"THE PRACTICE AND PROCEDURE OF THE HUMAN RIGHTS COMMITTEE UNDER THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS".

by DOMINIC McGOLDRICK, LL.B.

VOLUME 1.

Thesis presented to Nottingham University for the Degree of Doctor Of Philosophy, October, 1988.

ABSTRACT.

This thesis examines the practices and procedures of the Human Rights Committee, the body established under the International Covenant On Civil And Political Rights (ICCPR) (1966).

Chapter 1 examines the origins of the ICCPR, the principal drafting issues that arose, and the significance of the ICCPR in international law. Chapter 2 examines the organisation and the institutional characteristics of the Human Rights Committee. Chapter 3 examines and evaluates the practices and procedures of the Human Rights Committee under the reporting procedure in article 40 ICCPR. Chapter 4 examines and evaluates the practices and procedures of the Human Rights Committee under the provisions for individual communications in the Optional Protocol to the ICCPR.

Chapters 5-12 examine the jurisprudence of the Human Rights Committee under the reporting procedure (article 40) and the Optional Protocol in respect of selected articles of the ICCPR. Chapter 5 considers article 1 (self-determination). Chapter 6 considers article 2 (general obligations to respect and ensure the rights in the ICCPR, to give effect to it, and to provide a remedy in the event of violation). Chapter 7 considers article 4 (derogation provision). Chapter 8 considers article 6 (right to life). Chapter 9 considers article 7, (torture and other prohibited treatment and punishment), and, in part, article 10 (treatment of persons deprived of their liberty). Chapter 10 considers article 14 (fair trial). Chapter 11 considers article 19 (freedom of opinion and expression). Chapter 12 considers article 20 (war propaganda and advocacy of national, racial or religious hatred).

Chapter 13 provides a general appraisal of the the work of the Human Rights Committee.

CONTENTS. PAGE.

CONTENTS.

ACKNOWLEDGEMENTS.

I acknowledge an enormous debt of gratitude to Professor David Harris for his expert supervision. I can only hope to repay him in some way in the course of time.

I would also like to thank the library staffs of the University of Nottingham and Trent Polytechnic for their unfailing assistance.

It would not have been possible to finish this thesis without the continued encouragement the McGoldrick and Owen families, and many friends. In particular I acknowledge the support of my wife, April, and the assistance of my brother, John.

This thesis is dedicated to April, Jessica and Agnes.

TABLE OF CASES.

HUMAN RIGHTS COMMITTEE.

Waksman v. Uruguay, Doc.A/35/40 p.120; 1 S.D. 9, 36.
Weinberger Weisz v. Uruguay, Doc.A/36/40 p.114; 1 S.D. 57.
Wight v. Madagascar, Doc.A/40/40 p.171.

X. (a non-governmental organization) on behalf of S.G.F. v. Uruguay, Doc.A/38/40 p.245.
X. (a non-governmental organization) on behalf of J.F. v. Uruguay, Doc.A/38/40.

Y.L. v. Canada, Doc.A/41/40 p.145.

Z.Z. v. Canada, 1 S.D. 19.
Zwaan-de Vries v. Netherlands, Doc.A/42/40 p.160.

EUROPEAN COURT OF HUMAN RIGHTS: Series A:
Adolf v. Austria, vol.49, (1984).
Abdulaziz, Cabales and Balkendales v. U.K., vol.94, (1985).
Airey v. Ireland, vol.32, (1979).
Albert And Le Compte v. Belgium, vol.58, (1983).
Artico v. Italy, vol.37, (1980).
Axen v. FRG, vol.72, (1983).
Baggetta v. Italy, vol.119, (1987).
Barthold v. FRG, vol.90, (1985).
Belgian Linguistics Case, vol.6, (1968).
Belilos v. Switzerland, vol.132, (1988).
Bentham v. Netherlands, vol.97, (1985).
Bonisch v. Austria, vol.92, (1985).
Boyle and Rice v. U.K., vol.131, (1988).
Buchholz v. FRG, vol.42, (1981).
Campbell and Cosans v. U.K., vol.48, (1982).
Campbell and Fell v. U.K., vol.80, (1984).
Colozza v. Italy, vol.89, (1985).
Corigliano v. Italy, vol.57, (1982).
De Cubber v. Belgium, vol.86, (1984).
De Weer v. Belgium, vol.35, (1980).
Delcourt v. Belgium, vol.11, (1970).
Deumeland v. FRG, vol.100, (1986).
Dudgeon v. U.K., vol.45, (1981).
Ekbatani v. Sweden, (1988).
Engel v. Netherlands, vol.22, (1976).
Erkner and Hofauer v. Austria, vol.117, (1987).
Feldbrugge v. Netherlands, vol.99, (1986).
Glasenapp v. FRG, vol.104, (1986).
Goddi v. Italy, vol.76, (1984).
Golder v. U.K., vol.18, (1975).
Guincho v. Portugal, vol.81, (1983).
H. v. Belgium, vol.127, (1987).
Handyside v. U.K., vol.24, (1976).
Ireland v. United Kingdom, vol.25, (1978).
Konig v. FRG, vol.27, (1978).
Kosiek v. FRG, vol.105, (1986).
Lawless v. Ireland, vol.3, (1961).
Le Compte, Van Leuven and De Meyere v. Belgium, vol.43, (1981).
Leander v. Sweden, vol.116, (1987).

EUROPEAN COMMISSION ON HUMAN RIGHTS.

AUSTRALIA.

Lenanese Moslem Association and Others v. Minister For Immigration And Ethnic Affairs, 67 ALR (1986) (Fed. C.A.).

NEW ZEALAND.

Broadcasting Corporation Of New Zealand v. Attorney-General, (1982) 1 NZLR 120.

Department of Labour v. Latailakepa, (1982) 1 NZLR 632.

R. v. Wjee, (1981) NZLR 561;

TABLE OF TREATIES AND OTHER INTERNATIONAL INSTRUMENTS.

1919 Covenant Of The League Of Nations.
1919 Constitution Of the International Labour Organization.
1936 Convention Concerning The Use Of Broadcasting In The Cause Of Peace.
1945 Charter Of The United Nations.
1945 Statute Of The International Court Of Justice.
1946 Convention On The Privileges And Immunities Of the United Nations.
1948 Universal Declaration Of Human Rights.
1948 American Convention On The Rights And Duties Of Man.
1950 Convention On the Prevention And Punishment Of The Crime Of Genocide.
1950 European Convention On Human Rights.
1952 Convention On The International Right Of Correction.
1957 Standard Minimum Rules For The Treatment Of Prisoners.
1960 Declaration On the Granting Of Independence To Colonial Peoples And Countries.
1961 European Social Charter.
1962 Resolution On Permanent Sovereignty Over Natural Resources.
1965 International Convention On The Elimination Of All Forms Of Racial Discrimination.
1966 International Covenant On Civil And Political Rights.
1966 Optional Protocol To The International Covenant On Civil And Political Rights.
1966 International Covenant On Economic, Social And Cultural Rights.
1969 European Agreement Relating To Persons Participating In Proceedings Of The European Commission And Court Of Human Rights.
1969 Vienna Convention On The Law Of Treaties.
1969 American Convention On Human Rights.
1970 Declaration Of Principles Of International Law Concerning Friendly Relations And Cooperation Among States In Accordance With The Charter Of The United Nations.
1973 Convention On The Prevention And Punishment Of The Crime Of Apartheid.
1974 Declaration On The Establishment Of A New International Economic Order.
1974 Charter Of Economic Rights And Duties Of States.
1974 Resolution On The Definition Of Aggression.
1975 Helsinki Declaration On Security And Cooperation In Europe.
1975 Declaration On The Protection Of All Persons From Being Subjected To Torture And Other Cruel, Inhuman Or Degrading Treatment Or Punishment.
1979 Convention On The Elimination Of Discrimination Against Women.

1979 Code Of Conduct For Law Enforcement Officials.
1981 African Charter Of Human And Peoples' Rights.
1982 Principles Of Medical Ethics Relevant To The Role Of Health Personnel, Particularly Physicians, In The Protection Of Prisoners And Detainees Against Torture And Other Cruel, Inhuman Or Degrading Treatment Or Punishment.
1985 United Nations Convention Against Torture.
1986 Inter American Convention To Prevent And Punish Torture.
1986 Declaration On The Right To Development.
1987 European Convention For The Prevention And Suppression Of Torture And Inhuman Or Degrading Treatment Or Punishment.

ABBREVIATIONS.

AJIL.	American Journal Of International Law.
A.F.D.I.	Annual Francais De Droit International.
AFR.	African Charter Of Human And Peoples Rights.
Am.J.Comp.L.	American Journal Of Comparative Law.
AMR.	American Convention On Human Rights.
Am.U.L.R.	American University Law Review.
ASIL Proc.	Proceedings Of The American Society Of International Law.
Australian YIL.	Australian Yearbook Of International Law.
BYIL.	British Yearbook Of International Law.
Bracton LJ.	Bracton Law Journal.
Brit.JIS.	British Journal Of International Studies.
Boston Coll.ICLR.	Boston College International And Comparative Law Review.
Brownlie.	Principles Of Public International Law.
Buff.L.R.	Buffalo Law Review.
Bull GDR Committee.	Bulletin of the German Democratic Republic Committee For Human Rights.
Cal. West. ILJ.	California Western International Law Journal.
Can Bar Rev.	Canadian Bar Review.
Can.HRYB.	Canadian Human Rights Yearbook.
Can.YIL.	Canadian Yearbook Of International Law.
C.D.	Collection Of Decisions Of The European Commission Of Human Rights.
CERD.	Committee On The Elimination Of Racial Discrimination.
Ch./ch.	Chapter.
Col.LR.	Colombia Law Review.
Col.H.R.L.R.	Colombia Human Rights Law Review.
Col.J.Trans.L.	Colombia Journal Of Transnational Law.
Comm.L.B.	Commonwealth Law Bulletin.
Corn.ILJ	Cornell International Law Journal.
Cmd.	U.K. Command Papers.
CLR.	Criminal Law Review.
C.L.P.	Current Legal Problems.
D.& R.	Decisions And Reports Of The European Commission Of Human Rights.
Denver JILP.	Denver Journal Of International Law And Politics.
Doc.	Document.
Ed./ed.	Editor.
E.T.S.	European Treaty Series.
ECHR.	European Convention On Human Rights.
ECOSOC.	Economic And Social Council.
EUCM.	European Commission Of Human Rights.
EUCT.	European Court Of Human Rights.
Fawcett.	The Application Of the European Convention On Human Rights.
GAOR.	General Assembly Official Records.
GYIL.	German Yearbook Of International Law.
Harv.ILJ.	Harvard International Law Journal.

ABBREVIATIONS.

Hofstra L.R.	Hofstra Law Review.
Hous. JIL.	Houston Journal Of International Law.
HRC.	Human Rights Committee.
HRCion.	Human Rights Commission.
HRLJ.	Human Rights Law Journal.
HRQ.	Human Rights Quarterly.
HRRev.	Human Rights Review.
IACM.	Inter American Commission On Human Rights.
ICCPR.	International Covenant On Civil And Political Rights.
ICESCR.	International Covenant On Economic, Social And Cultural Rights.
ICJ.	International Court Of Justice.
ICLQ.	International And Comparative Law Quarterly.
I.L.A. Report.	International Law Association Report.
ILM.	International Legal Materials.
ILO.	International Labour Organisation.
Iowa LR	Iowa Law Review.
Ind.JIL.	Indian Journal Of International Law.
Ind.Y.W.A.	Indian Yearbook Of World Affairs.
Int.Affairs.	International Affairs.
Int.Conc.	International Conciliation.
Int. Org.	International Organisation.
Int.Prob.	International Problems.
ILR.	International Law Reports.
Int.S.Q.	International Studies Quarterly.
Isr.H.R.Y.	Israeli Human Rights Yearbook.
Jap.Annual.IL.	Japanese Annual Of International Law.
J.Int.L.& Econ.	Journal Of International Law And Economics.
LQR.	Law Quarterly Review.
Minn.LR.	Minnesota Law Review.
MLR.	Modern Law Review.
NILR.	Netherlands International Law Review.
NYUJILP.	New York University Journal Of International Law And Politics.
NYLSLR.	New York Law School Law Review.
p./pp.	Page(s).
pr./prs.	Paragraph(s).
P.L.	Public Law.
PSQ.	Political Science Quarterly.
R.I.A.A.	United Nations Reports Of International Arbitral Awards.
R.I.D.P.	Revue De Institut De Droit Penal.
Rec Des Cours.	Recueil Des Cours De L'Academie De Droit International.
RDH/HRJ.	Revue Des Droits De L'homme/ human Rights Journal.
Rev.ICJ.	Review Of The International Commission Of Jurists.
Rev.Int. Stud.	Review Of International Studies.
SR.	Summary Record.
Santa Clara LR.	Santa Clara Law Review.
1 S.D.	Human Rights Committee: Selected Decisions Under The Optional Protocol.

South African YIL.	South African Yearbook Of International Law.
Temple. LQ.	Temple Law Quarterly.
Tex.ILJ.	Texas International Law Journal.
UDHR.	Universal Declaration Of Human Rights.
U.K.T.S.	U.K. Treaty Series.
UNESCO.	United Nations Education, Scientific And Cultural Organisation.
U.Pa.LR.	University Of Pennsylvania Law Review.
Univ.H.R.	Universal Human Rights.
Univ.NSWLJ.	University Of New South Wales Law Review.
Univ.Tor.L.J.	University Of Toronto Law Journal.
Univ.Ill.L.F.	University Of Illinois Law Forum.
U.N.T.S.	United Nations Treaty Series.
Va.JIL.	Virginia Journal Of International Law.
Vand.J.Trans.L.	Vanderbilt Journal Of Transnational Law.
Van Dijk And Van Hoof.	Van Dijk And Van Hoof, Theory And Practice Of The European Convention On Human Rights.
Vill. LR.	Villanova Law Review.
Wayne LR.	Wayne Law Review.
WHO.	World Health Organisation.
Will. & Mary LR.	William And Mary Law Review.
Wisc.L.R.	Wisconsin Law Review.
Yale J.W.P.O.	Yale Journal Of World Public Order.
Y.B.W.A.	Yearbook Of World Affairs.
Y.E.L.	Yearbook Of European Law.
Z.A.O.R.V.	Zeitschrift Fur Auslandisches Offentliches Recht Und Volkerrecht.

STATES PARTIES TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS.

87 States Parties: (As of 8 April 1988).

Afghanistan, Argentina, Australia, Austria, Barbados, Belgium, Bolivia, Bulgaria, Byelorussian SSR, Cameroon, Canada, Central African Republic, Chile, Colombia, Congo, Costa Rica, Cyprus, Czechoslavakia, Democratic Peoples's Republic Of Korea, Democratic Yemen, Denmark, Dominican Republic, Ecuador, Egypt, El Salvador, Equatorial Guinea, Finland, France, Gabon, Gambia, German Democratic Republic, Germany/ Fed Republic, Guinea, Guyana, Hungary, Iceland, India, Iran, Iraq, Italy, Jamaica, Japan, Jordan, Kenya, Lebanon, Libyan Arab Jamahiraya, Luxembourg, Madagascar, Mali, Mauritius, Mexico, Mongolia, Morocco, Netherlands, New Zealand, Nicaragua, Niger, Norway, Panama, Philippines, Peru, Poland, Portugal, Romania, Rwanda, Saint Vincent and the Grenadines, San Marino, Senegal, Spain, Sri Lanka, Sudan, Suriname, Sweden, Syrian Arab Republic, Tanzania, Togo, Trinidad & Tobago, Tunisia, Ukrainian SSR, Union of Soviet Socialist Republics, United Kingdom, Uruguay, Venezuela, Vietnam, Yugoslavia, Zaire, Zambia.

Entry into force: 23rd march 1976

INTRODUCTION.

According to Louis Henkin "Human rights is the idea of our time". In concrete terms the "idea" of human rights is given expression through a myriad of regional and global international instruments. The most general of those instruments, the 'Universal Declaration Of Human Rights' (1948), the 'International Covenant On Civil And Political Rights' (1966), the 'Optional Protocol' thereto (1966), and the 'International Covenant On Economic, Social And Cultural Rights' (1966), collectively form the "International Bill Of Rights". The two Covenants and the Optional Protocol entered into force in 1976.

Under the terms of the International Covenant On Civil And Political Rights a "Human Rights Committee" was established in 1977 with certain functions in respect of the Covenant and the Optional Protocol thereto. This thesis examines the work of the Human Rights Committee. Through that examination it is possible to determine and evaluate the nature of the Human Rights Committee and assess its contribution to the development of the "idea of our time".

Chapter One and the opening section of Chapter Four provide brief accounts of the origins, drafting, and significance in international law, of the Covenant and the Optional Protocol thereto. A knowledge of these matters is a necessary precondition to a proper evaluation of the work of the Human Rights Committee.

Chapter Two analyses the institutional nature of the Human Rights Committee. The aim is to determine what kind of a body the Human Rights Committee is.

Chapters Three and Four provide a full examination of the practices and procedures under the two functions exercised by the Human Rights Committee to date. These are the reporting system provided for in article 40 ofthe Covenant and the individual communications system provided for in the Optional Protocol. Each Chapter offers an appraisal of the development of the respective systems to date.

To obtain a more specific insight into the work of the Human Rights Committee the thesis proceeds with the examination of its work under the two implementation systems in respect of selected rights in the Covenant. Initially it was hoped to consider each of the articles on which the Human Rights Committee had seen fit to express a "General Comment" under article 40 (4) of the Covenant. In the event that proved to be impossible. However, each of the articles examined have been the subject of a "General Comment" by the Human Rights Committee and this may perhaps be taken as some reflection of their relative importance in the view of the Human Rights Committee. In any event it is submitted that the articles chosen are self evidently important.

Chapter Five considers the article 1 (self-determination). Chapter Six considers article 2 (general obligations to respect and ensure the rights in the Covenant, to give effect to it, and to provide a

remedy in the event of violation). Chapter Seven considers article 4 (derogation provision). Chapter Eight considers article 6 (right to life). Chapter Nine considers article 7 (torture and other prohibited treatment and punishment), and, in part, article 10 (treatment of persons deprived of their liberty). Chapter Ten considers article 14 (Fair Trial). Chapter Eleven considers article 19 (freedom of opinion and expression). Chapter Twelve considers article 20 (war propaganda and advocacy of national, racial or religious hatred). Each of Chapters Five to Twelve concludes with a general appraisal which links the consideration of the respective articles to the general themes of the nature of the Human Rights Committee and the development of the Covenant and the Protocol. For the sake of completeness I have appended the texts of the two "General Comments" of the Human Rights Committee to date which are not considered in full in this thesis (Appendix IV). These concern the position of aliens under the Covenant and the right to privacy in article 17 of the Covenant.

Chapter Thirteen provides a general appraisal of the work of the Human Rights Committee in giving life to the structures and mechanisms of the Covenant and the Protocol and meaning to its language.

CHAPTER 1. THE ORIGINS AND DEVELOPMENT OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS AND THE OPTIONAL PROTOCOL THERETO.[1]

---

[1] This account is mainly drawn from the following United Nations records. The Reports of the Human Rights Commission, 1947-1954: 1st session, U.N.Doc.E/259, ECOSOC, O.R., fourth session, Supp.3,(1947); 2nd session, U.N.Doc.E/600, ESCOR,O.R., sixth session, Supp.1,(1948); 3rd session, U.N.Doc.E/800, ECOSOC, O.R., seventh session, Supp.2,(1948); 5th session, U.N.Doc.E/1371, ECOSOC, O.R., ninth session, Supp.10, (1949); 6th session, U.N.Doc.E/1681, ECOSOC,O.R., eleventh session, Supp.5, (1950); 7th session, U.N.Doc.E/1992, ECOSOC, O.R., thirteenth session, Supp.9, (1951); 8th session, U.N.Doc.E/2256, ECOSOC O.R., fourteenth session, Supp.4, (1952); 9th session, U.N.Doc.E/2447, ECOSOC,O.R., sixteenth session, Supp.8,(1953); 10th session, U.N.Doc.E/2573, ECOSOC, O.R., eighteenth session, Supp.7, (1954). An excellent annotation of the work of the HRCion can be found at U.N.Doc.A/2929, 10 GAOR, Annexes, Agenda Item 28, Part II, (1955).

From 1954 to 1966 the draft Covenants were considered by the Third Committee of the General Assembly. For its Reports see the following U.N.Documents:

A/2808 and Corr.1,9 GAOR,Annexes,Ag.Item.58,part I,(1954);
A/2907, 10 GAOR, Annexes, Ag.Item.28, part.I, (1955);
A/3077, 10 GAOR, Annexes, Ag.Item.28, part I, (1955);
A/3525, 11 GAOR, Annexes, Ag.Item.31, (1956);
A/3764,and Corr.1, 12 GAOR, Annexes,Ag.Item.33, (1957);
A/4045, 13 GAOR, Annexes, Ag.Item.32, (1958);
A/4299, 14 GAOR, Annexes, Ag.Item.34, (1959);
A/4625, 15 GAOR, Annexes, Ag.Item.34, (1960-61);
A/5000, 16 GAOR, Annexes, Ag.Item.35, (1961-62);
A/5365, 17 GAOR, Annexes, Ag.Item.43, (1962);
A/5655, 18 GAOR, Annexes, Ag.Item.48, (1963), which is accompanied by A/5411, a Report of the Secretary-General updating A/2929 above; A/6173, 20 GAOR, Annexes, Ag.Item.65,(1966); A/6546, 21 GAOR, Annexes, Ag.Item.62, (1966).

There is an extensive literature dealing with the matters dealt with in this chapter. See H.O. Agarwal, Implementation Of The Human Rights Covenants With Special Reference To India, (1983); A.Cassese, International Law In A Divided World, ch.11, (1986); R.Chakravarti, Human Rights and the United Nations, (1958); R.Cohen, International Covenant on Civil and Political Rights, 6 International Problems, pp.38-49,

(Footnote Continued)

(Footnote Continued)
(1968); A.L.Del Russo, International Protection of Human Rights, chs.I-III, (1970); P.N.Drost, Human Rights As Legal Rights-The Realization of Human Rights In Positive International Law, (New York, 1951, Leiden, 1965); G.Ezejiofor, Protection of Human Rights under the law, chs.2-3, (1964); T.J.Farer, The United Nations And Human Rights: More Than A Whimper Less Than A Roar, 9 HRQ (1987) pp.550-585; D.P.Forsythe, The United Nations and Human Rights, 100 Pol.S.Q., pp.249-269,(1985); M.Ganji, International Protection Of Human Rights, (1964); J.F.Green, The United Nations and Human Rights, chs.1-3, (1956); W.P.Gormley, The Implementation Of United Nations Human Rights Covenants: Contemporary Legal Precedent And Future Procedural Remedies, 3 Vols, Ph.D. thesis, (Manchester, 1972); W.Korey, The Key To Human Rights-Implementation, 570 International Conciliation, pp.5-70, (Nov.,1968); L.Henkin, Introduction, to L.Henkin (ed.), The International Bill Of Rights - The Covenant On Civil And Political Rights, (1981); J.P.Humphrey, Human Rights and the United Nation - A Great Adventure, (1984); Fareed Nabiel Jamiel, The United Nations Commission On Human Rights And Its Work For Human Rights And Fundamental Freedoms, chs.1 and 3, (1979); F.Jhabvala, The Practice Of The Covenants' Human Rights Committee 1976-82:Review Of State Party Reports, 6 HRQ (1984), p.81 at pp.81-95; H.Lauterpacht, International Law and Human Rights, Part II, (1950); H. Lauterpacht, The International Protection Of The Individual, in E.Lauterpacht, ed., H.Lauterpacht, International Law-Collected Papers, Vol.3, The Law Of Peace, pp.407-430, (1977); M.Lippman, Human Rights Revisited - The Protection Of Human Rights Under The ICCPR, 26 NILR (1979) PP.221-277; E.Luard (ed.), The International Protection of Human Rights, chs.1-4, (1967); M.S.McDougal and G.Bebr, Human Rights In The United Nations, 58 AJIL (1964),pp.603-641; M.Moscowitz, Human Rights and World Order-The Strugggle For Human Rights, (1958); M.Moscowitz, The Politics and Dynamics of Human Rights, (1968); M.Moscowitz, International Concern with Human Rights,ch.1, (1974); M.Neal, The United Nations and Human Rights, 489 International Conciliation,pp.111-174, (March,1953); V.Pechota, The Development of the Covenant on Civil and Political Rights, in Henkin (ed.), The International Bill Of Rights - The ICCPR, above, ch.2,(1981); A.H.Robertson, Human Rights in the World, ch.2, (1982); P.Sieghart, The International Law of Human Rights, chs.1 and 2, (1983); J.Simarsian, periodic notes on the drafting at 42 AJIL (1948),pp.879-883, 43 AJIL (1949), pp.779-786; 45 AJIL
(Footnote Continued)

1.1 A. ORIGINS. The traditional rule of international law[2] was that, apart from the treatment of aliens,[3] and possibly humanitarian intervention,[4] the rights of

---

(Footnote Continued)
(1951),pp.170-177; 46 AJIL (1952), pp.710-718; L.B.Sohn, A Short History Of United Nations Documents On Human Rights, In The United Nations And Human Rights, Eighteenth Report of the Commission to Study the Organisation of Peace, pp.39-186, (1968); E.Schwelb, Notes On The Early Legislative History Of The Measures Of Implementation Of The Human Rights Covenants, in Melanges Offerts A Polys Modinos, pp.270-289 (1968); E.Schwelb, Civil and Political Rights:The International Measures of Implementation, 62 AJIL (1968), pp.827-868 (revised in 12 Tex.ILJ (1977),pp.141-186); E.Schwelb, Some Aspects Of The International Covenants On Civil And Political Rights 1966, in Eide & Schou, (eds.), The International Protection Of Human Rights, pp.103-129, (1968); L.Sohn and T.Buergenthal, International Protection Of Human Rights, pp.505-556, (1973); I.Szabo, Historical Foundations Of Human Rights And Subsequent Developments, in K.Vasak (ed.), P.Alston (English Edition, ed.), The International Dimensions of Human Rights, Vol.1, ch.2, (1982); H.Tolley, Jr., The U.N. Commission on Human Rights, chs.1-3, (1987); United Nations Action In The Field Of Human Rights, U.N.Doc. ST/HR/2/Rev.2/, chpts.1 and 2,(1983); J.H.W.Verzijl, International Law In Historical Perspective, Vol.V, chpt.IV,(1972); Ton.J.M.Zuidjwick, Petitioning The United Nations-A Study In Human Rights, chpt.1, A, sections 7-10, (1982).

[2] Traditional international law is taken as all international law (both customary and conventional) predating the U.N. Charter in 1945.

[3] See in particular Chakravarti, n.1 above, ch.1; R.B.Lillich, The Human Rights Of Aliens In Contemporary International Law, pp.1-40, Manchester University Press, (1984); M.McDougal, H.Lasswell & L.C.Chen, Human Rights And World Public Order, pp.473-508, (1980). For some examples of seventeenth and eighteenth century treaties providing for human rights protection see Verzijl, n.1 above,

[4] See in particular Sohn and Buergenthal, n.1 above, ch.3; Ganji, n.1 above, ch.1; R.Lillich, Forcible Self-Help To Protect Human Rights, 53 Iowa LR (1967), pp.325-351; M.Akehurst, Humanitarian Intervention, in H.Bull (Ed.), Intervention In World Politics, pp.93-118,(1984); I.Pogany, Humanitarian Intervention In
(Footnote Continued)

individuals were not matters regulated by international law.[5] Some of the earliest examples of international law concerning itself with individual rights can be observed in the attempts in the nineteenth century to abolish slavery and the slave trade.[6] The revolutionary development of the twentieth century (though some would argue it is more properly viewed as an evolutionary development)[7] has been the internationalisation of the concept of human rights.[8] Among the most significant milestones in this development were the Covenant of the

---

(Footnote Continued)
International Law: The French Intervention In Syria Re-examined, 35 ICLQ (1986), pp.182-190; N.Ronzitti, Rescuing Nationals Abroard Through Military Coercion And Intervention On Grounds Of Humanity, (1985).

[5] See Sohn and Buergenthal, n.1 above, chpt.1; L.Oppenheim, International Law, H.Lauterpacht (Ed.), pp.636-642, (8d, 1955). A State could, however, assume legal obligations towards individuals by virtue of an international agreement. See the Case Concerning The Jurisdiction Of The Courts Of Danzig, P.C.I.J. Series B, No.15, (1928). For a recent view see R.Higgins, Conceptual Thinking About The Individual In International Law, 4 Brit J.I.S. (1978) pp.1-19, reprinted in R.Falk et al,(Eds), International Law - A Contemporary Perspective, pp.476-494, (1985).

[6] See Ganji, n.1 above, ch.3; Robertson, n.1 above, pp.15-17. For more recent developments see U.N.Action, n.1 above, chpt.VII,B; Slavery, U.N.Doc.E/CN.4/Sub.2/ 1982/20/ Rev.1,(1984), updating report by B.Whittaker; K.Zoglin, U.N. Action Against Slavery: A Critical Evaluation, 8 HRQ (1986), pp.306-339.

[7] See F.Capatorti, Human Rights: The Hard Road Towards Universality, in R.St.J.MacDonald and D.M.Johnstone, (eds) The Structure And Process Of International Law, pp.977-1000 at p.978, (1984).

[8] See Humphrey, n.1 above, p.46 (1984); Humphrey, The World Revolution And Human Rights, in A.Gotlieb (ed.), Human Rights Federalism and Minorities, pp.147-179, (1969); L.B.Sohn, The New International Law: Protection Of The Rights Of Individuals Rather Than States, 32 Am.ULR (1982) pp.1-64.

League of Nations (1919),[9] the Mandates System,[10] the establishment of the International Labour Organization (1919),[11] the Minorities Treaties and Declarations,[12] President Roosevelts' "Four-Freedoms" address in his message to Congress on 6 January 1941,[13] the Declaration of the 'United Nations' of 1 January 1942[14] and the Charter of the United Nations (1945).[15]

1.2 The rise of totalitarianism and the horrors and excesses of the Second World War had shaken the moral, legal and political foundations of the world community.

---

[9] The League of Nations Covenant does not specifically mention human rights but some important international developments did take place concerning limited areas of human rights matters, see Green n.1 above, pp.8-13.

[10] See Sohn and Buergenthal, n.1 above, chpt.5.

[11] See E.A. Landy, The Effectiveness Of International Supervision-Thirty Years Of I.L.O. Experience, Stevens, London, (1966); N.Valticos, The ILO, in Vasak/ Alston, (eds), n.1 above,pp.363-399; F.Wolf, Human Rights And The I.L.O., in T.Meron (Ed.), Human Rights In International Law - Legal And Policy Issues, pp.273-304,(1984).

[12] See P.De Azcarate, League Of Nations And National Minorities-An Experiment,1945); Sohn and Buergenthal, n.1 above, ch.4; Ganji, n.1 above, ch.2; J.F.Green, Protection Of Minorities In The League Of Nations And The United Nations, in Gotlieb (ed.), n.8 above, pp.180-210; W.McKean, Equality And Discrimination Under International Law, chs.1 and 2, (1983).

[13] 87 Congressional Record, Pt.I, pp.46-47, (77th Congress, 1st session).

[14] For the text see 36 AJIL Supplement(1942),pp.191-192. 27 other countries later adhered to the Declaration, see U.N. Yearbook (1946-47),p.1. Mention should also be made of the influential 'Declaration Of The Rights Of Man' adopted by the Institute Of International Law in 1929, see 35 AJIL (1941),pp.662-665; and Professor Lauterpacht's work, 'International Bill Of Rights' (1945).

[15] Text in Brownlie, Basic Documents In International Law, (3d, 1983).

The defence and re-establishment of human rights came to be seen, in a sense, as one of the 'war-aims'.[16] By the early 1940's a widespread human rights movement had developed that was to exercise a critical influence on the injection of human rights provisions into the institutional framework of the new post-world order.[17]

1.3 Some of the early American drafts of the United Nations Charter included a Bill of Rights or a Declaration of Human Rights.[18] However, in the Dumbarton Oaks Proposals (1944) for the United Nations Charter there was only one general reference to the promotion of respect for human rights and fundamental freedoms as one of the functions of the proposed General Assembly, and under its authority the Economic and Social Council.[19] The United Nations Conference On International Organization (1945) considered a large number of amendments to the proposed United Nations Charter that would have made more detailed and specific reference to human rights and fundamental freedoms. Support for these amendments came not only from various states but also from numerous non-governmental interest and pressure groups.[20] Only in the final stages were the sponsoring powers persuaded to accept the proposed amendments but with their support success was assured.[21] The result was

---

[16] See Green, n.1 above, p.13. See also the Atlantic Charter (1941), 35 AJIL (1941), Supp. p.191, and the second preambular paragraph of the U.N. Charter.

[17] See Humphrey, n.1 above, (1984), pp.12-13.

[18] See Huston, n.25 below.

[19] See Chpt.IX, sect.A(I) of the Dumbarton Oaks Proposals, UNCIO iv, 13. Text in Goodrich, Hambro and Simons, Charter Of The United Nations, p.664 at p.672, (3d, 1969).

[20] See Green, n.1 above, p.16 and n.17 above.

[21] See Green, n.1 above,pp.15-23.

that the highest constitutional document of the new world order,[22] the United Nations Charter (1945), specifically refers to human rights in its Preamble and in six of its articles.[23] The nature of the human rights obligations imposed on States by the U.N. Charter has been extensively debated but there is no doubt that their inclusion in the Charter was of fundamental importance to the internationalisation of human rights.[24]

Among the proposals not adopted at the Conference were those that would have incorporated within the U.N. Charter some form of an "International Bill Of Rights".[25] The Conference did not adopt these proposals because the time available did not permit the detailed consideration thought necessary. One proposal which was adopted was the inclusion in Article 68 of the Charter of a specific reference to the establishment by the ECOSOC of a Commission for the promotion of human rights. The United States Secretary of State commented

---

[22] Cf. R.St.J.McDonald, The United Nations Charter: Constitution or Contract, in R.St.J.McDonald and D.M.Johnstone (Eds.), n.7 above,pp.889-912.

[23] Articles 1(3), 13(1)(b), 55(c), (and see article 56), 62, 68 and 76.

[24] Many of the works cited in n.1 above deal with this question. See also E.Schwelb, The International Court Of Justice And The Human Rights Clauses Of The Charter, 66 AJIL (1972),pp.337-351; N.Singh, Enforcement Of Human Rights, pp.20-36, (1986); L.Sohn, The Human Rights Law Of The Charter, 12 Tex.ILJ (1977),pp.129-140; R.Lillich and F.Newman, International Human Rights - Problems Of Law And Policy, problems 1 and 2, (1979); Case Concerning United States Diplomatic And Consular Staff In Tehran, I.C.J. Reports (1980),p.3.

[25] See e.g., UNCIO, Vol.I, p.425, (proposal of South Africa); UNCIO, Vol.III, pp.266-269 (Panama); UNCIO, Vol.III, pp. 64,70,91 (Mexico). See J.Huston, Human Rights Enforcement Issues At The United Nations Conference On International Organization, 53 Iowa L.R. (1967),pp.272-290.

in his Report To The President on the Conference that, "The unanimous acceptance of this proposal may well prove one of the most important and most significant achievements of the San Francisco Conference".[26] It was clearly envisaged therefore that one of the first tasks of the new Human Rights Commission (HRCion) would be to draft an International Bill Of Rights.[27] The ECOSOC established the HRCion and instructed it to submit proposals, recommendations and reports regarding an International Bill Of Rights and suggestions regarding ways and means for the effective implementation of human rights and fundamental freedoms.[28]

---

[26] Charter Of The United Nations - Report To The President, p.118, (1945, reprint 1969). See also UNCIO, vol.I, p.683 (Pres.Truman).

[27] The establishment and work of the Human Rights Commission is dealt with in a number of works in n.1 above. In particular see those by Lauterpacht, Jamiel, Tolley and Zuidjwick. A Panamanian proposal that the first General Assembly adopt a Declaration On Human Rights was not adopted, see G.A.Resn.43(I), 11 Dec,1946.

[28] See ECOSOC Resns.5(I) and 9(II), ECOSOC OR, 1st year, 2nd session, pp.400-402 (1946).

B. DRAFTING.[29]

1.4 The HRCion held its first session in early 1947.[30] Mrs.F.D.Roosevelt was elected Chairman. She held that office until 1951 and remained a member of the HRCion for a further year. She exerted an immensely important influence in the HRCion in its formative years when the first steps towards an International Bill of Rights were taken[31]. The HRCion's discussions began with a general debate on the form and content of an International Bill of Rights. The possible forms included a Declaration,[32] a Resolution of the General Assembly, a multilateral Convention binding on all States ratifying it, or an amendment to the Charter of the U.N. The initial concensus was that the Bill would be a Declaration to be adopted by Resolution of the General Assembly. A Drafting Committee of eight members was ultimately established to prepare a preliminary draft International Bill of Rights.[33] The drafting Committee initially based its work on a draft Declaration prepared by the Secretariat.[34]

1.5 In the drafting Committee the different views as to the form the International Bill should take were further

---

[29] See n.1 above.

[30] Doc.E/259, n.1 above. See Humphrey,n.1 above, pp.23-28.

[31] See A.J.Glen Mower,Jr., The U.S., the U.N. and Human Rights - The Eleanor Roosevelt and Jimmy Carter Eras, Part I, (1979); M.G.Johnson, The Contributions Of Eleanor And Franklin Roosevelt To The Development Of International Protection Of Human Rights, 9 HRQ (1987),pp.19-48.

[32] On the legal status of a Declarations see G. Von Glahn, Law Among Nations, pp.17-19, (5d, 1986).

[33] For details see Humphrey, n.1 above.

[34] See U.N. Human Rights Yearbook,1947,p.484.

developed.[35] The major division was between those who favoured a Declaration or Manifesto and those who favoured a Convention. The divisions proved not to be fundamental. Those who favoured a Declaration agreed that it should be accompanied or followed by a Convention or a series of Conventions on specific groups of rights. Similarly those who favoured a Convention agreed that the General Assembly, in recommending a Convention to member States, might make a Declaration which was wider in content and more general in expression. Accordingly, it was decided to draft two documents. The Draft Declaration was to set forth general principles or standards of human rights. The Draft Convention was to define specific rights and the limitations or restrictions on their enjoyment. The Drafting Committee also considered the question of implementation and transmitted a memorandum on this matter prepared by the Secretariat.[36]

At its second session in late 1947 the HRCion decided that it would prepare a Declaration and a Convention (to be called a Covenant) as well as measures of implementation. The term "International Bill Of Rights" was to apply to all three documents in preparation.[37] Three working groups were established to consider each of these matters. A draft Declaration and a draft Covenant were produced and along with the report of the working group on implementation were transmitted to Governments for observations, suggestions and proposals.[38]

---

[35] See Doc.E/CN.4/56; SR.E/CN.4/AC.3/SR.1-9.(1947).

[36] See Doc.E/CN.4/21,Ax.H,pp.68-74, Report of the Drafting Committee (1947).

[37] Doc.E/600, n.1 above, pr.18.

[38] Ibid.,annexes (A-C). The representative of the Ukrainian SSR withdrew from the working group on implementation on the basis that the question of implementation demanded previous knowledge of the rules

(Footnote Continued)

The third session of the HRCion in 1948 concentrated on the draft Declaration.[39] The revised draft was submitted to the ECOSOC which after brief consideration transmitted the draft Declaration to the General Assembly for adoption.[40] The "Universal Declaration Of Human Rights" was finally adopted by the General Assembly on 10 December 1948.[41] The first stage of the International Bill of Rights was complete.

(Footnote Continued)
to be implemented. It is interesting to note the measures of implementation proposed at this stage in annex III. It was agreed that the primary responsibility for the enforcement should be at the State level and that each State should be under an obligation to incorporate (in the sense of giving effect through national laws and practices) the provisions of the Covenant. This basic principle survived to become article 2 of the ICCPR. See ch.6 below. Disputes concerning alleged violations were to be referred to a Standing Mediation, and Conciliation Committee, appointed by the ECOSOC, which would provide a remedy if possible. Disputes not settled by this Committee would be sent to the HRCion which would decide whether the dispute should be referred to an international tribunal to be created. The decisions of that tribunal were to be binding on the States parties and were to be implemented by the General Assembly.

[39] Doc.E/800. n.1 above.

[40] U.N.ECOSOC OR, 7th session, Vol.1, (1948),pp.642-660, 694-702.

[41] G.A.Resn.217(A), GAOR, 3rd session, Part I, Resolutions, p.71. See Green, n.1 above, pp.24-37; Tolley, n.1 above, pp.19-24; P.Alston, The Universal Declaration at 35, 31 Rev.I.C.J., pp.60-70, (Dec.1983); H.Lauterpacht (1950), n.1 above, pp.394-428; B.G.Ramcharan (Ed.), Thirty Years After The Universal
(Footnote Continued)

1.6 Attention then focused on the draft Covenant and measures of implementation.[42] At its fifth session (1949) the HRCion conducted a detailed article by article examination of the draft Covenant.[43] Increasing attention was being focused on the question of implementation. A variety of proposals were made for the establishment of an International Court or Committee Of Human Rights with different powers and functions. The HRCion requested the Secretary-General to prepare a methodical questionnaire for Governments on the basis of the proposals put forward.[44] One of the most significant matters considered by the HRCion was whether a right of petition to an international conciliation body would extend to individuals and groups of individuals. The HRCion was equally divided on this issue there being eight votes for and eight against. Under the HRCion's rules of procedure this meant that the proposal was not adopted.[45] Although

---

(Footnote Continued)
Declaration, (Nijhoff,1979); The Proclamation Of Tehran (1968), Human Rights International Instruments, pp.18-19, (1983).

[42] G.A.Resns.217E (III) and 217B (III) (1948).

[43] See Doc.E/1371, n.1 above. New articles were proposed concerning economic and social rights. See also the survey prepared by the U.N. Secretary-General of the activities of U.N. organs and Specialized Agencies falling within the scope of articles 22-27 UDHR which cover economic and social rights, Doc.E/CN.4/364.

[44] That questionnaire itself constitutes an interesting document, see Doc.E/1371, n.1 above, Ax.III,pt.II.

[45] See U.N.Docs.E/1371, n.1 above and E/CN.4/SR 118. It is interesting to note the voting pattern at this stage. The following States voted for a resolution laying down that a right of petition by individuals, groups and organizations should be recognised forthwith in the Covenant: Australia, Denmark, France, Guatemala, India, Lebanon, the Philippines and Uruguay. The following States voted against: China, Egypt, Iran, the Ukraine, the USSR, the U.K., the U.S. and Yugoslavia.

similar proposals were consistently made at subsequent sessions none was ever adopted.[46]

At its sixth session (1950)[47] the HRCion gave further consideration to the question of implementation. By a narrow vote the HRCion approved the principle of the establishment of a permanent body in the measures of implementation in the draft Covenant. That body was to be known as the Human Rights Committee (HRC). The HRC would consider Inter-State complaints but not complaints from individuals or non-governmental organizations.[48] The HRC was to offer its good offices to the States concerned with a view to the friendly solution of the matter on the basis of respect for human rights as defined in the Covenant. A proposal that the HRC should have as one of its functions the general supervision of the observance of the provisions of the Covenant was rejected.[49]

On the question of economic, social and cultural rights it was decided that they should not be included in the first Covenant but that the HRCion would proceed at its next session to consider "additional covenants and measures dealing with economic, social, cultural,

---

[46] Note also the negative position taken by the HRCion itself that it had no jurisdiction to take any action with regard to complaints concerning human rights, That position was maintained until the late 1960's. See Zuidjwick, n.1 above; Tolley, n.1 above, pp.16-19 and ch.4.

[47] Doc.E/1681, n.1 above.

[48] Ibid, prs.34-50. Humphrey, n.1 above, comments that, "It was clear from the voting patterns that opposition to an effective right of petition was hardening", p.108.

[49] "To this end it should collect information, including legislation and judicial decisions, regarding the observance within States parties to the Covenant, of human rights as defined in the Covenant, and initiate an inquiry if it thought it necessary", Doc.E/1681, pr.43.

political and other categories of human rights".[50] It was also decided to secure the co-operation of the Specialized Agencies in the drafting of articles on economic, social and cultural rights.[51]

1.7 The ECOSOC considered the draft Covenants at its eleventh session (1950).[52] In one of its most important decisions concerning the Covenants it requested the General Assembly to take four policy decisions.[53] The first policy decision concerned the general adequacy of the first eighteen draft articles. The General Assembly expressed the opinion that the draft should be revised to include additional rights and to define the rights and the permissible limitations with the greatest possible precision.

The second policy decision concerned the desirability of including special articles on the application of the Covenant to federal States and non-self-governing and trust territories. The General Assembly requested the HRCion to study a federal State article and prepare recommendations which would, "have as their purpose the securing of the maximum extension of the Covenant to the constituent units of federal states and the meeting of the constitutional problems of federal States".[54]

---

[50] Doc.E/1681, n.1 above, prs.34-46 and Ax.I.

[51] Ibid.,prs.29-33.

[52] See ECOSOC OR, 11th session,SR.377-79 and E/CN.4/AC.7/ SR.139-157 and 159.

[53] ECOSOC Resn.303I (XI). See Humphrey, n.1 above, pp.119-133. A bitter debate ensued at ECOSOC's 12th session on receipt of the G.A.'s policy decisions, ECOSOC OR, 12th session,(1951),SR.438-442.

[54] G.A.Resn.421C (V) (1950). For some contemporary views see Y.L.Laing, Colonial And Federal Clauses In U.N. Multilateral Instruments, 45 AJIL (1951), pp.108-128; Lauterpacht (1950), n.1 above, pp.359-365; M.Sorenson,

(Footnote Continued)

Notwithstanding the clear recognition of the constitutional problems of federal States by the G.A. the HRCion interpreted this decision as a direction to exclude any provision for a federal State article. This is the position adopted in the final text of the Covenant.[55] Regarding the territorial application (or colonial clause) the G.A. was more direct. It instructed the HRCion to insert a specified text into the Covenant.[56] That text, however, was subsequently deleted in the Third Committee of the G.A.[57] The G.A. also requested the HRCion, "to study ways and means which would ensure the right of all peoples to self-determination and to prepare recommendations" thereon.[58] Professor Humphrey has commented that, "these decisions marked the beginning of the politicization of the Covenants. The developing countries were in revolt and new voices were beginning to be heard".[59]

The third policy decision concerned the desirability of including articles on economic, social and cultural rights. The G.A. decided that these rights should be included in the Covenant on human rights together with an explicit recognition of the equality of men and women in related rights as set forth in the U.N.Charter. The HRCion was requested to include in the draft Covenant, "a clear expression of economic, social and cultural rights

---

(Footnote Continued)
Federal States And The International Protection Of Human Rights,46 AJIL (1952), pp.195-218. See also Johnson, n.31 above, pp.41-44.

[55] See article 50 ICCPR and article 10 O.P.

[56] G.A.Resn.422 (V), (1950). See Doc.A/2929, n.1 above, ch.1, pr.21.

[57] See Doc.A/6546, n.1 above, prs.131-138.

[58] G.A.Resn.421D (V), (1950).

[59] Humphrey, n.1 above, p.129.

in a manner which relates them to the civil and political freedoms claimed in the draft Covenant".[60]

The final policy decision related to the adequacy of the articles relating to implementation. The G.A. requested the HRCion, "to proceed with the consideration of provisions, to be inserted in the draft Covenant or in separate Protocols, for the receipt and examination of petitions from individuals and organizations with respect to alleged violations of the Covenant", and to take into consideration a number of proposals on measures of implementation.[61] However, as we have noted the HRCion never adopted measures to give individuals or organizations a right of petition.[62]

1.8 At its seventh session (1951)[63] the HRCion drafted fourteen articles on economic, social and cultural rights and ten articles on measures of implementation under which States parties would submit periodic reports to the ECOSOC concerning the progress made in achieving the observance of economic, social and cultural rights.[64] The HRCion did not decide whether the reporting system would be applied to civil and political rights. The provisions concerning the proposed Human Rights Committee were also further revised.

The policy decision of the G.A. to have a single Covenant had not ended the disagreements between States

---

[60] G.A.Resn.421E (V), (1950). Humphrey, Ibid., notes that, "After the British defeat in the United Nations (when it was decided to include economic and social rights in the Covenant), the Government was considering not only abandoning the Covenant but with drawing from the Commission", p.145.

[61] G.A.Resn.421F (V), (1950).

[62] See n.45 above and ch.5 below.

[63] Doc. E/1992, n.1 above.

[64] A State party could, however, refer to a report which it had submitted to a Specialized Agency.

over this issue. The matter was again considered by the ECOSOC at its thirteenth session (1951). After a protracted debate it decided to invite the G.A. to reconsider its decision on this matter.[65] The G.A. took up this invitation and after a bitter debate it requested the ECOSOC to ask the HRCion,

> "To draft two Covenants on human rights...,one to contain civil and political rights and the other to contain economic, social and cultural rights, in order that the General Assembly may approve the two Covenants simultaneously and open them at the same time for signature, the two Covenants to contain, in order to emphasise the unity of the aim in view and to ensure respect for and observance of human rights, as many similar provisions as possible".[66]

The G.A. also decided to include in the Covenants an article stipulating that, "All peoples shall have the right to self-determination", and that, "all States, including those having responsibility for the administration of Non-Self-Governing Territories, should promote the realization of that right, in conformity with the purposes and principles of the United Nations, and that States having responsibility for the administration of Non-Self-Governing Territories should promote the realization of that right in relation to the peoples of such territories".[67]

---

[65] ECOSOC Resn.384(XIII), ECOSOC OR, 13th session.

[66] G.A.Resn.543(VI) (1952), GAOR, 6th session, Supp.20, (A/2199),p.36. See Humphrey, n.1 above who comments that, "The largely ideological controversy and decision split the United Nations down the middle", p.129, 160.

[67] G.A.Resn.545 (VI). See Humphrey, Ibid, p.163.

In response to the G.A.'s decision most of the HRCion's eighth session (1952)[68] was taken up with the drafting of a provision on self-determination which it was decided would be included as article 1 of each of the Covenants. Further revision took place of both draft Covenants. A proposal to request the G.A. to reconsider the decision to prepare two Covenants was not adopted.

1.9 At its ninth session (1953)[69] the HRCion adopted additional articles dealing with civil and political rights and revised the provisions concerning the establishment, composition and jurisdiction of the proposed Human Rights Committee.[70] Again a proposal to request the G.A. to reconsider its decision to have two Covenants was not adopted. However, a special implementation procedure for the right of self-determination was adopted.[71]

The HRCion concluded its work on the draft Covenants at its tenth session (1954).[72] The articles relating to the system of periodic reports for the implementation of economic, social and cultural rights were redrafted. A new article was adopted on a reporting procedure for the Civil and Political Rights Covenant. The State reports were to cover, "The legislative or other measures, including judicial remedies, which they have adopted and which give effect to the rights recognized herein". The

---

[68] Doc.E/2256, n.1 above. Humphrey, Ibid., pp.167-168.

[69] Doc.E/2447, n.1 above.

[70] The proposed nine member Human Rights Committee was to be chosen for five year terms by the ICJ from nominations made by States parties to the Covenant.

[71] Draft article 48, Doc.E/2447, n.1 above, p.48. The G.A. at its eighth session (1953) discussed the questions of a federal State article and a right of petition but made no policy decision on either question.

[72] See Doc.E/2573, n.1 above.

reports were also to indicate the factors and difficulties, if any, affecting the progressive implementation of draft article 22(4) of the Covenant which concerned the equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution and special measures for the protection of children.[73] The reports were to be transmitted, "for the ECOSOC which may transmit them to the Commission on Human Rights for information, study and, if necessary, general recommendations".[74] The HRCion also did not adopt any provisions concerning the applicability of the Inter-State complaint procedure under the draft ICCPR to the Economic, Social and Cultural Rights Covenant.[75] There was further discussion of extending the right of petition but no provision was adopted. Finally, the provision extending the civil and political Covenant to all parts of federal states was adopted.[76] The HRCion's final drafts were the submitted through the ECOSOC to the G.A.[77]

1.10 The G.A. reviewed the draft Covenants at its ninth session (1954)[78] and recommended that its Third Committee

---

[73] This draft provision became article 23(4) ICCPR.

[74] Doc.E/2573, n.1 above, draft article 49. It was argued that the HRCion was a more appropriate body to receive reports as the proposed Human Rights Committee would be a "quasi-judicial" organ concerned with inter-State complaints, Ibid.,pr.178. It was explained that the words "general recommendations" had been taken from the system of periodic reports adopted for inclusion in the draft Covenant on economic, social and cultural rights, Ibid., prs.124, 128, 132 and 181.

[75] Ibid., prs.215-225. Proposals to that effect were withdrawn.

[76] See text to note 55 above.

[77] For the text of the HRCions final draft see Doc.

[78] GAOR, 9th session, Third Committee,SR.557-586;
(Footnote Continued)

(Social, Humanitarian and Cultural Questions) begin an article by article discussion at its tenth session. So began over a decade of detailed scrutiny. A series of amendments were made to the substantive rights adopted by the HRCion. A new article on the rights of the child was adopted but proposals for a right to asylum and a right to property failed. To assist the Third Committee in its consideration of measures of implementation the Secretary-General had prepared, at the request of the G.A., a detailed explanatory paper which examined all of the possibilities in the light of contemporary developments in international implementation procedures. That paper clearly indicated the feasibility of reporting and petition systems as international implementation measures.[79]

1.11 The result of the Third Committee's deliberations were some fundamental changes in the measures of implementation.[80] The final text of the ICCPR provided for three measures of international implementation.

Firstly, a compulsory reporting procedure covering all of the rights set forth in the Covenant (Article 40).[81] The reports were to indicate, "the progress made in the enjoyment of those rights", and to indicate the factors and difficulties, if any, affecting the implementation of the Covenant. The particular implementation provision dealing with the rights and responsibilities of spouses and protection for children

---

(Footnote Continued)
Plenary Meetings,SR.504. See G.A.Resn.833(IX), A/2929, n.1 above, ch.1, pr.50.

[79] G.A.Resn.1843B (XVIII) of Dec.19,(1962). For the Secretary-Generals' paper see Doc.E/5411, n.1 above.

[80] See in particular Jhabvala, n.1 above, and ch. 3 below. The changes made by the Third Committee were accepted by the General Assembly in 1966.

[81] This procedure is examined in detail in ch.3 below.

was deleted[82] as was the special implementation procedure for the right of self-determination.[83] The State reports were to be considered by the new Human Rights Committee rather than by the ECOSOC and the HRCion.[84] The HRC was to "study" the reports and "transmit its reports, and such general comments as it may consider appropriate, to the States parties".[85] The role envisaged for the Specialized Agencies was minimal.[86]

Secondly, the Inter-State Good Offices, Fact-Finding and Conciliation procedure was made optional rather than mandatory as it had been under the HRCion's draft.[87] The provisions themselves were spelt out in much greater detail and became a more distinct two stage procedure. During the first stage the HRC would exercise its Good Offices (Article 41). The second stage would be conducted by a Conciliation Commission appointed by the HRC with the consent of the States parties (Article 42). It is also noteworthy that all references in the HRCion's draft to the International Court Of Justice were deleted, even its election of members of the HRC. This has been seen as an adverse reaction to the judgement of the I.C.J. in the South West Africa Cases (1966).[88]

Thirdly, the Third Committee introduced an Optional provision for the receipt and consideration by the HRC of

---

[82] See n.73 above.

[83] Doc.E/6546, n.1 above, prs.541-543. See n.71 above, and Green. n.1 above, p.53.

[84] See n.74 above.

[85] Ibid.

[86] On the HRC and Specialized Agencies see ch.3 below.

[87] See Doc.A/2929, n.1 above, ch.vii, prs.59-98; Doc.E/6546, n.1 above, prs.398-436.

[88] I.C.J. Rep. 1966, p.6. See Pechota, n. 1 above, p.62; Korey, Ibid., p.56; Cf. Article 22 ICERD (1965).

communications from individuals, but not non-governmental organizations, claiming to be victims of violations of rights recognized in the Covenant. The HRC would then express 'its views' on the communication. This provision ultimately emerged as the Optional Protocol to the ICCPR.[89]

1.12 The HRC had clearly survived then to become the central international implementation organ in the ICCPR and the O.P.[90] It was to study the reports submitted by states parties and make such 'general comments' as it considered appropriate (Article 40); exercise its good offices concerning Inter-State complaints (Article 41); appoint a Conciliation Commission if its good offices failed to resolve the matter (article 42); and consider and express its views on communications submitted by individuals under the O.P. In addition to altering its functions the Third Committee increased the size of the HRC from nine to eighteen members and provided for it to be elected at meetings of States parties to the Covenant.[91]

In Resolution 2200 (XI) of 16 December 1966 the G.A. adopted and opened for signature the International Covenant On Economic, Social And Cultural Rights, the International Covenant On Civil And Political Rights and the O.P.[92] Thus the International Bill Of Rights was

---

[89] This procedure is examined in detail in ch.4 below.

[90] On the HRC see ch.2 below.

[91] See Doc.A/6546, n.1 above, prs.188-303.

[92] The ICESCR was adopted by 105 votes to none; the ICCPR by 106 votes to none. The O.P. to the ICCPR was adopted by 66 votes to 2 with 38 abstentions. See U.N. Yearbook, 1966, p.418; U.N. Juridical Yearbook, 1966, pp.69-70, 170-195. The ICCPR and the O.P. both entered into force on 23 March 1976.

complete.[93] The Bill was the product of almost two decades of detailed consideration by the HRCion, the ECOSOC, the Third Committee of the G.A. and to a lesser extent the plenary G.A. At each stage of preparation Governments were afforded the opportunity of close consultation through the submission of their observations, recommendations and proposals. The HRC has thus been left with a wealth of travaux preparatoires at their disposal which could be of enormous value when faced with problems of interpretation and application.[94]

1.14 No account of the drafting of the International Bill of Rights would be complete without drawing attention to two highly significant influences on its development. Firstly, the Secretariat of the then U.N. Human Rights Division played a fundamental role.[95] It continually acted in a positive and constructive manner introducing new ideas and initiatives either of its own motion or through the State representatives in the HRCion and in the Third Committee.

1.15 Secondly, throughout the drafting process a large number of

---

[93] See F.Newman, The International Bill Of Rights: Does It Exist?, in A.Cassese (Ed.), Current Problems Of International Law, pp.107-116, (1975); C.W.Jenks, The United Nations Covenants On Human Rights Come To Life, in Recueil D'Etudes En Hommage A Paul Guggenheim, pp.805-813, (1968); E.Schwelb, Entry Into Force Of The International Covenants On Human Rights And The Optional Protocol, 70 AJIL (1976), pp.511-519.

[94] See M.Bossuyt, A Guide to the Travaux Preparatoires To The ICCPR AND OP. (1987). The HRC have had recourse to the travaux preparatoires on a number of occasions.

[95] See in particular Humphrey, n.1 above and ch.2 prs.2.16-2.17 below. A number of Specialized Agencies also contributed to the drafting of the Covenants. These included the I.L.O., U.N.E.S.C.O., W.H.O., the Commission On The Status Of Women and the Sub-Commission On The Prevention Of Discrimination And The Protection Of Minorities. On the HRC and Specialized Agencies see ch.3 pr.3.13-3.16 below.

non-governmental-organizations made a very positive contribution.[96] Their representatives served to keep the pressure on governmental representatives to produce the most comprehensive provisions to protect rights and the most effective international measures of implementation possible. Non-governmental-organizations have played a very significant role in the development of a consciousness of human rights at both national and international levels. We have already noted that it was partly their efforts that led to the inclusion of the human rights provisions in the U.N. Charter.[97] Their activities have continued and expanded ever since and their work represents a very important part of the machinery for the international protection of human rights.[98]

---

[96] The representatives attending each session of the HRCion are recorded in the reports of the HRCion, n.1 above.

[97] See n.17 above.

[98] For some of the roles played by NGO's see P.Archer, Action By Unofficial Organizations On Human Rights, in E.Luard (Ed.), n.1 above; J.D.Armstrong, Non-Governmental Organizations, in R.J.Vincent, ed., Foreign Policy And Human Rights, pp.243-260, (1986); C.Desmond, Persecution East And West: Human Rights, Political Prisoners and Amnesty, (1983); M.Kamminga and N.S.Rodley, Direct Intervention At The U.N.:NGO Participation In The Commission On Human Rights And Its Sub-Commission, in H.Hannum (Ed.), Guide To International Human Rights Practice, ch.11, (1984); V.Leary, A New Role For NGO's In Human Rights: A Case Study Of NGO Participation In The Development Of International Norms Of Torture, in A.Cassese (Ed.), U.N.Law/Fundamental Rights - Two Topics In International Law, pp.197-210, (1979); J.Shestack, Sisyphus Endures: The International Human Rights NGO, 24 N.Y.S.L.R. (1978), pp.89-123; H.Thoolen and B.Verstappen, Human Rights Missions (1986); D.Weissbrodt, The Contribution Of International NGO's To The Protection Of Human Rights, in T.Meron (Ed.), Human Rights In International Law - Legal And Policy Issues, ch.11, (1984); Ibid., The Role Of International NGO's In The Implementation Of Human Rights, 12 Tex.ILJ (1977),

(Footnote Continued)

We now examine some of the principal issues that arose during the drafting.

(Footnote Continued)
pp.293-320; Ibid., Fact-Finding by NGO's, in B.Ramcharan (Ed.), International Law And Fact-Finding In The Field Of Human Rights, ch.IX, (1982). On the HRC and NGO's see ch.3, prs.3.17-3.18 below.

C. One Covenant or Two.[99]

1.16 We have already noted how this question was finally resolved during the drafting by the decision of the General Assembly in 1951-2 to have two separate Covenants.[100] The question bitterly divided both the HRCion and the Third Committee of the G.A. Those who favoured two Covenants argued that civil and political rights were "enforceable", or "justiciable" and of an "absolute character" and that this was not the case with economic, social and cultural rights. Civil and political rights were said to be immediately applicable and obliged States to protect individuals against unlawful action by the State. Moreover, economic, social and cultural rights were to be progressively implemented, called for positive action by the State to promote them and depended on domestic and international economic and social conditions.[101] Against this view it was argued that human rights could not be so neatly divided into different categories and should not be so classified in a hierarchical manner. All human rights should be protected and promoted at the same time.[102]

The question of whether there should be one or two Covenants was inextricably linked to that of the appropriate systems of implementation. It was strongly argued that whatever the merits of the preceding

---

99 See Doc.A/2929, n.1 above, ch.II, prs.4-12; Pechota, Ibid., pp.41-43; Green, Ibid., pp.39-42; Neal, Ibid., pp.126-129; Th.C.Van Boven, Distinguishing Criteria Of Human Rights, in Vasak, Alston, (eds.), Ibid., pp.43-59.

100 See prs.1.7-1.8 above.

101 Cf. The comments of the EUCT in the Airey v. Ireland, vol.32 Eur.Ct.H.R., Series A, pr.26, (1979).

102 Generally see M.Bossuyt, La Distinction Juridique Entre Les Droits Civils Et Politiques Et Les Droits Economiques, Sociaux Et Culturels, 8 RDH/HRJ (1975), pp.783-820.

arguments the two groups of rights called for different implementation machinery. To incorporate two systems of implementation within one Covenant would have resulted in a Covenant within a Covenant.[103] In the HRCion it was originally argued that while an inter-State complaint machinery was appropriate to civil and political rights which were to be given immediate effect the progressive nature of economic, social and cultural rights rendered some form of reporting machinery more appropriate.[104]

Debate continues as to the relationship between the two sets of rights and the most appropriate implementation machinery for them.[105] In retrospect it is submitted that the separation of the two sets of rights has proved beneficial from the point of view of the ICCPR. The HRC's brief of twenty seven substantive articles (articles 1-27 ICCPR) is still very wide and onerous. However, the subsequent chapters of this thesis

---

[103] See Humphrey, n.1 above,pp.144 and 162. See, e.g., E/CN.4/SR.273 p.13.

[104] At this time the HRCion proposal was for a compulsory inter-State complaints procedure for the ICCPR and a reporting procedure for the ICESCR. Note that the compulsory individual applications procedure and the optional inter-state complaint procedure under the American Convention On Human Rights (1970) do apply to the economic, social and cultural rights in article 26 though that article is clearly in terms of progressive development, see T.Buergenthal, R.Norris and D.Shelton, Protecting Human Rights In The Americas, (2d, 1986).

[105] See e.g. D.Harris, The European Social Charter, pp.268-272,(1984); A Berenstein, Economic And Social Rights: Their Inclusion In The ECHR- Problems Of Formulation And Interpretation, 2 HRLJ (1981), pp.257-280; L.J.Macfarlane, The Theory And Practice Of Human Rights, ch.7 (1985); P.Sieghart, The Lawful Rights Of Mankind, pp.81-84,(1985). See the important G.A.Resn. 32/130 (16 Dec,1977) discussed by Ramcharan, A Critique Of Third World Responses To Violations Of Human Rights, in Cassese, (ed.) (1979) , n.98 above, pp.249-258; Principle 6 of the Draft Principles On Responsibility, n.187 below. Note that the African Charter Of Human And Peoples Rights draws no distinction between categories of rights, see n.268 below.

will relate how the HRC has built up a constructive practice on the framework of the article 40 reporting procedure and the O.P. individual petition procedure.[106] By contrast the record of the implementation procedures and practices established under the ICESCR has been somewhat disappointing to date.[107] Indeed, the contrasting fortunes of the two sets of implementation machinery are vividly illustrated by the fact that a new Committee on Economic, Social and Cultural Rights, largely modelled on the HRC, has now been established to replace the machinery established under the ICESCR.[108] The fears of those who argued that the separation of human rights into two Covenants with different implementation machinery would relegate the importance of, and hinder the effective implementation of, economic, social and cultural rights have in practice been realized.[109]

---

[106] See chs.3-12 below.

[107] See Report Of The Sessional Working Group On The Implementation Of The ICESCR, Doc.E/CN.4/1981/64 (1981). See 27 Rev.ICJ (1981) pp.26-39; Alston, n.108 below.

[108] See P.Alston, Out Of The Abyss: The Challenges Confronting The New U.N. Committee On Economic, Social And Cultural Rights, 9 HRQ (1987), pp.332-381; P.Alston and B.Simma, First Session Of The UN Committee On Economic, Social And Cultural Rights, 81 AJIL (1987) pp.747-756.

[109] See prs.1.7-1.8 above. Note that almost every State that has ratified the ICCPR has also ratified the ICESCR, see the 'Introduction' to this thesis, above.

D. Progressive or Immediate Obligations.[110]

1.17 There were marked differences of opinion during the drafting on the matter of the obligations that would be incurred by a State party to the ICCPR. Some representatives argued that the obligations under the ICCPR were absolute and immediate and that, therefore, a State could only become a party to the ICCPR after, or simultaneously with, its taking the necessary measures to secure those rights. If there were disparities between the Covenant and national law they could best be met by reservations. These representatives criticized the draft article 2(2) of the ICCPR whereby States would undertake "to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in this Covenant", where they were not already provided for, because it introduced the notion of progressiveness.[111] Similar criticism was also directed to the draft reporting procedure.[112]

Against this view it was argued that the prior adoption of the necessary measures in domestic law was not required by international law.[113] Moreover,

> "At the same time the need for paragraph two arose because it was essential to permit a certain degree of elasticity to the obligations imposed by the Covenant, since all States would not be in a position immediately to take the necessary legislative or other measures for the implementation

---

110 See the Report of the Working Group on Implementation, Doc.E/600, n.1 above, prs.26-27; Doc.A/2929, Ibid., ch.VII, prs.162,165; U.N.Doc.A/5655, Ibid., pr.21. See also the literature cited in ch.6, n.1.below.

111 See Doc.A/2929, n.1 above, ch.v,pr.10; Doc.A/5655, Ibid., pr.21.

112 See Doc.E/2573, n.1 above, prs.171-205.

113 This view was supported by a Legal Opinion submitted by the Secretary-General at the request of a drafting Committee of the HRCion, see U.N.Doc.E/CN.4/116 (1948).

of its provisions. The Covenant, it was pointed out, unlike ordinary Conventions, concerned a vast field so that no State could claim its legislation to be in complete harmony with all its provisions. Paragraph two would also take into account the constitutional processes of various countries which differed as regards the implications of an act of ratification of an international instrument".[114]

It was further suggested that the draft article 2(2), unlike a system of reservations, would not perpetuate the law of any State that did not conform to the Covenant.

Proposals to provide that the necessary measures be taken within a specified time limit or within a reasonable time were rejected as was a suggestion that each State fix its own time limit in its instrument of ratification. The only clear intentions of the HRCion that emerged were those of avoiding excessive delays in the full implementation of the Covenant and of not introducing the general notion of progressiveness that was a feature of the obligations under the then draft ICESCR.[115]

The objections to the draft article 2(2) were again voiced in the Third Committee but the provision remained unchanged. The Committee's report stated that,

"It represented the minimum compromise formula, the need for which, particularly in new States building up their body of legislation, was manifest. The notion of implementation at the earliest possible moment was implicit in article 2 as a whole. Moreover, the reporting requirement in article 49

---

[114] U.N.Doc.A/2929, n.1 above, ch.V, pr.8.

[115] See E.W.Vierdag, The Legal Nature Of The Rights Granted In The ICESCR, 9 NYIL (1979), pp.69-105; G.J.H. Van Hoof, The Legal Nature Of Economic, Social And Cultural Rights: A Rebuttal Of Some Traditional Views, in P.Alston and K.Tomasevski, (eds.), The Right To Food, pp.97-110, (1984).

(later article 40) would indeed serve as an effective curb on undue delay".[116]

The approach of the HRC to article 2 ICCPR is dealt with below.[117]

---

[116] See U.N.Doc.A/5655, n.1 above, pr.23. See also O.Schacter, The Obligation To Implement The Covenant In Domestic Law, in Henkin (Ed.), n.1 above, p.311 at p.325.

[117] See ch.6.

E. International Measures Of Implementation.[118]

1.18 There was general agreement during the drafting that the primary obligation under the ICCPR would be implementation at the national level by States.[119] There was continuing disagreement, however, on the question whether there should also be international measures of implementation. A minority of States, principally the Soviet bloc, insisted that there should be provisions to ensure implementation but that there should be no international measures of implementation.[120] It was argued that such measures were a system of international pressure intended to force States to take particular steps connected with the execution of obligations under the Covenant. They were, therefore, contrary to the principle of domestic jurisdiction in article 2(7) of the

---

[118] This matter is dealt with in many of the works cited in n.1 above. See, e.g., Green,pp.50-53; P.Sieghart, The Lawful Rights Of Mankind,ch.10,(1985).

[119] See n.38 above. P.Sieghart, Ibid.,ch.9. It was frequently proposed during the drafting that States parties be obliged to establish national human rights commissions to review the national provisions for the protection of the rights in the Covenant and report to the Head of State and to the Government. The proposals were not adopted and the question was submitted for further study to the HRCion, see U.N.Doc.A/6546, prs.557-561,613-626. For subsequent developments see U.N. Action In The Field Of Human Rights, n.1 above., pp.344-345; Report Of The Secretary-General, "National Institutions For The Promotion And Protection Of Human Rights", Doc.E/CN.4/1987/37.

[120] With the exception of Yugoslavia. See e.g., the USSR statement with regard to the drafts and proposals on implementation of 18 May 1948, in Doc.E/1371, n.1 above, pp.47-48. See Ganji, n.1 above, pp.186-189; F.Jhabvala, The Soviet Bloc's View Of The Implementation Of Human Rights Accords, 7 HRQ (1985), pp.461-491; V.Kartashkin, The Socialist Countries And Human Rights, in K.Vasak/ P.Alston, (eds.), n.1 above, pp.631-650. The soviet bloc was, however, willing to accept an international system of implementation for the right of peoples to self-determination, see U.N.Doc.E/CN.4./ SR.476, and notes 71 and 83 above.

United Nations Charter,[121] would undermine the sovereignty and independence of States[122] and would upset the balance of powers established by the U.N. Charter. Moreover, the establishment of petitions systems would transform complaints into international disputes with consequent effects upon peaceful international relations.

1.19 Against these views it was argued that the undertaking of international measures of implementation were an exercise of domestic jurisdiction and not an interference with it. International measures were essential to the effective observance of human rights, which were matters of international concern. However, even within those States that agreed that international measures were essential, there were significant differences of opinion as to the appropriate types of

---

121 On this fundamental question see R.Bernhardt, Domestic Jurisdiction Of States And International Human Rights Organs, 9 HRLJ (1987) pp.205-216: F.Ermacora, Human Rights And Domestic Jurisdiction, 124 Receuil De Cours, 1968-II, pp.371-415; J.Fawcett, Human Rights And Domestic Jurisdiction, in E.Luard (Ed.), n.1 above, pp.286-303; G.J.Jones, The United Nations And The Domestic Jurisdiction Of States, ch.III, (1979); R.Higgins, The Development Of International Law Through The Political Organs Of The United Nations, Part II, particularly at pp.118-139 (1963); L.Henkin, Human Rights And Domestic Jurisdiction, in T.Buergenthal (Ed.), Human Rights, International Law And The Helsinki Accords, pp.21-40, (1977); H.Lauterpacht, International Law And Human Rights, ch.12, (New York,1950); H.Kelsen, The Law Of The United Nations, pp.27-50, (1950); M.Markovic, Implementation Of Human Rights And The Domestic Jurisdiction Of States, in Eide And Schou (Eds.), n.1 above, pp.47-68; J.S.Watson, Autointerpretation, Competence And The Continuing Validity Of Article 2(7) Of The U.N. Charter, 71 AJIL (1977), pp.60-83; M.Bossuyt, Human Rights And Non-Intervention In Domestic Matters, 35 Rev.ICJ (1985),pp.45-52; See also Principle 42 of the Draft Principles On Responsibility, n.187 below.

122 See R.Falk, Human Rights And State Sovereignty,(1981); H.Lauterpacht, State Sovereignty And Human Rights, in H.Lauterpacht, International Law, E.Lauterpacht (Ed.), Vol.3, pp.416-430, (1977).

measures.[123] The proposals included an International Court of Human Rights empowered to settle disputes concerning the Covenant;[124] settlement by diplomatic negotiation and, in default, by ad-hoc fact-finding Committees; the establishment of an Office of High Commissioner (or Attorney-General) for Human Rights;[125] the establishment of reporting procedures covering some or all of the provisions in the Covenant; empowering the proposed Human Rights Committee to collect information on all matters relevant to the observance and enforcement of human rights and to initiate an inquiry if it thought one necessary.[126]

1.20 There was further division of opinion as to whether, if an international right of petition were included, it would be limited to States or whether it would be extended to individuals, groups of individuals, or to all or selected non-governmental organizations.[127] As noted, the HRCion rejected the latter possibilities in 1949 and never reversed that position.[128] Only during its final session did the Third Committee adopt the Optional Protocol to the ICCPR which provides an international right of petition for individuals but not for non-governmental organizations.[129]

---

123 See Doc.E/600, n.1 above,p .43-44; Humphrey, Ibid., pp.37-49.

124 Australia was the leading proponent of this view. See, e.g. Doc.E/1371, n.1 above, pp.36-49 (1949); Doc.E/2573,Ax.III.

125 See Korey, n.1 above, pp.59-64; Humphrey, Ibid.,pp.130. See R.S. Clark, A United Nations Commissioner For Human Rights (1972).

126 See Doc.A/2929, n.1 above, prs.87-89, (India).

127 The respective arguments are briefly rehearsed in ch.4, pr.4.2-4.3 below.

128 See pr.1.6 above.

129 See n.127 above.

1.21 The lengthy drafting process of the ICCPR largely coincided with the depths of cold war confrontation, the explosive development of notions of self-determination[130] and independence, the accompanying political tensions of large scale decolonization, and the consequential effects of a rapidly altering balance of diplomatic power within the United Nations.[131] In retrospect then it must be acknowledged that it was much more difficult to agree on the text of a Covenant containing binding legal obligations and limited measures of international implementation that it had been to agree upon the statement of political principles in the Universal Declaration in 1948.[132] It is submitted, therefore, that the completion of the the ICCPR and the O.P. should be viewed as an achievement of considerable significance. The presence of at least some limited international implementation procedures offered some hope that the Human Rights Committee, the body of independent experts to be established to operate them, could fashion something constructive and influential from them. The subsequent chapters of this work essentially seek to determine whether that hope has been fulfilled.[133]

---

[130] See pr.1.22 below and ch.6 below.

[131] See Pechota, n.1 above, pp.63-64. For a political history of part of the period see E.Luard, A History Of The United Nations, Vol.1: The Years Of Western Domination, (1982). See also J.F.Green, Changing Approaches To Human Rights: The U.N. 1954 and 1974, 12 Tex ILJ.(1977) pp.223-238.

[132] See Green, n.1 above, pp.65-67 and n.41 above.

[133] Note that the ICERD (1965) contains a mandatory reporting procedure (art 9), a mandatory inter-state complaint procedure (arts.11-13) and an optional provision on individual communications (art.14). Humphrey, n.1 above, suggests that their inclusion without substantial objection can be explained in terms of the U.N.'s pre-occupation with discrimination, pp.331-334. A petition system relating to the implementation of the 1960 Declaration On The Granting Of Independence To Colonial Countries And Peoples had also been established, see Zuidjwick, n.1 above, ch.VI.

F. Self-Determination.[134]

1.22 Perhaps the most controversial provision included in the ICCPR was the provision on self-determination. As we have noted it was considered and included at the request of the G.A. in 1950.[135] However, its inclusion was strenuously opposed on various grounds particularly by the Western powers. It was argued that it was a vague and undefined concept, that it was a political principle rather than a legal right, that it was a collective rather than an individual right, and that the implementation systems in the Covenant could not be applied to it and that its inclusion would disturb the system of functions and powers allocated to the United Nations organs in the Charter. The opponents of its inclusion in the Covenant suggested that it could be included in a separate covenant or protocol. In the event, however, the tide of political opinion in favour of including a right of self-determination proved irresistible.[136] Its proponents argued that it was a fundamental collective human right and a pre-condition to the enjoyment of all the rights and freedoms of the individual.

A minority of States argued that the right should be limited to the colonial situation. The majority, however, including those States that opposed inclusion, took the view that if the right was to appear in the Covenant it should not be limited to colonial territories but should

---

[134] See U.N.Doc.A/2929, n.1 above,ch.iv; Doc.E/2256, Ibid., prs.27-77; Doc.E/CN.4/SR.252-266; U.N.Doc.A/3077,n.1 above prs.27-77; See A/C.3/SR.562-573, 575, 578, 580-582 (9th session), SR 641-655, 667-676 (10th session); Ganji, Ibid., pp.192-203; Green, Ibid., pp.48-50; Humphrey, Ibid., pp.165-169; Chakravarti, Ibid., ch.IV; See also ch.6 below.

[135] See n.17 above.

[136] The important "Declaration On The Granting Of Independence To Colonial Countries And Peoples", G.A.Resn.1514(XV) had been adopted in 1960.

apply to the people of any territory whether independent, trust or non-self-governing. A particular fear expressed with respect to self-determination was its invocation by minorities and the consequential destruction of the sovereignty and territorial integrity of States.[137] It is, therefore, important to note that the drafting history clearly indicates that the Covenant does not accord to minorities, as such, the right of self-determination generally.[138] The problems of minorities were conceived of as different matters. Thus limited provision dealing with ethnic, religious or linguistic minorities was included as article 27 ICCPR. This provides that such minorities shall not be deprived of the right, "to enjoy their own culture, to profess and practice their own religion, or to use their own language".[139]

1.23 In the HRCion an important addition to the proposed right of self-determination was that it would include a right to permanent sovereignty over natural wealth and resources.[140] Those opposed to this addition argued that

---

137 The central problem of G.A.Resn.1514 is the conflict between self-determination of the people and the maintainance of the sovereignty and territorial integrity of the State. For a recent view see K.W.Blay, Self-Determination Versus Territorial Integrity In Decolonization Revisited, 25 Ind.JIL (1985), pp.386-410.

138 See e.g., Cassese, The Self-Determination Of Peoples, in Henkin, ed., (1981) n.1 above, p.92 at 96; n.134 above. This does not necessarily mean that a minority cannot have a right to self determination. That depends on whether or not they constitute a "people" and that in itself is a most difficult question.

139 On art.27 see Sohn, The Rights Of Minorities, in Henkin, ed., (1981), n.1 above, pp.270-289; F.Capatorti, Study On The Rights Of Persons Belonging To Ethnic, Religious And Linguistic Groups, Doc.E/CN.4/Sub.2/384/Rev.1.(1979).

140 See Doc.E/2556, n.1 above,pr.67.(proposal of Chile), Doc.E/2573, Ibid., prs.62, 65-66. See Humphrey, (Footnote Continued)

the concept of permanent sovereignty had little meaning and was untenable because any State could voluntarily limit its own sovereignty. Moreover, concern was expressed that the article would sanction unwarranted expropriation or confiscation of foreign property and would permit the unilateral denunciation of international agreements. Against this view it was argued that the right to permanent sovereignty over natural wealth and resources was an essential part of self-determination. The purpose of the article was not to threaten foreign investment as suggested but to prevent such foreign exploitation as would deprive the local population of its means of subsistence. To meet some of the objections, however, the Third Committee deleted the reference to permanent sovereignty and inserted a reference to, "obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law".(article 1(2)).[141]

It has been argued, however, that the subsequent adoption of article 47 ICCPR has substantially altered the compromise reached on the content of article 1. Article 47 provides that, "Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and

---

(Footnote Continued)
n.1 above, p.167. In 1962 the General Assembly had adopted an important resolution on 'Permanent Sovereignty Over Natural Resources', G.A.Resn.1803(XVII), A/5217, GAOR, 17th session, Supp.17. See also G.A.Resn.2158(XXI) of 25 Nov.,1966, The Declaration On The Establishment Of A New International Economic Order, G.A.Resn.3201 (S-VI), 1 May 1974, and the Charter Of Economic Rights And Duties Of States, G.A.Resn.3281(XXIX),1974. For recent works on this subject see G.Elian, The Principle Of Sovereignty Over Natural Resources, (1979), K.Hossain and S.R.Chowdhurry, Permanent Sovereignty Over Natural Resources In International Law - Principle And Practice,(1984).

[141] See Doc.A/3077, n.134 above.

freely their natural wealth and resources".[142] Article 47 attracted great opposition from the Western States who argued that it was designed to modify the effect of the substance of article 1.[143] Some commentators have accepted that the purpose of article 47 was indeed to override the contents of article 1.[144]

In the final event then an identical text on self-determination appears in article 1 of each of the Covenants. From the perspective of the ICCPR this raises the question of whether this right is subject to the same implementation procedures as the other rights and freedoms in the ICCPR.[145] In terms of the practice of the HRC the answer has been in the affirmative. The right to self-determination has been considered under the reporting procedure in article 40,[146] has been the subject of a general comment by the HRC under article 40(4)[147] and has been the subject of a number of important views under the Optional Protocol.[148]

The practice of the HRC concerning the right to self-determination is considered below.[149]

---

[142] An identical text appears in article 25 ICESCR.

[143] See Doc.A/6546, n.1 above, prs.95-101.

[144] See K.P.Saskena, International Covenants On Human Rights, 15-16 Ind.Y.I.A. (1966-67), p.596-613 at p.602; Y.Dinstein, Collective Rights Of Peoples And Minorities, 25 ICLQ (1976), pp.102-120 at pp.110-111; E.Schwelb, in Eide and Schou, (eds.), n.1 above, p.112; D.Halperin, Human Rights And Natural Resources, 9 William and Mary Law Review (1968) pp.770-787.

[145] For comment see e.g., Ganji, n.1 above, pp.192-203. We have already noted that a different implementation mechanism was proposed at one time in the HRCion for the right of peoples to self-determination, see notes 71 and 83 above.

[146] See ch.5 below.

[147] Ibid.

[148] See ch.5 below.

[149] See ch.5 below.

G. THE TERRITORIAL (COLONIAL) CLAUSE, THE FEDERAL CLAUSE, RESERVATIONS.

1.24 We have already noted the outcome concerning the territorial and federal State clauses.[150] It only remains to note that both provisions were the subject of considerable controversy. Questions concerning the territorial application of the ICCPR and its application in federal States have arisen and the approach of the States parties and the HRC are noted below.[151]

The matter of reservations was also subject to extensive consideration.[152] In the event no provision dealing with reservations appears in the ICCPR or in the O.P.[153] Their admissibility and validity are thus matters regulated by general international law.[154] In fact a considerable number of reservations and interpretative declarations have been made to the ICCPR and to the O.P.[155] A number of objections have been made to these.[156] Many of those reservations raise interesting

---

[150] See pr.1.7 above; Doc.A/2929, ch.X, prs.8-12, 13-20; Green, n.1 above, pp.53-59.

[151] See ch.6 below.

[152] See Doc.A/2929, n.1 above, ch.X, prs.25-39; Doc. E/2573, Ibid., prs.28-33, 274-301.

[153] Cf. D.Shelton, State Practice On Reservations To Human Rights Treaties, (1983) C.H.R.Y.B, pp.205-234.

[154] See articles 19-23 VCLT (1969) on which see I.Sinclair, The Vienna Convention On The Law Of Treaties, ch.III, (2d, 1984). Generally see the Reservations To The Convention On Genocide case, ICJ Rep.(1951) p.15; P.H.Imbert, Reservations And Human Rights Conventions, 3 H.R.Rev.(1981), pp.28-60; P.H.Imbert, Reservations To The European Convention On Human Rights Before The Strasbourg Commission: The Temeltasch Case, 33 ICLQ (1984) pp.558-595; D.Shelton, n.153 above.

[155] See Reservations, Declarations, Notifications And Objections Relating To The International covenant On Civil And Political Rights And The Optional Protocol Thereto, Note By The secretary-General, Doc.CCPR/C/2/Rev.1 (11-5-1987). Human Rights - Status Of International Instruments, pp.25-94 (1987).

[156] Ibid.

questions as to their validity and indicate in some cases how States parties interpret their obligations under the ICCPR and the O.P. Their presence also raises the question as to whether the HRC has jurisdiction to pronounce on the validity of a reservation during the consideration of reports or under the O.P. process.[157] The approach of the HRC to these questions is noted at various points in this thesis.[158]

---

[157] This question has been raised within the HRC but no formal decision has been taken, see ch.6, pr.6.3 below.

[158] See e.g., ch.4, prs.4.92-4.96 below.

H. THE POSITIONS OF THE SUPERPOWERS.

1.25 It is interesting to note briefly the positions of the two superpowers concerning the Covenants. In the early post World War Two years the United States assumed the position of leadership of the international human rights movement with Mrs. Roosevelt as a major force and inspiration.[159] However, from 1948 onwards there were signs that the U.S. Senate would reject any human rights treaty.[160] Concerted domestic opposition and concern over the constitutional implications of ratification of international human rights treaties culminated in the introduction of the celebrated "Bricker Amendments" (1952-53) which would have restricted the treaty making powers under the Constitution.[161] Although the amendments were defeated they substantially contributed to the adoption of a new policy by the administration concerning human rights treaties. Essentially this new policy rejected the treaty approach as the proper and most effective way to promote human rights. With respect to the International Covenants the policy meant that henceforth the U.S. would not actively participate in the drafting of binding human rights Covenants and would not, in any event, ratify any Covenant approved by the United

---

[159] See n.31 above; Simarsian, n.1 above. See Human Rights In The World Community: A Call For U.S. Leadership, The Subcommittee On International Organizations And Movements Of The Committee On Foreign Affairs, 27 March 1974, pp.59-64.

[160] See Green, n.131 above.

[161] See W.Bishop, Cases And Materials On International Law, pp.110-112,(3d, 1971); V.Van Dyke, Human Rights, The United States And The World Community, ch.7, (1970); S.Garrett, Foreign Policy And The American Constitution: The Bricker Amendment In Contemporary Perspective, 16 Int.S.Q. (1972), pp.187-220; Johnson, n.31 above, who comments that, "It was designed in part as a unilateral federal state clause, denying effect to any treaty which would have been unconstitutional as a simple act of Congress", p.45.

Nations.[162] The alternative approach advocated by the U.S. was the so-called "Action Programme" which in time made an important contribution to the United Nations human rights programme.[163]

The U.S. did continue to take part in the drafting of the Covenants but with decidedly less vigour. On specific issues the initial U.S. position as regards the proposed international measures of implementation was that it favoured inter-State procedures rather than petition procedures for individuals or non-governmental organizations.[164] This position was later modified to support the latter procedures.[165] The U.S. supported the reporting procedures, favoured two Covenants, opposed the inclusion of an article on self-determination, and fought vigorously for the inclusion of a provision that would take account of the constitutional problems of federal States.[166]

---

162 For the U.S. announcement see U.N.Doc.E/CN.4/SR.340, pp.8-12,(1953); U.S. Dept. of State Bulletin, Vol.28, p.592, (April 20, 1953). See Green, n.1 above, pp.59-64; Ganji, n.1 above, pp.221-224; Humphrey, n.1 above, pp.176-177; Johnson, n.31 above,pp.44-47. See the Dulles Memorandum of 20 Feb.1953, "United States Policy Regarding Draft International Covenants On Human Rights", in Foreign Relations Of The United States,1952-54, Vol.3, pp.550-555, (1979), cited in Johnson, n.31 above,p.46, n.90.

163 On the Action Programme see Green, n.1 above, ch.III; U.N. Action In The Field Of Human Rights, ibid., pp.357-362; Humphrey, Ibid., pp.174-181; Tolley, ibid., ch.3.

164 See n.41 above. As early as 1947, however, the U.S. had submitted a draft proposal supporting individual and group positions, see Doc.E/CN.4/21,p.95,(July 1,1947). For its view in 1948 see Doc.E/800, n.1 above, p.41,n.1.

165 See e.g., the draft U.S. proposal for a protocol on petitions from individuals and non-governmental organizations in Doc.E/1992, n.1 above,Ax.V,(1951),later withdrawn.

166 See Ganji, n.1 above, pp.168-172; Green, n.1 above, pp.53-55; see pr.1.7 above.

More recently the Carter presidency gave a new momentum to the international human rights movement by his efforts to integrate human rights considerations as priority aspects of U.S. foreign policy.[167] A number of human rights treaties, including the ICCPR, but not the O.P., were submitted to the Senate for advice and consent to ratification but unfortunately such consent was not forthcoming.[168] There seems little prospect of the

---

[167] Johnson, n.31 above, points out that the Carter presidency picked up on increased Congressional activity on human rights from 1970-75. See generally P.G.Brown and D.Maclean (eds.), Human Rights And U.S. Foreign Policy, (1980); Symposium: Human Rights And U.S. Foreign Policy, 14 Virg.JIL (1973-74), pp.591-701; N.K.Hevener, The Dynamics Of Human Rights In U.S. Foreign Policy, (1981); R.Lillich and F.Newman, International Human Rights: Problems Of Law And Policy, Problem XII, (1979); J.Mayall, The United States, in R.J.Vincent (ed.), Foreign Policy And Human Rights, pp.165-187,(1986); A.G.Mower, n.31 above; J.C.Tuttle,(ed.), International Human Rights Law And Practice, (1978). For some specific analyses and criticisms of U.S. human rights foreign policy see N.Chomsky and E.S.Herman, The Washington Connection And Third World Fascism - The Political Economy Of Human Rights, Vol.1, (1979); L.Schoultz, Human Rights And U.S.Policy Towards Latin America,(1981); H.Shue, Basic Rights, Subsistence, Affluence And US Foreign Policy, (1980).

[168] See S.Exec. C,D,E and F, 95th congress, 2d.Sess, III-IV, (1978). M.L.Nash, Contemporary Practice Of The U.S. Relating To International Law, 72 AJIL (1978) pp.620-631; M.D.Craig, The ICCPR: Department Of State Proposals For Preserving The Status Quo, 19 Harv.ILJ (1978) pp.845-886; D.Weissbrodt, U.S. Ratification Of The Human Rights Covenants, 63 Minn.LR (1978) pp.35-78; McChesney, Should The U.S. Ratify The Covenant? A

(Footnote Continued)

present U.S. administration supporting the ratification of the ICCPR or the O.P.[169]

As for the U.S.S.R., and indeed the rest of the Soviet bloc, with the partial exception of Yugoslavia,[170] we have already noted their different understanding of implementation and their opposition to all international measures of implementation.[171] They favoured provisions on economic, social and cultural rights, opposed the separation of human rights into two Covenants, and opposed what they considered to be special exceptions clauses in favour of federal States and colonial powers.[172]

1.26 Considering the position of most of the Soviet bloc as regards international measures of implementation it was perhaps surprising when the U.S.S.R. and the other members of the bloc ratified the two international

---

(Footnote Continued)
Question Of Merits, Not Of Constitutional Law, 62 AJIL (1968) pp.912-917; R.Lillich (Ed.), U.S. Ratification Of Human Rights Covenants: With Or Without Reservations, (1981); U.Haksar, The International Human Rights Treaties: Some Problems Of Policy And Interpretation, 126 Pa.LR (1978) pp.886-929; J.Skelton, Jr., The U.S. Approach To Ratification Of the International Covenants On Human Rights, 1 Hous.JIL (1979) pp.103-125.

169 Note though that the U.S. recently ratified the Genocide Convention, see 80 AJIL (1986) pp.612-622.

170 Yugoslavia does not consistently vote with any political caucus at the U.N.

171 See pr.1.18 above; Jhabvala, n.120 above; H.O.Bergeson, Human Rights - The Property Of The Nation State Or A Concern For The International Community? - A Study Of Soviet Positions Concerning U.N. Protection Of Civil And Political Rights Since 1975, XIV Cooperation And Conflict, (1979), pp.239-254.

172 Note that the U.S.S.R. is itself a federal State. See generally A.P.Movchan, The Human Rights Problem In Present Day International Law, in G.Tunkin (ed.), Contemporary International Law, pp.233-250, (1969); J.Carey, Human Rights - The Soviet View, 53 Kentucky LJ (1964) pp.115-134; A.Rees, The Soviet Union, in R.J.Vincent (Ed.), n.167 above, pp.61-83; V.Kartashkin, Human Rights And Peaceful Co-Existence, IX HRJ/RDH (1976) pp.5-19; V.Kartashkin, n.120 above.

Covenants.[173] They are, therefore, subject to the respective reporting procedures of the two Covenants although they may take a limited view of the nature and purpose of those reporting procedures.[174] None of these States, however, have accepted the optional inter-State complaint procedure or the O.P.[175] There would seem to be little possibility that they will do so as they appear to remain opposed in principle to such procedures.[176]

1.27 The adoption of a new human rights policy of the U.S. in the early 1950's allowed the U.S.S.R. to assume, at least formally, the mantle of human rights leadership at the United Nations.[177] The absence of the U.S. from the International Covenants, and indeed from most of the U.N. human rights treaty network, is greatly to be regretted.[178] Apart from depriving the American people of international protection of their basic human rights, and

---

[173] For comment see K.Tudin, The Development Of Soviet Attitudes Towards Implementing Human Rights Under The United Nations Charter, 5 RDH/HRJ (1972) p.399-418; Jhabvala, n.120 above. "In 1953 Mrs. Roosevelt expressed the view that, 'Many of us are fairly sure that it (the Soviet Union) will not ratify'," cited in Johnson, n.31 above, p.46.

[174] By 1963, however, the U.S.S.R. and the other eastern bloc States had declared that the reporting provisions of both draft Covenants were acceptable in principle, see A/C.3/SR.1273,p.13,(Dec.2,1963); Tudin, n.173 above.

[175] Note, however, that some socialist countries have ratified the O.P., e.g., Senegal, Mauritius.

[176] See G.Tunkin, Theory Of International Law, pp.83-86, (1974); See Szawlowski, The International Protection Of Human Rights - A Polish And A Soviet View, 28 ICLQ (1979) pp.775-781.

[177] See pr.1.25 above; Humphrey, n.1 above, p.180.

[178] The U.S. have ratified only six out of the 20 principal international human rights instruments listed in the U.N.'s Status Of International Instruments, n.155 above (as of 1/9/87). Cf. D.Dhelton, The Baby Boy Case 2 HRLJ (1981) pp.309-318.

setting a poor precedent for other States,[179] it more particularly deprives the ICCPR and the O.P. of the world wide publicity attendant upon any American international involvement. Ironically, however, it may have allowed the HRC to escape the overt "politicisation" of most other U.N. human rights institutions.[180] The consequences of such "politicisation", real or imagined, have led most recently to U.S. withdrawal from U.N.E.S.C.O.,[181] and to repeated threats of U.S.S.R. withdrawal from the I.L.O.[182] The absence of politicisation and conflict has allowed the HRC to develop a remarkable consensus practice.[183] To date no decision taken by the HRC has been forced to a vote. This consensus has allowed the development of a surprisingly constructive and critical practice under the reporting procedure (article 40)[184] and the emergence of a potentially effective system of individual petition under the O.P.[185]

---

[179] A number of other non states parties might then follow the U.S. in ratifying the ICCPR.

[180] Particularly the HRCion, see Tolley, n.1 above.

[181] See 23 ILM (1984),p.218 and 24 ILM (1985),p.489. The U.K. and Japan have also left.

[182] For a recent comment see The Economist, Vol.296, No.7403, pp.50-51,(July 20,1985). The U.S. withdrew from the ILO from 1977-78.

[183] See ch.2, pr.2.7.

[184] See ch.3 below.

[185] See ch.4 below.

I. AN OUTLINE OF THE ICCPR.

1.28 The ICCPR consists of a preamble and fifty three articles divided into six parts. The Preamble recognizes the inherent dignity of the human person as a source of equal and inalienable rights and proclaims that the, "ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights". The Preamble also notes the obligations on States under the United Nations Charter to promote human rights,[186] and the duties and responsibilities of the individual.[187] In accordance with General Assembly Resolution 543 (VI) the preambles in the two Covenants are identical, mutatis mutandis. The aim was to underline the unity of the two Covenants.[188]

1.29 Part I (Article 1) concerns the rights of all peoples to self-determination.[189] Part II (Articles 2-5) contains certain general provisions relevant to all of the rights set out in the ICCPR. Article 2 contains the basic undertakings to respect and ensure the rights in the Covenant, to adopt the necessary measures to give effect to those rights, and to ensure that an effective remedy exists and is enforced in the event of violation

---

[186] See n.24 above.

[187] See the Draft Body Of Principles And Guidelines On The Right And Responsibility Of Individuals, Groups And Organs Of Society To Promote And Protect Human Rights And Fundamental Freedoms, of the Sub-Commission on the Prevention Of Discrimination And The Protection Of Minorities, Doc.E/CN.4/Sub.2/1985/30. The draft is now being considered by a working group of the HRCion. For its first report see Doc.E/CN.4.1987/30. See also art.29 UDHR; arts.27-29 AFR; art.32 AMR.

[188] See text to n.66 above.

[189] See prs.1.22-1.23 above and ch.5.

of those rights.[190] Under article 3 States parties undertake to ensure the equal rights of men and women to the enjoyment of the rights in the ICCPR. Article 4 is the derogation provision. Derogation is permitted, "in time of public emergency which threatens the life of the nation". However, it is only permitted to the extent strictly required by the exigencies of the situation and no derogation is permitted from certain specified articles. There is also a requirement of notification of derogation.[191] Article 5(1) is a provision designed to avoid abuse of the ICCPR by preventing the use of the ICCPR as a justification for the destruction of the rights in the ICCPR or at their limitation to a greater extent than is provided for in the ICCPR.[192] Article 5(2) is a saving provision which prevents the use of the ICCPR to restrict or derogate from human rights that are recognized or exist in a State party.

1.30 Part III (Articles 6-27) contains a catalogue of civil and political rights. Each article begins with a general statement of the right concerned. This is then followed by a more detailed formulation of aspects of that right and any applicable limitations or restriction.[193] In general terms the rights and freedoms

---

[190] See ch.6 below.

[191] See ch.7 below.

[192] See ch.4, prs.4.84-4.85 below for an interpretation of the Covenant and the Protocol based in part on article 5 of the Covenant.

[193] See generally E.I.A.Daes, The Individual's Duties To the Community And The Limitations On Human Rights And Freedoms Under Article 29 Of The UDHR, U.N.Doc.E/CN.4/Sub.2/432/ Rev.2 (1983); E.Orucu, The Core Of Rights And Freedoms: The Limits Of Limits, in T.Campbell et al, (eds), Human Rights: From Rhetoric to Reality, pp.37-59 (1986); A.Kiss, Permissible Limitations On Human Rights, in Henkin (Ed.), n.1 above,pp.290-310. For an example of the HRC's approach to limitation clauses see the consideration of art.19 in ch.11 below.

in Part III cover the right to life (Article 6),[194] the prohibition of torture and cruel, inhuman or degrading treatment or punishment (Article 7),[195] the prohibition of slavery, servitude and forced or compulsory labour (Article 8), the liberty and security of the person (Article 9), the humane treatment of persons deprived of their liberty (Article 10),[196] non-imprisonment for failure to fulfil a contractual obligation (Article 11), freedom of movement and residence (Article 12), the expulsion of aliens lawfully in the territory of a State party (Article 13), the right to a fair trial (Article 14),[197] the prohibition of the retroactive application of criminal law (Article 15), equal recognition of persons before the law (Article 16), the right to privacy (Article 17), freedom of thought, conscience and religion (Article 18), freedom of opinion and expression (Article 19),[198] the prohibition of propaganda for war or advocacy of national, racial or religious hatred (Article 20),[199] the right to peaceful assembly (Article 21), the right to freedom of association (Article 22), rights relating to marriage and to the family (Article 23), certain rights relating to children (Article 24), certain political rights of citizens (Article 25), equality before the law and equal protection of the law (Article 26), and rights of ethnic, religious and linguistic minorities (Article 27).[200]

---

[194] See ch.8 below.

[195] See ch.9 below.

[196] Ibid.

[197] See ch.10 below.

[198] See ch.11 below.

[199] See ch.12 below.

[200] See Capatorti, n.139 above; Sohn, Ibid.; (Footnote Continued)

1.31 Part IV (Articles 28-45) contains provisions for the establishment and operation of an independent Human Rights Committee and provisions concerning two international measures of implementation. Firstly, a reporting procedure under which each State party submits periodic reports for examination by the HRC (Article 40).[201] Secondly, an inter-State complaint procedure (Articles 41 and 42).[202] Note should also be made of article 45 which provides that the HRC shall submit an annual report on its activities to the General Assembly through the ECOSOC.[203]

1.32 Part V (Articles 46-47) deals with two matters of interpretation of the ICCPR. Firstly, the ICCPR shall not be interpreted as impairing the provisions of the U.N. Charter and the constitutions of the specialized agencies which define the respective responsibilities of the various organs of the U.N. and of the specialized agencies in regard to matters dealt with by the ICCPR (Article 46).[204] Secondly, nothing in the ICCPR is to be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources (Article 47).[205]

(Footnote Continued)
Tomuschat, Protection Of Minorities Under Article 27 Of The ICCPR, Volkerrecht Als Rechtsordnung, Internationale Gerichtsbarkeit. Mensrechten: Festschrift Fur Hermann Mosler, pp.949-979 (1983). The most notable omissions from the ICCPR are the right of asylum, to a nationality (except for children, article 23(4)), and a right to property.

201 See ch.3 below.

202 This procedure has not yet been used and is not considered in this thesis. See Rules 72-77E of HRC's Rules Of Procedure; Doc.A/34/40 prs.28-53; SR 156 and 169.

203 See ch.3, pr.3.40 below.

204 See Bossuyt, 'Guide', pp.731-734.

205 Ibid., pp.735-736. See pr.1.23 above; J.N.Hyde,
(Footnote Continued)

1.33 Part VI (Articles 48-53) contains the final clauses dealing with signature, ratification or accession (Article 48),[206] entry into force (Article 49), the extension of the ICCPR to all parts of federal States without any limitations or exceptions (Article 50),[207] amendment to the ICCPR (Article 51),[208] and the authentic texts (Article 53).[209] There are no provisions dealing with denunciations[210] or reservations.[211]

(Footnote Continued)
Permanent Sovereignty Over Natural Resources, 50 AJIL (1956) pp.854-867.

[206] Ibid., pp.737-752. Objections have been made to this article by most of the Eastern European states on the basis that it is of a discriminatory nature and that the Covenants should be open to all state concerned. See e.g., Human Rights - Status Of International Instruments (1987), p.46 (USSR).

[207] See pr.1.7 above.

[208] See Bossuyt, 'Guide', pp.769-779. Cf.Article 11 O.P.

[209] The HRC have discovered at least one difference in the authentic texts of the O.P. concerning article 5(2)(a) O.P., see ch.4, notes to pr.4.87 below.

[210] There is no denunciation clause in the ICCPR although there is one in article 12 of the O.P. Schwelb has argued, correctly is it submitted, that in the light of article 56 VCLT (1969) it is not possible to denounce the ICCPR. See E.Schwelb, The Law Of Treaties And Human Rights, in W.M.Reisman and B.H.Weston, (eds.), Towards World Order And Human Dignity, pp.262-290 (1976); Sieghart, The International Law Of Human Rights, pp.119-121 (1984). See generally P.Weis, The Denunciation Of Human Rights Treaties, 8 HRJ/RDH (1975) pp.3-7.

[211] See pr.1.24 above.

For convenience the provisions of the O.P. are outlined in the chapter on the O.P.[212]

---

[212] See ch.4, prs.4.4-4.5 below.

J. THE SIGNIFICANCE OF THE ICCPR IN INTERNATIONAL LAW.[213]

1.34 The most signally important feature of the ICCPR is that it is a universal instrument which contains binding legal obligations for the States parties to it.[214] The rights enshrined within it represent the basic minimum set of civil and political rights recognised by the world community. The fact that the ICCPR was adopted by more than one hundred States in 1966 and has been ratified by 87 States from all of the geo-political regions of the world render it less susceptible to criticism as being founded on a Western, individualistic or alien philosophy.[215] Moreover, whatever the disagreement over

---

[213] The significance of the O.P. to the ICCPR is dealt with in ch.4, prs.4.2-4.3, 4.19 below.

[214] See F.Jhabvala, The ICCPR As A Vehicle For The Global Promotion And Protection Of Human Rights, 15 Isr.H.R.Yb. (1985), pp.184-203; C.Tomuschat, Human Rights In A World Wide Framework, 45 Za.A.O.R.(1985),pp.547-584; C.Tomuschat, Is Universality Of Human Rights An Outdated Concept, in Das Europa Der Zweiten Generation - Gedachtnisschrift Fur Christophe Sasse, pp.585-609 (vol.2, 1981); R.Bystricky, The Universality Of Human Rights In A World Of Conflicting Ideologies, in A.Eide and A.Schou,n.1 above, pp.83-93; F.Capatorti, n.7 above. The strongest challenge to the "universality" of the ICCPR has come in the form of arguments based on cultural relativism. See J.Donnelly, Cultural Relativism And Human Rights, 6 HRQ (1984), pp.400-419; R.Howard, Is There An African Concept Of Human Rights?, in R.J.Vincent (ed.), n.167 above, pp.11-32, (1986); A.D.Renteln, The Unanswered Challenge Of Relativism And The Consequences For Human Rights, 7 HRQ (1985), pp.514-540; F.R.Teson, International Human Rights and Cultural Relativism, 25 Va.JIL (1985) pp.869-898. The only State reported to have expressly rejected philosophy of the U.D.H.R. is Iran, see Sunday Times, January 20th,1985,8a, and Tomuschat, this note, p.553, n.21. However, Iran has remained a party to the ICCPR. See generally, Human Rights In Islam (ICJ, 1982); M.I.Malik, The Concept Of human Rights In Islamic Jurisprudence, 3 HRQ (1981) pp.56-67.

[215] See P.Alston, The U.D.H.R. at 35: Western And Passe or Alive And Universal, 31 Rev.ICJ (1983), pp.60-70; O.M.Garibaldi, On The Ideological Content Of Human Rights Instruments: The Clause: "In A Democratic

(Footnote Continued)

the nature of the human rights obligations in the United Nations Charter[216] and in the Universal Declaration Of Human Rights,[217] there is no doubt that the obligations in article 2 ICCPR to "respect and ensure" the rights in the ICCPR are legally binding.[218] The debate over the precise effect of those obligations and the fact that there is no coercive mechanism to enforce those obligations does not alter this conclusion.[219]

1.35 The ICCPR is also of significance with respect to the standards required of States in the treatment of

---

(Footnote Continued)
Society", in T.Buergenthal,(ed.), Contemporary Issues In International Law, pp.23-68 (1984); H.M.Scoble and L.S.Weisman, Access To Justice- The Struggle For Justice In South East Asia, (1985); R.P.Claude, The Western Tradition Of Human Rights In Comparative Perspective, 14 Comparative Judicial Review (1977), pp.3-66.

[216] See n.24 above.

[217] See n.41 above.

[218] On article 2 ICCPR see ch.6 below.

[219] The disparity between human rights standards and the human rights practices of States raised important questions concerning the validity of human rights law. For some contributions to the debate see J.S.Watson, Autointerpretation, Competence And The Continuing Validity Of Article 2(7) Of The Charter, 71 AJIL (1977) pp.60-83; J.S.Watson, Legal Theory, Efficacy And Validity In The Development Of Human Rights Norms In International Law, Univ.Illinois Law Forum (1979), pp.609-641; E.Lane, Demanding Human Rights: A Change In The World Legal Order, 6 Hofstra L.R. (1978), pp.269-295; E.Lane, Mass Killings By Governments: Lawful In The World Legal Order?, 12 N.Y.U.J. I.L.P. (1979), pp.239-280; L.Sohn, The International Law Of Human Rights, 9 Hofstra L.R. (1981), p.347; R.Higgins, Reality And Hope In International Human Rights, 9 Hofstra L.R. (1981), pp.1485-1499; L.F.Schechter, The Views Of 'Charterists' And 'Skeptics' On Human Rights In The World Legal Order: Two Wrongs Don't Make A Right, 9 Hofstra L.R. (1981), pp.357-98; A.D'Amato, The Concept Of Human Rights In International Law, 82 Col LR (1982) pp.1110-1159.

aliens.[220] It is a controversial question of international law as to whether an alien is entitled to the protection of an "international minimum standard" of treatment or only to equality of treatment with the nationals of the State concerned, that is, "national treatment".[221] However, most of the rights in the ICCPR are stated to be applicable to "everyone", or to "all persons", or "every human being". As Professor Lillich has commented, "The inescapable conclusion is that aliens are generally covered".[222] Further support for this conclusion can be adduced from the non-discrimination and equality provisions of articles 2(1) and 26 of the ICCPR and the provision in article 16 ICCPR that, "Everyone shall have the right to recognition as a person before the law". Articles 12 and 13 concerning freedom of movement and the expulsion of aliens lawfully within the State's territory are clearly of specific concern to aliens. Conversely, the article 25 guarantee of certain political rights is extended only to "every citizen". Clearly then an alien may be entitled to a greater measure of protection under the ICCPR than under general international law and the ICCPR may itself contribute to the the further development of customary international

---

220 See R.B.Lillich, n.3 above, (1984),ch.3; P.S.Chandra, Civil And Political Rights Of Aliens (1982).

221 A third possibility is that there is no international standard at all and that a State may treat aliens at its complete discretion and not necessarily as favourably as it treats its own nationals. This view can possibly be seen in the Charter Of Economic Rights And Duties Of States, G.A.Resn.3281 (XXIX). See generally I.Brownlie, Principles Of Public International Law,ch.XX (3d, 1979); D.J.Harris, Cases And Materials On International Law, ch.8, (3d, 1983).

222 Lillich n.3 above, p.145. See also the important general comment by the HRC on the position of aliens, Apx.IV below.

law concerning aliens.[223] Finally in this respect attention should be drawn to the fact that communications under the O.P. may be submitted by "individuals subject to (the) jurisdiction (of the) State party" (article 1 O.P.). This clearly includes aliens, and indeed, communications from aliens have been considered by the HRC.[224]

1.36 The ICCPR may well be of some significance even for States which are not party to it. This argument is based on the view that at least some of the provisions in the ICCPR reflect norms of customary international law and are therefore binding on States on that basis.[225] It could also be argued that the provisions of the ICCPR are declaratory of the law laid down in the United Nations Charter and therefore bind the members of the U.N. on that basis.[226] Although there is a clear historical link between the U.N. Charter and the International Bill Of Rights[227] it is difficult to sustain this declaratory theory particularly as the complex of rights and limitations in the ICCPR have only been accepted by just over half of the members of the U.N. It is submitted that the link between the ICCPR and the U.N. Charter is not sufficiently strong to justify recourse to the latter

---

[223] Ibid., pp.1-3.

[224] See ch.4, pr.4.67 below.

[225] Torture might be an obvious example in this respect, see Filartiga v. Pena-Irala, 630 F.2d.p.876 (1980), 19 ILM (1980),p.966, U.S. Circuit Court Of Appeals, 2nd Circuit; N.Rodley, The Treatment Of Prisoners In International Law, ch.2 and pp.104-106 (1986); Lillich, n.3 above, pp.44-47.

[226] E.Schwelb has advanced a similar argument as regards the ICERD, See n.24 above, (1972), p.337 at p.351; D'Amato, n.219 above, pp.1128-1149. See also Singh, n.24 above.

[227] See ch.1, prs.1.1-1.3 above. See also the preamble to the ICCPR, Apx.I below.

to impose the obligations of the ICCPR on non-States parties. A further argument on which the applicability of the ICCPR to non-States parties could be based is that certain of its provisions may reflect "the general principles of law recognized by civilized nations".[228] This argument may be more acceptable with respect to particular provisions of the ICCPR than the declaratory theory noted above.[229]

1.37 The status of the ICCPR in international law is also important from the perspective of domestic law.[230] According to the particular constitutional system of a State it may be open to an individual to invoke the ICCPR as directly applicable superior law or as persuasive authority as regards the interpretation of constitutional, legislative and administrative provisions.[231] The provisions of the ICCPR are increasingly being invoked in this manner in, for example, Australia,[232] Canada,[233] Federal Republic of

---

[228] Article 38(1)(c) of the Statute of the ICJ. See N.K.Hevener and S.A.Mosher, General Principles Of Law And The U.N. Covenant On Civil And Political Rights, 27 ICLQ (1978), pp.596-613.

[229] See n.226 above.

[230] In addition to the references below see the bibliography in Bossuyt, 'Guide' ,pp.826-836. On the domestic implementation of the ICCPR see ch.6 below on article 2 ICCPR. Cf.A.Drzemczewski, European Human Rights Convention In Domestic Law, (1983).

[231] See R.Lillich, The Role Of Domestic Courts In Enforcing International Human Rights Law, in H.Hannum (Ed.), Guide To International Human Rights Practice, ch.13 (1984); Ibid., The Enforcement of International Human Rights Norms In Domestic Courts, in J.C.Tuttle (ed.), n.167 above, pp.105-131; Ibid, Invoking International Human Rights Law In Domestic Courts, 54 Univ.Cin.LR (1985) pp.367-415.

[232] See Lebanese Muslim Association v. Minister For Immigration And Ethnic affairs, 67 ALR 195 (1986). See also the Australian Bill Of Rights Bill (1985), and

(Footnote Continued)

Germany,[234] France,[235] India,[236] the Netherlands,[237] New Zealand,[238] the United Kingdom[239] the United States,[240]

(Footnote Continued)
Explanatory Memorandum.

[233] See e.g., Re Mitchell and the Queen (1983) 42 O.R. (2d) p.481 (article 15); Re Vincent And Minister Of Employment And Immigration (1983) 148 DLR (3d) p.385 (article 13). Both cited in XXII Can.YIL 1984 (1985) pp.405-407. Before the HRC in 1984 the Canadian representative stated that the Covenant was influencing the interpretation of the Charter. There were at least twenty decisions to date in which judges referred to the Covenant and other human rights instruments to interpret provisions of the Charter, (SR 559 pr.26).

[234] See Tomuschat, ch.6, n.1, below (1984),p.38 who cites a decision of the Federal Administrative Court in 1982 which cited the decision of the HRC in the Mauritian Women Case which is dealt with in ch.4, pr.4.75 below.

[235] Before the HRC in 1983 the French representative stated that the Covenant had been invoked in one case concerning a doctor who had invoked freedom of opinion in refusing to pay his contribution to a professional association, SR 439 pr.10. The Nicaraguan representative stated that the Covenant was frequently invoked in courts, SR 428 pr.11.

[236] See H.O.Agarwal, n.1 above, chs.4-6, (1983); Justice Bhagwati, Human Rights As Evolved By The Jurisprudence Of The Supreme Court Of India,(Part I), 13 Comm.L.B. (1987) pp.236-245; statement of the Indian representative before the HRC, Doc.A/39/40 pr.268.

[237] See SR 321 pr.3 (48 reported cases in which Covenant mentioned in the courts opinion). See e.g. notes in NYIL (1984),p.424-5, 445-7, 641-4, 451,n.101, 448-450.

[238] See R. v. Wjee, (1981) 1 NZLR 561; Broadcasting Corporation Of New Zealand v. Attorney-General, (1982) 1 NZLR 120; Department Of Labour v. Latailakepa, (1982) 1 NZLR

(Footnote Continued)

Norway,[241] and Yugoslavia.[242] Similarly national commentators have attempted to to compare domestic provisions with standards established in the ICCPR in, for example, Canada,[243] Australia,[244] India,[245] Japan,[246]

(Footnote Continued)
632. See also Tay, NZLJ (1979) p.365-370.

239 See Ministry Of Home Affairs and Another v. Fisher and Another, 1980 A.C. 319; R. v. Secretary Of State For The Home Office, ex.p.Chubb, (Queens Bench Divisional Court, 1 July 1986, unreported); The Bank Of Tokyo Ltd. v. Karoon, (QBD, 1 May 1986, unreported).

240 See e.g. the celebrated decision in Filartiga v. Pena-Irala, n.225 above. See also Lillich, n.231 above and Lillich, International Human Rights Instruments (1983).

241 D.Sandifer, The Re-Emergence Of Indigenous Questions In International Law, Can H.R.Y. (1984-85), at p.24-25 cites a Norweigan case in which article 27 ICCPR was cited although the decision of the Supreme Court was not based on it.

242 See the decision of the Constitutional Court of Yugoslavia in the I.C.J. Study, ch.7, n.1 below, p.84, n.121-122. It is understood that the provisions of the ICCPR played an important part in the consideration within Yugoslavia of the appropriate interpretation of a certain law concerning discrimination on political grounds in the context of employment.

243 See H.Fischer, The Human Rights Covenants And Canadian Law, 15 Can.YIL (1977), pp.42-83; M.Cohen and A.F.Bayefsky, 61 Can.Bar.Rev. (1983), pp.265-313; A.Bayefsky, The Human Rights Committee And the Case Of Sandra Lovelace, 20 Can.YIL pp.244-266 (1982); A.Brudner, The Domestic Enforcement Of International Covenants On Human Rights: A Theoretical Framework, 35 Univ.Tor.LJ (1985) pp.219-254; W.S.Tarnopolsky, A Comparison Between The Canadian Charter Of Rights and Freedoms And The International Covenant On Civil And Political Rights, 8 Queens LJ (1982-83) pp.211-231.

244 See G.Triggs, Australia's Ratification Of The
(Footnote Continued)

New Zealand,[247] the U.S.S.R.,[248] the U.S.,[249] and the U.K.[250].

1.38 As a basic universal standard the ICCPR is frequently invoked in resolutions of the General Assembly of the United Nations,[251] the reports[252] and

---

(Footnote Continued)
ICCPR: Endorsement Or Repudiation? 31 ICLQ (1982), pp.278-306; Ibid., Australia's Ratification Of The ICCPR: Its Domestic Application To Prisoners Rights, 3 HRLJ (1982), pp.65-102; S.K.N.Blay, The ICCPR And The Recognition Of Customary Law Practices Of Indigenous Peoples: The Case Of Australian Aborigines, 19 CILSA (1986) pp.199-219.

245 See Agarwal, n.1 above; G.H.Guttal, Human Rights: The Indian Law, 26 Ind.JIL (1986) pp.53-71.

246 See S.Yasuhiko, Japan And Human Rights Covenant, 2 HRLJ (1981), pp.79-107; Y.Iwasawa, Legal Treatment Of Koreans In Japan: The Impact Of International Human Rights Law On Japanese Law, 8 HRQ (1986), pp.131-179; Y. Kawashima, The International Covenants On Human Rights And The Japanese Legal System, 22 Japanese Annual Of International Law (1978), pp.54-74.

247 J.B.Elkind, Application Of The International Covenant On Civil And Political Rights In New Zealand, 75 AJIL (1981), pp.169-172; J.B.Elkind and A.Shaw, A Standard For Justice (1986).

248 V.Kartashkin, Covenants On Human Rights And Soviet Legislation, X HRJ/RDH (1977), pp.97-115.

249 A.Noble, The Civil And Political Rights Covenant As the Law Of The Land, 25 Vill.LR (1979) pp.119-140. See n.168 above.

250 See e.g. the JUSTICE Report, Compensation For Wrongful Imprisonment, (1982).

251 See e.g. the resolutions cited by Weissbrodt in 80 AJIL (1986) pp.685-699; Zuidjwick, n.1 above, p.380 et seq.

252 For example, the reports of UN Working Groups and Special Rapporteurs consistently make reference to
(Footnote Continued)

resolutions[253] of the United Nations human rights bodies, regional institutions[254] and national Parliaments.[255] It is also interesting to note the reference to the ICCPR in the Final Act Of The Conference On Security And Co-Operation In Europe (The Helsinki Final Act)[256] and in the Treaty between the United Kingdom And China concerning Hong Kong.[257] The ICCPR is often used as the standard by which to measure and assess the human rights performance of States[258] and as the starting point for the development for the development of new international human rights instruments.[259]

(Footnote Continued)
the Covenant. See, e.g., the reports on summary and arbitrary executions in ch.8, n.1 below.

[253] See e.g. Commission On Human Rights, Report of 42nd session, 1986, ECOSOC OR 1986, Supp.2; U.N.Doc.E/CN.4/ 1986/65.

[254] See e.g. Resolutions Of The European Parliament, 4 HRLJ (1983) pp.1-17. The ICCPR has also been referred to in a number of cases under the ECHR.

[255] See e.g. Marston, UK Materials In International Law, 65 BYIL 1985 pp.426-431 (1986); Ibid., 55 BYIL 1984 (1985) pp.451-458.

[256] 14 ILM (1975), p.1292. See J.Frowein, The Interrelationship Between The Helsinki Final Act, The International Covenants On Human Rights And The European Convention On Human Rights, in T.Buergenthal (Ed.), Human Rights, International Law And The Helsinki Accords,(1977), pp.71-82.

[257] Joint Declaration Of The Governments Of The U.K. And The Peoples Republic Of China On The Question Of Hong Kong, 26 UKTS (1985); Cmnd.9543.

[258] See e.g. E.R.Cohen, Human Rights In the Israeli-Occupied Territories 1967-1982, (1985).

[259] See e.g. H.Hannum, The Right To Leave And Return In International Law And Practice (1987); W.H.Bennett,Jr., A Critique Of The Emerging Convention On The Rights Of The Child, 20 Corn.ILJ (1987) pp.1-64; Lillich, n.3 above, appendices.

1.39 Finally, it is useful to set the ICCPR in its international perspective both in terms of the rights established by it and its implementation procedures. As to the rights established we have already noted that the Covenants were intended to be a further development of the Universal Declaration Of Human Rights (1948).[260] We have also drawn attention to the division of human rights into a set of civil and political rights and a set of economic, social and cultural rights.[261] The two international covenants co-exist with a myriad of international human rights instruments.[262] The official U.N. compilation contains fifty seven such instruments which detail human rights and provide for various implementation procedures.[263] Many of these instruments are of relevance to particular rights established in the ICCPR and reference has been made to them in the procedures established by the ICCPR.[264] However, the principal overlap in terms of rights covered lies at the regional level in the form of the American Declaration Of The Rights And Duties Of Man (1948),[265] the American

---

[260] See ch.1, prs.1.4-1.5 above.

[261] Ibid., and pr.1.16 above.

[262] See T.Meron, Human Rights Law Making In The United Nations: A Critique Of Process And Instruments, (1986); J.Donnelly, International Human Rights: A Regime Analysis, 40 Int.Org. (1986) p.599-642.

[263] Human Rights: A Compilation Of International Instruments, U.N.Doc.ST/HR/1/Rev.2, (1983).

[264] See chs.3-12 below.

[265] O.A.S. Resn.XXX, adopted by the Ninth International Conference Of American States, Bogota, Colombia,(1948). Reprinted in Handbook Of Existing Rules Pertaining To Human Rights In The Inter-American System, OEA, Series.L/V/II.60, doc.28,(1983).See.P.Sieghart, The International Law Of Human Rights, p.28,55, (1984).

Convention On Human Rights (1969),[266] the European Convention For The Protection Of Human Rights And Fundamental Freedoms (1950),[267] and most recently, the African Charter On Human And Peoples' Rights (1981).[268]

As regards implementation procedures there now exists a sophisticated range of organs and procedures with jurisdiction to implement the human rights provisions established in the international and regional instruments noted above.[269] For the purposes of this thesis the most instructive comparisons to be drawn are those concerning

---

[266] O.A.S.T.S. No.36,p.1. Reprinted in Handbook, n.264 above, pp.31-63; P.Sieghart, Ibid., pp.28-29. See T.Buergenthal, The Inter-American System For The Protection Of Human Rights, in T.Meron,(ed), n.11 above, ch.12; T.Buergenthal et al, n.104 above; R.Piza, Coordination Of The Mechanisms For The Protection Of Human Rights In The American Convention With Those Established By the United Nations, 30 Am.ULR (1981) pp.167-187.

[267] U.K.T.S. p.70 (1950); Cmnd.8969. See Van Dijk and Van Hoof, The Theory And Practice Of The European Convention On Human Rights, (1984); J.Fawcett, The Application Of The European Convention On Human Rights, (2d, 1987); R.Higgins, The European Convention On Human Rights, in T.Meron, (ed.), n.11 above, ch.13; R.Beddard, Human Rights In Europe, (2d, 1980).

[268] 21 ILM (1982), pp.58-68; 7 Comm.Law.Bull.(1982), pp.1057-1068. See R.Gittleman, The African Charter On Human And Peoples' Rights: A Legal Analysis, 22 Va.JIL (1982), pp.667-714; E.G.Bello, The African Charter On human And Peoples Rights - A Legal Analysis, 194 Rec.Des Cours (1985-V) pp.21-268 (1987); B.O.Okere, The Protection Of Human Rights In Africa And The African Charter On Human And Peoples Rights: A Comparative Analysis With The European And American Systems, 6 HRQ (1984), pp.141-159; U.O.Umozurike, The African Charter On Human And Peoples' Rights, 77 AJIL (1983), pp.902-912; N.S.Rembe, Africa And Regional Protection Of Human Rights, (1985). The African Commission On Human Rights has now been elected.

[269] Arguably too many. See Sohn, Human Rights: Their Implementation By The United Nations, in Meron, (ed), n.00 above, pp.369-401; A.P.Vijapur, The UN Mechanisms For The Promotion And Protection Of Human Rights, 26 AJIL (1986) pp.576-611.

the work of the Inter-American Commission On Human Rights (IACM) and Court (IACT),[270] the European Commission Of Human Rights (EUCM) and Court (EUCT),[271] and the Committee On The Elimination Of Racial Discrimination (CERD) under the International Convention On The Elimination Of Racial Discrimination.[272]

We begin our examination of the practices and procedures developed under the ICCPR by considering the permanent body established by the ICCPR: the HUMAN RIGHTS COMMITTEE.

---

[270] See n.265 above.

[271] See n.266 above.

[272] U.K.T.S. 77 (1969), Cmnd.4108; 660 U.N.T.S. p.195; 60 AJIL (1966), p.690. See N.Lerner, The United Nations Convention On The Elimination Of Racial Discrimination, (2d, 1980); T.Meron, n.261 above, pp.7-52; Tolley, n.1 above, pp.45-50.

CHAPTER 2. THE HUMAN RIGHTS COMMITTEE.[1]

Introduction.

2.1 As we noted in chapter one the principle of establishing a Human Rights Committee (HRC), a permanent human rights body to implement the Covenant, only just survived the drafting process.[2] The HRC emerged as the only organ with express functions with respect to the Covenant and the Protocol. However, key changes had been made in the Third Committee concerning the composition and functions of the proposed Committee.[3] This chapter examines the composition, organization, functions, nature and status of the HRC.

A. Membership.

2.2 Article 28(1) of the Covenant provides for the establishment of a "Human Rights Committee" to consist of eighteen members and to carry out the functions provided for in the Covenant and the Protocol. The members of the HRC shall both "be elected and shall serve" in their

---

[1] See M.J.Bossuyt, Le Reglement Interieur Du Comite Des Droits De L'homme, 14 Revue Belge De Droit International (1978-79) pp.104-156; G.Cote-Harper, Le Comite De Droits De L'homme Des Nations Unies, 28 Cahiers Des Droits (1987) pp.533-546; E.Decaux, La Mise En Vigeur Du Pacte International Relatifs Aux Droits Civils Et Politiques, 84 Revue Generale De Droit International Public (1980) pp.487-534; F.Capatorti, ch.1, n.1 above pp.136-138; M.Lipmann, Ibid., pp.250-251; A.H. Robertson, The Implementation System: International Measures, in L.Henkin (ed), ibid., pp.337-341; F.Jhabvala, ibid., pp.81-95; E.Schwelb, ibid., (1968) pp.835-838; M.Nowak, ch.3, n.1 below, pp.143-146; A.J.G.Mower, Organizing To Implement The UN Civil/Political Rights Covenant:First Steps By The Committee, 3 HRRev. (1978) pp.122-131; A.J.G.Mower, The Implementation Of the UN Covenant On Civil And Political Rights, X HRJ (1977) p.271; E.Mose And T.Opsahl, ch.4, n.1 below; P.S.Brar, ch.3, n.1 below, ch.I; V.Dimitrijevic, The Roles Of The Human Rights Committee (1986).

[2] See ch.1, prs.1.6-1.12 above.

[3] Ibid. See, in particular, Jhabvala, n.1 above.

personal capacity (article 28(3)).[4] Article 28(2) provides that members "shall be of high moral character and recognized competence in the field of human rights, consideration being given to the usefulness of participation of some persons having legal experience". In the election of the Committee, "consideration shall be given to equitable geographical distribution of membership and to the representation of the different forms of civilization and of the principal legal systems" (article 31(2)).[5]

The experience of international human rights organs would suggest that the independence of HRC members from governmental or other institutional influences is fundamental to its nature and at least gives it the potential to be effective.[6] However, the Covenant does not stipulate that a member must be personally

---

[4] Under article 38 every member of the Human Rights Committee must make a solemn declaration that he will perform his functions impartially and conscientiously.

[5] Article 8 ICERD follows article 31(2) ICCPR. The presence of experts from different legal systems can assists the HRC in its consideration of reports under article 40. For example, during consideration of the report of Morocco it was useful to have members of the HRC who were conversant with Islamic laws. The provision in article 31(2) can give States parties the confidence that their approach will at least be understood even if disagreed with and avoids the necessity of having provision for an "ad hoc" representative nominated by the particular State party concerned which could only detract from the independent status of the HRC. Ad hoc representation was proposed during the drafting stages but was deleted by the HRCion in 1951, see Doc.E/1992, ch.1, n.1 above, pr.78. See SR 299 pr.11 (Movchan).

[6] Independent international human rights bodies include the EUCM, EUCT, CEDAW, IACM, IACT, Committee Against Torture, Sub-Commission On The Prevention Of Discrimination And The Protection Of Minorities, the Committee Of Independent Experts under the ESC, the Committee Of Experts On The Application Of Conventions And Recommendations of the ILO; and the new UN Committee on Economic, Social And Cultural Rights.

independent of his government.[7] In practice membership of the HRC has included former cabinet and government ministers, members of Parliament,[8] former ambassadors and senior governmental representatives.[9] Membership of the HRC is part-time. Although members of the HRC receive emoluments from the United Nations rather then their respective national governments the level of emoluments has been very low.[10] The effect in practice has been that membership of the HRC has been limited to persons receiving a regular salary, for example, in academic or government posts.[11] As the work of the HRC is very demanding both in terms of difficulty and the time involved there is an obvious case to be made for making membership of the HRC a full-time salaried occupation.[12] However, the continuous contact of members with high level political and legal activity within their respective national systems brings critically important practical knowledge and expertise to the HRC's

---

[7] Cf. Rule 4 of Rules Of the EUCT, see ECHR Collected Texts (1986) p.147.

[8] E.g. Mr.Ermacora is a member of the Austrian Parliament.

[9] E.g. Mr.Graefrath has represented the GDR in the Third Committee of the General Assembly.

[10] The Chairman receives $5,000. The members receive $3,000 per year. See SR 263. There have been consistent complaints from HRC members concerning the level of emoluments and problems with other facilities, e.g. lack of medical insurance. Under article 8(6) ICERD members of the CERD receive their expenses from the national governments. There have been problems in members receiving their expenses. It has been argued that the ICCPR represents an advance in this respect.

[11] See the comments of Mr.Van Boven, SR 150 pr.71.

[12] "There is a strong case for making membership on the Committee a salaried occupation to which members could devote all their time", Robertson , n.1 above,p.339.

considerations. It is submitted that the HRC should remain a part time body but that its members should be properly remunerated "having regard to the importance of the Committee's responsibilities" (article 35).[13]

2.3 Nominees for the HRC have been of a very high quality.[14] To some extent this suggests that States parties regard the HRC and the Covenant as important. Moreover, the fact that highly qualified individuals are willing to devote a substantial part of their time over a period of years bears testimony to the importance they see in the role of the HRC.[15] However, the reference to "legal expertise" in article 28 has perhaps been too literally applied. Members of the HRC to date have all been legal experts of some kind. Although many of the members have had various periods of their careers as, for example, journalists or politicians,[16] the expertise of the HRC could usefully be broadened by experts from other disciplines such as social sciences or economics. No woman served on the HRC until one was elected in 1983 to replace the expert from Canada who resigned to take up a

---

[13] This submission is also based on the view that the UN Secretariat will need to play an increasing role in the work of the HRC, see prs.2.16-2.17 below.

[14] See the bibliographies published for the meeting of States parties to elect members of the HRC, documents prefixed CCPR/SP. By contrast the regional groupings consistently failed to nominate enough candidates for the Sessional Working Group Of Experts under the ICESCR, See Alston, n.97 below, p.346 n.97.

[15] The sessions of the HRC cover approximately three months of the year in total.

[16] E.g., the present Chairman, Mr.Prado-Vallejo was formerly a journalist.

judicial appointment.[17] As of 1 January 1988 two women are serving on the HRC.[18]

2.4 Whatever the governing provisions of a treaty or of a resolution establishing an independent human rights organ the proof, of course, lies in the practice. Since its inception members of the HRC have continually stressed their independence from governments, the Secretariat and other United Nations bodies.[19] Whilst there is no denying that there have been marked differences between members as to the HRC's functions and powers and different approaches to the implementation of particular rights, these differences appear to stem from the various ideological and legal approaches mandated in the HRC's membership (article 31(2)) rather than from political pressures from governments or other forces.[20] The line between the two is a thin and difficult one but in practice HRC members do appeár to operate as independent experts.[21] The fundamental pre-condition to the HRC's continued development is that they should continue to do so.[22]

---

[17] Docs.A/38/40, pr.8; A/39/40 pr.6.

[18] Mrs. Higgins, independent expert from the U.K., is Professor of international law at the University of London, London School of Economics. Ms. Chanet, independent expert from France, is a judge.

[19] "The Committee operated on a contractual basis, namely, the Covenant", SR 572 pr.11 (Movchan). See B.Graefrath, Trends Emerging In the Practice Of The Human Rights Committee, 3 Bull. GDR Committee Human Rights (1980) pp.3-32.

[20] See ch.3, prs.3.29-3.38 below.

[21] Occasionally members of the HRC have strayed into more overtly political questioning. See, SR 364, 365,366 and 368 on Iran.

[22] See SR 729; Doc.A/42/40 pr.7.

B. Election.

2.5 The members of the HRC are elected by secret ballot by States parties to the Covenant at meetings convened by the Secretary-General of the United Nations.[23] The Secretary-General convened the first meeting of the States parties on 20th September 1976.[24] Subsequent elections take place every two years.[25] A list of nominees is submitted by the Secretary-General to the States parties no later than one month before the date of each election.[26] Each State party to the Covenant is entitled to nominate not more than two persons who shall be nationals of the nominating State.[27] The HRC may not include more than one national from the same State.[28] The persons elected are those nominees who obtain the largest majority of the votes and an absolute majority of the votes of the representatives of States parties present and voting.[29]

Each member of the HRC is elected for a term of four years.[30] The States parties decided that the term of office of the initial members of the HRC should begin on 1 January 1977.[31] The terms of nine of the initial members, chosen by lot by the Chairman of the initial

---

[23] Article 30 (1), (4).

[24] See Doc.CCPR/SP/7 (1976): Decisions of the first meeting of the States parties to the ICCPR.

[25] Hence elections have taken place in 1978, 1980, 1982, 1984 and 1986. See the series of documents prefixed CCPR/SP.

[26] See article 30 for details.

[27] Article 29. Cf. article 8(2) ICERD; article 36(2) AMR.

[28] Article 32.

[29] Article 30(4).

[30] Article 32.

[31] Doc.CCPR/SP/SR 2.

meeting of the States parties, expired at the end of two years.[32] Consequently the States parties meet every two years to replace the terms of the nine members whose terms are to expire. This ensures some continuity of membership as does the provision in article 29(3) permitting the renomination of HRC members. The HRC has been fortunate in having both a good record of attendance by members and a strong degree of continuity of membership in its first decade, although there have been a number of significant changes recently.[33] As of 1 January 1988 only 3 of the original members remain.[34] A member elected to fill a vacancy holds the office for the remainder of the term of the member who vacated the seat.[35] As of 24 July 1987 the composition of the HRC was as follows:[36] { * Term expires on 31 December 1988; ** Term expires on 31 December 1990}.

Name of member.	Country of nationality.
Mr.Andres AGUILAR *	Venezuela.
Mr.Nisuke ANDO **	Japan.
Ms.Christine CHANET **	France.
Mr.Joseph A.L. COORAY **	Sri Lanka.
Mr.Vojin DIMITRIJEVIC **	Yugoslavia.
Mr.Omran EL-SHAFEI **	Egypt.
Mrs.Rosalyn HIGGINS *	United Kingdom of Great Britain and Northern Ireland.
Mr.Rajsoomer LALLAH *	Mauritius.

---

[32] Article 32.

[33] In particular the following influential members have recently left: Sir Vincent Evans (U.K.), Tomuschat (FRG), Graefrath (GDR) and Opsahl (Norway).

[34] Mr.Movchan, Mr.Mavrommatis, and Mr.Prado-Vallejo.

[35] Article 34(3). Article 33 of the Covenant deals with members ceasing to carry out functions, and with deaths and resignations.

[36] A/42/40, Annex II, p.116. The previous members of the HRC are shown in the HRC's annual reports.

Mr.Andreas V. MAVROMMATIS *	Cyprus.
Mr.Joseph A. MOMMERSTEEG **	Netherlands.
Mr.Anatoly P. MOVCHAN *	Union of Soviet Socialist Republics.
Mr.Biriame NDIAYE **	Senegal.
Mr.Fausto POCAR *	Italy.
Mr.Julio PRADO VALLEJO **	Ecuador.
Mr.Alejandro SERRANO CALDERO *	Nicaragua.
Mr.S.Amos WAKO *	Kenya.
Mr.Bertil WENNERGREN **	Sweden.
Mr. Adam ZIELINSKI *	Poland.

As regards geographical representation there is no precise rule in the Covenant beyond that in article 31(2)[37] nor has any been adopted in the practices for electing the HRC.[38] In practice, however, each of the six elections to date has produced a broadly balanced Committee in geographical terms. This would suggest that States parties do bear the geographical criteria in mind.[39]

In accordance with article 43 the members of the HRC, "shall be entitled to the facilities, privileges and immunities of experts on mission for the United Nations as laid down in the relevant sections of the Convention

---

[37] See pr.2.2 above.

[38] Cf. The "relatively inflexible formula" of five geographical groupings in the rules for the CESCR, see P.Alston, Out Of The Abyss: the Challenges Confronting The New U.N. Committee On Economic, Social And Cultural Rights, 9 HRQ (1987) pp.332-381 at p.349. See also Committee On Economic, Social And Cultural Rights, Report of first session, ECOSOC OR, 1987, Supp.17 (1987); P.Alston and B.Simma, First Session Of The New UN Committee On Economic, Social And Cultural Rights, 81 AJIL (1987) pp.747-756.

[39] See Mower, n.1 above (1978); Decaux, ibid.

on the Privileges and Immunities of the United Nations".[40]

C. Organization of Work.

2.6 In accordance with article 37(1) the initial meeting of the HRC was convened at the headquarters of the United Nations in New York. Subsequent meetings were to be held in accordance with the Rules of Procedure drawn up by the HRC under article 39(2) and were normally to be held in New York or Geneva.[41] In its Rules the HRC provided that it would hold such sessions as were required for the satisfactory performance of its functions.[42] Initially the HRC decided to hold two sessions a year but as the volume of its work increased the practice of the HRC since 1978 has been to hold three sessions a year of three weeks duration.[43] Normally one session has been held in New York in the spring and two sessions in Geneva in the summer and the autumn.[44] However, economic

---

[40] Convention On The Privileges And Immunities Of The United Nations, 1 UNTS 15.

[41] Article 37(2),(3). The HRC adopted "Provisional Rules of Procedure" at its first and second sessions (hereinafter "Rules"). Subsequent amendments were made at its third and seventh sessions. See Doc.CCPR/C/3/Rev.1 (1979).The Rules remain provisional. On the Rules see in particular, Bossuyt, n.1 above; Mower, (1978), ibid., Robertson, ibid. The CERD has recently upgraded its provisional rules, see Doc.CERD/C/35/Rev.3 (1986).

[42] Rules 1 and 2.

[43] The General Assembly accepted the arguments of the HRC on the need for a third session.

[44] Some rescheduling of the HRC's sessions was experienced in the HRC's early years. HRC members have stressed the importance of holding at least one session a year in New York on the basis that it is the major headquarters of the UN, the information media there is more developed, and it is a more suitable venue for a number of States parties, particularly developing countries most of which have permanent missions in New

(Footnote Continued)

constraints seem to be forcing the HRC into a situation of holding almost all of its sessions in Geneva. Each session is normally preceded by one or two working groups of up to five days.[45] Financial constraints within the United Nations system forced the cancellation of the HRC's proposed session in the autumn of 1986 and only permitted the establishment of one pre-sessional working group at HRC's spring and summer sessions in 1987, instead of the customary two.[46] The HRC has pressed strongly to retain its three session per year.[47] Only one session has been held outside of New York or Geneva.[48] In accordance with the Rules the HRC established the offices of Chairman, three Vice-Chairmen and a Rapporteur. The

---

(Footnote Continued)
York which is not the case in Geneva. A number of States have requested that their reports are considered in New York rather than Geneva. See SR 44 prs.20-22; SR 177 prs.6-17; Doc.A/35/40 pp.96-97.

[45] The use of pre-sessional working groups has been an almost constant feature of the HRC's work subject to occasional resource problems. The working groups continue to meet during the sessions of the HRC.

[46] Doc.A/42/40 prs.425-434; A/42/40 prs.4, 12-14. The single working group found it impossible to deal with its workload, SR 758 prs.22-35.

[47] Ibid. Support has been expressed in the Third Committee for maintaining the normal pattern of the Committee's meetings, Doc.A/42/40 pr.27.

[48] The fourteenth session was held in Bonn. See Docs.A/36/40 prs.28-31; A/37/40 pr.4; SR 290. Particularly in its early years many members of the HRC indicated the desirability of the HRC holding sessions outside of New York or Geneva. The possibility was examined by the Secretary-General at the request of the General Assembly, (G.A.Resn.38/145). The Secretary-General drew attention to G.A.Resn.31/140 which provides in part that,"UN bodies may hold sessions away from their established headquarters when a Government issuing a request for a session to be held within its
(Footnote Continued)

officers are elected for two years and may be re-elected.[49]

2.7 The Rules provide that, "The meetings of the Committee and its subsidiary bodies shall be held in public unless the Committee decides otherwise or it appears from the relevant provisions of the Covenant or the Protocol that the meetings shall be held in private".[50] The relevant provisions are article 41(1)(d) of the Covenant and article 5(3) of the Protocol which provide that the Committee shall hold closed meetings when considering inter-State and individual communications respectively. In practice almost all of the HRC's meetings are held in public except when they are considering communications under the Optional Protocol.[51] A small number of representatives of non governmental organizations attend HRC meetings but members of the public have rarely been present.[52] The Covenant contains only two mandatory rules of procedure.

(Footnote Continued)
territory has agreed to defer...the actual additional costs directly and indirectly involved". The financial crisis at the UN makes any change in the governing rules extremely unlikely. It is submitted that the developed States should give serious consideration to hosting a session of the HRC.

[49] The HRC has paid tribute to its expert chairmanship of Mr.Mavrommatis during its first ten years, Doc.A/42/40 pr.11.

[50] R.33. The understanding was that the HRC would meet in private only in exceptional cases, see SR 5 and 6.

[51] The working of the Optional Protocol has sometimes been discussed in public session.

[52] It would be helpful if the annual reports of the HRC listed the non-governmental representatives who have attended its sessions even though they have no formal role in the HRC's proceedings. Cf. Report of CESCR, n.38 above, prs.6-7. Private individuals rarely attend HRC meetings and have often faced difficulties in gaining access. See the comments at SR 91 pr.43; SR 263 pr.32; SR 282 pr.53.

Article 39(2) provides that (a) twelve members shall constitute a quorum and that (b) decisions of the Committee shall be made by a majority vote of the members present. Notwithstanding this clear rule the appropriate method of decision making was the subject of intensive discussion within the HRC. From its inception the HRC had taken decisions on the basis of consensus.[53] When it came to adopting its Rules of Procedure the question arose as to whether the principle of decision making by consensus should be formally expressed within the corpus of the Rules.[54] In particular the independent experts from Eastern Europe were strongly in favour its being formally expressed.[55] They referred to the increasing use of consensus decisions making in international organizations.[56] However, a strong majority emerged against formal incorporation.[57] In the event the HRC adopted the draft rule referring to majority voting but with the following footnote in its Rules,

> "1. The members of the Committee generally expressed the view that its methods of work should normally

---

[53] See Fischer, ch.3, n.1 below, pp.149-151; K.Zemanek, Majority Rule And Consensus Technique In Law-Making Diplomacy, in MacDonald and Johnstone, (eds), ch.1, n.7 above, pp.857-887; B.F.Selassie, Consensus And Peace, (UNESCO, 1980).

[54] For the HRC's discussion of consensus see SR 4, 5, 6, 7, 13, 14 and 15; Doc.A/32/44 prs.27-34. SR 14 pr.2 contains a summary of the various suggestions.

[55] See e,g, the comments at SR 7 prs.5 (Hanga), 9 (Koulishev), 10 (Graefrath), 22 (Movchan).

[56] E.g. by the Conference On The Law Of The Sea, the International Law Commission and the Conference On Security And cooperation in Europe.

[57] They argued, inter alia, that the consensus principle might be interpreted in a sense incompatible with the independence of members, that it might in practice operate as a veto and create working difficulties.

allow for attempts to reach decisions by consensus before voting, provided that the Covenant and the Rules of Procedure were observed and that such attempts do not unduly delay the work of the Committee.

2. Bearing in mind paragraph 1 above, the Chairman at any meeting may, and at the request of any member shall, put the proposal to a vote".[58]

In retrospect the adoption of consensus decision making has proved to be one of the most significant decisions made by the HRC. Despite the inevitable differences that have arisen between members on many issues the HRC has shown a remarkable ability to reach decisions by consensus. As of 1 July 1988 no decision of the HRC has been taken by vote.[59] More than a decade of constructive development on the basis of consensus has made it something of a psychological barrier which members are loath to see destroyed. In theory there are obvious merits and demerits in consensus decision making.[60] A more realistic assessment of its worth can only be made on the basis of the HRC's actual practice in specific areas. Hence an assessment is offered in the concluding chapter of this thesis after the practices and procedures of the HRC have been examined in some detail.[61] More generally, however, it can be noted that the working relationships between members have been very good and references are consistently made to the, "conciliatory and co-operative spirit prevailing within the Committee

---

[58] Rule 10.

[59] The consensus was nearly broken over the drafting of a general comment on article 20, see ch.12 below.

[60] See n.53 above. For some comments see SR 357 pr.60 (Vincent-Evans); SR 34 pr.39(Opsahl).

[61] See ch.13 below.

based on mutual respect".[62] The most striking aspect of this has, of course, been the practice of consensus decision making itself. As Sir Vincent-Evans pointed out, this internal co-operation also assists in establishing relationships with the States parties, "States have consistently co-operated well and it appeared that the characteristic restraint and lack of polemics in the Committee's proceedings had helped it to gain the confidence of States parties".[63]

2.8 The official languages of the HRC are Chinese, English, French, Spanish and Russian and, since 1984, Arabic. Its working languages are English, French, Spanish, Russian and, since 1984, Arabic.[64] The Rules provide that, "Any speaker addressing the Committee and using a language other than one of the official languages shall normally provide for interpretation into one of the working languages".[65] The HRC's Rules provide that the summary records of public meetings of the Committee shall be documents of general distribution unless, in exceptional circumstances, the Committee decides otherwise.[66] The summary records of private meetings are subject to

---

[62] SR 6 pr.9. See Anon, The New Human Rights Committee, 19 Rev.ICJ (1977) pp.19-22. The meetings of the new CESCR have not been so harmonious, see E/CN.12/1987/SR.1-28.

[63] SR 232 pr.24. See also SR 260 pr.17 (Graefrath).

[64] Rule 28. see Doc.A/39/40 pr.24.

[65] R.30. So, for example, Iran provided its own translators when it appeared before the HRC under the reporting process. R.30 was adopted on the understanding that, "the Committee had taken note of the fact that it might have to assist petitioners in providing for interpretation", SR 14 prs.12-27.

[66] R.36(1). See SR 6 prs.29-44; SR 14 prs.1-17. The summary records are drafted in English and French and then translated into the other languages. Some long translation delays have occurred, see Doc.A/42/40 pr.24; ECOSOC Resn.1987/4 pr.14.

restricted distribution.[67] The reports and other official documents of the HRC are of general distribution unless the HRC decides otherwise. Official documentation related to articles 41 and 42 of the Covenant (the inter-State procedure) and to the Optional Protocol are subject to restricted distribution.[68] Recently, temporary financial restrictions have meant that summary records are only provided for two weeks per session.[69]

2.9 The HRC has consistently recognized the importance of publicity for its work.[70] Press releases are prepared on its consideration of State reports and announcing the publication of its views under the Optional Protocol.[71] Press conferences are held to try and publicize its work.[72] The HRC's consistent pressure for broader publication of its records has had some success. Three volumes of a Yearbook of the Human Rights Committee have been published but they only cover its first two years and part of its third and fourth years.[73] Further volumes are planned but financial constraints seem certain to hinder publication and in any event they are increasingly dated. More helpful has been a publication of a volume of Selected Decisions under the

---

[67] R.36(2). See SR 6 prs.48-53. So documents relating to the Optional Protocol are confidential until the views of the HRC under article 5(4) are made public.

[68] R.64.

[69] Doc.A/41/40 pr.432.

[70] See Docs.A/34/40 prs.21-23; A/35/40 prs.13-19; A/36/40 prs.19-27; A/37/40 prs.17-20; A/38/40 prs.19-25; A/39/40 prs.26-35.

[71] See R.75.

[72] See Doc.A/41/40 pr.10.

[73] Yearbook Of The Human Rights Committee 1977-78, vol.I, Doc.CCPR/1 (1986); vol.II, Doc.CCPR/C/Add.1 (1986); Yearbook Of The Human Rights Committee 1979-80, vol.I, Doc.CCPR/2 (1988).

Optional Protocol.[74] A second volume is under preparation.[75] Publicity for the work of the HRC is also given by the United Nations 'Human Rights Bulletin' and the 'United Nations Yearbook On Human Rights'.[76] On a number of occasions members of the HRC have publicized the work of the HRC by representing it at international human rights meetings at various locations.[77] Similarly a number of HRC members have published articles explaining and commenting on the work of the HRC and the provisions in the Covenant.[78] The obvious problem faced by the HRC in attracting national and international publicity is that because it has conducted its work in a serious, de-politicized manner it is less "newsworthy" than, for example, the Human Rights Commission. Moreover, its sessions take place in countries which are not parties to the Covenant. Therefore, the publicizing roles of the Secretariat, national and international non governmental organizations and academics assume critical importance.[79]

D. Functions.

2.10 The functions of the HRC are those provided for in the Covenant and the Protocol.[80] These lay down three substantive procedures directed towards the effective observance of the rights in the Covenant.

---

[74] Selected Decisions, vol.I, ch.4, n.1 below.

[75] Publication is expected in 1988 and will covers views up to HRC's 28th session.

[76] See e.g the Special U.N. Human Rights Bulletin (Geneva, 1986).

[77] Refs to A/38/40 prs.35-39.

[78] Members who have published include Tomuschat, Graefrath, Tarnopolsky, Dimitrijevic.

[79] See prs.2.16-2.17 below.

[80] Article 28. See ch.1 pr.1.18-1.21 on international implementation measures.

2.11 Firstly, there is a mandatory reporting procedure. Article 40 of the Covenant provides for the "consideration" and "study" by the HRC of the national reports submitted by States parties on the measures they have adopted to give effect to the rights recognized in the Covenant and on the progress made in the enjoyment of those rights. The HRC must transmit "its reports" and such "general comments" as it may consider appropriate to the States parties. The HRC may also transmit to the Economic and Social Council (ECOSOC) these comments along with copies of the reports it has received from States parties to the Covenant. This reporting procedure is examined in detail in chapter 3.

2.12 Secondly, there is an optional inter-State procedure. Articles 41 and 42 of the Covenant provide for a system of inter-State complaints that another State party is not fulfilling its obligations under the Covenant. The HRC's competence only arises if both States parties have made a declaration under article 41 recognizing the HRC's competence to receive and consider such communications. Under article 41 the HRC, "shall make available its good offices to the States parties concerned with a view to the friendly solution of the matter". If the matter is not resolved within the framework of article 41 further functions may, with the prior consent of the States parties, be exercised with respect to such allegations but by an ad-hoc Conciliation Commission appointed under article 42 of the Covenant rather than by the HRC.[81] However, as of 1 January 1988 the inter-State procedure has not been invoked and it is not, therefore, examined in this thesis.[82]

---

[81] See Rules 72-77E; Doc.A/34/40 prs.28-53.

[82] On the inter-State procedure see Robertson, n.1 above, pp.351-356. Cf. the compulsory inter-State procedure under article 11 ICERD. See generally, S. Leckie, The Inter-State Complaint Procedure In International Law: Hopeful Prospects Or Wishful Thinking? 10 HRQ (1988) pp.249-303.

2.13 Thirdly, there is an optional individual communications procedure under the Optional Protocol to the Covenant. Under the Protocol the HRC is competent to receive and consider communications from individuals subject to the jurisdiction of a State party to the Protocol who claim to be victims of a violation of any of the rights set forth in the Covenant. On completing its examination the HRC, "shall forward its views to the State party concerned and to the individual".[83] The Optional Protocol entered into force on 23 March 1976.[84] The procedure under the Optional Protocol is examined in detail in chapter 4.

2.14 In addition to these substantive tasks the HRC is required to submit to the General Assembly, through the ECOSOC, an Annual Report on its activities under the Covenant and containing a summary of its activities under the Protocol.[85] The contents and function of these reports are considered in the appropriate parts of chapters 3 and 4 below.

2.15 Finally, in April 1987 the HRC adopted a "Statement on the Second Decade to Combat Racism and Racial Discrimination".[86] The HRC has no express jurisdiction to issue such statements..

E. Relations With The Secretariat.

2.16 Article 36 of the Covenant provides that, "The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Covenant". The Secretariat for the HRC is

---

[83] Article 5(4) O.P.

[84] See ch.4, pr.4.

[85] Article 45 Covenant; article 6 O.P.

[86] See SR 725; Doc.A/42/40 pr.18 and Apx.VI.

provided by the UN Centre for Human Rights in Geneva. Different Secretariat staff service the HRC under the reporting and petition procedures.[87] From as early as the HRC's fifth meeting it was apparent that adequate provision for secretarial resources had not been made although some improvement has taken place since.[88] The HRC has recommended in its Annual Reports that the Secretariat be granted the necessary personnel and resources.[89] As will be noted below,[90] the HRC has a peculiar status in that its Secretariat is provided by the UN but it is not a UN organ. As Sir Vincent Evans commented, "The Committee was a unique body and might frequently find itself asking the Secretariat to perform unusual tasks. Rather than straitjacket the Secretariat, it might be better to define the Secretariat's rights and duties empirically. The Committee and the Secretariat should act as a team with a common purpose of promoting human rights".[91]

Generally the working relationship between the HRC members and the Secretariat has been very good. Members of the HRC have consistently commended the work of the Secretariat. There have been some problems but they appear to be as a ones of communication difficulties rather than of substance.[92] However, during discussion of

---

[87] The International Instruments Unit and the Communications Unit respectively. The Secretary-General informed the General Assembly that he accepted the responsibilities under article 36. See also G.A.Resn.31/86.

[88] See SR 5 pr.11 (Schreiber, Director of the then Human Rights Division); SR 42 prs.44,45; SR 74 pr.38.

[89] See Doc.A/32/44 prs.178-180.

[90] See prs.2.18-2.19 below.

[91] SR 153 pr.7.

[92] See the comments at SR 572 prs.14-17; SR 727 pr.3.

the HRC's rules of procedure it was evident that the HRC members did not wish to delegate any substantive decision making power to the Secretariat.[93]

2.17 The role of the Secretariat was acutely raised in the reaction of the HRC to a speech delivered by Mr.Van Boven (then Director of the then Division of Human Rights) at the opening of the HRC's seventh session in which he commented on the HRC's work and pointed to some of the fundamental questions before it.[94] A number of HRC members expressed misgivings about the speech and concern about the role the Secretariat was assuming while others expressed their appreciation of the support given by the Secretariat.[95] Mr.Van Boven himself commented forcefully,

> "He recognized that the Secretariat should be impartial and objective, but did that mean that the Secretariat was neutral? He did not think that the Secretariat should be a neutral and amorphous organ. In his opinion, that would not be in keeping with the provisions of the Charter. He cared greatly for the independent responsibility of the Secretariat as laid down in article 100 of the Charter. It was in the spirit of the Charter that all organs established in pursuance of the Charter should promote human rights and fundamental freedoms, and it was against that background and in that spirit that he raised those issues..".[96]

In practice the Secretariat has had an increasing influence on the practices of the HRC under both the Covenant and the Optional Protocol. The Secretariat plays

---

[93] See the discussion in SR 5 on the information to be provided to the HRC by the Secretariat.

[94] See SR 152 prs.2-16.

[95] SR 153 prs.4-12; SR 179 prs.22 et seq.

[96] SR 153 pr.11. Subsequently Mr.Van Boven's contract with the UN was not renewed.

a major role in the preparatory work for the consideration of State reports under article 40,[97] the drafting of decisions on admissibility and final views under the Optional Protocol,[98] and the Annual Report of the HRC.[99] Other important aspects of its work include giving publicity to the work of the HRC,[100] keeping HRC members informed of world wide developments concerning human rights,[101] developing technical assistance and training schemes to assist States parties in complying with their reporting obligations under the Covenant.[102]

The HRC has always struggled to cope effectively with its workload. Increases in that workload appear to be inevitable notwithstanding the slowdown in ratifications of the Covenant and in individual communications in recent years. With increased publicity for its work and an increasing awareness of the covenant and the Optional Protocol the HRC will almost certainly find it necessary to delegate more substantive tasks to the Secretariat. If so the role of the Secretariat and its relationship with the HRC will be of increasing significance. The good relationship to date augurs well for such a development to take place constructively.[103]

F. The Status of the Human Rights Committee.

---

[97] See ch.3 below.

[98] See ch.4 below.

[99] See ch.3, pr.3.40 below.

[100] See pr.2.9 above.

[101] See ch.3 below.

[102] Ibid.

[103] Mose and Opsahl, n.1 above, suggest that the HRC needs the assistance of a permanent Secretariat, p.330. Secretariats often play a very influential role in the development of international human rights law and practice.

F. The Status of the Human Rights Committee.

2.18 The fundamental point to note here is that the Human Rights Committee is not, strictly speaking, a United Nations organ. It is a treaty based organ created by the States parties to the Covenant.[104] Having recognized this independent status the HRC has sought to exert a degree of autonomous decision making on the basis of it. This has manifested itself in a number of decisions concerning, for example, the holding of and venue of sessions,[105] rules of procedure,[106] distribution of documents,[107] and the role of the Secretariat under the Covenant and the Optional Protocol.[108] It is also interesting to note that the HRC's request that its Chairman be invited to present its first Annual Report to the General Assembly was refused on the ground that it might give the impression that the HRC was accountable to the General Assembly.

2.19 Realistically, however, it must be recognized that in practice the HRC is, in effect, in the position of a United Nations organ.[109] With one exception the HRC's sessions have been held at the two main seats of the

---

[104] See pr.2.4 above; Doc.A/32/44 pr.19. Mose and Opsahl, n.1 above comment,"Nor is the activity of the Committee under the Protocol subject to any kind of control or review by other bodies, or backed by any machinery of enforcement. We have noted its independent status in not being a United Nations' organ. Depending on the Committee's approach, this position may be seen as a source of considerable weakness as well as a source of in some respects", p.326.

[105] See SR 3 prs.37-46.

[106] See e.g. SR 6 pr.59 (Vincent-Evans); SR 8 pr.27 (Movchan).

[107] See e.g., SR 8 pr.44 (Opsahl); Doc.A/32/44 prs.35-37.

[108] See prs.2.16-2.17 above.

[109] See Farer, ch.1, n.1 above, p.567.

United Nations and are likely to continue to do so.[110] They are totally financed from the United Nations budget and are therefore subject to the general and particular fiscal constraints as are imposed on all United Nations organs. The members of the HRC receive emoluments from the United Nations.[111] The administrative functioning and servicing of the HRC depends totally on the assistance of the Secretariat within the United Nations Centre For Human Rights in Geneva. This extreme financial dependance on the United Nations was particularly evident when the HRC was equally, if not disproportionately, affected by the across the board financial cuts implemented by the United Nations Secretary-General because of the financial crisis at the United Nations. In the final event this led, inter alia, to the cancellation of the HRC's proposed session in autumn 1986.[112]

Various other provisions of the Covenant and the Protocol underline the link between the HRC and the UN. The UN Secretary-General has an important role in the conduct of elections to the HRC by the States parties and those elections take place at the UN.[113] The Secretary-General is the depository for ratifications and accessions to the Covenant and the Protocol and circulates the information relating to it.[114] Amendments to the Covenant and the Protocol must be submitted to the General Assembly for approval.[115] Finally, as we have already noted, the Annual Report of the HRC is submitted

---

[110] See pr.2.6 above.

[111] Article 35. See pr.2.2 above.

[112] See Docs.A/41/40 prs.425-434; A/42/40 pr.4.

[113] See pr.2.5 above.

[114] See articles 48-49, 51-53 Covenant; articles 8-9, 13-14 O.P.

[115] See article 51 Covenant; article 11 O.P.

to the General Assembly, through ECOSOC.[116] In practice the Annual Report is considered in some detail by the Third Committee of the General Assembly.[117] By contrast the meetings of the States parties have played no substantive role in the implementation of the Covenant or the Protocol.[118]

G. The Nature of the Human Rights Committee.

2.20 We noted in chapter one the major changes made by the Third Committee to the functions of the HRC in the Human Rights Commission's draft.[119] We have also referred to the key elements in the composition of the HRC, namely, the independent status of HRC members, their geographical distribution and the representation of the different forms of civilization and of the principal legal systems.[120] One of the major purposes of the subsequent chapters of this thesis is to indicate the nature of the HRC through its practices and procedures. However, on a number of occasions members of the HRC have indicated their perceptions of the institutional character and nature of the HRC and it is instructive to note some of these.[121]

.

---

[116] See pr.2.14 above.

[117] See ch.3, pr.3.40 below.

[118] See ch.3, pr.3.39 below. Mose and Opsahl, n.1 above, comment, "Whether the meeting (of States parties) may exercise additional or inherent powers in its electoral capacity or assume other functions has not yet been explored. It does not seem to be intended that such a meeting should act as a representative of the collectivity of States in matters of substance, for example, by issuing binding instructions to the Committee", p.284.

[119] See ch.1, pr.1.6-1.12 above.

[120] See prs.2.2-2.5 above.

[121] See also ch.3, prs.3.29-3.38 below.

2.21 Mr.Uribe-Vargas described it as a body whose work was of a "judicial nature".[122] Mr.Mora-Rojas said that "The Committee was quite different in nature from other bodies and, even though it was not a court or a tribunal, it did hear testimony and had evidence presented to it".[123] Mr.Tomuschat has commented that, "The Committee was...ruled by the Covenant and while it was true that members were not judges they had the task of applying the provisions laid down in the Covenant and therefore had to exercise judgement. It was the duty of the Committee to ensure that States parties fulfilled their obligations under the Covenant".[124] Mr.Tomuschat has also said that "The Committee was not an international court but was similar to one in certain respects, particularly in regard to its obligation to be guarded by exclusively legal criteria - which rightly distinguished it from a political body".[125] Mr.Ermacora was concerned that the Committee should avoid giving the impression that it was "a sort of advisory service, or had technical, assistance functions, whereas in fact its activities were based on legally binding instruments, with all the attendant consequences that that entailed".[126] Mr.Aguilar commented that the Committee "was not a judicial body" and "its role was not to find fault".[127] Mr.Bouziri commented that the "Committee was not a court of law".[128] Mr.Pocar commented that the Committee's function "was not to judge

---

[122] SR 6 pr.73.

[123] SR 7 pr.17.

[124] SR 7 pr.19.

[125] SR 117 pr.35.

[126] SR 306 pr.20.

[127] SR 743 pr.12 and SR 719 pr.32 respectively.

[128] SR 231 pr.29.

and then either to condemn or congratulate States parties".[129] Mr.Graefrath, "did not share the view that the work of the Committee could be compared to that of a court... Unlike a court the Committee was not required to make judgements, but simply to consider and comment on reports and to act as a conciliatory body in dealing with complaints and communications".[130] Mr.Opsahl has described the HRC as the "executive organ" of the Covenant.[131] Emphasis is often put on the HRC's role as a promoter, monitor or supervisory body with respect to improved human rights performances.[132] However, some members have expressed doubts as to whether the HRC can properly be called a "supervisory body" or a "parent organ".[133]. Finally, Mr.Suy (UN Legal Advisor) believed the HRC to be, "neither a legislative or a judicial body but that every expert body was sui generis",[134] and Mr.Herndl, former Under Secretary-General of the United Nations, recently described the HRC as "the guardian of the Covenant".[135]

2.22 Clearly then, there are some differences within the HRC as to its nature and its purposes. However, many of these comments broadly accord with the shift from the

---

[129] SR 719 pr.29.

[130] SR 7 pr.1.

[131] SR 342 pr.68. "In effect the meetings of States parties was the legislative organ for the Covenant", ibid. Cf. the comment of Mose and Opsahl, in n.118 above.

[132] SR 50 pr.7 (Opsahl); SR 232 pr.44 (Tarnopolsky); SR 117 pr.35 (Tomuschat), and the discussion in SR 231.

[133] See SR 174 Add.1 pr.28 (Graefrath), 45 (Hanga), 47 (Koulishev).

[134] SR 13 pr.6 (Mr.Suy, Under-Secretary-General, Legal Counsel).

[135] SR 702 pr.4.

largely judicial nature of the HRC envisaged in the Human Rights Commissions draft to a HRC with a more amorphous nature. That nature includes elements of judicial, quasi-judicial, administrative, investigative, inquisitorial, supervisory and conciliatory functions. It is submitted that to understand the true nature of the HRC it must be recognized that its nature may alter in accordance with its exercise of the various functions and roles it performs or could perform.[136]

We now examine in turn the principal functions of the HRC to date under the systems of periodic reporting (ch.3) and of individual communications under the Optional Protocol (ch.4).

---

[136] See V.Dimitrijevic, n.1 above.

CHAPTER 3. THE SYSTEM OF PERIODIC REPORTING.[1]

Introduction.

3.1 Periodic reporting is the most widespread and established implementation technique for the

---

[1] See Bossuyt, 'Guide', pp.615-633. There have been a number of studies dealing with the provisions of the Covenant on reporting. There is a small but growing literature on the actual practices of the HRC under those provisions. See P.S.Brar, International Law And The Protection Of Civil And Political Rights: A Critique Of The United Nations' Human Rights Committee's Nature, Legal Status, Practices, Procedures And Prospects, (M.A.L.D. Thesis, The Fletcher School Of Law And Diplomacy, U.S.A., c.1983); M.Bossuyt, ch.2, n.1 above, (1978-79); F.Capatorti, ch.2, n.1 above, (1967); K.Das, United Nations Institutions And Procedures Founded On Conventions On Human Rights And Fundamental Freedoms, in K.Vasak/P.Alston (eds.) The International Dimensions Of Human Rights, vol.I, p.303 at pp.336-338 (1982); E.Decaux, ch.2, n.1 above, (1980) p.487 at pp.512-519; J.L.Gomez Del Prado, United Nations Conventions On Human Rights: The Practice Of The Human Rights Committee And The Committee On The Elimination Of Racial Discrimination In Dealing With The Reporting Obligations Of States Parties, 7 HRQ (1985) pp.492-513; B.Graefrath, Trends Emerging In The Practice Of The HRC, GDR Committee For Human Rights Bulletin, No.1/80 (1980) pp.3-32; B.Graefrath, ch.6, n.1 below; D.Fischer, Reporting Under The Covenant On Civil And Political Rights: The First Five Years Of The HRC, 76 AJIL (1982) pp.142-153; D.Fischer, International Reporting Procedures, in H.Hannum (ed.), Guide To International Human Rights Practice, p.165 at pp.168-173, (1984); (Footnote Continued)

(Footnote Continued)
M.Lippman, ch.2, n.1 above, (1979); F.Jhabvala, The Practice Of The Covenant's HRC, 1976-82: Review Of State Party Reports, 6 HRQ (1984) pp.81-106; P.Gormley, ch.1, n.1 above, (1972); M.Novak, The Effectiveness Of The ICCPR - Stocktaking After The First Eleven Sessions Of The U.N. Human Rights Committee, 1 HRLJ (1980) p.136 at pp.146-151 and 163-170; Ibid., 3 HRLJ (1982) p.207 at pp.207-210; Ibid, 5 HRLJ (1984) p.199 at pp.199-203; T.Opsahl, Human Rights Today: International Obligations And National Implementation, 23 Scandinavian Studies In Law (1979) p.156; A.G.Mower, ch.2, n.1 above (1977); Ibid., ch.2, n.1 above, (1978); B.Ramcharan, The Emerging Jurisprudence Of The HRC, 6 Dalhousie LJ (1980) pp.7-40; Ibid., Implementing The International Covenants On Human Rights, in B.Ramcharan (ed.), Human Rights - Thirty Years After The Universal Declaration, p.159 at pp.174-187 and 190-195 (1979); Robertson, ch.2, n.1 above, pp.341-351 (1984); E.Schwelb, The International Measures Of Implementation Of The International Covenant On Civil And Political Rights And Of The Optional Protocol, 12 Tex.ILJ (1977) pp.141 at 154-160;

For purposes of comparison to other international reporting procedures reference is made in this chapter to the following works: P.Alston, ch.2, n.38 above (1987); T.Buergenthal, Implementing The Racial Convention, 12 Tex.ILJ (1987) pp.187-221; M.Galey, International Enforcement Of Women's Rights, 6 HRQ (1984) pp.463-490; D.Harris, The European Social Charter, (1984); E.A.Landy, The Effectiveness Of International Supervision - Thirty Years Of I.L.O.Experience, (1966); F.Wolf, Human Rights And The I.L.O., in T.Meron (ed.), Human Rights In International Law - Legal And Policy Issues, vol.II.,ch.7,(1984); T.Meron, Human Rights Law-Making In the United Nations (1986); N.Valticos, The International Labour Organization (1979); N.Lerner, The International Convention On The Elimination Of Racial Discrimination, (2d, 1980).

international implementation of human rights.[2] The obligation to submit reports is the only obligation which States parties to the ICCPR assume, ipso facto, on ratification or accession. The national reports submitted are considered and examined by the Human Rights Committee (HRC), the independent body of experts established under article 28 ICCPR.[3] This chapter analyses the reporting procedure as it has developed in the first decade of practice by the HRC.

The reporting obligation is contained in article 40 ICCPR which provides that,

> "1. The States parties to the present Covenant undertake to submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights:
>
> (a) Within one year of the entry into force of the present Covenant for the States Parties concerned;
>
> (b) Thereafter whenever the Committee so requests.
>
> 2. All reports shall be submitted to the Secretary-General of the United Nations, who shall

---

[2] See article 22 of the Covenant of the League of Nations; articles 19 and 22 of the Constitution of the I.L.O.; articles 73e, 87a and 88 of the U.N. Charter; article VIII of the Constitution of UNESCO; articles 21 and 22 of the European Social Charter; article 57 ECHR; articles 16-22 of ICESCR (see now Alston, n.1 above); articles 9 ICERD. In 1956 the ECOSOC established a system of periodic reporting by States on development and progress on human rights, ECOSOC Resn.624B (XXII). The system was terminated by the General Assembly in 1980, apparently on the initiative of the UN Secretariat, G.A.Resn.35/209. On that system and criticisms of its termination see U.N.Action In The Field Of Human Rights, pp.323-325 (1983); J.P.Humphrey, ch.1, n.1 above, p.178; Ibid., The Implementation Of International Human Rights Law, 24 N.Y.S.L.R. (1978) pp.31-62; L.Sohn, ch.1, n.1 above, p.39 at pp.74-79.

[3] See ch.2 above.

transmit them to the Committee for consideration. Reports shall indicate the factors and difficulties, if any, affecting the implementation of the present Covenant.

3. The Secretary-General of the United Nations may, after consultation with the Committee, transmit to the specialized agencies concerned copies of such parts of the reports as may fall within their field of competence.

4. The Committee shall study the reports submitted by the States Parties to the present Covenant. It shall transmit its reports, and such general comments as it may consider appropriate, to the States Parties. The Committee may also transmit to the Economic and Social Council these comments along with copies of reports it has received from States Parties to the present Covenant.

5. The States Parties to the present Covenant may submit to the Committee observations on any comments that may be made in accordance with paragraph 4 of this article.

A. THE NATIONAL REPORTS.

3.2 In practice three types of reports have emerged: initial, supplementary and periodic.[4] It is necessary to explain these to understand the HRC's decisions on periodicity.

---

[4] The national reports are published as official U.N. Documents. The reports for the years 1977-1978 appear in Yb.HRC (1977-78) vol.II. The reports form an extremely valuable account of the implementation by States parties of the provisions of the Covenant and provide important material for human rights researchers. The United Kingdom reports are compiled by the Foreign and Commonwealth Office from information provided by more than half a dozen departments and the administrations of the Dependant Territories.

1. The Initial Reports.

3.3 These are the reports submitted by the States Parties in accordance with the basic obligation under article 40(1)(a) ICCPR. The HRC has recently emphasized that, "the submission of such reports was an international legal obligation under article 40, paragraph 1 (a), of the Covenant".[5] States Parties are required to report on the, "measures they have adopted to give effect to the rights recognized herein and on progress made in the enjoyment of these rights". The general term "measures" was preferred in the Third Committee of the General Assembly to more specific formulations as it was argued that it would afford states parties greater freedom to report on the entire range of laws and practices ensuring compliance with the Covenant.[6] The "rights recognized" are the rights contained in articles 1-27 of the Covenant[7] although other articles may also be relevant.[8] It is not open to States Parties to accept only certain of the rights established in the ICCPR.[9] In accordance with article 40(1)(a), the first initial reports were due to be submitted on 23 March 1977, one year after the entry into force of the ICCPR for the original States parties.[10]

---

[5] SR 756 pr.77; Doc.A/42/40 pr.40.

[6] Doc.A/6546, ch.1, n.1 above, pr.384.

[7] See the questions raised by Mr.Errara in a decision under the O.P. concerning self-determination, ch.5, pr.5.20-5.21 below.

[8] For example, article 47 may be relevant to article 1, see ch.1, pr.1.23 above and ch.5, pr.5.12 below.

[9] Cf. Article 20 European Social Charter, as to which see Harris, n.1 above, pp.14-21.

[10] Initial Reports Of States Parties Due In 1977,
(Footnote Continued)

The Covenant itself gives no further indication of the required form and contents of State reports. The extreme qualitative and quantitative diversity of the early reports submitted clearly demonstrated the need for guidelines indicating the wishes of the HRC in this regard. Having gained some initial experience in the consideration of reports, the HRC had no hesitation in producing general guidelines for the assistance of States parties in complying with their reporting obligations.[11] The HRC stated that compliance with the guidelines "will help to ensure that reports are presented in a uniform manner and enable the HRC and States Parties to obtain a complete picture of the situation in each State as regards the implementation of the rights referred to in the Covenant", and, "reduce the need for the Committee to request additional information under its rules of procedure".[12] In accordance with the general guidelines the initial reports of States were to be in two parts as follows.[13]

Part I: General. This part should briefly describe the general legal framework within which civil and political

---

(Footnote Continued)
Note By the Secretary-General, Doc.CCPR/C/1; Yb.HRC (1977-78) Vol.II p.15.

[11] 'General Guidelines Regarding The Form And Content Of Reports From States Parties Under Article 40 Of The Covenant', Doc.CCPR/C/5; Doc.A/32/44, Apx.IV. Adopted by HRC at its 44th meeting (2nd session), 29 August 1977. The guidelines are not legally binding but HRC members have strongly encouraged their use.

[12] Ibid., pr.2.

[13] Ibid., pr.3. Many national reports have been accompanied by substantial documentary appendices. The U.K.'s second periodic report was accompanied by 42 reference documents, Doc.CCPR/C/32/ Add.5,p.21 (1984). The two reports submitted by Nicaragua were accompanied by 77 appendices.

rights are protected in the reporting State. In particular it should indicate:

(a) Whether any of the rights referred to in the Covenant are protected either in the Constitution or by a separate "Bill of Rights", and, if so, what provisions are made in the Constitution or in the "Bill of Rights" for derogations and in what circumstances.

(b) Whether the provisions of the Covenant can be invoked before and directly enforced by the courts, other tribunals or administrative authorities or whether they have to be transformed into internal laws or administrative regulations to be enforced by the authorities concerned.

(c) What judicial, administrative or other competent authorities have jurisdiction affecting human rights.

(d) What remedies are available to an individual who claims that any of his rights have been violated.

(e) What other measures have been taken to ensure the implementation of the provisions of the Covenant.

Part II: Information relating to each of the articles in parts I, II and III of the Covenant. This part should describe in relation to the provisions of each article:

(a) The legislative, administrative or other measures in force in regard to each rights;

(b) Any restrictions or limitations even of a temporary nature imposed by law or practice or any other manner on the enjoyment of the right;

(c) Any other factors or difficulties affecting the enjoyment of the right by persons within the jurisdiction of the State;

(d) Any other information on the progress made in the enjoyment of the right.

The general guidelines also state that the State report should be accompanied by copies of the principal legislative and other texts referred to in the report and that the HRC would welcome at any time information on any significant new development in regard to the rights referred to in the Covenant. On the basis of the reports the HRC hoped to "develop a constructive dialogue with each State Party in regard to the implementation of the Covenant.[14] This emphasis on "constructive dialogue" has been the keynote of the HRC's practice under article 40.

2. Supplementary (or Additional) Reports.[15]

3.4 Notwithstanding the general guidelines established by the HRC the problem of incomplete reports has bedevilled its work under article 40 ICCPR. Many reports have been characterised by their brevity and inadequacy, containing little more than generalities and unsubstantiated references to national legislative and administrative provisions. Abstract legalism has been accompanied by proclamations of wholesale compliance with the Covenant.[16] Few reports have made any serious

---

[14] Ibid., prs.4-6 (my emphasis).

[15] The terminology applied by the HRC has varied from time to time. This account uses the term 'supplementary'.

[16] See Jhabvala, n.1 above, pp.102-104. During consideration of the report of the Lebanon Mr.Graefrath commented that, "The report appeared, however, to deal at greater length with, for example, legislation on prostitution than with the real situation of human rights and the Government's difficulties", SR 442 pr.37. "It might be useful...to read the report of the Democratic Republic Of Korea (Docs.CCPR/C/22/Add.3 (1983) and Add.5 (1985) and the summary records covering the consideration of that report (SR 509, 510 and 516) in order to understand how difficult it is to come to grips with facts and not to remain in a mollifying nirvana of sheer verbalism", Tomuschat, ch.2, n.214 above, p.577 (1985).

attempt to identify the "factors and difficulties" affecting the implementation of the Covenant (Article 40(4)).[17] States are perhaps naturally reluctant to identify their own difficulties and shortcomings although when State representatives appear before the HRC they are more forthcoming in identifying obstacles to the implementation of the Covenant.[18]

Faced with inadequate and incomplete reports and the fact that in the course of its consideration of State's reports Committee members have often been prompted to raise questions which State representatives have left unanswered, the Committee have in the case of all reports to date requested additional information under Rule 70 of the HRC's Rules in the oral hearings.[19] Similarly in many cases State representatives have promised additional information. This information is submitted in Supplementary (or Additional) reports. Whether States parties are under a legal obligation to submit such information has occasionally been questioned within the HRC. The majority of members, however, appear to take the view that a legal basis for such requests exist either in the obligation on States parties to comply fully with the basic reporting obligation under article 40(1)(a) or in the HRC's power to request a subsequent interim report whenever it chooses to do so (Art.40(1)(b)) on the basis that this implies a lesser

---

[17] For an example of one that did see the report of Cyprus, Doc.CCPR/C/1/Add.28,pp.18-22.

[18] See e.g. SR 764 pr.57 (State representative, Trinidad and Tobago). See also ch.6 below.

[19] Rule 70 provides that, "If a report of a State party to the Covenant, in the opinion of the Committee, does not contain sufficient information, the Committee may request that State to furnish additional information which is required, indicating by what date the said information should be submitted".

power to request additional information.[20] It is submitted that the majority view is correct on either basis. It should not sensibly be open to a State to submit an inadequate report and then refuse to supply any further information. On a number of occasions the HRC have made it clear that they did not consider that the consideration of a State's report was complete until it had received and considered further information.[21] In an important recent development the HRC reached a consensus that it had the power under article 40(1)(b) to request additional information from a State in response to particular events.[22]

No guidelines have been established for Supplementary reports. Their content has varied from State to State. They have contained information omitted from initial reports, additional information to bring matters up to date or thought by the State party to be relevant, and answers and replies to questions put by members of the HRC during the consideration of the initial report.[23]

As of 1 July 1988 the Committee has considered some 91 initial reports and supplementary reports most of which were prepared after publication of the general guidelines.[24] Although the Committee has noted that the guidelines have been followed by the majority of reporting States and proved useful both to those States and to the Committee it has indicated that it would review them in due time to see

---

[20] See e.g. the discussion in SR 630.

[21] E.g, Uruguay, El Salvador.

[22] See pr.3.8.1 below.

[23] For example the U.K. Supplementary Report, Doc.CCPR/C/1/Add.35 (1978).

[24] Figures calculated from the Annual reports of the HRC and information supplied by the UN Secretariat.

whether they could be improved.[25] It has not yet chosen to do so. This might suggest that the Committee is reasonably satisfied with the guidelines as they stand. It can be argued, however, that part of the need which the Committee members have felt to ask a large number of questions requesting further information, explanations and detailed clarifications, stem from the very generality in which the guidelines are framed.

There is no indication of the specific aspects of each article on which the HRC wishes to have information. The guidelines of the I.L.O. Committee of Experts and the Committee of Independent Experts under the European Social Charter are much more detailed and have produced fuller information.[26] Similarly, the Committee On The Elimination of Racial Discrimination has issued revised general guidelines on the form and content of State reports under article 9 ICERD which specify the information required in respect of each article of the ICERD.[27] Those revised guidelines have included some of the Recommendations of the CERD adopted under Article 9(2) ICERD. It could be argued that the very generality of the HRC's guidelines has been fruitful in that it has resulted in an extensive, substantial and informative dialogue between the HRC and the State Parties, through their State representatives. However, it is submitted that the HRC should revise and expand its general guidelines into more specific guidelines taking account of the General comments adopted by it under article 40(4) and its established repertoire of questions under

---

[25] See G.C.2/13; Doc.A/36/40 Ax.VII. Also issued in Doc.CCPR/C/21.

[26] See Landy, n.1 above, pp.15-16, 23-25; Valticos, n.1 above, prs.591-592; Harris, n.1 above, pp.201-202.

[27] See Doc.CERD/C/70/Rev.1,(6 Dec 1983); Doc.A/35/18. See Gomez Del Prado, n.1 above.

the article 40 reporting procedure.[28] More specific guidelines would make for a more efficient and productive consideration of future reports and allow more time for substantive comments by members rather than an extended series of questions and requests for further information. However, it must be recognised that the practical effect of new guidelines would not be very great as it is periodic reports which are now assumed more importance.

3. Periodic Reports.

3.5 In an important "Consensus Statement"[29] on its duties under article 40 of the Covenant the HRC reaffirmed its aim to be that of engaging in a "constructive dialogue" with States Parties on the basis of periodical reports submitted under article 40(1)(b) ICCPR.[30] The aim of the periodic reports is to complete the information required by the HRC and to bring to the HRC's attention any developments with respect to the implementation of the ICCPR since the consideration of the previous State report. At its thirteenth session (July 1981) the HRC adopted the following guidelines as regards the form and content of periodic reports under article 40(1)(b).[31] Again the reports were to be in two parts.

---

[28] Some members of the HRC have made similar suggestions, see SR 306 pr.30 (Tomuschat), SR 414 pr.20 (Hanga); Doc.A/41/40 pr.26.

[29] Statement On The Duties Of The Committee Under Article 40 Of the Covenant, Doc.A/36/40, Ax.IV. Also issued in Doc.CCPR/C/18. See generally prs.3.29-3.38 below.

[30] Ibid., pr.(d).

[31] "Guidelines Regarding The Form And contents Of Reports From States Parties Under Article 40, Paragraph 1 (b) Of The Covenant", Doc.CCPR/C/20 (Adopted by the

(Footnote Continued)

"Part I: General

This part should contain information concerning the general framework within which the civil and political rights recognized by the Covenant are protected in the reporting State.

Part II: Information in relation to each of the articles in Parts I, II and III of the Covenant.

This part should contain information in relation to each of the provisions of individual articles.

Under these two main headings the reports should concentrate especially on:

(a) the completion of the information before the Committee as to the measures adopted to give effect to rights recognized in the Covenant, taking account of the questions raised in the Committee on the examination of any previous report and including in particular additional information as to questions not previously answered or not fully answered;

(b) information taking into account general comments which the Committee may have made under Article 40, paragraph 4, of the Covenant;

(c) action taken as a result of experience gained in co-operation with the Committee;

(d) changes made or proposed to be made in the laws and practices relevant to the Covenant;

(e) factors affecting and difficulties experienced in the implementation of the Covenant;

(f) the progress made since the last report in the enjoyment of rights recognized in the Covenant.

It should be noted that the reporting obligation extends not only to the relevant norms laws and other norms, but also to the practices of the courts and administrative organs of the State Party and other relevant facts

---

(Footnote Continued)
HRC at its 308th meeting, thirteenth session, on 27 July 1981).

likely to show the degree of actual enjoyment of rights recognized in the Covenant.
The report should be accompanied by copies of the principle legislative and other texts referred to in it".

The Periodicity of Reports.

3.6 Having confirmed that the dialogue with States parties was to be conducted on the basis of the regular periodic reports to be submitted under article 40 (1)(b) the HRC then considered the question of the appropriate reporting period.[32] The Covenant is silent on the periodicity of reports other than the initial ones. The operative part of the HRC's periodicity decision, adopted at its thirteenth session (1981), provides that,

"In accordance with article 40, paragraph 1(b), the Human Rights Committee requests:

(a) State parties which have submitted their initial reports or additional information relating to their initial reports before the end of the thirteenth session to submit subsequent reports every five years from the consideration of their initial report or their additional information;
(b) Other States parties to submit subsequent reports to the Committee every five years from the date when their initial report was due.
This is without prejudice to the power of the Committee, under article 40, paragraph I(b), of the Covenant, to request a subsequent report whenever it deems appropriate".[33]

---

[32] For the HRC's discussion see SR 295, 296, 299, 303, 306 and 308. See also pr.(f) of the HRC's "Consensus Statement" on its Duties, pr.3.5 above.

[33] Decision On Periodicity, Doc.A/36/40, Ax.V.
(Footnote Continued)

The five year periodicity was established without prejudice to moving to a three or four year periodicity at a later stage as soon as this would appear feasible in terms of the HRC's workload.[34] It has not yet proved feasible and seems unlikely to do so. Bearing in mind the detailed consideration of reports by the HRC, the wide scope of the rights covered by the Covenant and the large number of international reporting obligations imposed on States parties it is submitted that five years is a sensible and practicable period and should not be reduced unless the various international reporting procedures are rationalized.[35]

The apparent simplicity of the periodicity decision belies the complexity of the issues involved. In the event members clearly acknowledged that the decision did not cover all aspects of a State's reporting obligations and that a number of issues awaited resolution.[36] One of those issues concerned the effect on periodicity, if any, of the submission by States of Supplementary reports. The HRC had recognised that it might have to take account of the submission and consideration of such reports in setting submission dates for periodic

---

(Footnote Continued)
Adopted by the HRC at its 303rd meeting, (22 July 1981). Also issued in Doc.CCPR/C/19.

[34] Doc.A/36/40 pr.388. On the periodicity under the ICESCR see Alston, ch.2, n.2 above, pp.361-362.

[35] See Alston, ch.2 n.38 above pp.332-333. Essentially States are complaining of too many and unduly onerous reporting obligations and questioning their effectiveness. The General Assembly has recognised the problem and called for meetings of the Chairpersons of the supervisory bodies entrusted with the consideration of reports submitted under United nations conventions on human rights, G.A.Resn.42/405. See Doc.A/40/600 (1985). The next meeting is scheduled for October 1988, see Doc.CCPR/C/54.

[36] See n.33 above. See also SR 312 pr.65, 318 pr.68.

reports. In its Consensus Statement it had indicated that, "As far as the States parties whose additional information or supplementary reports have already been considered by the Committee are concerned, these reports may be considered to be their second periodic reports".[37]

3.7 In practice there have been substantial difficulties and delays in obtaining the Supplementary reports promised by State parties. Members of the HRC perceived the source of these difficulties to be its own periodicity decision which had given States parties the impression that the HRC would not take any action subsequent to the consideration of the initial report for a period of five years.[38] The failure of States to submit reports meant that the "dialogue" between the HRC and States parties was breaking down for very long periods. In an effort to induce States to submit supplementary reports and continue their dialogue with the HRC the HRC adopted an amendment to its periodicity decision. The amendment provides that;

"3. In such cases where a State Party submits additional information within one year or such other period as the Committee may decide, following the examination of its initial report or of any subsequent periodic report and the additional information is examined at a meeting with representatives of the reporting State, the Committee will, if appropriate, defer the date for

---

[37] See pr.(f) of the "Consensus Statement", pr.3.5 above.

[38] See SR 349, 357 and 359.

> the submission of the State party's next periodic report".[39]

The amendment was a useful one in that it offered some encouragement to States parties to submit supplementary reports punctually while clearly retaining the discretion to defer the date of submission of the State party's next periodic report. The discretion has already been exercised in a number of cases, for example, that of Canada.[40] As for the future it appears from recent decisions noted below that the consideration of a supplementary report by the HRC is likely to be the exception rather than the rule. If so the amendment to the periodicity decision is likely to rarely be invoked. This is unfortunate in that it may again lead to States defaulting on the submission of supplementary reports.

3.8 A second matter left open in the original periodicity decision was the scope of the HRC's authority to "request" a report under article 40(1)(b) ICCPR. Does this provision authorize the Committee to request Ad Hoc reports or only regular periodic reports in accordance with the general application of its periodicity decision. This issue has been variously mooted by members in respect of the troubled and emergency situations prevailing in Iran, Uruguay, Chile and elsewhere. An excellent summary of the views expressed in the HRC appears in its Annual Report,

> "Members of the Committee exchanged views on what some of them called the general problem of derogation and notification under article 4 of the Covenant and its relation to the reporting system and the obligations of

---

[39] Doc.A/37/40, Ax.IV. Adopted by the HRC at its 380th meeting on 28 July 1982. Also issued in Doc.CCPR/C/19/Rev.1.

[40] See SR 569 prs.77-80.

both the States parties and the Committee under the Covenant, particularly article 40 (see CCPR/C/SR.334, 349 and 351). Reference was made to paragraph 3 of general comment 5/13 which, it was noted, implied that the procedures of notification and reporting were equally important but which did not explain how those two procedures should interact.

Maintaining that the Committee could not discharge its responsibilities under the Covenant if it did not consider major changes in a country's constitution or law, or suspension thereof, which had a bearing on the protection of human rights, and that States parties under article 40 (1)(b) had undertaken to submit reports whenever the Committee so requested, some members were of the opinion that whenever a notification under article 4 (3) of the Covenant had been made, it should be transmitted forthwith to the members of the Committee, that the Committee had the power to request a special report on how public emergency affected human rights; that the Committee should avail itself of all information available, at least in the United Nations system, in this regard; that such situation or report should be considered, if need be, at an extraordinary session of the Committee or by an intersessional working group, and that the procedure for requesting such reports must be formalised and be applied to all States parties without exception and should reflect a quick response to emergency situations and prevent possible cases of exces de pouvoir by States parties.

The position of some members who favoured the establishment of a procedure for requesting reports on emergency situations was contested on various grounds. It was pointed out by other members that article 4 of the Covenant specifically provided for the possibility of a State party's derogating from obligations under the Covenant in time of national emergency, that measures taken in such situations in accordance with article 4 could not be characterised as wrongful nor considered

violations of the Covenant because the effect of such a derogation is that certain obligations are temporarily suspended and that the proclamation of a state of emergency might well be the last resort to protect human rights and that was precisely what was envisaged in article 4. It was also maintained that there was nothing in article 4 to indicate or justify the assumption that States parties had conferred on the Committee any competence to determine whether a situation threatening the life of a nation existed; that information from a State derogating from the Covenant was to be transmitted to other States parties or the Committee for approval or that States parties had accepted any third party scrutiny in regard to whether derogations were limited to the extent strictly required by the exigencies of the situation. It was recalled that, under article 4, a State party availing itself of the right of derogation was required to inform not the Committee but the other States parties and that only a notification, and not a report, was required. The Committee's role under article 4 was described as being limited to ascertaining whether other States parties had been immediately informed, what rights were affected by the emergency measures and whether there had been derogations from the provisions mentioned in article 4 (2) and determining what were the reasons by which the State had been actuated and when the derogations had been terminated. Citing cases of public emergencies declared in several States parties, some of them dating back to the time when the Covenant came into force, and in connection with which no special report had been requested from any one of them, one member wondered what changes had occurred, prompting some members to urge the establishment of such a procedure now. He warned that if the proposal was adopted the Committee might lay itself open to criticism that it was biased and be faced with suspicion and reluctance to co-operate on the part of States parties.

Other members, while asserting that the motives of Committee members were beyond question, stressed that it was important that the Committee should be seen to be acting with impartiality. Referring to article 1 of the Covenant, one member stated that the situation with regard to self-determination in southern Africa was even graver than a state of emergency, since it represented the institutionalization of the negation of humanity by law. Although South Africa was not a party to the Covenant, it was the duty of the Committee to bring the situation in that country to the attention of States parties. The Committee might wish to try to understand those people who thought that sanctions were desirable where the victims were white but not where they were non-white and that it should be seen to act, not because it contained members from third world countries or because it wished to politicize matters or react selectively, but because its deliberations reflected the provisions of the Covenant. It was pointed out that, in considering situations under article 4 of the Covenant, the Committee, for the time being, could only consider that article in terms of its functions under article 40, that the role of the Committee, however, was not limited to taking note of reports which had been submitted because if that had been the case there would have been no need for its independence to be safeguarded by the Covenant; that if the Committee requested a report on the emergency situation it would merely receive some indication of the legal framework; that the Committee should do everything possible to make States aware of their obligations under the Covenant, perhaps by altering the rules for the submission of reports or by making general comments. It was also suggested that the Committee could consider emergency situations in terms of their relevance to the implementation by the reporting State of its obligations under the Covenant in the course of the Committee's exercise of its functions under article 40.

Members of the Committee agreed to defer for further consideration the question of derogations and notifications under article 4 of the Covenant and other questions raised during the discussion in relation to the reporting system and the obligations of States parties under article 40 (see CCPR/C/SR.379)".[41]

3.8.1 It is submitted that the majority opinion is the better one and certainly this approach would seem to be more in line with the general purpose of the ICCPR and especially the need to ensure non-derogation of the rights in article 4(2) in such emergency situations. Moreover, the Committee's decision on periodicity was expressly adopted without prejudice to the power of the Committee to "request a subsequent report whenever it deems it appropriate".[42] However, the objections of some members had prevented any further progress being made on the issue of Ad Hoc reports. No developments seemed likely on this matter and this seemed to illustrates again the limitations of consensus decision making.[43] However, in what may prove to be an imporatant precedent the HRC has recently acted under article 40(1)(b) in response to the assassination of the Chairman of the Human rights commission of El Salvador. Under article 40(1)(b) the HRC requested the Government of El Salvador, " to provide it with information on

---

[41] Doc.A/37/40 prs.340-344. See also SR 334, 349 and 351 on the general problem of derogation and notification under article 4 of the Covenant and the obligations of both the States parties and the HRC under article 40.

[42] See pr.3.6 above.

[43] See ch.2, pr.2.7 above.

measures it has taken relative to this case in its supplementary report due before the end of 1988".[44]

C. The submission of reports.[45]

3.9 Before proceeding to consider the nature of the examination to which State reports are subjected some attention must be directed to the matters of compliance with States parties with their reporting obligations both quantitatively and qualitatively. As noted, initial reports are due from States parties within one year of the entry into force of the ICCPR for that State.[46] Of the 86 initial reports due from 1977 to 1987, 11 were overdue as of 27 October 1987.[47] However, very few of them have been submitted on time.[48] The length of delayed submission has varied from a matter of months to several years. The worst case is that of Zaire whose report was submitted nine years late.[49] The excuses advanced by States have been various and diffuse including unforeseen preparatory difficulties, pending

---

[44] SR 767 pr.1.

[45] At each session the HRC is informed of and considers the status of the submission of reports. Details of the submission of reports in the period under review are given in each of the Annual Reports adopted by the HRC, see pr.3.40 below. See also Note By the Secretary-General, Reporting Obligations Of States Parties To The International Covenants On Human Rights And The International Convention On The Elimination Of Racial Discrimination, Doc.A/39/484 (1984); Report Of The Secretary- General Concerning The Obligations Of States Parties To The UN Conventions on Human Rights, Doc.A/40/600 and Add.1 (1985).

[46] Article 40 (1) (a).

[47] SR 760 pr.9. This includes three reports due in 1987. For reports due as of 13 November 1987 see HRC's 'Provisional Agenda And Annotations', (32nd session), Doc.CCPR/C/53 (20 Jan 1988). As of 1 July 1988 10 initial reports were overdue.

[48] See G.C.1/13, Doc.A/36/40 pp.107-108.

[49] Doc.CCPR/C/4/Add.10 (1987). Due in 1978.

constitutional or governmental reforms, co-ordination between the various domestic ministries, consultations required under federal systems, status as a developing country, and concurrent obligations to other international forums. These may well be valid reasons in some cases and the Committee must respond flexibility if convinced that the difficulties are genuine rather than evidence of bad faith.[50] More reprehensible is the failure of Belgium to submit its initial report due in 1983 (as of 13 November 1987).[51] There is no doubt that the reporting obligation under the ICCPR is a demanding one. In its first series of general comments under article 40(4) the HRC drew the immediate attention of States in the process of ratifying the ICCPR to their reporting obligations and stressed that, "The proper presentation of a report which covers so many civil and political rights necessarily does require time".[52]

Although the record on the ultimate submission of reports is perhaps surprisingly good the persistent delays in submission has represented a continuing problem to the HRC. In practice a fairly uniform set of procedures have emerged in dealing with defaulting States. The first steps are for the HRC to send a series of reminders to the State concerned couched in increasingly firmer language.[53] If these reminders seem to produce no effect the HRC has attempted to establish direct personal contacts with the State concerned. These

---

[50] See Doc.A/42/40 pr.39.

[51] See Doc.A/42/40, Ax.IV, p.118. The report was finally submitted in December 1987 and issued in March 1988, Doc.CCPR/C/31/Add.3.

[52] G.C.1/13, Doc.A/36/40 pp.107-108.

[53] As of November 1987 Saint Vincent and the Grenadines had been sent eight reminders concerning its initial report. Since July 1985 at the request of the HRC the Secretariat has sent automatic reminders of overdue reports at the end of each spring and autumn session, see SR 704 pr.4 (Secretary to HRC).

have taken the form of personal approaches from either the Chairman of the HRC, a member of the HRC from the same geographical region as the State concerned, or the Director of the United Nations Centre For Human Rights (formerly the Human Rights Division).[54] The approaches are usually made to the Mission concerned in Geneva or New York, accompanied by an extremely firmly worded aide-memoire.

On a number of occasions representatives from the permanent missions have been invited to an informal discussion with the HRC or the Bureau of the HRC concerning its reporting obligations.[55] The most advanced form of direct contact established by the HRC was for a personal visit by a member of the HRC, Mr. Ndiaye, to Guinea with the consent of the State party to discuss its reporting obligations and the work of the HRC.[56] The visit was apparently a success and the report of Guinea was submitted shortly thereafter, some years late. Unfortunately, however, no representative from Guinea appeared before the HRC when its report was being considered.[57]

If the above steps do not succeed three further sanctions have been developed. Firstly, the two ultimate sanctions to which the HRC has had to resort have been the sending of a letter to the meeting of the States Parties to the ICCPR informing the meeting of the non-compliance with their reporting obligations of the States concerned.[58] Secondly, expressly citing those

---

54 See Docs.A/41/40 pr.38; A/42/40 prs.41,49.

55 See Doc.A/41/40 pr.38.

56 See e.g. Doc.A/41/40 pr.38.

57 See Docs.A/41/40 pr.38; A/42/40 prs.41, 49.

58 See Doc.A/35/40, Ax.IV. See SR 237.

States which have failed to submit reports in its Annual Report to the General Assembly under Article 45 ICCPR.[59] Thirdly, a Special "Chairman's letter" is sent, on behalf of the HRC, directly to the Minister For Foreign Affairs of the States concerned.[60]

As regards supplementary reports we have already noted that there have been substantial difficulties and delays in the submission of these.[61] As noted, these problems eventually resulted in an amendment to the HRC's decision on periodicity.[62] That decision as regards the consideration of Supplementary reports does not appear to have been very succersful.[63]

3.10 The record of submission of second periodic reports from State parties has also been disappointing. Approximately 30% of the reports due had been submitted. Twenty eight periodic reports due in the period 1983 to June 1987 had not been submitted and a number of them were due from States parties whose third periodic reports were due in 1988.[64] As of 1 July 1988 32 second periodic reports and 4 third periodic were overdue.64A.

---

[59] This step was first taken by the HRC in its 1980 report, Doc.A/35/40, pr.36. The procedure was dropped for a number of years and then resumed, see SR 617 pr.4-15; Doc.A/40/40 pr.43. The HRC's reports now give full details of the submission of reports, see e.g. A/42/40 Ax.IV (1987).

[60] See Doc.A/42/40, prs.41, 45 and Ax.VII,A. The letter was sent to nine States. See also the comments at SR 733 prs.6-7; 772 pr.1 which suggest that the letter did produce some response from States.

[61] See pr.3.7 above.

[62] Ibid.

[63] Doc.A/42/40, pr.38 and Ax.IV.

[64] See Doc.A/42/40 Ax.IV, pp.119-122. See the special 'Chairman's letter' in Doc.42/40, Ax.VII,B. the letter was sent to five States.

64A. Information supplied by the UN Secretariat.

The responses of the HRC have mirrored its approach to the submission of initial and periodic reports.[65] However, the HRC has also given some consideration to the question of technical assistance to States parties.[66] It was decided to make an informal request to the Secretary-General of the United Nations as to how technical assistance could be provided to States parties which requested it, for example, with regard to the preparation of their national reports.[67] A number of initiatives have been taken in this context, for example, training schemes on the preparation and submission of reports by States parties to the various international human rights Conventions, and others are actively being developed.[68] Similarly, the meetings of the Chairman of the international human rights bodies may result in some moves towards the rationalization of and co-ordination between States' reporting obligations.[69]

In its considerations the HRC has expressed continuing concern over the matter of the delayed submission of reports. That concern and the flexible approaches developed by the HRC have served to clearly indicate to State Parties the seriousness which the HRC attaches to the reporting obligation in the Covenant.

---

[65] See Doc.A/42/40 Ax.IV, pp.119-122. See the special 'Chairman's letter' in Doc.42/40, Ax.VII,B. the letter was sent to five States.

[66] See Docs.A/38/40 prs.42-43; A/39/40 pr.38; A/40/40 pr.17; A/41/40 pr.15; A/42/40 prs.16-17, 18-19.

[67] For steps taken by the ILO see Landy, n.1 above, pp.153-154.

[68] To assist States parties the HRC now send "model" initial reports by other States parties, its "General Guidelines" and copies of relevant summary records, SR 733 prs.29, 35.

[69] See n.26 above.

In perspective, however, the record of submission is reasonably good and stands comparison with the records of submission under I.L.O. Conventions[70] the European Social Charter,[71] and under the International Covenant on Economic, Social and Cultural Rights.[72]

Among the State reports which have been seriously delayed have been those of Iran and Libya[73] Saint Vincent and the Grenadines, Bolivia, and Vietnam[74] Guinea, [75] Zaire[76] and Belgium.[77] However, it must be recognised that at no stage has the HRC been without reports to consider and, indeed, some reports have not been considered until some considerable time after submission.[78]

---

[70] See Valticos, n.1 above pr.618.

[71] See Harris, n.1 above, pp.200-214.

[72] See Alston, n.1 above; Anon, 27 ICJ Rev. p.26 at p.34.

[73] Second periodic report due in 1983, not yet submitted.

[74] Initial reports due 1983, not yet submitted.

[75] Initial report due 1979, submitted 1980. However, the HRC decided to request the Government of Guinea to submit a new initial report because the report submitted did not comply with the HRC's "Guidelines". The new report, due in 1985, was submitted in 1987 and was scheduled for consideration as an initial report in March 1988.

[76] Initial report due 1978, submitted 1987.

[77] Initial report due 1984. Not submitted as of November 1987.

[78] For example the reports of Iceland and Austria were submitted to the HRC in March and April 1981 respectively but were not considered by the HRC until October 1982 and March 1983 respectively.

3.11 Even more serious has been the deficient quality of a number of reports.[79] The reporting obligation under the Covenant is a very extensive and demanding one. Preparation of an adequate report clearly demands time and expertise.[80] The HRC's inquiry as to assistance to State Parties in respect of their reporting obligations has resulted in some useful developments.[81] Moreover, on many occasions the initial consideration of a report by the HRC has indicated to the State representatives the breadth of information required by the HRC and has produced substantial additional information from the State representative and in the Supplementary report of the State Party. Similarly as the HRC adopt more and more General Comments these will provide further assistance to State Parties. It has also been submitted that could much improve its "General Guidelines" on the form and content of initial periodic reports. It must be acknowledged, however, that in the light of the slow pace of new accessions to the Covenant it is the periodic reports which are going to assume paramount importance rather than initial reports.

To date the HRC has tended to attempt to exhaust all possible use of reminders, aide-memoires and personal contacts, even if the processes have taken years, and it has been rather reluctant to publicize defaulting States. Such an approach may have been apposite as the HRC gained experience in the consideration of reports and developed its procedures for their consideration. In the final analysis, however, the HRC must have properly compiled reports and additional information if it is to perform its functions

---

79 See e.g. the initial report of Zambia, Doc.CCPR/C/36/Add.1 (1987) (8pp).

80 See G.C.1/13, Doc.A/36/40 pp.107-108.

81 See also SR 758 (Mortenson).

of consideration and study under article 40. If States parties do not comply with their reporting obligations by submitting adequate and timely national reports, then the HRC must give effective publicity to the breaches by the States concerned of their international legal obligations under the ICCPR. More trenchant and public criticism by the HRC as a body rather than just from individual members would clearly convey to States parties the seriousness which the HRC attaches to the reporting obligations under the ICCPR. The Conference of States Parties, ECOSOC and the Third Committee of the General Assembly are all bodies in which the HRC's criticisms should be considered and direct political pressure brought on States Parties to comply fully with their reporting obligations.[82]

---

[82] See SR 760 for the HRC's latest discussions. The HRC have accepted the need to deal with problems on a case by case basis, SR 760 pr.61 (Chairman).

C. Sources of Information.[83]

3.12 One aspect which necessarily plays some part in determining the very nature of the Committee's examination of States reports is the source and nature of the information that comes before it. The national reports submitted by the States parties inevitably present the official version of the situation regarding the implementation of the rights in the ICCPR. Despite the provision in article 40(2) requiring States "to indicate the factors and difficulties if any, affecting the implementation of the Covenant", one could hardly

---

[83] See Fischer, n.1 above,pp.146-147; Y.K.Tyagi, Co-Operation Between The HRC And Non-Governmental Organizations, 18 Tex.ILJ (1983) pp.273-290. There are many sources the HRC could consult. See Amnesty International Reports on individual countries and its Annual Report (latest Report 1987); The annual "Freedom House Comparative Survey - Freedom In The World: Political And Civil Liberties", edited by G.Gill; The Annual Reports Of The United States Department To Congress On Human Rights, 'Country Reports On Human Rights' (latest Report 1988); World Human Rights Guide (revised and updated, 1986 and 1987) compiled by Charles Humana; J.Carey, U.N. Protection Of Civil And Political Rights, ch.XI (1970). There have been calls within the United Nations for "An Annual Worldwide Report On The Progress Made In The Implementation Of Human Rights In Each And Every Country", (Ecuador, 39th session General Assembly,1984). For some of the problems involved in obtaining and assessing human rights information see J.I.Dominguez, Assessing Human Rights Conditions, in J.I.Dominguez and others (eds.), Enhancing Global Human Rights,(1979),pp.21-116; N.S.Rodley, Monitoring Human Rights Violations In The 1980's, Ibid, pp.117-151; J.Salzberg, Monitoring Human Rights Violations - How Good Is The Information?, in P.G.Brown and D.Maclean (eds), Human Rights In U.S. Foreign Policy (1979) pp.173-182; Symposium, Statistical Issues In The Field Of Human Rights, 8 HRQ (1986) pp.551-699. See also the U.N. Legal Opinion on "The use of information by the CERD from sources other than States parties to the

(Footnote Continued)

expect States to do anything less than present their information in a subjective and most favourable light.[84]

The question of the availability or otherwise of other sources of information outside the State reports and the ability of the Committee to verify and complete the information transmitted to it thus assumes major proportions in any assessment of the effectiveness of its role as an implementation organ.[85]

3.13 The natural and obvious source of some potentially valuable information might well be thought to be the specialized agencies to which, in accordance with article 40(3) of the ICCPR, the Secretary-General may, after consultation with the Committee, transmit such parts of the State reports as may fall within their fields of competence.[86] In fact the character of the

---

(Footnote Continued)
ICERD, and the conditions under which co-operation could be established between the CERD and ILO and UNESCO bodies dealing with discrimination", 1972 U.N. Juridical Yearbook, pp.163-167. The opinion concluded, inter alia, that, "especially in respect of article 9 (the reporting procedure) it is not clear that CERD is precluded from using extraneous information for ancillary purposes, i.e., in evaluating the completeness of the reports submitted to it and in formulating requests for supplementary data, and the early practice of the Committee indicates that it does indeed rely on such information. Thus there would not seem to be any legal bar to the utilization, within the indicated limits, of information obtained from ILO or UNESCO", pr.8.

84 See Jhabvala, n.1 above, p.102.

85 See Capatorti, n.1 above, p.137.

86 In the Third Committee of the General Assembly it was understood that the Secretary-General would not transmit the report of a State that was not a member of the Specialized Agency concerned, Doc.A/6546, ch.1, n.1 above, pr.385. See also article 46 ICCPR, Ax I below. There were some difficulties in determining which articles actually fell within the fields of competence of the Specialized Agencies. The HRC agreed to draw the attention of the UNESCO to the relevant parts of States' parties reports concerning articles 18, 19 and 27. The
(Footnote Continued)

relationship between the Committee and the specialized agencies has proved to be both complex and elliptical and a brief look at the evolution of that relationship is useful.

The specialized agencies upon which most attention has been concentrated are the International Labour Organisation (I.L.O.) and the United Nations Educational, Scientific and Cultural Organization (UNESCO) both of which have repeatedly expressed the desire to establish strong and fruitful co-operation with the Committee.[87] The general approach of the Committee was to avoid taking any decision in haste but rather waiting until it had acquired the practical experience to enable it to give the question of co-operation fuller and more mature consideration.

The necessity for co-operation at both the procedural and normative levels was appreciated by the Committee on a number of counts. Among these were the need to avoid conflicting standards and definitions of rights common to other international instruments, the advantages of considering those studies already completed in order to avoid conflicting decisions at the

---

(Footnote Continued)
UNESCO Board intimated that it further wished to study articles 6, 7, 8, 13, 22, 23 and 24. UNESCO also submitted a document to the Committee detailing its contribution to the implementation of the ICCPR (108/EX/CR/SS.1). There was no similar difficulty with the ILO which indicated that the articles of interest to it were articles 8(3) and 22. See the comparative analysis of the International Covenants on Human Rights and International Labour Conventions And Recommendations, 52(2) ILO Bulletin (1969) pp.188. The ICESCR contains much more specific provisions on the role of Specialized Agencies in the implementation of that Covenant, see P.Alston, The U.N. Specialized Agencies And The Implementation Of The ICESCR, 18 Col.J.Trans.L. (1979) pp.79-118; P.Alston, ch.2, n.38 above, pp.362-374.

[87] See SR 180, 181 and Docs.CCPR/C/L.3 And Add.1-3, in Yb.HRC (1977-78) vol.II, pp.11-14.

international level and any obligations incumbent on States parties to both the ICCPR and to I.L.O. and UNESCO Conventions, the petitions procedures for violations of human rights under the Optional Protocol and those established by UNESCO. Further advantages of co-operation pointed to by members of the Committee were that the information and decisions which the specialized agencies could supply would facilitate a useful intermediate stage in the procedure since they would enable members to put more pertinent and meaningful questions to the State representatives concerning their obligations under the ICCPR.

3.14 Quite clearly then the Committee recognized the value of co-operation and evinced a strong desire to establish close and effective co-operation. To formalize that recognition however proved a difficult task. The first problem concerned the determination of "such parts of the reports as may fall within their fields of competence". Some members considered that to transmit the whole of States reports would be ultra vires article 40(3). Such an interpretation raised practical difficulties since references to articles were often scattered throughout and could only be understood in the context of the rest of a national report. In practice the whole of reports are sent with an accompanying note to indicate those parts considered to fall within their field of competence.

More difficult and substantive problems for the Committee concerned the question of any more positive role which article 40(3) might be thought to accord to the specialized agencies on their receipt of the parts of the national reports referred to them by the Committee and the legal value to be placed on any material supplied by the specialized agencies. At its simplest the fundamental question before the Committee was whether the role envisaged for the specialized agencies included the submission of comments on the reports transmitted to them under article 40(3). In

adopting its procedural Rules in 1977 the Committee had included a provision that,

> "The Committee may invite the specialized agencies to which the Secretary-General has transmitted parts of the reports to submit comments on those parts within such time limits as it may specify".[88]

A minority of the members indicated that they would find such comments valuable in the consideration of States reports but the majority of the members were clearly against such a role and suggested that on further reflection they considered rule 67(2) to be ultra vires the Covenant. Among the most influential arguments was that to give the specialized agencies power to make specific comments and judgements would be to usurp and surpass the Committee's own role in commenting on possible violations of human rights and effectively place the specialized agencies in a position to claim that a State party was not fulfilling its obligations under the Covenant something for which article 41 of the ICCPR had laid down a special procedure. It was argued that such an approach was undesirable not only because it would enable States parties to the specialized agencies but not to the ICCPR to comment on the performance of the States who were, but also that it was likely to dissuade States from acceding to the ICCPR and co-operating with the Committee if they conceived of article 40 as a procedure of inquiry whereby they might effectively be accused of transgressions by an agency not privy to the "intimate dialogue" to which States believed they were committing themselves. It was further suggested that the authors of the Covenant were unaware that the Committee's documents would be

---

[88] R.67(2).

documents of general distribution and thus the purport of article 40(3) as drafted was rather for the Committee to help the specialized agencies than vice-versa.

3.15 The provisional decision taken by the Committee was to the effect that,

> "The specialized agencies could not submit comments, it being understood that the Committee could revert to the matter at a later stage and in the light of the experience it had gained seek ways to further strengthen its co-operation with the specialized agencies".[89]

As to the nature of the information to be received it was agreed that information, mainly on the specialized agencies interpretation of, and practice in relation to, the corresponding provisions of their instruments should be made available to members of the Committee on a regular basis, and that information of any other kind may be made available to them on request during meetings of the Committee which were attended by representatives of the specialized agencies concerned. This decision was adopted on the understanding that members were free to use the information in any manner they deemed fit.[90]

3.16 In practice only one Specialized Agency, the I.L.O. has responded to the HRC's desire for information. All members of the HRC receive the notes supplied by the I.L.O.[91] Although the I.L.O. has consistently supplied

---

[89] See e.g., SR 99 prs.39-46; Doc. A/35/40 pr.605.

[90] See SR 181; Doc.A/35/40 prs.410-414. The practice of the CERD is similar, see Gomez Del Prado, n.1 above, pp.498-500; Yb.HRC (1977-78) vol.II p.12; Lerner, n.1 above, pp.118-120.

[91] Although apparently not all HRC members were aware of it. See also the discussion in SR 180.

information to the HRC, its I.L.O. representatives are rarely present at HRC meetings.[92] The reluctance of other Specialized Agencies to supply the HRC with information is perhaps a result of the rather negative approach of the HRC to the question of co-operation with the Specialized Agencies. The impression given is that the HRC will allow the Specialized Agencies an almost negligible role in the implementation of the ICCPR. Symptomatic of this negative attitude of the HRC was the reaction of certain members to the inclusion in the HRC's Annual Report in 1984 of a section entitled, "Co-operation with the Specialized Agencies".[93] The section would have stated that the HRC "Took note with appreciation the information"[94] supplied by the I.L.O. Objection with taken to this section by Mr. Movchan and Mr. Graefrath on the grounds that the matter had not been formally included on the HRC's agenda at any of the sessions concerned, the HRC had not devised a formula for its relations with specialized agencies and that although its previous decisions had indicated that the HRC might request information from specialized agencies it had never in fact done so.[95] The eventual result was that the section in question was deleted from the Annual Report on the understanding that it would be taken up again at some future date.[96]

---

[92] It would be helpful if the HRC's Annual Report indicated which Specialized Agencies and non-governmental organizations had attended sessions of the HRC. Such information was included in the first report of the CESRC, ch.2, n.38 above.

[93] See the discussion at SR 542 prs.27-42.

[94] This is the formula used by CERD.

[95] See SR 542 pr.36 (Movchan) and prs.27, 38 (Graefrath).

[96] The matter does not appear to have been dealt with since.

This attitude of the HRC, dictated by the opposition of the two members, is most unfortunate. The breadth and quality of the work done by the major specialized agencies could be of significant assistance to the HRC, bearing in mind its wide approach to some of the rights in the ICCPR.[97] However, it should not be overestimated.[98] It is submitted that the HRC could at least take a much more positive attitude to the role of the specialized agencies even if it maintains the view that they cannot submit comments to the HRC on the reports of the States Parties. The HRC has certainly now acquired the experience and maturity on the basis of which it could seek to further develop and strengthen its co-operation with the specialized agencies.[99]

3.17 Apart from article 40 (3) ICCPR dealing with specialized agencies there is no other provision in the ICCPR dealing with the question of sources of information open to members of the HRC. In particular there is no provision according to non-governmental organizations (NGO's) any role or function in the implementation procedures.[100] A minority of members, notably Mr. Graefrath and Mr. Movchan, have argued that the absence of any further provision means that the HRC is not entitled to base its consideration of reports on anything other than the official report of the State

---

[97] See e.g. the HRC's approach to article 6 ICCPR in ch.8 below.

[98] On article 6 ICCPR see ch.8 below. The obvious limitations on the jurisprudence of specialized agencies are that the precise terms of the relevant Conventions may be different and the reporting systems may be operating on different timetables.

[99] In the General Assembly some representatives have expressed the hope that the exchange of information and experience would be extended under article 40.

[100] See Tyagi, n.83 above.

party or other United Nations documentation.[101] The majority of members of the HRC, however, have rejected this view and accepted that the ICCPR places no restriction on the sources of information that the Committee is entitled to use.[102] Many of the questions and comments of members, including Mr. Graefrath and Mr. Movchan[103] are clearly based on outside information.[104] The general, though not invariable, practice of members though has been to not refer directly to the source of their information. So members often simply say that, "I understand", "I have reason to believe", "It had been

---

[101] See e.g., SR 65 pr.30 and SR 345 pr.36 (Graefrath), SR 366 pr.30 and SR 473 prs.45-46 (Movchan). Note the comment of Alston, ch.2, n.38 above, "UN documentation is, at best, reticent about and, at worst, thoroughly averse to, reflecting information on the situation concerning civil and political rights", p.374, n.215.

[102] See e.g. the comments in notes.103-104 below.

[103] See e.g., SR 128 pr.40 (Tomuschat), SR 346 pr.10 (Tarnopolsky) and pr.39 (Ermacora); SR 321 pr.33 (Opsahl); SR 368 pr.44 (Tarnopolsky); SR 483 pr.40 (Dimitrijevic). SR 594 prs.9-10 (Movchan), SR 595 pr.39 (Movchan), SR 598 prs.29-32 (Movchan).

(Footnote Continued)

---

[104] See e.g., SR 128 pr.40 (Tomuschat), SR 346 pr.10 (Tarnopolsky) and pr.39 (Ermacora); SR 321 pr.33 (Opsahl); SR 368 pr.44 (Tarnopolsky); SR 483 pr.40 (Dimitrijevic). SR 594 prs.9-10 (Movchan), SR 595 pr.39 (Movchan), SR 598 prs.29-32 (Movchan). Mr.Movchan and Mr.Graefrath have suggested that a "gentleman's agreement" had been reached within the HRC that the Secretariat should not distribute in-sessional documents emanating from NGO's and that members should in no case refer to documents issued by a NGO or mention the name on a NGO during the exchange with delegations or in their presence. Mr.Movchan complained that some members were violating this agreement and thereby damaging the HRC's prestige by not agreeing to the "Rules of Play", SR 572 pr.11. Mr.Tomuschat replied that he wished to "State specifically that, the Committee had no clearly defined rules that members had undertaken not to mention their sources. It seemed to him that there had never really been an agreement along those lines and that, consequently, there could be no question of violating established rules. He also considered that all members of the Committee had always been duly discreet in that regard", Ibid., pr.13.

reported",[105] "He had information",[106] or referred only to "Other sources"[107] or "Reliable sources".[108] This general practice makes it difficult to determine the sources and the extent of the use made of outside information. However, those occasions when members have indicated their sources reveal the following examples:

1. Information derived from the HRCion Resolution 1503 procedure;[109]
2. The Reports of the Ad Hoc Working Group and the Special Rapporteur on Chile;[110]
3. The reports of the Special Rapporteurs of the HRCion on El Salvador,[111], Afghanistan,[112].
4. The Reports of the HRCion Working Group On Enforced and Involuntary Disappearances;[113]
5. The Reports of the IACM;[114]

---

[105] E.g., SR 128 pr.21 (Tomuschat on Chile).

[106] E.g., SR 421 pr.50 (Aguilar on El Salvador).

[107] E.g., SR 271 pr.7 (Opsahl on Kenya), SR 469 pr.23 (Errara on El Salvador).

[108] E.g., SR 365 pr.17 (Dieye on Iran), SR 469 pr.18 (Tomuschat on El Salvador).

[109] E.g., SR 475 pr.15 (Opsahl on Guinea).

[110] Doc.E/CN.4/1310; E/CN.4/1984/7; A/38/385 and Add.1.

[111] E/CN.4/1983/20. It is interesting to note that the representative of El Salvador also relied on the official report to substantiate some of his replies to the HRC, SR 468 pr.46.

[112] Doc.E/CN.4/1985/21. The report is reproduced in 6 HRLJ (1985) pp.29-76.

[113] E.g., SR 421 pr.16 (Ermacora on Nicaragua).

[114] E.G., 421 pr.40 (Aguilar on Nicaragua).

6. The I.L.O.;[115]
7. The International Commission of The Red Cross and National Red Cross Commissions;[116]
8. Cases decided in the EUCT;[117]
9. The national reports submitted to the CERD and the Committee on the Elimination of Discrimination Against Women;[118]
10. The considerations of the CERD;[119]
11. National Human rights institutions;[120]
12. Parliamentary debates and Parliamentary Committee reports;[121]
13. The Bar Association of New York;[122] the Lima Lawyers Association;[123]

---

[115] E.g., SR 281 pr.37 (Tarnopolsky on Tanzania), SR 522 prs.5-8 (Opsahl on Panama).

[116] E.g., SR 422 pr.28 (Prado-Vallejo on El Salvador).

[117] E.g., SR 258 prs.76-77 (Opsahl on Italy referring to the Guzzardi Case); SR 403 pr.48 (Tomuschat referring to the Sunday Times Case, though as a standard rather than a source of information); SR 321 pr.24 (Movchan on the Netherlands).

[118] E.g., SR 522 prs.19-21 (Cote-Harper on Panama). At its own request the HRC is now provided with reports submitted under the ICESCR, the ICERD and the CEDAW, Doc.A/41/40 pr.13.

[119] SR 321 pr.26 (Movchan on the Netherlands).

[120] E.g., SR 421 pr.26 (Tarnopolsky on Nicaragua), SR 403 pr.24 (Graefrath on Australia).

[121] E.g., SR 412 prs.13-14 (Graefrath on Australia), SR 430 pr.37 (Prado-Vallejo on Peru).

[122] See SR 469 pr.3 (Opsahl on El Salvador).

[123] See SR 430 pr.44 (Prado-Vallejo on Peru).

14. Non-Governmental Organizations,[124] like Amnesty International,[125] the International Commission of Jurists[126] and the International League for Human Rights;[127]
15. Church Organisations;[128]
16. The Press,[129] the British Press,[130] and the European Press;[131]

---

[124] NGO's known to have supplied information to the HRC include the Minority Rights Group (London), the Americas Watch Group (on El Salvador), the Bahai International Association (on Iran), and the International League for Human Rights (on various States).

[125] E.g., SR 282 pr.36 (Tarnopolsky on Tanzania), SR 468 pr.32 (Prado-Vallejo on El Salvador), SR 717 pr.1 (Zielinski on El Salvador). Note that Zielinski is Polish.

[126] E.g., SR 321 pr.11 (referred to by the State representative from the Netherlands).

[127] E.g., SR 436 pr.10 (referred to by Tarnopolsky).

[128] E.g., SR 430 pr.37 (Prado-Vallejo on Peru), SR 522 pr.10 (Opsahl on Panama), SR 421 pr.51 (Errara on Nicaragua).

[129] E.g., SR 364 pr.36 (Sadi on Iran), SR 442 pr.19 (Al Douri on Lebanon).

[130] E.g., SR 248 pr.21 (Vincent-Evans on Mali).

[131] E.g., SR 547 pr.40 (Cote-Harper on Chile).

17. Information derived from the consideration of cases under the O.P.[132]

3.18 It is submitted that in the light of the fact that the HRC has no independent fact-finding machinery under the ICCPR and that National Reports under Article 40 will almost always be self-serving it is completely unrealistic for any members of the HRC to suggest that members should limit themselves to the State report and other official U.N. information. Many State reports have been abstract, legalistic, insubstantial and have totally ignored the existence of human rights problems and difficulties. Official U.N. documents are not sufficient to present a comprehensive perspective on the human rights situations in all the States Parties. Therefore, recourse to a whole range of outside information is both inevitable and essential. Indeed, the broader the range of material consulted the more likely that a reliable picture of the prevailing human rights situation will be obtained.[133] The general practice of refraining from direct reference to the source of material should be maintained and should be sufficient to avoid the reporting procedure being perceived as a adversarial trial for the State concerned, an image which the HRC has been at pains to avoid. On occasions State representatives have asked for the source of or access to the information used by HRC members. Such requests should be complied with so long as to do so would not endanger the sources. Among the national and international bodies who should engage in

---

[132] See e.g, SR 373 pr.12 (Vincent-Evans on Uruguay); SR 735 pr.6 (Movchan on Zaire).

[133] As Mr.Errera commented during consideration of the report of El Salvador, "The coincidence and precision of the information received from a variety of sources could not but raise questions", SR 469 pr.23.

the important task of supplying the HRC members with information are, for example, trade unions, civil rights bodies, human rights commissions, parliamentary associations, pressure groups and NGO's.[134]

D. The Process Of Consideration: Initial and Supplementary (or Additional) Reports.

3.19 The general rule is that the National Reports submitted by State Parties are considered in chronological order as they are received. Exceptionally, however, the HRC may accord priority to a report because of the critical human rights situation in the State concerned.[135] In scheduling the consideration of reports the HRC attempts to maintain a geographical balance between the reports considered at each session although this has no always proved possible. Experience has shown that the HRC had found it difficult to consider more than four initial reports per session, each report taking two or three days to consider. The consideration of Supplementary reports usually takes a shorter period. The consideration of periodic reports has generally taken as long, if not longer, than the consideration of initial reports but the HRC hopes to reduce this time by further rationalization of the procedure for the consideration of such reports.

After an exchange of views within the HRC the following provisional practice was adopted in respect of the examination of initial reports.[136] In accordance

---

[134] See Tyagi n.83 above.

[135] For example, the report of El Salvador was accorded priority on this basis, SR 462 Add.1 prs.1-24. Similarly, the second periodic report of Ecuador was not considered at the HRC's twenty ninth session because of the recent earthquake in that country.

[136] For the exchange of views see Doc.A/32/44 prs.104-111; SR.25. The practice has been maintained to date.

with Rule 68 of the HRC's Rules of Procedure the HRC invites the State concerned to have a representative attend the meetings at which its report is to be discussed and make an oral introduction to that report.[137] Many States have made full use of this opportunity to deliver a comprehensive oral supplement to the written report setting that report in its relevant socio-economic context and adding significant new information in the light of political or legal changes.[138]

The First Round.

3.20 In what became known the "first round" of the consideration of the report members of the HRC are accorded the opportunity of addressing comments and putting questions to the State representatives. It became customary that the first speaker to be a member from the same geographical region as the State Party concerned. Similarly, it is customary practice that members do not address questions and comments to the representatives of the State of which they are a national.[139] This is a sensible approach because it avoids a member being put in the position of criticising the State of which he is a national. There is no reason, however, for the HRC to be deprived of the particular members familiarity with the human rights problems of the State concerned. There is no difficulty in the members concerned informally making other members aware

---

[137] This practice copied that of the CERD where it had been introduced in 1972 after the General Assembly had suggested that it would facilitate the Committee's work, see Lerner, n.1 above, p.105. A similar practice has been adopted by the new CESCR.

[138] See e.g., SR 108 prs.2-26, SR 564 prs.1-5 (USSR).

[139] Cf. The practice of the HRC under the Optional Protocol to the ICCPR, see ch.4 pr.4.10, n.124 below.

of the human rights problems and difficulties on which, in his or her opinion, attention can best be focused.

The State representatives are allowed the time necessary to prepare replies to the matters raised and they may then give comprehensive oral replies or refer such questions as they choose back to their respective Governments along with requests from HRC members for additional information. The additional information is supplied in Supplementary Reports.[140] After the State representative has replied members of the HRC occasionally address them again to draw attention to important questions and comments which have received unsatisfactory or incomplete replies. Finally, the State representative is often asked to indicate when the HRC will receive the Supplementary report from the State party. The whole process normally lasts between two and three full days. There is no formal determination by the HRC of whether a report is satisfactory or not or whether the replies of State representatives have been adequate.[141]

The Second Round.

3.21 The consideration of the Supplementary report follows the practice of the so-called "second round".[142] The questions and comments tend to be more specific and detailed and they are presented together according to

---

[140] See pr.3.4 above.

[141] On the former practice of the CERD in this respect see Gomez Del Prado, n.1 above, p.507. Exceptionally, however, the HRC have stated that they would not consider that they had not finished consideration of a State's initial report until it had submitted further information, e.g. El Salvador.

[142] For the discussion which preceded the adoption of this practice see SR 117 prs.60-70. For the first example of the "second round" in operation see the HRC's consideration of the report of Ecuador (Doc.CCPR/C/1/Add.8 and 29) at SR 118, in 1978.

the particular parts of provisions of the Covenant. The questions are again directed to the State representatives to be answered ad hoc, if possible, as they are put. The "dialogue" nature of the examination is much more in evidence during this second round.[143] In the early years of HRC practice a critical problem arose which threatened to destroy the atmosphere of co-operation and consensus within the Committee. This concerned the function of the "second round" examination.[144] Committee members were agreed that the general purport was to deepen and strengthen the "dialogue" initially established but the tendency of certain members to put questions in the manner of a cross examination led to a withdrawal of Eastern European members from active participation in the "second round" examination for a period of time.[145] The different conceptions of the "second round" relate closely to the general and more important question of the very extent of the Committee's jurisdictional power under the ICCPR which will be discussed below.[146] It is sufficient to note at this point that after extensive discussion, the Committee adopted the . "Consensus Statement" on its future work on State reports and since the twelfth session all members have contributed to the second round process.

---

143 Fischer, n.1 above, comments that, "This procedure is far from cross-examination, but it does result in a public record that exposes more clearly a country's efforts to evade or ignore uncomfortable issues", p.170.

144 See Jhabvala, n.1 above, pp.84-95; Nowak, (1980), Ibid., pp.150-151. See also Graefrath SR 275 pr.12.

145 The reports concerned were those of Finland, Sweden and Hungary, see SR 170-172, 188, 189, 225 and 228.

146 See prs.3.29-3.38 below.

3.21.1 The HRC has recently taken some important decisions with respect to the consideration of Supplementary Reports. The HRC's Working Group on article 40 suggested that before supplementary reports were placed on the agenda the working group or a member of the HRC would go through them and determine whether they were comprehensive enough to form a topic for special consideration. If so they would be placed on the agenda for consideration in the normal way and, in accordance with its amendment to the decision on periodicity, the HRC would then have to decide whether it was appropriate to defer the date for the submission of the State party's next periodic report. Normally, however, it was expected that the HRC would just take note of the supplementary reports and discuss them together with the next periodic report.[147]

This approach was formalised at the HRC's twenty sixth session (1985) when the HRC agreed to the following procedure for the handling of any additional information submitted by State parties and for dealing with cases where additional information had been promised but not submitted:

(a) Whenever additional information is received at the same time as the next periodic report or shortly before the next periodic report is due, to consider the additional information together with the periodic report;

(b) When additional information is received at other times, to decide on a case to case basis, whether it should be considered, and to notify the State party concerned of any eventual decision to examine the additional information;

(c) Where promised additional information has not been received, the Bureau of the Committee will consider

---

[147] See SR 549 prs.39-62.

sending appropriate reminders to the States parties. The Secretariat, in corresponding with States parties concerning the date for submission of their next periodic report, is also to remind them of their promise, during consideration of their previous reports, that additional information would be supplied to the Committee.[148]

It is submitted that these decisions were sensible ones. The HRC maintains its flexibility to consider a supplementary report if it considers is sufficiently important to do so but it retains the option of postponing consideration of the supplementary report until the next periodic report is considered.[149] The result thus combines flexibility with practicality and should save the HRC some time which it can then devote to matters of more pressing importance.

3.22 There can be no doubt that the HRC has largely been successful in achieving its stated aim of establishing and developing a "constructive dialogue" with each State party in regard to the implementation of the Covenant.[150] The work of the HRC under article 40 on selected articles of the Covenant is analysed in chapters 5-12 below. States Parties have generally co-operated with the HRC as regards the submission of reports although, as we have noted, there have been problems of inadequacy and delay. Similarly, all States Parties, including Guinea,[151] have sent a representative or group of representatives to appear before the HRC. This is a remarkably good record and compares favourably with

---

148 Doc.A/41/40 pr.45.

149 This has now been done on a number of occasions.

150 General Guidelines, pr.3.3 above.

151 Guinea finally sent a representative in March 1988.

the experience of the CERD.[152] Some States have sent large top-level delegations while others have sent low level representatives usually from the Permanent Missions in New York or Geneva.[153] The existing practices of the HRC for the consideration of reports subjects State representatives to intensive time pressure and experience has shown that a single representative will not normally be in a position to deal adequately with all the questions and comments made by members.[154] The HRC has clearly recognized the vital role that State representatives have in establishing the dialogue which it regards as so important.[155] In its very first general comment under Article 40(4) the HRC commended States for their co-operation and noted that, "the level, experience and the number of representatives has varied". The Committee wishes to state that if it is to be able to perform its functions under Article 40 as effectively as possible and if the reporting State is to obtain the maximum benefit from the dialogue, it is desirable that the State representatives should have such status and experience (and preferably be in such number) as to respond to questions put, and comments

---

[152] See Buergenthal, n.1 above, p.201.

[153] Canada sent a top level delegation of a dozen members. India sent its Attorney-General to head its delegation. Some State representatives have been able to answer very few of the HRC's questions, for example, the representative of Barbados, SR 264, 265 and 267. It was very difficult for the United Kingdom to send an appropriate person before the HRC in respect of its Dependant Territories.

[154] 300 questions were raised during consideration of the report of Yugoslavia. The French representative identified 153 separate questions put to him during the first round examination of the French report.

[155] SR 351 pr.12.

made, in the Committee over the whole range of matters covered by the Covenant".[156]

3.23 However, the procedures adopted by the HRC to consider initial and supplementary reports have however been criticised by some members of the HRC. Mr. Dieye criticised the existing procedure as too time-consuming and proposed that the introductory statements by State representatives should be briefer and that the "second round" practice alone should be used in the consideration of State reports. These suggestions however met with strong opposition, for example, on the ground that the dialogue method used for the second round would not be useful in the initial consideration of a State's report because members' questions often raised very technical questions which could not be answered immediately.[157]

The first round practice was seen to facilitate the duplication of questions by members and to place intensive pressures on State representatives and on Committee members. The problems noticeably lessened as the Committee gained experience and members refrained from repetition unless they wanted to further develop a previous question, but the need to systematise the procedure into a more progressive and constructive process has been recognised.[158] One possibility that warrants further investigation and has been mooted on a

---

[156] See G.C.2/13 pr.4; Doc.CCPR/C/21, Doc.A/36/40 pp.108-109. See also the HRC's discussion of this comment at SR 308 pr.44 et seq.

[157] See SR 150 pr.46 et seq. Mr.Dieye criticized the HRC's procedures as irrelevant and academic as regards developing countries but he never complied with requests to submit concrete proposals for reform.

[158] See e.g. SR 466 pr.21 (Prado-Vallejo) The Iranian representative complained that at least five members of the HRC had put the same question concerning the treatment of the Bahai's.

number of occasions is that of decentralizing the consideration of initial reports to a special rapporteurs.[159] A variation on this theme would be to assign small groups of members particular articles for them to look at in depth. The groups could rotate if that was thought desirable and the right of each member to make comments and ask questions on any matter he wished would obviously be preserved. Not all members seem to favour decentralization however and prefer instead to try to improve the committee's existing working methods. The essential organizational problem is that their is no discussion by the HRC as to how to consider a particular State report as there is before the consideration of periodic reports.[160]

3.24 As each member of the HRC addresses questions and comments individually to the state representatives the questions put tend to reflect the particular interests of each member. It should also be noted that members rarely reply specifically to the comments of other members.[161] For example, Mr. Bouziri has repeatedly made clear his view that it should be open to women to secure abortions if they wish to do so.[162] Normally, the other members of the HRC make no direct reply to his comments. This could be taken to mean that they agree with him that they have no particular view on the matter or perhaps that they consider the the matter is not within the scope of the Covenant at all. The consequence of the

---

159 See e.g. SR 219 pr.6.

160 Cf. the decentralized procedures for the consideration of State reports under the ILO system, see Landy, n.1 above, pp.28-31; and under European Social Charter, Harris, ibid., p.223.

161 Although there seems to be an increasing tendency to associate with the comments of another member.

162 On abortion see ch.6 pr.6. below.

procedures used by the HRC is that no clear or balanced view emerges on the view of the HRC of the human rights performance of the state party concerned in general or on many important human rights issues affecting that State.[163] This problem is partially met now by the practice of members to make "final observations" at the end of the consideration of a States' periodic report. Those observations have often included an evaluation of the human rights performance of the States concerned.[164]

It is submitted that many of the criticisms of the HRC's practices for the consideration of reports relate back to the inadequate general guidelines on the form and contents of reports adopted by the HRC.[165] Their inadequacy has been a factor in producing inadequate reports. Such reports have attracted hundreds of questions as members have attempted to obtain the basic information on the implementation of the Covenant. The time spent asking for questions has subjected State representatives to unreasonable burdens. They are left trying desperately to fill in the huge gaps in the reports submitted by their respective Governments. Many State representatives have been surprised by the range and depth of information desired by members of the HRC and many matters have had to be referred back to the Government concerned. Moreover, time spent asking questions reduces the time available for critical and constructive comments from HRC members. These deficiencies have been accentuated by the individually orientated and unstructured procedure for the consideration of reports. It is submitted then that the

---

[163] The HRC has not yet adopted a practice of preparing specific reports on the implementation of each State party, see prs.3.29-3.38 below.

[164] See the discussion in SR 755 on the practice of making general observations.

[165] See pr.3.4 above.

HRC could do much to improve its general guidelines and to rationalize and structure the consideration of reports for example through more decentralized procedures. The HRC's procedures for the consideration of periodic reports are of a more rational and structured nature as we will see below.[166] Another suggestion which might then be taken up is that of creating a working group to consider the adequacy of a State report before its consideration by the plenary Committee or that a similar function be performed by the Secretariat.[167] With the co-operation of the state party this might then ensure that when the report is considered by the HRC it is substantive enough for the HRC to be able to build up a constructive dialogue with the state party on the basis of it. Another suggestion with the same aim of obtaining more adequate reports is the drawing up by the Secretariat of a list or digest of the questions most frequently asked by members relating to various subjects under the ICCPR. Such documents, up-dated from time to time, were to be circulated to the States Parties for their information.[168] In fact only one such document has been produced but it is very brief, has never been formally adopted by the HRC and has never been up-dated.[169]

---

[166] See prs.3.25-2.28 below.

[167] See the discussion in SR 49 prs.27-54. The representative of the then Division of Human Rights expressed doubts as to whether this could be done without making substantive judgements on State reports and thereby usurping the role of the HRC.

[168] Pr.(h) of the HRC's "Consensus Statement", Doc.A/36/40 pp.101-103.

[169] See Doc.CCPR/C/XII/CRP.1.

E. The Process Of Consideration: Periodic Reports.

3.25 In the "Consensus Statement" on its duties under article 40 the HRC looked forward to the consideration of second periodic reports.[170] It decided that two procedures would be adopted. Firstly, before the consideration of the report with the State representatives a working group of three members of the HRC would meet to review the information so far received by the Committee in order to identify those matters which it would seem most helpful to discuss with the representative of the reporting State.[171] This procedure was expressly adopted without prejudice to any member of the Committee raising any other matter which appeared to him to be important. Secondly, the HRC would request the Secretariat to prepare an analysis of the examination of each report. The analysis would set out systematically both the questions asked and the responses given with precise references to the domestic legal sources, quoting the main ones.[172]

3.26 The first of the "second periodic reports" scheduled for consideration was that of Yugoslavia in October 1983.[173] The HRC's Working Group On General Comments (now known as the Working Group on article 40) submitted a Conference Room Paper to the HRC entitled, "Proposed Approach and Procedure for the Consideration of Second Periodic Reports".[174] The working group suggested that the HRC should focus on the progress made

---

[170] Doc.A/36/40 pp.101-103.

[171] Ibid., pr.(i).

[172] Ibid., pr.(j).

[173] Doc.CCPR/C/28/Add.1, considered at SR 483, 484 and 488.

[174] Unpublished. Summarized in A/39/40 pr.39.

in each State party and on the points stressed in pr.(g) of the "Consensus Statement" of Duties[175] and elaborated in pr.I(b) of the guidelines for periodic reports.[176] As to the procedure to be followed it was submitted that the method for considering second periodic reports need not in principle differ significantly from that followed by the Committee in considering initial reports, although a different method whereby replies to questions posed could be expected during the same meeting may be desirable provided that the States parties representative would be willing to do that, and that the State party could be approached in advance to secure its acceptance to the conduct of the dialogue in this way.

3.27 After some discussion[177] the HRC agreed to the setting up of the working group envisaged in the consensus statement and the Secretariat prepared an analysis of the examination of the initial report of Yugoslavia.[178] The analysis was not intended to pass any value judgements on the initial report but simply to facilitate the task of the members. The list of issues and questions prepared by the working group was quite brief containing four general questions, for example, on progress made and response to the proceedings of the HRC, and questions on ten articles of the Covenant.[179] Though some members expressed misgivings it was decided to transmit the informal, unofficial list, with some supplementary questions, to the Mission of Yugoslavia with a note indicating, however, that the questions were

---

[175] See pr.3.5 above.

[176] See pr.3.6 above.

[177] SR 466 and 467; Doc.A/39/40 prs.58-66.

[178] Unpublished.

[179] SR 480 pr.1. Subsequent lists have tended to be longer and more detailed.

not exhaustive and that members of the HRC retained the right to put additional questions. It was also decided that the list of questions would be put by the members of the working group on the points that they had selected. It was accepted by members that the procedure satisfied most members of the HRC and made for a frank and informative dialogue in which the co-operation of the Yugoslavian representatives was a major factor.[180]

The working group was asked to repeat a similar process with respect to the consideration of the reports of Chile and the G.D.R. The lists prepared by the working group are considered, discussed and amended by the HRC.[181] The lists attempt to be as exhaustive as possible so that the HRC can expect immediate replies from the State representatives who would have had the list for some period in advance of consideration by the HRC. It was again stressed that members reserved the right to put any additional questions and comments to State representatives, though these were expected to be reduced to a minimum, and the State representatives would be accorded time to prepare their replies to further questions if necessary. The list of issues is accompanied by an explanation of the procedure to be followed. When they appear before the HRC the representatives of the States parties are asked to comment on the issues listed, section by section, and to reply to any additional questions raised by members. Finally the Chairman of the HRC invites members to make "final observations" and may request an indication of when any additional information that may have been promised will be submitted.[182]

---

[180] SR 488 prs.38-49.

[181] See, e.g., consideration of the list of issues for the report of Chile, discussed in SR 519, 523, 524.

[182] Doc.A/41/40 pr.44.

In discussing its procedures on periodic reports the HRC members have stressed a number of matters including the need for rational and structured consideration of periodic reports, with the lists serving as "a frame of reference for organizing the discussion";[183] the importance of obtaining precise information on the actual human rights situation in States; the key role played by the State representatives who appeared before the HRC;[184] the necessity of focusing on a smaller number of particularly important human rights issues; and the need for members to exercise self-discipline in order not to frustrate the very purpose of the new procedures which was to allow the most efficient and effective consideration of reports as possible.[185]

3.28 As of 1 July 1988 the HRC has completed the consideration of 24 second periodic reports on the basis of the procedures indicated above.[186] A number of members have expressed concern about and even the opposition to the new procedures. It was observed that the lists were too long, too many questions were asked and aspects discussed that were not of any real interest, and that the consideration had gone on too long and, therefore, had not solved the problem of the time constraints on the HRC.[187] It was noted that the drawing up of lists created problems because it required a subjective

---

[183] SR 523 pr.22 (Serrano-Caldero).

[184] See pr.3.19 above.

[185] See the comments at SR 540 prs.28-41, SR 541 prs.1-28, SR 542 pr.75, SR 543 prs.3,9.

[186] Figures calculated from the Annual reports of the HRC and information supplied by the UN Secretariat.

[187] The Iraqi representative spoke for so long before the HRC that only a few members were able to put comments and questions.

judgement[188] and because care had to be taken to ensure that the wording used did not appear to label the reporting States.[189] Some members though saw some merit in the procedure which they considered to be balanced,[190] time well-spent[191] and a marked improvement over the procedure for the consideration of initial reports which had, in their view, become almost impossible because of the countless questions asked.

Ultimately it was decided to set up a "Working Group on Article 40" to, inter alia, prepare further lists of issues and to review the HRC's methodology in the light of its experience of consideration of second periodic reports and the comments expressed by members.[192]

The working group submitted that there should be no radical departure from the experimental procedure for the consideration of periodic reports, that the lists had to be more concise and be forwarded to the State Party concerned as far in advance as possible and that the HRC should inform the State representatives of how it intended to proceed.[193] Opinion was divided, however, on the question of whether the procedure should be flexible, depending on the quality of the State representatives, or applied to all States without distinction. The procedures adopted for periodic reports are still in operation as of November 1987 and it appears likely that it will be continued though there

---

[188] SR 541 pr.7 (Tomuschat).

[189] Ibid., pr.3 (Cote-Harper).

[190] SR 541 pr.18 (Ermacora).

[191] Ibid., pr.6 (Tomuschat).

[192] Ibid., pr.27.

[193] See SR 545 prs.10-12; SR 598 pr.20 (Graefrath).

may be attempts to refine it.[194] No decision has been taken on the procedures for the consideration of third pericdic reports. The first of these are due in 1988 though they may not be considered until 1989. It appears likely that the procedures for the consideration of second periodic reports will be the basis of any procedure adopted.

The general opinion of Committee members seemed to be that the procedures it had established to consider reports had been substantially effective in establishing the desired dialogue with States Parties many of whom had remarked on the value of the questions, comments and observations of individual members. As already noted a number of suggestions have been made to improve yet further the effectiveness of those initial stages, but it was generally recognised that the Committee had not yet fulfilled its full potential of collective "study" prescribed in article 40(4) and that steps should be taken to complete the process though differences soon emerged as to the mode and purpose of that follow-up process.

It is evident from the summary records of the HRC that many State representatives have found the detailed questions, comments and criticisms of the HRC somewhat disconcerting if not intimidating.It has often been necessary to assure State representatives that the approach of the HRC is consistent from State to State.[195] Many State representatives have ultimately replied with detailed information, sometimes accepting difficulties of implementation and providing lengthy explanations. Many State representatives have thanked the HRC in their final comments for its serious considerations, offered their continued co-operation and

---

[194] See Doc.A/42/40 pr.53.

[195] See e.g. SR 364, 365, 366 and 368 (on Iran).

expressed the hope that the process had contributed to the universal implementation of the Covenant.[196]

F. The Committee's Jurisdiction under Article 40.[197]

3.29 Under article 40 (2) and (4) of the ICCPR the Committee's mandate is to engage in the "consideration" and "study" of the reports submitted to it in accordance with article 40(1). The vague and rather ill-defined nature of these terms was commented upon in the course of the articles drafting history but no further clarification was inserted.[198] In practice terms such as appraisal, analysis, comparison, and evaluation could be applied to the tasks positively undertaken by Committee members as they have subjected States reports to very close, critical and specific analysis.[199]

3.30 The "study" of reports is to be followed by the Committee's transmission of "its reports, and such general comments as it may consider appropriate, to the States Parties". Two central but related jurisdictional difficulties have arisen within the Committee in the interpretation of this vital sentence. The first concerns the reports to which "its reports" refers, the second to the scope and meaning of the phrase "general comments". The difficulties can only be understood in the light of the differing approaches that have emerged regarding the very nature of the reporting procedure under article 40 and, as Jhabvala has noted, much of the

---

196 See e.g., the comments by the State representative from Tunisia in SR 715.

197 See Fischer, n.1 above, pp.147-151; Jhabvala, Ibid., pp.91-95; Nowak, Ibid., pp.147-151. See also SR 48, 49, 50, 55, 73, 219 Add.1, (Doc.A/34/40 prs.15-20); SR 231, 232, (Doc.A/35/40 prs.370-383); SR 275, 276, 295, 304, 306, 308, 309, (Doc.A/36/40 prs.380-389).

198 See Jhabvala, n.1 above, pp.84-95.

199 See Schwelb, n.1 above, p.843.

discussion reflects a, "manifestation of the various views expressed during the drafting stages of the Covenant in the Commission on Human Rights and the Third Committee of the General Assembly".[200]

3.31 Broadly speaking there emerged two distinct schools of thought. The first school of thought was shared by the majority of the members at the time.[201] They took what might be described as a liberal, purposive approach to the scope of its powers under article 40 bearing in mind the object of the Covenant to promote and ensure the observance of the civil and political rights recognized therein. The limitations of an abstract, theoretical approach to the consideration of reports was stressed as was the ineffectiveness of bland general comments. Reference was made to the independent nature of the committee and the attributes specified for its members and the adoption of rule 70(3)[202] which it was suggested reflected the purpose of the study called for in article 40(4).

According to this school the purpose of the studies to be undertaken by the Committee was to ascertain whether or not a State Party has implemented the rights in the Covenant. The nature of this exercise was neither

---

[200] Jhabvala, n.1 above, p.93. On the drafting of the Covenant see chapter 1 above.

[201] Some of the key actors in the debate on jurisdiction have now left the HRC notably Mr.Graefrath, Mr.Tomuschat, Sir Vincent-Evans and Mr.Opsahl. It is therefore uncertain whether the new members take a different approach but there is no evidence of any significant pressure within the HRC to reopen or reconsider the issues involved.

[202] This rule provides that, "If, on the basis of its examination of the reports and information supplied by a State party, the Committee determines that some of the obligations of that State party under the Covenant have not been discharged, it may, in accordance with article 40, paragraph 4, of the Covenant, make such general comments as it may consider appropriate".

to be inquisitorial nor accusative and its end was to be neither condemnation nor approbation. Rather the dialogue was to be constructive and instructive, pointing to situations in which a State's domestic provisions were at variance with the Covenant or made insufficient provision for the rights protected under the Covenant, with suggestions being made as to how States could overcome the factors and difficulties that hindered the full implementation of the Covenant.

This approach was given textual justification by reference to the phrase "its reports" in article 40(4) which it was argued could refer to separate reports drawn up by the Committee in respect of each of the reporting States, for example, commenting article by article on how well each State was fulfilling its obligations under the Covenant. Only such specific comments, it was argued, would allow the Committee to effectively supervise the implementation of the Covenant. Any other approach, such as that restricting the Committee to general comments addressed to all States, was dismissed as implicitly condoning violations of human rights in certain countries and a procedure that "risked being nothing more than a stylistic exercise" whereby "human rights would suffer by an excess of diplomacy" and whereby the Committee would be abdicating its duties under the Covenant. Further the Annual Report sent through ECOSOC to the General Assembly under article 45 were not "reports" in the sense of article 40(4) because it contained neither positive nor negative results and were essentially only descriptive accounts. Mr. Lallah argued that if separate reports were adopted the Annual Report to the General Assembly under article 45 should continue to give only, "general indications of the Committee's work since it was essential to preserve the dialogue established between State's Parties and the Committee and to protect that dialogue from the disadvantages which might arise

from discussion of those matters by the General Assembly".[203]

While advocating such a liberal interpretation of article 40(4) the majority view recognized that the preparation of separate reports would be a complex and time-consuming activity which would almost certainly call for a restructuring of the consideration of reports through working groups, more efficient Committee practices, additional resources from the Secretariat and perhaps even extended or additional sessional time. The subject of comments might need precise definition and the substance of such reports would have to be flexible enough to allow it to indicate whether there had been a consensus or a majority or a divergence of views. These separate reports would be transmitted to the State Party concerned which, in accordance with article 40(5), would be entitled to submit to the Committee any observations on the comments contained therein.

More generally it was argued that the adoption of separate reports would in no way preclude the Committee from adopting general comments based on an over-all analysis of the major trends and difficulties which emerged from their experience in considering State reports, for example, possible amendments to the ICCPR, the general aspects of the reporting obligations, general and specific implementation difficulties, the status of the ICCPR in the national law of States parties, the general and particular nature of the rights in the ICCPR.

3.32 The second school of thought conceived of the nature of the Committee's mandate in a much more restrictive way. The only duty on States was to report and the "dialogue" between the HRC and the States

---

203 In practice the General Assembly has only considered the reports of the HRC in broad terms rather then in respect of specific States parties.

parties was purely voluntary in nature. Mr. Graefrath commented that, "The purpose of the State reports and their study by the Committee was..to exchange information, to promote co-operation among States, to maintain a steady dialogue and to assist States to overcome difficulties...The Committee was not called upon to make an appraisal or to indicate whether or not a given State had failed to fulfil its obligations. Nor could it say that a State had failed to fulfil its obligations or that certain national actions were contrary to the Covenant. To do so would be to go beyond its mandate".[204] It logically followed then that the Committee had no jurisdiction to prepare separate reports for each State concerned and no Rule of procedure adopted by it (Rule 70(3)) could give the Committee jurisdiction beyond that in the ICCPR.[205] The "reports" which the Committee was required to submit under article 40(4) were, it was argued, the Annual Reports submitted to the General Assembly under article 45.[206] Otherwise, it was argued, the Covenant would have specified the content of the reports and the State parties for whom they were intended, as it did in articles 41 and 42. General comments were what they literally indicated, that is, comments of a general character relating to matters of common interest to the States parties, for example, matters of general importance affecting the implementation of the Covenant and not in the form of suggestions or recommendations to particular States, the Covenant or the specific rights in the Covenant. It was for the States parties to draw their own conclusions from the Committee's Annual Report and any General Comments the Committee chose to prepare.

---

[204] See SR 49 and 231.

[205] See n.202 above.

[206] See pr.3.40 below.

Through these mediums the Committee could promote the observance of human rights in a constructive way with the voluntary assistance of States. Any other approach would be an unjustified interference in the internal affairs of States.[207]

3.33 Recognizing the vital role that their consideration of reports was likely to play in their efforts to secure the implementation of the ICCPR all members of the Committee, despite the differing opinions which existed, were anxious to make at least some progress. To that end a working group was set up to meet before the Committee's eleventh session to consider the formulation of such general comments, "as would be likely to gather the support of the Committee as a whole, and to examine what further work, if any, the Committee should undertake at this stage to give effect to its duties under article 40 of the Covenant". After extensive informal consultations and intensive work within the group a "Consensus Statement" was adopted on "The Duties of the Human Rights Committee under article 40 of the Covenant".[208] Committee members stressed that the consensus was no more than a first, though useful compromise step, that the procedure agreed upon was without prejudice to further consideration of the Committee's duties under article 40(4) on which members retained their previous positions and that the Committee recognized that it had to keep its procedures for the examination of reports under constant review in the light of its experience.[209]

---

[207] See ch.1, pr.1.18 above.

[208] Doc.A/36/30 pp.101-103. Adopted by the HRC at its 260th meeting, 30th Oct.1980. Also issued in Doc.CCPR/C/18. It is often referred to by members as the 'October Consensus'.

[209] See SR 260. See also SR 525 prs.16-18.

With respect to the issue of General Comments the consensus stated that:

"(b) In formulating general comments the Committee will be guided by the following principles:

They should be addressed to the States Parties in conformity with Article 40, paragraph 4 of the Covenant;

They should promote co-operation between States Parties in the implementation of the Covenant;

They should summarize experience the Committee has gained in considering States reports;

They should draw the attention of States Parties to matters relating to the improvement of the reporting procedure and the implementation of the Covenant;

They should stimulate activities of State Parties and international organizations in the promotion and protection of human rights.

(c) The general comments could be related, inter alia, to the following subjects;

The implementation of the obligation to submit reports under article 40 of the Covenant;

The implementation of the obligation to guarantee the rights set forth in the Covenant;

Questions related to the application and the content of individual articles of the Covenant;

Suggestions concerning co-operation between States Parties and international obligations in applying and developing the provisions of the Covenant.

(d) The Committee confirms its aim of engaging in a constructive dialogue with each reporting State. This dialogue will be conducted on the basis of

periodical reports from States Parties to the Covenant".[210]

3.34 The two schools of thought again appeared when the Committee reconsidered the consensus statement with a view to taking certain decisions based upon it.[211] The particular difficulties arose because some of the members argued that paragraph (b) of the "Consensus Statement" was ambiguous as it would permit of an interpretation allowing specific as well as general comments addressed to States Parties. The view which prevailed, even amongst those who advocated separate reports containing specific comments addressed to individual States, was that for the time being the Committee should proceed initially with the preparation of comments relating to States generally bearing in mind the principles outlined in the consensus statement. This approach allowed the Committee to make further progress in performing its functions under article 40 while preserving its right to proceed further on individual reports at a later date. In accordance with this decision a working group of five met before the Committee's thirteenth session to draft general comments which after discussion and amendment were adopted.

According to the Committee the purpose of those general comments was to make the Committee's cumulative experience, "available for the benefit of all States in order to promote their further implementation of the Covenant; to draw their attention to insufficiencies disclosed by a large number of reports; to suggest improvements in the reporting procedure and to stimulate the activities of these States and international organizations in the promotion and protection of human

---

[210] Doc.A/36/40 pp.101-103.

[211] See SR 275 and 276.

rights. These comments should also be of interest to other States, especially those preparing to become parties to the Covenant...".[212] Certainly the comments adopted to date have been very much concerned with reporting obligations rather than specific, concrete instances of non-implementation of the ICCPR. There is no doubt however that their adoption does little or nothing to resolve the divergent interpretations of article 40(4).[213]

The initial drafts are prepared by the Working Group on article 40 (formerly known as the Working Group on General Comments) of the HRC. After consideration by its members and taking account of the views of written proposals submitted by other members the working group then attempts to submit a consensus text to the HRC. That draft is then considered in the HRC, sometimes in

---

212 Introduction to the HRC's first general comments, Doc.A/36/40 p.107.

213 Capatorti, n.1 above, comments that the aim of the expression 'General Comment' is, "...to exclude the possibility of specific recommendations, namely recommendations addressed to a single government and concerning its attitude in the field of human rights. But, evidently, only specific recommendations might be efficient instruments to promote respect of the Covenants". He goes on to argue that whenever the examination of reports is superficial - as he suggests it is with the ICCPR because its verification machinery is ill-devised- "the only possible outcome consists in general recommendations: and these have the function of means for political pressure, rather than of true instruments for the observance of agreements",p.138. Robertson, n.1 above, (1984) comments that, "The term is not defined. It does not mean that these comments must be addressed to all States parties and not to particular States. As the drafting history makes clear, the Human Rights Committee may make recommendations to particular States parties. But they must be in general terms and not relate to individual cases, and cannot therefore focus attention on specific violations and bring influence to bear to remedy them", pp.350-351. The reference for this proposition, Doc.A/5411, pr.22, does not, per se, support it.

public sessions. Members may comment on the draft text, seek explanations or clarifications, and propose additions or amendments. Normally the draft is referred back to the working group for further consideration in the light of the views expressed by members of the HRC. If a consensus text is finally reached by the HRC it is adopted sometimes initially in a single or two language version.[214] The comments are transmitted to all States parties my notes verbale, and are included in the Annual report of the HRC[215] and given publicity in a number of other ways.[216]

3.35 As of 1 July 1988 the HRC has adopted sixteen general comments. The most recent was on article 17 (right to privacy).[217] The first set of general comments dealt with certain aspects of the reporting obligations and procedures,[218] the obligation on States parties under article 2 to take specific activities to enable individuals to enjoy their rights and the importance of individuals knowing their rights under the Covenant and of all administrative and judicial authorities being aware of their obligations under the Covenant (G.C.3/13).[219]

Subsequent general comments have dealt with elements of the implementation of articles 3[220], article

---

[214] This procedure has caused a number of problems when the HRC has attempted to adopt the other language texts. See e.g. SR 537 on the general comment on article 1.

[215] See pr.3.40 below.

[216] See ch.2, pr.2.9 above.

[217] G.C.16 (32), Doc.CCPR/C/21/Add.6, adopted at HRC's 791st meeting on 23 March 1988. See SR 749, 751, 752, 770, 791; Doc.A/42/40 pr.392. For the text see Apx.III below.

[218] G.C.1/13 and 2/13, Doc.A/36/40 pp.107-108.

[219] Ibid., p.109.

[220] G.C.4/13, Ibid., pp.109-110.

4[221], article 6[222], article 7[223], article 9[224], article 10[225], article 19[226], article 20[227], article 1[228], article 14[229], a second comment on article 6[230], and on the position of aliens under the Covenant.[231] All of the General Comments to date have been addressed to all States parties and not to individual States.[232] Some of these general comments have been of a high quality and represent valuable indications of the content of the respective rights and the steps that States parties could or should undertake to ensure the implementation of those rights. Other general comments have been much less helpful. The terms of most of the General Comments are dealt with elsewhere in this work in their relevant contexts. The HRC has stressed the importance of the use of the general comments primarily within the context of

---

[221] G.C.5/13, Ibid., p.110.

[222] G.C.6/16, Doc.A/37/40 pp.93-94.

[223] G.C. 7/16, ibid., pp.94-95.

[224] G.C.8/16, ibid., pp.95-96.

[225] G.C.9/16, ibid., pp.96-97.

[226] G.C.10/19, Doc.A/38/40 p.109.

[227] G.C.11/19, ibid, pp.109-110.

[228] G.C.12/21, Doc.A/39/40 pp.142-143.

[229] G.C.13/21, ibid., pp.143-146.

[230] G.C.14/23, Doc.A/40/40 p.162.

[231] G.C.15/27, Doc.A/41/40 p.117.

[232] "The Committee (CERD) has, thus far, adopted general recommendations and decisions aimed at obtaining more informative reports of States parties. The CERD has not yet formulated as a collective body formal suggestions (regarding a single State) or general recommendations (regarding a group of States or all States parties), concerning to what extent obligations

(Footnote Continued)

the reporting system but also in other areas, for example, the adoption of views under the Optional Protocol.[233] The guidelines adopted by the HRC for periodic reports specifically refers to the need to take account of the general comments adopted by the HRC in the preparation of such reports.[234] A copy of the HRC's General Comments are sent to State representatives with the list of issues prior to the consideration of periodic reports. The HRC has recently agreed that it should be more specific in soliciting information from States parties concerning its general comments.[235] As the number of general comments adopted has increased members have increasingly referred to them during the examination of State reports and referred to general comments to support proposed amendments to the HRC's procedures.[236] Similarly, some State reports have expressly referred to the General Comments adopted but not in sufficient numbers to satisfy the HRC.[237] In 1985 the Congo and Madagascar were the first States to make

---

(Footnote Continued)
under the Convention have been discharged at the national level", Gomez, n.1 above, p.507. The CERD has, however, adopted a number of country specific decisions concerning the problem of territories occupied or controlled de facto by another country. The cases have concerned the Golan Heights, the West Bank of the River Jordan, Cyprus, and the Panama Canal Zone. See Ibid., pp.502-503; Lerner, n.1 above, ch.IV.

233 A specific reference was made to a General Comment by the HRC in Hamel v. Madagascar, Doc.A/42/40 p.130, pr.19.2.

234 See pr.3.5 above.

235 SR 758 pr.64.

236 See SR 595 prs.30-40 Movchan on U.K.); pr.34 (Mavrommatis); reply at SR 596 prs.3-5.

237 Members of the HRC have noted that that requirement has not been adequately met by many States parties, Doc.A/42/40 pr.391; SR 744 pr.30 (Movchan on Iraq).

formal use of the opportunity in article 40(5) ICCPR to submit observations to the HRC on general comments adopted by the HRC on articles 1 and 14 ICCPR.[238] The observations submitted by the two States were not observations on the general comment adopted by the HRC but an account of how their respective domestic systems implemented the provisions of the article concerned. The HRC made no formal response to the observations submitted but requested the Secretariat to convey its gratitude to the States concerned and indicate to them that the information submitted might have more appropriately been included in the information submitted by those States to the HRC for consideration under the reporting procedure. Subsequently comments under article 40(5) have been received from a small number of States.[239] Mr.Graefrath has suggested that it, "might be useful to give Governments some guidance on the form and content of the observations expected of them".[240] This suggestion should be acted upon as it would be a useful way of continuing the "dialogue" between the HRC and the States parties between the consideration of State reports.

3.36 The only substantive comment and observations on the general comments adopted by the HRC has come from the Third Committee of the G.A.[241] Those comments, sometimes critical, are noted in the respective context

---

[238] Doc.CCPR/C/40 (18 July 1985). The feedback on General Comments has been disappointing and compares unfavourably to the feedback to general recommendations adopted by the CERD, see Gomez Del Prado, n.1 above,p.512-513.

[239] See SR 729 pr.3.

[240] SR 633 pr.14.

[241] See pr.3.40 below.

of each general comment.[242] Further publicity to the general comments is given by the Centre for Human Rights in Geneva which regularly draws attention to them in the various organs it serves. Similarly, academic commentators and interest organisations are increasingly referring to the General Comments in their respective publications.[243]

3.37 Some criticism has been expressed within the HRC of its procedures for the preparation of general comments.[244] It has been suggested that their preparation was too dependent on the isolated initiatives of members of the HRC and that despite repeated appeals members had been slow to make suggestions and proposals for general comments. The working group on article 40 is now spending most of its time on the lists of issues for periodic reports. The preparation of General Comments is one area where the Secretariat could play a greater role by initiating proposals and undertaking research on the articles concerned including relevant work undertaken by other human rights bodies. The Secretariat has offered more assistance in this direction and this is now being more fully realised.

3.38 The General Comments adopted by the HRC are potentially very important as an expression of the accumulated and unparallelled experience of an independent expert human rights body of a universal character in its consideration of the implementation of the ICCPR. Whether this potential has been realised is

---

[242] See e.g. in ch.8 below on article 6.

[243] See e.g., B.Ramcharan, ch.8, n.1 below; N.Rodley, The Treatment Of Prisoners In International Law, ch.9, n.1 below.

[244] See SR 525 prs.14-23; 540 prs.23-27; 545 prs.15-17; 633. However, the consensus was that there should be no change in those procedures.

considered in the relevant parts of subsequent chapters. It is appropriate at this point, however, to note that it is necessarily a most difficult task to obtain a consensus agreement from eighteen experts from different geographical regions and legal schools. The application of the technique of consensus decision making in this context inevitably results in general comments that to some extent represent the highest common denominator between members. The chairman of the HRC acknowledged this point recently when, in the light of substantial difficulties among members concerning a draft general comment concerning article 27 ICCPR (minority rights), he suggested to members that they would have to try to be less maximalistic in their approach if there was to be any hope of reaching a consensus.[245] Ultimately, the draft general comment on article 27 was dropped because, it was argued, there was not enough information available to form a sound basis for decision.[246] As Professor Higgins pointed out the lack of information available might have been taken to indicate the desirability of making a general comment that would indicate to States parties the information the HRC required.[247] However, at least the HRC emerged from the debate on article 27 with an established criteria to guide their work in respect of general comments. The applicable considerations are: "the relevance of the proposed subjects to the problems encountered by States parties in implementing the Covenant; the topicality of the proposed subject; and the prospects for reaching

---

[245] See SR 624 pr.7.

[246] SR 633 pr.35 (Chairman).

[247] SR 633 pr.26.

consensus within the Committee on the eventual draft general comments".[248]

G. The role of the ECOSOC.

3.39 In accordance with article 40(4) ICCPR the HRC shall transmit "its reports" and "may" also transmit copies of any General Comments it considers appropriate to adopt to the States parties. The HRC "may" also transmit these comments to the ECOSOC along with the copies of the reports it has received from the States parties.[249] There is no express indication in the ICCPR of the role, if any, of ECOSOC on receipt of any General Comments transmitted to it by the HRC and the reports of States parties. Presumably then it is open to the ECOSOC to exercise whatever powers it assumes under its general jurisdiction to consider human rights matters. Arguably this could include making specific, formal recommendations directly to particular States on the basis of the General Comments adopted by the HRC and the State reports. There is a precedent for this in a similar function performed by ECOSOC under the periodic reporting system established under ECOSOC Resolution and operated by the Human Rights Commission.[250] In practice, however, ECOSOC has not taken any action with respect to the General Comments of the HRC or the reports of States parties.

Under article 45 ICCPR the HRC is obliged to submit an Annual Report on its activities to the General Assembly through the ECOSOC.[251] There is no indication in the ICCPR of whether the ECOSOC is to conduct any

---

248 Doc.A/41/40 pr.411.

249 The reports are in fact transmitted, see SR 571 prs.10-11.

250 See n.2 above.

251 See pr.3.40 below.

consideration of the Annual Report. Again any such powers can only be deduced from ECOSOC's general jurisdiction. It was apparent at the first occasion on which the HRC's Report was transmitted to ECOSOC that ECOSOC was unclear as to what its role should be.[252] It is clear that at least some delegations envisaged that ECOSOC would play an active role in considering reports.[253] In practice, however, the ECOSOC has authorized the Secretary-General to transmit the Annual Report of the HRC directly to the General Assembly unless the ECOSOC was invited at the request of either a member or the Secretary-General to consider it.[254] To date no such request has ever been made. The non-consideration of the report by ECOSOC ensures that there is no danger of the report not being considered by the General Assembly in the same year as its adoption.[255] It is difficult to see what useful function the ECOSOC could perform with its composition and political nature bearing in mind the consideration of the HRC's Annual Report by the Third Committee of the General Assembly.

H. The Annual Report of the HRC to the General Assembly.

3.40 Article 40(5) ICCPR provides that, "The Committee shall submit to the General Assembly of the United Nations, through the Economic And Social Council (ECOSOC), an annual report on its activities".[256] The

---

[252] See Doc.E/SR 2087.

[253] See A/C.3/SR 1435 pr.13 (representative of Hungary).

[254] See ECOSOC Resn.1985/117.

[255] The HRC has been very concerned to ensure that this remains the situation. See e.g., SR 571.

[256] See also article 6 O.P. For the HRC's Annual
(Footnote Continued)

Annual Report serves as a vital link between the HRC, the States parties and the General Assembly.[257] The Annual Reports have in practice been substantial documents containing thorough accounts of the consideration of reports and of communications under the O.P. together with basic information on the practices and procedures of the HRC. As noted, to date the ECOSOC has not exhibited any serious interest in the work of the HRC.[258]

Within the G.A. the Annual report is considered by the Third Committee of the G.A. (Social, Humanitarian and Cultural Questions) in the autumn of the same year of its publication.[259] The role of the Third Committee is not spelt out in the ICCPR. In fact since 1978 the Third Committee has spent an increasing amount of its time discussing the HRC's Annual Report. Indeed, it is an interesting question as to the relationship between the HRC and the Third Committee.[260] We have already noted that the HRC is not a United Nations body but an independent body established by the State parties to the

---

(Footnote Continued)
Reports to date see the documents listed in 'Principal Documentation' at the beginning of this thesis. Since 1979 the HRC's Annual Report has covered the Autumn, Spring and Summer sessions. The draft annual report is prepared by the Rapporteur of the HRC with the substantial assistance of the Secretariat. The report is then considered, amended and adopted by the HRC at the close of its summer session. There have occasionally been difficulties concerning its drafting, see e.g., SR 542, 543 and 544 As part of the economy measures at the U.N. the HRC has agreed to reduce the size of its annual report by 10%.

257 See ECOSOC OR, 16th session, Supp.8, prs.195-197).

258 See pr.3.39 above.

259 The discussion of the HRC's reports is interspersed within the summary records of the Third Committee on the appropriate agenda item.

260 See Brar, n.1 above, pp.15-21.

Covenant, although the HRC is dependant on the U.N. for finance and administration.[261] A number of members have suggested that the HRC is not bound by the opinion of the Third Committee.[262] In recent discussions, "It was understood that the members of the Committee, notwithstanding their capacity as independent experts, would bear in mind, in the exercise of their functions, the observations made by delegations".[263]

During its spring session (normally in New York) the HRC discusses the considerations of the Third Committee.[264] HRC members have recognised the importance of establishing an effective dialogue with the Third Committee and giving serious consideration to the views expressed by it. Generally the Third Committee has commended the work done by the HRC. The Annual Report has been subjected to searching consideration and various views have been expressed, for example, on the procedures adopted by the HRC, the functions of the HRC under the reporting procedure, the comments proposals and amendments considered by the HRC, the comments expressed with regard to particular countries, views expressed under the O.P., publicity for the Covenant, the Optional Protocol and the work of the HRC. Very occasionally, however, certain representatives in the Third Committee have seen fit to attack certain aspects of the HRC's work, for example, an alleged political

---

[261] See ch.2 above.

[262] See e.g. the discussion in SR 338.

[263] See e.g. Doc.A/41/40 pr.22.

[264] At its fifteenth session (1982) the HRC decided to place on the agenda of its spring session every year an item on, "Action by the General Assembly on the annual report submitted by the Committee under article 45 of the Covenant". The views expressed in the HRC's debates are now reflected in its Annual Reports. See e.g., A/42/40 prs.26-32.

cover up by certain members of the systematic genocide of the Palestinian Peoples.[265] Similarly, Uruguay raised some objections to the HRC's practices under the Optional Protocol,[266] and a number of States criticized parts of the HRC's second General Comment on article 6.[267] More generally the Third Committee has drawn the attention of the HRC to the standard setting work of some of the other human rights organs, called for it to deepen the reporting process and the follow up action, requested the HRC to give specific content to the rights recognized in the Covenant and point to any weak points that might need to be improved, asked the HRC to consider the role of people in the processes engaged in by their Governments under the ICCPR, called upon all States to become parties to the Covenant,[268] and recognized the need to co-ordinate the reporting obligations of States parties under the various international reporting procedures and organize the flow of information among the relevant bodies.

I. Appraisal.

3.41 This chapter has reviewed the institutional aspects of the reporting system established by the ICCPR and the practices and procedures adopted by the HRC in implementing that system. The system must be subject to critical appraisal in the light of the increasing criticism of international reporting procedures. It has been argued that the systems are inherently defective and that the increasing number of them has led to an

---

265 Statement of the representative of the G.D.R. in the Third Committee.

266 See the comment at SR 318 pr.7 (Tomuschat).

267 See ch.8, prs.8.12-8.13 below.

268 Cf. Article 48 of the Covenant, Ax.1 below. See ch.1, pr.1.33 above.

apparent decline in the willingness of States parties to submit reports and to financial and logistical problems.[269] As we noted in chapter 2 the HRC has established itself as a respected body of independent, highly qualified members who have attracted consistent praise for the serious and constructive nature of their deliberations both from State representatives that have appeared before them and in the Third committee. We also noted that in its consideration of reports under article 40 it has established a remarkable consensus practice and although there are clear political differences between members the HRC has avoided the overt politicization evident in many human rights institution.[270] It is perhaps a measure of the HRC's success that the new Committee on Economic, Social and Cultural Rights has been modelled to some degree on the HRC and its practices under article 40.[271] The groundwork for the success of the HRC has been established by the commitment displayed by the members who have served on the HRC in its formative years. Its continued success will to a large part depend on the continuing integrity of its present and future members.[272]

3.42 With respect to the submission of reports the HRC has displayed great patience and flexibility. Although the eventual record of submission has been commendable

---

[269] See Alston, ch.2, n.38 above; SR 760 pr.38 (Mommersteeg).

[270] See ch.2, pr.2.7. See generally T.D.Gonzales, The Political Sources Of Procedural Debates In The United Nations: Structural Impediments To The Implementation Of Human Rights, 13 N.Y.U.J.Int'l.L.& Pol. (1981) pp.427-472.

[271] See ch.2, n.38 above.

[272] See the comments of Mr. Herndl (Assistant Secretary-General for Human Rights, SR 702 pr.3.

the delays involved have often been considerable. Having established itself as a serious and important human rights body the HRC would do well to take a firmer line regarding the delayed submission of reports. The HRC's very success gives it greater potential to exert pressure on State parties to submit reports on time and, if that fails, to give effective publicity to that default. However, it must be recognized that the problem is a very difficult one to resolve. The co-operation of States parties is critically important and the HRC must retain sufficient flexibility to be able to respond to situations on a case by case basis as they arise. Some failures, however, for example that of Belgium in submitting an initial report, must be open to severe criticism.

3.43 It has been submitted that the guidelines for the preparation of initial reports could be expanded and improved. Despite suggestions to this effect within the HRC no action has been taken.[273] Similarly the procedure for the consideration of initial reports is capable of rationalization. Such rationalization might even allow the consideration of initial reports, provided they substantial enough, to be conducted in accordance with the "second-round" procedure developed by the HRC. This is important because the second round procedure is generally much more productive than the "first-round" and the use of the second round procedure may be greatly reduced in the light of the HRC's decision that henceforth whether the HRC will conduct a consideration of a Supplementary Report will be decided on a case to case basis depending in part on the timing of the submission of reports.[274] The procedures for the

---

[273] SR 633 pr.7 (Aguilar), pr.19 (Movchan); Doc.A/41/40 pr.26.

[274] See pr.3.21.1 above.

consideration of periodic reports are now well established and although there may be some refinement, substantial changes seem unlikely. Those procedures appear to work very well and the comments by both HRC members and State representatives suggest that consideration of periodic reports to date have been very useful and informative in obtaining a better understanding of the implementation of civil and political rights in the States concerned and of the factors and difficulties encountered. This is critically important as it appears that the consideration of periodic reports that will come to play the major role in the future work of the HRC.

3.44 The great majority of States have exhibited an attitude of co-operation with the HRC and appear to have taken their reporting obligations very seriously. Many of the second periodic reports of States parties have been substantially better than their initial reports. That all but one State, Guinea, has sent a representative or a group of representatives to appear before the HRC bears testimony to that seriousness and to respect for the HRC. The even higher quality of State representatives who have attended for the consideration of periodic reports confirms this view. In retrospect the decision of the HRC to invite State representatives to appear before it constitutes one of its most important procedural decisions to date. The presence of State representatives has been fundamental to the establishment of the "constructive dialogue" sought by the HRC. The development of this dialogue has enabled members of the HRC to clearly indicate whether they are of the view that violations of the Covenant have occurred or that domestic legislation or provisions are inconsistent with the Covenant. It can be argued that this dialogue with the State party, through its representatives has pre-empted any necessity for the HRC to adopt formal determinations of non-compliance. Such a course could ultimately be adopted by the HRC if its

deliberations are seen to produce no effective results but there has been no consensus to date in favour of such a development. Indeed, as we have noted, considerable disagreement exist within the HRC concerning its jurisdictional powers under article 40 including the permissible scope of its "General Comments".[275] At present it seems unlikely that there will be any development towards the adoption of country specific reports or of General Comments addressed to one particular State party. This may encourage members to try and make the established reporting procedures as specific and penetrating as possible, to make the General Comments as specific as possible in respect of each right in the ICCPR and further develop the general observations and evaluations of the performance of a State in their concluding statements.[276]

However, it appears from the consideration of reports that members of the HRC have legitimate differences on the question of implementation in particular States.[277] It would seem then that it would in any event be difficult, if not impossible, to each a consensus agreement on specific reports on each State party or on general comments addressed to particular States. The alternative of majority voting has not commended itself to the HRC and has, indeed, become something of a psychological barrier.[278]

3.45 Only time will reveal whether the HRC's failure to draw up specific reports on each State party and General Comments addressed to particular State parties are

---

[275] See prs.3.29-3.38 above.

[276] See pr.3.24 above. See e.g. SR 743 pr.4

[277] Compare the concluding comments of Tomuschat, SR 598 prs.15-16, and Movchan, SR 598 prs.29-32, on the U.K.

[278] See ch.2, pr.2.7 above.

fundamental defects in the reporting procedure. Part of the relative success of the reporting systems of the ILO and under the European Social Charter has stemmed from the publicity and political support given to the observations, reports and conclusions reached by the relevant examining bodies.[279] Under the ICCPR it is uncertain as to which body, if any, is charged with taking any further action subsequent to the work of the HRC. The absence of any specific reports or specific General Comments makes the task of any superior political body very difficult because it has no agreed basis from which to work. For example, the considerations of the Third Committee of the General Assembly are based on the Annual Reports of the HRC. The Annual Reports are drafted in a neutral manner and merely summarize the considerations of the HRC. It does not form an adequate basis for the adoption of specific recommendations addressed to particular States concerning the implementation of their obligations under the ICCPR. In the absence of specific reports and specific general comments the inevitable tendency will be for the considerations of the HRC to lie largely hidden within the mass of general United Nations documentation. Without effective publicity and specific political backup the effectiveness of the HRC's considerations is likely to be marginal in all but the most exceptional of cases.[280] Therefore, national and international non - governmental organisations have an important role to play in following up the consideration of State reports. Similarly national Parliaments or Assemblies, where they exist, could play a role.

---

[279] See Landy, n.1 above, ch.3; Harris, Ibid., ch.V.

[280] See Jhabvala, n.1 above, pp.104-106.

3.46 The establishment of a periodicity of five years would appear realistic considering the range of rights covered by the ICCPR and the existence of several other international reporting procedures that are time consuming for States. However, as the rate of new of ratifications or accessions has declined consideration should be given to reducing the period to three or four years as envisaged in the HRC's original periodicity decision but it has been submitted that the issue is not crucial.[281] The establishment of any shorter period than this might prejudice the quality of reports and the practice of only considering the reports in the presence of State representatives.

It was unfortunate that the original periodicity decision had the unintended effect of reducing the incentive for States parties to promptly submit supplementary reports containing additional information. The subsequent amendment to correct this defect may yet prove to be effective but seems to date to have produced little result. The approach now developed by the HRC as regards Supplementary Reports is both sensible and flexible.[282] It is submitted that it is important for the HRC to keep open the possibility of the consideration of supplementary reports because the second round procedure used has often proved very useful and has done much to remedy the inadequate first round consideration of reports.

3.47 We noted that no general decision was adopted concerning the HRC's powers to request a report "whenever it deems it necessary" other than in accordance with its general periodicity decision.[283] It is submitted that the proposals made should have been

---

[281] See pr.3.6 above.

[282] See pr.3.21.1 above.

[283] See prs.3.8-3.8.1 above.

adopted as they were sufficiently flexible to leave the decision to the HRC on a case by case basis but would have removed the appearance of them being selective, ad hoc and political requests. The absence of a general, formal decision on this matter is to be regretted. However, the decision to request a report from El Salvador under article 40(1)(b) after the killing of a member of their national human rights commission may have set an important precedent.[284]

3.48 A disappointing aspect of the reporting procedures are the minimal roles played by the specialized agencies and the non-governmental organizations.[285] Of the specialized agencies only the I.L.O. regularly submits notes to the HRC members and it rarely sends a representative to the meetings of the HRC at which State reports are being considered. As for non-governmental organizations, they have no formal role at all and are limited to submitting information to HRC members in their individual capacities.[286] However, a number of members accept such information on a regular basis. The restrictive opinion of the members of the HRC from Eastern Europe would appear to preclude the possibility of any formal decision recognizing a legitimate role for the non-governmental organizations. It is vital, therefore, that HRC members make NGO's aware that they are willing and ready to receive appropriate information and that NGO's continue to take an active interest in the work of the HRC notwithstanding the absence of a formal decision recognizing their role. Similarly, it has been submitted that the HRC could exhibit a much more positive attitude to the specialized agencies even if the HRC does not change its present formal decision

---

284 See pr.3.8.1 above.

285 See 3.13-3.16 above.

286 See prs.3.17-3.18 above.

that they are not competent to submit comments on the reports submitted by States.

3.49 Having regard to the absence of any judicial determination, binding decisions or recommendations, and enforcement powers it is apparent that the key to the effectiveness of the reporting procedure established by the ICCPR will be the HRC's powers to persuade. The HRC's weight lies in its moral and legal authority as a respected and independent human rights body. Further pressure and persuasion can be derived from effective publicity and the political support of superior bodies.[287] Unfortunately, the former has been sadly lacking. Consideration of the United Kingdom's reports, for example, attracted little national publicity. Ironically, the serious and depoliticized nature of the HRC's considerations have made it less newsworthy. Academic attention to the actual practices of the HRC has also been infrequent although it is now increasing.

3.50 The political support for the HRC could have come from various bodies. However, the Conference of States parties and ECOSOC have taken no substantive roles concerning the HRC's work. The only serious attention to the HRC's work has come from the Third Committee of the G.A. during its discussion of the HRC's Annual Report. We have noted the development of extensive consideration of the HRC's work in the Third Committee with various views and opinions being expressed. The actual relationship between the HRC and the Third Committee is not spelt out in the ICCPR but in practice the HRC has

---

[287] The HRC has been concerned to see that their functions under article 40 have not been misrepresented or incorrectly reported by newspapers or academic commentators. E.g. some members criticized the article by Professor Nowak, n.1 above, which pointed to alleged political differences within the HRC. See also SR 428 prs.1-5 concerning a report in the New York Times on 31/1/87 on the HRC's consideration of the report of Nicaragua.

given very serious consideration to the views expressed in the Third Committee. The Third Committee is an important forum where at least a limited amount of political pressure can be brought to bear on State parties who default on their obligations to submit reports and on their obligations to implement the provisions of the Covenant.

3.51 The substantive deliberations of the HRC under the article 40 process are extensively illustrated in chapters 5-12 with respect to selected rights in the ICCPR. The foregoing account would appear to suggest that the HRC has established a workable reporting procedure. A oral dialogue has been established with all States except Guinea. That dialogue has been conducted in a searching, critical manner by members of the HRC. Acrimonious exchanges with State representatives and the introduction of Inter-State disputes have generally been avoided though a number of exchanges have been marked by a degree of tension.[288] There is also some limited evidence that the HRC's considerations have had some direct effect on the protection of human rights in some States parties. This evidence is considered in Chapter 13. However, it is much less systematic than the record of formal changes in laws and practices that can be given under the system of I.L.O. Conventions[289] or under the European Social Charter.[290]

3.52 On balance, despite some of the deficiencies noted in this chapter, the reporting procedure has been developed into a much more useful procedure of international implementation (in the broad sense) than

---

[288] E.g. during the consideration of reports from Iran, Rumania, Chile, El Salvador.

[289] See Valticos, n.1 above, prs.618-619.

[290] See Harris, n.1 above, pp.188-191 and appendices II and III.

might confidently have been predicted when the Covenant was adopted in 1966.[291] Moreover, as Professor Tomuschat has noted, there is a broader dimension to the HRC's work which must not be overlooked,

> "The meetings being held by the Committee marked a turning point in the history of human rights: for the first time, a procedure had been established which applied to the States of all regions in the world, irrespective of the ideological and political differences separating them, and which was designed to exercise, through a friendly and constructive dialogue, a kind of international control".[292]

However, there remains little doubt that the some fundamental jurisdictional questions remain unresolved and the system is open to further improvement, rationalization and development along the lines suggested in this Chapter.

---

[291] See Capatorti, n.1 above. Cf. "The reporting system is essentially a means of providing information,...the reporting system as articulated in article 40 is not a monitoring system", Wallace, International Law, p.189 (1986).

[292] SR 117 pr.35.

CHAPTER 4. THE OPTIONAL PROTOCOL TO THE ICCPR.

INTRODUCTION.[1]

This chapter examines the work of the HRC in implementing the O.P. to the ICCPR. A right of petition

---

[1] For full text of the O.P. see appendix II below. There is a substantial amount of literature on the O.P. Most of this deals with the drafting process or comments on the provisions of the O.P. Very little of it is directed to the actual practices of the HRC. See Anon, 23 Rev.ICJ (1979) p.26 at pp.28-30; Anon, 25 Rev.ICJ (1980) p.35 at pp.37-38; Anon, 31 Rev.ICJ (1983) p.42 at pp.46-49; Anon, 35 Rev.ICJ (1985) p.18 at pp.21-25; Anon, 37 Rev.ICJ (1986) p.25 at pp.28-31; A.K.Ahmed, Analysis Of Decisions Of The Committee On Human Rights, LLM thesis, c.1982; Agarwal, ch.1, n.1 above, pp.40-47; Bossuyt 'Guide', pp.793-818; M.Bossuyt, Le Reglement Interieur Du Comite Des Droits De L'Homme, XIV Revue Belge De Droit International,(1978-79), p.104 at 132-156; P.S.Brar, ch.3, n.1 above, ch.III; P.S.Brar, The Practice And Procedures Of The Human Rights Committee Under The Optional Protocol Of The International Covenant On Civil And Political Rights, 26 Ind.JIL (1986) pp.506-543; F.Capatorti, ch.1, n.1 above, p.131 at pp.143-148,(1968); K.Das, United Nations Institutions And Procedures Founded On Conventions On Human Rights And Fundamental Freedoms, in K.Vasak, (General Editor), P.Alston (Ed.,English Edition), p.303 at pp.343-348; P.R.Ghandhi, The Human Rights Committee And The Right Of Individual Communication, 57 BYIL 1986 (1987) pp.201-251; W.P.Gormley, ch.1, n.1 above; M.Lippman, Human Rights Revisited:The Protection Of Human Rights Under The ICCPR, XXVI NILR (1979), p.221 at pp.262-277; E.Mose and T.Opsahl, The Optional Protocol To The ICCPR, 21 Santa Clara Law Review (1981), pp.271-331; M.Moscowitz, Human Rights And World Order, Chapters IX and X, (1958); M.Nowak, The Effectiveness Of The ICCPR-Stocktaking After The First Eleven Sessions Of The HRC, 1 HRLJ (1980), p.136 at pp.152-162,168-169; M.Nowak, Survey Of Decisions, 2 HRLJ (1981), p.168 at 169-172; Ibid., 3 HRLJ (1982) p.207 at pp.210-218;

(Footnote Continued)

(Footnote Continued)
Ibid., 5 HRLJ (1984) p.199 at pp.203-208; Ibid., 7 HRLJ (1986) p.287 at pp.292-306; Othan A. Prounis, The Human Rights Committee: Toward Resolving The Paradox Of Human Rights Law, 17 Col.HRLR (1985) pp.103-119; Pathak, The Protection Of Human Rights, 18 Ind.JIL (1978) pp.265-273; B.G.Ramcharan, Implementing The International Covenants On Human Rights, in B.G.Ramcharan,(Ed.), Human Rights:Thirty Years After The Universal Declaration, p.159 at pp.187-195,(1979); B.G.Ramcharan, The Emerging Jurisprudence Of The Human Rights Committee, 6 Dalhousie L.J.(1980), p.7 at pp.33-40; A.H.Robertson, ch.2, n.1 above p.332 at 357-369,(1984); A.H.Robertson, Human Rights In The World, pp.54-60, (2d, 1982); H.R.S.Ryan, Seeking Relief Under The United Nations ICCPR, 6 Queens L.J. (1980), pp.389-407; E.Schwelb, Civil And Political Rights-The International Measures Of Implementation, 62 AJIL (1968), p.827 at pp.860-868; E.Schwelb, The International Measures Of Implementation Of The ICCPR and Of The O.P.,12 Tex.ILJ (1977), p.141 at pp. - ; D.L.Shelton, Individual Complaint Machinery Under The United Nations 1503 Procedure and the O.P. to the ICCPR, in H.Hannum,(Ed.), Guide To International Human Rights Practice, p.59 at pp.67-72, (1984); L.B.Sohn, ch.1, n.1 above, p.39 at 166-167 (1968); L.B.Sohn, Human Rights:Their Implementation And Supervision By The United Nations, in T.Meron,(Ed.), Human Rights In International Law-Legal And Policy Issues,Vol.2, p.369 at pp.389-391; P.Sieghart, The International Law Of Human Rights, Parts II-III passim, pp.387-389,(1983); R.Starr, International Protection Of Human Rights And The United Nations Covenants, (1967) Wisconsin L.R. p.841 at pp.875, 881-883; M.Tardu, Human Rights - The International Petition System, vol.I, pp.2-25, vol.II, part I, (1979-86); C.Tomuschat, Evolving Procedural Rules:The United Nations Human Rights Committee's First Two Years Of Dealing With Individual Communications, 1 HRLJ (1980), pp.249-257; Ton J.M. Zuidjwick, Petitioning The United Nations- A Study In Human Rights, Ch.XIV at pp.348-369 and Ch.XV,(1982); Ton J.M. Zuidjwick, The Right To Petition The United Nations Because Of Alleged Violations Of Human Rights, 59 Can.Bar Rev.(1981) pp.103-123; A.De Zayas and J.Th.Moller, Optional Protocol Cases Concerning The Nordic States Before The United Nations Human Rights Committee, 4 Nordic Journal Of International Law (1986) pp.384-400; A.De Zayas, J.Th.Moller, T.Opsahl, Application Of The International Covenant On Civil And Political Rights Under The Optional Protocol By The Human Rights Committee, 28 GYIL (1985) pp.9-64; M.J.Cote, Le Recours Au Comite Des Droits De L'homme De L'ONU - Une Illusion?, 26 Cahier De Droit (1985) pp.531-547; T.Meron, Human Rights Law-Making In

(Footnote Continued)

(communication)[2] to or against governments is of long historical standing both in national and international law.[3] Proposals to include such a right in the international bill of rights proved controversial. That controversy is briefly examined in section A. Section B concerns the structure and terms of the O.P. Section C deals with the status of the O.P. and of communications submitted under it. Section D examines in detail how the practices and procedures of the HRC have developed the structure of the O.P. These aspects are linked to section E which reviews how the HRC has approached and interpreted the terms of the O.P., the ICCPR, and its own provisional rules of procedure in the consideration of communications. The HRC's views on a series of substantive rights in the ICCPR are examined in the following chapters. Finally in this chapter, section F offers an appraisal of the work of the HRC under the O.P.

It is important to be clear concerning the primary purpose of the chapter. That purpose is not to present a comprehensive analysis of the O.P. per se. Rather it is to examine how the practice of the HRC has developed the O.P. as an implementation technique. Through that examination it is possible to observe the role that the HRC perceives for itself under the O.P. Is it to fulfil the role of a judicial body in proceedings of an

---

(Footnote Continued)
The United Nations, ch.III, (1986); A.J.Glenn Mower, Jr., Organizing To Implement The UN Civil/Political Rights Covenant, 3 HRRev. (1978) pp.122-131.

[2] See n.39 below.

[3] See generally on the right to petition in international law Zuidjwick,n.1 above,(1982); Gormley,n.1 above; D.P.Parson, The Individual Right Of Petition: A Study Of Methods Used By International Organizations To Utilize The Individual As A Source Of Information On The Violation Of Human Rights, 13 Wayne L.Rev.(1967), pp.678-705.

adversarial or inquisitorial nature or a more dynamic role? How is it to be guided in matters concerning the burden and standard of proof, the admission and admissibility of evidence, and fact-finding generally? Will the practices and precedents of other international institutions, particularly human rights organs, be followed? How strictly will the conditions of admissibility be interpreted and applied? Are the powers of the HRC to be strictly construed from the express terms of the O.P. or will the HRC assume implied powers that it considers reasonably necessary for it to fulfil its functions effectively? On many of these matters the O.P. itself offers little or no guidance so the answers can only be sought in the practices and procedures of the HRC.

A. THE ORIGINS, DRAFTING AND SIGNIFICANCE OF THE OPTIONAL PROTOCOL TO THE ICCPR.[4]

4.2 It is impossible to comprehend the significance in international law of the inclusion of a right of petition for individuals in the O.P. without at least an outline of its drafting history. As we noted in chapter one, when the General Assembly approved the Universal Declaration Of Human Rights in 1948 it instructed the Human Rights Commission (HRCion) to continue with the drafting of the international covenants and to consider measures of implementation including a right of individual petition.[5] More specifically in 1950 the General Assembly called upon the ECOSOC to request the HRCion to proceed with the consideration of provisions, "to be inserted into the draft covenant or in separate protocols, for the receipt and examination of petitions from individuals and organizations with respect to alleged violations of the Covenant".[3]

Such proposals were almost necessarily going to be controversial as already some States had indicated that they considered the draft proposals for an inter-State procedure to be contrary to national sovereignty, international law and article 2(7) of the United Nations Charter.[4] Various proposals were made which would have extended the right of petition to individuals, groups of individuals, all or selected non-governmental

---

[4] See n.1 above. For summaries of the drafting work on the right to petition see Doc.A/2929, ch.1, n.1 above at ch.VII, prs.59-89 (1955), Doc.A/6546, prs.568-612 (1966), ibid. This account is largely drawn from those two documents.

[5] Doc.A/2929, n.4 above, ch.I, pr.9.

[3] G.A.Resn.421 (V), section F, cited in Doc.A/2929, n.4 above, pr.22.

[4] See ch.1, pr.1.18 above.

organisations.[5] Other proposals favoured empowering the Human Rights Committee to act of its own motion, merely granting the right to communicate but leaving the matter of any action thereafter to the initiative of the HRC or States parties.[6] Yet another suggestion was to appoint a High Commissioner (Attorney-General) for Human Rights with jurisdiction to receive charges from any source and with authority to institute proceedings before the HRC.[7]

In the event proposals to extend the right of petition beyond states parties were to seriously divide the HRCion. Ultimately all such proposals were either rejected or withdrawn and the final HRCion draft contained no provisions for petitions by individuals or organizations.[8]

Opposition to these proposals on petitions were broadly based on three lines of argument. Firstly, the traditional argument that only States were subjects of international law. The right of individuals and groups to complain of violations of their rights at the national level and the duty of States parties to ensure remedies for such violations had been recognised in the draft article 2 of the ICCPR;[9] petitions in the case of Trust Territories and under the Minorities system of the League of Nations were said to be distinguishable;[10] the

---

[5] See e.g. ECOSOC OR, 13th session, Supp.9, pr.84; Doc.A/2929, n.4 above, pr.75 et seq.

[6] See e.g. ECOSOC OR, 16th session, Supp.8, Ax.3, prs.132-143; Doc.A/2929, n.4 above, pr.76.

[7] Doc.A/2929, n.4 above, prs.84-86. See Clark, ch.1, n.125 above.

[8] See ch.1, pr.1.6 above.

[9] See text to ch.1, n.38 above. On article 2 ICCPR see ch.6 below.

[10] See ch.1, pr.1.1 above. See also Zuidjwick, n.1 above chs.III.

State was the unit of international organisation and only States were subjects of international law; no theory of supra-national authority had been generally accepted; the obligations of States under the United Nations to co-operate on human rights matters implied, apart from the Trusteeship system, no automatic recognition of the right of petition of individuals and non-governmental organisations; responsibility for observation of the Covenants should rest with States; extending the right of petition might violate the sovereignty of States and the sovereign equality of States.

Secondly, it was argued that the proposed system of inter-State complaints was sufficient to safeguard the provisions of the Covenant. There was no reason to doubt that States parties would fulfil their obligations; States parties would be free to take up cases of violations; most cases could be settled by direct diplomatic negotiations; charges brought before the Committee would be strictly confined to violations of the Covenant.

The third line of argument was that the international responsibility for the promotion of human rights was a relatively recent development and so an extended petition system might be unacceptable to many countries. Some representatives accepted that, ideally, the right of individuals, or at least non governmental organizations, ought to be recognized internationally as they were nationally. They argued, however, that the international community was not sufficiently developed for the right of petition to be granted immediately without fear of its being abused. The result might be a mass of irresponsible and mischevious allegations submitted for political or propaganda purposes. It was feared that the whole implementation machinery could thus be paralysed and it was doubted whether adequate safeguards could be introduced. Moreover, the inclusion of a right of petition might prevent States from

ratifying the Covenant and thus delay or even prevent the Covenant from coming into force.

4.2.1 Those in favour of extending the right of petition beyond States parties argued that the question of effective implementation had to be examined from the point of view of the individuals concerned as well as States. The traditional theory that only States were subjects of international law was said to be under challenge. Various precedents were cited including the United Nations Charter, the Minorities System of the League of Nations, the International Labour Organisation system, the Nuremberg trials, and the European Convention on Human Rights.[11] The views of several authors were cited as further support for this view.[12] Moreover, it was argued that under the very terms of the Covenant the individual was plainly a subject of international law and the purpose of the Covenant was to protect him against abuses of power by the State. The view was advanced that as each State was free to accept the Covenant or not, what was involved was not an invasion of sovereignty but rather a voluntary relinquishment of some national sovereignty.[13] Fears of abuse were countered with the view that adequate safeguards could be provided to protect States.

The advocates of an extended petition system argued strongly that an inter-State petition system alone was not sufficient to effectively implement the Covenants. Violations by one State would cause moral rather than

---

[11] Doc.A/2929, n.4 above, pr.68. On the ECHR see 'European Convention On Human Rights: Collected Texts', (1986).

[12] E/CN.4/SR.434, p.6 (Turkey).

[13] Doc.A/2929, n.4 above, pr.69. See the view of the HRC under the O.P. in Antonaccio v. Uruguay, pr.4.11 below.

immediate and direct injury to other States parties so intervention would be unlikely. Past experience of the League of Nations and the I.L.O. was cited to demonstrate that intervention by States to redress violations of human rights, even under treaty obligations, had been negligible and rarely fruitful. Political reality indicated that States would be unlikely to lay charges of violations against friendly States or States with which they had close political or economic ties. Conversely, allegations concerning a State with which the applicant State was not on friendly terms would be viewed as motivated by other than humanitarian purposes.[14]

It was argued that the Covenant had to give the individual human being a basic right to protest when his dignity was impaired. A particular plea was made to allow non-governmental organisations having consultative status with ECOSOC to have the right to petition. These organisations had played an important part in promoting human rights nationally and internationally, would act with great caution because of the potential fear of criticism from their own members and from ECOSOC, and had the advantage over private citizens of owing no allegiance to any particular State and would therefore be free to defend the interests of humanity as a whole.

4.3 The possibility of including an optional protocol on the right of petition was discussed in the HRCion as a potential solution to the objections of states opposed to the inclusion of of this right in the text of the Covenant. However, this too was opposed. Some States maintained their objections in principle to the right of petition. Even the advocates of the right of petition

---

[14] Doc.A/2929, n.4 above, prs.70-72. A proposal to insert a special article to the effect that States parties would not consider any steps taken by another party under the inter-State procedure as an unfriendly act was not received favourably, Ibid., pr.71.

did not favour this course because they considered that inclusion of the right of petition was indispensable for the proper implementation of the Covenant.[15] A draft protocol on petitions from individuals and non-governmental organisations was submitted by the United States but was subsequently withdrawn without there having been any detailed discussion.[16]

In the event then the final draft of the HRCion's text contained no provision for petitions from individuals or non-governmental organisations. During the consideration of the HRCion's draft in the Third Committee amendments were proposed to insert an article on the right of individual petition.[17] The debate on these proposals largely mirrored those in the HRCion. Those who supported a right of individual petition cited the precedents of the ECHR (1950) and the ICERD (1965) and argued that they had transformed the status of the individual in international law. In addition to pointing to the optional nature of the proposed right stress was laid on the safeguards within it that would prevent its being abused. As for the opponents of the right of petition particular concern was expressed in terms of the alleged infringement of State sovereignty involved, the dangers of abuse and undesirable publicity. Moreover, they argued that its inclusion might limit ratifications to the extent that the Covenant would not enter into force.

A key question raised in the debate was whether if a right of individual petition was to be included it should be embodied in the draft covenant or provided for in a separate protocol annexed to the draft protocol. Those in favour of the former stressed the "organic

---

15 See Doc.A/2929, n.1 above, prs.74-80.

16 See ECOSOC OR, 14th session, Supp.4, Ax.IIIA.

17 See Doc.A/6546, n.1 above, pr.477.

unity" of the instrument; those in favour of the latter argued that the mere presence of such a provision in an instrument might of itself make it impossible, on grounds of principle, for many States to become parties. Eventually, the Third Committee narrowly adopted a proposal that the right of petition be included in a separate protocol annexed to the draft Covenant.[18] After further discussion and amendment the draft Protocol was approved by the Third Committee though with a substantial number of abstentions.[19] The Optional Protocol was finally adopted by the General Assembly by a vote of 66 to 2, with 2 abstentions.[20] After two decades of discussion and debate the "International Bill Of Rights" was complete.[21] Not until a decade later, however, were the two Covenants and the Optional Protocol to come into force. The rest of this chapter examines the first decade of practice under the O.P. The final appraisal includes an examination of the significance of the Optional Protocol in international law.[22]

---

[18] Doc.A/6546, n.1 above, pr.485.

[19] The vote was 59 for, 2 against and 32 abstentions, Doc.A/6546, n.4 above, pr.597.

[20] G.A.Resn.2200 A (XXI), 21 UN GAOR (1496th meeting) pr.60 at 6; A/PV 1496 (1966).

[21] See ch.1, pr.1.3 above.

[22] See pr.4.119 below.

B. The Structure And Terms Of The O.P. to the ICCPR.

4.4 According to the Preamble to the O.P. the HRC is given competence to consider communications from alleged victims, "in order to further achieve the purposes of the ICCPR".[23] Under Article 1 of the O.P. a State party to the O.P. recognizes the competence of the HRC, "To receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant". The competent body then is the HRC[24] and only the HRC.[25] A suggestion in the Third Committee that the States parties to the O.P. should establish a separate Committee for the consideration of communications was not taken up.[26]

Communications are considered by all of the members of the HRC. Therefore,independent experts who are nationals of States which are not parties to the O.P.,[27] and which may in fact oppose recognition of the right of

---

[23] The HRC referred to the preamble in its decision in Antonaccio v. Uruguay, A/37/40, p.114. See pr.4.11 below.

[24] See pr.4.120 below.

[25] There is no reference in the O.P. to any role in the implementation machinery of the O.P. for the ECOSOC or the Third Committee of the General Assembly. See the schemes of implementation machinery of the ECHR,the AMR,the ICESCR and the ESCh in Vasak/Alston, (Eds.),n.1 above, pp.684-685.

[26] See the statement of Mr.Kornyenko (Ukrainian SSR),Third Committee,A/C.3/SR 1441,pr.51,(1966). See Schwelb,Civil and Political Rights,n.1 above,p.861 and n.152.

[27] So,for example,the two independent experts from the U.K. who have served on the HRC have taken part in the consideration of communications even though the U.K. is not a party to the O.P.

individual petition,[28] still participate fully in the consideration of communications. While there are obvious objections to this similar practices can be observed with respect to the ICJ,[29] the EUCM,[30] the EUCT,[31] the CERD,[32] the IACM,[33] and the IACT.[34] Hopefully,through the participation of their nationals in the development of the O.P. procedure States which are not parties can be encouraged and induced to ratify the O.P. With the continuing involvement of the nationals in the O.P. procedures it may become increasingly difficult for the U.S.S.R. and the Eastern European States to maintain their position in opposition to the right of individual petition.[35]

There is no provision in the O.P. for Ad hoc members to join the HRC.[36] Consequently a State party

---

[28] This would include members of the HRC of Russian, East German, Rumanian, Bulgarian, Polish and Yugoslavian nationality.

[29] All members of the United Nations are ipso facto parties to the Statute of the ICJ (article 93 of U.N. Charter). However, members of the ICJ are to be elected regardless of their nationality (article 2, Statute of ICJ). Judges may sit on the court even if they are a national of a State which has not accepted the compulsory jurisdiction of the court under article 36(2) of the Statute.

[30] See Van Dijk and Van Hoof, pp.18-23.

[31] Ibid., pp.23-27.

[32] See Lerner, ch.3, n.1 above, pp.82-86.

[33] See Buergenthal, Norris and Shelton, Protecting Human Rights In The Americas, ch.VI (2d, 1987).

[34] Ibid.

[35] See Mose and Opsahl, p.330.

[36] Cf.Art 31 of the Statute of the ICJ; Art.10 of the Statute of the IACT. Under the ECHR all Contracting parties have one member of the EUCM of their nationality
(Footnote Continued)

may be a respondent before the HRC without one of its nationals or a person nominated by it being on the HRC.[37] We may also note here that the HRC does not possess any advisory jurisdiction.[38]

(Footnote Continued)
or nominated by them, and all members of the Council of Europe have one judge of the EUCT of their nationality or nominated by them even if they have not accepted the right of individual petition (article 25) or the compulsory jurisdiction (article 46) of the EUCT. When a Chamber of the EUCM or the EUCT is formed they include the Commission member or judge respectively of the national States concerned.

[37] For example,most communications to date have concerned Uruguay which has never had one of its nationals or a person nominated by it serving as an independent on the HRC.

[38] Under Articles 96 of the U.N. Charter an advisory opinion of the ICJ can be sought by organs of the U.N. and specialized agencies if they have been authorized by the General Assembly to do so. The autonomous status of the HRC would place it outside article 96 despite its strong links with the U.N., see ch.2 above. The General Assembly or the Security Council could obtain an advisory opinion concerning the ICCPR or the O.P. but such an opinion would not be binding on the States parties. See Sohn, ch.1, n.1 above, p.149 citing a Report of the Secretary-General (1950). We have already noted that all references to the ICJ in the ICCPR were deleted, see ch.1, pr.1.11 above. The EUCT has limited advisory jurisdiction under the 2nd Protocol to the ECHR which has never been invoked, see ECHR -
(Footnote Continued)

Early draft versions of what emerged as the O.P. used the term "petition".[39] This was changed to "communication" but this does not seem to have been intended as a substantive change.[40] The O.P. only provides for communications to be submitted by

---

(Footnote Continued)
Collected Texts, n.11 above, pp.27-30; Van Dijk and Van Hoof, pp.158-160. The desirability of empowering the EUCT to give preliminary rulings at the request of a national court is being considered within the Council of Europe, see Information Sheet No.18, Apx.XXIV, Council of Europe, (1986) and Information Sheet No.19, pp.21-22, (1986) The IACT has issued a number of important advisory opinions, for example on reservations and the death penalty. See T.Buergenthal, The Advisory Jurisdiction Of The Inter American court Of Human Rights, in T.Buergenthal (ed.), Contemporary Issues In International Law,pp.127-147 (1984).

[39] See the Netherlands proposal,A/C.3/L.1355, Report of the Third Committee, Doc.A/6546,pr.474,(1966), and the ten power amendment,A/C.3/L.1402/Rev.2 (draft article 41 bis), Ibid., pr.477. For some of the different terminology used in some international instruments see Schwelb,Civil and Political Rights, n.1 above, p.864. "The meaning of the term "petition" in international legal usage is somewhat different from its meaning within the common law systems. The aim of the right of petition is especially to inform the relevant authorities of a certain problem or situation,and does not automatically lead to subsequent proceedings", Van Dijk and Van Hoof, p.35.

[40] The changes were suggested by France, A/C.3/SR.1418 pr.8 (Mr.Paolini). See also
(Footnote Continued)

"individuals".[41] As we have noted proposals to extend the right of petition to all or selected non-governmental organisations were not accepted.[42]

4.5 The communication submitted to the HRC must be in "written" form (Article 2 O.P.) and all available domestic remedies must have been exhausted.(Articles 2 and 5(2)(b) O.P.) There is no provision in the O.P. equivalent to that in Article 14 ICERD which provides that a State party must establish or indicate a body within its national legal order which shall be competent to receive and consider petitions from individuals who claim to be victims of any of the rights in the ICERD and have exhausted all other available domestic remedies.[43] Presumably,however,a State party to the O.P. would not be precluded from establishing such a body and if it did so the individual would probably be required to have recourse to it in order to satisfy the domestic remedies requirement of the O.P.

Article 3 of the O.P. provides that the HRC shall consider "inadmissible" any communication which is anonymous,[44] or which it considers to be an abuse of the

---

(Footnote Continued)
A/C.3/L.1394,later withdrawn. In the HRCion India proposed a "petition" system under which the Committee might undertake an enquiry on receipt of complaints from groups of individuals and non-governmental organizations if it so decided. The proposal was rèjected. This would have been a petition system in strict international law usage, see HRCion, Report of 7th session, ECOSOC OR, 13th session, Supp.9, prs.84-85.

[41] See prs.4.64-4.81 below. Cf.ECHR art.25; ICERD art.14; AMR art.44.

[42] See prs.4.23-4.26 above.

[43] Article 14(2) ICERD. For the background to this unusual provision see Humphrey, ch.1, n.1 above, p.333 (1984); Lerner, ch.3, n.1 above, p.84. See also Article 14(3) - (6) ICERD.

[44] See pr.4.117 below.

right of submission,[45] or incompatible with the provisions of the Covenant.[46] Subject to the provisions of Article 3 O.P. communications are brought to the attention of the State party concerned (Article 4(1)) The State party then has six months to submit to the HRC, "Written explanations or statements clarifying the matter and the remedy,if any,that may have been taken by that State".(Article 4(2))

Under Article 5(2) O.P. the HRC shall not consider any communication from an individual unless it has ascertained that:

"(a) The same matter is not being examined under another procedure of international investigation or settlement;[47]

(b) The individual has exhausted all available domestic remedies.[48]

This shall not be the rule when the application of the remedies is unreasonably prolonged".[49]

The examination of communications is to be conducted in closed meetings.(Article 5(3) O.P.) On completing its "examination" the HRC "Shall forward its views to the State Party concerned and to the individual".(Article 5(4) O.P.) There are no express provisions in the O.P. concerning a friendly

---

[45] See pr.4.118 below.

[46] See prs.4.49-4.86 below.

[47] See prs.4.87-4.99 below.

[48] See prs.4.100-4.116 below.

[49] This sentence has been the subject of important decision by the HRC as to whether it applies to Article 5(2)(a) O.P. as well as to Article 5(2)(b) O.P. See pr.4.97 below.

settlement[50] or the exercise of good offices by the HRC.[51]

Article 6 O.P. instructs the HRC to include in its annual report under Article 45 ICCPR a summary of its activities under the O.P.[52] Article 7 O.P. provides that pending the achievement of the objectives of the General Assembly's "Declaration on the Granting of Independence To Colonial Countries and Peoples" (1960),[53] the provisions of the O.P., "Shall in no way limit the right of petition granted to these people by the Charter of the United Nations and other international conventions and instruments under the United Nations and its specialized agencies".[54]

Articles 8-10 O.P. are noted below.[55] Article 11 deals with amendments; article 12 concerns denunciations; article 13 provides for States parties to be informed of certain matters concerning the O.P. by the Secretary- General of the United Nations; article 14 provides that the Chinese, English,French,Russian and Spanish texts of the O.P. are equally authentic.[56]

---

[50] Cf.Articles 28 and 30 ECHR. See Van Dijk and Van Hoof, pp.101-110.

[51] A good offices procedure is provided for in Article 41(1)(e) ICCPR for inter-State complaints. On good offices in a human rights context generally see B.Ramcharan, Humanitarian Good Offices In International Law (1983).

[52] For the importance of the HRC's Annual Report see Ch.3, pr.3.40 above.

[53] G.A.Resn.1514(XV), (Dec.14, 1960), GAOR,15th session, Supp.16, p.66.

[54] Cf.Article 15 ICERD. On the rights of petition of such peoples see Zuidjwick, n.1 above.

[55] See pr.4.6 below.

[56] A discrepancy in the texts has been identified concerning article 5 O.P., see pr.4.87 below.

Like the provisions of the ECHR dealing with the right of individual petition the O.P. is notable for its brevity. This is partly accounted for by the haste in which the O.P. was drafted and adopted.[57] The consequence,however,is that the HRC was necessarily left with substantial scope and flexibility to establish the necessary procedural system to operate the O.P. This system is given detailed attention after a brief consideration of the status of the O.P. and the status of communications placed before the HRC.

---

[57] Mose and Opsahl, p.276 argue that the speed of drafting has to be taken into account in interpreting and applying the O.P.

C. Status of the O.P.; Status of communications under the O.P.

4.6 Although the ICCPR and the O.P. are substantially related, and the HRC is the implementation organ for both, they are separate international treaties.[58] The O.P. is open for signature by any State that has signed the ICCPR (Article 8(1) O.P.). It can only be ratified by or acceded to by a State which has ratified or acceded to the ICCPR (Article 8 (2)(3) O.P.). The O.P. provides that it shall enter into force three months after the date of deposit of the tenth instrument of ratification or accession (Article 9(1) O.P.). However, the entry into force of the O.P. was "Subject to the entry into force of the ICCPR" (Article 9(1) O.P.). In fact the O.P. entered into force on the same date as the ICCPR, 23 March 1976, because by that date there were already the necessary ten States Parties to the O.P.[59] For States subsequently ratifying or acceding to the O.P., the O.P. enters into force three months after the date of the deposit of the instrument of ratification or accession (Article 9(2) O.P.) As with the ICCPR the provisions of the O.P. "Extend to all parts of federal

---

[58] In the Third Committee it was originally decided that the draft provisions on the right to individual petition would be included in a separate Protocol annexed to the Covenant. Subsequently the argument "that it was impossible to have a Protocol that was both separate and annexed", was accepted, see SR A/C.3/SR/1451, pr.62 (Saskena). See the comments at A/C.3/SR.1446 pr.28 and SR 1451 pr.54 (Schreiber, Director of the Human Rights Division). The ICCPR and the O.P. are listed as separate treaties by the Secretary-General of the U.N. Professor Robertson has suggested that there is even some advantage in the O.P. being a separate treaty in terms of publicity, Robertson, ch.3, n.1 above, p.360 (1981).

[59] There were in fact twelve States parties as of that date.

States without any limitations or exceptions" (Article 10 O.P.).[60]

There is no provision in the O.P. concerning its territorial scope.[61] The Netherlands has declared the O.P. applicable to the Netherlands Antilles.[62] There is also no provision concerning reservations to the O.P.[63] In practice a number of states have made reservations to the O.P. some of which have been considered by the HRC.[64]

Status of communications under the O.P.

4.7 As of 1 April 1988 forty one of the eighty seven States which have ratified or acceded to the ICCPR have accepted the competence of the HRC to deal with individual communications by ratifying or acceding to the O.P. These States are Argentina, Austria, Barbados, Bolivia, Cameroon, Canada, Central African Republic, Colombia, Congo, Costa Rica, Denmark, Dominican Republic, Ecuador, Equatorial Guinea, Finland, France, Iceland, Italy, Jamaica, Luxembourg, Madagascar, Mauritius, Netherlands, Nicaragua, Niger, Norway, Panama, Peru, Portugal, Saint Vincent and the Grenadines, San Marino, Senegal, Spain, Suriname, Sweden, Togo, Trinidad and Tobago, Uruguay, Venezuela, Zaire, Zambia.[65] A number of West European

---

[60] See ch.1, prs.1.7, 1.24 above.

[61] Article 29 V.C.L.T. (1969) provides that, "Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each State party in respect of its entire territory".

[62] 'Human Rights - Status Of International Instruments' (1987) p.94, Doc.ST/HR/5.

[63] See ch.1, pr.1.24 above.

[64] See n.62 above, pp.91-94. See prs.4.92-4.96 below.

[65] Doc.A/42/40 Apx.I, p.114. Information supplied by the UN Secretariat.

States are not parties.[66] The U.S.S.R. and the East European bloc are not parties.[67] A small number of African states are parties. No Asian State is a party. As the United States has not ratified the ICCPR it is precluded from ratifying the O.P.[68]

At its very first session (March-April 1977) the Secretary-General of the United Nations informed the HRC that some communications had been submitted for consideration by the HRC.[69] The HRC began its consideration of communications at its second session (August 1977).

4.8 As of 1 April 1988 288 communications have been placed before the HRC for consideration, concerning 26 States parties to the O.P.[70]. The status of the 288 communications is as follows:

(a) Concluded by views under Article 5(4) O.P.: 83;

(b) Concluded in another manner (inadmissible, discontinued,suspended or withdrawn): 115;

(c) Declared admissible, not yet concluded: 22;

---

66 Of the twenty one Contracting parties to the ECHR nine are also States parties to the O.P. The U.K. has not signed or ratified the O.P. on the ground that, "In some respects it compares unfavourably from the individual's standpoint with the procedure established by article 25 of the European Convention on Human Rights, to which the United Kingdom has acceded", Hansard, H.C.Debs., vol.962, Written Answers, col.262, (8 Feb.1979). See N.Grief, The International Protection Of Human Rights: Standard-Setting And Enforcement By The United Nations And The Council Of Europe, (1983) Bracton LJ pp.41-65.

67 These States do not recognize the standing of the individual in international law, see ch.1, prs.1.18 - 1.21, 1.26 and ch.4, pr.4.2-4.3 above.

68 See ch.1, pr.1.25 above.

69 Doc.A/32/44 prs.146-147.

70 Information supplied by the U.N.Secretariat.

(d) Pending at pre-admissibility stage: 68.

D. THE PROCEDURAL FUNCTIONING OF THE O.P.

1. The Receipt And Transmission Of Communications.[71]

4.9 Every year tens of thousands of communications concerning human rights matters are received by the United Nations. The task of channelling communications to the appropriate body is undertaken, on behalf of the Secretary-General of the U.N., by the Communications Unit of the Centre for Human Rights in Geneva.[72] The nature and extent of the Secretary-Generals' powers are of immense importance in determining which communications are directed to the HRC for consideration under the O.P.[73] There are no express provisions in the O.P. dealing with this matter. There was general agreement within the HRC that the function should be a "purely administrative",[74] technical one rather than constituting a "preliminary screening procedure".[75] The exercise of any substantive discretion was to be

---

71 See Rules 78-81; Doc.A/32/44,prs.52-54.

72 On behalf of the Secretary-General the Centre for Human Rights acts as the Secretariat to the HRC. The Secretariat staff for the work of the HRC under the O.P. is different from the staff which works with the HRC on the reporting process under article 40. The Communications Unit receives any submission, however addressed, provided it is intended for the U.N. and alleges some violation, Report of the Secretary-General, Doc.E/CN.4/1317 (1979). The Human Rights Centre employs nearly 50 professionals to serve the HRCion and related organs. On the HRC and the Secretariat see ch.2, prs.2.16-2.17 above.

73 The Secretariat refers as many communications as possible for consideration under the O.P., Doc.E/CN.4/1317, n.72 above, prs.30-36 (1979).

74 SR 11 pr.19 (Lallah).

75 SR 11 pr.21 (Opsahl).

reserved to the HRC.[76] Among the matters discussed were cases in which it was not clear whether a communication was intended as a formal complaint or not,[77] the need for clarifications to assist the HRC and the author,[78] and authors who had no knowledge of the provisions of the O.P. and no access to expert legal advice.[79]

Under the Rule adopted,

> "The Secretary-General shall bring to the attention of the Committee, in accordance with the present rules, communications which are or appear to be submitted for consideration by the Committee under article 1 of the Protocol".[80]

Inevitably the selection and channelling of communications within the U.N. involves an element of discretion on the part of the Secretary-General notwithstanding the various guidelines indicated by bodies like the HRC.[81] The rule adopted by the HRC would

---

76 This point was consistently emphasised during the discussion and adoption of the HRC's Rules. The suggestion during the discussion by Mr.Mazaud, Deputy Director of the then Division of Human Rights, that the Secretariat could take a decision on whether a communicant was under the jurisdiction of a State party to the O.P. must, it is submitted, be wrong, (SR 11 pr.32). Such a decision would clearly be one of substance that should be decided by the HRC.

77 SR 11 pr.11 (Esperson).

78 SR 11 pr.16 (Esperson).

79 SR 11 pr.25 (Lallah).

80 R.78(1). For example in C.E. v. Canada, S.D., p.16, C.E.'s letter was not explicitly addressed to the HRC but appeared to be submitted for consideration under the O.P.

81 The CERD has adopted the same rule as the HRC but with the addition of the words, "and who are subject to the jurisdiction of a State party bound by a declaration under article 14".(R.83(1)) Under the ECHR the Secretariat has the power to draw to the attention of potential applicants the possibility of rejection of the complaint in cases where the case law of the EUCM points in that direction, see Mikaelson, pp.40-42; Van Dijk and Van Hoof, pp.53-55.

appear to afford the Secretary-General sufficient latitude and flexibility to include borderline cases.[82]

Before taking a decision on transmission the Secretary-General may request clarification from the author as to his wish to have the communication submitted to the HRC for consideration under the O.P.[83] If doubt as to the author's wish remains it is resolved in favour of the HRC being seized of the communication.[84]

The only situation explicitly provided for in the Rules is that of a communication against a State which is not a party to the O.P. Such communications are not to be received by the HRC.[85] In practice the Secretary-General informs the author that the State concerned is not a party to the O.P. and that, therefore, the HRC has no jurisdiction.[86] The HRC considered it permissible for the Secretary-General to take such a decision because factually the matter would be clear.[87] There may, however, be difficult cases and these should in principle be decided by the HRC.[88]

During the discussion of the Rules concerning these matters various members made a number of comments on the general policy to be adopted. It was stressed that a restrictive transmittal policy should be avoided since

---

82 See Doc.A/39/40,pr.561.

83 R.78(2).

84 Ibid.

85 R.78(3). The CERD has adopted the same rule (R.83(3)). A substantial number of applications to the EUCM have concerned States not a party to the ECHR. See EUCM, Survey Of Activities And Statistics, (1987) p.8.

86 See Doc.A/33/40 pr.590.

87 See the comments of Graefrath at SR 11 pr.27.

88 See Bossuyt, n.1 above, pp.130-133; Mose and Opsahl, p.281.

the O.P. procedure was new and unknown. It was suggested that the Secretary-General should point out to the authors of communications the existence of the O.P. procedure whenever appropriate and indicate the possibility of them addressing their communications to the HRC. It was also suggested that the Secretariat draw up a model communication and guidelines to assist communicants. A model communication has been prepared but communicants are not obliged to use it.[89]

No Rule was adopted by the HRC concerning the language in which authors could submit their communications. The view was expressed, however, that authors should be able to write in the language of their choice. It was also suggested that the initial acknowledgement sent to authors should be drafted in the language in which the communication was submitted, and dispatched not later than ten to twenty days after the receipt of their communication.[90]

As already noted there is no time limit in the O.P. concerning the submission of communications.[91] A draft Rule proposed by the Secretariat would have established a twenty four month deadline.[92] This proposal raised an interesting discussion.[93] It was argued that the concept of a time limit was "Customary",[94] "A generally accepted principle and an important practical feature of domestic

---

89 The Secretariat model can be found in Apx.IV below.

90 Doc.A/32/44,pr.174. Cf. Rule 24 of the Rules of procedure of the EUCM, ECHR Collected Texts, n.11 above, p.120.

91 Cf. article 14(2) ICERD (6 months); art.26 ECHR (6 months); article 46 AMR (6 months).

92 Draft Rule 91(1), CCPR/C/L.2 and Add.1 and 2, Yb.HRC,Vol.II,p.1 at 8.

93 See SR 20 prs.51-60; SR 21 prs.1-16.

94 SR 20 pr.54 (Lallah).

and international law",[95] and would protect the HRC from the consideration of claims relating to very old events.[96] The precedent set by the ECHR was cited.[97] However, the proposal met with strong opposition as being "Neither legally nor morally defensible"[98] and as carrying the possibility of unfortunate consequences.[99] It was decided that there was no immediate need to adopt a Rule on the matter and that the HRC could revert to it if experience justified the consideration of such a provision.[100] No subsequent discussion on a time limit has been held in any public session and there remains no Rule on the point. In the course of the discussion a number of members pointed to the possibility that the HRC could treat an unreasonable delay in the submission of a communication as an abuse of the right of submission (Article 3 O.P.) and accordingly declare the communication inadmissible.[101]

It should also be noted that no Rule deals with the matter of the withdrawal of a communication.[102] Again the point was discussed during the drafting of the Rules but the HRC decided to revert to the question if the

---

95 SR 20 pr.55 (Vincent-Evans).

96 SR 21 pr.1 (Mr.Mazaud, Deputy Director, of the then Human Rights Division).

97 Article 26 ECHR.

98 SR 20 pr.60 (Prado-Vallejo).

99 SR 21 pr.5 (Opsahl).

100 SR 21 pr.15 (Chairman).

101 See SR 20 pr.57 (Vincent-Evans), SR 21 pr.6 (Movchan), SR 21 pr.8 (Esperson), SR 21 pr.13 (Mora-Rojas). To the same effect see Mose and Opsahl, p.310.

102 See Van Dijk and Van hoof, pp.107-108; Mikaelson, pp.50-51.

need arose on the basis of its further experience.[103] No Rule has subsequently been adopted. In practice there have been withdrawals.[104]

The Secretary-General prepares and circulates to HRC members at regular intervals lists of communications submitted to the HRC with a brief summary of their contents.[105] This Rule is designed to avoid delay between the receipt of a communication by the Secretary-General and its submission to the HRC. It also ensures that members have a working document for each communication submitted for consideration. The full text of any communication is available to any member on his request.[106] A permanent register of every communication is maintained by the Secretary-General.[107] For each registered communication the Secretary-General prepares and circulates a summary of the relevant information.[108]

The HRC has given the Secretary-General authority to request clarifications from the author concerning the applicability of the O.P. to his communication.[109] Such requests indicate a time limit with a view to avoiding

---

103 For the HRC's discussion see SR 17 pr.27-34, SR 34 pr.60-74; Doc.A/32/44,prs.90-94. See Mose and Opsahl, p.315.

104 See prs.4.19.4 below.

105 R.79(1). For the HRC's discussion see SR 11 prs.65-76.

106 R.79(2).

107 R.79(1). The numbering system used in the registration process was retrospectively changed at the HRC's eighteenth session, see Doc.A/37/40, note to pr.381.

108 R.81.

109 R.80(1).

undue delays.[110] Clarifications may be sought, in particular, regarding:

(a) The name, address, age and occupation of the author and the verification of his identity;

(b) The name of the State party against which the communication is directed;

(c) The object of the communication;

(d) The provision or provisions of the Covenant alleged to have been violated;

(e) The facts of the claim;

(f) Steps taken by the author to exhaust domestic remedies;

(g) The extent to which the same matter is being examined under another procedure of international investigation or settlement.[111]

A request for clarification does not preclude the inclusion of the communication in the list prepared by the Secretary-General for circulation to the HRC.[112]

---

110 R.80(2).

111 R.80(1) (a)-(g). Under R.80(3) the HRC may approve a questionnaire for the purpose of requesting this information from the author. Such a questionnaire is presently under consideration. When R.80 (draft R.81) was being adopted Mr.Esperson stated that, "It was possible for the State party to have entered a reservation when ratifying the Covenant and, in such cases, the Secretary-General had to determine whether its reservations applied to the communication under consideration".(SR 12 pr.26.) It is submitted that this view is incorrect. The applicability of a reservation must be a substantive question that is reserved to the HRC. In fact the HRC has considered such a question in a number of cases. See, e.g., Fanali v. Italy, ch.10, pr.10.52 below.

112 R.80(4)

2. General Provisions Regarding The Consideration Of Communications.[113]

4.10 Article 5(3) O.P. directs that the HRC hold closed meetings when examining communications under the O.P. This is repeated in Rule 82 but with the important addition that, "Meetings during which the Committee may consider general issues such as procedures for the application of the Protocol may be public if the Committee so decides".[114] The HRC has exercised this discretion on a number of occasions and thus allowed some useful insights to be gained into the workings of the O.P.[115]

All documents relating to the consideration of communications under the O.P. are confidential.[116] Thus while a communication is being considered no substantive information is made available to the public or the press. This applies to both the admissibility and merits stages.[117] A selection of decisions holding a communication inadmissible have been published in the HRC's annual report.[118] The identity of the author or

---

[113] See Rules 82-86.

[114] For the HRC's discussion see SR 12 pr.28-34.

[115] See, e.g., the summary of the HRC's discussion of the question of follow-up to final views in prs.4.41-4.43 below.

[116] It is interesting to note, however, that a proposed rule referring to "confidential" was not adopted.

[117] If a communicant were to publicize this information the HRC might consider such action to be an abuse of the rights of submission and accordingly declare the communication inadmissible. See pr.4.118 below.

[118] These are published on the basis that they are "final" decisions.

alleged victim is not normally revealed.[119] Decisions declaring a communication admissible are not published but their terms are sometimes revealed in the HRC's final views. The final views of the HRC under Article 5(4) O.P. are made public. The text of these often includes the terms of earlier decisions on admissibility, requests for submissions, or other interim decisions. They are issued at the end of each session as press communiques and are included in the HRC's annual reports. A volume of selected decisions has been prepared by the Secretariat under the guidance of the HRC and has been published.[120] As the O.P. contains no express reference to the publication of HRC decisions and views the decision to publicize them is to be applauded as it may add greatly to their force.[121]

Members of the HRC considered that although the principle of confidentiality governed their considerations under the O.P. a minimum of information should be included in its annual reports. This was a reflection of the view that the general public had a legitimate interest in being informed of the approaches of the HRC. The annual reports now contains information on, for example, the status of communications, the issues considered, the rights concerned, and jurisdictional questions. The annual reports constitute

---

[119] The identity of the authors and the State party concerned have sometimes been revealed in literature from the State party concerned. See, e.g., the information published in Can.HRYB.

[120] "Selected Decisions Under the Optional Protocol, (2nd-16th sessions)", Doc.CCPR/C/OP/1. A second volume is imminent.

[121] The degree of publicity afforded by the HRC to its O.P. decisions has surprised and pleased the Secretariat (personal communication). Nonetheless the HRC can still look to the Council of Europe as a model of how to produce regular and detailed information concerning individual petitions.

valuable accounts of developments in the HRC's consideration of communications.

The Rules provide that a member shall not take part in the examination of a communication by the HRC if he has any personal interest in the case or has participated in any capacity in the making of any decision on the case covered by the communication.[122] If a question arises concerning these provisions it is dealt with by the HRC.[123] A second Rule is of wider scope providing for withdrawal if, "For any reason a member considers that he should not take part or continue to take part in the examination of a communication".[124] In practice resort has been had to both of these rules.[125]

A draft rule providing that the HRC or a Working Group "may at any time request the State party concerned to take interim measures in order to avoid irreparable damage to the victim of the alleged violation", while a matter involving it was before the HRC evoked an interesting discussion.[126] Views differed on whether the

---

[122] R.84(1)(a) and (b).

[123] R.84(2).

[124] R.85. In some views members have participated but not voted. No explanation has been given for this practice. The explanation appears to lie in disagreement within the HRC on whether a member who is a national of the respondant State should take part in the consideration of such communications. The disagrreement has not been resolved to date.

[125] For example, Mr. Lallah did not take part in the Mauritian Women case dealt with in pr.4.75 below. Members who are nationals of the respondent State are not automatically precluded from consideration of the case. For example Mr. Tarnopolsky took part in the decision in McIsaac v. Canada, Doc.A/38/40 p.111.

[126] Draft Rule 86, Doc.CCPR/C/L.2 and Add.1 and 2, in Yb HRC,Vol.II,p.1 at p.7. See SR 13 prs.26-59; SR 17 prs.17-26; Mose and Opsahl, pp.288-289. During the discussion it was debated whether the HRC could delegate to a working group any power concerning interim measures. In the result the power under R.86 was reserved to the HRC.
(Footnote Continued)

HRC had such "Implied powers" as were necessary to enable it to perform its functions in a reasonable manner or whether the absence of any express provision in the O.P. denied the HRC competence to request such measures. The compromise which emerged omitted the stronger term "request". It stated that,

> "The Committee may, prior to forwarding its final views on the communication to the State party concerned, inform the State of its views whether interim measures may be desirable to avoid irreparable damage to the victim of the alleged violation. In doing so, the Committee shall inform the State party concerned that such expression of its views on interim measures does not imply a determination on the merits of the communication".[127]

The rule is clearly designed to deal with urgent, emergency situations. There can be no doubt that such views on interim measures are not binding on the State party.[128] The terms of the rule leave open the question

---

(Footnote Continued)
Note also that there is no provision for interim measures in the inter-State procedure in the ICCPR nor has any such provision be made in the rules of procedure adopted by the HRC to deal with such complaints, Rules 72-77E. Interestingly, the HRCions' final draft contained an express provision on serious and urgent cases in the inter-State procedure, see article 40(3) in Doc.A/2929,p.81 and p.86,prs.96-98. 16. Mower, n.1 above, comments, "For all practical purposes, the kind of approach this particular Committee takes to a State is irrelevant; what counts is that a Government has been made aware of an international concern for the fate and well-being of an individual, and of the feeling on the part of the international agency that interim measures are necessary and desirable. What happens then depends on the receptivity of a Government to international promptings, not the from in which they are conveyed", p.125. Cf. P.Mahoney, Development In The Procedure Of The EUCT: The Revised Rules Of Procedure, 3 Yb.European Law (1983),p.127 at 156-158; Van Dijk and Van Hoof, pp.57-58; Article 48(2) AMR, Rule 26 of The Rules of Procedure of the IACM, in 'Handbook', p.130.

[127] SR 17 pr.25.

[128] Even final views of the HRC are not binding, see prs.4.37-4.40 below.

of whether views on interim measures could be forwarded before a decision on admissibility has been taken.[129] It is submitted that in principle this should be permissible. It appears that in practice this rule has been used on a number of occasions to useful effect.[130] The compromise on this rule set an important precedent in terms of the implied powers which the HRC considers necessary to enable it to function effectively. Subsequent debates on other suggested implied powers, for example, concerning follow up measures after the adoption of final views, have referred back to the decision on interim measures as a precedent.[131]

---

[129] During the HRC's debate it was suggested that this should be permissible to deal with urgent cases. The draft rule 86 had provided that interim measures could be requested "at any time". This was amended to "prior to forwarding its final views".

[130] "..he mentioned the case of an alleged victim of violations of human rights whose life had probably been saved by the fact that the Committee had asked for her to be examined by a doctor. Another case, about eighteen months earlier, was that of a person who had eventually not been extradited to a country where she was in danger of being sentenced to death. Another victim of alleged violations of human rights would be - or had already been - released. These cases showed that action taken by the Committee was effective, even if it could not change political systems or situations from one day to the next", SR 179 pr.35 (Chairman). See also SR 731 pr.13 (Pocar). At the HRC's most recent session (March-April 1988) the HRC requested a number of stays of execution in respect of a number of individuals from Jamaica.

[131] See below, prs.4.41-4.43.

3. Access to the HRC.

4.11 The HRC has strongly asserted the importance of individuals being allowed access to it under the O.P. In Antonaccio v. Uruguay,[132] A's wife (V.S.) submitted the communication on behalf of A alleging, inter alia, that he had been arrested, tortured, denied medical attention and denied the right to a fair trial. The author requested the HRC to take appropriate action to secure A's right to submit the communication himself.[133] After the the communication had been held admissible the author further submitted that A had the right to be informed of that decision and afforded an opportunity to supplement her submissions.[134] In a subsequent Interim Decision the HRC decided,

> "That, as requested by Violeta Setelich, the State party should be requested to transmit all written material pertaining to the proceedings (submissions of the parties, decisions of the Human Rights Committee), to Raul Sendic Antonaccio, and that he should be given the opportunity to communicate directly with the Committee".[135]

The State party objected to this decision. It argued that the HRC's competence was limited by Article 5(4) O.P. to the sending of its observations to the State party concerned.[136] The HRC had, therefore,

---

[132] Doc.A/37/40,p.114.

[133] Ibid.,pr.2.6.

[134] Ibid.,pr.10.

[135] Ibid.,pr.11 at 3.

[136] Ibid.,pr.14.

"Arrogated to itself competence which exceeded its powers".[137] Moreover,

> "The Committee on Human Rights is applying a rule which does not exist in the text of the Covenant and the Protocol, whereas the function of the Committee is to fulfil and apply the provisions of those international instruments. It is inadmissible for a body such as the Committee to create rules flagrantly deviating from the texts emanating from the will of the ratifying States. Those were the circumstances in which the decision in question was taken. Paragraph 3 requests, with absolutely no legal basis, that a detainee under the jurisdiction of a State party- Uruguay -be given the opportunity to communicate directly with the Committee. The Government of Uruguay rejects that decision, since to accept it would be to create the dangerous precedent of receiving a decision which violates international instruments such as the Covenant and its Protocol. Moreover, the Uruguayan Government considers that the provisions in those international instruments extend to States parties as subjects of international law. Thus these international norms, like any agreement of such a nature, are applicable to States and not directly to individuals. Consequently, the Committee can hardly claim that this decision extends to any particular individual. For the reasons given, the Government of Uruguay rejects the present decision of the Committee, which violates elementary norms and principles and thus indicates that the committee is undermining its commitments in respect of the cause of promoting and defending human rights".[138]

This argument was emphatically rejected by the HRC,

---

[137] Ibid.

[138] Ibid.

"The Human Rights Committee cannot accept the State party's contention that it exceeded its mandate when in its decision of 24 October 1980, it requested the State party to afford to Raul Sendic Antonaccio the opportunity to communicate directly with the Committee.

The Committee rejects the State party's argument that a victim's right to contact the Committee directly is invalid in the case of persons imprisoned in Uruguay. If governments had the right to erect obstacles to contacts between victims and the Committee, the procedure established by the Optional Protocol would, in many instances, be rendered meaningless. It is a prerequisite for the effective application of the Optional Protocol that detainees should be able to communicate directly with the Committee. The contention that the International Covenant and the Protocol apply only to States, as subjects of international law, and that, in consequence, these instruments are not directly applicable to individuals is devoid of legal foundation in cases where a state has recognized the competence of the Committee to receive and consider communications from individuals under the Optional Protocol. That being so, denying individuals who are victims of an alleged violation their rights to bring the matter before the Committee is tantamount to denying the mandatory nature of the Optional Protocol".[139]

It is submitted that this must be correct. Although there is no express provision in the ICCPR like

---

139 Ibid., pr.18. Antonaccio was still not permitted to communicate with the HRC. The HRC made a similar request in Bequio v. Uruguay, Doc.A/38/40 p.180.

the undertaking in Article 25 ECHR "Not to hinder in any way the effective exercise", of the right of individual petition,[140] considerations of effectiveness demand that an alleged victim must be permitted to submit a communication to the HRC.[141] It is important to note the limits of the HRC's statement. It is not a general proposition concerning the status of individuals in international law.[142] The HRC only goes so far as to say that if a State has recognized the competence of the HRC under the O.P. it cannot then deny or obstruct an individual's exercise of the right to communicate with the HRC.

Similar considerations apply in the many cases when an alleged victim's communication to the HRC is assisted by having a legal representative. If States parties take action against or punish in any way those who represent alleged victims the effectiveness of the O.P. will be greatly reduced. The issue arose in Hamel v. Madagascar.[143] H had been expelled from Madagascar. He alleged, and the State party appeared to confirm, that this was due in part to his

---

[140] See Van Dijk and Van Hoof,p.43-46; Mikaelson, pp.24-33. See also the 'European Agreement Relating To Persons Participating In Proceedings Of The European Commission And Court Of Human Rights', (1969), ECHR-Collected Texts, n.11 above, pp.100-109.

[141] On the principle of effective interpretation see McNair, Law of Treaties,ch.XXIII; Brownlie, Principles Of International Law, p.628; Harris, Cases and Materials on International Law,(3rd ed., 1983), pp.595-601.

[142] A general proposition that individuals had status under international law was rejected by opponents of an individual right of petition, see ch.4, pr.4.2 above. Presumably such a proposition would still be objectionable to certain members of the HRC.

[143] Doc.A/42/40 p.130.

having represented alleged victims submitting communications to the HRC.[144] The HRC expressed the view that,

> Were that to be the case, the Committee observes that it would be both untenable and incompatible with the spirit of the International Covenant On Civil and Political Rights and the Optional Protocol thereto, if States parties to these instruments were to take exception to anyone acting as legal counsel for persons placing their communications before the Committee for consideration under the Optional Protocol".[145]

When the HRC adopts final views its general practice is to inform the State party concerned that it is "Obliged" to transmit a copy of the views to the individual concerned. The authority for this is presumably the provision in Article 5(4) O.P. that the HRC shall forward its views to the State party concerned and to the individual.

---

[144] Ibid., pr.15. See e.g. Marais v. Madagascar, Doc.A/38/40 p.141.

[145] Ibid., pr.19.3.

4. Legal Representation And Legal Aid.[146]

4.12 There is no express reference to legal representation in the O.P.[147] Rule 90(1)(b) of the HRC's Rules states that the communication may be submitted by the individual himself or by his representative.[148] The HRC must have evidence that the representative has been duly authorised.[149] In practice alleged victims have been represented by lawyers, law professors, and

---

[146] See Clark, Legal Representation, in Ramcharan, (Ed.), International Law And Fact-Finding In The Field Of Human Rights, pp.104-136 (1982); Ryan,n.1 above; Zuidjwick,n.1 above. See also Hamel v. Madagascar, pr.4.11 above.

[147] Cf.R.94(5) of CERD's Rules of Procedure which provides that "The Committee may invite the presence of the petitioner or his representative and the presence of representatives of the State party concerned in order to provide additional information or to answer questions on the merits of the communication", U.N.Doc.CERD/C/35/Rev.3,p.28. There was some discussion in the CERD as to whether the Rule exceeded CERD's mandate and how the travel expenses of the petitioner would be defrayed if he was unable to pay them, see A/38/18,pr.45,(1983). R.30(1) of the revised rules of the EUCT (1982) allow an individual to play a much more significant role than hitherto in EUCT proceedings, see Mahoney, n.126 above, pp.127-141; P.T.Muchlinski, The Status Of The Individual Under The ECHR And Contemporary International Law, 34 ICLQ (1985) pp.376-382.

[148] See pr.4.14 below.

[149] This rule is considerably relaxed in some cases, see prs.4.70-4.74 below.

non-governmental organisations.[150] Their role to date has been confined to drafting the original complaint, supplying further legal and factual information and observations, and responses to the submissions of the State party concerned. No oral hearings have been held to date.[151] If the HRC were to develop such a practice, with the consent of the State party, it is submitted that the alleged victim's legal representative, and the alleged victim,should be permitted to address the HRC on whatever terms the State party is heard.[152] This would seem to be demanded by the principle of "Equality of arms" which the HRC seeks to uphold.

There is also no provision in the O.P. or in the HRC's Rules concerning the provision of legal aid to a communicant. Thus whether a communicant receives aid will presumably depend on its availability under the domestic legal aid provisions of the state party concerned and in most cases this will be very unlikely. The present financial restrictions at the U.N. would suggest that it is also unlikely that any provision for legal aid will be made by the U.N. itself in the foreseeable future.[153] While the HRC's proceedings

---

150 Ibid.

151 See prs.4.23-4.26 below.

152 "Bearing in mind the admixture of adversarial and inquisitorial elements usually found in fact-finding it may be valuable for fact-finding bodies to consider ways and means of drawing upon legal expertise in the examination of witnesses and in the marshalling of evidence", Clark,n.146 above, p.130. Clark also notes "the predilection to adopt civil law rather than common law modes of doing legal business", ibid., pp.129-130. Further matters that would present themselves would be the possibility of submissions from interested third parties as has happened under the ECHR on a number of occasions, see Mahoney, n.126 above, pp.141-154; Van Dijk and Van Hoof, pp.131-132.

153 Under the ECHR provision for legal aid is dealt

(Footnote Continued)

remain wholly written the absence of legal aid to communicants will be less significant a hurdle than if oral procedures are developed.[154] Assisting in the presentation of communications is an obvious avenue through which non-governmental organizations can contribute to the effective implementation of the O.P.[155]

(Footnote Continued)
with on the basis of administrative measures devised by the Council of Europe. The provisions are set out in the Addendum to the EUCM's Rules of Procedure, see ECHR-Collected Texts, n.11 above, pp.134-135; Van Dijk and Van Hoof, pp.55-56. In 1987 35 applicants received legal aid from the EUCM. The total sum expended was approximately 235,000 French Francs, EUCM, Survey of Activities, (1987), p.5.

[154] Zuidjwick, n.1 above describes the present O.P. procedures as "inexpensive and simple", p.121 (1981).

[155] On NGO's see ch.1, pr.1.15 above. A recent example of a body offering such assistance is INTERIGHTS, the International Centre For The Legal Protection Of Human Rights (London).

5. The Determination Of Admissibility:Procedures.[156]

4.13 The HRC took the view that the order of the articles as they appeared in the O.P. did not reflect a chronological order of procedures to be followed in the consideration of communications. The O.P. established the conditions of admissibility but not the procedures for the determination of admissibility.[157] Accordingly, the rules of procedure establish those detailed procedures. The discussion of those rules was premised on the idea of making the procedures as flexible, practical, effective and efficient as possible while maintaining the basic principle of equality of arms.[158]

The rules provide for the establishment of one or more working groups to examine communications and make recommendations concerning the fulfilment of the admissibility conditions in articles 1, 2, 3 and 5(2) O.P.[159] In practice only one working group on communications has existed.[160] The group consists of no more than five members and its composition is intended to reflect the geographical groupings of the HRC members. The normal practice has been for the working

---

[156] See Rules 87-92. See in particular, Brar, n.1 above (1986).

[157] Doc.A/32/44,pr.59; SR 20 prs.3,5,6 and 8.

[158] Doc.A/32/44, pr.58.

[159] R.89(1). The rules of procedure of the HRC apply as far as possible to the Working Group, R.89(2).

[160] This Working Group has been established since the HRC's third session. It did not meet prior to the HRC's 5th session because no budgetary provision had been made for it. Instead one member (Vincent-Evans) examined communications a few days in advance of the session. As an economy measure the functions of the HRC's two Working Groups (one on Article 40, the other on the O.P.) were temporarily combined for the HRC's 28th session, March 1987). The practice has not been continued since.

group to meet for one week before each of the HRC's three week sessions. The working group continues to meet during HRC sessions. The working group plays a fundamental role in the consideration of communications under the O.P.

4.14 The working group examines the initial communication together with the further material and information obtained by the Secretary-General.[161] Rule 90 specifies a number of matters which shall be ascertained with a view to reaching a decision on admissibility:

"1.(a) that the communication is not anonymous and that it emanates from an individual, or individuals, subject to the jurisdiction of a State party to the Protocol;

(b) that the individual claims to be a victim of a violation by that State party of any of the rights set forth in the Covenant. Normally, the communication should be submitted by the individual himself or by his representative; the Committee may, however, accept to consider a communication submitted on behalf of an alleged victim when it appears that he is unable to submit the communication himself;

(c) that the communication is not an abuse of the right to submit a communication under the Protocol;

(d) that the communication is not incompatible with the provisions of the Covenant;

(e) that the same matter is not being examined under another procedure of international investigation or settlement;

(f) that the individual has exhausted all available domestic remedies.

---

[161] Rules 78(2) and 80. One or more communications may be merged for joint consideration, R.88(2). See,e.g., Lanza and Perdoma v. Uruguay, S.D.,p.45,pr.10.

2. The Committee shall consider a communication, which is otherwise admissible, whenever the circumstances referred to in article 5(2) of the Protocol apply".

These matters are basically taken from the provisions in articles 1, 2, 3 and 5(2) O.P. There was considerable discussion on what became rule 90(1)(b). A literal construction which limited the competence of the HRC to receive communications only from the alleged victim would, in practice, be an enormous constraint. There was general agreement within the HRC that this construction should be rejected. However, it proved difficult to formulate an appropriate rule. A proposal that the HRC should receive communications from "Someone authorized" to act on the victims behalf proved unacceptable because it was thought to introduce complexity, rigidity and domestic law requirements.[162] The HRC have taken a practical and relatively liberal view in the application of rule 90(1)(b). That practice is examined in the consideration of article 1 O.P. below.[163]

4.15 During the drafting of rule 90(2) a difficult question arose as to the interpretation of article 5(2) O.P.[164] In the certified true English text article 5(2) O.P. provides that,

"The Committee shall not consider any communication from an individual unless it is ascertained that:

(a) the same matter is not being examined under another procedure of international investigation or settlement;

(b) the individual has exhausted all available domestic remedies. This shall not be the rule where the

---

[162] For the discussion see SR 21 prs.17-42, SR 22 prs.1-45.

[163] See prs.4.70-4.74 below.

[164] See SR 22 prs.46-64; SR 33 prs.21-52; Doc.A/32/44, prs.68-73.

application of the remedies is unreasonably prolonged".[165]

The difficult question that arose was whether the last sentence of article 5(2) applied to the whole of paragraph 2 or only to sub-paragraph (b). On the former interpretation it would be permissible for the HRC to declare admissible a communication being examined under another procedure of international investigation or settlement if it took the view that that procedure had been unreasonably prolonged. After some discussion the matter was referred for the expert opinion of United Nations Legal Counsel. That opinion was to the effect that the last sentence applied to both sub-paragraphs (a) and (b).[166] Notwithstanding the clear opinion of U.N. Legal Counsel many of the HRC members were reluctant to accept the implications of the HRC having to pass judgement on another international body. Members pointed to the difficulty of establishing the correct interpretation before specific cases had been examined and the need to allow the HRC a certain amount of discretion.[167] Rule 90(2) as adopted merely repeats the terms of Article 5(2) O.P. without clarification.

---

[165] SR 33 pr.23 (Mr.Mazaud, Assistant Director, Division Of Human Rights). The individual communications procedure in article 14 ICERD makes no reference to procedures of international investigation or settlement, see art.14(7) ICERD.

[166] Ibid.

[167] It is interesting to note the comments of Mr.Movchan (USSR) "The Legal Counsel's interpretation, based on semantic and historical considerations, should obviously be taken into account, but that did not mean that other interpretations, which might give more weight to ethics, psychology or the law and be based on the practice of international bodies, should be dismissed", SR 33 pr.27. See also Ibid.,pr.28. The comparable rule in the ICERD clearly only refers to domestic remedies, art.14(7)(a) ICERD.

The reluctance of the HRC to pass judgement on another international organ is understandable. However, the delays evident in international petition systems render such a situation a distinct possibility.[168] Though the HRC would need to proceed with great circumspection it is submitted that if the delay is unreasonable by comparison with the admittedly lengthy norm in international procedures then the HRC should proceed to consider the communication.[169]

4.16 After examining the material placed before it by the Secretariat the working group will decide to take one of a number of actions. It could decide to request from the author further additional written information or observations relevant to the question of admissibility.[170] Alternatively, it could decide to transmit the communication to the state party as well or only to the State party with a similar request.[171] Such requests must include a statement that the request does not imply that any decision has been reached on the question of admissibility.[172] In practice the time limit established by the HRC for the submission of

---

[168] The Council Of Europe has recently adopted an eighth Protocol to the ECHR with a view to speeding up the consideration of applications by the EUCM, see ECHR-Collected Texts, n.11 above, pp.57-62. See also Colloquy Report on Merger Of The EUCM and the EUCT in 8 HRLJ (1987) pp.1-216.

[169] It is worth noting here that the reservations made by all of the Contracting parties to the ECHR, who have ratified the O.P. bar the Netherlands, would exclude such an eventuality by barring the HRC's jurisdiction ab initio, see pr.4.93-4.96 below. See Van Dijk and Van Hoof, p.52.

[170] See,e.g., A et al v. S, S.D.,p.3.

[171] See,e.g.,Ramirez v. Uruguay, Doc.A/35/40, p.121; S.D.,p.3.

[172] R.91(1).

observations and information is eight weeks.[173] The parties have a further four week limit for the submission of comments on the information and observations if they choose to do so.[174]

It was established at the HRC's fourth session that to assist expediting the consideration of communications the above decisions could be taken by the working group without being placed before the HRC for approval.[175] In cases of doubt or disagreement within the working group the matter is decided by the HRC. A further option for the working group is to recommend to the HRC that the communication be declared inadmissible or be discontinued because of clear deficiencies that cannot be remedied by seeking further information from the author.

4.17 An important provision is that in rule 91(2) which states that a communication may not be declared admissible unless the State party concerned has received the text of the communication and has been given an opportunity to furnish information or observations relevant to the question of admissibility. Members stressed the fundamental importance of this rule in terms of procedural equality.

The decision on admissibility must be taken by the HRC as soon as possible.[176] The working group can only recommend what action the HRC should take although its recommendations are normally followed.

---

[173] Doc.A/32/44,p.154; Doc.A/40/40 pr.29.

[174] Ibid. There is no specific rule of procedure on this point, see Mose and Opsahl, p.287; Bossuyt,p.148. The time limits are often exceeded by both authors and States parties.

[175] Doc.A/33/40, pr.588.

[176] R.87.

4.18 During its first round of discussion the HRC considers the case documentation and the accompanying recommendations of the working group. It may adopt the W.G. recommendations or take a different course. It may also decide at this, or at a later stage, that the communication is of sufficient complexity to warrant the designation of a special rapporteur.[177] This step has been taken on a number of occasions to date.

Unless the communication is declared inadmissible by the HRC it is subject to further consideration at a subsequent session or sessions again based on the recommendations of the W.G. or the special rapporteur if one has been appointed. The HRC may adopt, change or reject any such recommendation. Unless further information, observations or comments are sought from the parties the HRC will take a decision on the question of admissibility at this point. The substantive determinations by the HRC on the grounds of admissibility are examined in detail below.[178]

4.19 The five options that have been developed to date have been to declare the communication:

4.19.1 Inadmissible, In Whole Or In Part.

This decision is communicated to the author of the communication and, where the communication has been transmitted to the State party, to that State party.[179] If the decision is based on article 5(2) O.P. (non-exhaustion of domestic or international remedies) the HRC may review this decision at a later date upon the receipt of a written request by or on behalf of the

---

[177] It is clear, therefore, that a Special Rapporteur may be appointed before a decision as to admissibility is taken. The HRC's practice in this respect is similar to that of the EUCM, see Van Dijk and Van Hoof,p.56-57.

[178] See prs.4.49-4.118 below.

[179] R.92(1).

individual concerned containing information to the effect that the reasons for inadmissibility referred to in article 5(2) no longer apply.[180] One member justified the limitation in this rule to the grounds in article 5(2) on the basis that these were conditions of a "Temporary nature".[181] Other members wanted the rule broadened because there could be grounds outside article 5(2) in which review was necessary.[182] It appeared to be accepted that the adoption of the rule does not preclude the author from re-submitting a communication held inadmissible on grounds other than those in article 5(2) O.P.[183] The alternative course would be for the HRC to regard it as a new communication particularly as neither the O.P. nor the rules of procedure lay down any time limit for the submission of communications.[184] In practice there have been requests for the HRC to reconsider decisions declaring a communication inadmissible but to date the HRC have found no reason to justify reconsideration in any such case.[185]

4.19.2 Discontinued.

This option has been used in a number of circumstances. In one case the authors, despite repeated requests, failed to furnish the HRC with the necessary information without which the HRC was unable to arrive

---

[180] R.92(2).

[181] SR 33 pr.9 (Opsahl).

[182] See SR 24 pr.62 (Tomuschat), SR 33 pr.8 (Graefrath).

[183] SR 33 pr.15 (Graefrath).

[184] See pr.4.9 below.

[185] Doc.A/38/40,pr.395. See pr.4.41 below on reconsideration of communications.

at a decision on admissibility.[186] In another case the HRC were informed that the authors wished to withdraw the case from consideration by the HRC on the ground that the same matter had been submitted to and was being considered under another procedure of international investigation or settlement.[187] Such a case would have been declared inadmissible in any event under article 5(2) O.P.[188]

It has already been noted that the O.P. does not contain any provision for the securing of a friendly settlement similar to that in article 28 ECHR.[189] The procedure that the HRC should adopt if a settlement is reached is not spelt out in either the O.P. or the HRC's rules. In Waksman v. Uruguay[190] the approach of the HRC was to declare the communication "Discontinued" after taking note that the state party had taken steps to remedy the matter complained of.

It would appear reasonable to suggest that certain conditions which lead to a communication being declared "Discontinued" may be of a temporary nature. For example, if the authors of the first communication noted above[191] were later to provide the requested information and provided a reasonable excuse for their earlier failure to do so, it should be open to the HRC to resume consideration of the communication.

---

[186] See V v. S, S.D., p.35; B,C,D and E v. S, S.D., pp.11-12. See also Doc.A/34/40, pr.449.

[187] O.E. v.S, S.D., p.35.

[188] At least until those proceedings have been completed, see prs.4.87-4.99 below (on art.5(2)).

[189] See pr.4.5 above.

[190] Doc.A/35/40,p.120; S.D., p.36.

[191] V. v. S, n.186 above.

4.19.3 Suspended.

Consideration of a communication will be suspended if, for example, contact with the author has been lost because of the failure of the author to supply a return address.[192]

4.19.4 Withdrawn.[193]

This has occurred, for example, when an individual has opted for another procedure of international investigation or settlement.[194]

4.19.5. Wholly Or Partly Admissible.[195]

In this event the texts of the decision of admissibility any relevant documents are forwarded to the State party as soon as possible.[196] The author of the communication is also informed.[197]

---

[192] See A et al v.S, S.D., pp.35-36.

[193] See text to notes 102-104 above.

[194] See, e.g., V v. S, S.D. p.35. The communication was discontinued.

[195] For examples of communications held partly admissible see B, C, D and E v. S, S.D., pp.11-12; Pinkey v. Canada, S.D., pp.12-15. For examples of admissibility decisions see Waksman v. Uruguay, S.D., pp.9-10; Lovelace v Canada, S.D., p.10.

[196] R.93(1).

[197] Ibid.

6. The Consideration Of Communications On The Merits:Procedures.[198]

4.20 Any communication declared wholly or partly admissible is then subject to consideration on the merits. As already noted there is no intermediate stage between admissibility and merits for any attempt to reach a friendly settlement or for the exercise of good offices by the HRC.

Under article 4(2) O.P. the State party concerned then has six months to submit written explanations or statements clarifying the matter under consideration and any remedy, if any, that it has afforded.[199] This six month time limit is the only time limit expressly provided for in the O.P. The explanations or statements submitted by the State party are communicated to the author of the communication who may submit additional written information or observations within such time limits as the HRC directs.[200] The time limit commonly specified is six weeks.[201] Although not expressly provided for in the rules the HRC will receive further additional information and observations from either party in the light of any additional information and observations received.[202] This is in accordance with the general principle of procedural equality that the HRC seeks to apply to its considerations. The HRC may decide of its own motion to request specific additional information or replies to certain questions from either

---

[198] See Rules 93 and 94.

[199] R.93(2).

[200] R.93(3). See SR 34 prs.2-13. They should also be communicated to the alleged victim if different, see pr.4.11 above.

[201] Doc.A/36/40,pr.397.6.

[202] SR 34 prs.4-5.

party.[203] It has done so on a number of occasions through the adoption of "Interim decisions" (sometimes referred to as "interlocutory decisions").[204]

At its third session the HRC decided that it was necessary to amend its rules to make specific provision for the review of a decision declaring a communication admissible in the light of any additional information and observations submitted to it.[205] The rules now make provision for this and the rule was applied for the first time at the HRC's twenty-fourth session (1985).[206]

Unless the decision that a communication is admissible is reversed the HRC proceeds to consider the communication in the light of all written information made available to it by the author and the State party.[207] The final step is for the HRC to formulate its "Views" on the communication.[208] The HRC may refer the communication to the W.G. on Communications for the consideration and formulation of views.[209] The W.G. then makes recommendations to the HRC. The HRC may adopt, change or reverse any recommendation of the W.G. The

---

[203] Doc.A/36/40,pr.397.7.

[204] See e.g., Massera and others v. Uruguay, S.D.,p.37; Lovelace v. Canada, S.D., pp.37-39; B v. S, S.D.,p.39; Bleir v. Uruguay, Doc.A/37/40 p.130, prs.11.1-13.1; Hamel v. Madagascar, Doc.A/42/40 p.130, prs.1a and 13.1.

[205] See the discussion at SR 72 prs.19-26.

[206] R.93(4). See C.F. et al v. Canada, Doc.A/40/40,p.217. Recourse to R.93(4) was again made in J.M. v. Jamaica, Doc.A/41/40,p.164. For a case where the HRC found no justification to review its decision declaring a communication inadmissible see Hamel v. Madagascar, Doc.A/42/40 p.130, pr.17. See Mose and Opsahl,pp.316-317.

[207] Article 5(1) O.P.; R.94(1).

[208] Article 5(4) O.P.; R.94(1).

[209] R.94(1).

views of the HRC are then forwarded to the State party concerned and to the individual author.[210] The HRC has also requested the State party concerned to forward the views to the alleged victim if he or she is not the author.[211]

4.21 The HRC's views take the form of a collegiate view.[212] There was detailed discussion within the HRC on whether to permit members to attach individual opinions to the views of the HRC.[213] The main concern expressed was that these might undermine the moral authority of the HRC's views. It was stressed that the HRC's views were not legally binding and that it was therefore only through its "Moral and political impact" that the HRC's views could be enforced. The majority of members, however, took a different view. They argued that individual opinions could strengthen the HRC, that the minority should not be prevented from making its own views known, and that such a provision was in accordance with the freedom of expression established in article 19 O.P. The rule adopted states that,

> "Any member of the Committee may request that a summary of his individual opinion shall be appended to the views of the Committee when they are

---

[210] Article 5(4) O.P.; R.94(2). Both these provisions refer to the "individual" rather than to the victim or the author.

[211] The State party would seem to be under an obligation to allow the victim to receive the HRC's views, see pr.4.11 above.

[212] The same is true of the EUCM, the EUCT, the European Court of Justice and the ICJ. The same used to be true of the Privy Council prior to 1966, see Lord Reid, The Judge as Law Maker, (1972) XII J.S.P.T.L.(n.s.) p.153.

[213] See SR 34 prs.14-57; Bossuyt,pp.152-153 (1978-79).

communicated to the individual and to the state party concerned".[214]

This rule provides only for a "Summary" of an individual opinion so members may be restricted from appending lengthy, detailed explanations of their opinions. In practice individual opinions have been appended to the HRC's views on a number of occasions.[215] To date they have normally been very brief. It is submitted that the decision to permit individual opinions was sensible and constructive. Such opinions can contribute to the development of the HRC's jurisprudence by, for example, making the view of the HRC clearer by revealing a further step or an alternative interpretation that the majority of the HRC felt unable to adopt.[216] The usefulness of individual opinions under the ECHR system and in the I.C.J. gives further support to this conclusion.[217]

---

[214] R.94(3).

[215] In each case there has been only one individual opinion although more than one member may have associated themselves with that opinion. A number of individual opinions are noted at relevant points in this work.

[216] Professor Robertson has commented that they "should strengthen the quasi-judicial character of the HRC and should contribute to the development of its jurisprudence", in Henkin (Ed.),n.1 above,p.363. Similarly, Bossuyt, n.213 above.

[217] See I.Hussain, Dissenting and Separate Opinions in the World Court,(1984). Note also Lauterpacht, The Development of International Law by the International Court, (1958), who quotes the following comment by Hughes C.J., "A dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed", p.66,pr.23,n.10. This passage was adopted by Judge Jessup in his dissenting judgement in the South West Africa cases and recalled by Judge Schwebel in his recent dissent in the Case Concerning Military And Paramilitary Activities In And Against Nicaragua, (Nicaragua v. U.S.), I.C.J. Reports, 1986,p.14 at p.167.

7. Evidence.[218]

(1) Admissibility.

4.22 It is difficult to determine any fixed rules that the HRC has applied. There has been no general statement on the types of evidence that the HRC will consider admissible.[219] Moreover, no piece of evidence has been stated to be excluded from the HRC's considerations in any particular case as inadmissible. It is possible to note the particular sources of evidence that the HRC has taken account of. These include:

(a) Testimonies from the authors;

(b) Testimonies from the alleged victims;

(c) Testimonies from alleged witnesses to the violations;

(d) Medical Reports;

(e) Psychiatric Reports;

(f) The text of legal judgements;

(g) The text of legislative, executive and administrative acts.

(h) The texts of Codes of Practice or Guidelines connected with the texts in (g);

---

[218] See generally B.G.Ramcharan, Evidence, in Ramcharan (Ed.), International Law And Fact-Finding in the Field Of Human Rights, p.64 at pp.68-83; H.Cohn, International Fact-Finding Processes, 18 I.C.J. Rev.(1977),p.40; D.Sandifer, Evidence Before International Tribunals, (Rev.Edition),(1975).

[219] Cf. The statement of the EUCT that, "The Court is not bound, under the Convention or under general principles applicable to international tribunals, by strict rules of evidence. In order to satisfy itself, the Court is entitled to rely on evidence of every kind including, in so far as it deems them relevant, documents or statements emanating from Governments, be they respondent or applicant, or from their institutions or officials", Ireland v. United Kingdom, EUCT, Series A, Vol.25, pr.209.

(i) The statements of a representative of the State Party in proceedings before another United Nations body;

(j) The submissions from the State party.

One author has concluded after surveying international practice and relevant literature that,

> "Subject to any rules of admissibility which may be specified in its constitutive instrument, fact-finding bodies may apply flexible admissibility criteria".[220]

This conclusion seems to hold good for the HRC where the only express exclusion would appear to be that in Article 3 O.P. providing for the exclusion of "Anonymous" communications.[221] This exclusion also seems to accord with the international practice of fact-finding bodies.[222] Apart from anonymous evidence then, it would appear open to the HRC to consider admissible evidence from whatever source and then decide as to its relevance and probative value.[223] Such an approach would accord with the general practice of international tribunals in the admission of evidence of adopting the liberal system of procedure of civil law countries.[224]

---

[220] Ramcharan, n.218 above,p.72.

[221] See below pr.4.118.

[222] Ramcharan, n.218 above, p.73.

[223] See Sandifer, n.218 above, ch.IV.

[224] See Clark, n.146 above. On the I.C.J. see G.Schwarzenberger, International Law, Vol.IV,pp.636-640.

7. Evidence

(2) Form.

4.23 The O.P. refers only to a "Written" procedure. Individuals may submit a "Written communication" to the HRC for consideration.(Article 2 O.P.) The State party must submit to the HRC "Written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State".(Article 4(2) O.P.) The HRC is directed to consider communications in the light of all "Written information made available to it by the individual and by the State party concerned".(Article 5(1) O.P.)

The obvious question raised is whether it would be possible for the HRC to provide for a system of oral hearings through its rules of procedure or whether this possibility is excluded by the terms of the O.P.[225] The HRC has discussed this question in private session[226] but no positive step has been taken in the direction of oral hearings and to date all communications have been considered on the basis of written information only.

4.24 The present limitation to written procedure is unsatisfactory.[227] It may be difficult for the HRC properly to resolve contradictions on the substance of

---

[225] For some comment on this question see Schwelb, n.1 above,p.867; Mose and Opsahl, pp.279, 289-290; Tomuschat, n.1 above, p.254; Robertson, n.1 above in Henkin (Ed.), p.361; A.Dieye, Hearings, in Ramcharan (Ed.), n.218 above, ch.V.

[226] See SR 138 prs.105-121 (Confidential Document), referred to by Tomuschat, n.1 above.

[227] In 1980 Mr. Tomuschat commented that "Since it is confined to 'written information', the Human Rights Committee finds itself in an extremely delicate situation. To date, the procedure provided for in the Optional Protocol has not stood the test of viability. And it is difficult to see how this unsatisfactory state of affairs could be improved", n.225 above, p.254 (my emphasis).

the matter or to have a useful exchange of views when particular difficulties arise. Since the State party concerned in most communications to date, Uruguay, has not properly co-operated with the HRC, many of the HRC's views have effectively been judgements by default and so the full extent of these difficulties have not been exposed. They could only be resolved within a written procedure, if at all, by a lengthy process of submission and counter submission. As the proceedings of the HRC attain a greater degree of subtlety and complexity the deficiencies of a wholly written procedure are likely to become more acute.[228] Provisions for oral proceedings would then provide an eminently sensible procedure to assist the HRC.

If such provision were made other difficulties would then present themselves. How would the travel expenses of communicants be defrayed if they were unable to pay for them?[229] Would legal representation be permitted?[230] Additional Secretariat staff and resources would almost certainly be necessary. Professor Tomuschat has pointed to another difficulty by posing the question, "Can the stage of taking evidence take place differently according to the greater or lesser degree of preparedness of the State party concerned to allow for additional methods of proof?"[231] It is submitted that the answer must be yes. If at least some State parties are willing co-operate in oral hearings the HRC should

---

[228] Members have indicated that matters raised in communications are becoming more complex and raising difficult questions of interpretation, see SR 731 pr.14 (Chairman).

[229] See pr.4.12 above. The question has been raised by members of the ICERD with respect to the procedures recently adopted by them.

[230] Ibid.

[231] Tomuschat, n.1 above, p.254.

take advantage of that co-operation rather than reduce procedures to those dictated by States who do not wish to permit oral hearings. There should be no opposition to oral hearings as long as they only take place with the consent of the State party concerned.

4.25 It is submitted that in principle it is open to the HRC to make provision for the possibility of oral hearings with the consent of the State party concerned.[232] Such a procedure would parallel the successful practice under the Article 40 reporting procedure of inviting State representatives to attend the consideration of national reports.[233] It is further submitted that the HRC should in fact make provision for oral hearings with the consent of the State party. The written procedure should remain the primary mode of obtaining evidence but when the HRC felt that an oral investigation would substantially assist its considerations that possibility should be open to it. Experience would indicate whether such a practice would become the exception or the rule.

Similar comments to the above can be made concerning the possibility of on site inspections by the HRC concerning communications under the O.P. Again there is nothing explicit in either the ICCPR or the O.P. As Mose and Opsahl comment, "Whether in the future this will be interpreted as a lacuna or a prohibition due to lack of competence remains to be seen".[234] Again it is submitted that in principle it is open to the HRC to develop such practices with the consent of the State party concerned.

---

[232] Mr. Dieye, a former member of the HRC, has argued that, "If it is not expressly provided for, it is submitted that as a general principle, fact-finding bodies possess inherent competence to conduct hearings", n.225 above, p.94.

[233] R.68. See ch.3, pr.3.19 above.

[234] Mose and Opsahl, p.290, n.98.

The experience of the IACM,[235] the EUCM[236] and the ILO[237] suggests that on-site investigations can assist human rights organs in their determinations and they

---

[235] See Edmundo Vargas Carreno, Visits on the Spot - The Experience of the Inter-American Commission of Human Rights, in Ramcharan (Ed.), n.146 above, pp.137-150; R.E.Norris, Observations In Loco - Practice and Procedure of the Inter-American Commission on Human Rights, 15 Texas I.L.J., pp.46-95, (1980).

[236] See H.C.Kruger, Visits on the Spot - The Experience of the European Commission of Human Rights, in Ramcharan (Ed.), n.146 above, pp.151-159; Van Dijk and Van Hoof, pp.94-96. Visits on the spot by the EUCM have generally concerned complaints under article 3 ECHR regarding the treatment of prisoners or other detained persons and the conditions of their detention. For example Commissioners have visited Broadmoor prison in the U.K. A delegation from the EUCM has recently (27/1/85-2/2/85) visited Turkey at the initiation of the Turkish Government to investigate violations of the ECHR alleged by Denmark, France, Netherlands, Norway and Sweden, A.9940-9944/82. A friendly settlement has recently been agreed which involves continuing supervision by the EUCM of the human rights situation in Turkey, see EUCM, Report On The Applications Of Denmark, France, Netherlands, Norway and Sweden Against Turkey And The Conclusion Of A Friendly Settlement, XXV ILM (1986) pp.308-318.

[237] See G.Von Potobsky, Visits on the Spot - the Experience of the I.L.O., in Ramcharan (Ed.), n.146 above, pp.160-175.

provide useful models for the HRC to follow and develop.[238]

A less radical proposal would be for the HRC to develop a "Direct contacts" approach similar to that used with some success by the ILO.[239] This could provide the possibility of a more direct, informal, speedier process than a full scale on-site investigation. It would also almost certainly introduce the idea of friendly settlement into the O.P. proceedings. A similar direct contact approach has been developed to a limited extent under the Article 40 process with some success.[240]

4.26 The basic submission behind each of these proposals is that the HRC has to have the flexibility to develop and adapt its procedures under the O.P. with the co-operation of the State parties concerned. In the long term it may well prove to have been sensible for the HRC to build up its practices and procedures carefully and cautiously. Over a period of time it can establish a bedrock of practice and allow States parties to acquire confidence in its impartiality and objectivity. With that confidence may come the degree of co-operation necessary for the implementation of the new practices suggested here.[241] Their adoption, particularly oral hearings, could be immensely important steps in making the O.P. procedure more effective.

---

[238] See also Sandifer, n.218 above,s.80.

[239] See G.Von Potobsky, n.146 above; F.Wolf, Human Rights and the International Labour Organisation, in Meron (Ed.),p.273 at pp.285-286.

[240] See ch.3, pr.3.9 above.

[241] Cf. The development of practices under the ECHR on the status of the individual and submissions from third parties, see Mahoney, n.126 above, pp.141-154.

7. Evidence.

(3) The Burden and Standard of Proof.[242]

4.27 The approach of the HRC to the matters of the burden and standard of proof are of immense practical importance to the effective functioning of the O.P. The initial burden of proof or persuasion would clearly seem to be on the alleged victim or the person acting on his behalf (both of whom will henceforth be referred to as the "author"). An author is not obliged to prove his case at the admissibility stage. The obligation is only to submit sufficient evidence in substantiation of the allegations as will constitute a prima facie case.[243] The HRC has declared a number of communications inadmissible on the ground of non-substantiation of allegations.[244] In a clear case a decision to declare a communication inadmissible or otherwise to terminate or suspend consideration of it may be taken without referring the case to the State party for its observations.[245] So, for example, if the author's evidence does not raise a prima facie case the communication will not be referred to the state party at all. Conversely, however, a communication may not be declared admissible unless the State party has received the text and has been afforded an opportunity to furnish information or observations.[246] Thus it is open to the

---

[242] See generally Sandifer, n.218 above, ss.29-32. See also pr.4.102 below on the burden of proof as regards the exhaustion of domestic remedies.

[243] Doc.A/39/40, pr.588.

[244] See e.g., O.F. v. Norway, Doc.A/40/40,p.204; M.F. v. Netherlands, Doc.A/40/40,p.213; J.D.B. v. Netherlands, Doc.A/40/40,p.226; K.L. v. Denmark, S.D.,p.24.

[245] See Doc.A/36/40 pr.397.3 at (d).

[246] R.91(2). Commentators regard this rule as of fundamental importance, see Cohn, n.218 above.

state party to refute the allegations and reduce the sufficiency of the authors' evidence below the required level of a prima facie case. For example, in J.M. v. Jamaica[247] J.M. alleged that article 12(4) (the right to enter his own country) had been violated because he had been unable to obtain a new passport and thus unable to return to Jamaica. The State party submitted no information. The HRC declared the communication admissible. That decision was set aside when the state party submitted evidence which rebutted J.M.s' evidence. The HRC concluded that J.M. had failed to establish that he was a Jamaican citizen and had failed to substantiate that he was a victim of violations of the provisions of the ICCPR.

4.28 If a communication is declared admissible the state party is required to submit explanations or statements clarifying the matter under consideration.(Article 4(2) O.P.)[248] The explanations or statements must primarily relate to the substance of the matter under consideration and in particular the specific violations of the Covenant alleged to have occurred.[249] The HRC can also request further detailed information from the author or the state party and may specify particular questions and aspects of the communication as to which

---

[247] Doc.A/41/40, p.164.

[248] In Fals Borda and Others v. Colombia, Doc.A/36/40,p.153 and S.D.,p.139, the HRC stated that the State party was not under a duty to address new allegations introduced only after a communication had been held inadmissible, pr.13.5.

[249] See e.g., De Bouton v.Uruguay, Doc.A/38/40, p.143 and S.D., p.72, pr.5 at 3. See below on how this approach has developed. For a case in which the HRC did accept the submission of the State party see Scarrone v. Uruguay, Doc.A/39/40,p.154. There the HRC found that in the light of information provided by the State party with regard to the treatment of Scarrone it could not justify a finding of a violation of article 10(1) of the Covenant, (pr.10.3.).

more information should be supplied.[250] These requests by the HRC represent one of the few positive roles in the O.P. proceedings taken by the HRC.

If the author fails to supply this information the HRC may hold that it can make no finding on all or part of the communication or that the allegations are unsubstantiated.[251] The effect of failure on the part of the state party is examined below.[252]

With regard to the consideration of communications on the merits the evidence supplied by the author has been sufficient when it has been of a specific, substantial, not insubstantial nature and of pertinent character. As for the obligations on the State party it is unfortunate that the HRC's approach can for the most part only be gleaned from cases in which the State party concerned has generally proved uncooperative.[253] Therefore, as noted earlier, many of the HRC's views effectively take the form of a judgement by default. This has been the situation since the HRC's very first expression of views in the Massera case.

---

[250] See pr.4.14 above. Such requests are usually made either within the HRC's admissibility decisions or by means of Interim (Interlocutary) Decisions. See e.g., Lovelace v. Canada, Doc.A/36/40 p.166, prs.7-8.

[251] See e.g.,Bequio v.Uruguay, Doc.A/38/40, p.180, pr.11.4; Montejo v. Colombia, Doc.A/37/40, p.168 and S.D.,p.127, pr.9.2; Cabriera v. Uruguay, Doc.A/38/40, p.209, pr.10.3; Vidal Martins v. Uruguay, Doc.A/37/40, p.157, and S.D.,p.122,pr.8.

[252] See prs.4.29-4.36.

[253] The I.C.J. has faced the similar and related problem of non-appearance, see Fitzmaurice, The Problem Of The Non-Appearing Defendant Government, 51 BYIL 1981 (1982) pp.89-122; J.B.Elkind, Non-Appearance Before The International Court Of Justice: A Functional And Comparative Analysis (1984); H.W.A.Thirlway, Non-Appearance Before The International Court Of Justice (1985).

4.29 In J.L.Massera and Others v. Uruguay[254] the communication alleged multiple violations of the covenant to four victims. The explanations of the State party consisted of a, "Review of the rights of the accused in cases before a military criminal tribunal, and domestic remedies available to him for protecting and safeguarding his rights in the national courts of justice".[255] The HRC decided that the submission of the state party was not sufficient to comply with the requirements of the O.P. (Article 4(2)) since it contained, "No explanations on the merits of the case".[256] A further request for observations met with no response. The HRC decided to base its views on the facts which had not been contradicted by the State party.[257] It expressed the view that there had been multiple violations to three of the alleged victims.

4.30 A different approach was taken to the problem of non co-operation from a State party in the HRC's second views. In Santullo (Valcada) v. Uruguay[258] S made specific allegations of ill treatment and named the senior officers responsible. In its submissions the State party referred to the domestic legal provisions prohibiting any physical maltreatment in Uruguay. The submission did not give any further details but claimed that the authors' allegations were, "Unfounded, irresponsible and unaccompanied by the least shred of evidence and that they accordingly did not deserve

---

254 Doc.A/34/40,p.124; S.D.,p.40.

255 Ibid.,pr.6.

256 Ibid.,pr.7.

257 Ibid., pr.9. Tomuschat, n.1 above, p.252, adds, "Nor discloses any prima facie appearance of being false or inaccurate". Note, however, that this sentence does not appear in the HRC's view.

258 Doc.A/35/40, p.107; S.D.,p.43.

further comment".[259] The HRC decided to base its views on facts which had been, "Essentially confirmed by the State party or are unrepudiated or uncontested except for denials of a general character offering no particular information or explanations".[260] The HRC stated that,

> "The State party has adduced no evidence that his allegations of ill-treatment have been duly investigated in accordance with the laws to which it drew attention in its submission...A refutation of these allegations in general terms is not enough. A State party should investigate the allegations in accordance with its laws".[261]

Surprisingly, perhaps, the view that the majority of the HRC then went on to express was that,

> "As regards Article 7 of the Covenant[262] the Committee cannot find that there has not been any violation of this provision. In this respect the Committee notes that the state party has failed to show that it had ensured to the person concerned the protection required in article 2[263] of the Covenant."[264]

Obviously this negative finding does not carry the weight of a positive finding of a violation and

---

[259] Ibid., pr.8.

[260] Ibid., pr.10.

[261] Ibid., pr.11.

[262] Article 7 contains a prohibition on torture and inhumane or degrading treatment or punishment. See ch.9 below.

[263] Article 2 provides, inter alia, that States parties must respect and ensure to all individuals within their jurisdiction the rights in the ICCPR. See ch.6 below.

[264] Doc.A/35/40, p.107; S.D.,p.43.

represents a rather cautious and unsatisfactory jurisprudence.[265] Fortunately such a view has only ever been taken in the Santullo (Valcada) case. In all subsequent cases the HRC have either expressed no view because, for example, of the generality of the allegations,[266] or expressed a positive view when the state party has only refuted allegations in general terms. In its third view, Lanza and Perdoma v.Uruguay,[267] the HRC reiterated its view in the Massera case that denials of a general character would not suffice and stated that,

> "Specific responses and pertinent evidence (including copies of the relevant decisions of the courts and findings of any investigations which have taken place into the validity of the complaints made) in reply to the contentions of the author of a communication are required. The Government did not furnish the Committee with such information. Consequently, the Committee cannot but draw appropriate conclusions on the basis of the information before it".[268]

4.31 It is this approach to evidence which has since prevailed. The approach takes account of what may often be a factual inequality in evidential terms between the parties. The HRC's approach was further clarified in the case of Bleir v. Uruguay.[269] The authors[270] submitted detailed allegations that B had been arrested, detained

---

[265] See Mose and Opsahl, pp.324-325; Anon, 23 Rev.ICJ (1979) p.26 at 29-30.

[266] See n.251 above.

[267] Doc.A/35/40,p.111; S.D.,p.45.

[268] Ibid., pr.15.

[269] Doc.A/37,40, p.130; S.D.,p.109.

[270] The alleged victims father and mother.

incommunicado and subjected to ill-treatment. These allegations were supported by the statements of family members and eyewitness testimonies. Uruguay submitted a brief categorical denial of B's detention. In the light of the "Overwhelming evidence" of the authors the HRC considered that the State party's submission was "Totally insufficient".[271] The HRC concluded in an Interim Decision that,

> "13. The failure of the state party to address in substance the serious allegations brought against it and corroborated by unrefuted information, cannot but lead to the conclusion that Eduardo Bleir is either still detained, incommunicado, by the Uruguayan authorities or has died while in custody at the hands of the Uruguayan authorities".[272]

The State party objected to this part of the HRC's Interim Decision,

> "The Government of Uruguay wishes to state that,in paragraph 13 of that document, the committee displays not only an ignorance of legal rules relating to the presumption of guilt, but a lack of ethics in carrying out the tasks entrusted to it, since it so rashly arrived at the conclusion that the Uruguayan authorities had put Eduardo Bleir to death. The Committee, whose purpose is to protect, promote and ensure respect for civil and political rights, should bear in mind that this task should always be carried out under the rule of law in accordance with its mandate and the universally accepted procedures concerning such matters as guilt and presumption of guilt".[273]

---

[271] Doc.A/37/40 p.130, pr.11.2 at 11.

[272] Ibid., pr.11.2 at 13.

[273] Ibid., pr.12.

The HRC replied decisively,

"The Human Rights Committee cannot accept the State party's criticism that it has displayed an ignorance of legal rules and a lack of ethics in carrying out the tasks entrusted to it or the insinuation that it has failed to carry out its task under the rule of law.

On the contrary, in accordance with its mandate under article 5(1) of the Optional Protocol, the Committee has considered the communication in the light of the information made available to it by the authors of the communication and by the State party concerned. In this connection the Committee has adhered strictly to the principle audiatur et altera pars and has given the State party every opportunity to furnish information to refute the evidence presented by the authors.

The Committee notes that the State party has ignored the Committee's repeated requests for a thorough inquiry into the authors' allegations.

With regard to the burden of proof, this cannot rest alone on the author of the communication, especially considering that the author and the State party do not always have equal access to the evidence and that frequently the State party alone has access to the relevant information. It is implicit in article 4(2) of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violation of the Covenant made against it and its authorities, especially when such allegations are corroborated by evidence submitted by the author of the communication, and to furnish to the Committee the information available to it. In cases where the author has submitted to the Committee allegations supported by substantial witness testimony, as in this case, and where further clarification of the case depends on information exclusively in the

hands of the State party, the Committee may consider such allegations as substantiated in the absence of satisfactory evidence and explanations to the contrary submitted by the State party".[274]

4.32 This approach to the burden of proof has now become established as part of the HRC's standard jurisprudence. The statement above is the major precedent on this matter and the HRC frequently refers back to it.[275] In some subsequent decisions the HRC has indicated to the State party the appropriate evidence required, for example medical reports, inquiry reports, details of alleged charges, copies of court proceedings, and reports on the questioning of officials.[276]

4.33 In summary the HRC has interpreted article 4(2) O.P. as explicitly providing that the State party has the duty to contribute to clarification of the matter and an implicit duty to investigate in good faith all allegations of violations of the Covenant made against the State and its authorities, especially when corroborated by evidence, and to furnish to the HRC the information available to it. This represents a very positive interpretation of the O.P. by the HRC and prevents the lack of co-operation by a State party destroying the effective functioning of the O.P. The effect is that no State party can benefit from its failure to co-operate fully with the HRC.[277]

---

[274] Ibid., prs.13.1-13.3.

[275] See e.g.,Romero v. Uruguay, Doc.A/39/40, p.159, pr.12.3.

[276] See e.g., Solorzano v. Uruguay, Doc.A/41/40, p.134; Vasilskis v. Uruguay, Doc.A/38/40, p.173, prs.10.3 and 10.4; Pietraroia v. Uruguay, Doc.A/36/40, p.153 and S.D., p.76, pr.15.

[277] See Tomuschat, n.1 above, pp.252-253; Nowak, n.1 above, pp.159-160. See also the comments of the HRC in Scarrone v.Uruguay, Doc.A/39/40, p.154, pr.10.2.

4.34 There have, however, been occasions when it might have been expected that the HRC would go further in attempting to obtain substantiation or corroboration of the allegations. For example, in Vasilskis v. Uruguay,[278] the author (V's brother) based his statements on the testimony of ex-prisoners who were in the same prison as his sister, who were then in Europe as refugees, and who allegedly witnessed the torture and maltreatment at first hand and would have been prepared to testify to it, if necessary, to the HRC. The HRC could perhaps have requested the author to provide signed testimonies from these ex-prisoners. This would only impose a minimal burden on the author. Similarly, in Quinteros and Quinteros v. Uruguay,[279] it had been alleged, inter alia, that E.Q. had been arrested in the grounds of the Venezuelan embassy in Montevideo. Uruguay denied that the Government had any part in the episode. Again it would seem to impose a minimal burden on the authors to submit signed testimonies from the witnesses in the Venezuelan embassy or at least to request such.

4.35 If the State party raises a defence under the particular limitation provisions of an article or under the general derogation provisions in article 4 the burden would seem to be on the State party to justify its limitation or derogation under the terms of the ICCPR.[280] For example, in Hammel v. Madagascar,[281] the HRC expressed the view that the State party had not shown that there were compelling reasons of national

---

[278] Doc.A/38/40, p.173.

[279] Doc.A/38/40, p.216.

[280] See e.g., on limitations, Hertzberg and Others v. Finland, Doc.A/37/40 p.161, dealt with in ch.11, prs.11.19-11.19.2 below, and on derogations, Silva v. Uruguay, Doc.A/36/40 p.130, dealt with in ch.7, pr.7.37 - 7.41 below.

[281] Doc.A/42/40 p.130.

security requiring that H be deprived of his remedy to challenge an expulsion order.[282] It should also be noted that the HRC will consider, ex officio, whether acts or omissions which are prima facie not in conformity with the Covenant could for any reasons be justified under the Covenant in the circumstances. The Committee then notes whether it would have been permissible to derogate from the rights concerned under article 4 O.P., and, if so, whether the Government has made any submissions of fact or law to justify such derogations.[283]

4.36 The HRC have not made any general comment on the matter of the appropriate standard of proof other than that of a prima facie requirement at the admissibility stage.[284] The general non co-operation of and the failure to comply with the HRC's requests by Uruguay, the State party concerned in most communications to date, has rendered the consideration of most communications a largely one sided affair. However, the general approach of the HRC would suggest that it is applying something approximating to proof on a "balance of probabilities" rather than a "beyond reasonable doubt" standard. There may be some flexibility within this standard depending on the seriousness of the allegations involved.[285]

---

[282] Ibid., pr.19.2.

[283] See e.g., Lanza and Perdoma v. Uruguay, Doc.A/35/40 p.111, pr.15.

[284] See text to n.243 above.

[285] In Ireland v. United Kingdom, the EUCT adopted a standard of beyond reasonable doubt in relation to allegations of violations of article 3 ECHR, EUCT, Series A, Vol.25, prs.160-161. See Cross On Evidence, pp.141-148 (6d, 1985).

8. Final Views Under The O.P.[286]

4.37 After consideration and examination of the communication the HRC is directed to, "Forward its views to the State party concerned and to the individual". (Article 5(4)) The term "Views" was preferred in the Third Committee to the stronger terms "Suggestions" and "Recommendations".[287] A number of commentators have regretted the weakness of the term views and argued that the the stronger terms rejected by the Third Committee would have been more precise and accorded greater authority to the HRC.[288] Professor Schwelb has noted that the French expression used "Contestations" would suggest that the HRC would have stronger powers than are suggested by the term views.[289] M.Tardu has argued that, "It seems that the HRC would have discretion as to the substance of its "views" which might include judgements as to the conformity of conduct of the state with the Covenant".[290]

---

[286] See Pathak, The Protection of Human Rights, 18 Ind.JIL,(1978),pp.165-173; C.Tomuschat, International Courts And Tribunals With Regionally Restricted And/Or Specialized Jurisdiction, in Mosler and Bernhardt (Eds.), Judicial Settlement Of International Disputes, p.285 at pp.305-306, (1974); Schwelb, (Civil and Political Rights), n.1 above, pp.857-859, 867-868; Capatorti, n.1 above, p.144; Saskena, Ch.1, n.144 above, p.596 at p.610; Brar, n.1 above, pp.538-541; Mose and Opsahl, pp.317-331; Tardu, n.650 below, p.781.

[287] Cf. U.N.Doc.A/C.3/L.1402/Rev.2 ('suggestions') with the revised text A/C.3/L.1411/Rev.2 ('views'). See A/C.3./SR 1440, pr.9 and SR 1441 pr.40.

[288] See n.268 above. The Chairman of the CERD has suggested that the power of the CERD to make "suggestions" and "recommendations" under the petition procedure in article 14 ICERD gives the CERD greater competence than article 5(4) O.P. gives the HRC, see Report of the CERD, Doc.A/38/18, pr.25, (1983).

[289] n.268 above.

[290] n.268 above.

4.38 It was, therefore, very important to note how much authority the HRC considered that the term "views" accorded to it. The practice of the HRC has been clear from its very first views. The HRC's views follow a judicial pattern and are effectively decisions on the merits.[291] The initial communication, allegations of the author, the submissions of the State party, the decision on admissibility and any interim decisions are recited in some detail. The facts upon which the HRC bases its views are set out. If the State party has not been co-operative the facts upon which the views are based are those which have been either essentially confirmed by the State party or are or appear to be uncontested except for denials of a general character offering no particular information or explanation.[292] The views often contain an indication of certain "Considerations" which the HRC has taken into account in formulating its views. These considerations have included, for example, the failure of either party to submit information requested by the HRC, particular matters arising during the consideration of the communication, the burden of proof, the obligations of either party under the Covenant or the general comments adopted by the HRC under article 40(4).[293] Many of the HRC's views contain

---

[291] "The HRC has managed to make it "views" under article 5(4) an efficient tool of its evaluation. None of the decisions hitherto handed down reads like a diplomatic communique. Obviously, they have all been drafted on the pattern of a judicial decision", Tomuschat, n.1 above,p.255. See also Nowak, n.1 above, (1980), p.54; B.Graefrath, Trends Emerging In The Practice Of The HRC.3/80 Bulletin Of The G.D.R. Committee For Human Rights, pp.3-32.

[292] See prs.4.27-4.36 above.

[293] Ibid. For example, in Hammel v. Madagascar, Doc.A/42/40 p.130, pr.19.2, the HRC took account of its general comment under article 40(4) on the position of aliens.

substantive interpretations of the provisions of the Covenant and the O.P.[294] The views then state whether in the HRC's view the facts as found disclose violations of the Covenant and why. However, the linkage between the facts and the violations found has not always been clearly spelt out by the HRC, particularly in its early views, with a consequent lack of clarity and legal precision.[295]

4.39 It is clear from the drafting work that the views of the HRC do not constitute a legally binding decision as regards the State party concerned.[296] In this respect the O.P. parallels the reports of the European Commission on Human Rights,[297] and the supervision systems of the International Labour Organization[298] and under the European Social Charter.[299] It contrasts markedly with the decisions of the European Court of Human Rights and the recommendations of the Committee of Ministers under the ECHR which are legally binding.[300] There is no higher organ expressly authorised to review or supervise the implementation of the HRC's views so these remain the last word on the communication.[301]

---

294 See chs.5-12 below.

295 See e.g., ch.9 below (on articles 7 and 10(1)).

296 See n.1 above.

297 See Van Dijk and Van Hoof, ch.II.

298 See N.Valticos, The International Labour Organization (1979).

299 See D.Harris, The European Social Charter,(1984).

300 See Van Dijk and Van Hoof, chs.III and IV.

301 It is uncertain whether the General Assembly or the ECOSOC could play any role in communications under their general jurisdictional powers. Brar n.1 above (1986) comments, "It is hoped that the Third committee of the General Assembly will be increasingly used as a

(Footnote Continued)

Again this contrasts with the implementation systems under the ECHR,[302] the I.L.O.[303] and the European Social Charter.[304]

It is submitted that the HRC's views would obviously carry greater authority if they were legally binding on the State party. A legally non-binding view and the absence of any mechanisms of enforcement or execution afford a victim the most minimal degree of protection and relief. The strongest argument to support the O.P. system has been put by Professor Tomuschat,

> "Legally, the views formulated by the Human Rights Committee are not binding on the State party concerned which remains free to criticize them. Nonetheless, any State party will find it hard to reject such findings in so far as they are based on orderly proceedings during which the defendant party had ample opportunity to present its submissions. The views of the Human Rights Committee gain their authority from their inner qualities of impartiality, objectiveness and soberness. If such requirements are met, the views of the Human Rights Committee can have a far-reaching impact, at least vis-a-vis such Governments which have not outrightly broken with the international community and ceased to care anymore for concern expressed by international bodies. If such a situation arose, however, even a

---

(Footnote Continued)
forum to bring pressure to bear upon States parties to comply with the final views adopted by the Human rights Committee", p.541.

302 See n.297 above.

303 See n.298 above.

304 See n.299 above.

legally binding decision would not be likely to be respected".[305]

Much of this chapter on the O.P. has been directed to showing how the development of practices and procedures by the HRC enhance these very qualities of impartiality, objectiveness and fairness. Many of these matters have been commented upon favourably and thus help to invest the HRC's views with greater authority and a legal rather than merely a "political value".[306]

4.40 It is arguable that the ambiguity of the term views and the fact that they are non-binding has allowed the HRC to go further in those views than might have been expected. The views do not end with the HRC's findings on the question of violations. Each view continues with a statement of the view of the HRC on the "Obligation" of the State party in the light of the HRC's findings. Among the general and particular obligations indicated by the HRC have been:

(a) To take immediate steps to ensure strict observance of the provisions of the Covenant;[307]

(b) To provide immediate and effective remedies to the victims (Article 2(3) ICCPR);[308]

---

[305] Tomuschat, n.1 above, p.255. Unfortunately, this was perhaps the case with Uruguay prior to the new Government in March 1985.

[306] Capatorti, n.1 above, p.144.

[307] See e.g., Ambrosini, Massera and Massera v. Uruguay, Doc.A/34/40, p.124, pr.10 at (iii).

[308] See e.g., Lopez Burgos v. Uruguay, Doc.A/36/49, p.176, pr.14. In Carballal v. Uruguay, Doc.A/36/40, p.125, pr.14 the obligation specified was to provide effective remedies, "If applied for". There is no explanation of why this requirement only appears in that view.

(c) To provide adequate or appropriate remedies to the victims;[309]

(d) To provide compensation to the victims;[310]

(e) To immediately release the victims;[311]

(f) To take steps with a view to enabling the victims to participate again in the political life of the nation;[312]

(g) To adjust the provisions of legislation, sometimes specified, in order to implement its obligations under the Covenant;[313]

(h) To give the victim permission to leave the country;[314]

---

[309] See e.g., De Montejo v. Uruguay, Doc.A/37/40, p.168, pr.12; Broeks v. Netherlands, Doc.A/42/40 p.139, pr.16.

[310] See e.g., Carballal v. Uruguay, Doc.A/36/40 p.125. In a number of cases the HRC has specifically referred to "compensation in accordance with article 9(5) of the Covenant". See e.g. Santullo (Valcada) v. Uruguay, Doc.A/35/40 p.107, pr.13. Mose and Opsahl, comment that, "The specific provision referred to here does not exclude other remedies, but since neither the Protocol nor the Covenant prescribe what kind of measures are required in the various situations of violations, the Committee apparently felt it could not be more precise", p.324.

[311] See e.g., Lopez Burgos v. Uruguay, Doc.A/36/40 p.176.

[312] See e.g., Silva and Others v. Uruguay, Doc.A/36/40, p.130, pr.10.

[313] See e.g., Aumeeruddy-Cziffra and Others v. Mauritius, Doc.A/36/40, p.134, pr.11; Fals Borda V. Colombia, Doc.A/37/40, p.193, pr.15.

[314] See e.g., Lopez Burgos v. Uruguay, Doc.A/36/40 p.176.

(i) To extend (to the victims) the treatment and rights of detained persons laid in articles 7, 9 and 10 of the Covenant;[315]

(j) To ensure that the victim receives and continues to receive all necessary medical care;[316]

(k) To establish what has happened to the alleged victim, to bring to justice any persons found to be responsible for his death, disappearance or ill-treatment, and to pay compensation to him or his family for any injury which he has suffered;[317]

(l) To ensure that the right to life is duly protected by amending the law;[318]

(m) To give the victim a trial or a fresh trial with all the procedural guarantees in Article 14;[319]

(n) To provide the victim with effective remedies which would give her the possibility of enjoying the rights under Article 12 of the Covenant (freedom of movement and residence) including a passport valid for travel abroad;[320]

---

[315] See e.g., Schweizer v. Uruguay, Doc.A/38/40, p.117, pr.11.

[316] See e.g., Antonaccio v. Uruguay, A/37/40, p.114, pr.21.

[317] See e.g., Bleir v. Uruguay, Doc.A/37/40, p.130, pr.15; Barbato v. Uruguay, Doc.A/38/40, p.124, pr.11.

[318] See e.g., De Guerrero v. Uruguay, Doc.A/37/40, p.137, pr.15.

[319] See e.g., Antonaccio v. Uruguay, Doc.A/37/40 p.114, pr.21.

[320] See e.g., Vidal Martins v. Uruguay, Doc.A/37/40, p.157, pr.10. In three parallel cases concerning passports the HRC referred only to an obligation to provide effective remedies pursuant to article 2(3) of the Covenant, Lichtensztejn v. Uruguay, Doc.A/38/40 p.166, pr.10; Montero v. Uruguay, Doc.A/38/40 p.186, pr.11; Nunez v. Uruguay, Doc.A/38/40 p.225, pr.11.

(o) To investigate the allegations of torture;[321]

(p) To return property to the victim;[322]

(q) To take steps to ensure that similar violations do not occur in the future;[323]

(r) To transmit a copy of the views to the victim.[324]

It is interesting to note the specific nature and directness of some of these obligations, for example, to pay compensation or amend particular pieces of legislation.[325] This approach is very positive compared, for example, with that of the EUCT which simply states whether or not there has been a violation of the ECHR, though it has power under Article 50 ECHR to award damages and costs in certain circumstances.[326]

4.41 Having declared a communication inadmissible or expressed its view as to the alleged violations and any

---

[321] See e.g., Muteba v. Uruguay, Doc.A/39/40, p.182, pr.13. In Baritussio v.Uruguay, Doc.A/37/40, p.187, pr.14, the HRC urged the State party "to investigate the allegations of torture made against named persons in this case".

[322] See e.g., Ex-Philibert v. Zaire, Doc.A/38/40, p.197, pr.9.

[323] See e.g., Lopez Burgos v. Uruguay, Doc.A/36/40 p.176. This obligation has been expressed in the majority of views to date.

[324] See e.g., Barbato v. Uruguay, Doc.A/38/40 p.124, pr.11.

[325] Note that in Marais v. Madagascar, Doc.A/38/40, p.141, pr.20, the HRC's views included the statement that, "The Committee would welcome a decision by the State party to release Mr. Marais, prior to completion of his sentence, in response to his petition for clemency". Mr.Marais was not released until the completion of his sentence.

[326] Cf. The powers of the EUCT under article 50 ECHR as to which see Van Dijk and Van Hoof,pp.146-156, and R.53 of the EUCT's Rules of Procedure. There is now a substantial jurisprudence on article 50 ECHR. See also article 32 ECHR for the role of the Committee of Ministers when a case is not referred to the EUCT.

resulting obligations the question remains whether the HRC has any competence to reconsider its views at the request of either party or follow up in any way its expression of views to ensure that they are respected by the State party.[327] These important matters have been considered by the Working Group on Communications and the plenary HRC. The extensive debate is well summarized in the HRC's annual report,

> "Some members were of the opinion that nothing in the Covenant and the Optional Protocol, which were the legal basis of the Committee's functions and limits, empowered the Committee to reconsider its views on communications or to ensure their implementation; that the Committee could have no inherent powers that had not been given to it explicitly by States parties and that it therefore had no competence to initiate the review of a case already concluded; that there was nothing in the Optional Protocol to prevent an individual from submitting a further communication if he was not satisfied with the Committee's views, or if he considered that there were facts or evidence to which attention should be drawn, and the question would then become one of admissibility of the new communication; that the Committee was a sui generis body, with no judicial powers and that the implementation of its views was left to the goodwill of the State party concerned; that the question of monitoring of the implementation of those views in the absence of a clear legal mandate

---

327 In two cases the HRC has had recourse to R.93(4) of its rules which provides for a review of a decision declaring a communication admissible in the light of any explanations or statements submitted by the State party. See C.F.et.al. v. Canada, Doc.A/40/40 p.217; J.M. v. Jamaica, Doc.A/41/40 p.164. In both cases the authors made no comments on the information subsequently provided by the State party.

to that effect, might even be contrary to Article 2, paragraph 7, of the Charter of the United Nations relating to the internal affairs of States; that States parties could, if they so wish, use the amendment procedure under Article 11 of the Protocol, an easy matter at the current stage, when there were only 28 States parties to the Protocol; that if the Committee took it upon itself to change procedures for which explicit ratification was required, its action could be taken as a warning to States to think twice before ratifying the Optional Protocol, since there was no prediction what additional obligations and procedures the Committee would attach to that instrument; and that no useful progress could be made in trying to press States to do what they were no obliged to do.

The majority of members, however, pointed out that the Committee could not let its work under the Optional Protocol degenerate into an exercise of futility; that due consideration had to be paid to both the letter and the spirit of the Covenant, and that whereas the Committee believed that certain appropriate action was reasonably open to it, or was not expressly prohibited, the Committee should take it and that the Optional Protocol allowed considerable latitude for interpretation since many issues were not specifically covered by its provisions. Several such issues were cited, as well as decisions and steps taken previously by the Committee, but which could not be traced directly back to the Covenant or the Optional Protocol.[328] Considering that the Optional Protocol did not provide for the principle of res judicata as far as

---

[328] See, e.g., pr.4.10 above on interim measures under the O.P.

the Committee's decisions were concerned, and that the Committee's rules of procedure allowed for a review of a decision on admissibility, reconsideration of a communication should be possible, but only as an exception, not as a rule; that it should primarily be based on new facts, although legal arguments adduced at a later stage could not be entirely excluded; that a new rule to that effect may not be desirable at the present stage, but that if one was ultimately to be drawn up it should be an enabling rule whose effect would be to impose limitations and to discourage abuses. As to the question of whether the Committee was entitled to monitor the implementation of its decisions under the Optional Protocol, it was pointed out that, whereas the Committee had no executive powers enabling it to enforce its views, it could nevertheless do something to bring redress, or end continued violations, of the victim's rights after transmission of its views to the State party concerned. Moreover, it was clear from the preamble of the Protocol[329] and Article 2(3) of the Covenant[330] that the States parties intended the Covenant to be implemented. When a victim was clearly within the jurisdiction of a State and not in direct communication with the Committee, the Committee should indicate in its views that he might avail himself of certain remedies and the Committee should request the State party to communicate the entire decision to him and should also be requested to inform the Committee of any developments".[331]

---

[329] For the text of the Preamble see Apx.II below.

[330] See ch.6 below.

[331] Doc.A/38/40, pr.394.

The HRC have been pressed on the questions of reconsideration and follow up of communications because in a number of cases authors have asked the Committee to take additional steps to persuade the States parties concerned to act in conformity with the views of the HRC. Similarly the HRC have been requested by authors to review a number of inadmissibility decisions.[332] The HRC has now expressed the opinion that,

> "Its role in the examination of any given case comes to an end by the adoption of views or by the adoption of another decision of a final nature. Only in exceptional circumstances may the Committee agree to reconsider an earlier final decision. Basically, this would only occur when the Committee is satisfied that new facts are placed before it by a party claiming that these facts were not available to it at the time of the consideration of the case and that these facts would have altered the decision of the Committee. The Committee, however, takes an interest in any action by the State party as a consequence of the Committee's views under the Optional Protocol, or in any action taken by the State party which concerns either the legal issues involved or the situation of the person concerned. Thus, when forwarding its views to a State party, the Committee invites the State party to inform it of any action pursuant to the views".[333]

The decision is clearly a compromise between the opposing views on these matters outlined above. Its sets another important precedent of the HRC applying an interpretation of the O.P. which allows it some flexibility to take appropriate action, albeit modest,

---

[332] Doc.A/39/40, pr.621.

[333] Ibid. (My emphasis).

which is reasonably open to it , which is not expressly prohibited by the terms of the O.P.

4.42 Since the HRC's fifteenth session (March-April 1982) the letter of transmittal accompanying the Committee's views invites the State party to inform the HRC of any action pursuant to its views. A number of responses had been received by States parties. Three responses were received in 1983 from Canada,[334] Finland[335] and Mauritius[336] informing the HRC of legislative or other measures that had been or were being taken in response to the HRC's views. Madagascar also informed the HRC that an individual whose case the HRC had considered had been released from imprisonment upon completion of his sentence and had left Malagasy territory.[337] In 1984 the Government of Uruguay requested that a list of persons released from imprisonment in 1983 and 1984 which had been furnished to the Secretary-General, be brought to the attention of the HRC. Included in the list were two persons whose cases had been considered by the HRC.[338] The HRC learned from other sources of the release of three other individuals whose cases it had considered.[339] Similar

---

[334] Doc.A/38/40,pr.394 and Appx.XXXI.

[335] Ibid.,Appx.XXXII.

[336] Ibid.,Appx.XXXIII.

[337] Doc.A/39/40,pr.624.

[338] Doc.A/39/40, pr.623.

[339] Ibid. The three individuals were J.L.Massera, Doc.A/34/40 p.124; L.Celiberti de Casariego, Doc.A/36/40 p.185; R.Pietraroia, Doc.A/36/40 p.153. Professor Tolley has noted that J.L.Massera, a distinguished mathematician, was released three days before the situation in Uruguay was to be subject to a private discussion in the Human Rights Commission. He comments that, "a procedure fashioned to redress patterns of gross violations thus produced an isolated individual

(Footnote Continued)

lists were provided by the Uruguayan Government in October 1984 and in February and March 1985.[340] Those lists included a number of persons whose cases were pending before the or had been considered by it.[341]

4.43 In 1985 Canada informed the HRC that amending legislation had been passed to bring the Indian Act into conformity with the HRC's decision in the Lovelace case.[342] Finally Madagascar provided detailed comments and information concerning the decision in Monja Jaona v. Madagascar.[343] Madagascar maintained that the communication was inadmissible and in any event no violations of the Covenant had occurred. The State party expressed its regret at not having made the information available to the HRC at an earlier stage and affirmed its intention to co-operate more fully with the HRC in the future.[344]

In response the HRC expressed its satisfaction at all measures taken by the States parties towards the

---

(Footnote Continued)
remedy granted for symbolic effect", The Concealed Crack In The Citadel:The United Nations Commission On Human Rights' Response To Confidential Communications, 6 HRQ (1984), p.420 at p.457.

340 Doc.A/40/40, pr.703. The newly elected Government came to power on 1st March 1985. The new Government provided the HRC with part of the text of a general amnesty law of 8 March 1985 under which all political prisoners had been released and all forms of political banishment had been lifted. In Conteris v. Uruguay, Doc.A/40/40, p.196, pr.9.2, the HRC noted that Conteris had been released pursuant to this general amnesty.

341 Ibid. The individuals concerned have included Antonaccio, Izquierdo, Bequio, Vasilskis, Nieto, Machado, Scarrone and Romero, cited in Nowak, n.1 above, (1986) p.305, n.74.

342 Doc.A/40/40, pr.704. Lovelace v. Canada, Doc.A/36/40, p.166; S.D.,p.83.

343 Monja Jaona v. Madagascar, Doc.A/40/40, p.179.

344 Doc.A/40/40, pr.705.

observance of the Covenant and welcomed the positive responses and the co-operation of the States parties concerned.[345]

---

[345] Doc.A.39/40,pr.625; Doc.A/40/40,pr.706.

E. THE INTERPRETATION AND APPLICATION OF THE O.P.

1. The Function Of The HRC Under The O.P.

4.44 There are no provisions in the ICCPR or the O.P. which expressly address this matter. However, the HRC has had a number of occasions on which to make clear its view of its function in relation to national courts and tribunals. In Hertzberg et al. v. Finland[346] the Committee pointed out that it was,

> "not called upon to review the interpretation of paragraph 9(2) of chapter 20 of the Finnish Penal Code. The authors have advanced no valid argument which could indicate that the construction placed upon this provision by the Finnish tribunals was not made bona fide. Accordingly, the Committee's task is confined to clarifying whether the restrictions applied against the alleged victims, irrespective of the scope of the penal prohibitions under Finish penal law, disclose a breach of any of the rights under the Covenant".[347]

Similarly, in Pinkey v. Canada[348] the Committee observed,

> "that allegations that a domestic court has committed errors of fact or law do not in themselves raise questions of violation of the Covenant unless it is also appears that some of the requirements of article 14 have not been complied with".[349]

---

[346] Doc.A/37/40 p.161; S.D. p.24.

[347] Ibid., pr.9.2.

[348] Doc.A/37/40 p.101; S.D. p.12.

[349] Ibid., pr.11. See also the arguments raised by both the State party and the author in M.A. v. Italy, Doc.A/39/40 p.190.

Again in Maroufidou v. Sweden[350],

> "M claims that the decision to expel her was in violation of article 13 of the Covenant because it was not "in accordance with the law". In her submission it was based on an incorrect interpretation of the Swedish Aliens Act. The Committee takes the view that the interpretation of domestic law is essentially a matter for the courts and authorities of the State party concerned. It is not within the powers or functions of the Committee to evaluate whether the competent authorities of the State party in question have interpreted and applied the domestic law correctly in the case before it under the Optional Protocol, unless it is established that they have not interpreted and applied it in good faith or that it is evident that there has been an abuse of power".[351]

In the light of the information before it the HRC was,

> "satisfied that in reaching the decision to expel Anna Maroufidou the Swedish authorities did interpret and apply the relevant provisions of Swedish law in good faith and in a reasonable manner and consequently that the decision was made "in accordance with law" as required by article 13 of the Covenant".[352]

And again in J.K. v. Canada[353] the Committee observed that it was

---

[350] Doc.A/36/40 p.160; S.D. p.80.

[351] Ibid., pr.10.1.

[352] Ibid., pr.10.2. The Committee had established that article 13 requires compliance with both the substantive and the procedural requirements of the law, ibid., pr.9.3. For article 13 see apx.I. On the interpretation of "in accordance with the law" under the ECHR see Van Dijk and Van Hoof, pp.424-427.

[353] Doc.A/40/40 p.215.

> "beyond its competence to review findings of fact made by national tribunals or to determine whether national tribunals properly evaluated new evidence submitted on appeal".[354]

The Committee, "does not deal with questions of constitutionality, but with the question whether a law is in conformity with the Covenant, as applied in the circumstances of the case...".[355] Therefore, the application of a legal provision may violate the Covenant event though it has been held constitutional in the national courts of the State concerned.[356]

> A related aspect is that the Committee,
> "has only been entrusted with the mandate of examining whether an individual has suffered an actual violation of his rights. It cannot review in the abstract whether national legislation contravenes the Covenant, although such legislation may, in particular circumstances, produce adverse effects which directly affect the individual, making him thus a victim in the sense contemplated by article 2 of the Optional Protocol".[357]

The "victim" requirement is dealt with in detail below.[358]

4.45 It is notable that the views which the Committee has taken of its function under the O.P. closely

---

[354] Ibid., pr.7.2. Similarly in Muhonen v. Finland, Doc.A/40/40 p.164, pr.11.1, as regards the evaluation by Finnish authorities of an application for exemption from armed or unarmed service in the Finnish Armed Forces.

[355] Fals Borda v. Colombia, Doc.A/37/40 p.193, pr.13.3.

[356] An example is the Fals Borda Case, ibid.

[357] Hertzberg and Others v. Finland, Doc.A/37/40 p.161; S.D. p.124, pr.9.3. See also McIsaac v. Canada, Doc.A/38/40 p.111, pr.10.

[358] See prs.4.75-4.4.81 below.

parallels those taken by the EUCM and the EUCT under the ECHR.[359] Like those organs the HRC has also engaged in limited ex officio tasks, for example, raising of its own motion certain issues during the consideration of communications. However, there has as yet been no indication whether the HRC takes any view similar to that established under the ECHR of protecting the objective character of the obligations under the European Convention and "l'ordre public de l'Europe".[360]

---

[359] See Fawcett, pp.323-329.

[360] See Fawcett, pp.330-335. Cf. The 2nd Advisory Opinion Of The IACT On The Entry Into Force Of The American Convention For A State Ratifying Or Adhering With A Reservation, 3 HRLJ (1982) p.153-165. "In concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various legal obligations, not in relation to other States, but towards all individuals within their jurisdiction", ibid., pr.29.

2. The Interpretation Of The ICCPR And The O.P.[361]

4.46 The most important view of the HRC concerning the interpretation of the ICCPR and the O.P. is that in Van Duzen v. Canada.[362] The facts of the case raised complex issues concerning whether the provision in Article 15(1) ICCPR for the retroactivity of a "Lighter Penalty" was applicable to a law amending the rules concerning the forfeiture of parole. The author raised the matter of the applicable principles of interpretation. He submitted that in a case of doubt a presumption of liberty of the individual should be applied to Article 15(1). He further argued that the meaning of Article 15(1) he was advancing was assumed in reservations made by certain other States Parties when they ratified the Covenant and was supported in the proceedings of the Third Committee in 1960 in which Canada had participated.[363] The State party agreed with the principle of interpretation advanced but submitted that there was no ambiguity in Article 15(1). Therefore the author could not benefit from the presumption in favour of liberty.[364]

Unfortunately, the HRC made no comment or observation on such an alleged general principle of

---

[361] See P.Hassan, The International Covenants On Human Rights: An Approach To Interpretation, 19 Buffalo LR (1969) pp.35-50; Ibid., The International Covenant On Civil And Political Rights: Background And Perspective On Article 9(1), 3 Denver.JILP (1973) pp.153-183. See generally, articles 31-32 V.C.L.T. (1969).

[362] Doc.A/37/40 p.150. See T.Opsahl and A.De Zayas, The Uncertain Scope Of Article 15(1) Of The International Covenant On Civil And Political Rights, 1983 Can HRYB pp.237-254.

[363] Ibid., pr.6.2.

[364] Ibid., pr.8.6.

interpretation.[365] It did, however, make an important statement on the interpretation of the terms and concepts of the ICCPR and the O.P.,

> "The Committee further notes that its interpretation and application of the ICCPR has to be based on the principle that the terms and concepts of the Covenant are <u>independent</u> of any particular national system of law and of all dictionary definitions. Although the terms of the Covenant are derived from long traditions within many nations, the Committee must now regard them as having an <u>autonomous meaning</u>. The parties have made extensive submissions, in particular as regards the meaning of the word "Penalty" and as regards Canadian law and practice. The Committee appreciates their relevance for the light they shed on the nature of the issue in dispute. On the other hand, the meaning of the word "Penalty" in Canadian law is not, as such, decisive. Whether the word "Penalty" in Article 15(1) should be interpreted narrowly or widely, and whether it applies to different kinds of penalties, "Criminal" and "Administrative", under the Covenant, must depend on other factors. Apart from the text of Article 15(1) regard must be had, inter alia, to its object and purpose".[366]

It in interesting to note, first, that the HRC will regard at least some of the terms and concepts of the

---

[365] See Brownlie, Principles Of Public International Law, pp.288-289, 623-630 (3d, 1979).

[366] Doc.A/37/40 p.150, pr.10.2 (my emphasis). See also Maroufidou v. Sweden, Doc.A/36/40 p.160, on article 13 ICCPR, "The reference to "law" in this context is to the domestic law of the State concerned, which in the present case is Swedish law, though of course the relevant provisions of domestic law must themselves be compatible with the provisions of the Covenant", ibid., pr.9.3.

Covenant as having an "Autonomous", "Independent" meaning. A similar approach has been developed under the ECHR.[367] A clear example of the HRC adopting an autonomous interpretation of a provision of the Covenant is the case of Lovelace v. Canada.[368] At the time of submitting the communication L no longer qualified as an Indian under Canadian legislation. However, the HRC took the view that,

> "Persons who are born and brought up on a reserve, who have kept ties with their community and wish to maintain these ties must normally be considered as belonging to that minority within the meaning of the Covenant".[369]

The HRC decided on the facts that L was entitled to be regarded as "Belonging" to the minority concerned and thus to claim the benefits of Article 27 of the Covenant.[370]

4.47 Secondly, we can note the direct reference to the text of the treaty and to its object and purpose mirrors the general rule of treaty interpretation in Article 31

---

[367] See e.g. the decision of the EUCT in the Engel Case, (1978) on the concept of "criminal charge" in article 6(1) ECHR. The equivalent of article 15(1) ICCPR can be found in article 7 ECHR. The EUCM has deemed itself competent to review the interpretation and application of the provisions of municipal law by the national court, A.1852/63, X. v. Austria, Yearbook VIII (1965) p.190 at p.198. See Van Dijk and Van Hoof, pp.273-282, who comment, "As a matter of fact the case law of the Commission shows that the national authorities hardly have to fear an autonomous interpretation of that municipal law by the Commission", p.274.

[368] Doc.A/36/40 p.166; S.D. p.83.

[369] Ibid., pr.14.

[370] Ibid.

V.C.L.T.(1969).[371] Under the ECHR a teleological interpretation has increasingly been adopted and is now highly developed.[372] There has as yet been no parallel in the HRC's jurisprudence to the "dynamic approach" to interpretation under the ECHR in accordance with which the institutions have identified their role as a protector of human rights in accordance with the changing perceptions of them in Western Europe as social values and attitudes evolve.[373] Clearly the HRC's comment does not rule out reference to the preparatory work on the Covenant and the O.P., and indeed resort has been had to the preparatory work in a number of views. Notable example were three Dutch cases concerning the scope of article 26 ICCPR.[374] In each case the HRC stated that it had "perused" the travaux preparatoires of the ICCPR which provide a "supplementary means of interpretation" (article 32 of the V.C.L.T.).[375] The HRC concluded that, "The discussions, at the time of the drafting, concerning whether the scope of article 26 extended to rights not otherwise guaranteed by the Covenant, were inconclusive and cannot alter the conclusion arrived at by the ordinary means of

---

371 "A Treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose", Article 31(1) V.C.L.T. (1969).

372 See e.g. Wemhoff v. FRG, EUCT, vol.7, 1968), Golder v. U.K., EUCT, vol.18, (1981); Airey v. Ireland, EUCT, vol.32, (1979); Young, James and Webster v. U.K., EUCT, vol.44, (1981).

373 See e.g. Dudgeon v. U.K., EUCT, vol.45, (1981); Marcxx v. Belgium, EUCT, vol.31, (1979); Weeks v. U.K., EUCT, vol.114, (1987). See generally C.C.Morrisson, The Dynamics Of Development In The European Human Rights Convention System (1981).

374 Broeks v. Netherlands, Doc.A/42/40 p.139; Danning v. Netherlands, ibid., p.151; Zwaan-de Vries v. Netherlands, ibid., p.160. See prs.4.55-4.58 below.

375 Ibid., pr.12.2 of each view.

interpretation...".[376] The "ordinary means" means referred to by the HRC were those in article 31 V.C.L.T.[377]

Finally, in Lopez Burgos v. Uruguay, [378] the HRC stated that it would not adopt an interpretation of the Covenant which was "Unconscionable".[379]

4.48 It is convenient to note here that the "Margin Of Appreciation" (or "Discretion") doctrine which has formed an important part of the jurisprudence under the ECHR has been introduced by the HRC. In Hertzberg and Others v. Finland,[380] the authors argued that the Finish authorities including the organs of the State controlled Finish Broadcasting Corporation had interfered with their right to freedom of expression and information (Article 19) by imposing sanctions against participants in, or censoring, radio and television programmes dealing with homosexuality.[381] In its final views the HRC stated hat,

> "It has to be noted, first, that public morals differ widely. There is no universally applicable common standard. Consequently, in this respect, a certain margin of discretion must be accorded to the responsible national authorities".[382]

It is as yet too early to know how widely the doctrine of the margin of appreciation will be interpreted in the HRC's jurisprudence. An unduly wide

---

376 Ibid., pr.12.3 of each view.

377 See n.371 above.

378 Doc.A/36/40 p.176.

379 Ibid., pr.12.3.

380 Doc.A/37/40 p.161; S.D. p.124.

381 Ibid., pr.2.1.

382 Ibid., pr.10.3. For the HRC's view see ch.11 below.

interpretation inevitably lowers the level of protection offered to alleged victims by reducing the level of international supervision. Though firmly established under the ECHR, and indeed of increasing significance, the doctrine has not been without its critics.[383]

---

[383] See C.Morrisson, Margin Of Appreciation In European Human Rights Law, 4 HRR/RDH (1973) pp.263-286; T.O'Donnell, The Margin Of Appreciation Doctrine: Standards In The Jurisprudence Of The European Court Of Human Rights, 4 HRQ (1982) pp.474-496; Van Dijk and Van Hoof, pp.427-449; C.Feingold, The Little Red Schoolbook And The European Convention On Human Rights, 3 HRRev. (1978) pp.263-286.

3. Incompatibility With The Provisions Of The Covenant.[384]

(a) Ratione Temporis.[385]

4.49 The HRC has clearly stated that with respect to the original States Parties to the O.P. it is only competent to consider alleged violations occurring on or after the date of the entry into force of the O.P. on 23 March 1976.[386] Similarly with respect to States which have later acceded to the O.P. the HRC is only competent to consider alleged violations occurring on or after the date of the entry into force of the O.P. for that State party.[387] Moreover, in A.R.S. v. Canada[388] the HRC expressed the view that,

> "No action taken before the entry into force of the Covenant for the State party concerned can, as such, be judged in the light of the obligations deriving from the Covenant".[389]

4.50 However, alleged violations occurring before the date of the entry into force of the State concerned can be considered by the HRC if the violations continue or have continuing effects after that date which themselves

---

384 See Brar, n.1 above, pp.507-531; Mose and Opsahl, pp.295-302.

385 Generally see article 28 of the Vienna Convention On The Law Of Treaties, (1969). For the practice under the ECHR see Van Dijk and Van Hoof, pp.8-10. For recent decisions see Baggetta v. Italy, EUCT, vol.119, (1987); Milasi v. Italy, EUCT, Ibid.

386 See, e.g., Sequeira v. Uruguay, Doc.A/35/40, p.127; De Touron v. Uruguay, Doc.A/36/40, p.120.

387 See, e.g., C.E.v.Canada, S.D., p.16.

388 S.D., p.29.

389 Ibid., pr.5.1. The communication concerned certain provisions of the Parole Act 1970 and article 15

constitute a violation of the Covenant.[390] This approach has been consistently applied in a number of cases in which the HRC has declared communications or parts of communications inadmissible ratione temporis.[391] The HRC's final views in such cases commonly take the form that the facts as found by the HRC, "In so far as they continued or occurred after the date of entry into force of the ICCPR and the O.P." disclose certain violations or not.[392] In Altesor v. Uruguay[393] the HRC held that it could not establish with certainty what facts had occurred after the entry into force of the ICCPR and the O.P. They would, therefore, make no finding as regards those allegations.[394]

The question of continuing violations has been raised in a number of communications. In Carballal v. Uruguay[395] the HRC concluded that although the date of C's arrest was prior to the entry into force of the ICCPR and the O.P. the alleged violations of Articles 7,9,10 and 14 continued after that date.[396] In Cabreira v. Uruguay[397] it was argued that although the alleged torture of C took place before the entry into force of the ICCPR and the O.P. in Uruguay it had effects up to

---

[390] Doc.A/33/40, pr.581. See, e.g., A et al. v. S, S.D., p.3 and p.17. Cf. the decision of the EUCM in De Becker v. Belgium, 2 Y.B.E.C.H.R. (1958-59), p.214 at pp.233-234.

[391] See, e.g., De Bazzano v. Uruguay, S.D., p.40; L.P. v. Canada, S.D., p.21.

[392] See, e.g., De Bazzano v. Uruguay, Ibid., pr.10.

[393] Doc.A/37/40, p.122.

[394] Ibid., prs.8(2), 9(2). See also Acosta v. Uruguay, Doc.A/39/40, p.169, pr.14.

[395] Doc.A/36/40, p.125.

[396] Ibid., pr.5(a).

[397] Doc.A/38/40, p.209.

the date of the communication because it was on the basis of the confessions made under torture that C was sentenced to twelve years imprisonment which he continued to serve.[398] Unfortunately, the HRC did not reply to this argument but it would appear to have rejected it.

4.51 This question of the continuing effects of violations has been more directly considered in other cases. In M.A. v. Italy[399] the communication raised various possible violations of the ICCPR including the fair trial guarantee under Article 14. Italy argued that the alleged violations occurred prior to the entry into force of the ICCPR and the O.P. in Italy on 15 December 1978 and that, therefore, the communication should be declared inadmissible ratione temporis.[400] M.A. raised the same point as in the Cabreira case.[401] He argued that,

> "The violations did not come to an end prior to 15 December 1978, which is obvious since he is currently serving the sentence for which he was tried. Thus, the law applied is still in force and the sentence against M.A. is being carried out".[402]

The reply of the HRC was that,

> "It must be shown that there were consequences which could themselves have constituted a violation of the Covenant. In the opinion of the Committee there were no such consequences in the circumstances in the present case".[403]

---

398 Ibid., pr.2.3.

399 Doc.A/39/40, p.190.

400 Ibid., pr.7.2.

401 See Doc.A/38/40, p.209.

402 Doc.A/39/40, p.190, pr.9.

403 Ibid., pr.13.2.

The HRC's view seems to be a clear rejection of the argument advanced by M.A. It is submitted that the HRC's view was correct. The prison sentence was clearly a consequence of the alleged violations but that is a necessary rather than a sufficient condition. The consequence itself, that is, the sentence, had to constitute a violation of the Covenant and on the facts it did not.

4.52 Other consequences of a prison sentence were raised in J.K. v. Canada[404]. J.K. was convicted of arson prior to the entry into force of the ICCPR and the O.P. for Canada. He argued,

> "That the stigma of an allegedly unjust conviction and the social and legal consequences thereof, including the general prejudice in society against convicted persons, make him a victim today of Article 14, paragraphs 1 and 3 (a) to (c), and article 25 of the Covenant - of article 14 because he was allegedly denied a fair trial and of article 25, because his conviction bars him from equal access to public service and from running for public office and because his criminal record puts him at a disadvantage, in particular in the field of employment".[405]

Again the HRC took the view, correctly it is submitted, that, "the consequences as described by the author do not themselves raise issues under the International covenant On Civil And Political Rights".[406]

---

[404] Doc.A/40/40, p.215.

[405] Ibid., pr.4.

[406] Ibid., pr.7.3.

(b). Ratione Materiae.

4.53 The HRC is only competent to consider communications alleging violations of the rights "Set forth" in the ICCPR (Article 1 O.P.).[407] The HRC has declared inadmissible ratione materiae communications alleging violations of rights or matters not contained in the ICCPR.[408] In K.B. v. Denmark[409] the communication was declared inadmissible, inter alia, on the ground that, "The right to dispose of property, as such, is not protected by any provisions of the ICCPR".[410] In C.E. v. Canada[411] the communication related to C.E.'s claim for workman's compensation. It was declared inadmissible, inter alia, because the claim did not concern any of the rights referred to in the

---

[407] Cf.the practice under the parallel article 25 ECHR as to which see Van Dijk and Van Hoof, pp.69-70; Digest of Strasbourg Case Law Relating To The ECHR, Vol.1, (articles 1-5), pp.22-73, Council Of Europe, (1984). By contrast the inter State procedure under article 24 ECHR covers alleged violations of any of the provisions of the ECHR, not just its Section I. The position would probably be the same under the inter-State procedure in article 41 ICCPR.

[408] Doc.A/39/40, pr.587. See, e.g., J.J. v. Denmark, S.D., p.26, in which the author's complaint concerned the refusal of the Ombudsman to censure a decision of the Ministry of Justice.

[409] S.D., p.24.

[410] Ibid. The HRC also found no facts to substantiate the author's claims that she was a victim of a breach of articles 2(1), 3 or 26 or of any other rights protected by the Covenant. A right to property was proposed in both the HRCion and the Third Committee of the General Assembly, see ch.1, n.200 above.

[411] S.D., p.16.

Covenant. In I.M. v. Norway[412] I.M. alleged that he had been overtaxed as a result of various acts and omissions of the Tax Office in Oslo allegedly based on racial discrimination against him and that the Oslo authorities had failed to provide him with low rent accommodation which failure contributed to his paying higher taxes.[413] The HRC stated that the communication did not reveal any evidence of violation of any of the rights in the ICCPR.[414] In particular the HRC pointed out that,

> "The assessment of taxable income and allocation of houses are not in themselves matters to which the Covenant applies; nor is there any evidence in substantiation of the author's claim to be a victim of racial discrimination".[415]

Accordingly, the HRC held the communication inadmissible as incompatible with the provisions of the ICCPR (Article 3 O.P.). In Stella Costa v. Uruguay[416] Uruguay argued that the communication should be declared

---

[412] Doc.A/38/40, p.241.

[413] Ibid., prs.1 and 2.

[414] Ibid., pr.5.

[415] Ibid. The reference to racial discrimination raises the important of whether the ICCPR contains a prohibition on certain forms of discrimination or only a prohibition on certain forms of discrimination with respect to the rights contained in the ICCPR. See now the important decisions of the HRC noted in prs.4.55-4.58 below.

Under article 14 ECHR there is only the more limited protection as regards the rights in section I. Cf.The admissibility decision of the EUCM in the East African Asians Cases, 13 YBECHR 928 at 994,(1970), where the EUCM stated that, "Quite apart from any consideration of article 14, discrimination base on race could, in certain circumstances, of itself amount to degrading treatment within the meaning of article 3 of the Convention". See C.C.Morrisson, The Dynamics Of Development In The European Human Rights Convention System, (1981).

[416] Doc.A/42/40 p.170.

inadmissible, "on the ground that the author had no subjective right in law to be appointed to a public post, but only the legitimate aspiration to be soemployed".[417] The HRC decided that the question whether the author's claim was well-founded should be examined on the merits as he had made a reasonable effort to substantiate his claim and had invoked specific provisions of the Covenant in that respect.[418]

4.54 In L.T.K. v. Finland[419] the author claimed to be a victim of a violation of Articles 18 and 19 ICCPR because his status as a conscientious objector to military service had not been recognised in Finland and he had been prosecuted because of his refusal to perform military service. The HRC expressed the view that,

> "The Covenant does not provide for the right to conscientious objection; neither Article 18 nor 19 of the Covenant, especially taking into account paragraph 3(c)(ii) of Article 8, can be construed as implying that right".[420]

Accordingly the claim was held inadmissible. More generally the HRC stated in K.L. v. Denmark[421] that it had no competence to examine allegations of violations of other international instruments. In J.D.B. v. Netherlands[422] the

---

[417] Ibid., pr.7.3. See ibid., prs.4 and 6.1.

[418] Ibid.

[419] Doc.A/40/40, p.240.

[420] Ibid., pr.5.2. See also M.J.G. v. Netherlands, C/32/D/267/1987 (To be published in Doc.A/43/40, (1988). For the provisions of the Covenant see Appx.I. For a recent report see Eide and Mubanga- Chipoya, Conscientious Objection To Military Service, U.N.Doc. E/CN.4/ Sub.2/1983/30/Rev.1, (1985).See also Recommendation No.R (87) 8 of the Committee of Ministers of the Council of Europe, (April, 1987).

[421] S.D. p.24. The position is the same under the ECHR.

(Footnote Continued)

communication referred to the right to work in Article 6 ICESCR.[423] The communication was declared inadmissible.

4.55 More difficult questions concerning the scope of the ICCPR and its relationship to other human rights instruments, in particular the International Covenant on Economic, Social and Cultural Rights, were raised in three cases concerning the Netherlands. Those decisions concerned the scope of article 26 ICCPR which provides that,

> "All persons are equal before the law and are entitled without any discrimination to equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".[424]

4.56 The three views, all issued on the same day, concerned various aspects of social security legislation in the Netherlands. In S.W.M.Broeks v. Netherlands[425] and in F.H.Zwaan-de Vries v. Netherlands[426] the authors complained that the Dutch Unemployment Benefit Act of 1976 violated article 26 of the Covenant. They argued that it was discriminatory in that, under it, benefits were discontinued to them because they had not proved

---

(Footnote Continued)

422 1 S.D. 24. The author had occasionally worked as a television repair man without the required licence from the Chamber of Commerce. He claimed that he was "discriminated against by Dutch legislation which prevents him from gainful employment and which punishes him for seeking an alternative to being unemployed".

423 On the right to work see D.Harris, The European Social Charter, pp.21-37, (1985).

424 On the drafting of article 26 see Bossuyt, 'Guide', pp.479-492. For academic views on the interpretation of article 26 see Ramcharan and Tomuschat, in ch.6, n.1 below.

425 Doc.A/42/40 p.139. See also P.P.C. v. Netherlands, Doc.CCPR/C/32/D/212/1986, (To be published in Doc.A/43/40 (1988).

426 Doc.A/42/40 p.160.

complained that the Dutch Unemployment Benefit Act of 1976 violated article 26 of the Covenant. They argued that it was discriminatory in that, under it, benefits were discontinued to them because they had not proved that they were the "breadwinners" of their respective families. This condition applied to them as married women but did not apply to married men. In L.G.Danning v. Netherlands[427] the author alleged a violation of article 26 in conjunction with article 2(1) on the basis that Dutch legislation on disability benefits was discriminatory in that it provided for higher benefits for married beneficiaries than for single, but cohabiting, beneficiaries. In each of these cases the Netherlands raised a number of similar arguments, some of which are considered elsewhere.

With respect to the scope of article 26 the Netherlands argued, firstly, that this article could only be invoked under the O.P. in the sphere of civil and political rights though not necessarily limited to the civil and political rights in the ICCPR. The example given by the Netherlands was that it could envisage the admissibility of a complaint concerning discrimination in the field of taxation.[428] Therefore, the Netherlands could not accept the admissibility of a complaint concerning the enjoyment of economic, social and cultural rights. The State party referred to the rights concerning social security in the ICESCR, namely, articles 2, 3 and 9 and noted that the ICESCR had its own specific system and its own specific organ for the international monitoring of how States parties met their obligations and that it deliberately did not provide for an individual complaints procedure. "The contracting

---

[427] Doc.A/42/40 p.151.

[428] Broeks v. Netherlands, Doc.A/42/40 p.139, pr.8.3.

parties deliberately chose to make this difference in international monitoring systems, because the nature and substance of social, economic and cultural rights make them unsuitable for judicial review of a complaint lodged by a State party or an individual".[429] It was, therefore, incompatible with the aims of both the ICESCR and the ICCPR and its Optional Protocol that an complaint with respect to social security as referred to in article 9 ICESCR to be dealt with by way of individual complaint under the O.P. based on article 26 ICCPR.

The view of the HRC was that,

> "the International Covenant on Civil and Political Rights would still apply even if a particular subject matter is referred to or covered in other international instruments, e.g., the International convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All forms Of Discrimination Against Women, or, as in the present case, the International Covenant on Economic, Social and Cultural Rights. Notwithstanding the interrelated drafting history of the two Covenants, it remains necessary for the Committee to fully apply the terms of the International Covenant on Civil and Political Rights. The Committee observes in this connection that the provisions of article 2 of the International Covenant on Economic, Social and Cultural Rights do not detract from the full application of article 26 of the International Covenant on Civil and Political Rights.
> ...The discussions, at the time of the drafting, concerning the question whether the scope of article 26 extended to rights not otherwise

---

429 Ibid., pr.8.5. See ch.1, prs.1.8-1.12, 1.18-1.21 above.

guaranteed by the Covenant, were inconclusive and cannot alter the conclusion arrived at by the ordinary means of interpretation...

The Committee begins by noting that article 26 does not merely duplicate the guarantees already provided for in article 2. Its basis stems from the principle of equal protection without discrimination, as contained in article 7 of the Universal Declaration of Human Rights, which prohibited discrimination in law or in practice in any field regulated by public authorities. Article 26 is thus concerned with with the obligations imposed on States in regard to their legislation and the application thereof.

Although article 26 requires that legislation should prohibit discrimination, it does not of itself contain any obligation with respect to matters that may be provided for by legislation. Thus it does not, for example, require any State to enact legislation to provide for social security. However, when such legislation is adopted in the exercise of a State's sovereign power, then such legislation must comply with article 26 of the Covenant.

The Committee observes in this connection that what is at issue is not whether or not social security should be progressively established in the Netherlands but whether the legislation providing for social security violates the prohibition against discrimination contained in article 26 of the International covenant on Civil and Political Rights and the guarantee given therein to all persons regarding equal and effective protection against discrimination.

The right to equality before the law and to equal protection of the law without any discrimination does not make all differences of treatment discriminatory. A differentiation based on

reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26".[430]

Having established that article 26 applied the HRC expressed the view that there was a violation of article 26 in the Broeks[431] and Zwaan-de Vries[432] cases on the basis that the differentiation between married men and married women was not reasonable and therefore was discriminatory. By contrast in the Danning case[433] the HRC declared the communication inadmissible on the basis that it was, "persuaded that the differentiation complained of by Mr.Danning is based on objective and reasonable criteria...By choosing not to enter into marriage, Mr.Danning and his cohabitant have not, in law, assumed the full extent of the duties and responsibilities incumbent on married couples. Consequently, Mr.Danning does not receive the full benefits provided for in Dutch law for married couples. The Committee concludes that the differentiation complained of by Mr.Danning does not constitute discrimination in the sense of article 26 of the Covenant".[434]

4.58 The decision concerning the scope of article 26 is of great significance and resolves, to at least some extent, academic disagreements concerning prohibited discrimination.[435] As article 26 is stated to be "concerned with the obligations imposed on States in regard to their legislation and the application

---

[430] Ibid., prs.12.1-13.

[431] Ibid., prs.14-15.

[432] Doc.A/42/40 p.160, prs.14-15.

[433] Doc.A/42/40 p.151.

[434] Ibid., pr.14.

[435] See n.424 above.

thereof", "in any field regulated and protected by public authorities", its scope is potentially extremely wide. It may cover, for example, taxation,[436] the whole range of social security and welfare legislation,[437] and immigration.[438] In all such areas the legislation will apparently be tested by reference to the test of whether the differentiations made are based on "reasonable and objective criteria". This may well pose severe problems for States. As the Netherlands argued in the above cases, "Years of work are required in order to examine the whole complex of national legislation in search of discriminatory elements. The search can never be completed, either, as distinctions in legislation which are justifiable in the light of social views and conditions prevailing when they are first made may become disputable as changes occur in the views held in society".[439] Although the HRC did not specifically respond to this point, presumably the answer to the latter part of it would lie in the concept of the "margin of appreciation" (or discretion) under which a State party makes an initial assessment of the conditions obtaining in its national system and the consequent need to restrict or limit rights.[440] The criterion of "reasonable and objective" differentiations

---

436 See I.M. v. Norway, pr.4.53 above.

437 The EUCT has recently dealt with social security cases in terms of article 6 ECHR, see Feldbrugge Case, EUCT, (1987); Deumeland Case, EUCT, (1986).

438 It is often alleged that U.K. immigration legislation and practice is discriminatory though this is rejected by the present Government.

439 Broeks v. Netherlands, Doc.A/42/40 p.139, pr.8.3.

440 The HRC have applied the concept under the O.P. see ch.11 below. On the margin of appreciation see n.383 above.

thereof", "in any field regulated and protected by public authorities", its scope is potentially extremely wide. It may cover, for example, taxation,[436] the whole range of social security and welfare legislation,[437] and immigration.[438] In all such areas the legislation will apparently be tested by reference to the test of whether the differentiations made are based on "reasonable and objective criteria". This may well pose severe problems for States. As the Netherlands argued in the above cases, "Years of work are required in order to examine the whole complex of national legislation in search of discriminatory elements. The search can never be completed, either, as distinctions in legislation which are justifiable in the light of social views and conditions prevailing when they are first made may become disputable as changes occur in the views held in society".[439] Although the HRC did not specifically respond to this point, presumably the answer to the latter part of it would lie in the concept of the "margin of appreciation" (or discretion) under which a State party makes an initial assessment of the conditions obtaining in its national system and the consequent need to restrict or limit rights.[440] The criterion of "reasonable and objective" differentiations

---

[436] See I.M. v. Norway, pr.4.53 above.

[437] The EUCT has recently dealt with social security cases in terms of article 6 ECHR, see Feldbrugge v. Netherlands, EUCT, vol.99, (1986); Deumeland v. FRG, EUCT, vol.100, (1986).

[438] It is often alleged that U.K. immigration legislation and practice is discriminatory though this is rejected by the present Government.

[439] Broeks v. Netherlands, Doc.A/42/40 p.139, pr.8.3.

[440] The HRC have applied the concept under the O.P. see ch.11 below. On the margin of appreciation see n.383 above.

is that applied by the EUCT but it is clear that the prohibition on discrimination under the only applies with respect to the application of the rights in the ECHR.[441] American jurisprudence in the area of discrimination and equal protection is immensely sophisticated.[442] Finally, we can note the express application of the provisions of the Vienna Convention On The Law On Treaties (1969) on the interpretation of treaties.[443]

4.59 In decisions on admissibility the HRC inevitably considers the parameters of the relevant articles in the ICCPR. For example, in A.S. v. Canada[444] the communication concerned the authors' unsuccessful efforts to obtain permission from the Canadian authorities for her daughter and grandson to enter Canada to join her from Poland. The communication was declared inadmissible ratione materiae on the basis that Articles 12, 17 and 23 ICCPR were not applicable on the facts and with respect to Article 26 there was no question in the circumstances of the case of any discrimination on any of the grounds referred to in the ICCPR.[445]

4.60 A more controversial decision was that in J.B. et.al. v. Canada.[446] The authors claimed that the general prohibition on strikes by public employees in the Alberta Public Employee Relations Act of 1977

---

441 See the Belgian Linguistics Case, EUCT, (1968); Van Dijk and Van Hoof, pp.386-398.

442 See Rotunda, Nowak and Young, Treatise On Constitutional Law: Substance And Procedure, vol.2, ch.18 (1986).

443 See prs.4.46-4.48 above on the interpretation of the Covenant and the Optional Protocol.

444 S.D., p.27.

445 For these provisions see Apx.I below.

446 Doc.A/41/40, p.151.

Moreover, it would appear to the Committee that the acts of which M.A. was convicted (reorganizing the dissolved fascist party) were of a kind which are removed from the protection of the Covenant by Article 5 thereof and which were in any event justifiably prohibited by Italian law having regard to the limitations and restrictions applicable to the rights in question under the provisions of Articles 18(3), 19(3), 22(2) and 25 of the Covenant. In these respects therefore the communication is inadmissible under Article 3 of the Optional Protocol, as incompatible with the provisions of the Covenant, ratione materiae".[449]

Article 5 ICCPR to which the HRC refers provides that,

"1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms herein recognized herein or at their limitation to a greater extent than is provided for in the present Covenant".

The decision of the HRC parallels a controversial and much criticised early decision of the EUCM under the equivalent of Article 5 ICCPR (Article 17 ECHR) which declared inadmissible an application from the West German Communist Party alleging that government action banning it was contrary to Articles 9, 10 and 11 ECHR.[450] It is submitted that the scope of Article 5 should have been considered only at the merits stage. Similarly, it is submitted that the scope and application of permissible restrictions and limitation

---

[449] Doc.A/39/40, p.190, pr.13.3.

[450] A.250/57, 1 YBECHR 222 (1955-57). On article 17 ECHR see Van Dijk and Van Hoof, pp.410-415.

clauses under the ICCPR should normally be reserved for consideration at the merits stage.

4.62 Finally, in M.A. v. Italy[451] the HRC stated that,

> "M.A.'s additional claim that extradition proceedings, initiated by Italy while he was living in France, constitute a violation of the Covenant, is without foundation. There is no provision of the Covenant making it unlawful for a State party to seek extradition of a person from another country. The claim is therefore inadmissible under Article 3 of the Optional Protocol, as incompatible with the provisions of the Covenant, ratione materiae".[452]

M.A.'s claim with respect to a State seeking extradition is a novel one. There have been a number of applications under the ECHR concerning the sending state.[453] If on the facts of this case M.A. might have faced some danger on his return to Italy it would have been more appropriate to submit a communication concerning the sending State, France. The HRC would then have faced the question of whether to follow the jurisprudence under the ECHR concerning extradition.[454]

4.63 It remains to note that, like the EUCM,[455] the HRC does not require the communicant to specify accurately, or indeed at all, the particular rights in the ICCPR which he alleges have been violated. The HRC will conduct an examination, ex officio, of the articles of

---

451 Doc.A/39/40, p.190.

452 Ibid., pr.13.4.

453 See Fawcett, pp.51-53, 119-120.

454 On the facts, however, this would not have assisted M.A. because the O.P. did not enter into force with respect to France until 17 May 1984.

455 See Van Dijk and Van Hoof, pp.70-71.

the ICCPR that appear to be relevant from the submissions of the parties.[456]

---

[456] See, e.g., the approach of the HRC in the case of A.S. v. Canada, S.D., p.27, pr.4.

3. (c) Ratione Personae.[457]

4.64 The matters to be considered here are the two basic questions of against whom and by whom may a communication be brought. The separate but related requirement that the communicant be a "Victim"[458] is also considered here for convenience.

(i) Against whom may a communication be brought.?

4.65 The HRC is only competent to consider alleged violations be a State party to the ICCPR that has also become a party to the O.P. (Article 1 O.P.)[459] So, for example, if a State validly denounces, terminates, suspends or withdraws from the ICCPR or the O.P. the HRC would lose its competence in respect of that State under the O.P.[460] Communications have been submitted concerning States that have not been party to the ICCPR or the O.P. Under the HRC's Rules of Procedure the HRC do not receive such communications.[461]

4.66 Inevitably the HRC will have to deal with questions concerning the extent of the responsibility of a State party for acts or omissions committed "Within its jurisdiction" (Article 1 O.P.) but committed by individuals, companies, corporations, or other

---

457 See Mose and Opsahl, pp.298-302; Meron,n.1 above, pp.100-106; Brar, n.1 above pp.509-515. On the practice under the ECHR see Van Dijk and Van Hoof, pp.66-69.

458 Article 1 O.P.

459 See ch.1, pr.1.33.

460 There is no denunciation clause in the ICCPR although one was considered, see ch.1, n.210 above. There is a denunciation clause in the O.P.(article 12). Generally see articles 42-72 of the Vienna Convention On The Law Of Treaties, (1969).

461 See ch.4, pr.4.9 above.

bodies.[462] The question was raised in the case of Hertzberg and Others v. Finland.[463] The authors argued that the Finnish authorities, including organs of the State controlled Finnish Broadcasting Corporation (FBC) had interfered with their right to freedom of information and expression in Article 19 ICCPR by, "Imposing sanctions against participants in, or censuring, radio and television programmes dealing with homosexuality".[464] Criminal charges under the Finnish Penal Code had been brought against the editor of a programme dealing with homosexuality.[465] In its final views the HRC stated that it started from,"The premise that the State party is responsible for actions of the Finish Broadcasting Company (FBC), in which the State holds a dominant stake (90 per cent) and which is placed under specific government control".[466] On these facts the finding of State responsibility was not too difficult a decision for the HRC. An alternative approach would have been to rest the responsibility of Finland on the legislative acts on which prosecutions had been brought. That was the approach taken by the EUCT in the Young,James and Webster Cases.[467] More

---

[462] For the practice under the ECHR see Van Dijk and Van Hoof, pp.66-69. On the general rules of State responsibility see I.Brcwnlie, Systems Of The Law Of Nations - State Responsibility, (Part 1), chs.VII and VIII, (1983).

[463] Doc.A/37/40,p.161. The case is discussed in ch.11 prs.11.19-11.19.2 below.

[464] Ibid., pr.2.1.

[465] Ibid., pr.2.2.

[466] Ibid., pr.9.1.

[467] Young, James and Webster v. U.K., EUCT, Vol.44, prs.48-49, (1981). Accordingly, the EUCT did not examine whether, as the applicants had argued, the State might also be responsible on the ground that it should be

(Footnote Continued)

difficult cases are sure to arise. For example, would the United Kingdom government be responsible for the activities of the British Broadcasting Corporation or Independent Television.[468] If in a particular case it proves impossible to hold the State party responsible for the acts concerned the possibility remains that the State parties responsibility can be based on its failure to secure the rights in the ICCPR (Article 2(1) ICCPR) or to provide an effective remedy for the violation of rights (Article 2(3) ICCPR).[469] The stated approach of the EUCT is to apply the general international law rules of State responsibility.[470] A similar approach from the HRC would seem sensible and desirable.

(ii) By whom may a communication be brought.

4.67 The HRC is only competent to receive and consider communications from "Individuals" who claim to be a victim of a violation by a State party of any of the rights set forth in the ICCPR (Article 1 O.P.)[471] This clearly covers communications from one or more

---

(Footnote Continued)
regarded as employer or that British Rail was under its control.

468 See A.4515/70, X and Association of Z v. U.K., Coll.38, p.86, (1972). The application concerned complaints about the BBC. The EUCM expressly left the question of State responsibility open. See also A.6586/74, X v. Ireland, (unpublished).

469 F.Jacobs, The European Convention On Human Rights,(1975) made this suggestion with respect to the ECHR. However, the EUCT has decided that article 1 ECHR is not capable of independent violation, Ireland v. United Kingdom,EUCT,Series A,Vol. (1978),pr.13. The precise effect of article 13 ECHR has not yet been fully resolved, see Van Dijk and Van hoof, pp.379-386, Fawcett, pp.289-294, who comments that, "The fact is that there is basic confusion of thought as to the real purpose and function of the Article", ibid., p.294.

470 See A.852/60, X v. FRG, 4 YBECHR (1961), p.346 at pp.350-352.

471 Cf.article 21(1) ECHR.

individuals.[472] It is also clear that the right to submit communications is not confined to the nationals of the State party concerned, nor only to the nationals of any State party. It is open to all "Individuals" whether nationals, aliens or stateless persons provided they are "Subject to the jurisdiction" of the State party concerned.[473]

4.68 The HRC has held that an organization as such cannot submit a communication. In Cmn.No.163/1984[474] the communication was submitted by a group of associations for the defence of the rights of the disabled and handicapped persons in Italy (a non-governmental organization referred to as "Coordinamento") and the representatives of those associations. The representatives claimed that they themselves were disabled or handicapped or that there children were. The representatives acted primarily on behalf of "Coordinamento" but also claimed to be acting on their own behalf.[475] The HRC held that,

> "According to Article 1 of the Optional Protocol, only individuals have the right to submit a

---

[472] For example, in the Mauritian Women Case the communication was submitted by twenty Mauritian women, Doc.A/38/40,145; S.D.,p.67. Initially the authors requested that their identity should not be disclosed to the State party. Subsequently, one of the authors agreed to the disclosure of her name. Such requests could cause difficulties if acceded to because it may not be possible for the State party to properly defend itself unless it knows the particular circumstances of the individual or individuals concerned.

[473] For example, in Marais v. Madagascar, Doc.A/38/40, p.141, M was a South African national. South Africa is not a party to the ICCPR. On the requirement that the individual be "subject to the jurisdiction" of the State party (article 1) see prs.4.82-4.86 below.

[474] Doc.A/39/40, p.197.

[475] Ibid., pr.1.

> communication. To the extent, therefore, that the communication originates from the "Coordinamento", it has to be declared inadmissible because of lack of personal standing".[476]

In as far, however, as the communication was submitted on their own behalf by the representatives of the different associations forming the "Coordinamento", those representatives did have personal standing under Article 1 O.P. The communication was, however, declared inadmissible on other grounds which are examined below.[477]

4.69 Similarly, in J.R.T. and W.G. Party v. Canada[478] the HRC held the communication inadmissible in so far as it concerned the W.G. Party (an unincorporated political party under the leadership of J.R.T) because the W.G. Party was an association and not an individual.[479] As an individual J.R.T. had standing to submit the communication. The communication was declared inadmissible on other grounds.[480]

The O.P.'s limitation of locus standi to individuals obliges organizations to hide behind the name of a person who does have the standing to submit a communication even when the alleged violations concern restrictions on the rights of groups or associations, for example, on the rights of assembly and association

---

[476] Ibid., pr.5.

[477] See pr.4.78 below Cf. the decision of the EUCM in the case of A.3798/68, Church of Scientology v. U.K., 12 YBECHR p.306. The decision is criticized by Jacobs, n.470 above, p.148.

[478] Doc.A/38/40, p.231.

[479] Ibid., pr.8.

[480] These are examined in ch.12 below.

(Articles 21 and 22 ICCPR).[481] That individual, or individuals, will also have to satisfy the O.P.'s other requirements, for example, that he or they be "Victims" (Article 1 O.P.) That requirement is dealt with below.[482]

4.70 The basic rule then under the O.P. is that a communication may only be submitted by one or more individuals. The HRC has stated its view that this does not mean that the individual must necessarily sign the communication himself.[483] We have already noted that during the drafting of its Rules the HRC recognized that provision would have to be made for situations in which the alleged victim was unable to act.[484] The Rules provide then that,

> "Normally, the communication may be submitted by the individual himself or by his representative; the Committee may, however, accept to consider a communication submitted on behalf of an alleged victim when it appears that he is unable to submit the communication himself".[485]

Communications from duly authorized representatives have been accepted on a number of occasions but in

---

481 Mose and Opsahl, p.302. "It may be noted that the Committee has not been authorized to receive communications from organizations. In a world where individuals can generally act effectively only through organizations, this omission is significant", Pathak, n.1 above,p.270. Professor Buergenthal has suggested that measures taken against a juridical person may amount to a violation of the ICCPR if they infringe upon rights of individuals, for example, the right of association, Buergenthal in Henkin (Ed.), n.1 above, p.73.

482 See prs.4.75-4.81 below.

483 Doc.A/35/40, pr.393.

484 See pr.4.14 above.

485 R.90(1)(b).

practice the HRC has had to exercise its discretion under the above rule in a considerable number of cases. The person submitting the communication is identified in the HRC's jurisprudence as the "author".[486] The HRC regards a close family connection as sufficient to justify an author acting on behalf of an alleged victim.[487] Communications have been accepted on this basis, for example, from the alleged victims' father,[488] husband,[489] wife,[490] brother,[491] son-in-law,[492] niece,[493] daughter,[494] brother-in-law.[495] Generally, the HRC appears to have taken a fairly liberal approach as regards close family members For example, in Lanza and

---

[486] So, for example, in Guerrero v. Colombia, Doc.A/37/40, p.137, the communication was submitted by a Professor of International Law from Colombia; in Hertzberg v. Finland, Doc.A/37/40, p.161, the five authors and alleged victims were represented by SETA (Organization For Sexual Equality); in Nunez v. Uruguay, Doc.A/38/40, p.225, the communication was submitted by the author with the assistance of the International League For Human Rights. On the concept of the "author" see Mose and Opsahl, p.300.

[487] Doc.A/33/40, pr.580. An objection to this approach was made in the Third Committee of the General Assembly be the representative of Argentina, U.N.Doc.A/C.3/32/SR.30 at 13, pr.59, (1977).

[488] Bleir v. Uruguay, Doc.A/37/40, p.130.

[489] Ibid.

[490] Touron v. Uruguay, Doc.A/36/40, p.120.

[491] Mbenge v. Zaire, Doc.A/38/40, p.134.

[492] Ibid.

[493] Lanza and Perdoma v. Uruguay, Doc.A/35/40, p.111.

(Footnote Continued)

Perdoma v. Uruguay[496] N submitted the communication on behalf of her aunt (L) and her uncle (P) concerning their detention and the conditions in which they were held. The HRC requested detailed information from N on the grounds and circumstances justifying her acting on behalf of L and P. N explained that the alleged victims were unable to act on their own behalf and that she was acting on their behalf as a close relative, believing, on the basis of her personal acquaintance with them that the alleged victims would agree to lodging a complaint.[497] The HRC decided that N was justified by reason of close family connection in acting on behalf of L and P.[498] If during the consideration of a communication by the HRC it becomes possible for the alleged victim to communicate with the HRC, for example, because they have been released, they are asked by the HRC whether they wish consideration of the communication to continue.

4.71 According to the HRC a communication submitted by a third party can only be considered if the author justifies his authority to submit the communication.[499] The onus of proof is on the author to establish that there is a sufficient link with the alleged victim or that he has justification to act.[500] As indicated above,

---

(Footnote Continued)

[494] Bleir v. Uruguay, Doc.A/37/40, 130.

[495] A member of the HRC has indicated that the status of a brother-in-law as a relative raised some discussion in the HRC, see V.Dimitrijevic, The Roles Of The Human Rights Committee, p.22, (1985).

[496] Doc.A/35/40, p.111.

[497] Ibid., prs.3 and 4.

[498] Ibid., pr.6.

[499] Doc.A/39/40, pr.571.

[500] See, e.g., Hartikainen v. Finland, Doc.A/36/40 p.147; S.D., p.74, prs.3-4.

in the case of close family members this burden may not be too difficult to discharge.[501] Generally though, to justify their acting on behalf of alleged victims who are not signatories, the authors must provide their reasons for believing that the alleged victims would approve of the authors acting on their behalf and the authors reasons for believing that they are unable to act on their own behalf.[502] For example, in Massioti and Baritussio v. Uruguay[503] M originally submitted the communication on behalf of herself and B. They had both been detained in the same prison. M submitted to the HRC that she had been informed by B's former defence counsel that B approved of M acting for her.[504] M claimed that B was not able to act on her own since that was impossible for someone detained under the "prompt securities measures regime".[505] She further claimed that B had no defence counsel at the time of the submission of the communication.[506] The HRC decided that M was acting on B's behalf.[507] It might be suggested that the HRC could have checked with B's former defence counsel that B did in fact approve of M acting for her. Presumably also the State party could have objected to the admissibility of the communication on this point or have produced evidence to show that B could have acted on her own behalf. In fact the State party raised neither of these issues.

---

501 See pr.4.70 above.

502 See A et al. v. S, S.D., pp.3 and 17-18.

503 Doc.A/37/40, p.187; S.D., p.136.

504 Ibid., pr.2.1.

505 Ibid.

506 Ibid.

507 Ibid., pr.4.

4.72 However, a number of communications have been declared inadmissible for failure to satisfy this onus of proof. In Mbenge v. Zaire[508] the HRC decided that M could act for his brothers and father-in-law but not for an unrelated pharmacist or the family driver because he had not established any grounds justifying his authority to act on their behalf.[509] In L.A. on behalf of U.R. v. Uruguay.[510] L.A. submitted the communication on behalf of U.R., a medical student detained in Libertad prison in Uruguay. L.A. informed the HRC that as a member of the Swedish branch of Amnesty International he had been working on the case of U.R. for almost two years with no success. L.A. claimed to have authority to act because he believed, " that every prisoner unjustly treated would appreciate further investigation of his case by the Human Rights Committee".[511] The HRC decided that on the basis of this information it could not accept that the author had any authority to submit the communication on behalf of the alleged victim.[512]

4.73 In S.G.F. v. Uruguay[513] the communication was submitted by X (a non-governmental organization). X submitted that the request for it to act on behalf of

---

[508] Doc.A/38/40, p.134. Note that at the time of the submission M was resident in Belgium. The alleged violations occurred after M had left Zaire in 1974. See also A.S. v. Canada, pr.4.59 above, in which the author was resident in Canada and the communication concerned the failure by A.S. to obtain permission from the Canadian authorities for her daughter and grandson, who were resident in Poland, to enter Canada to join her.

[509] Ibid., pr.5.

[510] Doc.A/38/40, p.239.

[511] Ibid., pr.2.

[512] Ibid., pr.4. Similarly in D.F. v. Sweden, Doc.A/40/40, p.228, concerning alleged discrimination and abuse of Arabs in Sweden.

[513] Doc.A/38/40, p.245.

S.G.F., a Uruguayan national living in Sweden, was made through close friends living in France whose identity it felt unable to disclose.[514] The HRC specifically pointed out that, "No written evidence with regard to the authority of the organization (X) to act on behalf of the alleged victim has been provided".[515] The HRC held that it could not accept, on the basis of the information before it that X had the necessary authority to submit the communication on behalf of S.G.F.[516] In J.F. v. Uruguay[517] a parallel communication was received from X concerning J.F., the husband of S.G.F. J.F. was a Uruguayan national detained at Libertad prison in Uruguay. X claimed that the communication was submitted at the request of S.G.F. and that this request had been made through close friends whose names it felt unable to reveal.[518] Again the HRC pointed out that there was no written evidence with regard to the authority of X to act at the request of S.G.F. on behalf of J.F.[519] Accordingly, the communication was held inadmissible because the HRC could not accept that the author (X) had the necessary authority to act.[520]

4.74 These two decisions clearly indicate that if there were appropriate evidence of authority to act the non-governmental organization could have acted on behalf of the alleged victims. In this way non-governmental organizations can play an important, though limited,

---

514 Ibid., pr.1.

515 Ibid.

516 Ibid., pr.3.

517 Doc.A/38/40, p.247.

518 Ibid., pr.1.

519 Ibid.

520 Ibid., pr.3.

role under the O.P. procedure.[521] The greater resources and experience of non-governmental organizations could assist communicants who might otherwise find it immensely difficult to utilize the O.P. machinery effectively.

4.74.1 Finally, we can note that the HRC has expressed an important view on who may bring a claim of a violation of article 1 of the Covenant (self-determination).[522]

---

[521] See Mose and Opsahl, p.301-302. On NGO's see ch.1, pr.1.15 above.

[522] See ch.5 pr.5.22 below.

(iii). The Requirement That The Individual Has Been A Victim.

4.75 Under Article 1 O.P. the "individuals" submitting the communication or on whose behalf the communication is submitted must claim to be "victims" of a violation by a State party. The HRC's most important pronouncement on the concept of a victim came in the case of Shirin Aumeeruddy-Cziffra And Nineteen Other Mauritian Women v. Mauritius[523] (hereinafter the Mauritian Women Case). The women claimed that the enactment of two legislative acts[524] on immigration and deportation, "Constituted discrimination based on sex against Mauritian women, violated the right to found a family and home, and removed the protection of the courts of law, in breach of articles 2, 3, 4, 17, 23, 25 and 26 of the ICCPR".[525] They claimed that,

> "Prior to the enactment of the laws in question, alien men and women married to Mauritian nationals enjoyed the same residence status, that is to say, by virtue of their marriage, foreign spouses of both sexes had the right, protected by law, to reside in the country with their Mauritian husbands or wives. The authors contend that, under the new laws, alien husbands of Mauritian women lost their residence status in Mauritius and must now apply for a "residence permit" which may be refused or removed at any time by the Minister of Interior. The new laws, however, do not affect the status of alien women married to Mauritian husbands who

---

523 The victim requirement also appears in article 25 ECHR as to which see Van Dijk and Van Hoof, pp.34-46.

524 Doc.A/36/40, p.134; S.D., p.67.

525 The Immigration (Amendment) Act 1977 and the Deportation (Amendment) Act 1977.

retain their legal right to residence in the country. The authors further contend that under the new laws alien husbands of Mauritian women may be deported under a ministerial order which is not subject to judicial review".[526]

When the communication was submitted to the HRC seventeen of the co-authors were unmarried and three of the co-authors were married to foreign husbands.[527]

The State party argued, inter alia, that the authors of the communication did not allege that any particular individual had in fact been the victim of any specific act in breach of the provisions of the ICCPR.[528] The State party further argued that the communication was aimed at obtaining a declaration by the HRC that the two legislative acts complained of were capable of being administered in a discriminatory manner in violation of various provisions of the ICCPR.[529]

Before giving its views the HRC indicated the considerations upon which it based those views. The HRC stated that,

"A person can only claim to be a victim in the sense of article 1 of the Optional Protocol if he or she is actually affected. It is a matter of degree how concretely this requirement is taken. However, no individual can in the abstract, by way of an actio popularis, challenge a law or practice claimed to be contrary to the Covenant. If the law or practice has not been concretely applied to the detriment of that individual, it must in any event be applicable in such a way that the alleged

---

526 Doc.A/36/40, p.134, pr.1.1.

527 Ibid., pr.1.2.

528 Ibid., pr.7.3.

529 Ibid., pr.5.5.

victim's risk is more than a theoretical possibility".[530]

Applying this approach the HRC sought to distinguish between the two groups of co-authors. The HRC noted that in the case of the seventeen unmarried co-authors there is,

"No question of actual interference with, or failure to ensure equal protection by the law to any family. Furthermore there is no evidence that any of them is actually facing a personal risk of being thus affected in the enjoyment of this or any other rights set forth in the Covenant by the laws complained against. In particular it cannot be said that their right to marry under article 23(2) or the right to equality of spouses under article 23(4) are affected by such laws".[531]

Accordingly, the seventeen unmarried co-authors could not claim to be "victims" of any breach of the rights under the ICCPR.[532]

As for the three married co-authors there is,

"No doubt that they are actually affected by these laws, even in the absence of any individual measures of implementation (for instance, by way of a denial of residence, or an order of deportation, concerning one of the husbands). Their claim to be

---

[530] Ibid., pr.9.2. In the South West Africa Cases the ICJ stated that "actio popularis", although known to certain legal systems, was not a general principle of law, ICJ Reports, (1966), p.6.

[531] Ibid., pr.9.2(a).

[532] Ibid., pr.10.3. Meron, n.1 above comments that, "This conclusion was not inevitable. The Committee could have reasoned that the statutes affected the right of the women to marry persons of their choice and that, therefore, these women could claim to be affected by a violation of article 23 when considered in conjunction with the provisions of the Political Covenant prohibiting discrimination", p.105.

"victims" within the meaning of the Optional Protocol has to be examined".[533]

The reasons given by the HRC as to why the three married co-authors were "actually affected by these laws" included the precarious and uncertain residence situation of their foreign husbands, the years of delay with respect to one of the co-authors in the consideration of an application for residence permit upon which also the granting of a work permit was dependant, and the possibility of deportation without judicial review at any time".[534] The HRC then proceeded to examine the substance of their claims.[535]

4.76 The HRC's statement on the concept of a victim in the Mauritian Women case clearly indicated its general approach while leaving it sufficient flexibility to assess whether the victim requirement has been satisfied on a case to case basis. In a number of subsequent cases the HRC has had the opportunity to shed further light on the concept of the victim. In Hertzberg v. Finland,[536] H, a lawyer, asserted in a radio interview that there was job discrimination in Finland on the ground of sexual orientation, and more particularly, to the detriment of homosexuals. Criminal charges were brought against the editor of the programme under the Finnish Penal Code. The editor was acquitted but H claimed that through those penal proceedings his right to seek,

---

[533] Ibid., pr.9.2(b)2.

[534] Ibid., pr.9.2(b)2(i)3.

[535] The HRC expressed the view that the facts disclosed violations of articles 2(1) and 3 in conjunction with articles 17, and of articles 2(1),3 and 26 in conjunctiсn with article 23, ibid.,prs.9.2(b)2(i)8 and 9.2(b)(2)(ii)4. Note that pr. 10.1 of the HRC's view is misleading in this respect. The case is considered in ch.6 below.

[536] Doc.A/37/40, p.161.

receive and impart information under article 19 ICCPR was curtailed.[537]

The HRC concluded that H could not validly claim to be a victim on the grounds that the programme was actually broadcast, no sanctions were imposed against him, and H had not claimed that the programme restrictions applied would in any way personally affect him. The HRC added that,

> "The sole fact that the author takes a personal interest in the dissemination of information about homosexuality does not make him a victim in the sense required by the Optional Protocol".[538]

The HRC preceded its decision on H's claim to be a victim with a reference back to its decision in the Mauritian Women Case.[539] The HRC stressed that it had,

> "Only been entrusted with the mandate of examining whether an individual has suffered an actual violation of his rights. It cannot review in the abstract whether national legislation contravenes the Covenant, although such legislation may, in particular circumstances, produce adverse effects which directly affect the individual, making him thus a victim in the sense contemplated by articles 1 and 2 of the Optional Protocol".[540]

4.77 With respect to H's co-authors the HRC held that they did satisfy the victim requirement on the basis that their programmes had actually been censored by the Finnish Broadcasting Company.[541] It is interesting to

---

[537] Ibid., pr.2.2.

[538] Ibid., pr.10.1.

[539] See pr.4.75 above. Note that the question of whether H was a victim was decided at the merits stage. The communication had been held admissible, ibid., pr.5.

[540] Doc.A/37/40, p.161, pr.9.3.

[541] Ibid., pr.10.2.

note where the HRC drew the line in this case concerning the requirement of the individual claiming to be a victim. The provisions in the Finnish Penal Code had not been directly applied to any of the alleged authors. As Mr. Opsahl pointed out in an individual opinion in the case, "The question remains whether they have been more indirectly affected by it in a way which can be said to interfere with their freedom of expression".[542] H's co-authors satisfied the victim requirement because their programmes had actually been censored. H did not because the programme with which he was involved had actually been broadcast and no sanctions had been imposed on him. It is important that the HRC noted that H had not claimed that the programme restrictions applied would in any way personally affect him. If H had so claimed, for example, on the basis that he was a journalist rather than a lawyer, he might then have satisfied the victim requirement on the bases of continuing interference with his right to freedom of expression, that prosecutions had taken place and thus inevitably the threat of prosecution would hang over his work in that field, and that he would be faced with the options of refraining from that area of work or becoming liable to criminal prosecution. In analogous circumstances the EUCT found the victim requirement satisfied in the case of Dudgeon.[543]

4.78 In Group Of Associations For The Disabled v. Italy[544] the HRC gave some indication that the concept of the victim extended beyond persons actually and directly affected. The HRC stated that,

> "It is not the task of the Human Rights Committee, acting under the Optional Protocol, to review in

---

[542] Ibid., Appendix.

[543] EUCT, Series A, Vol.45 (1982).

[544] Doc.A/39/40, p.197.

> abstracto national legislation as to its compliance with obligations imposed by the Covenant. It is true that in some circumstances, a domestic law may by its mere existence directly violate the rights of individuals under the Covenant".[545]

The communication was declared inadmissible because the authors had not demonstrated that they themselves were "actually and personally affected" by the law concerned.[546] The obvious question is in what circumstances could a domestic law violate the Covenant by its very existence. The HRC may simply be referring to situations like that in the Mauritian Women Case where some actual effects of the laws concerned could be discerned even in the absence of actual implementation. The Klass Case[547] under the ECHR, concerning secret surveillance techniques, might suggest another situation where the HRC might find the victim requirement satisfied even in the absence of evidence of actual implementation.

4.79 To date, however, the HRC have stressed the need for the alleged victim to have been actually and personally affected. In A.R.S. v. Canada[548] the HRC referred to the requirement of an "actual grievance". The HRC stated that,

> "The mandatory supervision system is therefore not yet applicable to him. The possibility of the remission he has earned being cancelled after his release is still more hypothetical. In the present situation, therefore, he has no actual grievance such as is required for the admissibility of a

---

545 Ibid., pr.6.2.

546 Ibid.

547 EUCT, Series A, Vol.28, (1978).

548 S.D., p.29.

communication by an individual under articles 1 and 2 of the Optional Protocol".[549]

The alleged violations must relate to specific individuals at a specific time. So in J.H. v. Canada[550] the HRC stated that,

"An allegation to the effect that past or present promotion policies are generally to the detriment of English-speaking members of the Canadian Armed Forces is not sufficient in this respect".[551]

And in Lovelace v. Canada[552] the HRC stated that,

"In the case of a particular individual claiming to be a victim of a violation, it cannot express a view on the law in the abstract, without regard to the date on which the law was applied to the alleged victim".[553]

4.80 The HRC have made it clear that the onus of proving in a substantiated manner that an individual has been a victim lies with the author.[554] The HRC will not engage in hypothetical or speculative assessments of potential violations. A person will not be a victim if they have in fact substantially obtained the benefit claimed. Two communications against Canada are instructive in this regard. Both of them raised very complex issues concerning the interpretation and application of Article 15(1) ICCPR in relation to the effects of the Canadian

---

549 Ibid., pr.5.2.

550 Doc.A/40/40, p.230.

551 Ibid., pr.4.2.

552 Doc.A/36/40, p.166; S.D., p.83.

553 Ibid., pr.10.

554 See Group Of Associations For The Disabled v. Italy, pr.4.78 above.

Criminal Law Amendment Act 1977[555]. That Act removed the automatic forfeiture of parole for offences committed while on parole. The two authors claimed that by not making the Act retrospective Canada had contravened the last sentence of Article 15 ICCPR.

In the first of these communications, Van Duzen v. Canada,[556] the HRC expressed the view that,

> "...regard must be had to the fact that the author has subsequently been released, and that this happened even before the date when he claims he should be free. Whether or nor this claim should be regarded as justified under the Covenant, the Committee considers that, although his release is subject to some conditions, for practical purposes and without prejudice to the correct interpretation of article 15(1), he has in fact obtained the benefit he has claimed. It is true that he has maintained his complaint and that his status upon release is not identical in law to the one he has claimed. However, in the view of the Committee, since the potential risk of re-imprisonment depends upon his own behaviour, this risk cannot, in the circumstances, represent any actual violation of the right invoked by him".[557]

Accordingly, the HRC expressed the view that the case did not disclose a violation of the Covenant. As the HRC commented in the second case, McIsaac v. Canada[558], Van Duzen had failed to "...clearly establish

---

[555] Article 15(1) ICCPR provides, inter alia, that, "If subsequent to the commission of the offence, provision is made for the imposition of a lighter penalty, the offender shall benefit thereby".

[556] Doc.A/37/40, p.150.

[557] Ibid., pr.10.3.

[558] Doc.A/38/40, p.111.

that his position in the end was substantially affected by the applicability or non-applicability of the new provision, and that therefore there was no violation of the Covenant".[559] A similar result obtained in the McIsaac Case itself. There the HRC, in the absence of precise submissions from the author, attempted to examine in what way, if any, the alleged victim was affected by the situation of which he was in substance complaining. The HRC concluded that,

> "Mr. McIsaac had not established the hypothesis that if parole had not been forfeited, the judge would have imposed the same sentence of fourteen months and that he would therefore have been released prior to May of 1979. The HRC was? not in a position to know, nor was it called upon to speculate how the fact that his earlier parole was forfeited may have influenced the penalty meted out for the offence committed while on parole. The burden of proving that in 1977 he has been denied an advantage under the new law and that he is therefore a "victim" lies with the author. It is not the Committee's function to make a hypothetical assessment of what would have happened if the new Act had been applicable to him".[560]

4.81 The HRC's jurisprudence with respect to the concept of the victim has now been examined. In summary, the HRC have stressed the requirement of the individual being "actually and personally affected", or suffering an "actual grievance". While the review of the

---

[559] Ibid., pr.10.

[560] Ibid., pr.11. (My emphasis) "These considerations led to the conclusion that it cannot be established that in fact or law {as to which see paragraph 12} the alleged victim was denied the benefit of a "lighter" penalty to which he would have been entitled under the Covenant",Ibid., pr.13. See also A.D. v. Canada, Doc.A/39/40, p.200, pr.8.2.

compatibility of legislation with the ICCPR in abstracto has been ruled out it is a "matter of degree" how concretely the requirement of being personally affected is taken. There is clearly some degree of flexibility open to the HRC as they have recognised that there may be circumstances when the mere existence of a domestic law may violate the ICCPR. Again this is an area of the HRC's work where the experience with respect to the ECHR may be instructive.

4.81.1 Finally we can note that the HRC has issued an important view concerning article 1 (self-determination) which is relevant in this context.[561]

---

[561] See ch.5, pr.5.22 below.

(d). Ratione Loci.[562]

4.82 A communication can only be submitted by "individuals subject to {the} jurisdiction" of the State party (Article 1 O.P.). Uruguay has argued in a series of cases that once an individual had left Uruguay he was, "outside the jurisdiction of the Uruguayan State". Therefore, "To consider the communication further would be incompatible with the purpose for which the Covenant and its Protocol were established, namely to ensure the effective protection of human rights and to bring to an end any situation in which these rights were being violated. The State party concluded that in this case no de facto situation existed to warrant findings by the Committee and that consequently, by intervening, the Committee would not only be exceeding its competence but would also be departing from normally established legal procedures".[563]

The HRC has rejected the contentions of Uruguay on the ground that in each case the victims were under the jurisdiction of Uruguay while the alleged violations took place,

> "The Committee recalled that by virtue of article 2(1) of the Covenant, each State party undertakes to respect and to ensure to "all individuals subject to the jurisdiction" of the State party concerned at the time of the alleged violation of the Covenant, irrespective of their nationality.

---

562 See Meron, n.1 above, pp.106-109; T.Meron, Human Rights In Internal Strife: Their International Protection, pp.40-43 (1987); K.Widdows, The Application Of A Treaty To Nationals Of A Party Outside Its Territory, 35 ICLQ (1986) pp.724-730.

563 See Massioti and Baritussio v. Uruguay, Doc.A/37/40 p.187; S.D. p.136, pr.7.1 (M had left for the Netherlands, B for Sweden); Estrella v. Uruguay, Doc.A/38/40 p.150 (E had left for France).

> This was manifestly the object and purpose of article 1".[564]

The argument advanced by Uruguay accorded with that of Professor Schwelb[565] and noted by others.[566] Professor Schwelb has argued that the words "within its territory" in article 2(1) ICCPR amount to a "limitation of the substantive scope of the Covenant".[567] Therefore, "The conclusion seems inescapable that the scope of the procedural protection afforded by the Protocol cannot be wider than that of the substantive protection of the Covenant".[568] Mose and Opsahl argue in response that the result of Professor Schwelb's view is not always convincing,

> "As an illustration, if a citizen's publications are seized or his passport annulled while he is abroad, he ought to be able to submit a communication invoking his freedom of expression or movement under the Covenant; and the travaux preparatoires to the Covenant suggest that the

---

564 Massioti and Baritussio, Ibid., pr.7.2; Estrella, Ibid., pr.4.1.

565 Schwelb, 'Civil and Political Rights', n.1 above, p.862-863 (1968). See also Schindler, Human Rights And Humanitarian Law, 31 Am.ULR (1982) pp.935 at p.939.

566 See Lippman, n.1 above, p.226.

567 See n.1 above (1968). Although concern was expressed about this limitation in both the HRCion and the Third committee the words were retained in a separate vote in the Third Committee. It was suggested that the words be deleted and the term "jurisdiction" be qualified to show that the guarantee extended to individuals subject to the territorial and personal jurisdiction of the State, Doc.A/5655, prs.18 and 29 (1965).

568 Ibid.

drafters in adopting the clause "within its territory" did not have such cases in mind".[569]

The approach of the HRC as noted above[570] and below[571] has been to clearly reject the argument that once an individual has left the territory he had left the jurisdiction and therefore could not submit a communication. It is submitted that the HRC's approach is correct. It represents the most sensible interpretation from a human rights perspective and corresponds with the approach taken to the ECHR.[572]

4.82.1 It would, however, be premature to assume that the HRC have rejected altogether the view that the O.P. must be interpreted subject to the territorial limitation in article 2(1) ICCPR. The point can be illustrated by reference to the HRC's views in the case of E.Quinteros and M.C.Almeida De Quinteros v. Uruguay.[573] A.Q. alleged that her daughter, E.Q., had been arrested by military personnel and systematically tortured. A.Q. also claimed that she was a victim of violations of article 7 (psychological torture because she did not know where her daughter was) and of article 17 because of interference with her private and family life.[574] A.Q. was a Uruguayan national who was living in Sweden at the time she submitted the communication. The HRC specifically noted that the communication raised the matter of whether A.Q. was "subject to the jurisdiction"

---

569 Mose and Opsahl, pp.298-299.

570 See pr.4.82 above.

571 See pr.4.82.1-4.86 below.

572 See Van Dijk and Van Hoof, pp.6-8.

573 Doc.A/38/40 p.216. The decision is considered in ch.9, pr.9.23 below.

574 Ibid., pr.1.9.

at the time of the alleged violations.[575] The State party made no submissions on the point. In its final views the HRC noted that the statement of A.Q. that she was living in Uruguay at the time of the incident regarding her daughter was not contradicted by the State party. The HRC expressed the view that A.Q. had been a victim. It must therefore have accepted that she was within the jurisdiction.[576]

On the facts this decision follows those in the cases noted above.[577] It is interesting to consider, however, what approach the HRC would have taken if A.Q. had been temporarily resident outside Uruguay at the relevant time. It is submitted that the result should be the same as the violations would be the same and it is hoped that the HRC would take this approach.

4.83 More difficult might be the situation where the alleged victim lived permanently abroad, for example, if in the example given A.Q. had been permanently resident in Sweden at the time of the alleged violations. Here the HRC might be more willing to accept the argument of Professor Schwelb concerning territorial limitation. In most cases there would be no problem because the alleged victim would not normally be subject to the State's jurisdiction at the time of the alleged violations in any event.

This situation of an alleged victim who is resident permanently or semi-permanently abroad has been considered by the HRC in a series of cases concerning the issuance of passports.[578] In Lichtensztejn v.

---

[575] Ibid., pr.2.

[576] Ibid., pr.14.

[577] See pr.4.82 above.

[578] Lichtensztejn v. Uruguay, Doc.A/38/40 p.166; Nunez v. Uruguay, ibid., p.225; Montero v. Uruguay, (Footnote Continued)

Uruguay[579], L, a Uruguayan citizen resident in Mexico since 1974 was refused issuance of a new passport when his passport expired on 23 October 1978. Uruguay argued that L failed to fulfil the minimum requirement of being "subject to its {the State party's} jurisdiction", because he was outside the jurisdiction of the Uruguayan State when his petition was submitted. "It is therefore inadmissible that the Committee should deal with communications of this kind, which run counter to its terms of reference and violate provisions of international instruments".[580]

The HRC rejected Uruguay's argument that it was not competent under article 1 O.P. to consider the communication,

> "The issue of a passport is clearly within the jurisdiction of the Uruguayan authorities and he is "subject to the jurisdiction" of Uruguay for that purpose. Moreover, a passport is a means of enabling him "to leave any country, including his own", as required by article 12(2) of the Covenant. Consequently, the Committee found that it followed from the very nature of that right that, in the case of a citizen resident abroad, article 12(2) imposed obligations both on the State of residence and on the State of nationality and that,

---

(Footnote Continued)
ibid., p.186; Martins v. Uruguay, Doc.A/3740 p.157. See Anon., Rev.ICJ (1983) p.42 at pp.47-48; Meron, n.1 above, p.109; H.Hannum, The Right To Leave And Return In International Law and Practice, pp.20-21 (1987). See also Mbenge v. Zaire, Doc.A/38/40 p.134, where the alleged victims were resident in Belgium and all the alleged violation occured after they had left the territory of Zaire. The requirment of M being within the territory and subject to the jurisdiction of Zaire was not discussed by the HRC. On the case see ch.8 below and ch.10 below.

579 Ibid.

580 Ibid., pr.4.

therefore, article 2(1) could not be interpreted as limiting the obligations of Uruguay under article 12(2) to citizens within its own territory".[581]

The difficult question which this decision raises is just which of the articles in the ICCPR are not of such a "nature" that the HRC could interpret them as subject to the territorial limitation in article 2(1) ICCPR.[582] The examples drawn from the Quinteros Case[583] above might suggest that article 7 ICCPR (prohibition of torture and of inhuman or degrading treatment or punishment) should be subject to the territorial limitation in certain cases. On that basis A.Q. could not have claimed to be a victim if she had been permanently resident abroad. More directly, in Lopez Burgos v. Uruguay[584] the HRC had to consider its competence under article 1 O.P. to express its views on communications alleging violations of the Covenant by governments agents but carried out in foreign territory.[585]

4.84 In Lopez Burgos the author alleged that on 13 July 1976 her husband, L.B., was kidnapped in Buenos Aires, Argentina, by members of the "Uruguayan security and intelligence forces", who were aided by Argentinian para-military groups, and secretly detained in Buenos Aires for two weeks. L.B. was then illegally and clandestinely transported to Uruguay. He was then officially arrested on 23 October 1976 and the Press was informed that, "subversives has been surprised while

---

581 Ibid., pr.6.1.

582 Article 13, concerning the expulsion of aliens, might be an example. For text see Apx.I.

583 See pr.4.82.1 above.

584 Doc.A/36/40 p.176; S.D.p.88.

585 See generally I.Brownlie, Systems Of The Law Of Nations - State Responsibility (Part.I), ch.X, (1983).

conspiring". He was detained incommunicado by the special security forces at a secret prison for three months. During approximately four months of detention in Argentina and Uruguay he was continuously subjected to physical and mental torture.[586]

In response to requests from the HRC the State party claimed that it had no information as to L.B.'s whereabouts between July and October 1976.[587] In its final views the HRC observed that,

> "although the arrest and initial detention and mistreatment of Lopez Burgos allegedly took place on foreign territory, the Committee is not barred either by virtue of article 1 of the Optional Protocol ("...individuals subject to its jurisdiction"...) or by virtue of article 2(1) of the Covenant ("...individuals within its territory and subject to its jurisdiction"...) from considering these allegations, together with the claim of subsequent abduction into Uruguayan territory, inasmuch as these were acts perpetrated by Uruguayan agents on foreign soil.
>
> The reference in article 1 of the Optional Protocol to "individuals subject to its jurisdiction" does not affect the above conclusion because the reference in that article is not to the place where the violation occurred, but rather to the relationship between the individual and the State in relation to a violation of any of the rights set forth in the Covenant, wherever they occurred.
>
> Article 2(1) of the Covenant places an obligation upon a State party to respect and to ensure rights "to all

---

[586] Doc.A/36/40 p.176, prs.2.2-2.3.

[587] Ibid., pr.7.3.

individuals within its territory and subject to its jurisdiction", but it does not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of the State or in opposition to it. According to article 5(1) of the Covenant,

'Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant'.

In line with this, it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory".[588]

The interpretation of article 1 O.P. as referring "not to the place where the violation occurred, but rather to the relationship between the individual and the State in relation to a violation of any of the rights set forth in the Covenant, wherever they occurred", and the view that article 2 does not exclude accountability for violations by agents committed upon the foreign territory of another State, lend further weight to the argument against the incorporation of the territorial limitation of article 2(1) of the Covenant into article 1 O.P.[589] More generally, an approach to

---

[588] Ibid., prs.12.1-12.3.

[589] See prs.4.82-83 above.

jurisdiction based on the individual-State relationship significantly extends the ambit of the protection offered by the O.P.

4.85 One member of the HRC, Professor. Tomuschat, thought that the views of the HRC needed to be clarified and expanded and so appended an individual opinion.[590] He argued that the statement in the HRC's views that article 2(1) of the ICCPR does not imply that a State party cannot be held accountable for violations of the Covenant which its agents commit upon the territory of another State "was too broadly framed and might therefore give rise to misleading conclusions".[591] He argued, moreover, that,

> "In principle the scope of application of the Covenant is not susceptible to being extended by reference to article 5, a provision designed to cover instances where formally rules under the Covenant seem to legitimize actions which substantially run counter to its purposes and general spirit".[592]

On this point it is submitted that Professor Tomuschat is correct. However, it is worth noting that the HRC made reference to article 5(1) only to support an interpretation they would have adopted in any event. It does not constitute the basis of that interpretation.

4.86 Professor Tomuschat continued with his view of the proper interpretation of article 2(1) ICCPR,

> "To construe the words "within its territory" pursuant to their strict literal meaning as excluding any responsibility for conduct occurring beyond the national boundaries would, however, lead to utterly absurd results. The formula was intended

---

590 Doc.A/36/40 p.184.

591 Ibid., first para.

592 Ibid. See also M.A. v. Italy, pr.4.61 above

to take care of objective difficulties which might impede the implementation of the Covenant in specific situations. Thus, a State party is normally unable to ensure the effective enjoyment of the rights under the Covenant to its citizens abroad, having at its disposal only the tools of diplomatic protection with their limited potential. Instances of occupation of foreign territory offer another example of situations which the drafters of the Covenant had in mind when they confined the obligation of States parties to their own territory. All these factual patterns have in common, however, that they provide plausible grounds for denying the protection of the Covenant. It may be concluded, therefore, that it was the intention of the drafters, whose sovereign decision cannot be challenged, to restrict the territorial scope of the Covenant in view of such situations where enforcing the Covenant would be likely to encounter exceptional obstacles. Never was it envisaged, however, to grant States parties unfettered discretionary power to carry out wilful and deliberate attacks against the freedom and personal integrity against {sic} their citizens living abroad. Consequently, despite the wording of article 2(1), the events which took place outside Uruguay come within the purview of the Covenant".[593]

Here Professor Tomuschat's analysis is less convincing. The problem raised is not so much when protection should be denied as when there should be responsibility for violations. The "tools of diplomatic protection" do limit the protection the national State can offer when a citizen is abroad but that does not

---

[593] Ibid.

bear on the question where the national State is itself the alleged violater. Similarly, with respect to the example of occupation of foreign territory, there is persuasive authority under the ECHR for holding a State responsible in such a situation for matters under its "actual authority and control".[594]

[594] Cyprus v. Turkey, EUCM, 2 D.& R. p.125 at p.136 (1975). See also A.8007/77, Cyprus v. Turkey, EUCM, 13 D.& R. p.85 at pp.148-149 (1979). More generally see T.Meron, Applicablity Of Multilateral Conventions To Occupied Territories, 72 AJIL (1978) pp.542-557; E.R.Cohen, Human Rights In The Israeli Occupied Territories, (1985).

4. The Same Matter Is Not Being Examined Under Another Procedure Of International Investigation Or Settlement. (Art.5(2)(a) O.P.)[595]

4.87 Under article 5(2)(a) O.P. the HRC is precluded from considering a communication only if the same matter is simultaneously being examined under another procedure of international investigation or settlement.[596] This is a notable departure from comparable international petitions procedures which preclude consideration of matters that have already been dealt with by other

---

595 Mose and Opsahl, pp.305-309; Lippman, n.1 above; Schwelb, n.1 above, pp.866-867; Brar, n.1 above, pp.520- 524; Tardu, n.650 below. Article 5(2)(a) O.P. only deals with the effects of consideration by another international procedure. It does not address the question of whether the HRC could reconsider a communication which it has already considered, and if so, in what circumstances. This question is dealt with in pr.4.41 above. Cf. Article 27(1)(b) ECHR as to which see Mikaelson, pp.144-152. There is no co-ordination rule in respect of the inter-State procedures under the ICCPR. Note though article 44 ICCPR, text in Apx.I below.

596 While considering communication under the O.P. the HRC became aware of a language discrepancy in the text of article 5(2)(a) O.P. The Chinese, English, French and Russian texts provide that the HRC shall not consider any communication from an individual unless it has ascertained that the same matter "is not being examined" under another procedure of international investigation or settlement". However, the Spanish text refers to any communication which "has not been examined". The HRC ascertained that the discrepancy was due to an oversight in the preparation of the Spanish text of the O.P. The HRC decided to base its work on the other language versions. See Doc.A/35/40 pr.385, n.8. The HRC's decision was clearly correct in the light of the travaux preparatoires. In the Third Committee of the

(Footnote Continued)

international procedures.[597] Obviously article 5(2)(a) will increase in importance as the number of States parties to the ICCPR and O.P. increases and the number of international procedures of investigation and settlement in operation expands. A number of the HRC decisions have given some content to the prohibition in article 5(2)(a) O.P.

4.88 On a number of occasions the HRC has had to consider the situation of communications submitted to another procedure of international investigation or settlement by a third party. In Antonaccio v. Uruguay[598] the HRC took the view that it was not precluded from consideration of the communication as the third party had, at the authors request, asked the IACM to discontinue consideration of the case.[599] A similar approach was taken in Altesor v. Uruguay[600] even though the authors had made repeated efforts to conceal the fact that they were also the authors of the complaint to the IACM. When they withdrew their complaint to the IACM the HRC proceeded with its consideration.[601] In Altesor v. Uruguay,[602] in addition to the authors, an unrelated third party had also submitted a new complaint to the IACM. On this point the HRC concluded that,

---

(Footnote Continued)
General Assembly the principle una via electa had been abandoned in favour of a system of adjournment of proceedings pendante lite. See Lipmann, n.1 above; Tardu, n.650 below; and the discussion in A/C.3/SR.1432 and 1433.

[597] See, e.g., article 27 ECHR.

[598] Doc.A/37/40, p.114; S.D., p.101.

[599] Ibid., prs.5-8.

[600] Doc.A/37/40, p.122; S.D., p.105.

[601] Ibid., prs.7.1-7.2.

[602] Doc.A/37/40,p.122; S.D.,p.105.

"It was not prevented from considering the communication submitted to it by the authors...by reason of the subsequent complaint made by an unrelated third party under the procedures of the {IACM}".[603]

This view was further explained in Estrella v. Uruguay.[604] There the HRC observed that article 5(2)(a) O.P. could not be so,

"...interpreted as to imply that an unrelated third party, acting without the knowledge and consent of the alleged victim, can preclude the latter from having access to the HRC. It therefore concluded that it was not prevented from considering the communication submitted to it by the alleged victim himself, by reason of a submission by an unrelated third party to the IACM. Such a submission did not constitute "the same matter", within the meaning of article 5(2)(a) of the Optional Protocol".[605]

In Cmn.No.75/1980[606] the HRC further explained that,

"...the concept of the 'same matter' within the meaning of article 5(2)(a) of the Optional Protocol must be understood as including the same claim concerning the same individual, submitted by him or someone else who has standing to act on his behalf before the other international body".[607]

Similarly in V.O. v. Norway[608] the HRC stated that in its view the phrase "the same matter" refers, "With

---

603 Ibid., pr.5.

604 Doc.A/38/40, p.150.

605 Ibid., pr.4.3.

606 Referred to in Doc.A/39/40 pr.580.

607 Ibid.

608 Doc.A/40/40, p.232.

regard to identical parties, to the complaints advanced and facts adduced in support of them".[609]

4.89 In Sequeira v. Uruguay[610] the HRC decided that a communication submitted to the IACM before the date of the entry into force of the ICCPR and the O.P. could not relate to events alleged to have taken place after that date.[611] Although the HRC did not explain the decision in these terms it seems reasonable to interpret its decision as stating that the complaints to the IACM were not the "same matter" within the meaning of article 5(2)(a) O.P. as the complaints submitted to the HRC. Also in Sequeira the HRC decided that a two line reference to the person concerned in a case before the Inter-American Commission on Human Rights, which listed in a similar manner the names of hundreds of other persons allegedly detained in the State party, "did not constitute the same matter as that described in detail by the author in his communication to the HRC".[612]

4.90 In three cases concerning the Netherlands published on the same date the HRC observed that the examination of State reports, submitted under article 16 of the ICESCR, does not, within the meaning of article 5(2)(a) O.P., constitute an examination of the "same matter" as a claim by an individual submitted to the HRC under the O.P.[613]

4.91 The prohibition in article 5(2)(a) O.P. only covers "procedures of international investigation or

---

609 Ibid., pr.4.4.

610 Doc.A/35/40, p.127; S.D., p.52.

611 Ibid., pr.6(a).

612 Ibid., pr.9(a).

613 Broeks v. Netherlands, Doc.A/42/40 p.139; Zwaan-de Vries v. Netherlands, Ibid., p.160; Danning v. Netherlands, Ibid., p.151. The cases are considered in prs.4.55-4.58 above

settlement". HRC decisions have helped to clarify the kind of procedures covered. Of particular importance was the HRC's approach to the examination of a particular human rights situation in a given country under Economic And Social Council Resolution 1503 (XlVIII) which governs the procedures for the examination (by HRCion And Sub-Cion) of communications which appear to reveal "a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms".[614] The HRC determined that the Resolution 1503 procedure does not constitute a procedure of international investigation or settlement within the meaning of article 5(2)(a) O.P. because it is concerned with the examination of situations which appear to reveal a consistent pattern of gross violations of human rights and a situation is not "the same matter" as an individual complaint.[615] The HRC stated that, "The Protocol was not intended to deal with situations as such, but with individual complaints".[616] Therefore, the Resolution 1503 procedure does not bar the HRC from consideration of an individual communication. The HRC's decision strengthens the argument of those who argue

---

[614] A et al. v. S, S.D., p.17. The State party also argued that the HRC could not consider the communication with respect to one alleged victim, D, because his case had already been submitted to UNESCO. The HRC found, however, that, "UNESCO has at present no procedure of international investigation or settlement, as referred to in article 5(2)(a) of the Protocol, relevant to this case",ibid.,p.17-18. On HRCion procedures see Bossuyt, The Development Of Special Procedures Of The United Nations Commission On Human Rights, 6 HRLJ (1985) pp.179-210. On UNESCO procedures see S.Marks, The Complaint Procedure Of UNESCO, in H.Hannum,(ed.), A Guide To International Human Rights Practices, pp.94-107, (1984).

[615] Ibid.

[616] Ibid.

that there are good legal grounds for the co-existence of the Resolution 1503 procedure and the O.P.[617]

In an early decision the HRC decided that a procedure established by a non-governmental organization, such as the Inter-Parliamentary Council Of The Inter-Parliamentary Union, does not constitute a procedure of international investigation or settlement within the meaning of article 5(2)(a) O.P.[618] This decision was based on the HRC's determination that article 5(2)(a) O.P. can only relate to procedures implemented by Inter State or intergovernmental organizations on the basis of inter State agreements or arrangements.[619] Subsequently the HRC explicitly stated that procedures established by non-governmental organizations such as Amnesty International, the International Commission Of Jurists or the International Committee Of The Red Cross, irrespective of the latter's standing in international law, do not constitute procedures of international investigation or settlement within the meaning of article 5(2)(a) O.P.[620]

In 1984 the HRC declared admissible a number of similar and related cases concerning the same country. The HRC observed that,

> "...a study by an intergovernmental organization either of the human rights situation in a given

---

[617] The Sub-Commission for the Prevention of Discrimination and the Protection Of Minorities has debated whether Resolution 1503 should be reviewed by ECOSOC in the light of the entry into force of the O.P., see Zuidjwick, n.1 above (1982).

[618] Doc.A/33/40, pr.582.

[619] Ibid. This would presumably cover proceedings by, for example, the Russell Tribunal or Permanent Peoples Tribunals as to which see M.Dixon, (ed.), On Trial: Reagan's War Against Nicaragua - Testimony Of The Permanent Peoples' Tribunal, (1985).

[620] Doc.A/39/40, pr.582.

country (such as that by the IACHR)[621] or a study of the trade union rights situation in a given country (such as the issues examined by the Committee on Freedom of Association of the ILO), or of a human rights problem of a more global character (such as that of the Special Rapporteur of the Commission on Human Rights on summary or arbitrary executions), although such studies might refer to or draw on information concerning individuals cannot be seen as being the same matter as the examination of individual cases within the meaning of article 5(2)(a) of the Optional Protocol".[622]

4.92 It may be open to States that are parties to various international procedures of investigation or settlement to determine which of those procedures to preclude reconsideration of a case by the HRC by making a reservation to article 5(2)(a) O.P. This has been done by eight of the nine contacting parties to the ECHR that have also ratified the O.P.[623] Those reservations have been to the effect the the HRC shall not have competence if the same matter has been examined under another procedure of international investigation or

---

621 See T.Buergenthal, R.Norris and D.Shelton, Protecting Human Rights In The Americas, (2d, 1987).

622 Doc.A/39/40, pr.582. The communication concerned was Baboeram and Others v. Suriname, Doc.A/40/40 p.187, pr.9.1.

623 Reservations of Denmark, France, Iceland, Italy, Luxembourg, Norway, Spain and Sweden, in Human Rights - Status Of International Instruments, pp.90-94 (1987). The exception is Netherlands whose position is explained in Van Dijk and Van Hoof p.52. Thus the HRC could consider the case of H.v.D.P. V. Netherlands, Doc.A/42/40 p.185, which had been declared inadmissible ratione materiae by the EUCM, ibid., pr.2.2. The reservations are in accordance with a resolution of the Committee Of Ministers Of The Council Of Europe, see 3 YBECHR XII (1970) pp.74-76.

settlement.[624] The validity and application of these reservations have been raised in communications before the HRC.

4.93 In A.M. v. Denmark[625] A.M. alleged violations of the Universal Declaration of Human Rights which the HRC said corresponded in substance to articles 7,14 and 26 ICCPR.[626] A.M. had submitted the same matter to the EUCM. That application had been declared inadmissible as manifestly ill-founded under article 27(2) ECHR.[627] The HRC decided that in the light of Denmark's reservation to article 5(2)(a) O.P. the communication was inadmissible because the same matter had already been considered by the EUCM and therefore the HRC was not competent to consider it.[628]

4.94 One member of the HRC, Mr.Graefrath, appended an individual opinion to the HRC's decision.[629] He argued that the reservation did not refer to matters the consideration of which had been denied under any other procedure by a decision of inadmissibility. An application which had been declared inadmissible had not, in the meaning of the reservation, been "considered" in such a way that the HRC was precluded from considering it. His argument continued by noting that the conditions of admissibility and the substance

---

624 Ibid.

625 Doc.A/37/40,p.212; S.D.,p.32.

626 Ibid.,pr.3.2.

627 Ibid.,prs.2.2-3.2. The expression "manifestly ill-founded" does not appear in the O.P. although it was present in early draft versions in the Third Committee, see e.g. Doc.A/6546, n.1 above, pr.474. On a number of occasions States parties have argued that communications should be rejected as "ill-founded".

628 Ibid., prs.6-7.

629 Ibid., Appendix.

of the rights in other instruments were different from those in the O.P. so that although a communication under the O.P. might lead to a similar result as under, for example, the ECHR this was not necessarily so.

Mr.Graefrath's view was based on his opinion that,

> "The reservation aims at preventing the HRC from reviewing cases that have been considered by another international organ of investigation. It does not seek to limit the competence of the HRC to deal with communications merely on the ground that the rights of the Covenant allegedly violated may also be covered by the European Convention and its procedural requirements. If that had been the aim of the reservation, it would, in my opinion, have been incompatible with the Optional Protocol".[630]

On the facts of the case it appears that the difference of opinion between the HRC's view and Mr.Graefrath's turns on the question of whether the EUCM had "considered" the application by A.M. It is submitted that the reservations should be interpreted as precluding consideration by the HRC only when the matter has been subject to substantive consideration under another procedure of international investigation or settlement. That consideration may have taken place at either the admissibility or merits stage. Though this submission seems clear it may in practice call for a degree of sophisticated analysis by the HRC.[631]

4.95 The HRC's approach to such reservations can be illustrated by reference to two other communications. In V.O. v. Norway[632] Norway argued that the communication was inadmissible because the inadmissibility decision of

---

630 Ibid., fourth paragraph.

631 See Mikaelson, who takes a similar view concerning article 27 ECHR. See the four examples he gives, pp.144-150.

632 Doc.A.40/40, p.232.

the EUCM on the basis of the application being manifestly ill-founded had involved an examination of the substance of the application.[633] The author of the application had argued, inter alia, that the provisions of the ICCPR differed in several respects from those of the ECHR.[634] The HRC declared the communication inadmissible because the same matter had been examined by the EUCM.[635] In O.F. v. Norway[636] the author had been informed by the EUCM that he was too late to submit an application.[637] The State party, however, informed the HRC that it would not object to the admissibility of the communication on the basis of its reservation because the case had not been examined by the EUCM.[638] It is submitted that on the basis of the argument above the HRC could have taken the view that it was competent to consider the matter notwithstanding the reservation because the matter had not received any substantive consideration by the EUCM.

4.96 Finally on this matter, it is interesting to note Mr.Graefrath's view that if the reservation had sought to limit the competence of the HRC in certain respects he considered that it would have been "incompatible" with the O.P.[639] and thus presumably invalid.[640] In no decision to date has the HRC expressed the view that a reservation was incompatible with the O.P. although

---

633 Ibid., pr.4.2.

634 Ibid., pr.2.5-2.6.

635 Ibid., pr.4.4.

636 Doc.A/40/40, p.204; Doc.A/39/40, pr.583.

637 Ibid., pr.1.4.

638 Ibid., pr.3.3.

639 Doc.A/40/40, p.232, Appendix.

640 See article 19 V.C.L.T. (1969).

doubts have been expressed during the reporting procedure under article 40 concerning certain reservations.[641]

4.97 A difficult question of interpretation concerning article 5(2)(a) O.P. arose during the HRC's considerations of its draft Rules of procedure concerning the O.P.[642] After the text of the rules on international remedies (art.5(2)(a)) and domestic remedies (art.5(2)(b)) the provision continues,

> "This shall not be the rule where the application of the remedies is unreasonably prolonged".

The question that arose was whether this provision applied to both article 5(2)(a) and (b), or only to (b). On the former interpretation it would be permissible for the HRC to declare admissible a communication being examined under another procedure of international investigation or settlement if it took the view that that procedure had been unreasonably prolonged. After some discussion the matter was referred for the expert opinion of United Nations Legal Counsel. That opinion, based mainly on the clarifications given by the sponsors of article 5(2) O.P. in the Third Committee,[643] was to the effect that the provision applied to both sub-paragraphs (a) and (b).[644] Notwithstanding this clear opinion many of the HRC members were reluctant to accept its implications in terms of the HRC having to pass judgement on other international bodies. Members pointed to the difficulty of establishing the correct

---

641 See ch.6 below.

642 See SR.21, prs.46-64; SR.33, prs.21-52; Doc.A/32/44, prs.68-73.

643 See Doc.A/C.3/L.1411/Rev.2 in Doc.A/6546, n.1 above, pr.568 (1966). Cf. Article 14(7) ICERD which clearly only covers domestic remedies.

644 SR 33 pr.23.

interpretation before specific cases had been examined and the need to allow the HRC a certain amount of discretion.[645] The Rule adopted by the HRC merely repeats the terms of article 5(2) without clarification.[646]

The reluctance of the HRC to pass judgement on another international body is understandable. However, the delays evident in international petition systems renders such a situation a distinct possibility. If faced with this problem the HRC should proceed with great circumspection and would clearly need to identify the source of the delay. It appears that no such situation has arisen to date.[647]

4.98 The decisions of the HRC noted above are very important. They have given clear indications of both the general and specific approach of the HRC to the considerations of other international procedures. Article 5(2)(a) O.P. could have been interpreted by the HRC in a way that would have greatly limited its competence. It could have taken the view that it was precluded from consideration of any matter that had been submitted to any other human rights institution or general investigation. It could similarly have taken a

---

645 It is interesting to note the comments of Mr.Movchan (USSR national), "The Legal Counsel's interpretation, based on semantic and historical considerations should obviously be taken into account, but that did not mean that other interpretations, which might give more weight to ethics, psychology or the law and be based on the practice of international bodies, should {not} be discussed", SR 33, pr.27. See also his comments at SR.33, pr.28.

646 R.90(2). Mose and Opsahl, p.309, comment, "The intention was clearly to leave the scope of the prolongation clause still open to discussion".

647 An Eighth Protocol to the ECHR has recently been adopted with a view to speeding up the procedures of the EUCM., see ECHR - Collected Texts, pp.57-62 (1986).

very expansive view of what constitutes "the same matter" and which procedures qualify as "procedures of international investigation or settlement".

On the contrary, however, the general approach of the HRC has evinced a great reluctance to relinquish its competence. Restrictive interpretations have been applied to the expressions "the same matter" and "procedures of international investigation and settlement".[648] The HRC has affirmed the principle of adjournment pendente lite a the expense of the principle una via electa.[649] This interpretation of the O.P. makes it likely that at some stage the HRC will have to consider a communication which has already been the subject of a substantive consideration by another international body. This eventuality will raise acutely the difficulties concerning the co-existence of several procedures of international investigation or settlement. The reluctance of the HRC to follow the opinion of United Nations Legal Counsel when the application of the procedures of international investigation or settlement have been unduly prolonged bears testimony to the caution of the HRC concerning such co-existence and its desire to retain its flexibility while it gained further experience.

4.99 Certain aspects and problems of co-existence have been identified and analysed by commentators and suggestions have been made for their resolution.[650] No

---

[648] See pr.4.88-4.96 above.

[649] See pr.4.97 above.

[650] Anon, 31 Rev.ICJ., pp.43-44, (1983);T. Buergenthal, International And Regional Human Rights Law And Institutions: Some Examples Of Their Interaction, 12 Tex.ILJ., pp.321-330, (1977); Council of Europe, Report Of The Committee of Experts To The Committee Of Ministers On The Problem Of The Co-existence Of The Two Systems Of Control, Doc.CM (68) 39, (February,1968); (Footnote Continued)

formal co-ordination procedures have been adopted by the HRC or other international institutions although procedures have been established for the exchange of information. It is very difficult to ascertain and provide solutions in the abstract for problems of co-existence. It would seem better not to establish any formal rules or procedures but to await the hopefully judicious resolution of particular difficulties as and when they arise. There is no reason to believe that the HRC cannot take a practical and flexible approach to each problem and accord to it the most appropriate solution.

Where States have made reservations aimed at preventing repeated consideration it has been submitted that these should be restrictively interpreted so as

---

(Footnote Continued)
Council of Europe, Report of the Committee of Experts to the Committee of Ministers, Human Rights:Problems Arising From The Co-existence Of The United Nations Covenants On Human Rights And The ECHR, Doc.CE/H 70(7),(1970); J.De Meyer, International Control Machinery In The ECHR In Relation To Other International Instruments For The Protection Of Human Rights, Colloquy On Human Rights, Athens, (Sept.,1978), Doc.H/Coll.78(5), pp.45-58; A.Eissen, The ECHR and the U.N. Covenant on Civil and Political Rights: Problems Of Co-existence, 22 Buffalo L.R., pp.181-216, (1972); Lippman, n.1 above, who suggests that, "The solution to the problem of priority among competing international procedures would seem to lie in standardization of international organizational practices", p.268; A.H.Robertson, The U.N. Covenant On Civil And Political Rights And The ECHR, 1968-69 BYIL, pp.21-48, (1970); A.H.Robertson, Human Rights In The World, pp.114-117, (1982); E.Schwelb, The ICERD, 15 ICLQ p.996 at pp.1046-1048; Sieglerschmidt, Report to the Consultative Assembly of the Council Of Europe, On The Protection Of Human Rights In The U.N. Covenant On Civil And Political Rights And Its Optional Protocol And In The ECHR, Council of Europe, Consultative Assembly, Doc.3773, 28th Ordinary Session, (1976); L.Sohn, Human Rights:Their Implementation And Supervision By The U.N., in T.Meron, (ed.), Human Rights In International Law-Legal And Policy Issues, Vol.II, pp.390-394, who suggests that, "The Optional Protocol, however, may be interpreted as giving precedence to regional
(Footnote Continued)

only to preclude reconsideration of the substantive determination of another international body.[651]

(Footnote Continued)
procedures", p.394; L.Sohn, A Short History Of U.N. Documents On Human Rights, in 18th Report Of The Commission To Study The Organization Of Peace, pp.174-179, (1968); M.Tardu, The Protocol To The U.N. Covenant On Civil And Political Rights And The Inter-American System:A Study In Co-existing Procedures, 70 Am.JIL. (1976) pp.778-800; A.A.C.Trindade, The Domestic Jurisdiction Of States In The Practice Of The United Nations And Regional Organizations, 25 ICLQ (1976) pp.715-765,; Van Dijk and Van Hoof, Theory and Practice of the ECHR, pp.46-52; see also 62 U.N.ESCOR., Supp.(No.6), 15-16, U.N.Doc.E/5927, E/CN.4/1257, (1977).

[651] See prs.4.92-4.96 above.

5. The Individual Has Exhausted All Available Domestic Remedies. (Articles 2 and 5(2)(b) O.P.)[652]

Introduction.

4.100 The domestic remedies rule is an important feature of the international law concerning State responsibility for the treatment of aliens.[653] The rationale, purpose and application of the rule were the subject of extensive debate during the drafting of both the ICCPR and the O.P. in relation to both inter-State and individual communications.[654] That debate has continued in the HRC.[655]

4.101 Before examining the HRC's practice some important matters must be noted. Firstly, the O.P. does not expressly state that the domestic remedies rule shall be applied according to generally recognized rules of international law.[656] However, the HRC has stated that it, "considers that this provision should be interpreted and applied in accordance with the generally accepted principles of international law with regard to the exhaustion of local remedies as applied in the field of

---

652 See C.Cancado Trindade, The Application Of The Rule Of Exhaustion Of Local Remedies In International Law (1983); C.Cancado Trindade, Exhaustion Of Local Remedies Under The UN Covenant On Civil And Political Rights And Its Optional Protocol, 28 ICLQ 734-765 (1979); Mose and Opsahl, pp.302-305; Brar, n.1 above, pp.524-527.

653 See generally Trindade, n.653 above (1983). In the Interhandel Case, (U.S. v. Switzerland), 1959 I.C.J., p.6 the Court stated that, "The domestic remedies rule is a fixture of international law".

654 See article 41(1)(c) ICCPR. On the drafting see Bossuyt, 'Guide', pp.666-669.

655 See Trindade, n.652 above (1979), pp.757-759.

656 Cf.article 41(1)(c) ICCPR and article 26 ECHR where this reference to international law does appear. On the practice under the ECHR see Mikaelsen, pp.105-140; Van Dijk and Van Hoof, pp.72-88.

human rights".[657] It is therefore important to note that most highly developed jurisprudence concerning domestic remedies is that under the ECHR, which does refer to public international law.[658] In one case the HRC has expressly referred to the "generally recognized rules of international law" concerning domestic remedies.[659]

Secondly, the O.P. does not contain any time limit within which a communication must be submitted after exhaustion of domestic remedies.[660] Such a time limit was debated during the drafting but was not adopted. The

---

[657] Doc.A/33/40 pr.586.

[658] Note Mikaelsen's comment that, "Especially in the earlier practice of the Commission frequent references are found to generally recognized rules of international law as defined in the various decisions by various tribunals. However, as the practice of the Commission on this rule developed rapidly, the reference in article 26 to generally recognized rules of international law became almost futile as the most important contribution to the international evolution of the exhaustion doctrine came from the Commission itself", p.107.

[659] X v. Canada, S.D., p.19. Referred to by Trindade (1979), n.652 above, p.763. The HRC referred to special circumstances which according to "generally recognized rules of international law" absolved an author from exhausting the domestic remedies requirement. See pr.4.105-4.114 below.

[660] See Trindade (1983), n.652 above, ch.5; Trindade, The Time Factor In The Application Of The Rule Of Exhaustion Of Local Remedies In International Law, 61 Rivista Di Diritto Internazionale (1978) pp.232-257. Mose and Opsahl suggest that, "The term "available" in the Protocol may be used to soften some of the harsher effects of the strict application of non-exhaustion as a ground of inadmissibility", p.304.

HRC also debated whether to include a time limit in its Rules of procedure but no such rule was adopted.[661]

Thirdly, the experience under the ECHR suggests that the approach taken by the institution concerned to the question of domestic remedies can be of enormous importance in determining the impact of that institution.[662] The rule has already been the subject of a considerable body of jurisprudence in the HRC's views under the O.P. and a number of communications have been declared inadmissible on this ground. That jurisprudence will now be examined.

(a) The Burden Of Proof As To Exhaustion.[663]

4.102 In a series of cases Uruguay argued that the authors had failed to exhaust domestic remedies and , moreover, that the burden of proof with regard to exhaustion was entirely upon the authors of the communication.[664] This argument was based on the submission that according to criminal law, dating back to the time of Roman law, the burden of proof "in all cases" rested upon the plaintiff; for the party against which a charge was made, a reversal of the burden of proof would mean "a probatio diabolica".[665] The HRC stated that it did not accept Uruguay's objection to admissibility, "in the absence of specific information on local remedies available to the complainants in the

---

661 See pr.4.9 above.

662 See Mikaelsen n.656 above.

663 See Trindade (1983) n.652 above, ch.3; Trindade (1979) n.652 above, pp.761-762; Trindade, The Burden Of Proof With regard To The Exhaustion Of Local Remedies In International Law, 9 RDH/HRJ (1976) pp.81-121. On the practice under the ECHR see Mikaelsen, pp.108-111.

664 See e.g. Lanza and Perdoma v. Uruguay, Doc.A/35/40, p.111, prs.8, 13.

665 Cited in Trindade (1979), n.652 above, p.761.

particular circumstances of their cases".[666] The general approach of the HRC has been that a communication would not be considered inadmissible for failure to exhaust domestic remedies unless the State party gave details of the particular remedies available in the circumstances of the case together with a reasonable prospect that such measures would be effective.[667] "It is incumbent on the State party to prove the effectiveness of remedies the non-exhaustion of which it claims", and the availability of the alleged remedy must be "reasonably evident".[668]

It seems clear then that there is a burden on the State party to prove that local remedies are available and effective. However, there is also a burden on the author to show that he has exhausted any allegedly available remedies, that the alleged remedies are not effective or that there were special circumstances which absolved him from exhausting domestic remedies.

It is difficult to establish whether the initial burden is on the author to provide evidence that he has satisfied the domestic remedies rule or on the State party to prove that domestic remedies are available and effective. It is submitted that in principle the initial burden must rest with the author. However, the burden may not be very heavy.[669] If satisfied the onus of proof then moves to the State party. If the State party then provides evidence of available an effective remedies the

---

666 Ramirez v. Uruguay, Doc.A/35/40, p.121; S.D., p.49.

667 Ibid.

668 C.F. et al. v. Canada, Doc.A/40/40, p.217, prs.6.2, 10.1.

669 Under the ECHR the applicant has only to provide prima facie evidence (commencement de preuve) that the requirement has been complied with, Trindade (1983), n.652 above, ch.3, p.145.

onus may then return to the author to prove unavailability, ineffectiveness or special circumstances.

(b) The Remedies To Be Exhausted.

4.103 The O.P. refers to the exhaustion of "available" domestic remedies.(Arts.2, 5 O.P.)[670] The HRC has clarified this requirement. Firstly, the HRC has established that the

> "The Covenant provides that a remedy shall be granted whenever a violation of one of the rights guaranteed by it has occurred; consequently, it does not generally prescribe preventative protection, but confines itself to requiring effective redress ex post facto".[671]

It is important to understand the precise context of these words. On the facts of the case concerned the HRC expressed the view that, "...a subsequent judgement could nevertheless in principle have been an effective remedy in the meaning contemplated by article 2, paragraph 3, of the Covenant and article 5, paragraph 2(b), of the Optional Protocol".[672] More generally, however, the

---

[670] In the HRCion it was explained with regard to the expression "available domestic remedies" in the draft inter-State provisions that, "The absence of a specific reference to 'domestic, judicial and administrative remedies' was to take account of the fact that there might be remedies other than judicial and administrative ones just as there were cases where no available remedies existed", A/2929,ch.VII,pr.99. Note that under article 2(3) ICCPR each State party undertakes to "develop the possibilities of judicial remedy". On article 2 see ch.6 below.

[671] C.F. et al. v. Canada, Doc.A/40/40, p.217, pr.6.2.

[672] Ibid. "The Committee has stressed in other cases that remedies the availability of which is not reasonably evident cannot be invoked to the detriment of the author in proceedings under the Optional Protocol. According to the detailed legal explanations....,however, the legal position appears to be sufficiently clear in that the specific remedy of a declaratory judgement was available, and if granted, would have been an effective remedy against the authorities concerned. In drawing this conclusion, the (Footnote Continued)

undertaking in article 2(1) ICCPR to "respect and ensure" the rights in the ICCPR may well prescribe some degree of "preventative protection" for individuals.[673]

The HRC has expressed the view that, "Exhaustion of domestic remedies can be required only to the extent that these remedies are effective and available".[674] In a number of communication Uruguay has supplied a list of the local remedies allegedly available and submitted that the authors had failed to exhaust those remedies.[675] The typical response of the HRC has been to inform Uruguay that,

> "...the communication would...not be considered inadmissible in so far as the exhaustion of domestic remedies was concerned, unless the State party gave details of the remedies which it submitted had been available to the author in the circumstances of his case, together with evidence that there would be a reasonable prospect that such measures would be effective".[676]

In reply Uruguay has submitted general descriptions of the remedies provided without, however, specifying which remedies were available in the particular

---

(Footnote Continued)
committee also takes note of the fact that the authors were represented by legal counsel", ibid., pr.10.1.

673 On article 2 see ch.6 below.

674 Doc.A/39/40, pr.584. This notion of effectiveness was apparently stressed in the HRC's private discussions on the domestic remedies rule, see Trindade (1979), n.652 above, pp.757-759.

675 Ramirez v. Uruguay, Doc.A/35/40, p.121; Sequeira v. Uruguay, Doc.A/35/40, p.127. For this list see Trindade (1979), n.652 above, p.760, n.155.

676 See e.g. Ramirez v. Uruguay, Doc.A/35/40 p.121, pr.5.

circumstances.[677] The HRC has rejected such submissions as insufficient. It concluded, for example,

> "...that article 5(2)(b) of the Protocol did not preclude the Committee from considering a communication received under the Optional Protocol where the allegations themselves raise issues concerning the availability or effectiveness of domestic remedies and the State party when expressly requested to do so by the Committee did not provide details on the availability or effectiveness of domestic remedies in the particular case under consideration".[678]

4.104 The approach of the HRC is not that the domestic remedies rule does not apply as a condition of admissibility when the allegations themselves raise issues concerning the availability and effectiveness of those remedies. The decision is limited to the effects of the failure of a State party to provide details of the availability and effectiveness of domestic remedies in a particular case. Professor Trindade has applauded this approach of concentrating on, "...the element of actual redress over a mechanistic process of exhausting local remedies".[679]

---

[677] The authors of one communication submitted that the list of remedies was, "A mimeographic reproduction in every single case, regardless of the completely different situations involved...In practice the legal remedies fail to operate because of the restrictive interpretations they receive...that contention cannot be defeated by a series of quotations from legal codes. All this does is to deprive the argument of any reality", U.N.Doc.CCPR/C/FS/R.8/Add.5 prs.3 and 4. Cited by Trindade (1979), n.652 above, p.760.

[678] Ramirez v. Uruguay, Doc.A/35/40, p.121, pr.9; S.D., pp.4, 49.

[679] Trindade (1979), n.652 above, p.761. The HRC's subsequent practice has maintained this approach of concentrating on the availability and effectiveness of local remedies.

If a matter is being actively considered within the domestic system then domestic remedies will not have been exhausted. For example, in J.S. v Canada[680] J.S. had successfully applied to the Supreme Court of Ontario for judicial review of the decision of the Ontario Legal Aid Plan (OLAP), the legal aid authority in Ontario. The Supreme Court had set aside the decision and ordered that J.S.'s application be reconsidered. The OLAP had indicated that it was applying for leave to appeal to the Court of Appeal. The HRC noted that the matter was still sub judice and that, therefore, domestic remedies had not been exhausted.[681]

Conversely, if the domestic remedies are no longer open to the alleged victim, for example, because he has been refused leave to appeal,[682] the domestic remedies rule will be satisfied. It seems to be sufficient that the domestic remedies have been exhausted while the communication has been considered by the HRC.[683]

It is too early to determine the HRC's approach to extraordinary remedies. In one case the HRC stated that, "..an extraordinary remedy, such as seeking the annulment of decisions of the Ministry of Justice, does not constitute an effective remedy within the meaning of article 5(2)(b) of the Optional Protocol".[684] There are

---

680 Doc.A/38/40, p.243.

681 Similarly in F.G.G. v. Netherlands, Doc.A/42/40 p.180

682 As for example in Z.Z. v. Canada, S.D., p.19. The communication was declared inadmissible on the basis that, "A thorough examination by the Committee of the dossier submitted by the author has not revealed any facts in substantiation of his allegations, and the communication is thus found to be manifestly devoid of any facts requiring further consideration".

683 Pietraroia v. Uruguay, Doc.A/36/40, p.153.

684 Doc.A/39/40, pr.584. See Pietraroia v. Uruguay, (Footnote Continued)

conflicting decisions of the EUCM and in customary international law concerning the need to exhaust extraordinary remedies.[685] It might therefore be unwise to take the HRC's statement as a general practice. It simply represents the view of the HRC on the question of exhaustion of an extraordinary domestic remedy in the particular circumstances of one case. There may prove to be "extraordinary remedies" in other legal systems of which the HRC will take the view that exhaustion is required.[686]

(Footnote Continued)
n.686 below. By implication all ordinary judicial, administrative and arbitral remedies must be exhausted.

685 See Mikaelsen, pp.118-121, particularly on the decisions in the Nielsen Case, A.343/57, 2 YBECHR (1958-59) p.412 AT 438-442), and X v. Denmark, A.4311/69, 14 YBECHR (1971) p.280 at pp.316-320. Cf.The decision in the Salem Case, (Egypt v. U.S.), 2 R.I.A.A., p.1161, (1932). See Trindade (1983), n.652 above, pp.89-94.

686 See Pietraroia v. Uruguay, Doc.A/36/40, p.153, pr.12 concerning two exceptional remedies.

(c) Relief From The Duty Of Execution.[687]

4.105 Customary international law placed great importance on an exception to the domestic remedies rule for an injured party who proves the futility of exhausting domestic remedies.[688] The HRC has had a number of occasions on which to consider whether this exception should apply. Indeed, in the HRC's first published admissibility decision the authors argued that in the situation prevailing in Uruguay no local remedies existed. The HRC accepted that there were no effective local remedies and further indicated that in a communication complaining both of the prevailing situation and of an alleged violation of an individuals rights only the latter would be considered.[689]

4.106 The HRC has accepted that special security regimes may render a local remedy ineffective. For example, in Santullo (Valcada) v. Uruguay[690] Uruguay informed the HRC that the remedy of habeas corpus was not applicable under the regime of "prompt security measures" then in operation.[691] Similarly the HRC may accept that the alleged remedy was factually unavailable in the particular case of the alleged victim. In Bleir v. Uruguay[692] the HRC accepted the submission that, "All of the guarantees that could be invoked in penal

---

687 See generally Trindade (1983), n.652 above, ch.2, B and ch.4, II.

688 See Manke, n.652 above, p.645; The Ambatielos Case (Greece v. U.K.) 12 RIAA p.83.

689 R.1/1, (1976-78), Doc.CCPR/C/FS/R.1/Add.1, 2-3, (unpublished), cited in Trindade, n.652 above (1979), p.762.

690 Doc.A/35/40 p.107; S.D. p.43.

691 Ibid., pr.8. Similarly see Lanza and Perdoma v. Uruguay, Doc.A/35/40 p.111, pr.13; Sequeira v. Uruguay, Doc.A/35/40 p.127, pr.3.

692 Doc.A/34/40 p.130; S.D. p.109.

proceedings were irrelevant, because he never appeared before any court; nor was he ever formally informed of the reasons for his arrest".[693] In G.Barbato v. Uruguay[694] Uruguay submitted that G had not exhausted the domestic remedies available to him. However, no details were given of the remedies which could have been invoked in the particular circumstances of the case and it was not specified as to which of the violations could have been effectively remedied within the established military judicial process. The HRC expressed the view that it was unable to conclude that there were remedies available to G which he should have pursued.[695] Thus the communication was held admissible. Subsequently, the State party reiterated its submission and listed seven remedies allegedly available.[696]

The author, G's cousin, rejected the State party's assertions. His submission dealt with each of the alleged remedies and showed that each of them were either "inapplicable", "entirely theoretical and totally ineffective" or "inappropriate". The author then addressed the argument that as certain of the remedies might be applicable at a later stage they could be regarded as remedies which had not been exhausted. The author argued that it was essential to look at the entire procedure and noted that G had been detained for twenty months and that it would be a long time before a first instance decision would be made,

> "Accordingly, to claim that the proceedings must be completed in order to apply for -and exhaust- the remedies that are theoretically available would

---

693 Ibid., pr.2.5.

694 Doc.A/38/40 p.124.

695 Ibid., pr.5.2.

696 Ibid., pr.6.2.

mean postponing action by the Committee for an unacceptable amount of time, particularly since failure to make a decision within a reasonable time is one of the violations that have been reported and one of the most obvious causes of what has happened. In other words, the possibility of instituting unacceptably lengthy proceedings, which is in itself a violation of the Covenant, would make the Government think that it was not subject to the Committee's jurisdiction. That could hardly be the intention of the Covenant".[697]

In its decision the HRC expressed the view that,

> "...the remedies listed by the State party as unexhausted cannot be considered available to the alleged victim in the circumstances of his case. They are either inapplicable de jure or de facto and do not constitute an effective remedy, within the meaning of article 2(3) of the Covenant, for the matters complained of. There are, therefore, no grounds to alter the conclusion reached in the Committee's decision...that the communication is not inadmissible under article 5(2)(b) of the Optional Protocol".[698]

The decision is of particular interest because of the direct reference to the obligations of the States parties to the ICCPR to provide an 'effective remedy' to any person who claims that his rights or freedoms under the ICCPR have been violated (article 2(3) ICCPR).[699] Professor Trindade has argued at length that the drafters of the Covenant envisaged the local remedies

---

[697] Ibid., pr.7.4.

[698] Ibid., pr.9.4.

[699] On article 2 see ch.6 below.

rule as directly related to the State's duty to provide effective local remedies as in article 2(3) ICCPR.[700]

4.107 An example of the legal, as distinct from the factual, unavailability of remedies is the case of Guerrero v. Uruguay.[701] Under the provisions of a legislative act it was not possible to institute a civil action for damages in conjunction with military criminal proceedings. An alternative action for compensation for persons injured by a police operation depended first on determining the criminal liability of the accused. As the accused had been acquitted no civil or administrative suit could be filed to obtain compensation. The HRC was unable to conclude that there were still effective remedies available that could be invoked on G's behalf.[702]

4.108 For remedies to be effective an alleged victim may need legal assistance. In Lanza and Perdoma v. Uruguay[703] the HRC noted that habeas corpus was not applicable and the State party had not shown the remedies available in the particular circumstances of the case.[704] The HRC then added that,

"Moreover, B.W.(L) and A.L.(P) have explained that they had no effective contact with lawyers to

---

700 See Trindade (1983), n.652 above; Ibid., (1979). See also Trindade, Exhaustion Of Local Remedies In International Law And The Role Of National Courts, Archiv Des Volkerrechts (1977-78) pp.333-370. See also pr.4.116 below.

701 Doc.A/37/40 p.137.

702 Ibid., prs.4.2, 6.2, 6.3, 7.2, 7.3, 8.2, 9 and 11.8.

703 Doc.A/35/40 p.111; S.D.p.45.

704 Ibid., pr.13.

advise them of their rights or to assist them in exercising them".[705]

This suggests that the HRC might take the view that when failure to exhaust the remedies available can be ascribed to the failure of the state party to permit,or provide if necessary, legal assistance that will constitute a "special circumstance" which excuses the exhaustion of domestic remedies.[706] This argument might extend to failure to satisfy other requirements of the fair trial guarantee in article 14 ICCPR. Indeed the HRC has expressed the view on the facts of one case that the requirement of effective and available domestic remedies entails that the procedural guarantees for a fair and public hearing by a competent, independent and impartial tribunal must be scrupulously observed.[707] It is submitted that this should not be read so widely as to suggest that all domestic remedies must conform with the requirements of article 14. Article 2(3) ICCPR clearly contemplates administrative and other non-judicial remedies.[708]

---

[705] Ibid.

[706] See also Simones v. Uruguay, Doc.A/37/40 p.174 concerning the failure of a court appointed counsel to make alleged exceptional domestic remedies known to the alleged victim. The HRC noted that they were "exceptional in character" and that, "the officially appointed defence counsel had not invoked them on behalf of (S) although more than a year has passed since the Supreme military court rendered judgement against her. They could not therefore be regarded as having, in effect, been "available" within the meaning of article 5(2)(b) of the Optional Protocol". Cf. Fawcett, p.360, "the failure of the lawyer may, if proved, be a special circumstance excusing compliance with the rule in article 26 (ECHR) provided he has sought and failed to obtain restitutio in integrum", (1987) See also the Artico Case, EUCT, (1980).

[707] Gilboa v. Uruguay, Doc.A/41/40 p.128, pr.7.2.

[708] On article 2 see ch.6 below.

4.109 A State party may be estopped from raising the domestic remedies requirement in certain cases.[709] Thus in Y.L v. Canada[710] the alleged victim had not been informed of the alleged remedy in the original decision complained of, or by his State appointed lawyer.[711] The HRC took the rather strict view that, "The fact that the author was not advised that he could have resorted to judicial review is irrelevant in determining whether the claim of the author was of a kind subject to judicial control and supervision".[712] However, in a joint individual opinion three members of the HRC took the view that Canada was "estopped from asserting that either, procedurally, the author has failed to exhaust local remedies or that, substantively, the requisite guarantees under article 14 (1) of the Covenant have been complied with".[713]

Another interesting point concerning domestic remedies is suggested by the facts of C.A. v. Italy.[714] C.A. had opted for an exceptional administrative procedure rather than the normal court process. That option excluded the latter as a matter of law. It is

---

[709] Cf. Foti, EUCT, (1982); Corigliano, EUCT, (1982); Van Oosterwijk Case, EUCT, (1980). Van Dijk and Van Hoof, p.128.

[710] Doc.A/41/40 p.145.

[711] Ibid., prs.3.1, 7.

[712] Ibid., pr.9.4. In the view of the HRC the provisions in the Federal Court Act did contain provisions to ensure to the author the right to a fair hearing in the situation. Therefore, the communication was inadmissible because the basic allegations did not reveal the possibility of any breach of the Covenant", ibid., prs.9.5, 10.

[713] Doc.A/41/40 p.150 (Graefrath, Fausto Pocar and Tomuschat).

[714] Doc.A/38/40 p.237.

submitted that on these facts the State party could not have relied on the domestic remedies rule.[715]

4.10 The effect of conditions attached to the exercise of remedies was raised in Montero v. Uruguay.[716] M was a Uruguayan citizen resident in West Berlin. She alleged that the ICCPR had been violated because the Uruguayan authorities had refused, without explanation, to renew her passport.[717] M was informed that there was a recourse by way of appeal against the Government decision but that this had to be done in Uruguay. As M had no relatives in Uruguay to represent her the Uruguayan authorities offered her a safe-conduct to travel to Uruguay. M declined the offer because she did not have the financial means to undertake the journey and because her studies would have been unduly interrupted.[718]

The HRC expressed the view that it was unable to conclude that in the circumstances there were effective domestic remedies available to M which she had failed to exhaust.[719] The State party repeated its submission that M was free to return to Uruguay even without a valid passport. M replied that it was the normal procedure for Uruguayan citizens residing abroad to have their passport renewed by Uruguayan consulates, that she had applied to all the appropriate consular posts, and that

---

[715] The decision in C.A. v. Italy is considered in ch.10, pr.10. below.

[716] Doc.A/38/40 p.186.

[717] Ibid., pr.1.2.

[718] Ibid., pr.2.10. Cf. Under the ECHR lack of financial means is not regarded, per se, as a special circumstance which absolves the applicant from exhaustion of domestic remedies, see A.181/56 (1957), 1 YBECHR (1955-57) pp.139-141; A.2257/64, Soltikow v. FRG (1968), 27 C.D. p.1 at pp.27-28.

[719] Ibid., pr.6.1.

the suggestion of the Uruguayan authorities that she travel to Uruguay was "abnormal".[720]

The HRC made no further comment on the matter of the exhaustion of domestic remedies. Again the HRC seems to have avoided a "mechanistic application" of the rule. Presumably the approach of the HRC was that although a possible remedy existed the conditions attached to its use were so onerous, unreasonable and unnecessary in the particular circumstances of M's case that it did not constitute an effective and available remedy. If this is the correct interpretation then it is submitted that it is to be commended.

4.111 The HRC would appear to have adopted the rule that the available domestic remedies must be properly exhausted.[721] This is particularly important because the result in such cases is not merely suspensory but precludes the admissibility of the communication.[722] In N.S. v. Canada[723] the communication concerned N.S.'s dismissal from work allegedly because of his race and religion. N.S. wished to appeal from a decision of the Adjudicator of the Public Service Staff Relations Board to the Canadian Federal Court of Appeal. However, the time limit for filing an appeal had passed. N.S. applied to the court for an extension but this was refused. N.S. submitted that he had exhausted all domestic remedies. The HRC rejected this submission. The HRC noted that N.S. had failed to avail himself of the remedy of appeal in time. Moreover, the communication did "..not disclose the existence of any special circumstances which might have absolved the author,

---

720 Ibid., prs.8.3, 8.4.

721 Cf. Mikaelson pp.131-2; The Ambatielos Case, n.688 above.

722 See R.92(2) discussed in pr.4.19.1 above.

723 S.D. p.19. See also S.H.B. v. Canada, Doc.A/42/40 p.174, pr.7.2 in which the HRC took the view that the author's doubts about the effectiveness of the particular domestic remedies were not warranted and did not absolve him from exhausting them under article 5(2)(b) O.P.

according to generally recognized rules of international law, from exhausting the domestic remedies at his disposal".[724] Therefore, N.S. could not be considered to have exhausted the remedies available to him under Canadian law and the communication was declared inadmissible. In J.R.T v. Western Guard Party[725] the HRC took the view that, "It appears, however, in view of the ambiguity ensuing from the conflicting time limits laid down in the laws in question, that a reasonable effort was indeed made to exhaust domestic remedies in this respect and, therefore, the Committee does not consider that, as to this claim, the communication should be declared inadmissible under article 5 (2) (b) of the Optional Protocol".[726]

4.112 If the HRC do follow this approach the author must ensure that he has properly exhausted available domestic remedies. This will demand, for example, observance of time limits and the correct procedures and formalities of national law, making full use and advantage of the remedies available by pleading the important allegations, calling the necessary witnesses, and making appropriate objections.

4.113 Is is open to the HRC to reverse a decision on non-exhaustion in the light of subsequent information.[727] 4.114 Finally, it is important to note that article 5(2)(b) contains an exception to the rule of exhaustion of domestic remedies, "...where the application of the remedies is unreasonably

---

[724] Ibid., (my emphasis).

[725] Doc.A/38/40 p.231.

[726] Ibid., pr.8 (b). The communication was declared inadmissible on other grounds which are examined in ch.12 below.

[727] See C.F. et al v. Canada, Doc.A/40/40 p.217.

prolonged".[728] The HRC could have expressly relied on this exception in the case of G.Barbato v. Uruguay[729] It was expressly relied upon in Pietroroia v. Uruguay[730] Referring to two remedies of an exceptional nature the HRC commented that it was, "...not satisfied that they are applicable in the present case and, in any event, to require resort to them would unreasonably prolong the exhaustion of domestic remedies".[731] In Hammel v. Madagascar,[732] a judicial decision on H's case was rendered while the HRC was considering the communication on the merits. The HRC expressed the view that as the applications had taken over four years the remedy had been unreasonable prolonged in the sense of article 5(2)(b) of the O.P.[733] The HRC considered and rejected the application of the exception in H.S. v. France[734]. The case concerned a delay of six and a half years in the decision depriving H.S. of his french nationality. The HRC expressed the view that,

> "...the delays in the proceedings in 1984 and 1985 were caused by the author himself. For that reason the Committee is unable to conclude that domestic remedies, which according to both parties, are in progress, have been unduly prolonged in a manner

---

[728] See pr.4.15 above for HRC's discussion on this.

[729] See pr.4.106 above.

[730] Doc.A/39/40 p.153.

[731] Ibid., pr.12. See also Weinberger v. Uruguay, Doc.A/36/40 p.114, pr.11 and Solorzano v. Uruguay, Doc.A/41/40 p.134, pr.5.6.

[732] Doc.A/42/40 p.130.

[733] Ibid., pr.17.

[734] Doc.A/41/40 p.169.

that would exempt the author from exhausting them under article 5(2)(b) of the Optional Protocol".[735]

Accordingly, the requirement of exhaustion of domestic remedies had not been met by the author at the time of the submission and had still not been met. The communication was, therefore, inadmissible.

---

[735] Ibid., pr.9.4.

(d) Does The Exhaustion Rule Apply Where An Application Is Directed Against Legislative Measures Or An Administrative Practice.?[736]

4.115 This question is raised simply because of comparable international practice.[737] As we have already noted the HRC have stated that an individual cannot challenge in abstracto the compatibility of national legislation with the ICCPR. The individual must allege that the legislation has been applied in such a manner, or has produced "adverse effects which directly affect" him, that he has actually been a "victim" of a violation of the ICCPR.[738] An interesting point to note is that on some occasions the HRC have concluded that the questions of violation and of effective remedies can only be properly examined at the merits stage.[739]

A more difficult question for the HRC will be the application of the domestic remedies rule where the communication alleges the existence of an "administrative practice"'. Many of the communications

---

[736] See Trindade (1983), n.652 above, pp.157-158, 187-212; Mikaelson, pp.122-131.

[737] Ibid. Mikaelsen suggests the following summary of the EUCM's approach, "If an individual application is directed against the governing rules of a country in from of legislation or administartive practice tolerated at a high level, the exhaustion rule does not apply unless the legal system of the country concerned offers a possibility to test the legal provisions or the administrative practice concerned against the Constitution of the country, including the Convention if this is incorporated as Constitutional law. If an individual application is directed against an administrative practice tolerated at lower level the Commission will ascertain whether or not the domestic remedies available are effective", p.129.

[738] See prs.4.64-4.81.1 above, in particular Hertzberg v. Finland, pr.4.76.

[739] See e.g. Fals Borda v. Colombia, Doc.A/37/40 p.193, pr.7.2. This approach parallels that under the ECHR.

concerning Uruguay have alleged that the violations concerned result from systematic practices and in response the HRC expressed the view that a "practice" of inhuman treatment existed at La Libertad prison in Uruguay.[740] In none of these views though has the HRC made any comment on the effect of such a practice on the rule of exhaustion of domestic remedies. The question has been considered in the ECHR system most notably in the cases of Donnelly and Others v. United Kingdom[741] and Ireland v. United Kingdom.[742] The jurisprudence which has emerged is rather sophisticated, and has been criticised, but may at least provide some instructive points of reference for the HRC.[743]

---

[740] See ch.9, prs.9.18-9.18.1 below.

[741] A.5577-5583/72, 16 YBECHR p.212 at 262 (1973), 19 YBECHR p.84 (1975). See K.Boyle and H.Hannum, Individual Applications Under The ECHR And The Concept Of An Administrative Practice: The Donnelly Case, 68 AJIL (1974) pp.440-453; ibid., The Donnelly Case, Administrative Practice And Domestic Remedies Under The European Convention: One Step Forward And Two Steps Back, 71 AJIL (1977) pp.316-321.

[742] EUCT, Series A, vol.27 (1978).

[743] See the literature in notes 736, 737 and 741 above.

(e) Domestic Remedies: An Appraisal.

4.116 The placing of the burden of proof as regards the exhaustion of domestic remedies is a matter of great importance to the effectiveness of individual petition systems. It poses the choice between a strict application of the domestic remedies rule accompanied by an onerous burden of proof on the individual concerned or a shared burden of proof which takes account of the factual procedural equality of the individual. Professor Trindade has argued that, "General international law (arbitral and judicial practice) provides ample and strong evidence in support of the sharing or distribution of the burden of proof between contending parties in inter-State litigation".[744] A fortiori this approach should apply in respect of individual applications, "since the local remedies rule per se already favours the much stronger party the Sovereign State".[745] This sharing of the burden of proof has been the practice of the EUCM since the early 1960's.[746]

The relatively small amount of practice of the HRC has been noted above. With the proviso that the matter is a very difficult one, that all its aspects have not yet been considered, and that early approaches must necessarily be treated with some caution, it seems fair to comment that the HRC has taken an individual orientated approach, or at least not a State centred approach. It has avoided placing a heavy onus on the individual and placed the burden of showing that remedies are "available and effective" squarely on the respondent State.[747] This approach is, in general terms,

---

744 Trindade (1983), n.652 above, p.169.

745 Ibid.

746 Ibid.

747 See prs.4.102-4.103 above.

very much in line with that of the EUCM and the EUCT,[748] the IACM,[749] and the United Nations Sub-Commission On The Prevention Of Discrimination And Protection Of Minorities.[750] It represents a sensible, practical approach which recognises the factual procedural inequality which will normally exist between the individual and the State party concerned and takes account of the complimentary undertaking on States parties under article 2(3) ICCPR to provide "effective remedies".[751]

More generally, the practice of the HRC in relation to the exhaustion of domestic remedies may provide some important international law precedents. However, as Professor Bowett has pointed out there is a danger in extrapolating from human rights claims to general international law claims.[752] In particular he notes Professor Trindade's argument that there may well be a duty on State parties to provide local remedies for violations of human rights on the basis of, for example, article 2(3) ICCPR,[753] and comments that,

> "It is doubtful, however, that this can be extended to a more general proposition that a State is under a legal duty to provide local remedies for any

---

[748] See Trindade (1983), n.652 above; and the literature cited in.656 above.

[749] See Trindade, Exhaustion Of Local Remedies In The Inter American System, 18 Ind.JIL (1978) pp.345-351.

[750] See Manke, n.652 above; Trindade (1983), n.652 above, pp.163-168; See also Trindade, Exhaustion Of Local Remedies Under ICERD, 22 Germ.YIL (1979) pp.374-383.

[751] On article 2 see ch.6 below.

[752] Bowett, Book Review of Trindade (1983), n.652 above, 55 BYIL 1984 (1985) pp.268 at p.269.

[753] See Trindade (1979) and (1983), n.652 above.

breach of international law in relation to an alien".[754]

---

[754] Bowett, n.752 above.

Abuse of the Right Of Submission (Article 3 O.P.).[755]

4.117 Although raised by States parties on a number of occasions this ground has rarely operated to render a communication inadmissible.[756] It did so operate in K.L. v. Denmark.[757] There the HRC took into account that a similar complaint from the author had previously been declared inadmissible under the O.P. as devoid of any substantiation;[758] that the second complaint was similarly devoid of any substantiation in facts or law; and that the author had himself indicated that he still intended to pursue further domestic remedies. The HRC concluded that in these circumstances, the submission of the communication must be regarded as an abuse of the right of submission under article 3 O.P.

Anonymous Communications (Article 3 O.P.).[759]

4.118 No communication has been declared inadmissible on this ground. In Carballal v. Uruguay[760] the HRC received no further correspondence from the author subsequent to his original communication. Letters addressed to him by the UN Secretariat were returned as unclaimed. The HRC based its final view on the information in the original communication.[761]

---

[755] See Mose and Opsahl, pp.294-295. On the ECHR see Van Dijk and Van Hoof, pp.60-62.

[756] For submissions of States parties see L.P. v. Canada, S.D. p.21 at p.22 (a); Pinkey v. Canada, D.S. p.95 pr.24-25.

[757] S.D. p.26-27.

[758] For that decision see K.L. v. Denmark, S.D. p.24.

[759] See Brar, n.1 above, pp.530-531. On practice under ECHR see Mikaelsen, p.72; Van Dijk and Van Hoof, pp.59-60.

[760] Doc.A/36/40 p.125, pr.8.

[761] Ibid., pr.8.

F. THE OPTIONAL PROTOCOL: SIGNIFICANCE, APPRAISAL AND PROSPECTS.

(i) THE STATUS OF THE INDIVIDUAL.[762]

4.119 Although the International Convention on the Elimination of Racial Discrimination 1965 contained a provision on communications[763] the O.P. is perhaps of greater significance because it recognises a right of individual petition in a universal instrument covering a wide range of civil and political rights.Commentators have described the O.P. as being revolutionary in terms of international law.[764] Over a decade of practice under the O.P. has demonstrated the feasibility of individual petition systems at the international level as the ECHR has at the regional level.[765] In this respect the O.P. represents a signal contribution to the recognition of the individual as a proper subject of international law.[766] Indeed, in theory at least, the O.P. represents an advance on the ECHR because the ECHR was intended primarily as a more general 'public ordre' guarantee than as providing individual remedies.[767]

---

[762] See ch.1, pr.1.1 above.

[763] See article 14 ICERD. The provision did not enter into force until 3 Dec., 1982. See Reports Of The CERD Doc.A/38/40 p.7-13 (1983), Doc.A/42/40 p.159 (1987).

[764] Mose and Opsahl, text to n.813 below.

[765] See F.Jacobs, The European Convention On Human Rights, p.272.

[766] See n.262 above.

[767] See generally, A.H.Robertson, Human Rights In Europe, ch.2 (2d, 1977).

(ii) THE HRC UNDER THE O.P.

4.120 If the examination of communications by the HRC was to have credibility and be potentially effective then this task had to be carried out with objectivity, fairness and procedural due process. There are a number of features of the O.P. that can be identified as affording credibility to the HRC in its work under the O.P.[768] Firstly, the members of the HRC are "independent experts", rather than governmental representatives.[769] Practice has shown this to be a fundamental prerequisite for effective human rights organs.[770] Secondly, the HRC has a more secure existence in that it was established by a Treaty rather than a Resolution.[771] Thirdly, the HRC's mandate is defined by the O.P. and the legal norms it is to interpret and apply are established by the ICCPR. A major problem for United Nations human rights bodies conducting inquiries has been the lack of a defined set of legal norms against which to evaluate the

---

[768] See generally, Ramcharan, (ed.), n.218 above; Cohn, ibid.; F.Ermacora, International Enquiry Commissions In The Field Of Human Rights, I HRJ (1968) pp.180-218; Ibid., United Nations And Human Rights In Chile, I HRR/RDH (1976) pp.145-156; T.F.Franck and H.S.Fairley, Procedural Due Process In Human Rights Fact-finding By International Agencies, 74 AJIL (1980) pp.308-345; Theo.C.Van Boven, Fact-Finding In The Field Of Human Rights, 3 Isr.YBHR (1973) pp.93-117; W.Miller, United Nations Fact-finding Missions In The Field Of Human Rights, Australian YBIL (1970-73) pp.40-50.

[769] See ch.2 above.

[770] Cf. The EUCT, EUCM, IACM, IACT, CERD, CESCR, Committee Against Torture, Sub-Commission On The Prevention Of Discrimination And the Protection Of Minorities, are all composed if independent experts. THe HRCion, the most controversial and criticized international human rights body, is composed of governmental representatives. See Tolley, The UN Human Rights Commission, (1987).

[771] Cf. the new Committee on Economic, Social and Cultural Rights which is solely based on an ECOSOC Resolution. See Alston, and Alston and Simma in ch.1, n.108 above.

facts as determined by them.[772] Fourthly, the O.P. is not open to the criticism of being a "pre-judging" resolution which often establish international fact finding bodies.[773] Fifthly, the optional nature of the O.P. should protect the HRC from charges of political selectivity and "ad-hocery" and thus avoid the development of alleged "double standards" in the selection of cases to consider.[774] Sixthly, although the HRC's consideration and examination of communications is conducted in private its final "views" are published.[775] Thus the damaging secrecy and excessive confidentiality of procedures like that under ECOSOC Resolution 1503 (XLVIII) are avoided.[776]

Thus the HRC has many distinct advantages in terms of the treaty status of the O.P. and in terms of the nature of the HRC as a body, its mandate and the defined norms with which it is to operate. Other elements of the HRC's work examined above, for example, matters of access, admissibility and form of evidence, the burden and standard of proof, the approach to the

---

[772] See the literature in n.768 above.

[773] Ibid.

[774] This is one of the principal criticisms levelled at the United Nations and at the HRCion in particular, see Tolley, n.770 above, ch.9; Franck, Of Gnats And Camels: Is There A Double Standard At the United Nations? 78 AJIL (1984) pp.811-833, which also appears in Franck's book, Nation Against Nation: What Happened To the UN Dream And What The U.S. Can Do About It, (1985).

[775] The admissibility decisions and views are initially notified in press releases which are issued simultaneously in Geneva and New York. They are available on request. The decisions and views are included as appendices in the HRC's Annual Reports. A volume of selected decisions has been published and another is under preparation. See pr.4.124 below.

[776] See Tolley, n.770 above, ch.4; Bossuyt, n.614 above.

non-cooperation of some States parties, legal representation and legal aid, the nature and scope of the HRC's views, also have an important bearing on the credibility of the O.P. process. In general terms the HRC has proceeded cautiously on the basis of consensus. It has stressed the fundamental importance of individuals having access to it under the O.P. It appears to have taken a liberal approach to the admissibility of evidence. It has recognised the factual inequality in evidential terms between the author and the State and adopted an approach to the burden of proof which has taken account of this. It has refused to allow the non co-operation of a State party to defeat the object and purpose of the O.P. by effectively having an expression of views by default in such cases. Above all the HRC has consistently stated that it operates in accordance with the principle of "equality of arms".

4.121 The HRC has effectively understood 'views' as meaning a decision (or determination) on the merits.[777] Those views, both at admissibility and merits stages, have incorporated substantive interpretations of the provisions of the ICCPR and the O.P. As the following chapters will illustrate the clarity and legal precision of some of the HRC's views has been open to criticism but to some extent this may be due to the initial caution of the HRC under a new procedure and its practice of operating on a consensus basis. The necessity for consensus inevitably reduces clarity and precision even if provision exists for the appending of individual opinions. Perhaps the most surprising aspect of the HRC's final views has been the clear and specific obligations spelt out in them for the State party concerned.[778] A State party is left in little or no

---

[777] See prs.4.37-4.43 above.

[778] See pr.4.40 above.

doubt as to the necessary remedial action which may include, for example, amending legislation. The experience of the HRC in its consideration of communications under the O.P. can and has assisted it in its formulation of general comments under article 40(4) ICCPR. Such assistance can be gained both from the interpretation of the ICCPR in specific, concrete situations and in the revealing the absence of procedural safeguards necessary to prevent human rights violations.

4.122 As noted when the HRC discussed the issue a majority of the HRC indicated that they do not interpret the HRC's role as necessarily ending with its expression of views.[779] The HRC accepted the possibility of reconsideration of communications in exceptional circumstances and have now taken such action in respect of decisions on admissibility.[780] The HRC also stated that they have a continuing interest in any action taken by the State party in consequence of the HRC's expression of views. This decision is not only important in itself in the absence of any higher body to supervise implementation of the obligations on a State party, but also because of the approach to interpretation on which its is based. That approach to interpretation follows the precedent of other decisions of the HRC that were not expressly authorised by the ICCPR or the O.P., for example, that on interim measures.[781] Such decisions have been taken on the basis that the HRC believed that, certain appropriate action reasonably open to it, or was not expressly prohibited.[782] Such an approach to

---

[779] See pr.4.41 above.

[780] Ibid.

[781] See pr.4.10 above.

[782] See Mose and Opsahl, pp.276-280.

interpretation allows the HRC to develop practices and procedures designed to secure the object and purposes of the ICCPR and the O.P.

4.123 It has been argued by Mose and Opsahl that it is open to the HRC to adopt an active, conciliatory or mediatory function to bring about some kind of friendly settlement between the State party and the alleged victim.[783] They argue that the O.P. itself envisages some kind of settlement after admissibility because article 4(2) O.P. refers to the obligation of the State party to clarify, "the remedy, if any, that may have been taken by the State". Their view is that "remedy" cannot refer to existing domestic remedies because they must already have been exhausted under articles 2 and 5(2)(b) O.P. "It rather suggests that a State party which has been faced with an admissible claim, and perhaps has conceded some justification for it, may already have taken action to resolve it by way of remedying the situation".[784] They further argue that it "would be preferable and not contrary to the Protocol for the Committee to show some initiative at the stage of the merits...It should not be seen as incompatible with the Committee functions to suggest, formally or informally, that it is at the disposal of the parties in order to reach a friendly settlement".[785]

The authors' argument that "remedy" in article 4(2) O.P. cannot mean domestic remedies is questionable bearing in mind Rule 93(4) of the HRC's Rules which allow it to review a decision declaring a communication admissible in the light of further explanations or statements from the State party under article 4(2)

---

783 Ibid., pp.321-322.

784 Ibid., p.321.

785 Ibid., pp.321-322.

O.P.[786] Nonetheless, their general argument that the HRC could develop practices and procedures directed to the securing of friendly settlements is sound and sensible. Whether members of the HRC would be willing to take such steps will depend on their approach to the interpretation of the O.P. The present consensus practice would prevent such a development if there is opposition to it within the HRC. However, even those members who are opposed to any follow-up action by the HRC after its expression of views might accept that attempts to secure friendly settlements comes within their conception of the proper role of the HRC under the O.P. Unfortunately, it appears that no proposals on these lines have been made and no public discussion of this matter has taken place in HRC meetings.

4.124 As there are no enforcement or supervisory mechanisms expressly envisaged by the O.P.- and none have been developed in practice - the pressure to observe the HRC's views must primarily come from their inherent authority as emanating from an independent body's objective assessment and from the accompanying publicity. Unfortunately, effective publicity for the HRC's work has been sadly lacking.[787] In part this no doubt stems from the fact that the work itself is carried out confidentially, in camera and without oral hearings. It must also be observed that, ironically, the absence of overt politicization in the HRC renders it less likely to attract national and international publicity.[788] As a matter of practice it seems fair to note that the absence of United States participation

---

[786] See pr.4.20 above.

[787] The Council of Europe has a highly developed publicity system for the work of the EUCM and the EUCT.

[788] By contrast the HRCion gets a great deal of national and international publicity.

deprives the HRC of the national and international publicity that inevitably seems to focus on any U.S. involvement at the international level. Even within legal circles relatively scant attention has been paid to the actual practice of the HRC under the O.P. although this is now increasing.

4.125 The members of the HRC have consistently emphasised the need for greater publicity for all aspects of its work.[789] The Bureau of the HRC have met with the Director of the Information Service at Geneva to discuss ways of ensuring better publicity for the HRC and for the O.P. Press conferences have been held for these purposes. An essential element of publicity at the international level is the availability of published material. Even within a confidential procedure the EUCM has shown that it is possible to publish a limited amount of information concerning communications. The greater the availability of published information the more likely the procedures concerned are to attract academic, professional, non-governmental, national and international attention. The situation as regards the O.P. is improving in this respect particularly with the publication of a volume of selected decisions in 1985.[790] A second volume is in preparation.[791] Recent academic publications are increasingly referring to decisions under the O.P.[792] Similarly there is some evidence that some of the HRC's views have been

---

[789] See ch.2, pr.2.9 above.

[790] See n.1 above.

[791] This will cover the HRC's work up to its 28th session.

[792] See e.g., B.G.Ramcharan, The Right To life In International Law (1985); N.Rodley, The Treatment Of Prisoners In International Law (1987); H.Hannum, The Right to Leave And Return In International Law And Practice (1987).

influential in the States concerned and have attracted national publicity.[793]

There can be no doubt, however, that unless steps are taken to afford much greater publicity to the work of the HRC under the O.P. within the United Nations system, in national and international media, in national and international governmental and non-governmental institutions, then no matter how objective and authoritative the HRC's views the dearth of publicity for them will render them ineffective except as regards the most co-operative and committed of States parties.[794] It is a defect of the O.P. that there is no specific obligation on States parties to give publicity to it. Finally, as regards publicity, the best publicity for the O.P. would of course would be its ratification by an increasing number of States parties to the ICCPR. Recommendations of the Human Rights Commission and the General Assembly along these lines must be accompanied by concerted pressure from national and international human rights bodies.[795]

4.126 In general terms this chapter has asserted that whatever the features of an international petition system its fate will ultimately be determined firstly, by the approach and attitude of the implementation body and secondly, by the co-operation of the States parties concerned. With respect to the first determinant, though the work under the O.P. is still at a relatively early

---

[793] See A.Bayefsky, The Human Rights Committee And The Case Of Sandra Lovelace, 20 Can.YIL (1982) pp.244-266. Views of the HRC also appear to have attracted national publicity in Uruguay and Colombia.

[794] A number of States have not co-operated with the HRC under the O.P.

[795] See e.g., HRCion Resn.1986/17, HRCion, Report of the 42nd session, ECOSOC OR, 1986, Supp.2, p.59; G.A.Resns.41/32 (3 Nov. 1986), 41/119, 41/120 and 41/121 (4 Dec. 1986).

stage, it is submitted that on the basis of the foregoing examination the HRC can be commended for having adopted a positive approach and have fashioned a practicable and functional procedure. Though there are undoubted limitations in adopting a consensus approach the degree of consensus apparent in the HRC is remarkable in a universal body.[796] With time, patience, the continued cautious development of practices and procedures, continued consensus, and increased publicity, there can be at least some hope that the O.P. can develop into an effective counterpart on the universal level to the established regional systems.

(iii) THE EFFECTIVENESS OF THE O.P. FOR INDIVIDUALS.

4.127 The ultimate concern of an alleged victim is of course with the observance of the HRC's views in an individual case rather than with the procedural merits of the O.P. system. It must be frankly admitted that compliance with the HRC's views by States parties has been disappointing. However, to make an informed appraisal it is important to put the situation into proper perspective.

4.128 As regards interim measures there have been some occasions on which States parties have complied with the HRC's views. This has had direct results for the individual concerned in terms of them being accorded medical treatment or not being tortured or executed.[797] The interim measures indicated by the HRC are non-binding as a matter of law and depend totally on the co-operation and good faith of the State party concerned. Publicity might well add to their

---

[796] On concensus see ch.2, pr.2.7 above. A more cynical view might note that the co-operation of experts from Eastern Europe is risk free in terms of Eastern European states who are not parties to the O.P.

[797] See pr.4.10 above.

effectiveness although HRC might think it could achieve more on a confidential basis. As a matter of contrast it is interesting to note that the record of compliance by Contracting parties under the ECHR is notably good[798] while the record of the ICJ has been rather poor.[799]

4.129 The State party concerned in the vast majority of the HRC's final views has been Uruguay. The degree of co-operation afforded by the Uruguayan government has varied from minimal to non-existent,[800] although there was full cooperation by the new democratic government in Uruguay in the HRC's most recent decision.[801]Moreover, there is no evidence that any of the HRC's final views were observed prior to the installation of the new democratic Government in March 1985. Representatives of the new Government appeared before the HRC and promised co-operation both with respect to the reporting process and the O.P. procedure. The new Government released many political prisoners including persons found by the HRC to be victims of human rights violations. The situation in Uruguay prior to March 1985 was characterized by a total breakdown of law and order. On that basis it can be argued that it gives a false and distorted impression of the effectiveness of the final views of the HRC.[802] It would be a gesture of faith in the HRC, and probably

---

798 See Van Dijk and Van Hoof, pp.57-58, 130. See N.Price, Human Rights, 'Death Row', And Administrative Remedies, 34 ICLQ (1985) pp.162-167.

799 See Schwarzenberger, International Law - International Courts, vol.IV, pp.527-554. See also G.Naldi, Case Concerning The Frontier Dispute Between Burkina Faso And Mali: Provisional Measures Of Protection, 35 ICLQ (1986) pp.970-975.

800 See prs.4.27-4.36 for the approach of the HRC.

801 Stella Costa v. Uruguay, Doc.A/42/40 p.170.

802 Similar comments might apply with respect to the situation in Colombia.

a matter of obligation under the O.P., for the new Uruguayan government to comply with the HRC's final views, or at least those expressed after March 1985 but concerning events before that time.[803] There has to date been no evidence from Uruguay that it has taken such steps.

4.130 If the disappointing compliance record of Uruguay can perhaps partly be explained by the abnormal situation there the same cannot be said of other States that have either not co-operated with the HRC or have not complied with the HRC's final views. These States include Madagascar, Zaire, Suriname.

4.131 There is, however, some evidence that States parties are willing to co-operate with the HRC in its examination of communications and to observe its final views. States which have co-operated in the examination of communications include Canada, France, Italy, Norway, Mauritius, Finland, Jamaica, Denmark, Netherlands, Sweden.

4.132 Three views in particular are important in showing that the HRC's final views can be influential and given effect to. Firstly, in Lovelace v. Canada,[804] the HRC expressed the view that Canada had violated article 27 ICCPR in denying Lovelace the right to reside on an Indian reservation. Subsequently Canada informed the HRC that it had taken substantial steps towards amending the relevant legislation.[805] Although a Canadian commentator had expressed doubts as to whether the steps taken by the Canadian government were sufficient there is at

---

[803] Cf. the recent decision of the Iran-United States Claims Tribunal in Short v. Islamic Republic Of Iran (1987), noted in 82 AJIL (1988) pp.140-143.

[804] Doc.A/36/40 p.166.

[805] Doc.A/38/40, Apx.XXXI.

least a strong element of respect and co-operation with the HRC.[806] Secondly, the Mauritian Women case provides the clearest example of a State party taking measures in consequence of the HRC's final views.[807] The response of Mauritius was to amend the two pieces of legislation concerned so as to remove the discriminatory effect of those laws on the grounds of sex.[808] Thirdly, it is important to note the response of the Government of Finland in Hartikainen v. Finland[809] Although the HRC did not find a violation of article 18(4)[810] of the Covenant in the application of the relevant Finnish legislation it did note that certain difficulties had arisen in giving effect to those provisions but hat it believed that appropriate action was being taken to resolve the difficulties.[811] The Finnish government subsequently informed the HRC of an amendment to the relevant Statute and further measures taken to solve the problems noted by the HRC.[812] Such a response is to be highly commended.

---

[806] See Bayefsky, n.793 above.

[807] See pr.4.75 above and ch.6 below.

[808] Doc.A/38/40 Apx.XXXII. Cf. the response of the U.K. to the judgement of the EUCT in Abdulaziz, Cabales and Balkandales Case (1985) which was to remove the advantages enjoyed by foreign wives and fiancees, see Statement of Changes in Immigration Rules, Parliamentary Papers, 1985, HC, Paper 503.

[809] Doc.A/36/40 p.147.

[810] Article 18 (4) provides, "The States parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions".

[811] Doc.A/36/40 p.147 pr.10.5.

[812] Doc.A/38/40 Apx.XXXIII.

4.133 The most authoritative review of the O.P. to date concluded that,

> "In principle it is revolutionary. In practice so far, it has had only limited, nearly negligible effects. The Covenant is a great document. Yet the committee is a very modest entity for its implementation, and the Protocol does not give it much additional power. Despite all polite official comments about its importance, which reflect the overwhelmingly persuasive strength of the ideas of the Covenant rather than the realities which the Committee is facing, the Committee lacks support, publicity, and resources. Public opinion is hardly aware of it. The Protocol will only become effective if the Committee does. Both depend on being used, and being given means to work with, including assistance by a permanent Secretariat.
> ..The fact that only few countries have accepted it, usually the ones with a record which gives them relatively little fear from individual complaints, is sometimes mentioned as a reason to be cautious. The countries with the most real problems are, however, likely to remain outside the reach of the Protocol in the all-foreseeable future. The Committee should not look to them, or what is acceptable to them, when establishing its own patterns and standards...The procedures under the Protocol can no doubt be developed and improved. But the measure of its success should be the degree to which the Committee is able to convince and influence States, rather than condemn and expose them".[813]

To an extent it is important that optional Protocol is being kept alive as in the final analysis, though it is

---

[813] Mose and Opsahl, pp.329-331.

of little comfort to victims of human rights violations, progress in the international protection of human rights is likely to be identified over decades rather then years.[814] The broader significance of the Protocol in terms of the status of the individual in international law should also not be overlooked. As Prounis has commented,

> "The Human Rights Committee has not yet ushered in a new era in the observance of human rights. It neither provides an efficient forum for the vindication of individuals' human rights, nor addresses the remedial paradox of human rights violations. It does, however, stand as a historic first step towards providing a greater role for the individual in promoting protection of his or her rights. With a little initiative by the committee members, the system created under the Optional Protocol could develop further".[815]

---

[814] An assessment of the first decade of experience under the ECHR would not have suggested its present success.

[815] Prounis, n.1 above, p.118.

5.1 ARTICLE 1.[1]

1. All peoples have the right to self-determination. By virtue of that right they freely determine their

---

[1] Cf.Arts.1, 55 U.N. Charter; ICESCR Art.1; AFR Arts.19 and 20. For summaries of the drafting history of article 1 see ch.1, n.134 above; Bossuyt, 'Guide', pp.19-48. There is an extensive literature on the right to self determination. Particularly useful are Y.Alexander and R.A.Friedlander,(eds.), Self-Determination: National, Regional and Global Dimensions, (1980); A.K.Ahmed, Analysis Of The Decisions Of The Committee On Human Rights, pp.10-13, (LLM.thesis, London); K.N.Blay, Self-Determination Versus Territorial Integrity In Decolonization Revisited, 25 Ind.JIL (1985), pp.386-410; L.C.Buchheit, Secession:The Legitimacy of Self-Determination,(1978); A.Cassese, The Self- Determination of Peoples, in Henkin, (ed.), The International Bill Of Rights - The International Covenant on Civil and Political Rights, pp.92-113, (1981); L.Chen, Self- Determination As A Human Right, in M.Reisman and B.Weston (Eds.), Towards World Order And Human Dignity, pp.198-261, (1976); J.Crawford,The Creation Of States In International Law, pp.84-118, 219-27, 257-68, 335-83, (1979); A.Cristescu, The Right to Self-Determination: Historical and Current Development on the basis of United Nations Instruments, U.N.Doc.No.E/CN.4/Sub.2/404/Rev.1, (1981), U.N.Sales No.E.80.XIV.3; J.Fawcett, The Role Of The United Nations In The Protection Of Human Rights - Is It Misconceived?, in A.Eide and A.Schou (eds.), International Protection Of Human Rights, pp.95-101 and 282-288, (1968); T.M. Franck and P.Hoffman, The Right Of Self-Determination In Very Small Places, 8 N.Y.U.J.I.L.P. (1975-76) pp.331-386; H.Gros Espiell, The Right To Self-Determination: Implementation of United Nations Resolutions, (1980), U.N.Sales No.E.79.XIV.5; A.Kiss, The Peoples' Right To Self-Determination, 7 HRLJ (1986) pp.165-175; S.Morphet, The Development of Article 1 of the Human Rights Covenants, Paper presented to Conference on Foreign Policy And Human Rights, (Southampton Univ., March, 1987); K.J.Partsch, Fundamental Principles of Human Rights, Self-Determination, Equality and Non-Discrimination, in K.Vasak, (ed.), P.Alston, (rev.ed.), The International Dimensions Of Human Rights, Vol.I, pp.61-68, (1982); M.Pomerance, Self-Determination In Law and Practice, (1982); M.N.Shaw, Title To Territory In Africa: International Legal Issues, (1986); M.Rafiqul Islam, Use Of Force In Self-Determination Claims, 25 Ind.JIL (1985-86), pp.424-447; A.Rigo Sureda, The Evolution of the Right of Self- Determination: A

(Footnote Continued)

political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation,based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right,in conformity with the provisions of the Charter of the United Nations.

Introduction.

5.2 The concept of self-determination has been one of the dominant political forces of the twentieth century.

(Footnote Continued)
Study of United Nations Practice (1973); E.Suzuki, Self-Determination And World Public Order, 16 Va.JIL (1976), pp.781-862; U.O.Umozurike, Self-Determination in International Law,(1972); United Nations Action In The Field Of Human Rights, Ch.III, (1984); V.Van Dyke, Human Rights, The U.S., And The World Community, ch.5, (1970); R.C.A.White, Self-Determination: A Time For Re-Assessment, 28 NILR (1981), pp.147-170; M.Whiteman, Digest Of International Law, vol.5, pp.38-87, vol.13, pp.701-768.

The principal international instruments on political and economic self-determination are The Declaration On The Granting Of Independence To Colonial Territories And Peoples,G.A.Resn.1514 (XV), 15 UN GAOR Supp.66, p.66, Doc.A/4684,(1960); G.A.Resn.1541, 15 UN GAOR, Supp.16, p.29, Doc.A/4684, (1960); The Resolution On Permanent Sovereignty Over Natural Resources, G.A.Resn.1803 (XVII),17 UN GAOR Supp.17, p.15, Doc.A/5217,(1962); The Declaration On Principles Of International Law Concerning Friendly Relations and Co-Operation Amongst States In Accordance With The Charter Of The United Nations, G.A.Resn.2625 (XXV),(1970); The Charter Of Economic Rights And Duties Of States, G.A.Resn.3281, 29 UN GAOR Supp.No.31,p.50, Doc.A/9631,(1974).

It did not expressly appear in the Covenant of the League of Nations (1919) but by 1945 the pressure for the inclusion of the "principle" of self-determination in the United Nations Charter proved irresistible. As we noted in chapter one the inclusion of a "right" of self-determination in the international covenants was the subject of prolonged controversy.[2]

Article 1 is not covered by the non-derogation provision in Article 4(2).[3] It has been the subject of a General Comment under Article 40.[4] A small number of States have made reservations to Article 1.[5] Article 1 has generally been considered separately but on

---

[2] See ch.1 pr.1.22-1.23 above.

[3] Nicaragua is the only State to have derogated from article 1. See Human Rights - Status Of International Instruments, p.64, (1987). A number of HRC members commented on the derogation, see SR 422 pr.17 (Al Douri), pr.38 (Dimitrijevic). The State representative explained that the decree relating to the state of emergency, instead of listing the rights and guarantees that had been suspended because of the state of emergency, had included all the provisions of the Covenant except those relating to guarantees which were not subject to suspension. He acknowledged that the procedure was mistaken and was due to his Governments inexperience in such matters, SR 429 pr.33. Revised Declarations did not include derogation from article 1, Human Rights - Status, above, pp.65-68. Notwithstanding that Article 1 is derogable under the terms of the Covenant it would be impermissible to derogate from the right of self-determination if self-determination is jus cogens. See H.Gros Espiell, Self-Determination and Jus Cogens, in A.Cassese, (ed.), n.1 above; Pomerance, n.1 above, Ch.IX.

[4] G.C.12(21), U.N.Doc.A/39/40, Ax.VI. Also in Doc. CCPR/C/21/Add.3. For the HRC's discussions see SR 476, 478, 503, 504, 513, 514, 516, 537. The English version of the G.C. was adopted at the HRC's 516th meeting.The other language versions were adopted at the 537th meeting.

[5] See Human Rights - Status, n.3 above. States making reservations or interpretative declarations have included the U.K. and India.

occasions it has been linked with Article 25 which deals with certain political rights of citizens and Article 19 concerning freedom of opinion and expression.[6]

5.3 The HRC have stressed the importance of Article 1 in a General Comment,

"In accordance with the principles and purposes of the Charter of the United Nations, article 1 of the International Covenant on Civil and Political Rights recognises that all peoples have the right to self-determination. The right of self-determination is of particular importance because its realization is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights. It is for that reason that States set forth the right of self-determination in a provision of positive law in both Covenants and placed this provision as article 1 apart from and before all of the other rights in the two Covenants".[7]

---

[6] See e.g., SR 128 pr.19 (Tomuschat on Chile). For the text of Article 25 see Ax.I.

[7] G.C.12(21), pr.1.(my emphasis). Mr.Ndiaye was concerned at the attribution of the importance of article 1 to its place in the Covenant. For comments by individual members on the importance of Article 1 see, e.g., SR 294 pr.4 (Bouziri on Portugal).During the preparation of the G.C. there were discussions on whether to include a reference to the U.N. Charter, whether self-determination was a principle or a purpose of the Charter, and whether it was an individual or a collective right. Note the U.K. declaration in respect of article 1, "[T]he Government of the United Kingdom declare their understanding that, by virtue of article 103 of the Charter of the United Nations, in the event of any conflict between their obligations under article 1 of the Covenant and their obligations under the Charter (in particular, under articles 1, 2 and 73 thereof) their obligations under the charter shall prevail", Human Rights - Status, n.3 above, p.46. In response to questioning from HRC members, SR 594 prs.34-46, the U.K. representative commented that, "[H]e

(Footnote Continued)

The importance attached here by the HRC contrasts markedly with the minimal information provided by States parties in their national reports.[8] As the HRC commented,

> "Although the reporting obligations of all States parties include Article 1, only some reports give detailed explanations regarding each of its paragraphs. The Committee has noted that many of them completely ignore Article 1, provide inadequate information in regard to it or confine themselves to a reference to election laws. The Committee considers it highly desirable that States parties' reports should contain information on each paragraph of Article 1".[9]

5.4 The HRC's approach to each paragraph of Article 1 is outlined below. A few general issues concerning self-determination raised by the HRC members must briefly be noted first. Members have questioned State representatives on the relationship between self-determination and the proposed New International Economic Order[10] and the Right to Development.[11] Similar

---

(Footnote Continued)
would, however, note unofficially that the reservation seemed to do no more than what was already provided in the Charter, namely, that in any conflict between obligations under the Charter and any other international obligations, those under the Charter would in any event take priority", SR 594 pr.50.

[8] Many of the early national reports included no information on article 1.

[9] G.C.12(21), pr.3. For critical comments by individual members see, e.g., SR 294 pr.4 (Bouziri on Portugal).

[10] See, e.g., SR 214 pr.54 (Graefrath on Senegal), reply at SR 217 pr.46; SR 476 pr.17 (Hanga on Iran). On the New International Economic Order see K.Hossain, (ed.), Legal Aspects Of The New International Economic Order (1980); A.Cassese, International Law In A Divided World, ch.13 (1986).

(Footnote Continued)

questions have related to the relationship between self-determination and certain general principles of international law, for example, non-intervention, non-interference,and the prohibition on the use of force.[12] For instance,the Iranian representative was asked how the advocacy of the export of revolution could be reconciled with article 1 and the principle of non-interference in the internal affairs of States.[13]

5.5 In its General Comment the HRC referred to, "Other international instruments concerning the right of all

---

(Footnote Continued)

11 See, e.g., SR 440 pr.9 (Prado-Vallejo on France). See the Declaration On The Right To Development, G.A.Resn.41/128 (4 Dec, 1986) noted in 38 Rev.ICJ (1987) pp.53-56; Report of the Secretary-General on The Realization In All Countries Of Economic And Social Rights And On A Human Right To Development In Relation To Peace And The Requirements Of A New International Economic Order, U.N.Doc.E/CN.4/1334 (1979); S.K.Baruah, (Rapporteur), The Right To Development And Its Implications For Development Strategy, Human Rights And Development Working Papers No.3, (1979); C.G.Weermantry, The Right To Development, 25 Ind.JIL (1985-6), pp.482-505; G.Abi-Saab, Analytical Study On Progressive Development Of The Principles And Norms Of International Law Relating To The New International Economic Order, Doc.A/39/504, Add.1 (23 Oct.1984); F.Snyder & P.Slinn, International Law Of Development: Comparative Perspectives (1987). "In the post-colonial era the rights to self-determination manifests itself as the right to development", Graefrath, ch.6, n.1 below, p.13.

12 See,e.g., SR 98 pr.23 (Mora-Rojas on Yugoslavia), reply at SR 102 pr.28; SR 214 pr.11 (Vincent-Evans on Senegal); SR 282 pr.9 (Sadi on Tanzania); SR 468 pr.25 (Prado-Vallejo on El Salvador), reply at Ibid., pr.36; SR 421 pr.1 (Hanga on Nicaragua). See Military And Paramilitary Activities In And Against Nicaragua (Nicaragua v. U.S.), Merits, 1986 I.C.J. Rep. p.14.

13 See SR 365 pr.46 (Al Douri on Iran). There was no direct response from the State representatives, SR 368. See also in the context of self-determination and revolution SR 472 pr.2 (Movchan on El Salvador);SR (Tarnopolsky on Suriname); SR 366 prs.24-27 (Graefrath on Iran).

peoples to self-determination in particular the Declaration on Principles of International Law concerning Friendly Relations and Co-Operation Amongst States in accordance with the Charter of the United Nations".[14] This in an interesting reference because it has been argued that the concept of self-determination in the 1970 Declaration is much narrower than that in the Covenant.[15] However, the mere reference by the HRC in its General Comment to the 1970 Declaration could not sensibly be taken to suggest either that the two instruments are of the same scope or that the scope of the ICCPR has been narrowed by the 1970 Declaration. A narrower view that the right of self-determination does not apply to a sovereign independent State or to a section of the people or nation but only to a people under foreign or alien domination has been argued for by India and Sri Lanka who have made reservations or interpreted article 1 to this effect.[16] These views were criticised by some HRC members as being too restrictive[17] and formal objections were made by France,

---

[14] G.C.12(21), pr.7. See G.Arangio-Ruiz, The United Nations Declaration On Friendly Relations And The System Of The Sources Of International Law, pp.131-141, (1979).

[15] See Cassese in Henkin (ed.), n.1 above, who suggests that the 1970 Declaration indicates to the HRC how article 1(3) should be interpreted, p.110, and Cassese, Political Self-Determination - Old Concepts and New Developments, in A.Cassese,(ed.), U.N.Law/ Fundamental Rights, pp.137-165, (1979).

[16] Human Rights -Status, n.3 above, p.9 (India); Doc. CCPR/C/14/Add.6, pr.2.

[17] See SR 472 prs.32 (Bouziri) and 38 (as corrected) (Graefrath), SR 477 pr.67 (Bouziri on Sri Lanka); reply at SR 477 prs.51, 71; Doc. A/39/40, pr.269 (India). Cf. the comments of the Indian representative in 1952 to the effect that the field of application of the the draft self-determination article was wider than the colonial situation, Doc.E/CN.4/SR 399 pr.4. Note

(Footnote Continued)

F.R.G. and the Netherlands.[18] When faced with such interpretations or reservations it would be particularly helpful in determining the scope of the ICCPR if the HRC was to express a Committee view on its validity rather than individual members simply expressing isolated views that other members may or may not agree with.[19]

Finally, we must note that the HRC has stated that it,

> "Considers that history has proved that the realization of and respect for the right of self-determination of peoples contributes to the establishment of friendly relations and co-operation between States and to strengthening international peace and security".[20]

Article 1,paragraph 1.

5.6 The questions most consistently put to State representatives have concerned how the right of peoples to self-determination was understood, promoted and given effect.[21] Was self-determination seen as a continuing right or did a people achieve self-determination once

---

(Footnote Continued)
also the view expressed by Professor Graefrath in an article that self- determination keeps the way open for the next step of the emancipation of mankind, i.e., the prohibition of exploitation by capital, ch.6, n.1 below, p.12.

[18] See Doc.CCPR/C/2/Add.1, pp.37-39.

[19] For an example of the view of an individual member note the following comment by Sir Vincent-Evans during consideration of the report of Sri Lanka, "Article 1 of the Covenant clearly stated that all peoples had the right of self-determination. He took the view that reference to "peoples" meant the whole of the people within the independent sovereign people, including minority sections of the population. The right of self-determination was a right of a continuing character...", SR 477 pr.68.

[20] G.C.12(21), pr.8.

[21] See, e.g., SR 392 pr.15 (Bouziri on Iceland); SR 222 pr.4 (Sadi on Colombia).

and for all upon attaining independence or with the uniting of the constituent political entities of the State?[22] Was it possible to argue for changes in the present constitutional structures and political processes of the State? For example,the representatives of the German Democratic Republic and the Democratic Republic of Korea were questioned as to the possible reunification of Germany[23] and Korea respectively.[24] Another matter frequently raised has been the possibility of advocating and achieving secession.[25] For example, the representatives of the USSR, the Byleorussian SSR and the Ukrainian SSR were all asked similar questions concerning the right to secession guaranteed in their respective constitutions.[26] In reply the representative of the U.S.S.R, for example, stated that,

> "In the first place, it should be realized that it was absolutely inconceivable that a Republic would want to secede, since there was a solid and

---

[22] See SR 532 pr.23 (Ermacora on G.D.R.). Cassese, n.1 above, argues that internal self-determination is a continuing right that cannot be considered as implemented once and for all, p.98.

[23] 92 pr.50 (Graefrath on FRG); SR 532 pr.23 (Ermacora on GDR).

[24] See SR 509, 510 and 516; Doc.A/39/40 pr.370; reply at pr.388. See K.L.Kow, The Korean Unification Question And The United Nations, in T.Buergenthal, (ed.), Contemporary Issues In International Law, pp.541-558.

[25] See e.g., SR 99 pr.20 (Tarnopolsky on Yugoslavia); SR 136 pr.57 (Tomuschat on Rumania). On secession see Buchheit, n.1 above, ch.2.

[26] See SR 109 pr.51 (Tomuschat on USSR); reply at SR 112 pr.7-8; SR 117 pr.27 (Lallah on Byleorussian SSR); reply at SR 119 PR.64; SR 154 pr.37 (Tarnopolsky) and SR 155 pr.29 (Opsahl on Ukrainian SSR); reply at SR 159 pr.11. See generally Buchheit, n.1 above, pp.121-127 on 'Soviet policy and practice'. The U.S.S.R. faces increased demands for autonomy from is nationalities. On 12 July 1988 the Parliament of Nagorny Karabakh voted for secession of the region from Azerbaijan and its transfer to Armenia.

unshakeable bond uniting all the peoples and nations of the state, which attributed their well-being to the fact that they formed part of the Soviet Union. Nevertheless, the right to secede did exist and could be exercised".[27]

5.7 A number of questions put by the HRC have concerned the beneficiaries of Article 1. Who was entitled to the right of self-determination?What criteria were applied in making that decision?[28] During consideration of the report of Canada[29] one member asked whether the word "peoples" in Article 35 of the Canada Charter of Rights And Freedoms 1982[30] (concerning the 'aboriginal peoples') cast a light on the application of Article 1 of the Covenant.[31] The representative of the USSR was asked,

"Whether,under the Soviet system,there was any difference between nations and nationalities as such and the concept of the Soviet people. Who had the right to self-determination:nations and nationalities,or only the Soviet peoples within the meaning of the Constitution?"[32]

Similarly members have asked whether the people had been consulted concerning the present constitutional structure or any changes in that structure and whether a people had the right to choose another political

---

[27] SR 112 pr.8.

[28] See e.g.,SR 206 pr.26 (Graefrath on Canada); SR 472 pr.20 (Dimitrijevic on El Salvador); SR 109 pr.51 (Tomuschat on USSR).

[29] U.N.Doc.CCPR/C/1/Add.43.

[30] The Constitution Act 1980, Part B,

[31] SR 559 pr.46 (Ermacora); reply at SR 562 pr.8.

[32] SR 565 pr.10 (Ermacora).

system.[33] Related questions have concerned the relevance of self-determination to minorities in States parties.[34] What was the status of those minorities?[35] How did the State party view the relationship between Article 1 and Article 27 concerning the rights of minorities?[36] Was

---

[33] See Doc.A/39/40 pr.323 (on the Gambia).

[34] Minorities dealt with have included the Tamils in Sri Lanka, Aborigines in Australia, Amerindians in Colombia, Macedonians in Bulgaria. A number of States parties have argued that they do not have any minorities at all. France made a reservation that, [I]n the light of Article 2 of the Constitution of the French Republic, the French Government declares that article 27 is not applicable so far as the Republic is concerned", Human Rights - Status, n.3 above, p.35. The F.R.G. declared that it interpreted this, "[d]eclaration as meaning that the Constitution of the French Republic already fully guarantees the individual rights protected by article 27", ibid., p.88. In response to questioning from HRC members the French representative commented, inter alia, that, "[T]he concept of a "minority" had come from Central Europe, where the interplay of different languages, ethnic groups and cultures had caused it to be developed in certain well-defined geographical and historical circumstances. In France, however, the concept had always seemed dangerous, since the establishment of a minority could lead to its isolation, to the establishment of ghettos, and to persecution...If the issue were analysed in depth, the provisions of article 27 of the covenant would be seen to run counter to the provisions of article 26, since the concept of a "minority" was closely connected with the concept of discrimination. France was opposed to all forms of discrimination and therefore could not accept the concept of a legal "minority", since it intended to grant to everybody the same degree of freedom in conditions of equality and fraternity...Liberty and equality did not imply uniformity, and it was by virtue of the concepts of liberty and equality, and not of the concept of legally organized minorities, that the rights of citizens to live in their different ways were recognized", SR 455 prs.80-82. It is a defect in the HRC's procedures that the HRC does not respond as a whole to such fundamental arguments concerning the interpretation and implementation of the Covenant.

[36] See, e.g., SR 109 pr.12 (Opsahl on USSR); SR 206 pr.3 (Hanga on Canada).

the aim to assimilate indigenous populations or to assist them in preserving their identity?[37] We have already noted that the travaux preparatoires would suggest that minorities, as such, do not have a right of self-determination.[38] The language of article 1 though is not clear and literally would not preclude a right of self-determination for a minority if that minority constituted a "people". A central issue then is what constitutes a "people" and on that issue the HRC have not even attempted to provide a definition or any governing criteria. Although it must be recognised that the drafters deliberately did not define a "people"[39] the HRC is open to criticism for its failure to address this central. The HRC is in a unique position to provide some guidance to States on this issue. While the central issues of self-determination remain undefined and without guiding criteria the dangers of explosive self-determination claims arising will continue.

5.8 In a General Comment the HRC stated that,

> "Article 1 enshrines an inalienable right of all peoples as described in its paragraphs 1 and 2. By virtue of that right they 'freely determine their political status and freely pursue their economic,social and cultural development'. The

---

[37] See, e.g., SR 206 pr.26 (Graefrath on Canada). On Indigenous Peoples see R.L.Barsh, Indigenous Peoples: An Emerging Object Of International Law, 80 AJIL (1986) pp.369-385. The Sub-Commission On The Prevention Of Discrimination And The Protection Of Minorities is drafting A Declaration on the Rights Of Indigenous Populations, see 39 Rev.ICJ (1987) p.28.

[38] See ch.1, pr.1.22 above.

[39] See Doc.A/2929, ch.iv, prs.9, 15 (1954); Doc.A/3077, pr.31 (1955). Many of the works in n.1 above attempt to define self-determination or aspects of it. During the drafting of the G.C. on article 1 the Chairman commented that, "The difficulties in the field could not be avoided indefinitely", SR 476 pr.34.

article imposes on all States parties corresponding obligations. This right and the corresponding obligations concerning its implementation are interrelated with other provisions of the Covenant and rules of international law".[40]

The General Comment does not specify the "corresponding obligations" or identify the "other provisions of the Covenant"or the "rules of international law' referred to.[41] The HRC's General Comment also stated that States parties, "[s]hould describe the constitutional and political processes which in practice allow the exercise of this right".[42]

Article 1,paragraph 2.

5.9 Article 1 (2) has been the subject of relatively minimal consideration by the HRC. Occasionally questions have been raised concerning the distribution of property,[43] limitations on the right to use property,[44] and Government measures affecting property and natural resources, for example, agrarian reform,[45]

---

[40] G.C.12(21), pr.2.

[41] See the international instruments cited in n.1 above.

[42] G.C.12(21), pr.4. Cassese, n.1 above, comments that, "[S]elf-determination presupposes freedom of opinion and expression (article 19), the right of peaceful assembly (article 21), the freedom of association (article 22), the right to vote (article 25(b)), and more generally the right to take part in the conduct of public affairs, directly or through freely chosen representatives (article 25(a)). Whenever these rights are recognized for individuals, the people as a whole enjoy the right of internal (political) self-determination; whenever those rights are trampled upon, the right of the people to self-determination is infringed", p.97.

[43] See, e.g., SR 129 pr.14 (Bouziri on Chile).

[44] We have already noted that there is no right to property in the ICCPR, ch.1, n.200 above.

nationalization and expropriation measures.[46] Members have also requested information on the State's view of the new international economic order, the extent and influence of multinational companies in the economy generally and more specifically concerning the exploitation of natural resources.[47]

5.10 During consideration of the report of France[48] one member suggested that Article 1(2) implied the right to protect a State's natural resources from pollution. In that respect he asked the French representative how France reconciled the right of the peoples of its Territories in the South Pacific to protect themselves from atmospheric pollution with the carrying out of atomic weapons tests in the Muraroa Atoll.[49] The French representative did not reply.

5.11 Commenting on Article 1(2) the HRC has stated that,

> "Paragraph 2 affirms a particular aspect of the economic content of the right of self-determination; namely the right of peoples, for their own ends, freely to "dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit,and international law. In no case may a people be deprived of its own means of

---

[46] See, e.g., SR 386 pr.28 (Graefrath) and SR 387 pr.41 (Hanga on Colombia).

[47] See, e.g., SR 199 pr.10 (Hanga on Iraq); SR 422 pr.4 (Hanga on Nicaragua). See n.10 above.

[48] U.N.Doc.CCPR/C/22/Add.2.

[49] SR 440 pr.10 (Prado-Vallejo). The International Court Of Justice declined to consider the legality of French nuclear testing in the Nuclear Tests Cases (Australia v. France), I.C.J. Reps.1974, p.253; (New Zealand v. France) I.C.J. Reps., p.457. See N.Grief, Nuclear Tests And International Law, in I.Pogany, Nuclear Weapons And International Law, pp.217-244, (1987).

subsistence". This right entails corresponding obligations for all States and the international community. States should indicate any factors or difficulties which prevent the free disposal of their natural wealth and resources contrary to the provisions of this paragraph and to what extent that affects the enjoyment of other rights set forth in the Covenant".[50]

Again the HRC does not indicate the specific nature of the "corresponding duties" on other States and the international community.[51] That the arguments for a new economic order and a right to development are often couched in terms of the obligations on developed States and the international community might suggest that the HRC had such matters in mind.[52]

5.12 It remains to note that no member of the HRC has yet commented on the relationship between Article 1(2) and Article 47, nor does the HRC's General Comment address this issue. As we have noted some commentators have suggested that Article 47 radically affects Article 1(2).[53]

---

[50] G.C.12(21), pr.5.

[51] Cf. The Trail Smelter Arbitration, 3 R.I.A.A. 1905 (1941). Ahmed, n.1 above, suggests that in the light of the question asked by Mr.Prado- Vallejo, n.46 above, "the right of a country to freely dispose of its natural wealth entails the corresponding duty of protection to all peoples, both citizens of its own territories and others", p.12.

[52] See M.G.K.Nayar, Human Rights and Economic Development: The Legal Foundations, 2 Univ.HR (1980) pp.55-81. A number of HRC members had reservations about making an express reference to a new international economic order in the general comment, see e.g., SR 476 pr.21 (Vincent-Evans), SR 478 pr.11 (Bouziri).

[53] See Ch.1, n.144. Cf. E.N.Luttwak, Intervention And Access To Natural Resources, in H.Bull, (ed.), Intervention In World Politics, pp.79-94 (1984).

Article 1,paragraph 3.

5.13 The most consistent request to State representatives on Article 1(3) has been for a clear statement on the international application of self-determination.[54] Three members of the HRC in particular, Mr.Al Douri, Mr.Bouziri and Mr.Graefrath have taken the lead concerning Article 1(3). States have been asked what practical and concrete steps they had taken to help peoples to achieve self-determination.[55] Particular attention has been given to the Palestinian[56] and Namibian peoples.[57] The matters raised by HRC members have included support for and diplomatic relations with Israel[58] and South Africa;[59] maintaining an embassy in Jerusalem;[60] the economic or military assistance given to national liberation movements and to the peoples concerned;[61] support for and application of

---

[54] See, e.g., SR 528 pr.39 (Prado-Vallejo on Chile).

[55] See, e.g., SR 392 pr.15 (Bouziri on Iceland).

[56] See, e.g., SR 257 pr.27 (Graefrath on Italy); SR 331 pr.40 (Tarnopolsky on Jordan). See S.Morphet, The Palestinians And Their Right To Self- Determination, in R.J.Vincent (Ed.), Foreign Policy And Human Rights, pp.85-103, (1986); M.C.Bassiouni, Self-Determination And The Palestinians, ASIL Proc. (1971), pp.31-40; L.C.Green, Self - Determination And The Settlement Of The Arab- Israeli Conflict, ASIL Proc. (1971) pp.40-48.

[57] See, e.g., SR 469 pr.8 (Bouziri on El Salvador). See I.I.Dore, Self-Determination Of Namibia: Paradigm Of A Paradox, 27 Harv.ILJ (1986) pp.159-191.

[58] See, e.g., SR 356 pr.41 (Al Douri on Uruguay).

[59] See, e.g., SR 322 pr.62 (Sadi on Netherlands).

[60] See, e.g., SR 222 pr.12 (Bouziri on Colombia).

[61] See, e.g., SR 257 pr.67 (Sadi on Italy); SR 291 pr.12 (Hanga on Jamaica). See pr.5.19, n.83 below.

economic and military sanctions against South Africa;[62] ratification of International Conventions against Apartheid;[63] the promotion of self-determination in overseas territories,dependencies and departments and the situation if such territories desired independence but did not have the economic resources to sustain it.[64]

5.14 Mr.Graefrath has regularly asked State representatives whether individuals or companies subject to the State's authority were permitted to contribute by their trade, co-operation and activities to the support of the South African regime or the occupation of Namibia.[65] He has argued that States parties could not

---

[62] See, e.g., SR 257 pr.26 (Graefrath on Italy), reply at SR 261 prs.35-37; SR 440 pr.12 (Prado-Vallejo on France).

[63] See, e.g., SR 293 prs.25-26 (Movchan on Portugal); SR 482 pr.38 (Graefrath on N.Z.). The principal Convention is the International Convention On The Suppression And Punishment Of the Crime Of Apartheid, 1973. The Swedish representative replied that, "[a]lthough his Government considered Apartheid to be a serious violation of human rights and fundamental freedoms, it took the view that defining Apartheid as an international crime entailed international legal obligations which could not be fully understood or implemented", SR 635 pr.40.

[64] See, e.g., SR 439 pr.27 (Bouziri on France); SR 440 pr.9 (Prado-Vallejo on France); SR 69 pr.28 (Tarnopolsky), pr.43 (Prado-Vallejo on U.K.); reply at SR 70 prs.20-21.

[65] See, e.g., SR 441, pr.34 (on France); SR 594 pr.37 (on U.K.). See A.M.Khalifa, Adverse Consequences For The Enjoyment Of Human Rights Of Political, Economic And Other Forms Of Assistance Given To The Racist And Colonialist Regime Of South Africa, (1985), U.N.Doc. E/CN.4/Sub.2/1984/8/Rev.1; U.N.Sales No.E.85.XIV.4; referred to by Graefrath at SR 594 pr.37 (On U.K.). See also Implementation of Decree No.1 For The Protection Of The Natural Resources Of Namibia, 80 AJIL (1986) pp.442-491; M.C.Gosiger, Strategies For Disinvestment From United States Companies And Financial Institutions Doing Business In South Africa, 8 HRQ (1986), pp.517-539; Transnational Corporations In South Africa

(Footnote Continued)

evade their obligations under Article 1(3) in this manner.[66] It is submitted that Mr.Graefrath is correct in terms of article 1(3) with respect to the responsibility of States parties for individuals and companies "within their jurisdiction" (article 2(1)). There is, however, considerable disagreement between States concerning the effectiveness of, for example, political and economic sanctions against South Africa.[67] It is doubtful, therefore, that article 1(3) could oblige States to impose sanctions or other measures against South Africa or other States as the only way to promote the realization of the right of self-determination.

5.15 Many of the major current international disputes have arisen before the HRC. While often expressing great concern members have generally been very restrained in their comments. Among the conflicts adverted to have been those in the Lebanon,[68] Sri Lanka,[69] the Western

---

(Footnote Continued)
And Namibia: U.N. Public Hearings, vol.1, Reports Of The Panel Of Eminent Persons And Of The Secretary-General (1986).

[66] See e.g., SR 635 pr.38 (Graefrath on Austria).

[67] For important recent developments see the U.S. Comprehensive Anti-Apartheid Act 1986 and other measures in, 26 ILM (1987) pp.77-133; Mission to South Africa: The Commonwealth Report (1986); U.N.Hearings, n.65 above. Cf. P.J.Kuyper, The Implementation Of International Sanctions: The Netherlands And Rhodesia, (1978).

[68] See SR 365 pr.35 and 366 pr.3 (Bouziri on Iran); SR 442 pr.12 (Al Douri on Lebanon), reply at SR 446 pr.13. See 'Lebanon - A Conflict Of Minorities', (1983), Minority Rights Group, report no.61; Report Of Amnesty International Mission To Sri Lanka, 31 Jan-9 Feb,1982, (1983) and Updating Statement, July - September 1983, (1983); J.P.Gasser, Internationalized Non-International Armed Conflicts: Case Studies Of Afghanistan, Kampuchea and Lebanon, 33 Am.ULR (1983) p.145.

[69] See SR 473 pr.8 (Opsahl on Sri Lanka); SR 472 pr.20 (Dimitrijevic on Sri Lanka). See 'The Tamils Of
(Footnote Continued)

Sahara,[70] New Caledonia,[71] the Falkland Islands,[72] Northern Ireland[73] and Afghanistan.[74] Though restrained members have often made very clear the importance of the

---

(Footnote Continued)
Sri Lanka', Minority Rights Group, report n.25, (revised, 1983); P.Hyndman, Human Rights, The Rule Of Law And The Situation In Sri Lanka, 8 Univ.NSWLJ (1985) pp.337-361. India-Sri Lanka, Agreement To Establish Peace And Normalcy In Sri Lanka, XXVI ILM (1987) pp.1175-1185.

[70] See SR 327 pr.13 (Ermacora on Morocco); See G.J.Naldi, The Statehood Of The Saharan Arab Democratic Republic, 25 Ind.JIL (1985-6), pp.448-481; M.Shaw, The Western Sahara Case 49 BYIL 1978 (1979) pp.118-154; T.Franck, The Stealing Of The Sahara, 70 Am.JIL (1976), pp.694-721; The Western Sahara Case, Advisory Opinion, ICJ Reports, 1975, p.12. A UN Team has recently visited the Western Sahara, (Times,Dec.1987).

[71] See SR 441 pr.43 (Al Douri on France).

[72] See SR 594 pr.40 (Prado-Vallejo) and pr.45 (Pocar) on U.K.; reply at pr.54. On self-determination with respect to the Falkland Islands see D.Dunnett, Self- Determination And The Falklands, 59 International Affairs (1983), pp.415-428; M.Pomerance, n.1 above, pp.16, 21-22, 27, 29, 44; A.R.Coll and A.C.Arendt, The Falklands War - Lessons For Strategy, Diplomacy And International Law, pp.19, 25, 29-30, 82-3, 94, 99; H.E.Chebabi, Self-Determination, Territorial Integrity And The Falkland Islands, 100 PSQ (1985) pp.215-225.

[73] See SR 594 pr.42 (Wako on U.K.); reply at pr.53. See C.Townshend, Northern Ireland, in R.J.Vincent (ed.), n.56 above, pp.119-140; A.Guelke, International Legitimacy, Self-Determination, And Northern Ireland, 11 Rev.Int.St. (1985) pp.37-52; 'The Two Irelands- The Problem Of The Double Minority- A Dual Study Of Inter-Group Tensions', Minority Rights Group, Report no.2 (Revd.ed, 1982). The most important recent constitutional development in respect of Northern Ireland was the Anglo-Irish Agreement, which was unsuccessfully challenged in Ex.p.Molyneaux, [1986] 1 W.L.R. p.331.

[74] See SR 565 pr.8 (Opsahl on USSR); SR 608 pr.26 (Afghan State representative). See Ermacora's report, n.77 below and Higgins, pr.5.19 below. See A.G.Noorani, Afghanistan And The Rule Of Law, 24 Rev.ICJ (1980) pp.37-52; Gasser, n.68 above. An agreement for, inter alia, withdrawal of Soviet troops was signed on 14th April 1988, see Times, 15th April 1988 p.8.

application of self-determination to these situations and it would seem clear, therefore, that members of the HRC view article 1 as having an application outside the colonial situation.[75] The comments of Professor Higgins concerning Afghanistan are not untypical,

5.16 "Her second question concerned the underlying and preliminary question of self-determination, in which connection the Committee relied heavily on information from United Nations institutions.[76] The Commission on Human Rights adopted an annual resolution speaking of the denial of the right to self-determination in Afghanistan. The presence of 100,000 occupying troops and the participation of foreign advisors in various ministries and in the Khad, the security apparatus, had been verified by Professor Ermacora's report (E/CN.4/1985/21).[77] It was difficult to see how that situation or the fact that 4 million refugees had chosen to flee the country after the 1979 events, were compatible with self-determination. She had listened with interest to the Afghan representative's remarks on the Loya-Jirgah.[78] In her view, however, it was questionable whether any system short of election on the basis of the "one-person,one vote" principle could be a satisfactory expression of self-determination, and in that connection she

---

[75] See pr.5.5 above on India and Sri Lanka.

[76] See ch.3, prs.3.12-3.18 on 'Sources of information'.

[77] See Report On The Situation In Afghanistan 6 HRLJ (1985), pp.29-76.

[78] The Loya Jirgah is a, "[S]upreme council composed of the most respected representatives of the people", SR 603 pr.14 (State representative) The Loya Jirgah has recently held only its second national assembly (Times 30 Nov. 1987).

referred to her own country's experience in Southern Rhodesia. Furthermore, according to her information, one quarter of the representatives in the Loya-Jirgah in fact consisted of party officials and persons sympathetic to the Government and there was little discussion beyond the ratification of Government policies".[79]

5.17 In its General Comment on Article 1 the HRC stated that,

"Paragraph 3, in the Committee's opínion,is particularly important in that it imposes specific obligations on States parties, not only in relation to their own peoples but vis-a-vis all peoples which have not been able to exercise or have been deprived of the possibility of exercising their right to self-determination. The general nature of this paragraph is confirmed by its drafting history. It stipulates that 'The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations'. The obligations exist irrespective of whether a people entitled to self-determination depends on a State party to the Covenant or not.[80] It follows that all States

---

[79] SR 604 pr.44.

[80] G.C.12(21), pr.4. Cassese, n.1 above, comments that, "[S]elf-determination presupposes freedom of opinion and expression (article 19), the right of peaceful assembly (article 21), the freedom of association (article 22), the right to vote (article 25(b)), and more generally the right to take part in the conduct of public affairs, directly or through freely chosen representatives (article 25(a)). Whenever these rights are recognized for

(Footnote Continued)

parties to the Covenant should take positive action to facilitate realization of and respect for the right of peoples to self-determination. Such positive action must be consistent with the States' obligations under the Charter of the United Nations and under international law: in particular, States must refrain from interfering in the internal affairs of other States and thereby adversely affecting the exercise of the right of self-determination. The reports should contain information on the performance of these obligations and the measures taken to that end".[81]

5.18 Again the HRC does not attempt to spell out the "specific obligations" on States parties. It seems clear though that the HRC takes the view that those obligations exist whenever a people (though that term is not defined) are being deprived of their right to self-determination and are not dependant on the people concerned being under the jurisdiction of another State party to the Covenant.[82] The HRC's view seems to go further than the undertaking on States parties in Article 2 of the Covenant, "To respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant". As interpreted by the HRC article 1 calls for positive action to support the right of self-determination of individuals who are not within its territory or subject to its jurisdiction. The obligation to take action though is limited to measures over

---

(Footnote Continued)
individuals, the people as a whole enjoy the right of internal (political) self-determination; whenever those rights are trampled upon, the right of the people to self-determination is infringed", p.97.

[81] G.C.12(21), pr.6.

[82] For the HRC's discussion on this see SR 537. On article 2 see ch.6 below.

individuals within its territory or subject to its jurisdiction.

5.19 Although the general comment calls for "positive action", that action must be consistent with the United Nations Charter and international law. That of course hides the differences of opinion among States as to the legitimacy of, for example,the use of force to achieve self-determination, and of the kinds of assistance that it is permissible to afford to national liberation movements.[83] The particular reference to "Interference in the internal affairs" of States reflects the concern of many States at such interference and the continuing debate as to what constitutes purely internal affairs.[84] Finally, it is interesting to note the express reference to the drafting history of Article 1. Such references have been relatively rare in the practice of the HRC. The preparatory work appears to have been of greater relevance to the preparation of general comments, and views under article 5(4) O.P.,[85] than within the context of the reporting procedure under article 40(1) ICCPR.

---

[83] See Crawford, n.1 above; Akehurst, A Modern Introduction to International Law, pp.299-302 (6d, 1987); Pomerance, n.1 above, ch.VIII; Blay, n.1 above; Cassese, n.1 above, p.100; P.Rubino, Colonialism And The Use Of Force By States, in A.Cassese, (ed), The Current Legal Regulation Of The Use Of Force, pp.133-145 (1986); R.Higgins, The Attitude Of Western States Towards Legal Aspects Of The Use Of Force, in Cassese, (ed), ibid., p.435 at pp.448-450; H.Bokor-Szego, The Attitude Of Socialist States Toward The International Regulation Of The Use Of Force, in Cassese, (ed), ibid., p.453 at pp.476-469; M.Rafiqul Islam, Use Of Force In Self-Determination Claims, 25 Ind.JIL (1985) pp.424-477; R.A.Falk, Intervention And National Liberation Claims, in H.Bull, (ed.), n.52 above, pp.119-134.

[84] Ibid., and see ch.1, prs.1.18-1.21.

[85] See Ch.4, prs.4.46-4.48 above.

Article 1 under the Optional Protocol.

5.20 Article 1 has been raised in a small number of communications under the O.P. In A.D. v. Canada[86] the author, a Grand Captain of the Mikmaq tribal society, claimed that the Mikmaqs had been denied and were continuing to be denied the right of self-determination by the Government of Canada. It was further submitted that Canada had deprived the alleged victims of their means of subsistence and had enacted and enforced laws and policies destructive of the family life of the Mikmaqs and inimical to the proper education of their children.[87] The stated objective of the communication was that the traditional Government of the Mikmaq tribal society be recognized as such and that the Mikmaq nation be recognized as a State.[88]

The HRC declared the communication inadmissible because the author had not proved that he was authorized to act as a representative on behalf of the Mikmaq tribal society and had failed to support his claim that he personally was a victim of a violation of any rights contained in the Covenant.[89]

5.21 Mr.Errera appended an interesting individual opinion to the HRC's views.[90] He argued that the

---

[86] Doc.A/39/40, pp.200-204.

[87] Ibid., pr.2.1. The territory concerned was the lands allegedly possessed and governed by the Mikmaq's when they entered into a protection treaty with Great Britain in 1952 (sic) and which were known today as Nova Scotia, Prince Edward Island, and parts of Newfoundland, New Brunswick and the Gaspe peninsula of Quebec, ibid., pr.1.

[88] Ibid., pr.2.2.

[89] Ibid., pr.8.2. The specific allegations made by A.D. related to self-government, education, enfranchising of aboriginal peoples, property rights and subsistence, Ibid., pr.3.

[90] Doc.A/39/40 p.200 at p.204.

examination on admissibility raised three questions that were fundamental to the interpretation of article 1(1) and to the HRC's jurisprudence relating to individual communications alleging violations of article 1(1). The three questions were:

(1) Does the right of "all peoples" to "self-determination", as enunciated in article 1, paragraph 1, of the Covenant, constitute one "of the rights set forth in the Covenant" in accordance with the terms of article 1 of the Optional Protocol?

(2) If it does, may its violation by a State party which has acceded to the Optional Protocol be the subject of a communication from individuals?

(3) Do the Mikmaq constitute a "people" within the meaning of the above-mentioned provisions of article 1, paragraph 1, of the Covenant?

As the HRC's decision did not answer any of these questions he could not endorse it.

As for the HRC's view it is normal practice for judicial or administrative rulings to avoid answering substantive questions and even procedural questions if the matter can be dismissed by reference to other procedural requirements.[91] As to the three questions raised, comments by individual HRC members during the drafting of the general comment on article 1 might suggest that the first two should be answered in the affirmative.[92] The HRC's decision itself would suggest

---

[91] Famous examples are the the judgements of the ICJ in the Nuclear Tests Cases, n.49 above, and the South West Africa Cases ICJ Reps. 1966, p.6.

[92] "...the expression "collective right" seemed to him to be poorly chosen, since it gave the impression that an individual alone could not invoke a violation of article 1 of the Covenant", SR 476 pr.36 (Graefrath). In response Mr.Bouziri commented, "In the Working Group that expression had caused no difficulty. It implied that a people could take advantage of that right but did

(Footnote Continued)

that the second question should be answered in the affirmative as it would appear that the communication would not have been declared inadmissible if A.D. had been properly authorized to act as a representative of the Mikmaqs.[93] The more interesting questions perhaps was not whether individuals could bring a communication in a representative capacity but whether an individual could bring a self-determination claim qua individual. It is interesting to speculate how an individual could show that he personally was a victim of a violation of the right of a people to self-determination.[94] Would simple denial of the right to vote be sufficient[95] or would a more general denial of civil and political

---

(Footnote Continued)
not thereby prevent an individual from invoking it in a communication under the Optional Protocol", SR 478 pr.9.

[93] On the facts the HRC took the view that A.D. had merely authorized himself. It appears that the only body which could properly have authorized A.D. was the "Grand Council" of the Mikmaqs, the traditional Government of the Mikmaqs. A communication is pending before the HRC from the Lubicon Lake Band but this is now being considered under article 27 rather than article 1. For the domestic Canadian decision see Lubicon Lake Band et al. v. The Queen In Right Of Canada et al., 117 D.L.R. (3d) 247.

[94] The HRC's view appears to assume that it is open to an individual to advance evidence to show that he personally was a victim of a violation of the right to self- determination. It is interesting to note that the State party argued, inter alia, that the author could not claim because self-determination is a collective right; that the communication was inadmissible, ratione materiae, on the basis that article 1 could not affect the territorial integrity of a State (reference was made to the Declarations of 1960 and 1970 in n.1 above); and because the remedy sought, namely the recognition of Statehood, goes beyond the competence of the HRC. Unfortunately, the HRC view did not address these arguments.

[95] Note that article 25 (b) ICCPR contains a right to for citizens to take part, inter alia, in the conduct of public affairs and to vote. For text see Apx.I below.

rights be necessary?[96] The case of Mpaka-Nsusu v. Zaire[97] below might have suggested another possibility in terms of restrictions on the establishment of political parties.

5.22 The HRC view is now clearer after two recent admissibility decisions. In the first of these the HRC stated that,

> "...the author, as an individual, cannot claim to be a victim of a violation of the right of self-determination enshrined in article 1 of the Covenant. Whereas the Optional Protocol provides a recourse procedure for individuals claiming that their rights have been violated, article 1 of the Covenant deals with rights conferred upon peoples, as such".[98]

Similarly, in the second admissibility decision concerning a communication submitted by an individual acting on his own behalf and claiming to act on behalf of others, the HRC observed,

> "...that the Covenant recognizes and protects in most resolute terms a people's right to self-determination and its right to dispose of its natural resources, as an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights. However, the Committee observes...that the author, as an individual, cannot claim under the Optional Protocol to be a victim of a violation of the right to self - determination enshrined in article 1 of

---

[96] See Cassese, ch.5, n.42 above.

[97] Doc.A/41/40 p.142. See pr.5.23 below.

[98] Doc.A/42/40 pr.401.

> the Covenant, which deals with rights conferred upon peoples as such".[99]

The view of the HRC then appears to be that an individual can only bring a self-determination claim in a representative capacity and only for violation of the peoples' right to self-determination though no indication is given of what that right includes.[100]

As for Mr.Errera's third question this is clearly a substantive matter that could only be determined on a full consideration. We have noted above that the HRC have not attempted to define or establish criteria for a "people" under the article 40 reporting procedure or in its general comment on article 40.[101]

5.23 The second communication alleging a violation of article 1 is Mpaka-Nsusu v. Zaire.[102] The author, again an individual communicant, alleged that although the people of Zaire had declared themselves in favour of a bipartisan constitutional system he had been prevented from establishing a second political party.[103] The HRC declared the communication inadmissible. They observed

---

[99] Doc.A/42/40 p.106. "[T]he Committee decided, however, that the communication could be considered, in so far as it might raise issues under article 27 and other articles of the Covenant", ibid. The first sentence quoted in the text is almost taken directly from the HRC's general comment on article 1, see pr.5.3 above.

[100] Note the criteria in the 1970 Declaration, n.1 above, which refers under the principle of equal rights and self-determination to, "[i]ndependent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour". See also Brar, ch.4, n.1 above, p.515.

[101] See pr.5.7 above.

[102] Doc.A/41/40, p.142.

[103] Ibid., pr.9.2.

that the information before it did not justify a finding as to the alleged violation of article 1.[104] The observation is not very helpful. It could be interpreted simply as there being insufficient evidence on the facts or that the allegations did not even raise an issue of self-determination. The latter interpretation would be of particular significance bearing in mind the large number of one party States and the question of the compatibility of such regimes with the ICCPR.[105] In the light of the importance of this issue it is submitted that the latter interpretation should not necessarily be assumed to be the correct one.

---

[104] Ibid., pr.9.2.

[105] See ch.6 below on article 2 ICCPR.

Article 1: Appraisal.

5.24 On reflection the practice of the HRC under article 1 seems somewhat disappointing. Many national reports have contained little if any information. Questions have been spasmodic and often there has been no reply from the State representative in any event, although the situation is often better during consideration of second periodic reports. The General Comment adopted by the HRC on article 1 was vague, uninformative and went little beyond a bare call for more information from States parties rather than an attempt at interpretation. The adoption of general comments affords the HRC an important opportunity to give some content to the right to self- determination. The HRC is open to criticism for not using that opportunity to attempt to provide some definitions and criteria in terms, for example, of the meaning of "peoples", the relationship between self-determination and the preservation of territorial integrity, and the relationship between article 1 and article 27 of the ICCPR on minority rights. It is instructive to consider why the HRC appears to have made little constructive progress with respect to article 1.

5.25 Firstly, the criticisms of those who argued that self-determination should not have been in the ICCPR because it was a political principle rather than a legal right may have proved to have been correct.[106] In this regard it is interesting to note the comment of Mr.Opsahl during consideration of the Report of Sri Lanka, "In article 1, the Covenant had given a legal aspect to self-determination, but it was primarily a political ideal that needed to be adjusted to the realities of the situation. The Covenant was not helpful in suggesting how the indispensable political solution

---

[106] See ch.1, prs.1.22-1.23.

might be achieved".[107] Of course, it is that adjustment to reality that causes the greatest controversy between protagonists. Mindful of the difficult political conflicts that are usually associated with calls for self-determination the HRC has generally treaded very warily in this area. Similarly, as was noted by the United Kingdom representative before the HRC, self-determination issues are generally addressed in a number of other, and arguably more appropriate, international forums.[108]

5.26 Secondly, since the proposal to include self-determination in the Covenants was made by the General Assembly (1952) most trust and non-self-governing territories have achieved independence.[109] The decolonization era is now largely complete. The attentions of those newly independent States have now turned to other matters, for example, a New International Economic Order[110] and the Right To Development and other "Third Generation" rights.[111] While self-determination remains a cardinal principle for these States in the external sense of independence from colonial, alien or foreign domination there is distinctly less enthusiasm for the internal aspects of self-determination in terms of the free choice of domestic political institutions and authorities and

---

[107] SR 473 pr.8.

[108] See SR 594 pr.34.

[109] The major exceptions is South West Africa/ Namibia.

[110] See n.10 above.

[111] See n.11 above; P.Alston, Conjuring Up New Human Rights: Proposal for Quality Control, 78 AJIL (1984) pp.607-621; S.Marks, Emerging Human Rights: A New Generation For The 1980's?, in R.Falk et al, (eds.), International Law: A Contemporary Perspective, pp.501-513 (1985).

respect for the international human rights of the people of the State.[112] Similarly, the fears of claims for secession based on self-determination for minority and other groups remains an overriding concern for many States.[113]

5.27 Thirdly, the very concept of self-determination remains a controversial one. The central difficulties of reconciling the right to self-determination with the preservation of the "territorial integrity" of the State, of identifying the beneficiaries and content of the right, and the consequences of the international recognition of the right of self-determination in terms of international support remain.[114] The practice of the HRC to date has done little or nothing to shed light on these fundamental problems and appears unlikely to do

---

[112] A number of members stressed the non-limitation of article 1 to colonial situations during discussion of the draft General Comment on article 1, see SR 478. Mr.Bouziri stated that the HRC was unanimous on this question, SR 477 pr.67. Note also the comment of Professor Harris, "The 1966 Covenants do not limit the principle of self-determination to the colonial situation. It seems unlikely that they reflect customary international law in this respect", D.J.Harris, Cases and Materials on International Law, p.101, (3d, 1983). Professor Cassese has argued that the more limited doctrine of self-determination may be jus cogens, n.1 above, pp.109-111. On external and internal self-determination see H.Gros Espiell, n.1 above.

[113] See Buchheit, n.1 above. During consideration of the report of Senegal Mrs.Higgins, [s]ought more specific information about demands for autonomy in Casamance, which the Senegal government seemed inclined to interpret as a demand for secession that must be opposed", SR 722 pr.10. In reply the state representative commented, "[s]tressed that the right to secession ought not to be likened to a principle of international law. As for the first element of article 1, it in fact referred to a colonial situation. However, no colonial situation existed in Casamance", SR 722 pr.13.

[114] "Above all, the determination of which 'self'

(Footnote Continued)

so. That may in part reflect the inherent limitations of working only on the basis of consensus.[115]

5.28 It is perhaps unfair to be too critical of the HRC's performance concerning article 1. In the light of difficulties outlined above a minimalist, cautious and uncontroversial approach to article 1 may ultimately appear to have been the only sensible avenue open to it. As Mr.Tomuschat commented during the consideration of the HRC's draft comment on article 1,

> "The comments prepared by the Committee might seem rather insubstantial, but they reflected its experience with regard to the application of article 1, which was rather limited. Furthermore, a large number of United Nations bodies dealt with the implementation of that fundamental article, and the Committee's action could only be modest or marginal".[116]

(Footnote Continued)
is entitled to determine 'what', 'when', and 'how', remains the central question which elude simple objective answers", Pomerance , n.1 above, p.73.

115 The comments of the Chairman of the Working Group that drafted the general comment would seem to support this view, see SR 476 prs.11-14, SR 478 prs.7-15 (Bouziri).

116 SR 478 pr.2.