

Fact-Finding by UN Human Rights Complaints Bodies – Analysis and Suggested Reforms

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I. Introduction

In 1990, *Henkin* earmarked our age the age of rights.¹ What this should become, in the 21st century, is the age of implementation; a move away from the elaboration of human rights to their enforcement. Compared to the 1980s, when *Falk* noted that the “absence of any real enforcement prospect makes it feasible to give lip service to human rights”,² significant progress has been made towards ensuring implementation.

At the institutional level, there has been an increase in the number of United Nations human rights treaty bodies with amongst others mandates to examine state reports and to consider individual complaints. In 1980, there existed only four treaty bodies, of which only two had the potential competence to consider complaints. They are the Committee on the Elimination of Racial Discrimination (CERD Committee)³, and the Human Rights Committee (HRC), established under the International Covenant on Civil and Political Rights (ICCPR).⁴ By 2004, the number of treaty bodies has grown to seven. Two of the new treaty bodies, the Committee against Torture (CAT Committee)⁵ and the

* The assistance of the Alexander von Humboldt Stiftung in making possible this research is acknowledged.

¹ L. Henkin, *The age of rights*, 1990.

² R. Falk, *Human rights and state sovereignty*, 1981, 33.

³ Under article 14 of CERD a state may accept the competence of the CERD Committee to consider individual complaints submitted against that state.

⁴ Under the First Optional Protocol (OP) to the ICCPR, states may accept the right of individuals to bring petitions to the Human Rights Committee (HRC).

⁵ Under article 22 of CAT, a state party may make a declaration accepting the competence of the CAT Committee to consider individual communications against that state.

Committee on the Elimination of Discrimination against Women (CEDAW Committee)⁶ also provide for complaints mechanisms. The Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), adopted in 1990, which entered into force in 2003, establishes the CMW Committee, which also has the potential competence to consider complaints.

Greater concern for implementation of human rights standards highlights the importance of establishing facts about human rights violations. Implementation is often equated with realisation, the process of rendering visible, of impacting on the reality of peoples' lives. Asking the question whether human rights treaties have made a difference, *Hathaway* makes a statistical analysis of the factual information provided by four sources, including reports by the United States Department of State.⁷ Her concession that "the accuracy of the analysis necessarily depends on the accuracy of the data" that may be "imperfect"⁸ is also raised by her critics, who point out that the analysis relies on recorded and reported violations, rather than "actual violations".⁹ Her response is telling: it is "not possible ever to know with certainty what 'actually' occurred", but by employing empirical techniques she seeks to "produce results that are not unacceptably biased by measurement error".¹⁰

This move towards the increased reliance on "facts" comes as post-modern thinking has called into question numerous notions treasured in traditional legal discourse, such as objectivity, coherence, closure, fact and truth. One of the major critiques of the liberal legal tradition, the Critical Legal Studies (CLS) movement, is for example that law cannot be applied consistently and with certainty, due to the indeterminacy inherent in all language, including legal texts.¹¹ While their attack was

⁶ Introduced by way of an Optional Protocol to CEDAW, which entered into force on 22 December 2000.

⁷ O.A. Hathaway, "Do human rights treaties make a difference?", *Yale L. J.* 111 (2002), 1935 et seq. (1967).

⁸ See above, 1940.

⁹ R. Goodman/ D. Jinks, "Measuring the effects of human rights treaties", *EJIL* 14 (2003), 171 et seq. (175).

¹⁰ O.A. Hathaway, "Testing conventional wisdom", *EJIL* 14 (2003), 185 et seq. (190).

¹¹ See e.g. M. Tushnet, "Critical Legal Studies and constitutional law: an essay in deconstruction", *Stanford Law Journal* 36 (1984), 623 et seq.

launched mainly at the interpretation of legal texts, much of these criticisms may also be levelled at the process of fact-finding in law.

These insights should alert those engaged in fact-finding that there is no pre-existing “reality” (facts-out-there), in need of mere discovery, through the distillation of its essence, by finders of fact. Instead, fact-finders should be aware of their active role in constructing a social reality. Just as in domestic judicial fora, this process is dependent on and plays itself out through language. Even “real” evidence or on-site inspections are reduced to written (or oral) observations. Reliance on the word is even more apparent at appeal hearings, where courts of appeal rely exclusively on written records and materials, in the absence of oral testimony. The fact-finder is thus engaged in a process of constructing a platform on which to base legal findings. Put another way, the fact-finding body constructs a text by reading and interpreting available texts, for a very specific purpose – that of enabling the body to respond to an allegation of the violation of human rights.

Although some may regard fact-finding as a quest to uncover the truth,¹² it should not be equated with truth seeking. One may have some understanding for the invocation of “truth” in answering white-or-black questions about matters that seem to allow for very little grey in their answering, such as whether someone has died or was released.¹³ On the whole, though, fact-finding is inherently subjective and depends on a multiplicity of factors relevant to the construction of the factual text. It is impossible to find the “real facts” or “truth”, both as a matter of epistemology and pragmatism.

Human rights fact-finding should be regarded as the outcome of a discursive contest in which the fact-finder plays a co-constitutive role.

¹² To Herndl, for example, the main purpose of fact-finding is “the establishment of the truth”, and to make proposals “based on the true facts” (K. Herndl, “Recent developments concerning United Nations fact-finding in the field of human rights”, in: M. Nowak et al. (eds), *Progress in the spirit of human rights. Festschrift für Felix Ermacora*, 1988, 1 et seq. (32)).

¹³ Even a hardened post-modernist may have some sympathy for the CAT Committee that concluded its article 20 inquiry in which it found systematic torture in Egypt, as follows (Doc. A/51/44 of 3 May 1996, paras 180-222 (para. 222): “In addition, the Egyptian authorities should undertake expeditiously a thorough investigation into the conduct of the police forces in order to establish the truth or otherwise of the many allegations of acts of torture, bring the persons responsible for those acts before the courts and issue and transmit to the police specific and clear instructions designed to prohibit any act of torture in the future.” (emphasis added).

There may be greater legitimacy in a more participatory process of establishing a version of events that may be referred to as “procedural” or “institutional truth”. As the focus shifts from standard setting to implementation, more and more governments and NGOs display awareness for the contested nature of human rights “facts”. They increasingly participate in fora such as the annual sessions of the UN Commission on Human Rights and sessions of the African Commission on Human and Peoples’ Rights, in the examination of state reports and make use of opportunities to comment and criticise fact-finding.¹⁴ The establishment of “government NGOs” (GONGOs) and national human rights institutions without any real autonomy or independence may be viewed as cynical attempts on the part of some governments to secure an advantage in the process of constructing the social reality of human rights violations.

In this contribution, three main forms of human rights fact-finding are first identified, before focusing on one of them, fact-finding forming part of considering complaints. The practice of the three relevant treaty-based bodies, in particular the HRC, is reviewed, followed by a discussion of that of the Working Group on Arbitrary Detention (Working Group). Although their practices are described separately, the two types of bodies share many characteristics. For the remainder of the discussion, these bodies (all dealing with individual complaints) are grouped together under the umbrella term “complaints bodies”. The terms “complaint” and “complainant” are also used as general terminology, although they do not correspond to the exact terminology used by these bodies. After highlighting problematic implications of the current fact-finding practice of these complaints bodies, some solutions are suggested and considered.

¹⁴ For example: In 1997, the United Kingdom delegation at the examination of the state report consisted of 11 members, the delegation of France numbered some sixteen persons, and that of Gabon eight (Doc. A/52/40/ Vol. II). At the African Commissions 31st Sess. (in 2002), for example, 36 of the state parties attended; for the 21st Sess. (in 1997), the number was 19 (11th and 15th Annual Activity Report of the African Commission).

II. Forms of Human Rights Fact-Finding

Fact-finding by human rights mechanisms and bodies takes three main forms: investigation, indirect fact-finding as part of examining state reports, and complaints-based fact-finding.¹⁵

1. Investigative Fact-Finding

Although information about human rights violations are essential in both the UN Charter-based and treaty-based human rights systems, fact-finding is mostly associated with and discussed in the context of the numerous *ad hoc* Charter-based instruments and procedures, functioning under the UN Commission on Human Rights. These fact-finding procedures undertake “investigations”, usually entailing a visit to a country or countries, followed by a report to the Commission.

At first concerning itself with standard setting that culminated in the “International Bill of Rights”, the United Nations after 1967 increasingly concerned itself with the violation of those standards. In that year, the UN organ with primary responsibility for human rights, the ECOSOC, adopted Resolution 1235, allowing for the examination and public discussion of gross and systematic human rights violations.¹⁶ A first fact-finding body, the *ad hoc* Working Group of Experts on Human Rights in Southern Africa, was also appointed in the same year.¹⁷ After some tentative extensions, for example to Chile, the 1980s saw a multiplication of fact-finding organs mandated to investigate country situations and thematic issues of broader concern. As these mechanisms developed incrementally, and do not form part of a holistic design, there is no standard fact-finding procedure or format. Attempts to formalise such a uniform code have respected the reality of the diversity of institutions and aims, as well as the need for flexibility. However, they share the common understanding that the reception of and value attached to their reports depend on the “correct assessment of the correct information”.¹⁸ For this reason, they share some basic characteristics aimed at

¹⁵ See also F. Ermacora, “International enquiry commissions in the field of human rights”, *Revue de Droits de l’Homme/Human Rights Journal* 1 (1968), 180 et seq.

¹⁶ E/RES/1235 (XLII) of 6 June 1967.

¹⁷ See Herndl, see note 12, 9.

¹⁸ Herndl, see note 12, 28.

ensuring fair procedures, such as adhering to the principle of *audiatur et altera pars*.¹⁹ These reports serve as discussion documents in political fora, in particular the Commission on Human Rights, and need to withstand possible criticism of being biased or unsubstantiated. World opinion, the Commission and UN bodies are unlikely to be mobilised or influenced by facts they find unconvincing.

A recent example of an investigative fact-finding mission that led to a dispute about the accuracy of the reported facts involves Australia. Responding to an invitation by the government, the Working Group on Arbitrary Detention in 2002 visited that country. The aim of the visit was to investigate and report on the situation of mandatory detention of unauthorised arrivals in Australia. The Working Group concluded that the system in place constitutes conditions similar to imprisonment, raised a number of concerns and made recommendations.²⁰ In relation to the automatic nature of detention, for example, it recommended that unauthorised arrivals should not be treated in generalised terms, but should be dealt with individually, in terms of court orders.

After receiving and studying the Working Group's draft report, the government presented detailed comments, requesting that the report be rid of "inaccuracies", "incorrect" statements, assumptions and inferences, and unsubstantiated allegations.²¹ The Working Group took note of these observations, but went ahead to publish its final report without the suggested amendments. In a letter to the Australian Permanent Representative at the UN Office in Geneva, it remarks that any inaccuracies in the report may be ascribed to the variety of sources from which the Working Group obtained information, and "is not due to any lack of good intention or fairness" on its part.²² Implying that the government is overplaying some of these "inaccuracies" or facts that are open to dispute, such as whether the detainees are, as a rule, handcuffed when leaving the detention centres, the Working Group dismisses these as "not having a decisive impact" on the main issue under investigation.²³ In its report, and requesting that the government's comments should be attached to the report when it is discussed at the Commission on Hu-

¹⁹ "Also hear the other side", also referred to as the *audi alteram partem*-rule.

²⁰ Doc. E/CN.4/2003/8/Add.2 of 24 October 2002.

²¹ See Doc. E/CN.4/2003/G/22 of 10 January 2003, Annex III.

²² Doc. E/CN.4/2003/G/22 of 10 January 2003, Annex II, also noting that the Working Group established the facts in "as objective and impartial" a manner as was possible in the short time available.

²³ Ibid.

man Rights' 52nd Session in order to present a "balanced" view, the Permanent Representative reiterates the government's concern about the "reluctance to address factual errors", viewing that a UN body should not "knowingly perpetuate such inaccuracies, regardless of these source".²⁴ Clearly, the government wanted one, sanitised version to be presented to the Commission (and the broader community), while the Working Group preferred to let the different versions speak for themselves, thus refusing to construct a single overarching narrative.

In contrast to the Charter-based mechanisms, fact-finding by UN human rights treaty bodies only exceptionally takes the form of an "investigation". One of the UN human rights treaties, CAT, provides for fact-finding similar to that of the UN Charter-based special mechanisms. Under article 20 of CAT, the CAT Committee may conduct an inquiry, including an on-site visit, if it receives "reliable information" indicating that torture was being practiced systematically in the territory of a state party to CAT. The near future may witness the extension of this more investigative form of fact-finding. Under the Optional Protocol to CAT, which is not yet in force,²⁵ a system of preventive visits to supplement the inquiry procedure is foreseen. State parties to the Optional Protocol to CEDAW not only accept the right of individual petition, but also the possibility of a confidential inquiry when the Committee "receives reliable information indicating grave or systematic violations" in that state.²⁶ Such an inquiry may include a visit to the state concerned after the state's consent has been obtained. However, states may exclude the possibility of an inquiry (but not of individual communication) by making an explicit "opt out" declaration.²⁷

Some of the problems encountered in the course of applying article 20 of CAT are illustrated by the CAT Committee's inquiry into the situation of detainees in Egypt. Although the CAT Committee targeted Egypt for an article 20 inquiry, the Committee never managed to visit Egypt, and had to rely on NGO reports (mainly provided by Amnesty International, the Egyptian Organization for Human Rights and the World Organization against Torture) and the UN Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. Concluding its inquiry in May 1996 with the finding that tor-

²⁴ See Doc. E/CN.4/2003/G/22 of 10 January 2003, Annex I.

²⁵ Adopted 2002, requiring 20 ratifications to enter into force. By 31 December 2003, only two formal acceptances have been forthcoming.

²⁶ Article 8 of the Optional Protocol to CEDAW.

²⁷ In terms of article 10 of the Optional Protocol to CEDAW.

ture is “systematically practised by the security forces in Egypt, in particular by State Security Intelligence”,²⁸ the Committee recommends that Egypt reinforce its legal and judicial infrastructure “in order to combat the phenomenon of torture in an effective way”.²⁹

Although the Egyptian government provided detailed information about efforts to combat torture, it did not address the main issue raised by the NGO reports, which consistently describe the “State Security Intelligence premises and military camps of the Central Security Forces as places where torture allegedly occurs”.³⁰ Instead, the Egyptian government adopted the formalistic stance that “State Security premises are administrative buildings and that Central Security camps are military installations and, that, therefore these places are not among those where people may be detained”.³¹ Given that the two parties have essentially spoken at cross purposes, the Committee’s finding that “there is a clear contradiction between the allegations made by non-governmental sources and the information provided by the Government with regard to the role of the Egyptian security forces and the methods they use”, comes as no surprise.³² In addition to making use of NGO sources, the Committee relied on written information presented by Egypt, as well as meetings with Egyptian delegations in Geneva. However, in the light of the contradictions, it reiterated its “conviction that a visiting mission to Egypt would have been extremely useful to complete the inquiry”.³³

In another example of speaking at cross purposes, the acceptance by Egypt of a visit also became the object of a factual dispute. Formally, the Egyptian government continuously expressed its commitment to engage in dialogue with the Committee. It never expressly declined permission for a visit, but drew attention to the need to discuss “the framework through which the visit could take place”.³⁴ However, the Egyptian government never responded to two explicit proposals to visit within a specified time,³⁵ thus rendering unconvincing the argument that “at no stage of its dialogue with the Committee did it protest

²⁸ Doc. A/51/44 of 3 May 1996, para. 220.

²⁹ *Ibid.*, para. 22.

³⁰ *Ibid.*, para. 208.

³¹ *Ibid.*, para. 209.

³² *Ibid.*, para. 209.

³³ *Ibid.*, para. 209.

³⁴ *Ibid.*, para. 216.

³⁵ See *ibid.*, paras 185, 186.

against the request for a visiting mission to Egypt”.³⁶ The extended nature of these deliberations is one of the main reasons why the investigation took three years to be finalised (from November 1991 to 1994).

In the end, the Committee accepted that the allegations appear to be well founded. Its conclusion is based on the quantity of (the “existence of a great number of allegations”), variety in (“which came from different sources”), consistency between (“allegations largely coincide and describe in the same way the methods of torture, the places where torture is practised ...”) and consistent reliability of sources (“sources that have proved to be reliable in connection with other activities of the Committee”).³⁷ There can be little doubt that the government’s objection to the publication of the inquiry report is just as much about a denial of the factual basis of the finding as it is about the reasons stated, namely the implicit support of terrorism.³⁸

Thereafter, in December 2002, the CAT Committee concluded, after examining Egypt’s fourth state report, that torture and ill treatment of detainees is still a problem.³⁹ Recalling the recommendations arising from the inquiry under article 20 of the Convention, the Committee requested information about implementation, which had still not been provided.⁴⁰ Responding to the government’s expressed willingness to co-operate with the UN bodies and procedures, the Committee recommended that the government agree to a visit by the UN Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.⁴¹ In his report on 2002, the Special Rapporteur notes that numerous allegations and urgent appeals have been directed

³⁶ Ibid., para. 216.

³⁷ Ibid., para. 219.

³⁸ See the following statement, contained in a letter by the Egyptian government to the Committee, pre-empting post-11 September 2001 United States rhetoric: “If a summary account of the results of the confidential proceedings concerning Egypt were published in the Committee’s annual report, this might be interpreted as signifying support for terrorist groups and would encourage the latter to proceed with their terrorist schemes and to defend their criminal members who engage in acts of terrorism by resorting to false accusations of torture. In other words, it might ultimately be interpreted as signifying that the Committee is indirectly encouraging terrorist groups not only in Egypt but worldwide. This is definitely not one of the objectives specified in the Committee’s mandate.”

³⁹ Doc. CAT/C/CR/29/4 of 23 December 2002.

⁴⁰ Ibid., para. 7.

⁴¹ Ibid., para. 8.

against Egypt, but that a number of them received no response. The report expresses regret at the fact that the Special Rapporteur had yet not been invited, and reiterates the concerns raised during the latest HRC and CAT Committee examinations of state reports.⁴²

2. Indirect Fact-Finding through the Examination of State Reports

While the investigative fact-finding of the UN human rights treaty bodies is limited, other forms of fact-finding are central to the exercise of much of their mandates. This may not be apparent at first, given that the main obligation of state parties is to “take the necessary steps ... to adopt such legislative or other measures as may be necessary to give effect”⁴³ to the treaty, or to “take effective legislative, administrative, judicial or other measures” to do so.⁴⁴ Indeed, if states fully domesticate treaties, no disputes (of a legal or factual nature) should arise. Superficially, compliance with this obligation may also seem easily ascertainable, for example with reference to the theory of monism, or to a specific statute transforming the treaty into national law in respect of dualist countries. Yet, as soon as one moves beyond formulae and formalism, when one debates the “effectiveness” of measures and their implementation in practice, questions about domestication dissolve into questions about compliance-in-fact. It is mainly through the process of examining state reports that the treaty bodies assess compliance with the obligation of state parties to give effect to the provisions of treaties.

All the seven human rights treaty bodies are mandated to examine initial and periodic state reports. The process of examination has been termed “indirect fact-finding”.⁴⁵ A sensitivity for the factual basis of such an examination has inspired the practice to allow NGOs to submit parallel or shadow reports as part of the process of examination. Presented with only one version, the treaty body would be reduced to a mere rubberstamp, and the exercise watered down to a formalistic one in which the only question is if the state reported, and whether its report complied with the reporting guidelines. Without the available information, the treaty body would not be in a position to adopt con-

⁴² Doc. E/CN.4/2003/68/Add.1 of 27 February 2003, paras 475 and 476.

⁴³ Article 2 (2) of ICCPR.

⁴⁴ Article 2 (1) of CAT.

⁴⁵ Ermacora, see note 15, 186.

cluding observations containing conclusions identifying main areas of “concern”, or “problem areas”, and to formulate useful and pointed recommendations. Both the dialogue and the concluding observations are thus premised on the existence of reliable facts. A question that arises in this context is how the body resolves a factual dispute, for example when a government blankly denies allegations of non-compliance.

Such a case presented itself when the HRC in 2001 examined the second state report from Syria.⁴⁶ In general, the Committee expressed regret at the lack of information in the state report “on the human rights situation in actual fact”.⁴⁷ This lack of a factual basis made it difficult to assess the realisation of human rights in the country. One of the subjects of concern raised in the concluding observations relates to conditions of detention. Noting the information provided by the delegation, the Committee “remains concerned about the many allegations of inhumane prison conditions and inadequate medical care in a number of prisons, particularly military prisons, including Tadmur prison”, and recommended that the state party should “ensure that appropriate and timely medical care is available to all detainees”.⁴⁸ In its subsequent “Comments” on the concluding observations, the Syrian government expressed amazement at “the false information” contained in that paragraph.⁴⁹ Numerous other parts of the observations are denied as “false and tendentious information disseminated by bodies hostile to Syria which are seeking to cause harm and confusion”⁵⁰ or as containing “no truth”.⁵¹

The question may be posed how such an impasse is to be bridged. Especially in respect of conditions of detention and allegations of torture the possibility of an investigative fact-finding mission invites itself. Another option is that the treaty bodies may work closer with UN *ad hoc* fact-finding procedures that are already appointed, using data they have accumulated, and referring matters for their further action. Although some advances have been made in integrating the work of the human rights treaty bodies through meetings of chairpersons (and even enlarged groups involving other members of treaty bodies), the modali-

⁴⁶ Doc. CCPR/CO/71/SYR (Concluding Observations) of 24 April 2001.

⁴⁷ *Ibid.*, para. 1.

⁴⁸ *Ibid.*, para. 13.

⁴⁹ Doc. CCPR/CO/71/SYR/Add.1 of 28 May 2002, para. 15.

⁵⁰ Para. 10 of the Comments, and para. 8 of the Concluding Observations.

⁵¹ Para. 14 of the Comments, and para. 12 of the Concluding Observations.

ties of co-operation between treaty bodies and the special procedures still need much attention and discussion.

The three categories of fact-finding identified here are interrelated. When the CAT Committee examined Cameroon's second state report, for example, it drew attention to the "gap between the adoption of rules in accordance with human rights standards, including those designed to prevent the practice of torture, and the findings made *in situ*"⁵² by an independent entity such as the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, who has reported on the existence of numerous cases of torture. This statement illustrates the potential benefit to treaty bodies of investigative reports on human rights, and suggests that investigative fact-finding may supplement indirect fact-finding through the examination of state reports.

3. Complaints-Based Fact-Finding

The main concern of this contribution is with the third form of fact-finding by human rights treaty bodies, that of establishing facts as part of reaching a finding on the basis of individual communications. Four of the seven human rights treaty bodies allow for individual complaints to be brought, and the competence of one more awaits a sufficient number of formal acceptances. Only the supervisory mechanisms under the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Convention on the Rights of the Child (CRC) still lack individual complaints mechanisms. The four already in place are the CERD Committee, the Human Rights Committee, the CAT Committee and the CEDAW Committee. However, by 31 December 2003, the CEDAW Committee has not dealt with any individual communications, thus minimising its role in the discussion. The CMW Committee may in the future also consider inter-state and individual communications. Acceptance of its complaints mechanism is optional though, and of the ten declarations accepting the CMW Committee's competence to consider individual communications required before this mechanism enters into force, none has as yet been deposited.⁵³

The investigative function of the Charter-based special mechanisms has been highlighted above. Despite the lack of a clear mandate, some of

⁵² Doc. A/56/44 of 6 December 2000, para. 65(c).

⁵³ As required under article 77 of CMW.

the thematic mechanisms, such as the Working Group on Enforced or Involuntary Disappearances, started to deal with individual communications.⁵⁴ Building on these cautious beginnings, the Working Group on Arbitrary Detention has developed a sophisticated and formalised complaints procedure reminiscent of those of the treaty bodies. Formally forming part of the UN Charter-based thematic special mechanisms, the Working Group on Arbitrary Detention is not a treaty-based body. However, the Working Group “adopts a methodology more akin to that of treaty bodies with competence over individual communications”⁵⁵ and has interpreted its mandate to become a “full-fledged supervisory mechanism outside the specific human rights treaties”.⁵⁶ Adopting “quasi-judicial” working methods similarly to those of relevant treaty bodies, the Working Group has finalised a huge number of complaints.⁵⁷ It is therefore included as a “complaints body” for the purpose of the discussion here.

The reason for focusing on the role of fact-finding with reference to complaints bodies, to which this article now turns, is the relative neglect of this area in the literature, combined with the “considerable growth in terms of the number of communications received and the complexity of the issues raised” under the UN complaints mechanisms.⁵⁸

⁵⁴ Established as the first thematic mechanism under the Commission on Human Rights in 1980, the Working Group aims at clarifying instances of disappearances. This is done on the basis of individual cases. Although statistics of these cases are kept, no individual findings are made (see e.g. Doc. E/CN.4/2004/58 of 21 January 2001, Annexes).

⁵⁵ J. Fitzpatrick, “Human rights fact-finding”, in: A.F. Bayefsky, *The UN Human Rights Treaty System in the 21st Century*, 2000, 65 et seq. (77).

⁵⁶ B. Rudolf, “The Thematic Rapporteurs and Working Groups of the United Nations Commission on Human Rights”, *Max Planck UNYB* 4 (2000), 289 et seq. (319).

⁵⁷ Rudolf, see above also emphasises the “unequivocal evaluation” of complaints and the self-image of the Working Group as being a “quasi-judicial body”, 319 and 315.

⁵⁸ See e.g. the informal note serving before the 13th Mtg. of Chairpersons of the (Human Rights) Treaty Bodies, held in June 2001, Geneva: Strengthening support to and enhancing the effectiveness of the treaty bodies, Doc. HRI/MC/2001/Misc. 2 of 16 May 2001, para. 16: “This reflects developments in the regional bodies – the European Court of Human Rights, the Inter-American Court of Human Rights, the Inter-American Commission on Human Rights, and the African Commission on Human and Peoples’ Rights.”

III. Fact-Finding under the Treaty-Based Complaints Procedure

Treaty bodies have been established partly as diplomatic bodies, with the limited competence to make recommendations to a political parent body, and partly as technical committees of experts, able to act independently on their findings. Especially in relation to their competence to consider individual complaints, these bodies have however soon evolved into quasi-judicial bodies, displaying a formalised and relatively rigid procedure.

The process of consideration of complaints takes an exclusively written format,⁵⁹ starting with the submission of a complaint, which is registered if it meets minimum requirements. These requirements are set out in the treaties, but are also mirrored on the “Complaint Form” to be completed by authors of communications. The principle of *audiat et altera pars* is applied. Once a complaint is registered, information is obtained from the state party. After the case is declared admissible, the state party has another opportunity to submit information and arguments on the merits, to which the author may respond. There is no requirement that the allegation or other statements be in the form of sworn statements. Only evidence submitted by the parties is allowed. However, under article 22 (4) of CAT, the CAT Committee considers communications in the light of “all information made available to it by or on behalf of the individual and by the State Party concerned”. In this respect, CAT differs from the emphasis on written proceedings in respect of CERD and the Human Rights Committee, by omitting the word “written” before “information”. Article 7 (1) of OP of CEDAW mirrors the provisions of CAT in this regard.

Going one step further, the Rules of Procedure of the CAT Committee allow the Committee to “invite” complainants or their representatives, or both, to “provide further clarifications or to answer questions on the merits of the complaints”.⁶⁰ In its practice, the CAT Committee has not made use of this implicitly broadened scope for fact-finding, though.

⁵⁹ See article 5 (1) of OP ICCPR, as well as C. Tomuschat, *Human Rights Between Idealism and Realism*, 2003, 179-180.

⁶⁰ Rule of Procedure of the CAT Committee, Rule 111(4), Doc. CAT/C/3/Rev. 4 of 9 August 2002 An invitation to one party should be extended to the other party as well. Non-appearance following an invitation does not prejudice any party.

In the findings of these bodies, one may identify three phases: finding the facts, stating the law, and applying the law to the facts in order to reach a conclusion.⁶¹ In many cases, but by no means all, the applicable law is quite clear. The process of application of law to facts is mostly based on logic, deductive reasoning and analogy, for instance by relying on precedents. However, even legal findings are inevitably factually based, making a lasting divorce or true separation between facts and law impossible. At a first glance, this is not always clear from a reading of the findings. In *Länsman and others v. Finland*,⁶² for example, the question is posed whether the quarrying on a flank of a mountain would violate the right under article 27 of the ICCPR. Finding itself as mediator between tradition and progress, the HRC had to answer the question whether the forces of progress violate the right to culture of a minority. The Committee resolves this issue by positing two factual situations against one another – the activities may have “a certain limited impact”,⁶³ or their impact may be “substantial”.⁶⁴ It is clear what the legal consequences of each of these possibilities are: no violation in the case of the former, a violation in the case of the latter, thus collapsing a “legal” question into a factual determination.

The central role of factual findings and ways in which complaints bodies have dealt with them are discussed in the four phases through which a complaint may proceed: the pre-admissibility phase, the admissibility phase, the finding on the merits, and the follow-up phase.

1. Pre-Admissibility Phase

Complaints are received by the secretariats of the treaty bodies, by the Petitions Unit at the Office of the High Commissioner for Human Rights (for HRC, CERD and CAT Committees), or the UN Division for the Advancement of Women (for CEDAW). Based on the information that approximately 30 “pieces of correspondence pertaining to the

⁶¹ See e.g. Communication No. 195/1985, *Delgado Páez v. Colombia*, Doc. A/45/50, Vol. II of 21 July 1990, where the facts and legal exposition is followed by the “question of the application of this finding to the facts of the case under consideration”, (at para. 5.6).

⁶² Communication No. 511/1992, Doc. A/50/40, Vol. II of 26 October 1994.

⁶³ *Ibid.*, para. 9.4.

⁶⁴ *Ibid.*, para. 9.5.

petitions procedures arrive each day” at the Office of the HCHR,⁶⁵ one can draw a rough conclusion that more than 10, 000 complaints-related “pieces of correspondence” are received yearly. Allowing that some of this correspondence may relate to communications already submitted, in the form of follow-up, queries or further information, the number still falls very far short of the number of communications that are dealt with by the treaty bodies. In the period between 1977 and 2000, a total of 936 communications have for example been registered (in which 346 final views were given) before the most active of these bodies, the HRC.⁶⁶

The difference in these numbers draws attention to the important sifting role performed at the Secretarial level. At this stage, the issue to be determined is whether the “piece of communication” constitutes a communication-complaint. Very little is known about this gate-keeping process, which is characterised as administrative. However, it seems evident that the factual basis provided in these “pieces of communication” is crucial in a decision to process them as complaints. Only once the “piece of communication” is registered as a communication do the bodies exert some influence and potential control over their processing.⁶⁷

2. Admissibility Phase

A significant number of complaints never proceed beyond the admissibility phase. Can the complaint be declared inadmissible for lack of substance, that is, for want of a substantiated factual basis?

Each of the relevant treaties set out admissibility requirements that need to be met. The criterion that complaints have to be “compatible with” the treaty provisions forms the basis for the rather obvious requirement that complaints must reveal some indication of a material breach of the treaty. In some instances this has been set as a *prima facie* standard,⁶⁸ in others merely as providing some substantiation.⁶⁹ Al-

⁶⁵ Doc. HRI/MC/2001/Misc. 2 of 16 May 2001, para. 16.

⁶⁶ A.F. Bayefsky, *The UN human rights treaty system. Universality at the crossroads*, 2001, 506.

⁶⁷ See e.g. Rules of Procedure of CAT, Rule 98.

⁶⁸ See e.g. *KL v. Denmark*, Communication No. 81/1980, Doc. A/42/40 of 27 March 1981, 139.

though none of the admissibility requirements refer explicitly to non-substantiation as a ground for inadmissibility,⁷⁰ the requirement that complaints should not constitute an abuse of the submission procedure has to some extent fulfilled that role. The OP to the ICCPR, for example, does not contain a similar provision, but allows the HRC to declare inadmissible communications it “considers to be an abuse of the right of submission”.⁷¹ As *Ghandi* shows, it is often difficult to separate findings on admissibility based on abuse of rights from those based on non-substantiation.⁷² The OP to CEDAW deals more openly with the matter by providing that a complaint may be declared inadmissible if it is “manifestly ill-founded or not sufficiently substantiated”.⁷³

As all the relevant treaties require that local remedies be exhausted before applications are admitted, this aspect is most frequently invoked.⁷⁴ Although framed in legal terms, the question whether a matter is admissible is also often factual in nature. Factual differences may arise about the legal position pertaining to remedies, the “prospect of success” of making use of a particular remedy, whether a remedy is “effective”, or if it has been or is likely to be “unreasonably prolonged or delayed”. The following admissibility finding provides an illustration: the complaint in *Simalae Toala and Others v. New Zealand*⁷⁵ arose from the adoption by New Zealand of the Citizenship (Western Samoa) Act of 1982, which allegedly constituted a mass denationalisation of people of Samoan descent in New Zealand. Initially, the HRC found the communication admissible. At a later meeting, a majority of the HRC reversed the decision, declaring the communication inadmissible on the grounds of non-exhaustion of local remedies. However, it would seem that the factual basis of the two decisions does not differ. At the initial

⁶⁹ See e.g. Doc. E/CN.4/2004/3 of 15 December 2003, para. 33. Visits have been undertaken to e.g. Indonesia, Peru, Romania and Mexico.

⁷⁰ See, in contrast, the European system, where the admissibility requirement that applications should not be “manifestly ill-founded” is applied to reject “wholly or clearly unsubstantiated” allegations, lacking “evidence of the alleged facts to support a claim” (A. Drzemczewski, “Fact-finding as part of effective Implementation: the Strasbourg experience”, in: Bayefsky, see note 66, 2001, 115 (122)).

⁷¹ Article 3 of OP ICCPR.

⁷² P.R. Ghandi, *The Human Rights Committee and the right of individual communication – law and practice*, 204.

⁷³ Article 4 (2)(iii) of the 1999 OP to CEDAW.

⁷⁴ Article 5 (2)(b) of OP ICCPR; article 22 (5)(b) of CAT.

⁷⁵ Doc. CCPR/C/79/D/675/1995 of 22 November 2000.

hearing, the state's submission that the authors should "have indicated their intention to apply to the Courts to seek judicial review of the removal orders" was noted.⁷⁶ The HRC rejected this argument, as it "was not apparent to the Committee that any remedies that might still be available to the authors would be effective to prevent their deportation".⁷⁷ Reversing its decision by way of "review", the HRC remarks that the state "provided information about the procedures open to the authors to seek judicial review of the decision of the Removal Review Authority. It appears that although the authors had indicated that they intended to make use of this procedure, they did not do so".⁷⁸ Not seeing "any reason to change" the initial finding, a minority of four members expresses the view that it is "extremely doubtful" that the local remedies would have been effective. In a barely hidden accusation that the majority has manipulated the "facts", the minority casts some doubt on their reasoning: "We find it difficult to take this apparently easy route in order to by-pass a decision on merits which might possibly lead to a rather inconvenient result".⁷⁹

Often, when complaints are found inadmissible on this ground, the finding is not on the basis of non-exhaustion of local remedies, but on the basis of *lack of information* that local remedies have been exhausted. Sometimes all this is easily cleared with a submission of court records, but often matters are more complicated.

The availability of facts also determines the burden of proof. To be exempted from using local remedies, the complainant has to make specific allegations about the ineffectiveness or non-existence of local remedies, or about unreasonable delay. Once this has been done, the burden of proof shifts to the state. Should the state not respond to these allegations, or if it only makes vague or general observations about the formal availability of such remedies, "without relating them to the circumstances of the case",⁸⁰ the bodies will find the matter admissible.

⁷⁶ Ibid., para. 4.1.

⁷⁷ Ibid., para. 6.4.

⁷⁸ Ibid., para. 10.

⁷⁹ Committee Members Amor, P. N. Bhagwati, de Pombo, Solari-Yrigoyen.

⁸⁰ *Mukong v. Cameroon*, Communication No. 458/1991, Doc. A/49/40, Vol. II of 21 July 1994, para. 5.1.

3. Merits

Findings on the merits vary according to a number of factors. Four categories of cases, each giving rise to different issues related to fact-finding, are discussed: findings after local remedies have been exhausted; findings following an exemption to make use of local remedies; findings about facts arising after the local remedies have been (or could have been) used; and findings in *non-refoulement* cases.

a. Local Remedies have been exhausted

Under anticipated model circumstances, where the remedies have been exhausted, the body should be in the possession of a full record of the domestic court decision(s). Without a dispute about the factual finding of the domestic courts, the applicant's submissions serve to reinforce and emphasize contentions most likely already raised, and argue for a favourable application of the law to the *given facts*. In my view, such occasions are very rare. When they do come before complaints bodies, such complaints mostly entail an allegation that the legal position itself, and not only its application in the particular instance, violates the treaty. An example is the HRC finding in *Kavanagh v. Ireland*,⁸¹ where the complainant was tried by the Special Criminal Court, thus facing an extraordinary court procedure, without the right of a trial by jury, as is allowed in ordinary criminal trials. He was tried pursuant to a determination by the Director of Public Prosecutions (DPP), acting in terms of legislation allowing the DPP an unfettered discretion to decide who should be tried in these extraordinary courts. There was no significant dispute about the facts. Finding a violation of the right to "equal protection of the law" in the particular circumstances, the HRC generalises its findings by requiring the state to "ensure that persons are not tried before the Special Criminal Court unless reasonable and objective criteria for the decision are provided".⁸² Another example is provided by *Aumeeruddy-Cziffra v. Mauritius*,⁸³ where the HRC explicitly requires the state to "adjust" the provisions of its immigration laws in line with the Committee's findings. If the complainant did not contest the constitutionality of the legislation as such at the domestic level, the full implications of a finding calling for legislative amendment may not have been

⁸¹ Communication No. 819/1998, Doc. A/56/40, Vol. II of 4 April 2002.

⁸² *Ibid.*, para. 12.

⁸³ Communication No. 35/1978, Doc. A/36/40 of 9 April 1981.

considered there. Lacking an appropriate factual basis, such a finding by a complaints body may consequently be perceived as facile or superficial.

More often the complaint also contests a factual finding or the factual basis of the local court's findings. In terms of the adversarial process adopted by the bodies, the government is provided with an opportunity to respond. Governmental responses may take three forms: no reply whatsoever; a general denial of the assertions in the complaint; or specific denials with reference to the allegations. For the complaints system to function optimally, states should evidently make use of the last of the three possibilities.

Faced with the government's silence, the bodies all have recourse to the notion of an *ex parte* or default judgement. The reason for reverting to this fiction is understandable – the bodies cannot be rendered powerless by the lack of government co-operation. The fiction applies equally when the state provides a general, unhelpful denial. The reasoning behind its application here is that by giving weight to such a general denial, the body would legitimate sham co-operation, while in fact the government undermined the process by not addressing the specific facts in issue. In the first two scenarios, the allegations of one party are taken as given, thus allowing no other voice or possibility to impact on the process of “constructing” the “factual text”. From this point of view, the application of the default rule is less than desirable. Only when the government makes a clear and *bona fide* attempt to deal with the specific allegations are the relative versions of the two parties really considered.

Generally, the bodies adopt a deferential approach to the text (judgements) produced by the local courts. In a recurring phrase, it is reiterated that “it is generally for the courts of States parties”, and “not for the Committee, to evaluate facts and evidence in a particular case, unless it is apparent that the courts' decisions are manifestly arbitrary”.⁸⁴ In some instances, a “denial of justice” is added as possible ground for interference.⁸⁵ In its first General Comment, the CAT Committee implicitly identifies the tension between the “considerable weight” that is to be given to “findings of fact that are made by organs

⁸⁴ See e.g. *H C v. Jamaica*, Communication No. 383/1989, Doc. CCPR/C/45/D/838/1989 of 13 August 1992, para. 6.2.

⁸⁵ See e.g. *Asbby v. Trinidad and Tobago*, Communication No. 580/1994, Doc. A/57/40, Vol. II of 21 March 2002, para. 10.3.

of the State party” and the competence of “free assessment of the facts based upon the full set of circumstances in every case concerned”.⁸⁶

A communication against Finland submitted under the ICCPR illustrates some consequences of reliance on local findings. In that matter, reindeer breeders of Sami ethnic origin claim that by allowing logging to take place in parts of its best winter herding land, the state fails to protect their rights to enjoy their Sami culture under article 27.⁸⁷ Both parties accept that the claim could in principle give rise to a violation of article 27, but disagree about the impact of the logging on the area. As in *Länsman*, the Committee applies its test whether the interference is “so substantial” as to constitute a violation of the right to enjoy their culture.⁸⁸ As part of the domestic proceedings, an on-site investigation was undertaken to the area, assessing the potential impact. The two relevant Finnish Courts (District Court and Court of Appeal) differed in their interpretation of the report of this investigation – the first Court finding in favour of the authors, the second, against them. There was also a dispute about whether the area was “the best” winter herding land, as the authors claimed. Basing itself “on the submissions before it from both the authors and the State party”, the Committee “considers that it does not have sufficient information before it in order to be able to draw independent conclusions on the factual importance of the area to husbandry and the long-term impacts on the sustainability of husbandry”.⁸⁹ Consequently, the Committee declared itself “unable to find” whether the logging caused a violation, thus highlighting the importance and consequences of failed fact-finding.

b. Exemption of Local Remedies

The need for fact-finding by complaints bodies becomes much more pronounced when the local remedies requirement has not been fulfilled. An applicant or author is required to exhaust local remedies only if they are “available” and “effective”. If they are not, he or she is exempted from exploring relief locally. The same principle applies when the domestic remedies are excessively prolonged. When the author is

⁸⁶ CAT Committee General Comment No.1, para. 9, contained in Doc. A/53/44, Annex IX of 21 November 1997.

⁸⁷ *Aärelä and another v. Finland*, Communication No. 779/1997, Doc. A/57/40, Vol. II of 24 October 2001.

⁸⁸ *Ibid.*, para. 7.5.

⁸⁹ *Ibid.*, para. 7.6.

exempted from making use of local remedies, the absence of a set of facts decided by at least one judicial level domestically changes the role of the complaints body. Clearly, it is very difficult to talk of merely being a treaty monitoring or supervisory body under such circumstances, given that there is no factual basis on which to rely. The complaints body here has a clear duty to find the facts itself, rather than merely interpreting facts already established.

It may be that the state co-operates, and supplements the dearth of information caused by the domestic judicial vacuum, but this is unlikely and mostly does not happen. Under such circumstances, the complaints body has to formulate its views on the strength of the author's version alone. Applying a default rule is understandable, because states would otherwise be shielded from adverse findings by their silence. However, the situation is not ideal, especially when the matter has not been raised in any forum other than before the Committee.

Sometimes governments participate in proceedings, even when the requirement of local remedies has been discarded, but do not assist in resolving factual matters. In *Coronel v. Colombia*, for example, the HRC found that local remedies were unduly prolonged, and exempted the applicants from making use thereof.⁹⁰ Although the government participated in the proceedings, it insisted – even at the merits phase – that local remedies were available and effective, but did not present any information or arguments on the merits. The HRC then applied the principle that “due consideration should be given to the authors’ complaints to the extent that they are substantiated”,⁹¹ given the absence of information presented by the state.

c. Post-Trial or New Facts

Some complaints contain allegations that have arisen after the local remedies have been or should have been exhausted. One such example is *Osborne v. Jamaica*.⁹² This complaint raises the question whether the imposition of corporal punishment on Mr. Osborne constitutes a violation of the ICCPR. Some time after the corporal punishment had been administered, Mr. Osborne wrote to the HRC, forwarding a “new claim” about a severe beating by prison warders.⁹³ The government

⁹⁰ Doc. CCPR/C/76/D/778/1997 of 29 November 2002.

⁹¹ *Ibid.*, para. 9.2.

⁹² Communication No. 759/1997, Doc. A/55/40 of 15 March 2000.

⁹³ *Ibid.*, para. 3.1.

presented the HRC with a result of an investigation, including a medical report inconsistent with the author's allegations. As a result, the Committee found that, "based on the material before it", no violation had been revealed.⁹⁴ The Committee thus investigated the factual circumstances arising from a complaint without raising the need to establish the facts through local judicial mechanisms. It should be pointed out, though, that the government did not object to the admissibility of this claim.⁹⁵ Under these conditions, the complaints body also becomes the primary fact-finder, similar to cases where complainants are exempted from exhausting local remedies.

d. *Sui generis*: Applications involving *non-refoulement*

In a number of cases before especially the CAT Committee, complainants have alleged that their expulsion from a state party to CAT would expose them to torture or ill treatment in the receiving country. This kind of cases is brought under article 3 of CAT, but also under article 7 of ICCPR. In these applications the local remedies in the delivering state may be exhausted, but often the material issue concerns the situation in another country, the receiving country. These issues relate to the general human rights situation in that country, and to the specific threats that the complainant would face on his or her return to that country.

In such cases, disputes are often about oral evidence, but may also relate to written material. An example is *KM v. Switzerland*,⁹⁶ alleging a violation of article 3 of CAT. Briefly stated, the facts are that KM, a Kurdish Turkish national, fled Turkey in 1995, fearing that he would be unjustly prosecuted for supplying shoes to Kurdish rebels. Arriving in Switzerland, his application for asylum was rejected, and he risked being expelled to Turkey. KM consequently approached the CAT Committee for a finding that his expulsion would expose him to the substantial risk of imprisonment or torture on his return to Turkey. Pointing to a number of "discrepancies, contradictions and inconsistencies" in his versions, the Swiss government disputed the exact nature of his initial arrest.⁹⁷ Avoiding a resolution of this dispute, the Committee considered that information irrelevant "for the assessment of the risk under

⁹⁴ Ibid., para. 9.2.

⁹⁵ Ibid., para. 8.4.

⁹⁶ Doc. CAT/C/23/D/107/1998 of 4 July 2000.

⁹⁷ Ibid., para. 4.2.

which the author might be if he is returned to Turkey”.⁹⁸ The factual dispute then turned on the risk of prosecution (and thus, of mistreatment and imprisonment) KM faces as a returnee. Central to this inquiry are two questions – one generalised and broad, and the other individualised and narrow.

Although it is not determinative of the issue, proof about the general human rights climate in a particular country is an important aspect in clearing the article 3 hurdle. *Burgers* and *Danelius* comment that the “lack of evidence may frequently be a serious obstacle”, and point to the difficulty of calling witnesses and collecting other evidence due to unwillingness of “receiving states” to co-operate.⁹⁹ Plainly, it is easier for the individual to prove “substantial personal risk” if such a claim is embedded in a general situation of consistent patterns of gross, flagrant or massive human rights violations. Quite obviously, it is very difficult for the individual to provide “evidence” of this nature. In its finding, the CAT Committee refers, without specifying them, to “numerous reports concerning the use of torture in Turkey”.¹⁰⁰ One may thus assume something akin to judicial notice, as this information is seemingly known to the Committee, without need of substantiation.

As to the individualised inquiry, it centred on the authenticity of a document produced by the author, and on information supplied by the Swiss Embassy in Ankara. The document in question was “issued by the prosecutor of Gaziantep, dated 28 March 1995, indicating that he [KM] was wanted by the police”.¹⁰¹ KM requested this document from his father, who sent it to him after “he had had to go to the police station several times in order to obtain the document”.¹⁰² The Swiss government considers this to be a fake, on the grounds of its appearance (the quality of paper), the absence of official indications “that generally appear in this type of document” and the nature of the document (it was not normally intended for the “wanted person”).¹⁰³ The Committee finds that the “explanations provided by the author to demonstrate that the said document is authentic are not convincing”.¹⁰⁴ This seems

⁹⁸ Ibid., para. 6.5.

⁹⁹ J. H. Burgers/ H. Danelius, *The United Nations Convention against Torture*, 1988, 138.

¹⁰⁰ Doc. CAT/C/23/D/107/1998 of 4 July 2000, para. 6.7.

¹⁰¹ Ibid., para. 2.5.

¹⁰² Ibid., para. 5.1.

¹⁰³ Ibid., para. 4.7.

¹⁰⁴ Ibid., para. 6.6.

to place some form of burden on the complainant – it is not so much for the complainant to show that the document is authentic, as it is for the government to show that it is not. If the Committee applied a “balance of probabilities” test here, it did not make that clear. Nor is it clear who had the burden of persuasion. In my view, the context suggests that this burden was shifted or placed onto the complainant. Even so, whoever has such a burden, the finding does not sufficiently take into account the criminal justice system in Gaziantep, aspects about which no information appears on the record. Why should it be unlikely that the prosecutorial service is unwilling to provide the relevant documentation, and provide instead a document not tailor-made for that purpose? Should the quality of paper really be an indication of anything, or could it just as well be explained by official neglect as by forgery? The Committee thus takes an a-contextual decision, favouring the state in the absence of information about the context, and the ability to establish the facts, thus opening itself to the criticism that there is an unspoken assumption of dishonesty on the part of the applicant.

Of some importance, too, in the Committee’s view, is the question whether the Turkish police has a file on KM, and whether they are seeking him actively. Not being in a position to establish these facts itself, the Committee has to rely on information provided by either the complainant or the government. It is unlikely that the complainant will be able to produce conclusive proof of such information. In casu, as in other cases, the state – and the Committee – relies on the government’s embassy – here, the Swiss Embassy in Ankara. This is done in an unquestioning fashion, noting the information, and then deducing a conclusion therefrom (“accordingly”).¹⁰⁵ In so doing, the Committee shows very little awareness of the inherent bias and hearsay nature of this evidence. Even if there is no specific reason to mistrust a government in its revision of information of this nature, it must be noted that the Embassy is, or may be seen to be a biased party in the proceedings; and the provision of such information leaves no opportunity to the complainant to contest the facts, thus relinquishing the principle of *audiatur et altera pars*. Even if this is guaranteed in theory, with an opportunity to contest information, access to an alternative source, or the same sources to verify them may be very unlikely or problematic for many complainants. In addition thereto, the Swiss Embassy merely serves as a conduit for the Turkish government in such instances. The information provided by the Swiss government is therefore pure hear-

¹⁰⁵ Ibid., para. 6.6.

say – it cannot vouch for the authenticity, correctness, or truth of the information, merely because the Turkish government has provided it. It is not clear from the record how this information was obtained, at which level of the “police”, whether it was verified, cross checked or merely accepted at face value. These aspects, if carefully undertaken, should either be reflected in the record, or the lack thereof must be pointed out. Reliance on the written record opens the possibility of a very contentious (or incorrect) finding.

In *C v. Australia*, a majority of the HRC found that article 7 of ICCPR had been violated under similar circumstances. In their dissent, three members of the Committee take issue with the factual findings of the majority, questioning how the state’s “detailed arguments could be so lightly set aside in favour of an article 7 violation as has been done by the majority”.¹⁰⁶ The contest thus arises about the information provided by one state (the respondent) about the situation in another (the receiving) state, which is not a party to the dispute.

4. Follow-Up Phase

Follow-up differs from one complaints body to another. The HRC has put in place the most comprehensive of these procedures. When it finds a violation, the HRC routinely indicates to states that they have to provide an effective and enforceable remedy, and requests the state party to supply it with “information about the measures taken to give effect to the Committee’s Views”. The HRC has also routinely set a time limit of 90 days within which a state has to respond, providing information that would enable the Committee to ascertain “the measures taken by states”.¹⁰⁷ This process is overseen by one of the Committee members designated as Special Rapporteur for Follow-up. Information about follow-up is contained in the Committee’s annual report.¹⁰⁸

The practice of the Committee has fluctuated between adopting vague, open-ended remedies, leaving states much scope to determine

¹⁰⁶ See e.g. Communication No. 900/1999, *C v. Australia*, Doc. CCPR/C/76/D/900/1999 of 13 November 2002, Opinion of Committee Members Ando, Klein and Yalden.

¹⁰⁷ Rule 95 (1) of the Committee’s Rules of Procedure.

¹⁰⁸ Rule 95 (4) of the Rules of Procedure.

their content,¹⁰⁹ and precise and circumscribed remedies, calling for specific measures. An example of the latter category is the requirement to amend specific legislation, as was required of Mauritius in the *Aumeeruddy-Cziffra* Case.¹¹⁰ Remedies not requiring clearly defined action are more likely to lead to disputes about the adequacy of follow-up than detailed or specific remedies. This factor at least partially explains why the *Aumeeruddy-Cziffra* Case has been hailed as a clear example of successful follow-up.¹¹¹

This is an area in which treaty bodies should involve local NGOs. Their permanent presence in the country makes them better suited to ascertain whether remedies have been given effect to and to exert pressure on governments to comply. However, the body should not rely exclusively on fact-finding by NGOs, as their information may suffer from bias or inaccuracy.

IV. Fact-Finding by the Working Group on Arbitrary Detention as Complaints Body

Established in 1991, the Working Group on Arbitrary Detention has the mandate to investigate “cases of detention imposed arbitrarily or otherwise inconsistently with the relevant international standards set forth in the Universal Declaration or in relevant international legal instruments accepted by the States concerned”.¹¹² These cases include administrative detention and detention following the completion of a criminal trial. The Working Group’s substantive mandate arises from article 56 of the UN Charter, and by way of state consent to being bound by treaties, in particular the ICCPR. In respect of states that have not ratified the ICCPR, the Working Group uses the Universal Declaration as a yardstick, thereby confirming the view that at least the relevant provisions, usually articles 9 and 10, have attained the status of

¹⁰⁹ See e.g. the requirement to provide an “appropriate remedy” (*Kivenmaa v. Finland*, Communication No. 412/1990, Doc. A/49/40, Vol. II of 31 March 1994, para. 11).

¹¹⁰ See above, para. 11.

¹¹¹ See generally D. McGoldrick, *The Human Rights Committee*, 1991, 154-155.

¹¹² Doc. CHR/RES/1991/421 of 5 March 1991, Suppl. 2, 103, para. 2

customary international law or *ius cogens*.¹¹³ In some of its findings, the Working Group has also called on states to become party to the ICCPR.¹¹⁴ In 2003, for example, the Working Group adopted 26 opinions involving 151 persons; in respect of 131 of these complainants, it considered the deprivation of liberty to be arbitrary.¹¹⁵

The complaints procedure before the Working Group is triggered when a “source” provides information alleging arbitrary detention. Resorting to the principle of *audiatur et altera pars*, the information is then brought to the attention of the state party, with the request to respond to the allegations within 90 days. If the state responds, the “source” is given an opportunity to reply to the information provided by the state. The Working Group then evaluates the evidence before it, and makes a finding (initially called a “decision”, later an “opinion”). In this process, it takes note of circumstantial evidence, and of the reports by other special mechanisms and the treaty bodies (such as an inquiry in terms of article 20 of the CAT, to Turkey),¹¹⁶ and applies as standard of proof the criterion of “convincing evidence”.¹¹⁷ Follow-up of recommendations is mainly by way of written procedure. Information on government follow-up is reported annually.¹¹⁸

In some instances governments have taken direct issue with findings of the Working Group. Taking the form of a letter to the UN Commission on Human Rights, governments request that their response be attached to the report of the Working Group and be made available to all the delegates to the Commission’s session where the Working Group’s report is discussed, as the following example shows.

¹¹³ See e.g. Opinion 3/2002 against Eritrea, Doc. E/CN.4/2003/8/Add.1 of 24 January 2003, para. 15.

¹¹⁴ See above. The WG expresses the opinion that the detention violates articles 9 and 10 of the Universal Declaration. These provisions afford guarantees against arbitrary arrest and detention, and of a fair and public hearing, respectively. The Opinion concludes with the request that the government should take “adequate initiatives with a view to becoming a State party to the International Covenant on Civil and Political Rights”. See also Opinion 10/2002, *Sidi Fall v. Mauritania*, Doc. E/CN.4/2003/8/Add. 1 of 24 January 2003, 81.

¹¹⁵ Doc. E/CN.4/2004/3 of 25 December 2003, Summary.

¹¹⁶ See e.g. Doc. E/CN.4/1996/40/Add.1 of 31 October 1995, Decision 38/1994 (Turkey), para. 9.

¹¹⁷ See e.g. Doc. E/CN.4/1993/24 of 12 January 1993, Decision 14/1992 (Cuba), para. 6(h).

¹¹⁸ Doc. E/CN.4/2004/3 of 15 December 2003, paras 10 to 22.

In an opinion dealing with two persons of Indian descent detained in the United States, the Working Group found that the two persons “have been detained for more than 14 months, apparently in solitary confinement, without having been officially informed of any charge, without being able to communicate with their families and without a court being asked to rule on the lawfulness of their detention”.¹¹⁹ In its response to the communication as part of the process before the Working Group, the United States government made a general statement about the treatment of detainees in the country, beginning with the sentence: “Without providing any specific information about the cases reported ...”. Expressing dissatisfaction that the government’s response “merely described the current procedure under United States law without providing any information on the individuals in question”,¹²⁰ and in the absence of any specific information by the government, the Working Group relied on the information provided by “the source”. This information consists of the statements of the two detainees and a letter written to the mother indicating that they were detained for 14 months, in the immediate aftermath of the destruction of the World Trade Centre in New York on 11 September 2001. This information is apparently substantiated by an American *pro bono* lawyer.

Responding to the finding in its letter to the Commission on Human Rights, the United States government for the first time presented detailed information about the circumstances of the case. In short, it argued that the opinion was “unsubstantiated” and was based on “false facts” as well as a “fundamental misunderstanding of our law”.¹²¹ However, the misunderstanding seems rather to be on the American side. It is quite conceivable that the Working Group’s opinion could have been affected had the information been provided by the state at the appropriate time. The American version is that the two persons were detained for “overstaying their immigration visa”, and were subsequently charged and convicted for credit card fraud, to which they pleaded guilty in June 2002. After a sentence of one year, they were deported. By not providing any of this information before the Working Group, the United States government thwarted the process. Its strongly worded reply, with a string of sentences stingingly starting with “There is no factual support ...” is mere rhetoric and cannot undo the initial

¹¹⁹ Opinion 21/2002 of 3 December 2002, Doc. E/CN.4/2004/8/Add.1, para. 15.

¹²⁰ *Ibid.*, para. 12 of the Opinion.

¹²¹ Doc. E/CN.4/3003/G/72 of 7 April 2003.

lack of co-operation by the United States government to establish the facts.

There are similarities and differences between the procedures of the Working Group and those of the treaty-based complaints bodies. Both procedures take an exclusively written form, contain formal requirements such as time limits and embody procedural fairness. Like the treaty bodies, the Working Group applies a default rule when states fail to respond to allegations, routinely observing that it is “left with no option but to proceed to render its decision” on the basis of what has been “brought to its knowledge.”¹²² “[S]ince the facts and allegations contained in the communication have not been challenged by the Government in spite of the opportunity which was given to it to do so”, the Working Group takes a decision on the facts and circumstances of the cases.¹²³ Similar to the treaty bodies, the Working Group is reluctant to second-guess domestic fact-finding processes.¹²⁴ Follow-up to the findings of both the Working Group and the treaty bodies remains unsatisfactory.¹²⁵

The procedure before the Working Group is less rigid and does not contain a distinct admissibility phase. When an allegation is unsubstantiated, the Working Group has on occasion requested the “source” to provide additional information.¹²⁶ Not restricting itself to the submis-

¹²² See e.g. Doc. E/CN.4/1996/40/Add.1 of 31 October 1995, Decision 33/1995 (Turkey), para. 2.

¹²³ *Ibid.*, para. 3.

¹²⁴ In a case against China the Working Group points out that “its task is not to evaluate facts and evidence in a particular case; this would be tantamount to replacing the national courts, which falls outside the Working Group’s remit” (Opinion 2/2003 (China) of 7 May 2003, Doc. E/CN.4/2004/3/Add.1, para. 17).

¹²⁵ The HRC’s annual reports contain detailed information about steps taken to ensure compliance with opinions, see e.g. Doc. A/57/40 (Vol. I), Part VI, containing a table of follow-up by states. The information sometimes merely reveals non-compliance, see e.g. para. 239, in respect of the DRC: “With regard to case No. 16/1977 – *Mbenge et al.* (Doc. A/45/40), the author informed the Committee by letter of 3 June 2002 that the State party, both before and after the change of regime, had failed for over a decade to give effect to the Committee’s Views. The author remained without the use of his property and had not been compensated for his losses. The authorities had ensured that certain property of other persons was returned to them, but the author had not been treated in like fashion.”

¹²⁶ See note 122, para. 9.

sions of the parties, the Working Group makes use of a broader range of sources, including the reports of other special mechanisms and human rights treaty bodies. The Working Group also deals with “urgent appeals”,¹²⁷ and may conduct country visits, especially when complaints have revealed the need for legislative changes.¹²⁸

Decision 7/1992 (Peru) provides an example of disputed fact-finding before the Working Group.¹²⁹ In this matter, involving the alleged torture of Dr. Saavedra, the Working Group held that it “is not appropriate” for it to “pronounce on a matter which has already been dealt with by another organ of the Commission”. In this previous report, the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment stated that a special commission headed by the Dean of the Medical Association “had found that Dr. Saavedra’s wrists bore marks of having been bound and there were contusions on his body”. In its subsequent criticism, the NGO American Association of Jurists noted as follows:¹³⁰ “The fact of withholding action in favour of the Special Rapporteur runs counter to the explanations provided by the Group itself about its mandate (E/CN.4/1993/24, paras 6 and 7). This body is supposed to collaborate with Rapporteurs of the Commission and Sub-Commission and with treaty monitoring bodies. Such collaboration should take the form, *inter alia*, of the exchange of information for the sake of co-ordination, the saving of time and resources, and the following-up of all information.”¹³¹ As far as the evaluation of evidence is concerned, the Working Group found that “there is no evidence to justify a finding by the Working Group that this allegation has been proved”.¹³² In the view of the American Association of Jurists, this finding “overlooks the view of the medical commission”.¹³³

¹²⁷ In 2003, 157 such appeals (involving 812 persons) were made, Doc. E/CN.4/2004/3 of 15 December 2003, para. 23.

¹²⁸ In 2003, e.g. the Working Group visited Iran and Argentina. Since 1998, letters are addressed to governments to follow up appeals, which in some instances have led to legislative reform (see e.g. the situation in Indonesia Doc. E/CN.4/2004/3, paras 33, 38-40).

¹²⁹ Doc. E/CN.4/1993/24 of 12 January 1993, para. 6(h).

¹³⁰ Doc. E/CN.4/1994/NGO/18 of 8 February 1994.

¹³¹ *Ibid.*, para. 11.

¹³² Doc. E/CN.4/1993/24 of 12 January 1993, Annex I, para. 6(k).

¹³³ Doc. E/CN.4/1994/NGO/18 of 8 February 1994, para. 12.

V. Some Implications of Current Complaints-Based Fact-Finding

1. Fundamental Contradiction between Greater Judicialisation and Written Fact-Finding

When the earliest complaints systems were devised in the 1960s, the treaty bodies seem to have been modelled on domestic courts of appeal. This meant that the proceedings would be in writing only, based on the record as established through the domestic judicial system, which has to be exhausted. Oral hearings consequently do not form part of these proceedings. Just like domestic courts of appeal, these bodies do not undertake fact-finding investigations (on-site-visits). Different to the domestic appeals court, though, the treaty bodies do not entertain legal argument. This possibility was most likely omitted due to the resource implications, as well as some uneasiness about over-judicialising these bodies.¹³⁴ Although the mandate of the later CAT Committee leaves open the possibility for relying on non-written evidence, this possibility has not been exploited. The submission of evidence is also restricted to the parties. This has the cumulative effect that the factual basis of the complaints bodies is restricted to what the parties put on paper and present to the bodies.

Greater judicialisation has characterised the complaints bodies, which may now be described as “quasi-judicial” bodies. It may be argued that, initially, the judicial character of the complaints bodies was not very clear. Established by state parties as monitoring bodies with declaratory powers only, or as diplomatic bodies empowered to make recommendations, they nonetheless developed into quasi-judicial bodies.¹³⁵ Findings by treaty bodies have acquired a status that closely resembles binding “judgements”, in all but name, as exemplified in the expectation of compliance that is supervised through an increasingly effective system of follow-up, thus approximating a judicial finding in

¹³⁴ See e.g. R. Hanski/ M. Scheinin, *Leading cases of the Human Rights Committee*, Institute for Human Rights, 2003, 14.

¹³⁵ CAT Committee General Comment No. 1 para. 9, Doc. A/53/44, Annex IX of 21 November 1997 seems to be a case of “protesting too much”.

form and effect. This development towards judicialisation can be derived from a number of factors.¹³⁶

As *Tomuschat* notes, from the very beginning none of the findings of the HRC reads “like a diplomatic communiqué”, as they are drafted “on the pattern of a judicial decision”.¹³⁷ In his view, the persuasiveness of the findings depends on their “judicial” nature – their “impartiality, objectiveness, and soberness”.¹³⁸ Generally, the arguments of the two parties are stated, followed by the finding in which the factual position is clarified, applied to the relevant law, and the conclusions stated.¹³⁹ Although some of the CERD Committee findings contain an extensive exposition of the arguments of the two sides, and only a brief application of the facts to the law, with almost no analysis, they are still in principle modelled on the “pattern” of legal decisions. In substantiating their findings, complaints bodies refer to their own precedents, thus

¹³⁶ As opposed to the flexible and *ad hoc* nature of fact-finding under the UN Charter-based organs, the treaty-based organs have a more rigid and strictly legal basis, based on relatively detailed rules of procedure, for fact-finding in respect of individual communications, thus lending themselves to judicialisation. As has been pointed out, the Working Group displays characteristics similar to that of the treaty bodies dealing with communications. In respect of three cases against Cuba (Decisions 9, 14 and 15 of 1992), the NGO American Association of Jurists remarked that the Working Group’s decisions to file them without taking further action are in contradiction with other decisions, in which the Group declared detention arbitrary notwithstanding certain gaps in the information provided by the state or by the author of the request. The Association continues: “It would be as well, therefore, especially in view of the lack of information from the Government in question, to keep the case under review as far as possible, before taking a final decision. In doing otherwise the Working Group would run the risk of losing some of its effectiveness.” (Doc. E/CN.4/1994/NGO/18 of 8 February 1994, para. 2).

¹³⁷ C. Tomuschat, “Evolving Procedural Rules: The UN-Human Rights Committee’s First Two Years of Dealing with Individual Communications”, *HRLJ* 1 (1980), 249 et seq. (255).

¹³⁸ *Ibid.*

¹³⁹ See also the observation by the member of the HRC, Klein, in *Hill v. Spain*, Communication No. 526/1993, Doc. A/52/40 of 2 April 1997, that the authority of the Committee’s views largely depends on “a convincing ratio decidendi”.

also basing themselves on their own institutional authority rather than on outside influence or pressure.¹⁴⁰

Not only the findings, but the underlying procedure follows a judicial model, namely *audiatur et altera pars*. The exchange of information is indicative of an adversarial process between the parties. In the event of this exchange not being realised, relatively rigid rules pertaining to standard of proof, rather than flexible *ad hoc* principles, come into play.

An increasing trend to issue minority views, as part of the body's finding, not only illustrates the seriousness with which members approach findings, but also testifies to the rational and considered discourse that underlies the findings.¹⁴¹ These views are not necessarily "dissenting", but sometimes present a separate opinion in which specific issues are stated or positions clarified. An analysis of the HRC's annual reports in 1993 and 2002 reveals that the number of minority opinions as a percentage of the total number of findings has increased from about 28 per cent to around 54 per cent.¹⁴²

Although lawyers are not required for the preparation of complaints to any of these bodies, for some time now the majority of complaints are prepared with the assistance of lawyers. In 1993, some 28 per cent of complainants before the HRC were without legal representation; in 1997 the percentage dropped to approximately 18 per cent and in 2002

¹⁴⁰ See, in this regard, the minority view of Christine Chanet in Communication *E and AK v. Hungary*, No. 520/1992, Doc. CCPR/C/50/D/520/1992 of 5 May 1994, where she disagrees with the majority's view declaring the communication inadmissible on the basis of jurisdiction *ratione temporis*: "Finally, it is my view that when the Committee considers a communication under the Optional Protocol, its decisions should be guided only by the legal principles found in the provisions of the Covenant itself, and not by political considerations, even of a general nature, or the fear of a flood of communications from countries that have changed their system of Government."

¹⁴¹ See e.g. M. Nowak, *UN Covenant on Civil and Political Rights* (CCPR Commentary), 1993, 172, who identifies the adoption of minority views as part of a development towards strengthening the quasi-judicial nature of the HRC. (See also article 5 (4) of OP ICCPR, and Rule 94 (3) of the Rules of Procedure of the HRC).

¹⁴² Doc. A/48/40 of 1 November 2003, Part II: 6 minority opinions in a total of 21 cases decided on the merits; Doc. A/57/40, Vol. II: 20 separate opinions in 35 cases.

it was again around 28 per cent.¹⁴³ Lawyers have thus been used in about three quarters of all communications heard on the merits by the HRC.

The greater acceptance of the moral authority of the findings of complaint bodies goes hand in hand with greater judicialisation of the procedures and working methods of these bodies. However, in respect of fact-finding, the working methods have not changed or advanced, leaving the impression of a dichotomy, or inherent contradiction, between the increasingly judicialised bodies at odds with an unchanged fact-finding procedure. More than that, the fact-finding methods may also undermine the process towards securing greater binding authority for these findings especially if there is a perception that “the unavailability of relevant information may have resulted in decisions which were, either in law or in fact, incomplete or misleading”.¹⁴⁴ Although the complaints process has become more judicialised in many respects, the way of reaching these findings has lagged behind. Complete reliance on written information seems more and more anachronistic.

2. Domestic Remedies: Between Usurpation and Deference

As has been illustrated, the model of domestic-dependent fact-finding breaks down when complainants are exempted from exploring domestic relief. Particularly in cases where no attempt has been made to exhaust local remedies, the complaints body becomes, *in toto*, the court of record. Under such conditions, the body principally relies on the allegations of the complainant, as set out in the Complaints Form, which does not require sworn statements. As these are the types of cases where governments are less likely to respond to allegations, the default rule will often be applied. In this event, the complaints body becomes the court of first and last instance on the basis of the uncontroverted,

¹⁴³ These statistics relate to communications finalised on the merits. Doc. A/48/40 of 1 November 1993, Part II: in 6 out of 21 complaints there is no indication of legal representation; Doc. A/52/40 of 8 November 1996, Part II, 4 out of 22 complaints were not represented; Doc. A/57/40 of 21 March 2002, Vol. II: 10 out of a total of 35 complainants not represented.

¹⁴⁴ M. Schmidt, “Individual human rights complaints procedures based on United Nations treaties and the need for reform”, *ICLQ* 41 (1992), 645 et seq. (652). (Schmidt at the time worked in the Communications Section of the UN Centre for Human Rights in Geneva).

but untested and unscrutinised version of the complainant. The logical consequence of the use of fact-finding under such circumstances would be that the international body serves as a substitute to the domestic system. This approach is less than ideal, as it requires members of bodies to rely on assumptions, as well as “logic and experience”, without the benefit of hearing more than one voice. However, the adoption of this approach, favouring the *prima facie* acceptance of untested allegations above inaction that would legitimise the lack of co-operation by states, was unquestionably the best possible result under the circumstances.

The total usurpation of the fact-finding role in these cases starkly contrasts with the deferential attitude of the complaints bodies towards the facts found by domestic courts in instances where domestic remedies have in fact been exhausted. Under those circumstances, a reassessment of the facts is exceptional. The fluidity of the standard on which interference is allowed to some extent accounts for an open-ended and inconsistent practice in this regard.

3. Delays due to Written Procedures

As *Schmidt* points out, using a written procedure forces a complaints body to “engage in time-consuming exchanges of correspondence” before arriving at a finding.¹⁴⁵ This is especially the case when the co-operation of the government is not forthcoming, but attempts are nonetheless made to secure information from it.

Perhaps because it has adopted a low threshold standard of proof, the bodies have tended to bend backwards to accommodate especially states to make use of additional procedural possibilities, thus further prolonging the process. Although these rules are relatively rigid and precise, they are not always strictly applied. In a case involving the United States, the Working Group on Arbitrary Detention for example expressed the view that it “would have appreciated more cooperation from the Government, which has had over seven months, rather than the 90 days provided for under paragraph 15 of the methods of work of the Working Group, to clarify the situation”.¹⁴⁶ In this regard, the Working Group recalled that the government “requested additional

¹⁴⁵ Schmidt, see above, 651-652.

¹⁴⁶ Opinion 21/2002, Doc. E/CN.4/2004/3/Add.1 of 26 November 2003.

time, which it was granted in accordance with paragraph 16 of the methods of work".¹⁴⁷

In the *Lubicon Lake Band* case,¹⁴⁸ no less than 78 pieces of information (documents, fact sheets, papers) were used as a basis for the HRC's finding.¹⁴⁹ The time lapse between submission of the complaint (in 1984) and the final decision (in 1990) was more than six years. The delay in this matter was due to the complexity of the legal issues involved, as well as the "new" allegations made after the communication had been declared admissible in respect of article 27, and not article 1 and 2. Dealing instantly with all these matters during an oral hearing (after a shortened exchange of written information) could have reduced the delay considerably.

4. Defensive Strategies adopted by Complaints Bodies

It is not contested that there is individual and institutional awareness of the complexities and pitfalls of fact-finding as part of the consideration of complaints. What follows, are examples of strategies adopted in treaties and by complaints bodies to alleviate some of the problems arising from their fact-finding mandate and role.

To some extent, all the bodies are institutionally insulated from criticism that they find facts subjectively. The members of the bodies are elected through a relatively transparent and impartial process involving all regions of the world. Geographic representation is in practice strictly adhered to.¹⁵⁰ A good illustration of an institutionalised claim to "objectivity" is found in the Optional Protocol to CAT, which provides that the Subcommittee on Prevention of Torture shall be guided by the principles of confidentiality, impartiality, non-selectivity, universality and objectivity.¹⁵¹ Members of these bodies all serve as independent experts, not as government agents. The Rules of Procedure allow members to recuse themselves in instances where they have a personal interest, or if for "any reason" a member considers not to take

¹⁴⁷ Ibid.

¹⁴⁸ Communication No. 167/1984, *Ominayak and Another v. Canada*, Doc. A/45/40, Vol. II of 26 March 1990.

¹⁴⁹ Schmidt, see note 144, 652.

¹⁵⁰ See e.g. arts 29 (3) and 31 (2) of the ICCPR.

¹⁵¹ A/RES/57/199 of 18 December 2002, para. 2 (3).

part in the examination.¹⁵² This provision has been interpreted to lead to the recusal of a member in all matters involving the state of which he or she is a national. In an illustration of what “any reason” would constitute, *Buergethal* withdrew as member from the HRC’s consideration in *Faurisson v. France*, involving “Holocaust denial”, on the basis that he was a survivor of the Nazi concentration camps.¹⁵³

This institutional “objectivity” is sometimes internalised and made part of the body’s rhetorical strategies.

The CAT Committee has described itself as a monitoring body created by the states parties themselves with declaratory powers only, and not an “appellate, a quasi-judicial or an administrative body”.¹⁵⁴ The Working Group on Arbitrary Detention, for example, has been adopting the following standard formulation in its findings:¹⁵⁵ “The Working Group on Arbitrary Detention, in accordance with the methods of work adopted by it ... and in order to carry out its task *with discretion, objectivity and independence*, forwarded to the Government concerned the communication received by it and found to be admissible, in respect of allegations of arbitrary detention reported to have occurred”. In a famous rhetorical backtrack, the Working Group changed the tag of its findings from “decisions” to “opinions”. An NGO enjoying consultative status with ECOSOC, the American Association of Jurists, in 1994 submitted a written statement to the Commission on Human Rights, noting the inappropriate use of the term “decision” to designate the findings of the Working Group: “The Group’s opinions have no binding legal force; it can only ‘request [States] to take the necessary steps to remedy the situation’. It is up to the good will of the Government concerned to respect such a request or not. If the Group uses terms such as ‘decide’ or ‘declare’, which correspond not to its mandate but rather to a jurisdictional mandate, it risks giving rise to serious confusion. ... In order to avoid creating unfortunate confusion, the Group should use terms of a more neutral nature, such as ‘opinions’ or ‘views’, and confine itself to ‘considering’ or ‘believing’ that a detention is or is not arbitrary. All the resolutions adopted by the Group are described as ‘deci-

¹⁵² Rules of Procedure of the HRC, Rules 84 and 85; Rules of Procedure of the CAT Committee, Rules 103 and 104.

¹⁵³ Doc. A/52/40, Vol. II, Communication No. 550/1993 of 8 November 1996.

¹⁵⁴ CAT Committee General Comment No.1, para. 9, Doc. A/53/44, Annex IX of 21 November 1997.

¹⁵⁵ This quoted from Decision 7/1992 (Peru), Doc. E/CN.4/1993/24 of 12 January 1993, Annex I para. 1 (emphasis added).

sions’”.¹⁵⁶ In 1997, the Working Group changed its practice, “in order to avoid any controversy over the interpretation of its mandate”.¹⁵⁷

Displaying at least an implicit awareness of the complexity of factual and truth claims, complaints bodies are (understandably and correctly) wary of invoking the notion of unqualified “facts” or “truth” in relation to their findings. For one thing, the allegations of the authors need not be in the form of sworn statements. For another, the rules pertaining to the burden and standard of proof underscore the relative “truth” of their findings. Thus, the findings invariably refer to the body’s view or opinion on the basis of “the facts *before it*”,¹⁵⁸ the “information *before it*”,¹⁵⁹ or “the material *before it*”,¹⁶⁰ rather than “the fact”, “the information” or “the material” as such. The Working Group often invokes the formulation that it “believes it is in a position to give an opinion on the facts and circumstances of the case”.¹⁶¹ Linked hereto, is the application of a standard of proof that is quite flexible, but never requires proof beyond reasonable doubt (as is the case in for example the European system).¹⁶² The Working Group has used the standard that the allegation should provide “convincing evidence for a finding that the detention is arbitrary”.¹⁶³

The bodies have emphasised the importance of procedural fairness. The central role of co-operation by governments has also been stressed in this context. As a general rule, states have an opportunity to respond to the allegations within a fixed period of time. Thereafter, the complainant has an opportunity to reply to the government version of events.

¹⁵⁶ Doc. E/CN.4/1994/NGO/18 of 8 February 1995, para. 15

¹⁵⁷ Doc. E/CN.4/1999/63 of 18 December 1998, para. 9.

¹⁵⁸ See also Decision 7/1992 (Peru), in which the Working Group observes the following: “In the light of the allegation made, the Working Group welcomes the cooperation of the Government of Peru. The Working Group believes that it is in a position to take a decision on the facts and circumstances of the case, in the context of the allegations made and the response of the Government thereto”.

¹⁵⁹ *H C v. Jamaica*, see note 84, para. 6.4.

¹⁶⁰ See above, para. 10.4.

¹⁶¹ See e.g. Opinion 15/2002 (Tunisia), para. 4, 17/2003 (Cuba), para. 4, 18/2002 (United Arab Emirates), para. 4.

¹⁶² K. Rogge, “Fact-Finding”, in: R.St.J. Macdonald/ F. Matscherand/ H. Petzold (eds), *The European System for the Protection of Human Rights*, 1993, 677 et seq. (690).

¹⁶³ Decision 9/1992, Doc. E/CN.4/1993/24 of 12 January 1993, para. 6(h).

Apart from standard of proof, the complaints bodies have adopted a number of strategies that are devised to minimise the intrusiveness of its fact-finding role. They have adopted the principle of complementarity as to factual matters, emphasising that they are not replacing domestic courts. In fact, when domestic remedies have been exhausted, these bodies showed great deference for the decisions of domestic courts, in particular as far as the facts are concerned.

In particular the CERD Committee has developed a practice of not finding a violation, but of stating a “reminder” of the state’s obligations, when the factual basis for a finding of violation is, in its view, lacking, but there are some indications that a violation might have been occurred. As an illustration, the two concluding paragraphs of the CERD Committee’s finding in *M B v. Denmark*, bears quoting in full:¹⁶⁴ “Due to the above mentioned specific circumstances of the case, the police *could not accomplish a complete and in-depth investigation of the case*. Therefore, the Committee has no elements at its disposal that would allow it to conclude that a violation by the State party of the provisions of the Convention has indeed taken place in this case. *However, the Committee wishes to emphasize the importance it attaches to the duty of the State party* and, for that matter, of all States parties, to remain vigilant, in particular by prompt and effective police investigations of complaints, that the right established under article 5, paragraph f, is enjoyed without discrimination by all persons, nationals or foreigners, under the jurisdiction of the State party.” Finding no violation on the facts in *Sadic v. Denmark*,¹⁶⁵ the CERD Committee similarly invited the state “to reconsider its legislation, since the restrictive condition of ‘broad publicity’ or ‘wider dissemination’ required by article 266 (b) of the Danish Criminal Code for the criminalization of racial insults does not appear to be fully in conformity with the requirements of articles 4 and 6 of the Convention”.¹⁶⁶

¹⁶⁴ *M B v. Denmark*, Communication No. 20/2000, Doc. CERD/C/60/D/20/2000 of 15 March 2002, paras 9 and 10, emphasis added.

¹⁶⁵ Doc. CCPR/C/62/D/25/2002 of 16 April 2003.

¹⁶⁶ *Ibid.*, para. 6.8.

VI. Some Suggested Solutions

Two broad possible ways of addressing the issues discussed above present themselves. One set of solutions relates to the procedures within complaints bodies (here termed “intra-institutional”), the other set of possibilities are linked to reform that affect the co-existence of the bodies (termed “inter-institutional”).

1. Intra-Institutional Solutions

a. Improve the Current Practice

One option is to keep the current system in place, with improvements to fact-finding methods. Essentially, this would entail better communication with the parties, more efforts to obtain information, a more rigorous analysis of the written material provided to complaints bodies, and making better use of “authenticated depositions and independent expert opinions”.¹⁶⁷ In the latter respect, the possibility of working with independent local academics may be explored.

b. Introduce Oral Hearings

Evidence and information received in writing are by necessary implication to be evaluated and assessed. The possibility of oral hearings, which the OP of the ICCPR does not exclude, and CAT already allows, is one way of such evaluation and assessment. The introduction of oral hearings finds support in the practice of some regional human rights bodies, as well as in the fact that parties have “in the past offered to present oral clarification in the Committee plenary”.¹⁶⁸ So far, none of the complaints bodies have made use of oral hearings.

Two possibilities arise with respect to oral hearings – the one minimal, the other optimal. A minimal position would be reached when the parties are allowed to present arguments through lawyers or personally at the hearing of the complaints body. From the point of view of complainants, that would entitle them to make a statement to the complaints body, even if unrepresented. The optimal position would be a

¹⁶⁷ Nowak, see note 141, 694.

¹⁶⁸ Schmidt, see note 144, 653.

fully-fledged hearing, in the sense that witnesses would be sworn in, their evidence would be lead, and cross-examination or questioning would be allowed in the presence of all parties. Thereafter, parties would be able to make oral presentations on the evaluation of facts, the demeanour and credibility of witnesses, the applicable law and the application of the facts to the law.

If the minimal position prevails, the main advantage is that the presence of lawyers may assist the complaints body towards a better understanding of the applicable legal provisions of the country concerned. Under international law, establishing the legal position in a country is also a question of fact. In the absence of any expert, the complaints bodies may feel disempowered when they do not fully understand the functioning of a legal system, leading to greater disinclination to interfere with the findings of local courts. The presence of lawyers and legal argument will also enhance the quality of legal analysis, thus increasing the rigour displayed in legal findings. The complaints body may further use the opportunity to direct questions to parties and hear their comments on contentious or problematic aspects related to the facts.

If the optimal solution is adopted, the advantages extend to fact-finding proper. Even after exchanging documents, the dispute between the parties may still remain, and the complaints body may not be able to determine the facts. In such an instance, the current practice has been to rely on intuition, and to apply a burden of proof in favour of the complainant. These methods may be unsatisfactory, and in fact may lead to incorrect findings. Oral hearing may go some distance in assisting the body to arrive at “the objective truth”.¹⁶⁹ The additional opportunity of hearing witnesses, taking note of their demeanour, and testing their versions during cross-examination may provide the complaints body with a much clearer picture of events. If witnesses are called to resolve specific factual uncertainties, their testimony may clarify matters instantaneously, thus shortening the process of finalisation. Oral hearings will arguably not only lead to an improved construction of the facts, but will also increase the legitimacy of the complaints bodies. This could ultimately enhance respect for their findings, and improve protection and implementation of human rights.

Allowing for oral hearings would also bring the UN complaints practice in line with that of the three regional human rights systems. *Cassel* points to both the direct impact of oral evidence and the pres-

¹⁶⁹ Nowak, see note 141, 694.

ence of complainants or witnesses, and the practical problems of conducting such hearings due mainly to a lack of resources.¹⁷⁰

The most obvious disadvantage of oral hearings is the concern about the “substantial cost” that such a process would involve.¹⁷¹ At the very least, that cost could relate to the travel expenses of the complainant to the seat of the complaints body. If lawyers are involved, as is here argued, the question of their costs also arises. Given a state’s greater access (in principle) to financial resources, it seems feasible to provide financial support to the complainant, in order to ensure “equality of arms”.¹⁷² The question arises: would that include support to witnesses as well?

Most authors do not regard the exclusive reliance by the HRC (and other treaty bodies, for that matter) on written material as inevitable.¹⁷³ They accept that by omitting reference to, rather than by prohibiting the use of oral evidence, the OP to the ICCPR does not legally exclude the possibility of oral hearings, either as “a preliminary phase before the submission of final briefs”,¹⁷⁴ or oral argument on the merits of the case. As a matter of fact, some complainants and states have in the past been more than willing to present oral testimony.¹⁷⁵

Most have argued or accepted that state consent to oral hearings is required or advisable.¹⁷⁶ However, such a course will lead to an inconsistent procedure, differing according to the presence or absence of state consent,¹⁷⁷ making “the stage of taking evidence” dependent on the “preparedness of the State party concerned to allow for additional methods of proof”.¹⁷⁸ Notwithstanding these concerns, *McGoldrick*

¹⁷⁰ J. Cassel/ W. Douglas, “Fact-finding in the Inter-American system”, in: Bayefsky, see note 55, 106-107.

¹⁷¹ Nowak, see note 141, 694.

¹⁷² See D. Kretzmer, “Human Rights Committee”, in: Bayefsky, see note 55, 165.

¹⁷³ See e.g. Hanski/ Scheinen, see note 134, 14. See, however, the contrary view of Nowak, see note 141, 694, observing that neither the wording of OP ICCPR nor the historical background supports the extension of consideration of communications to oral hearings.

¹⁷⁴ Hanski/ Scheinen, see note 134, 14.

¹⁷⁵ Ghandi, see note 72, 310.

¹⁷⁶ See e.g. Kretzmer, see note 172, 165.

¹⁷⁷ Kretzmer, see note 172, 165, calls it an “equality problem”, because the committee would “have two levels of decisions”.

¹⁷⁸ Tomuschat, see note 137, 254.

supports such a course as being “eminently sensible”, arguing that the body “should take advantage of that co-operation rather than reduce procedures to those dictated by States who do not wish to permit oral hearings”.¹⁷⁹ Such a solution would lead to a situation not very different from that pertaining in any event between those states that have accepted the Optional Protocol, and those that have not. Of importance, though, is that all states should know about the options and consequences. This information may be provided to states by way of a general comment on oral hearings, ensuring that states know where they stand from the outset.

It may even be possible that state consent is not required. On the basis that the power to allow oral hearings is “implied” by the OP, such a change may arguably be introduced by a change to the Rules of Procedure.¹⁸⁰ As far as the CAT Committee is concerned, it has already been pointed out that the Rules of Procedure allow for the possibility of oral evidence. The principles of equal opportunity to both parties and no negative consequences for non-appearance, as set out in the CAT Rules of Procedure, should be adhered to.

Whether state consent is required or not, recalcitrant states, such as the Zaire/Democratic Republic of the Congo in the 1980s and Uruguay in the 1970s, are unlikely to be more co-operative. They are unlikely to give explicit consent or to abide by changed Rules of Procedure. For this reason, the course of adopting amended Rules seems to me to be preferable, as those states that are unlikely to give their consent are in any event unlikely to abide by the Rules.

c. Introduce Investigative Fact-Finding by a Special Rapporteur on Fact-Finding

At the outset, the concept of “investigation” should be clarified. The term is sometimes applied to refer to oral examinations that are taken on commission. If the European Commission sent three delegates to hear the testimony and cross-examine twelve witnesses in Turkey, was that in itself an “investigation”?¹⁸¹ An oral hearing is still an oral hearing, no matter where it takes place. For purposes of this discussion, an “oral hearing” converts itself into an “investigation” if something more

¹⁷⁹ McGoldrick, see note 111, 144.

¹⁸⁰ See Ghandi, see note 72, 310.

¹⁸¹ See e.g. *Mentes v. Turkey*, Case 58/1996/667/867, ECHR, Judgement of 28 November 1997.

than mere oral evidence is at stake. Is it sufficient that the delegation also collects some documentary evidence, or may that be construed as merely corroboration to the oral evidence? It should be accepted that an on-site investigation usually consists of identifying witnesses, hearing and subjecting their testimony to scrutiny, and collecting other information. At least in these respects may “investigation” be clearly distinguished from “hearings” as such.

So far, the bodies have not undertaken country-specific investigative visits to establish facts. There seems to be a possibility that the Working Group may undertake such missions.¹⁸²

Under the HRC at least in respect of follow-up, this possibility is also suggested. The Rules of Procedure allow the Special Rapporteur for Follow-up to “take such an action as appropriate for the due performance of the follow-up mandate”.¹⁸³

By adopting investigative missions to establish facts, the complaints bodies under discussion may draw on the experience of the primary complaints body in the International Labour Organisation (ILO), the Committee on Freedom of Association (CFA).¹⁸⁴ The CFA is responsible for complaints submitted to the ILO Governing Body alleging violations of freedom of association. In the year 2002 – 2003, the CFA examined “about 200 cases” involving trade union and collective bargaining disputes.¹⁸⁵ It meets in private sitting at every session of the ILO Governing Body. In terms of the Standing Orders concerning the procedure for the examination of representations under articles 24 and 25 of the ILO Constitution, a representative of the ILO Director-General may visit a state complained against to obtain relevant information. This procedure adapts the method of “direct or preliminary contacts” (which enables the ILO officials to visit a country to “make contact”, obtain information and seek possible solutions) to “a fact-finding device in complaints procedures”.¹⁸⁶

¹⁸² See e.g. Doc. E/CN.4/2004/3 of 15 December 2003, para. 33; on follow-up of such visits, see para. 36.

¹⁸³ Rule 95 (2) of the Rules of Procedure of the HRC.

¹⁸⁴ See <www.ilo.org>.

¹⁸⁵ Report of the Chairperson of the Governing Body to the Conference for the Year 2002-2003, ILO Conference, Geneva, 2003, Provisional Record 1, 7.

¹⁸⁶ G. von Potobsky, “The experience of the ILO”, in: B.G. Ramcharan (ed.) *International law and fact-finding in the field of human rights*, 1982, 160 et seq. (165).

2. Inter-Institutional Solutions

a. A Single, Dedicated Consolidation Complaints Body

Buergenthal argues that the existing six (now seven) treaty bodies be replaced by two “consolidated committees”, one inter-disciplinary committee specialising on state reports, and the other a committee of legal professionals dealing with communications.¹⁸⁷ His motivation relates mainly to the duplication, as well as administrative and bureaucratic burdens occasioned by state reporting. As far as individual communications are concerned, the rationale for a single, separate specialised committee is the “ever-increasing backlog” of cases due to an increased caseload.¹⁸⁸

How will a single treaty consolidated treaty body eliminate this problem? It may in fact have more cases, thus attaining the opposite result, as it will consolidate the possible avenues for redress. The core problem remains the available time, and resources to prepare and follow up cases. The essential requirement he leaves unstated, namely that the new committee will have to meet much more often, and be supported more seriously. Others have translated this into a call for a permanent or “standing” body.¹⁸⁹

This logic has already seen the creation of a single, dedicated and “comprehensive” unit (the “Petitions Team”) at the secretarial level.¹⁹⁰ As secretariat to all the Committees but one, the OHCHR is responsible for processing most individual complaints directed at UN bodies. Comprising screening of correspondence, registration of communications, preparation of draft findings, supplying legal advice and technical assistance for follow-up, this is a burdensome and time-consuming exercise.¹⁹¹ Since its establishment in November 2000, the Petitions Team,

¹⁸⁷ T. Buergenthal, “A Court and Two Consolidated Treaty Bodies”, in: Bayefsky, see note 55, 299 et seq. (300).

¹⁸⁸ Buergenthal, see above, 300.

¹⁸⁹ Schmidt, see note 144, 658.

¹⁹⁰ See e.g. the informal note serving before the 13th Mtg. of Chairpersons of the (Human Rights) Treaty Bodies, held in June 2001, Geneva: strengthening support to enhancing the effectiveness of the treaty bodies, Doc. HRI/MC/2001/Misc. 2 of 16 May 2001.

¹⁹¹ Para. 16: “It must be borne in mind that approximately 30 pieces of correspondence pertaining to the petitions procedures arrive each day. One of the major problems facing the Petitions Team is addressing a backlog of

consisting of a co-ordinator and seven staff members, centralises previously disparate communications-related activities at the OHCHR secretariat.

How would the existence of a single body affect fact-finding? If the body is permanent, then it could devote more time to fact-finding, thus overcoming some of the main objections to the proposal to have oral proceedings or on-site investigations, which will also require resources. However, truth is, if existing bodies were supported, with more time and more resources, they could also undertake oral proceedings and on-site investigations.

b. A UN Court of Human Rights

If a UN human rights court were established, it would probably function on the lines of the three regional human rights courts, created under the Council of Europe, the Organisation of American States (OAS) and the Organisation of African Unity (OAU)/ African Union (AU). Such a court would no doubt address many of the failings of the complaints bodies, such as the non-binding, recommendatory nature of their findings, the confidentiality of their proceedings, the lack of hearings at which evidence is led or legal issues argued, and the inability to conduct on-site inspections.

Some regard the evolution towards a UN human rights court as an inherent end-result of current developments. For *Buergenthal*, a Court for Human Rights is an ideal.¹⁹² Pre-empting principled objections to its creation, he offers the option of a disempowered court, able only to issue advisory opinions, and only at the request of treaty bodies or state parties. To be fair, he regards this as a foot in the backdoor, paving the way for a subsequent extension of jurisdiction to contentious cases and the right of appeal to individuals.

Following this development, there is arguably an inherent and inevitable development towards the judicialisation of the UN complaints system. However, the move towards a human rights court of global jurisdiction will not be realised overnight. Its essential contribution, that of providing unequivocally binding decisions, is likely to be resisted by states on the basis of inroads into their sovereignty.¹⁹³ In response, it

correspondence written in languages other than the working languages of the Secretariat”.

¹⁹² Buergenthal, see note 187, 301.

¹⁹³ Schmidt, see note 144, 658.

may be argued that acceptance of the UN Human Rights Court's jurisdiction, like that of the treaty-based complaints bodies, is likely to be optional.

Pre-empting resource-based resistance, *Buergenthal* raises the possibility of a special chamber of the ICJ or ICC dedicated to this task, rather than the establishment of another self-standing institution.¹⁹⁴ Such a course should, in my view, rather be avoided, as the human rights mandate cannot be fused with the mandates of those courts without detracting from its importance. Making use of their physical facilities and co-operating with them is another matter, though.

While it seems feasible that a court can effectively develop and strengthen universal human rights law,¹⁹⁵ the question remains whether such a court will necessarily deal better with fact-finding. The establishment of a single dedicated complaints body, with the competence to conduct oral hearings and undertake investigative fact-finding, should be regarded as a prerequisite for the later emergence of a human rights court. In this way, the experience and expertise would be transferred to the court, when it either replaces or supplements the consolidated complaints body.

VII. Conclusion

Factual issues are of central importance in all the phases during which complaints are processed and considered by the complaints bodies.

Whatever solution in improving fact-finding is adopted, the use of a written process should be retained. The exchange of written information has advantages. In an ideal case, where the domestic remedies have been exhausted and if the parties collaborate, the written process may reveal that there are no factual differences of any significance. Even if factual differences remain, the written exchange should at least have clarified the points of contention or disagreement between the two parties. In both instances, the written process plays an indispensable role. Proposals for a supplementary oral process, which would create a space for more contested and reasoned fact-finding, should take into account the result of the written process. The oral process may thus take two

¹⁹⁴ Buergenthal, see note 187, 301.

¹⁹⁵ Buergenthal, see above.

very divergent forms, depending on the outcome of the written proceedings.

In the first situation, where there is no substantial factual disagreement, oral proceedings would be aimed at resolving legal disputes arising from the agreed facts. Most likely, legal counsel from both parties will supplement their written arguments with an oral presentation. However, questions may be posed about the necessity of allowing counsel to address the bodies under these circumstances. It may be argued that written arguments are sufficient, and that possible benefits are outweighed by the increase in cost and the possibility of further backlogs and delays. The financial burden of instructing counsel and securing their presence in Geneva or New York may be something most states can easily bear, although individuals may find it prohibitively heavy. It seems very unlikely that the bodies would be able to undertake visits to states, given the existing lack of resources for their activities. Would it make sense for the UN to sponsor a lawyer at cost that may approximate the eventual compensation awarded to the complainant? The introduction of lawyers also implies greater legal complexity, and the very real risk of greater inaccessibility, especially for people in the developing world. The major advantage of oral legal arguments is that the presence of and exchange between lawyers may assist the body to focus its mind on the essential legal dispute between the parties, something that may lead to an improvement in the quality of findings.

In the second situation, oral proceedings would be directed at resolving the remaining significant factual differences between the parties. Such a determination need not involve lawyers, and could be done at lesser cost. The oral process would involve the examination, by the body, or part of it, of the complainant, or another witness. Some of the difficulties raised above may also be raised here, but are less persuasive in the light of the fact that the process actually stalls without a factual basis on which to proceed.¹⁹⁶ Oral fact-finding should be prioritised in these situations, where there are no facts, or where there is serious disagreement about the facts to the extent that there is no factual basis on which to apply the law. The introduction of an oral process should seek to create a balance between the need for the development of a contested discourse on human rights violations, in which both facts and law is

¹⁹⁶ See also Kretzmer, see note 172, 165, arguing that “unless the Committee were to hear witnesses, the oral pleadings of the parties would probably add little to the pleadings which are at present in writing”.

constantly opened to debate, on the one hand, and the requirements imposed by efficiency and institutional and political realities.

These modalities may be implemented in the current complaints bodies, but the optimal solution is the consolidation of the treaty bodies into two, one specialising on state reports, and the other on complaints. Such a course makes sense from the point of view of resource-allocation, development of expertise and efficiency. To be sure, a consolidated complaints body should consist of a group of full-time lawyers, they need to be representative of all legal cultures, and should be well resourced and serviced. I agree with those who see such a body as an interim step towards an eventual UN Court of Human Rights. Obviously, such reforms can be brought about only by way of treaty amendment. Lack of political will, rather than the complex or time-consuming nature of the amendment process, has stifled debate on this possibility.¹⁹⁷ As pressure increases to rationalise the complaints procedures, more states may come round to accepting that fundamental reform of the system is the best long-term solution to the problems of an increased workload in the face of limited resources.

There is still the question whether any of these bodies should have an investigative function. This form of fact-finding may either be reserved for exceptional cases, and be undertaken by the complaints body, or may be entrusted to bodies better equipped to undertake investigations, such as the Charter-based Special Rapporteurs. The latter option would require the improved integration of the activities of the complaints body and the special mechanisms. Although the need for an inquiry may arise from the submission of numerous complaints against one state, for example, there is good reason to doubt whether a quasi or fully legal body dedicated to considering complaints is best suited to undertake general, urgent or preventive investigative missions. A consolidated fully-fledged quasi-judicial body or court can never replace the resolution of deeply embedded conflicts about structure, or in situations of total breakdown of government authority. One may pose the question: would a finding by a UN Human Rights Court have made a difference to the genocide in Rwanda? Although one may argue that a finding that the government itself is involved in genocide would not have undone that government's actions or swayed it, such a finding

¹⁹⁷ See the report by P. Alston, "Effective implementation of international instruments on human rights, including reporting obligations under international instruments on human rights", Doc. A/44/668 of 8 November 1989, paras 193 – 197.

could have served as a factual basis for a clearer obligation of the international community to intervene, rather than to confess in retrospect.

Perhaps the best solution would then be to establish three dedicated bodies, one to examine state reports, one to consider communications, and one to undertake on-site missions especially in matters of great urgency, but also as a supplement to the mandate of the complaints body. The creation of the third body will recognise the central role of and the deficiencies in the present system of fact-finding by UN human rights complaints bodies.