

The U.N. Human Rights Committee

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I. Introduction

The United Nations Human Rights Committee is not the oldest UN human rights treaty body. That distinction belongs to the Committee on the Elimination of Racial Discrimination (CERD).¹ Over time, though, the Human Rights Committee has emerged as the most active

¹ See generally R. Wolfrum, "The Committee on the Elimination of Racial Discrimination," *Max Planck UNYB* 3 (1999), 489 et seq.

and innovative of these institutions. Although it is difficult to fully explain why the Committee acquired this special status, a number of factors may have contributed to it. One has to do with the fact that the Committee has the broadest subject-matter jurisdiction or competence of any of these treaty bodies.² Another factor may be attributed to the Cold War and the perception then current that CERD, with its jurisdiction over racial discrimination, offered the Soviet Union and its allies as well as many non-aligned third world nations a propaganda tool to be used against the West. The Human Rights Committee, by contrast, provided these groupings of states with no comparable propaganda advantage. The East must consequently have decided that it had an interest in ensuring that the Committee not become an East-West battleground, whereas the West no doubt concluded that its interests in promoting civil and political rights were best served by not politicizing the Committee.³ Thus, despite the fact that the West and nations aligned with it at different times tended to have a majority in the Committee, the members from these countries appeared to have decided early on that little would be gained in the long run by attempting to impose their will on the Committee as a whole.

The unstated compromise not to politicize the Committee produced a body that manoeuvred around the shoals of the East-West conflict without making too many waves: it did not threaten the East while advancing the interests of the West, albeit only minimally, in promoting

² The International Covenant on Civil and Political Rights, whose entry into force gave birth to the Committee, guarantees a comprehensive catalogue of civil and political rights. The other United Nations treaty bodies have a more limited jurisdiction, dealing as they do with racial discrimination, rights of children or women, and torture. The Committee on Economic and Social Rights, which administers the implementation of the International Covenant on Economic, Social and Cultural Rights and whose jurisdiction within its sphere of competence matches that of the Human Rights Committee, is not a treaty body. It was established by a resolution of the ECOSOC.

³ Symptomatic of Cold War paranoia is the fact that the same states (the Soviet bloc and many so-called non-aligned nations), which supported a mandatory inter-State complaint mechanism and a reference of disputes to the ICJ as well as an optional individual petition system for the International Convention on the Elimination of All Forms of Racial Discrimination, strongly opposed the inclusion in the Covenant of the very same mechanisms. See A.H. Robertson, "The Implementation System: International Measures," in: L. Henkin (ed.), *The International Bill of Rights: The Covenant on Civil and Political Rights*, 1981, 332 et seq., (336).

civil and political rights. This compromise was reflected in the Committee's decision to work by consensus, if at all possible.⁴ The fact that the Committee was perceived as not being a Cold War battleground enabled it during those formative years to attract a distinguished group of Committee members — well-known international lawyers, human rights scholars and national judges — who labored hard to strengthen the Committee's mandate by a process that put a premium on non-threatening gradualism. What might today be mistaken for timidity, probably preserved the Committee's credibility during the first decade of its existence and laid the foundation for the institutional advances the Committee made over the years.⁵

This article will analyze the manner in which the Committee discharges its mandate under the Covenant and the Optional Protocol to it. It will describe the functions of the Committee under these two instruments and provide a brief overview of the rights the Covenant guarantees. The main focus will be on the Committee's practice or *modus operandi*. The article will conclude with some reflection on the challenges confronting the Committee.

II. Normative Content and Institutional Structure: An Overview

The Covenant was adopted by the United Nations General Assembly on 16 December 1966 and entered into force on 23 March 1976, three months after the required 35 instruments of ratification had been de-

⁴ Human Rights Committee, Rules of Procedure, Rule 51, where the Committee, in a footnote to that provision, agreed "that its method of work normally should allow for attempts to reach decisions by consensus before voting."

⁵ On the Human Rights Committee generally, T. Opsahl, "The Human Rights Committee," in: P. Alston (ed.), *The United Nations and Human Rights: A Critical Appraisal*, 1992, 369 et seq.; D. McGoldrick, *The Human Rights Committee*, 1994. See also W. v. d. Wense, *Der UN-Menschenrechtsausschuss und sein Beitrag zum universellen Schutz der Menschenrechte*, 1999; E. Klein, "The Reporting System under the International Covenant on Civil and Political Rights," in: E. Klein (ed.), *The Monitoring System of Human Rights Treaty Obligations*, 1998.

posited.⁶ The Optional Protocol entered into force at the same time as the Covenant.⁷ The Second Optional Protocol to the Covenant, which aims at the abolition of the death penalty, was adopted on 15 December 1989 and entered into force on 11 July 1991.

The Covenant guarantees a comprehensive catalogue of individual civil and political rights as well as two so-called peoples' or group rights. The latter category consists of the right of "all peoples to self-determination" and of their right to "freely dispose of their natural wealth and resources."⁸ The list of individual civil and political rights is set out in Part III of the Covenant and consists of 21 articles.⁹ These provisions guarantee the right to life, the prohibition of torture and slavery, and various due process guarantees. They proclaim such basic rights as freedom of expression, assembly, association, privacy and movement as well as the right to participate in government. The Covenant contains a broad equal protection and non-discrimination clause and a provision that deals with the rights of persons belonging to ethnic, religious or linguistic minorities. Part II of the Covenant contains an additional non-discrimination clause, tailored to the enjoyment of the rights guaranteed in the Covenant, and a provision in which the States parties undertake "to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant."¹⁰ Part II of the Covenant also permits the States parties temporarily to suspend the enjoyment of certain rights the Covenant guarantees when such action is necessary during situations of national emergency.¹¹

The Covenant provides for the establishment of the Human Rights Committee and stipulates that it should consist of 18 members who are

⁶ See International Covenant on Civil and Political Rights (hereinafter cited as Covenant), article 49 para. 2.

⁷ Pursuant to article 9 para. 1 of the Optional Protocol to the International Covenant on Civil and Political Rights (hereinafter cited as Optional Protocol or Protocol) ten ratifications were required to bring that instrument into force subject to the entry into effect of the Covenant.

⁸ Covenant, article 1 paras 1 and 2.

⁹ For an analysis and legislative history of these provisions, M.J. Bossuyt, *Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Right*, 1987; M. Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary*, 1993.

¹⁰ Covenant, article 2 para. 1 and article 3.

¹¹ Covenant, article 4.

to serve in their personal capacity and be persons of "high moral character and recognized competence in the field of human rights."¹² In the election of the members of the Committee, "consideration shall be given to equitable geographical distribution of membership and to the representation of different forms of civilization and of the principal legal systems."¹³ Committee members are elected to a term of four years; they may be re-elected.¹⁴ Over the years, there has not been a very dramatic turnover of the Committee's membership. For example, three individuals who were first elected to the Committee in 1977 when that body was established, continued to serve on the Committee twenty years later, two of them without interruption and one after a brief absence. A substantial number of former and current members have remained on the Committee for at least two or three terms, providing it with considerable institutional continuity.

As far as geographic representation is concerned, prior to the 1996 elections Latin America and the Caribbean had five members on the Committee, Western Europe and Others had six, whereas Africa was represented by two, Asia by three, and Eastern Europe by one. Israel, which is not part of any UN grouping of states, also had a member on the Committee. The 1996 elections changed this picture somewhat: while Asia, Africa and Eastern Europe retained the same number of seats, Western Europe and Others gained two seats at the expense of Latin America and the Caribbean. As this list indicates, Africa and Asia tend to be underrepresented on the Committee, although the situation improved substantially for Africa in the 2000 elections, when it gained two new members. The under representation of Africa in prior years can no doubt be attributed to the fact that Africa has fielded a large number of candidates, rather than agreeing on a few that all African States parties to the Covenant would support. Since most African States are parties to the Covenant, they could easily have elected additional candidates had they not split their vote. Asia, of course, is also underrepresented. That is due in part to the much smaller number of Asian States parties to the Covenant; for example, neither China, Indonesia, Malaysia nor Pakistan are parties to the Covenant.

The Covenant confers two major functions on the Committee; the Optional Protocol adds another one. The Covenant requires all States parties to submit reports to the Committee "on the measures they have

¹² Covenant, article 28.

¹³ Covenant, article 31 para. 2.

¹⁴ Covenant, article 32 para. 1 and article 29 para. 3.

adopted which give effect to the rights” it guarantees and “on the progress made in the enjoyment of those rights.”¹⁵ In addition to the reporting obligation, which is mandatory for all States parties, the Covenant establishes an optional inter-State or State-to-State dispute settlement mechanism.¹⁶ The Optional Protocol enables any State party to the Covenant to recognize the competence of the Committee to deal with “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.”¹⁷ As its name indicates, the individual petition system is optional; it can be invoked only after a State party has ratified the Protocol. Of the 148 countries that have become parties to the Covenant, 98 have to date ratified the Optional Protocol. 47 states have made the declaration under article 41 para. 1, accepting the competence of the Committee to receive inter-State complaints filed by other States parties which have made the same declaration. No state has as yet invoked the procedure envisaged by article 41. On the other hand, by the end of 2000 the Committee had received close to 1000 individual communications. Here it is important to note that a State party which does not voluntarily subject itself to the optional dispute resolution schemes described above, is bound only by the Covenant’s reporting requirement.

III. State Reports

An analysis of the manner in which the Committee has administered the reporting system established by article 40 of the Covenant¹⁸ should start with the recognition that states traditionally have been very reluctant to make mandatory any so-called international measures of implementation¹⁹ or supervision in human rights treaties that might have

¹⁵ Covenant, article 40 para. 1.

¹⁶ Covenant, arts 41 and 42.

¹⁷ Optional Protocol, article 1.

¹⁸ On this subject generally see I. Boerefijn, *The Reporting Procedure under the Covenant on Civil and Political Rights*, 1999.

¹⁹ On the use of this term of art, which has come to mean measures for the international supervision of the observance of (human rights) commitments, see E. Schwelb, “The International Measures of Implementation of the International Covenant on Civil and Political Rights and of the Optional Protocol,” *Tex. Int’l L. J.* 12 (1977), 141 et seq., (142).

“teeth,” viz., be effective. But while states have tended to believe that inter-State and individual petition systems would threaten their freedom of action, reporting systems have on the whole not been seen by them as involving much of a risk in that regard. This explains why most human rights treaties adopted within the United Nations framework provide for a mandatory reporting system. Dispute resolution mechanisms are less common and usually optional, particularly those that give individuals a right of action, which states consider as particularly threatening.

These same considerations entered into the drafting of the measures of implementation of the Covenant and explain why only the reporting requirement is mandatory.²⁰ It should be emphasized, however, that the assumption that the reporting requirement is “harmless” is not necessarily valid. Whether or not it is, will frequently depend upon the composition of the supervisory body, its commitment to the cause of human rights, its creativity and the larger political climate within which it exercises its functions. In fact, experience suggests that there is nothing inherently weaker about a reporting system compared with other measures of implementation such as quasi-judicial mechanisms of settlement or investigation, which are sought by their very nature to be better suited to achieve results in the human rights field. Whether one or the other implementation measure will produce the desired result in terms of improving a given country’s human rights situation — that, after all, is the object of the exercise — depends on a variety of factors. It is therefore important to look at the Covenant’s reporting mechanism, to analyze the manner in which the Human Rights Committee has implemented it and to explore how it might evolve in the future.

1. The Committee’s Role

In article 40 para. 1 of the Covenant, the States parties undertake “to submit reports on the measures they have adopted which give effect to the rights recognized [in the Covenant] and on the progress made in the enjoyment of those rights.” Article 40 para. 2 specifies that these reports “shall indicate the factors and difficulties, if any, affecting the implementation” of the Covenant in the reporting countries. The State reports are to be submitted to the Committee “for consideration.”²¹ The

²⁰ Robertson, see note 3.

²¹ Covenant, article 40 para. 2.

Committee is to “study” the reports and submit “its reports, and such general comments as it may consider appropriate, to the States Parties.” It may also transmit these comments to the UN Economic and Social Council “along with the copies of the reports it has received from the States Parties....”²² Article 40 para. 5 gives the States parties the right to submit their observations to the Committee on the latter’s general comments. The Secretary-General of the UN is authorized under article 40 para. 3, in consultation with the Committee, to transmit to the specialized agencies of the UN “copies of such parts of the [State] reports as may fall within their field of competence.” With regard to the timetable for the submission of State reports, the Covenant provides that they shall be submitted “within one year of the entry into force of the present Covenant for the States Parties concerned” and “thereafter whenever the Committee so requests.”²³ As rule the Committee requests the submission of such reports every five years.

The language of article 40 indicates that those who drafted this provision did not wish to spell out very clearly what powers the Committee was to exercise in dealing with State reports. While the Committee was mandated “to study” these reports, article 40 fails to specify the object or purpose of the study. It provides that after studying the State reports, the Committee is to “transmit its reports, and such general comments as it may consider appropriate, to the States Parties.”²⁴ In other words, left unstated or vague is the function the Committee is to exercise in studying the State reports, what issues the Committee’s reports may consider, and whether its comments may be addressed to individual states rather than to all States parties in general.²⁵

The Committee debated these issues at great length in 1980.²⁶ A majority of its membership, led by Professor Torkel Opsahl of Norway, took the position that the purpose of the study to which article 40 para. 4 of the Covenant refers was “to ascertain whether the State party had

²² Covenant, article 40 para. 4.

²³ Covenant, article 40 para. 1 lit.(a) and (b).

²⁴ Covenant, article 40 para. 4.

²⁵ On the rather ambiguous nature of the legislative history of article 40 para. 4, see Nowak, see note 9, 568–571.

²⁶ For the summary records of the debate, see (1979-1980) *Yearbook of the Human Rights Committee* (hereinafter cited *Yearbook HRC*), Vol. 1, 397 et seq. For a summary of the debate, see (1979-1980) *Report of the Human Rights Committee* (hereinafter cited *HRC Report*), GAOR, Suppl. No. 40 (Doc. A/35/40), 83–87 (1980).

reported as it should and, on that basis, whether it had implemented or was implementing the Covenant as it had undertaken to do."²⁷ According to Opsahl and those who supported him,

"... the study should lead to the adoption of separate reports by the Committee on each State party's report. The exercise would, however, be conducted in such a way as not to turn the reporting procedure into contentious or inquisitory proceedings, but rather to provide valuable assistance to the State party concerned in the better implementation of the provisions of the Covenant. The reports to be adopted by the Committee as a result of its study of each individual State report should not be seen as identical with its annual report ... to the General Assembly under article 45 of the Covenant ... These reports would be transmitted separately to each individual State party concerned and that State party would be entitled to submit to the Committee under article 40(5), observations on any comments made by the Committee in its report."²⁸

This interpretation of the function to be exercised by the Committee under article 40 was unacceptable to Mr. Bernhard Graefrath of the German Democratic Republic and some of his colleagues. They argued that:

"... the study the Committee was required to undertake under paragraph 4 of article 40 was limited to the exchange of information, the promotion of co-operation among States, with the purpose of maintaining a steady dialogue and assisting States in overcoming difficulties, and that the study did not have in it any element of assessment or evaluation ... [T]he primary functions of the Committee under article 40 of the Covenant were to assist States parties in the promotion of human rights, and not in pronouncing on whether the States parties were or were not implementing their undertaking under the Covenant [T]he Committee was not empowered under the Covenant to interfere in this manner in the internal affairs of States parties".²⁹

²⁷ *HRC Report*, see above, 85.

²⁸ *Id.*

²⁹ *Id.*, 86. See also B. Graefrath, "The Reporting and Complaint Systems in Universal Human Rights Treaties," in: A. Rosas/ J. Helgesen (eds), *Human Rights in a Changing East/West Perspective*, 1990, 290.

Although a majority of Committee members were in agreement with the interpretation advanced by Mr. Opsahl, the Committee's practice of operating by consensus enabled the minority to block its acceptance.

In 1984 a partial compromise solution was adopted. It allowed individual members to voice their own assessment or observations with regard to a State report at the conclusion of its review by the Committee.³⁰ These individual observations were then summarized and reproduced in the Committee's annual report to the UN General Assembly.³¹ Finally, in 1992, after again reviewing its functions under article 40 para. 4, the Committee decided that "observations or comments reflecting the views of the Committee as a whole at the end of the considerations of any State party report should be embodied in a written text, which would be dispatched to the State party concerned as soon as practicable."³²

This is the current practice of the Committee. It consists of the adoption by the Committee of so-called "Concluding Observations." These observations consist of an assessment of the state's human rights situation in light of the information provided in the State report, the answers the Committee received to the questions posed by its members during the examination of the report, and information available to the members from other sources, all analyzed in terms of the country's obligations under the Covenant. The Committee transmits its concluding observations to the State party concerned shortly after the hearing; they are also reproduced in the Committee's annual report to the General Assembly.³³ The format of the document adopted by the Committee for this assessment consists as a rule of the following parts: 1.) introduction, 2.) factors and difficulties affecting the application of the Covenant, 3.) positive aspects, 4.) principal subjects of concern, 5.) suggestions and recommendations.

³⁰ (1983-1984) *HRC Report*, GAOR, Suppl. No. 40 (Doc. A/39/40), 10-12 (1984).

³¹ In 1994, the Committee decided to discontinue summarizing the discussions of the Committee's review of State reports after it had already decided in 1992 to substitute the Committee's "Concluding Observations" for these summaries, (1993-1994) *HRC Report*, GAOR, Suppl. No. 40 (Doc. A/49/40), 9, 12 (1994).

³² (1991-1992) *HRC Report*, GAOR, Suppl. No. 40 (Doc. A/47/40), 3 (1994). This decision was formalized by the Committee at its next session. *Id.*, 4.

³³ See e.g. (1999-2000) *HRC Report*, GAOR, Suppl. No. 40 (Doc. A/55/40), 22 et seq. (2000), for examples of these final observations.

Concluding observations are adopted by the Committee as a whole in closed meetings after a thorough paragraph-by-paragraph discussion of a draft text prepared by a country rapporteur, working alone or with a small country working group. Given their formal character and the care with which they are increasingly being drafted by the Committee, the findings set out in concluding observations must be viewed as authoritative pronouncements on whether a particular state has or has not complied with its obligations under the Covenant. What we have here is a type of Committee "jurisprudence," which provides some insights about the manner in which the Committee interprets the Covenant.³⁴

2. Sources of Information

For a substantial period of time the Committee was divided on the question of the sources of information it could draw on in examining State reports. Article 40 is silent on this subject, although it does authorize the Secretary-General of the UN "to transmit to the specialized agencies concerned copies of such parts of the [State] reports as may fall within their field of competence."³⁵ While some Committee members thought that this provision authorized the Committee to receive comments on the State reports from UN specialized agencies, this view did not find the necessary support in the Committee.³⁶ The Committee did decide, however, that information from the specialized agencies on the manner in which they apply and interpret provisions similar to those of the Covenant should be made available to members of the Committee on a regular basis. It was also decided 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."³⁷

³⁴ For a useful analysis of this "jurisprudence," see S. Joseph, "New Procedures Concerning the Human Rights Committee's Examination of State Reports," *NQHR* 13 (1995), 5 et seq., (8-12). See also E. Tistounet, "Amélioration des procédures conventionnelles des Nations Unies en matière de droits de l'homme," *RUDH* 5 (1993), 145 et seq.

³⁵ Covenant, article 40 para. 3.

³⁶ (1978) *HRC Report*, GAOR, Suppl. No. 40 (Doc. A/33/40), 105 (1978).

³⁷ (1979-1980) *HRC Report*, GAOR, Suppl. No. 40 (Doc. A/35/40), 86-87 (1980).

These decisions were made in the late 1970's and early 1980's and continued for years to reflect the Committee's practice in relation to the specialized agencies. A dramatic change occurred in the early 1990's, when the Committee

"... modified its working methods so as to enable the specialized agencies and other United Nations organs to take an active part in its activities. The Committee accordingly decided that a meeting would be scheduled at the beginning of each session of the pre-session working group³⁸ so that it might suitably receive oral information provided by these organizations. Such information should thus relate to the reports to be considered during the Committee's session and, if need be, supplement the written information already provided."³⁹

This continues to be the Committee's practice. It enables the Committee to receive valuable information relating to the human rights situation in the reporting countries. The Committee also draws with increasing frequency on the studies and resolutions of various UN organs, particularly those prepared by country and thematic rapporteurs appointed by the UN Commission on Human Rights.

In the past there was even greater controversy in the Committee regarding information provided by non-governmental human rights organizations (NGOs).⁴⁰ While some members argued in the early years of the Committee's existence that this information could not be resorted to even by Committee members, not to mention the Committee itself, the members and the Committee have over time made ever greater use of NGO material. Initially, Committee members would draw on this information in formulating their questions without, however, attribution as to its source. In recent years, Committee members increasingly refer by name to the NGO source relied upon and even ask the State representative to confirm or deny the information.⁴¹ Some

³⁸ The pre-session working group usually meets one week before each session of the Committee to make the necessary preparations for the review of the State reports due to be considered at that session. Now it also prepares the draft list of issues for the succeeding session.

³⁹ (1994-1995) *HRC Report*, GAOR, Suppl. No. 40, (Doc. A/50/40), 17 (1995).

⁴⁰ D. McGoldrick, *The Human Rights Committee*, 1994, 77-79.

⁴¹ See F. Pocar, "Current Development and Approaches in the Practice of the Human Rights Committee in Consideration of State Reports," in: A. Eide/

NGOs even submit so-called "alternative reports" in which the information provided in the State report is contradicted. In 1995, moreover, the Committee initiated a practice of giving NGOs an opportunity to meet with inter-sessional working groups of the Committee prior to the Committee session to exchange information on the human rights situation in countries whose reports would be considered at that session. NGOs now also hold informal briefings for Committee members. These tend to be scheduled during lunch hours or early in the morning before the start of the formal Committee meetings.

3. Contents and Examination of State Reports

Article 40 para. 1 requires the States parties to submit their first or so-called initial report to the Committee within one year after they have ratified the Covenant. Reports are due thereafter "whenever the Committee so requests."⁴² These periodic reports must now be submitted to the Committee roughly every five years. Initial and periodic reports are to be drafted in accordance with the instructions of the Committee, set out in its "Guidelines" on the subject.⁴³ The guidelines have been amended over the years in light of the Committee's experience in examining reports.

The Committee requires both types of reports to deal with a country's domestic law and practice by reference to the obligations the state has assumed under the Covenant, and to do so on an article-by-article basis. The reports are to be comprehensive and to include, *inter alia*, information regarding the nature or types of restrictions or limitations on rights, if any. They should describe factors or difficulties affecting the enjoyment of the right by persons within the jurisdiction of the state, including any factors affecting the equal enjoyment by women of that right. The Committee now also requires each State party to include information about measures it took or what remedies it granted in compliance with the Committee's decisions in individual cases lodged

J. Helgesen (eds), *The Future of Human Rights Protection in a World of Change: Essays in Honour of Torkel Opsahl*, 1991, 51 et seq., (57-58).

⁴² Covenant, article 40 para. 1 lit.(b).

⁴³ For the latest version, see Consolidated Guidelines for States Parties' Reports Under the International Covenant on Civil and Political Rights, (hereafter cited as Consolidated Guidelines), (1999-2000) *HRC Report*, GAOR, Suppl. No. 40 (Doc. A/55/40), 112-17 (2000).

against it. In filing their periodic reports, states are asked to address the concerns raised by the Committee in connection with its review of the State's previous report. The Committee's guidelines emphasize throughout the need for it to receive information not only about the relevant legislation, but also about the practices of the courts and administrative organs of the State party and other facts bearing on the actual enjoyment of rights recognized by the Covenant. These instructions reflect the Committee's frustration with the many State reports that focus on the texts of national laws and constitutions rather than on the actual human rights situation in the country, which often bears very little resemblance to what the laws and constitutions provide. On the whole, periodic reports have become more comprehensive in recent years.

The examination of State reports take place as follows: after a report has been received and entered on the Committee's agenda, it is studied by a so-called country rapporteur and a small country working group of the Committee. They prepare a draft set of questions to be addressed by the Committee to the state. Designed to obtain more detailed information on specific human rights concerns, these questions are reviewed by a pre-sessional working group and submitted for adoption to the Committee as a whole. In the past they were transmitted to the state a few days prior to the Committee hearing on the report with the request that they be answered orally by its representative. In 1999, the Committee decided to prepare a list of issues at the session prior to the examination of the report in order to give the state more time to respond to the Committee's concerns.⁴⁴ The Committee examines the country reports in public session. Following the oral presentation by the state's representative, individual members may ask additional questions and comment on the answers. One full day is usually devoted to the public examination of the country reports, although more time may be set aside for initial reports, particularly if the country's human rights problems warrant it. Once the oral phase is over, the Committee meets in private and adopts its "concluding observations." Their contents will as a rule reflect many of the concerns Committee members expressed at the public hearing during the question and answer period.

Although article 40 makes no reference to the presence of State representatives during the Committee's examination of a country's report, their participation in this review process dates back to the earliest days of the Committee's activities. A similar practice was pioneered by the

⁴⁴ *Id.*, 16.

Committee on the Elimination of Racial Discrimination for the examination of State reports under the Convention on the Elimination of All Forms of Racial Discrimination, which also made no provision for it.⁴⁵ Impressed by CERD's experience, the Human Rights Committee incorporated the relevant provision of CERD's Rules of Procedures into its own.⁴⁶ The text of the Committee's rule on the subject – Rule 68 – has remained the same over the years.⁴⁷ Although it merely authorizes, but does not require, states to send representatives to the Committee meetings at which their reports will be examined, their attendance record has been exceptionally good. This result can be attributed to the fact that the Committee expects State representatives to be present and will postpone consideration of a report when it appears that no representative will attend.⁴⁸ This practice makes a great deal of sense because an examination of a State report in the absence of State representatives willing to respond to questions would certainly not promote the constructive dialogue between the State party and the Committee which, in the latter's view, constitutes the essence of the reporting procedure. It is in the state's interest, moreover, to be represented before the Committee when it examines the country's report. This is often the only way for the state to prevent or clarify misunderstandings about its human rights situation.

The nature of the dialogue between the States parties and the Committee has changed over the years. The Committee members' questions have become more probing and intrusive than in the past. Compared with the Committee's practice during the Cold War, when it was not uncommon for certain states, regardless of their human rights record, to be treated with "kid gloves" during the examination of their reports, the Committee's current practice is at once more honest, even-handed and certainly more inquisitorial in style. The net result is a public review of a state's human rights situation that leaves few relevant human rights is-

⁴⁵ See T. Buerghenthal, "Implementing the UN Racial Convention," *Tex. Int'l L. J.* 12 (1977), 187 et seq., (199–201), which describes the evolution of this practice in CERD.

⁴⁶ (1977) *HRC Report*, GAOR, Suppl. No. 44 (Doc. A/32/44), 10 (1977).

⁴⁷ Compare Rule 68 of the 1977 Rules of Procedure, *ibid.*, 60, with the same provision in the current Rules of Procedure.

⁴⁸ Nowak, see note 9, 563, who reports that in dealing with the one State – Guinea – which had sent no representative, the Committee postponed taking up that country's report until a representative eventually appeared. The Committee took the same position in 1995, when the representative of Afghanistan failed to reach Geneva in time to present his country's report.

sues unexplored. It also exposes, probably more than other existing measures of implementation, the achievements and failures of a state's human rights policies. This said, it must be emphasized that the great weakness of the reporting system lies in the failure of certain states, frequently the biggest violators of human rights, to submit their reports to the Committee in a timely fashion. As a matter of fact, while a majority of states may be a year or two behind in getting their initial or periodic reports to the Committee, there are those whose reports are overdue by more than eight to ten years. In 1993, the Committee reported, for example, that:

"The situation facing the Committee has worsened over the years, particularly since third periodic reports became due in 1988. The number of overdue reports, as at 1 May 1993, reached 15 initial, 26 second periodic and 37 third periodic reports, involving a total of 65 States parties The fact that, since 1993, fourth periodic reports have also started to become due is expected to lead to a further increase in overdue reports."⁴⁹

In 2000, the Committee identified 44 states whose reports were at least five years overdue, and some states on the list had reports overdue by more than ten years.⁵⁰ There are various reasons why states are delinquent in complying with their reporting obligations. Although some of them have poor human rights records and wish to avoid public scrutiny, that is certainly not true of all delinquencies. Some smaller, poorer states lack the necessary resources or professional staff to prepare their reports within a reasonable period of time. Civil wars or disruptive internal turmoil often also play a role, as does bureaucratic inertia. The large number of overdue reports obviously weakens the effectiveness of the reporting system, for it prevents the Committee from engaging the

⁴⁹ "Document Submitted by the Human Rights Committee to the [Vienna] World Conference on Human Rights," (1992-1993) *HRC Report*, GAOR, Suppl. 40 (Doc. A/48/40), Part 1, Annex X, 218 et seq., (220-21) (1993). By September 1998 the number of delinquent States parties had climbed to 86, almost two thirds of all States parties, (1987-1998) *HRC Report*, GAOR, Suppl. No. 40 (Doc. A/53/40), 10 (1998). For a comprehensive up-to-date list, see "Recent Reporting History Under the Principal International Human Rights Instruments," Doc. HRI/GEN/4/ Rev.1 (2001).

⁵⁰ (1999-2000) *HRC Report*, GAOR, Suppl. No. 40 (Doc. A/55/40), 19-20 (2000).

delinquent states in a dialogue designed to promote compliance with their treaty obligations.⁵¹

Although the Committee appears thus far to have proceeded on the assumption that it lacks the power to exercise its article 40 mandate in the absence of a State report, the large number of reporting delinquencies might compel it to reexamine that assumption if the reporting situation continues to be unsatisfactory. Were it to do so, it could redefine what is meant by the concept of a "State report" for the purpose of article 40 of the Covenant. For example, in dealing with delinquent periodic reports, the Committee might take up the State's initial or previous periodic report and analyze it in light of current information from non-state sources. Whether "no report" or a report originating from non-state sources could also be considered a State report is a more difficult question. Some such approach might prompt the states concerned to finally submit their reports. In this connection, it is interesting to note that the Committee recently reported that "it is working on procedures which would enable it ... to consider compliance by States parties which have failed to submit reports under article 40."⁵²

This discussion would be incomplete if it failed to call attention to the fact that the large number of overdue reports has made it possible for the Committee to avoid having to deal with a difficult problem: if all or almost all States parties did submit their reports in a timely fashion, the Committee would face a serious backlog caused by its inability to process these reports within a reasonable period of time. The Committee now meets in three annual sessions of three weeks each. Experience indicates that the Committee cannot deal effectively with more than five to six State reports per session and complete its other work, especially the processing of the growing number of individual communications. Serious financial problems at the United Nations have reduced the Committee's professional support staff and resulted in substantial delays in the translation of incoming State reports, all of which affects the Committee's ability to discharge its mandate expeditiously. Unless these conditions improve or the Committee's sessions are expanded, which is most unlikely in the foreseeable future, the Committee may well have to reassess the manner in which it deals with State reports. One solution might be to limit the number of rights states would be

⁵¹ See generally, J. Connors, "An Analysis and Evaluation of State Reporting," in: A. Bayefsky (ed.), *The UN Human Rights Treaty System in the 21st Century*, 2000, 3.

⁵² (1999–2000) *HRC Report*, GAOR, Suppl. 40 (Doc. A/55/40), 20 (2000).

asked to report on in any given reporting period. Another might be to establish different reporting periods or distinct reporting obligations geared to a selected number of rights for different states, depending upon the Committee's assessment of problems and achievements that had been revealed in the examination of their earlier reports. The Committee's latest reporting guidelines appear to move in that direction.⁵³

4. Special Reports

In 1991, the Committee began to request certain States parties to submit special reports if there existed exceptional situations in those countries with regard to the enjoyment of human rights. The first such request was addressed to Iraq in April 1991.⁵⁴ The Committee formalized the practice in 1993 by amending its Rules of Procedure accordingly.⁵⁵ The amendment came on the heels of the Committee's 1992 decision to request the Governments of Bosnia and Herzegovina, Croatia and the Federal Republic of Yugoslavia "to submit special reports on events affecting human rights protected under the Covenant in respect of persons and events now coming under their jurisdiction."⁵⁶ The Committee's request to these states was accompanied by a series of questions, drafted by reference to specific provisions of the Covenant, which the Committee wanted to have addressed. Between 1991 and after the amendment of its Rules of Procedure, the Committee requested special reports from Angola and Burundi (1993), Rwanda and Haiti (1994), Nigeria (1995), and the United Kingdom with regard to Hong Kong (1996). While the affected States parties are usually given a period of three months within which to comply with the request for a special re-

⁵³ See Consolidated Guidelines, see note 43.

⁵⁴ (1990-1991) *HRC Report*, GAOR, Suppl. No. 40 (Doc. A/46/40), 10 (1991).

⁵⁵ The amendment added a new paragraph 2 to Rule 66 of its Rules of Procedure. This paragraph reads as follows:

"Requests for submission of a report under article 40, paragraph 1 (b), of the Covenant may be made in accordance with the periodicity decided by the Committee or at any time the Committee may deem appropriate. In the case of an exceptional situation when the Committee is not in session, a request may be made through the Chairman, acting in consultation with the members of the Committee."

⁵⁶ *Id.*, 9.

port, not all of them have done so on time and some have failed to comply altogether.⁵⁷

It is probably too early to say how the special reports practice will evolve. It is possible that it might usher in a gradual change in the Committee's *modus operandi* under article 40. Rather than requiring all states to report every five years with regard to all articles of the Covenant, the Committee might begin to request special reports from countries that have serious human rights problems while limiting the scope and frequency of periodic reports from states with less serious problems. This approach could be justified on the ground that the Committee's limited time and resources call for a greater focus on problem states. Here, it might also be asked whether the Committee is the proper institution to deal with the type of "emergency situations" that have prompted it to request special reports. Other UN bodies, such as the Commission on Human Rights, the UN High Commissioner for Human Rights and even the Security Council, would not only have jurisdiction to deal with these situations, they would be in a better position to do so more effectively than the Committee. The Committee's limited resources, expertise and institutional legitimacy could be put to better use if employed to promote a general climate of compliance with the Covenant in all States parties instead of competing with or attempting to complement the work of other UN bodies with more "political muscle" and resources. It is by no means clear that by seeking special reports from Rwanda, Haiti, Nigeria or the former Yugoslavia, for example, the Committee had any meaningful impact on the human rights situation in those countries or effectively complemented the actions of other UN bodies with regard to these countries. The Committee might therefore consider whether it should not stay out of these situations in order to avoid disrupting and weakening its normal article 40 functions, particularly when other UN bodies already assumed jurisdiction over these situations or are likely to do so.

⁵⁷ For a useful analysis, see I. Boerefijn, "Towards a Strong System of Supervision: The Human Rights Committee's Role in Reforming the Reporting Procedure under Article 40 of the Covenant on Civil and Political Rights," *HRQ* 17 (1995), 766 et seq., (776-782); Boerefijn, see note 18.

5. Reporting Obligations and State Succession

In exercising its functions under article 40 of the Covenant, the Committee has had to address some important questions relating to the membership status of so-called new or successor states, that is, states that acquired their independence as a result of the break up of a State party to the Covenant. These issues have arisen in the context of the break-up of the Soviet Union and of Yugoslavia, the agreed upon transfer of Hong Kong to the Peoples Republic of China, and the purported denunciation of the Covenant in November 1997 by the Democratic Peoples Republic of Korea (DPRK). The Committee has taken the position that the emergence of new states from the territory of a State party does not deprive the people previously under the protection of the Covenant of those rights, even though the new entities have not formerly ratified or acceded to the Covenant. With regard to the states that had been part of Yugoslavia, for example, the Committee determined "that all the peoples within the territory of the former Yugoslavia are entitled to the guarantees of the Covenant," having found "that the new States within the boundaries of the former Yugoslavia succeeded to the obligations of the former Yugoslavia under the Covenant in so far as their respective territories were concerned"⁵⁸ In the Committee's view, moreover, the former Yugoslav states and the former Soviet Republics "were bound by the obligations under the Covenant as from the date of their independence."⁵⁹

The situation of Hong Kong, which reverted to the Peoples' Republic of China in July 1997, raised a somewhat different issue. Here the Committee had to determine whether the inhabitants of Hong Kong would continue to be protected by the Covenant once the transfer had occurred, and if so, whether China, which is not a party to the

⁵⁸ (1992-1993) *HRC Report*, GAOR, Suppl. No. 40 (Doc. A/48/40), Vol. 1, 15 (1993). Here it should be emphasized that the principle underlying the Committee's decisions relating to the former Soviet republics and to the former Yugoslavia apply with equal force to article 41 declarations (inter-state communications) and the Optional Protocol (individual communications). For the time being, however, this issue has arisen only in the context of State reports.

⁵⁹ *Id.*, 14. This finding did not apply to the Ukraine and Belarus, which had been UN Member States prior to the break up of the Soviet Union, nor to the three Baltic States (Estonia, Latvia and Lithuania) whose incorporation into the Soviet Union was not recognized by the international community. The latter states subsequently acceded to the Covenant.

Covenant, or the Hong Kong Government, would have to file a report under article 40 with regard to that territory. The Committee answered the first question in the affirmative, relying on the precedents it established in dealing with the former Yugoslavia and Soviet Union, as well as on the Joint Declaration concluded by the United Kingdom and China.⁶⁰ The Joint Declaration provides that “the provisions of the ... Covenant ... as applied to Hong Kong shall remain in force.”⁶¹ With regard to the second question, the Committee determined that the reporting requirement would continue to be applicable to Hong Kong after the transfer, leaving it to the parties to the Joint Declaration to decide which authority would file the report. Subsequently China filed the report. In its concluding observations on the Hong Kong report, the Committee thanked “the government of China for its willingness to participate in the reporting procedure under Article 40” At the same time, the Committee affirmed “its earlier pronouncement on the continuity of the reporting obligations in relation to Hong Kong.”⁶²

The Committee’s practice relating to the above issues indicates that the Committee considers that individuals subject to the jurisdiction of a State party to the Covenant acquire an independent or vested right — independent of the state — to the protection of the guarantees and measures of implementation set out in the Covenant. The Chairman of the Committee, speaking on behalf of the Committee and with its authorization, put the matter as follows:

“The Human Rights Committee — dealing with cases of dismemberment of States parties to the International Covenant on Civil and Political Rights has taken the view that human rights treaties devolve with territory, and that States continue to be bound by the obligations under the Covenant entered by the predecessor State.

⁶⁰ Statement by the Chairperson on Behalf of the Human Rights Committee Relating to the Consideration of the Part of the Fourth Periodic Report of the United Kingdom Relating to Hong Kong, Doc. CCPR/C/79/Add.57, page 6 (1995). The Committee reaffirmed this position in its Concluding Observations to the 1996 Report of the United Kingdom relating to Hong Kong, Doc. CCPRX/79/Add.69 (1996).

⁶¹ Section 156 of Annex 1 to the Sino-U.K. Joint Declaration on the Question of Hong Kong, which entered into force on 27 May 1985, and reads as follows: “The provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights as applied to Hong Kong shall remain in force.”

⁶² (1999–2000) *HRC Report*, GAOR, Suppl. No. 40 (Doc. A/55/40), 40 (2000).

Once the people living in a territory find themselves under the protection of the International Covenant on Civil and Political Rights, such protection cannot be denied to them by virtue of the mere dismemberment of that territory or its coming within the jurisdiction of another State or of more than one State."⁶³

The Committee restated and expanded its position on this subject in the following terms in its General Comment No. 26:

"The rights enshrined in the Covenant belong to the people living in the territory of the State party. The Human Rights Committee has consistently taken the view ... that once the people are accorded the protection of the rights under the Covenant, such protection devolves with the territory and continues to belong to them, notwithstanding a change in government of the State party, including dismemberment in more than one State or State succession or any subsequent action of the State party designed to divest them of the rights guaranteed by the Covenant."⁶⁴

The reference in General Comment No. 26 to "subsequent action of the State party designed to divest them of the rights guaranteed by the Covenant," was prompted by the Committee's rejection of the Democratic People's Republic of Korea's (DPRK) purported denunciation in 1997 of the Covenant on the ground that the Covenant is a treaty which, once ratified, cannot be denounced.⁶⁵ Interestingly enough, the DPRK seems to have accepted the Committee's interpretation in that it submitted its second periodic report on 20 March 2000.⁶⁶

Although it remains to be seen whether the views expressed by the Committee in General Comment No. 26 will find general acceptance, the Human Rights Committee is not alone in espousing them. For example, the Meeting of Persons Chairing Human Rights Treaty Bodies took the position that "successor States were automatically bound by

⁶³ Statement of the Chairperson, see note 60, 6. See also, Concluding Observations on the 1996 United Kingdom Report on Hong Kong, Doc. CCPR/C/Add.69 (1996).

⁶⁴ General Comment No. 26 (Continuity of Obligations), by the Human Rights Committee, adopted on 29 October 1997, reproduced in: "Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies," Doc. HRI/GEN/1/Rev.5 of 26 April 2001, page 163.

⁶⁵ For the full text of General Comment No. 26, see above.

⁶⁶ (1999–2000) *HRC Report*, GAOR, Suppl. No. 40 (Doc. A/55/40), 100, footnote 3 (2000).

obligations under international human rights instruments from the respective date of independence and that observance of the obligations should not depend on a declaration of confirmation made by the Government of the successor State.”⁶⁷ Whether this view is shared by the UN Secretariat, which acts as the depositary for these treaties, or by other UN bodies is not altogether clear. In addressing this issue, the Commission on Human Rights appears not to have gone as far as the Human Rights Committee, although the language of its resolution on this subject is rather ambiguous.⁶⁸ In one of the operative paragraphs of the resolution, the Commission “reiterates its call to successor States which have not yet done so to confirm to appropriate depositaries that they continue to be bound by the obligations under international human rights treaties.” In another paragraph, it requests the human rights treaty bodies “to consider further the continuing applicability of the respective international human rights treaties to successor States, with the aim of assisting them in meeting their obligations.” In yet another paragraph, the Commission “requests the Secretary-General to encourage States to confirm their obligations under international human rights treaties to which their predecessor States were a party.” Some parts of the foregoing language seem to suggest that the successor states are bound by these treaties, whether or not they confirm their continuing adherence. But other language conveys the impression that “confirmation” is necessary for these states to continue to be bound. Moreover, in the Secretary-General’s Report on the Status of the International Covenants on Human Rights,⁶⁹ some former Soviet republics are listed as having “acceded” to these treaties, whereas the former Yugoslav republics as well as the Czech Republic and Slovakia are deemed to have “succeeded” to these instruments.⁷⁰ Equally ambiguous is “General Recommendation XII on Successor States”, adopted by the Committee on the Elimination of Racial Discrimination in 1993, which “encourages successor States that have not yet done so to confirm to the Secretary General ... that they continue to be bound by the obligations under that

⁶⁷ Report of the UN Secretary-General on Succession of States in Respect of International Human Rights Treaties, Doc. E/CN.4/1996/76, page 3 (1996).

⁶⁸ UN Human Rights Commission, Res. 1995/18 (1995).

⁶⁹ Doc. E/CN.4/1996/76 (1996).

⁷⁰ *Id.*, 5 et seq. It is worth noting too that the *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*, Doc. SL/LEG/8 (1994), provides no clear answer to the question raised above and contains no special section on human rights treaties.

Convention, if predecessor States were parties to it.⁷¹ The obvious ambiguity that exists on this entire subject calls for a uniform UN position relating thereto.

IV. Inter-State Communications

The Covenant establishes an optional inter-State communication system set out in arts 41 and 42 thereof.⁷² To date no State party has invoked this mechanism. The only Committee practice applicable to it consists of the rules of procedure governing inter-State communications. These rules were adopted by the Committee shortly after it was constituted and have not been amended since that time.⁷³

The inter-State mechanism applies only to States parties that have made the requisite declaration under article 41 para. 1 of the Covenant, recognizing "the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the ... Covenant." The Committee may only consider these communications if both states have made the declaration under article 41 para. 1. Article 41 does not establish a judicial or quasi-judicial dispute resolution mechanism. Rather, it creates a conciliation procedure, which assigns a very limited role to the Committee. Assuming that states X and Y have made the requisite declarations under article 41 para. 1, this mechanism would function in the following manner: If X believes that state Y is violating the Covenant, state X is free to make this allegation in a formal note addressed to state Y, which must answer it within a period of three months. If the two states do not resolve their differences within a period of six months after the receipt by Y of Xs original communication, either state has the right to bring the matter to the attention of the Committee. The Covenant does not require the initial communication from X to Y to be copied to the Committee. The Committee will therefore be unaware of the initiation of the proceedings under article 41 until one of the two states decides, after the expiration of the six-months period, to bring the

⁷¹ "Compilation of General Comments and General Recommendations Adopted by the Human Rights Treaty Bodies," Doc. HRI/GEN/1/Rev.5, page 182 of 26 April 2001.

⁷² For an analysis of these provisions, Nowak, see note 9, 580 et seq.; Schwelb, see note 19, 160; Robertson, see note 3, 351.

⁷³ See Human Rights Committee, Rules of Procedure, Rules 72-77 E.

matter to its attention. When this issue was discussed by the Committee, some members suggested the inclusion in the relevant rules of procedure of a provision enabling either state when starting the proceedings to provide the Committee with copies of the initial communication. This view did not prevail, in part because some members considered that article 41 did not confer any competence on the Committee until the matter was referred to it by one of the states on the expiration of the six-months period.⁷⁴ The Committee's Rules of Procedure consequently do not address the proceedings prior to this formal submission.

The Committee may deal with the case only after ascertaining that all available domestic remedies "have been invoked and exhausted ... , in conformity with the generally recognized principles of international law."⁷⁵ This requirement would presumably apply only in those cases where the complaining state alleges a violation of some of the rights guaranteed in the Covenant. But since article 41 para. 1 is broader and applies to claims generally that a State party "is not fulfilling its obligations under the present Covenant", it could be invoked also with regard to disputes concerning compliance with other provisions of the Covenant, for example, the failure of a State to comply with its reporting requirement under article 40. Here it would obviously not be necessary to show the non-exhaustion of domestic remedies. Once the Committee has concluded that domestic remedies have been exhausted or need not be exhausted, it "shall make available its good offices to the States Parties concerned with a view to a friendly solution of the matter on the basis of respect for human rights and fundamental freedoms as recognized in the ... Covenant."⁷⁶ The Committee has the right also to call on the states concerned to supply any information it considers relevant in addition to the written and oral submissions the parties are free to make under article 41. The proceedings are closed to the public.

The Committee must prepare a report within 12 months after the case has been referred to it. Two types of reports are envisaged. If the matter has been resolved, the Committee's report is to confine itself "to a brief statement of the facts and the solution reached."⁷⁷ In cases where no solution was reached, the report is to contain a brief statement of the facts, supplemented by the written and oral submissions of the parties,

⁷⁴ (1978-1979) *HRC Report*, GAOR, Suppl. No. 40 (Doc. A/34/40), 9 (1979).

⁷⁵ Covenant, article 41 para. 1 lit.(c).

⁷⁶ Covenant, article 41 para. 1 lit.(e).

⁷⁷ Covenant, article 41 para. 1 lit.(h)(i).

which are to be attached to the report. Both types of reports are to be transmitted to the State parties concerned. The Covenant makes no reference to the publication of the reports, and neither do the here relevant Rules of Procedure. This fact would not, however, prevent the Committee from describing the proceedings in its annual report to the UN General Assembly where it is required to report "on its activities."⁷⁸ The Committee would be able also to follow up on the substance of the claimed violations in its examination of the periodic reports of the states concerned.

The proceedings between state X and state Y need not, however, end with one of the two reports envisaged under article 41. This is so because under article 42, if the matter has not been resolved to the satisfaction of the parties, the Committee may with their consent appoint a five-member *ad hoc* Conciliation Commission, which will attempt to reach an amicable solution. If such a solution is arrived at, the Commission will prepare a report containing a brief statement of the facts and an indication of the nature of the settlement. If the Commission is unable to bring about an amicable solution, it will have to draw up a report "that shall embody its findings on all questions of fact relevant to the issues between the States Parties concerned, and its views on the possibilities of an amicable solution of the matter."⁷⁹ The written and oral submissions of the parties are to be appended to this report, which is to be submitted to the Chairperson of the Human Rights Committee for transmission to the parties. Although nothing is said about the publication of the Commission's report, neither article 41 nor article 42 prohibits the States parties concerned or any one of them from publishing the report once the proceedings under these two provisions have been concluded.

The fact that arts 41 and 42 envisage a rather weak conciliation mechanism for inter-State disputes is counterbalanced in part by article 44 of the Covenant, which indicates that the Covenant dispute machinery is not exclusive. Article 44 reads as follows:

"The provisions for the implementation of the present Covenant shall apply without prejudice to the procedures prescribed in the field of human rights by or under the constituent instruments and the conventions of the United Nations and of the specialized agencies and shall not prevent the States Parties to the ... Covenant from having recourse to other procedures for settling a dispute in accor-

⁷⁸ Covenant, article 45.

⁷⁹ Covenant, article 42 para. 7 lit.(c).

dance with general or special international agreements in force between them.”

This language appears to permit States parties to the Covenant, among other options, to take a dispute relating to the interpretation or application of that instrument to the ICJ, either before or after the conclusion of the procedures envisaged under arts 41 and 42. It would also make it possible, for example, for those States parties to the Covenant that are Member States of the Organization of American States to seek an advisory opinion on the same subject from the Inter-American Court of Human Rights under article 64 of the American Convention on Human Rights.⁸⁰

V. Individual Communications

1. The Normative Framework

The Optional Protocol to the Covenant establishes a complaint mechanism that permits individuals to submit communications to the Committee against States parties to the Covenant that have ratified the Protocol. 98 states have to date become parties to it. Unlike the inter-state machinery provided for by arts 41 and 42 of the Covenant, which sets up a conciliation procedure, the Protocol's individual petition system resembles a quasi-judicial dispute resolution mechanism. Whether or not it meets all the criteria of a quasi-judicial system is probably less important than that the Committee has increasingly structured this remedy along quasi-judicial lines as far as concerns the procedures for dealing with individual communications and the form in which Committee decisions are drafted.

The individual communication or petition system provided for by the Optional Protocol can be described in a few sentences.⁸¹ It permits

⁸⁰ On the relevant jurisdiction of the Inter-American Court of Human Rights, see Advisory Opinion OC-1/82 of 24 September 1982 (“Other Treaties” Subject to the Advisory Jurisdiction of the Court); Inter-American Court of Human Rights, Advisory Opinion OC-16/99 of 1 October 1999 (“The Right to Consular Information”). On the relationship between article 44 and the European Convention on Human Rights, see Nowak, see note 9, 619.

⁸¹ See generally M. Schmidt, “The UN Human Rights Committee: Process and Progress,” *Human Rights Forum* (Philippines) 5 (1995), 31;

victims of a violation of the rights guaranteed in the Covenant committed by a State party to the Optional Protocol to file a so-called "communication" with the Committee, provided they have exhausted all available domestic remedies. To be considered admissible, the communications must also not be anonymous, abusive of the "right of submission" or "incompatible with the provisions of the Covenant."⁸² The Committee may not consider a communication unless it has ascertained that "the same matter is not being examined under another procedure of international investigation or settlement."⁸³ The Committee examines all communications in private sessions on the basis of the written information submitted to it by the parties.⁸⁴ The proceedings end with the adoption by the Committee of so-called "Views" that is, its findings or decisions.⁸⁵

Over the years, the Committee has been able to transform this skeletal structure into a rather substantial individual petition system. What is interesting about the evolution of this system is that Cold War ideological battles had much less of an inhibiting impact on this process than on the reporting mechanism. One explanation may well be the optional character of the mechanism established by the Protocol. Its optional nature reduced the risk for states not wishing to open themselves up to international scrutiny, permitting their nationals on the Committee to be much less concerned about efforts to strengthen the individual petition system. Even so, major breakthroughs in the implementation of the Protocol, such as the establishment of Special Rapporteurs on New Communications and for Follow-Up on Views, did have to await the end of the Cold War.

Until relatively recently, the Committee considered the admissibility of communications first, before addressing the merits of the case. Beginning on an *ad hoc* basis in 1995, the Committee began to consider

McGoldrick, see note 5, 120; R. Higgins, "Admissibility under the Optional Protocol to the International Covenant on Civil and Political Rights," *Canadian Human Rights Yearbook* 1992, 57 et seq., (58); J. Moller, "Recent Jurisprudence of the Human Rights Committee," *ibid.*, 79; A. De Zayas et al., "The Application of the International Covenant on Civil and Political Rights under the Optional Protocol by the Human Rights Committee," *GYIL* 28 (1985), 9 et seq.

⁸² Optional Protocol, article 3.

⁸³ Optional Protocol, article 5 para. 2 lit.(a).

⁸⁴ Optional Protocol, article 5 paras 1 and 3.

⁸⁵ Optional Protocol, article 5 para. 4.

admissibility and merits together, unless the State Party concerned objected. Two years later, the Committee formalized its decision to treat admissibility and merits in a single proceeding unless the special aspects of the case justified dealing with admissibility separately.⁸⁶ In its first few years, the Committee as a whole passed on all admissibility issues. In the late 1980's this task was divided between it and pre-sessional Working Groups on Communications and, in certain cases, the Special Rapporteur on New Communications.⁸⁷ But only the plenary Committee has the power to declare a communication inadmissible,⁸⁸ whereas a finding of admissibility may be made by the Working Group, provided all five of its members agree with the decision.⁸⁹ If there is no such agreement in the Working Group, the Committee must decide. By the same token, if a communication raises a number of admissibility issues and the Working Group considers some to be admissible and others not, it must refer the communication to the Committee on the latter issues.

The Special Rapporteur on New Communications, who acts as a sort of clearing house for all new communications, may recommend to the Committee that a communication be declared inadmissible.⁹⁰ But here again, the power to decide the issue is vested in the Committee. The position of the Special Rapporteur on New Communications was established in 1989 to enable the Committee to deal more expeditiously with individual communications, especially with urgent cases involving capital punishment, extradition and expulsion.⁹¹ Since the Committee meets only for a period of three weeks three times a year, all action on incoming communications, including requests for additional information, had to be delayed until the Committee or its pre-sessional Working Group could deal with the matter. Today all new communications are referred to the Special Rapporteur, who determines whether they need to be amplified for admissibility purposes and/or whether to refer them to the States parties concerned for their observations on issues of admissibility and merits. Here it should be noted that no case may be

⁸⁶ See Rules of Procedure, Rule 91.

⁸⁷ See Rules of Procedure, Rules 87 to 92.

⁸⁸ See Rules of Procedure, Rule 92.

⁸⁹ See Rules of Procedure, Rule 87 para. 2.

⁹⁰ See Mandate of the Special Rapporteur on New Communications, (1990-1991) *HRC Report*, GAOR, Suppl. No. 40 (Doc. A/46/40), 218 (1991).

⁹¹ (1988-1989) *HRC Report*, GAOR, Suppl. No. 40 (Doc. A/44/40), para. 619-620 (1989).

declared admissible unless the State party concerned has received the text of the communication and been given an opportunity to address the questions raised.⁹²

The Special Rapporteur has another important function. Although the Optional Protocol is silent on the question of emergency or so-called interim measures, Rule 86 of the Committee's Rules of Procedure, which dates back to the first rules it adopted, empowers the Committee to issue interim measures to "avoid irreparable damage to the victim of the alleged violation." The Committee, in turn, has authorized the Special Rapporteur to exercise this function in appropriate cases falling within the scope of his/her mandate.⁹³ This procedure permits the Committee through the Special Rapporteur to act in emergency situations even before a communication has been ruled admissible. The Special Rapporteur may also exercise this function whether or not the request for interim measures is made at the time a new communication is submitted or at a later stage.⁹⁴ Over the years, States parties have displayed a relatively high degree of compliance with the interim measures issued by the Special Rapporteur.

The pre-sessional Working Groups do not only deal with communications at the admissibility stage.⁹⁵ On receipt of a communication by the Committee, the parties are informed and the State party is given a period of six months within which to submit its arguments on the merits of the case.⁹⁶ The individual then has an opportunity to reply within a period of time fixed by the Committee. Where the State party concerned has an objection relating to admissibility alone (usually, inadmissibility for formal or procedural reasons), it has two months within which to submit an application for rejection of the communication on those grounds. The Committee (or Working Group or Special Rapporteur on New Communications) may decide to extend the time limit for

⁹² Rules of Procedure, Rule 91 para. 2.

⁹³ See Mandate of the Special Rapporteur on New Communications, see note 90, 218.

⁹⁴ Subparagraph (b) of the Special Rapporteur's Mandate, see note 90, which declares that the Special Rapporteur shall have the following mandate: "... (b) To issue rule 86 requests, whether coupled with a request under rule 91 or not."

⁹⁵ See Rules of Procedure, Rules 93 and 94, which apply to the examination of the merits of a communication.

⁹⁶ Rules of Procedure, Rule 91.

the proceedings on the merits while admissibility is decided.⁹⁷ Once the admissibility proceedings have concluded and the case has been ruled admissible, it will be studied by a pre-sessional Working Group, which will make its recommendations to the Committee in the form of a draft view. The Committee analyzes the draft and adopts its decision, usually after extensive discussion. While the chair will attempt to bring about a decision by consensus, individual members of the Committee are free to append dissenting and concurring opinions, and frequently do so.⁹⁸ As a result, consensus plays a much less important role in the application of the Optional Protocol than it does in the Committee's other activities. Although the Committee's decision at this stage usually involves a finding on the merits, it retains the power to dismiss the case as inadmissible if justified as a result of additional information developed during the proceedings.⁹⁹

Until April 1997, all deliberations of the Committee and its working groups relating to the admissibility and the merits of a case were confidential.¹⁰⁰ So were most of the interlocutory decisions adopted by it before the decision on the merits or during the admissibility stage, including a decision ruling a case admissible. However, the Committee's inadmissibility decisions and its views on the merits were always published after their transmission to the parties. This continues to be the practice, which is also applied to decisions on discontinuance.¹⁰¹ The general rules relating to confidentiality were relaxed somewhat in April 1997. Although communications continue to be examined in closed session, and although summary records together with the Committee's own working documents, summaries and drafts remain confidential (unless the Committee decides otherwise), the author of a communication or the State party concerned now has the right to make public any submissions or information bearing on the proceeding.¹⁰² Noteworthy,

⁹⁷ Rules of Procedure, Rule 91 para. 3.

⁹⁸ On the Committee's practice, see P. Ghandi, *The Human Rights Committee and the Right of Individual Communication: Law and Practice*, 1998.

⁹⁹ Rules of Procedure, Rule 93 para. 4.

¹⁰⁰ On the issue of confidentiality, see Rules of Procedure, Rules 96-97. Rule 96 as adopted at the 1585th Mtg. of the Committee on 10 April 1997, replaces old rules 96, 97 and 98 which reflected a relatively strict secrecy regime.

¹⁰¹ Rules of Procedure, Rule 96 para. 5.

¹⁰² Rule 96 paras 1-3. Rule 96 para. 3 provides in part: "However, the Committee, the Working Group ... or the Special Rapporteur ... may, as deemed appropriate, request the author of a communication or the State party con-

too, is the fact that the Committee's decisions ordering interim measures are made public.¹⁰³ This practice permits public pressure to be put on states to comply with interim measures.

The Optional Protocol is not too clear on what may and may not be published. One provision declares that "the Committee shall hold closed meetings when examining communications under the present Protocol."¹⁰⁴ Another provides that "the Committee shall forward its views to the State Party concerned and to the individual."¹⁰⁵ Finally, article 6 of the Protocol stipulates that "the Committee shall include in its annual report under article 45 of the Covenant a summary of its activities under the present Protocol." Reading these provisions together, it appears that the confidentiality rules as amended by the Committee in 1997 are consistent with the requirements imposed by the Protocol. By the same token, although there was some doubt when the Committee was first constituted whether its Views could be published (the Protocol only calls for their transmittal to the parties), these doubts were resolved in favor of publication when the Committee, relying on the language of article 6, included its first Views in its annual report to the General Assembly.¹⁰⁶ The Committee has followed this practice ever since and now also reports decisions on inadmissibility and discontinuance.¹⁰⁷ Since the Committee's final Views include a summary of its admissibility decision, all of its actions in the matter will eventually be

cerned to keep confidential the whole or part of any such submissions or information." And Rule 96 para. 4 provides: "When a decision has been taken on the confidentiality pursuant to paragraph 3 above, the Committee, the Working Group ... or the Special Rapporteur ... may decide that all or part of the submissions and other information, such as the identity of the author, may remain confidential after the Committee's decision on inadmissibility, merits or discontinuance has been adopted."

¹⁰³ Rules of Procedure, Rule 96 para. 5.

¹⁰⁴ Optional Protocol, article 5 para. 3.

¹⁰⁵ Optional Protocol, article 5 para. 4.

¹⁰⁶ (1979) *HRC Report*, GAOR, Suppl. No. 40 (Doc. A/34/40), 124 (1979).

¹⁰⁷ All of these decisions are now published in volume two of the Committee's annual report to the General Assembly as well as in the Yearbook of the Human Rights Committee. To date, the Committee has also published two volumes of decisions under the title of "Selected Decisions of the Human Rights Committee under the Optional Protocol," Vol. I (1985), Vol. II (1990), the former covering sessions two through sixteen, the latter seventeen through thirty-two. Volume III in this series is in the process of being edited.

published, although they may remain confidential in the special circumstances envisaged in Rules 96 paras 3 and 4.¹⁰⁸

2. Follow-Up

The Optional Protocol is silent on the issue of the Committee's role subsequent to the adoption of its Views in a case.¹⁰⁹ Article 6 of the Protocol does, however, require the Committee to provide the UN General Assembly with a summary of its activities under the Protocol. This provision enables the Committee to call the Assembly's attention to the failure of states to comply with the Committee's Views. In the early 1990's the Committee decided to include this information in its annual report to the Assembly and to take two additional steps designed to prod states to give effect to its Views under the Protocol: first, it established the position of a Special Rapporteur for the Follow-up of Views and, second, it imposed the requirement that in their reports under article 40 of the Covenant, States parties indicate what measures they have taken to give effect to the Committee's Views in cases requiring such action.¹¹⁰ Noteworthy, too, is the fact that in drafting Rule 97 of its Rules of Procedure, the Committee decided to exclude from the confidentiality requirement information furnished by the parties in the context of the follow-up process. The same is true of the Commit-

¹⁰⁸ See note 102.

¹⁰⁹ For the Committee's practice, see M. Schmidt, "Follow-up Mechanisms Before UN Human Rights Treaty Bodies and the UN Mechanism and Beyond," in: Bayefsky, see note 51, 233.

¹¹⁰ See "Measures adopted at the thirty-ninth session of the Human Rights Committee to monitor compliance with its views under article 5, paragraph 4 of the Optional Protocol to the International Covenant on Civil and Political Rights," (1989-1990) *HRC Report*, GAOR, Suppl. No. 40, (Doc. A/45/40), Vol. 11, 205 (1990). See also "Follow-up on Views adopted under the Optional Protocol to the International Covenant on Civil and Political Rights," Documents Submitted by the Human Rights Committee to the World Conference on Human Rights, reprinted in: (1992-1993) *HRC Report*, GAOR, Suppl.No. 40 (Doc. A/48/40), Annex X, 222 (1993). The mandate of the Special Rapporteur for Follow-up can be found in the Committee's Rules of Procedure, Rule 95. See M. Schmidt, "The UN Human Rights Committee: Process and Progress," *Human Rights Forum (Philippines)* 5 (1995), 31 et seq., (44); A. de Zayas, "The Follow-Up Procedure of the UN Human Rights Committee," *Review of the Int'l Comm. Jurists*, 47 (1991), 28 et seq.

tee's decisions "relating to follow-up activities." In its submissions to the Vienna World Conference on Human Rights, the Committee explained the reasons for these decisions in the following terms:

"Publicity for follow-up activities would not only be in the interest of the victims of violations of provisions of the Covenant, but could also serve to enhance the authority of the Views and provide an incentive for States parties to implement them. Those States unwilling to cooperate under the follow-up procedure would be listed in an appendix to the annual report; in appropriate instances, and notably when States Parties challenge the Committee's findings, the Committee would adopt an official response to the State party concerned."¹¹¹

These considerations prompted the Committee in 1994 to initiate the practice of including in its annual report a separate and highly visible chapter on follow-up activities under the Optional Protocol and to adopt other measures designed to give publicity to the failure of states to cooperate with the Committee's follow-up activities.¹¹² This practice has been further developed and strengthened in recent years.¹¹³

Article 95 para. 2 of the Committee's rules of procedure authorize the Special Rapporteur for Follow-Up to "make such contacts and to take such action as appropriate for the due performance of the follow-up mandate." In reliance on this mandate, the Special Rapporteur conducted the Committee's first *in loco* follow-up mission by visiting Jamaica at its Government's invitation in June 1995.¹¹⁴ This action was taken because a large number of Views relating to Jamaica had not been acted upon by the Government. During his visit to Jamaica, the Special Rapporteur met with members of the Government, judges, and officials

¹¹¹ (1992-1993) *HRC Report*, GAOR, Suppl. No. 40 (Doc. A/48/40), Annex X, 224 (1993).

¹¹² (1994-1995) *HRC Report*, GAOR, Suppl. No. 40 (Doc. A/50/40), 99 (1995).

¹¹³ In 1996, a "blacklist" of uncooperative states was for the first time included in the follow-up chapter of the Committee's annual report. However inadequate staff resources precluded systematic follow-up consultations in the Committees 62nd and 63rd sessions, with the result that no "blacklist" could be included. (1998) *HRC Report*, GAOR, Suppl. No. 40 (Doc. A/53/40), 72 and 79 (1998). For the current list, see (1999-2000) *HRC Report* GAOR, Suppl. No. 40 (Doc. A/55/40), 90 (2000).

¹¹⁴ (1994-1995) *HRC Report* GAOR, Suppl. No. 40 (Doc. A/50/40), 100 (1995).

of non-governmental organizations and, among other things, inspected the prison where death row inmates were being held. (Many of the Committee's Views relating to Jamaica concern the treatment of prisoners on death row). After hearing his report, the Committee expressed guarded satisfaction with the improved compliance by Jamaica with the Committee's Views, but urged the Special Rapporteur to maintain contact with the Government in order to bring about "greater compliance."¹¹⁵ This first and to date only *in loco* follow-up mission sets an important precedent. As a result, the Committee has repeatedly asked the Office of the United Nations High Commissioner for Human Rights (OHCHR) to budget for at least one such mission every year.¹¹⁶ These requests have thus far not been acted upon. Less dramatic follow-up activities consist of meetings in Geneva and New York by the Special Rapporteur with the heads of diplomatic missions to the United Nations of states whose governments have failed to comply with Committee Views. These visits are designed to encourage the diplomatic missions to urge their governments to give effect to the Views and to call their attention to the adverse publicity non-compliance may produce. In some cases these meetings have had the desired result.

In reporting on the effectiveness of the follow-up process, the Committee recently observed:

"Attempts to categorize follow-up replies are necessarily imprecise. Roughly 30 per cent of the replies received could be considered satisfactory in that they display the State party's willingness to implement the Committee's Views or to offer the applicant an appropriate remedy. Other replies cannot be considered satisfactory in that they either do not address the Committee's recommendations at all or merely relate to one aspect of them. Certain replies simply indicate that the victim has failed to file a claim for compensation within statutory deadlines and that, therefore, no compensation can be paid to the victim.

The remainder of the replies either explicitly challenge the Committee's findings, on either factual or legal grounds, constitute much belated submissions on the merits of the case, promise an investigation of the matter considered by the Committee or indicate that the

¹¹⁵ *Id.*, 101.

¹¹⁶ *Id.*

State party will not, for one reason or another, give effect to the Committee's recommendations."¹¹⁷

These observations and the Committee's follow-up activities indicate, first, that state compliance with its Views and Follow-up process still leave much to be desired and, second, that the Committee is becoming increasingly more activist in its efforts to compel compliance.¹¹⁸ Among the obstacles encountered by the Committee is the fact that the Optional Protocol does not make Views binding on the States Parties to it. Some states consequently do not feel obliged to give effect to them. Other states claim that under their domestic law they cannot pay compensation or take other mandated measures in compliance with non-binding recommendations of international bodies. These considerations prompted the Committee in its submissions to the 1993 Vienna World Conference on Human Rights to endorse a proposal to add a new paragraph to article 5 of the Protocol, which would read as follows: "States Parties undertake to comply with the Committee's Views under the Optional Protocol."¹¹⁹ No action has been taken on this proposal. It has also not been seriously promoted by the Committee, probably because its members do not believe that it is likely to be adopted any time soon. Instead, the Committee has for a number of years attempted to strengthen the normative character of its Views by relying on article 2 of the Covenant. In those cases where the Committee's decision in a case requires a State party to grant the individual a remedy, its views now routinely contain the following language:

"In accordance with article 2, paragraph 3(a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy. In the Committee's opinion, this entails guaranteeing [there follows the remedy prescribed in the case]....

Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to Article 2 of the Covenant, the State party has

¹¹⁷ (1999-2000) *HRC Report*, GAOR, Suppl. No. 40 (Doc. A/55/40), 90 (2000).

¹¹⁸ On this subject generally, see C. Tomuschat, "Making Individual Communications an Effective Tool for the Protection of Human Rights," in: U. Beyerlin et al., *Recht zwischen Umbruch und Bewahrung*, Festschrift für Rudolf Bernhardt, 1995, 615 et seq.

¹¹⁹ (1992-1993) *HRC Report*, GAOR, Suppl. No. 40 (Doc. A/48/40), Vol. II, Annex X, 225 (1993).

undertaken to ensure to all individuals within their territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective remedy in case a violation has been established, the Committee wishes to receive from the State party, within ninety days, information about the measures taken to give effect to the Committee's Views."

This language reflects the Committee's conviction that its mandate under the Optional Protocol, read together with article 2 of the Covenant, endows its Views with a normative and institutional legitimacy that carries with it the justifiable expectation of compliance. In short, Views may not be legally binding as such, but neither are they devoid of legal significance.

3. Applying the Optional Protocol

This is not the place to examine the Committee's vast jurisprudence interpreting the rights guaranteed in the Covenant in cases coming to it under the Optional Protocol. It is useful, however, to focus briefly on some important aspects of the Committee's case law that interprets and applies the Optional Protocol itself.

Article 1 of the Protocol empowers the Committee to consider communications from individuals subject to the "jurisdiction" of a State party to the Protocol who claim to be "victims" of a violation of the Covenant by that state. The meaning of jurisdiction in this provision raises two interrelated issues. The first has to do with the fact that in the past some states tried to argue that individuals had standing to refer cases to the Committee only if they were subject to the jurisdiction of these states at the time of the filing of the case. The Committee rejected this rather absurd interpretation by holding that the jurisdictional requirement was met as long as the individual applicant could demonstrate that he/she was subject to the state's jurisdiction when the alleged violation of the Covenant took place.¹²⁰ The second issue concerns the relationship between article 1 of the Protocol and article 2 para. 1 of the Covenant. In the latter provision each State party "undertakes to re-

¹²⁰ *A. Viana Acosta v. Uruguay*, Comm. No. 110/1981, 2 Selected Decisions of the Human Rights Committee under the Optional Protocol (hereinafter cited as Selected Decisions), 148, at para. 6 (1990). Cf. *E.M.E.F. v. France*, Comm. No. 409/1990, (1990-1991) *HRC Report*, GAOR, Suppl. No. 40 (Doc. A/46/40), 318 (1991).

spect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant....” In a case dealing with the interrelationship of these two provisions, the Committee made clear that an individual communication was not necessarily inadmissible because the alleged violation of the Covenant took place outside the territory of the State party concerned. The case involved the refusal of the State party to grant a valid passport to one of its nationals who was living abroad. In rejecting the State party’s argument that the Committee was not competent to deal with the communication because the author did not fulfil the requirements of article 1 of the Optional Protocol, the Committee determined that the issuance of a passport to a national is clearly a matter within the state’s jurisdiction and that for that purpose he was subject to the state’s jurisdiction even though he was outside the country at the time. Relating that conclusion to the provisions of article 2 para. 1 of the Covenant, the Committee continued as follows:

“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 ... it followed from the very nature of that right that, in the case of a citizen resident abroad, article 12 (2) imposes obligations both on the State of residence and on the State of nationality and that, therefore, article 2 (2) of the Covenant could not be interpreted as limiting the obligations of Uruguay under article 12 (2) to citizens within its own territory.”¹²¹

The Committee made this point even clearer in a case in which an individual alleged that he was detained and mistreated by Uruguayan security forces in Argentina before being transported to Uruguay. The Committee held that it was “not barred either by virtue of article 1 of the Optional Protocol ... or by virtue of article 2 (1) of the Covenant ... from considering these allegations....”¹²² In its view, the reference in article 1 of the Optional Protocol to “individuals subject to its jurisdiction” referred to the “relationship between the individual and the State in relation to the violation of any of the rights set forth in the Covenant...” rather than to the place where the violation occurred.¹²³

¹²¹ *Lichtensztejn v. Uruguay*, Comm. No. 77/1980, 2 Selected Decisions 102, 104.

¹²² *Lopez Burgos v. Uruguay*, Comm. No. 52/1979, 1 Selected Decisions 88, para. 2.1 (1985).

¹²³ *Id.* at para. 12.2. With reference to article 2 para. 1 of the Covenant, the Committee emphasized that provisions should not be read to “imply that

The requirement of article 1 of the Optional Protocol that the claimant must be a "victim" of a violation of the Covenant raises a number of distinct issues. Thus, with regard to the question whether the victim alone must file a communication or whether others may do so for the victim, the Committee has recognized that although the communication should be submitted by the victim or his/her representative, "a communication submitted on behalf of an alleged victim may, however, be accepted when it appears that he is unable to submit the communication himself."¹²⁴ The Committee has also held that associations have no standing to file cases on behalf of their members or individuals on behalf of corporations.¹²⁵ On another occasion, the Committee ruled that to qualify as a victim under article 1 of the Protocol, a person must make a showing that he/she has already been adversely affected by the alleged violation or that "such effect is imminent."¹²⁶ Recognizing that the "imminent effects" test is too restrictive, the Committee modified this test in a later case by requiring only that the danger of such an effect be real.¹²⁷

the State party concerned cannot be held accountable for violations of rights which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it." *Id.* at para. 12.3. See also the Individual Opinion in that case by C. Tomuschat, who explained the legislative history of article 2 para. 1. On this subject generally, see T. Meron, "Extraterritoriality of Human Rights Treaties," *AJIL* 89 (1995), 78 et seq.; T. Buergethal, "To Respect and to Ensure: State Obligations and Permissible Derogations," in: Henkin, see note 3, 72 et seq., (73). The Committee very strongly reaffirmed the views it expressed in the Lopez Burgos case in its Concluding Observations on the Initial Report of the United States of America, (1994-1995) *HRC Report*, GAOR, Suppl. No. 40 (Doc. A/50/40), Vol. I, 52, para. 284 (1995).

¹²⁴ Rules of Procedure, Rule 90 lit.(b). But see *A.B. v. Italy*, Comm. No. 565/1993, (1993-1994) *HRC Report*, GAOR, Suppl. No. 40 (Doc. A/49/40), Vol. II, 360 (1994), where the author failed to provide proof that he was authorized to act on behalf of the alleged victim, resulting in the inadmissibility of the communication.

¹²⁵ *S.M. v. Barbados*, Comm. 502/1992, (1993-1994) *HRC Report*, GAOR, Suppl. No. 40, (Doc. A/49/40), Vol. II, 318 (1994); *A Group of Associations v. Italy*, Comm. No. 163/1984, (1983-1984) *HRC Report*, GAOR, Suppl. No. 40 (Doc. A/39/40), 197 (1994).

¹²⁶ *E.W. v. The Netherlands*, Comm. No. 429/1990, (1992-1993) *HRC Report*, GAOR, Suppl. No. 40 (Doc. A/48/40), Vol. II, 198, para. 6.4 (1993).

¹²⁷ *Hopu and Bessert v. France*, Comm. No. 549/1993, (Doc. CCPR/C/60/D/549/1993) Rev.1 of 29 December 1997.

In reviewing the manner in which the Committee deals with individual communications, it is useful to look at arts 2 and 3 of the Optional Protocol together. Article 3 requires the Committee to reject as inadmissible any communication which is anonymous, an "abuse of the right of submission," or incompatible with the provisions of the Covenant. Article 2 declares that "individuals who claim that any of their rights enumerated in the Covenant have been violated and who have exhausted all available domestic remedies may submit a written communication to the Committee for consideration." Although these admissibility grounds track those found in regional human rights instruments, such as the European Convention on Human Rights and the American Convention on Human Rights, the latter treaties contain an additional ground that permits applications to be declared inadmissible because they are "manifestly ill-founded" or "manifestly groundless."¹²⁸ This requirement has been interpreted to mean that a communication, to be admissible, must contain allegations that are sufficient to state a *prima facie* case, viz., that the communication must contain allegations which, if proved, would amount to a violation. Over the years, the Committee has interpreted article 2 of the Optional Protocol to permit it to dismiss a communication as inadmissible when it fails to state a *prima facie* case.¹²⁹ In these cases, the Committee usually declares that the author of the communication, having failed to substantiate the allegations of a violation of the Covenant, "has no claim under article 2 of the Optional Protocol."¹³⁰ What we have here, unlike in the other grounds of inadmissibility, is a determination on the merits that the claim made by the author of the communication, regardless of how well substantiated from an evidentiary point of view, does not amount to a violation of the Covenant.¹³¹ But if the communication presents only sketchy allegations that suggest, but do not adequately document, acts that amount to a violation, the Committee or the Special Rapporteur on New Communications will usually ask for additional information without dismissing the case out of hand. Of course, if that infor-

¹²⁸ European Convention on Human Rights, article 35 para. 3; American Convention on Human Rights, article 47.

¹²⁹ (1989-1990) *HRC Report*, GAOR, Suppl. No. 40 (Doc. A/45/40), Vol. I, 135 (1990).

¹³⁰ (1994-1995) *HRC Report*, GAOR, Suppl. No. 40 (Doc. A/50/40), Vol. I, 85 (1995).

¹³¹ See the summary of cases described in (1991-1992) *HRC Report*, GAOR, Suppl. No. 40, (Doc. A/47/40), 149-50 (1992).

mation is subsequently not supplied, the case will be dismissed under article 2.

It is not always easy to distinguish the dismissal of a case under article 2 or on the ground of incompatibility spelled out in article 3 of the Optional Protocol. Traditionally, the latter ground is used in circumstances where the complaint is against a state that is not a party to the Covenant and the Protocol or to one or the other of these instruments at the time the violation of the Covenant is alleged to have taken place.¹³² It is also applied where the communication invokes rights not guaranteed in the Covenant. The latter ground can often not be distinguished from a determination that the author failed to make out a *prima facie* case under article 2. This is so because the Committee sometimes applies article 3 to cover cases in which it had to interpret the meaning of a specific provision of the Covenant in order to find that the claimed right was not guaranteed by the Covenant.¹³³

Article 3 also deals with anonymous communications and those that are abusive. The former concept is self-explanatory, while the latter requires some explanation as far as its application by the Committee is concerned. In a 1991 decision, the Committee based its inadmissibility ruling on this latter ground with the following argument:

"The Committee has noted that the author generally complains that the Canadian judiciary is not subject to any supervision and, more particularly, that he charges bias and misconduct on the part of the judge of the provincial court of Montreal and the Committee of Enquiry These allegations are of a sweeping nature and have not been substantiated in such a way as to show how the author qualifies as a victim within the meaning of the Optional Protocol. This situation justifies doubts about the seriousness of the author's submission and leads the Committee to conclude that it constitutes an

¹³² See e.g., *S.E. v. Argentina*, Comm. No. 275/1988, (1989-1990) *HRC Report*, GAOR, Suppl. 40 (Doc. A/45/40), Vol. II, 159 (1990). Here it should be noted that the Committee has consistently taken the position that it has jurisdiction under the Optional Protocol only with regard to violations of the Covenant taking place after the state in question has ratified the Protocol. While one may question the legal soundness of this conclusion, it is probably no longer open to challenge.

¹³³ *I.S. v. Hungary*, Comm. No. 389/1989, (1989-1990) *HRC Report*, GAOR, Suppl. No. 40, (Doc. A/46/40), 316 (1990). See also the cases described in (1991-1992) *HRC Report*, GAOR, Suppl. No. 40 (Doc. A/47/40), 150-51 (1992), which seem to involve determinations of no *prima facie* violations.

abuse of the right of submission, pursuant to article 3 of the Optional Protocol.¹³⁴

This communication could have been dismissed under article 2 for lack of substantiation rather than article 3 — Canada had invoked both of these grounds — but the Committee preferred to base itself on abuse of the right of submission. It is open to question whether that ground should be used for unsubstantiated communications that are not verbally abusive or intentionally misleading.

Article 5 para. 2 declares that the Committee shall not consider individual communications unless it has determined that “(a) the same matter is not being examined under another procedure of international investigation or settlement [and]; (b) the individual has exhausted all available domestic remedies.” Article 5 para. 2 also indicates that the requirements spelled out in subparagraphs (a) and (b) may be disregarded “where the application of the remedies is unreasonably prolonged.” Article 5 para. 2 thus applies not only to the domestic remedies, but also to the international procedures referred to in article 5 para. 2 lit.(a). Where an international body unreasonably delayed acting on an applicant’s case, the Committee held that it was free to deal with it.¹³⁵ With regard to unreasonably prolonged domestic remedies, the Committee has held that a delay of over three and a half years between arrest and trial and acquittal justified the conclusion that the pursuit of domestic remedies had been ‘unreasonably prolonged’ within the meaning of article 5(2)(b).¹³⁶

In dealing with subpara. (a) of article 5 para. 2, the Committee made clear in one of its earlier decisions that “another procedure of international investigation or settlement” can refer only to those international mechanisms that address charges of violations of individual

¹³⁴ *J.J.C. v. Canada*, Comm. No.367/1989, (1991-1992) *HRC Report*, GAOR, Suppl. No. 40 (Doc. A/47/40), 372, para. 5.2 (1992). See also *Z.P. v. Canada*, Comm. No. 341/1988, (1990-1991) *HRC Report*, GAOR, Suppl., No. 40 (Doc. A/46/40), 302, para. 5.5 (1991).

¹³⁵ See e.g., *Polay Campos v. Peru*, Comm. No. 577/1994. CCPR/C/61/D/577/1994 of 9 January 1998. The Committee found the communication to be admissible in 1996, although it had been filed in 1992 with the Inter-American Commission on Human Rights. The Committee’s conclusion was facilitated by the Inter-American Commission’s statement that it “had no plans to prepare a report on the case within the next 12 months.”

¹³⁶ *Isidora Barroso v. Panama*, Comm. No. 473/1991, reprinted in Doc. CCPR/C3 7/WP. 1, 46 (1996).

rights.¹³⁷ Hence, proceedings under ECOSOC Resolution 1503, which is not an individual complaint procedure because it applies only to situations that reveal a consistent pattern of gross violations of human rights, are not covered by article 5 para. 2 lit.(a) of the Optional Protocol.¹³⁸ By the same token, if a case is pending before the bodies established under the European Convention or the American Convention, for example, which deal with and have the power to act on claims by individuals, article 5 para. 2 lit.(a) would apply provided the subject-matter of the claim is the same.¹³⁹

Article 5 para. 2 lit. (a) applies only to cases "being examined" under other international procedures and not to those that were previously examined or decided. That omission has prompted various States parties to the European Convention on Human Rights to attach a reservations to their ratifications of the Optional Protocol that bar the consideration by the Committee also of communications that "have already been examined" under such international procedures. Although these reservations resolve some issues, they raise other questions, for example, whether they apply to all determinations made by another body, including procedural rulings, or only to decisions on the merits. That is, will the Committee have to reject a communication that was ruled inadmissible under another international procedure? This question was first considered by the Committee in 1982, when it held a communication inadmissible on the basis of the European reservation after the European Commission of Human Rights rejected the same case as manifestly ill-founded.¹⁴⁰ One Committee member argued in a separate opinion that the reservation should not be deemed to apply to cases that were ruled inadmissible rather than decided on the merits.¹⁴¹ This ar-

¹³⁷ *A. et al v. State S*, Comm. No. 1/1976, 1 *Selected Decisions* 17 (1985). It should be noted, in this connection, that the "procedures for international investigation or settlement" to which this provision refers embrace not only international human rights procedures; its language indicates that it would apply also to international judicial or arbitral proceedings instituted, for example, on the individual's behalf by the state of his/her nationality, provided this was done with the individual's consent.

¹³⁸ *Id.*

¹³⁹ On this subject, see *Duilio Fanali v. Italy*, Comm. 75/1980, 2 *Selected Decisions* 99, para. 7.2 (1990). For earlier cases, see (1983-1984) *HRC Report*, GAOR, Suppl. No. 40 (Doc. A/39/40), 115-16 (1984).

¹⁴⁰ *AM v. Denmark*, Comm. No. 121/1982, (1981-1982) *HRC Report*, GAOR, Suppl. No. 40 (Doc. A/37/40), 212 (1982).

¹⁴¹ *Id.*, 214.

gument overlooks the fact that an inadmissibility decision on the manifestly ill-founded ground is in fact a decision on the merits, which would explain why the Committee reached a similar conclusion in a later case.¹⁴²

What is less clear is whether an inadmissibility decision on grounds other than manifestly ill-founded would also be governed by the European reservation. Here the Committee would presumably have to determine whether these grounds correspond to those that could also be invoked under the Covenant. Thus, for example, under article 35 of the European Convention a case must be lodged within a period of six months after the exhaustion of domestic remedies. The Covenant contains no such time limit. Hence, if the European Court were to hold a case inadmissible under the six-months rule and the applicant then referred it to the Committee, the European Court's decision should not prevent the Committee from hearing the case notwithstanding the reservation. It should also be noted that an inadmissibility decision grounded on the finding that the claimed-for right is not guaranteed under the European Convention, for example, should not prevent its consideration by the Committee if that right is in fact guaranteed in the Covenant.

The Optional Protocol establishes the requirement for the exhaustion of domestic remedies in article 2 and then again in article 5 para. 2 lit.(b). These provisions are cumulative in the sense that if one were omitted it would not affect the basic obligation. It is true, of course, that under article 5 domestic remedies need not be exhausted if they are unduly prolonged, but this is a basic international law rule that the Committee would apply even if it were not spelled out in the Optional Protocol. In interpreting the exhaustion of domestic remedies requirement, the Committee has consistently held that a state which claims that domestic remedies have not been exhausted, has the obligation to demonstrate the availability of these remedies and to submit evidence that "there would be a reasonable prospect that such remedies would be effective."¹⁴³ The Committee has also ruled that a state cannot claim that a domestic remedy is effective when the state fails to provide the

¹⁴² *Thierry Trebutien v. France*, Comm. No. 421/1990, (1993-1994) HRC Report, GAOR, Suppl. No. 40 (Doc. A/49/40), Vol. II, 250 (1994).

¹⁴³ *W. Torres Ramirez v. Uruguay*, Comm. No. 4/1977, 1 *Selected Decisions* 4, para. (b).

legal aid necessary to enable an indigent defendant to properly invoke the remedy.¹⁴⁴

In *Kennedy v. Trinidad and Tobago*¹⁴⁵ the Committee had to deal with the effect to be given to a reservation attached by Trinidad and Tobago to its re-ratification of the Optional Protocol. The issue presented itself because Trinidad, having previously ratified the Protocol without a reservation, withdrew from the Protocol by denouncing its initial ratification, only to rejoin shortly thereafter with a new instrument containing the reservation. In Trinidad's view, its reservation divested the Committee of jurisdiction to hear the instant case. It stipulated that the Committee:

"shall not be competent to receive and consider communications relating to any prisoner who is under sentence of death in respect of any matter relating to his prosecution, his detention, his trial, his conviction, sentence or the carrying out of the death sentence on him and any matter connected therewith."¹⁴⁶

The Committee held that the reservation was incompatible with the object and purpose of the Protocol, because it "singles out a certain group of individuals for lesser procedural protection than that which is enjoyed by the rest of the population."¹⁴⁷ In the Committee's view, the consequence of the incompatibility of the reservation with the object and purpose of the Protocol was that "the Committee is not precluded from considering the present communication under the Optional Protocol."¹⁴⁸ The soundness of this conclusion was questioned in a compelling joint dissenting opinion by four Committee members.¹⁴⁹ The decision of the Committee prompted Trinidad and Tobago to denounce the Optional Protocol effective 27 June 2000. Some time earlier, Jamaica had denounced the Protocol as well.¹⁵⁰ Unlike the Covenant, which

¹⁴⁴ *A. Peart & G. Peart v. Jamaica*, Comm. Nos. 464 & 482/ 1991, Doc. CCM/C37/WPA, 36 (1996).

¹⁴⁵ Comm. No. 845, (1999-2000) *HRC Report*, GAOR, Suppl. No. 40 (Doc. A/55/40) Part II, 258 (2000).

¹⁴⁶ *Id.*, 263.

¹⁴⁷ *Id.*, 266.

¹⁴⁸ *Id.* Four Committee members joined in a separate dissenting opinion, rejecting the Committee's assertion of jurisdiction.

¹⁴⁹ *Id.*, 268.

¹⁵⁰ For the reasons that motivated some of the Commonwealth Caribbean countries to take this action, see N. Schiffrin, "Jamaica Withdraws the

contains no provision concerning denunciation,¹⁵¹ article 12 of the Protocol permits it.

VI. General Comments

The Committee's so-called "General Comments", are frequently treated as part of the reporting procedure established by article 40 of the Covenant. There is considerable logic to this approach because the general comment as a concept has its origin in the reporting procedure. Thus, the only mention of the phrase "general comments" is found in article 40 para. 4 of the Covenant, which reads as follows:

"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 the copies of the reports it has received from the States Parties to the present Covenant." (Emphasis added)

It is also true that initially at least the Committee's practice in developing general comments was directly related to the reporting procedure and the debates that raged in the Committee about its authority to comment on the failure of individual states to live up to their obligations under the Covenant.¹⁵² But all that is ancient history because over time the general comment has become a distinct juridical instrument, enabling the Committee to announce its interpretations of different provisions of the Covenant in a form that bears some resemblance to the advisory opinion practice of international tribunals. These general comments or "advisory opinions" are relied upon by the Committee in evaluating the compliance of states with their obligations under the Covenant, be it in examining State reports or "adjudicating" individual communications under the Optional Protocol. They would play the same function in the Committee's examination of any inter-State communications that might be referred to it. In addition, States parties and individuals increasingly rely on general comments to support their legal

Right of Individual Petition under the International Covenant on Civil and Political Rights," *AJIL* 92 (1998), 563 et seq.

¹⁵¹ On this subject, see discussion regarding General Comment No. 26, see note 64, 27-29.

¹⁵² See generally Opsahl, see note 5, 407-12; McGoldrick, see note 5, 92-96.

arguments before the Committee. General comments consequently have gradually become important instruments in the lawmaking process of the Committee, independent of the reporting system. That is why it is treated separately in these pages.

General comments have their origin in the Committee's failure, in the early years of its existence, to examine State reports in order to determine whether a given state was in violation of its Covenant obligations. When it became clear that some Committee members were unwilling to interpret article 40 para. 4 so as to permit the Committee to address comments to individual states at the conclusion of the examination of their reports, the Committee in 1980 agreed on a statement setting out guidelines for the promulgation of general comments.¹⁵³ Although this statement was intentionally vague in its formulation, it was designed to make clear that the reference to general comments in article 40 para. 4 would be interpreted as envisaging guiding principles relating to the reporting process and the implementation of the Covenant, and that they would be addressed to the States parties in general rather than to any one of them individually. This conception of the role or function of the general comment has not changed since 1980, despite the fact that as we have seen, the Committee now adopts so-called "Concluding Observations" addressed to states individually after the examination of their initial or periodic reports. But, what has changed significantly over the years is the character and content of general comments.¹⁵⁴

The first few general comments were quite short — never longer than a page — and they tended to be rather laconic and hesitant in their interpretation of the Covenant. Controversial matters and the finer points of law were as a rule not addressed or papered over with generalities on which consensus could be reached. Since it was often impossible during the Cold War to reach a consensus on issues touching on matters of ideological sensitivity, those parts of draft general comments that dealt with these subjects were simply omitted, which explains why the early general comments were rather bland and uninspiring. The quality of general comments began to improve significantly in the late 1980's, in large measure because the end of the Cold War made it easier

¹⁵³ (1980-1981) *HRC Report*, GAOR, Suppl. No. 40 (Doc. A/36/40), 101-102 (1981). For a summary of the discussion relating to the adoption of these guidelines, see *id.*, 81-84.

¹⁵⁴ For a compilation of the Committee's general comments, see *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, see note 64, at 110.

for the Committee to reach the desired consensus on the interpretation of the Covenant provisions. General comments are now, as a rule, longer and more analytical, and frequently address difficult issues of interpretation. But since consensus is still an inherent part of the drafting process of these instruments, they remain compromise instruments that tend to gloss over issues in need of clearer interpretative guidance. One of the problems here is that the Committee has not as yet developed a procedure enabling individual members to attach concurring or dissenting views to general comments. The absence of such a mechanism results in a stricter application of the consensus rule, since the majority is reluctant to impose its interpretation on a minority that has no outlet for the expression of opposing views.

The Committee usually discusses the advisability of drafting a general comment on a specific article of the Covenant after receiving a recommendation to that effect from one of its working groups. When the decision has been made to proceed with the drafting process, a small working group or an individual member of the Committee is designated to prepare an outline, usually followed by a preliminary draft. These documents are considered by the Committee and guide the working group or Rapporteur in the preparation of a revised draft. The revised draft is discussed paragraph-by-paragraph in the Committee. The Committee deliberations relating to general comments take place in public sessions. While NGOs do not have a formal input into this drafting process, they are free to express their views on the subject to the working group or Rapporteurs; in recent years they have done so with increasing frequency.

At present no formal mechanism exists for States parties to have an input into the drafting process,¹⁵⁵ although they have the right under article 40 para. 5 to "submit to the Committee observations on any comments that may be made in accordance with paragraph 4 of this article." In the past, states have only rarely availed themselves of this op-

¹⁵⁵ If States parties wished to have an input into the drafting process of general comments, they could do so in a number of ways. Since the draft general comments are public documents, states have access to them and could express their views on the subject in an official communication to the Committee chair. They also have access to the Committee's annual report and summary records, which track the Committee's discussion of the contents of the general comment. Since the drafting process usually takes at least two years, there is time for states to react to proposed interpretations or to advance their own.

portunity.¹⁵⁶ In a dramatic departure from this historic passivity by States parties, the United States, the United Kingdom and France exercised their right under article 40 para. 5 of the Covenant and objected to various parts of the Committee's General Comment No. 24 on Reservations, adopted in 1994.¹⁵⁷ In General Comment No. 24 (1994),¹⁵⁸ the Committee formulated a set of principles governing reservations to the Covenant and Optional Protocol that would guide it in discharging its functions under these treaties. The aforementioned states criticized various parts of the Comment.¹⁵⁹ The Committee did not respond to these criticisms. No formal procedure or precedent exists for such an exchange of views. However, the Committee authorized its Chairman to respond in a very general way to the United States observations. He was able to do so because a text of the observation was presented to him by the United States representative during the public hearing on the United States report.¹⁶⁰ The absence of a formal procedure enabling the Committee to respond to objections by governments to views expressed in general comments does not mean that they cannot be taken

¹⁵⁶ See McGoldrick, see note 5, 94.

¹⁵⁷ The United States and United Kingdom observations are reprinted in (1994-1995) *HRC Report*, GAOR, Suppl. No. 40 (Doc. A/50/40), Vol. I, 131 and 135, respectively (1995). For the observations of the French Government, see (1995-1996) *HRC Report*, GAOR, Suppl. No. 40 (Doc. A/51/40), (1996) (not as yet published).

¹⁵⁸ General Comment No. 24 is reproduced in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, see note 64, 150.

¹⁵⁹ The ILC also took up the matter and adopted a statement that appeared to reject some of the propositions enunciated by the Committee. See International Law Commission, "Preliminary Conclusions of the International Law Commission on Reservations to Normative Multilateral Treaties Including Human Rights Treaties," Report of the International Law Commission on the Work of its Forty-Ninth Session, GAOR, Suppl. No. 10 (Doc. A/52/10), 126 (1997). For a discussion of the controversy engendered by General Comment No. 24, see B. Simma, "Reservations to Human Rights Treaties - Some Recent Developments," in: G. Hafner et al. (eds), *Liber Amicorum Professor I. Seidl-Hohenveldern*, 1998, 659 et seq.; see also R. Higgins, "Introduction," in: J. Gardner (ed.), *Human Rights as General Norms and a State's Right to Opt Out: Reservations and Objections to Human Rights Conventions XV*, 1997, for a critical analysis of the British, French and US objections to the General Comment.

¹⁶⁰ For the Chairman's Statement, see Doc. CCPR/C/SR/ 1406 of 31 March 1995.

into account by the Committee. Opportunities for such reconsideration present themselves in the Committee's Concluding Observations on State reports, in its decisions under the Optional Protocol as well as formal modifications of specific provisions of general comments and in *sub silencio* departures therefrom.¹⁶¹

VII. Conclusions

The UN Human Rights Committee confronts four major challenges as it attempts to discharge and strengthen its mandate under the Covenant and the Optional Protocol. There is first the problem of getting the States parties to comply with their obligation to submit initial and periodic reports in a timely fashion. Next there is the Committee's growing inability to deal efficiently and effectively with State reports under the Covenant and with individual communications under the Optional Protocol. Its third challenge arises because the Committee is for all practical purposes the principal "quasi-judicial" human rights body within the UN human rights system. This fact requires it to rethink the role it should perform in light of the changes that the end of the Cold War era has ushered in. Finally, the Committee's efforts to ensure that its decisions in cases brought to it under the Optional Protocol are complied with run up against legal and practical problems that need to be addressed.

1. Delinquent State Reports

A growing number of States Parties either delay the submission of initial or periodic State reports for substantial periods of time or fail to file them altogether. Not all of these delinquencies are attributable to the poor human rights record of the states concerned, although many certainly are. These states delay submitting their reports in order not to expose their poor human rights record to international scrutiny, which in some ways is a compliment to the prestige of the Committee. Other delinquencies are due to bureaucratic inertia or a shortage of qualified

¹⁶¹ For example, it is interesting to note that in its examination of the initial report of the United States and its Concluding Observations thereon, the Committee made only a passing reference to General Comment No. 24 without formally relying on it.

governmental personnel to work on the reports. Sometimes two or all three of these factors combine to explain the failure of a state to file in a timely fashion. Here it needs to be noted that many states have ratified all or most UN human rights treaties and that a large number of these instruments impose extensive reporting obligations. Smaller, poorer states may have legitimate problems complying with these multiple reporting obligations. Some of these states, including those with poor human rights records, frequently ratify human rights instruments without intending to comply with the substantive and procedural obligations these instruments impose or without giving much thought to their ability to do so. They tend to assume these obligations because of domestic or international pressures or for a variety of political reasons without seriously believing that they will be expected to comply.

If the reporting mechanism established by the Covenant is to continue to evolve into an important implementation tool, which it certainly could be, a way will have to be found to deal with the problem of delinquent reports.¹⁶² For if groups of states, for whatever reason, increasingly avoid having their human rights records examined by the Committee, the resultant selective impunity and the cynicism it fosters will gradually have a serious adverse effect on the entire Covenant machinery. Some states might then ask why they should subject themselves to what has become an ever more intrusive and aggressive scrutiny of their human rights practice when many other countries evade their reporting obligations altogether. Moreover, to the extent that states with poor human rights records are more likely to delay the submission of their reports, the Committee will increasingly be forced to engage in a compliance dialogue only with the "better" states. This problem must be addressed much more imaginatively than it has been to date. The reporting mechanism developed by the Committee has evolved into an important implementation or compliance tool, which forces the States parties to expose their entire human rights policies and practices to international scrutiny. But, it can only have long term beneficial consequences if all States parties to the Covenant comply with their reporting obligations.

In confronting the issue of delinquent reports, the Committee will have to take a number of cumulative steps. It is not enough merely to list in the Committee's annual report to the UN General Assembly the

¹⁶² Here it should be noted that by February 1999, a total of 1143 State reports were overdue under the six existing State reporting procedures of the UN. See generally Bayefsky, see note 51.

names of states whose reports are overdue. The Committee must develop a procedure, in cooperation with the Office of the High Commissioner for Human Rights (OHCHR), to assist states to prepare their reports and to familiarize them with the practice and jurisprudence of the Committee, thus helping states to comply with their reporting obligations. While it is true that the OHCHR provides some such assistance to States parties, a much more aggressive policy will have to be developed to get states to seek this assistance and act on it. The Committee itself must also be involved in the process. Of course, this approach will not help with states that do not wish to report or are reluctant to do so. To encourage these states to reconsider their position, the Committee may in extreme cases and as a last resort, have to develop a procedure permitting it to examine the human rights situation of a state even in the absence of its formal report.

2. Working Methods and Financial Problems

It is ironic that while this article suggests the need for procedures capable of reducing the number of delinquent State reports, it is clear that if all States parties were to comply promptly with their reporting obligations, the Committee would not be able to examine them within a reasonable period of time. It would face a similar problem in disposing of individual communications under the Optional Protocol. The Committee already has a substantial backlog of such communications and would fall even further behind if it received merely a few communications from each of the nearly 100 countries that have ratified the Protocol.¹⁶³ There are various reasons why that is so. The financial crisis at the UN has not only reduced the Committee's professional staff. It has also resulted in a substantial reduction of available language services, making it difficult for the Committee to receive timely translations of State reports and individual communications. Moreover, the Committee has failed thus far to fully adjust its working methods to the requirements of an ever increasing number of state accessions to the Covenant and to the Optional Protocol. The Committee meets in three three-week sessions annually, that is, for 45 working days. Given its current working methods, the Committee cannot deal effectively with more than four to six State reports and some 15 individual communications at

¹⁶³ D. Kretzmer, "The Human Rights Committee," in: Bayefsky, see note 51, 163.

any given session, besides devoting additional time to follow-up issues and work on general comments. The cumulative effect is a growing backlog of State reports and communications. To reduce that backlog, the Committee will have to make some serious changes in its working methods. Although it has already begun the process, recent changes are not enough to address the problem.

The Committee normally devotes one full day to the public examination of an individual State report. It requires the reports, whether initial or periodic, to describe all relevant law and practice by reference to an article-by-article analysis of the rights guaranteed in the Covenant. Although the Committee as a whole now adopts "concluding observations" with regard to each report and submits written questions to the State party prior to the public-hearing, individual members continue to ask a large number of additional questions and to make extensive comments. While it is important for members to preserve the right to ask follow-up questions when a State has failed to address certain issues raised in the Committee's list of written questions, the large number of additional comments disguised as questions posed by members at the hearing itself results in considerable confusion and wasteful repetition. This could be avoided if Committee members took seriously the request of their working groups to submit their questions for inclusion in the Committee's list of written questions. There might still be a need for follow-up questions, but their number could be significantly reduced. One of the most significant recent improvements has been the formal discontinuance of the practice which enabled all members of the Committee to take the floor at the end of the discussion to make their own concluding remarks. This practice had become completely unnecessary with the adoption of concluding observations by the Committee as a whole.

The Committee will have to continue to review what information it wants states to provide in their reports. While it makes a great deal of sense to require all new States parties to submit an initial report providing an article-by-article overview of its compliance with the relevant provisions of the Covenant, all subsequent reports should be made to focus on specific problem areas. The Committee has recently begun to move in that direction by declaring that "in their periodic reports States parties need not report on every article, but only on those which are identified by the Committee in its concluding observations and those articles concerning which there have been important developments

since the submission of the previous report.”¹⁶⁴ This new approach is to be welcomed. The Committee might also give some thought to developing procedures permitting the Committee to forgo public hearings with regard to periodic reports from countries with few human rights problems. These reports could be dealt with through a written exchange of views and the adoption of concluding observations. Such a dual track approach is admittedly more difficult to administer. To the extent, however, that it would serve to reward states with sound human rights policies and diligent reporting habits, it would provide incentives that might in the long run benefit the Covenant system as a whole.

Turning now to working methods applicable to the Optional Protocol, the Committee must take the steps necessary to substantially increase the number of individual communications it deals with in one session in order to reduce the growing backlog. Although the Committee has recently made some progress in streamlining the manner in which it acts on communications at the admissibility stage, these innovations must be extended to the merits of the case. At this time, the Committee as a whole, that is 18 members, discuss and decide each case in a plenary session, usually after a working group has already examined the matter. As a result and because a growing number of these cases raise complex legal issues, it becomes ever more difficult for the Committee to dispose of a reasonable number of communications on the merits in one session. One solution, which would increase substantially the number of cases decided by the Committee, would allow panels or chambers of seven or nine Committee members to formulate final decisions on the merits. It is true, of course, that in the absence of an amendment to the Optional Protocol permitting chambers to decide cases on the merits, the Committee as a whole would have to retain the formal authority to approve these decisions. It could decide, however, to establish a *pro forma* approval procedure that would call for an actual review of a chamber’s action only under certain circumstances, for example, if the chamber’s decision was not unanimous or if a certain number of Committee members asked for a reconsideration of the decision.¹⁶⁵

¹⁶⁴ (1999-2000) *HRC Report*, GAOR, Suppl. No. 40 (Doc. A/55/40), 16 (2000).

¹⁶⁵ For suggestions calling for a more differentiated and selective approach to individual communications, see H. Steiner, “Individual Claims in a World of Massive Violations: What Role for the Human Rights Committee,” in: P.

3. Norm-Setting and Quasi-Judicial Role

Besides streamlining its working methods, the Committee must now also decide on what issues it should focus in the future. This reassessment of its future role has become necessary because of the dramatic expansion of UN human rights institutions and mechanisms. Particularly relevant, in this connection, is the creation of the position of the UN High Commissioner for Human Rights, the appointment by the Commission on Human Rights of an ever growing number of country and thematic Rapporteurs, supplemented by other procedures for dealing with large-scale violations of human rights, developed by the Commission and the Sub-Commission on the Promotion and Protection of Human Rights. Equally relevant is the entry into force of newer UN human rights treaties with their own treaty bodies and with jurisdiction over rights which the Covenant also guarantees.

Given these developments, it should be asked whether the Committee has a special role to play in the ever more complex web of overlapping UN institutions and legal norms. One obvious answer is that the Committee should avoid duplicating activities other bodies are better equipped to perform.¹⁶⁶ The Committee must not let itself be drawn into the political thicket of UN human rights activities. That means that it must work hard to be perceived as being what in reality it is: an independent, non-political body of experts that interprets and applies the Covenant in an objective and legally sound manner. The Committee must therefore take special care that its decisions interpreting and applying the Covenant and Optional Protocol are perceived as being culturally neutral and legally beyond reproach. To satisfy this requirement the Committee may have to spell out in greater detail the legal reasons justifying its decisions and to assure itself that the principles enunciated do in fact have universal applicability.

The principal focus of the Committee should be legal in character, that is, it should focus on practice-oriented articulation and development of the law of the Covenant and not seek to compete with other

Alston/ J. Crawford, *The Future of UN Human Rights Treaty Monitoring*, 2001, 15 et seq.

¹⁶⁶ For example, an important step towards co-ordination involves the decision to hold the Meetings of the Chairpersons of UN Human Rights Treaty Bodies concurrently with meetings of the Special Rapporteurs and Chairpersons of the Working Groups of the Commission on Human Rights.

UN bodies. Hence, for example, the Committee probably should not make it a habit to request special or emergency reports from states that have attracted international attention due to some sudden or persistent practice of large-scale human rights violations. In the recent past, the Committee has sought such reports from various states, including states comprising the former Yugoslavia, Rwanda, Haiti and Nigeria, even though other UN bodies were already seized of these cases. Here the Committee has less to contribute than the Security Council, the Commission on Human Rights or the High Commissioner for Human Rights. The Committee could use its time better by dealing with regular State reports and individual communications. For the same reasons, the Committee should resist the temptation of embarking on *in loco* investigatory missions.

The Committee's broad competence over civil and political rights requires it to be constantly aware of the fact that its decisions interpreting and applying the relevant Covenant provisions will in one way or another also affect the interpretation and application of comparable provisions of other more specialized UN human rights treaties. This special position of the Committee among UN human rights treaty bodies, most of which have a narrower legal competence, present difficult lawmaking challenges. One of these involves the task of ensuring that the Committee's pronouncements on the scope of civil and political rights not limit or unduly restrict the normative evolution of UN human rights law in general or the parallel provisions of other UN instruments. In the absence of a UN human rights court with jurisdiction over all UN human rights treaty bodies, the Committee is best equipped to play a comparable role within the UN human rights system. It can and should discharge some of the normative functions such a tribunal would perform, particularly when adopting general comments and rendering decisions on individual communications. To this end it will have to promote a much greater institutional and personal interaction with the other UN treaty bodies and seek a better understanding of the legal issues confronting these entities. There now exists a vast body of UN human rights treaty law that needs to be fully understood, interpreted and applied. The Committee is uniquely suited to contribute to this process and to assist with the development of other relevant legal principles of relevance for UN human rights institutions in general.

4. Binding Decisions under the Optional Protocol

The decisions or so-called Views the Committee adopts in dealing with individual communications under the Optional Protocol are not legally binding. The Optional Protocol contains no provisions making Views binding, and the very use of the word "Views" in article 5 para. 4 of the Protocol¹⁶⁷ is designed to indicate that they are advisory rather than obligatory in character. This does not mean, of course, that these decisions have no normative effect or that they can be disregarded with impunity. After all, by ratifying the Optional Protocol the States parties have recognized the competence of the Committee to determine whether a state has violated a right guaranteed in the Covenant. As States parties to the Covenant, these states have also undertaken to give effect to Covenant rights on the domestic plane and to provide an effective remedy for their violation. A Committee determination that a state has violated a right guaranteed in the Covenant therefore enjoys a normative and institutional legitimacy that carries with it a justifiable expectation of compliance.

It is clear, nevertheless, that the absence of an unambiguous undertaking in the Protocol requiring the States parties to comply with the Committee's decisions has a number of adverse consequences as far as compliance is concerned. In some countries the government lacks the power to compensate victims of a violation of the Covenant without a legally binding determination mandating such payment. The fact that the Committee's Views are not binding is used by some governments as an excuse for taking no action to give effect to them. It is also much more difficult for litigants in domestic courts to rely on Committee decisions as legal precedents when they are considered to lack obligatory character. These considerations have the cumulative consequence of leaving many Committee Views and the remedies they prescribe totally or partially unimplemented or without much effect on the domestic adjudicatory process. The adoption of an amendment to the Protocol making the Committee's decisions binding on the States parties would go a long way towards addressing these problems, but it is not likely to be adopted. Even if it were adopted, it would not necessarily have an immediate dramatic effect on state compliance with Committee decisions under the Protocol, although it would lead to a gradual improvement of the situation and strengthen the Committee's hand in dealing

¹⁶⁷ Article 5 para. 4 of the Optional Protocol declares that "the Committee shall forward its views to the State Party concerned and to the individual."

with non-complying states. In the long run, it would probably also substantially increase the precedential value on the domestic plane of Committee decisions and thus help to bring domestic law into compliance with the Covenant.

Whether the creation of additional regional human rights courts with jurisdiction to deal with individual complaints will in time reduce the need to resort to the Protocol machinery remains to be seen. For the time being, therefore, and in the absence of a UN Human Rights Court,¹⁶⁸ the Committee has no choice but to continue to redouble its efforts to strengthen the normative and institutional legitimacy of its decisions under the Protocol, thus making it increasingly more difficult politically for the States parties not to comply with them.

¹⁶⁸ See T. Buergenthal, "A Court and Two Consolidated Treaty Bodies," in: Bayefsky, see note 51, 299.