s own terms, the legitimacy of these rights comes from:

... a set of social values ingrained as a set of basic principles espoused by at least a substantial majority of a given society.Africa maintained a set of rights and duties for its peoples which were substantially in tune with the concept of “natural law” and the “dignity of man”.⁶⁰

3.5 *Universal Declaration of Human Rights*

It can be argued that the most important question relating to the universality of human rights is the following: whether they *are* universal or whether they *ought to be* universal. The answer to this question is far more than a simple ‘yes’ or ‘no’. It involves some relevant issues such as moral and cultural values, tradition, religion, state and legal

⁵⁹ Lindholt, Lone. 1997. *Questioning the Universality of Human Rights, The African Charter on Human and People’s Rights*. Aldershot: Ashgate/Dartmouth, p. 18. More details on the cultural perspective of the African human rights conception, see Abdullah Ahmed An-Na’im & Francis M. Deng (Eds.). 1990. *Human Rights in Africa, Cross-Cultural Perspectives*. Washington: The Brookings Institution.

⁶⁰ *Id.*, at p. 19.

systems as well as social, political, economic, and even historical backgrounds.

Addressing this issue, Lindholt argues:

The importance of distinguishing between the two lies within the fact that we cannot legitimately deduce from “is” to “ought”, since this represents a confusion of two distinct scientific methodologies. This means that just because there seems to be some degree of universal consensus as to basic human needs formulated as rights and freedoms, we cannot extend this to serve as the only legitimation for claiming that human rights, as they develop and express themselves at different times or under different circumstances, must therefore conform to a narrowly defined universal code of human rights. As to the contrary situation, deducing from the normative to the empirical also carries some dubious consequences. An illustration hereof would be to reject certain types or distinctions of rights because they do not conform to a normative definition of a universal human rights conception.⁶¹

Nevertheless, even though we cannot come to an agreement as to whether human rights are universal or not, due to the complexities and the variety of perceptions pertaining to this matter, one thing is certain: the basic principles set forth in the Universal Declaration of Human rights should indeed be deemed as acceptable to every human being and society. Affirming anything else would be irrational, and a disaster for the human individual in particular and society in general.

Let us examine briefly several principles upheld in the Declaration:

- all human beings are born free and equal in dignity and rights (Art. 1)
- everyone has the right to life, liberty and security of person (Art. 3)
- no one shall be held in slavery and servitude; slavery and slave trade shall be prohibited in all their forms (Art. 4)
- no one shall be subjected to torture or cruel, inhuman and degrading treatment or punishment (Art. 5)
- all are equal before the law (Art. 7)
- no one shall be subjected to arbitrary arrest, detention or exile (Art. 9)
- everyone has the right to freedom of movement and residence (Art. 13)
- everyone has the right to property (Art. 17)
- everyone has the right to freedom of thought, belief and religion (Art. 18)
- everyone has the right to social welfare (Arts. 22, 23, 24)
- everyone has the right to education (Art. 26), etc...

⁶¹ Lindholt, Questioning the Universality of Human Rights, *Ibid.*, at p. 23.

It is generally acknowledged that human beings everywhere aspire to the realisation of diverse values and interests to ensure their individual and collective well-being. It is also a common observation that these aspirations are often harshly frustrated by social as well as natural forces; resulting in exploitation, oppression, persecution and other forms of deprivation. That is why it is the duty of all peoples to prevent all this frustration from occurring by observing these “universally” accepted principles, upholding them in the family, the society, the state, and in the international arena.

It may be asked, how can this goal be reached if there is no “common understanding” or “gentlemen's agreement” among the peoples? It is therefore the purpose of this Declaration to lay a foundation and to provide a common understanding for all members of the human family in their striving for freedom, justice and peace in the world. The opening statement of the Declaration distinctly and appropriately acknowledges that:

...[the] recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.⁶²

Universal peace and the respect of human rights are urgent issues. Man can peacefully enjoy life if the human rights of every individual are recognized and, what is more, respected. Progress is only possible if peace prevails.

4. Human Rights Violations

Every person wishes to live in peace and harmony with their neighbours. This idea extends from home to society, state, and the whole world. Such noble endeavour must be

⁶² First sentence of the *Preamble* of the Universal Declaration of Human Rights.

protected. Any violation in a particular instance may be a threat for all human rights. Hence, it is the responsibility of the individual, family, society and the world to protect and preserve harmony by ensuring that human rights are not violated. In order to guarantee this, a State must make the effort to produce legislation that necessarily contains legal assurances for the preservation of human rights. A violation of such a right will only lead to a hostile society.

When does a violation of human rights take place? Any action against the enjoyment of human rights becomes a breach of human rights, regardless of the origin of this action, be it from an individual, a family, a society, a state or government, or the international community and its organisations.

From what *Lalit Parmar* has catalogued about situations in which human rights may be considered violated, any of the following actions or conditions are considered violations of human rights:

- Fear of exercising human rights; the fear to defend one's own human rights and those of others;
- Obstruction to human rights; any acts that prevent someone from enjoying his/her human rights;
- Breach of human rights; denying someone's rights to benefit from his/her rights;
- Molestation of those who attempt to exercise their human rights; any molesting or annoying acts that intimidate people so that they are deprived of enjoying their rights;
- Attack on human rights; some people do not wish to allow other people to enjoy their rights. Any clear, direct or indirect, attack to the rights of others.⁶³

⁶³ Parmar, Lalit. 1998. *Human Rights*. 1st ed. New Delhi: Anmol Publications Pty. Ltd, pp. 76-80.

5. Summary

The term Rule of Law (*Rechtstaat*) shares the fate of other political and legal definitions. This term is widely used in the political and legal discourse, although it is understood in various ways. It is, however, fortunate that many debates will cease when the existence of the Rule of Law is in danger; namely, when there is a threat or potential hindrance, be it coming from socio-political, economic, legal or any other forces.

One of the most serious threats to the consistent observance of the Rule of Law comes from State governments, which are supposed to be its defenders. In the specific situation of Indonesia, the most common form of threat is the excessive use of power. Using the powers vested in them, governments maintain the status quo and deny the rights of their citizens. Legislation, decisions, decrees and other acts of government are often abusive or simply unlawful, and yet unassailable. The government considers itself above and beyond the law.

In a *Rechtsstaat*, the government is also bound by the law, and all its acts are ideally subject to review for their lawfulness and conformity with human rights standards. Such review procedures are necessary in the interests of both the individual citizen and the government itself. Realising that everyone is acting according to the law creates a climate of confidence, and so progress is possible in the struggle for social welfare.

Judicial review is a court procedure whereby the legality and constitutionality of government acts is challenged, and if they are found unlawful, the court has the

competence to repeal the act or decision and, where possible, impose another that is lawful and in accordance with the law.

In the national context of Indonesia, a government act is by and large an administrative or executive action. In international law, however, actions of the judiciary also fall under the heading of government act, since a State is internationally responsible for any action of its courts that violates international law.

In order to assess whether a government act breaches human rights, a common understanding as to what human rights really are has to be achieved. It may be argued that the basic principles set forth in the Universal Declaration of Human Rights should be the international standards suitable for every civilised society, since there is no disagreement with those fundamental values of human dignity and rights.

Any act that breaches, denies, attacks or ignores human rights is seen as a violation of human rights. Recognition and respect of these rights are the preconditions for peace and the social, economic and political welfare among all members of the human family. Any interference with the exercise and enjoyment of these rights would be a disaster for all human beings.

Chapter 3

EXECUTIVE-HEAVY LEGISLATION, RESTRICTED JUDICIAL REVIEW AND STATE IMPUNITY: *The Case of Indonesia*

1. Preliminary Remarks

Why use Indonesia as a case study? Four main characteristics typify Indonesian law: chameleon-like fluidity, discriminative law enforcement, overlapping legislation and denial of justice. Under such conditions, many government acts and abuses of human rights cannot be prosecuted in domestic courts. The State government and its agencies can therefore avoid any liability for their abuses and breaches of human rights linked to their actions or even legislation. This makes them, for all intents and purposes, almost invulnerable unless this impunity is challenged through international mechanisms.

Indonesian law has sometimes been compared to a leaking umbrella. When it rains, the leaking is so bad that it cannot provide the desired protection for the people. Others liken Indonesian law to a spider's web, which can only catch little insects, but will be torn apart by bigger insects.

Indonesia's confusing legal system and legislation are a legacy of the Dutch colonial era, which was deliberately meant to disorient the colonised people so that they might more easily remain under the control of the colonial authorities at that time. Many of these colonial laws and institutions are still in force; in accordance with a provision mentioned in by the Supreme Clause II of the Constitutional Transitional Regulation.

Additionally, since every public or administrative agency is vested with rule-making power, there is such a plethora of regulations working at cross purposes that it is hard to be certain which one really applies. When this is combined with a multitude of different types of courts dealing with different types of cases, you end up with even more confusion for the people who wish for justice to prevail. Therefore, Indonesia serves as a rather unique, yet quite relevant, context in which to consider the desirability of some form of outside judicial review.

The purpose of this chapter is therefore twofold. First, to provide an example of how a State and its agencies (i.e. the government) can commit blatant and gross human rights violations in a system where no sufficient legal remedies are provided. This happens partly because of the inability of the legal system to provide the desired protection, a situation which may have been deliberately devised through State legislation. It also happens because of a government system which has assigned to the executive branch of government far more power than it has to the other branches of government (i.e. legislative and judiciary).

Hence, the judiciary and the parliament lack the necessary power to exercise some restraint over the executive. The second purpose of this chapter is to provide a reasonably detailed description of the existing Indonesian judicial review system which, until the first Annual Session of the *Majelis Permusyawaratan Rakyat* (MPR)⁶⁴, is unable to review the legality and constitutionality of certain legislation⁶⁵ on which government policies are based. Once again, this has been deliberately designed this way, using State legislation, institutions and measures. Moreover, abuse of power by the State remains unassailable,

⁶⁴ People's Consultative Assembly, Indonesia's highest state organ.

⁶⁵ Parliamentary acts/statutes or Undang-undang (UU), MPR Decrees or Ketetapan MPR (Tap MPR) and higher legislation (constitution).

since the laws and regulations on which such policies are based are “legal” and “constitutional”. Through those laws, which cannot be reviewed due to the country’s constitutional system, the government has been able to violate many basic human rights and fundamental freedoms of its citizens. In legal terms, therefore, Indonesia may serve as a good example of the unreliability of a State in providing its citizens with adequate protection against abuse of power and violation of human rights when only the constitution and legislation are relied on. Because many of the provisions of the Constitution are so vague and open to multiple interpretations, it has been the basis for the government’s ability to pass legislation that disregards the interests and rights of the people.

After its first Annual Session ever, the MPR passed a decree (or Tap MPR No. III / MPR / 2000) concerning judicial review of higher regulations such as Acts or statutes. This is certainly a new development in the Indonesian judicial system, but whether this will address the issue remains to be seen. This question will be covered in more detail in the section on the Indonesian judicial review system below.

The Republic of Indonesia is still struggling at this stage to establish genuine Rule of Law and a democratic government by which, subsequently, human rights will be respected and the law consistently observed. One of the related issues which is currently being debated intensely is the availability of judicial review for parliamentary acts and other higher-ranking regulations. The debate is receiving a great deal of attention, since the issue is very important for the whole constellation of the Indonesian legal system. The importance of this debate lies in the fact that judicial review is one of the “pillars of the rule of law” and a significant part of a democratic legal system.

Many unjust and abusive laws and regulations – both in regard to good governance as well as to the legal guarantee and protection of human rights – were enacted during the 32 year period of Soeharto’s regime⁶⁶: they need to be reviewed in terms of their legality and constitutionality.

Additionally, the unwillingness of the Indonesian government to ratify some important international legal instruments for the promotion and protection of human rights, and its reluctance to implement the instruments that have already been ratified, made the country an untrustworthy member of the international community in the area of human rights standards implementation. However, the discussion in this chapter is not limited to the issues mentioned above. The following related issues will also be addressed:

- the 1945 Constitution and the hierarchy of laws upon which the Indonesian legal system was founded;
- the constitutional guarantee of human rights;
- the Indonesian judicial review system;
- records of human rights violations; and
- attempts made by individuals in seeking remedy.

2. Indonesian Legal System

The Indonesian legal system embraces elements of both the European and common law systems, although it has to be acknowledged that the European legal system is the dominant influence, which is the outcome of a 350-year history of Dutch colonisation. The Indonesian legal system, if it may be described in a short phrase at all, is “confusing

⁶⁶ More popularly known as New Order Era, which emerged after the abortive coup attempt by the Indonesian Communist Party or G30S/PKI, led by general *Soeharto*, who then became the second President.

and complicated”.⁶⁷ *Sutan Takdir Alisyahbana*, a highly acclaimed writer and a prominent figure in the domain of literature and culture, once described the Indonesian legal system as “something of a hodge-podge”.⁶⁸ This kind of expression is, in the writer’s opinion, largely true as far as the consistency or certainty of the law is concerned, and particularly in relation to the application of regulations and provisions in the courts, and to law enforcement. *Sutan Takdir Alisyahbana* portrayed the situation that occurred during Dutch colonialism as one where the law depended on politics (i.e. the law served the political interests of the authorities), and where different laws and regulations were applied to different classes or types of residents.⁶⁹

To some extent this colonial heritage is still operative, although it is mainly restricted now to the trial of certain legal disputes in family law; such as marriage, divorce, inheritance, etc. Before the enactment of the *Kitab Undang-undang Hukum Acara Pidana* (KUHP) - that is the criminal procedure law book - Indonesian judges used to apply different procedural laws in settling criminal cases involving parties from different areas of residency. But it is no longer so today.

⁶⁷ In Indonesian language: *amburadul*, which means messy. Many legal experts, academics, politicians, journalists and even laymen use this expression to describe, in a popular way, the condition of the Indonesian legal system. An interview with Prof. Sahetapy in *TVRI News* program “Persepsi” aired by SBS Australia on March 22, 2000; articles in *Suara Pembaruan* February 26, 1998 at <http://www.suarapembaruan.com> (access date: 26/02/1998) and in *Kompas*, February 27, 1998 at <http://www.kompas.com> (access date: 29/02/1998). Some, among others Dr. Buyung Nasution, use the word *chaos*.

⁶⁸ Alisyahbana, S.T. 1981. *Indonesia, Social and Cultural Revolution*. Translated by Benedict R. Anderson, 4th impression, Selangor: Oxford University Press, p. 70.

⁶⁹ Articles 131 and 163 *Indishe Staatregeling* (I.S.), that was the constitution for Indonesia under Dutch colonial rule. It stipulated that for different classes of residents, a different law is applied. The Indonesian populace was divided into three classes: Europeans (incl. Japanese), far Easterners (Arab, India and Chinese) and **pribumi** (indigenous) who were the native Indonesians. See, among others, L.J. van Appeldoorn. 1982. *Pengantar Ilmu Hukum* (Inleiding tot de studie van het Nederlandse recht). Translated by Oetarid Sadino. Jakarta: Pradnya Paramita, p. 23; and *Hendardi* in *Suara Pembaruan* September 5, 1998, <http://www.suarapembaruan.com>, access date: 5/09/1998.

By contrast, the court is still using several different procedural laws to settle civil cases brought to the court. For the residents of Java and Bali, for instance, *Herziene Inlandse Regeling* (HIR) is applied as the civil process law, whereas *Regeling van Buitengewijzen* (RBG) is used to settle legal disputes outside Java and Bali. In cases where Muslims are involved, the Islamic law (Syari'ah) is applied.⁷⁰

Besides, there are various other factors that create uncertainty and contribute to “confusion” and “complication” in law enforcement, such as the credibility and integrity of the judges, *surat sakti* (over-ruling letter), *mafia peradilan* (court mafia) and extra-judicial settlements. These will be discussed later in this chapter.

This confusion in the legislation, which generates legal uncertainty, has a huge impact in the area of law enforcement and the administration of justice: law cannot be properly enforced and justice cannot truly prevail. As indicated earlier, Indonesian law is sometimes likened to a leaking umbrella or a spider's web: a leaking umbrella cannot adequately protect someone from getting wet when it is raining, and a spider's web can only trap little insects but will be broken by big insects.

After the Proclamation of Independence, however, a legal system that reflected the unity of the Indonesian people was gradually developed. In this system, the identity, interests and aspirations of the nation were clearly articulated. One of its achievements, which was regarded as monumental, was the enactment of the KUHAP; that is, the criminal

⁷⁰ There are four different kinds of court to which different kinds of cases are brought: General Court deals with general civil and criminal cases, Military Court deals with offences committed by or involving military personnel, Administrative Court hears petitions questioning administrative decisions and Religious Court hears cases involving Moslems in disputes of marriage, inheritance, divorce and the like.

procedural legislation. In general, however, Indonesian law still typically exhibits the following characteristics:

- a low degree of legal certainty;
- confusing overlaps between different legislation;
- discriminative law enforcement;
- denial of justice (justice delayed, justice denied).

2.1 *The 1945 Constitution and the Hierarchy of Laws*

Like many modern nations, the entire Indonesian legal system is built upon its Constitution. The Indonesian Constitution is called the *Undang-Undang Dasar 1945*, and is more commonly known by its acronym, UUD '45.⁷¹

The UUD '45 consists of the preamble (*Pembukaan*), the body of the Constitution (*Batang Tubuh*), containing 37 Articles, 16 Sections, 4 transitional provisions, 2 additional provisions, and the elucidation or annotation of the Constitution (*Penjelasan Resmi UUD '45*, the explanatory notes relating to each of the articles). The preamble, the body of the Constitution and the elucidation are regarded as one inseparable whole. Thus, if one speaks of the Indonesian Constitution, one speaks of these three components simultaneously.

The UUD '45 was first⁷² enforced by the Preparatory Committee of Indonesia's Independence (PPKI) on August 18th 1945, one day after the Proclamation of

⁷¹ The Indonesian version of the 1945 Constitution (UUD 45) used in this work is taken from *Bahan Penataran P4-Undang-Undang Dasar 1945* published by BP-7 Pusat Jakarta, 1994, while the English version is taken from http://www.uni-wuerzburg.de/law/id_indx.html, access date: 9/09/2000. The latter is attached as an appendix.

⁷² Indonesian history records that the 1945 Constitution has been revoked once in 1949 and was replaced by the Constitution of the United States of Indonesia (Konstitusi RIS) in 1949/50 and Provisional Constitution (UUUDS) from 1950-59, and with the Presidential Decree of July 5, 1959 the 1945 Constitution was re-enforced.

Independence. In the entire Indonesian constitutional system, the UUD '45 is considered only as one part of the nation's Constitution, which is called the written basic law. The other part, the unwritten basic law, is found *inter alia* in the so-called state convention, which comprises "regulations that develop and are preserved in the conduct of state affairs"⁷³, provided this does not contradict the provisions of the UUD '45.

Being the country's basic law, the UUD '45 functions as the source of all laws and regulations that concern all aspects of the nation's life, ranging from government and citizens and their relations to each other, to State organs or institutions and their relation to individuals' lives. This means that all legislation and regulations regarding both governmental and individual actions must be based on the UUD '45, which includes in the broadest sense all government activities including those of the administrative, legislative and judicial branches.

As mentioned before, UUD '45 consists of three inseparable parts: *Pembukaan* (preamble), *Batang Tubuh* (body) and *Penjelasan Resmi* (annotation). Within the system of UUD '45, *Pembukaan*, the first component of the Constitution, is the highest authority in the country's legal system, and is the primary source of law. As such, it is not amendable. That is because the *Pembukaan* contains the nation's ideals, aspirations and goals as well as its main guidelines for entering into relations with other countries.⁷⁴ So, amending or altering the *Pembukaan* is equivalent to changing or even annulling the

⁷³Penjelasan Resmi or Annotation or Explanatory Note of 1945 Constitution general section figure I. Indonesian constitutional law experts such as *Solly Lubis* and *Padmo Wahjono* agreed that at least two requirements must be met in order to be recognized as a state convention: continuous state practice/conduct and *opinio juris necessitas*. One example is the annual Presidential Address to the Nation on January 6. Compare with Harmaily Ibrahim & Moh. Kusnardi. 1984. *Pengantar Hukum Tata Negara Indonesia*. Jakarta: University of Indonesia Press, p. 39.

⁷⁴ According to the Preamble, Indonesia's foreign policy shall be free and active; free from foreign pressure or dictation and actively striving for and promoting international peace and prosperity based on social justice.

country's foundation. This is understandable since the *Pembukaan* contains four basic thoughts⁷⁵ that articulate the Nation's ideals, principles of life, and moral values, including its legal aspirations.⁷⁶

These are followed by the principles that the Constitution must “make it the duty of the State and all its institutions to foster high human ethical norms and to live up to noble [universal] moral aspirations”.⁷⁷ In addition, the *Pembukaan* also contains the reasons that inspired the Indonesian people to proclaim their independence from colonialism, and furthermore, to proclaim moral and social codes not only for the State apparatus but also for individuals in the conduct of their daily lives.

The basic thoughts, ideas and moral values of the *Pembukaan* find their concrete application in the articles of the *Batang Tubuh*, the second component of the Constitution. The *Batang Tubuh* UUD '45 is made up of 37 articles distributed amongst 16 chapters, as follows:

- Chapter I (Art. 1 (1) & (2)) regulates the form of the State and sovereignty
- Chapter II (Arts. 2 and 3) deals with the Majelis Permusyawaratan Rakyat (MPR) or the People's Consultative Assembly – the nation's constitutional body and supreme state institution
- Chapter III (Arts. 4-15) regulates the executive power
- Chapter IV (Art. 16) regulates the Dewan Pertimbangan Agung (DPA) or the Supreme Advisory Council
- Chapter V (Art. 17) concerns the State Ministers
- Chapter VI (Art. 18) is about Regional Government

⁷⁵ Explanatory note of 1945 Constitution, general section figure II. Those basic thoughts are: the State protects all the Indonesian people and the entire territory of Indonesia on the basis of humanity, the State shall strive for social justice for all the people of Indonesia, the State shall be based on the sovereignty of the people, on democracy and deliberations of representatives, the State shall be based on the belief in one and only God and on just and civilized humanity.

⁷⁶ The term used is *Rechtsideen* “which encompassed the basic law of the State, both the written and the unwritten.”

⁷⁷ An Indonesian perspective sees these as the universal principles of humanity crystallised in *Pancasila* (Five Principles), which is the State ideology and the nation's way of life: belief in one and only God, humanity, the unity of Indonesia, democracy and representation of the people, and social justice.

- Chapter VII (Art. 19-22) deals with the House of Representatives or Dewan Perwakilan Rakyat (DPR)
- Chapter VIII (Art. 23) is about the State Finance
- Chapter IX (Arts. 24 and 25) concerns the Judicial Power
- Chapter X (Arts. 26-28) is about Citizens
- Chapter XI (Art. 29) deals with Religion
- Chapter XII (Art. 30) deals with National Defence
- Chapter XIII (Arts. 31 and 32) is about Education
- Chapter XIV (Arts. 33 and 34) is about Social Welfare
- Chapter XV (Arts. 35 and 36) concerns the National Flag and Language
- Chapter XVI (Art. 37) deals with Amendments of the Constitution

Besides those 37 articles, the *Batang Tubuh* also contains four transitional and two additional provisions, but these provisions deal mainly with the specific conditions at the time Indonesia proclaimed its independence; e.g. the period of transition, and the power transfer, from colonial authority to the Indonesian people through the founding fathers. However, Clause II of the transitional provisions is of fundamental importance for the Indonesian legal system. It stipulates that “all existing state institutions continue to function and all [colonial] regulations remain valid” until new ones are established, provided they do not contradict the UUD '45.

The third component of the UUD '45 is the *Penjelasan Resmi*, that is, the annotations or elucidation of the Constitution. The *Penjelasan Resmi* is viewed as the official explanation of the Constitution and is meant to be the one and only valid “interpretation” of the articles contained in the *Batang Tubuh*. Despite its purpose of giving detailed explanations about every article, the *Penjelasan Resmi* only provides brief, general, and often ambiguous notes, particularly for articles that relate to human rights.

Ever since the 1945 Constitution was established, its interpretation has always been dominated and monopolised by the regime (State authority).⁷⁸ This is once again due to the character of the Constitution provisions, which are vague and multi-interpretative, enabling various interpretations as to what a certain article means. In making an interpretation, the government has always been the most authoritative.

It should be noted, however, that although the *Batang Tubuh* and *Penjelasan Resmi* are inseparable components of the Constitution, they differ from *Pembukaan* in the sense that they are amendable.⁷⁹ So far, the 1945 Constitution has been amended twice, and these two amendments occurred within the space of less than a year. The first amendment was decreed in plenary session of the MPR⁸⁰ on October 19, 1999. In the first amendment, which was regulated in the decree of MPR or Tap⁸¹ MPR No. III/MPR/1999, nine articles were amended, namely articles 5(1), 7, 9, 13(2), 14, 15, 17(2) and (3), 20 and 21.

In its Annual Session for the year 2000, which was concluded on August 18, the MPR endorsed another nine Tap MPR which took effect on the same day. One of those Tap MPR constitutes the second amendment of certain articles of the Constitution. The decree mentioned is the Tap MPR No. IX/MPR/2000 which contains alterations and

⁷⁸ See, Gadjah Mada University-based *Prof. Muchsan's* comment in *Kompas*, November 10 and 12, 1998 and August 30, 2000, <http://www.kompas.com>, access date: 10 & 12/11/1998 and 31/08/2000 respectively. See also, *infra*, note 17.

⁷⁹ This is because of the unique position of the body of the constitution (*Batang Tubuh*), which is not considered as *Grundnorm*, as it is the case with the Preamble, which contains four basic thoughts. See, *infra*, note 11.

⁸⁰ Stands for Majelis Permusyawaratan Rakyat, that is the highest state organ.

⁸¹ It is the abbreviation of *Ketetapan* decreed by the MPR, ranking second to the Constitution.

additions giving rise to the present form of Articles 18, 18A, 18B, 19, 20 (5), 20A, 22A, 22B, 25E, 26 (2) and (3), 27 (3), 28 A-I, 30, and 36A-C of the Constitution.⁸²

In addition to its special position as the prime source of laws, UUD '45 also functions as a benchmark against which lesser forms of legislation are assessed. Therefore, it is essential to observe the hierarchy of the Indonesian laws and regulations in the context of law making because in order to be declared valid, and therefore legally binding, a law or regulation has to show conformity with the Constitution.

The Indonesian legislation system, or as it is officially called, the hierarchy of laws and the order of the source of law and legislation, is regulated in Tap MPR No. XX/MPR/1966. This decree has been upheld by Tap MPR No. III/MPR/2000. It stipulates that the *Pancasila* (the State's five principles) is still the ideal source of law and the source of all sources of law followed by:

- UUD '45, or the 1945 Constitution.
- Decrees issued by the *Majelis Permusyawaratan Rakyat*, the People's Consultative Assembly, which is the highest state institution, and also the highest legislative and constitutional body. Such decrees are known as *Ketetapan* (Tap MPR).
- Laws or Acts - *Undang-undang* (UU) - endorsed by parliament and signed by president (Statute). Alongside these are the Government Regulations in lieu of Acts, called *Peraturan Pemerintah Pengganti UU* or Perpu.
- Government Regulations implementing the Act/statute or *Peraturan Pemerintah* (PP) issued by the President.
- Presidential Decrees or *Keputusan Presiden* (Keppres), issued by the President for the purpose of implementing the PP.
- Presidential Instructions or *Instruksi Presiden* (Inpres), also issued by the President for the purpose of either implementing the Keppres or imposing special measure under special circumstances.
- Ministerial Regulations or *Peraturan Menteri* (Permen), issued by a minister or the head of a government department; they are meant to be operational and/or technical directions for the handling of specific programs or issues under the particular department concerned.

⁸² *Kompas*, August 21, 2000, <http://www.kompas.com>, access date: 21/08/2000.

- Ministerial Decrees or *Keputusan Menteri* (Kepmen), very similar to a Permen, usually further detailed in a Ministerial Instruction or *Instruksi Menteri* (Inmen).

Basically, and generally speaking, the function of lower regulations is to implement higher regulations. Only for special reasons which require prompt decision-making, such as the organisation of an emergency aid program for the victims of a natural disaster, can a regulation (e.g. Inpres) be issued without its depending on other pre-existing regulations. Thus an act or UU, for example, takes effect as the implementation of a Tap MPR, because the Tap itself requires it, or else as the necessary reinforcement of a certain provision contained in a Tap MPR. Other regulations follow the same principle.

This hierarchy can be further extended down to even lower-ranking regulations that are considered as implementing the higher order requirements. Those lower-ranking regulations are, among others, the Provincial Regulations adopted by the Provincial House of Representatives (DPRD) called *Peraturan Daerah* or *Perda*, the Governor's Decree, called *Keputusan Gubernur*, and the Governor's Instruction, or *Instruksi Gubernur*, issued by the Governor as the Head of a provincial government, etc.

It must be noted though, that the 1945 Constitution says nothing about the hierarchy mentioned above. This ranking is based only on the MPRS Decree No. XX/MPRS/1966. The 1945 Constitution only recognises three types of legislation: the constitution itself, statutes (*Undang-undang*), and regulations in lieu of statutes (*Peraturan Pemerintah Pengganti UU* (Perpu)). As to the MPR Decree, it can only be deductively implied from the provision in Article 3, which reads:

The Majelis Permusyawaratan Rakyat [MPR] shall determine [in the form of a decree] the constitution and the guidelines for State policies.

2.2 *The Recognition of Human Rights in the 1945 Constitution*

There are only four articles contained in the 1945 Constitution that concern or regulate the rights of citizens. For each of these articles there is no annotation whatsoever that explains or interprets what the article means. The only explanatory note contained in the Penjelasan Resmi for these articles is “self explanatory”.⁸³

Article 27(1) states the equality of all before the law. It reads:

(1) All citizens have equal status before the law and in government and shall abide by the law and the government without any exception.

Article 27(2) affirms the right to live and work. It reads:

(2) Every citizen has the right to work and to live in human dignity.

Article 28 regulates the freedom of association and of expression, and it reads:

Freedom of association, assembly, and of verbal and written expression, and the like, shall be prescribed by the law.

Freedom of religion is regulated in Article 29(2). It reads:

The State guarantees all persons the freedom of worship, each according to his/her own religion or belief.

Article 31(1), which refers to education, reads:

Every citizen has the right to education.

In the Tap MPR No. IX/MPR/2000, the second amendment to the Constitution⁸⁴, many new provisions that regulate human rights have been added. Those seem to have been designed to cover all possible aspects of basic human rights. Also, for the first time ever,

⁸³ Penjelasan Resmi, or explanatory note, of the 1945 Constitution, Chapter X.

⁸⁴ MPR Decree or Tap MPR No. III/MPR/1999, which is the first amendment, does not contain additional references on human rights. References on human rights are still the same as in the original text of the 1945 Constitution.

the term *Hak Asasi Manusia* (human rights) appears and is used in the context of the Constitution. The second amendment introduces a separate chapter under this title, namely Chapter A consisting of 10 articles (28 A-J). While it includes generally accepted concepts such as the right to life, the right to be free from discrimination, the right to be treated equally before the law, the right to freedom of thought and the right to fair employment, etc., the chapter also contains controversial points. Among them is the right to build a family and procreate in the context of a lawful marriage⁸⁵.

3. The Indonesian Judicial Review System

Prior to discussing the Indonesian judicial review system, it is necessary to briefly address the State institutions, their rank and function, for this underpins the review system and its mechanism. According to the 1945 Constitution, the highest institution of the nation, and the one that enshrines the sovereignty of the people, is the *Majelis Permusyawaratan Rakyat* (MPR). This consultative body is made up of members of the *Dewan Perwakilan Rakyat* (DPR) or House of Representatives, which is the Parliament of the country; as well as of representatives of the provinces and of various functional or occupational groups. The MPR is also the State's constitutional body vested with the power to establish or amend the Constitution (Article 37). Subordinate to the MPR are five high-level state institutions, as follows:

- The Presidency: The President is the top administrator, head of the State and government, holder of the executive power and, in part alongside the DPR, legislative power; assisted by a Vice President and a number of state ministers.

⁸⁵ Currently there is no official English version for Articles 28A – 28 J. A free translated version can be found in the appendix.

- The House of Representatives or *Dewan Perwakilan Rakyat*, which is the State parliament, and comprises 500 elected members⁸⁶. Along with the President, it holds legislative power.
- The Supreme Court or *Mahkamah Agung* (MA) is the body in which the State's judicial power is vested. As the highest judicial institution, the MA is, according to Article 24 and *Penjelasan Resmi*, the only holder of judicial power, and should be free from any influence or interference, even from the government itself. This principle also applies to the status of the judges.
- The supreme advisory body or *Dewan Pertimbangan Agung* (DPA), which is the highest advisory body of the State. It gives both solicited and unsolicited advice to the President as the head of government.
- The audit supervisory body or *Badan Pengawas Keuangan* (Bepeka) is the State's supreme auditing body. It supervises the management of state finances.

All of these institutions are entitled by law to make regulations which are legally binding, not only internally but also to other institutions, and even to the public. As a matter of fact, all State institutions, and not only the higher ones, are vested with legislative or regulation-making powers. That is why it is so confusing for a citizen or for the public to abide by the rules, since one regulation issued by a certain institution can contradict another which is issued by a different institution, even though both regulations concern the same subject matter. This state of affairs makes the issue of judicial review an extremely difficult one.

⁸⁶Before the 1998 term of office, 100 members of the DPR were not elected (appointed). They were the representatives of the Indonesian Armed Forces (ABRI) and Police. After 1998, the first democratic election ever, all members are elected representing political parties.

The key institutions of the MPR, the President, the DPR and the Supreme Court will be discussed in greater detail below.

3.1. *Judicial Review in the 1945 Constitution*

If one tries to assess what the legal basis for Indonesian judicial review might be in terms of constitutional provisions, one becomes engaged in solving a riddle. The fact that the 1945 Constitution does not specify any type of judicial review forces one to accept two opposing conclusions: that judicial review is acknowledged and so exists; or that judicial review is not recognised, and so does not exist.⁸⁷

Indonesian history shows that, although only for a very short period from 1949 to 1950, the Constitution of the Federated State of Indonesia (*Konstitusi RIS*) did contain a provision for judicial review.⁸⁸ However, this was not the case with either the 1945 Constitution or with the Provisional Constitution of 1950.

On the whole, and from a legal point of view, there is some guarantee of a judicial review procedure, even though it is only applicable for subordinating laws and regulations.⁸⁹ This is not the consequence of the provisions contained in Articles 24 and 25 of the Constitution, as believed by many. These articles only provide that the Supreme Court may take any necessary measure to ensure a full and appropriate exercise of its judicial power, free from any intervention; including from the government. Both articles are actually silent as to the power of judicial review of the Court. There is no mention at all that the Court has the power of judicial review. Rather this is more of an “invention”, an

⁸⁷ Sri Soemantri, *Hak Menguji Materiil di Indonesia. Ibid.*, at p. 47.

⁸⁸ For more detail, *see*, Sri Soemantri. *Ibid.*, pp. 14-22.

⁸⁹ *Supra*, note 82.

ad hoc response to “popular demand”, with a little influence from Anglo-Saxon legal thinking.⁹⁰

However, speaking of a constitutional guarantee, there has never been even so much as a single clause or paragraph in the Constitution that regulates judicial review, even after two amendments. Article 24 of the 1945 Constitution concerning judicial power simply indicates that:

(1) the judicial power shall be executed by one Supreme Court and other judicial bodies and shall be regulated by law.

(2) the composition and competency of the courts shall be regulated by law.

The explanatory note to this article reads:

Judicial power is an independent power, which means free from [any, including] the influence of the government. In this connection the [independence of the] status of judges must be guaranteed by law.⁹¹

UU No. 14/1970 on the Basic Principles of Judiciary can be mentioned as one very significant example of a subordinating law which implements this provision in conjunction with judicial review. Article 26 reads:

(1) The Supreme Court is competent to declare all regulations ranking lower than law/statute to be null and void, by reason of contravention with a higher-ranking regulation.

(2) The annulment of the said regulation may be declared in connection with an examination in a cassation procedure. The repeal of the regulation which is declared null and void shall be executed by the authority concerned”.⁹²

⁹⁰ Compare with article on the subject written by Prof. Moh. Mahfud MD in *Republika Online*, September 16, 1997, <http://www.republika.co.id>, access date: 17/09/1997.

⁹¹ Lotulung, P.E. “Judicial Review in Indonesia” in Yong Zhang (Ed.). 1997. *Comparative Studies on the Judicial Review System in East and South-east Asia*. The Hague: Kluwer Law International, p. 168; cf. chapter IX Penjelasan Resmi (explanatory note) of 1945 Constitution.

⁹² Lotulung, P.E. *Ibid.*, at p. 176.

Thus, according to this provision, the limited type of judicial review available in Indonesia refers to a procedure of examination of regulations whereby the said regulations are tested as to whether or not their substance is consistent with the regulation on which they are based. This process is called substantive judicial review.

A similar provision can also be found in Article 31 of UU No. 14/1985 concerning the Supreme Court. This regulation is considered only as an implementation and reinforcement of the regulation subsumed in Article 26 of UU No. 14/1970. More specifically, that article contains provisions concerning the judicial review of regulations issued by the administration.

3.2. *Reviewable Regulations*

According to the aforementioned laws, the Indonesian judicial review system functions exclusively in the areas of examining administrative acts or actions which belong to the domain of general regulation. In fact, the entire judicial system does not have any provision for reviewing parliamentary legislation, either statutory or theoretical.⁹³ This also means that it does not allow any state institution, including the Supreme Court, to do so. Hence, based on the hierarchy and order of the sources of law subsumed in Tap MPRS No. XX/MPRS/66 and Tap MPR No. III/MPR/2000, the Indonesian Supreme Court, despite being the sole state institution vested with judicial power, can only review PP, Keppres, Inpres, Kepmen, and the like. The official reason⁹⁴ for this is that the position or level of the Supreme Court, according to the Constitution, is that of a high-level State

⁹³ Lotulung, P.E. *Id.*, also Sri Soemantri, *supra*, note 21

⁹⁴ This refers to officially accepted legal argumentation that state institutions that are at the same level cannot supervise or control each other. Supervision and control must be exercised by a higher-level state institution. On the level or rank of the state institution, see previous discussion on the 1945 Constitution and the Hierarchy of Laws.

institution, along with the Presidency and DPR: a legislator which produces the UU. It is thus considered to be irrational for the Supreme Court, from a legal and logical viewpoint, to review or test legislation endorsed by other State institutions that are on its own level. It is considered even more irrational, of course, for the Supreme Court to scrutinise the legislation (in this case, Tap MPR) decreed by the MPR as the State's highest institution.

Article 5, particularly paragraph (1), of the 1945 Constitution stipulates:

The President shall hold the power to make statutes in agreement with the Dewan Perwakilan Rakyat (DPR).

According to this provision, although an approval from the DPR is necessary, the President is also, alongside the DPR, the holder of legislative power, which means that the institution of the Presidency functions as a law-making body. In addition, the constitutionality and legality of the legislation (i.e. parliament act, or the UU) produced by these two institutions cannot be examined by the Supreme Court. Furthermore, the Constitution grants the President even more power in law-making than it does to the DPR.

Article 21 (2) provides that:

Should a bill not obtain the sanction of the President, notwithstanding the approval of the DPR, then the bill shall not be resubmitted during the same session of the Dewan.

With this provision, the President is given a stronger position than the DPR. As can be read in Article 5 above, "the President holds the power to make statutes"; the DPR does not. The DPR, according to this provision, only gives its "agreement" or "approval" to a bill submitted by the President. The history of constitutional law of the Republic of Indonesia may prove that the DPR, as the holder of legislative power, has been under the

strong influence of the executive (i.e. the President).⁹⁵ Prof. Koesnadi Hardjosoemantri of Gadjah Mada University stated:

...the 1945 Constitution does not give any room for democracy since there is too much power given to the government (executive), and only little to the representative bodies such as DPR.⁹⁶

This can be verified by the fact that until now, the DPR has never used its “right of initiative” to submit a bill despite a constitutional guarantee in Article 21(1). The government has always been the one taking the initiative in submitting a bill. Furthermore, the approval of the DPR has always been obtained, which in turn has led to ratification of the bill by the President’s signature. This renders any attempt at controlling the government, either by the DPR or the Supreme Court, extremely difficult. This remains the case, even though in 1991 an administrative court⁹⁷ was introduced, by which government policies and decisions can be legally tested and questioned.

Perpu stands for *Peraturan Pemerintah Pengganti Undang-undang* or Government Regulation in lieu of Law. Perpu is issued by the President “in the event of a compelling emergency”.⁹⁸ The Supreme Court does not have the competence to review this legislation, either. To prevent the President from misusing his power by issuing Perpu for reasons other than those permitted, the Constitution prescribes that such regulations “shall have the consent of the DPR during its subsequent session”.⁹⁹ And if “the approval of the DPR is not obtained”, those Perpu must be repealed and declared null and void.¹⁰⁰ So,

⁹⁵ The term used is “executive-dominated state” or “executive-heavy state”. More details on this, see Bedner, A. “Administrative Court in an Executive-dominated State: the Case of Indonesia”, in Yong Zhang (Ed.), *Ibid.*, at pp. 183-210.

⁹⁶ *Kompas*, October 8, 1999, <http://www.kompas.com>, access date: 10/10/1999; also, Prof. Harun Alrasid in *Suara Pembaruan*, May 10, 2000, <http://www.suarapembaruan.com>, access date: 3/06/2000.

⁹⁷ Bedner, A. *Ibid.*, at p. 183.

⁹⁸ Art. 22 (1) 1945 Constitution

⁹⁹ Art. 22 (2) 1945 Constitution. In practice, usually within a period of six months.

¹⁰⁰ Art. 22 (3) 1945 Constitution

according to Article 26 of UU No. 14/1970, the Supreme Court is competent to declare (to review) only regulations lower than statute (PP downwards) by reason of contravention with the higher-ranking regulations (UU or Perpu upwards).

In addressing this issue, three leading Indonesian legal experts, Dr. Adnan Buyung Nasution (member of the MPR), Prof. Bagir Manan (Chief Justice of the Supreme Court) and Prof. Sri Soemantri (University of Padjadjaran), suggested that Tap MPR, Perpu and Keppres be erased from the legislative system (hierarchy of laws).¹⁰¹ Furthermore, they also demand that Tap MPRS No. XX/MPRS/1966 on the source of legal order and the hierarchy of laws be revoked and another Tap be issued in its place. They made those recommendations during the course of a session with the second ad-hoc committee (PAH II) of the MPR, for the preparation of the first MPR Annual Session 2000.

Nasution, who was actively involved in the drafting, recalls that Tap MPRS No. XX/MPRS/1966 was a “mistake.”¹⁰² This Tap was only decreed out of the grave necessity in 1966 to tackle the crisis situation that followed the failed coup attempt known as G30S/PKI¹⁰³. Nasution said that the Tap was no longer relevant and should have been revoked long ago. He then finally suggested that MPR in its Annual Session should declare the Tap invalid and issue a new Tap in which the Ketetapan (Tap) MPR would no longer be part of the level of legislation which currently ranked immediately below the Constitution.

¹⁰¹ See previous discussion in this chapter on the Indonesian Legal System.

¹⁰² *Suara Pembaruan*, March 8, 2000, <http://www.suarapembaruan.com>, access date: 8/03/2000.

¹⁰³ The September 30 Movement, a coup attempt of the Indonesian Communist party (PKI) that enabled General Soeharto to come to power as President.

This suggestion was supported by Sri Soemantri, who commented further that even at MPR level, a Tap should be reviewed, and not only at the level of lower regulations. In particular, he urged the MPR to issue a Tap that would no longer recognise Keppres as part of the legislation. He drew attention to the fact that many, and even most of the Keppres issued by former President Soeharto were in contravention with, and superseded, higher regulations such as the UU. He stated that many Keppres that were not actually part of the Constitution were issued by Soeharto for the purpose of giving him and his cronies financial and political advantages.¹⁰⁴

Prof. Bagir Manan, commenting on the existence of a Perpu, stated that this kind of regulation should also be erased from the Indonesian legislation system. He argued that Perpu as a legal instrument could be misused in favour of the government, although only temporarily (according to Article 22 of the Constitution). Besides, he recommended that if a Perpu did not obtain the required approval from the DPR, it would be declared null and void, and there would be no law that could be applied to the matters regulated in the former Perpu.¹⁰⁵

Is there any way in which the Tap MPR in particular can be reviewed if it is not considered to be in conformity with the Constitution?¹⁰⁶ As regards the Constitution, there

¹⁰⁴ Suara Pembaruan, *Id.*, also F.H. Winata in *Kompas*, October 26, 1998, <http://www.kompas.com>, access date: 30/10/1998. To mention only one example is Presidential Decree or Keppres No. 46/1996 on National Car (Mobnas) which contradicts the import tax provisions set forth in Law No. 10/1995 on Custom.

¹⁰⁵ *See*, Suara Pembaruan, *Id.*. For example, Government Regulation in lieu of Law (Perpu) No. 1/1999 on the Establishment of National Human Rights Court, which was recently disapproved by the DPR, and was thus declared invalid. This has caused a big problem for the Indonesian law enforcement authority in prosecuting the suspected perpetrators of human rights abuses in East Timor, because no other laws or regulations deal with the issue.

¹⁰⁶ In addition to MPRS Decree no. XX/MPRS/1966, MPRS Decree No. XXV/MPRS/1966 on the Dissolution of the Indonesian Communist Party (PKI) and the Banning of the Teaching, Disseminating and Developing of Marxism/Leninism is also contradicting the provision of Art. 28 of 1945 Constitution on the guarantee of freedom of speech and expression.

is a possibility of reviewing it according to Article 37. This provision prescribes that in order to amend¹⁰⁷ the Constitution, “not less than two thirds of the total number of the Majelis Permusyawaratan Rakyat shall be in attendance” and that no less than two thirds of the members in attendance shall approve. And to date, there have been two amendments decreed by the MPR (see above).

Unfortunately, the MPR in its Decree Tap MPR III/MPR/2000, which was issued at the end of its Annual Session in 2000, did not respond to those recommendations. Instead of erasing all “unnecessary legislation”, the MPR, in addition to assuming the prerogative to review acts and statutes, only scrapped the Inpres, Kepmen and Permen from the prescribed types of legislation.¹⁰⁸ As for the Tap MPR, there is a consensus that it can and will be reviewed annually when the Annual Session is held.

3.3. *Exercising Institution and the Procedure*

Neither UU No. 14/1970 nor Law No.14/1985 regulates any judicial review procedure. As can be seen, Article 26 of UU No. 14/1970, which is considered the main point of reference for judicial review, does not give even the slightest clue as to how a petition for judicial review should be brought forward, or how it should be processed. This gives rise to many legal arguments as to whether or not a lawsuit or petition asking for judicial review may be brought to the Supreme Court; and if so, how it should be done. Or, in a case where the petition mainly concerns the civil rights of an individual, whether this falls under the jurisdiction of a general civil court, which would mean that the case would be

¹⁰⁷ Prior to amendment process the MPR need to review the actuality and the relevance of the Constitution to the current situation and development.

¹⁰⁸ *Suara Pembaruan*, June 13, 2000, <http://www.suarapembaruan.com>, access date: 29/09/2000. These types of legislation no longer belong to hierarchy of Indonesian law.

processed according to civil procedural law started from District Court and, if appealed, up to the Supreme Court; or whether a judicial review complaint should be processed directly by the Supreme Court.

In 1992, the first ever significant case requesting judicial review came before the Supreme Court.¹⁰⁹ The petition was brought by the representatives of PRIORITAS magazine, asking the Supreme Court to review the Ministry of Information Regulation or Permen No.1/PER/Menpen/1984/SIUP concerning the requirements to be met for the issue of a license for a publishing business. On the strength of this Permen, the Indonesian Minister for Information had placed a ban on the further publication of this magazine. The legal argument was that this regulation was in contradiction with the superior law on which it hierarchically depended (UU No. 11/1966 on Basic Rules on the Press). The lawsuit was filed directly with the Supreme Court. The Supreme Court ruled that this lawsuit was inadmissible (*niet onvankelijk verklaard* or NO), because up to the time when this petition was filed, there was still no regulation as to how and where a petition for judicial review should be brought.¹¹⁰

Apparently, the PRIORITAS case has “taught” the Supreme Court a lesson, because less than a year later, a regulation concerning the procedure for bringing a petition for judicial review was issued: the *Peraturan Mahkamah Agung*, or the Supreme Court’s Regulation No.1/1993. This regulation stipulates that a judicial review can only be conducted if there is a petition or lawsuit brought by individuals or any other party concerned. This regulation furthermore states that people or residents should file a lawsuit asking for judicial review directly with the Supreme Court, or else indirectly through the District

¹⁰⁹ Lotulung, P.E. *Ibid.*, at p. 177.

¹¹⁰ Lotulung, P.E. *Id.*

Courts of the region where the resident concerned lives, or where the party being sued is located.

Since the first petition brought by the representatives of PRIORITAS, and the enforcement of this Supreme Court regulation, there has only been a relatively modest number of cases seeking judicial review which have been dealt with by the Supreme Court. Some of the more important ones have been:

YEAR	Number of Cases/ Decision	Case Concerning
1993	3: - No. 02/P/TN/1993 - No. 01/G/TN/1993 - No. 02/G/TN/1993	Review of Regulation of the Minister of Home Affairs No 15/1975 on land use. Review of Regulation of the Minister of Manpower No.342/Men/78 on labor. Review of Regulation of the Minister of Manpower No. Kep-438/Men/1992.
1995	3: - No. 01/G/TN/1995 - No. 02/G/TN/1995 - No. 03/G/TN/1995	Review of Regulation of the Minister of Information No. 01/PER/Menpen/1984/SIUP. Review of Regulation of the Minister of Information No. 01/PER/Menpen/1984/SIUP. Review of Attorney-General Regulation No. Kep-129/JA/12/1976. ¹¹¹

With the implementation of Supreme Court Regulation No. 1/1993, twenty-three years after the enactment of Law No. 14/1970, the procedure for judicial review has become available to a much greater extent. Although the number of cases brought to the Supreme Court may be considered relatively small compared to the existing regulations that really need to be reviewed¹¹², the decisions mentioned above have had a significant impact on

¹¹¹ Lotulung, P.E. *Ibid.*, at p. 178.

¹¹² Djiwandono, Soedjati J., in *The Jakarta Post's Editorial and Opinion*, May 11, 2000, <http://www.thejakartapost.com>, access date: 12/05/2000, stated that "all past legislation passed by Soeharto's New Order regime must be thoroughly reviewed... and replaced."

the development of the Indonesian judicial system in general, and in particular on the judicial review system.

Even more promising still, it is reported that the Supreme Court is about to issue a new regulation to replace Regulation No. 1/1993. This new regulation is likely to stipulate that judicial review can be conducted even in the absence of a lawsuit or petition; meaning the Court can automatically review legislation that is allegedly in contradiction with other laws without waiting for an official petition be brought forward. "The purpose of this", stated a Supreme Court Justice, Prof. P.E. Lotulung, "is to enable the Supreme Court to be more pro-active in responding to popular legal aspirations in line with the demands of Reformasi"¹¹³. At that time Lotulung was briefing journalists on the subject of the Supreme Court law reform plan, and was in the company of the Secretary General of the institution.¹¹⁴

Nevertheless, Indonesia is still not free from controversy over judicial review. Polemics rage over whether or not there should be a judicial review which could scrutinize parliamentary Acts, and not only limited to lower regulations (administrative acts). Besides, there is also a lively debate over which institution should be granted the power to carry out this higher judicial review since, to date, the Supreme Court has only been granted the competence to review regulations below the level of parliamentary Acts.

¹¹³ *Reformasi* (reformation) is a popular, and predominantly student-led initiative and movement that successfully toppled the military-backed and dictatorial Soeharto from his Presidency of over 32 years. One of the reformation agendas (Agenda Reformasi) is to reform the legal system enabling greater access to justice, protection of human rights and supremacy of law. So far, however, this remains just an idea.

¹¹⁴ Kompas, January 29, 1999, <http://www.kompas.com>, access date: 3/02/1999.

At present, however, the main concern is whether the Supreme Court will be able to carry out its task at all, considering the huge number of regulations issued by government bodies and other administrative agencies. One must bear in mind that in Indonesia, *all* government agencies, including officials, are vested with rule-making powers, and that many of the regulations issued are likely to overlap and interfere with one another.

Those are not the only reasons for concern. For a considerable period of time during the New Order Era (1996-1998), the power and authority of the Supreme Court was further eroded. Using UU No. 14/1970 (particularly Article 11) and UU No. 14/1985, the government has been so deeply involved in judicial affairs that the organisation, management and finance of the Supreme Court have been put under the control of the government's Justice Department.

This kind of interference also found its way into the process of recruitment to the judiciary. According to legislation regulating specific court branches¹¹⁵, all judges (including Supreme Court justices) are government officials on the one hand; while on the other, they are agents of the judiciary at the same time. This means that the position of the judges is no longer independent as the Constitution (Articles 24 and 25) originally prescribed. During the New Order, the judges were even compelled to become members of the umbrella organisation for all government civil servants, called *Korpri* (Corps of Indonesian Civil Servants), an organisation directly supervised by the President.

¹¹⁵ Laws or UU No. 2/1986 on General Court, No. 5/1986 on Administrative Court, No. 7/1989 on Religious Court. About court types or branches, see, *supra*, note 77.

Based on UU No. 8/1974 concerning Civil Servants, it is stipulated in Article 3 that all Indonesian civil servants shall be “obedient and loyal to the government”¹¹⁶. So, how can a judge be a good agent of the judiciary, who can only be bound by the law alone, while he or she at the same time has to bow to the government’s will? No wonder Sarwata¹¹⁷, the former Chief Justice of the Supreme Court, said in an interview “the symbol of the executive still sticks to the implementation of the judiciary.”¹¹⁸

Another form of government intervention is the establishment of government-controlled (and particularly military-controlled) agencies that were given power to perform extra-judicial settlements such as *Polkam* (Restoration of Security and Public Order Command) and *Bakorstanas* (Agency for the Coordination of Support for the Development of National Stability). Although these agencies dealt mostly (although not only) with politically related legal cases, they represented further reduction of the power and authority of the Supreme Court. Both agencies, along with their branches and other similar institutions, have recently been abolished by presidential decree.¹¹⁹

Another quite common practice carried out by government agencies (in many cases even by the military) in settling a legal dispute is that of using the services of a so-called debt collector. A debt collector is a person who is assigned to solve mainly loan or debt related cases by using power and strength to intimidate debtors into paying the money that is owing, plus unlawful (self estimated) interest.

¹¹⁶ Officially termed as “mono loyalitas” or mono loyalty.

¹¹⁷ The then Chief Justice of the Supreme Court, who was himself a government official (4th deputy of State Apparatus Minister) and an army general when appointed by the President.

¹¹⁸ *Suara Pembaruan*, August 4, 1998, <http://www.suarapembaruan.com>, access date: 15/08/1999.

¹¹⁹ See The Jakarta Post, March 22, 2000, <http://www.thejakartapost.com>, access date: 24/03/2000.

Moreover, many justice-seekers doubt the credibility and integrity of the Supreme Court justices in handling cases brought before them. The Indonesian Corruption Watch (ICW), a non-governmental organisation formed to monitor corrupt practices in Indonesia, published the results of their research concluding that among forty-one currently active Supreme Court justices, only five can be considered as clean, credible and possessing integrity.¹²⁰ The bribing of Supreme Court justices is no secret in Indonesia.

Furthermore, in conjunction with the guarantee of legal certainty, some practices common to the Supreme Court create an even greater doubt among the public as to the capability of the Supreme Court to bring justice to the people and to ensure the adequate legal protection of the basic rights and freedoms of every individual.

The aforementioned practices refer to the issuing of *surat sakti*¹²¹ (overruling letter) by the Chief Justice. There are two kinds of *surat sakti*: the first kind, which is considered legal, is used by the Chief Justice of the Supreme Court to prevent his subordinate judges from conducting unfair trial procedures; the second kind, which is considered illegal, has nothing to do with legal process or fair trial. The latter is in this respect a greater source of problems, despite the official argument of the Supreme Court that defends this policy as

¹²⁰ See “Pay-offs prominent in court system”, article in The Jakarta Post, March 22, 2000, *Ibid.*, access date: 24/03/2000, also another article in Suara Pembaruan, *Ibid.*, March 10, 2000, access date: 11/03/2000

¹²¹ Originally this was meant to be a legal opinion of the Supreme Court. But lately in practice it has been used as court measure to protect (unjust) government policy. In Chief of Tribe Ohee v Irian Jaya local government, for instance, the issuance of surat sakti No. KMA/126/IV/1995 has hindered the compensation payment instituted in the Supreme Court decision No. 381/Pdt./1989, which had to be paid by the local government for unlawful occupation of a communal land traditionally belonging to the tribe. Similar surat sakti were also issued in the cases PT Anoa Perkasa v Bappindo (a state-owned bank) and People of Kedungombo v. Public Service Minister. The latter has human rights violation elements. For more details, see, Suara Pembaruan, *Ibid.*, June 17, July 8 and August 3, 1999, access date: 4/08/1998 and recently in *Varia Peradilan* (bulletin published by the Supreme Court) No. 171, 1999 edition.

“part of the legal supervision of subordinating courts and judges.”¹²² This second kind of *surat sakti* is used to annul legally binding decisions handed down by judges of the Supreme Court itself.¹²³ Contrary to that statement, Prof. Muladi, former Justice Minister, admitted that the issuing of *surat sakti* interferes with the independence of the judiciary.¹²⁴

Another “common” practice involving judges is the so-called *mafia peradilan* or ‘court mafia’. This practice makes the credibility of the Supreme Court as the last fortress of justice even more doubtful. “Court mafia” is a collusion or conspiracy involving bribery and the forgery of court rulings.¹²⁵ Court mafia may occur between the judge or judges of a proceeding case on the one hand; and the prosecutors, lawyers and perhaps one of the parties concerned on the other, to fabricate a verdict or court ruling in exchange for a certain amount of money, which benefits all those involved in a legal dispute.

In order to eliminate this practice, the Indonesian Forum for Law Enforcement (Forpeshi) suggests that a system of trial by jury be imposed in the Indonesian courts.¹²⁶ Under the jury system, a judge will only function as the facilitator of a court proceeding and not as a decision maker. It is believed that this system could prevent “court mafia” from becoming even more ubiquitous.

¹²² *Pranowo*, the Secretary General of the Supreme Court, in an interview with *Suara Pembaruan*, *Ibid.*, August 3, 1998.

¹²³ Two very well known *surat sakti* were issued in relation to the cases of Kedung Ombo in Yogyakarta and Tribe Chief Ohee of Papua. Both cases were lawsuits for compensation against government.

¹²⁴ *Suara Pembaruan*, July 8, 1998, *Ibid.*, access date: 4/08/1998.

¹²⁵ None other than Chief Justice Sarwata himself, along with two other justices (H.P. Panggabean and P.E. Lotulung), were at the time of writing implicated in the bribery and forgery of decision case and under police investigation.

¹²⁶ *Kompas*, November 3, 1999, <http://www.kompas.com>, access date: 4/11/1999.

It had been hoped that the enactment of UU No. 35/1999, which is an amendment of UU No. 14/1970, would mean the immediate end of government intervention in the judiciary. In actual fact, the law itself stipulates that a further five years has to elapse before this can happen. UU No. 35/1999 was enacted as an implementation of the provisions on the separation of the executive from the judicial powers contained in Tap No. X/MPR/1998. Five years have passed, but no sign is to be seen that this will happen soon. That has to be considered carefully though, since the wording of that law regarding the status of the judges who are now state officials and no longer government officials, requires further elaboration. According to the law, this process shall be carried out by a government regulation or a *Peraturan Pemerintah* (PP), but the said PP is as yet unavailable.

3.4. *Judicial Review in the Administrative Court*

A petition asking for the annulment of any administrative decision that causes damage or loss to individuals can be submitted to the Administrative Court (PTUN) provided that the said decision meets the categories of an administrative decision as stipulated in Article 1(3) of UU No. 5/1986 on Administrative Court. However, not all kinds of administrative decisions fall within these categories, as mentioned in Article 2, which can be considered as the exception to Article 1(3).

Apart from its supplementary character to the existing “powerless” judicial review system, the Administrative Court presents considerable weaknesses, which have been briefly summarised as follows by the former deputy Chief Justice Prof. P.E. Lotulung:

- The complexity of the preliminary procedure due to the fact that an administrative examination of the lawsuit is to be executed by the secretariat

of the court first, before the substantial examination is conducted through dismissal procedure by the chief of the court, which is to be followed by a pre-trial procedure by the panel of judges before the lawsuit is to be heard before the public by the panel of judges (Articles. 62 and 63).

- Free introduction of evidence is permissible according to Articles 100 and 107, although in a more limited sense.
- The possibility of issuing a stay of execution for an administrative decision by the administrative judge can be executed in two ways (art. 67 para. 2).
- The authority of an administrative judge to annul an administrative decision, to order the payment of compensation, and to require rehabilitation (in manpower or labor disputes) is, according to Articles 120 and 121, very limited.
- Relatively low compensation may be awarded by an administrative judge. The minimum is Rp. 250.000 (approx. A\$50) while the maximum is Rp. 5.000.000 (approx. A\$1,000).
- The system of execution depends largely on the hierarchical authority of the administrative official towards his subordinates. This hierarchy culminates in the president as the highest executive authority.¹²⁷

3.5. *Latest Developments*

The latest development concerning the judicial review system in Indonesia is the adoption of the Decree or Tap MPR No. III/MPR/2000, which deals with the source of the legal and chronological order of legislation and/or regulations. As mentioned above, for the first time in the history of the Indonesian legal system, a decree enables the legality and constitutionality of acts or statutes to be reviewed and examined. Furthermore, the Decree states that not only the legality of acts, but also of Tap MPR and the Constitution itself can now be tested (Article 5 (1)). To review the constitution means to modernise the content or provisions of it, which can only be conducted by the MPR. As expected, this development is seen by many as a further opening of the door to justice and freedom.

However, this regulation contains an anomaly, namely that the competence to review has not been granted to the Supreme Court as the holder of the nation's judicial power, but to the MPR instead. Before and after the Tap MPR was adopted, legal experts, scholars and

¹²⁷ Lotulung, P.E., *Ibid.*, at p. 171.

politicians were strongly of the opinion that the competence of judicial review should remain with the Supreme Court.¹²⁸ “This is to prevent legal affairs from becoming political affairs”, stated Prof. Sri Soemantri, a leading constitutional law expert at the Law Faculty of Padjadjaran University, Bandung.

However, it is conventionally considered, from the perspective of the Constitution and the structure of State institutions, to be “inappropriate” to grant this right to the Supreme Court, because its standing as a high-level state institution is exactly the same as that of the DPR and the President, who are the law makers. Besides, Supreme Court justices are elected by the DPR and appointed by the President.

In order to get out of this “vicious circle”, it was recommended by legal experts and observers¹²⁹ that a new institution be established which would be able to examine the legality of a statute and even of the Constitution. From an Indonesian way of legal thinking, a constitution can be declared illegal if it is no longer the manifestation of people’s aspiration. And, once again, only the MPR can assess this. The recommended institution was *Mahkamah Konstitusi* (Constitutional Tribunal)¹³⁰, which follows the model of the *Bundesverfassungsgericht* in the Federal Republic of Germany. In Indonesia's case though, the said tribunal would function only as an *ad-hoc* tribunal

¹²⁸ Sri Soemantri (in *Suara Pembaruan*, June 16, 2000, <http://www.suarapembaruan.com>, access date: 20/06/2000), Nursyahbani Katjasungkana, member of MPR, and Usamah Hisyam, member of the DPR (in *Kompas*, August 22, 2000, <http://www.kompas.com>, access date: 23/08/2000).

¹²⁹ Satya Arinanto of the University of Indonesia and Amin Aryoso, a prominent lawyer, in *Kompas*, August 12 and 16, 2000, <http://www.kompas.com>, access date: 29/09/2000.

¹³⁰ For more details on the German Federal Constitutional Tribunal or *Bundesverfassungsgericht*, see, among others, Christine Landfried (Ed.). 1988. *Constitutional Review and Legislation: an International Comparison*. 1st edition. Baden-Baden: Nomos-Verlagsgesellschaft, at pp. 147-168; Allan R. Brewer-Carias. 1989. *Judicial Review in Comparative Law*. *Ibid.*, at pp. 203-213 and P van Dijk. 1980. *Judicial Review of Governmental action and the Requirement of An Interest to Sue: A Comparative Study on the Requirement of An Interest to Sue in National and International Law*, *Ibid.*, at pp 155-195.

entrusted with the power to examine not only parliamentary acts or statutes, but also MPR decrees and even the Constitution.¹³¹

Nonetheless, even if the power to review legislation were to be entrusted to it, there would still be some doubt as to the capability of the Supreme Court to carry out its task. Contrary to popular opinion, a University of Indonesia law professor and current Minister of Law, Legislation and Human Rights, Yusril Ihza Mahendra, argues that “it isn’t time yet for the Supreme Court to review acts or statutes.”¹³² Apart from the reasons mentioned above, the examination procedure used within the Supreme Court is now the basis for this proposition. Under the current law and regulations, the examination and hearing procedure to settle a legal dispute within the Supreme Court (including a petition for judicial review) is conducted by a panel of three justices (*majelis hakim*).

The question here is whether these three Supreme Court justices can really represent the legal stance of the Supreme Court as a whole, which is supposed to reflect the people’s aspiration for justice. Ideally speaking though, the Supreme Court should hold the power not only to review acts, but also higher regulations (including the Constitution), “provided there is a check-and-balance system operating as in the USA.”¹³³ Since Indonesia does not embrace this system, it is therefore appropriate for judicial review of acts and statutes in particular to be entrusted to the makers of that legislation itself, namely the DPR and the President.

¹³¹ Sri Soemantri, *Suara Pembaruan*, *Ibid.*

¹³² *Kompas*, November 20, 1997, <http://www.kompas.com>, access date: 21/11/1997.

¹³³ Details on this are discussed in Edward McWhinney. 1986. *Supreme Court and the Judicial Law-making: Constitutional Tribunal and Constitutional Review*. Dordrecht, Boston: Nijhoff, distributed in the U.S. and Canada by Kluwer Academic, John Hart Ely. 1980. *Democracy and Distrust: a Theory of Judicial Review*. Cambridge: Harvard University Press and Charles L Black, Jr. 1960. *People and the Court: Judicial review in A Democracy*. Englewood-Cliffs, N.J.: Prentice-Hall.

However, such idea is hardly reasonable. How can one expect the DPR and the President to conduct a fair examination of the regulations which they themselves agreed upon as being law? Besides, according to *trias politica*, a principle partially adopted by the Indonesian legal system as stipulated in Articles 24 and 25 of the Constitution, the DPR and the President are not vested as the holders of the judicial power. Therefore, the most appropriate body to which the power of judicial review should be entrusted is the Supreme Court.

Despite being hailed as a new breakthrough, Tap No. III/MPR/2000 still does not solve some basic legal problems; rather it generates more confusion. This also means that the erosion of the power of the Supreme Court continues. A number of questions need to be satisfactorily answered, such as: how the will MPR exercise this competence, what the review procedure would look like, whether the MPR will hear a legal petition asking for judicial review from the people, or instead, whether it will thoroughly research all acts and decrees without petition, and subsequently declare unconstitutional legislation null and void.

Other relevant issues also need to be addressed, such as whether the whole 700 members of the MPR should attend the examination procedure, or whether the MPR may, for this purpose, appoint a representative committee of around 90 members. If the former is the case, what distinguishes this from the Annual Session of the MPR? And if the latter is the case, would this committee collectively represent the whole MPR as an institutional instrument of the people's sovereignty? And still, the result of the review will be in the form of a decree or Tap MPR that will disqualify the reviewed regulations. As far as the acts are concerned, it is unquestionable; but if this applies to the Constitution or Tap MPR

itself, that would be another problem. This is because, according to the hierarchy of laws and legislation, a lower regulation cannot disqualify another of the same level or higher. Unfortunately, even this basic principle has been ignored for a very long time.¹³⁴

Apparently, in Indonesia, the constitutional guarantee of the independence of the Supreme Court (Annotation to Articles 24 and 25 and upheld by Tap No. X/MPR/1998) has no real meaning at all. As regards the relationship between the President and the Supreme Court, the former not only interfered with the latter, but what is more, often ignored it altogether. When former President Soeharto handed power over to then Vice President Habibie, there was a debate as to the constitutionality of this hand-over. Article 8 of the Constitution requires that the President's oath be taken in front of the plenary session of the MPR. The appointment should then be decreed in a Tap MPR. Neither of these conditions was met during that hand-over. For such an important legal issue, the President did not consider it necessary to consult the Supreme Court, but sought advice instead from a university law professor.¹³⁵

Neither Tap No. X/MPR/1998 nor UU No. 35/1999 nor Tap No. III/MPR/2000 has empowered or ensured the independence of the Supreme Court. This has frustrated and delayed the expectations of many that, after the fall of the New Order, there would be a really powerful Supreme Court able to guard the Constitution and bring justice for all.

Given the extremely restricted procedures of judicial review, which are placed under heavy government influence and control; and given the lack of confidence in the

¹³⁴ Press release of *Ikahi* (Indonesian Judges Association) and Hajriyanto Thohari, member of 2nd Ad-hoc Committee of MPR, in *Kompas*, August 2, 2000, <http://www.kompas.com>, access date: 4/08/2000.

¹³⁵ Prof. Yusril Ihza Mahendra of the University of Indonesia, who was appointed Minister of Law and Legislation under Habibie's administration.

capability and integrity of the Supreme Court, together with the presence of court-like, government or even military-controlled extra-judicial institutions and procedures, it should not come as a surprise to anyone that many human rights violations and other injustices committed by the state government through its exercise of existing laws and regulations, remain unpunished. And this still goes on. Governmental impunity results in a whole chain of unpunished crimes.

As a matter of fact, more than thirty years ago, three Supreme Court rulings (*yurisprudensi* or precedents) were adopted to prohibit the Indonesian courts to try or conduct a hearing of lawsuits which involved government policies. In other words, no judges are allowed to examine any petition brought by any individual or organisation in which government policies are legally questioned. Those rulings are, respectively, the Supreme Court ruling of October 14, 1957 No. 118/K/Sip/1955, of May 18, 1960 No. 157/K/Sip/ 1960, and of March 3, 1971 No. 818/K/Sip/1970. These binding Court rulings were based only on the power and competence vested within the Supreme Court as provided for in Articles 24 and 25 of the UU No. 14/1970.

In connection with the implementation of international human rights standards aiming at developing respect for and promotion of human rights, the independence of the judiciary is a priority. Not only that; it is a necessity. The Basic Principles on the Independence of Judiciary, adopted by the United Nations in 1985, envisage that:

... all judges [must be vested] with full authority to act, free from pressures and threats, adequately paid and [well] equipped to carry out their duties.¹³⁶

¹³⁶ *United Nations Background Note*, Independence of Judiciary: A Human Rights Priority, at <http://www.un.org/rights/dpi1837.htm>, access date: 2/05/1998.

4. A Record of Human Rights Violations

Despite the availability of significant legal documents acknowledging international principles and standards of human rights, such as MPR Decree No. XVII/MPR/1998, Law No. 39/1999, and most recently MPR Decree No. IX/MPR/2000 on the second amendment of the Constitution, human rights violations in Indonesia are not likely to come to a rapid end.

Quoting a World Bank study on good governance, Ian Buchanan from Booz-Allen and Hamilton ranked Indonesia as the lowest, compared with other Asian countries, in the areas of good governance and efficiency of the judiciary and law enforcement systems.¹³⁷ In the area of human rights, during the New Order, Indonesia implemented only 33% of its commitments to promote and protect the basic rights and fundamental freedoms of its citizens. This is well below the average of 60% in other ASEAN countries¹³⁸.

A poll conducted by Kompas in 1998 shows that around 70% of the Indonesian population is of the opinion that the government has not done enough yet to promote and protect the human rights and fundamental freedoms of its citizens. This percentage of respondents replied “bad” to the question: “is the government protection of human rights good or bad?”¹³⁹ In its annual report, published in London in 1998, Amnesty International ranked Indonesia amongst the ten countries that violated human rights most blatantly.¹⁴⁰

¹³⁷ *Kompas*, October 1, 1999, <http://www.kompas.com>, access date: 4/10/1999.

¹³⁸ *Kompas*, December 1, 1999, *Ibid.*, access date: 2/12/1999.

¹³⁹ *Kompas*, December 10, 1998, *Ibid.*, access date: 10/12/1998.

¹⁴⁰ *Suara Pembaruan*, June 18, 1998, <http://www.suarapembaruan.com>, access date: 19/06/1998.

While recognising that there is no linear correlation between political democracy and equitable economic growth, Prof. Sudarsono, the former Vice-Governor of the Indonesian National Defence Institute or *Lemhanas*, recorded that in 1997, there were 25 million human rights infringements in Indonesia “simply because many of the citizens are still struggling below the poverty line¹⁴¹ and that they are in the process of being economically and socially empowered in order to better exercise their civil and political role as active and responsible citizens.”¹⁴²

There is no way to present a full record of the types of violations against specific rights that are internationally or universally recognised as fundamental human rights. It is nevertheless useful to provide a limited selection of the worst violations, in order to show how violations of human rights principles in Indonesia occur every day without adequate measures taken to reduce them. Those presented in this chronology are just the “big fish”.

The data presented has been taken both from the Annual Report (*Laporan Tahunan*) of the Indonesian National Commission of Human Rights (*Komnas HAM*),¹⁴³ and the United Nations Human Rights Record System,¹⁴⁴ as well as from other sources such as newspapers, press conferences and personal communications.

¹⁴¹ Article 34 of 1945 Constitution obliges the government to look after the poor, as this is their right.

¹⁴² Soedarsono, Juwono. 1997. Human Rights and Foreign Policy. Paper presented at the Conference on the Contemporary Indonesia, organised by Carleton University, Ottawa, and the Indonesian Embassy in Canada, February 25, 1997, p. 2.

¹⁴³ <http://www.komnas.go.id/indonesia/laporan/index.html>

¹⁴⁴ <http://www.hri.ca/fortherecord/vol3/indonesia.htm>

4.1. *Violations against Freedom of Opinion, Expression and Speech*

1994:

- Adnan Buyung Nasution was banned from speaking in a conference at the University of Indonesia just because of governmental prejudice (despite the constitutional guarantee in Article 28).
- Books and poems written by leading Indonesian authors, journalists and poets were not allowed to be published or distributed in Indonesia. Among these were the multiple award winner Pramudya Ananta Toer, the Acehese journalist and author D. Adnan Beuransyah, and Filomena da Silva Derreita, an author from East Timor.
- The publishing licenses of the magazines TEMPO, Editor and Detik were revoked by the government's Information Minister.

1995:

- A scholar and former member of the House of Representatives (DPR), Dr. Sri Bintang Pamungkas, was arbitrarily detained for criticisms he expressed in a seminar series organized by German NGOs in support of Indonesia. He then was wrongly accused of leading an underground subversive movement to topple President Soeharto, and eventually jailed.
- The editor and prominent member of the human rights group "Pijar" was arrested, tried, and eventually found guilty for having written a defamatory article about the President and Vice-President, which expressed hatred of and contempt for the government.

1996:

- Three University students were killed by military and security personnel during a rally to protest against local government policy on public transport in Ujung Pandang.
- On the 27th July, the government and military initiated a violent attack to stop the *mimbar bebas* (freedom of speech) activities in the Megawati-led Indonesian Democratic Party headquarters, in which at least 5 were killed, 149 were injured, and 23 disappeared. In this incident not only freedom of speech was violated but also freedom of assembly and association, freedom from fear and freedom from degrading and inhuman treatment.
- The labour rights activist Mukhtar Pakpahan was arrested for his involvement in the “Majelis Rakyat Indonesia”, an alliance of around 32 NGOs connected with his work as legal representative for workers and their concerns. His right to a fair trial was denied because his lawyer was continually intimidated by the government and the military.

1997:

- The state police banned a theatrical play, entitled “Marsinah Menggugat” or Marsinah’s Petition, which was scheduled to be performed in several important cities such as Surabaya and Bandung. The play was based on a true story about a young female worker and labour rights activist, Marsinah, who died under torture after repeated rape, in a police/military precinct.

1998:

- The Information Minister forbade both the electronic and print media to give any coverage to students’ protest rallies demanding political, legal and economic reform.

The rights to freedom of opinion, freedom of expression and freedom of speech are human rights recognised both in national law (Article 28 of the 1945 Constitution) and in international law (Article 19 of the 1948 Universal Declaration of Human Rights).

4.2. *Violations against Freedom of Assembly and Association*

- From 1973 to 1998, the government only acknowledged three political parties as contestants in general elections: PPP, Golkar and PDI. The MPR Decree and parliamentary acts were used by the government to restrict people to membership of one of only these three parties. The establishment of parties other than these three was against the law, and so subject to criminal prosecution under Subversive Act No. 1/PNPS/1969.
- Until 1999, workers were not allowed to join labour associations other than those endorsed by the government. As Indonesia is not a Party to the International Labour Convention, the norms and standards set out in the Convention have not been applied by the Indonesian government. Many attempts to build labour unions have been suppressed. It is a legal requirement for all social and mass organisations (including political and even religious ones) to adhere to the official state ideology, the Pancasila.

The rights to freedom of assembly and association are guaranteed in the 1945 Constitution (Art. 28) and proclaimed in the Universal Declaration of Human Rights or UDHR (Art. 20).

4.3. *Violations against Freedom of Religion*

- The Constitution grants religious freedom to the members of five officially recognised religions (Islam, Christianity, Buddhism, Hinduism and Confucianism) and one traditional belief called *Aliran Kepercayaan* (Belief Movement). However, there are some restrictions on certain types of religious activity. For instance, since 1967 (under Law 14/1967) some Confucianist religious practices were restricted to houses or temples and were not allowed in public places. Just recently, with Presidential Decree No. 6/2000, this ban has been lifted.
- There is discrimination in the selling or publishing of religious books and literature. In general, Islamic religious books and literature can be published and sold publicly, while for other religions it is confined only to their own followers.

The rights to freedom of religion are constitutionally guaranteed in Article 29 of the 1945 Constitution. The same principles are set forth in the UDHR (Article 18), which were further upheld and elaborated in the 1981 Declaration on the Elimination of All Forms of Discrimination Based on Religion or Belief.

4.4. *Other Violations against Individuals' Human Rights*

1965: Mass killings followed the 1965 abortive coup of the Indonesian Communist Party (G30S/PKI).

1997: Dita Sari Indah, a pro-democracy activist experienced inhuman and degrading treatment during her detention in the Malang Women's Prison where she was denied the right of free movement and access to her family.

1998:

- A number of politicians, human rights and pro-democracy activists (mainly students) were abducted. They were kidnapped by the former Indonesian Military Special Forces (Kopassus). Among them, twelve activists, mostly students, remain missing to the time of writing.
- Four Jakarta-based Trisakti University students were killed in a protest rally on campus.
- Since 1989, many gross violations of individual human rights have occurred in the so-called DOM (military operation region) which was established to crack down on the forces of the Freedom of Aceh Movement (GAM). Violations include summary killings, arbitrary arrest and detention, rape and sexual assault on women, abduction and destruction of property.
- In the so-called May 1998 tragedy, many members of the Chinese minority were victims of mass rape, destruction of property, and inhuman and degrading treatment.

1999:

- Mass and systematic killings, abduction, destruction of property, rape and sexual assaults occurred after the August 30 referendum in East Timor.
- The ongoing violence in Aceh and Irian Jaya (now, Papua Barat or West Papua) continues to be characterised by violations of human rights, inhuman and degrading treatment, destruction of property, rape and sexual assault, abduction, etc.

2000:

- Four national agrarian activists were kidnapped by well-trained kidnappers but were eventually released. No satisfactory measure was taken by the government in order to solve this case.

Without doubt, these incidents have violated Article 333 of the Indonesian Criminal Law book (KUHP), Article 9 of the International Convention on Civil and Political Rights (ICCPR), the principles set forth in the UDHR and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

5. Indonesia's View of Human Rights

Accepting the wisdom of sayings such as “*Apa yang engkau percaya menentukan siapa dirimu sebenarnya* (what you believe determines what you are)”, or “*Bagaiman engkau memandang sesuatu hal menentukan siapa dirimu* (the way you view things, that's what you are)”, it follows that Indonesia's view about international human rights standards determines the way the Indonesian state deals with these issues.

When he opened the Human Rights Conference in Vienna in 1993, the former United Nations' Secretary General Boutros Boutros-Ghali stated that human rights are “the common language of all humanity.” By this he meant that regardless of religion, race, nationality or social status, human rights, using Sir Ronald Wilson's expression, “matter

for everyone.”¹⁴⁵ But for many countries, including Indonesia, the universality of human rights is not totally accepted.

In the end, the Conference brought to a conclusion the long debate as to whether human rights are Western values being forced on the East, and whether human rights are universal or particular. In that conference, the universality of human rights was recognised; and at the same time, the particularity of its implementation was also acknowledged. By the former it is meant that human rights are to be implemented as they are universally formulated in the Universal Declaration of Human Rights, whereas the latter suggests that the implementation of human rights needs to take the circumstances specific to a country into consideration; that is to say, its culture, religion, history, etc.

Under this consensus, cultural diversity is seen as a reality and plays an important role in the promotion of respect for human rights. Specific cultural elements in certain countries have emerged as key parameters in understanding their economic development and their style of democracy and human rights.

This seems to acknowledge that there are no absolute human rights. All human rights have their own limitations and must be exercised in relation to the rights, conceptions and values of others, and of society at large. The Vienna Declaration of former days constituted a blend of Western and Eastern conceptions and ideas of human rights. In this declaration, human rights were defined as having five essential characteristics: universal, indivisible, impartial, non-selective and unchangeable.

¹⁴⁵ E-Law, *Murdoch University Electronic Journal of Law*, Vol. 3, No. 3 (September 1996), p. 1, access date: 30/07/1997.

Indonesia, swinging between the pursuit of economic growth and the promotion of international human rights standards, agrees with this conception; and moreover is of the opinion that every single right must be accompanied by its corresponding obligation or duty. In Indonesia, priority has been given to political stability as a prerequisite to sustained economic reconstruction leading to increased social justice.¹⁴⁶ It has been part of a citizen's duty to contribute (read: to sacrifice) something to the achievement of this political stability. And it seems that the need for political stability has been the best argument to justify the use of repression against trade unions, the media, non-governmental organisations and individuals.

Still on this issue, Prof. Muladi of the University of Diponegoro in Semarang, and former Justice Minister, stated that the universality of human rights could be restricted by national interest and security, democratic principles, public order, rights of others and morality.¹⁴⁷ Arguably, there should not be any objection to this view. The question is: who decides what is in the national interest in terms of security, public order, morality and democratic principles? The history of Indonesia provides evidence that these decisions have been made by the government in the narrowest sense, namely the executive; that is, the President and the presidential oligarchy.

As already explained in the previous section, Indonesia represents an executive-heavy state system, which does not give much room for other branches of government (i.e. legislative, judiciary) to exercise control and supervision on government policies. Even worse, many fundamental state policies and programs (e.g. State Policy Guidelines or GBHN) are formulated by the military (largely through the National Defence Institute and

¹⁴⁶ Soedarsono, Juwono. 1997. *Ibid.*, at p. 5.

¹⁴⁷ Suara Pembaruan, January 4, 1998, <http://www.suarapembaruan.com>, access date; 6/01/1998.

National Defence and Security Council) on the strength of the principle of dual function¹⁴⁸ which has been effectively exploited to shield the powers that be, rather than the nation at large.

The former Secretary General of the Indonesian National Defence and Security Council (*Wanhanakamnas*), Soekarto, explicitly stated that “human rights are inherent in, and inseparable from, human obligations”. He referred to the Pancasila (five principles) as instructing all Indonesian citizens not only to ask for their rights, but also to perform their duties. In the Guidelines for the comprehension and practical application of the Pancasila (P4), the Indonesian nation embraces the balance, harmony and synergy between rights and duties,¹⁴⁹ which are like two faces of the same coin. Within the ideology of the Pancasila as the nation’s basic principles, duty to the country is valued more highly than the demand for or exercise of rights.

Historically speaking, there was indeed a feeling of reluctance or discomfort among the founding fathers in introducing human rights provisions into the Constitution. Soekarno, who was the inaugural chairman of the Constitutional Drafting Committee and the first Indonesian President, argued that the inclusion of human rights in the Constitution meant recognition of *les droits de l’Homme et du Citoyen* which were derived from Western individualism and liberalism.¹⁵⁰ Indonesia was supposed to be against those philosophies, and instead sought to build its national spirit upon family-like principles of mutual help and the pursuit of social justice. This explains why there are only a few articles concerning human rights in the 1945 Constitution.

¹⁴⁸ Locally known as “dwi fungsi” ABRI (now TNI), which enables the Indonesian military to function both as defence as well as social and political force.

¹⁴⁹ BP-7 Pusat. 1994. *Bahan Penataran P4/Undang-undang Dasar 1945*. Jakarta: BP-7 Pusat, p. 38

¹⁵⁰ Bp-7 Pusat. *Ibid.*, at p. 39.

This reluctance can be traced through the sequence of human rights treaties that have been ratified by Indonesia. To this day, after 55 years of independence, Indonesia has become party only to four major human rights treaties, with one other acceded to, but not yet ratified. The table below shows the human rights treaties so far acceded to or ratified by Indonesia.

	T r e a t y	Entry into force	Date of signature or accession	Date of ratification
1.	International Convention on the Elimination of All Forms of Racial Discrimination	4/01/1969	25/06/1999	--
2.	Convention on the Elimination of All Forms of Discrimination against Women	3/09/1981	29/07/1980	13/09/1984
3.	Convention on the Political Rights of Women	7/07/1954	31/03/1953	16/12/1958
4.	Convention on the Rights of the Child	2/09/1990	26/01/1990	5/09/1990
5.	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. ¹⁵¹	26/06/1987	23/10/1985	28/10/1998

Certain reservations were expressed by the Government of the Republic of Indonesia regarding the interpretation and application of some provisions contained in the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child.

The Government of the Republic of Indonesia declared that it is not bound by the provisions contained in Article 29 of the Convention on the Elimination of All Form of

¹⁵¹ de Varennes, Fernand (Ed.). 2000. *Asia-Pacific Human Rights Documents and Resources*. Vol. 2. The Hague, Boston: Martinus Nijhoff Publishers, p. 577.

Discrimination against Women. It stated that any dispute on this would be settled through arbitration or the International Court of Justice with the consent of all parties.¹⁵²

Reservations were also expressed by the Indonesian government concerning the application of Articles 1, 14, 16, 17, 21, 22 and 29 of the Convention on the Rights of the Child. The rights of the child and other provisions in these articles were considered beyond constitutional guarantee and therefore the Indonesian government declared that it would “apply those provisions only in conformity with the 1945 Constitution.”¹⁵³

6. Attempts at Seeking Remedy

Several attempts have been made by individuals, groups of individuals or non-governmental organisations (NGOs) to find justice and to seek legal reparation for the violation of their rights through government acts and policies, both at national and international levels. Some of the most significant attempts are listed below.

6.1. National Level

It is obvious that any attempt at appealing against government acts that breach human rights in Indonesia will not be successful. As mentioned in the previous section, according to Supreme Court jurisprudence, the State government and its agencies may not be prosecuted before any national court for human rights abuses because, as State institutions, they merely implement state policies which strive for “social justice and welfare”.

¹⁵² *United Nations Human Rights System*. Record 1997 on Indonesia, at <http://www.hri.ca/fortherecord/1997/vol3/indonesia.htm>

¹⁵³ de Varennes (Ed.), *Ibid*.

From its very beginning, the Indonesian criminal law system, inherited from the Dutch colonial *Wetboek van Strafrecht* (criminal law book), has prohibited judges (and courts) from hearing cases questioning government or State policies, even when the State had committed criminal offences inflicting loss or damage to citizens.

The same situation applies in the case of the Indonesian military which, during the New Order, was used as a government bodyguard against the people. In the new Military Court Act (UU No. 31/1997), principles of legal immunity similar to those in the criminal law book, are also recognised. They can be found *inter alia* in Article 123 (1) concerning the competence of the investigating officer (*Pepera*). In paragraph (h), for example, the *Pepera* (who must be an active military officer) has the competence to “close the case for reasons of the interest of law, the public and the military.”

This is exactly what is happening to all human rights violation cases which involve the government and the military. To mention only one example, this is what happened to the Indonesian Democratic Party of Struggle (PDIP) led by Megawati Soekarnoputri, who went on to become the first Indonesian female President.

After her consecutive defeats in seeking legal reparation by appealing to the first (district court) and appeal courts (high court) nationwide, Mbak Mega as she is familiarly called, whose political rights were violated by the state government under Soeharto's regime through the endorsement and sponsoring of the Medan Congress¹⁵⁴, had to accept the

¹⁵⁴ The Congress was designed by the New Order ruler to depose Megawati from her post as Chairwoman of the PDI Party (Indonesia Democratic Party), which also meant her exclusion from candidacy for President. Many military officials acting as members of the Party were sent to the Congress and voted in favour of deposing Megawati.

Supreme Court ruling No. 1986K/Pdt./1998 of 18 August 1998. This decision ruled that the lawsuit filed against the state apparatus for illegal intervention in internal party affairs and violation of her constitutional rights, could not be heard by the Court on the basis of current jurisprudence, certain provisions of which stipulate that “the court is incompetent to hear cases questioning government policies”.

Since Indonesia has only very recently become a party to the International Covenant on Civil and Political Rights (but not yet its Optional Protocol permitting individual complaints when breaches of the treaty occurred), Megawati, as well as other individuals and bodies including NGOs, could not take any further steps to seek access to remedies offered by international law.

6.2. *International Level*

Of the students and pro-democracy activists who were kidnapped and tortured by the military during 1998, twelve are still missing, and nobody knows whether they are alive or dead. They were kidnapped because, in the Indonesian government’s opinion, they presented a threat to national stability and security. So, as part of the government policy of maintaining national stability, they had to be silenced. Such actions clearly violate the provisions contained in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Kidnappings have also occurred in several other parts of Indonesia such as Aceh, Irian Jaya and East Timor (when this was still part of Indonesia).

Since the Indonesian government did not take the necessary measures to solve the case (the government even seemed to ignore it), an Indonesian NGO called the Commission for Missing Persons and Victims of Violence (*Kontras*) tried to bring the case before the International Commission of the Red Cross.¹⁵⁵ Besides, *Kontras* intended to report the case to the UN High Commissioner for Human Rights (UNHCHR) by sending students and human rights activists to put it before a session of the Commission on Human Rights. A report of the episode was also made to the Working Groups on Enforced and Involuntary Disappearances.

Some individual attempts were also made to attract international attention to the incident. For example, once they were released, some of the students went to present their personal reports and testimonies in front of the U.S. Congress.

Another NGO was created to represent the victims of the violence perpetrated from 13-15 May 1998 - violence which was allowed to go unchecked by the State government. In these riots, the victims were mostly from the Indonesian Chinese minority.¹⁵⁶ The above-mentioned NGO, the Indonesian Legal Aid and Human Rights Association (PBHI), planned to bring a petition to the United Nations Sub-Commission on the Prevention of Discrimination and Protection of Minorities, which operates within the framework of the International Convention on the Elimination of All Forms of Racial Discrimination. As an integral part of this attempt, it was decided that a similar complaint would be submitted to the Commission on the Status of Women on behalf of Indonesian Chinese women who were the victims of mass rape in this violent episode.

¹⁵⁵ *Munir*, chairman of *Kontras* in *Suara Pembaruan*, June 23, 1998, <http://www.suarapembaruan.com>, access date: 25/06/1998.

¹⁵⁶ *Hendardi*, director executive of PBHI, in *Suara Pembaruan*, July 17, 1998, *Ibid.*, access date: 19/07/1998.

Finally, on behalf of the victims and relatives of the Semanggi Tragedy of 1998, where police assisted by military personnel brutally fired at peacefully protesting students and took five lives, the Association of the Victims of the 1998 Semanggi Tragedy (Paguyuban Korban dan Keluarga Tragedi Semanggi) filed a petition to the Geneva-based UNHCHR.

Little, if any, attempt has been made by the Indonesian government to bring the kidnappers or the violators before the court. To the time of writing, there has been no progress, let alone result, in these attempts; except for the last one, where the Jakarta-based UNHCHR representative promised to conduct an inquiry into the incident.¹⁵⁷ This inquiry has never come to pass, unfortunately.

7. Summary

The establishment of the supremacy of law has proven to be the first, hardest and most important task for the new Indonesian government with a claim to democracy. The supremacy of the law has never existed in Indonesia since its independence from Dutch colonial power in 1945. In the first fifteen years of Indonesia's independence, there was no supremacy of the law. Even the necessary state institutions had not been established yet. The cause of national unity, along with the transitional quality of law and government, were used as excuses for this situation.

During the New Order, this situation became worse. This was caused by three major constitutional problems: a confusing legal system and legislation, a State government

¹⁵⁷ *Kompas*, August 20, 1999, <http://www.kompas.com>, access date: 21/08/1999; also *Kompas*, October 24, 2000, <http://www.kompas.com>, access date: 30/10/2000.

dominated by the executive, and a powerless and dependent judiciary. The first problem generated legal uncertainty in most legal transactions. The second put the State government above all other State institutions, and so beyond any control mechanism. The third did not give enough space for the development of an effective judicial review system by which the lawfulness of State and government policies might be examined.

Since the legal system is unreliable, alternative mechanisms offer more hope. One aspect of the legal machinery that can prevent the state or government from misusing its power is the judicial review procedure, by which the constitutionality and legality of legislation are tested. Regrettably, the Indonesian judicial review system is so feeble and limited that many laws and regulations issued by the government cannot be scrutinised. Because the law may not be questioned, many abusive government acts have remained unpunished.

One way out of this situation would be found if the judges were dedicated and committed enough to bring about the justice that the people deserve. Both scholarly and factual evidence reveal that this is far from being the case in Indonesia. Not only is there government intervention in the judiciary and in court procedures, but the credibility and integrity of the judges are seriously questioned and doubted by the people. The government's interference is so entrenched that the judges are at the same time government officials who are supposed to be loyal to the government.

Frustration and annoyance with the domestic laws and legal system force Indonesia's citizens to turn to the international legal resources provided by the international human rights system, such as the International Convention on the Civil and Political Rights, and the Optional Protocol. Under this system, groups of people, organisations and even

individuals are entitled to bring petitions about alleged rights violations, provided the country of which they are nationals is a party to that treaty (or, as in some cases, has acceded to the protocol permitting individuals to have recourse to the complaint mechanism).

Unfortunately, the Indonesian government is not a party to the ICCPR's complaint mechanism protocol or related treaties. The government's reluctance to ratify such treaties, and its unwillingness to implement them once ratified, are responsible for this state of affairs. Indonesia's particular outlook on international human rights standards plays a significant role in this reluctance.

The burdens of constitutional duty and moral obligation to establish an independent judiciary will grow heavier if concrete action is not taken immediately. Obviously, the transfer of court administration from the executive to the Supreme Court urgently needs to be put on the agenda. The executive's involvement in judicial governance became the channel of the government's intervention in the judiciary for a long period under the New Order. The independence of the judiciary is constitutionally guaranteed by Articles 24 and 25 of the 1945 Constitution, and upheld by MPR Decree No. X/MPR/1998. So, there should not be any reason whatsoever not to implement this basic principle in a *Rechtsstaat* and not *Machtsstaat* like Indonesia.

Law No. 35/1999 has once again emphasised the independent status of judges. It is now up to the judges to decide whether or not they will be consistent in carrying out their duty to bring justice to the people. Nevertheless, there is much doubt as to the judges' integrity and credibility in exercising their function.

Experience shows that many crimes and human rights violations formerly committed under the New Order cannot be investigated under existing laws because they were deliberately protected from such investigation. During the New Order, not only the judiciary but also the legislative power were so paralysed that there was no rule of law, but rather rule of power. People no longer trusted either the court or the law. This situation, however, should not prevent judges from providing people with legal security and certainty. It is regrettable that judges should not be more dedicated to their duty as the champions of justice, but unfortunately this has been the experience for the majority of Indonesian people.

Asmara Nababan, the Secretary General of the Indonesian National Commission on Human Rights (Komnas HAM) and T. Mulya Lubis, a leading lawyer and human rights defender, suggest that Indonesian judges should use the so-called transitional justice.¹⁵⁸ By this they mean justice that is not only based on legal formalistic arguments (since this would mean chaos for Indonesia), but more than that, on moral and social values. In order to be able to do this, a judge must not use a merely legal formal approach in trying a case, but more importantly, as the then Vice President Megawati phrased it, “use [his] conscience.”¹⁵⁹

Until the desired level of this conscientiousness can be reached, which is a very subjective, uncertain and immeasurable matter, there are more reliable legal mechanisms available through international instruments and organisations. It is highly desirable that

¹⁵⁸ *Kompas*, October 24, 2000, at <http://www.kompas.com>, access date: 30/10/2000.

¹⁵⁹ *Kompas*, October 30, 2000, *Ibid.*,

the Indonesian government should now benefit by becoming a party to these instruments, even though such initiatives have proved uncomfortable for Indonesia in the past.

Another alternative would be that the international community (possibly the UN) should take the initiative to increase pressure on countries like Indonesia by making available a national prototype judicial review procedure in the light of which the country's constitution could be examined to see whether or not it was in conformity with international human rights standards. This, however, would prove impossible since the UN currently has no such mandate.

Chapter 4

INDIVIDUAL ACCESS TO THE INTERNATIONAL REMEDY SYSTEM

1. Preliminary Remarks

In the previous chapter, we saw that for citizens living in countries like Indonesia it is quasi-impossible to obtain adequate legal reparation for breaches of their human rights if they merely rely on national laws. This chapter has a dual purpose. First, it outlines the functions and powers of the United Nations bodies in the field of human rights, including the availability and ease of individual access to those bodies. Second, and more importantly, it analyses the existing international mechanisms or procedures available to individuals, including the limitations or weaknesses of these procedures. Although there is not the slightest intention to overlook or diminish the strengths and benefits of the procedures, the author is of the view that an analysis of their limitations is crucial for the purpose of this entire study.

Various communications procedures have been developed within the framework of the United Nations in the field of human rights. Of particular importance, and in support of the study conducted in the previous chapter, the centre of the analysis will be on the procedures concerning individual communications within the Charter and treaty-based bodies - that is, the Economic and Social Council with its subsidiary bodies and Committees, working in accordance with the Charter, resolutions and treaty provisions.

2. Overview of the United Nations Human Rights System

A number of mechanisms¹⁶⁰ that grant individuals access to means of legal redress at the international level have been developed within the framework of the United Nations¹⁶¹. Anyone, be it a single individual or a group of people, may bring human rights problems to the attention of the United Nations; thousands of people around the world have done this in the past, and continue to do so. What kinds of communications on human rights can the United Nations receive? How are they dealt with and what are the procedures for handling them? How about the outcomes? These are the issues that will be discussed in this chapter.

Within the United Nations human rights system, there are two different types of bodies that deal with communications of human rights problems. The first is Charter-based bodies or organs, also referred to as Charter bodies. The second is Treaty-based bodies, also referred to as treaty-monitoring bodies or simply treaty bodies. Charter bodies function in accordance with the provisions of the United Nations Charter, which applies to all Member States. Treaty bodies, on the other hand, function according to the provisions contained in the treaties, which apply only to the States that are parties to the treaties. Brief descriptions of the functions and powers of the Charter bodies are provided later in this chapter.

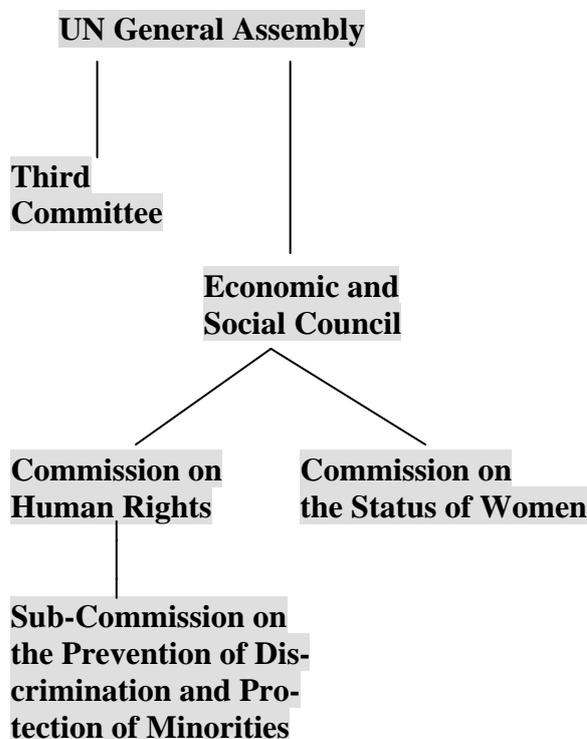
¹⁶⁰ Despite their long existence, not until the last decade did those mechanisms become popular to individuals in any countries; partly because of the information system within the UN itself, and largely because many countries are not yet willing to become parties to those treaties. Australia, for example, had just ratified and become party to the Optional Protocol on 25 December 1991 while Indonesia has not yet ratified either the ICCPR or its Protocol.

¹⁶¹ The term United Nations used here refers to the UN itself, as by definition the UN also includes a far wider family of other specialised agencies, e.g. ILO, Unesco.

The following diagram¹⁶² shows how the Charter-based and Treaty-based bodies work within the framework of the United Nations for the promotion and protection of international human rights:

UNITED NATIONS BODIES IN THE FIELD OF HUMAN RIGHTS

Charter-Based Bodies



Treaty-Based Bodies

**Human Rights Committee (HRC)
for the ICCPR**

**Committee on the Elimination of
Racial Discrimination (CERD) for
the ICERD**

**Committee Against Torture
(CAT) for the CAT-Convention**

**Committee on the Elimination of
Discrimination Against Women
(CEDAW) for the
CEDAW-Convention**

**Committee on Economic, Social
and Cultural Rights (CESCR)
for CESCR-Covenant**

**Committee on the Rights of the
Child for the CRC-Convention**

Office of the High Commissioner for Human Rights

¹⁶² Adapted from Sarah Pritchard, Naomi Sharp & Sandrine Rodrigues. 1998. *Petitioning the CERD Committee*, Human Rights Booklet No. 2, Sydney: Australian Human Rights Centre, at p. 9.

Individuals seeking redress for alleged abuse of their rights have access to the international system under four UN treaties¹⁶³: the International Covenant on Civil and Political Rights (ICCPR) with its first Optional Protocol¹⁶⁴, the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD),¹⁶⁵ the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)¹⁶⁶, and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)¹⁶⁷ with its Optional Protocol¹⁶⁸.

Under these treaties, any individual can bring a petition, complaint or communication¹⁶⁹ about alleged human rights violations to the respective Committees which function on the basis of the treaty provisions. The treaties are multilateral, and the fact that they are treaties makes them legally binding on the States parties. According to the provisions of these treaties, any individual who is a subject of the State Party can challenge acts it allegedly commits in violation of the rights set forth in the treaties. This may be done by filing a petition with the respective Committees.

Each treaty provides for the appropriate Committee to receive and consider, within the jurisdiction of the State concerned, any petition, complaint or communication submitted by individuals who claim to be victims of violations of any right laid down in the treaty.

¹⁶³ Actually, there are currently *six* treaties that provide for Committees to monitor their implementation, the other two are: the International Covenant on Economic, Social and Political Rights (ICESCR) and the Convention on the Rights of the Child (CRC). However, these two treaties do not make provisions on the procedures dealing with individual complaints. Both will be addressed briefly later in this chapter as they are closely related to the others.

¹⁶⁴ General Assembly Resolution 2200A (XXI) (1966).

¹⁶⁵ General Assembly Resolution 2106A (XX) (1965).

¹⁶⁶ General Assembly Resolution 39/46 (1984).

¹⁶⁷ General Assembly Resolution 34/180 (1979).

¹⁶⁸ General Assembly Resolution A/54/4 (1999).

¹⁶⁹ All of the four treaties use the term “communication” and it seems to be an ‘official’ one. However, in many writings the terms “petition” and “complaint” are also used, and it is rightly so considering the very nature of the communication, which is a petition or complaint.

3. Functions and Powers of Charter-based Bodies

Charter-based bodies do not receive nor consider individual communications. A brief description of the work and functions of the Bodies is given below.

3.1. General Assembly and the Third Committee¹⁷⁰

As one of the six principal organs of the United Nations, the General Assembly is its main representative body. It contains representatives from all Member States. The General Assembly refers most human rights matters to its Third Committee, which deals with social, humanitarian and cultural matters.¹⁷¹ The role of the General Assembly, prescribed in Articles 10 and 13 of the United Nations Charter, ranges from standard setting¹⁷², implementation and supervision of international standards¹⁷³, to providing advisory services, and hosting or participating in philosophical debates on human rights¹⁷⁴.

In brief, the functions and powers of the General Assembly are the following:

- to consider and make recommendations on cooperation in the maintenance of international peace and security, including disarmament and arms regulation;
- to discuss any question relating to international peace and security and except where a dispute or solution is being discussed by the Security Council, to make recommendations on it;

¹⁷⁰ More detail on this including the historical analysis of the General Assembly can be read in Antonio Cassese and John Quinn's essays "The General Assembly: Historical Perspective 1945-1989" and "The General Assembly into 1990s" in Philip Alston (Ed.) 1996. *The United Nations and Human Rights*. Oxford: Clarendon Paperbacks, pp. 23-106.

¹⁷¹ Pritchard, Sharp & Rodrigues, Petitioning the CERD, *Ibid.*, at p. 6

¹⁷² Mainly in adoption of resolutions but also in making recommendations, see John Quinn in Philip Alston (ed.), *Ibid.*, at p. 65.

¹⁷³ In relation to treaty implementation the GA receives reports from the HRC, the CESCR, the CAT and the CEDAW, *Ibid.*, at p. 68.

¹⁷⁴ For more details, see, John Quinn, *Ibid.*, at pp. 84 and 89.

- to discuss and, with the same exception as above, make recommendations on any question within the scope of the Charter or affecting the powers and functions of any organ of the United Nations;
- to initiate studies and make recommendations to promote international political cooperation, the development and codification of international law, the realisation of human rights and fundamental freedoms for all, international collaboration in the fields of economics health and socio-cultural affairs;
- to make recommendations for the peaceful settlement of any situation regardless of origin, which might impair friendly relations among nations;
- to receive and consider reports from the Security Council and other United Nations organs;
- to consider and approve the United Nations budget and to apportion the contributions among Members States;
- to elect the non-permanent members of the Security Council, the members of the Economic and Social Council and the members of the Trusteeship Council that are elected;
- to elect jointly with the Security Council the judges of the International Court of Justice, and on the recommendations of the Security Council, to appoint the Secretary-General.¹⁷⁵

3.2. *Economic and Social Council*

The powers and functions of the Economic and Social Council (the ECOSOC) are detailed in Chapter X of the Charter. Like the General Assembly, the ECOSOC is a principal organ of the UN. As regards human rights in particular, according to the UN Charter, the ECOSOC may, amongst other things, "... make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms ..." [Article 62 (2)]. In the field of human rights the ECOSOC has also initiated studies and prepared draft conventions for submission to the General Assembly.¹⁷⁶

The founders of the United Nations foresaw an important role for the Council and gave it considerable powers in the UN Charter, *inter alia*:

- to make or initiate studies and reports and to make recommendations to the General Assembly, Member States and Specialised Agencies;

¹⁷⁵ Fifty-sixth Session: 2001, General Assembly, at <http://www.un.org/ga/56/about.htm>, access date: 25/09/2001.

¹⁷⁶ Pritchard, Sharp & Rodrigues, *Petitioning the CERD*, *Ibid.*, at p. 6

- to prepare draft conventions for submission to the General Assembly, and to call for international conferences, subject to the General Assembly's approval;
- to enter into agreement with any of the specialised agencies and to define the terms in which the agency concerned should be brought into relationship with the UN;
- to co-ordinate the activities of these specialised agencies by consulting with them and issuing them with recommendations, along with recommendations to the General Assembly and members of the United Nations;
- to furnish information to the Security Council and assist it upon request.¹⁷⁷

Pursuant to Article 68 of the UN Charter, ECOSOC has established a number of functional commissions¹⁷⁸ including a Commission on Human Rights and a Commission on the Status of Women. In practice, the ECOSOC assigns most of its work on questions of human rights to these functional commissions.¹⁷⁹

To sum up, the functions and powers of the ECOSOC are the following:

- to serve as the central forum for the discussion of international economic and social issues of a global or inter-disciplinary nature and the formulation of policy recommendations on those issues addressed to Member States and to the United Nations System;
- to make or initiate studies and reports and make recommendations on international economic, social, cultural, educational, health and related matters;
- to promote respect for, and observance of, human rights and fundamental freedoms;
- to call international conferences and prepare draft conventions for submission to the General Assembly on matters falling within its competence;
- to negotiate agreements with the specialised agencies defining their relationship with the United Nations;
- to coordinate the activities of the specialised agencies by means of consultations with and recommendations to them by means of recommendations to the General Assembly and Members of the United Nations;
- to perform services, approved by the General Assembly, for Members of the United Nations and, on request, for the specialised agencies;
- to consult with Non-Governmental Organisations (NGOs) concerned with matters with which the Council deals.¹⁸⁰

¹⁷⁷ Declan O'Donovan (1996) "The Economic and Social Council" in Philip Alston (ed), *Ibid.*, at p. 107.

¹⁷⁸ As at the time of writing, there are *nine* functional commissions: Statistical Commission, Commission on Population and Development, Commission on Human Rights, Commission on the Status of Women, Commission on Narcotic Drugs, Commission on Crime Prevention Criminal Justice, Commission for Social Development, Commission on Science and Technology for Development and Commission on Sustainable Development. See Economic and Social Council on <http://www.un.org/documents/ecosoc.htm>, access date: 9/09/2001.

¹⁷⁹ See *supra*, note 166.

¹⁸⁰ Economic and Social Council, <http://www.un.org/documents/ecosoc.htm>, access date: 25/09/2001.

3.3. *Commission on Human Rights*

The Commission on Human Rights (CHR), which was created in 1947, meets annually for six weeks during February and March and consists of 53 Member States. It is the single most important United Nations body dealing with international human rights.¹⁸¹

The CHR assists ECOSOC in coordinating human rights activities within the United Nations system. It undertakes studies, makes recommendations and prepares draft international instruments. It undertakes tasks assigned to it by the General Assembly and ECOSOC, including the investigation of allegations concerning human rights violations.¹⁸² Since the 1960s, with the powers vested in it, the CHR has developed procedures in dealing with communications regarding violations of human rights.

Through the appointment of special rapporteurs, special representatives and independent experts, and through the establishment of working groups, the CHR has established rules and procedures for dealing with human rights situations in particular countries. It also deals with specific types of human rights violations which affect a large number of people in a large number of countries.¹⁸³ There are three types of procedure: country procedures, thematic procedures and “1503” procedures.¹⁸⁴ Together, these procedures are known as Charter-based human rights procedures.

¹⁸¹ The CHR is the main subsidiary body of the ECOSOC in the field of human rights. Mary Robinson, the UN High Commissioner for Human Rights, describes the CHR as having been “the central architect of the work of the United Nations in the field of human rights” at (<http://www.unhchr.ch/html/menu2/2/chr.htm>, access date: 25/09/2001).

¹⁸² *Ibid.*, at p. 7.

¹⁸³ See Philip Alston (1996) “The Commission on Human Rights” in Philip Alston (ed.), *Ibid.*, at p. 126 cf. Pritchard, Sharp & Rodrigues’ Petitioning the CERD, *Ibid.* at p. 7.

¹⁸⁴ Summary on the development of the procedures, see Philip Alston in Philip Alston (ed.), *Ibid.*, pp. 126-210.

The country procedures, also referred to as country mechanisms or mandates, are the mandates or procedures with which the CHR examines, monitors, and publicly reports on human rights situations in specific countries or territories. The thematic procedures are procedures by which the CHR examines, monitors, and publicly reports on major incidences of human rights violations worldwide.¹⁸⁵

Country and thematic mechanisms, which are extra-conventional, differ from treaty-based bodies in that they have no formal complaints procedures. The activities of the country and thematic mechanisms are based on communications which have been received from various sources (the victims or their relatives, local information or NGOs, etc.) and which contain allegations of human rights violations. Such communications may be submitted in various forms (e.g. letters, faxes, cables, emails, etc.) and may concern individual cases as well as details of situations of widespread or systematic alleged violations of human rights. Collectively, these procedures or mechanisms are known as the Special Procedure of the CHR.¹⁸⁶

With regard to the submission requirements of communications under these extra-conventional mechanisms, there is no distinction between the two procedures. The criteria required by both mechanisms are:

- identification of the alleged victims(s);
- identification of the perpetrators of the violation(s);
- identification of the person(s) or organisation(s) submitting the communications (anonymous communications are inadmissible);
- detailed description of the circumstances of the incident in which the alleged violation occurred.¹⁸⁷

¹⁸⁵ See, Commission on Human Rights on <http://www.unhchr.ch/html/menu2/2/chr.htm>, *Ibid.*

¹⁸⁶ Also referred to as communications under extra-conventional mechanisms, http://www.unhchr.ch/html/-menu2/8/ex_conv.htm, access date: 19/09/2001.

¹⁸⁷ *Id.*

In order to facilitate examination of reported communications, a questionnaire is made available to persons wishing to report alleged violations. Reports on communications will also be made available after consideration. Examples of reports that have been submitted through these mechanisms can be seen in the appendix.¹⁸⁸

The “1503” procedure is vested in the Sub-Commission on Prevention of Discrimination of Minorities, the main subsidiary body of the CHR. This is a procedure to confidentially examine communications which appear to reveal a consistent pattern of gross violation of human rights and fundamental freedoms.¹⁸⁹ It will be addressed in more detail later in this chapter.

3.4. Commission on the Status of Women (the CSW)

Like the CHR, the Commission on the Status of Women (the CSW) is one of the commissions which function under ECOSOC, pursuant to the provisions contained in Article 68 of the United Nations Charter. Its membership, which was originally set at fifteen and followed a pattern of geographic distribution, has increased to forty-five since the 1990s, reflecting the growing membership of the United Nations.¹⁹⁰

As its name indicates, the CSW concerns itself mainly with the promotion of gender equity. While the mandate of the CSW was not originally as broad as that of the CHR, it is clear from the early records that the Commission was intended to be the main policy-

¹⁸⁸ [Report] on *Country Mandates* is taken from <http://www.unhchr.ch/html/menu2/7/a/cm.htm>, and *Thematic Mandates* from <http://www.unhchr.ch/html/menu2/7/b/tm.htm>, access date: 25/09/2001.

¹⁸⁹ Sentence 1 of the ECOSOC Resolution 1503 (XLVIII).

¹⁹⁰ See, *supra*, notes 168 and 169.

making body of the United Nations on most questions relating to women. The mandate of the CSW was defined by ECOSOC in 1947 as follows:

The functions of the Commission shall be to prepare recommendations and reports to the Economic and Social Council on promoting women's rights in political, economic, civil, social and educational fields. The Commission shall also make recommendations to the Council on urgent problems requiring immediate attention in the field of women's rights with the object of implementing the principle that men and women shall have equal rights and to develop proposals to give effect to such recommendations.¹⁹¹

This mandate was gradually modified as the CSW over the years received authority to undertake standard-setting exercises, to review communications and make general recommendations on them, and to review the implementation of the documents emanating from the United Nations Decade for Women.¹⁹² Following the recommendations made by the CSW at its special session in 1987, the Council formalised the expansion of the commission's terms of reference since the 1980s to include "the functions of promoting the objectives of equality, development and peace, monitoring the implementation of measures for the advancement of women, and reviewing and appraising progress made at the national, subregional, regional, sectoral and global levels".¹⁹³

In short, the functions and powers of the CSW are as follows:

- to prepare recommendations and reports to ECOSOC on promoting women's rights in the political, economic, civil, social and educational fields;
- to make recommendations to ECOSOC on urgent problems requiring immediate attention in the field of women's rights;
- to promote implementation of the principle that men and women shall have equal rights.¹⁹⁴

¹⁹¹ *Supra*, note 168.

¹⁹² ESC Resolution 48 (IV) (1947).

¹⁹³ Laura Reanda. 1996. "The Commission on the Status of Women" in Philip Alston (ed.), *Ibid.*, at p. 272 in relation to, *supra*, note 168.

¹⁹⁴ ESC Resolution 1987/22.

3.5. *Sub-Commission on Prevention of Discrimination and Protection of Minorities*

As the main subsidiary body of the CHR working under the authority of ECOSOC, the Sub-Commission on the Prevention of Discrimination and Protection of Minorities (the Sub-Commission) was established in 1947. The Sub-Commission is an expert body subordinate to the CHR and ECOSOC. The main purpose of its creation, and therefore its main function, is to provide the CHR with analysis and advice. More recently, however, it has also become a link between official inter-governmental institutions and the general public as represented by the NGOs. As a consequence, it has consistently shown more independence than its parent bodies.¹⁹⁵ The mandate given in 1947 by the CHR to the Sub-Commission was set out as follows:

- (a) in the first instance, to examine what provisions should be adopted in defining the principles to be applied in the field of the prevention of discrimination on grounds of race, sex, language or religion, and in the field of the protection of minorities, and to make recommendations to the Commission on urgent problems in these fields.
- (b) to perform any other functions which may be entrusted to it by ECOSOC or the CHR.¹⁹⁶

In 1949 the CHR amended section (a) of the mandate to read:

- (a) to undertake studies particularly in the light of the Universal Declaration of Human Rights concerning the prevention of discrimination of any kind relating to human rights and fundamental freedoms and protection of racial, national, religious and linguistic minorities.¹⁹⁷

The mandate was subsequently expanded three times: in 1968, 1978 and 1986. The revisions and expansions of the mandate were made mainly at the request of the CHR and ECOSOC in order to address specific and urgent problems requiring immediate

¹⁹⁵ Commission on the Status of Women, <http://www.un.org/womenwatch/daw/csw/>, access date: 25/09/2001.

¹⁹⁶ Report of the Commission on Human Rights in 1947 (First Session), E/259 (1947), para. 19. *See also*, Asbjorn Eide, *Ibid.*, footnote 186, at p. 211.

¹⁹⁷ Report of the Commission on Human Rights in 1949 (Fifth Session), E/1371 (1949), para. 13, section A. Also, Asbjorn Eide, *Ibid.*, at note 186.

attention.¹⁹⁸ Those revisions and expansions of the mandate were by and large partial and incidental and did not change the basic function of the Sub-Commission.

In brief, the functions and powers of the renamed Sub-Commission on the Promotion and Protection of Human Rights¹⁹⁹ are:

- to undertake studies, particularly in the light of the Universal Declaration of Human Rights, and to make recommendations to the CHR concerning the prevention of discrimination of any kind relating to human rights and fundamental freedoms and the protection of racial, national, religious and linguistic minorities;
- to perform any other functions which may be entrusted to it by ECOSOC.²⁰⁰

3.6. Office of the High Commissioner for Human Rights

The UN Office of the High Commissioner for Human Rights, formerly known as the Centre for Human Rights, is part of the United Nations Secretariat. The Office plays an important part in implementing the human rights programmes developed by policy organs and in servicing Charter-based and Treaty-based human rights bodies.²⁰¹ One of its main functions is to provide and disseminate information and documents relating to international human rights, and to channel communications to the appropriate bodies. The Office is based in Geneva and has a branch in the United Nations headquarters in New York.

¹⁹⁸ Details on the changes to the mandate can be read in the ESC Resolution 1334 (XLIV) (1968), ESC Decision 1978/21 and ESC Resolution 1986/35.

¹⁹⁹ Since 1999, the ECOSOC has changed the name of the sub-Commission into Sub-Commission on the Promotion and Protection of Human Rights.

²⁰⁰ *Sub-Commission on the Promotion and Protection of Human Rights*, at <http://www.unhchr.ch/html/menu2/2/sc.htm>, access date; 25/09/2001.

²⁰¹ Pritchard, Sharp & Rodrigues, *Petitioning the CERD*, *Ibid.* at p. 10.

4. Communications Procedures and Individual Access through International Human Rights Instruments

Firstly, the discussion is about the communications procedures of the Charter bodies, in particular those that fall under the area of competence of the Economic and Social Council. Secondly, this discussion also concerns the procedures for dealing with individual complaints before the treaty bodies (that is, the Committees). While the former will only be touched on briefly, the latter will be addressed in more detail.

It should be noted that the procedures that are brought before the Charter bodies do not concern individual complaints or petitions as such; rather, these procedures concern human rights *situations that affect a large number of people in countries over a protracted period of time*.²⁰² Individuals or, in most cases, groups of people who claim to be the victims of alleged human rights abuses²⁰³ may, however, participate in the examination procedures as witnesses with a consultative status.²⁰⁴ Thus individuals do, to some extent, have *locus standi* under this treaty procedure.

As for individual complaint mechanisms under specific human rights treaties, there are currently four United Nations committees appointed to receive and consider individual communications concerning human rights: The Human Rights Committee (HRC), the Committee on the Elimination of Racial Discrimination (CERD), the Committee Against

²⁰² See, *United Nations Fact Sheet No. 7 on Communications Procedures*, at (<http://www.unhchr.ch/html/menu6/2/fs7.htm>, access date: 19/09/2001).

²⁰³ The role of the NGOs is of fundamental significance. More on this, see Declan O'Donovan in Philip Alston (ed.), *Ibid.*, pp. 110 ff. To date there are 1600 NGOs having consultative status with the ECOSOC, see <http://www.un.org/documents/ecosoc.htm>, *Ibid.*

²⁰⁴ When gathering information on human rights situation they may, where necessary, invite individuals or groups of peoples who are victims of alleged human rights abuses to testify before the Charter-bodies. For instance, sentence (a) of the CHR's Decision 1997/105 (E/CN.4/Dec/1997/105). Compare, provisions in the revised 1503 Procedure (E/Res/2000/3).

Torture (CAT) and the Committee on the Elimination of all Forms of Discrimination Against Women (CEDAW).

4.1. Charter-based Communications Procedures

Communications procedures within the framework of Charter bodies dealing with human rights problems, also referred to as Charter-based human rights procedures, occur mainly in the United Nations Economic and Social Council (ECOSOC), its Commission on Human Rights (CHR) and the Sub-Commission on Prevention of Discrimination and Protection of Minorities.

4.1.1. Communications Procedure under ECOSOC Resolutions

The procedures for dealing with communications concerning human rights are provided for in two ECOSOC resolutions: ESC Resolution 75(V) (1947) and ESC Resolution 116 (VI) A (1948).²⁰⁵

According to these resolutions, the United Nations Secretary-General will prepare a list of communications. This list will be submitted to ECOSOC for referral to the Commission on Human Rights, which will in turn examine it using the authority vested in it by ECOSOC.

The first resolution of ECOSOC concerning procedures for dealing with communications seems almost bureaucratic; a matter of simply deciding what to do with embarrassing

²⁰⁵ United Nations ECOSOC 5th Session (July-August 1947) and 6th Session (February-March 1948). See also, Satish Chandra. 1985. *Individual's Petition in International Law*. New Delhi: Deep & Deep Publications, footnote 25, at p. 39.

pieces of paper. Under this procedure, it is possible for the CHR to conclude that there should be no action taken on these documents. In addition, it could decide to keep their contents strictly confidential; so confidential that even the Secretary-General would be required to compile a list of communications without revealing their authors' identities.²⁰⁶ Later on, in accordance with Resolution 116 (VI) A, the identity of the authors could be revealed provided that they had no objection to disclosure.

In another resolution adopted in 1959, it was decided that this confidential list of complaints to the United Nations concerning human rights violations should be distributed to the CHR and to the Sub-Commission on the Prevention of Discrimination and Protection of Minorities. Under this resolution, it was reaffirmed that the CHR had “no power to take any action in regard to any complaints concerning human rights.”²⁰⁷

Despite this reaffirmation of the competence of the Commission, the resolution (unlike the previous ones) went on to specify that the Secretary-General of the United Nations should record confidential statistics of human rights communications by individual petitioners.²⁰⁸ However, rather than providing for the follow up of individual petitions, ECOSOC simply rewrote the rule of Resolution 75 (V) that no action would be taken on their communications. Further, in the resolution it was required that the governments of States which were referred to in the communications should receive copies and that their replies should also be sent to the CHR.

The CHR had to wait another twenty years before it was given the power to take any action on complaints about human rights infractions. In 1967, ECOSOC adopted a

²⁰⁶ Declan O'Donovan in Philip Alston, *Ibid.*, at p. 117.

²⁰⁷ ESC Resolution 728 F (XXVIII) (1959), *UN Fact Sheet* No. 7.

²⁰⁸ This amendment came into being after a recommendation brought to the ECOSOC by the CHR in its 5th Session in May-June 1949 (UN Doc. E/1371).

resolution (Resolution 1235)²⁰⁹ which entrusted the Commission on Human Rights with the power to “make a thorough study of situations which reveal a consistent pattern of violations of human rights, as exemplified by the policy of apartheid.” The reasons for this new attitude within ECOSOC were, briefly, the changing composition of the United Nations, the process of de-colonisation and the development of a human rights conscience among Western States.²¹⁰

It should be noted, however, that Resolution 1235 did not fully empower the CHR with the competence to take action on *any* kind of human rights violations. It clearly specified that action may only be taken in situations which reveal a consistent pattern of violations of human rights “as exemplified by the policy of apartheid”, and even then, the action taken should not exceed the power vested in it by the resolution, namely “to make a thorough study.”

Pursuant to this resolution, the CHR proposed to ECOSOC that an Ad Hoc Working Group be established to consider human rights violations in southern Africa. The ECOSOC accepted the proposal. The Working Group was to be sent to a particular country (South Africa) to gather all relevant information relating to human rights abuses. The establishment of this Working Group was the first “serious” action taken by the United Nations in fulfilling its task to “promote respect for, and observance of, international human rights standards.” In its work, the Working Group compiled information from both government representatives or agencies, and individuals or groups of people.

²⁰⁹ ESC Resolution 1235 (XLII) (1967) of 6 June 1967.

²¹⁰ Historical summary on this in Declan O’Donovan, *Ibid.*, pp. 118-121.

Although these developments did not by any means address every human rights issue or problem in need of attention and action, and although the driving force behind them was often ideological and political, they had a significant impact on the efforts of the United Nations to promote respect for, and observance of, international human rights standards.

As a result of these developments, the United Nations has now become more actively concerned with the implementation of international human rights principles than was the case up to the early 1960s. This was an important step forward. Another step followed in 1970, when ECOSOC adopted Resolution 1503,²¹¹ which provides for a “procedure for dealing with communications relating to violations of human rights and fundamental freedoms.” This procedure was referred to as the “1503” procedure, after the number of the resolution.

4.1.2. The “1503” Procedure

Every month, the Sub-Commission on the Prevention of Discrimination and Protection of Minorities (hereinafter referred to as the Sub-Commission) receives from the Secretary-General of the United Nations a list of communications with short descriptions of each case and any replies sent in by Governments. The same document is also supplied to the Commission on Human Rights.

To follow up the list of communications, a Working Group consisting of five members meets for two weeks each year, just before the Sub-Commission’s annual session. The Working Group, also called Working Group on Situations, considers all the

²¹¹ESC Resolution 1503 (XLVIII) (1970) of 27 May 1970.

communications that have been received, including Governments' replies, and selects for the attention of the Sub-Commission cases where there seems to be reliable evidence of “a consistent pattern of gross violations of human rights and fundamental freedoms”²¹², namely situations that affect a large number of people over a protracted period of time.

A majority vote by members of the Working Group's members is required for the selection to be considered by the Sub-Commission. If a majority vote is not achieved, no action in relation to the submissions is taken by the Sub-Commission. All communications successfully brought to the attention of the Sub-Commission are duly examined, whether or not they are eventually passed on to the CHR.

Subsequently, the CHR will determine whether a thorough study of a particular situation is needed, together with a report and recommendations to ECOSOC. If considered necessary, an ad hoc committee may also be appointed to make an investigation on a particular communication, but this requires the consent of the State in which the violations have allegedly occurred.

Procedural rules have been developed by the Sub-Commission to decide what communications may be accepted for further examination.²¹³ Firstly, these rules stipulate that the aim of the communications must be in conformity with the principles of the United Nations Charter, the Universal Declaration of Human Rights or other applicable human rights treaties or conventions. The procedure also specifies that there must be reasonable grounds to believe that there is a consistent pattern of violations of human

²¹² Sentence 1 of Resolution 1503 reads: “...which appear to reveal a consistent pattern of gross and reliably attested violations of human fundamental freedoms.”

²¹³ Sub-Commission Resolution I (XXIV) of 13 August 1971.

rights and fundamental freedoms. In addition to this, any replies by the Governments concerned must also be taken into account.

Furthermore, the procedure rules that communications may be admitted when they come from people, either individuals or groups, who claim to be the victims of human rights violations. The communications may also come from any person or group of people who have direct and reliable knowledge of such violations. Non-Governmental Organisations (NGOs) that want to submit communications must meet the condition that they are acting in good faith in accordance with recognised principles of human rights and that they have direct and reliable knowledge of the violations. Anonymous communications will not be accepted.

The contents of the communications must state the purpose of the petition, the factual evidence and the rights that have been violated. As a general rule, a communication will not be accepted if it contains abusive language or insulting remarks about the State against which the complaint is directed. Also, no communication will be considered if it shows political motivation or objectives.

Under this procedure, a communication may only be submitted after all domestic remedies have been exhausted. However, if it can be demonstrated that domestic remedies are either ineffective or, if undertaken, may extend over an unreasonable length of time, then an exception to this rule may be made.

Finally, the rules of procedure require that a communication will not be accepted if it has already been dealt with under other existing procedures within the United Nations system.

All actions taken on communications made under the “1503” procedure remain confidential until the Commission reports them to ECOSOC. Up to this point, the meetings of all the human rights bodies involved are held in private and the confidentiality of their records and of the documents that they handle is preserved.²¹⁴

Just recently, with its Resolution 2000/3 of 16 June 2000²¹⁵, ECOSOC has reformed the communications procedure. According to this resolution, the Sub-Commission on the Promotion and Protection of Human Rights will designate a Working Group from among its members on an annual basis²¹⁶. This Working Group on Communications is to be geographically representative of the five regional groups with an appropriate rotation, and will meet annually following the Sub-Commission’s session in order to examine any communications or complaints received from individuals or groups alleging human rights violations along with any responses from the Governments concerned.

Thus, under the “1503” procedure there are now two Working Groups: a Working Group on Situations and a Working Group on Communications. Unfounded communications will be screened out by the secretariat of the Working Groups and will not be submitted to the Working Group nor to the Government concerned. If the communications received are identified by the Working Group on Communications as showing reasonable evidence of

²¹⁴ Since 1978, however, the Chairman of the CHR has announced in public session the names of countries which have been under examination. The ECOSOC sometimes decides, on its own initiative or after a study of a particular situation has ended or on the recommendations of the CHR, to lift the confidentiality. This has been the case with *Equatorial Guinea* in 1979, *Argentina* and *Uruguay* in 1985 and *the Philippines* in 1986. The ECOSOC has also revealed the country that was under examination in the case of special representatives’ report on the human rights situation in Haiti in 1987.

²¹⁵ Adopted in its resumed organizational session for the year 2000, on the CHR’s recommendations, which were adopted in the Commission’s decision 2000/109 of 26 April 2000. See The Revised 1503 Procedure at <http://www.unhchr.ch/html/menu2/8/1503.htm>, access date: 19/09/2001.

²¹⁶ Since 1999 it is titled the Sub-Commission on the Promotion and Protection of Human Rights. See, *supra*, note 189.

a consistent pattern of gross violations of human rights and fundamental freedoms, the matter will be referred for examination to the Working Group on Situations.

The Working Group on Situations comprises five members. It will meet at least one month prior to the CHR's session to examine the particular situations submitted to it, and will decide whether or not a particular communication may be brought before the CHR.

The procedure is still called the "1503" procedure.²¹⁷

The criteria or conditions for a communication to be accepted for examination²¹⁸ are as follows:

- no communication will be admitted if it runs counter to the principles of the United Nations Charter, or it shows political motivation;
- a communication will only be admitted if consideration shows there are reasonable grounds to believe, also taking into account any replies by the Government concerned, that there is a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms;
- communications may come from individuals²¹⁹ or groups who claim to be victims of human rights violations or who have direct and reliable knowledge of the violations. Anonymous communications are inadmissible as are those based only on reports in the mass media;
- each communication must describe the facts, the purpose of the petition and the rights that have been violated²²⁰;
- domestic remedies must have been exhausted prior to submission of communications, unless it can be shown convincingly that the solutions at the national level would be ineffective or that they would extend over an unreasonable length of time.

²¹⁷ Sentence 8 of the Resolution 2000/3.

²¹⁸ The Revised 1503 Procedure, *Ibid.*

²¹⁹ Different from, and not to be mistaken for, individual communications before treaty bodies. Under the "1503" procedure, individual communications are considered as part of the "human rights situations affecting large number of people in all countries over a protracted period of time". *See supra*, note 191.

²²⁰ As a rule, communications containing abusive language or insulting remarks about the State against which the petition is directed will not be admitted for consideration.

4.1.3. Critical Appraisal and Limitations of the Procedures

So far, the role of ECOSOC itself has received only limited scrutiny. Whatever interest was once shown has diminished steadily over the years. No recent published study has focussed on the powers and functions of ECOSOC. O'Donovan concluded that this is due to two major failures of the Council: first, the failure of the Council to deal substantively with human rights issues; and second, its failure to relate human rights issues to the wider economic and social field.²²¹

O'Donovan argues that:

Conceptually, the debate on an integrated approach to human rights and on their importance in assessing development problems has passed the Council by. Operationally, the Council has made little effort to co-ordinate the work of the Commission on Human Rights with other bodies and agencies... The other part of the problem is that, because of the range of the economic and social programmes of the United Nations, the Council has difficulty in even monitoring what its various subsidiary bodies and associated bodies and agencies are doing.²²²

Many studies have been conducted on the work and effectiveness of the Commission on Human Rights as the main subsidiary body of ECOSOC. This is understandable because the Commission, along with its two main Sub-Commissions, is arguably the most important human rights body in the United Nations, even after the introduction of treaty-based bodies. The role of the Commission was analysed historically and critically in a study by Philip Alston.

In his analysis, Alston observes that, from the beginning, the Commission was reluctant to assume too much power, as shown by its deletion of the provision of the Universal

²²¹ Declan O'Donovan, "The Economic and Social Council" in Philip Alston, *Ibid.*, at p. 122.

²²² Philip Alston "The Commission on Human Rights" in Philip Alston's *The United Nations and Human Rights, Ibid.*, p. 139.

Declaration of Human Rights entitling it to handle petitions. This provision was included in the first draft declaration compiled by the United Nations Secretariat in 1947, which was adopted by the General Assembly in 1948.²²³ One year later, the appropriateness of this measure was raised again by the Secretariat. In its report, the Secretariat warned, *inter alia*, that deletion of the provision enabling the Commission to handle petitions would be 'bound to lower the prestige and the authority not only of the Commission but also of the United Nations as a whole.'²²⁴

Several prominent academics took uncompromising stances against the attitude of the Commission. One of the most outspoken was British international law expert Hersch Lauterpacht. He condemned the position of the Commission as 'constituting an extraordinary degree of abdication of the United Nations proper function.' He suggested that the United Nations and its organs, particularly the Commission, were duty bound to receive petitions concerning violations of human rights, to examine them, and, on the basis of such examinations, to take all requisite action short of intervention. Otherwise, he went on to warn, the United Nations would be found wanting in perhaps the most crucial aspect of its purpose.²²⁵

As previously noted, several procedures based on various ECOSOC resolutions have been developed to accommodate such views, such as the procedures under Resolutions 75 (V) and 11 (VI) noted above. Alston observes, nonetheless, that there is no question that these highly restrictive and unproductive procedures failed to do justice to the concerns and hopes of the tens of thousands of people who petitioned the United Nations annually. In the words of the official responsible for all of the Secretariat's assistance to the

²²³ UN Doc. E/CN.4/165 (1949).

²²⁴ Quoted from Philip Alston, *Ibid.*, at p. 140.

²²⁵ *Ibid.*, at p. 141

Commission at the time, the system became “the world’s most elaborate waste-paper basket.”²²⁶

Later on, ECOSOC adopted Resolutions 1235 and 1503, which authorised the Commission to take action on communications, and was generally aimed at making the Commission more ‘powerful’. Nevertheless, both procedures generated considerable controversy and raised high hopes while actually accomplishing relatively little during their first decade in operation.²²⁷

Despite a lack of public action by the Commission, especially in relation to situations in Kampuchea (Pol Pot), Central Africa (Bokassa), these procedures gained some respect during the next decade (1970s). Yet, as a survey conducted by the London daily newspaper, *The Times* concluded, “the Commission worked in almost total secrecy and had deliberately constructed a bureaucratic and procedural maze, as a result of which delay has been institutionalised and the aim has not been to protect the victims but the oppressors.”²²⁸

The “1503” procedure, for instance, can be better characterised as a ‘petition information system’ than as a ‘petition redress procedure’, since it offers no solace or redress to individual victims. Its objective is to use complaints as a means of helping the Commission to identify situations that involve a consistent pattern of gross and reliably attested violations of human rights. In this context, an individual victim is but a piece of

²²⁶ Quoted from Philip Alston, *Ibid.*, at p. 144.

²²⁷ *Ibid.*, at p. 145.

²²⁸ *Id.*

evidence whose case might, if accompanied by a sufficient number of related cases, spur the United Nations into action of some kind.²²⁹

4.2. Treaty-based Communications Procedures

Treaty-based communications procedures are procedures for dealing with human rights complaints which have been brought before the treaty-based bodies. These bodies will then consider and decide what action should be taken on the communications. There are two types of communications: inter-state communications and individual communications.

Treaty-based bodies, also referred to as treaty bodies, are established to defend the provisions laid down in the treaty, and to monitor and supervise their implementation. This means that the rules and procedures of the treaty apply only to those States which are parties to the treaty and not to all UN member States. The treaty bodies concerned are the Human Rights Committee (the HRC), the Committee on the Elimination of Racial Discrimination (the CERD), the Committee Against Torture (the CAT) and the Committee on the Elimination of Discrimination Against Women (the CEDAW).

4.2.1. Procedure brought before The Human Rights Committee (the HRC)

The Human Rights Committee (the HRC) works in accordance with the provisions set out in the International Covenant on Civil and Political Rights (ICCPR) and its first Optional

²²⁹ *Ibid.*

Protocol.²³⁰ The ICCPR and its first Optional Protocol were adopted by the General Assembly in its resolutions in 1966 and entered into force on 23 March 1976.²³¹

The ICCPR, along with its first Optional Protocol, is regarded as the most important international instrument for the protection of human rights.²³² This is for two reasons. Firstly, it not only sets down most, if not all, of the basic civil and political rights proclaimed in the Universal Declaration of Human Rights (part I, articles 6 to 27), but more importantly it puts those rights into a legally binding form. It should be noted however that the States that are Parties to the Covenant are not automatically Parties to the Optional Protocol. An act of ratification or declaration from a State is required before it becomes a Party to the Protocol. Secondly, it was the Optional Protocol which, for the first time, opened the door for individuals to access remedies at the international level. By 31 December 1995, 87 States had become parties to the Optional Protocol.²³³

Pursuant to the Covenant, the Human Rights Committee (the HRC) was created in September 1976 in accordance with the provisions contained in part IV (Articles 28 to 45) of the ICCPR to monitor the implementation of the Covenant. This part of the ICCPR sets out the establishment, composition, status, function and procedure of the Committee. Its two main functions are to consider reports from, and complaints against, States parties. The former is obligatory while the latter is optional.²³⁴

²³⁰ The Second Optional Protocol to the ICCPR aims at the Abolition of the Death Penalty.

²³¹ *See supra*, note 152.

²³² Torkel Opsahl in Philip Alston (Ed.), *Ibid.*, at p. 367.

²³³ Sarah Pritchard & Naomi Sharp, Communicating with the Human Rights Committee, *Ibid.*, at p. 8.

²³⁴ Obligatory according to Article 40 of the ICCPR; optional because it depends on the communications received. The wording of the Optional Protocol reads "...individuals ...**may** submit a written communication ...for consideration."

Technically speaking, the HRC is not an organ of the United Nations because it is not accountable to the General Assembly. However, the HRC uses the services of the Office of the United Nations High Commissioner for Human Rights and submits its annual reports to the General Assembly. The HRC has four main functions: to receive and consider periodic reports from the States parties, to make general comments, to examine inter-state communications, and to consider individual communications.

In accordance with the implications of the ICCPR, the HRC functions as a *quasi* court of law for the parties in cases of alleged violations of the rights set forth in the Covenant.²³⁵ Thus, under this procedure, individuals are granted a *locus standi*, the right to be heard in court or other proceeding. Communications or complaints against States parties exist in two forms: inter-state communications²³⁶ and individual communications.

The competence of the Committee to receive and consider individual communications is provided for in the first Optional Protocol to the Covenant (hereinafter referred to as the Protocol). The Protocol, which entered into force on the same date as the Covenant, sets out the conditions of admissibility of individual communications as well as their examination procedures. The second Protocol deals with the elimination or abolition of the death penalty within the States parties.

Article 1 of the Protocol stipulates that States parties must recognise the competence or ability of the HRC to receive and consider communications from individuals alleging that

²³⁵ Article 45 of the ICCPR: The Committee operates like a court in the manner it considers evidence and arguments and subsequently makes 'decision' on the communications. Moreover, in practice the functions of the Committee combine judicial, administrative, supervisory and conciliatory elements.

²³⁶ The procedure for handling inter-state communications is provided for in Article 41 of the ICCPR. States Parties can submit communications to the HRC alleging that another State party has not fulfilled its obligations under the treaty. At the time of writing, no communication had ever been submitted under this procedure.

the State party violates the provisions of the ICCPR. Thus, the HRC cannot receive nor consider petitions or communications which originate from citizens of States that are not parties to the Protocol.

Articles 2, 3 and 5 list the admissibility requirements that need to be met for communications. Articles 4, 5 and 6 concern the procedures that the Committee should follow in handling communications.

4.2.1.1. The Procedure

Let us first examine the criteria, or conditions of admissibility, for communications set down in the Protocol. They are:

- a) Compatibility with the Covenant: communications must assert that there has been a violation of at least one of the human rights or fundamental freedoms referred to in the Covenant, and that this violation occurred after the Protocol entered into force for the State party concerned; no communication will be declared admissible if it comes from or refers to a country that is not a party to the Covenant (no “*drittwirkung*” effect).
- b) Written submissions: communications must be submitted in written form. The format of this document has been developed by the Committee (see appendix)²³⁷;
- c) Individuals submitting communications must be the victims of human rights violations: a third party (e.g. NGO) may only submit a communication if authorised by an individual victim. Any individual, citizen as well as non-citizen, must be subject to the State party's jurisdiction. A non-citizen, however, may not complain about his/her right to participate in politics.²³⁸
- d) No abuse of rights of submission: an abuse of rights of submission occurs when the communications submitted to the Committee are based neither on facts, nor on the law;
- e) Anonymous communications are inadmissible;

²³⁷ There is no fixed or official format or model communication. See Michael O’Flaherty. 1996. *Human Rights and the UN, Practice Before the Treaty Bodies*. London: Sweet & Maxwell, at. p. 48. The model presented in the appendix here is adapted from the UN Fact Sheet No. 7 and Sarah Pritchard & Naomi Sharp, *Communicating with the HRC, Ibid.*

²³⁸ Compare Article 25 of the ICCPR.

- f) Communications must not be under examination by another international procedure.²³⁹
- g) Exhaustion of domestic remedies: prior to submitting communications to the Committee, all domestic systems available must have been used.²⁴⁰

Pursuant to Article 39 of the ICCPR, the Committee is permitted to develop its own rules of procedure in examining communications. So far, the HRC has established Rules of Procedure²⁴¹ (rules 78-94) for considering communications from individuals. Consideration of communications before the Committee is held in closed meetings. Rules 95-98 state that all steps of the procedure under the Protocol are confidential until the point where the Committee either adopts its views,²⁴² or else closes the case. Listed below are the various stages in handling or processing a communication:

Phase 1- Receipt and transmission of communications

The Office of the High Commissioner for Human Rights (formerly Centre for Human Rights) receives the communication and, if necessary, requests some clarifications from the author, before transmitting it to the Committee. Through its Communications Unit, the Office channels all communications to the appropriate body. The Office does not perform a discretionary or screening role in relation to communications.

Phase 2- Determination of the admissibility of communications

²³⁹ Article 5(2) (a) of the Optional Protocol. However, the Committee may consider the communications after the previous international procedure has been exhausted or discontinued.

²⁴⁰ In general, communications under this procedure are only possible as a mechanism of last resort. The Committee has however held in accordance with Articles 2 and 5(2) (b) of the ICCPR that the exhaustion of domestic remedies is required only to the extent that these remedies are effective, available and would not extend over an unreasonable length of time.

²⁴¹ UN Doc. CCPR/C/3/Rev. 3.

²⁴² That is the Committee's decision on the merit of the communication, normally reported in its annual report to the General Assembly.

Upon receipt, the CHR shall set a time to conduct closed meetings in order to examine the admissibility of the communications. The conditions of admissibility of communications as set out in the Protocol must be met by the author in order for a communication to be declared valid. The procedure on how to determine the admissibility of communications is not specified in the Protocol. In exercising its functions, the Committee has developed rules of procedures under which a Working Group on Communications has been established (rule 89) to assist the Committee in this matter. The Working Group makes recommendations to the committee on the admissibility of communications.

In order to assist the Working Group, Special Rapporteurs, who are members of the HRC, may be appointed if necessary. The HRC may rule that a communication is admissible if the Working Group unanimously so decides (rule 87 of the Rules of Procedure). A communication can be declared wholly or partly admissible. The criteria for rejection, however, can only be stated by the HRC. Communications are only permissible after the entry into force of the Protocol for the State party concerned.²⁴³

Phase 3- Determination of the merits of communications

Once a communication has been declared wholly or partly admissible, the Committee will ask the State party concerned to respond; that is to say to throw light on the problem by explaining what measures have been taken to try and resolve it. If further information is needed, the Committee may request it from the author or from the State party concerned (rule 93). After receiving all the necessary information, the HRC may refer the communication to the Working Group or Special Rapporteur and ask for

²⁴³ This means that events or human rights incidents that occurred before a particular State became party to the Optional Protocol will not be accepted for consideration even if a State has since become party to the ICCPR.

recommendations. The Committee then formulates its views, that is to say its final opinion on the merits of the communication, and transmits it to the author and to the State party concerned (rule 94). The views are generally adopted on a simple majority basis. However, before voting, the Committee always tries to make its decision passed by consensus among all its members.

In its views, the Committee formulates which obligations have to be fulfilled by the State party involved. Sometimes, in the wording of these obligations, the Committee is very specific about certain matters such as how much compensation should be paid or which part of the legislation should be amended. Generally, the obligations contained in the views can be summarized as follows:

- take immediate steps to ensure strict compliance with the ICCPR;
- provide immediate, effective and appropriate reparation to victims;
- alter legislation;
- immediately release victims who are imprisoned or reverse death sentences not already executed;
- allow victims to leave the country;
- ensure that the victims do receive, and will continue to receive, any necessary medical care;
- investigate what has happened to victims and bring to justice those who are responsible;
- give the victim a fair or fresh trial;
- return property to the victim;
- take steps to ensure that similar violations will not happen again in the future.²⁴⁴

²⁴⁴ Pritchard & Sharp, *Communicating with the Human Rights Committee*, *Ibid.*, pp. 22-23.

4.2.1.2. Critical Appraisal and Limitations of the Procedure

It must be noted that the HRC is not a court in the judicial sense and does not hand down judgements. The views it expresses on the merits of individual communications do not have legal force and are not binding on the State party involved. This is the most significant limitation of this procedure. The State party concerned is not obliged to take any of the steps or measures contained in the views, and the Committee has no means of enforcing them. Actually, despite recognition and vindication of the Committee's efforts in dealing with communications, these have been futile in many cases.²⁴⁵

It should be acknowledged, however, that some countries²⁴⁶ have responded positively to the Committee's final views. To date however, it can be asserted that in general, State compliance with the views of the Human Rights Committee has not been encouraging. Given the present limitations on the exercise of its mandate, one could hardly expect any more from the procedure.

Another basic weakness of the procedure is the absence of a direct and effective fact-finding mechanism.²⁴⁷ Other limitations of the Optional Protocol procedure are:

²⁴⁵ Among others, a case concerning human rights violations in Uruguay where the Committee's views simply fell onto deaf ears. *See*, Torkel Opsahl in Philip Alston's (Ed.), *The United Nations and Human Rights*, *Ibid.* pp. 434-443.

²⁴⁶ For example, Australia, in undertaking the measure contained in the Committee's views requiring change of legislation, has, through the intervention of the Federal Government, *enacted Human Rights (Sexual Conduct) Act 1994* to override the offending provision of Tasmanian Criminal Code. *See*, Pritchard & Sharp, *Ibid.*, pp. 32-33.

²⁴⁷ *See*, Torkel Opsahl in Philip Alston (Ed.), *Ibid.*, at p. 437.

- a) Limited right to complain. The Protocol does not recognise the right of individuals to complain about violations which are unrelated to their civil and political rights as set down in the Covenant.
- b) Lack of State compliance. At present, one could argue that there was a disappointing level of State party compliance with the views or decisions of the HRC. In order to ensure compliance with its views, the Committee largely relies on publicity. Until now this publicity has attracted but little notice. Another problem can arise as a consequence of the federal system of government: while the national government is responsible in international law for the violation of treaties such as the ICCPR, it may be that the violation involves a state or provincial government such as in the *Nicholas Toonen v Tasmanian State Government* case.²⁴⁸ The Australian Federal Government had to intervene by applying the Human Rights (Sexual Conduct) Act of 1994, as the Tasmanian Government failed to respond to the HRC's request that the part of its Criminal Code prohibiting certain forms of consensual sexual activity be amended.
- c) Ambiguity in the interpretation of "exhaustion of domestic legal avenues". The Committee's interpretation says that this means all "effective and available" legal remedies, so that there are situations in which the domestic remedies are so inaccessible or ineffective that these need not be resorted to before a victim can proceed with a communication. Uncertainty remains, however, as to whether this concept of "domestic remedies" includes administrative procedures such as an Ombudsman settlement, which may not result in a legal redress. There is also the fact that making use of all effective and available domestic remedies can be

²⁴⁸ Pritchard & Sharp, *supra*, note 237.

prohibitively expensive. It would seem that individuals must make use of all legal remedies, whether or not they have the financial means to do so.

- d) A long wait. When it was first established, the Committee only dealt with a few communications, but nowadays, there is a large backlog of cases that are awaiting examination.²⁴⁹ At present, a decision of admissibility can take up to a year; in some cases even longer. Complete examination of a communication can take up to four years or more. Individuals will no doubt endure even more suffering before a final decision can be made. In the appendix, the statistics on the cases that have recently been handled by the Committee will show this new development.²⁵⁰

4.2.2. Procedure before the Committee on the Elimination of Racial Discrimination (the CERD)

The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) was adopted by the UN General Assembly on 21 December 1965 and took effect on 4 January 1969. Like the ICCPR, the ICERD is a legally binding document on all States that have become parties to it. All of the States parties are simultaneously bound by the ICERD provisions dealing with individual communications. The ICERD is the main international legal instrument that promotes the equality of all races and requires the observance of human rights without any racial distinction.

Part I (Articles 1 to 7) of the ICERD contains substantive provisions concerning the definition of "racial discrimination", and a State's obligations to combat racial

²⁴⁹ UN Fact Sheet No. 7, <http://www.unhchr.ch/html/menu6/2/fs7.htm>, Ibid. The entire process of dealing with an individual complaint is normally completed within two to three years. Between 1977-1988 the Committee had received 333 communications involving 28 States. As at 23 August 2001 there were 197 living cases, the statistics of which can be seen in the appendix.

²⁴¹ Taken from a statistical survey of individual complaints dealt with by the Human Rights Committee provided by the UN Office of the High Commissioner for Human Rights at <http://www.unhchr.ch/html/menu2/8/stat2.htm>, access date: 16/04/2002.

discrimination. Its object is to ensure the domestic implementation of protection and compensation for the victims of racial discrimination, and to promote respect for human rights and tolerance through education and cultural activities. Part II (Articles 8 to 16) proposes measures for the implementation of the Convention and Part III (Articles 17-25) deals with the necessary procedures for the signature and ratification of the ICERD. Pursuant to Article 8, the Committee on the Elimination of Racial Discrimination (the CERD) was established to monitor and supervise the implementation of the Convention.

Technically speaking, the CERD is not an organ of the United Nations because it was created under a multilateral treaty. As such, the CERD is not accountable to the General Assembly. Links with the United Nations exist mainly through funding. The CERD's secretariat is funded by the regular budget of the United Nations. It also submits annual reports to the General Assembly and maintains dialogue with the Third Committee.

The three main activities of the CERD are: the reporting procedure, the early warning and urgent procedure, and the consideration of communication procedure.²⁵¹ Article 14 is of particular interest. It opens the possibility for an individual or, unlike the procedure under the Optional Protocol, for a group of persons to bring a communication against their State before the CERD. As is the case under the Optional Protocol of the ICCPR, this procedure can only be invoked if the State concerned is a party to the Convention and has declared that it recognises the competence of the CERD to receive and consider such complaints.

²⁵¹ More detail on the two previous procedures including statistical survey, *see*, Michael O'Flaherty, Human Rights and the UN, *Ibid.*, pp. 89-104.

The CERD Committee was created on 10 July 1969, a little more than six months after the entry into force of the Convention. One of the main functions of the Committee is to receive and consider communications, which occur in two forms: inter-state communications,²⁵² and individual communications. For the former, unlike the procedure under the ICCPR, the mechanism is automatically applied to all States parties, while for the latter, prior recognition from States parties is required.

Article 14 of the ICERD prescribes the optional procedure by which individuals or groups can make communications to the Committee alleging that the State party violates obligations set down in the ICERD. Although it is part of the Convention, Article 14 does not automatically apply to States that are parties to the ICERD, since it is an optional procedure. This means that States parties must first assume that they are bound by the provision of this particular article before a communication against them can be received or considered.

4.2.2.1. The Procedure

Articles 14 (2), (3), (4) and (5), in conjunction with rule 91 of the Rules of Procedure, list the conditions to be met by the author of communications for them to be admissible. They are as follows:

- a) The communications may come from an individual or group of persons (in the Convention's terminology: petitioners)²⁵³;
- b) Petitioners must be victims of alleged violations²⁵⁴;

²⁵² Unlike the procedure under the ICCPR, there is no requirement from States Parties for a specific recognition of the Committee's competence in this matter. At the time of writing, this inter-state procedure had never been invoked.

²⁵³ Thus, the CERD is wider in scope than the Optional Protocol, which only allows communications from individual and NOT groups of persons. The rules on NGOs willing to represent individuals, however, remain; and only authors of communications have standing (*locus standi*).

- c) Petitioners must be subject (citizen as well as non-citizen) to the State party's jurisdiction²⁵⁵;
- d) The communications must be in writing;
- e) The communications must concern a violation of a human rights as set down in the Convention (compatibility with the convention);
- f) The communications must not be in "abuse of rights of petition"²⁵⁶;
- g) The communications must not be anonymous;
- h) All domestic remedies (as long as these are effective and available) must have been exhausted. The same principles as those of the Optional Protocol apply in this matter.²⁵⁷

Articles 14 (6), (7) and (8) prescribe the procedure that has to be followed by the CERD Committee when examining communications. Pursuant to Article 10 of the Convention, the Committee is permitted to develop its own rules of procedure as it deems necessary. In 1983, the CERD Committee adopted rules 80-97 as Rules of Procedure²⁵⁸ for considering communications from individuals or groups of individuals.

Briefly speaking, despite differences of a mainly technical nature, the CERD procedure for handling individual communications is much the same as that of the ICCPR. In connection with Article 14(6), rule 88 of Rules of Procedure requires the CERD to hold closed meetings when considering individual petitions until a final decision has been made. Like the ICCPR examination procedure, there are three stages in the handling of individual communications under ICERD:

Stage I: The receipt and transmission of communications

²⁵⁴ As a rule, individual or groups of persons must be directly affected by the violations. Exceptions can be made for those who are incapable of submitting a communication, in which case they will be represented by an authorized third party.

²⁵⁵ In relation to the Optional Protocol, claims of the right of political participation are exempted for non-citizens.

²⁵⁶ This occurs when the alleged violations are not based on actual facts or laws.

²⁵⁷ However, unlike procedure before the HRC, the CERD is allowed to consider a communication that is simultaneously being examined under another international procedure.

²⁵⁸ UN Doc. CERD/C/65/Rev.

All communications are to be sent to the Office of the High Commissioner for Human Rights which, upon receipt, channels them to the appropriate body within the UN system. The Office exercises no screening role or other discretionary function in relation to communications. If necessary, however, the Office may require the authors of communications to provide some clarifications about their identity and about the alleged violations.

Stage 2: Determination of the admissibility of communications

There is also a Working Group and a Special Rapporteur established under the Convention to assist with the work of the CERD. The former only makes recommendations about the admissibility of communications while the latter is concerned with both their admissibility and merits. As is the case for the ICCPR, there are also communication admissibility requirements that must be met by the petitioners, and failure to meet any one of them may result in a communication being declared inadmissible. There is no fixed format or model of communication. However, a similar format as the one issued under the Optional Protocol procedure has been produced as a guide (see appendix).²⁵⁹

Stage 3: Determination on the merits of communications

After receiving all necessary information regarding the complaint, the CERD may refer this once again to the Working Group, which will then assist it in formulating its final opinion (that is, the decision on the merits of communications). Like the HRC, the CERD

²⁵⁹ Model adapted from Pritchard, Sharp & Rodrigues, *Petitioning the CERD*, *Ibid.*, pp. 72-74.

is not a court, and it does not hand down judgements. The opinion of the Committee is not legally binding. The CERD makes its decision based on the majority opinion of its members, after having first tried to reach a consensus. Also, following the same procedure as the ICCPR, the CERD Committee is permitted only to examine written evidence. No examination of oral evidence is allowed.

In its final opinion, the CERD Committee summarises all allegations, relevant facts and information pertaining to the case. Decisions on the admissibility and merits of communications constitute the essence of this opinion. Furthermore, the Commission may make recommendations and suggestions, which sometimes need to be formulated in a very specific manner.

In general, the opinions may contain requests for States parties to:

- investigate threats of violence, especially when made in public and by a group;
- review policy and procedure concerning decisions to prosecute cases of alleged racial discrimination;
- prevent any form of racial bias from entering into judicial proceedings, and
- provide individual petitioners with relief commensurate with the moral damage that they have suffered.²⁶⁰

4.2.2.2 Critical Appraisal and Disadvantages of the Procedure

While the ICERD provides a much-needed mechanism for protecting individual human rights, it is not without shortcomings. As noted above, the CERD Committee is not a court and does not hand down judgement. Its opinion is not legally binding on the State party and it does not have legal power. So, like the HRC, it can only hope that the State party will take the necessary steps recommended or suggested in the final opinion. There

²⁶⁰ *Ibid.*, at p. 32.

is no way of forcing the State party to accept the decision. Nor is there any supervisory body to monitor the implementation of the decision. This is the greatest weakness of the procedure.

Another major obstacle to the Committee's effectiveness is that it lacks an independent fact-finding capacity. According to the Convention, the CERD possesses no such mandate. Besides, some of the Committee's members would be reluctant to undertake such quasi-judicial activities.²⁶¹

Other limitations of the procedure are:

- a) Limitations of Article 14. The article only provides for the right of individuals to communicate with the CERD Committee about violations of their human rights in relation to acts of racial discrimination. Not all human rights and fundamental freedoms are covered by the Convention.
- b) Lack of State compliance. The CERD has to rely heavily on publicity to ensure State compliance with its opinion. So far, the Committee has only received limited acceptance and attention to its decisions. There is also the problem of non-uniform or partial implementation in federal states.
- c) Exhaustion of domestic remedies. This raises a number of difficulties for petitioning individuals or groups. Pursuing all available remedies (even if only those which are truly effective and available) under domestic legal systems can be very costly or even unaffordable. This can therefore constitute an obvious obstacle for those who cannot afford it.

²⁶¹ Karl Joseph Partsch (1996). "The Committee on the Elimination of Racial Discrimination" in Philip Alston (Ed.), *Ibid.* at p. 368.

- d) Extensive time frame. In the case of *Barbaro v Australia*²⁶² it took two and a half years for the CERD Committee to issue its final opinion. For other cases it might take much longer again before a final decision can be made.

In 1993, the CERD developed the so-called early warning and urgent procedures. These procedures enabled the Committee to take a more preventive rather than responsive approach in the implementation of the Convention. Apart from the fact that this mechanism was meant to forestall violations before they took place, the procedure did not give much room for the Committee to improve its effectiveness.²⁶³ For a statistical survey of recent cases dealt with by the CERD, see the appendix.²⁶⁴

4.2.3. Procedure Before the Committee Against Torture (the CAT Committee)

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT Convention) was signed on 10 December 1984 and entered into force on 26 June 1987. It was built particularly upon the Declaration on the Protection of All Persons from being subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which was adopted by the General Assembly in 1975.²⁶⁵

Part I (Articles 1-16) of the CAT Convention contains substantive provisions concerning the definition of torture, State obligations, the prosecution and extradition of persons charged with torture, and remedies for victims of torture. The establishment of a

²⁶² More on the case, see Pritchard, Sharp & Rodrigues, *Petitioning the CERD*, *Ibid.*, pp. 21, 42-43.

²⁶³ See and compare, Pritchard, Sharp & Rodrigues, *Ibid.*, with Karl Joseph Pratsch in Philip Alston (Ed.), *Ibid.*, pp. 345-348.

²⁶⁴ Taken from <http://www.unhchr.ch/html/menu2/8/stat4.htm>, access date: 19/09/2001.

²⁶⁵ Preamble of the Convention, cf. Andrew Byrnes' (1996) "The Committee against Torture" in Philip Alston (Ed.), *Ibid.*, pp. 509-520.

Committee against Torture (the CAT) is provided for in part II (Articles 17 to 24) while provisions regarding signature, ratification and amendments are provided for in part III of the Convention.

The Committee against Torture (CAT) was set up in accordance with Article 17 and commenced work in 1988. The main function of the Committee is to receive States' reports (Article 19) and to receive and consider communications or complaints submitted to it which allege that a State party has violated the rules of Convention. Communications or complaints exist in two forms: interstate communications (Article 21) and individual communications (Article 22).

Unlike the ICERD, but like the ICCPR, the CAT Committee can only examine inter-state communications brought against a State party which is a signatory to the Convention and recognises the competence of the Committee to consider the communication. In other words, the application of Article 21 must wait for the declaration or accession of States parties to the Convention stating that they accept to be bound by its provisions. This means that although they might have already been parties to the Convention, States may choose not to be bound by this particular article. The article thus assumes an optional character. The same applies to Article 22 concerning individual communications.

4.2.3.1. The Procedure

With a few exceptions, the Committee operates in the same manner as the Human Rights Committee and the CERD Committee. Its functions, powers and procedures are modelled on those of the other treaty monitoring bodies; in particular, those of the HRC.²⁶⁶

According to Article 22, for communications to be declared admissible, the petitioning individuals must be victims and subject to the jurisdiction of the State party being accused. Their communications must also be compatible with the Convention, be in writing, not be in abuse of right of submission, not be under investigation by another international procedure²⁶⁷, not be anonymous, and all available domestic remedies must have been exhausted.²⁶⁸ Third parties authorised by individual victims may bring petitions to the Committee on behalf of those victims. The issue raised in the communication must have taken place after the Convention entered into force for the State party concerned. Only an individual victim or a third party acting on his or her behalf may submit a communication, but no group of individuals may do so.

Article 20 requires the Committee to make sure that any individual communications referred to it “contain well-founded indications that torture is being systematically practiced in the territory of a State party”. The Committee will invite that State party to participate in the examination. If necessary, with the latter’s consent, the Committee may

²⁶⁶ Andrew Byrnes, *Ibid.*, pp. 510-512.

²⁶⁷ This differs from the requirement under the CERD, which permits the Committee to consider communications simultaneously.

²⁶⁸ As with the previous mechanisms, this has been interpreted to refer to those domestic remedies which are effective and available, so that in some cases it remains possible for individuals to submit communications to the CAT even if technically not all remedies theoretically available in a state have been used.

designate one or more of its members to conduct an inquiry (par. 2), including a visit to the territory of the State party concerned (par. 3). In the light of all information available to it by or on behalf of the individual and State party, the Committee will then hold closed meetings to consider the communications brought to it (Art. 22 par. 6).

In the course of this process, the Committee may, if it deems necessary and suitable, appoint an ad-hoc conciliation commission whose task is to achieve, where possible, a “friendly solution of the matter on the basis of respect for the obligations provided for in the Convention”.²⁶⁹

At the end of the procedure, the CAT Committee will formulate its views, that is, its official opinion on the merits of the communication.²⁷⁰ This decision is generally made on the basis of a majority vote. However, prior to resorting to a vote, the Committee tries to reach a consensus. In its final decision, the Committee can be so specific as to order and recommend that a State party involved in the case take immediate measures, such as to amend its legislation.

4.2.3.2. Critical Appraisal and Limitations of the Procedure

Just as was the case for the procedures of the ICCPR and the ICERD, the decisions made by the Committee are not legally binding on the State party concerned and do not have legal force. Nor does the Committee possess the means to force an implicated State party to comply with its final views. Like the HRC and the CERD, the CAT is not a court and

²⁶⁹ Article 21(e) of the Convention.

²⁷⁰ Article 22 (7).

does not hand down judgement. And this once again constitutes a major obstacle that hinders the effectiveness of the Committee.

The final views made by the Committee, which contain recommendations and suggestions to the State party, have so far had little effect.²⁷¹ Again, to ensure State compliance with its views, the Committee has to rely on publicity.²⁷²

As noted previously, exhaustion of domestic remedies is one of the conditions of admissibility of communications. Even when it is possible to circumvent this requirement to some degree (i.e. in cases where it could be claimed some so-called remedies are either not effective or not available), it would still be costly both in time and money for an individual who has to meet this requirement, especially in countries like Indonesia where torture and degrading treatment of detainees are, so to speak, their daily lot.

Even worse, in Indonesia, the execution of a death sentence may take place without notice prior to court hearings, as was the case in the *Petrus* (mysterious shooter) campaign.²⁷³ In addition, it can take a long time for a case to be completely settled by the Committee.

4.2.4. Procedure Before the Committee on the Elimination of Discrimination Against Women (the CEDAW Committee)

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) was adopted by the General Assembly in its Resolution No. 34/180 of 18

²⁷¹ Andrew Byrnes, *Ibid.*, at p. 546.

²⁷² For a statistical survey of recent cases dealt with by the CAT, see the appendix available at <http://www.unhchr.ch/html/menu2/8/stat3.htm>, access date: 19/09/2001.

²⁷³ This was a bloody campaign introduced by the then President Soeharto to combat criminals in the mid 1970s.

December 1979 and entered into force on 3 September 1981. The Optional Protocol to the Convention entered into force on 22 December 2000.²⁷⁴

For the purpose of considering and monitoring the progress made in the implementation of the Convention, a Committee on the Elimination of Discrimination against Women (the CEDAW Committee) was established as foreseen in Article 17 part V of the Convention.

According to the Optional Protocol, the Committee only receives and considers communications brought before it by individuals, groups of individuals, or third parties with the consent of individuals.²⁷⁵ So, unlike the three previous procedures mentioned above under the Optional Protocol, the CEDAW Committee does not receive nor consider interstate communications. Article 23 part VI guarantees that “nothing in the present convention shall affect” more conducive provisions contained in the legislation of the State party or other international conventions.

4.2.4.1. The Procedure

Keeping in mind that the Optional Protocol to the Convention only entered into force in 2000, and up to the time of writing, no procedure has taken place, the following explanation provides only general information.

²⁷⁴ <http://www.unhchr.ch/html/menu3/b/e1cedaw.htm>, access date: 19/09/2001.

²⁷⁵ This is similar to the procedure under the CERD Convention where groups of peoples have locus standi before the Committee.

As was the case for the three previous procedures, a number of admissibility requirements of communications brought before the CEDAW Committee must be met. These are provided for in Articles 3 and 4 of the Optional Protocol. In brief, they are:

- no anonymous communications;
- communications must concern States that are parties to the Optional Protocol;
- the matter has not been dealt with under another international procedure;
- compatibility with the Convention;
- no ill-founded or insufficient grounds;
- communications must not be in abuse of the right to submit a communication;
- exhaustion of all available and effective domestic remedies.

This instrument is the latest of the human rights treaties that have been implemented to enable an individual to communicate with the CEDAW Committee alleging that the State party, to whose jurisdiction he or she is subject, is not fulfilling its obligations under the Convention (Article 2 of the Protocol). Unlike other procedures, under this Protocol, individuals, groups of individuals and third parties acting on behalf of individuals, can submit communications provided that they are physically located in the country involved in the case.²⁷⁶

When examining communications, the Committee is required to hold closed meetings (Article 7 par. 2). Like the procedure under CAT, the CEDAW Committee may, where appropriate and with the State party's consent, designate one or more of its members to conduct an inquiry including a visit to the territory of the State party concerned (Article 8 par. 2).

The Committee's final decision on the merits of the communication comes when it formulates its views containing recommendations to the State party involved, requesting

²⁷⁶ Exception applies to the right to political participation.

that the latter take immediate measures to solve the problem in accordance with the views transmitted to it.

4.2.4.2. Critical Appraisal and Limitations of the Procedure

Just like the previous procedures, a decision made by the CEDAW Committee is not legally binding and has no legal power over the State party concerned. The Committee is not a court that can hand down a judgement which is legally binding on all parties involved. It has to rely largely on the commitment of the State party to ensure the enforcement of the decision. Publishing the views is one of the ways available to urge a State party to implement the Committee's recommendations made in relation to particular communications.

Problems may arise when trying to implement decisions within a federated State. For instance, the communication may be against the government of a state or territory (ie. sub-federal level) whereas, in international relations, the federal government is the recognised subject.

Exhaustion of all domestic remedies, even if only those which are effective and available, can be time-consuming as well as frustrating and prohibitively expensive for individuals. What if they cannot afford this? In countries like Indonesia, going through all available domestic procedures can be a frustrating and seemingly never-ending process. In most cases, the victims tend to give up hope and say, "This is our fate. May God deal with them and may a curse be upon them". Cases such as Trisakti or Semanggi I and II

undoubtedly prove that this is still the fate facing most individual Indonesians who seek domestic legal remedies.²⁷⁷

4.3. Other Treaty-based Communication Procedures

Two other treaties have already entered into force and are legally binding on States parties; namely the International Covenant on Economic, Social and Cultural Rights (ICESCR), on 3 January 1976, and the Convention on the Rights of the Child (CRC), on 2 September 1990. Unlike previously mentioned treaties, neither of these provide for a procedure whereby individuals may submit petitions of alleged violations of the obligations or rights covered by the respective treaties.

For the purpose of monitoring the implementation of the treaties and examining the progress made by States parties in meeting the obligations set forth in the treaties, two Committees have been created: the Committee on Economic, Social and Cultural Rights (the CESCR) for the ICESCR, and the Committee on the Rights of the Child (the CRC Committee) for the CRC.

4.3.1. Procedure Before the Committee on Economic, Social and Cultural Rights (the CESCR)

The ICESCR does not provide for the establishment of a Committee to monitor the implementation of the Covenant. The Committee on Economic, Social and Cultural Rights (the CESCR) was specially established in 1985 pursuant to ECOSOC Resolution

²⁷⁷ Up to the time of writing, no court procedure had been put into place to bring the perpetrators to justice. So far, only fact-finding procedures have been completed, including one conducted by Komnas HAM. Even worse, the Indonesian DPR has made a recommendation that the incidents “are not human rights violation cases.” See, The Jakarta Post, at <http://www.thejakartapost.com>, 20 January 2001.

No. 17 (1985).²⁷⁸ The establishment of the CESCR was deemed necessary by ECOSOC following the unsatisfactory performance of two previous bodies entrusted with monitoring the power of the Covenant.²⁷⁹

4.3.1.1. The Procedure

The Committee's work is based on many sources of information, including reports by States parties and information from many specialised agencies of the United Nations, such as the International Labour Organisation (ILO), the United Nations Educational, Scientific and Cultural Organisation (UNESCO), the World Health Organisation (WHO), the Food and Agricultural Organisation (FAO), and also from the Office of the United Nations High Commissioner for Refugees (UNHCR) and the United Nations Centre for Human Settlements (Habitat), among others.

The Committee also receives information from NGOs and other community-based organisations working in States that have already ratified the Covenant, as well as from other United Nations treaty bodies and from generally available literature.²⁸⁰

The main task of the Committee is to assist ECOSOC in monitoring the implementation of the Covenant by States parties. It strives to develop a constructive dialogue with States parties and seeks to determine through a variety of means whether or not the norms

²⁷⁸ See, Michael O'Flaherty, Human rights and the UN, *Ibid.*, p. 62, cf. Philip Alston, "The Committee on Economic, Social and Cultural Rights" in Philip Alston's (Ed.) *The United Nations and Human Rights*, *Ibid.*, at p. 473.

²⁷⁹ United Nations Fact Sheet No. 16 (Rev.1), The Committee on Economic, Social and Cultural Rights, <http://www.unhcr.ch/html/menu6/2/fs16.htm>, access date: 25/09/2001, in particular at p. 17 of 26. The two previous bodies were the Sessional Working Groups and Sessional Working Group of Governmental Experts. The latter succeeded the former.

²⁸⁰ UN Fact Sheet No. 16, *Ibid.*, pp. 3-4.

contained in the Covenant are being adequately applied by States parties, and how the implementation and enforcement of the Covenant could be improved; so that all people who are entitled to the rights enshrined in the Covenant can actually enjoy them in full.²⁸¹

In accordance with Article 16 of the Covenant, States parties undertake to submit periodic reports to the Committee on the measures that they have taken to give effect to the rights laid down in the Covenant, and on progress made in achieving the observance of those rights. Article 17 rules that those reports may include various factors and difficulties which affect the level of fulfilment of the obligations of States parties. As a general rule, States parties undertake to submit periodic reports to the Committee within two years after the Covenant's entry into force, and at least once every five years after the first report.

Upon receipt, the reports are processed and translated by the Secretariat. A standard examination procedure needs to be followed by the Committee in dealing with these reports.²⁸²

In the first instance, the Committee reviews the reports in the pre-sessional working group, which comprises five members. This working group meets to examine the reports six months prior to consideration by the full Committee. The pre-sessional working group makes a preliminary review of the reports, and appoints one member to give particular consideration to each report. The appointed member then develops written lists of questions based on the disparities found in the reports. The questions are then referred to

²⁸¹ *Ibid.*, at p. 18.

²⁸² For more details, *see* Michael O'Flaherty, Human Rights and the UN, *Ibid.*, pp. 64-70 compared with the UN Fact Sheet No. 16, *Ibid.*, pp. 19-20.

the State party concerned. The States parties are then required to submit written responses to these questions before they appear before the Committee at its request.

To assist the working group in its task, it usually has been supplied with a list of issues prepared by its members working as Country Rapporteurs and Country Analysts through the Secretariat. The preparation of this list does not involve the State party concerned. When examining the reports, the Committee encourages the representatives of the State party involved to be present. In practice, State delegations are almost invariably present during the examination process, which generally takes two days to complete. Delegations are requested to give introductory comments and responses to the questions prepared by the pre-sessional working group. This is followed by the presentation by the United Nations specialised agencies of information regarding the reports under examination. The Committee then puts questions and observations to the State party concerned. A period of time is allowed for the State party to respond to the questions and observations made by the Committee.

At the end of its sessions, the Committee formulates its “concluding observations”, which constitute an assessment of the compliance of a State party to its treaty obligations. Concluding observations are, as a rule, adopted in a closed session and are released to the public on the final day of session. The decision is divided into five sections: (1) introduction, (2) positive aspects, (3) factors and difficulties hindering the implementation of the Covenant, (4) principal subjects or issues of concern, (5) suggestions and recommendations.²⁸³

²⁸³ UN Fact Sheet No. 16, *Ibid.*, p. 20 of 26.

4.3.1.2. Critical Appraisal of the Procedure

Like other treaty-based procedures, the CESCR is not a court and does not hand down judgements. All that it can do is to make concluding observations which contain some recommendations, in the hope that the State party concerned will follow its advice. In cases where the Committee concludes that violations of any right in the Covenant have taken place, it will urge the State party to refrain from committing the same violations again in the future, and recommend that it takes the necessary steps to guarantee its citizens full enjoyment of their rights.

In addition to these conclusions, letters from the chairperson are occasionally addressed to States parties, informing them of the Committee's concerns. These do not have much effect either on the States parties involved in the alleged violations.

At present, the Committee is not permitted to consider complaints or petitions brought by individuals or groups of people who claim that their rights under the Covenant have been violated. The absence of such procedure places significant constraints on the ability and effectiveness of the Committee to develop jurisprudence or case law. And this, of course, essentially limits the chances of the victims of abuses of the Covenant to obtain international redress.

In order to address this issue, an optional protocol has recently been drafted which would make it possible for individuals to submit complaints to the Committee.²⁸⁴ Whether or not this would bring a breakthrough remains to be seen. But given the precedents to date, one

²⁸⁴ Report of the 6th Session of the Committee in 1991, E/1992/23, para. 362, *cf.* UN Fact Sheet No. 16, *Ibid.*, at p. 23 of 26.

may guess that the procedure and remedy system would be no more effective than its predecessors.

4.3.2. Procedure Before the Committee on the Rights of the Child (the CRC Committee)

Along with the Convention on the Rights of the Child (CRC), there are two Optional Protocols: first, the Optional Protocol on the sale of children, child prostitution and child pornography; second, the Optional Protocol on the involvement of children in armed conflicts. Both protocols were adopted by General Assembly Resolution A/Res/54/263 of 25 May 2000, and have not yet entered into force.²⁸⁵

Just like the Covenant on Economic, Social and Cultural Rights, the CRC does not make provision for individual communication procedure. For the purpose of examining the progress made by States parties in achieving the realisation of the obligations undertaken in the present convention, there shall be established a Committee on the Rights of the Child (the CRC Committee), which shall carry out the functions provided for in the Convention (article 43). The procedure is generally referred to as reporting procedure.²⁸⁶

4.3.2.1. The Procedure

Under Article 44 of the CRC, States parties are obliged to submit periodic reports to the CRC Committee two years after the Convention's entry into force and every five years thereafter. In reports, the States parties document the measures that they have adopted to

²⁸⁵ For a complete transcript of the Protocols, *see*, <http://www.unhchr.ch/html/menu2/dopchild.htm>, access date: 02/05/2001.

²⁸⁶ For more detail on the procedure, *see*, among others, Overview of the Reporting Procedure, UN Doc. CRC/C/33 and C. Prince Cohen (1991), "States reports: United Nations Convention on the Rights of the Child" in *New York Law School Journal of Human Rights*, No. 8, Vol. 2 (Spring 1991), pp. 367-382.

give effect to the rights contained in the Convention, and report on the progress made in the enjoyment of those rights. The article also stipulates that in their reports, the States should indicate any factors or difficulties which they encountered in their efforts to guarantee the full enjoyment of the rights laid down in the Convention.

Upon receipt of these reports, the Committee, through its informal working group, holds closed meetings at the end of each session to examine the reports scheduled for consideration either at the next or another forthcoming session. The purpose of the examination is to identify areas or issues which require clarification or are relevant to the Committee's concerns, and to prepare a list of questions to be submitted to the States parties with a request for a written response, which will then be considered along with the report.

In order to assist it, the Working Group normally receives a list of issues needing attention, which is prepared by its members working as Country Rapporteurs and Country Analyses through the Secretariat. At this stage, the State party concerned is not present yet. The result of this examination process, which is the complete document of report, State replies and comments made by the Working Group, is further referred to the Committee for consideration.

When holding meetings to consider reports, the CRC Committee will invite representatives of the State party involved in the case to be present. The sessions that are held are open to the public. At this stage, the Committee focuses its attention on the comments or responses made by the State party to the questions or concerns addressed to it by the Committee.

Following these public meetings to consider reports, the Committee proceeds to draft and then adopt its “concluding observations”. At this point the CRC Committee will generally include its assessment of the State’s handling of the issues, noting the positive and negative factors, matters that concern the Committee, and suggestions and recommendations. Pursuant to article 45(b), the recommendations are also transmitted to the relevant specialised agencies of the United Nations such as ILO, UNICEF, UNESCO, as well as to other competent entities.

4.3.2.2. Critical Appraisal of the Procedure

As in the other procedures mentioned above, the conclusions of the CRC Committee have no legal power. They consist mainly of recommendations and suggestions to the State party concerned to take measures and actions deemed necessary by the Committee for the comprehensive realisation of the Convention. Since they are only suggestions and recommendations, the implementation of concluding observations rely entirely on the State’s willingness to cooperate.

The Committee can only put pressure on States by making the decision available for public information. It is hoped that in this way, at least, States parties will feel uncomfortable if they do not follow the Committee’s suggestions. In ensuring the implementation of the Convention, the role of the NGOs is also important.²⁸⁷ With the assistance of the group it is expected that harder pressure can be made on States to comply with the Convention.

²⁸⁷ Article 45 of the Rules of Procedure (UN Doc. CRC/C/4). A Group of NGOs for the CRC has been established to help the Committee in its work and has a full-time coordinator in Geneva-based office of Secretariat (P.O. Box 88, CH 1211, Geneva, Switzerland).

There is no means available for the Committee to force the State to bow to its decision. The Committee is not a court. It does not hand down judgement.

According to the Convention, the CRC Committee is not allowed to receive or consider individual communications. This places significant constraints on the ability and effectiveness of the Committee to develop jurisprudence and case law and, of course, greatly limits the probability that individual victims of abuses of the Convention will obtain international redress.

5. Regional Individuals' Complaint Procedures

Although this thesis' focus is mainly concentrated upon the international mechanisms available to individuals whose rights are violated, for the sake of comprehensiveness a description will be given of a number of procedures that are available at the regional levels in different parts of the world, namely the Americas, Europe and Africa. This description will be brief, since none of the three regional systems are applicable to the Asian region and therefore have little direct relevance to the situation in Indonesia.

5.1 Procedure under the Inter-American Human Rights System

The American Declaration of the Rights and Duties of Man adopted in Colombia in 1948, though not a treaty, was still the first "international" human rights instrument of a general nature since it was actually approved by resolution before the adoption of the Universal Declaration of Human Rights. From 1959, a mechanism was put into place under the

American Declaration establishing an Inter-American Commission on Human Rights. In 1961, the Commission began to conduct on-site visits to observe the general human rights situation in a country or to investigate specific situations. From 1965, the Commission was authorized to examine individual complaints or petitions regarding specific cases of human rights violations.

The decisions of the Commission are, like those of UN committees under individual treaty complaint mechanisms, made public and published. One rather unusual difference between the two is that this procedure existed prior to the adoption of an actual human rights treaty. Up to that point, breaches of human rights under the American Declaration were considered more in terms of breaches of political commitments rather than breaches of legal obligations.

This was to change in 1969 when the American Convention on Human Rights was adopted, and entered into force in 1978. The Convention itself is a treaty which defines legal human rights standards, creates the Inter-American Court of Human Rights, and defines the functions, powers and procedures of both the Commission and the Court. Even though the Inter-American Commission was given powers to hear individual complaints under the treaty, it has preserved other autonomous mechanisms which pre-date, and are not derived directly from, the Convention; such as the processing of cases involving countries which are still not parties to the Convention.

The Inter-American Court of Human Rights is an actual court in the legal sense, whereas the various international mechanisms, such as the treaty-based UN committees, are not; as

has been seen previously. Briefly, the functions and powers of the Commission and of the Court will now be described.

The Commission's principal function is to promote the observance and defence of human rights by:

- 1) Receiving, analysing and investigating individual petitions which allege human rights violations through the procedure contained in Articles 44 to 51 of the Convention.
- 2) Observing the general human rights situation in the member States, and publishing special reports regarding the situation in a specific State, when it considers it appropriate.
- 3) Carrying out on-site visits to countries to engage in more in-depth analysis of the general situation and/or to investigate a specific situation. This would normally be followed by a published report regarding the human rights situation observed.
- 4) Stimulating public consciousness regarding human rights in the Americas by carrying out and publishing studies on specific subjects.
- 5) Organising and carrying out conferences, seminars and meetings with representatives of Governments, academic institutions, non-governmental groups, etc, in order to disseminate information and to increase knowledge regarding issues relating to the inter-American human rights system.
- 6) Recommending to the member States of the Organization of American States the adoption of measures which would contribute to human rights protection.
- 7) Requesting that States adopt specific "precautionary measures" to avoid serious and irreparable harm to human rights in urgent cases.

Additionally, the Commission itself can ask the Inter-American Court to issue an order for “provisional measures” in urgent cases which involve danger to persons, even where a case has not yet been submitted to the Court. The Commission can of its own initiative submit cases to the Inter-American Court, and it also appears before the Court in the litigation of cases.

Finally, the Commission can request advisory opinions from the Inter-American Court regarding questions of interpretation of the American Convention. The author presumes this also to be the case with the High Court of Australia. There may not actually be any victim *per se*. This is in a sense a form of judicial review at the regional level, as what this procedure involves is a clarification of whether a piece of existing or proposed legislation would violate some of the human rights guaranteed under the treaty.

Any person, group of persons or non-governmental organization may present a petition to the Commission alleging violations of the rights protected in the American Convention and/or the American Declaration. As is the case with all other human rights treaties, the Commission may only process individual cases where it is alleged that one of the member States of the OAS is responsible for the human rights violation at issue and if that specific State is a party to the treaty. Also, unusually, it is possible for the Commission to hear petitions involving States parties who have not ratified the Convention but who are members of the OAS. The Commission would then apply the American Declaration rather than the Convention.

The petitions presented to the Commission must show that the victim has exhausted domestic remedies. If domestic remedies have not been exhausted, it must be shown that the victim tried to exhaust domestic remedies but failed because the remedies do not provide for adequate due process; or in cases where there is effective access to remedies, there has been undue delay in the decision on those remedies.

Quite differently from UN treaty bodies, the Commission also may carry out its own investigations, conducting on-site visits, requesting specific information from the parties, etc. The Commission may also hold a hearing during the processing of the case, in which both parties are present and are asked to set forth their legal and factual arguments.

Once the various steps have been completed, the Commission then prepares a report which includes its conclusions and also generally provides recommendations to the State concerned, but this report is not made public. The Commission gives the State a period of time to resolve the situation and to comply with the recommendations of the Commission. At the end of this period of time, the Commission has two options. It can prepare a second report, which is similar to the first report and contains conclusions and recommendations. If it does that, the State is again given a period of time to resolve the situation and to comply with the recommendations of the Commission, if there are such recommendations. At the end of this second period granted to the State, the Commission will usually publish its report, although under the treaty the Commission can decide to do otherwise. Instead of this route, the Commission may decide to take the case to the Inter-American Court. It has to do it within three months from the date in which it transmits its initial report to the State concerned.

As for the Inter-American Court created under the American Convention on Human Rights, it is made up of seven judges who are elected in their personal capacity from among jurists of the highest moral authority and of recognized competence in the field of human rights. As a court of law, it has both an adjudicatory and an advisory jurisdiction: with the former, it can hear cases of actual violation which must be adjudicated, in the sense that it must hand down a legally binding court decision on an issue of the application of these human rights.

This is however not exactly a mechanism which is available to individuals, since only the Commission and the States parties to the Convention can actually submit cases concerning the interpretation and application of the Convention directly to the Court. In addition, for the court to hear a case against a State, that State must recognise the jurisdiction of the Court, either by a declaration accepting the Court's jurisdiction in all cases or on the basis of special agreement for a limited time or for a particular case.

The Court also has a further "judicial review" or advisory function. Article 64 of the Convention provides that any member state of the Organization may consult the Court on the interpretation of the Convention or of other treaties on the protection of human rights in the American states. The Court can also, at the request of any member state of the Organization, issue an opinion on the compatibility of any of its domestic laws with any of these treaties.

Under Article 63(1) of the Convention, the Court can order that the right involved be respected, and that the situation be remedied and if appropriate, fair compensation paid.

The Court can also issue “temporary injunctions” under Article 63(2) in cases of extreme gravity and urgency.

5.2 Procedure under the European Human Rights System

The system in Europe shares some common traits with the Inter-American system, in that it has an adjudicative body in the form of the European Court of Human Rights. The European Court, established under treaty provisions contained in the Convention for the Protection of Human Rights and Fundamental Freedoms (and optional protocols).

This 1950 treaty entered into force in September 1953 and initially contained two complementary mechanisms for the enforcement of its human rights obligations: a European Commission of Human Rights (set up in 1954), and the European Court of Human Rights (set up in 1959). In 1998, when Protocol No. 11 came into force, the part-time Court and Commission were replaced by a single, full-time Court. It is also with this Protocol that the mechanism for individuals to submit an application to the Court has become compulsory for all Member States to the European Convention. The number of judges at the Court is equal to that of the Contracting States to the European Convention (45 in 2006). Judges are elected by the Parliamentary Assembly of the Council of Europe and sit in their individual capacity.

In contrast to all other mechanisms available to individuals internationally, including the Inter-American Court of Human Rights, the procedure before the European Court is clearly judicial in nature. Matters do not necessarily involve hearings – these are usually only held in a minority of cases – but if there are hearings, these would normally be

public. Most matters are dealt with in writing, and these documents are filed with the Court's Registry by the parties and are available to the public.

The European Court can issue legally binding judgements as to the violation of one of the rights or freedoms protected under the Convention.

The European Court also has a further "judicial review" power in that, at the request of the Committee of Ministers, it can give advisory opinions on legal questions concerning the interpretation of the Convention and Protocols, and could take the role of advising on whether certain legislation may or may not breach the human rights protected under the Convention.

The responsibility for supervising the execution of judgements lies with the Committee of Ministers of the Council of Europe. Ultimately, it is this Committee of Ministers who will verify whether States are complying with the judgement and their human rights obligations under Article 46(2) of the Convention. It will determine what steps were taken by the State found to be in breach of its human rights obligations to pay any compensation or costs and expenses ordered by the European Court to the individual complainants, as well as any other measures ordered by the Court.

5.3 Procedure under the African Human Rights System

Adopted by Member States of the Organisation of African Unity (now known as the African Union) on 27 June 1981, the African Charter on Human and Peoples' Rights (ACHPR) entered into force on 21 October 1986. Until 2004, the African Commission on Human and Peoples' Rights was the only body under the Charter charged with the responsibility of promoting and protecting human and peoples' rights. The Protocol

establishing the African Court on Human and People's Rights was subsequently adopted on 10 June 1998 and came into effect on 15 January 2004 after ratification by 15 states. In July 2004, the African Union took a decision to merge the African Court on Human and People's Rights with the Court of Justice of the African Union.

Both the Commission and the Court now operate side by side, with the former remaining the main mechanism of which individuals and peoples can avail themselves in order to have governments comply with their rights under the Charter.

The African Commission is composed of eleven members elected by secret ballot from nominees presented by the States Parties to the Charter. These commissioners serve in their personal capacity, and their mandate as members of the Commission is both protective and promotional, the former being of most concern for the purposes of this brief description.

It is under its protective mandate that the Commission has the mandate to protect the human and people's rights guaranteed in the Charter, and therefore can receive and examine individual communications (as well as inter-state ones) through the procedures and requirements as set out in Articles 47 to 59 of the Charter. The Commission determines the admissibility of individual complaints using criteria such as the need to exhaust local remedies, though only where these remedies are effective and accessible under Article 50. It should be added that the Commission has also a further (though limited) "judicial review" power, in that it can interpret the Charter at the request of a state party, an institution of the African Union or an African organisation recognised by the African Union.

In a similar fashion to the Inter-American human rights system, the Commission can submit cases to the Court on behalf of individuals under Article 5 of the Protocol. Unlike the European human rights system, it means that most individuals do not directly have access to this mechanism: only the African Commission, and individuals and NGOs of States parties which, by a separate declaration, accept the competence of the Court can avail themselves of the Court's adjudicatory capacity. As of June 2006, this appears to exclude all individuals except for those from Burkina Faso, the only State to have accepted the competence of the African Court for this purpose.

One peculiarity is that the African Court is in fact not limited to the African Charter in its adjudicatory (and advisory) capacities. Article 3 of the Protocol declares that the Court's jurisdiction involves "all cases and disputes submitted to it concerning the interpretation and application of the Charter; this Protocol and any other relevant human rights instrument ratified by the states concerned".

The Court's judgements are legally binding on States, and it has the ability to order the payment of compensation and to issue orders for provisional measures. As with the European human rights system, it is ultimately the Council of Ministers of the African Union has the mandate to monitor the implementation of the Court's decisions.

Chapter 5

THE NEED FOR INTERNATIONAL JUDICIAL REVIEW OF GOVERNMENT ACTS AND LEGISLATION FOR BREACHES OF HUMAN RIGHTS

1. Preliminary Remarks

From the previous discussion in Chapter 4, it appears that individuals who claim to be the victims of violations of human rights recognised by international standards, and who reside in States which do not offer adequate legal procedures for defending their rights, have little chance to obtain fair redress under the existing international channels. Whereas individuals may still hope that their rights can be defended by international law, national laws do little to substantiate such optimism.²⁸⁸

In regards to situations involving human rights in Indonesia, for example - and Indonesia is not the only country in the world that shows such traits - the opportunity is even smaller for individuals to defend themselves against the State's acts of violence or abusive legislation. As mentioned above, in Indonesia, human rights abuses are "legalized" by laws and regulations passed by a very weak parliament working under the strong pressure of the executive. For even if the Government has grossly abused its citizens' rights, either through actual acts of violence or discriminatory and abusive legislation or quite often both, no adequate legal mechanism or procedure is available whereby the Government may be held responsible for its unlawful acts, or the legislation may be reviewed; as shown in Chapter 3.

²⁸⁸ B.G. Ramcharan. 1989. *The Concept and Present Status of the International Protection of Human Rights*. Dordrecht, Boston: Martinus Nijhoff Publishers, p. 267.

It should be admitted, however, that the presence of various international procedures for dealing with human rights communications has succeeded to some extent in providing individuals with a broader avenue and a better chance to defend their rights. Nevertheless, those procedures carry with them significant constraints and limitations (see discussion in Chapter 4, particularly on the critical appraisal and limitations of the procedures). Accordingly, these conditions greatly limit the chances for individual victims to obtain the international redress or compensation that they need so badly.

Can anything further be done to address this issue? Is there any other procedure or legal mechanism that would possibly provide a solution to this problem, that is to say a better way of countering the State's abusive acts and/or legislation? If this was the case, what would such a procedure be like and would it be operative at a national or international level?

In the author's opinion and belief, the answer to the first two questions is "yes". There is a stronger legal means that can still be put into operation, and that is international judicial review - from which Indonesians have yet to truly benefit. This should also be employed at an international level because the circumstances under which Indonesia is placed make any such procedure operating under the domestic legal system useless. If this procedure is used, both the State's legislation and Constitution²⁸⁹ will be put under the microscope to test whether or not they are in conformity with international human rights standards and norms.

²⁸⁹ In the context of this study, this has to be regarded as a State's entire legislation system including court orders and not only the Constitution *per se*. However, it also has to be understood that the basic rules are summed up in the constitution.

The main issues here are: why should it be an international judicial review? Who shall possess the judicial review power: the United Nations Charter as well as treaty-based bodies, or the International Court of Justice? Legally speaking, how well-founded is it, and what are its advantages compared to other procedures? Is there any trend at all showing that the world is ready for such a mechanism? If the first question, which is the most important, has been answered satisfactorily, the subsequent questions can also be answered.

The purpose of this chapter is twofold: first, to argue that another mechanism is needed at the international level as a complement to procedures which have been in place for a long time but proved relatively ineffective as the instruments of various international bodies; second, to analyse the advantages of the proposed procedure in comparison to the others that have been implemented internationally. Prior to the discussion, I would like to examine the power and competence of the International Criminal Court (ICC) under the Rome Statute as well as various international practices (e.g. good offices, etc.).

The discussion of these issues adds weight to the previous discussion in Chapters 3 and 4 by justifying the need for international judicial review for breaches of government acts and for breaches of human rights. These issues will now be addressed in order of importance.

2. Why is International Judicial Review Needed?

Is judicial review really necessary? In other words, why choose international judicial review in particular? What are the arguments in its favour? Aren't the international mechanisms currently in operation sufficient?

The answer to the first question is yes, another procedure needs to be put in place because all the existing international procedures, particularly those aimed at defending the human rights of individuals against the abuses of States and their legislation cannot fulfil the expectations of individual victims. In the first place, the problem lies within the procedure itself.

Under Charter-based procedures, for instance, no individual complaints are considered. Those procedures deal specifically with a given country's human rights situation as a whole. Under treaty-based procedures, although dealing with individual petitions, the views or conclusions most often do not bring about the desired result. One could even say that the quality of the decisions which result from these procedures makes the entire mechanism 'a waste of time and energy'. Why? Because those decisions have no legal binding force on the parties involved and thus cannot be carried into effect. Their implementation very much depends on the political will of States.

What about strengthening the position of the Committees by permitting them to hand down recommendations which are legally binding for States parties? This is certainly worth considering but, realistically, the materialisation of this idea is highly doubtful:

even with such moderate powers as they possess, it has taken a long time for the Committees to obtain recognition from States. How much longer would it take for the States to recognise a greater amount of power bestowed on the Committees?

Moreover, even if the treaty provisions entitle the treaty-based bodies to the same authority as a court, in most cases they still currently require additional official recognition, because the provisions are optional. The waiting time can be very long or even indefinite. From the victim's perspective, this is intolerable. Again, in this respect, the political will of the States plays a decisive role. Such political will can well be uncertain and unpredictable. With international judicial review, the door is at least partially opened: as a Member of the United Nations, a State is *ipso facto* a party to the Statute of the International Court of Justice, though as it currently stands, not all member States recognise the competence of the ICJ to hear a case and issue judgements on matters involving that State.²⁹⁰

There would additionally be a risk of inconsistency if some other international body was considered in order to deal with issues of international judicial review. For example, Judge *Gilbert Guillaume*, the International Court of Justice's former President, has recommended caution about the risk of inconsistency and conflicting judgements because of overlapping jurisdiction due to what he calls the "proliferation of international judicial bodies". In his address to the members of the General Assembly's Sixth (Legal) Committee, he asserted that the proliferation of judicial bodies was a response to the need

²⁹⁰ Article 93(1) of the Statute of the International Court of Justice.

to subject expanding inter-State relations and cross-frontier transactions to the rule of law.²⁹¹

He went on to warn:

Among the unfortunate consequences from that proliferation though, were the risk of overlapping jurisdictions, which could lead to ‘forum shopping’, the rendering of conflicting judgments and inconsistency in case law. While international law certainly has to adapt itself, it must nonetheless preserve the unity and provide the players on the international stage with a secure framework.²⁹²

This would suggest that it would be better to attempt to strengthen judicial review not by creating a whole new mechanism – which might conflict or contradict others in place – but instead expand the mandate of an already existing institution – such as the International Court of Justice if possible.

Another argument that can be advanced is that under all the aforementioned procedures, as one can see quite clearly, the main objective is to provide a broad platform from which individuals may exercise their right to defend themselves **after** their rights have been violated. However, would it not be better to prevent a violation of human rights, than to repair it after it had taken place? As the saying goes, prevention is better than cure.

Is there any indication at all as to whether or not the world is ready to accept an international judicial institution dealing specifically with human rights violation cases? Professor Martin Scheinin, Director of the Finland-based Abo Akademi University Institute for Human Rights and member of the Human Rights Committee is clearly in favour of this idea. In relation to the establishment of the International Criminal Court

²⁹¹ *UN General Assembly Press Release*, GA/L/3157, at <http://srch1.un.org:80/plweb-cgi/> access date: 27/10/2000. Judge Guillaume’s remark was actually made to comment on the establishment of the ICC, but its implication may well go beyond that.

²⁹² *Id.*

(ICC), seen by him as a parallel idea for possible establishment of an international human rights court, *Prof. Scheinin* argues:

The entry into force of the Rome Statute in July 2002 and the subsequent period when the ICC will become operative will provide momentum for international discussion on the need of a World Human Rights Court. If individuals are made, on the level of international law, subject to penal procedures and penal sanctions for violations of certain human rights, through the International Criminal Court with final and binding jurisdiction, why should the primary subject of international law, namely states, not be made subject to the jurisdiction of a human rights court with the power to issue binding decision?²⁹³

The background reason for Professor Scheinin coming to this conclusion is that in recent years, much attention has been given to the problems and potentials of the system of international supervision of human rights law; although this has primarily taken place only in academic and non-academic analysis on how to improve the functioning of the so-called treaty bodies established under six major human rights treaties elaborated within the United Nations framework²⁹⁴. Pointing out a recent development that occurred within the ICC, Scheinin sees that this could “serve as strong support for the parallel processes of giving individuals also rights directly on the international level and of making states accountable for their acts or omissions that lead to the violations of human rights”.²⁹⁵

He argues that a future “World Human Rights Court” would have to be endowed with all necessary power to fully exercise its jurisdiction as another world court (e.g. the International Court of Justice), such as the power of judicial review of state parties’ acts covering legislative and administrative products as well as judicial decisions. A tentative blueprint of this world human rights court could be based on the following characteristics:

²⁹³ Scheinin, Martin. 2003. Paper, Towards a World Human Rights Court. Institute for Human Rights, Åbo Akademi University, Finland. p. 6

²⁹⁴ *Ibid*, at p. 1

²⁹⁵ *Ibid*, at p. 6

- 1) No new substantive human rights norms need to be elaborated. The substantive norms of human rights are to be found in the 1948 Universal Declaration of Human Rights, subsequent human rights treaties and the evolving institutionalized practices of interpretation based on those treaties;
- 2) In order to ratify the Statute of the World Human Rights Court, States need not denounce the human rights treaties they have already ratified. However, States will be free to withdraw from existing optional complaint procedures if they recognize the binding jurisdiction of the Court in relation to the same set of substantive human rights norms;
- 3) The process of amending existing multilateral human rights treaties need not be resorted to;
- 4) The World Human Rights court will be optional in nature. Any State may subject itself to the binding jurisdiction of the Court, in relation to the substantive norms provided by one or more of existing human rights treaties. This will result in somewhat cumbersome variable geometry in the work of the Court, as the applicable law will differ from case to case. By converting the principle of independence and indivisibility of all human rights into a legal one, the resulting hardship can be kept within tolerable borders;
- 5) Entities other than States, including international organisations or multinational corporations, may by unilateral declaration recognize the binding jurisdiction of the Court. Such declaration must specify a) a set of human rights norms contained in the existing human rights treaties to which the entity considers itself bound, and b) what internal remedies of the entity, or generally available external remedies, need to be exhausted before a complaint may be submitted to the Court;
- 6) The same approach might be feasible even in respect of States themselves: that they would have the right to specify what regional or international procedures constitute such remedies that must be exhausted before engaging the Court. The admissibility question related to “the same matter” could be resolved in a similar fashion, by allowing the State in question to determine whether previous consideration by a regional human rights body precludes a subsequent complaint to the new Court;
- 7) The Court will have the competence to issue binding decisions on interim measures of protection and binding decisions on effective remedies in cases of human rights violations. The Court will have an effective follow-up mechanism to ensure the implementation of its judgements;
- 8) So far, no blueprint exists to address the question of whether the jurisdiction of the Court will be limited to complaints by individual victims of human rights violations, or whether a case can be initiated by other actors (States, non-governmental organisations, etc.), and whether this will require that the Court will deal not only with (individual) human rights violations but also with “unsatisfactory application”, e.g. to take positive measures.²⁹⁶

²⁹⁶ *Ibid*, at p. 8.

One interesting point in Scheinin's idea here is the possibility of giving such a court a more extensive jurisdiction not only to deal with individual complaints but also with "unsatisfactory application", such as to take positive measures. Taking a positive measure towards international human rights standards in the case of Indonesia, for instance, has never been a satisfactory act. The competence of such a court to deal with unsatisfactory application in taking a positive measure may well be regarded as involving the review of a State's acts or legislation and their conformity with human rights standards. This would be especially relevant in the Indonesian context in regards to legislation that "legalises" the acts of the Government and its branches that violate human rights.

It would therefore be useful if there existed at international level a judicial review procedure which scrutinised the consistency of a State's constitution and legislation with international human rights provisions and which took the necessary measures if inconsistencies were found. In this context, the availability of international judicial review of government acts for breaches of human rights may, in this context, prevent the violation of human rights from taking place and provide individuals with an avenue through which they can secure the exercise of their rights **before** any violation occurs. The procedure may thus function as an early-warning system for the protection of human rights.

Nonetheless, even if a violation has taken place because a particular State has adhered to its national system of judicial review²⁹⁷, international judicial review can still be used to

²⁹⁷ In countries such as Switzerland, a regulation will be reviewed through a referendum before it comes into effect. But in countries like Indonesia, a regulation enters into force first and if considered inconsistent, a petition may be filed with the court. On this, *see* discussion in Chapter 3. On various systems of judicial review, *see*, among others, Brewer-Carais, *Judicial Review in Comparative Law*, *Ibid.* (discussion in chapter 2).

bring about an amendment in the legislation of this State. The proposed mechanism may thus have a dual function: prevention and reparation.

Judicial review as a legal regulator may ensure that government does not exercise its power over and above what the law has stated. There is always a possibility that a government will misuse its power while conducting administrative affairs as well as a possibility that the legislators may adopt an abusive law. In both situations, the court should be able to examine the lawfulness and fairness of their actions.

The same notion should be applied to the international community with regard to its member States. After all, the purpose of the establishment of an international community placed under the auspices of the United Nations is to create peace and stability and to achieve welfare, which is also the goal of every Member State for its citizens. Thus, a parallel exists between the goals of the United Nations and those of its Member States; who can work side by side and complement each other. When a State is unable to work out its own goals, the international community should provide assistance. Where a Member State is not willing to promote world peace, security and welfare, the international community should take the necessary steps to guarantee the advance of these goals.

In this effort, unfortunately, it is possible that one particular Member State or possibly more are not in conformity with the acceptable principles governing the international community and thus do not support the common goal. Inconsistencies with these principles and norms should be prevented and, if any exist, they have to be fixed using mechanisms specifically designed for the purpose. The author believes that the best

possible procedure by which to achieve this goal is international judicial review. Under this procedure, the legality and conformity of Government acts, including State legislation in the area of human rights protection, are examined on the basis of internationally accepted standards or norms.

In relation to the violation of principles for the promotion and protection of international human rights, a range of treaties have been adopted and ratified. But mere adoption and ratification of treaties do not themselves decrease the incidence of violations of rights, for it is up to the States parties to work out how they are going to implement those treaties. Many of the treaties are not implemented in practice. The major obstacle to satisfactory implementation lies within the national laws. So, in order to secure the conformity of national laws with international standards of human rights, an international judicial review procedure must be available.

But what are the international standards or norms concerning human rights that shall be used as the grounds for judicial review? What is the international constitution or basic set of laws equivalent to that of national law, against which the Government acts or legislation of a Member State shall be reviewed? To date, the codification of such an international constitution has not occurred. The only documents that the international community can currently resort to with a sufficient international consensus to use for this basis is the **International Bill of Rights**, which consists of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights together with its two Optional Protocols, and the International Covenant on Economic, Social and Cultural Rights.

Except for the two covenants, which are legally binding on States parties, the principles contained in the Universal Declaration of Human Rights do not by any means represent legal standards which bind all Member States. Nevertheless, some of its provisions either constitute general principles of law or express basic humanitarian views.²⁹⁸ More important is its status as an authoritative guide, produced by the General Assembly, for the interpretation of the United Nations Charter. In this capacity, the Declaration has considerable indirect legal effect and is regarded by the General Assembly and by some prominent jurists as a part of the “law of the United Nations”.²⁹⁹

Moreover, in the Proclamation, it is stated that the Declaration is “a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.”³⁰⁰

²⁹⁸ See Article 38(1)(c) of the Statute of the International Court of Justice.

²⁹⁹ Ian Brownlie (Ed.).1995. *Basic Documents in International Law*. 4th Ed., Oxford: Clarendon Press, p. 255 and on **ius cogens**, see, Juergen Broehmer (1997). *State Immunity and the Violation of Human Rights*, The Hague: Kluwer Law International, particularly at pp. 145-147, excerpt of which: “... [t]he concept of jus cogens is based on the notion that the international legal order contains norms which cannot be subject to contracting out, respectively which cannot be derogated by any subsequent nor unless that norm is also attributed jus cogens character. In effect this postulates a set of norms higher in hierarchy than general norms of international law and insofar similar to public policy norms of municipal legal orders ... In the broader context of human rights the law of genocide, the principles of racial non-discrimination, the rules prohibiting slavery and piracy and the rules concerning crimes against humanity are the least controversial jus cogens norms. However, the jus cogens catalogue of norms also includes “the murder or causing the disappearance of individuals”, “torture or other cruel, inhuman or degrading treatment or punishment”. That follows from the definition of jus cogens norms as rules which cannot be derogated from and which must be recognized “by the international community of States as a whole” (art. 53 Vienna Convention on Law of the Treaty). “The international community as a whole” cannot be understood in the sense of each and every state: jus cogens norms do not rely on state’s consent for it to be bound ... it is at least not evident that there is any significant opposition within the international community against the very existence of these fundamental rules.”

³⁰⁰ U.N. Doc. A/811.

Most of the human rights principles and standards laid down in the Declaration are then elaborated in the Covenants, which even go so far as to propose mechanisms for defending human rights. Unfortunately, as explained above, those defence mechanisms may only be invoked by individuals who are placed under the jurisdiction of the States which are parties to both treaties. What is needed now is a mechanism that applies to all the Member States of the United Nations at the very least.

Several other references to the principles underlying these developments and to the practical modalities of their international implementation can be found in the United Nations Charter, particularly in Articles 1(3), 55(c), 56, 62(2), 68 and 76(c).

There is all the more reason to do away with any hesitations about the use of international standards of human rights as a basis for judicial review because these standards also involve other aspects of social interaction, such as culture and ethics. What sort of cultural or moral value judgement would deny the principles and standards set forth in the Universal Declaration of Human Rights? To put it another way, there should be no cultural or moral values that contradict the principles and standards contained in the Declaration; since human rights are the natural birthrights of every human being, universally.³⁰¹ The respective relationships of culture and ethics with human rights might be likened to *lex generalis* for the former and to *lex specialis* for the latter.

Thus, the promotion, observance, protection and defence of human rights is an international concern, and not simply the business of certain states, regions or groups of people unless the international peace and security that all are striving for is a mere slogan.

³⁰¹ United Nations Background Note “The Challenge of Human Rights and Cultural Diversity”, *supra*, discussion in chapter 2.

That is why a specific procedure needs to be established whereby the possible violation of any right as a result of wrongdoing or abusive legislation on the State's part may be prevented.

But why the concentration upon the State? Because it is the State's duty to protect individuals and to guarantee them the full enjoyment of their civil rights. Moreover, it is the State that makes legal decisions. So, generally speaking, a State may become the biggest violator of human rights.

What about the other international machinery, such as the International Criminal Court, that is currently being introduced? Besides, what are the contributions of other international practices similar to judicial review such as mediation and good offices, conciliation, arbitration, etc.? How far can these mechanisms go in providing redress for human rights violations at an international level? A systematic examination of these is provided in the following two sections.

3. The Power and Competence of the International Criminal Court (ICC)

Two years before entering the new millennium, the international community under the auspices of the United Nations³⁰² successfully drafted and adopted the Rome Statute of the International Criminal Court.³⁰³ The idea was supported without question by the

³⁰² That is, the Preparatory Commission for the Establishment of the International Criminal Court which was established by Resolution F of the Final Act (A/CONF. 183/10) of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of the International Criminal Court. On the work of the Preparatory Commission, see, among others, UN Press Release L/2968 of 8 December 2000; on the reading of the Rules of Procedure and Evidence and the Elements of Crimes, see, summary of proceedings PCNICC/1999/L.5/Rev.1, Add. 1 and Add. 2.

³⁰³ On 27 July 1998 the UN Diplomatic Conference adopted the draft Statute (A/CONF. 183/9). Complete text of the Statute is taken from http://www.un.org/law/icc/statute/99_corr/cstatute.htm, access date: 21/03/2001.

General Assembly, who emphasised even further "... the need to make necessary arrangements for the commencement of the International Criminal Court in order to ensure its effective operation."³⁰⁴

The Statute contains 12 parts and 128 articles. According to Article 126, the Rome Statute will come into force on the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification, acceptance, approval or accession. To date, of the 140 countries that have signed the Statute, more than 60 have already ratified the Statute marking the procedure's entry into force.³⁰⁵

The International Criminal Court (the ICC) is to be an independent and permanent judicial body with jurisdiction over "most serious crimes of concern to the international community as a whole" if they were committed by individuals. Nevertheless, in the Preamble of the Statute it is emphasised that the ICC "shall [only] be complementary to national criminal jurisdiction."³⁰⁶

The Court was seen as the offspring of two ad hoc tribunals which prosecuted war crimes in former Yugoslavia and in Rwanda, as well as of hybrid national/international courts which were being established in Sierra Leone, Cambodia and East Timor.³⁰⁷ But the very beginning of the ICC can be traced back to the second decade of the 1900s.

³⁰⁴ A/Res/55/155.

³⁰⁵ David Howell (2001) "Yes to the World Criminal Court, but with America on Board" in *International Herald Tribune*, 6 March 2001, at <http://www.globalpolicy.org/wldcourt/icc/2001/0703us.htm>, access date: 16/04/2001 For the number of states that have ratified the Statute, see, <http://www.un.org/icc>, access date: 24 February 2004.

³⁰⁶ See, sentence "Emphasizing...etc." of the Preamble and Article 1 of the Rome Statute.

³⁰⁷ Michelle Sief (2001) "World Needs a Crimes Court" in *Christian Science Monitor*, 15 March 2001 at <http://www.globalpolicy.org/wldcourt/icc/2001/0315us.htm>, access date: 16/04/2001.

The first proposals leading to the creation of a permanent and independent international criminal court were introduced just after the First World War, when the Permanent Court for International Justice was established. In the interval between the First and the Second World War, interest in the creation of this kind of court somehow subsided. The idea was revived after the Second World War, when the Nuremberg and Tokyo international military tribunals were created.³⁰⁸

The ICC functions as an organ of the United Nations. The relationship of the ICC with the United Nations shall be determined by an agreement to be approved by the Assembly of States parties to this Statute and thereafter concluded by the President of the ICC on its behalf (Article 2) and the seat of the Court shall be at The Hague in the Netherlands (Article 3).

According to Article 4, the ICC shall have international legal personality and other legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes (par. 1). The ICC may exercise its functions and powers on the territory of any State party and, by special agreement, on the territory of another State too (par. 2).

Part 2 of the Statute concerns the jurisdiction of the Court, the admissibility of a case and other relevant legal principles. Article 5(1) stipulates the types of crimes covered by the Court's jurisdiction. It specifies that these crimes must be of concern to the international

³⁰⁸ Bernhard Graefrath, "Universal Criminal Jurisdiction and an International Criminal Court" in *European Journal of International Law*, Vol. 1, No. 1 at <http://www.ejil.org/journal/Vol1/No1/art4-01.html>, access date: 10/04/2001. For more details on the history of the proposals, see M.C. Bassiouni (1987), *A Draft International Criminal Code and Draft Statute for an International Criminal Tribunal*, 2nd revised and updated edition, Dordrecht, Boston: Martinus Nijhoff Publisher, p. 1 ff., *International Criminal Law*, 2nd edition, Vols. 1-3, Ardsley, N.Y.: Transnational Publishers, also B.B. Ferencz (1980), *An International Criminal Court - A Step toward World Peace: a document, history and analysis*. Dobbs Ferry, N.Y.: Oceana Publications.

community as a whole, such as: (a) the crime of genocide, (b) crimes against humanity, (c) war crimes and (d) the crime of aggression.

Genocide occurs when any of the following acts is committed with intent to destroy in whole or in part a national, ethnic, racial or religious group:

- killing members of the group;
- causing serious bodily or mental harm to members of the group;
- deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- imposing measures intended to prevent births within the group;
- forcibly transferring children of the group to another group.³⁰⁹

A crime against humanity takes place when any of the following acts is committed as part of a widespread or systematic attack directed against any civilian population:

- murder;
- extermination;
- enslavement;
- deportation or forcible transfer of population;
- imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- torture;
- rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity;
- persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender, or other grounds that are universally recognised as impermissible under international law, in connection with any act within the jurisdiction of the Court;
- enforced disappearance of persons;
- the crime of apartheid; and
- other inhuman acts of similar character intentionally causing great suffering, or serious injury to body, physical and mental health.³¹⁰

³⁰⁹ Article 6 of the Rome Statute.

³¹⁰ Article 7 of the Rome Statute. Paragraph 2 of the article further defines the meanings of “attack directed against any civilian population” as a course of conduct involving the multiple commission of acts against any civilian population pursuant to or in furtherance of a State or organisational policy to commit such attack; “extermination” includes the intentional infliction of condition of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population; “enslavement” means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, without grounds permitted under international law; “deportation or forcible transfer of population”

War crimes occur when an act or acts of violence are committed as part of a plan or policy or as part of a large-scale order for such crimes to be perpetrated (Article 8 par. 1).

According to paragraph 2, war crimes include any of the following acts:

- a) grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the Conventions³¹¹: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, extensive destruction and appropriation of property not justified by military action and carried out unlawfully or wantonly, compelling a prisoner of war or other protected person to serve in forces of hostile power, wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial, unlawful deportation or transfer or unlawful confinement and taking of hostages;
- b) other serious violations of the laws and customs applicable in international armed conflict within the established framework of international law, such as attacks against civilians, non-military targets including those belonging to humanitarian or peacekeeping missions, the use of biological and chemical weapons, etc.;
- c) intentionally wounding retired soldiers who are *hors de combat*.³¹²

means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present without grounds permitted under international law; “torture” means the intentional infliction of severe physical or mental pain or suffering upon a person in the custody or under the control of the accused (pain or suffering due to lawful sanction is excluded); “forced pregnancy” means the unlawful confinement of a woman forcibly made pregnant with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law (this does not affect national laws on pregnancy); “persecution” means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the groups or collectivity; “crime of apartheid” means inhumane acts committed in the context of an institutionalised regime of systematic oppression and domination by one racial group over any other racial group or groups with intent of maintaining the regime; “enforced disappearance of persons” means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or political organisation, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

³¹¹ Altogether there are four Conventions and two Additional Protocols: Convention for the Amelioration of the Condition of the Wounded and Sick Members of Armed Forces in the Field, Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Convention Relative to the Treatment of Prisoners of War, Convention Relative to the Protection of Civilian Persons in Time of War, Additional Protocol relating to the Protection of Victims of International Armed Conflicts (Additional Protocol 1), and Additional Protocol relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol 2). All four Conventions entered into force on 21 October 1950, while the Additional Protocol 1 entered into force on 7 December 1979 and Additional Protocol 2 on 7 December 1978.

³¹² Article 8 of the Statute of the ICJ.

As concerns the crime of aggression in particular, the Statute prescribes that the Court shall extend its jurisdiction to this type of crime once a provision has been adopted in accordance with Articles 121 and 123 which define the crime and set out the conditions under which the Court shall exercise jurisdiction with respect to this crime.³¹³

3.1. Exercise of Jurisdiction

Article 13 rules that the Court may exercise its jurisdiction with respect to any sort of crime covered by the Statute if (a) a situation arises in which one or more of the alleged crimes is referred to the Prosecutor by a State party, (b) a situation arises in which one or more of the alleged crimes is referred to the Prosecutor by the United Nations Security Council pursuant to Chapter VII of the Charter, or (c) the Prosecutor has initiated an investigation *proprio motu* based on reliable information that one or more such crimes have indeed taken place.

To assist the Court in determining whether one or more such crimes have indeed taken place, a set of rules on the Elements of Crimes shall be adopted by a two-thirds majority of the Assembly of States Parties (Article 9 par. 1). In exercising its powers, the Court is also to uphold the general principles of criminal law, such as *ratione temporis* (Article 11), *nebis in idem* (Article 20), *nullum crimen sine lege* (Article 22), *nulla poena sine lege* (Article 23), non-retroactivity or *ratione personae* (Article 24), etc.

³¹³ Paragraph 2, Article 5 of the Rome Statute. The article further requires that the provision concerning the crime of aggression shall not contravene the provisions or principles of the United Nations Charter.

The jurisdiction of the Court excludes any person who was under the age of 18 (Article 26) when the alleged crime occurred, but no exception is made with respect to the official rank of a person, even if he/she enjoys legal immunity under international as well as national laws (Article 27). As in a normal criminal trial, the Court must exempt a person from criminal responsibility if the person is mentally ill, incapable, or acting in self-defence, etc. A person's right to presumption of innocence is also to be respected and the burden of proof is laid upon the Prosecutor (Article 66).³¹⁴

3.2. Analysis and Comparison

As noted above, the creation of the ICC is the next and perhaps the final outcome of the Nuremberg and Tokyo international military tribunals, two ad hoc international tribunals for former Yugoslavia and Rwanda and the current fledgling tribunals for Sierra Leone, Cambodia and East Timor for the effective enforcement of international humanitarian law.³¹⁵ The establishment of those tribunals was meant to provide a more effective means of enforcing international humanitarian law after the previous mechanisms seemed to fail.

The first means available for legally enforcing international humanitarianism was the traditional and rather controversial method of reprisals, whereby a soldier used an illegal means of warfare in response to violations of the laws of war by his enemy. The aim of this tactic is to make the enemy stop behaving illegally and to 'punish' him in order to deter him from committing further breaches. The second means was generally known as Protecting Power, a mechanism agreed upon by the parties to a conflict, to secure the supervision and implementation by the armed forces of their international humanitarian

³¹⁴ Rules on the trial process and the enforcement of the rulings are summed up in part 6 Articles 62 – 85 and part 10 Articles 103 - 111 of the Statute.

³¹⁵ Bernhard Graefrath, *supra*, note 294.

obligations. The third means was the existence of the Fact Finding Commission. The Commission was set up by the Secretary-General at the request of the Security Council in accordance with Resolution 780 (1992) to investigate violations of international humanitarian law in the former Yugoslavia. Based on the subsequent findings of this Commission, the Security Council decided to establish the International Criminal Tribunal for the Former Yugoslavia.³¹⁶

While the three previous methods concentrated on the States' duty to uphold their obligations under the international humanitarian law, the ICC focuses its jurisdiction on individual responsibility. It should be acknowledged that, in one way, the creation of the ICC does represent a step forward in the effort to promote the observance of humanitarian law internationally. Yet, on the other hand, the mechanism is flawed as far as the effective enforcement of international humanitarian law is concerned, because the implementation of the prosecution and punishment of individuals ultimately hinges on, and depends on, the goodwill of States.³¹⁷

Unlike the procedures which deal with individual communications under various treaties in which the Committees do not make legally binding decisions, the ICC does hand down judgements and has legal binding force on the parties concerned. This is only natural because the ICC is a judicial institution operating as a criminal court on the basis of general criminal law principles at international level. Thus, it does not work in the area of international human rights.

³¹⁶ Feature Article, European Journal of International Law, Vol. 9, No. 1 at <http://www.ejil.org/journal/Vol9/No1/art1-01.html>, access date: 16/04/2001.

³¹⁷ *Ibid.*

Petitions or complaints alleging violations of individual human rights are dealt with by the Committees established for that specific purpose, but they are not vested with the same degree of powers or competence as the ICC. In other words, some privileges enjoyed by the ICC such as the power to hand down judgement are not granted to the Committees. This makes the work of the Committees ineffective and in many cases futile for law enforcement purposes.

Indeed, the effective implementation of the decisions made by the ICC ultimately depends on the goodwill of States. Still, from this point onward, it is no longer a question of the court's judicial competence, but rather a question of sanction and of moral values held by individual States. The issue here is in which skilful way could an effective sanction be formulated so that a State would have no other choice but to implement it within its national jurisdiction, because it felt that this sanction served its own interests as well as those of the international community at large, even though it might have to observe it under constraint.³¹⁸ For no State would 'feel' happy to bow to international pressure and besides, there could be some financial or political consequences taking place.

4. International Practices Similar to Judicial Review

Article 2(3) of the United Nations Charter states that all Member States "shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered". This article means that there is no general rule requiring states to settle their grievances, but that if they decide to do so, this must be

³¹⁸ More on the theory of sanction and punishment, *see*, Igor Primoratz (1989). *Justifying Legal Punishment*, New Jersey, London: Humanities International Press, particularly pp. 1-31. On the effectiveness of the United Nations sanctions, *see*, Willem J.M. van Genugten and Gerard A. de Groot (eds.) (1999), *United Nations Sanctions, Effectiveness and Effects especially in the Field of Human Rights - A Multi-disciplinary Approach*, Antwerpen: Intersentia.

done in a peaceful manner. The absence of a general obligation to settle disputes is reflected by the fact that the jurisdiction of the International Court of Justice (ICJ) is not compulsory. Thus, a state cannot be compelled to submit a dispute with another state to a third party such as the ICJ for settlement unless it has agreed upon it.³¹⁹

Under international law, many procedures to settle disputes have been implemented; although, from a legal point of view, these are relatively obsolete. As a matter of fact, such procedures for the supervision and pacific settlement of disputes have been developed through old-fashioned processes in which the acts and omissions of the States could be reviewed for their conformity with international legal norms. Most of these procedures have a non-judicial character.³²⁰ Nevertheless, it is perhaps valuable to consider some of these procedures before possibly coming to the conclusion that an international judicial review is needed.

The said procedures vary greatly among themselves and can be any of the following:

- consultation between States parties;
- settlement of disputes through mediation and good offices;
- inquiry and conciliation (under the direction of one or more other States, a commission or an organ of an international organisation);
- specific settlement of disputes of non-judicial supervision;
- pacific settlement of disputes within the framework of international organisations or regional machinery.

³¹⁹ The only exception to this rule is the obligation of states under Art. 33 of the Charter which requires a state to submit disputes which are likely to endanger international peace and security to third party for a peaceful settlement.

³²⁰ P van Dijk, *Judicial Review of Governmental Action*, Ibid., at p. 363.

In general, most of these procedures concern the settlement of disputes of a specific nature; such as in diplomacy, problems relating to the international economy and trade co-operation, and other related matters such as disputes about territorial borders.³²¹

4.1. Negotiation

As in the national legal system, the most common method of settling a dispute is through negotiation which appears to be the best option because it is simple and it does not involve a third party.³²² However, the procedure can only operate if the disputants have agreed to adopt this method of settlement, which would then in turn affect the binding power of the settlement. If the parties concerned so decide jointly, the outcome of the procedure can become legally binding and then it may be set in the form of a treaty. Otherwise, the outcome can be recorded in an exchange of notes or diplomatic memoranda, which have no legal effect.³²³ The agreement between the People's Republic of China and the United Kingdom over the future of Hong Kong is an example of this second option.

³²¹ See, for instance, M. Dixon (1993), *Textbook on International Law*, London: Blackstone Press Limited, pp. 222-245 with Malcolm M. Shaw (1997), *International Law*, 4th Edition, London: Cambridge University Press, pp. 717-774 and Ian Brownlie (1998), *Principles of Public International Law*, 5th Edition, Oxford: Clarendon Press, pp. 703-706.

³²² Malcolm M. Shaw, *International Law*, *Ibid.*, p. 720.

³²³ M. Dixon, *International Law*, *Ibid.*, at p. 223.

4.2. Good Offices and Mediation

Unlike negotiation, the use of the procedures of good offices and mediation involves the service of a third party. This third party may be an individual or individuals, a State or a group of States, or else one or more international organisations.³²⁴

The main role of this third party is to persuade and encourage the contending parties to sit at the negotiating table to settle their differences. The person offering good offices must be a neutral and trustworthy party who is external to the negotiation, such as the American General Alexander Haig in the *Falkland Islands* war between the United Kingdom and Argentina.

The procedure of mediation is simply an extension of good offices. A mediator is a person approved by the opposing parties whose task is to suggest the terms and conditions of a settlement, so that he or she is actively involved in the negotiation. United Nations envoys, for example, have been active in this type of process with regard to the conflict in former Yugoslavia. Mediation and good offices are thus a preliminary procedure of negotiation.³²⁵ A number of rules governing these two procedures are laid down in The Hague Conventions for the Pacific Settlement of Disputes of 1899 and 1907.

³²⁴ Malcolm Shaw, *International Law, Ibid.*, at p. 723.

³²⁵ More on the procedures, see *International Court of Justice Report 1969*, in the North Sea Continental Shelf Cases, pp. 3 and 47, also, *ICJ Reports 1974 in the Fisheries Jurisdiction*, pp. 3 and 32.

4.3. Inquiry

Generally speaking, a commission of inquiry can be set up in which reputable observers investigate the evidence in detail when differences of opinion on factual matters underlie a dispute between parties. The parties to a dispute will agree to refer the matter to this impartial body who will engage in an unbiased fact-finding task.³²⁶ It is up to the parties to negotiate a settlement based on its findings and just like the other procedures noted above, the settlement has no legal binding force. Although established as a fact-finding body, the commission of inquiry works according to the judicial pattern in the sense that its reports contain legal conclusions. This is not surprising since the majority of the members of the commission are usually lawyers.³²⁷

4.4. Conciliation

Conciliation can be regarded either as a non-judicial or as a semi-judicial procedure for the settlement of international disputes. The procedure of conciliation implies the reference of a dispute to a third party, usually a commission or committee, whose task it is to propose recommendations for settlement. Conciliation commissions are different from commissions of inquiry because the latter do not produce concrete proposals for settlement. The 'semi-judicial' aspect of the work of a conciliation commission derives

³²⁶ M. Dixon, *International Law, Ibid.*, at p. 224.

³²⁷ *The Red Crusader Case* which concerned a British trawler and a Danish fisheries protection vessel which subsequently involved a British warship (a frigate) in 1962. The commission of inquiry came to the conclusion that the British frigate had 'exceeded the legitimate use of armed force'. See Malcolm Shaw, *International Law, Ibid.*, at p. 726.

from its competence to elucidate facts, hear the parties and formulate decisions in the form of proposals.³²⁸

The rules which define conciliation were drawn up in the General Act on the Pacific Settlement of International Disputes of 1928, revised in 1949. Under this procedure, a settlement is generally proposed by a neutral third party and has no legal binding effect. One example of a conciliation procedure is the *Jan Meyen Conciliation Commission (Iceland v Norway)* in 1981. In practice, the settlements proposed by conciliation commissions form the basis for the arbitration of further settlement procedures.

4.5 Arbitration

The procedure of arbitration was held to be the most effective and equitable manner of settling international disputes where diplomacy had failed. The procedure grew to some extent out of the processes of diplomatic settlement and represented an advance towards a more developed international legal system.³²⁹ Like all methods of pacific settlement in international law, arbitration is voluntary and may take place on *an ad hoc* basis or according to any other specific arrangement that the parties involved might have agreed upon. Prior to this process, the States concerned must consent to the exercise of jurisdiction by the arbitrators.³³⁰

The most notable arbitration procedure that was ever carried out and is still regarded as the model of modern arbitration was the Jay Treaty of 1794 between the U.S.A. and Great Britain. The procedure was successfully used again in the *Alabama Claims* arbitration of

³²⁸ Ian Brownlie, *Principles of Public International Law*, *Ibid.*, p. 704.

³²⁹ Malcolm Shaw, *International Law*, *Ibid.*, pp. 737-738.

³³⁰ M. Dixon, *International Law*, *Ibid.*, p. 228.

1872 between the two countries, and resulted in the compensation payment by Great Britain to the U.S.A. for breaches of contractual obligations on the building of warships. Subsequently, in accordance with the conventions signed in The Hague in 1899 and 1907 (particularly Articles XV and XVIII), a permanent Court of Arbitration was established.

Actually, it is not really a court as such since it does not consist of a set number of judges. Rather, it consists of a panel of persons nominated by the contracting States (with a maximum of four national representatives), and comprises individuals of 'known competency in questions of international law, of high moral reputation and disposed to accept the duties of an arbitrator'.³³¹ Arbitration tribunals may thus consist of a single arbitrator or of a collegiate body of judges.

In 1958, the General Assembly adopted the Model Rules on Arbitral Procedure proposed by the International Law Commission.³³² These rules were, however, merely optional. In 1992, the Permanent Court of Arbitration itself adopted the Optional Rules for Arbitrating Disputes between Two States³³³. Generally, the law to be applied in arbitration is international law, but the parties may agree upon certain principles to be taken into account by the tribunal and specify this in the *compromis*³³⁴. This principle was applied in the *British Guiana and Venezuela Boundary* dispute and in the *Trail Smelter Case*.

It is an important characteristic of arbitration that the tribunal has the competency to determine its own jurisdiction and therefore to interpret the relevant legal instruments

³³¹ Article XLIV of the Hague Convention as revised in 1907.

³³² General Assembly Resolution 1262 (XI) (1958).

³³³ These were based on the UNCITRAL (United Nations Commission on International Trade Law) Arbitration Rules adopted by the UN General Assembly on 15 December 1976 in its resolution 31/98. See, for example, Ian Brownlie, *Principles of Public International Law*, Ibid., at p. 706.

³³⁴ A *compromis* is a kind of arbitral decision based on the parties' consent and agreement. It is final and binding.

determining that jurisdiction. Once an arbitral award (that is, the decision) has been made, it is final and binding on the parties concerned, but in certain circumstances the award itself may be regarded as null. Nullity of award occurs when the tribunal exceeds the powers that it was given by mutual consent in the *compromis*.³³⁵

4.6 A Brief Analysis

It is clear that these procedures for settlement of disputes by peaceful means deal specifically with grievances between states. They do not relate to individual complaints. Besides, the grievances dealt with under these procedures do not concern human rights violations by any means. As mentioned above, complaints about human rights violations are dealt with by special bodies under special procedures according to special laws and provisions.

Of all the international legal resources mentioned above, not one can be invoked by individuals claiming that their rights have been violated as a result of State abuses or poor national legislation. This takes us to the next step in the search for a better protection of individuals in the field of human rights.

5. International Judicial Review as a Complementary Procedure

The following sections deal with two crucial issues on which the possibility of making international judicial review available is hinged: who shall possess the power of judicial review and by what legal principles is it underpinned? Prior to discussing these questions,

³³⁵ Malcolm M. Shaw, *International Law, Ibid.*, p. 740.

I will enumerate some of the advantages of international judicial review as a complement to other existing mechanisms.

5.1. The Complementary Functions of International Judicial Review

In the previous discussions, it has been noted quite extensively that the existing international legal tools for the promotion and protection of individual human rights only provided individual victims with limited redress. The disadvantages of the procedures came by and large from the defending bodies' inability to produce legally binding decisions on the parties involved in human rights violations and from the fact that communications before these international bodies were generally only acceptable on the condition that all available and effective domestic avenues had been exhausted beforehand.

It is precisely in connection with these frustrating limitations that the proposed international judicial review might constitute a breakthrough. As in national law, the outcome of international judicial review proceedings could have legal binding force on the parties involved. Besides, in order to ensure the acceptance and implementation of its decisions, forcible means (i.e. international sanctions³³⁶) and other available measures could be authorized. The power to exercise judicial review of government acts and

³³⁶ To mention just one example is the IMF sanction to suspend loan and other financial assistance imposed by the organisation upon the Indonesian government. One of the major conditions of the loan was a fundamental change (amendment) of Indonesian legislation in banking. It has been proved that this sanction worked effectively. Currently there is a major restructuring in banking taking place in Indonesia. See, The Jakarta Post, 31 December 2000, at <http://www.the-jakartapost.com>, access date: 10/01/2001.

legislation might be given to the International Court of Justice - as a court, it would certainly deliver final and binding judgement upon all parties.³³⁷

Another major bonus of the procedure would be the bypassing of the “exhaustion of domestic legal avenues” requirement found in the procedures before the treaty bodies. As mentioned above, it can take individuals a very long time to meet this requirement – even if there are some exceptions possible where the existing domestic remedies are unavailable, ineffective or even non-existent. It is also fraught with uncertainty, not to mention the heavy financial and possibly psychological burden that individuals may have to carry in the process. In short, it is just “as good as impossible” for individuals to fulfil their obligation in this particular area.

Under the proposed international judicial review, which targets this very issue, this prerequisite could be scrapped. As in domestic law, the individual could be permitted to file a lawsuit requesting a court review of the lawfulness of a particular act of government or legislation, without having to exhaust other “preliminary” procedures first³³⁸. This way, if an individual claimed that, by international standards, his or her human rights had been, or might be, violated by certain government acts or regulations, he or she would be allowed to file a lawsuit directly to the International Court of Justice instituting judicial review (more on this in Chapter 6).

Although it seems possible at this point to conclude that international judicial review is necessary to complement other international procedures currently in force under various forms, it is not a simple matter of need. It is also a matter of finding legitimate and

³³⁷ Articles 59 and 60 of the Statute of the ICJ.

³³⁸ See and compare, *supra*, discussion on judicial review in chapter 2.

reasonable answers to some fundamental questions such as who shall possess that power, should there be judicial review power for the ICJ, what is the source of the power and what is the scope of this type of judicial review.

5.2. Who Shall Possess the Power of Judicial Review?

For cases of human rights violations based on legislation (as is the case in Indonesia), and considering Prof. Scheinin's argument and idea³³⁹, the ideal judicial institution to possess the power of international judicial review would be some sort of world human rights court.

Constitutional law theory and practical national law models suggest that the competence of judicial review is one of a court's functions. Judicial review is a procedure whereby an individual challenges an allegedly unfair or unlawful government decision or action. In the course of the examination process, the court shall declare whether or not the action or decision is legal. If it is found to be illegal or unconstitutional, the decision must be declared invalid and must be revoked.³⁴⁰

At international level, despite all the limitations due to Charter regulations, the International Court of Justice (ICJ) has been the principal judicial organ of the United Nations. As a World Court,³⁴¹ the ICJ has proved to be capable and impartial in settling

³³⁹ See Scheinin on the "tentative characters of a World Human Rights Court", at *infra*, note 296

³⁴⁰ See, among others, Stanley de Smith, H.K. Woolf, A.P. le Seur & J.L. Lowell, (1995), *Judicial Review of Administrative Action*, 5th edition, London: Sweet & Maxwell; Grahame Aldous & John Alder (1993). *Application for Judicial Review: law practice of the Crown office*, 2nd edition, London: Buttersworth; Sue Arrowsmith (1988), *Government Procurement and Judicial Review*, Toronto: Carswell; cf., *supra*, discussion in chapter 2.

³⁴¹ *First sentence* of the Foreword of the booklet on the International Court of Justice at <http://www.icj-cij.org/icjwww/igen...formation/ibbook/Bbookforeword.htm>, access date: 23/10/2001. *Sir Robert Y. Jennings*, the former president of the Court used this term occasionally to refer to the ICJ, which

international disputes. In the light of these facts, the International Court of Justice should be entrusted with the power of judicial review.³⁴²

5.3. *Should there be a Power of Judicial Review for the ICJ?*

While discussion on the possible establishment of a world human rights court has merit, overall use of the International Court of Justice is a better option. A multi-level approach to this issue will be used by emphasizing three of its aspects: the Indonesian domestic example, the inherent competence of the International Court of Justice and the ever-increasing demand for a new world order.

5.3.1. The Indonesian Example

The Indonesian legal system does not permit the court to review legislation at a higher level than *Peraturan Pemerintah* (PP) or Government implementing regulation. The PP is the instrument for the practical application of a law or of a parliamentary act; both of which are issued at a superior level and are decreed by the President. In practice, this PP will be further implemented in various legal documents such as *Keputusan Presiden* (Keppres) or Presidential Decree, *Keputusan Menteri* (Kepmen) or Ministerial Decision,

probably goes back to Judge Manley O. Mason. The term is current in legal literature in English and not in Spanish, French or Arabic. It is thus familiar mainly to common-law jurists. The expression ultimately suggests that it is a court of and for the whole world. Moreover, it is also a judicial organ of the international legal order, a higher court on a world level and as an instrument of world governance. See, Georges Abi-Saab "The International Court as a World Court" in Vaughan Lowe and Malgosia Fitzmaurice (1996), *Fifty Years of the International Court of Justice*, Cambridge: Cambridge University Press, pp. 3-16. For an extensive essay on the ICJ as the World Court, see, Shabtai Rosenne (1995), *The World Court, what it is and how it works*, 5th edition, Dordrecht: Martinus Nijhoff Publishers.

³⁴² For personal view of the former President of the Court, see, Nagendra Singh (1989), *The Role and Record of the International Court of Justice: 1946 – 1988, in celebration of the 40th anniversary*, Dordrecht: Martinus Nijhoff Publishers, pp. 76-82 (more general in chapter V) also, compare with Renata Szafarz (1993), *The Compulsory Jurisdiction of the International Court of Justice*, Dordrecht: Martinus Nijhoff Publishers, in particular at pp. 1-14.

etc. All of these regulations are lower in rank than the Law and are subject to court judicial review upon petition. Above the law are the *Ketetapan MPR* (Tap MPR), which is the Decree of the nation's highest state institution or People's Consultative Assembly, and, of course, the Constitution itself.³⁴³

State policies and goals, including provisions for human rights protection, are set forth in the Constitution and Tap MPRs and these, under the Indonesian legal system, are very general and vague. Laws and other lower regulations will further define those provisions and finally, after various presidential or executive decisions, they will be carried into effect. These lower regulations may not contradict the higher regulations. So, if provisions contained in the Constitution, Tap MPRs and Laws are in contravention with international standards, and this has been the case until now, they cannot be amended, for those regulations are not subject to national judicial review procedure.³⁴⁴

In the interest of Indonesian individuals, these facts should be sufficient to come to the position that there should be no opposition to the idea of the establishment of international judicial review. This can of course happen if support can be obtained from the international community and organisations, e.g the United Nations. In all likelihood the Indonesian government will reject such ideas. However, recent developments in the area of economic recovery programmes have proven that under intensive international pressure Indonesia is willing to make changes in its banking and trade laws³⁴⁵.

³⁴³ See, *supra*, discussion in Chapter 3 on the Indonesian Legal System.

³⁴⁴ The 1945 Constitution does not even make provision on judicial review. The procedure is provided for in various laws on judiciary such as UU Nos. 14/1970 and 14/1985, and it is a very restricted procedure. See, *supra*, discussion in Chapter 3.

³⁴⁵ Government Report on Banking Law Reform Program that has been on the way since 1999 to the time of writing.

The first reason is that Indonesian law does not permit individuals to challenge national legislation on the strength of human rights standards recognised by the international community. The second reason that Indonesia has failed to provide satisfactory mechanisms for the protection of human rights.

5.3.2. The Inherent Competence of the International Court of Justice

As a court for the settlement of international disputes and as the principal judicial organ of the United Nations, the International Court of Justice should possess the power of judicial review. It is a role the Court already plays in a limited way as it gives advisory opinions and delivers decisions on matters such as the interpretation and implementation of treaties and resolutions.³⁴⁶

Article 92 of the Charter states that the Statute of the International Court of Justice is an integral part of the Charter. This statement points to at least two possible interpretations of what 'integral part' means. The first is that the Statute is essentially dependent on the Charter. The second and more generally accepted view is that any problem of

³⁴⁶ Since it began work in 1946, to 1996 the ICJ has given 23 advisory opinions and delivered 61 judgements. The General Assembly has requested 14 advisory opinions of the Court 13 cases, for example, The Conditions of Admission of a State in the United Nations (Article 4 of the Charter); the Security Council has requested advisory opinion of the Court concerning the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970); the ECOSOC has requested advisory opinions of the Court in two cases, one of them is the Applicability of the Article VI section 22 of the Convention on the Privileges and Immunities of the United Nations; the Executive Board of the UNESCO has requested advisory opinion of the Court in the case concerning Judgements of the Administrative Tribunal of the ILO upon Complaints Made Against UNESCO; WHO has requested advisory opinions of the Court in two cases, one of them is the Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt. A complete list of advisory opinions can be found at <http://www.icj-cij.org/icjwww/ibasictext/advisoryopinions.htm>, access date: 23/10/2001. Some of the Court's decisions: the Provisional Measures in the Questions of Interpretation and Application of the 1971 Montreal Convention (Lockerbie Case - Libya Arab Jamahiriya v. United Kingdom) of 14 April 1992, Judgement of 30 June 1995 on the Jurisdiction of the Court and Admissibility of the Application (the East Timor Case). A complete list of Court's orders and judgements can be seen at <http://www.icj-cij.org/icjwww/idecisions/casesbycountry.htm> access date: 23/10/2001.

interpretation is to be solved in line with the general direction and functions of the United Nations. This outlook implies in its turn that the Statute would certainly be able to support a power of judicial review even if it was not mentioned in the Charter.³⁴⁷

Article 24(2) of the Charter, for instance, states that the Security Council must exercise its power "... in accordance with the purposes and principles of the United Nations". Elsewhere, the Charter requires that these purposes and principles be carried out "... by peaceful means and in conformity with the principles of justice and international law." On the basis of these requests, the Court should possess the power of judicial review to examine legally, but not politically, whether the United Nations' recommendations have been duly implemented.

As a Member of the United Nations, a State has the obligation to introduce international human rights principles and standards into its national law (articles 1, 55, 56 of the Charter). In accordance with this principle, it is not such a huge step to go one step further and also adopt measures so that the Court is able to examine whether or not a member State has fulfilled its obligation to the Charter in the field of human rights.

The Statute emphasises that the Court is the principal judicial organ of the United Nations (Article 1). The Court's competence is outlined in Chapter II and its jurisdiction specifically addressed in Article 36. Although no mention is made of any power of judicial review, it would certainly be acceptable for the Court to be entrusted with such a power as the principal judicial body at international level. As Sir Robert Y. Jennings, a former president of the Court once maintained, it is only a matter of "... when and to what

³⁴⁷ Ken Roberts (1995), "Second-Guessing the Security Council: The International Court of Justice and Its Powers of Judicial Review" in *Pace International Law Review*, spring 1995, at <http://www.igc.org/globalpolicy/wldcourt/roberts.htm>, access date: 16/04/2001, p. 4 of 28.

extent the Court might or should have powers of judicial review of administrative action and of political decision. These are not simple but rather complex questions of basic importance for the legal character of the United Nations; and it is a gratifying sign of the maturity of the system that they should be dealt with by the ICJ, one way or another.”³⁴⁸

5.3.3. A New World Order³⁴⁹

The call for the International Court of Justice to assume a more prominent role in settling international disputes as part of a new world order has never been so intense as it is to date. The role and function of the Court as ‘the principal judicial organ of the United Nations’ is manifold: it is at once a court for the whole world, a judicial organ of the international legal order, a higher court on a world level and an instrument of world governance, which in turn has implications that go beyond the Court’s position within the international legal order.³⁵⁰

Through its special contribution to the settlement of international disputes, the Court partakes in world governance by taking a preventive approach to the pursuit of the first purpose of the United Nations, namely the maintenance of peace and security. In playing this role, the Court attracts an ever-increasing volume of work and this testifies to its growing involvement in the establishment of a new world order and the development and evolution (*novum*) of international law.³⁵¹

³⁴⁸ “The Role and Functioning of the Court” in *ICJ Yearbook 1992 – 93*, p. 251.

³⁴⁹ Generally, this refers to the post-Cold War era of the 1990s.

³⁵⁰ Cf. *supra*, note 325.

³⁵¹ This is the era where the Court is beginning to be seen as ‘a resort to be employed in close relationship with normal diplomatic negotiations rather than as a last resort’ where all else has failed (Sir Robert Jennings’ address to the General Assembly as the president of the ICJ [UN Doc. A/48/PV.31] of 8 November 1993). On the contributions made by the Court for the development of international law, *see*, Nagendra Singh, *The Role and Record of the International Court of Justice*, *Ibid.*, pp. 137-164 (chapter IV).

In the cases *Passage through the Great Belt (Finland v. Denmark)*³⁵² and *Certain Phosphate Lands in Nauru (Nauru v. Australia)*³⁵³, for instance, the perception that ‘recourse to the Court might usefully be employed at an earlier stage of disputes’ has been more widely accepted. In those two cases the parties have settled their disputes out of court after pleading them before the ICJ. This kind of intervention of the Court can be said to partake of ‘preventive diplomacy’ *lato sensu* by opening the way to a direct settlement of the dispute.³⁵⁴

If it were entitled to practise judicial review, the Court would be able to play that kind of role in preventing human rights violations caused by government act or state legislation from happening. In the words of Sir Robert Jennings: “Whenever the Court or its procedure can help in this way, the Court is, in an important sense, still productively at work.”³⁵⁵

5.4. *The Source of Judicial Review*

In this particular part of the discussion, it will be suggested that the International Court of Justice may already possess powers of judicial review. In support of this argument, four possible sources of power will be examined: the United Nations Charter, the Statute of the International Court of Justice, historical facts or *travaux préparatoires* of the Charter and certain developments of case law.

³⁵² *ICJ Reports*, 1992, p. 348.

³⁵³ *ICJ Reports*, 1993, p. 322.

³⁵⁴ Georges Abi-Saab, “International Court as a World Court”, *Ibid.*, at p. 15.

³⁵⁵ *Ibid.*, ICJ Yearbook 1992 – 93.

5.4.1. The U.N. Charter

Chapter XIV of the Charter deals specifically with powers attributed to the International Court of Justice. Article 92 states that the Court shall be the principal judicial organ of the U.N. and shall function in accordance with the annexed Statute of the ICJ. By virtue of this article, especially the phrase "principal judicial organ", it may actually be implied that the Court possesses judicial review power if States parties agree that there should be a judicial body with the authority to examine the validity of acts issued by other organs of the United Nations or State governments. However, it is obvious that no judicial review power can be based solely and directly on this provision of the Chapter.³⁵⁶

5.4.2. The Statute of the ICJ

The next possible source of judicial review power for the Court is the Statute of the International Court of Justice. Article 1 of the Statute confirms the specific existence of the ICJ as the principal judicial organ of the United Nations. The 'complete' competence of the Court is outlined in Chapter II while its jurisdiction is set down in Article 36. The connection between the Statute and the Charter is formalised by Article 92 of the Charter, which states that the Statute is an **integral** part of the Charter. On the strength of this argument, the Statute would certainly be able to support the Court's power of judicial review even if it did not exist in the Charter³⁵⁷. However, there is not a single paragraph or line in the Statute which mentions any power of judicial review in so many words. Once again, it can only be implicitly deduced from the phrase that the Court is the 'principal judicial organ of the United Nations'. A best therefore, it is a potential role

³⁵⁶ Ken Roberts, *Second-Guessing the Security Council: the International Court Of Justice and its Powers of Judicial Review*, *Ibid.*, p. 3 of 28.

³⁵⁷ Ken Roberts, *supra*, note 339.

which the Court could play, but would probably require some type of modification to the Statute in order to enshrine such a role from a legal point of view.

5.4.3. Historical Facts

The history of the U.N. Charter shows that there was originally a strong desire to grant the Court a power of judicial review, although the *travaux préparatoires* of the Charter in the San Francisco Conference on International Organisation was sternly against the idea. Belgium was the leading country proposing that a judicial review power should be given to the Court. The idea was based on the assumption that the Security Council might make decisions which would breach the essential rights of Member States. It was suggested that the proposed amendment would be added into the Charter's Chapter VI on the Pacific Settlement of Disputes. But this did not come to pass because it was feared that the Belgian Amendment would weaken the Security Council too much.³⁵⁸

Later on, still in the same Conference, Belgium once again raised the issue of empowering the Court with judicial review competence, but this time before the Committee on legal problems. The proposal was to establish a proper interpretative organ for certain parts of the Charter with the Court being the obvious possibility. The proposal was once again rejected on the ground that the General Assembly, the Court or *ad hoc* committees could fill the role themselves³⁵⁹. The French amendment, which strongly supported the idea of giving judicial power to the court, was also rejected³⁶⁰.

³⁵⁸ Proposal at the San Francisco Conference in International Organisation, UN Doc. 433/III/2/15 or Conference (UNCIO) Documents Nos. 47 and 48 (1945).

³⁵⁹ UN Doc. 664, IV/2/33, UNCIO Doc. 633 (1945).

³⁶⁰ That was a concept made by the French delegation to the Conference, suggesting points similar to that of Belgium's.

It was clear that the majority of the participants were not in favour of giving judicial review power to the Court but they were certainly not against the procedure *per se*. The Charter itself recognises judicial review-like practices in case Member States disagree with each other about the interpretation of the Charter. The Court will then be asked for its advisory opinion on the matter. Therefore, it can be argued that what the Charter rejected in the wake of the conference was the idea of the establishment of permanent judicial review procedure.³⁶¹

5.4.4. The Development of Judicial Review in Case Law

Examples of the Court's power of judicial review can also be found in the decisions of the Court in certain cases.

a. Certain Expenses Case

In this case, the General Assembly requested an advisory opinion from the Court on whether Member States had to pay expenses related to the United Nations operations in Congo in 1960-61 and in the Middle East in 1950. The requested opinion was about Article 17(2) of the Charter which stated that the "expenses of the Organisation [should] be borne by Member States as apportioned by the General Assembly". The question was whether or not this rule included expenses incurred by such operations.

³⁶¹ Ken Roberts, *Ibid.*, p. 6 of 28.

The opinion of the Court was basically in support of the view that each organ must determine its own jurisdiction.³⁶² It called for the Court to decide first whether the expenditures authorised by the General Assembly were in conformity with the Charter. Despite the fact that the request was not granted, the Court reserved for itself, if it so wished, the right to examine whether the act of the General Assembly was in line with the Charter provisions.

The Court's statement was that as long as the act fulfilled one of the stated purposes, "the presumption [was] that such action [was] not *ultra vires*." It would appear that the Court reserved for itself the power to review the validity of actions taken by the organs of the United Nations. Since then the 'presumption of validity' has served as the Court's standard of review.³⁶³

b. The Namibia Case

In this case, the Court was asked for advisory opinion on the Security Council Resolution No. 270 demanding South Africa's withdrawal from Namibia because, due to its apartheid practices, it had violated the Mandate that it had been given.³⁶⁴ The resolution thus put an end to the Mandate. The Court's opinion on this case was that the Council had not violated the 'presumption of validity' principle in its resolution despite claims by France and South Africa that the Council's decisions were *ultra vires*.³⁶⁵

³⁶² *Certain Expenses Case*, ICJ Report, 1962, at p. 168.

³⁶³ Ken Roberts, *Ibid.*, at p. 7 of 28.

³⁶⁴ Mandate of the League of Nations authorising South Africa to administer the so-called Mandate for Namibia in the territory then known as South-West Africa following World War I.

³⁶⁵ *Namibia Case*, ICJ Reports 1971, p. 53.

This opinion reflects the view that the Court, when asked to do so, may not avoid putting to the test the legality or validity of any resolution made by any organ of the United Nations.

c. Lockerbie Case (Provisional Measures)

In this case the Court was asked once again to give its advisory opinion based on the suits filed by Libya against the U.S. and the U.K. alleging that both states had violated the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Sabotage) of 1971 by continuing to attempt to gain custody of two Libyan nationals implicated in the case. In its application, Libya argued that the Security Council resolutions³⁶⁶ regarding the bombing incident, upon which the U.S. and the U.K. based their demands, were *ultra vires* because they violated Article 7 of the said Montreal Convention. It further asked the Court to order provisional measures regarding the imposition of sanctions.³⁶⁷

Article 7 of the Montreal Convention, recognising the *aut dedere aut judicare* principle, establishes that the country of origin of the suspects of air sabotage may choose either to surrender its nationals to foreign jurisdiction for trial or to have its own court procedure.

On 14 April 1992 the Court, in relation to the refusal to comply with Resolution 731, ruled that “the rights claimed by Libya under the Montreal Convention ... were not appropriate for protection by the indication of provisional measures; an indication of the

³⁶⁶ Security Council Resolution 731 on 21 January 1992 requested that Libya surrender its two nationals involved in the bombing of Pan Am flight 103 over Lockerbie, Scotland [UN Doc. S/Res. 731 (1992)] and Resolution 748 adopted on 31 March 1992, imposing universal and mandatory diplomatic and economic sanctions on Libya [UN Doc. S/Res./748 (1992)].

³⁶⁷ Letter from Ibrahim M. Bishari, the Secretary of State of Libya, to the ICJ dated 3 March 1992.

measures requested by Libya would be likely to impair the rights which appear *prima facie* to be enjoyed by the two respondent States (the U.S. and the U.K.) by virtue of Security Council Resolution 748.”³⁶⁸

In conjunction with Resolution 748 particularly, the Libyan application essentially left the Court with three jurisprudential options. Firstly, it could have maintained that the sanctions ordered by Resolution 748 should be suspended until such time as might be ascertained after which, at the merit stage, it could have declared that the claims were groundless. Secondly, it could have decided that since no sufficient case of *mala fides* or *ultra vires* had been established by Libya at this preliminary stage, there were no grounds upon which the Court could order such interim relief. Or thirdly, the Court could have declared that no relief would be forthcoming at any stage of the proceedings if granting that relief would require the Court to find out whether the Security Council had exceeded its Charter-mandated power (Chapter VII). It is obvious that the first two choices imply the right of judicial review whereas the third implies judicial restraint or abdication.³⁶⁹

So what did the Court choose in the end? It appears that the Court chose a soft version of the second option. The majority (11-5 votes) of the Court found that “both Libya and the United States, as Members of the United Nations, [were] obliged to accept and carry out the obligations imposed by Security Council in accordance with Article 25 of the Charter”, including obligations contained in Resolution 748. It further concluded that “the

³⁶⁸ *Lockerbie Case* (Libya v. U.K.), *ICJ Reports 1992*, p. 29.

³⁶⁹ Thomas M. Franck (1992), “The ‘Powers of Appreciation’: who is the ultimate guardian of UN legality?” in *American Journal of International Law* (July 1992) at <http://www.globalpolicy.org/wldcourt/franck.htm>, p 2 of 5.

obligations of the Parties in that respect [prevailed] over their obligations under any other international agreement, including the Montreal Convention.”³⁷⁰

Before handing down judgement, the Court was once again challenged to decide the matter in the judicial review-like manner in which it examined the lawfulness and conformity of the Council resolutions with the Charter and the 1971 Montreal Convention.

d. Bosnia-Herzegovina v. Federal Republic of Yugoslavia (Serbia and Montenegro)

In March 1993 Bosnia-Herzegovina submitted an application to the Court seeking provisional measures in order to stop Yugoslavia's acts of genocide. In response to this request, the Court ordered Yugoslavia to stop any genocidal actions and also indicated further measures that needed to be taken.³⁷¹ However, this order could not stop the violence and so another request was filed with the Court by Bosnia-Herzegovina on 27 July 1993 asking that the Security Council's Weapon Embargo Resolution 713 in 1991 be declared invalid.

The resolution was adopted when Bosnia-Herzegovina was still part of federated Yugoslavia, but by 1993 they had split into two different states. Bosnia-Herzegovina based its argument on the fact that due to the weapon embargo imposed through the resolution, it could not defend itself against Yugoslavia. Yugoslavia was clearly taking advantage of the provisions in the resolution. However, these provisions were in breach of

³⁷⁰ *Id.*, at p. 3 of 5.

³⁷¹ Court Order on the case, 8 April 1993, *see*, Bosnia-Herzegovina v Yugoslavia *ICJ Reports 1993*, p. 332.

Bosnia-Herzegovina's inherent right to self-defence under Article 51 of the Charter in particular and customary law in general.

This request led to a second order of the Court on 13 September 1993. In this decision, one of the central issues considered by the Court was whether the weapon embargo provisions set forth in the Security Council Resolution 713 were valid or not. This time again, the Court could not avoid reviewing the validity of the Resolution, using as basis not only the Charter but also the principles of customary international law e.g. *jus cogens*³⁷². This proves that there have been cases dealt with by the Court in the manner of judicial review. Thus, without explicit power entrusted to it, the Court has been using judicial review procedure in its journey of work to settle international disputes.

In addition, there are also statements or opinions from experts and judges in favour of the judicial review power of the Court.³⁷³ Judge Bedjaoui, for example, favouring the judicial power of the Court as opposed to the dominating power of the Security Council, asserted that a degree of balance should be achieved and that "the Court should not be displaced from exercising its primary judicial function." He felt that its primary judicial function should include judicial review power on legislative acts and actions.³⁷⁴

In light of the cases mentioned above, it appears that from now on, it is going to be increasingly inevitable for the Court to be granted powers of judicial review.

³⁷² Ad hoc *Judge Lauterpacht*, for example, asserted that the prohibition against genocide has long been established as a principle of *jus cogens*. See, *ICJ Reports 1993*, *Ibid.* p. 440.

³⁷³ Brief quotations of these opinions can be read, for example, in Ken Roberts' "Second-Guessing the Security Council: the International Court of Justice and its Powers of Judicial Review, *Ibid.*, pp. 10–15 of 28.

³⁷⁴ *Id.*

6. Summary

Together with wars and armed conflicts, State acts and actions have become the main cause of gross violations of human rights. Abusive acts and actions of State governments, beside actual acts of violence, often assume the form of legislative enactments. By issuing laws that abuse human rights, a State legitimises its misconduct which violates the rights of individuals.

Despite the availability of a number of international procedures for the protection of human rights against abusive State acts or regulation, these provisions may still be regarded as insufficient due to the limitations of these procedures and the unwillingness of a State involved in such a case to comply with international decisions. The decisions made under such procedures are not legally binding on the States parties. The Committees that make these concluding remarks are not courts in the true sense. They do not hand down judgements, they merely give their opinion or views in which recommendations and suggestions are formulated. The implementation of these recommendations heavily depends on the willingness of the State party, despite the fact that their contents can be very specific (e.g. amendment of legislation).

Other major weaknesses in the implementation of this system are time and material as well as immaterial costs e.g. feelings of frustration. This is mainly caused by the individual's endeavour to meet the requirement of 'exhaustion of all domestic legal avenues'. Having to first trail through of domestic legal procedures can cause more suffering than any individual may experience when his or her rights are being abused. This phenomenon can be found in countries in which the legal system does not provide

adequate procedures for individuals who claim that internationally recognised violations of their rights have taken place. With regard to this issue, Indonesia certainly is a case in point.

Therefore, it is time to make available another procedure, in addition to the already existing instruments, by which a State may be brought to task for being in breach of its legal international human rights obligations. Hopefully, this measure will be able to better protect individuals against the State's refusal to comply with its legal obligations and its abuses against its own nationals. The proposed procedure is the international judicial review of any government act or legislation that breaches human rights.

Any decision coming from this procedure will be legally binding and have legal force on all Member States of the United Nations because it will be issued by the International Court of Justice. By becoming part of the United Nations, every Member State recognises the judicial competence of the ICJ to hand down judgement as the principal judicial organ of the United Nations.

It is of course true that at this stage there is no explicit legal basis for the Court to hold a power of judicial review. But as the principal judicial organ of the world, and on the strength of historical facts as well as of the development of case law, it is no longer inconceivable the Court could be given such a power, despite States' obvious desire to protect their sovereignty, when one considers all of the recent developments in international law that have recognised – in areas such as human rights, world trade and even the environment – that such sovereignty must give way to the needs of the

international community in areas of mutual concern such as peace, security – and of course human rights.

Chapter 6

A PROPOSED PROCEDURE FOR INTERNATIONAL JUDICIAL REVIEW

1. Preliminary Remarks

In the last chapter, I argued that international judicial review was necessary in order to complement the other existing international procedures for dealing with individual complaints of human rights violations. I also recommended that powers of judicial review should be entrusted to the International Court of Justice and demonstrated that such powers had actually been put into operation in various cases (essentially with treaty powers). Logically, the next queries are now: “How would this procedure operate? What are the possible rules of the procedure?”

These questions are narrowly connected to certain issues such as who may bring a case to the Court, what are the conditions of admissibility of an application and what are the different stages of the procedure. However, first of all, what needs to be determined is who the parties to the procedure are. This issue is related to one basic problem that this study needs to address, namely, can an individual person or a group of people, besides a State, be party to a case before the International Court of Justice? Or is a person or a group of people eligible to submit a petition to the Court? This question needs to be answered satisfactorily before other queries are discussed.

Although this chapter will be dealing with those issues, it should be noted that the rules and stages of procedure proposed in this section are by no means final. At this stage, they only exist as theories or ideas. Nonetheless, they are not carelessly or groundlessly formulated since they follow the patterns and standard procedures generally adopted for

the petitions which are brought before the International Court of Justice and the existing Committees.

2. Who Can Bring a Case to the Court?

Article 34(1) of the Statute of the International Court of Justice confirms that only States are eligible to initiate proceedings before the Court. International organisations, other collectivities and private persons are not entitled to bring a case to the Court. All Member States of the United Nations (plus Switzerland, which is not a Member of the United Nations but has become party to the Statute of the International Court of Justice) are entitled to be heard before the court.³⁷⁵

Under no circumstances is an individual, a private person or a group of people allowed to bring a petition i.e. have any *locus standi* before the Court. The only possible way of permitting individuals to submit an application to the Court is via amendment to the Statute. It can be amended only in the same way as the Charter, i.e. by a two-thirds majority vote in the General Assembly and ratification by two-thirds of member States, including the permanent members of the Security Council.³⁷⁶ Should the ICJ consider it desirable for its Statute to be amended, it must submit a proposal to this effect to the General Assembly by means of written communication addressed to the Secretary-General.³⁷⁷

³⁷⁵ See “Who can bring a case”, ICJ homepage at http://www.icj-cij.org/icjwww/iba...sictext/ibasic_who_bringcases.html, access date: 21/03/2000.

³⁷⁶ Article 108 of Charter of the United Nations in conjunction with Article 69 of the Statute of the ICJ.

³⁷⁷ Article 70 of the Statute of the ICJ.

The amendment proposal should, in the first instance, apply to Article 34(1) which declares that “only states may be parties in cases before the Court”. It should be added to this particular paragraph of the article that individuals are also entitled to submit their cases to the Court. The article could be formulated as follows: “States as well as individual persons or a group or groups of people may be parties in cases before the Court.”

However, this formulation still needs to be elaborated further since, in this context, individual persons would not be allowed to bring just any kind of case before the Court but only petitions specifically related to violation of international human rights. This takes us to the next step of the amendment proposal; namely the addition of another paragraph to Article 34 stipulating the specific type of cases in which a private person or a group of people may submit a petition to the Court to institute a judicial review procedure.

The additional paragraph would then read “The Court, subject to and in conformity with its Rules and other applicable international provisions of human rights, may hear and decide communications brought to it by individuals, or a group or groups of people, seeking judicial review of Government acts and/or State legislation, to which jurisdiction they are subject, alleging that the act and/or legislation is inconsistent with the international human rights provisions.”

Finally, an alteration or exception to the rule concerning the Court’s jurisdiction is also necessary. According to Article 36(2) the Court can only deal with a dispute when the States concerned have recognised its jurisdiction. Only then does the Court’s jurisdiction in contentious cases become compulsory for the parties concerned. Otherwise the

jurisdiction stipulated in Article 36 is optional or non-compulsory. This is a fundamental principle governing the settlement of international disputes in which the States are sovereign and free to choose the means of resolving their disputes.

The proposed exception should be addressed to the provisions stipulating the necessity of prior recognition of States before the Court's jurisdiction can be compulsory. Considering this factor, Article 36(2) could best be amended as follows:

- (2) The States parties to the present Statute may at any time declare that they recognise as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in, **with the exception of human rights related violation cases**, all legal disputes concerning ...etc.

The complete amendment proposal of Chapter II comprising of Articles 34 to 38 would read as follows:

Chapter II. Competence of the Court

Article 34

1. States **as well as individuals or a group or groups of people** may be parties in cases before the Court.
2. **The Court, subject to and in conformity with its Rules and other applicable international provisions of human rights, may hear and decide communications brought to it by individuals or a group or groups of people seeking judicial review of Government acts and/or state legislation, to which jurisdiction they are subject, alleging that the act and/or legislation is in contravention of international human rights provisions.**
3. Paragraphs 2 and 3 of the present Statute remain, but now become paragraphs 3 and 4.

Article 35 --- unchanged ---

Article 36

1. --- remains ---
2. The States Parties to the present Statute may at any time declare that they recognise as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in, **with the exception**

only of human rights violation related cases as mentioned in Article 34(2), all legal disputes concerning:

- (a) the interpretation of a treaty;
- (b) any question of international law;
- (c) the existence of any fact which, if established, would constitute a breach of an international obligation;
- (d) the nature or extent of the reparation to be made for the breach of an international obligation.

The rest of the provisions in this chapter should remain unaltered.

One cannot dismiss, however, the issue of whether such an amendment is in any way realistic. In response, it could be argued that it certainly is, because the Statute is not a holy book that cannot be altered. *Pantha rei*; everything changes. Nothing is eternal. What is eternal is change itself. Within the Court itself, amendments are by no means “taboo”, firstly by virtue of Articles 69 and 70 of the Statute and secondly, because it has already happened to the Rules of Court twice.³⁷⁸

A more reasonable question may perhaps be whether such a change could take place in the near future. This is of course a matter which depends on whether there is sufficiently strong political support from the international community for such a substantial shift, but as noted earlier these changes have already begun to appear on the international horizon.

What is needed is the kind of eagerness that has been the driving power behind the creation of the International Criminal Court. The maxim ‘where there is a will there is a way’ will find its true meaning in this exceptionally challenging situation. One could also say that desperate cases require desperate remedies. In addition to this, if one takes into

³⁷⁸ The first amendment was in 1972. The latest took place on 5 December 2000 and constitutes a revision of Articles 79 and 80 of the Rules of Court of 14 April 1978, and entered into force on 1 February 2001. Details of the changes can be seen in the Background Note by the Registry at http://www.icj-cij.org/ijcwww/ibas...ic_RulesofCourtbackgroundNote.htm, access date: 26/102001.

account the results that have been achieved so far in trying to secure the protection of human rights under existing mechanisms, one realizes that such a wish already exists, just waiting to become a reality.

Under this proposed procedure, there would not be any interstate communications. As a matter of fact, this procedure does not concern a treaty under which all States parties have agreed to fulfil their obligations or under which a State party may object and allege that another State party is not observing the terms of a mutual agreement. This principle is also in line with the concept of state sovereignty whereby it would be considered as an interference with domestic affairs for a state to submit complaints against another state's government acts or policies.³⁷⁹

Under the proposed amendment, it is understood that not only citizens are entitled to bring cases to the Court but also non-citizens provided they are 'subject to the State's jurisdiction'.

3. Stages of the Procedure

Applications to the Court for judicial review should be dealt with under the proceedings of contentious cases and not of advisory cases. The stages of the proposed judicial review procedure would, therefore, comprise three inseparable examination processes: receipt of

³⁷⁹ For a quite comprehensive discussion on the subject, see Juergen Brohmer. 1997. *State Immunity and Violation of Human Rights*. The Hague: Kluwer Law International.

communication, determination of the admissibility of communication and delivery of judgement.³⁸⁰

A further amendment to the Rules of Court would be necessary to accommodate these stages of procedure, for the present Rules do not make provisions for this procedure. *Materiae* of this possible amendment should cover the following issues.

3.1. Receipt of Communication

By virtue of the provisions set out in the present Statute and Rules of Court, *all* communications with the Court must be channelled through the Registrar.³⁸¹ In this proposed procedure, too, the Registrar should carry out his function accordingly.

In accordance with Article 40 of the Statute, on receipt of a communication, the Registrar will forward it to all the parties concerned (paragraph 1) and also, through the Secretary-General, to other Members States of the United Nations and other States which are not Members but entitled to appear before the Court (e.g. Switzerland).

As noted, all communications including *memorials*, *counter-memorials*, *replies* and other documents in support of the evidence shall be addressed to the Registrar before the latter transmits them to all the parties concerned. Exception to this rule is made under Article 30(1) of the Rules of Court which states that “any request made by a party shall be addressed to the Registrar *unless* made in the course of the oral proceedings.”

³⁸⁰ Details on the Proceedings before the Court provide Chapter III, Articles 39 – 64 of the Statute and Part III, Articles 30 – 101 Of the Rules of Court. Details on the examination procedure under treaty monitoring bodies, refer to *supra*, discussion in Chapter 4.

³⁸¹ Articles 40 of the Statute, 26(1)(a), 30 and 31 of the Rules of Court.

Pursuant to Articles 23 and 27 of the Rules of Court, a Deputy-Registrar shall assist the Registrar in the exercise of his function. Article 27 rules that if both the Registrar and the deputy-Registrar are unable to carry out their duties, the President of the Court shall appoint an official of the Registry to discharge those functions for a period of time as may be necessary (paragraph 1).

Unlike the High Commissioner for Human Rights in treaty-based procedures, the Registrar is not permitted to request additional information relating to the application from the parties to a case. Under Article 31 of Rules of Court, the President shall, in every case submitted to the Court, ascertain the views of the parties with regard to questions of procedure. For this purpose, he or she shall summon the agents or representatives of the parties to meet him or her as soon as possible after their appointment and whenever necessary thereafter. This first phase of procedure may be called *registration of application*.

3.2. Admissibility of Communication

In order to decide whether a judicial review communication is admissible or not, the Court would base its judgement on certain conditions. Rules concerning the admissibility requirements of such judicial review communications should be added to the Rules of Court. The present Rules of Court do not make any provision in this regard. With some adjustments, by using the Optional Protocol to the ICCPR as a model, the rules of the admissibility of communications may well be stipulated as follows:

- a) The communication must be compatible with the competence of the Court in accordance with (proposed) Article 34(2) of the Statute (i.e. to review Government act and/or State legislation allegedly in violation of international human rights provisions);
- b) The communication must allege a violation of human rights provision contained in the international bill of rights and other accepted international human rights standards as deemed applicable by the Court;
- c) The communication must be in writing;
- d) The communication must come from an individual or a group or groups of people subject to the jurisdiction of the State being petitioned;
- e) The communication must not be an “abuse of rights of submission” (that is, it must have something in fact or law to support it);
- f) The communication must not be anonymous;
- g) The violation referred to in the communication, although under examination by another international investigation or settlement procedure, may still simultaneously be submitted to the Court.³⁸²

The first two requirements specify the characteristics of the cases that the Court will consider, namely it must be a request to review a government act or legislation the purpose of which is to clarify whether or not the said government act or State legislation contradicts, in fact and law, the internationally-recognised principles and standards of human rights and other applicable international norms.³⁸³

Consequently, the submission of other sorts of communications that do not conform to the proposed Article 34(2) of the Statute will be rejected. Moreover, in such communications, it is not permitted to include any political motives or background as a basis for the Court’s consideration. The basis for consideration is only legal if it concerns the wording or interpretation of the constitution, government acts and/or other relevant national law. The State’s acts, constitution or legislation which is thus placed under scrutiny must be the current ones, that is to say the ones legally in force at the time when the communication is submitted.

³⁸² See and compare with Sarah Pritchard and Naomi Sharp, *Communicating with the HRC*, Ibid., at p. 19.

³⁸³ That is, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights together with its two Optional Protocols and the Convention on Economic, Social and Cultural Rights and also *jus cogens* norms as may be applicable. See and compare with, *supra*, discussion in Chapter 5, particularly at note 285.

Furthermore, no communication will be declared admissible if it is not submitted in writing together with all necessary documents such as any official text and interpretation (where applicable) of the legislation in support of the communication. Oral communications will not be permitted. Although there will be no official or fixed form of written communication, a model communication shall be developed by the Court for efficiency's sake.³⁸⁴

This particular condition enables individuals, citizens as well as non-citizens, to communicate with the Court in order to seek judicial review of government acts or State legislation that is allegedly inconsistent with international human rights provisions. A group or groups of people may also bring a case before the Court. Sometimes, the circumstances of a particular violation mean that an individual cannot make a communication. In such a case, an authorised third party or representative may act on behalf of the individual.

Individuals or a group or groups of people or their representatives requesting judicial review from the Court must support their applications with strong evidence which clearly demonstrates the actual violation of international human rights norms as a result of Government policies based on abusive national laws. Failure to meet this requirement leads to a declaration of inadmissibility. The said evidence should consist of a detailed explanation of the national legal system, court decisions and other relevant decrees or regulations violating international principles. To assist the Court in its examination, the

³⁸⁴ For a comparative purpose, *see* model communication developed under Optional Protocol to the ICCPR in appendix to Chapter 4.

complete report of action and/or text of laws including their official elucidation (if any) shall be provided in the original language, English and French.³⁸⁵

The author(s) must be clearly identified when submitting communications to the Court. No anonymous communications will be accepted. In the case of a communication being submitted by an individual, his or her name and signature must be clearly written at the end of the document. Where possible, the position, occupation and other relevant details of the individual are specified. If a communication is brought to the attention of the Court by a group or groups of people, the head and the secretary of the group, or other members appointed specifically for that purpose, are to sign the application. In the former situation, the individual concerned must enclose proof of personal identification while, in the latter situation, all members of the group(s) must put their signature to the letter of authorisation.

Finally, under the proposed procedure, the Court is competent to hear and decide of a case that is simultaneously being investigated under another international procedure. However, both procedures shall be regarded as separate from each other. As a matter of fact, they are two different kinds of procedures. The former consists in reviewing the conformity of State government acts or national laws with international human rights legislation whereas the latter consists in examining the State's treaty compliance.

However, it should be noted that if a communication invoking judicial review of the Court has already been submitted, be it by a private person, a group or groups of people, the same application will not be accepted a second time. This is understandable since this

³⁸⁵ Article 39(1) rules that the official languages of the Court shall be French and English.

subsequent communication will be seeking the same rule or order from the Court, namely to declare that the Government act or legislation is in breach of a treaty obligation and must therefore be modified or ceased in order to be in line with international human rights standards.

The Court will decide this matter with the assistance of the screening function of the Registrar. In order to assist the Registrar to carry out this function, a summary of the communication needs to be completed by its authors. In this summary, the applicant should briefly explain what the complaint is all about (*ratione materiae*), who the parties are (*ratione personae*) and when the violation took place (*ratione temporis*). This last point is clearly related to the time when the legislation comes into force.

If it is discovered that a communication pursues the same objectives as an earlier one, the Registrar will let all parties concerned know that the initial communication is currently being examined by the Court and that, for this reason, the later communication will not be considered. In deciding the matter the Registrar only needs to consult the Judge(s) assigned for that specific purpose and not necessarily during the official hearing proceeding. A proceeding within the Chamber should be enough.³⁸⁶

The entire process of determining the admissibility of an application at this particular stage can be referred to as *pre-trial proceeding*, which was the case with the trial of the former president of Yugoslavia, Slobodan Milosevic.³⁸⁷

³⁸⁶ Compare with the *Proceedings before the Chambers* as laid down in Articles 26 and 29 of the Statute and Articles 90 – 93 of the Rules of Court.

³⁸⁷ *The Jakarta Post*, 31 October 2001 at <http://www.thejakartapost.com>, access date: 31/10/2001 and Australian *SBS Television* in World News program on 30/10/2001. In that Court's pre-trial hearing, Mr. Milosevic denies as unfounded all the charges pressed on him by the Prosecutor, Ms. Del Ponte. This

3.3. Determination of the Merits of Communication and Delivery of Judgement

As is the case for treaty-based procedures, once the Court has decided that the communication is admissible, the parties concerned are asked to explain what the problem is and to indicate whether anything has been done to resolve it. It may be that, during the period of registration of communication and pre-trial proceeding, the State government concerned has changed its constitution or has put into place a new court procedure under which the validity of the provisions regarding human rights laid down in the constitution may be reviewed, whether or not they are in conformity with international human rights norms.

Otherwise, it may also be that the State party that is being challenged wishes to counter the argumentation upon which the application is based. In countering the applicant's argumentation, for example, the State may present evidence indicating that the application is legally unfounded due to abuses of *ratione materiae*, *ratione temporis* and *ratione personae*, or that the same application is currently being examined under the same procedure. In such cases, the Court will refer the matter back to the pre-trial Judges and the latter will decide it in Chamber-like proceedings (see above).

According to Article 30 of the Rules of Court, all these disputes must go through the Registrar if the parties intend to put down their differences in writing. If the parties wish

type of proceeding would also be instituted to determine the admissibility of judicial review applications brought before the Court by individuals, or a group or groups of people.

otherwise, they can also explain their case orally and the Registrar will document the proceedings accordingly.³⁸⁸

Once all these issues have been sorted out, the Court shall proceed to the next step of the procedure, which would be referred to as a *determination proceeding*. According to Article 43 of the Statute, the Court proceeding exists under two forms: written and oral (par. 1). The written proceeding shall consist of the communication to the Court and to the parties of memorials, counter-memorials and, if necessary, replies; also of all papers and documents in support of the evidence (par. 2) and all these shall be made through the Registrar in the order and within the time determined by the Court (par. 3). The oral proceeding shall consist of the hearing by the Court of witnesses, experts, agents or representatives, counsel and advocates (par. 5).

Both the oral and written proceedings can be referred to as an *examination of evidence* proceeding. In this examination proceeding, the Court will gather all the relevant information that it will use later on as a basis for its judgement directly from the parties involved, including witnesses and experts. Unlike proceedings under treaty-based procedures, the Court will collect this information not only in writing but also orally. In the examination procedure under the Optional Protocol to the ICCPR, for instance, the HRC does not hear oral testimonies and relies solely on the written information provided by the author of communication or State party, as well as relevant supporting documentation.³⁸⁹

³⁸⁸ The complete rules of written proceedings are set forth in Subsection 2, Articles 44 – 53 while the complete rules concerning oral proceedings provides Subsection 3, Articles 54 – 72 of the present rules of Court.

³⁸⁹ See, *supra*, discussion on the procedures before various Committees in Chapter 4.

The Court should set a general rule as to what type of evidence it will consider admissible. Such a rule will serve only as a guideline. Amongst other things, the Court could make provision that any information or documentation can be regarded as evidence as long as it has a direct connection with the case. The information or documentation might include statements from the parties including their witnesses and experts, medical and/or psychiatric reports, texts of domestic court judgements and texts of relevant laws, policies, and codes of practice, guidelines, decrees, executive orders and other relevant documents.

Like the procedure before the Committees, the burden of proof should not rest upon the applicant alone. Sometimes, or even in many situations, the State which is party to the case has easier access than the applicant to information that can be used as evidence. The burden of proof should, therefore, also rest upon the State. However, the applicant must at least be able to establish that there is *prima facie* a case to be heard.³⁹⁰

The Court should also determine the standard of proof it will use in the procedure. Unlike the standard of proof under treaty-based procedures, which is the “balance of probabilities”, the Court must at least measure its decision by the higher standard of “beyond reasonable doubt”.³⁹¹

When all these proceedings have been completed, the Court may deliver its judgement. But prior to handing down judgement, the Court shall, as in a normal court of law, hold deliberation sessions. These should be held in closed meetings and not be open to the

³⁹⁰ See Sarah Pritchard & Naomi Sharp, *Communicating with the HRC, Ibid.*, pp. 20-22.

³⁹¹ *Ibid.*, at p. 22.

public.³⁹² By virtue of the provisions of the present Rules of Court, when the Court has completed its deliberations and subsequently adopted its judgement, the parties shall be notified of the date on which it will be read and this should take place in a session which is open to the public.³⁹³

In the same way as decisions made under treaty-based procedures, the said judgement, which shall state whether it is made by the Court or the Chamber, should include:

- the date on which it is read;
- the name of the judges participating in it;
- the names of the parties;
- the names of the agents, counsel and advocates of the parties;
- a summary of the proceedings;
- the submissions of the parties;
- a statement of the facts;
- the reasons in point of laws;
- the operative provisions of the judgement;
- the necessary steps to be taken by the State (e.g. adjustment or amendment of legislation);
- the decision, if any, in regard to costs;
- the number and names of the judges constituting the majority, and
- a statement as to the text of the judgement which is authoritative.³⁹⁴

Under the proposed international judicial procedure, there will also be interim measures. If the Court considers it necessary, it may, in the middle of the examination proceedings, order the State party to postpone the coming into force of any legislation that allegedly contravenes international human rights provisions.

The judgement made by the Court should be similar to the decision made in cassation trials in the domestic legal system. The decision is thus final and without recourse to

³⁹² Compare with *Article 54* of the present Statute of the Court.

³⁹³ By virtue of, and compare, *Article 58* of the Statute and *Article 94* of the Rules of Court.

³⁹⁴ Compare *Article 95* of the Rules of Court and the content of the views of the Human Rights Committee in Prichard & Sharp, *Ibid.*, at p. 23.

appeal.³⁹⁵ The judgement shall become binding on the parties on the day of the reading.³⁹⁶

According to Article 58 of the Statute, the President and the Registrar shall put their signature to the decision.

Pursuant to Article 88 of the present Rules of Court, the parties may, either jointly or separately, discontinue the proceedings before the final judgement has been delivered. Such request must be submitted to the Court in writing via the Registrar and he or she will issue an order indicating the discontinuance of the proceedings and the removal of the case from the list (par. 1).

If the parties have agreed to discontinue the proceedings resulting in the settlement of the dispute, the Court may record it in the aforementioned order. Otherwise, the terms of the settlement may be entered into the order itself or else added on to it in an annexure (par. 2). These rules would not be applied under the proposed international judicial review simply because the application concerns the abuse of the international obligations of Member States of the United Nations to implement international standards of human rights within national laws. So, once the allegation that national law contradicts the international human rights norms is legally substantiated, the Court would not be allowed to discontinue the proceedings notwithstanding any request by the parties.

4. Appraisal and Prospects

Unlike decisions made under treaty-based bodies, the judgement of the Court has legal binding force on the parties. To ensure compliance with their decisions, the treaty bodies

³⁹⁵ Article 60 of Statute of the Court.

³⁹⁶ Compare Article 94(2) of the Rules of Court.

must heavily rely on the publicity. On the contrary, State compliance with the Court's decision is a must and is mandated by the Charter of the United Nations.³⁹⁷ Moreover, according to the Charter, the Court has forcible means to ensure State compliance - using the "hand" of the Security Council.

Pursuant to the provisions laid down in Article 94, each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party (par. 1). This article goes even so far as to warn any State which is party to a certain case that if it does not comply with the Court's decision, it will incur sanction by the United Nations. Paragraph 2 of the same article states that "if any party to a case fails to perform the obligations incumbent upon it under the judgement rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures [sanctions] to be taken to give effect to the judgement".

The underlying implication of this provision is that failure to comply with a decision of the International Court of Justice would create a new political problem, and the Security Council is given wide powers to deal with the consequences. This type of situation would be similar to that which confronted the federal authorities of the United States in *Brown v. Board of Education*³⁹⁸ case in 1950.

In the case mentioned above, the local educational authorities in Little Rock, Arkansas refused to comply with the Supreme Court's decision not to remove black students from a

³⁹⁷ Article 94 of the Charter.

³⁹⁸ Shabtai Rosenne, *The World Court: what it is and how it works*, Ibid., pp. 43-44.

high school. The situation forced former President Eisenhower to send federal troops to ensure compliance with the judgement.

This kind of law enforcement is certainly not ideal as a means of ensuring State compliance with the judgement rendered by the International Court of Justice in human rights related violations, especially in the proposed judicial review procedure. Not only could this sort of sanction lead to another human rights problem, but it could also be deemed rather ‘inhumane’, rash and very costly.³⁹⁹

Unlike the decisions resulting from treaty-based procedures, and even though the means available to the Court might not be as effective as those of a national legal system, the Court’s decisions, as the voice of an international organisation, have generally been complied with satisfactorily; even in cases which were emotionally charged and involved important questions of national prestige and honour.⁴⁰⁰

So far, in the history of the Court, no such step towards enforcement has ever been taken by the Security Council following a failure to comply with a Court judgement. Based on an extensive study, a prominent observer of the ICJ concludes:

It is evident that a State will be far less likely to fail to comply with [even] an unfavourable decision in a case which it has specifically agreed to submit to the Court’s jurisdiction than in a case in which - for whatever reason - it has little interest in resolving the dispute on the basis of the existing law or legal considerations in general.⁴⁰¹

³⁹⁹ More details on the problems and difficulties in imposing United Nations sanctions including their types and effect so far and the guidelines to future use of sanctions, see, Willem van Genugten and Gerard A. de Groot, *United Nations Sanctions: A Multi-disciplinary Approach*, *Ibid.*, particularly at pp. 135 – 152.

⁴⁰⁰ Shabtai Rosenne, *the World Court*, *Ibid.*, at p. 48.

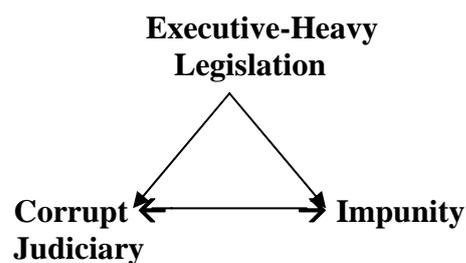
⁴⁰¹ *Ibid.*, at p. 47.

Chapter 7

CONCLUSIONS

History has proven that methods of pursuing and prosecuting human rights violators have failed in many ways. The reasons behind this failure range from state sovereignty issues, resource and funds shortages, lack of determination in the investigations and prosecutions due to political content of the case, to the dearth of cooperation (if any) from the country whose nationals are being implicated in the investigation or prosecution. With respect to the latter, a country like Indonesia is not only reluctant to cooperate, but in many cases, it even protects the perpetrator.

The availability of a power to review government acts or legislation for breaches of human rights at the international level that could be vested with the International Court of Justice could certainly provide a more effective means to fight “state-endorsed” human rights violations. And this should not be just a dream if *sumum ius* (supreme justice) is on the agenda of the international community under the auspices of the United Nations. A country like Indonesia certainly serves as a good (or bad) example of how systematic and grave violations of human rights remain untouched, thanks to three typical features of Indonesian legal system: executive heavy legislation, corrupt judiciary and state impunity which can be described as Human Rights Disaster Triangle:



Executive-heavy legislation provides the platform for corrupt court practices and legally unaccountable government agencies that lead to impunity. A corrupt judiciary and impunity make a perfect combination for a State to systematically violate individual rights without having to worry about the consequences and responsibility. And this remains protected by and “legalised” through legislation that ends up sanctioning the breaches of human rights. Persons suffering rights abuses under such a legal system will have to seek remedy from other sources, and that seems to be none other than international remedy systems.

There are at international law a number of procedures available that may be employed by individuals who believe that their rights have been violated as a result of State conduct. Those procedures are divided into two categories: Charter-based procedures and treaty-based procedures. The most important Charter-based procedures are the procedures under the Economic and Social Council of the United Nations which covers the procedures before the Commission on Human Rights with its thematic reports and the “1503” procedure. Currently, these procedures are just a “waste of time and energy”.

Under treaty-based procedures there are currently four Committees established to consider individual complaints: the Human Rights Committee, the Committee on the Elimination of Racial Discrimination, the Committee against Torture, and the Committee on the Elimination of all Forms of Discrimination against Women. Each of the Committees works in accordance with the provisions contained in the respective Covenant or Convention. The limitation of these procedures lies on the fact that their conclusions have no legally binding power. They are just recommendations or views to the State party concerned. Besides, in order to be permitted to invoke one of these

procedures a person must first exhaust “all the domestic legal remedies available (and effective)”. Fulfilling this obligation has proven very costly and time consuming for individuals, especially those who are living in a country like Indonesia.

In light of all this, it is perhaps time to consider on the desirability of putting in place an additional and complementary procedure - an international judicial review - even if such a mechanism still appears highly unlikely in the current international political climate. Under this procedure, a State’s legislation or activities could be placed under the microscope to see whether or not they are in conformity with international standards of human rights. By invoking this procedure, a person alleging that his or her rights have been violated by a State may bypass the costly and time consuming requirement set forth in the other international instruments mentioned above. The procedure will also serve as an early warning system for State governments in that it will prevent the latter from violating human rights through examination of the provisions laid down in legislation (including the constitution and other regulations).

The question of whether States will follow this procedure cannot easily be answered with “yes”, since this would of course involve issues such as a State’s sovereignty. States are still very protective of their sovereignty and do not lightly subject themselves to the control of an international body in terms of its policies or legislation. The desire to achieve international peace and cooperation, however, requires States to have the attitude of willingness to accept judicial review of their actions and legislation that breach human rights. In any event, it is noteworthy that there is in fact an increasing trend in international law for states to willingly limit their sovereignty through treaties and various dispute resolution mechanisms, not only in matters such as trade and intellectual property,

but also of human rights: there are now three “regional human rights courts” covering the Americas, Europa and Africa. Furthermore, there are steps being undertaken to establish a regional human rights mechanism for the Asia-Pacific region.⁴⁰² While the climate may not be immediately conducive for a “world court of human rights”, it is not such a quantum leap. This type of development ought to be the subject of discussions of the direction international law seems to be evolving and should continue to do so.

A tendency towards complying with the views of the international community can be seen in Indonesia, although at the present stage only in the field of economic and trade relations and cooperation. Hope shouldn't be given up that one day in the near future - as discussions on the academic and non-academic (that is, practitioner) level have shown - a world court dealing with human rights violations can be established. While waiting for this to come to operation, the ICJ should be entrusted with power of judicial review.

The most appropriate international organ to possess the power of judicial review is arguably the International Court of Justice. The entrusting of this competence to the ICJ is in line with its function as the ‘principal judicial organ’ of the United Nations, with obvious changes needed to its Statute. The need simply results from the fact that more has to be done ‘to promote respect for and protection of human rights’.

It is true that from an international law standpoint, there is still no legal basis available yet upon which such a procedure may be employed. As a matter of fact, the present principles of international law forbid the International Court of Justice and other international institutions to possess such a power. And that's exactly the reason to ask ourselves, ‘Isn't it

402 “Establishing a Regional Human Rights Mechanism for the Asia-Pacific Region”, February 2004, Report of the Asia Pacific Human Rights Network, available at http://www.asiapacificforum.net/annual_meetings/eighth/ngo_regional.doc.

time the Court was provided with the regulations which would allow it to exercise the power of judicial review?’ Is this some kind of daydream? Perhaps. But one thing is not a dream: violations and abuses of human rights and dignity in this age are more prevalent than when the law was still considered sufficient to defend. A strong political will is necessary to make this possible. The rest is just technicalities.

In his speech at the conclusion of the Rome Conference, which has adopted the Rome Statute of the International Criminal Court on 17 July 1998, Secretary General of the United Nations, Mr. Kofi Annan, suggested that:

There can be no global justice unless the worst of crimes - crimes against humanity - are subject to law. In this age more than ever we recognise that the crime of genocide against one people truly is an assault on us all. The establishment of an International Criminal Court will ensure that humanity’s response will be swift and will be just.⁴⁰³

The morale and spirit of this statement can certainly be a driving power towards the establishment of the international judicial review procedure of government activities and legislation for breaches of human rights.

⁴⁰³ <http://www.un.org/law/icc/prepcomm/commiss.htm>, access date: 11/03/2000

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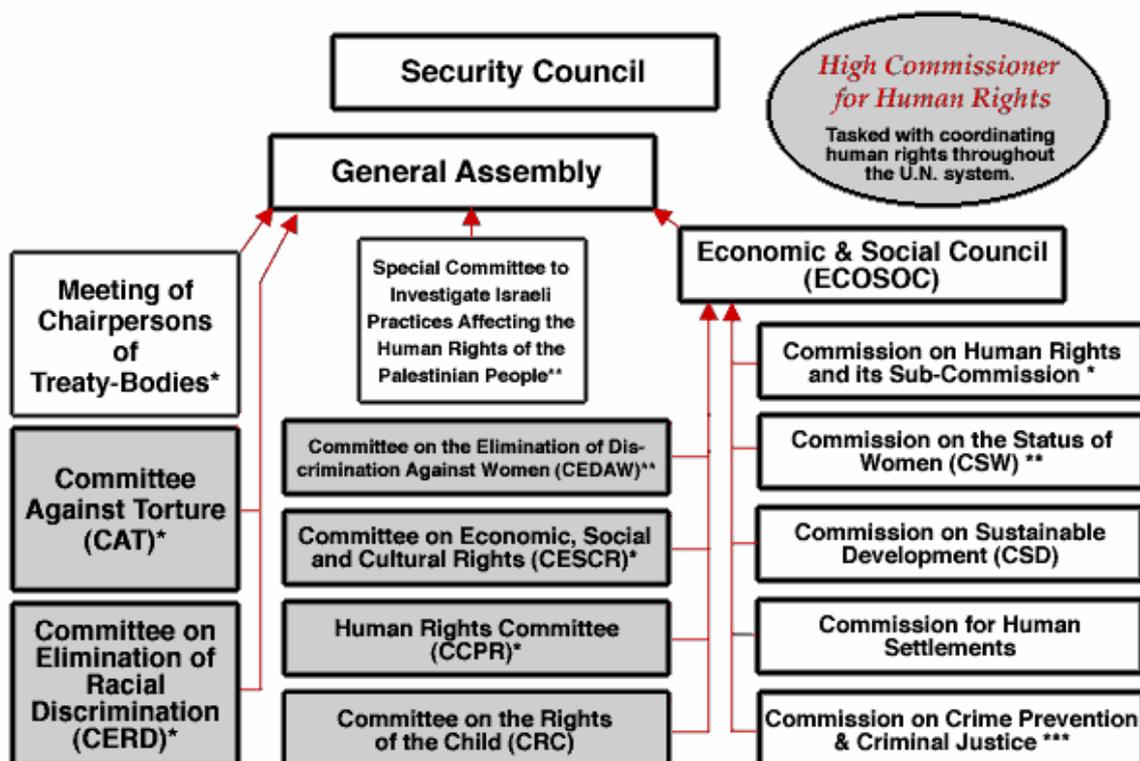
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Appendix 1



Appendix 2**THE 1945 CONSTITUTION OF THE REPUBLIC OF INDONESIA****Department of Information****Republic of Indonesia**

First Edition

1. THE OPENING TO THE 1945 CONSTITUTION

Whereas Independence is the natural right of every nation, colonialism must be abolished in this world because it is not in conformity with Humanity and Justice.

And the Struggle of the movement for the independence of Indonesia has now reached the hour of rejoicing by leading the People of Indonesia safe and sound to the gateway of the Independence of an Indonesian State which is free, united, sovereign, just and prosperous.

Thanks to the blessing of God Almighty and impelled by the noble desire to lead their own free national life, the People of Indonesia hereby declare their independence.

Following this, in order to set up a government of the State of Indonesia which shall protect the whole of the Indonesian People and their entire native land of Indonesia, and in order to advance the general welfare, to develop the intellectual life of the nation and to contribute in implementing an order in the world which is based upon independence, abiding peace and social justice, the structure of Indonesia's National Independence shall be formulated in a Constitution of the Indonesian State which shall have the structural state form of a Republic of Indonesia with sovereignty of the people, and which shall be based upon: Belief in the One, Supreme God, just and civilized Humanity, the unity of Indonesia, and democracy which is guided by the inner wisdom in the unanimity arising out of deliberation amongst representatives, meanwhile creating a condition of social justice for the whole of the People of Indonesia.

2. THE 1945 CONSTITUTION**Chapter I. Form and Sovereignty.**

Article 1

1. The State of Indonesia shall be a unitary state which has the form of a Republic.
2. Sovereignty shall be in the hands of the People and shall be exercised in full by the Majelis Permusyawaratan Rakyat.

Chapter II. The Majelis Permusyawaratan Rakyat.

Article 2

1. The Majelis Permusyawaratan Rakyat *) shall consist of members of the Dewan Perwakilan Rakyat**) augmented by delegates from the regional territories and the groups in accordance with regulation prescribed by statute.
2. The Majelis Permusyawaratan Rakyat shall sit at least once in every five years in the capital of the State.
3. All decisions of the Majelis Permusyawaratan Rakyat shall be determined by majority vote.

Article 3

The Majelis Permusyawaratan Rakyat shall determine the Constitution and the guidelines of the policy of the State.

Chapter III. The Powers of Government of the State

Article 4

1. The President of the Republic of Indonesia shall hold the power of government in accordance with the Constitution.
2. In exercising his duties, the President shall be assisted by a Vice-President.

Article 5

1. The President shall hold the power to make statutes in agreement with the Dewan Perwakilan Rakyat.
2. The President shall determine the Government Regulations necessary to implement statutes.

Article 6

1. The President shall be a native-born Indonesian.
2. The President and Vice-President shall be elected by the Majelis Permusyawaratan Rakyat by majority vote.

Article 7

The President and Vice-President shall hold office for a term of five years and shall be eligible for re-election.

Article 8

Should the President die, ceased from executing or be unable to execute his duties during his term of office, his office shall be taken by the Vice-President until the expiry of that term.

Article 9

Before assuming the duties of office, the President and Vice-President shall take an oath according to the requirements of religion, or shall make a solemn promise, before the Majelis Permusyawaratan Rakyat, or the Dewan Perwakilan Rakyat as follows:

Oath of the President (Vice-President).

"I swear before God that, to the best of my ability, I will fulfill as justly as possible the duties of the President (Vice-President) of the Republic of Indonesia; that I will hold faithfully to the Constitution and conscientiously implement all statutes and regulations, and that I will devote myself to the service of Country and Nation".

Promise of the President (Vice-President).

"I solemnly promise that, to the best of my ability, I will fulfill as justly as possible the duties of the President (Vice-President) of the Republic of Indonesia; that I will hold faithfully to the Constitution and conscientiously implement all statutes and regulations, and that I will devote myself to the service of Country and Nation".

Article 10

The President shall hold the highest authority over the Army, the Navy and the Air Force.

Article 11

The President, with the agreement of the Dewan Perwakilan Rakyat, declares war, makes peace and concludes treaties with other states.

Article 12

The President declares the state of emergency. The conditions governing, and the consequences of, the state of emergency shall be prescribed by statute.

Article 13

1. The President appoints diplomatic representatives and consuls.
2. The President receives the diplomatic representatives of other states.

Article 14

The President grants grace, amnesty, abolition and restoration of rights.

Article 15

The President grants titles, decorations and other marks of honour.

Chapter IV. The Supreme Advisory Council

Article 16

1. The structure of the Supreme Advisory Council shall be prescribed by statute.
2. This Council shall submit replies to issues raised by the President and shall have the right to submit proposals to the Government.

Chapter V. The Ministers of State

Article 17

1. The President shall be assisted by the Ministers of State.
2. These Ministers shall be appointed and dismissed by the President.
3. These Minister shall lead the Government Departments.

Chapter VI. Local Government

Article 18

The division of the area of Indonesia into large and small regional territories together with the structure of their administration, shall be prescribed by statute, with regard for and in observance of the principle of deliberation in the governmental system of the State, and the traditional rights in the regional territories which have a special character.

Chapter VII. The Dewan Perwakilan Rakyat (The Legislative Body)

Article 19

1. The structure of the Dewan Perwakilan Rakyat shall be prescribed by statute.
2. Dean Perwakilan Rakyat shall sit at least once a year.

Article 20

1. Every statute shall require the agreement of the Dewan Perwakilan Rakyat.
2. Should a draft law not obtain the agreement of the Dewan Perwakilan Rakyat, the draft may not be submitted again during the same session of the Dewan Perwakilan Rakyat.

Article 21

1. Members of the Dewan Perwakilan Rakyat shall have the right to submit draft laws.
2. Should those drafts, although agreed to by the Dewan Perwakilan Rakyat, not be ratified by the President, those drafts may not be submitted again during the same session of the Dewan Perwakilan Rakyat.

Article 22

1. Should exigency compel, the President shall have the right to determine Government Regulations in lieu of statutes.
2. Those Government Regulations must obtain the agreement of the Dewan Perwakilan Rakyat in its next session.
3. Should that agreement not be obtained, the Government Regulation shall be revoked.

Chapter VIII. Finance

Article 23

1. The estimates of revenue and expenditure shall be fixed each year by statute. Should the Dewan Perwakilan Rakyat not agree to the estimates proposed by the Government, the Government shall work to the estimates of the previous year.
2. All kinds of taxes for the needs of the State shall be based upon statutes.
3. All kinds and values of the currency shall be prescribed by statute.
4. Further matters of the finances of the State shall be regulated by statute.
5. In order to investigate the accountability for state Finances, a Body for the investigation of finances shall be set up, the regulation for which shall be prescribed by statute.

The results of that investigation shall be made known to the Dewan Perwakilan Rakyat.

Chapter IX. The Judicial Powers

Article 24

1. The judicial powers shall be exercised by a Supreme Court and other courts of law in accordance with statute.
2. The structure and powers of those courts of law shall be regulated by statute.

Article 25

The conditions for becoming a judge and for being dismissed shall be prescribed by statute.

Chapter X. Citizens

Article 26

1. Citizens shall be persons who are native-born Indonesians and persons of other nationality who are legalized by statute as being citizens.
2. Conditions with regard to citizenship shall be prescribed by statute.

Article 27

1. Without any exception, all citizens shall have equal positions in Law and Government and shall be obliged to uphold that Law and Government.
2. Every citizen shall have the right to work and to a living, befitting for human beings.

Article 28

Freedom of association and assembly, of expressing thoughts and of issuing writing and the like, shall be prescribed by statute.

Chapter XI. Religion

Article 29

1. The State shall be based upon Belief in the One, Supreme God.
2. The State shall guarantee freedom to every resident to adhere to his respective religion and to perform his religious duties in conformity with that religion and that faith.

Chapter XII. Defence

Article 30

1. Every citizen shall have the right and the duty to participate in the defence of the State.
2. Conditions concerning defence shall be regulated by statute.

Chapter XIII. Education

Article 31

1. Every citizen shall have the right to obtain an education.
2. The Government shall establish and conduct a national educational system which shall be regulated by statute.

Article 32.

The Government shall advance the national culture of Indonesia.

Chapter XIV. Social Well-Being

Article 33

1. The economy shall be organized as a common endeavour based upon the principle of the family system.

2. Branches of production which are important for the State and which affect the life of most people shall be controlled by the State.

3. Land and water and the natural riches contained therein shall be controlled by the State and shall be made use of for the people.

Article 34

The poor and destitute children shall be cared for by the State.

Chapter XV. Flag and Language

Article 35

The Flag of the Indonesian State shall be the Honoured Red-and-White.

Article 36

The Language of the State shall be the Indonesian Language.

Chapter XVI. Alterations to the Constitution

Article 37

1. In order to alter the Constitution, at least two-thirds of the total members of the Majelis Permusyawaratan Rakyat must be in attendance.

2. A decision shall be taken with the agreement of at least two-thirds of the total number of members who are in attendance.

3. TRANSITIONAL PROVISIONS

Clause I

The Preparatory Committee for Indonesia's Independence shall regulate and execute the transfer of government to the Indonesian Government.

Clause II

All existing institutions and regulations of the State shall continue to function so long as new ones have not been set up in conformity with this Constitution.

Clause III

The President and Vice-President shall be elected for the first by the Preparatory Committee for Indonesia's Independence.

Clause IV

Before the Majelis Permusyawaratan Rakyat, the Dewan Perwakilan Rakyat and the Supreme Advisory Council have been set up in conformity with this Constitution, all their powers shall be exercised by the President with the assistance of a National Committee.

4. ADDITIONAL PROVISIONS

1. Within six months after the end of the Greater East Asia War, the President of Indonesia shall regulate and implement all things which are stipulated in this Constitution.

1. Within six months after the Majelis Permusyawaratan Rakyat has been set up, the Majelis shall sit in order to determine the Constitution.

5. ELUCIDATION OF THE CONSTITUTION

GENERAL

I. The written Constitution, a part of Fundamental Law.

The written Constitution of a state is only a part of the Law that forms the basis of the state. The Constitution is that part of the Fundamental Law which is written down, while besides that Constitution there also prevails a Fundamental Law which is not written down, namely, the basic rules which arise and are maintained in the practice of running a state, although they are not written down.

Certainly, in order to study the Fundamental Law (**Droit Constitutionnel**) of a state, it is not enough only to study the articles of its written Constitution (**Loi Constitutionnel**) alone, but one must also study how it is applied and what is the spiritual background (*Geistlichen Hintergrund*) of that written Constitution.

The Constitution of any state whatsoever can not be understood if merely its text is read alone. Truly, to understand the meaning of the Constitution of a state, we must also study how that text came into being, we must know the explanations made of it and we must also know under what conditions that text was made.

In this way we shall be able to understand what is the meaning and purpose of the Constitution we are studying, and what current of thought it was which became the foundation of that Constitution.

II. Fundamental ideals in the "Opening" (Preamble).

What are the fundamentals contained in the Preamble to the Constitution?

1. The State - so the text runs - is what "shall protect the **whole** of the Indonesian People and their **entire** native land of Indonesia...based upon...unity...meanwhile creating a condition of **social justice for the whole** of the People of Indonesia".

2. In this Preamble, the current of thought is accepted of the **unitary state**, the state which protects and covers the whole of the people. Thus the state encompasses every kind of group opinion, encompasses all opinions of individuals. The state, in accordance with the

concept of this Preamble, seeks unity, and extends over the whole of the Indonesian People. This is one foundation of the state which may not be forgotten.

3. The third fundamental idea contained in the Preamble is that of **sovereignty of the people**, based upon democracy and deliberation amongst representatives. Therefore, the system of state which is given form in the Constitution must be based upon sovereignty of the people and must be based upon **deliberation amongst representatives**. Indeed, this current of thought accords with the character of the Indonesian society.

4. The fourth fundamental idea contained in the Preamble is that the state is based upon that **Belief in the One, Supreme God** which conforms with the principles of just and civilised humanity.

Therefore, the Constitution must oblige the Government and other authorities of state to nurture the nobility of human character and to hold fast to the fine moral ideals of the people.

III. The Constitution gives form in its articles to the fundamental ideas contained in the Preamble.

The above fundamental ideas pervade the spiritual background of the Constitution of the State of Indonesia. These fundamental ideas give rise to those ideals of law (Rechtsidee) which dominate the Fundamental Law of the State, both written law (the constitution) and unwritten law.

The Constitution gives form to these fundamental ideas in its articles.

VI. The Constitution is short and flexible in character.

The Constitution has only 37 articles. The other paragraphs contain only additional and transitional provisions. This draft is thus very brief when compared, for instance, with the constitution of the Philippines.

It is enough if the Constitution contains only fundamental rules, contains only guidelines of instruction to the Central Government and to other authorities of the State for conducting the life of the State and providing social well-being. Especially for a new state and a young state, it is better if that written Fundamental Law contains only basic rules, whilst the provisions implementing those basic rules are left to statutes which are more easily drawn up, altered and revoked.

This is the system of the Constitution.

We must always remember the dynamic of the life of the Indonesian society and state. The Indonesian society and state are growing, the era is changing, especially during this present period of physical and spiritual revolution.

Therefore, we must live dynamically, we must watch every kind of movement in the life of the Indonesian society and state. In that connection, let us not precipitately crystallize, provide form to (**Gestaltung**), ideas which can still easily alter.

Certainly, it is the nature of those written rules to be binding. For that reason, the more flexible ("elastic") those rules are, the better. Thus we must guard against the constitutional system being left behind the times. Let us not go so far as to make a constitution which is quickly out-moded (**verouderd**). What is extremely important in the administration and in the life of the state is the spirit, the spirit of the authorities of the state, the spirit of the leaders of the administration. Although a constitution is drawn up which, according to the letter, is characterized by the family principle, if the spirit of the authorities of the state, the leaders of the administration, individualistic, that constitution is certain to have no meaning in practice. On the other hand, although that constitution is not perfect, if the spirit of the authorities of the administration is good, that constitution will certainly not obstruct the course of the state. Thus what is most important is the spirit. That spirit is a living thing, or, in other words, it is dynamic. In this connection, only the fundamental rules alone must be laid down in the constitution whilst what is necessary for executing those fundamental rules must be left to statutes.

6. THE SYSTEM OF GOVERNMENT OF THE STATE

The system of the government of the State which is stipulated in the Constitution is:

I. Indonesia is a State based on Law ("Rechtstaat").

1. The State of Indonesia is based upon law (**Rechtstaat**), it is not based upon more power (**Machtstaat**).

I. The System is Constitutional

2. The government is based upon constitutionalism (Fundamental Law) not absolutism (authority without limits).

III. The Highest Authority of the State is in the hands of the Majelis Permusyawaratan Rakyat ("die gesamte Staatsgewalt liegt allein bei der Majelis").

3. The sovereignty of the people is held by a body named the Majelis Permusyawaratan Rakyat as the embodiment of the whole of the People of Indonesia (**Vertretungsorgan des Willens des Staatvolkes**). This Majelis determines the Constitution and the guidelines of the policy of the State. The Majelis appoints the Head of State (President) and the Vice-Head of State (Vice-President).

It is this Majelis which holds the highest authority of the State, whilst the President must execute the policy of the State according to the guidelines which have been determined by the Majelis.

The President who is appointed by the Majelis, is subordinate to and responsible to the Majelis. He is the "mandatory" of the Majelis, he is obliged to execute the decisions of the Majelis.

The President is not "neben" but is "untergeordnet" to the Majelis.

IV. The President is the Highest Executive of the Government of the State below the Majelis

Below the Majelis Permusyawaratan Rakyat, the President is the Highest Executive of the government of the State.

In conducting the administration of the State, authority and responsibility are in the hands of the President (concentration of power and responsibility upon the President).

V. The President is not responsible to the Dewan Perwakilan Rakyat.

Besides the President there is the Dewan Perwakilan Rakyat. The President must obtain the **agreement** of the Dewan Perwakilan Rakyat in order to make laws (**Gesetz gebung**) and in order to fix the estimates of the revenues and expenditures of the State (**Staatsbegroting**).

Because of this, the President must work together with the Dewan Perwakilan Rakyat, but the President is not responsible to the Dewan, which means that the President's position is not dependent upon the Dewan.

VI. The Ministers of State are Assistants to the President: the Ministers of State are not responsible to the Dewan Perwakilan Rakyat.

The President appoints and dismisses the Ministers of State. Those Ministers are not responsible to the Dewan Rakyat. Their positions are not dependent upon the Dewan but are dependent upon the President. They are the assistants of the President.

VII. The Authority of the Head of State is not unlimited.

Although the Head of State is not responsible to the Dewan Perwakilan Rakyat, he is not a "dictator", which means that his authority is not unlimited.

It has been stressed above that he is responsible to the Majelis Permusyawaratan Rakyat. Apart from this, he must carefully and thoroughly pay attention to the voice of the Dewan Perwakilan Rakyat.

The position of the Dewan Perwakilan Rakyat.

The position of the Dewan Perwakilan Rakyat is strong. The Dewan can not be dissolved by the President. (This is at variance with the parliamentary system). Apart from this, members of the Dewan are **all of them concurrently members of the Majelis Permusyawaratan Rakyat**. For that reason the Dewan Perwakilan Rakyat can at all times control the acts of the President, and if the Dewan considers that the President has in fact transgressed against the policy of the State determined by the Constitution or by the Majelis Permusyawaratan Rakyat. The Majelis can be called for a special sitting so that can ask the President to account for his responsibility.

The Ministers of the State are not ordinary high-ranking Civil Servants.

Although the position of the Ministers of State is dependent upon the President, nevertheless they are not ordinary high-ranking civil servants, because it are those Ministers who, in the first place, in practice execute the authority of the Government (**pouvoir executif**).

As the leaders of Departments, the Ministers know the ins and outs of matters connected with their jurisdictions. In this connection, Ministers have a great influence upon the President in determining that part of the state's policy with which their Departments are concerned. Indeed, what is intended is that the Ministers are Leaders of the State.

In determining Government policy and in co-ordinating the administration of the State, the Ministers work together as closely as possible, one with the other, under the leadership of the President.

Appendix 3

**Unofficial Version of the Amended Provisions of Articles 28A –J
Concerning Human Rights Guarantees in 1945 Constitution
of the Republic of Indonesia**

Art. 28 A on the right to live reads:

“Every person has the right to live and to defend his/her life.”

Art. 28 B regulates the right to build a family and have children. It reads:

- “(1) Every person has the right to build a family and to continue procreation through a lawful marriage.
- (2) Every child has the right to live, grow up and develop as well as the right to protection from violence and discrimination.”

Art. 28 C regulates the right to personal development and esteem. It reads:

- “(1) Every person has the right to develop himself/herself through meeting his/her
basic living needs, right to education and to benefit from science and technology, arts and culture, for the sake of his/her better quality of life and the welfare of human being.
- (2) Every person has the right to better self-esteem by utilising his/her rights collectively to develop the society, nation and country.”

Art. 28 D concerns the right to legal protection and access to work, government and citizenship. This article containing four verses reads:

- “(1) Every person has the right to recognition and protection and guarantee of law certainty that is fair and equal before the law.
- (2) Every person has the right to work, fair treatment and be rewarded accordingly in every employment relation.
- (3) Every citizen has equal opportunity to get involved in the government.
- (4) Every citizen has the right to his/her citizenship.”

Art. 28 E regulates freedom of religion, association and expression. Having three verses it reads:

- “(1) Every person is guaranteed the freedom of worship, each according to his/her own religion or belief; freedom to choose their preferred education, job,
place to live, change of citizenship and the right be repatriated.
- (2) Every person has the right to express and act according to his/her faith and consciousness.
- (3) Every person is guaranteed the freedom of association and expression.”

Art. 28 F is a constitutional guarantee for access to communication and information. It reads:

“Every person has the right to the communication and information in order to develop his/her personality and the living environment including the right to obtain, to treat, to keep and to pass information using every available means or channel.”

Art. 28 G constitutionally guarantees a person of possession and freedom from torture and other inhuman treatment. This article stipulates that:

- “(1) Every person has the right to protection of his/herself, family, honor, dignity, possession under his/her power as well as the right to personal security and to be free from fear of not and doing something that is considered his/her human right.
- (2) Every person has the right to be free from torture or inhuman treatment and the right to pursue political asylum in another country.”

Art. 28 H regulates the right of a person to have a happy life, health service, healthy environment, social security, justice and respect of human dignity and honour. It reads:

- “(1) Every person has the right to a happy life, physically as spiritually, accommodation, healthy environment and health service.
- (2) Every person has the right to be treated favourably to get opportunity and benefit for the sake of equality and justice.
- (3) Every person has the right to social security enabling development of his/her personality as a whole for the sake of human dignity and honor.
- (4) Every person has the right to personal possession and no one can, by force or inappropriate way, take this right away.”

Art. 28 I regulates the basic human rights and the principle of non-retroactive. It also regulates the freedom from discrimination, cultural rights, indigenous people, duty of the State, the promotion and protection of those rights by law:

- “(1) Right to live, not to be tortured, freedom of mind and conscious, freedom of religion, freedom from slavery, right to recognised as a human being before the law and the right not to be prosecuted retroactively are basic human rights which cannot be reduced under whatsoever circumstances.
- (2) Every person has the right to be free and protection from discrimination for whatever reason.
- (3) Cultural identity and the rights of indigenous people shall be respected in accordance with the development of time and civilisation.
- (4) The State, in particular the government is responsible for the protection, promotion and fulfilment of human rights.
- (5) The promotion, protection and guarantee of human rights shall be regulated by law in accordance with the principles of the rule of law and democracy.”

Art. 28 J regulates the limits of human rights and the relation of a person's rights to other person's and the society. It reads:

- “(1) Every person is obliged to respect the human rights of another person in the harmony of life within the society, nation and country.
- (2) In exercising his/her rights, very person is subject to limitations stipulated by law and regulations in order to solely guarantee and respect the rights and freedom of other person and to fulfil the demand for justice and equality in accordance with moral, religious, security and public order consideration within a democratic society.”