Judicial Colloquium on the Domestic Application of Human Rights Norms

by

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International Human Rights Norms, with particular emphasis on the application of the International Covenant on Civil and Political Rights by the Human Rights Committee

Distinguished participants,

It is, virtually to the day, twenty-five years ago that the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights were adopted by the General Assembly of the United Nations. Together with the Universal Declaration of Human Rights, these Covenants form what has come to be called the International Bill of Rights, the cornerstone on which all subsequent efforts to define and implement human rights standards in the U.N. framework have been based.

Today's working session therefore presents a fitting opportunity to examine in some detail a number of critical aspects of the implementation of these instruments. For practical reasons, much of my presentation will focus on the work of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights. This is because of all the treaty-based monitoring bodies established under U.N. human rights instruments, it is undoubtedly this body which has developed the most impressive body of international human rights jurisprudence, and it has been likened, not without some justification, to a nascent international court of human rights.

Most of you will be familiar with the drafting history of the two Covenants. In 1948, the General Assembly instructed the UN Commission on Human Rights to prepare one Draft Covenant on Human Rights as well as draft measures of implementation. After three years of arduous debates, it requested the Commission to instead draft two covenants, one on civil and political rights and one on economic, social and cultural rights; the idea being, with some degree of simplification, that civil and political rights do not lend themselves to gradual implementation, whereas economic, social and cultural rights were more programmatic in nature, thus allowing for gradual implementation. The Commission reviewed the two drafts in 1953 and 1954, and the General Assembly, after thorough scrutiny, recommended that its Third Committee initiate an article-by-article review of the texts at its 1955 session. Although the review began as scheduled, it took another eleven years to complete work on the Covenants, and it was not until 16 December 1966 that they were adopted. At the time, Secretary-General U Thant observed that "it is my sincere belief that our decision today will bring us nearer to the kind of world our organisation is committed to build". I propose to examine whether, a quarter of a century later, we have indeed moved nearer to that kind of world.

As of November 1991, 104 States had ratified the International Covenant on Economic, Social and Cultural Rights; 100 had ratified the International Covenant on Civil and Political Rights, and 60 had ratified the First Optional Protocol to the latter. We may assert with some confidence that since their adoption, these instruments have moved considerably towards their universal acceptance. It is the task of the two respective monitoring bodies, the Committee on Economic, Social and Cultural Rights and the Human Rights Committee, to watch over their universal implementation.

The first and most visible strand of the activity of the treaty-based human rights bodies consists in the examination of periodic State reports, which are submitted to them by the States parties to the various instruments. The idea underlying the reporting procedures is simple: standard-setting alone cannot ensure the enjoyment of human rights, and some monitoring responsibilities must be at the disposal of the treaty bodies.

States ratifying or acceding to one of the Covenants or a Convention are normally expected to file an initial report on the implementation of the instrument within one year; thereafter, so-called periodic reports are due, normally at two to five year intervals. During the examination of reports, the respective treaty body, consisting of independent experts sitting in their individual capacities and chosen on account of their high moral character and recognised competence in the field of human rights, "takes stock" of the measures States parties have adopted to achieve the observance of, for instance, civil and political rights. Committee members engage in an open dialogue with States party representatives and put detailed questions to them; they do not shy away from asking potentially embarrassing questions.

The Human Rights Committee has formulated detailed guidelines concerning, <u>inter alia</u>, the objectives of the reporting process, the most appropriate way to address the implementation of substantive rights, and the review of administrative policies. Over the years, the Human Rights Committee has established rather comprehensive guidelines[1] for initial, second and third periodic reports; the Committee on Economic, Social and Cultural Rights, the Committee against Torture and the CERD have their own reporting guidelines. Most states, today, endeavour to follow these model guidelines in the preparation of their periodic reports.

Another means of improving the comprehensiveness of reports and thus the effectiveness of the reporting procedure is to impress upon States parties, at the appropriate diplomatic level, that reports should not be prepared in a formalistic manner by Foreign Ministry officials who may not always have a solid grasp of all the details of the actual human rights situation, but in conjunction with the relevant national ministries or other authorities responsible for policy-making.

For the Human Rights Committee, Special Rapporteurs chosen from among the Committee members prepare, in collaboration with the UN Secretariat, detailed lists of questions on each report to be considered; these are reviewed and completed by the Committee's

Working Group on article 40 of the Covenant. Since the scope of the rights enshrined, to take an example, in the ICCPR, call for a high degree of expertise on the part of State representatives, it is obvious that a high-level delegation with solid support of various Ministry advisors from the capital is more conducive to constructive dialogue than a delegation consisting of Permanent Mission advisors in Geneva or New York.

Upon termination of the consideration of a report, Committee members will formulate their individual conclusions and recommendations to the State party delegation. The adoption of collective Committee conclusions, while actively considered for some time, in particular during the Human Rights Committee's 43rd session in October-November 1991, has not yet been carried through into practice. It is to be hoped that such collective conclusions will be adopted by the summer of 1992.

It has occurred that the Committee, upon concluding its consideration of a periodic report, is not satisfied with the explanations and clarifications provided by the State party delegation. In this situation, it may request the submission of additional clarifications, for consideration by the Committee's subsequent session(s); this recently occurred in the case of Morocco. Similarly, if apprised of developments that seriously jeopardise the respect of civil and political rights in a State party, the Committee may decide to request, under article 40, paragraph 1(b), the submission "without further delay" of an overdue report from that State party. Two such decisions were adopted by the Human Rights Committee in the course of 1991: the first in April in respect of Iraq, the second on 4 November 1991 in respect of Yugoslavia.[2]

A survey of State reports reveals that States are mindful of the Committee members' recommendations: a sizeable number of States has, in response to criticism formulated by the Committee, amended or abrogated legislation considered to be incompatible with the Covenant, or promulgated legislation aiming at an improved respect of Covenant rights. This, it is submitted, is a positive development, and bears out the fruitfulness of the dialogue between the Committee and States parties.

Useful as the reporting procedures are, they are not without their dilemmas. In 1987, the Committee on Economic, Social and Cultural Rights was told by one State party to the ICESCR that the State had achieved nothing less than the status of paradise on earth, at least as far as enjoyment of economic, social and cultural rights was concerned.[3] Such an assessment will be greeted, to say the least, with considerable skepticism, but it is not an isolated one.[4] It raises two questions:

(a) how can Committees persuade States parties to human rights instruments to be more forthcoming in outlining the extent of the problems which they face in seeking to realise the relevant rights? and

(b) how can the effectiveness of reporting procedures be improved, given that they remain one of the most important means by which the international community seeks to promote the implementation of States' human rights treaty-based obligations?

A second strand of the treaty bodies' activities is the formulation and adoption of so-called "General Comments". These may address States parties' general obligations under a convention or a covenant or, more commonly, spell out the treaty body's interpretation of the scope of application of the substantive provisions of which it monitors the implementation. While these General Comments are certainly not legally binding, it is wrong to dismiss them as useless. At worst, they merely couch in different terms the provision of which they seek to clarify the scope; generally they represent what I would call "authoritative interpretative guidelines" on the provisions of the Covenants and on the relationship between the domestic law of the States parties and the Covenants' international standards. Indeed, they have created what one observer has called "a new species of soft law".[5]

Both the Committee on Economic, Social and Cultural Rights and the Committee on the Elimination of Discrimination have adopted such valuable General Comments, but again, it is the Human Rights Committee which has formulated the most complete set of interpretative guidelines to the provisions of the Covenant on Civil and Political Rights. By November 1991, the Committee had adopted 20 General Comments on important issues such as the right to life, prohibition of torture and other forms of cruel, inhuman and degrading treatment, equality before the courts, the position of aliens under the Covenant, liberty and security of the person, freedom of expression, or the right to privacy. The most noted is perhaps the General Comment on article 26 of the ICCPR, adopted in 1989, in which the Committee considered that the prohibition of discrimination may extend into areas not specifically covered by the Covenant, such as social security rights.[6] The Committee will start work on other General Comments, especially on articles 25 (equal access to public service) and 18 (freedom of religion and of conscience), in the near future.

That these General Comments are valuable tools of interpretation is borne out by the practice of States both under the reporting and the Optional Protocol procedure: States parties frequently invoke the Committee's General Comments, in particular those on article 6 (right to life) and on article 14 (right to a fair trial) in their submissions to U.N. human rights instances. Thus, they serve to strengthen the Committee's role as "supreme interpretative authority" of the Covenant.

The right of individuals to seize UN human rights bodies of complaints about alleged violations of their human rights brings us to the third major activity of the treaty bodies. Three expert committees currently implement treaty-based individual complaints procedures: the Human Rights Committee under the Optional Protocol to the ICCPR (since 1977); the Committee on the Elimination of Racial Discrimination (CERD) pursuant to article 14 of the International Convention on All Forms of Racial Discrimination (since 1982); and the Committee against Torture under article 22 of the Convention against Torture and Other Forms of Cruel, Inhuman and Degrading Treatment (since 1988).

Article 77 of the Convention on the Rights of Migrant Workers and Their Families, which will enter into force three months after the twentieth ratification of the Convention, will add another procedure to this panoply.

Of these procedures, that under article 14 of the Convention on the Elimination of All Forms of Racial Discrimination has seldom been resorted to since 1982; few communications have thus far been considered and disposed of by CERD.[7] While only 14 States have recognised CERD's competence to consider individual complaints, one may nonetheless wonder why the procedure has been used so sparingly; CERD intends to investigate ways and means to encourage the submission of individual complaints.

The procedure under article 22 of the Convention against Torture became operative in the spring of 1988, and several cases have since been considered by the Committee against Torture which continues, in that particular aspect of its activities, to explore new terrain.

Undoubtedly, the procedure under the Optional Protocol to the ICCPR has developed into the most visible and effective of all the complaints procedures administered by human rights treaty bodies. I mentioned that as of 20 November 1991, 60 States had ratified the Optional Protocol[8]; it is interesting to note that in the past five months, ratifications have literally been "pouring in", most recently from the Ukrainian SSR, Australia, Estonia, the USSR, Poland and Lithuania; other countries have expressed their intention of ratifying the Protocol in the near future[9]. Since 1987, the number of complaints received and registered has not only grown exponentially, the cases themselves have also tended to become far more legally complex. While many of the Committee's decisions adopted during the early years of operation concerned human rights violations which were relatively easy to pinpoint from a legal point of view, such as ill-treatment of political prisoners or arbitrary detention, the Committee has since been called upon to consider, for example, allegedly discriminatory aspects of social security legislation in certain countries, or the economic aspects of the enjoyment of minority rights[10].

Under the Optional Protocol, the Committee operates as a quasi-judicial body, which may account for the growing popularity of the procedure - out of all the cases submitted since the entry into force of the Optional Protocol on 23 March 1976, roughly 60% were submitted in the past five years. Some 485 communications have been registered for consideration by the Committee; consideration of 125 communications has been concluded by the adoption of meritorious decisions (so-called "final Views" under article 5, paragraph 4, of the Optional Protocol); 138 cases have been declared inadmissible; 73 were discontinued; and some 150 cases are currently pending[11]. The number of cases has been rising at such a rate that the Committee was forced to amend its rules of procedure in the summer of 1989 to enable it to streamline the procedure and improve its effectiveness[12]. Still, additional improvements are necessary if the Committee is to avoid a catastrophic backlog in the consideration of communications, and if it does not wish to open itself to charges of "justice delayed is justice denied"[13]. The remainder of this presentation will be devoted to the operation of the Optional Protocol procedure.

With some degree of simplification, individual complaints registered under the Optional Protocol (and any of the other above-mentioned procedures) are considered in three stages[14]:

1. Pre-admissibility

Every complaint received goes through a preliminary screening by the Communications Section of the Centre for Human Rights, based in Geneva, whose staff routinely ascertains whether the complaints received raise any issues under the Covenant. There is no requirement as to the form in which a complaint is presented: a one page letter from a prisoner on death row is as acceptable as a submission of many hundred pages made on behalf of an applicant by a prestigious law firm. If the Secretariat considers that the complaint is not properly presented or incomplete, it contacts the author and informs him about the modus operandi of the procedure.

If a prima facie case is deemed to have been made by the complainant, his complaint will be forwarded to the Committee's Special Rapporteur for New Communications, who will decide on appropriate action. If the case is transmitted to the State party, the latter will be given a specific time limit - usually two months[15] - for the submission of its observations and comments on the admissibility of the communication. It should be noted that the deadlines determined by the Committee's rules of procedure are not sacrosanct: the Committee has, in the past, consistently approved requests for reasonable extensions of deadlines. Similarly, where the deadline was exceeded by the applicant or the State party without prior notification to the Committee, this does not automatically result in a default decision declaring the communication admissible or inadmissible, as the case may be. There are, however, examples of the Committee running out of patience and proceeding to adopt decisions on the basis of the information available to it. Thus, although extensions of deadlines should not be encouraged, individuals and States parties should let the Committee know if they cannot observe given deadlines[16].

The mandate of the Special Rapporteur for New Communications was created in 1989 and is an interesting example of how the Committee endeavours to manage an increasing workload through procedural flexibility. So as to take pressure off the plenary and in order to avoid wasting precious plenary meeting time, the Special Rapporteur screens new communications in cooperation with the Secretariat; he does take action throughout the year, thereby expediting the handling of new complaints. In instances of manifest inadmissibility, he is entitled to make an inadmissibility recommendation directly to the Committee[17]; perhaps more significantly, he may request interim measures of protection, such as stays of execution, where State party action may cause irreparable harm to a petitioner[18].

2. Adoption of a decision on admissibility or inadmissibility

It is worth recalling that since the amendments to the rules of procedure in 1989, the Committee's Working Group on Communications may declare complaints admissible if the Working Group is composed of five members and the members unanimously support a finding of admissibility (rule 87, paragraph 2). This procedural device, again, has been designed to enable the Committee plenary to handle a larger number of final decisions (that is, of inadmissibility and on the merits). At the admissibility stage, several issues must be determined:

(a) The standing of the authors (articles 1 and 2 O.P.). The communication must emanate from the victim him/herself, from a duly authorised legal representative or, where the victim is unable to submit the complaint, from relatives or close friends. On the other hand, commercial enterprises have no standing under the Protocol, and non-governmental organisations who simply purport to be acting in the best interest of the alleged victim(s) have no standing either[19].

(b) The violations complained of must personally affect the victim(s) and not merely relate to legislation or general administrative practices deemed to be incompatible with the provisions of the Covenant. The Committee has emphasised on numerous occasions that it is precluded from entertaining an actio popularis under the Covenant.

(c) The author's claims must have been sufficiently substantiated (rule 90 (b) of the rules of procedure); it is obvious that generalised and unsupported claims of judicial bias, sex-based discrimination or arbitrary detention do not meet this requirement. On the other hand, there is no rule, similar to that of article 27, paragraph 2, of the European Convention, that would enable the Committee to declare a complaint inadmissible as "manifestly ill-founded".

(d) The violation(s) complained of must have occurred after the entry into force of the Covenant and the Optional Protocol for the State party concerned, unless said violation continues to produce effects after the entry into force which in themselves constitute an independent violation of the Covenant. Several communications have thus been declared inadmissible ratione temporis[20].

(e) The complaint shall not constitute an abuse of the right of submission (article 3 of the O.P.). The Committee has hitherto been extremely reluctant to invoke the abuse clause. In the author's opinion, this approach has been overly cautious and opened the door to the consideration of a number of frivolous cases. In the past six months, however, the Committee appears to be willing to reconsider its position[21].

(f) The allegations must be compatible with the provisions of the Covenant (article 3 of the O.P.). A rich body of jurisprudence has developed around the criterium of inadmissibility ratione materiae. A number of complaints concerning, in formula that domestic remedies only must be exhausted to the extent that they are both available <u>and effective</u> - where the applicant demonstrates that such remedies as exist are merely hypothetical, because never used, or that judicial precedents preclude a positive result in the domestic courts, the rule does not apply. It further does not apply where the process of exhaustion of domestic remedies is unduly prolonged.

For a considerable number of communications from Commonwealth jurisdictions, the issue of exhaustion of domestic remedies has played a crucial role. Thus, in many cases against Jamaica, the authors contended that recourse to the Judicial Committee of the Privy Council in London was not an effective remedy within the meaning of the Protocol, mostly on account of the limited jurisdiction of the Judicial Committee, or because of the absence of reasoned judgments from the Court of Appeal of Jamaica. The Committee has held that <u>in principle</u>, recourse to the Judicial Committee is a remedy within the meaning of article 5(2)(b) - but the matter is looked at on a case-by-case basis, and several communications have been declared admissible although no petition for special leave to appeal had been lodged with the Privy Council by the applicant[26].

Problems of a different nature arise where criminal appellate remedies co-exist with constitutional remedies. Is an applicant required to exhaust both his criminal and his constitutional remedies, and does he have to do so even where no legal aid is made available for constitutional motions? An affirmative answer has been given forcefully in a number of cases by the Trinidadian and Jamaican Governments. The Committee has disagreed with this approach: it has held that in the absence of legal aid, constitutional motions do not constitute an available remedy which must be exhausted for purposes of the Optional Protocol adding that once provision for legal aid is made, this legal aid "should enable counsel to prepare his client's defence in circumstances that can ensure justice. This does include adequate remuneration for legal aid"[27].

On balance, the requirement of exhaustion of domestic remedies is determined by the Committee on a case-by-case basis. Over the years, it has tended to become stricter in its interpretation of the rule; certainly, if the applicant merely contends that recourse to the local courts would be futile or too costly, his communication will be declared inadmissible without further ado[28].

In admissibility decisions, the Committee occasionally adds that the decision may be reviewed under rule 93, paragraph 4, of the rules of procedure, in the light of pertinent information submitted by the State party. Numerous such requests have been made in capital cases submitted against Jamaica; some have been rejected, others remain pending. Furthermore, in several inadmissibility decisions, the Committee has added that its decision may be reviewed pursuant to rule 92, paragraph 2, of the rules of procedure, if either author or counsel plausibly submit that the reasons for inadmissibility no longer apply. This implies that, once domestic remedies have been exhausted, the complaint may be essence, the violation of the right to property or inadequate compensation for expropriation have been declared inadmissible on that ground[22]. Another example concerns situations in which the Committee is, in essence, called upon to determine whether the domestic courts properly evaluated the evidence in a case, or whether the domestic judge properly instructed the jury. The Committee has recently been seized of many such complaints in relation to capital cases from the Caribbean, and its conclusions deserve a longer quotation:

> "With respect to the author's claims of unfair trial, the Committee observes that it is generally for the appellate courts of States parties to the Covenant and not for the Committee to evaluate the facts and evidence placed before domestic courts and to review the interpretation of domestic law by national courts. Similarly, it is for the appellate courts and not for the Committee to review specific instructions to the jury by the judge, unless it is apparent from the author's submission that the instructions to the jury were clearly arbitrary or amounted to a denial of justice, or that the judge manifestly violated his obligation of impartiality."[23]

Where such defects cannot be ascertained, the Committee considers that the claim falls outside the scope of protection of article 14, paragraph 1, of the Covenant, and declares the communication inadmissible as incompatible with the provisions of the Covenant.

(g) The Committee must ascertain that the "same matter" is not being examined under another instance of international investigation or settlement (article 5, paragraph 2(a), of the Optional Protocol[24]), such as the Inter-American Commission on Human Rights or the European Commission of Human Rights. Many cases have been declared inadmissible under this rule; on the other hand, the Committee has had occasion to rule that the examination of the human rights situation in a particular country under ECOSOC Resolution 1503(XLVIII) (governing a procedure for the consideration of situations which appear to "reveal a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms") does not constitute examination of the "same matter" within the meaning of article 5, paragraph 2(a)[25]. Furthermore, the rule does not apply where the claim under the regional procedure was lodged by an unrelated party acting without the express authority of the alleged victim.

(h) Finally, the applicant must have exhausted all available domestic remedies (article 5, paragraph 2(b), O.P.). The requirement that domestic remedies be exhausted before an international instance of investigation and settlement is seized of the matter is a practical one, predicated upon the principle of State sovereignty. In the majority of instances, States parties deny that the author has exhausted available domestic remedies: the Committee thus has had the opportunity to develop its jurisprudence on article 5, paragraph 2(b). It has, for example, developed the standard re-submitted to the Committee.

3. Meritorious stage

Once a communication is declared admissible, the State party is given a time limit of six months to submit to the Committee its written explanations or statements on the substance of the complaint (article 4, paragraph 2, of the O.P.). Under rule 93, paragraph 3, of the rules of procedure, the author is then provided with another opportunity to comment on the State party's submission.

It is important to note that the procedure throughout is a written one (article 5, paragraph 1, of the O.P.); the Committee may request supplementary information by interlocutory decision from the parties, even after the complaint has been declared admissible. Only if it is satisfied that it has collected all the necessary information does the Committee proceed with the adoption of its final views. Thus, what was observed in respect of deadlines above also applies to the merits stage.

In the course of the past fifteen years, the Committee has created an impressive body of jurisprudence covering just about all the substantive provisions of the Covenant. This makes it impossible to provide an extensive survey of the Committee's jurisprudence, and I shall confine myself to those decisions that have attracted extensive attention and criticism from the legal and academic community. Suffice it to point out that the Committee's jurisprudence is recorded faithfully in the following documents[29]:

- The Annual Reports of the Committee to the General Assembly (Supplement No.40 to official General Assembly records for the years 1978 to 1991);

- The "Selected Decisions of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights", Vol.1 (second to sixteenth sessions)(1985); Vol.2 (seventeenth to thirty-second sessions)(1990);

- An article by A.de Zayas/J.Th.Möller/T.Opsahl in: German Yearbook of International Law Vol.28 (1985), Reprint No.1, Centre for Human Rights, Geneva (June 1989);

- The periodic surveys in the Human Rights Law Journal (published by the N.P.Engel Verlag, Strasburg/Kehl a.Rhein/Arlington);

- The periodic surveys in the Netherlands Quarterly of Human Rights (published by the Netherlands Institute of Human Rights [S.I.M.], Utrecht, The Netherlands);

- The quarterly Bulletin published by INTERIGHTS, London;

- The recent book by Dominic McGoldrick on the Committee's "Role in the Development of the International Covenant on Civil and Political Rights"[30];

- The impressive commentary on the Covenant and the Optional Protocol written by Professor Manfred Nowak (published in German in 1989 [N.P.Engel Verlag: Strasburg/Kehl/Arlington], to be released in English in the spring of 1992).

Articles 1 and 27 of the Covenant

In a number of complaints, the Committee has had the opportunity to deal with the question whether the right of self-determination, and other rights conferred on peoples under article 1 of the Covenant, can be invoked in a communication under the Optional Protocol, as well as to elaborate on its case law concerning the meaning and scope of article 27 on minority rights[31]. Communication 197/1985 (Kitok v. Sweden) concerned an ethnic Sami and reindeer breeder, who alleged violations of articles 1 and 27 of the Covenant, since he had been excluded from membership in his native Sami village (Sameby) by decision of the Sami community, on the basis of the Swedish Reindeer Husbandry Act. Communication 167/1984 (B.Ominayak and the Lubicon Lake Band v. Canada) was submitted by the Chief of the Lubicon Lake Band, a Cree Indian Band living within the Canadian province of Alberta. Simplified, this case concerned the right of self-determination and right of members of the Lubicon Lake Band to dispose freely of their natural wealth and resources.

Others have aptly reviewed the Committee's Views on these complaints[32], but the two important conclusions to be remembered are the following: Firstly, that neither an individual or a group of persons, no matter whether they consider themselves to be a people or not, may invoke the right of self-determination (article 1 of the Covenant) in a complaint brought under the Optional Protocol; while individuals cannot claim a right conferred upon peoples, as such, a group of individuals cannot use the individual complaints procedure under the Optional Protocol as a vehicle to assert the right of self-determination or any of the other rights enshrined in article 1. Secondly, the protection provided under article 27 to persons belonging to ethnic, linguistic or religious minorities, which includes the right for such individuals, in community, to enjoy their own culture, extends to economic activity, if such activity is considered an essential element in the traditional way of life of that community.

Article 14 of the Covenant

The right to a fair hearing (article 14, paragraph 1) as well as the minimum defence guarantees laid down in article 14, paragraph 3, have been the subject of numerous recent decisions, and any survey must necessarily be selective. In communication 213/1986, the author alleged a violation of article 14 because a police officer he accused of having maltreated him had not been criminally prosecuted. In declaring the communication inadmissible under article 3 of the O.P., the Committee observed that "the Covenant does not provide for the right to see another person criminally prosecuted"[33]. This statement has since become established jurisprudence.

In its Views on communication 203/1986, the Committee reaffirmed the principle that "justice delayed is justice denied". The author, who had been dismissed from public service, sought relief through various administrative and judicial channels. After more than ten years of litigation, and in spite of two favourable court decisions, he had not been reinstated in his post, nor obtained any compensation. The Committee considered that article 14 had been violated: "[w]ith respect to the requirement of a fair hearing....., the Committee [noted] that the concept of a fair hearing necessarily entails that justice be rendered without undue delay"[34].

Several communications submitted against Jamaica, many of them involving capital punishment, have raised issues under article 14, paragraph 3(d), of the Covenant (right to have legal assistance assigned). In communication 250/1987, the author contended that his representation before the Court of Appeal by a legal aid attorney not of his choosing, who effectively withdrew the appeal without prior consultation with his client, violated article 14, paragraph 3. The Committee affirmed "that it is axiomatic that legal assistance must be made available to a convicted prisoner under sentence of death. This applies to the trial in the court of first instance as well as to appellate proceedings". Having ascertained that the author had not been present in court for the hearing of his appeal and that counsel was not prepared to advance arguments in favour of the appeal being granted, thereby effectively leaving the author without representation, the Committee considered "that the State party should have appointed another lawyer for [the author's] defence or allowed him to represent himself at the appeal proceedings. To the extent that the author was denied effective representation at the appeal proceedings, the requirements of article 14, paragraph 3(d), have not been met"[35].

It is noteworthy that, in capital punishment cases, the Committee considers that a violation of article 14 may entail a violation of the right to life, protected under article 6. Thus, it has held that if a final sentence of death was passed without having met the requirements for a fair trial set out in article 14, the right to life has also been violated[36].

Article 26 of the Covenant

Probably the most noted and most contested recent decisions of the Committee have related to right of equality before and equal protection of the law, enshrined in article 26 of the Covenant. Until 1987, one of the unresolved issues before the Committee had been whether the non-discrimination clause in article 26 applied only to the rights enshrined in the ICCPR, or whether non-discrimination should be seen as an autonomous right applicable to civil and political rights not protected under the Covenant or even to economic, social and cultural rights protected under the International Covenant on Economic, Social and Cultural Rights. States parties had favoured a restrictive interpretation of article 26 on the ground that the two Covenants established different monitoring systems and that an individual complaints procedure was only envisaged under the ICCPR. In three Dutch communications examined in April 1987, the Committee boldly decided that it could examine allegations of discrimination with regard to economic, social and cultural rights. Having affirmed its competence, it went on to ascertain whether certain facts presented by the authors constituted prohibited discrimination within the meaning of article 26:

> "The right to equality before the law and equal protection of the law without any discrimination does not make all differences of treatment discriminatory. A differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26"[37].

On the basis of this observation, the Committee found violations of article 26 in two of the three communications under consideration[38]. These decisions have been criticised by a number of scholars, including Prof. Christian Tomuschat, former member of the Committee[39]. It remains open to debate whether the Committee has been swayed by these comments, but, since 1989, it has itself somewhat circumscribed the earlier, sweeping statements; in any event, alleged discrimination in the field of social security rights will be carefully monitored on a case-by-case basis[40].

Since its creation, the Committee has adopted its final decisions by consensus. The Committee's rules of procedure (or, for that matter, of any other treaty body) do not prescribe consensus as the <u>modus operandi</u> for the examination of complaints. In practice, the Committee has opted for a consensual procedure since it considered it the most appropriate way of avoiding deadlock attributable to unspoken but nonetheless existing political alignments in the plenary. One may hypothesize about the reasons for such alignments, and the former East-West confrontation that long bedevilled the work of UN human rights bodies provides undoubtedly part of the explanation.

Deciding by consensus in such instances has occasionally contributed to the gradual watering-down of the legal content of decisions: as it is sufficient for one expert to oppose a draft text that would otherwise be acceptable to all the others, the search for consensus not only necessitates protracted consultations on a compromise text, it has also at times resulted in final decisions in which it is difficult to follow the legal argument[41].

I submit that, as political alignments in UN treaty-based human rights fora are becoming increasingly rare, it is appropriate to consider alternative decision-making mechanisms. The recent practice of the Committee may provide some guidelines in this context: over the past three to four years, its members, rather than formally insisting upon the adoption of decisions by consensus, have instead resorted to the formulation of individual opinions, which are appended to the Committee's decisions. Thus, out of 34 final decisions adopted between October 1989 and July 1990, 10 had a total of 14 individual opinions appended to them[42]. I submit that this development is a positive one - it has not diminished the authority of the Committee's decisions. On the contrary, in the view of one close observer, it testifies to the "quasi-judicial nature" of the procedure[43]. Furthermore, it merely reflects the fact that in complex factual and legal situations, deciding by consensus has become a fiction. Notwithstanding, the search for consensus continues to apply to the consideration of the majority of cases, thus often necessitating protracted debates and sometimes causing a loss of cogency of the legal argument.

Compliance by States parties with the Committee's decisions

The Optional Protocol does not envisage a mechanism whereby the Committee would monitor the extent to which States parties give effect to its Views, or fail to do so. This reflects, in the first instance, the fact that the Committee's decisions lack legal enforceability, such as the judgments of the European Court of Human Rights. In the first years of its existence, the Committee did not follow up with States parties as to the measures taken to implement its Views.

Notwithstanding the above observation, the record of compliance with the Committee's decisions is positive. It should be candidly admitted that some States parties have simply ignored the Committee's Views; others have simply contested the Committee's findings as devoid of a factual, or legal, basis. On the other hand, the Committee has been informed by several States parties that they changed or amended national legislation in response to the Committee's Views, or awarded compensation to victims of violations of rights protected under the Covenant[44]. In other instances, concerning notably Uruguay and Madagascar, political prisoners were released subsequent to findings of violations of the Covenant by the Committee.

The Committee has been mindful of the necessity to strengthen the legal value of its decisions, and it has realised that an institutionalised follow-up mechanism is needed if Governments and an informed public opinion are to keep faith in the effectiveness of its implementation machinery. At its thirty-ninth session in July 1990, therefore, it created the mandate of a Special Rapporteur for the Follow-Up on Views and spelled out his powers in its Annual Report to the General Assembly[45]. Under his mandate, the Special Rapporteur requests detailed information from States parties as to the measures they have taken to implement the Committee's recommendations, and regularly reports on his findings to the Committee.

The first responses from States parties to requests for follow-up information from the Special Rapporteur have been encouraging; yet, at the same time, they have displayed a certain reticence on the part of States parties to recognise the Committee's decisions as binding. One State, while making compensatory payments to a victim of violations of the Covenant, emphasised that the payments were made *ex gratia*.

The Committee members have emphasised the necessity of endowing the Rapporteur with all the necessary powers to perform his mandate. Thus, it is envisaged to publish an annual list of States parties that ignore his requests for follow-up information. It is too early to draw detailed conclusions from the Special Rapporteur's experience. In the medium-term future, it would be desirable to strengthen his powers by, for example, granting him some measure of fact-finding capabilities, especially wherever States parties refuse to implement a final decision or simply ignore requests for follow-up information. Other treaty bodies, such as the Committee on the Elimination of Racial Discrimination or the Committee against Torture, should emulate the example of the Human Rights Committee.

Incorporation of the Covenant Rights into Domestic Legal Systems

One last issue to be considered is the way in which the rights enshrined in the Covenant have been incorporated into the national legal systems of States parties to the Covenant. Generally, international law leaves it to States to enact such legislative and other measures as are deemed necessary to give effect to the obligations they have pledged to implement, and to make sure that individuals whose rights have been violated dispose of effective remedies before independent and impartial tribunals. This is spelled out clearly in article 2, paragraph 2, of the Covenant.

Three principal methods for the incorporation of Covenant rights into domestic law may be distinguished[46]:

(1) Incorporation of the Covenant rights into the national legal order;

(2) Enactment of specific legislative measures in the domain of civil, criminal and administrative law to give effect to the rights enshrined in the Covenant;

(3) Self-executing operation of the Covenant in the domestic legal order.

For States parties to the Optional Protocol, one would consider it essential that the rights protected under the Covenant be given some form of recognition in the domestic legal system. This is because, firstly, of the requirement of exhaustion of domestic remedies, under which States are expected to investigate alleged violations of human rights and, wherever appropriate, remedy them. Secondly, it would assist an international instance of investigation or settlement in its activities if it is aware of the reasoning of the highest courts in the country against which violations of civil and political rights have been alleged.

As far as the Optional Protocol work is concerned, there were few, if any, cases during the first ten years of the Committee's existence in which the place of the Covenant in the domestic legal system was addressed at all. Fortunately, this situation appears to be changing slowly: since 1987, the matter is addressed by Governments in an increasing number of communications. Furthermore, it is clear that domestic courts appear to be more inclined to ponder the importance of Covenant rights in the domestic legal system.

Thus, in communication No.224/1987, the Norwegian Government observed that the Norwegian courts had given considerable weight to international treaties and conventions in the interpretation of domestic rules, even if these instruments had not been formally incorporated into domestic law. The country's Supreme Court has expressed the view that international rules, including in the field of human rights, are to be taken into consideration in the interpretation of domestic law[47].

Similarly, in the Finnish legal system, domestic courts have begun to take the human rights treaties ratified by Finland into consideration in their decisions. Furthermore, it is possible to affirm that the individual communications pending against Finland under the Optional Protocol have promoted the general awareness among Finnish judges that decisions of Finnish courts, even of the Supreme Court and the Supreme Administrative Tribunal, may be scrutinised by UN human rights treaty bodies[48]. In a case pending before the Committee, the Government observed that in "the Finnish legal system,...Parliamentary legislation coexists with the Covenant, which has been incorporated into domestic law. Thus, article [] is directly applicable before the Finnish authorities".

In the case of the Netherlands, the Committee's decisions on the applicability of article 26 of the Covenant in social security matters have had their undoubted impact on the Dutch court system. Thus, the Central Board of Appeal (Centrale Raad van Beroep), the highest domestic instance for the adjudication of social security disputes, has invoked the Committee's jurisprudence in the ratio decidendi of several of its more recent decisions dealing with alleged discrimination in the application of the Widowers' and Orphans' Act (AWW) or the Unemployment Benefit Act (WWV)[49].

In Canada, finally, there have been a number of references to the Committee's decisions in the decisions of lower courts. In its judgment of 13 December 1990, the Supreme Court of Canada referred for the first time to the Committee's jurisprudence, i.e. the decision in J.R.T. and the W.G. Party v. Canada[50].

The above references serve to underscore the fact that the Committee's jurisprudence is gradually being recognised and applied, albeit slowly, by the local courts of States parties to the Covenant. This brings me back to the remark made by Secretary-General U Thant in December 1966: has the international community, by virtue of the adoption and subsequent implementation of the Covenants, moved towards a better world? I submit that it has. The field of human rights is not among those where quick and facile successes may be expected: the Human Rights Committee, for its part, has contributed to the development of an impressive body of international human rights jurisprudence which, for domestic and international instances alike, has become a source of inspiration.

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(1) Human Rights Committee, "Draft consolidated guidelines for the initial part of States parties' reports", Annual Report of the Human Rights Committee, 1989 (A/44/40), pp. 177-178; "Guidelines regarding the form and contents of reports ... under article 40 (1) (b) of the Covenant", Doc. CCPR/C/20 (19 August 1981); for the reporting guidelines of the Committee against Torture, see Doc. CAT/C/4/Rev.1 (11 Dec.1989).

(2) See document CCPR/C/SR.1112

(3) See P. Alston, Bulletin of Human Rights, 89/1 (New York, 1990), pp.5-11.

(4) A Central American country presented a similarly rosy picture of the implementation of civil and political rights during the presentation of its report during the Human Rights Committee's 38th session in March 1990.

(5) Yogesh Tyagi, "The work of the Human Rights Committee under the ICCPR", pp.350 et seq. (Manuscript to be published shortly).

(6) For the text of the Human Rights Committee's General Comments, see Doc. CCPR/C/21/Rev.1 (19 May 1989); General Comment 18[37] (article 26), CCPR/C/21/Rev.1/Add.1 (21 Nov.1989); General Comment 19[39] (article 23), CCPR/C/21/Rev.1/Add.2 (19 Sept. 1990).

(7) See communication 1/1984 (Yilmaz-Dogan v. Netherlands), opinion of 10 August 1988; and 2/1989 (D.T. Diop v. France), opinion of 18 March 1991.

(8) On the African continent, 15 States have ratified the Protocol. They are Algeria, Cameroon, Central African Republic, Congo, Equatorial Guinea, Gambia, Libyan Arab Jamahiriya, Madagascar, Mauritius, Niger, Senegal, Somalia, Togo, Zaire and Zambia.

(9) These states include Belgium, Brazil, Bulgaria, the Republic of Belarus, and Rumania.

(10) See, for instance, the Views on Communication No.182/1984 (Zwaan-de Vries), in: Selected Decisions of the Human Rights Committee under the Optional Protocol, Vol.II, pp.209-214; Views on Communication No.197/1985 (Kitok v. Sweden), Doc.CCPR/C/33/D/197/1985.

(11) Statistical survey as of early December 1991.

(12) Rules of Procedure of the Human Rights Committee, Doc. CCPR/C/3/Rev.2 (14 Dec.1989), rules 87 to 94.

(13) See Schmidt, "The future of individual human rights complaints procedures under United Nations treaty-based instruments" (forthcoming).

(14) A Chart explaining the different stages of the Optional Protocol procedure can be found in Schmidt, 4 Interights Bulletin (1989), pp.27-30, at 29.

(15) See rule 91 of the rules of procedure of the Human Rights Committee.

(16) See Schmidt, 4 Interights Bulletin (1989), p.28

(17) The mandate of the Special Rapporteur is spelled out in the Committee's Annual Report to the General Assembly, 1991, Doc. A/46/40, Annex X., p.218.

(18) Rule 86 of the Committee's rules of procedure is the basis for such requests.

(19) See decision of 14 July 1989 on communication 360/1989 (A Newspaper Publishing Company v. Trinidad), Annual Report, 1989, (A/44/40), Annex XI.L.

(20) The latest example is Communication No.457/1991 (A.I.E. v. Libyan Arab Jamahiriya), decision of 7 November 1991.

(21) See Communications No.367/1989 (J.J.C. v Canada), decision of 5 November 1991; No.448/1991 (H.J.H. v Netherlands), decision of 7 November 1991.

(22) See, for instance, decision of 6 November 1990 on communication 419/1990 (O.J. v. Finland), paragraph 3.2.

(23) See decision of 11 April 1991 on Communication No.304/1988 (D.S. v. Jamaica), paragraph 5.2.

(24) Many European parties to the Protocol have entered reservations in respect of this provision, to the effect that the Committee's competence is precluded <u>once the case has been examined</u> by the European Commission of Human Rights.

(25) See "Selected Decisions of the Human Rights Committee under the Optional Protocol", Vol.I (1985), p.17.

(26) See Views on Communications 229/1987 (Irvine Reynolds v. Jamaica) and 253/1983 (Paul Kelly v. Jamaica), Annual Report of the Human Rights Committee, 1991, A/46/40, Annex XI.C. and D; Views on Communication No.240/1987 (Willard Collins v. Jamaica), adopted on 1 November 1991, paragraphs 7.2-7.5.

(27) See the Views on Communication 250/1987 (Carlton Reid v. Jamaica), Annual Report, 1990, Vol.II, Annex IX.J., paragraph 10.3 and 13; Communication No.283/1988 (Aston Little v. Jamaica), decision of 1 November 1991, paragraph 7.3.

(28) See, for instance, decision of 11 July 1988 on communication 224/1987 (A. and S.N. v. Norway), Annual Report 1988 (A/43/40), Annex VII.C.

(29) Credit should be given to the list drawn up by Judge Lallah, for his presentation to the Second Judicial Colloquium on the domestic application of international human rights norms, Harare, 19-22 April 1989, in: Developing Human Rights Jurisprudence, Vol.2 (Nov.1989), pp.40-41.

(30) Clarendon Press, Oxford: 1991; see also review by M G Schmidt in: International and Comparative Law Quarterly, 1991, pp.985-987.

(31) See Views on communication No.197/1985 of 27 July 1988, Doc. CCPR/C/33/D/197/1985; communication 167/1984, Views adopted on 26 March 1990, Doc.CCPR/C/38/D/167/1984.

(32) J.Th. Möller, paper presented to the Workshop on the Optional Protocol to the ICCPR, Ottawa, 17-20 June 1990; P.Thornberry, International Law and the Rights of Minorities (Clarendon Press, Oxford: 1991), pp.211-213.

(33) H.C.M.A. v. Netherlands, Annual Report, 1989 (A/44/40), Annex XI, Sec.B, paragraph 11.6.

(34) Muñoz v. Peru, Annual Report 1989 (A/44/40), Annex X., Sec.D, paragraph 11.3.

(35) Carlton Reid v. Jamaica, Views adopted on 20 July 1990, Annual Report 1990 (A/45/40), Vol.2, Annex IX.J., paragraph 11.4.

(36) Ibid; and Views on communication 253/1987 (Paul Kelly v. Jamaica), Annual Report 1991 (A/46/40), Annex XI.C., paragraph 5.14.

(37) Communication 182/1984 (Zwaan-de Vries v. Netherlands), Annual Report 1987 (A/42/40), Annex VIII Dec.D, paragraph 13.

(38) Ibid., paragraph 14; communication 172/1984 (Broeks v. Netherlands), Annual Report 1987 (A/42/40), Annex VIII Sec.B; no violation was found in respect of case 180/1984 (L G Danning v. Netherlands), Annual Report 1987 (A/42/40), Annex VIII Sec.D.

(39) Cf. his annotations to the Committee's Views in Europäische Grundrechte Zeitschrift (EuGRZ) (1989), pp.37-38.

(40) See the decisions on communications 218/1986 (H S Vos v. Netherlands) Annual Report 1989 (A/44/40), Annex X.G; 273/1988 (B d B v. Netherlands) Annual Report 1989, Annex XI.F.

(41) The Committee's decision on Communication No.167/1984 (B.Ominayak and the Lubicon Lake Band v Canada) has been criticized as having fallen victim of the search for consensus.

(42) Annual Report 1990 (A/45/40), Vol.2, Table of contents, vii-ix; no less than 4 individual opinions were appended to the decision on case 354/1989 (L.G. v. Mauritius): see Annual Report 1991 (A/46/40), Annex XII.K.

(43) G. Cohen-Jonathan, in: Mélanges René-Jean Dupuy (Pédone, Paris: 1991), p.92.

(44) See, for example, Selected Decisions under the Optional Protocol, Vol.2, pp.224-226; Annual Report 1990 (A/45/40), Vol.2, Annex XII, pp.207-211.

(45) Annual Report 1990 (A/45/40), Vol. 1, pp.144-145; Vol.2, Appendix XI; CCPR/C/SR.1063/Add.1 (16 Apr. 1991), paragraphs 6-15; The Law Society's Gazette (London), 28 Nov. 1990, pp.11-12.

(46) Cf. the survey given by Lallah in op.cit. (note 29), pp.47-48.

(47) See decision on communication 224/1987 (A. and S.N. v. Norway), adopted on 11 July 1988, paragraph 4.5.

(48) See Martin Scheinin, Human Rights in Finnish Law: a study ... of the domestic validity of international human rights treaties and the applicability of human and constitutional rights in the Finnish legal order, 1991, pp.356-362.

(49) See Centrale Raad van Beroep [Central Board of Appeal], judgments of 10 May 1989 and of 5 July 1991.

(50) Communication No.104/1981, in Selected Decisions under the Optional Protocol, Vol.2, pp.25-28; Canada (H.R.C.) v. Taylor, C.S.Canada 20462, J.E.91-40.