

Outline for a new Intergovernmental Human Rights Initiative

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Cover photograph: former Nazi concentration camp Natzweiler, Vosges, France

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1. Introduction

Human rights are an idea, a body of thought, and for many a source of inspiration. There are countless initiatives, large and small, national and international, from governments and private organizations, that seek to promote human rights. Together, all these initiatives form a global movement: the human rights movement.

But the global human rights situation is not well – to say the least. Anyone who follows the news for a while can see this: persecution of political opponents, oppression of minorities, human trafficking, sectarian violence, ethnic cleansing and even genocide: there seems to be no end to it. Democratic values are moreover under pressure almost worldwide. Even in Europe, trust in government is declining and the rule of law is losing ground.

The human rights movement is currently clearly unable to turn this tide. Without a new, powerful impetus, it is to be feared that the prevailing trend towards the negative will only become stronger. To deliver this new impetus, a new, worldwide initiative is needed.

1.1. What type of new initiative would be most effective?

To answer this question, we must consider the nature of human rights. Human rights are quite vulnerable: vulnerable to lack of attention, to lack of knowledge, to indifference, to ill will. They must therefore be actively protected and promoted. Laws and regulations in which human rights are firmly embedded are essential for this. Only the State however has the power to provide those laws and regulations, and only the State can enforce them. That is why the State is indispensable for the realization of human rights.

The State must however be kept on task, because it has so many other interests and priorities - interests and priorities that often seem more urgent. In theory it is for the citizen/voter to keep the State on the right path, but with human rights, this will mostly not work. During an election, issues such as privacy and the rights of suspects or refugees will not be top of mind. The average citizen is more concerned with his own rights than with human rights.

That is why a human rights movement is needed in the first place. And that is why all elements of the human rights movement focus primarily on the State – directly or through public opinion – to stimulate it to mend its ways. For the design of our new initiative, we therefore need to examine what type of organization within the human rights movement is best suited to influence the State.

The international human rights movement mainly rests on two pillars: IGOs and NGOs.

NGOs (non-governmental organizations) are organizations of private initiative. In a sense, every foundation or association is an NGO, but the term is more specifically used for large, often internationally operating organizations in the field of development cooperation and/or human rights. Well-known examples are Amnesty International, Doctors Without Borders, Freedom House and Human Rights Watch.

Intergovernmental Organizations, or IGOs, are associations of States, whereby these States in principle do not give up any part of their sovereignty. They come together, with equal rights, to discuss and settle matters by mutual agreement. Examples of IGOs with their own human rights initiative are the United Nations, the African Union, and the Council of Europe.

Both IGOs and NGOs turn to State governments when these fail to fulfill their human rights obligations. However, they do this in very different ways. IGOs address the State directly (either in public or through diplomatic channels), while NGOs do so indirectly: through publicity, issuing reports and press releases.

Publicity is a complex instrument, and the results of its use always remain uncertain. Governments do not have to respond to publicity if they do not wish to do so. When publicity takes hold of public opinion, ignoring it becomes more difficult, but governments of unfree States in particular are very adept at this.

Even in free countries the effect of publicity is often limited. With all the harrowing stories about the fate of refugees on the Greek islands, European governments continue to refuse to do anything about their hopeless situation.

In the human rights treaties of IGOs, States have committed themselves to their peers: the other States that have acceded to the same treaty. Anyone who follows the news knows that this does not carry enough weight to ensure compliance with the treaties. However, this does not mean that these commitments are totally without significance.

Member States of an IGO are usually parties to a large number of treaties. At some point it may be about post and telecommunications, the next time it concerns assistance in the investigation of drug criminals, the protection of cultural heritage, or landing rights. So, one meets one another again and again, and will often need each other. States can hold each other accountable for "State decency": if you have acceded to a treaty, you should adhere to it, because that is in everyone's interest. By adhering to treaties, a State proves itself to be a reliable partner. This provides a form of prestige, which is important when concluding the next treaty.

The effect of State decency is not so important that it will induce a dictatorship to implement democratic reforms. But it can help to keep a declining constitutional State (such as the Netherlands) on track.

Efforts to reinvigorate the cause of human rights would therefore be better invested in an IGO rather than in an NGO.

This brings us to the question of whether there might be an existing IGO that could be suitable as a vehicle for a new impetus for the cause of human rights.

There are currently five IGOs with their own human rights initiative:

- The United Nations:
- The Organization of American States;
- The Council of Europe;
- The African Union;
- And the Association of Southeast Asian Nations.¹

Only the UN works globally, the others are regional organizations. A regional organization however would be unsuitable to carry our new initiative, because we would not want to exclude any State up front. Hence, we only need to consider the question of whether the UN could serve as a home for our new impetus.

¹ The European Union has drawn up a Charter of Fundamental Rights of the European Union, but this has, for several reasons, never become a full-fledged human rights initiative.

1.2. Is the UN part of the solution, or part of the problem?

It would be a huge advantage if we could use the UN for our new impetus. The UN has a robust organization, it has more than seventy years of experience in international politics, and it has a wealth of expertise in the field of human rights.

Unfortunately, the UN would not be the right organization for us, for a number of reasons.

- First of all, there is the UN's explicit policy to involve as many States as possible in all
 activities. This commitment runs so deep at the UN that it can be said to be part of the
 organization's DNA. And in the case of human rights, as we will see, this is not an advantage, but a major disadvantage.
- Then there are the practices of power politics and clientelism that dominate the day-today business of the UN.
- And finally, there is the right of veto that a number of States with poor human rights policies have at the Security Council.

1.2.1. The intention to involve as many States as possible

The UN was established as a platform for all States in the world. With 193 members, this goal has almost been achieved. And 170 or more States have become parties to the most important UN human rights treaties. In one treaty (the Convention on the Rights of the Child) there are even 192.²

Any State that ever wished to do so has always been able to accede to any UN human rights treaty. As a result, many States with very poor human rights policies have also become parties to these treaties.

The UN's motive for admitting these States is clear. It was believed that, after accession, they could gradually be persuaded to respect human rights. This was to be brought about through so-called implementation mechanisms, under the supervision of Committees of Independent Experts.

These implementation mechanisms are the following:

- a reporting cycle for the State parties;
- the State complaints right;
- the individual complaints right;
- and the right of investigation by the Committee.

The most important of these mechanisms is the reporting cycle. All State parties must periodically - usually every two to four years - submit a progress report to the Committee. This report then forms the starting point for an exchange of questions from the Committee and answers from the State. The intention was that the members of the Committee would gradually "educate" the State to a better understanding and better observance of human rights.

This idea has proven to be untenable. Even after decades, some State parties have not yet implemented any part of these treaties in their legislation or administrative practice.

From the perspective of an unfree State, this makes perfect sense. Under human rights treaties, States must guarantee their citizens free elections, freedom of assembly and association, and freedom of speech. They must allow a free press and independent trade unions.

² Only the United States has not become a party to this treaty.

They must respect the privacy of their citizens and the rights of suspects. They must ensure good governance and an independent judiciary. In an unfree State, these are all direct threats to the survival of the regime. That is why the government of an unfree State will not allow these things. Promoting human rights goes directly against the self-interest of these regimes.

The fact that many of these States have nevertheless acceded to human rights treaties is therefore not to be seen as proof that they support the idea of human rights. They did this to avoid isolating themselves in the international community.

However, the effect of admitting unfree States to human rights treaties has far-reaching consequences. The members of the Committees of Independent Experts are nominated and elected by the States party to the relevant treaties. These experts may be independent in name, but those nominated by authoritarian regimes will not be able to operate independently from their governments.

The accession of these States to the human rights treaties, and their participation in the associated bodies and processes, mostly creates a lot of disruption and frustration.

This does not mean that their participation is completely pointless, but with these States involved one cannot hope to create a vigorous new impetus for human rights.

1.2.2. Power politics

The UN has become a diplomatic battleground. Geopolitical disputes, such as between Israel and the Arab States, between Iran and Saudi Arabia, and between the US and China, are fought out in all UN bodies – including human rights bodies.

Within the UN, all kinds of issues are discussed – not just human rights. And in the minds of politicians and diplomats, most other matters usually outweigh human rights. Trade relations or military alliances e.g. are much more tangible than human rights. Although human rights occupy a prominent place in the UN Charter, in daily practice they often play only a modest role – if not the role of bargaining chip.

There may be no State in the world where human rights are being violated more brutally than North Korea. But the UN sanctions against that country were imposed because of its nuclear weapons program, which is seen as a serious threat to world peace - not because of the oppression of its own population.

The human rights situation in Saudi Arabia is not much better than that in North Korea. Yet the US – self-proclaimed champion of human rights – supports that country because it is an important supplier of oil, an ally against Iran, and a major buyer of American weaponry. And so Saudi Arabia is allowed to silence all internal opposition and wage a terrible war in Yemen.

1.2.3. Clientelism

Major States such as the US, Russia, China, Saudi Arabia and Iran buy political influence by supporting other, often authoritarian regimes. What they want in return is, among other things, "supportive" voting behavior in the UN and other international forums.

What this clientelism can result in became apparent, for example, on October 13, 2020. On that day, 15 new members were elected to the UN Human Rights Council. The States elected there for three-year terms included China and Russia – thanks to the votes of their client States. The regimes of Russia and China, which have completely subordinated human rights to their own survival, can in this Council defend not only their own interests, but also those of their totalitarian clients, thereby deeply frustrating the work of the human rights movement.

1.2.4. The right of veto in the Security Council

The five permanent members of the Security Council - the US, Russia, China, France and the United Kingdom – all have the right of veto in the Security Council. This means that each of them is able to block any form of action by a simple vote against.

The Security Council is the strong arm of the UN. The task of the Security Council is to maintain international peace and security. The Security Council has at its disposal a whole arsenal of diplomatic tools for this purpose, but, if necessary, it can also impose economic sanctions, an arms embargo, or financial punitive measures (such as blocking bank assets). In extreme cases it can even initiate military intervention.

Because major human rights violations always entail threats to peace and security, these regularly come before the Security Council. But it rarely takes any form of action. Even pronouncing a conviction is often blocked by a veto. This way, Russia can prevent measures against Syria, and China against North Korea. And the US can prevent Israel from being punished for building settlements in occupied territory and for treating its Arab nationals as second-class citizens.

The US, Russia and China in particular use their veto power in the Security Council to protect their client States, effectively preventing measures to be taken against regimes that violate human rights. These three States should therefore under no circumstances be admitted to a new human rights initiative. This means that such an initiative is virtually unthinkable within the UN.

Because of its stated policy of including as many States as possible in every endeavor, the ubiquitous practices of power politics and clientelism, and the right of veto in the Security Council of States with a dubious human rights policy, the United Nations is unsuitable as a vehicle for a new impetus for human rights. This new impetus therefore requires the creation of a new international organization, one that is not burdened with a legacy of political chicanery, and is dedicated exclusively to the advancement of human rights.

A new international organization automatically means a completely new human rights initiative, with a new human rights treaty.

1.3. What lessons can be learned from existing human rights initiatives?

Before we plan a new design, we must first see what we can learn from existing initiatives, preserving the good and avoiding the bad.

On the negative side, there are two design defects in particular which have far-reaching consequences.

The first has already been mentioned above, when discussing the UN's policy to admit as many States as possible to the treaties. This is only possible because there is no control at the gate: anyone who wanted to join could do so, "no questions asked."

The second important design flaw is that most human rights treaties allow a wide range of obligation-evading schemes. This concerns the use of optional provisions and protocols, allowing reservations to be made upon ratification or accession, and the option to sign a treaty without ratifying it later.

On the positive side, a number of institutions should be mentioned, from the UN, and from the Council of Europe.

We will now have a look, first at the downsides, and then at the upsides.

1.3.1. The admission policy

Because any State that wanted to do so could accede to the human rights treaties, dozens of States with very poor human rights policies are now parties to these treaties. Of the 53 States in the lowest category of The Economist's Democracy Index (EDI³), 46 are now parties to the ICCPR, and 48 to the ICESCR⁴. This concerns States such as Afghanistan, China, North Korea, Iran, Iraq, Russia, Syria and Yemen.

From the same group of States, Azerbaijan, Russia and Turkey⁵ are parties to the European Convention on Human Rights.

The participation of these States in the human rights treaty processes only leads to disruption and frustration.

To prevent this from happening in the new human rights initiative, an admission test will have to be introduced. Only States for which it has been established that they already comply with the new treaty in legislation and implementation practice may be admitted to the treaty.

This will automatically lead to a much smaller group of participating States. This smaller group however could better work together in the realization of human rights than is currently possible in the existing, broader platforms. They could present themselves as an ethical vanguard.

1.3.2. Optional protocols and provisions

The use of optional protocols and provisions in a treaty is again a strategy, aimed at having as many States as possible accede to it. If, when drawing up a treaty, it turns out that a number of States are less ambitious than other States, the controversial parts may be put into an optional protocol. States that wish to opt for a more limited scope of the treaty can then choose not to accede to that protocol.⁶

³ Economist Democracy Index, data from 2019.

⁴ ICCPR: the International Covenant on Civil and Political Rights. ICESCR: the International Covenant on Economic, Social and Cultural Rights. These are the two most important UN human rights treaties.

⁵ Turkey is in the second worst category of the EDI.

⁶ Another type of optional protocol also occurs. Sometimes parties want to further expand the scope of a treaty later, when it has already entered into force. This can then be accomplished by adding new provisions in an additional protocol. The provisions of that protocol will only apply to parties that explicitly accept them.

A variant of this is the optional provision. This is a provision in a treaty of which an acceding party must separately declare that it accepts it by means of a letter to the depositary of the treaty. Otherwise, this provision will not apply to the party in question.

In the UN human rights treaties, optional provisions and protocols mostly concern the powers of the Committees, in particular the State complaints right and the individual complaints right. The percentage of treaty parties that have accepted this type of optional protocols varies from 67% for the ICCPR to 15% (!) for the ICESCR. The Convention on the Rights of the Child, to which 192 of the 193 member States of the UN are parties, includes an optional protocol that sets out both the State complaints right and the individual complaints right. Only 45 States have accepted this protocol: less than a quarter of all parties to the treaty.

The use of optional protocols and provisions no doubt has led to many more States acceding to the relevant treaties than would otherwise have been the case. But the fact that a large proportion of these States subsequently did not agree to the accountability mechanisms of the State complaints right and individual complaints right is telling.

The new treaty must be fully binding for all parties. It must therefore have no optional provisions or protocols.

1.3.3. Reservations

The making of reservations when acceding to an international treaty is regulated in the Vienna Convention on the Law of Treaties (VCLT), also called the Treaty of Treaties.

There is even an entire section in the VCLT devoted to this subject. This makes it a legitimate instrument – provided it is applied correctly. The VCLT prohibits some types of reservations. The most important prohibition is against reservations that are "incompatible with the object and purpose of the treaty [in question]." This could, for example, be a reservation against a core point of a treaty. But it may also concern a reservation that is so unclear or vague that doubts may arise about whether the State in question truly wants to be bound by the treaty.

For example, it sometimes happens that a State, when acceding to a treaty, declares that it will interpret the treaty in accordance with its own Constitution, or with the Sharia (Islamic law). Because it is then not immediately clear what this State considers itself to be bound by, such a reservation is not permitted. Nevertheless, States have made such reservations when acceding to human rights treaties. These reservations are properly recorded on the UN website, but the States concerned have still become parties to these treaties.

This is primarily so because there is no authority that can reject as invalid an instrument of accession which contains an inadmissible reservation. Instruments of accession are sent to the depositary of the treaty. For the UN human rights treaties, this is the UN Secretary General. A depository however, only has administrative duties. Communications regarding the treaty are received, and then relayed to all other parties concerned. For the rest, the depositary is completely passive.

This means, among other things, that the depositary cannot intervene when a State submits an instrument of accession or ratification with inadmissible reservations. The depositary can only forward the documents to the other parties. It is up to them to react, if they so wish.

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⁷ VCLT, art. 19, sub c.

A State that is already party to a treaty can, in theory, object to an inadmissible reservation. The objecting party may even determine that the treaty will not be valid between him and the party that made the reservation. With respect to human rights treaties, the first has occurred occasionally, but no examples of the second are known to this author.

And so it is, that States with inadmissible reservations have nevertheless become parties to the human rights treaties.

Making reservations when acceding to a human rights treaty is contrary to the spirit of human rights. Take it or leave it: one embraces human rights, or one does not. The new treaty will therefore have to contain a provision that prohibits the making of reservations. The treaty must also stipulate that the depositary is obliged not to receive an instrument of accession that does not meet the conditions set out by the treaty.

1.3.4. Signing without ratifying

A State can become a party to a treaty via either of two routes: signing followed by ratification, or acceding. Both routes produce exactly the same result, namely that the State agrees to be bound by the treaty (in the VCLT referred to as "consent to be bound").

The two-step method of signing followed by ratification is a very common one. By signing the treaty, a State expresses its intention to become a party to the treaty "in due course". The interim period is meant to allow the State to bring its legislation and implementation practice in line with the requirements of the treaty. Once that has happened, the State will start the domestic ratification process. This process varies per State, but in democracies it usually concerns the approval of the treaty by parliament. Once this process is completed, the State's government can submit an "instrument of ratification" to the treaty's depositary. From that moment on, the State is bound by the treaty.

In most cases, signing a treaty is only possible for a certain period of time. States that after that period wish to become a party to the treaty can only do so in a procedure which is called acceding to the treaty. It has the same legal consequences as ratification. The State in question must go through the same internal process as for ratification. The document that the State subsequently deposits is not called an instrument of ratification, but an instrument of accession.

As said, by signing a treaty for which ratification is mandatory, a State declares that it intends to ratify it at a later date. Yet it happens that a State signs a treaty but never ratifies it. Two notable examples in the area of human rights are the following:

- China signed the ICCPR in 1998, but never ratified it.
- The United States signed the ICESCR in 1977, without ever ratifying it. Given the period of time that has elapsed since the signing, these States – and many others in comparable situations – clearly never intend to follow through to ratification.

Signing without ratifying is the most sweeping way to limit the obligations arising from a treaty, because they are then actually limited to nil. And yet such States will be listed on the UN website as having signed the treaty. This allows them to make a good impression with a non-binding signature. 8

⁸ The VCLT does provide that a State that has signed a treaty, but not yet ratified it, must "refrain from acts which would defeat the object and purpose" of the treaty in question (VCLT, art. 18). In the case of a human rights treaty, this provision offers little solace.

To prevent this highly undesirable situation, the new treaty must provide that States can only become parties by accession. The route of signature followed by ratification should explicitly be excluded.

1.3.5. Positive aspects

When examining the existing human rights initiatives, some positive aspects that are worth preserving also stand out. This concerns in particular the Committees of Independent Experts from the UN human rights treaties, and the European Court of Human Rights that was established by the Council of Europe. These will therefore return (with some modifications) hereafter, in sections 2.1 and 2.3, respectively.

2. The Comprehensive Human Rights Initiative (CHRI)

We will call our new human rights impetus the Comprehensive Human Rights Initiative (CHRI). The term Comprehensive is added to stress the fact that human rights are not a bundle of threads, but a fabric. Human rights are not a list or a menu to be chosen from, but a world view to be embraced, in total, without reservations.

Ideally, the CHRI would be a supranational body, but that is not a realistic option for the time being. That is why we will have to make do with an IGO. The CHRI will aim to promote human rights worldwide, on the one hand through a classic human rights initiative, on the other hand by entering into development cooperation specifically aimed at realizing human rights.

The CHRI will have four bodies: a Committee of Independent Experts, a Council of Ministers, a Human Rights Court, and a Sounding Board Group.

The CHRI will have three main documents: a Charter, a Declaration (the Evolved Declaration of Human Rights) and a Treaty (the Comprehensive Convention of Human Rights).

2.1. The Committee of Independent Experts

A special feature of the UN human rights initiative is, that almost every treaty has a Committee of Independent Experts. These Committees are charged with monitoring the implementation of the treaties. There are four implementation mechanisms:

- A reporting cycle. State parties must periodically submit extensive reports to the Committee. In these they must indicate what they have done in the past period to implement the treaty provisions. This allows the Committee to closely monitor developments and, where necessary, propose adjustments with critical comments and suggestions. The Committees' findings are made public.
- The State complaints right. This means that a State party can submit a complaint to the Committee about another State party.
- The individual complaints right. This means that an individual citizen can submit a complaint to the Committee about conduct by a State party.
- The right of independent investigation. Some Committees can independently conduct investigations when abuses are suspected.

However, States can in most cases choose not to recognize the competence of the Committees with regard to the State complaints right or the Individual complaints right. This option is widely used: see section 1.3.2 "Optional protocols and provisions" on page 9 above.

In practice, the reporting cycle is the most important instrument of the Committees – also because it is in all cases compulsory for the States. A strong point of this tool is that it enables the Committee to act both actively and proactively. It can therefore be very effective – provided the State in question takes the process seriously.

The Comprehensive Human Rights Initiative will also include a Committee of Independent Experts. Its members will be nominated and appointed by the Council of Ministers.

The tasks of this Committee will in part be the same as those of the Committees of the UN treaties, namely the reporting cycle and the right of investigation. The procedures for State complaints right and Individual complaints right however will be transferred to the Court. In-

dependent experts can do a great job in coaching and investigating, but making judgments in conflicts is better left to legal professionals.

An important additional task for the Committee will be to deal with applications for accession to the Convention. The Committee will assess the legislation and implementation practice of States wishing to accede against the content of the Convention. Only when the Committee has come to the conclusion that the State complies fully with the Convention will it advise the Council of Ministers to invite this State to become a party to the Convention.

Another new power for the Committee will be to refer, in case of necessity, matters arising from reports or investigations to the Court.

Compared to the UN Committees, a number of organizational adjustments will be necessary.

- Because the new treaty will be much more comprehensive than any of the existing UN
 human rights treaties, the new Committee will need significantly more members. This
 could include specialized subcommittees for, among others, the rights of the child, the
 rights of the disabled, and the rights of women.
- The UN Committees are in session only a few weeks per year. The CHRI Committee will have to function all year round.
- The UN Committees can rely on the organization of the UN High Commissioner for Human Rights for administrative and judicial support. This will have to be replaced by an extensive internal staff.

In the phase between the drafting of the Convention and the accession of the first States to the Convention, the Committee will already have to be in place in order to assess applications from prospective State parties. This means that the Council of Ministers will also have to be in place to appoint the members of the Committee. Since it is not certain in advance that all States that contributed to the conclusion of the Convention will later be admitted to it, there will initially be a Provisional Committee and a Provisional Council of Ministers.

2.2. The Council of Ministers

In an IGO, the participating States do not give up any part of their sovereignty. Still, decisions must be made. To this end, a group must be formed in which the States are represented at the highest political level.

Within the organization of the Council of Europe, there is a Committee of Ministers for this purpose. It is composed of the ministers of Foreign Affairs of the member States. This Committee meets once a year at ministerial level and weekly at deputy level (the permanent representatives to the Council of Europe).

A Council of Ministers should be formed in the CHRI based on this model. To ensure a good focus on human rights, it should however not consist of ministers of Foreign Affairs, but of Justice.

The purpose of the Council will be to provide executive direction to the CHRI. The tasks and powers of the Council will include:

- Appointing the members of the Committee of Independent Experts.
- Appointing the judges of the Court.
- Monitoring the implementation of judgments of the Court.
- Deciding on sanctions against a State if it fails to implement a judgment of the Court. The Council will have the power to suspend a State or to deprive it of membership of the CHRI. A two-thirds majority should be required for these sanctions.

2.3. The Court of Human Rights

The Court can be set up on the model of the European Court of Human Rights (ECtHR).

- The judges will be nominated by the State parties to the Convention and appointed by the Council of Ministers.
- The Court will deal with procedures from both the State complaints right and the Individual complaints right.
- In addition, the Court will be able to deal with cases brought by the Committee of Independent Experts.
- Like the ECtHR, this Court will have its own executive body that monitors the execution of its verdicts.
- If a case is not settled in accordance with the verdict, the Court may refer the case to the Council of Ministers for the determination and imposition of sanctions against the State concerned.
- The Court will act as the highest authority within the CHRI regarding the interpretation of the Convention.

2.4. The Sounding Board Group

Ideally, one would also like to have a parliament within the CHRI, for democratic input and control. However, human rights are an area that is not particularly suited for this, because human rights take precedence over the interests of the individual – and often even conflict with individual interests. "One man one vote" is at odds with that fact.

Still, independent input from outside the organization is essential. This can be provided by a Sounding Board Group, composed of people with a passion for the cause of human rights. In this group, permanent seats may be reserved for what is called civil society, such as NGOs working in the field of human rights, and representatives of national human rights institutions.

This group can act as a sounding board for the Council of Ministers. It must have the right to provide solicited and unsolicited advice, and to make its advice public.

2.5. Founding the Comprehensive Human Rights Initiative

The establishment of the CHRI will have to take place in a number of phases.

- The first step will be to convene an international conference that draws up the organization's Charter. This Charter will stipulate, among other things, that only States that are parties to the Convention yet to be drawn up can be members of the CHRI. The States that participate in the drafting of the Charter will therefore initially become Provisional Members.
- The same conference or a follow-up conference drafts the Evolved Declaration of Human Rights and the Comprehensive Convention of Human Rights.
- Adoption and authentication of the texts is done by means of initialing by the representatives of the States that participated in the preparation of the texts.⁹

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⁹ VCLT, art. 9 and 10.

- Subsequently, a Provisional Council of Ministers is established. Each of the participating States sends its Minister of Justice.
- The Provisional Council of Ministers appoints the members of a Provisional Committee of Independent Experts.
- This Provisional Committee considers applications from States to accede to the Convention.
- The Provisional Committee examines whether the States concerned comply with letter and spirit of the Convention in their legislation and implementation practice, and, if necessary, makes recommendations for changes.
- When it is established that a State meets the set criteria, the Provisional Committee will inform the Provisional Council of Ministers. The Provisional Council then invites the State concerned to accede to the Convention.
- Accession shall be effected by the deposit of an Instrument of Accession with the depositary of the Convention. 10 In this Instrument, reservations will not be allowed. 11
- After acceding to the Convention, the State concerned becomes a full member of the
- After a number of States specified in the Convention have acceded to the Convention, the Convention will enter into force. At the same time, the Provisional Committee and the Provisional Council shall become the Committee and the Council, respectively. From that moment on, the Committee and the Council will consist exclusively of representatives of the States that have acceded to the Convention.

¹⁰ VCLT. art. 15 and 16.

¹¹ See section 1.3.3 "Reservations" on page 10 above.

3. The Declaration

For a human rights initiative, a treaty will not suffice, because the philosophy of human rights cannot be fully captured in a treaty text.

States commit themselves to a treaty in a legal sense. In many countries, the text of an international treaty to which one is a party automatically becomes law. This means that the judges of that country must be able to work with it. This in turn means that the treaty texts must be precise, concise and unambiguous. A side effect of this is that the texts will usually be not very inspiring.

Yet inspiration is indispensable for human rights. Human rights are first and foremost a body of thought, based on a vision of what the essence, the most essential, of humanhood is. This is why, in addition to a treaty, a Declaration is needed, to set out this vision. This Declaration needs to be convincing, but also persuasive: an invitation to participate, to share in this vision.

So, the question arises: would the UN's Universal Declaration of Human Rights (UDHR) be suitable to also drive our new impetus?

The UDHR has been the leading human rights text for more than seventy years, precisely because it is not a treaty, but a statement of ideas. The influence of this text can hardly be overestimated: almost every human rights treaty drawn up since then refers (also) to the UDHR as a source of inspiration. It is the foundation of the global human rights movement.

But as a foundation for our new impetus, this text would now fall short.

The main reasons why the UDHR is not suitable as a foundation for the new human rights initiative are briefly as follows:

- the text contains clear evidence of a Western superiority complex;
- the text lacks a number of rights, and a number of other rights need to be further developed;
- the text must be adapted to new developments;
- the text does not distance itself from a number of anachronisms;
- the text contains some political compromises;
- and the text needs to be better structured.

We will shortly have a look at each of these points. As we shall see, many of the shortcomings of the Universal Declaration of Human Rights have their origins in historical circumstances that have now disappeared. Society has evolved, and so have concepts of human rights. Therefore, the new Declaration will be called the Evolved Declaration of Human Rights.

3.1. The Western superiority complex in the UDHR

The UDHR was drawn up shortly after the Second World War, in 1948, and this timeframe had a significant, and readily recognizable influence on the text. Colonialism was still very common at that time, the family was still the cornerstone of society, and religion was not yet "just an opinion."

In 1948, only a handful of States on the African continent were independent: the rest were still colonial possessions – mostly of England, France and Portugal. The same applied to large parts of Southeast Asia. What is now Indonesia was still called "the Dutch East Indies", while Vietnam, Laos and Cambodia still were "French Indo-China". All in all, large parts of the world were unable to participate in the drafting of the UDHR.

The text of the UDHR shows clear evidence of a colonial mindset. See, for example, the end of the Preamble:¹²

Now, therefore, The General Assembly, Proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

And in Article 2:

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

The underlined parts refer to colonies.

Another clearly time- and culture-bound aspect is the emphasis on the family as the cornerstone of society. Article 16(3) is quite insistent:

The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

But the family is also presented as the norm in Articles 23 and 25. Article 23(3):

Everyone who works has the right to just and favourable remuneration ensuring <u>for himself and his family</u> an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.

Article 25(1):

Everyone has the right to a standard of living adequate for the health and well-being \underline{of} himself and of his family (...)

Yet another cultural prejudice is evident from the distinction made between religion on the one hand and other opinions on the other. Freedom of religion is dealt with in Article 18, freedom of opinion in Article 19. This distinction shows a cultural bias in favor of religious opinions.

It is undisputed that the concept of human rights is of Western origin. It can be traced back to 13th century England. Then it was laid down for the first time in the Magna Charta that the king also had to adhere to "the laws of the land." So, he was no longer *above* the law. This was a crucial step toward establishing what the UDHR describes as "the rule of law."

¹² All underlining hereafter is added by the author.

The later evolution of human rights also continues through Western developments, such as the American and French Revolutions, the abolition of slavery, the struggle for universal suffrage, and the rise of socialism.

This one-sided Western origin of human rights regularly causes discomfort - also in the West. It then is obviously not helpful that the UDHR contains easily demonstrable Western stereotypes.

The Evolved Declaration of Human Rights (EDHR) should be an outstretched hand, not a raised finger. All States that subscribe to the values of this Declaration, whether from the East or the West, the North or the South, will be welcome to accede to the Convention.

3.2. Extensions and clarifications needed

The UDHR still lacks a number of rights that later appear in various human rights treaties. The most important of these should be incorporated in the EDHR.

There are also some rights that, although mentioned in the UDHR, are not sufficiently developed. A declaration will always be less detailed than a treaty, but it should not be vague.

3.2.1. Rights that are missing in the UDHR

The following rights are missing in the UDHR, and should be added to the EDHR:

- The right of parents or guardians to determine the ideas with which their children are raised.
- The right to good governance.
- A ban on undergoing medical or scientific experiments without explicit and informed consent.
- The right to judicial review of detention (habeas corpus).
- The right to compensation in the event of unlawful deprivation of liberty.
- A ban on all forms of forced labor.
- And a ban on the death penalty under all circumstances.

These matters were later addressed in various human rights treaties, but they are important enough to be incorporated in the Declaration.

Furthermore, the UDHR pays little attention to the rights of the child, and says nothing about the rights of the elderly, the chronically ill and the disabled. These matters must also be included in the EDHR.

3.2.2. Rights that need to be further developed

When the text of the UDHR was drawn up, it was already known that a treaty would be drawn up in which these rights would be further elaborated¹³. Perhaps this is why some matters in the UDHR remain rather vague. Now that a new Declaration is to be drafted, it would be unwise to resort to a similar level of vagueness again. All parts of the new initiative must be as inspiring as possible, and clarity can help with this.

¹³ Ultimately, the text was divided over two treaties: the ICCPR and the ICESCR.

Two examples.

Arrest

Article 9 of the UDHR reads as follows:

No one shall be subjected to arbitrary arrest, detention or exile.

This is all that is said in the UDHR on the subject of "arrest". Further elaboration follows in the ICCPR. Article 9(4) of the ICCPR for instance stipulates that anyone "deprived of his liberty by arrest or detention" has the right to ask a judge to assess the lawfulness of his detention. This principle, known as "habeas corpus," is so essential for the rule of law¹⁴ that it should certainly be included in the new Declaration.

Another crucial extension of the provisions surrounding arrest is the right of a detainee to be informed, immediately upon arrest, about his rights, in particular the right to remain silent, and the right to legal assistance, free of charge if necessary.

The economic rights

The economic section of the UDHR consists of Articles 22 to 24. Article 22 formulates the principles, and some further elaboration follows in Articles 23 and 24.

The text of Article 22 is as follows:

Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

There's a lot here, but it's rather woolly. The woolliness is mostly in the last part of the article:

(...) the economic (...) rights indispensable for his dignity and the free development of his personality.

This could be formulated much more clearly, e.g. as follows:

Everyone has the right to the existence of just economic relations in society, as a necessary condition for the realization of human rights.

Such a formulation creates more clarity in several respects. First of all, "economic rights" is replaced by "the right to (...) just economic relations", which establishes a direct link to the structure of society. This formulation also makes it immediately clear that what follows is not an exhaustive list of economic rights, but only a selection from them.

Furthermore, "which are indispensable for his dignity and for the free development of his personality" is replaced by "as a necessary condition for the realization of human rights." This makes it clear that a society needs just economic relations as an indispensable precondition for human rights.

Articles 23 and 24 of the UDHR then provide a summary of the economic rights:

Article 23(1):

- The right to work,
- The right to free choice of employment,
- The right to just and favorable conditions of work,
- The right to protection against unemployment.

¹⁴ It is so important because it places, in cases of deprivation of liberty, the judiciary above the executive.

Article 23(2):

 The right for "everyone" to equal pay for equal work (there is no explicit mention here of men and women, although that is what is probably intended).

Article 23(3):

• The right to just and favorable remuneration, sufficient for "an existence worthy of human dignity", supplemented, if necessary, with social support.

Article 23(4):

• The right to form and to join trade unions.

Article 24

The right to rest and leisure, and periodic holidays with pay.

The Evolved Declaration requires at least the following extensions:

- The right to adequate facilities for pregnant and lactating employees.
- The right to equal opportunities for promotion,
- The right to healthy, hygienic and respectable working conditions,
- The right to employment conditions that enable a good combination of work and private life
- And the right for employees to consultation about, and participation in the governance of the company.

3.2.3. The prohibition of discrimination

The wording of the prohibition of discrimination deserves special attention, because discrimination is one of the greatest threats to human rights. Discrimination is addressed in the UDHR in Articles 2 and 7.

Article 2:

Everyone is entitled to all the rights and freedoms <u>set forth in this Declaration</u>, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 7:

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination <u>in violation of this Declaration</u> and against any incitement to such discrimination.

In both articles, the scope of the prohibition of discrimination is therefore limited to "all rights and freedoms set forth in this Declaration." This means that no principled position is being taken here against all forms of discrimination.

A simpler, but equally imprecise approach is offered in Article 1 of the Dutch Constitution:

All persons in the Netherlands are treated equally in equal cases. Discrimination on the grounds of religion, belief, political opinion, race, gender or on any other basis is not permitted.

What is missing though from all this is what exactly discrimination is. Formulating this properly is a complex matter, and it may be partly for this reason that human rights texts opt for more limited descriptions.

Below is an example of a possible description of the concept of discrimination, for inclusion in the EDHR.

Discrimination is understood to mean: all expressions, and all actions or failures to act¹⁾, towards a person or persons, in his or their capacity as a member of a group²⁾ which is identifiable on the basis of a real or alleged characteristic³⁾ such as race, skin color, gender, sexual identity or orientation, national⁴⁾, ethnic or social origin, language, religion, political or other beliefs, marital status, age, membership of a cultural minority, disability, wealth⁵⁾, literacy⁶⁾ or otherwise⁷⁾, which aims to, or may have as a result, stigmatization⁸⁾, or causing or maintaining an unequal position⁹⁾ relative to others with regard to the recognition, enjoyment or exercise of human rights and fundamental freedoms in the political, economic, social or cultural spheres or in other areas of human interaction.

- 1) "All expressions, and all actions or failures to act": so this includes all conceivable doings, but not holding an opinion. Every opinion, even a discriminatory one, is free. Only the expression of an opinion can be subject to judgement.
- 2) "As a member of a group": this is the aspect which makes the difference between "simple" insulting, threatening or intimidating on the one hand, and discrimination on the other hand. The group aspect makes all "members" of the group a potential target for discrimination which is stigmatization.
- 3) "Alleged characteristic": it is not important whether the characteristic can be determined objectively: what matters is the perception of the person who discriminates.
- 4) National origin: not to be confused with nationality. States may, to a certain extent, distinguish between the rights of nationals and those of aliens.
- 5) Prosperity requirements have often been used to limit access to the right to vote. For example, during the French Revolution, only "citoyens" were allowed to vote in elections; one had to have a certain amount of capital to be a citizen (and one also had to be a man.)
- 6) Literacy: In the US there have been regular attempts to exclude blacks from the right to vote by introducing literacy requirements.
- 7) "Or otherwise:" in light of unlimited human creativity, an exhaustive list would not suffice here. Think of tall people, short people, fat people, people with blonde hair and blue eyes, etc. Bear in mind the hunt for people who wear glasses which would indicate them to be intellectuals under the Khmer Rouge regime in Cambodia.
- 8) Stigmatization: a particularly poignant example from history is the Star of David that was introduced by the Nazis during the Second World War to designate Jews.
- 9) An unequal position: this can also refer to a better (preferential) position as a result of favoring one group over another.

3.3. Adjustments to the new age

A lot has changed since 1948, and it is only logical that a statement from just after the Second World War now needs some adjustments to take that into account.

3.3.1. Information Technology

The new possibilities for large-scale collection and analysis of information relating to individuals have an enormous impact on society. Data are not only collected, but also combined to create personal profiles. These profiles describe us more clearly than a photo, and they provide tools with which organizations can manipulate us. They can not only tempt us to buy

certain products, but also, for example, to subscribe to news channels that reinforce our opinions by omitting other opinions. They can then sell the data of their loyal subscribers to advertisers, closing the feedback loop.

In this way, the human need to receive affirmation from fellow human beings, the need to belong, is unfairly exploited to create a group that can be sold as a reliable, homogeneous outlet for products or (political) opinions.

This is dangerous not only because it leads to unfair competition – as only very large companies can deploy these resources – but also because it leads to the creation of echo chambers: virtual spaces in which only one kind of "truth" circulates. This obstructs the free exchange of ideas and thoughts, which is one of the basic requirements for a democracy. It can easily lead to the division of society into hostile camps.

These practices pose a serious threat to our freedom. The techniques used are so fundamental in nature that they must be mentioned separately in the new Declaration: a reference to the protection of personal privacy is really insufficient.

The Evolved Declaration of Human Rights will therefore have to include the provision that people have a right to protection of their personal data, and that anyone (including governments) is prohibited from linking personal data to create profiles.

Only for the prosecution of the most serious crimes an exception should be made, and then only under strict guarantees for careful application.

(There is an analogy here with the use of force by the government. In a democratic constitutional State, founded on and bound by the law, only the government may use violence, and only for purposes, and under conditions, that have been approved in a democratic process. The same must apply to combining personal data to create (perpetrator) profiles.)

Companies may then still collect data from their customers, but they may not process these into profiles, or sell them. Economic exploitation of personal data must be prohibited, just as the economic exploitation of people is prohibited.

And if this means that the economy takes a hit, then so be it.

3.3.2. Registration of movements

The UDHR states the right to freedom of movement and residence as follows:

Everyone has the right to freedom of movement and residence within the borders of each State. (Article 13(1))

This right is as important today as it was in 1948, but it is now subject to a whole new set of threats. Modern techniques now make it possible to track someone's movements with unprecedented accuracy. For all debit and credit card payments, our whereabouts are recorded exactly: in place and time. The same happens with the location data of mobile phones. Traffic cameras and general surveillance cameras (both public and private), whether or not equipped with facial recognition software, fill in any remaining gaps.

The systematic recording of citizens' movement data poses a potential threat to freedom of movement. The EDHR should therefore state that everyone has the right to protection against the unlawful recording of this information.

As with the drawing up of personal profiles, the use of travel data must be available for the investigation of serious crimes. Permission must be given for this by a judge, on an individual basis, just as is currently the case for tapping telephone conversations.

3.3.3. Migration

The UDHR stipulates that everyone has the right to leave any country, including his own (UDHR, art. 13(1)). But only refugees seeking asylum are provided with the right to admission to another country (UDHR, art. 14(1)). The UDHR therefore implicitly recognizes the right of each State to determine for itself whether it wants to admit foreigners - other than refugees - and, if so, who.

Migration has become one of the biggest humanitarian problems of our time. The main cause of this problem is the extremely unequal distribution of wealth in the world. Most of the blame for this inequality lies with the richer countries, which have, after the decolonization process, shown insufficient solidarity with their poorer brethren.

But even apart from these political considerations, simple humanity requires that the EDHR formulates an answer to this crisis.

This answer must be based on two pillars:

- the right of migrants to regulated admission;
- and non-discrimination in the admission process.

Admission will have to be regulated to prevent the collapse of the economic systems and social cohesion in the immigration countries. As part of this regulation, an absolute ceiling per year is permissible: a small State such as Andorra can simply accept fewer migrants than a larger State such as Germany or France.

It is also important that the admission policy does not discriminate, for example on country of origin, on religion, or on professional qualities ("merit-based admission"). A possible ceiling cannot therefore consist of separate numbers per country, but only of a total for all migrants together. If too many migrants apply in total, selection would only be permissible on a chance basis, e.g. by drawing lots, or in order of registration.

A major advantage of an explicit immigration policy is, that migrants no longer have to appeal to refugee status. As long as there is no credible immigration policy, migrants are forced to do so to have any chance of admission. But in doing so they clog the channels intended for refugees.

3.3.4. Other new developments

A changing world can bring new threats from which citizens must be protected. This means that new rights must then be included in the EDHR. Without claiming completeness, the following matters should in any event be addressed:

- The right to protection of the environment.
- The right to consumer protection.
- The right to protection of the freedom and pluralism of the media, including a freely accessible Internet.
- The right to protection against the illegitimate use of someone's identity (identity theft).

The right to a self-chosen death, as a further elaboration of the right to self-determination.

3.4. Anachronisms to be rejected

The basis for human rights is a democratic constitutional State, based on the law, and subject to the law. But not every form of democracy is equally democratic, and not every law is equally just. By remaining silent on a number of matters, the UDHR avoids some thorny issues.

The following anachronisms must be expressly rejected in the EDHR.

- Trial by jury. Good administration of justice requires a high degree of expertise. "Judgment by one's peers" was a step forward in the Middle Ages, but is now completely outdated.
- Elections through a district-based system. The use of voting districts leads to a severe
 reduction in the number of political parties represented, mostly to a de facto two-party
 system. The examples of the US and the UK show that this can easily result in disastrous
 polarization.
- Electoral thresholds. An electoral threshold limits access to parliament for smaller parties, thus suppressing the reflection of the people's representation. The governability of the country should not be an excuse for suppressing legitimate political opinions.
- The heredity of titles, offices or social positions, as a further elaboration of the principle that everyone is born free and on an equal footing. This concerns not only caste systems, such as in India, but also nobility systems and royal families.

Naturally, this will lead to fewer potential member States for the CHRI, but for those who prefer watered down compromises, there is always the UN.

3.5. Political compromises to be eliminated

The UDHR contains a number of remarkable political compromises that should not be included in a new text. For example, Article 21(3):

The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

The underlined part seems to be a reference to the American system of the caucus as an election model. In this model, voters vote for their candidate by walking in a large room to a certain corner. The candidate who gathers the most voters in his corner wins. This still happens locally in the US. This method is contrary to the principle of secret elections and should therefore be rejected.

UDHR, Article 17(1) states:

Everyone has the right to own property alone as well as in association with others.

Joint ownership is a reference to the communist dogma of collective ownership of the means of production. The right to own property, on the other hand, is clearly a reference to capitalism. This article is therefore a compromise between the two ideologies that strove for supremacy just after the Second World War. The EDHR should instead state that everyone has the right to protection of their property. That is an indispensable element of the rule of law.

3.6. Structural reinforcements

The UDHR hardly has an explicit structure. A preamble is followed by 30 articles. Numbers 3 to 21 deal with political and civil rights, and numbers 22 to 27 concern economic, social and cultural rights. Within these two groups (which were later further elaborated in the ICCPR and the ICESCR, respectively) a number of subgroups can be distinguished. But that's it, as far as structure goes.

For a good understanding of human rights, it is essential that they are not merely presented in a simple list, but in an explicit, didactic structure. This structure must distinguish between personal freedom rights (such as the right to freedom of thought, freedom of speech, of privacy, and of movement), and conditions-creating rights (such as the right to a democratic constitutional State and to a caring government.)

It must be made crystal clear that our freedoms are completely dependent on the existence of a democratic constitutional State, based on the law, and subject to the law – and that this State therefore must be defended at all costs. Every public servant must realize that it is his duty to act in good faith to maintain the health and quality of our society, in harmony with human rights, lest our freedoms be in jeopardy.

For a better understanding of human rights, the EDHR must also make two matters clearer than is currently the case in the UDHR:

- the obligatory aspect of the rights;
- and the importance of sufficient financial resources for the realization of human rights, coupled with the importance of intensive development cooperation.

3.6.1. The obligatory aspect of rights

The UDHR only mentions duties once, namely in Article 29(1):

Everyone has duties to the community in which alone the free and full development of his personality is possible.

This is the epitome of vagueness.

The Evolved Declaration of Human Rights must meet many requirements. Not the least important of these is that the text must be educational. And vagueness doesn't help with that.

In theory, it is sufficient to say that everyone has a certain right, e.g. the right to freedom of speech. However, it is only human to think primarily about one's own right to free speech, and not so much about that of others. But my freedom depends on the acceptance of it by others. This means that everyone has an obligation to respect other people's freedoms. With respect to free speech it means, that everyone is obliged to accept that everyone else is also entitled to expresses their opinion - even if this opinion is, for example, mocking or hurtful. Human rights do not cover protection for the touchy.

The boundaries for freedom of speech are determined by the democratically established law. For example, the law states that discrimination is prohibited. If the expression of an opinion is in fact discrimination, then expressing that opinion is prohibited.

The law also stipulates that threats are prohibited. So, if the expression of an opinion is in fact a threat, then the expression of that opinion is also prohibited.

Although in theory it would be sufficient to include in the Declaration that everyone has freedom of speech, from an educational point of view it is desirable to add that everyone is obliged to respect the freedom of speech of everyone else.

Something similar applies to the freedom that everyone has to experience their culture. It would be good to add, for example: "The right to experience one's culture does not include the right to express intolerance towards other cultures." Because that would hinder others' right to freely experience their culture.

Every right entails a duty. The right of one can only exist by the grace of the consent of the other. Right and duty are bound together in an inseparable circle – and that fact must be clearly reflected in the EDHR.

Man is not born to be as free as possible, but to be a member of a community, and within that as free as possible.

3.6.2. The importance of development cooperation

To some extent, human rights are also a money issue. The UDHR recognizes this in the previously cited Article 22¹⁵:

Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

This article marks the beginning of the part of the UDHR that deals with social, economic and cultural rights. It is striking that the UDHR only mentions the "money issue" here: apparently it was believed that money does not play an (important) role in the area of civil and political rights, which are mentioned earlier in the Declaration.

It is obvious that the quality of healthcare, education and social services in particular depends on sufficient budgets, but the rule of law also costs money.

When Gambia joined the ICCPR, a reservation was made to art. 14(3)(d) regarding the right to free legal assistance:

"For financial reasons free legal assistance for accused persons is limited in our constitution to persons charged with capital offences only. The Government of the Gambia therefore wishes to enter a reservation in respect of article 14 (3) (d) of the Covenant in question."

Gambia is on the UN list of Least Developed Countries. (Incidentally, the human rights situation in Gambia is very poor: in the 2019 EDI¹⁶ list, they rank 107th (out of 167 States assessed)).

It is to be expected that most of the States admitted to the CHRI will be developed to highly developed. For reasons of solidarity, as well as self-interest, these States will do well to focus with respect to development cooperation primarily on those States where budgetary problems are an obstacle to the realization of human rights. One might e.g. consider setting up a fund to strengthen the rule of law in developing countries. This fund could be used to pay for training of lawyers and judges.

However, insufficient financial resources should not be a ground to wave the requirements of the Treaty.

¹⁵ On page 20 above.

¹⁶ Economist Democracy Index.

4. The Treaty

A Declaration is a coherent list of principles and intentions, a Treaty is the elaboration of these in legal terms.

The original UN human rights initiative was explicitly designed this way. First came the Universal Declaration of Human Rights, in 1948. Here, human rights are presented as a whole, in broad outline. The intention was actually to then draw up a single treaty, in which the details would be worked out in mandatory articles. However, this turned out to be politically unfeasible. The treaty had to be split into two parts: the ICCPR for civil and political rights, and the ICESCR for economic, social and cultural rights. Both treaties were opened in 1966.

The Comprehensive Human Rights Initiative will, in addition to the Evolved Declaration of Human Rights, also have to have a treaty: the Comprehensive International Convention for Human Rights.

The Treaty must have the same format as the Declaration, with the same order of topics. Above all, it should be one treaty, and not two, as is the case with the initiatives of both the UN (ICCPR versus ICESCR), and the Council of Europe (European Convention on Human Rights versus the European Social Charter). Human rights form one coherent whole, and this is best expressed by having them together in one treaty.

Furthermore, the new treaty should contain the key points of the UN's specialized human rights treaties:

- the International Convention on the Elimination of All Forms of Racial Discrimination (1966):
- the Convention on the Elimination of All Forms of Discrimination against Women (1979);
- the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984);
- the Convention on the Rights of the Child (1989);
- the Convention on the Rights of Persons with Disabilities (2006);
- and the International Convention for the Protection of All Persons from Enforced Disappearance (2006).

A number of important aspects of the Treaty have already been discussed above:

- There will be no optional provisions or protocols (see section 1.3.2 on page 9 above).
- Only full accession to the Treaty will be possible. There will be no signing first pending ratification later (section 1.3.4 on page 11).
- Accession will only be possible without reservations or declarations. Human rights are not a menu of options: one either accepts them completely or not (section 1.3.3 on page 10).
- The depositary is required not to receive instruments of accession that do not meet the requirements of the Treaty (section 1.3.3 on page 10).
- The Council of Ministers will have the power by a two-thirds majority to suspend or expel a State that fails to comply with its obligations under the Treaty (section 2.2 on page 14).

The most important new element of the Treaty will be the admission system. This is aimed at preventing the participation of States with poor human rights policies.¹⁷ States that wish to accede to the Treaty will have to demonstrate that they comply with the provisions of the Treaty in their legislation, regulations, and practice. Whether this is the case will be assessed

¹⁷ See in particular section 1.2.1 on page 6 above.

by the (Provisional) Committee of Independent Experts. Only after a positive advice from the Committee will the (Provisional) Council of Ministers allow the accession of the State in question.

The Treaty will therefore contain the provision that States can only accede on invitation by the (Provisional) Council of Ministers, after approval from the (Provisional) Committee.

Finally, the Treaty should provide for the possibility of withdrawal. Although everything is aimed at only admitting States that deal seriously with human rights, unforeseen circumstances - such as a coup - must also be taken into account.

If a State no longer complies with its treaty obligations, it can ultimately be expelled. However, reaching and implementing such a decision will always be a difficult process. It can then be helpful if a State has the opportunity of "saving face."

About half of the UN human rights treaties do not contain the option to denounce the treaty. Two important examples are the ICCPR and the ICESCR.

North Korea has experienced first-hand what this means. In 1997, after much criticism on its human rights record, the government of North Korea sent a letter to the UN Secretary General stating that it wished to withdraw from the ICCPR. After some investigation, the Secretary General replied that unfortunately this was not that simple, because the treaty does not provide for the possibility of withdrawal. This meant that North Korea could only leave the treaty if all other States party to the treaty expressly agreed to this. 18 After that, nothing more was heard from North Korea in this respect.

The European Convention on Human Rights does provide for the possibility for a State to denounce the treaty. This happened once, in 1969.

In 1967 a coup took place in Greece. A military junta came to power: the so-called Colonel's Regime. Shortly afterwards, an investigative committee of the Council of Europe concluded that this regime violated human rights on an extensive scale. Political opponents were imprisoned, tortured and murdered. But before the Council could take the decision to expel Greece on the basis of this report, the Greek regime itself decided to leave the Council in 1969. (After the restoration of democracy, Greece was readmitted to the Council.) 19

Well, that's it. So, who accepts the challenge?

¹⁸ So regulated in the VCLT, Art. 54.

¹⁹ This episode has left no trace on the Council of Europe's website (www.coe.int). Greece is simply listed there as a member of the Council since 1949.