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ABSTRACT

This article analyzes the right of petition by individuals to the conventional committees that form part of the Global Human Rights Protection System established under the auspices of the UN. This article analyzes the right of petition by individuals to the conventional committees that form part of the Global Human Rights Protection System established under the auspices of the UN. The text describes the system that allows individuals to submit petitions with international organizations denouncing their States for human rights violations listed in the Universal Declaration and the International Covenant of Civil and Political Rights (ICCPR) or in the norms established in specific treaties such as the U.N. Convention Against Torture (UNCAT), the International Convention for the Elimination of all Forms of Racial Discrimination (ICERD), the Convention Against the Elimination of all Forms of Discrimination Against Women (CEDAW), and the International Convention on the Rights of Persons with Disabilities. According to the author, the recommendations made by UN bodies relating to allegations made directly through individual petitions are binding and must be complied with by the States in question.

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KEYWORDS

Right of petition – Human rights – Global System



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RIGHT OF PETITION BY INDIVIDUALS WITHIN THE GLOBAL HUMAN RIGHTS PROTECTION SYSTEM*

Carla Dantas

1 Introduction

This article is developed using the doctrinal currents of International Law as theoretical landmarks that assign the moral grounding for the development of rights, whose just and binding nature do not result exclusively from the discretion of states. This enables the emergence of an international order that is valid *erga omnes*, in which the protection of international rights is not guaranteed by a monopoly of states.¹

This doctrinal position involves the recognition of principles such as the prohibition of the use of force and war, the equality of states, the peaceful solution to disputes and humanitarian protection in times of war. It also includes the broadening of the international agenda, which now interferes in domestic legal systems (SOARES, 2004, p. 337), even determining the treatment that States must provide their own citizens.

Placed in historical perspective, the United Nations General Assembly (UNGA), carried out its mandate to promote human rights by adopting the Universal Declaration of Human Rights in 1948. This was an important landmark in the process of internationalizing human rights, since it proclaimed the rights contained in the Declaration to be a common standard of achievement for all nations (DALLARI, 2008, p. 55) and marked the start of the positivization and universalization of human rights, meaning that “more important than being proclaimed, they [the rights] must be guaranteed against all manner of violation” (AMARAL, 2002, p. 642). The UNGA’s subsequent adoption of international human rights treaties that established institutions to monitor the rights they contained led to the development of the global system of human rights protection.

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Thus, international human rights obligations were imposed on states during the 20th century, giving rise to the possibility of holding states internationally responsible for non-compliance with these obligations (RAMOS, 2012, p. 29). Two prominent treaties were the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR), together with its First Optional Protocol, which: a) recognized the need to create conditions whereby each individual can enjoy their rights; b) established obligations for states to guarantee effective instruments to defend the rights recognized by these treaties in their domestic legal systems;² and c) provided for international contentious and non-contentious instruments to promote and protect the rights, such as the good offices, the system of reports, the possibility of creating *ad hoc* conciliation commissions and the right of individuals to petition international bodies.

This article discusses the international human rights instruments established by the international treaties and approved under the auspices of the UN that recognize the right of individuals to petition the committees created by these international treaties, such as the Human Rights Committee (HRC), which is provided for in the ICCPR and its optional protocol.³

Just like the ICCPR, other international treaties adopted under the auspices of the UN allow for the possibility of addressing individual petitions to their respective committees. These are the following conventions:⁴

- (i) International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), which created the Committee on the Elimination of Racial Discrimination (CERD);
- (ii) Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which created the Committee on the Elimination of Discrimination against Women (CEDAW);
- (iii) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishments (CAT), which created the Committee against Torture (CAT); and
- (iv) Convention on the Rights of Persons with Disabilities (CRPD), which created the Committee on the Rights of Persons with Disabilities (CRPD).

During the 20th century, there was a significant increase in the number of international human rights norms, which projected individuals onto the international stage with powers to claim their rights, notably through the right to petition the aforementioned committees.

There is clearly a need today, as shall be demonstrated later, for a dynamic interaction between international law and domestic law in order to promote and protect human rights, which includes the efficient functioning of the regional and global human rights protection systems. On this point, Cançado Trindade has said that “international law and domestic law walk hand-in-hand and point in the same direction, coinciding behind the ultimate and basic common purpose of protecting the human being” (TRINDADE, 2001, p. 34).

2 The Global Human Rights Protection System

During the last century, there emerged an:

entire sector of International Law, with unbelievable normative force, that since the installation of the UN, in 1945, has grown increasingly more vigorous: the international protection of human rights, with normative engineering that is extremely well crafted and endowed with mechanisms to verify compliance”

(SOARES, 2004, p. 156).

In the context of the UN, this process of internationalization of human rights materialized with the establishment of the Global Human Rights Protection System, a term widely used in certain circles to refer to the international system for the protection of human rights that is universal and based on the principles established by the UN Charter. This system is intended to promote and protect the human rights guaranteed by the treaties adopted by the UNGA, such as those presented above.

The Global Human Rights Protection System is monitored primarily by the Human Rights Council, a subsidiary body of the UNGA and successor of the Commission on Human Rights in the task of promoting and protecting human rights.

The Global Human Rights Protection System can be categorized into two areas: *conventional*, established by international conventions and monitored, fundamentally, by the different committees created by them, which are known as “Treaty-Based Bodies”; and *extra-conventional*, formed by resolutions adopted by UN bodies and consisting of bodies created by the UN Charter or derived from them, which the UN calls “Charter-Based Bodies.”⁵

The conventional system operates through mechanisms to examine human rights violations documented by petitions from states or individuals that are addressed to the specialized committees, which, according to Carvalho Ramos, have a quasi-judicial nature (RAMOS, 2012, p. 75).

Each one of the conventional human rights protection committees that make up the Conventional Global Human Rights Protection System receives structural support from the UN Secretariat, more specifically the Office of the UN High Commissioner for Human Rights⁶ (OHCHR), a subsidiary body of the UN Secretariat that is responsible for promoting respect for and the full implementation of human rights.⁷

The UN Secretary General, via the OHCHR, is responsible for providing the conventional human rights monitoring committees with all the necessary staff and facilities for the effective performance of their functions.⁸ In the performance of this task, the UN Secretary General, via the OHCHR, helps these committees with their working methods, provides materials, office space and staff for the committees to perform their functions, and also conduct the initial screening of petitions submitted to the committees. This process consists of verifying whether all the formal requirements that are identified and analyzed in Chapter 3 below are observed. During the screening, the staff also prepares a summary of the content of each petition before submitting the cases for the consideration of the committees and keeping the register.

The committees examined in this article with the exception of CEDAW receive this support from the UN and report to the UNGA,⁹ via the Secretary General,¹⁰ and

officially participate in the UN specialized agencies.¹¹ Nevertheless, these committees are independent bodies and have a composition formed with the intent to preserve this independence, as presented below.

2.1 Function and composition of the committees

The conventional committees presented above have four common functions:

- (i) To receive, examine and issue opinions (concluding observations)¹² on the reports of state parties on the steps they have taken to apply the international treaties in their territories.¹³ In 2001, for example, the CAT issued an opinion on the Brazilian report, recommending that Brazil ensure that their law dealing with torture was interpreted in conformity with article 1 of the CAT, and that it improve conditions in its prison system, as well as regulate and institutionalize the right of victims to receive fair compensation for the cruel treatment suffered;
- (ii) To prepare general comments to assist State Parties to apply international treaties by defining their obligations. The HRC, for example, issued general comments in 2011 on the content and scope of the right to freedom of expression contained in article 19 of the ICCPR;
- (iii) To decide on allegations of non-compliance with the international treaties submitted by one state party against another; and
- (iv) To issue decisions (views)¹⁴ on the allegations of non-compliance with the international treaties contained in the individual petitions or communications presented to them, which is the subject matter of this study.

Conventional committees are composed of independent members with acknowledged competence in the field of human rights, which represent different geographic regions, and thereby form legally and culturally diversified committees. The members of the conventional committees are elected by secret ballot to the respective conventions from a list of experts nominated by State Parties and compiled upon the request of the UN Secretary General.¹⁵ To ensure that they act independently, the members of the committees serve in their personal capacity and not as representatives of their nationality or the state that nominated them. Moreover, members do they participate in the analysis of either the reports or the individual petitions relating to the state in question.

The committees conduct an extensive interpretation of the international treaties, which guarantees the greatest possible protection for the person and, therefore, prevents the exclusion or revocation of greater legal protection. This guarantees the application of the principle of the primacy of the most favorable norm and of maximum protection. In this context, the committees work with proven facts and although they are not required to follow the typical formalities of legal interpretations and arguments that are normally observed in contentious proceedings, they aim to have a real effect on the conduct of the State Parties being monitored. This working

rationale is consistent with the view of Alberto Amaral, who writes, the “interpretation of the treaties on human rights is subject to its own criteria (...) the interests of the parties gives way to considerations of public order” (AMARAL, 2002, p. 646).

Although they operate independent from each other, the committees are guided by the same principles of human rights protection and they share the same goals. As such, they are reviewed here together, with an attention to pointing out their operating differences when relevant.¹⁶

2.2 State Parties

In cases in which monitoring committees are instituted in the body of the main treaty, State Parties to these treaties accept and recognize the competence of the committees to analyze petitions by making a declaration at any time. Article 14.1 of the ICERD refers to this point. For committees whose competence to receive petitions from individuals is recognized by the optional protocols to the treaties, State Parties need to recognize this competence by ratifying the optional protocol in question, in accordance with article 1 of the optional protocols to the CEDAW and the ICCPR.

The international declaration accepting the competence of the committee or, depending on the case, the instrument of ratification of the optional protocol that recognizes the competence of the committee, are international acts that are internationally binding for State Parties, in accordance with the terms and conditions established in the declaration itself or international treaty.

According to domestic law in Brazil, for example, promulgation by the President of the Republic makes these acts legally valid and enforceable in Brazil. However, since this promulgation is an act of domestic law, it should not be confused with or determine the the international competence of committees to review petitions submitted by individuals under Brazilian jurisdiction. Under international law, this occurs by declaration by the UN Secretary-General or upon the ratification of the optional protocol in accordance with formal rules established by the treaty itself.

Currently, the ICERD has more than 150 States Parties. Brazil ratified the treaty in 1968 and promulgated in 1969 by Decree 65,810. However, it was not until 2002 that Brazil made its declaration to the UN Secretary-General recognizing the competence of the CERD to receive petitions from individuals under Brazilian jurisdiction under the terms of article XIV.1 of the ICERD. In 2003, this act was incorporated into Brazilian law by Decree 4,738.

The Convention against Torture, meanwhile, has 150 States Parties and the convention was ratified by Brazil in 1989 and promulgated in 1991 by Decree 40. To date, however, Brazil has not recognized the competence of the Convention against Torture to review petitions from individuals under Brazilian jurisdiction.

With more than 100 States Parties, the Optional Protocol to the CEDAW was ratified by Brazil in 2002, giving the CEDAW the competence to receive petitions from individuals under Brazilian jurisdiction. The protocol was promulgated in the same year by Decree 4,316.

The First Optional Protocol to the ICCPR, which in article 2 recognizes the

right of individuals to petition the HRC, has been ratified by more than 100 states. Brazil ratified the treaty in 2009, approving the text with a reservation to article 2 by Legislative Decree 311. However, it has not to date promulgated the treaty, nor has it made a declaration accepting the competence of the HRC to receive petitions from individuals under its jurisdiction.

Finally, the CRPD has 66 States Parties. Brazil ratified this convention and its optional protocol in 2008, recognizing the competence of the CAT to review petitions submitted by individuals under Brazilian jurisdiction. The CRPD and its protocol were promulgated on August 25, 2009 by Decree 6,949. It is interesting to note that the CRPD was the first international convention to be approved as a constitutional amendment under the terms of article 5, paragraph 3 of the Brazilian Constitution.¹⁷

Although Brazil has ratified and recognized the competence of certain conventional committees to review petitions submitted by individuals under its jurisdiction, no decision has been issued against Brazil within the framework of this conventional system of human rights protection to date.

3 Presentation of petitions to the OHCHR

The right to petition the committees is a conventional mechanism for the protection of human rights. This mechanism permits the direct and independent action of individuals on the international stage to the extent that it does not require the mediation of the State Party or any other entity.

The rules of procedure established in infra-conventional documents are intended to simplify and this process with the objective of providing broad access to this mechanism, thereby observing the principle of maximum protection.

Individual petitions¹⁸ must be submitted to the OHCHR,¹⁹ although the petitioner does not need to be represented by a lawyer, since familiarity with technical legal terms is not required.

As pointed out earlier, committees perform an effective and material analysis of each concrete case. Accordingly, the right of the individual and the violation by the state are extracted from the facts and the arguments presented by the petitioner. This is done regardless of whether the petitioner employs legal reasoning and vocabulary, removing the need to engage in technical debates or follow other legal and procedural formalities. Nevertheless, as shall be explored in this and subsequent chapters, the individual petition must contain a series of information and be accompanied by specific documents that substantiate its allegations.

First, individual petitions must be signed and identify the author with their personal data.²⁰ The committees may, *ex officio* or upon the justified request of the author, keep the identity of the victim confidential.²¹

The petition must also be written in one of the official languages of the UN, since it is the responsibility of the UN Secretary General, via the OHCHR, to conduct the preliminary review.

The petition, moreover, must present in detail, preferentially in chronological order, the facts that constitute the disrespect for the international convention in question and they must be accompanied by documents and information that confirm

the alleged events. In particular, this includes official documents such as judicial and administrative decisions on the matter and a copy of the domestic legislation applicable to the case.²²

Finally, the petitioner must demonstrate compliance with each of the admissibility requirements, which shall be presented in Chapter 5.

In the absence of one of the above items or any other information deemed important for the review of the petition by the committees or the OHCHR, which conducts the initial screening of the petitions, the petitioner will be contacted. Depending on the nature of the topic, the petitioner will be contacted by the committees themselves or by the UN Secretariat, in either case via the OHCHR, to request that they provide the information necessary to proceed with the petition.²³

In accordance with the principles of the primacy of human rights and of maximum protection, the fact that a petition is incomplete or unaccompanied by all the aforementioned documents and information does not, in itself, prevent the petition from being received. Petitions will only be rejected, and therefore not registered by the OHCHR or submitted to review by the committees, when their omissions preclude such a review. Nevertheless, in order to avoid delays and get through this first stage of the process, it is important for the petitioner to clarify the reason why they failed to submit any given document or information, as well as the reason why they may have failed to observe any of the admissibility requirements for the petition.

3.1 Standing to submit a petition and perpetrators of the alleged violations

Petitions may be submitted to the conventional committees not only by citizens of states that recognize the competence of the committees, but also by all persons residing within their territory and subject to their jurisdiction.²⁴

As expounded in General Comment No. 31 of the HRC, the right to petition the conventional committees is reserved for individual persons, although many of the rights recognized in the treaties under examination are also rights guaranteed to legal persons. The same document states that although this conventional human rights monitoring mechanism is reserved for individual persons, it does not prevent such individuals from submitting petitions in defense of legal persons whose rights have been violated according to the conventions.²⁵

Petitions submitted on behalf of a third party are admissible provided they are accompanied by proof that the victim is unable to act on their own behalf,²⁶ together with authorization from the victim for the third party to report the violation of their rights to the proper committee. In the name of the principle of maximum protection, such authorization may be dispensed with if the victim is a child, imprisoned, inaccessible or in a similar condition.²⁷

The perpetrator of the alleged human rights violation must always be a state party to the international convention that has been violated and that has accepted the competence of the committee to review the petitions, as described before. Nevertheless, the act or omission being reported may be one committed by either a public authority or a private individual. This is because the state is responsible for

not implementing measures to prevent acts or omissions that violate human rights or punish the violators of these rights (CONFORTI, 2005, p. 336). This is also view taken on article 2 of the ICCPR by the HRC in its General Comment No. 31. In this context, it is important to understand the extent of the international obligation of States Parties to the international conventions (being) examined here.

3.2 The extent of the international obligations

The essential condition for submitting a petition is an allegation of a violation of one or more rights set forth in the conventions. This includes the right to be provided, by the State Parties, with effective domestic remedies²⁸ aimed at respect, implementation and correction of violations of substantive rights set forth in the conventions, in accordance with article 2 of the ICCPR. This right reflects the general international obligation of the State Party to provide preventive and punitive remedies by monitoring the respect for the substantive rights of all persons as set forth in the convention.

State governments should first be instructed and prepared to prevent, investigate and punish any violation of the rights recognized in international treaties (SLAUGHTER, 1997, p. 185) and, second, if the violation is declared by a competent international organization, these governmental authorities should have previously established instruments and policies in place to immediately remedy the violated right or repair the damage caused by the internationally declared violation.

As shall be analyzed later, not only do the committees monitor disrespect of substantive rights, but they also track any omission or inefficiency by states in protecting or reestablishing such rights.²⁹ This is the very reason why the committees, in their decisions, declare the violation of substantive rights and establish a time limit for a state to present the measures it has taken to remedy the violation and thereby comply with its obligation.

State Parties should comply with this obligation in good faith and without invoking their domestic law as an impediment in accordance with the Vienna Convention on the Law of Treaties. This view is also shared by the *Escola Superior do Ministério Público da União* (Higher School of the Federal Public Prosecutor's Office) (PETERKE, 2010, p. 148).

4 Procedures

Each committee adopts its own rules of procedure, but since they are guided by the principles of maximum protection and the primacy of human rights, the committees are committed to pursuing a material solution for each issue. As such, depending on the complexity and urgency of the case, committees may bypass the rules of procedure presented below.

Once the OHCHR has identified all the essential information specified in section 3, the petition is registered. In other words, the OHCHR prepares a report with the content of the petition and submits it for the consideration of the proper committee, keeping track of the case registered with the UN Secretariat.³⁰

Invariably, the right of confrontation will be present in all stages of the human rights monitoring mechanism.³¹ The members of the committee receive this report, the petitioner is informed of the registration and the accused state is notified so it can present the considerations it deems relevant within a time **frame** that varies from four weeks to six months, depending on the committee and the nature of the case.

Once registered, the committee's examination of the petition occurs in two stages. The first consists of an examination of the admissibility of the petition and the second involves an examination of the merit. In general, these two stages of the mechanism are analyzed on the same occasion; for example, in the same plenary session of the committee,³² which as a rule is not public.³³ In exceptional circumstances, the admissibility of the petition and merit may occur in different plenary sessions given specific time limits set for the parties to submit comments at each stage. Additionally, should the state first submit considerations that are only related to the admissibility of the petition, the committees will, out of respect for the principle of confrontation, grant a new time limit³⁴ for the state to submit considerations on the merit.

The failure of the State to respond either on the admissibility or **on** the merit does not prevent the committees from analyzing the petition.

When the time expires for the accused state to submit considerations, the case is referred to the committee plenary session for analysis. A specific working group may be established ahead of the session to analyze the admissibility of a petition, and if the group unanimously declares the petition to be admissible, then the committee proceeds directly to its analysis of the merit of the petition in its plenary session.³⁵

The main admissibility requirements analyzed in the plenary sessions or by the working groups are the following:

- (i) the same case is not the subject of analysis by a similar international body;
- (ii) the exhaustion of all domestic remedies;
- (iii) the causal link; and
- (iv) the non-retroactivity of the reported act or omission.

It is worth pointing out that an analysis of the decisions already issued by the committees allows us to identify other important conditions that can prevent an examination of the merit of the petitions. These include, for example, any reservations compatible with the object and purpose of the international convention in question that are *legitimately* established in advance by the accused state according to certain *provisions*.³⁶

Given the possibility ruling out an analysis of the merit of the petitions, it is important that the petitions are not abusive: there have been cases declared inadmissible by the committees given the unsuitability and impropriety of petitioning the international body to address the issue.³⁷

As stated earlier, the conventional committees adapt to the complex needs of international human rights law and thereby contribute to the promotion of an extensive interpretation of protected human rights. These committees also

conduct material analyses of each admissibility requirement in order to prevent cases from not proceeding for an examination of the merit due to purely formal or superficial reasons and to ensure that the principles of the primacy of human rights and of maximum protection are respected. With the same objectives in mind, the committees do not examine the merit of petitions they consider abusive, since this would take up time that could be spent on the effective protection of the human rights that the committees were set up to provide.

In the event that a petition is found inadmissible, the possibility exists to request a review of the decision.³⁸ Once the petition has been admitted, the members of the committee examine the merit of the case.

As mentioned earlier, the standard procedure presented here can be modified to some extent. For example, the time limit for analysis and comments by the victim and the state in question may be shortened or issues may be raised that may require a response from the state. Nevertheless, given large number of petitions, it is common for time limits to be extended and for final decisions to take years,³⁹ which contributed to the development of procedure of urgent interim.⁴⁰

5 Admissibility requirements

5.1 Case examined by another international body

The petitions addressed by the conventional committees (except those addressed to the CERD) must involve cases that are not being analyzed simultaneously by another international body that is comparable to the committee in question; in other words, wherein one body could be substituted by the other.

With regard to the CAT, CRPD and CEDAW, this admissibility criterion has been widely applied and they have rejected petitions whose subject matter has, in the past, already been analyzed by another comparable international body.⁴¹ For the HRC, this admissibility criterion only temporarily prevents the analysis of a petition and is no longer applicable after the conclusion of the case by the other international body.⁴²

The differences established between the committees for assessing this admissibility requirement do not mean that the committees are dependent or subject to the decisions taken by other international bodies. All the committees independently analyze the performance and extent of human rights monitoring conducted by the other international bodies that are handling the case before deciding on the petition's admissibility.

In order for the conventional committee in question to assess the extent and compatibility of the work of another international body examining the same case, the petitioner must disclose which international bodies are analyzing or have analyzed their case. They must also detail the date on which the analysis by the other body began, and well as the progress made on the matter. Based on this information, the committee will study the work of the international body, analyze the extent and the subject of the case submitted and then decide whether this conflict should prevent it from proceeding with an analysis of the merit of the

petition. All of this is done while taking into account the principles of the primacy of human rights and of maximum protection.

In *Bandajevsky vs. Belarus*, the HRC decided that the procedure before the Executive Board's Committee on Conventions and Recommendations of UNESCO did not constitute a procedure of investigation that would make a petition inadmissible. This is due to the facts that the body is extra-conventional and that, in its procedure for analyzing individual petitions, no conclusion of violation or non-violation of the rights protected in the ICCPR was made, nor did it issue any binding decision on the merit. As such, this case also established the position of the HRC on the possibility of submitting cases that are simultaneously subject to analysis by the Human Rights Council referring to the Special Procedures or to Procedure 1503, which are extra-conventional mechanisms that make up the Global Human Rights Protection System.

Moreover, in *Dahanayake et al. vs. Sri Lanka*, the HRC decided that, since the case was not based on allegations of a violation of the ICCPR, the complaint lodged to the Asian Development Bank could not be an obstacle for the petitioners to present a communication to the HRC.

5.2 *Exhaustion of effective domestic remedies*

The exhaustion of domestic human rights monitoring and protection remedies deserves attention given its importance and its close relationship with the general international obligation assumed by State Parties when they ratify each of the international conventions. These obligation includes respecting and guaranteeing respect for the rights contained in the conventions, which requires making available domestic remedies capable of applying the rights protected under these international treaties to individuals in their jurisdictions, as described in section 3.2.

The State Party fails to comply with this general international obligation not only when it violates a human right protected by the treaty, but also when it is unable to guarantee, via effective domestic remedies, respect for this right or a solution to the violation. Therefore, the basis of this admissibility requirement rests on the argument that the State Party breaches a treaty. This, in turn, establishes the legitimacy of the individual to address the petition to the committees after using all of the available domestic remedies.

Domestic remedies that have been exhausted must be *effective* in order for the petition to be considered inadmissible. For domestic remedies that are complicated, difficult to access, restricted, prolonged,⁴³ outdated⁴⁴ or incapable of being solved ordinarily,⁴⁵ the human rights violation under examination is considered ineffective and cannot obstruct the admissibility of the petition, while the State shall be considered in material breach of its general obligation.

Note that this rule of admissibility requires the petitioner to inform the committee of all measures taken domestically to attempt to solve the problem, while the state must provide detailed information on the remedies that are available to the petitioner and provide evidence that there is a reasonable possibility that these remedies could be effective to resolve the case. Alternatively, the petitioner may clarify

to the committee the reason why all the domestic remedies were not exhausted, demonstrating which remedies are not effective and thereby dispensing with this rule of admissibility.

Countless cases have analyzed this admissibility requirement and the conventional committees have developed an interpretation of the concept of *effective* remedies, as described above. Take, for example, the *Vargas vs. Peru* case, in which the petitioner, who was accused of being a member of Shining Path and imprisoned by the Peruvian Anti-Terrorism Department (DINCOTE), alleged he had been tortured. The HRC, after conducting an analysis of previous complaints, identified the inefficiency of domestic remedies against torture and mistreatment in similar cases of people imprisoned for connections to Shining Path, finding the Peruvian courts would hear these cases in a non-transparent and negligent manner and disrespect the rules of due legal process. As a result of this assertion and the inertia of Peru to demonstrate the efficiency of the Peruvian remedies available to the petitioner, the petition was admitted and the HRC established a time limit of 90 days for Peru to take steps to make domestic remedies available to Vargas that would guarantee the respect for his right to be tried in accordance with the rules of due legal process and to be compensated for proven harm suffered as a result of the violation of his political rights.⁴⁶

In contrast, in the *Dahanayake et al. vs. Sri Lanka* case, the complaint was not admitted because the petitioner had access to effective domestic remedies to repair the damage caused by the compulsory acquisition of her property for the construction of a road.

The exhaustion of domestic remedies serves as a reference for the establishment of a reasonable time limit for presenting petitions to the committees. Petitions should not be presented after the exhaustion of domestic remedies, since as time passes, it becomes harder to gather evidence and restore the situation prior to the violation. The CAT frequently considers petitions inadmissible if presented long after the exhaustion of domestic remedies and it has even identified this as an additional admissibility requirement in accordance with procedural rule 113(f). Based on procedural rule 91(f), the CERD has established a time limit for presenting petitions of six months from the date of the final domestic decision that corresponds to the exhaustion of domestic remedies.

5.3 *Causal link*

Upon interpreting article 2 of the Optional Protocol to the ICCPR, the jurisprudence of the HRC developed the view that, even when all the admissibility requirements have been satisfied, petitions may still not be accepted if they do not establish a causal link between the act or omission by a State Party and the alleged violation of the ICCPR. A violation of the ICCPR should be considered a violation of the substantive rights recognized in the ICCPR that are inherent to the victim identified in the petition, who must have been personally and directly harmed as a result of the violation. The other conventional committees have adopted similar views in relation to their respective treaties.

This is another requirement for the admissibility of petitions and, although the committees do not analyze the merit of the case at this stage of the procedure, it is important to provide consistent and accurate information in order to clarify how the act or omission by the State resulted in a violation of the convention and personally and directly affected the victim.

In the *Aalbersberg et al. vs. the Netherlands* case, the petitioners claimed disrespect of the right to life guaranteed to them in the ICCPR based on the position of the Netherlands on nuclear weapons development in the country. In its response, the HRC clarified that the petitioners were not able to demonstrate personally and directly how the position of the Netherlands would threaten their lives or disrespect any of their rights established in the ICCPR. It was for this reason that the complaint was considered inadmissible.

Similarly, in the *Beydon et al. vs. France* case, the petitioners alleged that France had curtailed their right to participate in the running of domestic public affairs because they did not participate in the talks and the subsequent accession of France to the statute of the International Criminal Court. The HRC, however, determined the complaint to be inadmissible based on the lack of status of the victim, in light of the fact that the petitioners had the opportunity to participate and exert influence on this process through public debate and dialogue with their representatives. Because France is a democratic country, public dialogue depends solely and exclusively on the capacity of the petitioners to organize themselves.

Once again, as stated in the analysis of the other admissibility requirements presented above, the verification of this requirement is conducted in a material manner. It takes into consideration the content of the information and arguments presented to the committee and after an analysis of the facts. In the example of France, the fact that determined the inadmissibility was that it is a democratic country.

5.4 Analysis of events prior to recognition of the competence of the Committee

The final admissibility requirement that deserves consideration is the condition that individual petitions may only be addressed to the conventional committees if the alleged human rights violations occurred after the State Party recognized the competence of these committees to receive petitions.

As a general rule, the conventional committees do not examine allegations of events prior to the acceptance by the accused State of the competence of the committee to monitor the respect for the treaty in question. It is important to point out that this admissibility requirement is not applied automatically,⁴⁷ since a petition may be admitted if the alleged rights violation continues to produce effects after the recognition of the competence of the committee to analyze individual petitions. This is confirmed by the decisions on the admissibility of the *Blaga vs. Romania* and *Kouidis vs. Greece* cases, in which the HRC determined that the fact that a second or final instance judgment in the domestic courts was still pending demonstrates the undue continuity of the trial. These pending cases were in

violation of the right of due legal process established by the ICCPR and did not, therefore, constitute a barrier to admissibility.

Moreover, not only do the effects of the human rights violation in question need to be continuous, but the non-compliance with an international treaty must also be ongoing and be confirmed upon the admission of the petition. On this point, *Yurich vs. Chile* was deemed inadmissible by the HRC because, although the disappearance of the petitioner's daughter constitutes a violation with an ongoing effect, Chile, before ratifying the ICCPR and its optional protocol, had recognized and taken responsibility for the violation.

6 Examination of the merit

Once the admissibility requirements have been satisfied, the analysis of the merit begins.

The analysis of the merit takes into account the arguments presented by the petitioner that demonstrate the reasons why the petitioner believes the reported facts constitute a violation of the monitored international treaty. The committees also recommend that the petitioner indicates which article of the treaty has been violated.⁴⁸

Additionally, the conventional committees seek to maintain consistency in their decisions, an effort conducted with the structural support of the OHCHR. Thus, arguments of merit are strengthened when they are grounded in prior decisions or in general comments formulated by the committees on earlier decisions, which clarify the extent and correct interpretation of the articles of the international conventions. It is also important for the petition to be accompanied by the proper documents that prove the reported facts, as described in section 3.

Once the examination of the merit is complete, the committee releases its decision based on a majority vote of the members. Although efforts are made to achieve a unanimous result, dissident votes may be made separately.

The decisions that declare a treaty violation generally establish a time frame for the State Party in question to submit a response explaining what arrangements have been made to resolve the matter. Sometimes the decisions of the committees suggest measures that should be adopted by the States Parties.

The parties are, then, informed of the decision, which is also published on the website of the OHCHR. Subsequently, they appoint a special rapporteur to follow up on the implementation of the decision by the accused State.

Whenever a committee determines that certain human rights have been violated, the State Party is invited to clarify what measures it has taken to affect the decision or to cease or compensate for the violation.⁴⁹ The victim is, then, invited to comment on the observations presented by the State. This marks the beginning of the following up on the decision, during which time the special rapporteur for follow-up on cases⁵⁰ requests clarification on the execution of the decisions of the committees. The conclusions of the special rapporteur are included in the annual report of the committees, which is submitted to the UNGA⁵¹ as well as in press releases.⁵²

7 Conclusion

Under the UN Charter, states assume the commitment to act in conformity with the principles established therein. These include the promotion and respect for human rights that were recognized by the Universal Declaration of Human Rights of 1948 and other international treaties approved under the auspices of the UN, which comprise the body of norms of the Global Human Rights Protection System.

The Universal Declaration of Human Rights is the authoritative interpretation of “human rights” as referenced in the UN Charter (PIOVESAN, 2007, p. 137) and it thereby representing an international obligation for the UN Member States

Additionally, the Declaration of 1948 is an instrument that *codifies* the rights it contains and, therefore, it establishes customary international law that is binding on all states, regardless of how they voted when it was adopted by the UNGA.

Certain rights included in the Universal Declaration are also recognized by the international community as *jus cogens*, defined by the Vienna Convention on the Law of Treaties as a peremptory norm of general international law that is accepted and recognized by the international community. These are norms from which no derogation is permitted and which can be modified only by a subsequent norm with the same character.

The combination of these attributes alone would be sufficient to defend the binding nature of the Universal Declaration of 1948 and, consequently, its mandatory application and observance in all domestic legal systems.⁵³

Some of the norms in international human rights law addressed in this article have one or more of the aforementioned attributes of the Universal Declaration of Human Rights and, therefore, express international obligations of states. These obligations are variously made by codifying a customary right that was previously valid *erga omnes*, by representing a rule of *jus cogens* or through a norm whose protection constitutes one of the principles and purposes of the UN. Therefore, disrespect implies a violation of the UN Charter itself (AMARAL, 2002, p. 641). The other international human rights norms that make up the Global Human Rights Protection System but that do not share these attributes are still binding and therefore express international obligations. This means that they must be observed by State Parties in accordance with the rules codified in the Vienna Convention on the Law of Treaties and in particular, the customary rules codified in articles 26, 27 and 31.

In all the hypotheses described above, international human rights norms analyzed establish legitimate international obligations. Non-compliance with these obligations generates a responsibility for the state to repair any damage that may have been caused, (RAMOS, 2012, p. 29-30). In this context, the conventional mechanisms for the protection of human rights, which include the right of petition addressed in this article, “are truly collective mechanisms for determining the international responsibility of the States” (RAMOS, 2012, p. 84) which “can lead to the imposition of collective sanctions capable of obligating the offending State to finally observe international decisions” (RAMOS, 2012, p. 345).

Moreover, the absence of coercive mechanisms intended to force compliance with these decisions in the international legal system does not justify a denial

of their binding nature, since the well-known “inconsistency between the new responsibilities that legal norms delegate to the international community and the lack of mechanisms capable of ensuring their effectiveness” (AMARAL, 2002, p. 649) does not reduce the degree of protection afforded by the monitoring mechanisms.⁵⁴

Assuming, then, that international human rights norms represent international obligations for which states can be held responsible, the normative framework of the Global Human Rights Protection System establishes the general international obligation analyzed in sections 3.2 and 5.2, according to which the State Parties to the international conventions have the duty to take steps and develop *effective* domestic instruments to guarantee the application of the conventions, thereby preventing legislative omissions and government inertia from violating the rights they protect.

This general international obligation is *reaffirmed* in the decisions of the committees, since non-compliance has been demonstrated in a concrete case. This is because, as we have seen, the decisions of the committees generally do not establish a new international obligation, yet they sometimes suggest measures considered *effective* by the committees to solve the matter. That respect and reception of the decisions of the committees constitutes no more than mere compliance with previously established international obligations on States Parties. This is because, as a general primary obligation, State Parties must develop *effective* domestic instruments to guarantee respect for the international convention in its domestic law, which should make it unnecessary for individuals subject to their jurisdiction to appeal to the conventional committees.

Nevertheless, if an individual does need to use an international remedy, and if the complaint is justified, this constitutes clear non-compliance by the accused state of its general international obligation described above and means that the state can now be held responsible internationally. At this point, the state has the responsibility to comply with the decision issued by the committee (according to paragraph 15 of the General Comments No. 33 released by the HRC in 2008). To do so, it must incorporate its recommendations into its legislation in order to correct the violations or improve the existing implementation instruments that were incapable of correcting them.

In the first case, the state would be complying with its general international obligation because the treaty itself expressly determines the duty of State Parties to develop domestic instruments to guarantee its application. In the second case, the state would be in compliance, albeit after a delay, with its general international obligation because if the individual needed to appeal to the conventional committees for their rights to be respected, it is because all the domestic instruments were exhausted and proven to be ineffective. In this case, the State Party must create new instruments or improve existing ones to correct this additional breach and comply with its international obligation, which also involves incorporating the decision of the committee in that concrete case.

In this context, by declaring themselves subject to the monitoring of these committees, states must comply with their decisions, and, therefore, accept these decisions as binding. On this point, Carvalho Ramos points out, “if [the state]

expressly accepts this system [of petitions] it would be illogical to consider their final deliberations merely as advice or recommendations” (RAMOS, 2012, p. 342).

As the HRC explains in its General Comment No. 33, although they do not carry the legal weight of judicial decisions, the decisions of the committees do share some important characteristics of those issued by judicial bodies. The decisions of the committees are issued in a similar context to judicial decisions and are rendered by impartial and independent judges who make an authoritative interpretation of the international convention. Moreover, the decisions are issued by entities with recognized and accepted authority and they have a determinative character typical of judicial decisions. In this context, the HRC asserts that the decisions represent a ruling endowed with the authority conferred by the convention ratified by the State Parties and, therefore, they are binding to them.

However, some states have argued that the decisions issued by the committees are merely non-binding confirmations and interpretations of the international convention in question, while the only convention itself is an international obligation.⁵⁵ This view denies the binding nature of the committee’s decisions and is based on the lack of express provisions in the international treaties with regard to this matter.

The conventional committees have pronounced that the lack of specificity in the treaties in question concerning the binding nature of their decisions cannot be interpreted by State Parties as freedom to choose whether or not they accept these decisions, as pointed out in the General Comment No. 31 issued by the HRC. Such a view would represent a regression to a time before the internationalization of human rights when states were the only agents empowered to promote the protection of human rights and had a significant amount of discretion in doing so.

Due to this uncommitted position of some State Parties, the effectiveness of this human rights monitoring mechanism has come under threat and, consequently, the power of the individual to act on the international stage via individual petitions has diminished.

The annual reports of the committees that monitor the execution of the decisions in domestic legal systems demonstrate that the denial of the binding nature of these decisions has proven to be a significant obstacle in their implementation, to the extent that “the States [however] resist offering the international organizations the necessary instruments to address the new complexity that has emerged” (AMARAL, 2002, p. 649).

Consequently, this existing global monitoring mechanism has still not achieved the relevance that was intended to when it was conceived, as it depends fundamentally on the discretionary and even arbitrary cooperation of states. This situation contradicts the principles of international human rights law, as well as the primary motivation for the internationalization of human rights: not leaving the respect for rights that are so highly valued by international society to the discretion of States.

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NOTES

1. Articles 1(3), 13, 55, 56 and 62(2 and 3) of the UN Charter.
2. Article 2(3) of the ICCPR.
3. Article 1 of the Optional Protocol to the ICCPR.
4. The International Convention on Migrant Workers and the optional protocols to the ICESCR and to the Convention on the Rights of the Child endowed their respective monitoring committees with the competence to receive individual petitions, but these treaties are not yet in effect internationally. However, ECOSOC has the competence to monitor compliance with the ICESCR and some rights set forth in these conventions may be monitored separately by the mechanisms addressed here.
5. It is important to point out that the *conventional* human rights protection mechanisms have their material work limited by the convention, and are only applicable on the States Parties to the conventions. The *extra-conventional* mechanisms, meanwhile, are more susceptible to political influence, with the exception of those that have rules of independence intended to neutralize the interference of the governments of States being monitored.
6. The CEDAW also receives this structural support from the UN Division for the Advancement of Women.
7. The OHCHR is headed by the High Commissioner for Human Rights, elected in accordance with the rules established by Resolution 48/141 of the UNGA that are intended to preserve the independence and the rotational nature of the position.
8. Articles 36 of the ICCPR, 10.3 of the ICERD, 17.9 of the CEDAW, 25.2 of the CAT and 34.11 of the CRPD.
9. Resolutions 48/141 and 60/251 of the UNGA.
10. Articles 9.2 of the ICERD and 21.1 of the CEDAW, for example.
11. Article 38(a) of the CAT and 22 of the CEDAW, for example. See Report 49/537, resulting from the 5th meeting of persons chairing the committees.
12. The CERD and the CEDAW call them general recommendations.
13. Articles 9.1 of the ICERD, 35 and 36 of the CRPD and 18 of the CEDAW.
14. The CERD calls them opinions.
15. Articles 8 of the ICERD, 29 of the ICCPR, 17 of the CEDAW, 34 of the CRPD and 17 of the CAT.
16. On the harmonization of the work of the committees, see Report 49/537 resulting from the 5th meeting of persons chairing the committees and Report 65/190 resulting from the most recent meeting of the committees.

17. See MAGALHÃES, 2000, p. 65 and RAMOS, 2008, p. 455, for doctrines on the (supra) constitutional status of these treaties. For an analysis of the evolution of the jurisprudence of the Brazilian Supreme Court on the subject, see DANTAS, 2011.
18. For model petition forms, go to the website of the OHCHR.
19. Petitions Team, Office of the High Commissioner for Human Rights, United Nations Office at Geneva, via mail, to the address 1211 Geneva 10, Switzerland and, in urgent cases, via fax to the number + 41 (22) 9179022. Additionally, the petitioner may use the email address tb-petitions@ohchr.org, exclusively for informal contact.
20. Articles 96(a) of the HRC and 84.1(a) of the CERD, for example.
21. Rules of procedure 102.4 of the HRC, 74.4 of the CEDAW and 76.6 of the CRPD.
22. Article 2(e) of the optional protocol to the CRPD.
23. Rules of procedure 55.2 of the CRPD, 84.2 of the HRC and 58 of the CEDAW.
24. General Comments of the HRC No. 31, paragraph 10.
25. The CERD and the CEDAW also recognize as victims groups of people (articles 14.2 of the ICERD and 2 of the optional protocol to the CEDAW).
26. Rules of procedure 96(b) of the HRC, 68.2 and 68.3 of the CEDAW and 91(b) of the ICERD.
27. See the cases *Ruzmetov vs. Uzbekistan* and *Burgess vs. Australia*.
28. On the concept of effective remedies, see Chapter 5.2.
29. Of importance is the study of the role of the Judiciary (See CUNHA, 2005) and the National Human Rights Institutions (NHRI) devised by the Paris Principles established by Resolution 1992.154 of the Commission on Human Rights.
30. Rule of procedure 85 of the HRC, for example.
31. Rules of procedure 97.6 of the HRC and 69.9 of the CEDAW.
32. Rule of procedure 97.2 of the HRC and 70.3 of the CRPD. The CERD is the only committee that, as a rule, conducts these examinations in different stages.
33. Rules of procedure 88 of the HRC and 88 of the CERD, for example.
34. Rule of procedure 97.2 of the HRC, for example.
35. Rule of procedure 93 of the HRC, for example.
36. Emphasis is given to the use of the terms "legitimate" and "provisions", i.e., to the fact that some reservations, in contrast, cannot prevent the analysis of a petition by one of the committees, if they apply to non-derogable provisions of these treaties that do not constitute International Law provisions to which reservations are permitted. See *Kennedy vs. Trinidad and Tobago*.
37. Articles 14 of the ICERD, 2(b) of the CRPD, 3 of the ICCPR and 22.2 of the CAT and rules of procedure 71(d) of the CERD and 96(c) of the HRC.
38. Rules of procedure 98.2 of the HRC, 70.2 of the CEDAW and 93.2 of the CERD, for example.
39. The CAT, in its report, has stated that monitoring procedures are generally concluded in a time frame of between one and two years. The CERD, meanwhile, has stated that given the reduced number of cases before the committee, some cases are resolved in a time frame of less than one year.
40. In urgent cases, the committee may forward to the accused State a request for interim measures, in order to prevent irreversible harm to the victim while the petition is being analyzed by the committee. Despite their provisional characteristic, the interim measure requests are equivalent to decisions of merit.
41. Article 2(c) of the optional protocol to the CRPD and articles 22.4(a) of the CAT and 4.2(a) do the CEDAW.
42. Article 4.2(a) of the optional protocol to the ICCPR.
43. Article 5.2(b) of the optional protocol to the ICCPR and 7(a) of the CERD, rules of procedure of the CERD, 113(e) of the CAT.
44. See *Carranza vs. Peru*.
45. See *Chisanga vs. Zambia*.
46. See *K.N.L.H. vs. Peru*; *Blaga vs. Romania* and *Quispe vs. Peru*.
47. Article 2(e) of the optional protocol to the CRPD, for example.
48. Rule of procedure 84.1(d) of the CERD.
49. Rule of procedure 101.2 of the HRC, for example.
50. Rule of procedure 102.1 of the HRC.
51. Rules of procedure 101.4 of the HRC and 96 of the CERD, for example.
52. Rule of procedure 97 of the CERD, for example.
53. For an opposing view, see HEINTZE, 2010, p. 29.
54. In this context of the absence of secondary norms that can force the execution of the decisions of the committees, it is opportune to study the reasons why States fail to comply with the international treaties and obligations and, therefore, do not execute these decisions (CHAYES, A.; CHAYES, A. H., 1995, p. 3), seeking alternative non-coercive measures, or "non-forcible measures" (DUPUY, 1997, p. 23), to convince States to respect International Law. See also the study by the Human Rights Institute of Abo Akademy University.
55. The International Law Association also views the decisions issued by the committees only as non-binding confirmation and interpretations of the international treaty in question, while only the treaty itself is an international obligation. Similarly, the Supreme Court of Ireland ruled in this way in the case of *Kavanagh vs. Governor of Mountjoy Prison*

RESUMO

O artigo analisa o direito de petições individuais junto aos comitês convencionais que compõem o Sistema Global de Proteção dos Direitos Humanos mantido sob os auspícios da ONU. O texto descreve o sistema que permite a indivíduos entrarem com petições junto a organismos internacionais denunciando seus Estados por violações dos direitos humanos elencados na Declaração Universal ou no Pacto Internacional de Direitos Civis e Políticos (ICCPR) ou ainda das normas estabelecidas em tratados específicos tais como a Convenção contra a Tortura (CAT), a Convenção Internacional sobre a Eliminação de Todas as Formas de Discriminação Racial (ICERD), a Convenção sobre a Eliminação de Todas as Formas de Discriminação contra a Mulher (CEDAW) e a Convenção Internacional sobre os Direitos das Pessoas com Deficiência (CRPD). Segundo a autora, as recomendações feitas pelos órgãos da ONU relativas a denúncias feitas por meio direito de petição individual têm caráter vinculante e devem ser cumpridas pelos Estados em questão.

PALAVRAS-CHAVE

Direito de petição – Direitos humanos – Sistema Global

RESUMEN

El artículo analiza el derecho individual de petición ante los comités convencionales que forman parte del Sistema Global de Protección a los Derechos Humanos de la ONU. El texto describe el sistema que permite a los individuos entrar con peticiones junto a organismos internacionales denunciando a sus Estados por violaciones de los derechos humanos incluidos en la Declaración Universal o en el Pacto Internacional de Derechos Civiles y Políticos (ICCPR) o incluso por las normas establecidas en tratados específicos tales como la Convención Contra la Tortura (CAT), la Convención Internacional sobre la Eliminación de Todas las formas de Discriminación Racial (ICERD), la Convención sobre la Eliminación de Todas las Formas de Discriminación contra la Mujer (CEDAW) y la Convención sobre los Derechos de las Personas con Discapacidad (CRDP). Según la autora, las recomendaciones hechas por los órganos de la ONU relativas a denuncias hechas por medio del derecho de petición individual tienen un carácter vinculante y deben ser cumplidas por los Estados en cuestión.

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