5

ECONOMIC AND SOCIAL RIGHTS

A. OVERVIEW AND HISTORICAL BACKGROUND

COMMENT ON HISTORICAL ORIGINS

The Universal Declaration of Human Rights (UDHR) recognizes two sets of human rights: the 'traditional' civil and political rights, as well as economic, social and cultural rights. In transforming the Declaration's provisions into legally binding obligations, the United Nations adopted two separate International Covenants which, taken together, constitute the bedrock of the international normative regime in relation to human rights.

The 'official' position, dating back to the Universal Declaration and reaffirmed in innumerable resolutions since that time, is that the two sets of rights are, in the words adopted by the second World Conference on Human Rights in Vienna, 'universal, indivisible and interdependent and interrelated' (Vienna Declaration, para. 5). But this formal consensus masks a deep and enduring disagreement over the proper status of economic, social and cultural rights. At one extreme lies the view that these rights are superior to civil and political rights both in terms of an appropriate value hierarchy and in chronological terms. At the other extreme we find the view that economic and social rights do not constitute rights (as properly understood) at all and that treating them as rights will inevitably undermine the enjoyment of individual freedom, justify large-scale state interventionism and provide an excuse to downgrade the importance of civil and political rights.

Although variations on these extremes have dominated both diplomatic and academic discourse, the great majority of governments has actually taken some sort of intermediate position. For the most part that position has involved (a) support for the equal status and importance of economic and social rights (as of September 1995, 132 states were parties to the International Covenant on Economic, Social and Cultural Rights—hereafter, the ICESCR), together with (b) failure to take particular steps to entrench those rights constitutionally, to adopt any legislative or administrative provisions based explicitly on the recognition of specific economic and social rights as human

rights, or to provide effective means of redress to individuals or groups alleging violations of those rights.

Even before the final adoption of the UDHR, the debate over the relationship between the two sets of rights had become a casualty of the Cold War: the Communist countries abstained from voting on its adoption in the General Assembly on the grounds that the economic and social rights provisions were inadequate. Moreover, at least since the 1970s, it has taken on an important North–South dimension. As a result, the debate carries a lot of ideological baggage. It is diffuse, often not well thought through and inextricably linked to some of the most basic political choices confronting any society. Nevertheless, with the rejection of communism, the widespread embrace of free-market economic solutions, and increasing global economic and social integration, economic and social rights are certain to remain at the center of controversy in the years ahead. Moreover, the issues which they raise have important implications for other aspects of human rights law.

The historical origins of the recognition of economic and social rights are diffuse. Those rights have drawn strength for example, from the injunctions reflected in different religious traditions to care for those in need and those who cannot look after themselves. In Catholicism, papal encyclicals have long promoted the importance of the right to subsistence with dignity, while 'liberation theology' has sought to build upon this 'preferential option for the poor.' Virtually all of the major religions manifest comparable concern for the poor and oppressed.[1] Other sources include philosophical analyses as diverse as those of Thomas Paine, Karl Marx, Immanuel Kant and John Rawls; the political programs of the nineteenth century Fabian socialists in Britain, Chancellor Bismarck in Germany (who introduced social insurance schemes in the 1880s), and the New Dealers in the U.S.; and constitutional precedents such as the Mexican Constitution of 1917, the first and subsequent Soviet Constitutions, and the 1919 Constitution of the Weimar Republic (embodying the *Wohlfahrstaat* concept).

For present purposes, however, our focus is on the evolution of international human rights law. The most appropriate starting point is the International Labour Organisation (ILO).

> Established by the Treaty of Versailles in 1919 to abolish the 'injustice, hardship and privation' which workers suffered and to guarantee 'fair and humane conditions of labour', it was conceived as the response of Western countries to the ideologies of Bolshevism and Socialism arising out of the Russian Revolution.[2]

[1] See Martin Shupack, The Churches and Human Rights: Catholic and Protestant Human Rights Views as Reflected in Church Statements, 6 Harv. Hum. Rts. J. 127 (1993).

[2] Virginia Leary, Lessons from the Experience of the International Labour Organisation, in Philip Alston (ed.), The United Nations and Human Rights: A Critical Appraisal, 580, 582 (1992).

In the inter-war years, the ILO adopted international minimum standards in relation to a wide range of matters which now fall under the rubric of economic and social rights. They included, *inter alia*, conventions dealing with freedom of association and the right to organize trade unions, forced labor, minimum working age, hours of work, weekly rest, sickness protection, accident, invalidity and old-age insurance, and freedom from discrimination in employment. The Great Depression of the early 1930s served to emphasize the need for forms of social protection of those who were unemployed and gave a strong impetus to a push for full employment policies such as those advocated by Keynes in his *General Theory of Employment, Interest and Money* (1936).

Partly as a result of these developments, various proposals were made during the drafting of the UN Charter for the inclusion of provisions enshrining the maintenance of 'full employment' as a commitment to be undertaken by Member States. The strongest version, known after its principal proponents as the 'Australian Pledge,' read:

> All members of the United Nations pledge themselves to take action both national and international for the purpose of securing for all peoples, including their own, improved labour standards, economic advancement, social security, and employment for all who seek it; and as part of that pledge they agree to take appropriate action through the General Assembly, the Economic and Social Council, the [ILO]. . . .[3]

Despite significant support for the proposal, the United States was strongly opposed on the grounds that any such undertaking would involve interference in the domestic, economic and political affairs of states. Ultimately agreement was reached on Article 55(a) of the Charter, which calls on Member States to promote 'higher standards of living, full employment, and conditions of economic and social progress and development' but does not call for any specific follow-up at the international level.

But U.S. opposition in this context did not signify the rejection of economic and social rights *per se*. Indeed, in 1941 President Roosevelt had nominated 'freedom from want' as one of the four freedoms that should characterize the future world order. He spelled out this vision in his 1944 State of the Union address[4]:

> We have come to a clear realization of the fact that true individual freedom cannot exist without economic security and independence. 'Necessitous men are not free men.' People who are out of a job are the stuff of which dictatorships are made.
>
> In our day these economic truths have become accepted as self-evident.

[3] See generally Ruth Russell and Jean Muther, A History of the United Nations Charter: The Role of the United States 1940–1945 (1958) 786.

[4] Eleventh Annual Message to Congress (Jan. 11, 1944), in J. Israel (ed.), The State of the Union Messages of the Presidents (1966), Vol. 3, 2875, 2881.

We have accepted, so to speak, a second bill of rights, under which a new basis of security and prosperity can be established for all—regardless of station, race, or creed.

Among these are:

The right to a useful and remunerative job in the industries, or shops, or farms, or mines of the Nation;

The right to earn enough to provide adequate food and clothing and recreation;

The right of every farmer to raise and sell his products at a return which will give him and his family a decent living;

The right of every businessman, large and small, to trade in an atmosphere of freedom from unfair competition and domination by monopolies at home or abroad;

The right of every family to a decent home;

The right to adequate medical care and the opportunity to achieve and enjoy good health;

The right to adequate protection from the economic fears of old age, sickness, accident, and unemployment;

The right to a good education.

All of these rights spell security. And after this war is won we must be prepared to move forward, in the implementation of these rights, to new goals of human happiness and well-being.

. . .

This approach was subsequently reflected in a draft international Bill of Rights, completed in 1944, by a Committee appointed by the American Law Institute (ALI). In addition to listing the rights contained in the U.S. Bill of Rights (the first ten amendments to the Constitution), the Institute's proposal advocated international recognition of a range of rights and acceptance of the correlative duties in relation to: (1) education ('The state has a duty to require that every child within its jurisdiction receive education of primary standard; to maintain or insure that there are maintained facilities for such education which are adequate and free; and to promote the development of facilities for further education which are adequate and effectively available to all its residents'); (2) work ('The state has a duty to take such measures as may be necessary to insure that all its residents have an opportunity for useful work'); (3) reasonable conditions of work ('The state has a duty to take such measures as may be necessary to insure reasonable wages, hours, and other conditions of work'); (4) adequate food and housing ('The state has a duty to take such measures as may be necessary to insure that all its residents have an opportunity to obtain these essentials'); and (5) social security ('The state has a duty to maintain or insure that there are maintained comprehensive arrangements for the promotion of health, for the prevention of sickness and accident, and for the provision of medical care and of compensation for loss of livelihood'). See Statement of Essential Human Rights, UN Doc. A/148 (1947), Arts. 11–15.

In relation to each of the proposed rights, a Comment by the Committee drew attention to the fact that it had already been recognized in the 'current or recent constitutions' of many countries; e.g. 40 countries in the case of the right to education; 9 for the right to work; 11 for the right to adequate housing; 27 for the right to social security.

Although these proposals were never formally endorsed by the ALI, they were submitted directly to the United Nations and were to prove highly influential in the preparation of the first draft of the Universal Declaration in 1947. In the drafting of the relevant provisions (Articles 22–28), strong support for the inclusion of economic and social rights came from the United States (a delegation led by Eleanor Roosevelt), Egypt, several Latin American countries (particularly Chile) and from the (Communist) countries of Eastern Europe. Australia and the United Kingdom opposed their inclusion,[5] as did South Africa which objected firstly that 'a condition of existence does not constitute a fundamental human right merely because it is eminently desirable for the fullest realisation of all human potentialities' and secondly that if the proposed economic rights were to be taken seriously it would be 'necessary to resort to more or less totalitarian control of the economic life of the country.'[6]

After the adoption of the Universal Declaration in 1948, the next step was to translate the rights it recognized in Articles 22–28 into binding treaty obligations. This process took from 1949 to 1966. The delay was due to reasons including the Cold War, U.S. opposition to the principle of international human rights treaties, and the scope and complexity of the proposed obligations. By 1955, the main lines of what was later to become the International Covenant on Economic, Social and Cultural Rights were agreed, although some of the formulations were amended between 1963 and 1965. The following analysis of the drafting process, prepared by the UN, captures the main dilemmas and controversies relating to the inclusion of economic, social and cultural rights.

ANNOTATIONS ON THE TEXT OF THE DRAFT INTERNATIONAL COVENANTS ON HUMAN RIGHTS

UN Doc. A/2929 (1955), at 7.

General Problems Relating to the Draft Covenants

. . .

One Covenant or Two

. . .

[5] See B. Andreassen, Article 22, and Asbjorn Eide, Article 25, in Asbjørn Eide *et al.* (eds.). The Universal Declaration of Human Rights: A Commentary (1992)

[6] UN Doc. E/CN.4 82/Add.4 (1948) 11, 13.

[Between 1949 and 1951 the Commission on Human Rights worked on a single draft covenant dealing with both of the categories of rights. But in 1951 the General Assembly, under pressure from the Western-dominated Commission, agreed to draft two separate covenants] . . . to contain 'as many similar provisions as possible' and to be approved and opened for signature simultaneously, in order to emphasize the unity of purpose,

7. It was clear that the opinion of United Nations Members was divided as to whether there should be one or two covenants. It should be noted, however, that those in favour of having two covenants as well as those in favour of a single covenant were generally agreed that 'the enjoyment of civil and political freedoms and of economic, social and cultural rights are interconnected and interdependent' and that 'when deprived of economic, social and cultural rights, man does not represent the human person whom the Universal Declaration regards as the ideal of the free man'. The divergence of opinion appeared to arise from a difference of approach rather than of purpose.

8. Those who were in favour of drafting a single covenant maintained that human rights could not be clearly divided into different categories, nor could they be so classified as to represent a hierarchy of values. All rights should be promoted and protected at the same time. Without economic, social and cultural rights, civil and political rights might be purely nominal in character; without civil and political rights, economic, social and cultural rights could not be long ensured. There should, therefore, be a single covenant which would embrace all human rights and by which States would solemnly undertake to promote and guarantee them all.

9. Those in favour of drafting two separate covenants argued that civil and political rights were enforceable, or justiciable, or of an 'absolute' character, while economic, social and cultural rights were not or might not be; that the former were immediately applicable, while the latter were to be progressively implemented; and that, generally speaking, the former were rights of the individual 'against' the State, that is, against unlawful and unjust action of the State, while the latter were rights which the State would have to take positive action to promote. Since the nature of civil and political rights and that of economic, social and cultural rights, and the obligations of the State in respect thereof, were different, it was desirable that two separate instruments should be prepared.

10. The question of drafting one or two covenants was intimately related to the question of implementation. If no measures of implementation were to be formulated, it would make little difference whether one or two covenants were to be drafted. Generally speaking, civil and political rights were thought to be 'legal' rights and could best be implemented by the creation of a good offices committee, while economic, social and cultural rights were thought to be 'programme' rights and could best be implemented by the establishment of a system of periodic reports. Since the rights could be divided into two broad categories, which should be subject to different procedures of implementation, it would be both logical and convenient to formulate two separate covenants.

11. However, it was argued that not in all countries and territories were all civil and political rights 'legal' rights, nor all economic, social and cultural rights 'programme' rights. A civil or political right might well be a 'programme' right under one régime, an economic, social or cultural right a 'legal' right under another. A covenant could be drafted in such a manner as would enable States, upon ratification or accession, to announce, each in so far as it was concerned, which civil, political, economic, social and cultural rights were 'legal' rights, and which 'programme' rights, and by which procedures the rights would be implemented.

12. [It was also said] that there should be only one covenant, on civil and political rights, and that economic, social and cultural rights, which could only be promoted progressively, should not be embodied in a legal instrument at all.

BRIEF CLAUSES OR ELABORATE PROVISIONS

13. There were two schools of thought regarding the manner in which articles on substantive rights should be drafted. One school held that each article should be a brief clause of a general character; another school was of the opinion that each right, its scope and substance, its limitations, as well as the obligations of the State in respect thereof, should be drafted with the greatest possible precision.

14. The first school maintained that, in general instruments of such a comprehensive character as the covenants, it was impossible to set forth the scope and substance of each right in great detail. While there were concepts of rights which might be generally acceptable there were also concepts which varied a great deal from one legal system to another and might not be universally applicable. It would be better to provide that 'no-one shall be held in slavery or in servitude' than to define exactly what slavery or servitude was. It would be better to provide that 'the States Parties to the Covenant recognize the right of everyone to social security' than to attempt to define the precise content of that right. The covenants could only contain general provisions, and the precise scope and substance of each right should be left to national legislation.

. . .

16. As to the obligations of States, according to this school of thought, the covenants could provide in a general manner that the States parties should guarantee civil and political rights in accordance with law, and should recognize and progressively promote economic, social and cultural rights. To enumerate the specific acts that States might perform in respect of civil or political rights or to determine in advance the particular measures they should take in respect of economic, social or cultural rights would be going far beyond the scope of the covenants. Furthermore, no directory of specific obligations could be exhaustive.

17. Finally, the covenants were not the only or the final instruments on

human rights. The rights set forth in the covenants could be elaborated—individually or severally—in a series of international conventions, should the community of nations so desire. . . .

18. The other school held the view that the covenants on human rights should not be a second edition of the Universal Declaration. . . .

19. [The] scope and substance of each right should be precisely defined. It was not sufficient to declare that 'everyone shall be entitled to a fair and public hearing'; it was far more important to specify minimum guarantees under which that right could be fully protected. It was not sufficient to declare that everyone shall have the 'right to education'; it was far more important to set forth the legal standards in respect of each level of education. To declare the existence of a right, without indicating its content, would leave much to be desired.

COMMENT ON THE ICESCR

This Covenant was adopted by the General Assembly in res. 2200A (XXI) of 16 December 1966 and entered into force on 3 January 1976. It is divided into five 'Parts'. Part I recognizes the right to self-determination; Part II defines the general nature of states parties' obligations; Part III enumerates the specific substantive rights; Part IV deals with international implementation; and Part V contains typical final provisions of a legal nature. Part III recognizes the rights to: work, just and favorable conditions of work; rest and leisure; form and join trade unions and to strike; social security; special protection for the family, mothers and children; an adequate standard of living, including food, clothing and housing; physical and mental health; education; and scientific and cultural life. The right to property, although recognized in the Universal Declaration, is not included. Its omission is due to the inability of governments to agree on a formulation governing social takings and the compensation therefor.

To grasp the following materials, it is important to become familiar now with Parts II and III of the Covenant.

The interdependence of the civil and political rights, and the economic, social and cultural rights, has always been part of UN doctrine. This is reflected in the Preamble to the ICESCR which states, in terms mirroring those used in the ICCPR, that 'in accordance with the Universal Declaration . . . , the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights.'

The interdependence principle was accepted partly as a necessary political compromise between the two principal competing visions. But it also reflects the fact that the two sets of rights can neither logically nor practically be separated in entirely watertight compartments. Thus, for example, the right to form trade unions is contained in the ICESCR while the right to freedom of

association is recognized in the ICCPR. The ICESCR also recognizes various 'liberties' and 'freedoms' in relation to schooling, scientific research and creative activity. Similarly, while the right to education and the parental liberty to choose a child's school are dealt with in the former (Art. 13), the liberty of parents to choose their child's religious and moral education is recognized in the latter (Art. 18).

Moreover, the prohibition of discrimination in relation to the provision of, and access to, educational facilities and opportunities can be derived from both Art. 2 of the ICESCR and Art. 26 of the ICCPR. The European Convention, which is generally considered to cover only civil and political rights issues, states (in Art. 2 of Protocol 1) that 'no person shall be denied the right to education.' While the supervisory organs have tended to adopt a restrictive, essentially non-discrimination based, approach to the interpretation of this provision, it is nevertheless generally considered to encompass an obligation on the part of the state 'to provide the existence and maintenance of a minimum of educational facilities.'[7] There is reason to expect that, over time, interpretations of this formulation will contribute to a further blurring of the supposed distinctions between the two sets of rights.

Although the title of the ICESCR expressly refers to 'cultural rights' and Art. 15 (1) recognizes 'the right of everyone . . . to take part in cultural life,' these rights have attracted relatively little attention in this context. Rather, they have tended to be dealt with in relation to the ICCPR, whether under its non-discrimination clause (Art. 2(1)), the minorities provision (Art. 27), or specific rights such as freedoms of expression, religion, and association and the right to 'take part in the conduct of public affairs.' Nevertheless, it is clear that this neglect of the specifically economic and social rights dimensions of cultural rights is unjustified and should be remedied.

The principal UN body concerned with economic, social and cultural rights is the Committee on Economic, Social and Cultural Rights, established in 1987 to monitor the compliance of states parties with their obligations under the Covenant (sometimes referred to as the ICESCR Committee). An initial report by each state party is due within two years, and subsequent reports are required at five-year intervals. The Committee consists of eighteen independent experts, elected by the Economic and Social Council for four-year terms and reflecting an equitable geographic distribution. Its principal activities are the adoption of 'general comments' and the examination of states parties' reports leading to the adoption by the Committee of 'concluding observations' thereon. An overview of its activities is provided at p. 316, *infra*.

[7] Manfred Nowak, The Right to Education, in Asbjørn Eide *et al* (eds.), Economic, Social and Cultural Rights: A Textbook 189, 204 (1994).

NOTE

Since 1990 the United Nations Development Programme (UNDP) has produced an annual Human Development Report which has done much to stimulate and re-orient the debate over development priorities. The following excerpt from the 1991 report gives an indication of the magnitude of the challenge. It is followed by part of the statement made by the ICESCR Committee to the Second World Human Rights Conference at Vienna.

UNITED NATIONS DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT

(1991), at 2.

[The world's population in 1990 was estimated at 5.3 billion.]

. . .

Poverty—Over one billion people live in absolute poverty.
Nutrition—Some 180 million children, one in three, suffer from serious malnutrition.
Health—One and a half billion people are deprived of primary health care. Nearly three million children die each year from immunizable diseases. About half a million women die each year from causes related to pregnancy and childbirth.
Education—About a billion adults cannot read or write. Well over 100 million children of primary school age are not in school.
Gender—Disparities between men and women remain wide, with female literacy still only two-thirds that of males. Girls' primary enrolment rates are a little over half that of boys', and much of women's work still remains underpaid and undervalued.

People in all developing regions share these problems, but the most urgent problems tend to differ. In Latin America, South Asia and the Arab States, poverty is reinforced by the very unequal distribution of assets.

. . .

. . . In Africa, almost two-thirds of the people lack access to safe water, and fewer than half the children attend primary school. The problem of absolute poverty is increasingly concentrated in Africa. Even in East and South-East Asia, where overall economic growth has been fast, half the people still lack access to safe water and basic health care.

In the industrial countries of the North, average income is much higher than in the South, and almost everyone has access to basic social services. But human deprivation and distress have not disappeared. Indeed, the analyses for

the industrial countries and the developing countries show many points of similarity, although the extent and character of deprivation are different:
Poverty—Over 100 million people live below the poverty line in the industrial market economies. If the USSR and Eastern Europe are included, the number is at least 200 million.
Unemployment—In ten industrial countries, the rate is between 6% and 10%, and in another three it is beyond 10%.
Gender—Female wages are, on average, only two-thirds those of men, and women's parliamentary representation is but a seventh that of men.
Social fabric—In many industrial countries, the social fabric continues to unravel fast—old cultural and social norms are disappearing, with nothing cohesive to take their place. The all-too-frequent result is isolation and alienation. There is evidence of high rates of drug addiction, homelessness, suicide, divorce and single-parent homes.

STATEMENT TO THE WORLD CONFERENCE ON HUMAN RIGHTS ON BEHALF OF THE COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

UN Doc. E/1993/22, Annex III.

2. [The principle of the equality of the two sets of rights] has often been more honoured in the breach than in the observance.

. . .

5. The shocking reality . . . is that States and the international community as a whole continue to tolerate all too often breaches of economic, social and cultural rights which, if they occurred in relation to civil and political rights, would provoke expressions of horror and outrage and would lead to concerted calls for immediate remedial action. In effect, despite the rhetoric, violations of civil and political rights continue to be treated as though they were far more serious, and more patently intolerable, than massive and direct denials of economic, social and cultural rights.

. . .

7. Statistical indicators of the extent of deprivation, or breaches, of economic, social and cultural rights have been cited so often that they have tended to lose their impact. The magnitude, severity and constancy of that deprivation have provoked attitudes of resignation, feelings of helplessness and compassion fatigue. Such muted responses are facilitated by a reluctance to characterize the problems that exist as gross and massive denials of economic, social and cultural rights. Yet it is difficult to understand how the situation can realistically be portrayed in any other way.

8. The fact that one fifth of the world's population is afflicted by poverty,

hunger, disease, illiteracy and insecurity is sufficient grounds for concluding that the economic, social and cultural rights of those persons are being denied on a massive scale. Yet there continue to be staunch human rights proponents—individuals, groups and Governments—who completely exclude these phenomena from their concerns. Such an approach to human rights is inhumane, distorted and incompatible with international standards. It is, in addition, ultimately self-defeating.

9. Democracy, stability and peace cannot long survive in conditions of chronic poverty, dispossession and neglect. Political freedom, free markets and pluralism have been embraced with enthusiasm by an ever-increasing number of peoples in recent years, in part because they have seen them as the best prospect of achieving basic economic, social and cultural rights. If that quest proves to be futile the pressures in many societies to revert to authoritarian alternatives will be immense. Moreover, such failures will generate renewed large-scale movements of peoples involving additional flows of refugees, migrants and so-called 'economic refugees', with all of their attendant tragedy and problems. . . .

B. THE CHALLENGE OF ECONOMIC AND SOCIAL RIGHTS

COMMENT ON OBJECTIONS TO ECONOMIC AND SOCIAL RIGHTS

Economic and social rights have been challenged on many grounds. In political terms, no group of states has consistently followed up its rhetorical support for these rights at the international level with practical and sustained programs of implementation. Nevertheless, formal support for economic, social and cultural rights has been near universal. The principal exception has been the United States whose attitude has varied considerably from one administration to another. Under President Johnson the U.S. voted in the General Assembly in 1966 in favor of adopting the Covenant. Although neither the Nixon nor Ford Administrations were opposed to these rights, neither actively promoted them. The Carter Administration adopted a different approach epitomized by Secretary of State Vance's 'Law Day Speech' at the University of Georgia, in which he defined human rights as including:

> First, . . . the right to be free from governmental violation of the integrity of the person. . . . Second. . . . the right to the fulfilment of such vital needs as food, shelter, health care and education. . . . Third, . . . the right to enjoy civil and political liberties. . . . (76 *Dept. of State Bulletin* 505 (1977)).

In 1978, President Carter signed the Covenant and sent it to the Senate for its advice and consent to ratification. No action was taken on the Covenant, even in Committee.

This approach was reversed by the Reagan and Bush Administrations which opposed the concept of economic and social rights on the grounds that while

> the urgency and moral seriousness of the need to eliminate starvation and poverty from the world are unquestionable . . . the idea of economic and social rights is easily abused by repressive governments which claim that they promote human rights even though they deny their citizens the basic . . . civil and political rights.[8]

Subsequently, in international forums, the U.S. opposed measures designed to promote economic and social rights. In 1993, Secretary of State Christopher indicated that the Clinton Administration would press for ratification of the Covenant, although no timetable was set.

However, at least in formal terms for the purposes of international law, debate over whether economic rights are 'really' rights was settled long ago. Whatever the disputes over their nature and consequences, they are an integral part of the Universal Declaration. Some contend that the UDHR as a whole should be considered part of international customary law (see p. 143, *supra*); such a position necessarily includes the provisions dealing with economic and social rights (Arts. 22–28).[9]

Moreover, these rights are an integral part of most of the core universal human rights treaties. For example, Article 5 of the Convention on the Elimination of All Forms of Racial Discrimination requires states parties 'to guarantee . . . equality before the law' in the enjoyment of economic, social and cultural rights. Similarly, both the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child contain extensive obligations relating to those rights. Since the latter has, as of March 1995, 170 states parties, there are only some 15 member states of the UN which have not assumed formal treaty obligations relating to some economic, social and cultural rights in at least some contexts. Nevertheless, the philosophical and ideological dimensions of the debate continue to be important.

The greatest challenge is to identify effective approaches to implementation—i.e. to the means by which economic, social and cultural rights can be given effect and governments can be held accountable to fulfill their obligations. The Covenant says only that governments must use 'all appropriate means' to work towards the stated ends. Such means may be universally valid or relevant or may be quite specific to a particular culture or legal system. The Covenant gives no further pointers, beyond noting that legislative measures

[8] Introduction, U.S. Dept of State, Country Reports on Human Rights Practices for 1992, 5.

[9] See generally Bruno Simma and P. Alston, The Sources of Human Rights Law: Custom, Jus Cogens and General Principles, 12 Aust. Y. B. Int'l L. 82–108 (1992).

are likely to be important. It is clear, however, that neither legislation nor effective remedies of a primarily judicial nature, which are both central to the domestic implementation framework contained in the ICCPR, will *per se* be sufficient in relation to the ICESCR.

We must therefore consider such issues as whether 'traditional' legal approaches, including justiciability, are important; whether constitutional or legislative entrenchment is indispensable or even desirable; what the implications are of the limitation of a state party's obligations to use the maximum of its 'available resources'; and whether a 'programmatic' approach is viable and, from both legal and practical points of view, sufficient.

The principal reasons for the relative under-development of economic and social rights by comparison with their civil and political rights counterparts include (1) the ambivalence of most governments, but particularly those from the Third World; (2) the demonstrated reluctance of non-governmental organizations (NGOs) to focus specifically on economic and social rights; and (3) the lack of innovative legal and other approaches to implementation by those governments that clearly do support the concept.

In relation to the first point it has often been argued in international fora, especially by Third World governments, that economic and social rights have been neglected by the international community. Thus, for example, at its 1992 Jakarta Summit meeting the Non-Aligned Movement 'expressed concern over a tendency to address aspects of human rights selectively, . . . and to neglect economic, social and cultural rights . . . .' UN Doc. A/47/675 (1992), p. 47, para. 75. Despite occasional rejections of this criticism, it is clearly warranted.[10] Ironically, however, even the strongest proponents of economic and social rights have rarely put forward concrete proposals for their systematic implementation at either the national or international levels. The only exception in this regard relates to the right to development, discussed in Chapter 16.

In relation to the second point, development NGOs active at the international level have tended to assume that the language of rights would not be effective in persuading potential donor states to contribute funds, for those states might not wish to see their benevolence merely as an obligation to help meet the rights of other states. Moreover, the donee states might see the invocation of human rights language as constituting an interference in their internal affairs. Moreover, development specialists are often justifiably sceptical of legal (or at least legalistic) approaches. They assume that such approaches invariably favor the rich and powerful rather than provide tools for the use of disadvantaged members of society.

International human rights NGOs have tended to adopt a primarily civil and political rights-driven agenda. Consider the following statement by the then Executive Director of Human Rights Watch:[11]

[10] Cf. Morris Abram, Human Rights and the United Nations: Past as Prologue, 4 Harv. Hum. Rts. J. 69 (1991); and Philip Alston, Revitalising United Nations Work on Human Rights and Development, 15 Melb. U. L. Rev. 216 (1991).

[11] Aryeh Neier, Human Rights, in J. Krieger (ed.), The Oxford Companion to Politics of the World 403 (199[illegible]

> The view that economic and social questions should also be thought of in terms of rights was not solely confined to the Soviet bloc. It is reflected in several provisions of the Universal Declaration of Human Rights and in an International Covenant on Economic, Social and Cultural Rights. . . . Moreover, human rights activists in a number of Third World countries, especially in Asia, have long held the view that both kinds of concerns are rights. Their argument has not proved persuasive in the West, however, and none of the leading international nongovernmental groups concerned with human rights has become an advocate of economic and social rights.

Although the accuracy of this statement is open to question on several counts, the fact remains that many leading international NGOs, including Human Rights Watch and Amnesty International, have not taken specific measures to promote awareness of economic and social rights issues, or to take direct account of them in their principal activities.

In relation to the third point, consider the following excerpts.

JEAN DRÈZE AND AMARTYA SEN, HUNGER AND PUBLIC ACTION

(1989), at 20.

2.1. Deprivation and the Law

When millions of people die in a famine, it is hard to avoid the thought that something terribly criminal is going on. The law, which defines and protects our rights as citizens, must somehow be compromised by these dreadful events. Unfortunately, the gap between law and ethics can be a big one. The economic system that yields a famine may be foul and the political system that tolerates it perfectly revolting, but nevertheless there may be no violation of our lawfully recognized rights in the failure of large sections of the population to acquire enough food to survive.

The point is not so much that there is no law against dying of hunger. That is, of course, true and obvious. It is more that the legally guaranteed rights of ownership, exchange and transaction delineate economic systems that can go hand in hand with some people failing to acquire enough food for survival. In a private ownership economy, command over food can be established by either growing food oneself and having property rights over what is grown, or selling other commodities and buying food with the proceeds. There is no guarantee that either process would yield enough for the survival of any particular person or a family in a particular social and economic situation. The third alternative, other than relying on private charity, is to receive free food or supplementary income from the state. These transfers rarely have the status of legal rights, and furthermore they are also, as things stand now, rather rare and limited.

For a large part of humanity, about the only substantial asset that a person owns is his or her ability to work, i.e. labour power. If a person fails to secure employment, then that means of acquiring food (e.g. by getting a job, earning a wage, and buying food with this income) fails. If, in addition to that, the laws of the land do not provide any social security arrangements, e.g. unemployment insurance, the person will, under these circumstances, fail to secure the means of subsistence. And that can result in serious deprivation—possibly even starvation death. In seeking a remedy to this problem of terrible vulnerability, it is natural to turn towards a reform of the legal system, so that rights of social security can be made to stand as guarantees of minimal protection and survival.

LOUIS HENKIN, INTERNATIONAL HUMAN RIGHTS AND RIGHTS IN THE UNITED STATES

in Theodor Meron (ed.), Human Rights in International Law (1984), at 33.

Like American rights, international human rights inevitably implicate the purposes for which government is created. But—unlike American rights originally—international rights surely do *not* reflect a commitment to government-for-limited-purposes-only. On the contrary, born after various socialisms were established and spreading, and after commitment to welfare economics and the welfare state was nearly universal, international human rights imply rather a conception of government as designed for many purposes and seasons. The rights deemed to be fundamental include not only freedoms which government must not invade, but also rights to what is essential for human well-being, which government must actively provide or promote. They imply a government that is activist, intervening, committed to economic-social planning for the society, so as to satisfy economic-social rights of the individual.

. . .

Different conceptions of equality may underlie the major difference between American and international human rights. While international human rights are as consistent with varieties of capitalism as with various socialisms, the Universal Declaration and the International Covenant on Economic, Social and Cultural Rights advance a few small, important steps toward an equality of enjoyment, declaring that all individuals are entitled to have society supply their basic human needs and other economic–social benefits if the individual cannot do so. That Covenant adds a galaxy of rights, most of them unknown to American constitutionalism. . . .

. . . Although states adhering to the Economic Covenant undertake only to realize these rights 'progressively' and 'to the maximum of [their] available resources', the Covenant uses the language of right, not merely of hope; of undertaking and commitment by governments, not merely of aspiration and goal. Some have asked whether it is meaningful to call what is promised there

'rights', since the undertakings are vague and long-term; they are unenforceable, if only because they require major governmental planning and programs and are conditioned upon availability of resources. But in international law and rhetoric, they are legal rights, and in many societies, including the United States, the language of rights is increasingly used and the sense of entitlement to such benefits is becoming pervasive.

. . .

Let there be no doubt. The United States is now a welfare state. But the United States is not a welfare state by constitutional compulsion. Indeed, it became a welfare state in the face of powerful constitutional resistance: federalism and, ironically, notions of individual rights—economic liberty and freedom of contract—held the welfare state back for half a century; and a constitutional amendment was required to permit the progressive income tax which was essential to make the welfare state possible. Jurisprudentially, the United States is a welfare state by grace of Congress and of the states. . . .

. . . Surely the United States has moved far from 'negative' government, from thinking that the poor are a special and natural category of people and are not the responsibility of society and government but only of church and charity. In theory, Congress could probably abolish the welfare system at will, and the states could probably end public education. But that is a theoretical theory. The welfare system and other rights granted by legislation (for example, laws against private racial discrimination) are so deeply imbedded as to have near-constitutional sturdiness. . . . And Americans have begun to think and speak of social security and other benefits as matters of entitlement and right.

QUESTIONS

1. Writing a decade after the passage above was written, Henkin concluded that '[r]ights in the United States remain in essence eighteenth century freedoms. . . . [W]elfare rights are legislative, not constitutional, and are subject to political, ideological and budgetary restraints.'[12] Do you agree with his characterization of the U.S. as a 'welfare state' and, if so, does this imply acceptance by the U.S. of the principle of economic and social rights?

2. Despite Henkin's optimism about the durability of U.S. welfare entitlements, the *New York Times* reported on Feb. 10, 1995 (p.1) that: 'House [of Representatives] Republican leaders moved today to undo more than a half-century of social welfare policy by proposing to eliminate the right of poor women and children to receive cash assistance from the Government. . . . Benefits would no longer be automatically available to people who met certain eligibility crite-

[12] Louis Henkin, Economic Rights Under the United States Constitution, 32 Colum. J. Transnat'l L. 97, 128 (1994).

ria.' Does the apparent vulnerability of welfare rights to political and ideological tides negate any claim they may have had to human rights status in the U.S.? Is the situation in this respect fundamentally different from those Western European social welfare states which do not have constitutionally entrenched economic and social rights?

3. Henkin has also observed that 'the contemporary international category of economic and social rights . . . treats economic rights principally as "welfare rights." It includes a right to property, but says nothing about freedom of economic enterprise or of a right to participate in a market economy.'[13] Should these rights have been reflected in the ICESCR, or in the ICCPR? Would it be appropriate to include them in a future protocol to either or both Covenants, or are the key principles now explicit or at least implicit when those treaties are read together? Is criticism of these omissions an argument for reverting to a single integrated Covenant that eliminates the distinctions between the two sets of rights?

NOTE

Consider the following remarks taken from a discussion organized by the Harvard Law School Human Rights Program and the François-Xavier Bagnoud Center for Health and Human Rights, and published as *Economic and Social Rights and the Right to Health* 13 (1995). The speaker was Albie Sachs, then a professor in South Africa, now a member of South Africa's newly created Constitutional Court.

> My faith in rights may appear terribly naïve here in the United States, where so many movements have come and gone, but it is a burgeoning period in my country. We must accept the imagery and language and symbolism that is most appropriate to the occasion. To begin with, the language of rights negates the core principles of apartheid: it says, *You have the right to be who you are.* Beyond that, it encourages pluralism: it says, *You have the right to be different.* Women are empowered, the disabled are empowered; gay and lesbian activists reflect the broader liberation movement. And then it establishes a framework for the allocation of resources that is very empowering for the poor. The most compelling health needs, such as child immunizations and clean drinking water, are a matter of right, and do not depend on some remote notion of efficacy.
>
> At this stage of nation-building, when we are sitting down with our oppressors, the rights rhetoric is very helpful. It helps to allay their fears: we will not lock them up or kick them out or boot them into the country; we want to escape this cycle of domination, subordination, resistance, and revolution, which never ends. As an internationally accepted aspiration, it

[13] Ibid., pp. 97–8.

appeals to the best in all of us. They have the right to their freedoms, we have the right to forgive.

C. AN OBLIGATIONS-BASED APPROACH

We here consider the principal issues and approaches that have emerged in relation to the implementation of economic and social rights.

COMMENT ON DIFFERENCES BETWEEN THE TWO COVENANTS

Three differences between the two major Covenants should be noted. First, the terminology used in the ICESCR to describe the obligations of states varies in significant respects from that used in the other Covenant. Whereas the ICCPR contains terms such as 'everyone has the right to . . .' or 'no one shall be . . . ,' the ICESCR employs the formula 'States Parties . . . recognize the right of everyone to . . . .' The principal exceptions concern Art. 3 (equal rights of men and women) and Art. 8 (trade union-related rights), under each of which the states 'undertake to ensure' the relevant rights; and Art. 2(2) (non-discrimination) where the undertaking is 'to guarantee.'

Second, the obligation of states parties stated in Art. 2(1) is recognized to be subject to the availability of resources. And third, the obligation is one of progressive realization. The key provisions are Arts. 2(1) and 2(2):

> 1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.
>
> 2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

This language has been subject to conflicting critiques. On the one hand, it is often suggested that the nature of the obligation is so onerous that virtually no government will be able to comply. Developing countries, in particular, are seen to be confronting an impossible challenge. On the other hand, it is argued that the relative open-endedness of the concept of progressive realization, par-

ticularly in light of the qualification related to the availability of resources, renders the obligation devoid of meaningful content. That in turn suggests that governments can present themselves as defenders of economic and social rights, without their policies and behavior being constrained in any way. A related criticism is that the Covenant imposes only 'programmatic' obligations upon governments—that is, obligations to be fulfilled incrementally through the ongoing execution of a program. It therefore becomes difficult if not impossible to determine when those obligations have been met.

NOTE

The next two readings examine the importance of conceptions of duty and obligation in general philosophical terms, while the two other readings that follow do so in relation to the Covenant. While the Covenant contains no provision for a binding interpretation of the nature and scope of the states' obligations in question, the ICESCR Committee is in a position to adopt more or less authoritative statements of interpretation, especially in the form of its 'general comments.' The Committee's third such comment (the fourth reading below) is directed explicitly at the issue of obligations.

IMMANUEL KANT, THE DOCTRINE OF VIRTUE,

in The Metaphysics of Morals, 1797 (M. J. Gregor, trans. 1964), at 116.

§24.

When we are speaking of laws of duty (not laws of nature) and, among these, of laws governing men's external relations with one another, we are considering a moral (intelligible) world where, by analogy with the physical world, *attraction* and *repulsion* bind together rational beings (on earth). The principle of *mutual love* admonishes men constantly to *come nearer* to each other; that of the *respect* which they owe each other, to keep themselves at a *distance* from one another. And should one of these great moral forces fail, 'then nothingness (immorality), with gaping throat, would drink the whole kingdom of (moral) beings like a drop of water'. . . .

§25.

In this context, however, *love* is not to be taken as a *feeling* (aesthetic love), *i.e.* a pleasure in the perfection of other men; it does not mean *emotional* love (for others cannot oblige us to have feelings). It must rather be taken as a maxim of *benevolence* (practical love), which has beneficence as its consequence.

The same holds true of the *respect* to be shown to others: it is not to be taken merely as the *feeling* that comes from comparing one's own *worth* with

another's (such as mere habit causes a child to feel toward his parents, a pupil toward his teacher, a subordinate in general toward his superior). Respect is rather to be taken in a practical sense (*observantia aliis praestanda*), as a *maxim* of limiting our self-esteem by the dignity of humanity in another person.

Moreover, the duty of free respect to others is really only a negative one (of not exalting oneself above others) and is thus analogous to the juridical duty of not encroaching on another's possessions. Hence, although respect is a mere duty of virtue, it is considered *narrow* in comparison with a duty of love, and it is the duty of love that is considered *wide*.

The duty of love for one's neighbour can also be expressed as the duty of making others' *ends* my own (in so far as these ends are only not immoral), The duty of respect for my neighbour is contained in the maxim of not abasing any other man to a mere means to my end (not demanding that the other degrade himself in order to slave for my end).

By the fact that I fulfill a duty of love to someone I obligate the other as well: I make him indebted to me. But in fulfilling a duty of respect I obligate only myself, contain myself within certain limits in order to detract nothing from the worth that the other, as a man, is entitled to posit in himself.

. . .

§30.

It is every man's duty to be beneficent—that is, to promote, according to his means, the happiness of others who are in need, and this without hope of gaining anything by it.

For every man who finds himself in need wishes to be helped by other men. But if he lets his maxim of not willing to help others in turn when they are in need become public, *i.e.* makes this a universal permissive law, then everyone would likewise deny him assistance when he needs it, or at least would be entitled to. Hence the maxim of self-interest contradicts itself when it is made universal law—that is, it is contrary to duty. Consequently the maxim of common interest—of beneficence toward the needy—is a universal duty of men, and indeed for this reason: that men are to be considered fellow-men—that is, rational beings with needs, united by nature in one dwelling place for the purpose of helping one another.

. . .

Casuistical Questions

. . .

The ability to practice beneficence, which depends on property, follows largely from the injustice of the government, which favours certain men and so introduces an inequality of wealth that makes others need help. This being

the case, does the rich man's help to the needy, on which he so readily prides himself as something meritorious, really deserve to be called beneficence at all?

. . .

§38.

Every man has a rightful claim to *respect* from his fellow-men and is *reciprocally* obligated to show respect for every other man.

Humanity itself is a dignity; for man cannot be used merely as a means by any man (either by others or even by himself) but must always be treated at the same time as an end. . . .

TOM CAMPBELL, THE LEFT AND RIGHTS: A CONCEPTUAL ANALYSIS OF THE IDEA OF SOCIALIST RIGHTS

(1993), at 142.

. . .

Summarising the previous section, we may say that the characteristic justificatory principle of socialist organisation is the equal satisfaction of need at the highest level of fulfilment. . . .

. . .

Interpreting the need principle as having primarily to do with the allocation of pre-existing resources for the satisfaction of human needs, the characteristic type of right that it justifies is one which places obligations on those in a position to provide the wherewithal for the satisfaction of the needs of others. Such rights will be positive or affirmative rights in that they correlate with obligations that others take positive steps to meet the needs of right-holders. This assumes the rejection of the liberal assumption that, while there is a general moral requirement not to harm others, there is no equivalent requirement to assist them, even when in need. . . .

. . .

Consequently, the relationships between right-holders and obligation-bearers is not the simple one-to-one correlation which holds in the case of such typical liberal rights as the right to freedom from bodily injury which are primarily rights which all members of a society have against all other members. The fact that meeting needs requires the co-operative effort of many individuals, involving public or collective procedures, means that the fulfilment of typically socialist duties must be mediated through social procedures. In this sense the individual's rights in a socialist society are rights against society and the correlative obligations can also be seen as obligations to society since their

fulfilment does not depend on the individual who has the obligation identifying and acting directly towards the individuals who have the correlative rights. In this formulation 'society' is simply a way of referring to the indispensable system of rule-governed co-operation which forms the intermediary between rights and duties.

This model of societally mediated rights and duties has, from the socialist point of view, the defect that it seems to assume the activity of B (the obligation-bearer) and the passivity of A (the right-holder), whereas the socialist ideal is of a society in which individuals are fulfilled primarily through the active co-operative creative ventures. In part this objection is met by pointing out that any particular person is both an A and a B, both a receiver of what he needs and a contributor to the social mechanisms designed to see that he and others receive what they need. It can therefore be argued that it is to obligations, not rights, that we should look for the instantiation of active, productive socialist man.

. . .

The social function of the socialist concept of rights would not, however, be centred on courts of law. The chief purpose of societal rules designed to further the concerns of individuals would be within the normal administrative operations of whatever institutional arrangements were thought necessary to organise communal life so as to meet approved human needs. It is an essential corollary of the dominance within a socialist society of positive or affirmative rights that those entrusted with the tasks of societal organisation would be the primary initiators in the protection of individual rights and themselves the bearers of significant power-rights to enable them to carry out their functions. Socialist rights are more typically directives and enablements than claims. They signify the proper ends and capacities of organised co-operative activity rather than the ultimate recourse of aggrieved individuals. This places them at the conscious centre of any human group organised to satisfy the needs of socialised man.

. . .

QUESTIONS

1. 'If we were to make a rough analogy, Kant's duty of respect recalls the ICCPR, while the duty of beneficence recalls the ICESCR.' Do you agree?

2. Under the ICCPR, say in relation to torture, the state must itself refrain from torture and must use reasonable efforts to enforce that obligation against any private, non-governmental actor who tortures. In that particular sense, the duties (correlative to individual rights) under the ICCPR affect individuals as well

as the state; individuals too would violate a right declared by the Covenant by torturing. Is the same true of the ICESCR? On its face, it imposes duties on the state. But does it also impose on private, non-governmental actors something akin to a duty of beneficence, such that one is under an obligation to assist a starving neighbor? Who would enforce that obligation?

G. J. H. VAN HOOF, THE LEGAL NATURE OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A REBUTTAL OF SOME TRADITIONAL VIEWS

in Philip Alston and K. Tomasevski (eds.), The Right to Food (1984), at 97.

. . . A considerable number of people, particularly in the West, and including eminent and influential international lawyers, still hold views attributing a second-rate status to economic, social and cultural rights. In their extreme form such views may be summed up as follows: either the position is taken which expressly denies a legally binding character to economic, social and cultural rights, or those rights are alleged to differ from civil and political rights in such fundamental respects that it becomes impossible to escape the conclusion that the former are inferior from a legal point of view.

. . .

In the following sections we will outline our own position on the basis of a discussion of the studies engaged in by two scholars, whose work is broadly representative of the prevailing school of thought concerning the legal nature of economic, social and cultural human rights. These authors are E. Vierdag and M. Bossuyt.[14] . . .

. . .

. . . Arguments that economic, social and cultural rights differ in fundamental respects from civil and political rights may vary in their implications. They may amount, or at least come close, to the proposition that economic, social and cultural rights are not really law. Alternatively, without denying the legally binding character of economic, social and cultural rights, it may be alleged that the differences between them and civil and political rights may be so great that the former are in fact considered to be second-rate human rights.

Bossuyt's approach would seem to be representative of the latter school of

[14] [Eds.] The works referred to by the author are E. Vierdag, The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights, 9 Neths. Ybk. Int.l L. 69 (1978) and Marc Bossuyt, La distinction entre les droits civils et politiques et les droits economiques, sociaux et culturels, 8 Hum. Rts. J. 783 (1975).

thought. The differences he construes between civil and political rights on the one hand, and economic, social and cultural rights on the other are very far-reaching. The ultimate reason for these differences is, according to Bossuyt, to be found in the fact that the realization of the latter set of rights requires a financial effort on the part of the State, while in respect of the former this is not the case. The fact that the implementation of at least a number of civil and political rights, such as the right to a fair trial and the right concerning periodic elections, may cost the State money, is dismissed by Bossuyt on the ground that the expenditure involved is very modest and, at any rate, does not go beyond the minimum required to ensure the very existence of the State. It is submitted, however, that in relation to the resources which at least some developing countries have available, the expenditure involved in, for instance, the holding of free and secret elections or the setting up of an adequate judiciary and legal aid system may be quite considerable.

Another, legally more tangible, argument used by Bossuyt is that civil and political rights require non-interference on the part of the State, whereas the implementation of economic, social and cultural rights requires active intervention by the State. The former are, therefore, said to create negative obligations, whereas the latter create positive obligations. In this rigid form the distinction put forward by Bossuyt is, in my view, difficult to uphold. There are well known examples of civil and political rights which in fact demand active intervention on the part of the State, such as the right to a fair trial. Similarly, not all the rights categorized as economic, social and cultural, fit the mould of State-intervention. Freedom to form trade unions constitutes the classic example, although much depends on how exactly this freedom is defined.

Despite these difficulties in the non-interference intervention dichotomy, Bossuyt deduces from it a difference in both the content and the character of the rights. As to the first aspect, Bossuyt argues that civil and political rights are of necessity invariable in their content, as minimum rights cannot vary from one country to another. Economic, social and cultural rights on the other hand are said to have a variable content depending upon the level of economic development of the State concerned. But the case law concerning the European Convention for the Protection of Human Rights and Fundamental Freedoms sheds a very different light on the allegedly invariable content of civil and political rights. Although the Convention applies to a region consisting of a comparatively homogeneous group of States, it has nevertheless been interpreted by the European Commission and the European Court of Human Rights so as to deny the existence of a uniform European standard applicable in all cases. In other words, the fact that the content given to a particular right or freedom protected by the Convention may deviate markedly from one Contracting State to the other has not been judged to be incompatible with the Convention.

As to the difference in character, Bossuyt asserts the existence of a fundamental distinction between the two categories of rights. To the civil and polit-

ical rights he assigns an absolute character: 'In recognizing civil rights, positive law can only protect those things that man already possesses'. Conversely, the economic, social and cultural rights can, according to Bossuyt, only be enjoyed 'to the extent that these rights have become subjective rights'. It is difficult to rebut views ascribing an absolute character to one or another type of human rights, when they are, as seems to be the case here, based on some concept of Natural Law. For such concepts ultimately prove not to be scientifically verifiable to those who are not already convinced of their validity. Nevertheless, I know of no convincing argument to support the contention that, for instance, the right to life is absolute because it emanates from human dignity, while, for instance, the right to food does not have the same absolute character.

. . .

One of the most important characteristics of the international law of human rights is its dynamic nature. This partly reflects the fact that this area of international law, or at least the considerably increased attention paid to it, is comparatively young. As a result, important parts of the field covered by it have not yet been sufficiently mapped out, which has been responsible for uncertainties and ambiguities. Secondly, and more importantly in this respect, the law of human rights is not only comprehensive, but also concerns the very foundations of society. Even more than other fields of law it is therefore influenced by developments in that society. Particularly in present times which witness far-reaching changes, the law of human rights finds itself in a state of more or less permanent development.

. . .

Parallel to and in interaction with these material changes, psychological processes have occurred which can be described as a general emancipatory movement. This movement is characterized in particular by the phenomenon that with respect to various aspects of life people have come to take on a less submissive, or rather more assertive attitude vis-à-vis the State. This has sometimes resulted in a more or less paradoxical situation. On the one hand more far-reaching demands are made upon the State in providing for the well-being and well-fare of its population; on the other hand such a deeper intervention on the part of the State is warded off on the basis of the argument that it encroaches upon traditional freedoms. . . .

As far as the international law of human rights is concerned, the upshot of the developments condensed in this brief survey is that traditional schemes for analysis have become obsolete in a number of respects.

In these circumstances the quest for innovative approaches to the promotion of human rights assumes particular importance. With respect to economic, social and cultural rights, it may be productive to approach the problem of implementation from the angle of obligations. In this regard four 'layers' of State obligations may be discerned which, for lack of better terms,

may be called: an obligation to respect, an obligation to protect, an obligation to ensure, and an obligation to promote.

. . .

This model obviously needs to be elaborated and refined. Nevertheless, even in the form outlined above, it would seem to offer a number of possibilities to develop a more fruitful approach to the international law of human rights. First and foremost, it stresses the unity between civil and political rights, and economic, social and cultural rights, as long as it is recognized that the various 'layers' of obligations can be found in each separate right or freedom. In other words, civil and political rights do not always consist only of obligations to respect and obligations to protect. Under the impact of the above-mentioned processes of increased interdependence and emancipation this type of right now sometimes involves obligations to ensure and even obligations to promote as well. An example is freedom of expression, which, at least in some countries, has come to include, apart from the prohibition of censorship, an obligation to create conditions favourable to the freedom to demonstrate (police-escort, police-protection, etc.) and to pluralism in the press and the media in general.

Conversely, economic, social and cultural rights are not always made up only of obligations to ensure and/or obligations to promote. They may also involve elements of obligations to respect and obligations to protect. For instance, the obligation to respect and protect the right to adequate housing, as laid down in Article 11 of the Covenant, would in my view be violated, if the government's policy, even in the least developed countries, allowed the hovels of poor people to be torn down and replaced by luxury housing which the original inhabitants could not afford and without providing them with access to alternative housing on reasonable terms. It bears reiterating therefore that obligations to fulfil and to promote cannot from a legal point of view too readily be assumed to be empty shells.

The foregoing may be illustrated a little further by briefly applying the model of the various 'layers' of obligations to the right to food. The following examples of the different types of obligations can thus be discerned. The obligation to respect the right to food implies that a government may not expropriate land from people for whom access to control over that land constitutes the only or main asset by which they satisfy their food needs, unless appropriate alternative measures are taken.

Similarly, the obligation to protect the right to food includes the duty on the part of the State to prevent others from depriving people in one way or another, for instance by force or economic dominance, from their main resource base to satisfy their food needs, such as access to land, water, markets, or jobs.

The obligation to ensure the right to food requires a State to take steps in case members of its population prove incapable of providing themselves with food of a sufficient quantity and quality. In emergency situations a State must,

to the maximum of its resources, make available the necessary food stuffs. Alternatively or in addition it must seek the assistance of other States to cope with the hunger problem. This raises the question as to the existence of an obligation on the part of other States to provide the required assistance to the best of their ability, as in my view can be deduced from article 11(2). In a more structural way the obligation to ensure the right to food may entail the duty of a State to initiate land reforms in order to improve the production and distribution of food. Although it is difficult *in abstracto* to indicate what measures a State has to take, in concrete situations particular measures can be said to be pertinent for the State concerned in order to meet its obligation to ensure the right to food. At any rate, a State violates this obligation when, in the face of food shortage, it does nothing.

The same holds, *mutatis mutandis*, for the obligation to promote the right to food. As was pointed out this type of obligation encompasses measures aimed at long term goals, and in the case of the right to food it may therefore consist of, for instance, the duty on the part of the government to set training programmes for farmers in an effort to improve methods of production and thus raise productivity in agriculture.

Apart from the fact that the model of various 'layers' of obligations allows for a more integrated approach to the issue of human rights it would seem to offer an additional advantage in that it constitutes a more promising point of departure for dealing with the issue of enforcement or implementation of human rights. From the point of view of effectiveness it may be expected that different types of obligations require different forms of enforcement or implementation. The model of 'layers' opens the possibility to tailor the system of enforcement or implementation to the various types of obligations.

COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, GENERAL COMMENT No.3 (1990)

UN Doc. E/1991/23, Annex III.

The nature of States parties obligations (article 2, paragraph 1)

1. Article 2 is of particular importance to a full understanding of the Covenant and must be seen as being a dynamic relationship with all of the other provisions of the Covenant. It describes the nature of the general legal obligations undertaken by States parties to the Covenant. Those obligations include both what may be termed (following the work of the International Law Commission) obligations of conduct and obligations of result. While great emphasis has sometimes been placed on the difference between the formulations used in this provision and that contained in the equivalent article 2 of the Covenant on Civil and Political Rights, it is not always recognized that there are also significant similarities. In particular, while the Covenant provides for progressive realization and acknowledges the constraints due to the

limits of available resources, it also imposes various obligations which are of immediate effect. Of these, two are of particular importance in understanding the precise nature of States parties obligations. One of these, . . . is the 'undertaking to guarantee' that relevant rights 'will be exercised without discrimination . . .'.

2. The other is the undertaking in article 2(1) 'to take steps', which in itself, is not qualified or limited by other considerations. . . . [W]hile the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant's entry into force for the States concerned. Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant.

3. The means which should be used in order to satisfy the obligation to take steps are stated in article 2(1) to be 'all appropriate means, including particularly the adoption of legislative measures'. The Committee recognizes that in many instances legislation is highly desirable and in some cases may even be indispensable. For example, it may be difficult to combat discrimination effectively in the absence of a sound legislative foundation for the necessary measures. In fields such as health, the protection of children and mothers, and education, as well as in respect of the matters dealt with in articles 6 to 9, legislation may also be an indispensable element for many purposes.

4. . . . [H]owever, the adoption of legislative measures, as specifically foreseen by the Covenant, is by no means exhaustive of the obligations of States parties. Rather, the phrase 'by all appropriate means' must be given its full and natural meaning. . . . [T]he ultimate determination as to whether all appropriate measures have been taken remains for the Committee to make.

. . .

7. Other measures which may also be considered 'appropriate' for the purposes of article 2(1) include, but are not limited to, administrative, financial, educational and social measures.

8. The Committee notes that the undertaking 'to take steps . . . by all appropriate means including particularly the adoption of legislative measures' neither requires nor precludes any particular form of government or economic system being used as the vehicle for the steps in question, provided only that it is democratic and that all human rights are thereby respected. Thus, in terms of political and economic systems the Covenant is neutral and its principles cannot accurately be described as being predicated exclusively upon the need for, or the desirability of a, socialist or capitalist system, or a mixed, centrally planned, or laisser-faire economy, or upon any other particular approach. . . .

9. . . . The concept of progressive realization constitutes a recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time. In this sense the obligation differs significantly from that contained in article 2 of the Covenant on Civil and Political Rights which embodies an immediate obligation to respect

and ensure all of the relevant rights. Nevertheless, the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the raison d'être of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified. . . .

10. . . . [T]he Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its raison d'être. By the same token, it must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned. Article 2(1) obligates each State party to take the necessary steps 'to the maximum of its available resources'. In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.

11. . . . [T]he obligations to monitor the extent of the realization, or more especially of the non-realization, of economic, social and cultural rights, and to devise strategies and programmes for their promotion, are not in any way eliminated as a result of resource constraints. . . .

12. Similarly, the Committee underlines the fact that even in times of severe resources constraints whether caused by a process of adjustment, of economic recession, or by other factors the vulnerable members of society can and indeed must be protected by the adoption of relatively low-cost targeted programmes.

. . .

QUESTIONS

1. 'With respect to economic rights such as food, housing and health, the notion of duty seems to be more appropriate for legal instruments than the concept of individual rights.' Do you agree?

2. Consider the analysis of economic and social rights in terms of the four levels of obligation—respect, protect, ensure, promote—originally suggested by the author Shue[15] and applied above to the right to food by van Hoof.

a. Is it a convincing analytical framework? For example, does it have the potential to illuminate the specific obligations of states parties to the Covenant in relation to other rights such as those to health, education or housing?

b. Does the framework also have utility for understanding the implications of civil and political rights? Can you apply the scheme to, say, the right to freedom from torture or the right to political participation through voting?

3. Do you consider the Committee's analysis to be too demanding, or insufficiently so? How does it relate to the approach outlined by van Hoof? Do you agree with the Committee's statement in para. 10 concerning minimum core obligations?

4. How do you react to the following ways of characterizing civil and political rights, and economic and social rights, by stating bold differences between the two sets?

Civil and Political Rights	*Economic and Social Rights*
law	politics, policy
rights	needs, wants, political claims
binding	hortatory, at best directive
no resource excuse for failure	resource contingent, legitimate restraint
immediate full application	progressive realization, programmatic
determinate	open-textured
judicial remedies, enforceable	non-justicable, non-enforceable
negative, hands off	positive, interventionist

Would an advocate of economic and social rights necessarily deny some or all of the asserted contrasts?

ADDITIONAL READING

Philip Alston and Gerard Quinn, The Nature and Scope of States Parties' Obligations Under the International Covenant on Economic, Social and Cultural Rights, 9 Hum. Rts Q. 156 (1987).

[15] Henry Shue, Basic Rights (1980).

D. THE RELEVANCE OF RESOURCE CONSTRAINTS

NOTE

Although some critics of the concept of economic and social rights would acknowledge the validity of the Committee's analysis in General Comment No. 3, *supra*, in relation to industrialized countries, they would argue that the majority of developing countries has no chance of meeting any 'minimum core obligation' in respect of all the rights recognized in the Covenant. For example, Maurice Cranston has written that: '[f]or a government to provide social security . . . it has to have access to great capital wealth . . . . The government of India, for example, simply cannot command the resources that would guarantee each' Indian an adequate standard of living.[16] For many critics it follows that, in the absence of large-scale international aid or of rapid domestic economic growth (or both), the government's hands are tied and little can be expected of it in response to its obligations under the Covenant. (Note that the issue of international aid is considered in Chapter 16, *infra*.)

In the post-Cold War world, in which oppressive and corrupt regimes are less likely to be propped up by 'powerful allies,' it has become common to speak of the phenomenon of 'failed states' (those whose governments are perceived to be incapable of performing the most elementary functions of governance). This has tended to reinforce the opinion that many Third World countries, perhaps even the majority, cannot be expected to meet the Covenant's demands. The following readings address that opinion.

MYRON WEINER, THE CHILD AND THE STATE IN INDIA: CHILD LABOR AND EDUCATION POLICY IN COMPARATIVE PERSPECTIVE

(1991), at 3.

The governments of all developed countries and many developing countries have removed children from the labor force and required that they attend school. They believe that employers should not be permitted to employ child labor and that parents, no matter how poor, should not be allowed to keep their children out of school. Modern states regard education as a legal duty, not merely a right: parents are required to send their children to school, children are required to attend school, and the state is obligated to enforce compulsory education. Compulsory primary education is the policy instrument by which the state effectively removes children from the labor force. The state

[16] Human Rights: Real and Supposed, in D.D.Raphael (ed.), Political Theory and the Rights of Man 43, 51 (1967).

thus stands as the ultimate guardian of children, protecting them against both parents and would-be employers.

This is not the view held in India. Primary education in India is not compulsory, nor is child labor illegal. The result is that less than half of India's children between ages six and fourteen—82.2 million—are not in school. They stay at home to care for cattle, tend younger children, collect firewood, and work in the fields. They find employment in cottage industries, tea stalls, restaurants, or as household workers in middle-class homes. They become prostitutes or live as street children, begging or picking rags and bottles from trash for resale. Many are bonded laborers, tending cattle and working as agricultural laborers for local landowners.

. . .

Most children who start school drop out. Of those who enter first grade, only four out of ten complete four years of school. Depending upon how one defines 'work' (employment for wages, or full-time work whether or not for wages), child laborers in India number from 13.6 million to 44 million, or more.

Indian law prohibits the employment of children in factories, but not in cottage industries, family households, restaurants, or in agriculture. Indeed, government officials do not regard the employment of children in cottage industries as child labor, though working conditions in these shops are often inferior to those of the large factories. . . .

India is a significant exception to the global trend. . . .

. . . Poverty has not prevented governments of other developing countries from expanding mass education or making primary education compulsory. Many countries of Africa with income levels lower than India have expanded mass education with impressive increases in literacy. . . . Between 1961 and 1981 the total number of adult illiterates in India increased by 5 million per year, from 333 million to 437 million. India is the largest single producer of the world's illiterates.

. . .

. . .Why is the Indian state unable—or unwilling—to deal with the high and increasing illiteracy, low school enrollments, high dropout rates, and rampant child labor? . . . Why has the state not taken legislative action when the Indian Constitution calls for a ban on child labor and for compulsory primary-school education. . . .

The central proposition of this study is that India's low per capita income and economic situation is less relevant as an explanation than the belief systems of the state bureaucracy, a set of beliefs that are widely shared by educators, social activists, trade unionists, academic researchers, and, more broadly, by members of the Indian middle class. These beliefs are held by those outside as well as those within government, by observant Hindus and by those who regard themselves as secular, and by leftists as well as by centrists and rightists.

At the core of these beliefs are the Indian view of the social order, notions concerning the respective roles of upper and lower social strata, the role of education as a means of maintaining differentiations among social classes, and concerns that 'excessive' and 'inappropriate' education for the poor would disrupt existing social arrangements.

Indians reject compulsory education, arguing that primary schools do not properly train the children of the poor to work, that the children of the poor should work rather than attend schools that prepare them for 'service' or white-collar occupations, that the education of the poor would lead to increased unemployment and social and political disorder, that the children of the lower classes should learn to work with their hands rather than with their heads (skills more readily acquired by early entry into the labor force than by attending schools), that school dropouts and child labor are a consequence, not a cause, of poverty, and that parents, not the state, should be the ultimate guardians of children. Rhetoric notwithstanding, India's policy makers have not regarded mass education as essential to India's modernization. They have instead put resources into elite government schools, state-aided private schools, and higher education in an effort to create an educated class that is equal to educated classes in the West and that is capable of creating and managing a modern enclave economy.

The Indian position rests on deeply held beliefs that there is a division between people who work with their minds and rule and people who work with their hands and are ruled, and that education should reinforce rather than break down this division. These beliefs are closely tied to religious notions and to the premises that underlie India's hierarchical caste system. . . .

. . . [T]here is historical and comparative evidence to suggest that the major obstacles to the achievement of universal primary education and the abolition of child labor are not the level of industrialization, per capita income and the socioeconomic conditions of families, the level of overall government expenditures in education, nor the demographic consequences of a rapid expansion in the number of school age children, four widely suggested explanations. India has made less of an effort . . . than many other countries not for economic or demographic reasons but because of the attitudes of government officials, politicians, trade union leaders, workers in voluntary agencies, religious figures, intellectuals, and the influential middle class toward child labor and compulsory primary-school education. Of particular importance . . . are the attitudes of officialdom itself. . . .

UNITED NATIONS DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT (1990), at 4.

7. Developing countries are not too poor to pay for human development *and* take care of economic growth.

The view that human development can be promoted only at the expense of economic growth poses a false tradeoff. It misstates the purpose of development and underestimates the returns on investment in health and education. These returns can be high, indeed. Private returns to primary education are as high as 43% in Africa, 31% in Asia and 32% in Latin America. Social returns from female literacy are even higher—in terms of reduced fertility, reduced infant mortality, lower school dropout rates, improved family nutrition and lower population growth.

Most budgets can, moreover, accommodate additional spending on human development by reorienting national priorities. In many instances, more than half the spending is swallowed by the military, debt repayments, inefficient parastatals, unnecessary government controls and mistargetted social subsidies. Since other resource possibilities remain limited, restructuring budget priorities to balance economic and social spending should move to the top of the policy agenda for development in the 1990s.

Special attention should go to reducing military spending in the Third World—it has risen three times as fast as that in the industrial nations in the last 30 years, and is now approaching $200 billion a year. Developing countries as a group spend more on the military (5.5% of their combined GNP) than on education and health (5.3%). In many developing countries, current military spending is sometimes two or three times greater than spending on education and health. There are eight times more soldiers than physicians in the Third World.

Governments can also do much to improve the efficiency of social spending by creating a policy and budgetary framework that would achieve a more desirable mix between various social expenditures, particularly by reallocating resources:

— from curative medical facilities to primary health care programmes,
— from highly trained doctors to paramedical personnel,
— from urban to rural services,
— from general to vocational education,
— from subsidising tertiary education to subsidising primary and secondary education,
— from expensive housing for the privileged groups to sites and services projects for the poor,
— from subsidies for vocal and powerful groups to subsidies for inarticulate and weaker groups and

— from the formal sector to the informal sector and the programmes for the unemployed and the underemployed.

Such a restructuring of budget priorities will require tremendous political courage. But the alternatives are limited, and the payoffs can be enormous.

PAKISTAN'S REAL POVERTY

The Economist, March 5, 1994, at 32.

. . .

It seems possible that Pakistan is beginning to redress the worst of its social wrongs: a disastrous educational record. Its failure in this area has undoubtedly damaged its economy as well as the hopes of its people. As a report last year by the World Bank analysing East Asia's success pointed out, one of the few policies successful countries had in common was heavy investment in education. Pakistan shows up badly not just against those countries, but also against its poorer neighbours, such as India (see table).

Some explain Pakistan's particular failure through its religion, which has discouraged the education of women. Some put it down to social structure—feudalstyle landlords and tribal chiefs who have no interest in giving the lower orders a chance to escape the slot they were born into. Others still blame the former military dictator, Zia ul Haq, under whom the educational system suffered especially badly.

Aid donors, who in Paris on February 25th agreed to provide $2.5 billion-worth of aid for Pakistan in 1994–95, have been badgering Pakistan for years to spend more on schooling. Pressure from them, combined with a growing realisation among Pakistani bureaucrats and businessmen that the country would never grow fast without a healthy, well-educated population, seems at last to have paid off. This year, after three years' planning and negotiation, an expensive national programme has got underway to try to improve Pakistan's record, not just in education, but also in health and population planning.

The Social Action Programme, a combined effort by the government and the donors, is worth $8 billion over five years. Pakistan will pay $6 billion, mostly by reallocating money from other sectors rather than by increasing public expenditure. Money will be shifted from universities (where state funding mostly benefits the already-prosperous) mostly to primary schools.

Already, the primary education budget has increased by two-thirds between 1991–92 and 1993–94. Politicians' discretion on education spending has been curtailed, so an MP can no longer get two schools built in a marginal village and leave the surrounding area with none. A 'community school' project is designed to allocate money as efficiently as possible, by providing funding only for those villages whose people prove there is a demand for education.

. . .

None of this is irrevocable, of course. The SAP can still fall victim to the current fiscal squeeze or to the tendency of politicians to use money on vote-buying handouts rather than on investment in the future. . . .

A lesson for Pakistan

	GDP per head 1991 PPPS*	Years of schooling 1990 average	Primary and secondary enrolment rate 1987–90, %
Indonesia	2,730	3.9	81
Pakistan	1,970	1.9	29
China	1,680	4.8	88
India	1,150	2.4	68

Source: UNDP *Purchasing-power parity

NANCY BIRDSALL, PRAGMATISM, ROBIN HOOD, AND OTHER THEMES: GOOD GOVERNMENT AND SOCIAL WELL-BEING IN DEVELOPING COUNTRIES

in Lincoln Chen, A. Kleinman and N. Ware (eds.), Health and Social Change in International Perspective 375 (1994) at 381.

[The author notes that, both to promote fairness (irrespective of ability to pay) and to compensate for market failure, governmental involvement in social programs has been characteristic of the twentieth century. In developing countries there are both pros and cons. The former include the high proportion of poor people, the relatively high return for social/public investment in fields like education or health, and the greater likelihood of capital market failures. The latter include the scarcity of administrative skills and the relative inefficiency of government. In low-income developing countries, the share of central government spending on social programs is less than 10%, compared to some 50% in developed countries.

Nevertheless, she points to 'substantial evidence that in the developing countries, government involvement in the social sectors . . . has been a marked success,' so that, for example. gross primary school enrolment in Africa has more than doubled since 1960 (36% to 75%) while adult literacy has gone from 9% to 42%. By the same token, social spending in these countries has declined significantly, due mainly to debt servicing requirements. 'Between the early 1970s and 1985, the share of central government budgets in all developing countries going to health fell from 7 to 4 percent; the share going to education fell from 14 to 10 percent.']

. . . Recent World Bank studies have emphasized in particular the extent to which the pattern of government spending in health, education, housing

and social security is inequitable, generally favoring the rich and the middle-class over the poor. In health and education, the problem is often referred to as the 'resource allocation' problem. In health, it is one of substantial spending of public resources on generally high-cost, curative hospital care that tends to benefit the rich, compared with low-cost primarily preventive services that tend to benefit the poor. In education, it is one of substantial spending of public resources on high-cost university education, again benefiting primarily the rich, compared with low-cost primary and secondary education. Many governments thus fail to play Robin Hood, i.e., to assure that through social programs some national resources are transferred from the rich to the poor.

This failure means much government spending is ineffective as well as inequitable. Because it is among the poor that health and education indicators are still low, spending that does not reach the poor has limited impact on average indicators for nations as a whole. The situation is particularly ironic because the unit costs of many programs that would reach the poor (primary health care, basic education) are relatively low.

. . .

A Pragmatic Framework for Assessing Government's Role

Social Programs: Definition and Society's Objectives

. . .

Most social services, along with other goods and services such as roads, sanitation systems and communications networks, are 'quasi-public' goods; they are neither pure public goods (such as clean air or national defense), for which all benefits of use are captured by all members of society, nor pure private goods (such as apples or clothing), for which all benefits of use are captured by the individual who consumes the good. . . .

Among quasi-public goods, social services are those for which society has, in addition, a particular concern about fairness. Fairness dictates that certain 'merit goods' be available to all members of society, irrespective of ability to pay. What these goods and services are (and hence which should be the subject of public policy) will vary across societies, depending on income, stage of development, and values. Access to basic education and health care are almost universally included; some societies, particularly in the industrial countries, include unemployment, disability and old age insurance, decent housing, and child care. Note that difficult issues of definition (and fairness) arise not only around what services should be included, but around how much of certain services (vocational and university education as well as primary and secondary education? coronary bypass operations as well as prenatal care?), and of what quality, should be included.

. . .

One way to think about the role of government in the social sectors is therefore to be concerned with the appropriate mix of inputs of government, given not only society's objectives and fiscal constraints, but also given initial conditions and potential opportunities regarding the private alternative (is there a private sector, and whom does it serve?).

. . .

Possible combinations of inputs by government, in descending order of government involvement, are:

1. Public provision of services, with full financing (through taxes) or partial financing (through a combination of taxes and user charges) by:
   — central or local governments, as in the case of fully funded public schools and health clinics;
   — quasi-independent public agencies (e.g., a publicly financed hospital or university with an independent board of trustees);

2. Public financing, full or partial, of the provision of such services by the private sector, through:
   — subsidies to individuals, including vouchers directly to potential consumers (allowing consumers to purchase directly from alternative public or private providers), and reductions of personal income taxes associated with private spending on health, education or other social services;
   — subsidies to private providers of services, including grants (e.g., to nonprofit organizations to run particular programs), reimbursement to providers of some costs by government (e.g., through public health insurance programs), and exemption from taxes;
3. Public regulation of private providers, including restriction of provision of services to nonprofit (vs. profit making) organizations; accreditation or other licensing of providers; control over inputs (licensing of teachers and doctors); price controls over outputs;
4. Public provision of information to consumers regarding particular services, products or providers (leaving decisions to consumers) in the public and private sector.

. . .

. . . [W]here *provision* of services is concerned, there is no simple 'correct' division between the public and private sectors. It may, for example, be efficient for the public sector to provide a full range of services (as is the case with the National Health Service in England, or with the state of California's university system), even including provision of some purely 'private' goods, to all income groups in a population.

There are at least three reasons that can justify public provision of apparently private goods, even to the nonpoor.

— First, joint production and consumption of public goods with private goods may be the most cost-effective approach, particularly in relatively small and relatively poor countries.

. . .

— Second, quality of services is likely to suffer if the government takes responsibility only for providing services to the poor. Or it may be more costly to government to find and target the poor than to simply provide a service to everyone.

. . .

— Third, and more generally, various market failures mean government, if it does not provide a service directly, will need to monitor provision by the private sector. In some circumstances, the social costs of monitoring and regulation may exceed the social costs of direct provision.

QUESTIONS

1. Weiner's analysis rejects resource constraints as a significant impediment to the realization of the right to universal primary education. If you accept his analysis, is there any reason not to find the Government of India in violation of its obligations under the ICESCR (which it ratified in 1979)? Recall the discussion of cultural relativism in Chapter 4(B). Is this a case in which cultural factors (religious, caste-based, and gender-based) could be cited to justify governmental inaction in response to claims of economic and social rights? Or is it one that highlights the need to insist upon respect for those human rights?

2. What conclusions would you draw from the change of education policy in Pakistan, as described by *The Economist*?

3. The ICESCR Committee states in para. 8 of General Comment No. 3, *supra*, that the Covenant 'neither requires nor precludes any particular form of government or economic system . . . '. By contrast, many commentators seem to assume that it is a recipe for socialism or at least for governmental 'welfarism.' Henkin, for example, in the excerpt *supra*, characterizes the Covenant as implying 'a government that is activist, intervening, committed to economic-social planning for the society . . . .' Similarly, Nowak argues that the right to education 'is based on the socialist philosophy which holds that human rights can only be guaranteed by positive state action.'[17]

Does this mean that economic and social rights are no longer viable, indeed are anachronistic, in an era characterized by widespread deregulation, the systematic privatization of activities ranging from the provision of essential services

[17] Manfred Nowak, The Right to Education, in A. Eide *et al* (eds.), Economic, Social and Cultural Rights: A Textbook 189, 196 (1994).

such as electricity, gas, water and sewerage to the running of prisons and postal services; and seemingly irresistible pressure to reduce both the scope and level of government spending?

4. Consider the following comment on the implications of the right to education set forth in an Article in the 1944 ALI Statement of Essential Rights (see other excerpts at p. 259 *supra*), which laid much of the groundwork for the inclusion of economic and social rights in the Universal Declaration.

> . . . The age limits within which the individual is to be considered a 'child' are left to reasonable interpretation in the light of local physiological and other conditions. . . . The Article does not make attendance at school compulsory although the great majority of children will be able to meet the requirements only by attendance at a public or private school.
>
> . . . The expression 'adequate and free' does not prohibit private schools from charging tuition or other fees. It does, however, impose upon the state the duty of insuring that there are maintained schools at which each child has the opportunity to receive a primary education free.
>
> The Article does not prescribe the extent to which schools and other educational facilities for 'further education' may be provided by the state or by churches, endowed institutions, or other voluntary bodies; the nature of the public control, if any, exercised over privately provided schools; the conditions under which privately provided schools may receive financial assistance from the state; or the status of universities. It does impose on the state the responsibility of insuring that adequate educational facilities are provided by either public or private action, a responsibility which would include the duty of providing such facilities itself whenever they are not effectively provided in some other manner. Thus the Article, while affirming the responsibility of the state, allows unlimited variety in the means by which the responsibility is discharged.
>
> The phrase 'to promote the development of facilities' recognizes the inevitability of gradualness in the implementation of the right to education; the interpretation of the phrase 'adequate and effectively available' will vary with local conditions from either a quantitative or qualitative standpoint. Facilities adequate at one stage of social and economic development will cease to be adequate as further progress becomes possible.

Is this an adequate formulation, albeit at a very general level, of the obligations flowing from the right to education? If so, does it point the way to an approach which does not depend inexorably on 'big government'? If not, does it prove the point made by Henkin and Nowak?

5. Birdsall does not use the language of human rights. Is her analysis fully compatible with the principles underlying economic and social rights? Consider, for example, her relativist approach in defining 'merit goods' according to various characteristics of the society.

NOTE

The Vienna World Conference on Human Rights called for a greater effort to be made to develop indicators in relation to the realization of economic and social rights. Consider the following analysis by Robertson.[18]

> [F]inancial, natural, human, technological, and informational resources are the most important resources in achieving ICESCR rights. State direction of these resources, to their maximum extent, toward the goal of promoting economic, social, and cultural well-being would signify . . . substantial if not total compliance with Article 2 . . . .
>
> . . .
>
> *V. How Can Compliance Be Measured?*
>
> [In relation to financial resources, it] would not seem possible to arrive at any one indicator. Rather, what seems reasonable are comparisons between certain countries, and between expenditures on ICESCR rights and other items. For example, if developed countries with comparable economies are spending different amounts on realizing ICESCR rights, then that is indicative, in the case of the low-spender, of non-compliance with Article 2. The same would be true of developing countries similarly situated. This is not to say that the high spenders are in compliance. It simply means that by one indicator the low spender is not. Similarly, comparisons could be drawn between ICESCR and other expenditures. Military expenditures provide a good example. In 1991, developed countries spent 3.6 percent of their GNP on military expenditures compared with health expenditures of 5.3 percent. Developing countries spent only 1.6 percent on health and more than twice as much on the military, 3.8 percent. Some individual developing countries had horrible military to health ratios: Sudan 20 to 1; Syria 34 to 1; Pakistan 38 to 1. Other developing countries were much closer to having a balance. Indicators could be developed which illustrate the trade-offs which countries have made. For example, spending more on the military than on health, education, housing, or social assistance would be indicative of non-compliance. Similar ratios could be developed which compare ICESCR expenditures to other expenditures which clearly do not claim the priority status of ICESCR rights. The greater the number of indicators that can be developed on domestic spending, the greater the insight will be into whether a state has accorded due priority to the obligation to devote the maximum available resources to ICESCR rights.

[18] Robert Robertson, Measuring State Compliance with the Obligation to Devote the 'Maximum Available Resources' to Realizing Economic, Social, and Cultural Rights, 16 Hum. Rts. Q. 693, 697 (1994).

QUESTION

How satisfactory is such an approach? Does it suggest that a system of indicators might be able to be developed for formal use by the ICESCR Committee in assessing compliance?

E. THE QUESTION OF JUSTICIABILITY

If one single issue has dominated the debate over economic and social rights, it is the question of whether those rights are justiciable at the national level. In the view of many observers, justiciability need not be seen as the indispensable characteristic of a human right (as opposed to a legal right in Hohfeldian terms). Nevertheless, programmatic approaches that depend solely upon legislatures and/or administrative agencies for the implementation of economic and social rights have left many observers, lawyers in particular, uneasy.

The question of justiciability (i.e. whether the courts can, and at least sometimes will, provide a remedy for aggrieved individuals claiming a violation of those rights) is seen by some as a 'red herring' or distraction from the real issues. Others, in contrast, view it as a *conditio sine qua non* for an entitlement to warrant classification as a human right. The ICESCR Committee has sought to respond to this issue, but has stopped short of characterizing justiciability as an indispensable element. Consider the following formulation.

COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, GENERAL COMMENT NO. 3 (1990)

UN Doc. E/1991/23, Annex III.

. . .

5. Among the measures which might be considered appropriate, in addition to legislation, is the provision of judicial remedies with respect to rights which may, in accordance with the national legal system, be considered justiciable. The Committee notes, for example, that the enjoyment of the rights recognized, *without discrimination*, will often be appropriately promoted, in part, through the provision of judicial or other effective remedies. Indeed, those States parties which are also parties to the International Covenant on Civil and Political Rights are already obligated (by virtue of articles 2(1), 2(3) 3 and 26 of that Covenant) to ensure that any person whose rights or freedoms (including the right to equality and non-discrimination) recognized in that

Covenant are violated, 'shall have an effective remedy' (article 2(3)(a)). In addition, there are a number of other provisions, including articles 3, 7(a)(i), 8, 10(3), 13(2)(a), 13(3), 13(4) and 15(3) which would seem to be capable of immediate application by judicial and other organs in many national legal systems. Any suggestion that the provisions indicated are inherently non-self-executing would seem to be difficult to sustain.

6. Where specific policies aimed directly at the realization of the rights recognized in the Covenant have been adopted in legislative form, the Committee would wish to be informed, *inter alia*, as to whether such laws create any right of action on behalf of individuals or groups who feel that their rights are not being fully realized. In cases where constitutional recognition has been accorded to specific economic, social and cultural rights, or where the provisions of the Covenant have been incorporated directly into national law, the Committee would wish to receive information as to the extent to which these rights are considered to be justiciable (i.e. able to be invoked before the courts).

NOTE

The rights referred to by the Committee in the preceding General Comment No. 3 are equal rights of men and women (Art. 3), equal pay for equal work (Art. 7(a)(i)), the right to form and join trade unions and the right to strike (Art. 8), the right of children to special protection (Art. 10(3)), the right to free, compulsory, primary education (Art. 13 (2)(a)), the liberty to choose a non-public school (Art. 13(3)), the liberty to establish schools (Art. 13(4)), and the freedom for scientific research and creative activity (Art. 15(3)). The extent to which these rights are actually justiciable varies considerably from one country to another. Nevertheless, that is sufficient to demonstrate that the rights in question are not intrinsically non-justiciable.

In relation to the remaining rights in the ICESCR, such as the rights to work (Art. 6), health (Art. 12), food, clothing, housing (Art. 11) and education (Art. 13), Vierdag concludes a lengthy critique of the Covenant in the following terms:[19]

> What are laid down in provisions such as Articles 6, 11 and 13 of the ICESCR are consequently not rights of individuals, but broadly formulated *programmes* for governmental policies in the economic, social and cultural fields.
>
> It is suggested that it is misleading to adopt an instrument that by its very title and by the wording of its relevant provisions purports to grant 'rights' to individuals but in fact appears not to do so, or to do so only marginally. It is also regrettable that, in this way, a notion of 'right' is

[19] E. Vierdag, The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights, 9 Neths. Ybk. Int. L. 69, 103 (1978).

introduced into international law that is utterly different from the concept of 'right of an individual' as it is traditionally understood in international law and employed in practice. . . .

QUESTIONS

The first two paragraphs of the preceding Note each lists a group of rights declared in the ICESCR. Should the two lists necessarily be treated similarly with respect to the issue of justiciability, i.e. either all amenable to adjudication or none amenable? Or could one draw a distinction between the two lists? What distinction, and what consequences might it suggest?

NOTE

In the following readings, bear in mind several aspects of the question of justiciability. (1) Are the rights as recognized in the ICESCR formulated in a manner that is sufficiently precise to enable judges to apply them in concrete cases? (2) To the extent that such cases will involve decisions about public spending priorities, should such decisions remain the exclusive domain of the executive and legislature? (3) Are judges well-suited in terms of their expertise, social and political background and the facilities available to them, to make such decisions? (4) Does the justiciability test need to be applied in a narrow, traditional manner, or are there more creative approaches, perhaps still involving the courts in some way, which would satisfy those demanding formal, institutionalized measures of implementation for economic and social rights?

In the early 1990s the question of the justiciability of economic and social rights was extensively debated in both Canada and South Africa in the context of constitutional reform. The debate in both countries also served to explode assumptions that social progressives would automatically favor the entrenchment of economic rights. In Canada the proposal was for a social charter rather than for the recognition of rights enforceable in the courts.

In the following article, Jackman reviews the principal arguments that were used against the latter approach and responds to some of them. In South Africa the principal focus of debate was on the possible inclusion of a set of 'directive principles' in the post-Apartheid constitution.

MARTHA JACKMAN, CONSTITUTIONAL RHETORIC AND SOCIAL JUSTICE: REFLECTIONS ON THE JUSTICIABILITY DEBATE

in Joel Bakan and D. Schneiderman (eds.), Social Justice and the Constitution: Perspectives on a Social Union for Canada 17 (1992), at 18.

The Ontario government discussion paper on the social charter canvassed a number of options. These included strengthening existing constitutional commitments to equalization and the reduction of interregional disparities; expanding the welfare component of the interprovincial mobility rights clause under section 6 of the *Canadian Charter of Rights and Freedoms*; entrenching a general statement of principles which would inform social and economic policy making; and adding certain basic and justiciable social rights to the constitution. The official proposals released by the Ontario government in February 1992 were, however, disappointingly modest. The government opted for an expanded version of the non-justiciable principles set out in section 36 of the *Constitution Act, 1982*, abandoning any mention of justiciable individual rights to specific programs or services.

In its proposals for a new 'social covenant,' released at the end of February 1992, the Beaudoin–Dobbie Committee also rejected the idea of a justiciable social charter in favour of a largely declaratory one. The Committee recommended that a new section 36.1 be added to the constitution, one 'which would commit governments to fostering' a number of 'social commitments,' including comprehensive, universal, portable, publicly administered and accessible health care; adequate social services and social benefits; high quality education; the rights of workers to organize and bargain collectively; and the integrity of the environment. The Committee explained its preference for a social covenant framed in terms of constitutional commitments, rather than justiciable social rights, on the grounds that:

> While these commitments are in many ways as important to Canadians as their legal rights and freedoms, they are different. These commitments express goals, not rights and they embrace responsibilities of enormous scope. Therefore, while these are appropriate subjects for constitutional recognition, elected governments should retain the authority to decide how they can best be fulfilled. We believe that the matters addressed in the Social Covenant are best resolved through democratic means.

The Committee acknowledged, however, that in order for the commitments contained in the covenant to 'be more than merely words,' governmental compliance must be subject to some form of public review. The Committee recommended that this review be carried out by a specialized commission, which would hold public hearings and table periodic reports in Parliament and in provincial and territorial legislatures.

The Case against Justiciability

The unwillingness reflected in [these proposals] to support a social charter containing justiciable social rights is shared by many constitutional scholars and others on the left. Criticism is based on three main arguments.

The first argument against the entrenchment of justiciable social rights is based on perceived distinctions between classical and social rights, and their appropriateness as a matter for judicial review. Classical, or 'negative' rights, it is argued, reflect natural and inherent traits in human beings. In order for these traits to become rights, the state need only recognize their existence and refrain from interfering with them. Social or 'positive' rights, on the other hand, do not come into existence automatically upon their recognition. Rather, the state must act affirmatively to create them or to ensure the conditions necessary for their enjoyment. And, while the content of classical rights is seen as relatively universal and precise, social rights are considered highly subjective and imprecise in character.

These differences have significant implications for the role of the judiciary. . . . To vindicate a claim for social rights, however, the court may have to order the state to act affirmatively, in some more or less specific way. Such judicial remedies will often require substantial and long-term state intervention and expenditure. Because of the contingent nature of social rights, and the lack of objective standards in this area, many fear that judges deciding social rights claims will substitute their own values for those of democratically elected, and accountable, legislatures. In enforcing social rights, courts will effectively engage in social policy making, forcing governments to expend public funds in ways they did not plan or choose. In addition to eroding public confidence in the independence and integrity of the judiciary, it is claimed that this usurpation of policy making by the courts will lead to an abdication of responsibility by governments, and to frustration and eventual apathy in voters. . . .

Social rights and judicial competence

A second set of arguments against justiciable social rights suggests that courts are institutionally incompetent to deal with the complex social, political and resource allocation issues which would inevitably be raised by individual social rights claims. For a number of reasons, including the complexity of judicial procedures, the incomprehensibility of judicial language, the formality and adversarial nature of judicial process, and the prohibitive cost of litigation, courts are virtually inaccessible to the poor.

. . . In remedying social rights violations, courts will potentially be required to tell governments what benefits or services they must provide, and in what quality or quantity. Such determinations require a thorough grasp of social and economic conditions in the society, as well as knowledge of public perceptions of the community's needs and means. Legislatures, and not courts, it is argued, are in the best position to make the complex judgements which these questions require.

The pursuit of rights as a mechanism for social change

A final objection to justiciable social rights reflects broader concerns relating to rights-seeking as a form of social action and as a mechanism for social change. In one variant of the critique, the pursuit of rights is seen as a new and damaging social trend which pits individualistic American-style conceptions of citizenship against traditional Canadian collectivist visions of the relationship between individual, community, and the state. In this conception, the individual as bearer of rights is seen as an incomplete and flawed construction of personhood, or as one commentator describes it, 'an emaciated, juridical conception of ourselves.'

More prominent in legal critiques of rights and rights-seeking is the argument that the constitutional entrenchment of rights represents a 'liberal lie,' promoting a false expectation in disadvantaged individuals and groups that the pursuit of legal rights through the courts can effect lasting social change, or that formal recognition of rights can have any real transformative impact on underlying social institutions, values, and conditions. Rights, it is claimed, operate instead to perpetuate existing power structures in society, and to channel potentially radical demands for change into legal claims which, by definition, will not be disruptive of the social and economic *status quo*.

An Assessment of the Social Rights Critique

. . . The distinction between negative and positive rights is . . . open to serious challenge. Once one moves beyond the most personal of human rights—such as the right to freedom of conscience or belief—the arguments that classical rights reflect natural and inherent traits in human beings, that they are absolute in character, or that their recognition imposes negligible costs on the state, are hard to sustain.

. . .

It is important to realize that traditional distinctions between classical or negative rights, and social or positive rights, and the willingness to provide for judicial enforcement of one but not the other, operate in fact to discriminate against the poor. To be in a position to complain about state interferences with rights, one has to exercise and enjoy them. But without access to adequate food, clothing, income, education, housing and medical care, it is impossible to benefit from most traditional human rights guarantees. . . .

From the perspective of the disadvantaged, arguments relating to democracy and judicial legitimacy must also be reassessed. The insistence that courts are incompetent to engage in social policy making ignores their historic and continuing intervention in this area. Courts create social policy not only in their interpretation of the *Canadian Charter of Rights and Freedoms*, but also in interpreting federal and provincial economic, labour, environmental and other legislation, as well as in their resolution of private law disputes. . . . The view that justiciable social rights are inimical to democracy fails to recognize

the role of the courts as an avenue for challenges to the antidemocratic behaviour of Parliament and its delegates. It also fails to consider the extent to which social rights can, by expanding the number of participants and the quality of participation, enhance democratic decision making by elected governments and other public institutions.

Critiques of rights-seeking must also be re-examined. The argument that meaningful social change cannot be achieved through the pursuit of legal rights suggests that the judiciary is somehow distinct from ordinary politics and government, and that legal institutions, legal reasoning, and litigation are not legitimate arenas for social action and debate. By failing to accept judicial challenges and rights-seeking as legitimate strategies for reform, the anti-rights critique recreates the dichotomy, challenged by progressive lawyers since the 1920s, between politics and law.

While the socially and economically disadvantaged may not be adequately represented by the courts, neither are they well represented by other branches of government. If judicial representation and access are a real concern, reforms of the judicial appointments process and judicial procedure are a more effective response than excluding the claims of the disadvantaged from the courts.

. . .

Conclusion

. . .

[A] constitution is more than a legal document. It is a highly symbolic and ideologically significant one—reflecting both who we are as a society, and who we would like to be. Inclusion of certain rights and principles in the constitution says a great deal about their stature and importance; omission of others has the same effect. . . .

QUESTIONS

1. Assess Jackman's analysis in light of the following arguments against a social charter for Canada, made by another commentator, Bakan.

> (a) [A] government might argue that its decision to lower or refuse to raise social assistance rates or minimum wages is justified because the current or new rate is equal to or higher than the minimum rate required by the social charter (as determined by an enforcement agency, or the government's own legal advisors). Ironically, along these lines, a social charter might actually *prompt* governments to cut spending and lower regulatory standards where the minimum levels determined to be acceptable under a social right are lower than the existing ones. . . .

(b) By necessity, an effective social charter will make some social goals priorities over others, and these priorities, not to mention the trade-offs they will require, may be undesirable from the perspective of many on the left and in social movements. Not all would agree, for example, that spending on health or education, each explicitly protected by a social right, is more important than spending on shelters for battered women, First Nations media and advocacy groups, foreign aid, or public broadcasting, to take just a few programs that might not come to be within the scope of social charter protection. . . .

(c) [For many] supporters, . . . a social charter would be a symbol of citizenship for economically disadvantaged and disempowered people; its absence would symbolize a denial of that citizenship. As well, they point out, the symbolism of social rights would inspire and mobilize people to demand from governments fulfillment of social obligations. I find little comfort in these arguments and I am concerned that the symbolism of social rights might backfire badly. One of the symbolic effects of a social charter, for example, might be to obscure and go some way towards legitimating a reality of social wrongs. . . . My concern is that social rights themselves may be understood as remedies for social inequality, and this will obfuscate the continuing need for social change. . . .[20]

2. Does Bakan's third proposition also challenge arguments to the effect that rights rhetoric is useful in the social field as a mobilizing agent and as a means of elevating the moral status of the claim?

3. Consider the justiciability of the claims made by the plaintiff in the following situations. Assume that State X has ratified both Covenants. (a) State X has legislated a plan administered by a government agency to provide food stamps for people below a certain income level. The plaintiff sues the agency because he has been denied stamps on the grounds that his higher income (as calculated by the agency pursuant to its formula interpreting the legislation) disqualifies him from the plan. (b) The plaintiff sues the agency on the ground that the plan disqualifies and thus illegally discriminates against people who have not lived in X for the past year. (c) X has failed to develop a national food strategy; it has no legislation providing food for the poor. The plaintiff argues that X is in violation of the ICESCR and requests the court to order the X legislature to draw up and enact such legislation at once.

4. 'It's not only with respect to economic and social rights that the role of courts has been overstated by human rights advocates. Only in a few states, and most of them concentrated in the West, have courts played vital roles in a state's development of civil and political rights. For the most part, respect by government for such rights has grown out of political battles, and sometimes violent battle.' Comment.

[20] Joel Bakan, What's Wrong with Social Rights, in J. Bakan and D. Schneiderman (eds.), Social Justice and the Constitution: Perspectives on a Social Union for Canada 85 (1992).

5. 'At least the courts in democratic states can work out of coherent traditions in giving content to and developing basic civil and political rights, like fair process in criminal trials, or equal protection, or free speech. But what guides are available to courts when they work with such nebulous conceptions in the ICESCR as a right to food, or health? Where do they turn—unlike a legislature, which turns to the full political process of interest groups, debate and elections?' Comment.

NOTE

Another technique for promoting economic and social rights, additional to making them justiciable, involves the inclusion of 'directive principles' in a constitution. Such principles are considered to be distinct from, and usually inferior in status to, rights that appear in the constitution without the qualification 'directive'. These principles appear in different forms in diverse constitutions including those of Ireland, Papua New Guinea and Nigeria.

It is the Indian experience, however, that holds the greatest interest for our purposes. With the fall of *apartheid* and the first democratic elections in South Africa in the early 1990s, considerable attention was given to the desirability of that country's following the Indian model by including social rights as directive principles in a new constitution.[21] The Indian Constitution of 1950 contains one chapter dealing with 'fundamental rights' (Part III) which consists largely of civil and political rights, and another (Part IV) dealing with 'directive principles of state policy.'

THE CONSTITUTION OF INDIA

in Albert Blaustein and G. Flanz, Constitutions of the Countries of the World, Release 94–7 (1994), at 77.

PART IV

. . .

39. The state shall, in particular, direct its policy towards securing—

(a) that the citizens, men and women equally, have the right to an adequate means of livelihood;

[21] See Patrick Macklem and C. Scott, Constitutional Ropes of Sand or Justiciable Guarantees?: Social Rights in a New South African Constitution, 141 U. Penn. L. Rev. 1 (1992); Nicholas Haysom, Constitutionalism, Majoritarian Democracy and Socio-Economic Rights, 8 S. Af. J. Hum. Rts. 451 (1992); Etienne Mureinik, Beyond a Charter of Luxuries: Economic Rights in the Constitution, *ibid.*, 464. See also Frederic Fourie, The Namibian Constitution and Economic Rights, 6 S. Af. J. Hum. Rts. 363 (1990).

(b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;
(c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment;
(d) that there is equal pay for equal work for both men and women;
(e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength;
(f) that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.

. . .

41. The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want.

42. The State shall make provision for securing just and humane conditions of work and for maternity relief.

. . .

46. The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.

47. The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties . . . .

NOTE

Over the years the Indian courts as well as the legislature have redefined the relationship between fundamental rights and directive principles. The important element in the present context is the extent to which the directive principles have gone from being clearly non-justiciable to providing the basis of a right of action at first instance before the Indian Supreme Court. The relationship between the two has been summarized as follows:[22]

. . .

[22] B. De Villiers, The Socio-Economic Consequences of Directive Principles of State Policy: Limitations on Fundamental Rights, 8 S. Af. J. Hum. Rts. 188, 198 (1992).

(i) The Constituent Assembly, after thorough consideration, decided to provide for two chapters in the Constitution dealing with fundamental rights. The fundamental rights are justiciable and provide for a wide range of civil, political, cultural, economic and social rights. The directive principles of state policy are not justiciable, but as the soul of the Constitution provide the framework according to which governments of the future should act. In more than one sense the directive principles constitute a social contract to which political parties have to conform.

(ii) The fundamental rights are central to individual rights and freedoms and form the basis of a democratic state. The directive principles are the backbone of state action and planning, and emphasize the socio-economic responsibility of the state towards its citizens.

(iii) The Constituent Assembly realized the importance of these two sets of principles being used in tandem in government and administration. Fundamental rights were regarded as essential to democratic processes, but they would be of no avail to a poverty-stricken society.

(iv) The Supreme Court has gone through various phases in interpreting the relationship between fundamental rights and directive principles. Initially there was a firm adherence to the supremacy of fundamental rights. After several constitutional amendments, public debate and disputes over court decisions, the Supreme Court has adopted a more balanced and integrated approach in order to interpret harmoniously the two chapters.

(v) The current attitude of the Supreme Court is that fundamental rights should be understood within the framework of directive principles. Legislation which may limit fundamental rights is upheld if it is reasonable, in the public interest and shows a clear nexus with the directive principles.

. . .

UPENDRA BAXI, JUDICIAL DISCOURSE: THE DIALECTICS OF THE FACE AND THE MASK

35 J. of the Indian Law Institute 1 (1993), at 7.

[In this reading Baxi describes the way in which the directive principles have been used in the context of what is sometimes called 'public interest litigation,' or what he prefers to term 'social action litigation' (SAL).]

. . . The procedure is that of epistolary jurisdiction, where letters written by ordinary citizens to courts get converted into writ petitions. And these letters do not allege violation of fundamental rights of their authors; the authors allege such violation of the rights of the impoverished groups of Indian society—be they people in custody, victims of police violence, forced, bonded, migrant, contract labour, child workers, rickshaw pullers, hawkers,

self-employed people, pensioners, pavement dwellers, slum dwellers, fishermen or Sri Lankan Tamils used as bonded labourers. The law of standing, that is persons who can bring complaints of rights-violation, has been thus revolutionised; and access to constitutional justice has been fully democratised.

The second major procedural innovation brought in by SAL is the collection of social data and legal evidence concerning the plight of these impoverished groups. Courts now appoint socio-legal commissions of public citizens, social scientists and others to examine the conditions alleged to be violative of people's rights; and the reports of the commission, constituted at state expense, provide the material for doing justice. Increasingly, universities and research institutes are directed by the court to function as commissions.

. . .

The third major aspect of the SAL is in the area of relief. Compensation and rehabilitation for victims deprived of their fundamental rights now constitute a constitutional right; the Supreme Court undertook a detailed monitoring of the rehabilitation of the blinded of Bhagalpur and since then has fashioned many a measure of compensation and rehabilitation; it has ordered the administration of theosuplhate [sic] injections to the Bhopal victims and upheld the constitutional validity of the Bhopal Act by reading into it the obligation to provide monthly interim relief . . . ; it has provided elaborate directives for treatment of prisoners and undertrials in jails; it has given specific directives for humane and just conditions of work for migrant workers and forced labourers.

The fourth salient aspect of the SAL is the development of constitutional jurisprudence itself. The right to compensation for violation of fundamental rights is now fully emergent. Indians have now a right to speedy trial though nowhere explicitly formulated by the Constitution. The custodial inmates have a right to dignity and immunity from cruel, unusual or degrading treatment. . . . Above all, the jurisprudence of SAL insists on a simple postulate of civilised jurisprudence: administration shall act in accordance with the law and the Constitution. This is a monumental achievement of SAL jurisprudence as this insistence has been vividly and memorably, in concrete contexts of the growing lawlessness of the state [sic].

Fifth, without being exhaustive, the SAL processes have at times resulted in a mini-takeover of the administrative regime of certain institutions of administration, which have displayed a congenital inability to work in accordance with the law and the Constitution. The most conspicuous illustration of this, perhaps, is the Agra Protective Home for Women, virtually run by the judiciary for well over ten years. The Supreme Court is doing its best to enable, by constant invigilation, the State of Bihar to ensure proper prison administration, to the point of maintenance of the record of undertrial and convict populations in the various jails of Bihar. In environmental cases, the Supreme Court has ordered the closure or monitored the pollution potential of private

industries. The State High Courts have not lagged behind in these and related areas.

. . .

But when, at the end of the day, judicial orders arrive, the executive is left with a series of rather painful choices. To implement them is to engage in tasks of renovation of power which the executive loathes in the first place: *e.g.*, appointment of vigilance committees under the bonded labour law, prosecution of officers allegedly guilty of blindings, torture and tyrannies, expansion of the minimum wage of factories inspectorate, avoidance of sex-based discrimination in public works, including famine relief, running of remand homes for women and juvenile institutions in accordance with its own declared laws and policies, and reformation of jails. The SAL outcomes are not perceived as opportunities to reshape power but rather as obstacles in the exercise of *real* power.

. . .

. . . Constitutional adjudication in SAL becomes, then, a dialogue between judiciary and executive on the nature of public power and its public purposes. The executive has yet to accept the role of the pupil, although the courts have all too eagerly donned the didactic robes of pedagogues for democracy and constitutionalism.

QUESTIONS

1. Does the 'access-to-justice' approach provide a persuasive response to those who argue that the inappropriateness of adjudication renders economic and social rights unfit to be characterized as human rights at all?[23]

2. In light of the Indian SAL experience as described by Baxi, is it desirable for 'constitutional adjudication' to have become 'a dialogue between judiciary and executive on the nature of public power and its public purposes'? From the perspective of promoting human rights, is it desirable for the judiciary to have 'donned the didactic roles of pedagogues for democracy and constitutionalism'?

3. Consider the arguments listed by Jackman against a justiciable social charter in light of the experience with SAL in India.

[23] For a more detailed exploration of these issues see M. Cappelletti, The Judicial Process in Comparative Perspective (1989).

F. DEVELOPMENT BY STATES OF A PROGRAMMATIC APPROACH

It has often been observed that, for the promotion of economic and social rights, the principal alternative to reliance on judicial remedies is a programmatic approach. Although there is no single structure for such an approach, it generally implies the formulation of a program of action aimed at ensuring the realization of the right in question, with the government playing a more or less central role. The program might also provide for participation in decision-making by those affected.

One formulation of a programmatic approach has been called 'access to justice'. The following reading, which is taken from an analysis prepared in the context of a review of new options for promoting human rights within the framework of the European Union (known then as the Community), explains what such an approach implies.

The second reading addresses the issue of whether a programmatic approach can be effective in practice. Drèze and Sen focus on what they see as the indispensable role of public action in relation to the elimination of hunger.

CASSESE, CLAPHAM AND WEILER, 1992—WHAT ARE OUR RIGHTS?: AGENDA FOR A HUMAN RIGHTS ACTION PLAN

in A. Cassese et al., Human Rights and the European Community: Methods of Protection 1 (1991), at 57.

[The authors argue that the 'normative-judicial model,' premised on judicial review, has shortcomings which are generally overlooked. They include: (1) various societal groups—for cultural, linguistic, socio-economic and other reasons—will be unaware of the possibility of their seeking judicial review; (2) for reasons of cost or standing, marginally-affected individuals will rarely take an issue to court; (3) an individual might not even be aware that her rights (e.g. to privacy) have been violated; and (4) the reluctance of many judges to address issues with major implications for public expenditure.]

. . .

The normative-judicial model must be complemented by an approach which insists on effective vindication over and above the normative content and judicial enforcement.

Again, for the sake of convenience only, we would like to refer to the com-

plementary approach as the 'Access-to-Justice' approach—denoting the range of procedural devices developed to make rights truly effective.

. . .

2. *Differentiation*

Clearly the key weakness of the normative-judicial model is that it treats, for most purposes, all rights in the same way in terms of their method of vindication. . . . Clearly, in the field, say, of data protection, an administrative provision such as a Commissioner for Data Protection and a requirement that public authorities report on any plan to open a new data base which would include personal information on individuals (such as we find in, for example, the British and the German systems) would be as important and maybe even more important than a simple judicial remedy for a violation of privacy. Clearly in fields such as consumer protection or environmental protection, where interests and rights are diffuse and fragmented, consideration of different rules of standing may be called for . . . .

. . .

3. *Information*

. . . [E]ach right, depending on its addressees—whether private individuals or public authorities—calls for a different approach to disseminating the content of the right and the means for its vindication. Sometimes legislation is enough. Other times one would have to make a concerted effort to cross cultural, socio-economic and other barriers in order to inform potential victims of their rights. In practically all Member States, large sums of social benefits remain each year uncollected by persons with entitlements—i.e. persons whom society has deemed it right should enjoy these entitlements. The usual reason is simply ignorance.

4. *Impact and means*

[I]t is necessary when discussing [economic and social rights] to consider the financial resources necessary for their vindication, and the impact that consecration of such a right may have on the state.

The converse . . . could be the requirement in fields such as environmental protection that new legislation and new public policies in diverse areas should be accompanied by impact studies on, say, the ecological balance of the environment. In the long run, such a requirement, by rendering the policy formation more transparent, may be as beneficial as an individual right which is to be protected by the judges.

5. *Proceduralization*

Under this heading one would have to investigate the different legal procedural devices which should accompany each right or cluster of rights. Should

the right be available only against violations by public authorities (vertical vindication) or also against private bodies (horizontal vindication)? What time limitations, if any, should be imposed? What rules of standing should apply? What kind of legal aid should be available and from whom, etc.?

6. *Institutionalization*

In the same vein, it is clear that different rights, or different clusters of rights, may require different institutional arrangements for their vindication. Here one may consider such centralized institutions as a Community Commissioner on Human rights whose task it would be to monitor and generally supervise the status, content, and vindication of human rights in the Community. But it is more likely that decentralized institutional arrangements such as advice bureaux may eventually be more effective.

. . .

NOTE

Discussions of the right to food often involve the assumption that if there is a lack of available food in a given situation, it is impossible for the government concerned to remedy the problem. But Amartya Sen has shown that 'food availability decline' has often been absent in famine situations.

> Starvation is the characteristic of some people not *having* enough food to eat. It is not the characteristic of there *being* not enough food to eat. While the latter can be a cause of the former, it is but one of many *possible* causes. Whether and how starvation relates to food supply is a matter for factual investigation. (*Poverty and Famines: An Essay on Entitlement and Deprivation* (1981) at 1.)

He shows, for example, that in the Great Bengal Famine of 1943, which claimed between 1.5 and 3 million victims, food may not have been plentiful but there was no less of it than in previous and subsequent years (in which there were no famines). The disaster was therefore due to factors other than a lack of food. They included: a war-related boom; speculation and panic hoarding; administrative ineptitude and chaos; a decline in the relative purchasing power of agricultural laborers; and the fact that, for political reasons, a famine was never declared. That omission resulted in a failure to trigger preplanned policy responses appropriate to such situations (*ibid*, pp. 52–83).

In a later analysis, Drèze and Sen argue that there is an essential role for public action in eliminating both famines and persistent food deprivation.

DRÈZE AND SEN, HUNGER AND PUBLIC ACTION (1989), at 257.

. . .

In the field of famine prevention, the decisive role of public action is illustrated not only by the elimination of famines in India since independence, but also by the unsung and underappreciated achievements of many African countries. These experiences firmly demonstrate how easy it is to exterminate famines if public support (e.g., in the form of employment creation) is well planned on a regular basis to protect the entitlements of vulnerable groups. Ensuring that the concerned governments take early and effective steps to prevent a threatening famine is itself a matter of public action. It is also clear that the eradication of famines need not *await* a major breakthrough in raising the per-capita availability of food, or in radically reducing its variance (even though these goals are important in themselves and can be—and must be—promoted in the long run by well-organized public policy). Public action can decisively eliminate famines *now*, without waiting for some distant future.

Regarding the elimination of regular, persistent deprivation (as opposed to the eradication of intermittent famines), the analysis presented here has indicated the positive contribution that can be made by public provisioning (especially of education and health services) and more generally by public support (including such different policies as epidemiological control, employment generation and income support for the vulnerable). Expectations based on general reasoning are, in fact, confirmed by the empirical experiences of different countries.

Public support in these different forms has played a major part in combating endemic deprivation not only in economies that are commonly seen as 'interventionist' (e.g., China, Costa Rica, Jamaica, Sri Lanka), but also in the market-oriented economies with high growth (e.g., Hong Kong, Singapore, South Korea); . . . . Indeed, the contrast between what was called 'growth-mediated security' (as in, say, South Korea) and 'unaimed opulence' (as in, say, Brazil) relates closely to the extensive and well-planned use of public support in the former cases, in contrast with the latter . . . .

When it comes to enhancing basic human capabilities and, in particular, beating persistent hunger and deprivation, the role played by public support—including public delivery of health care and basic education—is hard to replace.

The crucial role of public support in diverse economic environments is well illustrated by the intertemporal variations in the experience of China. The radical transformation in the health and nutritional status of the Chinese population (visible *inter alia* in a sharp increase in life expectancy, a dramatic decline of infectious and parasitic diseases, and improved anthropometric indicators) took place *before* the reforms of 1979, at a time of relatively moderate growth of GNP but enormously effective public involvement in the promotion

of living conditions. The post-reform period has seen an impressive acceleration in the growth of GNP and private incomes, but also a crisis of public provisioning (especially of health services), and an *increase* in mortality. Much more is involved in increasing human capabilities—and in preventing their decline—than the stimulation of economic growth through revamping private incentives and market profits.

We have also discussed how the crucial role of public support in removing endemic deprivation is visible not only in the achievements and failures of developing countries today, but also in the historical experiences of the rich and industrialized countries. This is well illustrated by the sharp increases in longevity in Britain during the decades of the world wars, which were periods of rapid expansion of public support in the form of public food distribution, employment generation and health care provisioning (not unconnected with the war efforts). There is nothing particularly *ad hoc* in the findings regarding the contribution of public support to human lives in the developing countries today.

Public action is not, of course, just a question of public delivery and state initiative. It is also, in a very big way, a matter of participation by the public in the process of social change. As we have discussed, public participation can have powerful positive roles in both 'collaborative' and 'adversarial' ways *vis-à-vis* governmental policy. The collaboration of the public is an indispensable ingredient of public health campaigns, literacy drives, land reforms, famine relief operations, and other endeavours that call for cooperative efforts for their successful completion. On the other hand, for the initiation of these endeavours and for the government to act appropriately, adversarial pressures from the public *demanding* such action can be quite crucial. For this adversarial function, major contributions can be made by political activism, journalistic pressures and informed public criticism. Both types of public participation—collaborative and adversarial—are important for the conquest of famines and endemic deprivation.

To emphasize the vital role of public action in eliminating hunger in the modern world must not be taken as a general denial of the importance of incentives, nor indeed of the particular role played by the specific incentives provided by the market mechanism. Incentives are, in fact, central to the logic of public action. But the incentives that must be considered are not only those that offer profits in the market, but also those that motivate governments to implement well-planned public policies, induce families to reject intrahousehold discrimination, encourage political parties and the news media to make reasoned demands, and inspire the public at large to cooperate, criticize and coordinate. This complex set of social incentives can hardly be reduced to the narrow—though often important—role of markets and profits.

. . .

QUESTION

Drèze and Sen see a decisive role for public action. Does this necessarily involve a comprehensive programmatic approach? Vierdag (see p. 279, supra) has argued that the term 'programmatic' automatically implies that the 'so-called right' is not enforceable by the individual 'in a court of law or similar body.' Is the public participation, both collaborative and adversarial, of which Drèze and Sen speak sufficient in itself to provide the necessary element of governmental accountability?

G. INTERNATIONAL SUPERVISION BY THE ICESCR COMMITTEE: CASE STUDY OF HOUSING

Neither the UN Commission nor its Sub-Commission has been very active in relation to the implementation of economic, social and cultural rights. The principal responsibility has thus fallen to the ICESCR Committee, established in 1987 to supervise compliance by states parties with their obligations under the ICESCR.

In many respects, the Committee functions in the same way as the ICCPR Human Rights Committee, examined in Chapter 9, *infra*. On the basis of regular reports submitted by states parties in accordance with the Committee's 'reporting guidelines', and of its own deliberations during 'days of general discussion' and in the drafting of 'general comments,' the ICESCR Committee seeks to achieve three principal objectives: (1) development of the normative content of the rights recognized in the Covenant; (2) acting as a catalyst to state action in developing national 'benchmarks' and devising appropriate mechanisms for establishing accountability, and providing means of vindication to aggrieved individuals and groups at the national level; and (3) holding states accountable at the international level through the examination of reports.

In the following case study of the right to adequate housing we consider the type of reports that the Committee has sought to elicit through its guidelines, the use it has made of 'general comments' to develop the content of the right, and the outcome of the examination of a report on the Dominican Republic. The 'concluding observations' on that report that are excerpted constitute the final stage in a process involving: the submission of the governmental report, receipt by the Committee of detailed NGO information, a detailed discussion of the relevant issues by the Committee and representatives of the Dominican Government, and drafting by the Committee in closed session of its observa-

tions. Those observations are then made public at the same time as they are provided to the government concerned.

COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, REPORTING GUIDELINES

UN Doc. E/1991/23, Annex IV.

[These guidelines, adopted by the Committee in 1991 and subject to revision over time, regulate the form and contents of the reports that states parties to the ICESCR are required to submit. An initial report is required within two years of ratification and periodic reports are due every five years thereafter.]

The right to adequate housing

(a) Please furnish detailed statistical information about the housing situation in your country.

(b) Please provide detailed information about those groups within your society that are vulnerable and disadvantaged with regard to housing. Indicate, in particular:

(i) The number of homeless individuals and families;

(ii) The number of individuals and families currently inadequately housed and without ready access to basic amenities . . . ;

(iii) The number of persons currently classified as living in 'illegal' settlements or housing;

(iv) The number of persons evicted within the last five years . . . .

. . .

(c) Please provide information on the existence of any laws affecting the realization of the right to housing.

(d) Please provide information on all other measures taken to fulfil the right to housing, including:

(i) Measures taken to encourage 'enabling strategies' whereby local community-based organizations and the 'informal sector' can build housing and related services. Are such organizations free to operate? Do they receive Government funding?

(ii) Measures taken by the State to build housing units and to increase other construction of affordable, rental housing;

(iii) Measures taken to release unutilized, under-utilized or mis-utilized land;

(iv) Financial measures taken by the State including details of the budget of the Ministry of Housing or other relevant Ministry as a percentage of the national budget;

. . .

4. Please give details on any difficulties or shortcomings encountered in the fulfilment of the rights enshrined in article 11 and on the measures taken to remedy these situations (if not already described in the present report).

COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, GENERAL COMMENT No. 4 (1991)

UN Doc. E/1992/23, Annex III.

The right to adequate housing (art. 11 (1) of the Covenant)

1. Pursuant to article 11 (1) of the Covenant, States parties 'recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions'. . . .

. . .

7. In the Committee's view, the right to housing should not be interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one's head or views shelter exclusively as a commodity. Rather it should be seen as the right to live somewhere in security, peace and dignity. . . .

8. . . . While adequacy is determined in part by social, economic, cultural, climatic, ecological and other factors, the Committee believes that it is nevertheless possible to identify certain aspects of the right that must be taken into account for this purpose in any particular context. They include the following:

(a) *Legal security of tenure.* Tenure takes a variety of forms, including rental (public and private) accommodation, cooperative housing, lease, owner-occupation, emergency housing and informal settlements, including occupation of land or property. Notwithstanding the type of tenure, all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats. . . .
(b) *Availability of services, materials, facilities and infrastructure.* An adequate house must contain certain facilities essential for health, security, comfort and nutrition. All beneficiaries of the right to adequate housing should have sustainable access to natural and common resources, safe drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services;

(c) *Affordability*. Personal or household financial costs associated with housing should be at such a level that the attainment and satisfaction of other basic needs are not threatened or compromised. Steps should be taken by States parties to ensure that the percentage of housing-related costs is, in general, commensurate with income levels. . . .

(d) *Habitability*. Adequate housing must be habitable, in terms of providing the inhabitants with adequate space and protecting them from cold, damp, heat, rain, wind or other threats to health, structural hazards, and disease vectors. . . .

(e) *Accessibility*. Adequate housing must be accessible to those entitled to it. Disadvantaged groups must be accorded full and sustainable access to adequate housing resources. . . .

(f) *Location*. Adequate housing must be in a location which allows access to employment options, health-care services, schools, child-care centres and other social facilities. This is true both in large cities and in rural areas where the temporal and financial costs of getting to and from the place of work can place excessive demands upon the budgets of poor households. Similarly, housing should not be built on polluted sites nor in immediate proximity to pollution sources that threaten the right to health of the inhabitants;

(g) *Cultural adequacy*. The way housing is constructed, the building materials used and the policies supporting these must appropriately enable the expression of cultural identity and diversity of housing.

. . .

10. Regardless of the state of development of any country, there are certain steps which must be taken immediately. . . . [M]any of the measures required to promote the right to housing would only require the abstention by the Government from certain practices and a commitment to facilitating 'self-help' by affected groups. To the extent that any such steps are considered to be beyond the maximum resources available to a State party, it is appropriate that a request be made as soon as possible for international cooperation in accordance with articles 11 (1), 22 and 23 of the Covenant, and that the Committee be informed thereof.

. . .

12. While the most appropriate means of achieving the full realization of the right to adequate housing will inevitably vary significantly from one State party to another, the Covenant clearly requires that each State party take whatever steps are necessary for that purpose. This will almost invariably require the adoption of a national housing strategy. . . . [S]uch a strategy should reflect extensive genuine consultation with, and participation by, all of those affected, including the homeless, the inadequately housed and their representatives. . . .

13. Effective monitoring of the situation with respect to housing is another obligation of immediate effect. For a State party to satisfy its obligations

under article 11 (1) it must demonstrate, *inter alia*, that it has taken whatever steps are necessary, either alone or on the basis of international cooperation, to ascertain the full extent of homelessness and inadequate housing within its jurisdiction. . . .

COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, CONCLUDING OBSERVATIONS ON THE REPORT OF THE DOMINICAN REPUBLIC

UN Doc. E/C.12/1994/15, at 3.

[The ICESCR Committee notes that 'detailed and precise information' that it has received over several years from NGO sources indicates, *inter alia*, that: 30,000 families in the Zona Norte are threatened with forced eviction; thousands of families have already been evicted from Faro a Colon and from other specified cities; 3,000 relocated families received neither compensation nor relocation allowances; and the housing conditions of some 750 families relocated after Hurricane David in 1979 are grossly inadequate. That information was relayed to the Government by the Committee.]

10. While the Government presented the Committee with information as to the achievements and shortcomings of its various policies in relation to housing, the Committee did not receive any information which would lead it to conclude that these problems do not exist or have been adequately addressed.

11. It therefore expresses its serious concern at the nature and magnitude of the problems relating to forced evictions and calls upon the Government of the Dominican Republic to take urgent measures to promote full respect for the right to adequate housing. In this regard, the Committee notes that whenever an inhabited dwelling is either demolished or its inhabitants evicted, the Government is under an obligation to ensure that adequate alternative housing is provided. . . .

. . .

13. . . . [T]he Committee was also informed that less than 17 per cent of Government-built housing units are provided to the poorest sectors of society.

14. On the basis of the detailed information available to it the Committee also wishes to emphasize its concern at the 'militarization' of La Cienaga–Los Guandules, the long-standing prohibition on improving or upgrading existing dwellings for the more than 60,000 residents of the area, and the inadequate and heavily polluted living conditions. The situation is especially problematic given that these communities were originally established as relocation areas for evictees in the 1950s. Since that time the Government has failed to confer legal security of tenure on residents or to provide basic civic services.

. . .

16. The Committee is also concerned at the effects Presidential decrees can and do have upon the enjoyment of the rights recognized in the Covenant. It wishes to emphasize in this regard the importance of establishing judicial remedies which can be invoked, including in relation to Presidential decrees, in order to seek redress for housing rights violations. The Committee is not aware of any housing rights matters that have been considered by the Supreme Court in relation to article 8 (15) (b) of the Constitution. In so far as this might be taken to indicate that the provision has not so far been subject to judicial review, the Committee expresses the hope that greater reliance will be placed upon it in future as a means by which to defend the right to adequate housing.

. . .

19. All persons residing in extremely precarious conditions such as those residing under bridges, on cliff sides, in homes dangerously close to rivers, ravine dwellers, residents of Barrancones and Puente Duarte, and the more than 3,000 families evicted between 1986–1994 who have yet to receive relocation sites . . . should all be ensured, in a rapid manner, the provision of adequate housing in full conformity with the provisions of the Covenant.

20. The Government should confer security of tenure on all dwellers lacking such protection at present, with particular reference to areas threatened with forced eviction.

. . .

23. The Committee requests the Government to apply existing housing rights provisions in the Constitution and for that purpose to take measures to facilitate and promote their application. Such measures could include: (a) adoption of comprehensive housing rights legislation; (b) legal recognition of the right of affected communities to information concerning any governmental plans actually or potentially affecting their rights; (c) adoption of urban reform legislation which recognizes the contribution of civil society in implementing the Covenant and addresses questions of security of tenure, regularization of land-ownership arrangements, etc.

24. In order to achieve progressively the right to housing, the Government is requested to undertake, to the maximum of available resources, the provision of basic services (water, electricity, drainage, sanitation, refuse disposal, etc.) to dwellings and ensure that public housing is provided to those groups of society with the greatest need. It should also seek to ensure that such measures are undertaken with full respect for the law.

25. In order to overcome the existing problems recognized by the Government in its dialogue with the Committee, the Government is urged to give consideration to initiatives designed to promote the participation of those affected in the design and implementation of housing policies. Such initiatives could include: (a) a formal commitment to facilitating popular participation in the urban development process; (b) legal recognition of community-based

organizations; (c) the establishment of a system of community housing finance designed to open more lines of credit for poorer social sectors; (d) enhancing the role of municipal authorities in the housing sector; (e) improving coordination between the various governmental institutions responsible for housing and considering the creation of a single governmental housing agency.

. . .

QUESTIONS

1. The ICESCR's key provision makes reference to resource constraints and progressive realization. In light of the wording of Art. 2(1), how do you assess the way the three preceding documents interpret and apply these provisions?

2. 'The housing standards in General Comment No. 4 are high, so high that they are way beyond the capacity of most states. To this extent they are not only unrealistic but ineffective. The Committee should instead have identified priorities indicating what all states must or must not do. Such standards could more readily be made operational.' Do you agree or disagree? What priorities would you suggest?

3. How do you evaluate the significance of the Committee's 'concluding observations'? Suppose the Dominican Republic does nothing in response. What recourse does the Committee have under the ICESCR? Could it have been more specific about what was to be done when, and demanded compliance reports?

ADDITIONAL READING

Matthew Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (1995); Philip Alston, *The Committee on Economic, Social and Cultural Rights*, in P. Alston (ed.), *The United Nations and Human Rights: A Critical Appraisal* 473 (1992); Bruno Simma, *The Implementation of the International Covenant on Economic, Social and Cultural Rights*, in F. Matscher (ed.), *The Implementation of Economic and Social Rights* 75 (1991); Scott Leckie, *Towards an International Convention on Housing Rights: Options at Habitat II*, (1994); and *An Overview and Appraisal of the Fifth Session of the UN Committee on Economic, Social and Cultural Rights*, 13 Hum. Rts Q. 545 (1991).

H. INTERNATIONAL ENFORCEMENT: IDENTIFYING VIOLATORS

The challenge is to see whether the various approaches that have been explored above are workable in practice and provide an adequate basis upon which the international community can proceed to evaluate the performance of states in relation to their obligations regarding economic and social rights. The two studies that follow provide an opportunity to test the utility of these approaches in the context of a variety of issues arising in different societies.

CHRISTIAN TOMUSCHAT, THE RIGHT TO HEALTH IN GUATEMALA

UN Doc. E/CN.4/1993/10, at 60.

[The Commission on Human Rights (Res. 1992/78) requested the UN Secretary-General to appoint an independent expert to examine the human rights situation in Guatemala. The expert, a German international law professor, submitted this report in 1993.]

223. . . . The Ministry of Public Health covers only 25 per cent of the population; the Guatemalan Social Security Institute (IGSS) covers 15 per cent, and the private sector 14 per cent. The total cover is thus 54 per cent of the population, concentrated exclusively in urban areas. This means that the remaining 46 per cent (i.e. 4.5 million people) is not provided with any kind of health service, not even a defective one. Most of these people are rural and indigenous. In addition, . . . the installations in 70 per cent of the country's 35 main hospitals are in a state of disrepair; many of them have already reached the end of their useful life. Basic equipment such as boilers, laundries, electricity plant, lifts, etc., are in a state of deterioration and in 45 per cent of the hospitals the support services such as radiology, laboratories, blood banks and sterilization facilities are described as '60 per cent in poor condition'.

224. In his written opinion of 9 April 1992 concerning the operating conditions in the Escuintla regional hospital, the Human Rights Procurator stated that 'the investigations carried out have shown that this hospital is in a very poor state which makes it difficult to operate normally. . . '.

225. In contrast, . . . the new departmental hospital of Huehuetenango . . . is of modern design and will have a capacity of 172 beds; its final cost, including equipment, is estimated at about 20 million United States dollars. However, the hospital will have to cater to the needs of a very large population (about 80,000 in the town and 600,000 in the department).

226. All these factors explain why the infant mortality rate remains high. Current data indicate that about 100 children die every day in Guatemala,

most of them from hunger and causes connected with malnutrition, and that 58 per cent of Guatemalan children aged between 3 and 36 months suffer from some degree of malnutrition; this figure rises to 72 per cent in rural and poor areas.

. . .

228. [An NGO, the] Human Rights Commission of Guatemala [has] reported . . . about the defects in health services in rural areas, where there is only one doctor for every 25,000 inhabitants [and] 80 per cent of the rural population does not have access to medical services. It adds that 68 per cent of health personnel works in hospitals, 25 per cent in health centres, and 7 per cent in rural communities; 45 per cent of the doctors live in the capital, where 20 per cent of the total population is concentrated.

NOTE

The Tomuschat report dealt primarily with abuses of civil and political rights but also, as this excerpt demonstrates, with issues of economic and social rights. In responding to the report, however, the Commission on Human Rights (Res. 1993/88) made no mention of the latter rights. It did invite the Government 'to give priority also to economic and social development programmes' (para. 13).

QUESTION

Guatemala ratified the ICESCR in 1988. Does the evidence contained in the report demonstrate any clear violations by the Government of its obligations under the Covenant? Under which provisions? How might Guatemala respond to a charge that it had violated the Covenant?

VAN DER STOEL, SITUATION OF HUMAN RIGHTS IN IRAQ

UN Doc. A/48/600 (1993).

[In the wake of Iraq's invasion of Kuwait in 1990 and its ouster in 1991, the Commission on Human Rights appointed a Special Rapporteur (a former Dutch Foreign Minister, Max van der Stoel) to examine alleged violations by the Iraqi Government. The violations related in particular to the Kurdish population in the north of Iraq, the Shi'ite population in the south and those living in the area of the southern marshes (the 'Marsh Arabs'). Iraq is a

party to the ICESCR. The following excerpt relates specifically to the 'Marsh Arabs'.

In previous reports the Special Rapporteur had concluded that the Government of Iraq was intent on de-populating the entire Marsh area because of its inhabitants' suspected opposition to the regime and the difficulties of policing such an area. It sought to achieve this goal through the re-settlement in 'secure' urban camps of all of the inhabitants of the area. This was to be achieved through instructions to re-locate as directed, backed up by military and police operations, the imposition of a total economic blockade and the drainage and destruction of the marshes.]

II. The Situation in the Southern Marsh Area

. . .

C. Violations of economic rights

. . .

34. In view of the Government of Iraq's obligations to take steps to provide for adequate food, clothing and housing and to achieve the highest standards of physical and mental health, the existence of prohibitions, restrictions and administrative requirements interfering with access constitute violations. Reports and testimonies indicate that such interferences exist and impact the Marsh Arabs in severe ways. For example, access to food rations is extremely limited for them because the system of food rationing employs the use of ration cards, which change periodically and for which recipients must be duly registered. However, this system assumes the prior possession of identification cards which . . . Marsh Arabs find extremely difficult to acquire in a considerable number of cases. Thus, the peculiar situation of the Marsh Arabs coupled with the registration process acts as an interference with their access to basic foodstuffs. In place of food rations, Marsh Arabs are left to acquire their provisions on the open market, which has been inflicted with hyper-inflation. Yet, even should they be able to afford provisions, testimonies allege that Government forces often confiscate acquired goods. . . .

35. Aside from the difficulties associated with the normal system of rationing, testimonies allege that, for those who previously had access, the Government stopped distributing rations within the marsh villages after the Gulf war of 1991. Instead, the Army is said to have established checkpoints which have the effect of stopping people from procuring food and other supplies in the towns. Moreover, other conditions on access to food rations within the towns have been reported: one witness claimed that he was refused his rations because he would not join the Army.

36. Access to health care is also said to be extremely limited for the Marsh Arab people. As in the case of access to food rations, the problem of identification cards also interferes with access to health care available through

the urban medical centres. Since Government doctors reportedly no longer come to the marsh villages, the population is left to its own means. Clandestine and illegal medical services are reportedly offered by individuals and groups operating on a humanitarian basis. . . .

37. In terms of needs, reports and testimonies indicate that malnutrition and disease are widespread within the marsh area. Waterborne diseases such as bilharzia are said to be rampant. . . .

. . .

39. Without a doubt, a major contributing cause to the increasing needs of the Marsh Arabs is the loss of their natural resources as the marshes have dried. While attacks on marsh settlements have resulted in the death of livestock, the greater cause of death of fish and animals is attributable to the depletion of water and the deterioration of that which remains. Reports, testimonies and video recordings indicate that the previously clean waters of the marshes have become toxic. This has also resulted in the loss of the Marsh Arabs' source of clean drinking water.

40. The precise cause and nature of the toxins in the water is unknown. Reports and testimonies allege that the Government has purposefully poisoned the waters through the introduction of chemicals and other poisons. Some witnesses claim to have observed the dumping of chemicals, while others recount how governmental authorities encouraged fishermen to pour bottled chemicals into the water, supposedly to improve their catches. However, the Special Rapporteur is much more of the opinion that the reduced waters have become stagnant and also extremely polluted by the huge amounts of industrial and agricultural waste, together with raw sewage, which have been running into the marshes subsequent to the destruction of urban water treatment facilities. In this connection, the Special Rapporteur notes the submission of the Government of Iraq in which the Government recounts damage caused to the environment through the discharge into surface water and soil of substantial amounts of 'various poisonous and dangerous chemical substances'—discharge resulting, according to the Government, from the destruction of civil installations by Allied bombing during the 1991 Gulf war (A/CONF.157/4, paras. 35–40 and annex I). Whatever the correctness of this explanation, the Special Rapporteur stresses that the Government of Iraq remains obliged to take steps to limit this discharge; . . .

41. . . . [T]he Special Rapporteur has also received reports, testimonies and photographs indicating that the agricultural region south-east of Amara has experienced significant flooding. Specifically, it has been reported that the farms and date orchards in [certain areas] were flooded in mid-June of 1993 just at the time of harvest; wheat, barley and rice crops were lost, and date orchards were destroyed.

42. . . . [T]he Government has apparently failed to respond to the factual situation irrespective of causes. For example, there are said to have been no efforts to ameliorate the situation of the Marsh Arabs. Vaccinations have

apparently also not been carried out, although the Government felt it appropriate to ask most humanitarian agencies operating in the south last year to leave. Moreover, testimonies allege that artillery bombardments of marsh villages are not followed by any efforts to assist the injured, innocent or not. Similarly, witnesses allege that there are no efforts to assist victims of mines which have been laid in the waters of the marshes and which may be hit by Marsh Arabs in their daily movements.

QUESTIONS

1. How would you describe, in legal terms, the precise obligations that the Special Rapporteur considers to have been violated?

2. Could these violations be dealt with as effectively under the rubric of civil and political rights? Which provisions of the ICCPR, to which Iraq is a party, apply?

3. Are the problems involved in proving violations of economic and social rights in this particular context such as to distinguish them, in some fundamental ways, from civil and political rights? Suppose the charge was that Iraq had failed to build enough hospitals or to provide enough food for the population. Would the distinction from civil and political rights be greater or lesser than in this case?

4. How would you assess a claim of the Iraqi Government that the absence of 'available resources' nullifies any obligation that it might otherwise have in relation to some, or all, of the issues raised by the Special Rapporteur?

5. Under what circumstances might it be acceptable for the Iraqi Government to drain the marshes? The Government claims that its objectives are: '(a) to wash away salt-encrusted soils; (b) to reclaim land for cultivation; and (c) to increase water available for irrigation' (UN Doc. A/48/600 (1993), para. 46). Does the Covenant oblige a government to desist from such activities even if undertaken in the name of national development?

6. Many of those affected in this case are indigenous peoples (the Ma'dan). Does this element make a fundamental difference in the principles you would endorse? To what extent do your principles draw upon notions of civil and political, rather than economic and social, rights?

ADDITIONAL READING

Asbjørn Eide, C. Krause and A. Rosas (eds.). *Economic, Social and Cultural Rights: A Textbook* (1994); Franz Matscher (ed.). *The Implementation of Economic*

and Social Rights (1991); Ralph Beddard and D. Hill (eds.), *Economic, Social and Cultural Rights: Progress and Achievement* (1992); Ellen Frankel Paul *et al.* (eds.), *Economic Rights* (1992); Partha Dasgupta, *An Inquiry into Well-Being and Destitution* (1993); Martha Nussbaum and A. Sen (eds.), *The Quality of Life* (1993); Joseph Wronka, *Human Rights and Social Policy in the 21st Century* (1992); A. Glenn Mower Jr., *International Cooperation for Social Justice: Global and Regional Protection of Economic/Social Rights* (1985); Craig Scott and P. Macklem, *Constitutional Ropes of Sand or Justiciable Guarantees: Social Rights in a New South African Constitution?*, 141 U. Penn. L. Rev. 1 (1992); Lammy Betten (ed.), *The Future of European Social Policy* (1989); Asbjørn Eide *et al.* (eds.) *Food as a Human Right* (1984); Krzysztof Drzewicki *et al.* (eds.), *Social Rights as Human Rights: A European Challenge* (1994); Amartya Sen, *Inequality Reexamined* (1992); David Harris, *The European Social Charter* (1984); Philip Alston, *U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy*, 84 Am. J. Int'l L. 365 (1990); Barbara Starck, *Economic Rights in the United States and International Human Rights Law: Toward an 'Entirely New Strategy'*, 44 Hastings L. J. 79 (1992); Danilo Türk, *The Realization of Economic, Social and Cultural Rights: Final Report submitted by the Special Rapporteur*, UN Doc. E/CN.4/Sub.2/1992/16; Human Rights Program, Harvard Law School and the François-Xavier Bagnoud Center for Health and Human Rights, *Economic and Social Rights and the Right to Health* (1995); Audrey R. Chapman (ed.), *Health Care Reform: A Human Rights Approach* (1994).

PART C

HUMAN RIGHTS INSTITUTIONS AND PROCESSES

Part C turns from the norms stressed in Part B to an examination of the international institutions embodying, developing, monitoring and enforcing those norms. The invention of institutions by the human rights movement has been among its most striking and important features. None of the institutions discussed in Part C existed before the end of World War II.

Neither Part B nor Part C can fully exclude the other and become an airtight compartment. Norms and institutions are too intricately and fundamentally connected. For example, several UN organs necessarily figured in the discussion in Chapter 3 of the development of the UDHR and ICCPR, as well as in the discussion in Chapter 5 of the ICESCR. In general, standard setting, the grandest achievement of the human rights movement's first half century, began within institutional processes. Similarly, the materials in Part C necessarily involve law making by international institutions in such varied settings as comments by committees on treaty texts or decisions by international courts.

Nonetheless our concerns here sharply change. They involve institutions as such, their constitutional structure, processes, functions, powers, and so on. Above all, we are here concerned with their role in 'enforcement' rather than standard setting.

Part C examines intergovernmental and non-governmental organizations, both universal and regional in scope, whose work basically involves international human rights. Its materials inevitably raise broader issues about international *organizations* or *institutions* as such.[1] An analogy to Part B is pertinent. There we gave some attention to characteristics of international law, as essential background to the study of international human rights norms. Here too we give some attention to characteristics of international organizations, again brief but sufficient for this book's purposes.

Chapter 6 introduces such broader characteristics of international institutions. The remaining chapters in Part C start with the UN human rights organs (or bodies), continue with non-governmental organizations, turn to the ICCPR Human Rights Committee to illustrate a treaty organ, and conclude with aspects of regional human rights organizations in Europe, the Americas and Africa.

[1] A word about terminology. The authors' text in this book uses the terms '*organization*' and '*institution*' more or less interchangeably. Excerpts from writings by other authors included in this book may, however, attach particular meanings to one or the other term. For example, some scholars of international 'organizations' view that designation as indicating possession of specific legal attributes, such as juridical personality and capacity to sue. From this perspective, the UN is the paradigmatic 'organization'. On the other hand the Human Rights Committee created under the ICCPR, a treaty *organ* or *body* (interchangeable terms), would not readily fit within such a meaning of the term. Some scholars view the term 'institution' as suggesting a richer and more complex and autonomous entity that goes beyond the form of a rudimentary organization that merely organizes states within a loose cooperative framework.

6

The Need for Institutions: Introductory Ideas

Except for non-governmental organizations, the international institutions and organs examined in Part C were created by multilateral treaties or derive their authority and legitimacy from such treaties. Customary law does not create institutions. These materials explore the more developed and complex institutional arrangements, going well beyond the kind of rudimentary organization created by a multilateral treaty that, say, provides only for periodic meetings of states parties to exchange views on a matter or draft conventions to be submitted to states for ratification.

Each of the five treaties here relevant—the Charter, the ICCPR, and the treaties creating the three regional human rights systems—creates a broad institution or one or more treaty organs that perform certain functions by exercising stated powers. To one or another extent, that institution or organ takes on a life of its own. It will have its own officials, staff and budget. Despite its pervasive links with the states parties (who are directly represented in the membership of many treaty organs such as the UN General Assembly or UN Commission on Human Rights), the institution or organ can be meaningfully considered separately from those parties (unlike, say, the 'rudimentary' form of organization described above). If in some major respects it depends on the states parties' 'will,' in other major respects it possesses autonomy. Thus an institution or organ may become a significant participant in international relations, adding to the traditional system of sovereign states and qualitatively changing the nature of international life.

The institutions here considered vary enormously. Even with respect to its human rights activities, the UN includes a panoply of organs of diverse constitution, competence and powers. On the other hand, the ICCPR creates only one organ, a committee of a radically different character from any UN organ. Despite some common attributes, each institution and organ considered in Part C has its distinctive character.

There follow excerpts from the Table of Contents of a leading treatise on the subject that suggest one framework for thinking about the constitution and operations of international institutions. They indicate the variety referred to above, how much choice states have, how many possibilities are before them when many states negotiate about the original design or the reform of

these institutions. The excerpts include the entire section of the Table of Contents on voting since a reading below draws on voting arrangements to illustrate its argument.

HENRY SCHERMERS, INTERNATIONAL INSTITUTIONAL LAW

(1980), at ix.

Table of Contents

. . .

Chapter Two. *Participants*
I. Full Members
A. Subjects of Membership
1. States
. . .
B. Entry into Effect of Membership
. . .
C. Termination of Membership
1. Withdrawal by the Member
. . .
2. Expulsion from the organization
. . .

Chapter Three. *General Rules for International Organs*
I. Composition of Organs
A. Size
B. Representation of Members
1. Representation by a delegation
. . .
d. Composition of delegations
. . .
(i) Governmental delegates
(ii) Delegates representing specific interests
(iii) Delegates from national parliaments
. . .
C. Use of Individual Experts
. . .
E. Equitable Representation of Interests
. . .
III. Powers
A. Attribution of Powers
B. Delegation of Powers
. . .

D. Implied Powers

. . .

Chapter Five. *Supervisory Organs*

I. Parliamentary Organs

. . .

D. Tasks
1. Control over the executive
2. Control over the budget

. . .

II. Judicial Organs

. . .

Chapter Six. *Decision-Making Process*

. . .

V. Voting
A. Unanimity
1. Consensus and unanimity
2. Organizations requiring unanimity
3. Exceptions to unanimity
B. Voting Power
1. Equality of voting power
2. Inequality of voting power
a. Permanent seats and weighted representation
b. Weighted voting
(i) Desirability
(ii) Existing systems
c. Veto
C. Required Majority
1. Kinds of majorities
2. Calculation of majorities
a. Majority of membership
b. Majority of the votes
c. Abstention
d. Absence
e. Invalid vote
3. Unqualified majority
a. Voting between two alternatives
b. Voting between several alternatives
c. Multiple elections
4. Two-thirds majority
5. Other qualified majorities
6. Qualified minorities
7. Factors influencing the majority to be preferred
a. The need for a decision
b. The effect of the decision
c. Structure and procedure of the decision-making organ
D. Methods of Voting
1. Simultaneous open voting

2. Roll-call or recorded vote
3. Secret vote
4. Vote by correspondence
5. Alteration of votes cast

E. Conditional Voting

Chapter Seven. *Financing*

. . .

Chapter Eight. *Legal Order*

. . .

II. Constitution

. . .

C. Amendment of the Constitution

. . .

III. Decisions of the Organization

A. Internal Rules

1. Rules on the functioning of the organization

. . .

B. External Rules

1. Recommendations

. . .

2. Declarations

. . .

3. Conventions

. . .

Chapter Ten. *Enforcement*

. . .

II. Supervision of the Implementation of Rules

A. Supervision by Other Members Acting on their Own Account

B. Supervision by or on behalf of the Organization

. . .

III. Official Recognition of Violations

. . .

V. Sanctions

A. Sanctions by the Organization

. . .

3. Suspension of representation

. . .

7. Expulsion from the organization
8. Sanctions through other organizations
9. Military enforcement

. . .

B. Sanctions by the Other Members

C. Sanctions against Individuals

D. Enforcement within the National Legal Order

. . .

COMMENT ON RELATIONS BETWEEN NORMS AND INSTITUTIONS

Imagine a human rights system consisting solely of the rules or principles growing out of treaties and customary law. That is, we 'assume away' the UN organs dealing with human rights issues, the organs under treaties like the ICCPR, and regional human rights organs. We do away entirely with the 'institutionalization' of norms in these different entities.

Simply imagining a human rights system shorn of its intergovernmental institutions and processes makes us realize how profoundly different the human rights movement would be. Only state governments and state institutions would be available to meet the need for development, monitoring and enforcement of norms. Of course one hopes that most states would take their obligations seriously, internally enforcing their treaty obligations through their own equivalent constitutional norms or through specific internalization of treaty norms (see Chapter 11). One also knows, however, that many states will not so act, and that some among them will engage in gross and systematic abuses. From the international perspective, human rights norms would be freely floating rather than anchored in any international regime, dependent for their effectiveness on the willingness of treaty parties to apply pressures to delinquent states.

Whatever the inadequacies of existing international human rights institutions, a state party to the basic treaties that commits serious violations would have much less to fear in such an imagined world. The state may have ratified the ICCPR and ICESCR without the intention of complying with essential norms of either one, thereby gaining some international respect and legitimacy from its formal participation in the human rights system. The ratification may have been seen as relatively costless, for, even within the existing system, the state may view the probability of serious enforcement as slender. In this new imagined world, that probability almost disappears.

We have previously noted a distinctive characteristic of human rights as a topic of treaty law. States parties to such a treaty lack the usual material incentives (as exist in, say, a reciprocal tax exemption treaty) to act against a violator state. The violation consists in that state's abuse of *its own* citizens. Why should state X invest its energies in trying to persuade state Y to stop jailing its own political dissidents? It would be foolish to assume that sustained inquiry, let alone serious pressures and sanctions, would originate in other states parties, which at most might suspend economic or military aid to the delinquent state (see Chapter 12).

It should then be no surprise that the traditional defenses by states of sovereignty and domestic jurisdiction are applied today more strongly against the enforcement powers or actions of international institutions than against standard setting. Through its collective acts and decisions, ranging from the holding of a debate to investigative missions or the ordering of sanctions, the

institution can hurt the delinquent state. It becomes the bridge between states (the very creators of international norms) and the norms themselves. It can make those norms 'real'.

All the institutions and organs examined in Part C reflect this tension or contradiction. States create institutions that, to one or another degree, are meant to discipline them. Much depends on the institution's architecture—its constitution and processes, its modes of decision-making such as majority vote or consensus, its powers. Here lie some of the most acerbic fights and deepest divisions in the human rights movement.

NOTE

The following readings raise in a preliminary and abstract way some basic questions about international institutions that recur in the later specialized chapters. They start with excerpts from a book of Inis Claude that refers to both the constitutional (internal) and substantive (external) problems of international organizations.

INIS CLAUDE, SWORDS INTO PLOWSHARES

(4th ed., 1984), at 6.

. . . To understand that international agencies are products not of the aspirations of idealists standing outside of and above international politics, but of the necessities felt by statesmen operating within the arena of international politics, is to sense the fact that international organization is a functional response to the complexities of the modern state system, an organic development rooted in the realities of the system rather than an optional experiment fastened upon it. For one who grasps this fact, the issue of whether we should have international organization is no more meaningful than the issue of whether urbanization should result in the provision of more extensive public services and the imposition of more elaborate governmental regulations. One recognizes international organization as a distinctive modern aspect of world politics, a relatively recent growth, but an established trend. Particular organizations may come and go, but international organization as a generic phenomenon is here to stay. The collapse of the League of Nations led almost automatically to consideration of the nature of its replacement, and similar failure by the United Nations might be expected to produce the same reaction. A sense of history provides the basis for the understanding that international organization has become a necessary part of the system for dealing with international problems, and that 'to organize or not to organize' is no longer an open question for statesmen or a useful one for students of international relations.

. . .

. . .The problems confronted by international organizations may be divided into two categories: constitutional problems—the problems *of* international organizations, and substantive problems—the problems *with which* the organizations are designed to grapple. The first group consists of internal matters, related to the management and functioning of the organizations, while the second includes external issues requiring solution. Constitutional problems are occasioned *by* the establishment of international organizations; substantive problems are the occasions *for* the establishment of such agencies.

However definite the dividing line between these two classes of problems may be in logic, it is not so in practice. The nature and intensity of world problems determine the nature and scope of organizational efforts, and thereby define the constitutional problems which emerge. Decisions concerning the internal development of international agencies are inevitably influenced by external political considerations, and, conversely, the solution of substantive political problems is affected by the degree of constitutional development achieved by international organizations. The two problem areas cannot be divorced.

One of the major tasks of twentieth-century statesmanship is to strike a balance between obsessive concern with institutional problems—which makes international organization an end in itself, and exclusive concentration upon substantive issues of current world politics—which neglects the building of an adequate institutional apparatus for international relations. . . .

. . . It is useful for statesmen to be reminded that they cannot expect international organizations to serve them well, now or in the future, if their urge to exploit these institutions for immediate political advantage overrides all consideration of the requirements of sound constitutional development. International organizations cannot become effective means to the ends that states envisage unless they are treated, to some degree, as ends in themselves.

. . .

NOTE

The excerpts from Ernst Haas present the issue of control by one or a few states of the processes and powers of an international organization. That issue permeates the materials in Chapter 7 on the UN General Assembly and Commission on Human Rights.

ERNST HAAS, WHEN KNOWLEDGE IS POWER (1990). at 57.

All international organizations have a heterogeneous membership. Their members differ in size, military power, population, resource endowment, and degree of industrialization. The members also differ greatly from one another in the extent to which they are permeable—that is, subject to being 'penetrated' economically, culturally, and politically by their stronger neighbors.

Most organizations have their own 'superpower' capable of playing a hegemonic role if it chose to do so. All organizations (except those of Eastern and Western Europe) count democratic, totalitarian, and authoritarian governments among their members. Even organizations that consist almost entirely of economically less developed countries display significant differences in the degree of development among their members. All universal organizations include members with capitalist, socialist, and mixed economies.

All organizations are characterized by major inequalities in power, however defined, among their members. Consequently, they are subject to rule by hegemonic states or hegemonic coalitions of states. The hegemony need not be expressed in the direct imposition of the preferences of the stronger on the weaker. It usually takes the form of higher financial contributions and disproportionate roles for the nationals of the stronger members in organizational secretariats. At the extreme, this kind of hegemony is illustrated by the role of the United States in U.N. agencies. On the one hand, a decision to reduce American financial contributions from 25 percent of the budget to 20 percent threatened to ruin organizational programs. On the other hand, the United States had been signally unsuccessful in translating its superpower status into consistent influence over the content of programs, having lost many programmatic battles for almost two decades except in organizations in which greater power is recognized in the form of weighted voting.

In addition to disproportionate influence due to financial prowess or voting privilege, the principle of sovereign equality is also contradicted in practice by the tendency of the more powerful states to constitute themselves into an inner elite that is consulted far more consistently by the formal heads of secretariats, commissions, and councils than are representatives of less important states. Membership in this elite differs with topic and issue. It almost always includes the delegates of the superpowers and of Japan, Britain, France, West Germany, India, and, increasingly, Brazil in organizations to which these states belong. But it may also include the delegates of smaller states if the country in question happens to be salient to the issue at stake. Sweden, Singapore, and Tanzania have played inner-elite roles on some occasions in the United Nations.

. . .

International organizations share a certain marginality with respect to the core activities in international politics. Few foreign policy initiatives depend

on international organizations for their success. States risk little by investing symbolically in the programs of such organizations; the core of one's foreign policy remains intact even if little concrete help is provided by the organizations. In most instances, any result from a symbolic investment in organizational action will not be experienced until much later. Foreign policy relies on nonorganizational means to a far greater extent than on institutionalized multi-lateral efforts. There are, of course, exceptions for large and small states. Immediate benefits can accrue from a successful peacekeeping operation for the losing side in a war; ambitious economic development and technical assistance projects are sources of prestige and employment for one's nationals; a country beset with refugees benefits immediately from multilateral aid; even the superpowers may benefit from a successful mediation to prevent crisis escalation. The great lines of foreign policy, however, are only marginally and gradually influenced by what goes on in international organizations.

NOTE

The following article by David Kennedy talks of the 'move' toward institutions as a key to understanding modern international law. These excerpts stress the complex, dual, even contradictory positions of states with respect to institutions. States parties make the treaty that creates the institution in which they become members. They lead lives 'within and without the institution.' They form part of its internal processes, participating in decisions about its external action. At the same time they remain sovereign, autonomous states that can become the objects of such action. Through his discussion of different voting arrangements, Kennedy illustrates some of these dilemmas.

DAVID KENNEDY, A NEW STREAM OF INTERNATIONAL LAW SCHOLARSHIP

7 Wisc. Int. L. J. 1 (1988), at 39.

. . .

. . . [F]ew areas of public international law doctrine today remain free of the network of institutions understood to have been set in motion in 1918. The corpus of modern doctrine . . ., is relentlessly procedural, harnessing each substantive aspiration into the policy objective of some institutional regime. Seen either from history or doctrine, then, the move to institutions is the key to modern international law.

From this perspective, institutions—and the discipline of international institutions—are different from doctrines . . . Public international law turns to institutions, turns into institutions, as a turn to practice, to engagement with sovereign society, as a move to realism and the politics of regime management.

We see then, in the relationship between our two disciplines—public international law and international institutions—a familiar division of labor. The one handles issues of independent legal judgment, the other problems of sovereign engagement. Of course this image is an oversimplification—we saw the repetition throughout public international law of a shrewd equivocation about the independence and normative nature of international law doctrine, and we are likely to find the discipline of international institutions riddled with doctrinal independence, procedural channels, consensual covenants, and the like.

But still, between them they handle international law's more general aspiration to both remain independent and connect with sovereign power. Perhaps this can be done ever so much better the more the division is blurred, or the division of labor proliferated throughout both disciplines. At least we never need face either sovereign autonomy or legal dominion in their pure form. They exist only as rather unstable and hesitant invocations and reference points. . . .

. . .

Questions of constitutional structure are normally considered in relationship to a constituting text—be it the League Covenant, the U.N. Charter or the U.N. Convention of the Law of the Sea. The texts establishing international institutions are remarkably similar in basic structure. In broad outline, all set out the membership, decisionmaking procedures, and respective competences of legislative and administrative organs. Sometimes provisions for reference to an independently established or integrated dispute settlement procedure is added. . . .

Leaving dispute resolution aside for a moment, no document seems complete, seems fully to have established a plenary [legislative plenary organ] if it does not indicate who will participate, how they will decide and how their collective being will be known. This pattern repeats the temporal logic of establishment: signatories are transformed into members, the interactions of members are structured, and the organ which they constitute is named. Membership marks a break between life within and without the institution. The organ is the name given the object established. Voting inserts a text between these two moments—both reminiscent of the particularity of members and generative of the constituted organ. The basic historical narrative could hardly be more familiar—a move from politics through text to institutional action.

. . .

. . . Focus for a moment on voting. People writing about institutional design in our discipline have devoted a great deal of energy to voting structure—the allocation of votes among members or the voting configurations required for action. On the one hand, the voting mechanism seems completely internal to the organization, a mere procedure for translating membership into organ activity. Such a sense focuses reformist energy on a technical procedure which

might easily be changed, even if it seems too removed from context to provide a fully convincing account of the institution's practices. On the other hand, the voting mechanism draws a connection between the original members and the activities of their institution—connecting the preinstitutional context to the actions of the organization. The result is a double position—within and without the institution.

As such, voting exists uneasily between membership—itself the break between the institution and its creators—and organs—themselves the link between the institution and its context and object. Voting reaches back to members, defining them, and forward to organs, reminding them of their past. The problem of voting is to translate membership into action, orchestrating a smooth movement from constitution as members (frozen in the intentions of the establishing document) to institutional action within the competences of the organ in question. Voting thus both marks the inside of the plenary and asserts a relationship with both a preinstitutional constituency and an implementing organization, thereby linking two constituted beings—states as members with institutions as actors. . . .

. . .

This central relationship demands much of voting. It must accommodate both the authority of sovereign members and the cooperative activity of the institution. . . . Voting must move from sovereign autonomy to cooperation. . . .

. . .

. . .[Voting] must both ratify and express a particular distribution of power merely promised states by membership and be the mechanism by which the community makes up its collective mind and expresses itself vis-a-vis specific state powers—a relationship posited by the instrumental posture of organs. If the institution must be open and closed, voting must be deferential to and expressive of state power and yet also control, channel and ultimately reapportion that power as the voice and mind of the international institution. . . .

. . .

. . . Over the past sixty-five years, scholars considering voting in international institutions have advocated plenary decisionmaking by unanimity, majority vote and consensus. They have expressed their enthusiasm for and disillusionment with each scheme in remarkably similar terms. Each, in turn, has been credited with an ability simultaneously to defer to sovereign authority and express sovereign cooperation. As each decisionmaking scheme fell out of favor, it was criticized for permitting or encouraging either the anarchy of organizational collapse or the tyranny of institutional capture.

During the Hague period, and into the first days of the League [of Nations], scholars defended unanimity voting as a move from sovereign decentralization,

in which international law could grow only through the relatively cumbersome mechanism of treaty drafting or the quite lengthy process of customary accretion, to institutionalization. At the turn of the century, unanimity symbolized the achievement of an institutional life among states, for it permitted autonomous sovereigns to sit in standing plenaries without forswearing their sovereign prerogative.

By the mid-1930's, unanimity no longer seemed so attractive. Scholars began to suggest that the League either need not, as a matter of law, or did not, as a matter of practice, continue to abide by a rigid unanimity rule. These texts advanced arguments against unanimity and in favor of some alternative voting scheme (usually majority voting) to those which had been advanced in support of unanimity during the preceding period. Unanimity, as a matter of theory and practice, could neither respect sovereign autonomy nor generate sovereign cooperation. It permits states to be held hostage by one bad actor, both preventing international action and centralizing international authority so as to override sovereign authority. By reducing international cooperation to the lowest common denominator of sovereign accord, unanimity emasculates the institution and sabatoges cooperation. In short, unanimity slows the momentum of institutional life and permits backsliding to anarchy.

Majority voting seemed much better. It would decentralize international authority, allowing states to defend their interests without waiting for the go ahead from one recalcitrant sovereign. At the same time, majority voting allows for more powerful and decisive institutional action, rendering the international institution persuasive by keeping it in touch with the greater part of the community. A strong international institution, in turn, fosters community. These arguments prevailed in 1945, and the post-war institutions exhibit a veritable cornucopia of majoritarian and weighted voting formulas.

By the mid-1960's, however, the luster was off majoritarianism. Weighted and majority voting—and particularly the veto—seemed a step backward, away from organization toward anarchy or irrelevance. On the one hand, majority voting produces a tyranny of the majority, allowing international organizations to be far too assertive, thereby threatening the sovereign authority of the minority. On the other hand, majority voting is the enemy of international cooperation. By encouraging rash decisions which reflect passing fads, majority voting leaves the institution powerless in the face of sovereign autonomy. By ignoring the interests of the minority, it debases the currency of international institutional outputs and causes the institution to lose respect. Majority voting fails the cooperative sovereign as much as the autonomous one.

By 1975, the fashionable international institution made up its mind by concensus. By exactly translating political reality into institutional action, concensus keeps the institution in step with all states. The minority feels attended to, included, respected: neither the big powers nor the blocs are able to control the majority any more. Consensus is the perfect form of institutional deference. Moreover, consensus permits the institution to make powerful

decisions and ensures compliance with such decisions as are taken. The very experience of coming to consensus builds community. Finally, as we might expect, by 1980, the bloom was beginning to be off consensus—and the reasons were familiar. The institution was hostage to one hold out autonomous state—and the individual sovereign felt bullied into agreement by a powerful consensus building plenary practice.

This rather fickle rotation among voting procedures repeats the same arguments in each generation. Good procedures instantiate both autonomy and cooperation among sovereigns. Bad procedures fail to banish the threats of anarchy and tyranny. The move from one to another—from unanimity to majoritarianism to consensus—also marks a certain maturity. Although the arguments for and against consensus sound similar to those advanced for and against unanimity, these procedures are quite dissimilar. In many ways, consensus is the very opposite of a voting mechanism, producing no actual record of inter-sovereign accord, it seems to presume the accord behind the institutional output.

We might say that unanimity positions voting close to membership, consensus close to organs. Seen this way, the move among voting mechanisms is simply a repetition of the more general institutionalizing move from membership through voting to organs. Unanimity suggests an immature plenary, constantly recapitulating the moment of establishment. Consensus suggests a mature organizational voice finally released from its members. Majority voting seems a middle ground, a half-way house of trust, in which formalization of minority rights is still necessary to shackle the organ to members.

. . .

NOTE

The attraction of international organizations as a means of solving international problems was perhaps at its height after World War II, an attraction and enthusiasm captured in the creation of the United Nations. Over the decades, enthusiasm waned as it became clear that institutions could simply incorporate the polarities and conflicts of the 'outside' world, become lethargic administrators through inertia and stale bureaucracy, and experience manipulation and corruption. They could share many vices of states themselves.

With the end of the Cold War, fresh hopes looked less to the creation of new institutions than to the revivification of existing ones, particularly the UN. Those hopes too have faded. Much current discussion looks toward reforms of major institutions like the UN to permit them to play a more significant and effective role.

Human rights institutions are fully part of this cycle of enthusiasm and despair. Each of the later chapters involves evaluation of existing institutions and inquires into the kinds of changes that are necessary, desirable, feasible.

The excerpts from Michael Reisman present one of many possible perspectives on necessary reforms. Reisman's approach is not radical, it does not propose restructuring. He prefers to work within the existing treaty structures to improve them, indeed if possible without returning to states parties for ratification of treaty amendments.

The ideas below underscore an issue that returns in the following chapters. Should international organizations continue to have so exclusively 'statist' a character excluding the presence and participation of a range of non-governmental international actors—human rights groups, religious organizations, environmental or women's groups, business organizations, trade unions, transnational political parties, and so on? How do we assure that international institutions embrace a popular component? Consider Reisman's proposals.

W. MICHAEL REISMAN, AMENDING THE UN CHARTER: THE ART OF THE FEASIBLE

American Society of International Law, Proceedings of 88th Annual Meeting 1994 (1995), at 108.

Reality is both an important element in constitutional design and an important corrective in constitutional dreams. The point has special relevance to discussions about changing the United Nations. No reality-based discussion of Charter revision can ignore Article 108, which allows for amendments by two-thirds of the General Assembly members but requires ratification by all the Security Council permanent members in order for those amendments to come into force. This does not mean that reform is unattainable, but rather that international constitutional amendment, in its conventional understanding, is the least likely to succeed and to be satisfactory.

. . .

. . . [T]he Charter is not a bad piece of drafting, in the sense that is has served and serves the interests of those who created it. Dissatisfactions with the Charter are found not within the Charter, as it were, but within the world constitutive process. New forces have gathered with different conceptions of what type of order the world requires. Most of the 180-some governments now in the United Nations are not Permanent Members of the Security Council and have no expectation of ever reaching that position. They are concerned about certain aspects of its operations. Less appreciated, but far more important, the nongovernmental entities that are now increasingly critical international actors pursue a set of goals quite different from those implicit in the state-centric Charter. Thanks largely to these non-state entities, issues such as human rights and environmental protection have been pushed to the forefront of international legal concerns. Non-state entities have different agendas and different priorities than those of the elite states within the United Nations.

Discussions of Charter reform frequently restrict their attention to the Charter, without relating it to these larger processes, which it is intended to influence and whose dynamics will determine its success. Reform proposals target a few dramatic but unrealistic or essentially marginal changes that confirm the state-centric structure of the Charter while ignoring a range of constitutional options that, though less dramatic, are more feasible and could yield substantial improvements in the overall performance of the Organization's functions. Change is directed at the Charter itself, which is viewed from within its four corners. Viewed from *outside*, however, the Charter's chief defect is that it is exclusively an interstate organization; this cannot be appreciated if one looks only at the Charter, for the whole Charter is premised on *étatism*. The sorts of changes the Charter itself contemplates can only redistribute power *within* that framework. But if one places the Charter in the largest world context, where many transnational and national nongovernmental entities now play increasingly critical roles in many decisions, the restriction on participation in the United Nations becomes glaringly apparent.

. . . If one of the purposes of Charter reform is the enhancement of programs such as human rights and the environment, then an instrumental goal should be a larger role for individuals and groups not affiliated with states. The 'deadest letters' in the UN Charter are in its very first words: 'We the peoples of the United Nations.' The peoples created the Charter, but were then summarily and totally dismissed from it; the Charter allows them no role whatsoever.

. . .

[The author considers proposals to expand the permanent membership of the Security Council, as well as suggestions that the International Court of Justice develop procedures for reviewing Security Council and General Assembly action under the Charter or international law. In the end, he advocates more effective control of the Security Council through the combined votes of its non-permanent membership, and through techniques permitting the General Assembly to follow more closely the Council's potential responses to crises and to make its views about those responses known to the Council. Such 'constitutional control' would not require amendment and would strengthen the voice of the Assembly.]

Making the General Assembly Credible and Effective

The real source of constitutional dissatisfaction in the United Nations is not the way the Security Council is structured, for in the final analysis there must be some sort of executive instrument with restricted membership and real power. The dissatisfaction relates instead to the reduced role of the General Assembly—the only arena in which the great majority of states can operate—and the inefficient way the Assembly performs its assigned functions. If, as I have suggested, UN constitutional reform would misfire by weakening or

diluting the Security Council, it would certainly benefit by making the General Assembly more efficient. Happily, many important constitutive changes in this area are within the province of the Assembly and cannot be derailed by opposition from the Security Council or by a withholding of ratification by all or some of the Permanent Members.

. . .

As a modern parliamentary body, the General Assembly is incredibly inefficiently organized. Its six plenary committees are too large, and the functions of intelligence gathering and processing, of promotion and of prescription are ineffectively performed. Confirmation of the low esteem of the committees even among the membership is reflected in low attendance records and the manifest somnolence of so many of those who must attend. The Assembly could increase its efficiency by discarding the plenary committees entirely and creating, in their place, smaller, representative, functional committees and subcommittees with no more than twenty-five members, to hold hearings, take testimony, draft resolutions or even more ambitious instruments, and oversee those parts of the international administration that pertain to their specific functions. The rules of these committees and subcommittees would have to be revised to allow for direct testimony by interested individuals and NGOs as well as by state representatives. Once such committees were formed and began to function, NGOs, performing the functions of lobbyists, would fill the vacuum and could begin to direct their attention to the committees. In this more refined focus, their energies would be magnified. Hopefully, some of these committees would be of enough interest to warrant media coverage through C-Span and similar operations, thus reaching a wider audience. Since the new committees would be performing important functions, attendance would revive.

. . .

The improvement of the output of committees would make the action of the plenary General Assembly more meaningful. . . .

7

Intergovernmental Enforcement of Human Rights Norms: The UN System

This chapter takes a thorough, systematic look at the UN human rights system insofar as it bears on enforcement. Hence it complements Chapter 3, which looked at that system with respect to the generation of norms. The stress here is on the UN as an organization, and on the roles and effectiveness of its different organs or bodies concerned with human rights issues. The materials trace the historical evolution of these organs over several decades, examine the UN's current and significant procedures or processes in this field, suggest criteria for evaluation of the UN's record, and explore possible reforms.

A. DEVELOPMENT OF THE UN HUMAN RIGHTS SYSTEM

COMMENT ON ENFORCEMENT AND THE UN ORGANS INVOLVED

Conceptions of Enforcement

For individuals whose human rights are being violated, and for the groups that seek to defend them, the effectiveness of the United Nations' human rights system depends to an important degree upon its ability to 'enforce' respect for the legal norms that originated within it. But the very concept of such international 'enforcement' is controversial and resisted by a significant number of governments (a few of which do so overtly, while many others use more subtle methods). As suggested by Chapter 6, it is therefore not surprising that, although the UN has been very effective in setting standards (often consensually) in many human rights fields, enormous energy has been invested in hotly contested efforts to establish institutions and procedures capable of securing enforcement.

An evaluation of the UN's performance will be strongly influenced by

one's starting point or perspective on world order. Do we assume that the 'globalization' of issues such as human rights is desirable, or perhaps even unavoidable, so that a nation's treatment of its own nationals is a legitimate concern of all others (an *erga omnes* approach in terms of international law)? Or do we hold to a more traditional image of the sovereign state that emphasizes the inviolability of national boundaries for human rights as well as other purposes? Even if the former, do we envisage a world in which an effective multilateral organization (which might or might not be the UN) should be able to act against the will of the government(s) concerned to enforce universal norms? Or do we believe that although some degree of globalization is inevitable, say with respect to standard setting, the actual implementation by individual governments of those standards, each in its own way, remains the most effective, desirable or realistic approach?

Another important consideration in evaluating the UN's performance involves reciprocity. Are we prepared to accept that the measures that we would happily support against another country might, in a different context, be applied against our own? Do we assume that international enforcement actions must be applied equally to powerful nations and to smaller states, so that we should only adopt policies that can be applied across the board, consistently?

The answers to all such questions will depend partly on the definition of enforcement. Do we mean by it only police actions, or should the notion extend to the other extreme of UN action, a debate or recommendatory resolution of the General Assembly? The only use of the term 'enforcement' in the UN Charter occurs in relation to the enforcement under Chapter VII of decisions of the Security Council (Article 45). This has led some international lawyers to equate enforcement with the use of, or threat to use, economic or other sanctions or armed force. It is true that most dictionary definitions of enforcement include an element of compulsion, although it may be moral as well as physical. It is also true that the possible use of force for human rights purposes has won increasing support in recent years, but this is surely not what is meant by calls for the UN to 'enforce', routinely, universal human rights norms.

At the other extreme, enforcement has been defined as 'comprising all measures intended and proper to induce respect for human rights.'[1] But that definition is so open-ended that it provides no criteria against which to evaluate the UN's performance. It puts the emphasis on intentions rather than on results achieved. It suggests that we might be content, for example, if the UN confined its efforts to the adoption of resolutions and other such hortatory activities.

In the materials that follow, three strong emphases or biases are to be observed. First, the concern of most UN organs—surely of the Commission

[1] Rudolf Bernhardt, General Report, in Bernhardt and Jolowicz (eds.), International Enforcement of Human Rights 5 (1985).

on Human Rights to which we give primary attention—is overwhelmingly with civil and political rights rather than with the economic and social rights that were examined in Chapter 5. Second, the emphasis is on responding to relatively discrete but gross and noticeable violations—large numbers of disappearances or killings of political opponents, violent ethnic conflict, a declaration of martial law. The emphasis is not on what might be termed persistent, endemic, and commonplace violations that are often ignored by other states—including such fundamental and serious violations as systematically entrenched discrimination against women or particular minority groups. Third, little attention is here given to consciousness-raising through education or promotional activities that many observers would identify as indispensable components of an effective UN program.

Such choice of themes can be said to reflect accurately the practice of the United Nations as a whole. Indeed, perhaps the principal criterion used by the vast majority of governments and commentators in assessing the UN's performance is the extent to which it reacts effectively to gross violations. But this criterion should not be accepted uncritically. It should be noted that a significant amount of the UN's important work concentrates on the longer-term, structural dimensions of human rights issues. Such activities include standard-setting, the promotion of greater awareness of those standards both within (e.g. in peace-keeping, or in the work of the World Bank and UN Development Programme) and outside the UN system, and the provision of advice and assistance (known in the UN as 'advisory services').[2]

UN Organs: Coverage of this Chapter

In the following reading, Louis Henkin discusses notions of compliance and enforcement and points to the differences in this regard between international law in general and international human rights law in particular. He employs the notion of a 'two-track' approach in relation to the UN's enforcement machinery. That is, he refers to:

(1) the *Charter-based organs* whose creation is directly mandated by the UN Charter (such as the General Assembly, the Economic and Social Council and the Commission on Human Rights) or has been authorized by one those bodies (such as the Sub-Commission on Prevention of Discrimination and Protection of Minorities, and the Commission on the Status of Women); and

(2) the *treaty-based organs* (such as the Human Rights Committee formed under the ICCPR, referred to in this book as the 'ICCPR

[2] More details of these programs can be obtained from the annual Report of the Secretary-General on the Work of the Organization (issued in 1995 as UN Doc. A/50/1) and the annual Report of the United Nations High Commissioner for Human Rights (issued in 1995 as E/CN.4/1995/98).

Committee' in order to reduce confusion with the UN Commission on Human Rights that is identified as the 'UN Commission') that have been created by six other human rights treaties originating in UN processes and that are intended to monitor compliance by states with their obligations under those treaties.

Except for some comments by Henkin and Alston in the introductory readings, the treaty-based organs (or bodies) are dealt with separately in Chapter 9.

Among the Charter-based organs, this chapter concentrates on the work of the UN Commission. Of course the debates, declarations, resolutions and recommendations of the General Assembly, the vital plenary organ, play an essential role. A number of readings draw on the work of the Assembly when it is particularly relevant to the problem under discussion.

The materials refer less frequently to the work of the Security Council that has only rarely directly addressed human rights violations as such. They include (p. 365, *infra*) the most significant historical action of the Council in this regard, relating to the *apartheid* issue. Since the end of the cold war, the Council has assumed a new importance in this field; some of its recent involvement is described in Chapter 15 on international criminal tribunals.

LOUIS HENKIN, INTERNATIONAL LAW: POLITICS, VALUES AND FUNCTIONS

in 216 Collected Courses of the Hague Academy of International Law 13 (Vol. IV, 1989), at 251.

Compliance with international law as to civil and political rights . . . takes place within a State and depends on its legal system, on its courts and other official bodies. But, as with other international obligations, the international system can exert influence on the State to comply. . . . States observe international law from developed habit and from commitment to order generally; because States have an interest in maintaining norms which they themselves made or to which they consented and in which all have a common interest (or which represent agreed compromises and accommodations); because the system has developed a (less-than-perfect) culture of compliance; because of the availability of 'horizontal enforcement' so that a would-be violator is deterred by the anticipated response of the victim State or of others which would visit undesirable consequences upon a violator. These inducements do not work in the same way for human rights law, precisely because that law promotes human values rather than State values. Because a State's commitments under human rights law are directed towards its own people and may require major internal readjustments, the habit of compliance with international standards may not have developed; indeed, ingrained attitudes and habits inconsistent with those standards may have to be broken, and established practices aban-

doned. Even after 40 years under the Universal Declaration, even years after States were persuaded to make legal commitments to human rights, many States have not yet 'internalized' their international human rights undertakings, have not developed strong commitment to constitutionalism, rights and the rule of law, have not established institutions to nurture that commitment.

The general culture of compliance with international law also is less effective for human rights law. The international human rights system is still 'settling in'. States have not yet wholly shed the idea that conditions inside a State, including how a State treats its own inhabitants, are no one else's business. . . . States have not yet wholly assimilated the fact that they have an *international obligation* to respect the rights of their citizens, that an act of torture or other inhuman treatment, for example, is a violation of an international law.

Compliance with international human rights obligations—i.e., respect for human rights at home—is more responsive to domestic forces, to the domestic constitutional culture, than to any international culture pressing for compliance with international human rights norms. The causes of human rights violations are cultural, political, internal, close to home—an underdeveloped commitment to constitutionalism, to the rule of law, to the idea of individual rights, to limitations on government; political-social-economic underdevelopment and instability; evil or stupid State leaders, fostering a culture that tolerates brutality and repression; inefficient administration. In such circumstances, external inducements to comply with international human rights law are remote and not readily felt.

Horizontal enforcement, the principal inducement for international compliance generally, also works differently and less effectively for human rights. Like other international obligations, human rights undertakings run to other States, to the other parties to a covenant or convention, or to all States when the obligation is under customary law and *erga omnes*. . . . In principle, human rights obligations, like other international obligations, create rights in the promisees and afford them remedies. But while State promisees are entitled to pursue such remedies, they have not been sufficiently motivated to do so and do not in fact do so. For the real beneficiaries are not the State promisees but the inhabitants of the promisor State, and, in general, States—even if they have adhered to international agreements—do not have a strong interest in human rights generally, and are not yet politically acclimated and habituated to responding to violations of rights of persons abroad other than their own nationals. Many States, themselves still lacking an entrenched human rights culture, themselves vulnerable to charges of violation, are reluctant to respond (surely to respond unilaterally) to a violation by another friendly State of the human rights of the State's own inhabitants. What is more, the principal element of horizontal deterrence is missing. A State promisee cannot respond to a violation by retaliation or the threat of retaliation; such retaliation would itself violate human rights. And the threat that 'if you violate the human rights of your inhabitants, we will violate the human rights of our inhabitants'

hardly serves as a deterrent. The result is that the temptation to violate human rights law is stronger than for other international law while fear of reaction by other States or of other adverse consequences is weaker.

In all, then, there has been a basic disappointment of original expectations about the enforcement of international human rights law.

. . .

Some of the weaknesses in the international enforcement of human rights law were clear from the beginning of the Human Rights Movement; others have become clearer during the intervening decades. In any event, for these (and other) reasons, the International Human Rights Movement has developed special 'enforcement machinery'.

Special enforcement machinery has followed two principal tracks. Some has been established by particular human rights agreements, such as the Human Rights Committee under the Covenant on Civil and Political Rights and the commissions and courts under the European and American conventions. A second track of enforcement consists of United Nations bodies—the General Assembly, the Economic and Social Council (ECOSOC), and especially the Human Rights Commission and its subsidiary units. Their activities are sometimes seen as politics, not law, but these bodies invoke norms and are properly seen as part of the enforcement system.

It is difficult to assess which of these 'tracks' has been more successful; surely they have both contributed to compliance. But they work differently. A monitoring body created by a human rights covenant or convention addresses only compliance by States parties to that agreement and only with the norms established by the agreement. The mandate, authority and procedures of the monitoring body are defined by the agreement. United Nations bodies, on the other hand, often address human rights issues as part of their general mandate as defined by the United Nations Charter and by General Assembly resolutions. They are not themselves monitoring bodies, but have sometimes created *ad hoc* monitors and have sometimes condemned violations. In principle, they might address human rights violations by virtually any State, since nearly all States are parties to the United Nations Charter; in fact, political bodies are likely to address only selected, dramatic human rights violations by selected countries.

. . .

Surely, horizontal enforcement is available to enforce the customary law of human rights. Obligations of customary law in respect of human rights are *erga omnes* and all States can act (peacefully) to induce compliance. They can protest, make claims, and even bring suit if the parties had consented to the compulsory jurisdiction of the International Court of Justice or to some relevant system of arbitration. [See the discussion of obligations *erga omnes* at p. 132, *supra*.]

International human rights law benefits significantly from enforcement also by political bodies [that are within the UN system, as well as by bodies created by the human rights treaties]. In general, international political bodies have attended only to the enforcement of norms of extraordinary political significance such as the law of the Charter on the use of force, but political bodies have devoted extraordinary efforts to promoting law on human rights and for that and other reasons they have not avoided the demands of enforcement of—inducing compliance with—that law.[3]

If law is politics, enforcement of law in the inter-State system is also heavily political. Political influence brought to bear in the organs and suborgans of the United Nations determined the enforcement machinery that found its way into covenants and conventions. (Political forces, I have suggested, have influenced also how that machinery has worked.) But United Nations bodies themselves have also been an arena for charges of human rights violations, sometimes evoking resolutions of condemnation.

One cannot appraise these activities with precision or with confidence, but clearly they have served as some inducement to terminate or mitigate violations, perhaps even as some deterrent. Political bodies, however, are subject to their own political laws. The larger bodies—notably the United Nations General Assembly—are more visible, more newsworthy, therefore more 'politicized', therefore less likely to apply human rights norms judicially, impartially. In such bodies, human rights are more susceptible to being subordinated to non-human rights considerations. There, voting, including 'bloc-voting', has led to 'selective targeting' of some States, sometimes exaggerating their violations, and overlooking those of other States, including some that are guilty of gross violations. Smaller political bodies, such as the Human Rights Commission, are also inhabited by government representatives concerned for State values and friendly relations, but increasingly they are able to be somewhat less 'political', more evenhanded, as well as more activist in the cause of human rights.

In monitoring human rights as in other matters, the influence of the United Nations bodies has reflected the transformation of the United Nations by the influx of new Members and the dominance of the Organization by the Third World. In general, Third World States have been committed to non-alignment and were therefore reluctant to support an active United Nations role in human rights monitoring, which, in the past at least, Communist States (and others particularly committed to State values) resisted. . . .

. . . On the other hand, African States provided a particular impetus to human rights activism when they led the United Nations to take a strong stance against apartheid, make it a perennial issue, adopt perennial resolutions of condemnation and exhortations to sanctions. On two occasions, in 1963 and in 1970, they induced the Security Council to call on States not to provide South Africa with weapons and in 1977 the Council imposed a

[3] [Eds.] See generally Sydney Bailey, *The UN Security Council and Human Rights* (1994).

mandatory arms embargo. It was the desire to attack apartheid by every means available that led to the development of 'working group' procedures under ECOSOC, originally designed for complaints of apartheid, then extended to other 'consistent patterns of gross violations of human rights and fundamental freedoms'. Votes on apartheid in United Nations bodies, adherence to the Convention on Racial Discrimination, and later to the Convention on the Suppression and Punishment of the Crime of *Apartheid*, became elements in friendly relations with African States. The influence of African and other Third World States has rendered racial discrimination the most serious international crime, and helps explain why the Convention on Racial Discrimination has the largest number of State adherences, with machinery, we saw, reaching farther than that provided in the Covenant on Civil and Political Rights.

PHILIP ALSTON, APPRAISING THE UNITED NATIONS HUMAN RIGHTS REGIME

in Alston (ed.), The United Nations and Human Rights: A Critical Appraisal 1 (1992), at 4.

. . . [T]he essential role of each of the treaty bodies is to monitor and encourage compliance with a specific treaty regime, while the political organs have a much broader mandate to promote awareness, to foster respect, and to respond to violations of human rights standards. Each treaty-based organ has been established either pursuant to the terms of a specific treaty or for the specific purpose of monitoring compliance with such a treaty. The Charter-based organs on the other hand derive their legitimacy and their mandate, in the broadest sense, from the human rights-related provisions of the Charter.

Within that overall framework the treaty-based organs are distinguished by: a limited clientele, consisting only of States Parties to the treaty in question; a clearly delineated set of concerns reflecting the terms of the treaty; a particular concern with developing the normative understanding of the relevant rights; a limited range of procedural options for dealing with matters of concern: caution in terms of setting precedents; consensus-based decision-making to the greatest extent possible; and a non-adversarial relationship with States Parties based on the concept of a 'constructive dialogue'.

By contrast, the political organs generally: focus on a diverse range of issues; insist that every state is an actual or potential client (or respondent), regardless of its specific treaty obligations; work on the basis of a constantly expanding mandate, which should be capable of responding to crises as they emerge; engage, as a last resort, in adversarial actions *vis-à-vis* states; rely more heavily upon NGO inputs and public opinion generally to ensure the effectiveness of their work; take decisions by often strongly contested majority voting; pay comparatively little attention to normative issues; and are very

wary about establishing specific procedural frameworks within which to work, preferring a more *ad hoc* approach in most situations.

It is, of course, easy to overstate the differences between the two types of organ and to underestimate the ability of one type to emulate certain characteristics of the other. Thus a Charter-based organ might choose to play down its political character and devote some of its efforts to a systematic clarification of the normative content of a specific right while a treaty-based organ might play down its constructive dialogue approach in order to indicate its strong disapproval of a state's behaviour. Nevertheless, the differences of mandate, content, and style between the two types of organs are sufficiently clear and consistent as to justify using this as the principal distinction for purposes of the present analysis.

3. *EVOLUTION OF THE CHARTER-BASED ORGANS*

. . .

The remaining principal organs form part of a definite hierarchy with the Security Council at the apex. The problem, however, is that the Council has a long history of refusing to consider itself as an organ for the promotion of respect for human rights, except in so far as a given situation constitutes a threat to international peace and security. Although there are many examples of the Council taking up human rights issues . . . its reluctance to alter its stance still persists . . . . [The] Council's position thus remains (artificially) detached from that of the remaining principal organs.

[In addition] the formal hierarchy consists of the General Assembly and ECOSOC as principal organs and, underneath them as 'functional commissions', the Commission on Human Rights and the Commission on the Status of Women. This is as far as the system goes in terms of specific Charter authorization. However, each of these organs is entitled to create whatever subsidiary mechanisms it considers necessary to enable it to carry out its own responsibilities and functions under the Charter. It is at this point that the proliferation begins. . . . The only such body to which specific attention need be drawn in this context is the Sub-Commission on Prevention of Discrimination and Protection of Minorities. [In contrast to the Commission, which composed entirely of governmental representatives, the Sub-Commission consists of 26 independent experts, elected by the Commission upon the nomination of governments. It meets for four weeks annually in Geneva in August, although its session is generally preceded by various Working Groups dealing with the rights of indigenous populations, contemporary forms of slavery, and communications. The degree of independence of its members varies radically.] It has long stood out because of its relative independence, its flexible agenda and working methods, its preparedness to act as a pressure group *vis-à-vis* its parent body (the Commission), and its ambiguous and often antagonistic relationship with that parent.

While in principle, the lines of authority are reasonably clear-cut and

obvious, in practice they are much less so. The ECOSOC, which once played a major role as an intermediary between the Assembly and the Commission, is now little more than a rubber stamp. The Assembly, on the other hand, has come to play an important initiating role in a number of areas while at the same time deferring (in substance, although not in form) to the Commission in many respects. Similarly, any analysis that portrayed the Sub-Commission as little more than a subsidiary organ to advise the Commission and do its bidding (and no more) might be an accurate reflection of the initial design as seen by some of its creators, but would otherwise be singularly out of touch with today's reality. The result of these various evolutionary trends is a much more complex interrelationship among the group of bodies than any diagram or flow-chart could ever convey.

NOTE

The most important UN body in the human rights field is the Commission on Human Rights. This UN Commission, established in 1946, currently consists of 53 member governments elected for three-year terms by the ECOSOC. To a significant extent its working methods reflect the regional composition of the Commission (Asia, Africa, Eastern Europe, Latin America, and Western Europe and Others—the last category including Canada, Australia and New Zealand, and, in practice, the U.S.). Working groups consisting of five member governments are commonly established to include one member from each group. The position of Chairperson rotates annually among the groups. The regional groups also caucus regularly during the Commission's annual six week session in Geneva starting in April, as from 1996. Since 1992 there has also been provision for emergency sessions of the Commission, three of which have been held as of June 1995 (two relating to the former Yugoslavia and one to Rwanda).

The Commission reports to the Economic and Social Council (ECOSOC). Any resolution or decision with financial consequences requires the latter's approval, unless an earlier authorization can be invoked. It is extremely rare for ECOSOC to refuse to endorse anything the Commission has decided.

Because of the extent to which the Commission's role has changed over the years, a sense of its historical evolution is critical to an understanding of how it operates today. The following excerpts describe that evolution.

PHILIP ALSTON, THE COMMISSION ON HUMAN RIGHTS

- in Alston (ed.), The United Nations and Human Rights: A Critical Appraisal 126 (1992).

. . . The key issue with respect to the Commission's terms of reference was whether its mandate was to be *limited* and thus restricted to specified objectives or *general* and therefore open-ended.

Partly due to the determined lobbying efforts of non-governmental organizations, the San Francisco Conference in 1945 included a series of human rights provisions in the UN Charter. One concern of a number of delegations at the Conference was to secure the adoption of a declaration of rights.

. . . These efforts were unsuccessful but there emerged from the Conference a clear expectation, as noted by President Truman in his closing speech, that the major task of the Commission on Human Rights, the establishment of which was provided for in the Charter, would be the drafting of an international Bill of Rights. . . .

Subsequently, the Preparatory Commission which met in London in late 1945 to make provisional arrangements for the different UN organs, suggested that the work of the Commission should be directed towards:

(*a*) formulation of an international bill of rights;
(*b*) formulation of recommendations for an international declaration or convention on such matters as civil liberties, status of women, freedom of information;
(*c*) protection of minorities;
(*d*) prevention of discrimination on grounds of race, sex, language, or religion; and
(*e*) any matters within the field of human rights considered likely to impair the general welfare or friendly relations among nations.

Through the inclusion of (*e*) in the proposed terms of reference the Preparatory Commission clearly envisaged a relatively open-ended, and thus politically active, mandate for the Commission. . . . [But] the paragraph was deleted by the Council at its first session, thus providing the preparatory session of the Commission (the so-called 'nuclear' session) with only a limited mandate.

However, when the Nuclear Commission of nine members met at Hunter College, New York, in April–May 1946, with Eleanor Roosevelt as Chairman, it expressed a definite preference for an expansive approach. In its report to ECOSOC it advocated that the Commission be composed of independent experts and that it be given an open-ended mandate including a general brief not only to assist ECOSOC and the Assembly in their work but also to 'aid the Security Council in the task entrusted to it by Article 39 of the Charter, by pointing to cases where a violation of human rights committed in one country may, by its gravity, its frequency, or its systematic nature, constitute

a threat to the peace'. . . . But this conception proved to be anathema to the governments represented in ECOSOC which, at it second session, in June 1946, promptly scrapped the proposals for an independent membership and for a role in dealing with violations constituting a threat to peace. However, perhaps by way of compensation, it agreed not to limit the mandate to the specific issues already listed, but to add a new version of paragraph (*e*), giving the Commission a role with respect to 'any other matter concerning human rights not covered by items (*a*) (*b*) (*c*) and (*d*). Thus, after a lengthy battle, the Commission was endowed with a *general* mandate. In fact, the new provision was even more open-ended and susceptible to a broad and flexible interpretation than was the original proposal.

. . .

THE COMMISSION'S INTERPRETATION OF ITS MANDATE

For the first twenty years of its existence the Commission struggled valiantly and successfully to avoid becoming an overtly political organ. Despite the significant human rights dimensions of the Cold War, the decolonization debate and many other matters being brought before the Assembly and the Security Council, the Commission managed to confine its efforts to standard-setting with a variety of other technical pursuits thrown in for good measure. In 1947 the Commission adopted its oft-criticized statement that it had 'no power to take any action in regard to any complaints concerning human rights', thereby effectively removing itself from the front line of the vast majority of human rights-related political battles. . . .

THE STANDARD-SETTING ROLE OF THE COMMISSION

The drafting of international instruments in the field of human rights has been a continuous occupation of the Commission and its achievements in this regard are by no means confined to the first decade of its existence. Indeed, until the early 1970s standard-setting continued to be by far its most productive and enduring activity. Even in the early 1990s, it is apparent that the development of new standards in a range of specialized fields will continue to occupy much of the Commission's agenda for the foreseeable future. . . .

In the space of only two sessions, in 1947–8, the Commission completed a comprehensive draft of the Universal Declaration, which was proclaimed by the Assembly less than six months later. By 1954, after a remarkably sustained and intensive drafting effort, the Commission had completed its drafts of the two Covenants and forwarded them on to the Assembly. . . .

Starting in 1977 the Commission's standard-setting role entered a new, and ultimately very productive, phase. In that year the Assembly, which had chosen to ignore it in drafting the Declaration against Torture, chose the Commission as the preferred forum in which to draft a Convention on the same subject. Also, in 1978, the Polish government selected the Commission as the place to launch an initiative designed to produce a convention on childrens' rights. These initia-

tives resulted in the adoption of Conventions of major importance in 1984 and 1989 respectively. In each case virtually all of the drafting work was done by the Commission. Another major achievement during this period was the 1986 Declaration on the Right to Development.

. . . .

RESPONDING TO VIOLATIONS

All too frequently the sole criterion which is used for judging the performance and achievements of the Commission is the extent to which it has succeeded in responding to specific violations of human rights and providing a degree of protection to actual and potential victims. While there are strong grounds for insisting that the Commission's performance be judged on the basis of a much broader range of considerations, the reality is that its effectiveness in responding to violations remains the benchmark which the great majority of governments and other observers continue to use. . . .

(a) The Historical Evolution: An Overview

. . . [T]here have been three very distinct phases: (1) 1946–66, during which time the Commission was not prepared to address the issue of specific violations at all; (2) 1967–78, when the Commission struggled to evolve procedures which were initially designed to respond only to problems associated with racism and colonialism; and (3) 1979 to the present, when the procedures developed earlier have been applied in an increasingly creative and tailored fashion to an ever-widening range of countries and types of violations. Thus any meaningful evaluation must at least recognize these distinct phases and acknowledge that it is only in the present (third) phase that the member States of the United Nations have made any serious effort to respond to violations in a manner that at all purports to be objective and even-handed. . . .

(i) 1946–1966: Abdication of Responsibility For twenty years, until 1967, the official and oft-repeated position of the Commission was that it had 'no power to take any action in regard to any complaints concerning human rights'. . . .

. . . [The] Commission was simply informed, on a confidential basis and in the most telegraphic fashion, of the complaints that were being received, without any information as to the identity of the authors involved. No action of any description was taken as a result and the sole justification for the ensuing charade was that Commission members could gain a better idea of the sort of concrete problems existing in the world at any given time.

. . . .

(ii) 1967–1978: A Gradual Assumption of Responsibility [By the mid-1960s there had been a dramatic change in the composition of the major UN organs as a reflection of the influx of new members, mainly newly independent

African and Asian states. Membership of the Commission went from 18 in 1960 to 32 in 1967 (20 of which were from the Third World.]

. . .

Another important development was the adoption of the Convention on the Elimination of All Forms of Racial Discrimination (CERD) in 1965 which included provision, in Article 14, for the submission of complaints by individuals or groups against States which accepted the procedure. This development was intimately linked with the emergence of the new Third World majority and the preparedness, indeed determination, of that majority to make racism a major concern and to develop whatever procedures might be necessary in order to combat it. In any such endeavours they were virtually assured the support of the Eastern Europeans who were happy to encourage attention to what were assumed to be quintessentially Western sins. By the mid-1960s they also had a significant (but by no means unqualified) degree of support from an American government which had committed itself to the implementation of civil rights domestically and had nominated black Americans to both ECOSOC (Clyde Ferguson) and the Sub-Commission (Beverly Carter). The willingness of the Third World majority to develop new procedures applied even though there was a significant 'risk' that the scope or reach of the procedure might eventually be extended to address problems other than racism.

The adoption of the CERD complaints procedure cleared the way for an Optional Protocol to the Covenant on Civil and Political Rights to be adopted the following year. It too enabled complaints to be brought against States Parties. These two procedures, even though they were not to bear much fruit for another couple of decades and would in any event apply only to the small number of ratifying states, constituted very important breakthroughs in terms of the principles involved, particularly that of accountability.

The most significant development, however, was a decision by the Third World countries, strongly supported by the Eastern Europeans, that a general, non-treaty-based communications-type procedure would be useful as an additional means by which to pursue the struggle against racist and colonialist policies, particularly in southern Africa. . . . It was on the initiative of the Special Committee on Decolonization, in 1965, that the attention of the Commission was drawn to petitions alleging human rights violations in southern Africa. The following year ECOSOC accordingly invited the Commission to consider urgently the question of the violation of human rights, including policies of racial discrimination and segregation and of apartheid in all countries, with particular reference to colonial and other dependent countries and territories, and to submit its recommendations on measures to halt those violations. In the Commission the view prevailed that an artificial restriction of such a mandate to only a single category of countries was not justified. As a result, the ambiguity of the Commission's original mandate was resolved by a General Assembly request that it give urgent consideration to ways and means of improving the capacity of the United Nations to put a stop to violations of

human rights *wherever they may occur*. This latter phrase was to prove to be of vital importance, despite the clear desire of most of the resolution's key proponents to confine the focus to racist and colonialist situations.

These developments resulted in the adoption of what eventually turned out to be two separate procedures. The procedure established under ECOSOC Resolution 1235 (XLII) established the principle that violations could be examined and responded to, and provided the necessary authorization for the Commission to engage in public debate on the issue each year. The procedure under ECOSOC Resolution 1503 (XLVIII) provided a carefully and deliberately constrained procedure by which situations which appear to reveal 'a consistent pattern of gross and reliably attested violations of human rights' could be pursued with the governments concerned, but in private. [Both the 1235 and 1503 procedures are examined below in this chapter.]

. . . [B]oth procedures generated considerable controversy and engendered high hopes while actually accomplishing relatively little during their first decade in operation. The inevitable teething problems involved in taking procedures which had been established on the basis of a hotchpotch of competing aspirations and transforming them into flexible and effective tools for inquiry and assessment, backed by at least a minimum of political will, were to take up almost all of the 1970s.

(iii) 1979 to the Present: Evolution Towards an Effective Response It was not until more than a decade had elapsed after the adoption of the 1235 procedure that a convergence of factors facilitated the next quantum leap in United Nations practice in response to violations. This took the form of: a more active and (albeit minimally) more public approach to the 1503 confidential procedures; increasing acceptance that confidential consideration did not preclude public consideration with respect to any given State; and a substantially expanded range of fact-finding activities. Unlike 1967 when the impetus had come primarily from a change in the composition of the Commission and ECOSOC, the developments in the late 1970s were environmental. The Commission had excelled itself in 1976–7 by a failure to act publicly with regard to horrendous violations in Pol Pot's Democratic Kampuchea, Amin's Uganda, Bokassa's Central African Empire, Macias' Equatorial Guinea, the military's Argentina and Uruguay, and several other situations. Thus a 1976 investigation by the (London) *Sunday Times* concluded that the Commission worked 'in almost total secrecy' and had deliberately constructed 'a bureaucratic and procedural maze' as a result of which 'delay has been institutionalized and the aim has not been to protect the victims but the oppressors'.

But the developing consciousness of public opinion (almost by definition among the élites in the West and a limited number of Third World countries), combined with the higher profile given to human rights issues by the Carter Administration and several of its allies contributed to a climate in which task expansion was almost an imperative. That the West was prepared to take the initiative, despite the fact that many of its 'allies' were among the worst

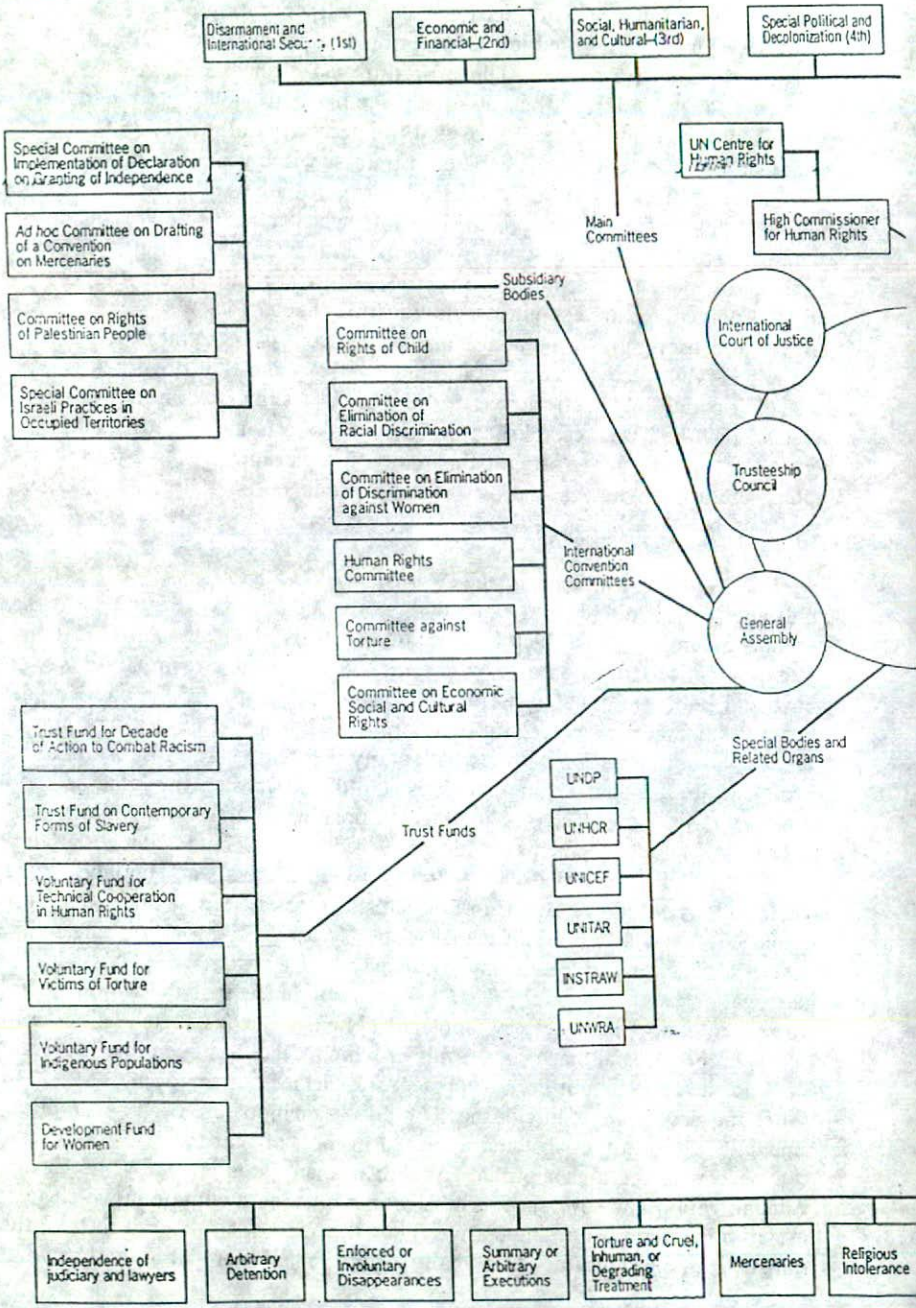
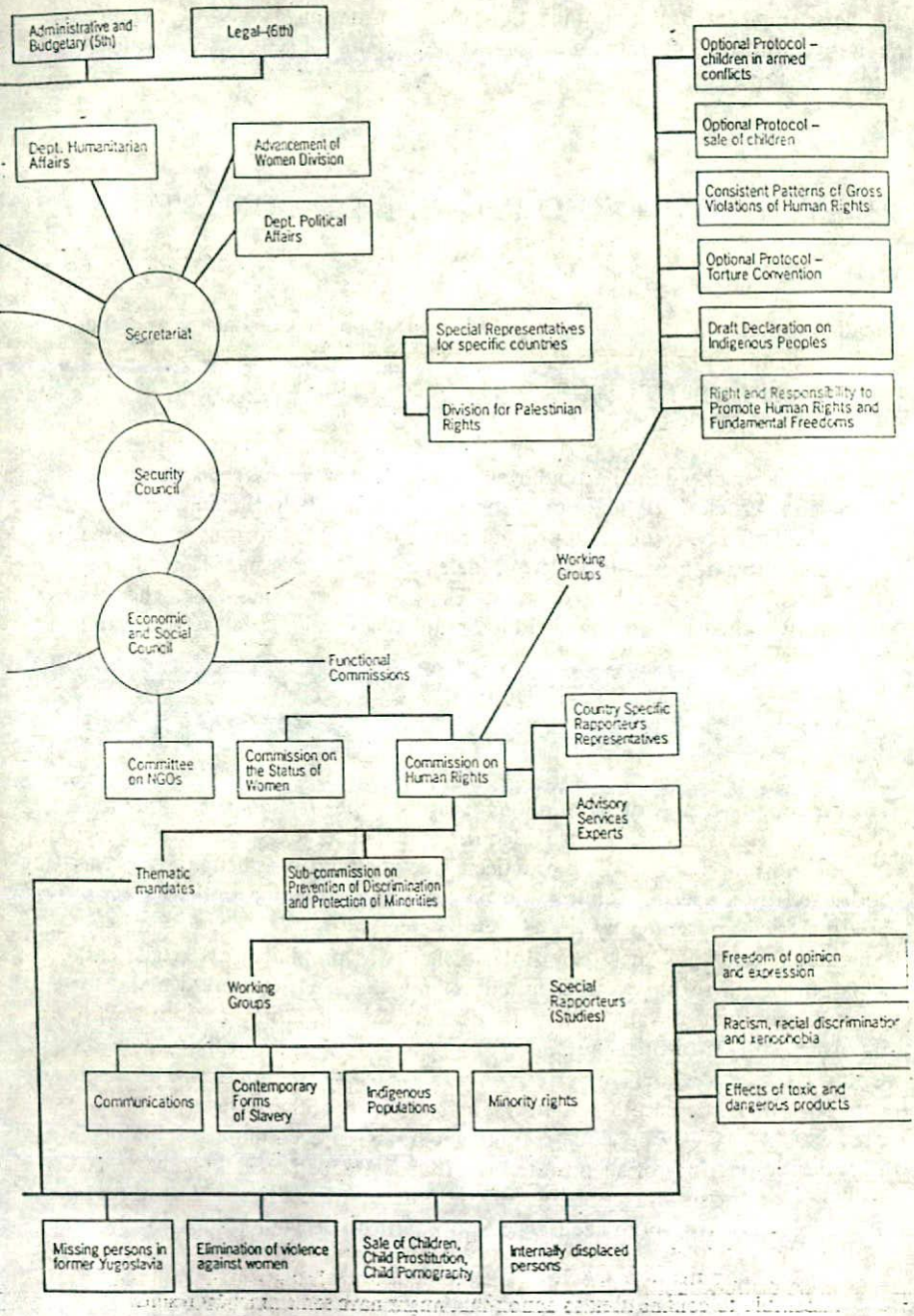


FIG. 1. UN Organs with Responsibilities in the Human Rights Area [as of July 1995]


Administrative and Budgetary (5th)
Legal–(6th)
Dept. Humanitarian Affairs
Advancement of Women Division
Dept. Political Affairs
Secretariat
Special Representatives for specific countries
Division for Palestinian Rights
Security Council
Economic and Social Council
Functional Commissions
Committee on NGOs
Commission on the Status of Women
Commission on Human Rights
Country Specific Rapporteurs Representatives
Advisory Services Experts
Working Groups
Optional Protocol – children in armed conflicts
Optional Protocol – sale of children
Consistent Patterns of Gross Violations of Human Rights
Optional Protocol – Torture Convention
Draft Declaration on Indigenous Peoples
Right and Responsibility to Promote Human Rights and Fundamental Freedoms
Thematic mandates
Sub-commission on Prevention of Discrimination and Protection of Minorities
Working Groups
Soecial Rapporteurs (Studies)
Communications
Contemporary Forms of Slavery
Indigenous Populations
Minority rights
Freedom of opinion and expression
Racism, racial discrimination and xenophobia
Effects of toxic and dangerous products
Missing persons in former Yugoslavia
Elimination of violence against women
Sale of Children, Child Prostitution, Child Pornography
Internally displaced persons

offenders, facilitated the mobilization of majorities in favour of action. Inevitably, it also resulted in an imbalance in the range of states against which action was taken. . . .

B. THE WANING OBSTACLE OF DOMESTIC JURISDICTION

Recall the discussion of domestic jurisdiction at pp. 148–65, *supra*, and the significance thereto of Article 2(7) of the Charter. Section B builds on these materials by stressing the significance of domestic jurisdiction within the UN human rights system.

In the 1940s and early 1950s, diplomatic exchanges and public statements about human rights in a particular state were said by many governments to contravene Article 2(7). The implications of that article in the human rights area were left to be resolved in practice by the relevant UN organs. The scope claimed for the domestic jurisdiction 'defense' in that area has changed considerably over the past half century. This section examines those changes through two illustrations: apartheid in South Africa and martial law in Poland in the early 1980s.

NOTE

The case of South Africa (initially focused on the treatment of persons of Indian and Pakistani origin) provided the principal context in these early years for the development of UN practice. The domestic jurisdiction issue was addressed by a special Commission on the Racial Situation in the Union of South Africa appointed by the General Assembly in 1952. The Commission concluded that only 'dictatorial interference' was prohibited by Article 2(7). This phrase, in turn, was interpreted as implying 'a peremptory demand for positive conduct or abstention—a demand which, if not complied with, involves a threat of or recourse to compulsion . . . .' Thus, in the view of the Commission, Article 2(7) referred 'only to direct intervention in the domestic economy, social structure, or cultural arrangements of the State concerned but does not in any way preclude recommendations, or even inquiries conducted outside the territory of such State.' (UN Doc. A/2505 (1953) 16–22.)

The Commission's report gave rise to extensive debate. The General Assembly was bitterly divided. The South African delegation took

> the position that the General Assembly could not even discuss the subject of race relations in South Africa. . . . The United States . . . urged the Assembly to confine itself to action that might have some practical results.

> . . . [It] declared it had observed with increasing concern the tendency of the Assembly to place on its agenda subjects the international character of which was doubtful. . . . [It] stated its opposition to addressing a recommendation to only one Member and to expressing regret over domestic legislation, and it abstained in the vote [on the proposed resolution under discussion].[4]

Apartheid in South Africa (and to a lesser extent the situation in Rhodesia) continued to provide the primary context within which the issue of domestic jurisdiction was debated within UN organs. The following excerpts from an article of Louis Sohn pick up the narrative in the early 1960s and describe some high points in the slow evolution of ideas about domestic jurisdiction. This reading also serves to illustrate the vital, decades-long process of elaboration or interpretation of the Charter by UN organs through which effectively new understandings about the UN's role and powers were reached. Moreover, it bears directly on this chapter's discussion of modes of enforcement of human rights norms, by emphasizing the role of the General Assembly in giving publicity to a situation and stimulating action responsive to it, and the (rare) role of the Security Council in ordering economic and other sanctions against a delinquent state.

Before reading these excerpts, you should become familiar with the provisions in Chapters VI and VII of the UN Charter, particularly Articles 36–41 and 48.

LOUIS SOHN, INTERPRETING THE LAW

in Oscar Schachter and Christopher Joyner (eds.), United Nations Legal Order 169 (1995), at 211.

. . .

A 1962 General Assembly resolution finally crossed the borderline between exhortatory recommendations and enforcement. It pointed out that 'the actions of some Member States indirectly provide encouragement to the Government of South Africa to perpetuate its policy of racial segregation, which had been rejected by the majority of that country's population' and requested Member States to take the following measures, separately or collectively, in conformity with the Charter, to bring about the abandonment of these policies:

(a) breaking off diplomatic relations with the Government of the Republic of South Africa or refraining from establishing such relations;

(b) closing their ports to all vessels flying the South African flag;

[4] James Green, The United Nations and Human Rights 785 (1956).

(d) boyco... African goods and refraining from exporting ... and ammunition, to South Africa;

(2) ref... passage facilities to an aircraft belonging to the Gov... Africa and companies registered under the laws of S...

In addition ... decided to establish a Special Committee to 'keep the ... development of South Africa under review' and to 'report either ... the General Assembly or to the Security Council, or to both, as may ...

Another ... been crossed. The General Assembly recommended that Mem... the specified measures against Sough Africa, and encoura... them immediately, separately or collectively, without waiting ... the Security Council.

The As... and the Council's primary jurisdiction to enact binding ... it to enact them in order to ensure compliance with both ... resolutions. A year later, Security Council Resolution 181 expressed its conviction that 'the situation in South Africa is seriously disturbing international ... and security' ... and called upon all states 'to cease ... shipment of arms, ammunition of all types and military ... Africa.'

The ... clarified the interpretation of Article 2(7) of the ... and the Council. The Security Council joined the ... General ... implicitly that human rights provisions of the Charter ... prohibition in Article 2(7) of the Charter. . . .

From ... the cases of South Africa and Southern Rhodesia ... became ... this period the Security Council and the General Assembly ... Rhodesia a variety of measures that were also subsequently ... South Africa. . . .

... was taken by the General Assembly in 1966, when it condemned ... of apartheid of the South African Government as 'a crime ...' and suggested to the Security Council that 'uni... economic sanctions are the only means of achieving ...

In 1970 ... Security Council . . . adopted a resolution which recognized . . . that ... resulting from the continued application of the policies of apartheid ... constant build-up of the South African military and

police forces . . . constitutes a potential threat to international peace.' It then called upon all states to strengthen the arms embargo:

> (a) by implementing fully the arms embargo against South Africa unconditionally and without reservations whatsoever;
>
> . . .
>
> (e) by prohibiting investment in, or technical assistance for, the manufacture of arms and ammunition, aircraft, naval craft, or other military vehicles;
>
> (f) by ceasing provision of military training for members of the South African armed forces and all other forms of military co-operation with South Africa;
>
> . . .

. . . Nevertheless, the Special Committee on the Policies of Apartheid immediately complained that this resolution was not mandatory, and that the arms embargo was being violated. . . .

. . .

In 1973, another step was taken to make condemnation of apartheid part of international law, when the General Assembly approved the draft Convention on the Suppression and Punishment of the Crime of Apartheid, prepared by the Commission on Human Rights, and opened it for signature and ratification. . . .

. . .

In its 1976 resolution on South Africa, the Assembly recognized 'that the consistent defiance by the racist régime of South Africa of United Nations resolutions on apartheid and the continued brutal repression, including indiscriminate mass killings, by that régime leave no alternative to the oppressed people of South Africa but to resort to armed struggle to achieve their legitimate rights'; and declared that the situation in South Africa constituted 'a grave threat to the peace, requiring action under Chapter VII of the Charter of the United Nations'; and appealed to all states and organizations 'to provide all assistance required by the oppressed people of South Africa and their national liberation movements during their legitimate struggle.' By this resolution, the Assembly not only encouraged a civil war, but also authorized foreign assistance to the 'freedom fighters.'

In 1977 another barrier to sanctions against South Africa fell. . . . Security Council Resolution 418 in 1977 concerned the mandatory arms embargo. The Council recognized that 'the military build-up by South Africa and its persistent acts of aggression against the neighbouring States seriously disturb the

security of those States.' The Council then decided that, in view of its conviction that 'a mandatory arms embargo needs to be universally applied against South Africa in the first instance,' it is obliged to act 'under Chapter VII of the Charter of the United Nations.' It determined that, 'having regard to the policies and acts of the South African Government, the acquisition by South Africa of arms and related *matérial* constitutes a threat to the maintenance of international peace and security,' and decided that 'all states shall cease forthwith any provision to South Africa of arms and related *matérial* of all types, including the sale or transfer of weapons and ammunition, military vehicles and equipment, paramilitary police equipment, and spare parts of the aforementioned.' Toward this end, the Council called 'upon all States, including States non-members of the United Nations, to act strictly in accordance with the provisions of the present resolution.' In reaction to this resolution, the Secretary-General issued a statement in which he observed that 'this was the first time in the history of the United Nations that mandatory sanctions have been imposed against a Member State.'

. . .

In 1984, the Security Council declared that the so-called 'new constitution' adopted by 'the exclusively white electorate' was contrary to the principles of the Charter of the United Nations and was therefore 'null and void.' It also rejected the so-called 'negotiated settlement' based on the Bantustan structure.

In 1989, the General Assembly adopted a record twelve resolutions and an ambitious Declaration on Apartheid and Its Destructive Consequences in Southern Africa. . . .

The Declaration contains a set of principles for a new constitutional order of South Africa, a set of requirements for creating an appropriate climate for negotiations, guidelines for the process of negotiations, and a program of action. According to the Declaration, the new constitutional order should be based on the Charter of the United Nations and the Universal Declaration of Human Rights. . . .

This declaration represented a turning point in the relations between the United Nations and South Africa. Its main emphasis was on substituting meaningful negotiations and achievable goals for hostile rhetoric. The door was opened for the Secretary-General to assist in achieving the new goals, rather than directing the strangling of the South African economy. For the first time, the United Nations presented to the South African Government a detailed plan on how the transition to new South Africa can be accomplished, in which all, including the white minority, will be able to live normal lives in peace.

. . .

After more than forty years of confrontation between South Africa and the United Nations over the right of the United Nations 'to intervene in matters which are essentially within the domestic jurisdiction' of South Africa, the

view finally prevailed that the issue of establishing in South Africa a non-racial and democratic constitution that would guarantee equal rights to all citizens was no longer a matter essentially of domestic jurisdiction. . . .

. . .

. . . While a 'threat to the peace' was first narrowly interpreted, it was considerably broadened over the years, far beyond the early tentative approach to include 'potential threats.' Apartheid in South Africa became transformed through interpretations of United Nations law from a social evil, to a repugnant practice, to a crime under international law, to a threat to the peace that must not be tolerated by the international community and which warranted the imposition of mandatory economic sanctions against the deviant government.

NOTE

As the General Assembly increasingly exercised its Charter-based authority to 'discuss any questions or any matters within the scope of the . . . Charter' (Art. 10) and to 'initiate studies and make recommendations for the purpose of . . . [*inter alia*] assisting in the realization of human rights' (Art. 13), governments turned their objections to more intrusive UN-related activities such as requests by UN organs to states to admit human rights monitors of one type or another, concerted campaigns to mobilize world public opinion, and the imposition of unilateral or multilateral sanctions.

Today, the Article 2(7) defence is invoked primarily in response to threats of forceful intervention. In recent years a coalition of Third World states, as noted below, has sought to resist this development.

In *Inter-State Accountability for Violations of Human Rights* (1992), Menno Kamminga traces the evolution of the domestic jurisdiction defense in relation to cases such as those of Vietnam in the early 1960s, Israel since the late 1960s, Chile in the 1970s and countries such as Iran and Afghanistan in the 1980s. A wide range of governments have proved to be unable to maintain a strong defensive interpretation of Article 2(7) that is consistent. Although they might wish to invoke the principle in their own defense or the defense of one of their allies, they have been prepared to insist on measures against certain states, thereby creating precedents that have been difficult to resist or distinguish in subsequent cases.

The only significant exception in this regard has been the People's Republic of China, which has abstained from condemning human rights violations in other states of which it clearly did not approve. But even China supported resolutions condemning human rights violations in Afghanistan, southern Africa and the Israeli Occupied Territories. Recall China's contemporary views about human rights, domestic jurisdiction and intervention that appear in the excerpts from the 1991 White Paper on Human Rights in China, at p. 233, *supra*.

In the early 1980s the Communist countries of Eastern Europe consistently invoked Article 2(7) in response to attempts to undertake a study of the situation under martial law in Poland. Martial law was declared in 1981 under the Polish Constitution partly in response to challenges by Solidarity and other trade union groups to the powers of the central government. In accordance with its obligations under Article 4 of the ICCPR, the Polish Government informed the UN Secretary-General 'of the temporary derogations from or limitations [to] some of the Covenant's provisions, to the extent strictly required by the situation, along with the reasons therefor' (UN Doc. E/CN.4/1983/SR.40/Add.1, para. 42). A resolution by the UN Commission condemning the declaration of martial law provoked the following response.

STATEMENT BY THE REPRESENTATIVE OF POLAND

UN Commission on Human Rights, 1983
UN Doc. E/CN.4/1983/SR.40/Add.1.

41. *MR SOKALSKI* (Poland) . . . [T]he Government of Poland had rejected [the resolution] as unlawful, null and void, politically harmful and morally two-faced. Poland had also publicly declared that it would not participate in any way in the implementation of the resolution, which represented a miscarriage of international justice on the part of some members of the Commission. . . .

. . .

47. Martial law was obviously a painful and by no means normal state of affairs, but not nearly so abnormal as the situation that had prevailed previously. It had represented neither a military coup nor an attempt to install a military dictatorship. The Polish people had sufficient strength, wisdom and national zeal to institute and live under an efficient democratic system of socialist government. Martial law was not an end in itself, not an attack, but an instinctive defence aimed at reversing an exceptionally serious public emergency that had threatened the life of the nation. . . . Developments in Poland had clearly fallen within the sphere of domestic jurisdiction and, in accordance with Article 2, paragraph 7, of the Charter, the United Nations was precluded from discussing them, a further reason why Poland had rejected resolution 1982/26 as a serious violation of the Charter principles.

. . .

52. The proclamation of martial law in Poland had complied with all the requirements of domestic and international law, had been throughout a sovereign Polish decision, and had in no way endangered any other State. . . .

. . .

54. The Polish constitutional authorities were alone entitled to pass judgement on the necessity for and justifiability of the action taken. . . .

55. In September 1982, the Minister for Foreign Affairs of Poland had had discussions with the Secretary-General . . . The detailed memorandum which the Secretary-General had received had spelled out clearly that, along with the intensive efforts for an early lifting of the remaining restrictions, continued efforts were being made to create conditions favourable to national accord, economic reconstruction and revitalization, and ensure that the policy of reforms and social renewal was irreversible. Poland would take every opportunity for greater co-operation with the Secretary-General on all matters of mutual interest, and in his capacity as the depositary of the International Covenant on Civil and Political Rights. It would do nothing under duress or under the unacceptable terms of illegal resolutions.

56. Pursuant to General Assembly and Economic and Social Council resolutions, United Nations organs, and notably the Commission on Human Rights, were entitled to consider human rights questions concerning Member States only if the following criteria were met: firstly, that a particular situation represented a gross, massive and flagrant violation of human rights and fundamental freedoms; secondly, that the situation represented a consistent pattern of such violations; thirdly, that the situation endangered international peace and security; and lastly, that consideration of the situation was without prejudice to the functions and powers of organs already in existence . . . .

NOTE

The end of the Cold War brought a dramatic change of policy with respect to domestic jurisdiction. Consider the statement adopted in October 1991 by the Moscow Meeting of the Conference on the Human Dimension of the Conference on Security and Co-operation in Europe (the CSCE, or Helsinki process, described at p.577, *infra*):

> The participating States emphasize that issues relating to human rights, fundamental freedoms, democracy and the rule of law are of international concern, as respect for these rights and freedoms constitutes one of the foundations of the international order. They categorically and irrevocably declare that the commitments undertaken in the field of the human dimension of the CSCE are matters of direct and legitimate concern to all participating States and do not belong exclusively to the internal affairs of the State concerned.[5]

Despite this clear erosion of the domestic jurisdiction defense, many commentators consider that the concept has not become meaningless. Recall the comments of Oscar Schachter, at p. 164, *supra*. Felix Ermacora's conclusion

[5] 30 Int'l Leg. Mat. 1670, 1672 (1991).

is that only matters relating ... a state's governmental system' are essentially within domestic jurisdiction ... nevertheless.

> [e]ven this only holds ... So far as the state can claim legitimacy in terms of the right to self-determination ... by virtue of a representative government, and by respect for human rights. No particular governmental system is dictated by the Charter or required by general international law; no UN resolutions prescribe a specific governmental system. A government must only exhibit the criteria mentioned above.[6]

A clear indication of the continuing attempt to grapple with these issues is contained in two recent statements. The first is a 1994 General Assembly resolution sponsored by a coalition of Third World states and rejected by the West. It was adopted by votes in favor, 35 against and 24 abstentions. General Assembly Resolution 49/186 (1994) reads in part:

> The General Assembly
>
> ...
>
> 6. *Considers it necessary* that all Member States to promote international cooperation on the basis of respect for the independence, sovereignty and territorial integrity of each State, including the right of every people to choose freely its own socio-economic and political system, with a view to solving international economic, social and humanitarian problems: ...

The second statement is a resolution on 'the principle of non-intervention in internal affairs' adopted in 1990 by the highly respected Institute of International Law (UN Doc. E/CN.4/1990/NGO/55). It provides, *inter alia*:

> [2] ... Without prejudice to the [UN Charter] ... States, acting individually or collectively, are entitled to take diplomatic, economic and other measures toward any other State which has violated the obligation [to ensure the observance of human rights], provided such measures are permitted under international law and do not involve the use of armed force in violation of the Charter ...
>
> ...
>
> [3] Diplomatic representations as well as purely verbal expressions of concern or disapproval regarding any violation of human rights are lawful in all circumstances.

[6] Ermacora, Article 2(7), in Bruno Simma *et al* (eds.), The Charter of the United Nations: A Commentary 139, 152 (1994).

QUESTIONS

1. What conclusions, if any, can be drawn from the manner in which the approach of states and of the principal UN organs to the issue of domestic jurisdiction has evolved since 1945?

2. What would be the implications of accepting either the 1982 Polish or the 1991 Chinese views for determining those situations in which the international community could legitimately concern itself with a state's human rights violations?

3. Can you suggest guidelines for a contemporary conception of domestic jurisdiction that would recognize its historical, essential purpose without unduly constraining the international community's ability to respond to human rights violations?

4. Is para. 6 of GA Res. 49/186 above compatible with the emerging approach to domestic jurisdiction that is reflected in the Moscow statement of the CSCE?

5. Consider the following observations of Martti Koskenniemi:

> The values of the international system as expressed in public international law are those of liberal individualism transposed to the interstate level. The system denies the existence of an external standard of judgment that is valid regardless of whether it is held by states themselves. Its law, Louis Henkin observed recently, 'is designed to further each state's realization of its own notion of the Good.' The 'system' exists only in the formal sense of a shared vocabulary and a set of institutional practices that states use for cooperation or conflict. It is an artificial creation, a contrived synthesis of power and ideas. In short, it is not an organism that embodies some autonomous ideal of authentic communal life.
>
> This is the understanding of the present state system shared and challenged by each of the discourses discussed above: human rights, nationalism, and world order. Each posits an ideal of *authenticity* outside the system that contrasts with the formal and artificial character of statehood. These ideals, however, cannot be sustained within liberal political rhetoric. To the contrary, their enforcement might appear as precisely the kind of authoritarianism against which the state system was created.
>
> . . .
>
> By establishing and consenting to human rights limitations on their own sovereignty, states actually define, delimit, and contain those rights, thereby domesticating their use and affirming the authority of the state as the source from which such rights spring. . . .
>
> . . .
>
> The most universally acclaimed principles of international law continue to be those of sovereignty, self-determination, territorial integrity, non-intervention, and consent, each of which is a reaffirmation of statehood as the law's creative center. . . .

. . .

Statehood survives and should continue to survive for the foreseeable future because its formal-bureaucratic rationality provides a safeguard against the totalitarianism inherent in a commitment to substantive values, which forces those values on people not sharing them.

. . .

These reflections . . . do not require an unreserved commitment to statehood . . . [It] remains a second best—defensible but only to the extent that there can be no general agreement about the authentic purpose of social life. . . .[7]

a. Human rights, says the author, both 'share and challenge' the understanding of the state system set forth in the first paragraph. How does it do each of these things?

b. What implications do these views have for the continuing vitality of the concept of domestic jurisdiction?

c. Can the human rights movement be viewed as what the author refers to as a 'commitment to substantive values' that has an inherent 'totalitarianism' in it? Does that movement tend to destroy cultural and other diversity associated with the existing state system and with related concepts like domestic jurisdiction?[7]

C. THE UN COMMISSION'S MAIN PROCEDURES FOR RESPONDING TO VIOLATIONS

The cumulative result of post-1967 developments in the UN Commission is that there are now three different procedures used by the Commission to respond to violations. They are: (1) confidential consideration of a situation under the 1503 procedure; (2) public debate under the 1235 procedure, which may lead to the appointment of a Special Rapporteur of the Commission, a Special Representative of the Secretary-General, or some other designated individual or group to investigate a situation; and (3) the designation of a 'thematic' rapporteur or Working Group to consider violations anywhere relating to a specific theme (such as torture, disappearances, or arbitrary detention).

In principle, each of these procedures is relatively distinct from the others in terms of its origins, the nature of its mandate, the steps to be followed and the types of outcome available. In practice, there is considerable overlap. It is conceivable that different aspects of a particular situation would be under review by all three procedures at the same time. Moreover, the same situation might be considered simultaneously by one or more of the treaty bodies (such as the ICCPR Human Rights Committee or the Committee Against Torture)

[7] Martti Koskenniemi, The Future of Statehood, 32 Harvard Int. L. J. 397, 404 (1991).

to be considered in Chapter 9 (and as well by one of the regional organizations described in Chapter 10).

For example, before the invasion of Kuwait, the human rights situation in Iraq was under consideration through the 1503 procedure and by several of the thematic mechanisms. Following Iraq's expulsion from Kuwait, its situation was taken up under the 1235 procedure and the thematic mechanisms as well as by several treaty bodies. Had there been a functioning regional organization in existence, consideration might have been extended to it as well.

This duplication raises questions which we briefly note. The first is: why have the relevant procedures, as well as the institutional arrangements, been permitted to develop in this way? One explanation follows.

> . . . The system has grown 'like Topsy' and the boundaries between the different organs are often only poorly delineated. For the most part, this pattern has hardly been accidental. Rather, it is the inevitable result of a variety of actors seeking to achieve diverse, and perhaps sometimes even irreconcilable, objectives within the same overall institutional framework. If an existing body could not do a particular job, whether because of some intrinsic defects, sheer incompetence, or, more likely, political intransigence, the preferred response was to set up yet another. In a very short space of time States and individual actors would develop a vested interest in the maintenance of the new body in the same form. This pattern simply repeated itself when a new policy agenda, to which none of the existing bodies was sufficiently responsive, emerged.
>
> In general then, the evolution of the regime has reflected specific political developments. Its expansion has depended upon the effective exploitation of the opportunities which have arisen in any given situation from the prevailing mix of public pressures, the cohesiveness or disarray of the key geopolitical blocks, the power and number of the offending state(s) and the international standing of their current governments, and a variety of other, often rather specific and ephemeral, factors. . . .[8]

A second question is whether it is desirable and feasible to rationalize the various procedures in order to reduce overlapping institutional competences. The 1993 World Conference on Human Rights at Vienna gave impetus to reform proposals in this area, but it remains necessary to overcome one of the principal obstacles to reform. That obstacle is the suspicion that the 'real' agenda of some governments advocating reform is the elimination of the most effective (and intrusive) procedures while retaining those that are largely cosmetic and ineffectual. Genuine reformers have thus tended to assume that the maintenance of duplicative arrangements is a necessary price to pay for ensuring the continuing existence of better procedures.

Before being in a position to consider possible reforms, we need to

[8] Philip Alston, Appraising The United Nations Human Rights Regime, in P. Alston (ed.), The United Nations and Human Rights: A Critical Appraisal 1, 2 (1992).

understand the existing procedures and the ways in which they have functioned. We will consider each procedure in turn.

1. THE 1503 PROCEDURE: PROS AND CONS OF CONFIDENTIALITY

The 1503 procedure involving communications (complaints) to the UN stems from Economic and Social Council Resolution 1503 (XLVIII)(1970). It was adopted after, and built upon, resolution 1235 (XLII)(1967). However, as a mechanism for investigating specific situations involving violations, it developed more rapidly than the 1235 procedure and has often been used as a precursor to action under the latter. Thus we consider it first.

The UN Commission had previously (under Resolutions 75 (V)(1947) and 728 F (XXVIII)(1959)) used communications only as a means of identifying general trends, thus providing no response whatsoever to the particular violations at issue. The adoption of the 1503 procedure involved a typical horse-trading exercise in which governments with competing objectives sought to reconcile their goals through the use of open-ended and flexible language. Both the resolution itself and the subsequent Sub-Commission resolution that laid down the admissibility criteria for communications are perfect case studies in ambiguity.

ECOSOC RESOLUTION 1503 (XLVIII)(1970)

The Economic and Social Council,

. . .

1. *Authorizes* the Sub-Commission on Prevention of Discrimination and Protection of Minorities to appoint a working group consisting of not more than five of its members, with due regard to geographical distribution, to meet once a year in private meetings for a period not exceeding ten days immediately before the sessions of the Sub-Commission to consider all communications, including replies of Governments thereon, received by the Secretary-General under Council resolution 728 F (XXVIII) of 30 July 1959 with a view to bringing to the attention of the Sub-Commission those communications, together with replies of Governments, if any, which appear to reveal a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms within the terms of reference of the Sub-Commission;

. . .

4. *Further requests* the Secretary-General:

(*a*) To furnish to the members of the Sub-Commission every month a list of communications prepared by him in accordance with Council resolution 728 F (XXVIII) and a brief description of them, together with the text of any replies received from Governments;
(*b*) To make available to the members of the working group at their meetings the originals of such communications listed as they may request. . . :

. . .

5. *Requests* the Sub-Commission on Prevention of Discrimination and Protection of Minorities to consider in private meetings, in accordance with paragraph 1 above, the communications brought before it in accordance with the decision of a majority of the members of the working group and any replies of Governments relating thereto and other relevant information; with a view to determining whether to refer to the Commission on Human Rights particular situations which appear to reveal a consistent pattern of gross and reliably attested violations of human rights requiring consideration by the Commission;

6. *Requests* the Commission on Human Rights after it has examined any situation referred to it by the Sub-Commission to determine:

(*a*) Whether it requires a thorough study by the Commission and a report and recommendations thereon to the Council in accordance with paragraph 3 of Council resolution 1235 (XLII);

[Eds. The other alternative is for the Commission to appoint an '*ad hoc* committee' to investigate the situation. But that requires 'the express consent of the State concerned and shall be conducted in constant co-operation with that State and under conditions determined by agreement with it.' All 'available means at the national level' must have been exhausted and the situation should not relate to a matter being dealt with under other international procedures. Members of the committee are appointed by the Commission but subject to the consent of the government concerned. Its work is to be entirely confidential and it should 'strive for friendly solutions' at all times. It then reports to the Commission 'with such observations and suggestions as it may deem appropriate.' This procedure has never been used.]

. . .

8. *Decides* that all actions envisaged in the implementation of the present resolution by the Sub-Commission on Prevention of Discrimination and Protection of Minorities or the Commission on Human Rights shall remain confidential until such time as the Commission may decide to make recommendations to the Economic and Social Council;

. . .

10. *Decides* that the procedure set out in the present resolution for dealing with communications relating to violations of human rights and fundamental freedoms should be reviewed if any new organ entitled to deal with such communications should be established within the United Nations or by international agreement.

SUB-COMMISSION RESOLUTION 1 (XXIV)(1971)

The Sub-Commission on Prevention of Discrimination and Protection of Minorities,

. . .

Adopts the following provisional procedures for dealing with the question of admissibility of communications referred to above:

(1) Standards and criteria

(a) The object of the communication must not be inconsistent with the relevant principles of the Charter, of the Universal Declaration of Human Rights and of the other applicable instruments in the field of human rights.

(b) Communications shall be admissible only if, after consideration thereof, together with the replies of any of the Governments concerned, there are reasonable grounds to believe that they may reveal a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms, including policies of racial discrimination and segregation and of *apartheid*, in any country, including colonial and other dependent countries and peoples.

(2) Source of communications

(a) Admissible communications may originate from a person or group of persons who, it can be reasonably presumed, are victims of the violations referred to in subparagraph (1)(b) above, any person or group of persons who have direct and reliable knowledge of those violations, or non-governmental organizations acting in good faith in accordance with recognized principles of human rights, not resorting to politically motivated stands contrary to the provisions of the Charter of the United Nations and having direct and reliable knowledge of such violations.

(b) Anonymous communications shall be inadmissible; . . . ;

(c) Communications shall not be inadmissible solely because the knowledge of the individual authors is second-hand, provided that they are accompanied by clear evidence.

(3) Contents of communications and nature of allegations

(a) The communication must contain a description of the facts and must indicate the purpose of the petition and the rights that have been violated.

(b) Communications shall be inadmissible if their language is essentially abusive and in particular if they contain insulting references to the State against which the complaint is directed. Such communications may be con-

sidered if they meet the other criteria for admissibility after deletion of the abusive language.

(c) A communication shall be inadmissible if it has manifestly political motivations and its subject is contrary to the provisions of the Charter of the United Nations.

(d) A communication shall be inadmissible if it appears that it is based exclusively on reports disseminated by mass media.

(4) Existence of other remedies

(a) Communications shall be inadmissible if their admission would prejudice the functions of the specialized agencies of the United Nations system.

(b) Communications shall be inadmissible if domestic remedies have not been exhausted, unless it appears that such remedies would be ineffective or unreasonably prolonged. Any failure to exhaust remedies should be satisfactorily established.

(c) Communications relating to cases which have been settled by the State concerned in accordance with the principles set forth in the Universal Declaration of Human Rights and other applicable documents in the field of human rights will not be considered.

(5) Timeliness

A communication shall be inadmissible if it is not submitted to the United Nations within a reasonable time after the exhaustion of the domestic remedies as provided above.

QUESTION

The best way to get a sense of the loopholes in the 1503 procedure that governments have tried to exploit over the years is to take a hypothetical case and formulate as many arguments as possible to the effect that the matter does not fit within the relevant guidelines, and therefore should not be considered.

Consider this case. The government you represent is responding to a communication alleging that 100 members of a group have been arbitrarily detained for a period of six months. The communication has been brought by a small NGO based in your country. The group's secretary is also the leader of a political party opposed to the government. The compiaint, based upon newspaper reports and accounts provided by relatives of eleven detained persons, mentions that the government is widely considered to be both oppressive and exploitative. The communication notes that the state's courts have always done the government's bidding and that it would be a waste of time and resources to ask the courts to order the release of the detainees.

What arguments would you make against admissibility?

NOTE

Until the mid-1980s the UN received, on average, 25,000 complaints per year. Recently this number has ballooned to around 300,000, but many of these complaints are identical as a result of letter-writing campaigns by groups with a large and active membership. Because the procedure was carefully designed to ensure that governments would not lightly be accused of violations and because it is concerned not with individual cases, but with 'situations,' the processes involved are tedious and time-consuming. Consider the following.

PHILIP ALSTON, THE COMMISSION ON HUMAN RIGHTS

in Alston (ed.), The United Nations and Human Rights: A Critical Appraisal 126 (1992), at 146.

. . .

[T]he procedure currently consists of the following four steps. Firstly, the Communications Working Group of the Sub-Commission begins the procedure by sorting through the various complaints that have been received in the preceding year. The group consists of five Sub-Commission members and each takes primary responsibility for complaints dealing with a specific cluster of rights. . . . The Group requires an affirmative majority vote before any 'situation' can be forwarded on to the Sub-Commission in plenary.

In recent years the Sub-Commission's Working Group has sent its parent a list of about eight to ten countries a year on average. It might also identify a few situations for specific consideration the following year, thus implicitly serving notice on the governments concerned. At the second stage, when the full Sub-Commission considers each of its Working Group's 'nominees', it opts by a simple majority vote to send the country on to the Commission, to drop it, or to reconsider it the following year. While the complainant is not informed at this stage, the government concerned is invited to submit written observations and to defend itself before the Commission, thus creating a clear inequality of opportunities to participate in the proceedings. As the third stage of the procedure the Commission also establishes a Communications Working Group. Its task is to draft recommendations as to the action which the Commission might wish to take on each country situation that is put before it. At the fourth stage the Commission itself devotes several days at each of its annual sessions to a consideration of all the relevant material. At the end of its deliberations its Chairman announces the names of the countries that have been considered and the names of those that have been let off the hook. He or she does not, however, provide any details as to the nature of the allegations or the specific action taken by the Commission. As to the latter, several options are available—in addition to dropping the case altogether. The

first is to keep it 'under review' which means that more evidence will be admitted next year and the government concerned will be called to account again. It also provides an incentive for at least cosmetic measures to be adopted and for strong lobbying to be undertaken in the meantime. The second option is to send an envoy to seek further information on the spot and report back to the Commission. The third is to appoint an *ad hoc* committee which, with the approval of the state concerned, can conduct a confidential investigation aimed at finding a 'friendly solution'. The Committee then reports to the Commission 'with such observations and suggestions as it may deem appropriate'. This procedure has, as of the end of the 1991 session, never been invoked. The fourth and final option is for the Commission to transfer the case to the 1235 procedure, thereby going public and permitting 'a thorough study by the Commission and a report and recommendations thereon to the Council'. The role of the Council in this respect has so far proved to be absolutely minimal.

Thus, in the absence of a decision to go public, the entire procedure is shrouded in secrecy, with each of its stages being accomplished in confidential sessions by the bodies concerned. Nevertheless, the details have invariably been leaked to the media for one reason or another and the complete documentation on several country situations has been made available as a result of Commission decisions to release all the relevant documentation in cases concerning Equatorial Guinea, Uruguay, Argentina, and the Philippines.

In statistical terms, the 1503 procedure has 'touched' an impressive number of countries. On the basis of unofficial sources it seems that at least forty-five countries have been reported to the Commission under the procedure since 1972. More authoritatively, however, it can be said that since the Commission began to officially identify the situations before it, in 1978, thirty-nine States have been subject to scrutiny as of the end of the 1991 session. Of these, twelve were in Africa, twelve in Asia, twelve in Latin America, two in Eastern Europe, and one in Western Europe.

NOTE

The release of the documentation on Uruguay, which was under 1503 review from 1978 to 1985, provides insights into some of the ways in which the procedure might be rendered ineffectual. Human rights NGOs had reported to the Commission (UN Doc. E/CN.4/R.27(1977)) thousands of cases of arbitrary arrest and torture, a significant number of disappearances and deaths and the 'destruction of the rule of law.' In response, the Commission requested the then Secretary-General (Kurt Waldheim) to undertake a confidential mission to make 'direct contacts with the Government . . . with a view to keeping the Commission informed and to improving the human rights situation.' He appointed Under-Secretary-General Javier Pérez de Cuéllar (later to become Secretary-General) as his envoy. His report read, in part, as follows:

REPORT OF THE SECRETARY-GENERAL ON URUGUAY PURSUANT TO RESOLUTION 15 (XXXIV) OF THE COMMISSION ON HUMAN RIGHTS

UN Doc. E/CN.4/R.50/Add.2 (1980)(Confidential), at 2.

. . .

The discussions held in the Commission . . . indicate that the Commission wanted 'direct contacts' to be established with the Governments of certain countries, in order to improve the human rights situation and keep abreast of developments. It is clear from the discussions that these "direct contacts" should meet the following criteria:

(a) Exclusive dealings with the authorities;
(b) Respect for the sovereignty of the State;
(c) A cautious and flexible approach to the problem;
(d) Confidentiality of the contacts.

. . .

2. *Direct contacts with the Uruguayan Government*

Mr. Pérez de Cuéllar arrived at Montevideo on 10 December 1979 and was met by . . . Ambassador Edmundo Narancio, and by a representative of the Commander in Chief of the Army, Colonel Regino Brugeno. Throughout the visit the latter was most helpful in establishing liaison with the various Uruguayan authorities . . . .

Five days after his arrival, Mr. Pérez de Cuéllar was received by the President of the Republic, Dr. Aparicio Méndez, who was accompanied by the Commanders-in-Chief of the three armed forces; by the President of the Council of State, Dr. Hamlet Reyes and the members of the Council, who were also the members of a 'Commission on Individual Rights' of the Council; by the Ministers for Foreign Affairs, Defense, Interior, Justice and Labour; by the Commander-in-Chief of the Army, and by the President of the Military Tribunal.

Mr. Pérez de Cuéllar was not only treated with courtesy at all times but he was also given every facility for the accomplishment of his mission.

. . .

First of all the authorities interviewed stated—as a basic premise—that the Uruguayan Constitution of 1967 (article 168, paragraph 17) authorizes the President of the Republic to take 'prompt security measures in serious or unforeseen cases of foreign attack or internal disorder'.

Secondly, they gave a detailed and documented account of the political, economic and social crisis suffered by Uruguay from 1967 onwards and of the way in which various [illegible] helped to turn this crisis into

a veritable challenge to the authority of the State and reduced the country to a state of internal chaos through their terrorist activities, which constituted outright subversion or intense disorder.

. . .

On 27 June 1973, considering that the Legislature was impeding the course of justice by refusing to suspend the immunity from prosecution of the members of Parliament involved in verified seditious activities, and was failing to perform or misrepresenting its constitutional functions, the President of the Republic dissolved the two Houses and ordered that their powers should be exercised by a Council of State consisting of 20 members, whose functions would be the specific functions of the Parliament, 'to monitor the actions of the Executive Branch in connexion with respect for the individual rights of the human person and the compliance of that branch with the Constitutional and legal provisions' and to 'draft a Constitutional Reform reaffirming the basic principles of democratic and representative government, to be adopted by the electorate at a future plebiscite'.

In June 1976 the Executive began to issue 'Constitutional decrees or Institutional Acts' introducing transitional amendments to the 1967 Constitution, pending the formulation of definitive Constitutional norms. The amendments included the establishment of the National Council, consisting of the members of the Council of State, and the members of the Council of General Officers (Junta de Oficiales Generales), with the power to appoint the President of the Republic and other heads of Government branches and to hear charges made against those dignitaries.

In September 1977 the Executive announced its intention of promulgating a new Constitution in 1980 and holding general elections in 1981.

3. *General situation of human rights in Uruguay*

The Uruguayan authorities with whom Mr. Pérez de Cuéllar discussed human rights in Uruguay most strongly re-emphasized that those rights not only form part of Uruguay's legal tradition and were recognized by the Constitution and the Constitutional Decree of 20 October 1976, but had been continually respected and were still being respected in the struggle against subversion in that country.

First of all the authorities most emphatically stated that neither in the past nor at present had there been, or were there, in Uruguay any prisoners arrested or detained for political reasons. . . .

Secondly, they stated that the 'State Security Act', making acts detrimental to the nation an offence, was a law enacted in 1972 by the Parliament elected in 1971, and therefore constitutionally unobjectionable. They maintained that the detentions under article 168, paragraph 17, of the Constitution were exceptions. At present there are only 20 such cases.

. . .

As for the trials of detainees, the authorities gave their assurance that they always acted within the constitutional and legal framework prescribed by Parliament, and particularly the Security Act. The procedure provided for in that Act, which continues to be applied, requires that the arrested person be brought before the competent Examining Military Judge within 10 days. The Government therefore rejects the charge that the prisoners are held incommunicado for months without being brought before a judge. It explained that if they had not been brought before a judge they would have invoked the right of habeas corpus under the Constitution (articles 12, 17, 23 and 30 of the Constitution). It stated that only three out of a thousand detainees had invoked that right. The constitutional principle of the right of defence was also respected, according to the authorities.

. . .

The authorities most strongly denied that any ill treatment or torture of prisoners, either before the trial or during their stay in prison, had been tolerated.

With regard to prison conditions and the treatment of prisoners, Mr. Pérez de Cuéllar was able to pay a lengthy visit to the . . . houses of detention. . . . [T]hose prisons did not house any common criminals who had not committed offences against State security. Mr. Pérez de Cuéllar was able to observe that the prison conditions were extremely reasonable as regards hygiene (cleanliness, lighting and ventilation), neatness, food and medical services. He was able to see that normal arrangements were made for recreation and outdoor activities. He visited special reading rooms, music rooms and workshops for the teaching or practice of handicrafts, such as carpentry, printing, weaving, upholstering, mechanics and bookbinding. The prisoners can hear radio programmes, national and international news reports, and information on and broadcasts of sports events. The guards are armed only with wooden truncheons for purposes of self defence. He was told that visits to prisoners were normal and regular, and he himself was able to observe the presence of relatives waiting to pay such visits. As regards correspondence, including parcels and foodstuffs, he was assured that they were of the kind allowed in any detention centre.

As for the physical condition of the detainees, Mr. Pérez de Cuéllar found that they all appeared healthy. Among the many prisoners whom he was able to meet, were Messrs. Altessor, Estrella, Massera and Turcanski, whose cases are known internationally.

. . .

4. The authorities interviewed made repeated references to the campaign being waged outside the country about the trial conditions and pressure on prisoners in Uruguay. They feel that this campaign is being engineered by exiled or fugitive opposition politicians, with the support of foreign political groups interested in projecting an image of inhuman repression in Uruguay.

QUESTION

This report remains controversial. (a) How would you characterize its strengths and weaknesses? (b) How would you describe the purposes of this report from the point of view of its author? How do you assess those purposes? (c) Does the element of confidentiality lend itself inevitably to the approach of this report? If not, what measures could be taken, within the constraints imposed by the procedure, to ensure a more satisfactory outcome?

PHILIP ALSTON, THE COMMISSION ON HUMAN RIGHTS

in Alston (ed.), The United Nations and Human Rights: A Critical Appraisal 126 (1992), at 151.

. . .

The experience gained with the 1503 procedure over almost twenty years is sufficient to enable some general observations to be made about it. With respect to the range of situations taken up it appears that: (*a*) alleged violations of economic, social, and cultural rights have never been examined seriously, despite a resolution by the Commission urging that they should be; (*b*) the Commission has responded to violations of only a limited range of civil and political rights, which in turn has ensured that while Third World countries are disproportionately represented on the 1503 blacklist, developed countries (both West and East) have only very rarely been called to account, (*c*) there is probably a *de facto* limit of 6 to 8 on the number of countries that the Commission is prepared to take on at any one time, but since a similar principle applies to the public country-specific procedures 1503 effectively doubles the number of countries that can be 'named'; (*d*) despite the focus on 'situations' some individuals have been directly assisted under the procedure; and (*e*) many of the situations dealt with under the Commission's public procedures have been raised earlier in the 1503 context.

With respect to the actual functioning of the procedure it is clear that some of the early wrinkles were effectively ironed out in the course of the first decade. In particular, the relationship between the public and private procedures, [i.e. the public 1235 procedure discussed below and the private 1503 procedure], which was often invoked in an effort to confine discussions to the latter domain in the 1970s, was resolved in such a way as to make it clear that only the proceedings themselves and the details of decisions taken were confidential. There is thus no bar to focusing on the same country in both procedures at the same time. Nevertheless, the procedure is designed to move extremely slowly and deliberations are, as a result, too often based on outdated information. . . .

Another criticism of the functioning of the procedure concerns the Commission's apparent failure to structure its working methods under 1503. Consequently, the response in one situation will often bear little relationship to that adopted in another generally comparable one. While no two situations are identical and attempts to draw comparisons are often flawed, there is still room to seek some consistency in responses, to seek a more uniform structure for reports prepared, and to question States representatives in a more systematic fashion. From the records that are available, the 'dialogue' that takes place is usually unadulterated political horse-trading rather than a probing inquiry into the facts and a quest for the most effective potential response. Thus, those who have observed the procedure in practice have noted that the level of debate in the closed sessions is sometimes abysmally low and reveals that delegations have done little, if any, serious preparation.

Providing a general evaluation of the 1503 procedure is difficult but necessary. The question is whether the procedure provides adequate returns in terms of the investments of faith, time, energy, and media attention that have been made in it; whether, on balance, it succeeds in putting enough pressure on enough countries in ways that could not more effectively be achieved by other means. Some of those means might already be in existence, others might more easily be created if the 1503 procedure were to be eliminated.

The first point to be made is that the historical value of the 1503 procedure cannot be doubted. In many ways it laid the groundwork for the development of the potentially effective public (i.e., resolution 1235-based) response to violations which began to come into its own after 1979. It put paid once and for all to the domestic jurisdiction *canard*; it accustomed States to the need to defend themselves and gave them practice in examining (and prosecuting) the performance of others; it galvanized some of the NGOs at a time when some of the other procedures offered even lower rates of return; and it exposed the Commission and Sub-Commission to the real world of violations more effectively than any earlier exercise had. But a valuable historical role does not of itself justify the procedure's retention in the 1990s. Among commentators, the procedure has had both its defenders and its critics. Among the latter was Amnesty International which, in the mid-1970s, characterized the confidentiality of 1503 as 'an undisguised stratagem for using the United Nations, not as an instrument for promoting and protecting and exposing large-scale violations of human rights, but rather for concealing their occurrence'. In a similar vein the then Director of the UN's human rights Secretariat, Theo van Boven, asked in a thinly veiled allusion to the procedure in his opening statement to the Commission in 1980:

> Is it satisfactory to place so much emphasis on the consideration of situations in confidential procedures thereby shutting out the international community and oppressed peoples? Are certain procedures in danger of becoming, in effect, screens of confidentiality to prevent cases discussed thereunder from being aired in public? While there is probably no alternative to trying to co-operate with the Governments concerned, should we

allow this to result in the passage of several years while the victims continue to suffer and nothing meaningful is really done?

Writing a decade later, in 1990, Iain Guest concluded that 'confidentiality has not persuaded governments to cooperate with the United Nations' and that '1503 has become truly dangerous to human rights—and that it offers a useful refuge to repressive regimes'.

While some of the procedure's proponents would disagree strongly with such assessments, their enthusiasm is nevertheless usually rather restrained. Writing in 1980, Tardu was optimistic about the procedure's future while conceding that its past performance had left much to be desired. In 1982 Zuijdwijk, after an exhaustive study of the procedure, damned it with faint praise by concluding that it is 'worth sending a petition to the United Nations under resolution 1503 (XLVIII) but petitioners should limit their expectations'. Tolley is equally sparing in his praise for 1503 although he attaches importance to the fact that most target governments feel threatened by it and that 'only four states have failed to have observers at two consecutive [Commission] sessions when their government was under Resolution 1503 review'. An experienced Sub-Commission member, Marc Bossuyt, has strongly defended the procedure on the grounds that: (1) 1503 review facilitates subsequent consideration of a country under the public procedures—a hypothesis that would appear to be at least questionable; and (2) that it enables attention to be paid to situations that would otherwise be ignored. His views are predicated on the assumptions that a government's reputation suffers from remaining under 1503 review and that a continuing dialogue is the key to success in dealing with human rights violations. . . .

In general, it would seem . . . that the shortcomings of the procedure are so considerable, its tangible achievements so scarce, the justifications offered in its favour so modest, and the need for an effective and universally applicable petition procedure so great, that it is time to re-evaluate its future. The principal options are major reform or abolition. . . .

FRANK NEWMAN AND DAVID WEISSBRODT,
in International Human Rights 109 (1990), at 122.

. . .

The 1503 process may encourage governments to engage in an exchange of views and possibly to improve the situation without the glare of substantial publicity. Many governments, including the U.S., regularly respond to 1503 communications. They may not provide a substantive answer to public criticism heard at the Commission or its Sub-Commission, because they have insufficient opportunity during the busy debate (under resolution 1235) to research and submit a good response. Also, unless there is a substantial consensus for action under 1235, governments may realize the public criticism can

safely be ignored. In addition, a few governments are so offended by public criticism that they stubbornly refuse to take action to improve the situation. Hence, the 1503 procedure may sometimes afford a better opportunity for constructive dialogue than the public 1235 process. Until 1989 Iran was an example of a country which was intransigent in the face of public actions under 1235. It is, though, doubtful whether Iran would have been more responsive under 1503.

While the 1503 process is painfully slow, complex, secret, and vulnerable to political influence at many junctures, it does afford an incremental technique for placing gradually increasing pressure on offending governments. Nevertheless, the confidentiality of the process can be used as a barrier to effective U.N. action in the case of governments that do not respond to incremental pressure and continue to engage, over several years in grave and widespread violations of human rights. If the objective is to obtain prompt publicity or public action for serious human rights violations, the 1503 process is inappropriate.

QUESTIONS

1. How would you evaluate the 1503 procedure? What criteria for effectiveness would you use? What reforms, if any, would you suggest in order to make the procedure more effective?

2. You are a lawyer working with an NGO in state X, ruled by a repressive military government. Your client, a journalist hostile to the regime, is one of a number of people—exact figures are not available, but an informed guess would be around 800—in this country of 10 million people that have recently been imprisoned because of their advocacy for a democratic regime. You have succeeded in seeing her only after 38 days of detention, during which she claims to have been tortured. Your client asks whether there are international procedures available for seeking relief. Assuming that a communication under the 1503 procedure would be held admissible, would you recommend that she request you to proceed?

2. THE 1235 PROCEDURE: PROCESSES AND PARTICIPANTS

a. The Process and its Outcomes

ECOSOC Resolution 1235 (XLII)(1967) established the procedure on the basis of which the Commission holds an annual public debate focusing on

gross violations in a number of states. The pertinent parts of the resolution are as follows.

ECOSOC RESOLUTION 1235 (XLII)(1967)

The Economic and Social Council,

. . .

1. *Welcomes* the decision of the Commission on Human Rights to give annual consideration to the item entitled 'Question of the violation of human rights and fundamental freedoms, including policies of racial discrimination and segregation and of *apartheid*, in all countries, with particular reference to colonial and other dependent countries and territories,' without prejudice to the functions and powers of organs already in existence or which may be established within the framework of measures of implementation included in international covenants and conventions on the protection of human rights and fundamental freedoms; . . .

2. *Authorizes* the Commission on Human Rights and the Sub-Commission on Prevention of Discrimination and Protection of Minorities, . . . to examine information relevant to gross violations of human rights and fundamental freedoms, as exemplified by the policy of *apartheid* as practised in the Republic of South Africa and in the Territory of South West Africa under the direct responsibility of the United Nations and now illegally occupied by the Government of the Republic of South Africa, and to racial discrimination as practised notably in Southern Rhodesia. . . .

3. *Decides* that the Commission on Human Rights may, in appropriate cases, and after careful consideration of the information thus made available to it, in conformity with the provisions of paragraph 1 above, make a thorough study of situations which reveal a consistent pattern of violations of human rights, as exemplified by the policy of *apartheid* as practised in the Republic of South Africa and in the Territory of South West Africa under the direct responsibility of the United Nations and now illegally occupied by the Government of the Republic of South Africa, and racial discrimination as practised notably in Southern Rhodesia, and report, with recommendations thereon, to the Economic and Social Council;

4. *Decides* to review the provisions of paragraphs 2 and 3 of the present resolution after the entry into force of the International Covenants on Human Rights;

. . .

COMMENT ON THE 1235 PROCEDURE AND ITS POSSIBLE OUTCOMES

These provisions provide a vivid illustration of the extent to which the Commission's mandate has evolved. The ways in which violations are now dealt with by the Commission, still under the rubric of the 1235 procedure, bear only a passing resemblance to the procedure formally authorized by the resolution.

The procedure now operates to legitimate two types of activity of the Commission. The first, in accordance with the mandate, involves the holding of an annual public debate in which governments and NGOs are given an opportunity to identify publicly those country-specific situations that they consider to be particularly deserving of the Commission's attention. The second involves studying and investigating particular situations (or individual cases) through the use of whatever techniques the Commission deems appropriate.

Although this section of Chapter 7 focuses primarily on fact-finding problems and the issues raised by reporting about governments' conduct, it should be noted that such investigative activity is only authorized in relation to a small proportion of the situations identified during the annual debate. This does not mean that the remaining situations are entirely neglected. The Commission can contribute in other ways to the pressures felt by a government accused of violations. In theory, there is a broad range of outcomes that might follow the identification of a serious country situation by another government or by an NGO within the framework of the 1235 debate. They include:

- the mere mention of a situation in the debate might embarrass a country (sometimes referred to as the sanction of 'shaming'), generate media coverage, or influence another country's foreign policy;
- an NGO might use the occasion to pressure other governments to take up the issue on a bilateral or multilateral basis;
- a draft resolution might be circulated, and then withdrawn, perhaps after a strong lobbying effort by the government concerned or in response to concessions offered by that government;
- the Chairman of the Commission might issue a statement of exhortation, with the (de facto, if not formal) approval of the Commission;
- the Commission might adopt a resolution calling for all available information to be submitted to it with a view to considering the matter at a later session;
- the Commission might call upon the government to respond to the allegations in detail and in writing before its next session;

- the Commission might adopt a resolution criticizing the government (for which purpose, language ranging from the diplomatic to the highly critical might be used) and calling upon it to take specific measures;
- the Commission might appoint a Special Rapporteur or other individual or group to examine the situation and submit a report to the Commission on the basis of a visit to the country; or
- the Commission might call upon the Security Council to take up the issue, with a view to considering the adoption of sanctions or some other punitive measure.

As later materials suggest, the impact of any of these measures will vary greatly depending on factors such as: the nature of the violations and especially the extent to which their continuation is central to the government's strategy for retaining power; the relative influence of domestic pressure groups; the degree of support for the measure in the Commission; the openness of the country concerned to external influences; the vulnerability of the country to trade, aid or other pressures; and the attitude taken by the country's allies and its regional neighbours.

Before examining the practice of the Commission under the 1235 procedure of appointing a Special Rapporteur or other individual or group to examine the situation, it is necessary to consider the assumptions and procedures on the basis of which international fact-finding has developed.

b. The Quest for Fact-finding Guidelines

In the context of this Chapter, the procedures and guidelines set forth in the following materials bear directly on investigations and reporting within the UN system. But they are also relevant to fact-finding by non-governmental organizations (see. p. 473, *infra*) and by regional organs such as the Inter-American Commission on Human Rights (p. 640, *infra*).

NOTE

The notion that the international community will seek to 'find facts' that may not accord with, or even flatly contradict, those provided officially by a sovereign government would have been virtually unthinkable not so many years ago. For example, when the 1907 Hague Convention relating to international commissions of inquiry was adopted, its scope was carefully limited so as to cover only 'disputes involving neither honour nor essential interests.' Today, international fact-finding is an accepted and relatively common activity. It is carried out not only by a large number of international organizations but also by individual states.

Fact-finding depends for its credibility and potential impact upon the extent to which it is perceived to have been thorough, politically objective and procedurally fair. For that reason attempts have been made to draw up rules or guidelines for fact-finders. In the following materials, Nicholas Valticos introduces some general issues. An excerpt from the State Department's annual Country Report on Human Rights Practices emphasizes the difficulty of getting to the truth of the matter.

NICHOLAS VALTICOS, FOREWORD

in B.G. Ramcharan (ed.), International Law and Fact-finding in the Field of Human Rights (1982), at vii.

. . . Today fact-finding is . . . frequently called for as part of the action taken by the international community to secure respect for human rights.

. . . It is no longer a matter of ascertaining the facts in cases which merely involve the interests of two States. As was pointed out by an ILO commission of inquiry in 1962, the purpose of inquiry is to gather 'thorough and objective information' on issues of 'public importance'. . . . [I]ssues of major importance to both the international community and the State concerned are often at stake. What type of action can be taken in such cases to meet the requirements of the international community while taking account of the susceptibilities of the State involved?

The problem is not confined to international action in the field of human rights. Fact-finding may be needed, in varying measure, in all procedures through which it is sought to check the conformity of particular situations with international standards of commitments. . . .

These preoccupations have many features in common, yet fact-finding in the field of human rights has a special importance, and also encounters special difficulties, both because of the subject-matter and because of the importance attached to it by public opinion, which regards it as the acid test of the effectiveness of international organisations. Fact-finding in respect of human rignts is however all the more difficult, because it frequently concerns the action and essential interests, if not indeed the very structure, of the States involved, who are therefore less inclined to accept international intervention in such matters. The issues often have political aspects and are the subject of discussion in political bodies, a factor which necessarily complicates their examination. Lastly, . . . fact-finding on questions concerning human rights has been undertaken by various organisations and bodies in differing contexts, and the methods used have not always been similar.

. . .

Having myself taken part in such procedures, I should like to set out some general reflections on the problem.

In the first place, as we are on the frequently unstable terrain of interna-

tional law, it is necessary, as has previously been recognised, not to confine oneself within unduly rigid categories or rules. In international law, functions intertwine—at times, indeed, too much— and judicial aspects cannot always be distinguished clearly from non-judicial ones. It is therefore not always possible, in international fact-finding, to transpose internal judicial procedures in full. Nor is it always possible—or even desirable—to establish unduly detailed rules which may turn out not to be applicable in practice. If procedures are too formal and judicial and rules too detailed, they may prove not to be adapted to the great variety of situations, to the susceptibilities and objections of the States concerned, or to practical needs.

One conclusion to be drawn from this is that it is necessary to have available a variety of procedures suited to different situations, ranging from quasi-judicial inquiries to methods involving a minimum of formality such as 'direct contacts'. . . .

Does this mean a purely empirical approach, with a different method in each case, marked by compromise and bargaining? Obviously not. On the contrary, even though fact-finding should not be constricted within unduly rigid *a priori* rules, it must be based on certain rules and respect certain principles, which are highlighted in the present volume.

The principles must be such that, having regard to the procedure followed and the persons entrusted with it, the fact-finding process enjoys the confidence of the international community as well as of the State concerned. It thus becomes possible more readily to obtain the co-operation of the latter, while not leaving the international community in any doubt about the integrity and reliability of the findings.

These principles must naturally be based on the principal concepts of *due process of law* in domestic procedures (such as the age-old rule 'auditur et altera pars'), but they must also make allowance for the special features of this kind of international action. Thus, in the event of on-the-spot visits, it will not normally be possible for a representative of the complainant to be present, nor will it be appropriate for a representative of the party complained against to take part in interviews with private individuals. The latter party should, however, be given an opportunity to comment on allegations received in the course of such visits. Similarly, precautions have sometimes to be taken to ensure the safety of witnesses and to protect them against intimidation or reprisals (or the mere fear of reprisals). More generally, one must bear in mind that the proceedings are aimed at ensuring observance of standards adopted by the world community (or by a regional organisation): they should therefore be investigatory in nature, particularly as regards the gathering of evidence, and should seek to obtain the fullest possible information on the matters at issue.

A process as difficult as human rights fact-finding calls not only for procedural safeguards. In a divided and distrustful world, and on questions where there exist profound differences of views, fact-finding itself and the conclusions and recommendations emanating from it are more likely to find

acceptance if it is entrusted to independent and impartial persons. Not only logic, but also several decades of experience lead to that conclusion.

U.S. DEPARTMENT OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1994

(1995), Appendix A.

We base the annual Country Reports on Human Rights Practices on information available from all sources, including American and foreign government officials, victims of human rights abuse, academic and congressional studies, and reports from the press, international organizations, and nongovernmental organizations (NGO's) concerned with human rights. We find particularly helpful, and make reference in most reports to, the role of NGO's, ranging from groups in a single country to those that concern themselves with human rights worldwide. . . .

. . .

We have attempted to make these country reports as comprehensive as space will allow, while taking care to make them objective and as uniform as possible in both scope and quality of coverage. . . .

It is often difficult to evaluate the credibility of reports of human rights abuses. With the exception of some terrorist organizations, most opposition groups and certainly most governments deny that they commit human rights abuses and often go to great lengths to conceal any evidence of such acts. There are often few eye-witnesses to specific abuses, and they frequently are intimidated or otherwise prevented from reporting what they know. On the other hand, individuals and groups opposed to a particular government sometimes have powerful incentives to exaggerate or fabricate abuses, and some governments similarly distort or exaggerate abuses attributed to opposition groups. . . . Many governments that profess to oppose human rights abuses in fact secretly order or tacitly condone them or simply lack the will or the ability to control those responsible for them. Consequently, in judging a government's policy, it is important to look beyond statements of policy or intent in order to examine what in fact a government has done to prevent human rights abuses, including the extent to which it investigates, tries, and appropriately punishes those who commit such abuses. We continue to make every effort to do that in these reports.

NOTE

The following readings involve attempts to codify international practice. The first excerpt is from a detailed set of rules drawn up by the United Nations

for a precedent-setting fact-finding mission to Chile in 1978. Despite attempts to do so, the UN has been unable to reach agreement on a set of model rules. Hence the Memorandum of Understanding agreed upon with the Government of Chile remains an important benchmark. Then follows a set of Rules drawn up by the International Law Association, an NGO whose recommendations carry no formal weight but whose professional standing ensures that these Rules are seriously considered by the international community.[9]

MEMORANDUM OF UNDERSTANDING WITH THE GOVERNMENT OF CHILE

UN Doc. A/33/331 (1978), Annex VII.

1. This memorandum reflects the exchanges between the *Ad Hoc* Working Group and representatives of the Government of Chile at the meetings held in New York from 22 to 26 May 1978.

A. Visit of the Ad Hoc Working Group to Chile

2. The representatives of the Government of Chile informed the Group that conditions now existed which enabled the Government to agree to a visit by the Group to Chile in fulfilment of the Group's mandate. The Group recognized the unprecedented nature of the visit it would undertake to Chile and the Group expressed its determination to fulfil its mandate in an objective and impartial manner and, within the terms of its mandate, to take steps to that end in co-operation with the Government of Chile. Taking into consideration the Government's wish that the visit take place in the near future and the need for adequate preparation it was agreed that the visit would begin on or about 12 July 1978 for an effective duration of two weeks, which the Group determined to be the minimum time necessary to carrying out adequately the visit as part of its mandate.

B. Facilities to be enjoyed by the Group during the visit

3. It was agreed that the Group would enjoy the following facilities during the visit which are necessary to the carrying out of its mandate:

(a) *Freedom of movement*

The members of the Group and the accompanying Secretariat staff will enjoy freedom of movement throughout the country.

[9] Mention should also be made of a Declaration on Fact-finding by the United Nations in the Field of the Maintenance of International Peace and Security, adopted by General Assembly Resolution 46/59 in 1991. It is addressed not to human rights matters but to the field of international peace and security. Nevertheless, some of its principles are potentially as applicable to human rights inquiries.

(b) *Freedom of investigation*

The Group, its members and the accompanying Secretariat staff will have access to prisons, places of detention and interrogation centres, will be able to interview freely and privately persons, groups and representatives of entities and institutions and will have access to pertinent files and other documents or materials which it considers necessary to its inquiry. The Government will provide members of the Group and the Secretariat staff with official identity documents stipulating the above. The representatives of the Government of Chile noted that access to places, persons and files, documents or other materials under the jurisdiction of the judicial authorities is subject to the authorization of the competent officials and that access to places connected with national security is similarly subject to the authorization of the competent officials. The representatives of the Government of Chile undertook to make the necessary arrangements with the appropriate authorities prior to and during the visit to ensure the Group's freedom of investigation. Visits or interviews with private persons or institutions would take place with due respect for the normal rights of said persons or institutions.

C. Assurances given by the Government of Chile in connexion with the visit

4. The representatives of the Government of Chile assured the Group that no person who had been in contact with the Group would for that reason be subjected to coercion, sanctions, punishment or judicial proceedings. The Group attaches particular importance to these guarantees.

5. The representatives of the Government of Chile assured the Group that the required measures will be taken to ensure the privacy and unimpaired conduct of the activities of the Group and the security of the members of the Group, the Secretariat staff and the Group's records and documents while in Chile.

6. The freedoms and assurances mentioned in paragraphs 3, 4 and 5 would be officially communicated to the Group in writing by the Government of Chile.

D. Basic rules of procedure

7. The Group reiterated that it could not diminish or depart from its terms of reference as determined by the Commission on Human Rights and the General Assembly nor could it delegate or renounce its sole responsibility for the interpretation of its mandate. Paragraphs 8 through 14 reflect the Group's understanding of certain aspects of its mandate.

8. The Group was of the opinion that its future reports to the Commission on Human Rights and the General Assembly should cover the situation of human rights in Chile from the most recent extension of its mandate, it being understood that the substance and conclusions of prior reports would in no way be affected, in part or in whole. Cases and

situations already mentioned in previous reports which continued to exist could be studied and reported on by the Group in fulfilment of its mandate.

9. Meetings and hearings of witnesses would, as provided for in rules 5 and 16 of the Group's rules of procedure, be held *in camera*.

E. Exchange of information between the Group and the Government

10. In order to facilitate collaboration between the Group and the Government of Chile the Group would communicate to the representatives of the Government of Chile in the measure possible the Group's views on areas of its concern relating to the situation of human rights in that country. The Group would also communicate to the Government of Chile information on testimonies, individual cases or events of concern to the Group relating to the situation of human rights in Chile insofar as such transmission of information is consistent with the Group's mandate and the Group's obligations to persons supplying information or mentioned therein. This would be done with a view to enabling the Government to submit information and views on these matters.

11. These exchanges would take place during and after the Group's visit and for this purpose a special meeting for two days between the Group and the Government would take place after the end of the visit. During the visit contacts with the liaison officer(s) in this regard would be maintained as appropriate. Information or views from the Government of Chile will be taken into consideration by the Group in the preparation of its report and included therein as appropriate.

12. In connexion with the contents of the substantive areas of the Group's report on which the Government of Chile had not previously had the occasion to submit its information or its views, the Group would make known to the Government the substantive contents of such areas before the final adoption of its report. Information and views of the Government in this regard would be taken into consideration by the Group and, as appropriate, included in its report. The Group agreed that it would annex to its report the observations of the Government, provided they were received prior to the end of the Group's meetings at which it adopts its report. Should they be received after such meetings they would be brought out in an addendum to the document containing the Group's report.

F. Information and evidence

13. The Group will continue to carefully weigh the evidentiary value of all the information it receives taking into consideration, *inter alia*, the character of the source of the information, its direct and reliable nature, the potential motivations of the source and the concordant nature of other information. The Group is aware that in taking these factors into consideration certain information or evidence in some cases that from

official sources, both national and international, may, in given circumstances, have greater probative value than other information or evidence and that such be reflected in the findings of the Group. The Group is also aware that in relation to certain matters, for example economic, social and cultural rights, official documents, reports and studies may, if on the point, be relevant but not to the exclusion of other evidence. The Group will take into consideration the relevant information and conclusions arrived at by the specialized agencies and other international bodies on matters within their respective competence.

14. The Group wishes to point out that the nature of its mandate and the task it is required to perform requires that it be responsible for the final decisions of the probative value of information and evidence in light of all the relevant circumstances.

15. In connexion with its visit to Chile the Group will transmit to the Government of Chile an indicative but not exhaustive list of persons and representatives of institutions the Group may wish to interview and the places and institutions it may wish to visit to enable the Government to take those steps necessary to facilitate the visit. In the exercise of its freedom of movement and investigation the Group will itself definitively decide on its programme and the persons it will interview and the places it will visit.

. . .

H. Privileges and immunities of the members of the Group and Secretariat staff

17. The Government of Chile agreed that the members of the Group and the Secretariat staff would enjoy, in addition to the privileges and immunities to which they are entitled by virtue of the Convention on the Privileges and Immunities of the United Nations, full diplomatic privileges and immunities. This will be confirmed in writing by the Government of Chile.

. . .

INTERNATIONAL LAW ASSOCIATION, THE BELGRADE MINIMAL RULES OF PROCEDURE FOR INTERNATIONAL HUMAN RIGHTS FACT-FINDING MISSIONS

75 Am. J. Int. L. 163 (1981).

I. *Terms of Reference (Mandate)*

1. The organ of an organization establishing a fact-finding mission should set forth objective terms of reference which do not prejudge the issues to be

investigated. These terms should accord with the instrument establishing the organization.

2. The resolution authorizing the mission should not prejudge the missions's work and findings.

3. While terms of reference should not unduly restrict the mission in the investigation of the subject and its context, they should be so specific as to indicate the nature of the subject to be investigated.

II. Selection of Fact-Finders

4. The fact-finding mission should be composed of persons who are respected for their integrity, impartiality competence and objectivity and who are serving in their personal capacities.

5. Where the mandate of the mission concerns one or several specific states, in order to facilitate the task of the mission, the government or governments concerned, whenever possible, should be consulted in regard to the composition of the mission.

6. Any person appointed a member of the fact-finding mission should not be removed from membership except for reasons of incapacity or gross misbehaviour.

7. The chairman and the rapporteur of the fact-finding mission should not be replaced during the term of the mission except for reasons of incapacity or gross misbehaviour.

8. Once a fact-finding mission has been established and its chairman and members appointed, no persons should be added to the mission as members except to fill a vacancy in the mission.

III. Collection of Evidence

9. At the commencement of the mission, all material relevant to the purpose of the mission should be made available to it, with the assistance of the organization concerned.

10. Fact-finding missions should operate with staff sufficient to permit the independent collection of data and should be assisted by such independent experts as the mission may deem necessary.

11. Fact-finding missions may invite the submission of evidence that is in writing and contains specific statements of fact that are in their nature verifiable.

12. The state concerned should have an opportunity to comment in writing on data referred to in paragraph 10 and statements referred to in paragraph 11.

13. Both the petitioners, such as states, non-governmental organizations, or groups of individuals, and the states concerned may present lists of witnesses to the fact-finding mission. The fact-finding mission should make its own determination as to which witnesses it will hear.

14. Petitioners ought ordinarily to be heard by the fact-finding mission in public session with an opportunity for questioning by the states concerned.

15. The fact-finding mission shall in advance require the state concerned to provide adequate guarantee of non-retaliation against individual petitioners, witnesses and their relatives.

16. In case a guarantee, as referred to in paragraph 15, is provided to the satisfaction of the fact-finding mission, the latter should, on hearing witnesses, either provide an opportunity for the state concerned to be present and to question witnesses, or make available to the state concerned a record of the witnesses' testimony for comment.

17. The fact-finding mission may withhold information which, in its judgement, may jeopardize the safety or well-being of those giving testimony, or of third parties, or which in its opinion is likely to reveal sources.

18. On the basis of data generated by its staff, written statements, and testimony of witnesses, the fact-finding mission should make its own determination as to whether it needs to conduct an on-site inspection.

IV. The On-Site Investigation

19. The fact-finding mission should draw up its programme of work, including the list of witnesses it wishes to interview at the site of the investigation, places it wishes to visit, and the sequence, timing and location of its activities on the site.

20. The fact-finding mission may operate as a whole or in smaller groups assigned to conduct specific parts of the investigation.

21. The fact-finding mission should insist on interviewing any persons it deems necessary, even if incarcerated.

V. Final Stage

22. After conclusion of the on-site investigation, members of the fact-finding mission should draw up a set of preliminary findings and submit these, together with supplementary questions where appropriate, to the state concerned, giving it an opportunity, within a reasonable time, to present comments and/or to rectify the matter investigated.

23. A final report shall be prepared by the chairman reflecting the consensus of the fact-finding mission. In the absence of a consensus, the mission's report should contain the findings of the majority as well as any views of dissenting members.

24. In case a decision is made to publish the report, it should be published in its entirety.

25. The organization establishing the fact-finding mission should keep under review the compliance of states with their undertaking regarding non-reprisal against petitioners, witnesses, their relatives and associates.

NOTE

Any consideration of fact finding with respect to human rights (or a great many other subjects) must keep in mind one pervasive, ongoing and transfor-

mative feature of the modern world. Electronic communication through e-mail or the Internet, as well as the now familiar transmission of messages by facsimile, make possible the instant diffusion of information to a vast audience. These technologies have made it almost impossible to contain knowledge of new, serious human rights violations within any part of the world, however remote and isolated.

This recent revolution in communications puts the contemporary fact-finder in a radically different situation from predecessors. As recently as the early decades of this century, horrific events within isolated parts of Europe such as the rural Balkans (during the 1912–13 wars preceding World War I) became known only through difficult expeditions by investigators who brought their findings out with them.[10]

The contemporary fact-finder has a further powerful advantage over predecessors. The human rights researcher into a given country or problem has access to ever expanding and more efficient data bases that apply search technologies to organized data and thereby yield detailed information about a vast range of matters from all parts of the globe.

Of course this vast expansion in 'information' available to a broad public gives no assurance of its accuracy. The problems of verification of allegations of human rights violations may be no less serious. But at a minimum the allegations are known, a large number of unrelated sources may have made them, and those receiving the information are able to make their decisions about how to proceed.

QUESTIONS

1. Are these instruments about standards or methods of fact-finding of help when an investigator interviewing varied people within a state hears conflicting accounts of events? Suppose, for example, that X has disappeared. Relatives claim that X, a known opponent of the government, was murdered and his body disposed of. The government claims that X left home to fight with guerillas in the mountains.

2. If you were an investigator writing a report about violations, what criteria would you apply in deciding whether a violation had occurred? Would you follow a standard like 'more likely than not'? Would it be relevant whether the government, which had information about the relevant events, remained silent, or said that it had no knowledge, or offered an account of what had occurred that did not amount to a violation?

[10] See the account of the difficulties in getting a fact-finding Commission underway in George Kennan, The Balkan Crises: 1913 and 1993, in The Other Balkan War 3, 6–9. (A Carnegie Endowment Book 1993).

c. *Case Studies of Fact-finding Under the 1235 Procedure*

The following excerpt provides an overview of the UN Commission's experience in relation to fact-finding between 1979 and 1992, as background for the case studies that follow.

PHILIP ALSTON, THE COMMISSION ON HUMAN RIGHTS

in Alston (ed.), The United Nations and Human Rights: A Critical Appraisal 126 (1992), at 163.

. . .

(iv) *The Selection of Countries Targeted.* [Although an enormous number of country situations have been discussed by the Commission under the 1235 procedure, only 23 special procedures (i.e. Special Rapporteurs, Rapporteurs, Special Representatives, Working Groups) were set up between 1979 and 1994. In relation to those countries that have been targeted, a number of imbalances exist. Eastern Europe was only subject to two investigations prior to 1992, remarkably few African countries have been identified and, in the Middle East, only Israel and Iraq have been singled out. Western Europe has not been targeted at all.]

Without seeking to justify these apparent imbalances, a number of factors help to explain them. In the first place, the great powers (such as the United States, the USSR, China, the United Kingdom, and France) and the major regional powers (such as India and Brazil) have all enjoyed a degree of immunity resulting from their political and economic clout. The case of China in 1990, when no State was prepared to introduce a much discussed and very watered-down draft resolution, best illustrates this regrettable phenomenon. The close allies of the great powers (e.g., El Salvador, Guatemala, Cuba, Poland, and Afghanistan) have not, however, avoided the spotlight. Secondly, regional solidarity has been an important means of preventing African and Arab nations from being scrutinized. It has been less effective in Asia and Latin America. Thirdly, it is clear that the Commission was only moved to action in cases involving widespread, documented repression of a serious kind. The 'mere' suppression of democracy, the violation of economic and social rights, the denial of the cultural and other rights of minorities and indigenees, and comparable violations were not deemed sufficient to warrant the creation of a special procedure. As a general rule it seems that blood needed to be spilled, and in large quantities. The main exceptions (such as Cuba and Poland) resulted from the investment of massive political capital (especially by the United States).

Finally, the disproportionately strong focus on Latin America may be

explained by: the strength of (the myth surrounding) the democratic/rights tradition in that region, the brutality of the violations, the close involvement of the United States and thus the special concern of activist American NGOs, the detailed and powerful reporting of the Inter-American Commission on Human Rights in the late 1970s and early 1980s, and the very active role of NGOs and the churches in the countries concerned. But, notwithstanding the plausibility of such explanatory factors, the focus on Latin America during the 1980s provoked persistent accusations that the Commission applied double standards. American support for many of the governments that the Commission had singled out as 'gross violators' led the US Representative to the United Nations, Jeanne Kirkpatrick, to tell the General Assembly in 1981 that: '[H]uman rights has become a bludgeon to be wielded by the strong against the weak, by the majority against the isolated, by the blocs against the unorganized . . . The activities of the United Nations with respect to Latin America offer a particularly egregious example of moral hypocrisy.' . . . Nevertheless, while allegations of egregious hypocrisy can no longer be sustained, it remains true that double standards have prevailed and that many countries which have been thoroughly deserving of scrutiny have been intentionally overlooked. Only time and a political preparedness on the part of states that are members of the Commission to be critical of their allies (when such criticism is warranted) can cure this defect. By the same token, the Commission's achievements in relation to the countries that have been targeted should not be under estimated simply on the grounds that other States should also have been selected.

. . .

(vi) *Designation and Selection of Rapporteurs* The implementation of special procedures has been entrusted to a wide range of entities. While 'working groups' and 'special rapporteurs' were initially the favoured means of fact-finding, various other designations have been added over the years. They include: 'rapporteurs', 'envoys', 'special representatives', 'experts', 'independent experts', 'delegations', etc. The different terminology was originally intended to reflect an unstated hierarchy according to the gravity of the response. But the Commission's creativity, combined with its inconsistency in this regard, has served to blur the significance of these distinctions, at least in the minds of all but those diplomats who continue to fight with such vigour and enthusiasm to secure one designation rather than another. . . .

The selection of rapporteurs (using the term generically) has been a quintessentially political process, the mechanics of which do little to ensure that expertise and competence will be the principal qualities sought. . . .

. . . The task of identifying individuals to undertake the special procedures has generally been left to the Chairman of the Commission who is expected to 'consult' with the regional groups before making an appointment. The target country has sometimes been closely involved in the selection process, an approach which has not always been welcomed by human rights activists.

When the task of reporting on the situation in Poland was entrusted to a representative of the Secretary-General the resulting reports were brief, superficial, and unduly solicitous of the government's viewpoint. In light of a similarly unsatisfactory experience under the confidential procedures there would appear to be very good grounds for concluding that the task of objective fact-finding is inherently incompatible with the 'neutrality' which Secretaries-General seem to assume they must demonstrate, even in human rights matters.

There is no doubt that there has been great unevenness in the quality of the reports produced by different rapporteurs. Some have been accused of being 'in the pockets' of the government being investigated while the efforts of others have been deemed 'spineless' and 'needlessly apologetic'. One proposed solution is that they be 'appointed by a body that is insulated from political pressure and whose members serve for sufficient time so that they can be called to account for their choices over a period of years'. But the feasibility of such a system in the United Nations' inevitably politicized milieu is at best questionable. The present system at least enables some pressure to be brought to bear on the Chairman not to appoint an individual who is patently unqualified. A better approach would seem to be that proposed in a UN report in 1970 according to which violations would be investigated by a standing body which would be 'scrupulously non-political' and 'should strive to offer all guarantees of impartiality, efficiency and rectitude'. Such a system would also have its potential defects but it is difficult to accept that they would outweigh those inherent in the existing approach.

Another valid criticism is that the range of people from which the Commission generally draws its rapporteurs is unduly narrow. [The first woman ever appointed under the public procedures was Radhika Coomaraswamy, Special Rapporteur on Violence against Women, appointed in 1994.] The nominees are usually diplomats, and expertise in human rights law or in the politics and culture of the region concerned is often not prominent among their attributes. . . .

(vii) *The Mandate: Prosecutors, Solution Seekers or Fact-finders?* The terms used to describe the formal mandates given to country rapporteurs have varied considerably. But whether they have been asked to 'study', 'inquire into', 'investigate', or 'examine', most rapporteurs have tended to assume considerable flexibility and to approach each situation as they see fit. The Commission, for its part, has generally not sought to impose any procedural straitjackets and has been reluctant to criticize the approach adopted by individual rapporteurs. Not surprisingly, this lack of structure has resulted in enormous disparities of style, methodology, content, and focus from one report to another. It has also enabled individual rapporteurs to assume that they have a *carte blanche* in determining the nature of their reports.

For analytical purposes, three principal approaches to country-reporting may be discerned. The first emphasizes the *fact-finding and documentation function*. In this view the function of reporting is to record the facts, to pro-

vide a reliable historical record, and to provide the necessary raw material against the background of which the political organs can determine the best strategy under the circumstances. In this approach, facts and their substantiation are the key. The report prepared by the Special Commission appointed in Argentina in 1984 is an excellent example in this regard. The second approach assumes that the *prosecutorial/publicity function* is paramount. Thus the rapporteur's role is not to establish whether violations have occurred but to marshal as much evidence as possible to support a condemnation that, in many instances, will already have been made. Thus Bailey has described the Special Committee on southern Africa as a fact-finding body 'only in the sense that it collects and collates facts in pursuit of a predetermined political aim'. The goal in such cases is to mobilize world public opinion and to provide the basis on which the earlier conviction can be justified. The third approach is to emphasize the *conciliation function*. The rapporteur's role is not to confront the violators but to seek solutions which will improve, even if not necessarily resolve, the situation. The perceived challenge is to steer a middle course between the positions of the accused and their accusers and the emphasis is on dialogue and co-operation between the Commission and the government. The high (or some would say low) point of this approach was the report on Guatemala in 1984 in which the Rapporteur stated his 'belief that the Commission . . . wishes to encourage as well as condemn'. He concluded by urging the Commission to adopt 'a constructive approach'. In a subsequent report, the same person, albeit redesignated as a Special Representative, concluded (again to the dismay of most observers) that the relevant government's efforts to guarantee human rights, 'even if not yet perfect or complete, should receive the support of the international community'.

Although each of these models has had its adherents among the various rapporteurs the Commission itself has never acknowledged that different situations appear to call for different approaches. It would seem wholly inappropriate, and even unfair, for such an important decision to be left to the predisposition of the rapporteur. It is inevitably unseemly and most probably unproductive for a rapporteur to engage in haggling with a government over whether his report will be 'constructive' and mild, or 'condemnatory' and uncompromising. An exercise which purports to be engaged in 'fact-finding', but then denies or plays down the seriousness of the violations in order to maintain a conciliatory stance, insults the victims, misleads the public and the Commission, and discredits the United Nations. It is the Commission itself which should determine what type of report is called for and it would be possible to draw up some general (perhaps informal) guidelines for that purpose. . . .

(viii) *Procedures and Fact-finding Methodology* It has been persuasively argued that 'if fact-finding is to become more than another chimera, the sponsoring institutions must develop universally applicable minimal standards of due process to control both the way the facts are established and what is done with them afterwards'. But in these respects the Commission's procedures got

off to a bad start and have yet to recover fully. The first two situations dealt with (apartheid and Israeli occupation) were hardly conducive to dispassionate and objective reporting and the resulting precedents were strongly criticized. As a result, the 1968 International Conference on Human Rights, held in Teheran, recognized 'the importance of well defined rules of procedure for the orderly and efficient discharge of their functions' by UN human rights bodies and called for 'model rules' to be prepared. A Working Group of the Commission subsequently took five years to come up with an incomplete draft which was never adopted but which ECOSOC requested be brought to the attention of all relevant bodies. In principle, therefore, the model rules are still relevant but, in practice, they have long since been forgotten. The only other comparable attempts to devise procedures designed to ensure both fairness and effectiveness were the rules drawn up by a fact-finding mission to South Vietnam in 1963 and the arrangements contained in a memorandum between the Working Group on Chile and the Chilean government in connection with the Group's on-site visit in 1978.

Despite the lack of any formal guidelines it has been suggested that the various rapporteurs do in fact generally follow certain 'basic rules and procedures'. But insofar as this may be the case, the rules in question are so rudimentary that they do not go anywhere near ensuring the degree of integrity of process that most commentators would agree to be essential if consistency, credibility, effectiveness, and fairness are to be achieved. Thus, for example, one rapporteur could happily observe that he was 'much indebted to the Army . . . for their safe-keeping and their transport, with many other kindnesses and facilities', without thereby running foul of any procedural rules for independent fact-finding. In brief, the existing methodology for fact-finding by UN rapporteurs is *ad hoc*, inconsistent, and often unsatisfactory. Perhaps the clearest demonstration of their inferiority is to compare the reports produced by UN fact-finders with those produced by their Inter-American counterparts. In the case of Guatemala and, albeit to a slightly lesser extent, Chile, the difference in quality and thoroughness is enormous. Similarly invidious comparisons may be made with respect to the ILO, with the case of Poland being especially telling. Yet in spite of these patent shortcomings, the Commission has tended to operate on the assumption that any attempt to move towards a more carefully structured and credible process would only be hijacked by those opposed to effective fact-finding. But it is now time to challenge that assumption and to move towards a methodology which would ensure that UN reports consistently pass muster in terms of their procedural probity. . . .

(ix) *The Preparedness of Governments to Co-operate* The picture in this regard is a very mixed one. Neither South Africa nor Israel have ever formally co-operated with the Commission's investigative organs. Chile permitted the Working Group to visit on only one occasion and almost certainly considered that to have been a grave mistake given the Group's uncompromising report on its findings. At a later stage, the Chilean government relented after a new rapporteur released what a leading NGO termed an 'informal, summary and

highly selective' report in 1985. As a result the rapporteur was able to conduct on-site investigations each year from 1986 to 1989. Poland was singularly uncooperative although a visit by the Secretary-General's representative was eventually tolerated. Afghanistan was entirely negative at first and then changed its tune dramatically to permit a visit by the rapporteur in 1987. Iran took a similar approach while Guatemala, Bolivia, and El Salvador have all permitted relatively unrestricted access to the respective rapporteurs. Cuba and Romania (after the fall of President Ceaucescu) have also been prepared to admit the Commission's representatives.

Overall, the factors that induce governmental co-operation seem to be rather diverse and to depend very much on a calculation, taking account of all of the relevant circumstances, as to the relative costs of co-operation versus non co-operation. The costs of the latter are being steadily increased but they are still far from being consistently prohibitive. But whether or not an on-site visit is permitted, the great majority of governments have sought to defend themselves systematically and vigorously within the Commission. Thus detailed rebuttals of country-specific reports are now very much the norm rather than the exception.

NOTE

The following readings are reports prepared for the Commission by special rapporteurs. The purpose of examining them is not to focus on the situation in the countries concerned, but rather to assess the adequacy of the reports in the light of the procedural standards noted above, as well as to get a sense of some difficulties involved in such fact-finding.

REPORT OF THE SPECIAL RAPPORTEUR ON CUBA

UN Doc. E/CN.4/1993/39.

[At the request of the Commission, the Special Rapporteur (Mr Carl-Johan Groth) reported in 1993 on a wide range of civil and political rights-related issues. The Government did not permit him to make an on-site visit. The following excerpts deal only with the rights to freedom of opinion, assembly and association; some objections raised by the Cuban Government; and the question of the United States' economic embargo against Cuba.]

. . .

IV. RIGHTS TO FREEDOM OF OPINION, ASSEMBLY AND ASSOCIATION

[The Special Rapporteur reviewed the relevant provisions of both the Universal Declaration and the Cuban Constitution in relation to these rights.]

. . .

29. The information received by the Special Rapporteur from individuals and non-governmental groups suggests that the framework of protection established by these provisions and the manner in which they are applied do not duly conform to the principle laid down in the Universal Declaration of Human Rights, because persons associated with groups whose purpose is to denounce violations of human rights, or groups of differing tendencies which are critical of the current political system, are harassed, even though their actions are perfectly peaceful and they address the authorities in a respectful manner. Furthermore, these groups that have emerged in recent years have not been able to obtain legalization since the numerous applications to the Ministry of Justice for legalization under the Associations Act have gone unanswered.

. . .

31. As regards the scale of the human rights violations referred to in the present section, the Special Rapporteur considers it worth mentioning, as an example, a document prepared by the organization 'Americas Watch', dated 30 September 1992 and updated in January 1993, in which it is stated that more than 250 people associated with human rights groups have been detained since 1989. At least 50 of them have apparently been serving sentences of up to 10 years for their activities in this connection. Others are being held in custody pending trial. At least half of the total have been in custody since September 1991. Many others have remained in custody for short terms in police or State Security Department premises.

. . .

A. Trial and sentencing

33. An Amnesty International report of December 1992 indicates that it is difficult to estimate the number of persons sentenced for political reasons since the authorities do not provide information on them, the activities of the national groups which try to follow up these cases are severely restricted and, for some time now, the international human rights organizations have not been allowed access to the country. However, Amnesty International estimates that there are at least 300 to 500 of them at present and that possibly half of them have been sentenced for trying to leave the country illegally.

. . .

IX. CONCLUSIONS AND RECOMMENDATIONS

80. The Government of Cuba has so far refused to cooperate at all with the Special Rapporteur, but nevertheless the Special Rapporteur continues to hope that, in the not too distant future, there will be an opportunity to open a dialogue and to make working visits to Cuba.

81. The Cuban Government's position is based on the arguments set out below. . . .

82. Secondly, the Government maintains that there are no human rights violations in Cuba, at least not on a scale comparable to the situations of mass violations existing in many countries being monitored by the Commission on Human Rights under agenda item 12 [relating to the 1235 procedure]. Accordingly, the Government maintains that the study of the human rights situation in Cuba in this context is unjustified and is entirely politically motivated.

83. In this connection, the Special Rapporteur wishes to make a number of observations. His mandate does indeed have a political origin, in that it derives from a resolution of the Commission on Human Rights, which is a politically constituted body. Regardless of this, however, it is the obligation of the Special Rapporteur, as of all rapporteurs and experts appointed by the Commission on Human Rights, to discharge his duties with impartiality, independence and objectivity, taking as points of reference the values embodied in international human rights instruments, particularly the Universal Declaration. While these instruments may also be said to have a political content, in that they are the result of a specific conception of the individual, society and the State, they have been universally recognized and now represent a minimum standard, regardless of the social or ideological situation prevailing in a given country.

. . .

85. This report and its recommendations focus on such basic rights as freedom of opinion, assembly and association, as well as trade union freedom and religious freedom. It also describes the practices followed by the Government in regard to freedom of movement and draws attention to the situation of the prison population, particularly of persons serving sentences for offences with political connotations. The report does not mention the right to life because, at present, violations in this area, such as summary or arbitrary executions or enforced or involuntary disappearances, are not typical of the Cuban situation. Economic, social and cultural rights have also been omitted.

86. There can be no doubt that the Cuban political system and Cuban society have special characteristics and, as a result, so do the human rights situation and the systematic violations committed. However, this in no way justifies such violations or makes them acceptable. One of the characteristics mentioned in the report which deserves special consideration is the fact that dissidence within the society is expressed in an entirely peaceful manner, in an attempt to avoid any confrontation or violence.

87. In the light of the human rights situation in Cuba as described in this report, the Special Rapporteur, through the Commission on Human Rights, recommends that the Government of Cuba should adopt the following measures with a view to improving the observance of fundamental rights:

(a) Ratify the principal human rights instruments to which Cuba is not a party, in particular, the International Covenant on Civil and Political

Rights and its Optional Protocols and the International Covenant on Economic, Social and Cultural Rights;

(b) Cease persecuting and punishing citizens for reasons relating to the freedom of peaceful expression and association;

(c) Permit legalization of independent groups, especially those seeking to carry out human rights or trade-union activities, and allow them to act within the law, but independently;

(d) Respect the guarantees of due process, in accordance with the provisions set forth in international instruments;

(e) Ensure greater transparency and guarantees in the prison system, so as to avoid incidents of excessive violence exercised against prisoners. In this connection, it would be a major achievement to renew the agreement with the International Committee of the Red Cross and to allow independent national groups access to prisons;

(f) Review sentences imposed for offences with political connotations and for trying to leave the country illegally;

(g) Expedite and make more transparent the procedure for applying for permission to leave and enter the country, while at the same time avoiding measures of retaliation against the applicants. Family reunification cases should be given priority attention. On this subject, the Special Rapporteur is aware of the need for persons wishing to travel to have visas for entry into other countries.

88. It would be desirable for Cuba's policy on travel abroad to be less strict and, for other countries, in their turn and as a counterpart, to relax the restrictions imposed on their own citizens regarding travel to and communication with Cuba. This, in addition to resolving difficulties from a strictly humanitarian aspect, would help to end the artificial and painful isolation in which the Cuban people live.

89. While not overlooking the urgent need for specific measures, as proposed above, the Special Rapporteur nevertheless wishes to point out that any analysis concerning the situation and implementation of human rights in Cuba must, as a point of departure, accept the fact that the Government is, and has for a long time been; surrounded by an international climate extremely hostile to many of its policies and, in some cases, even to its very existence. This hostile international climate does not seem to have been affected by the vast political, military and economic changes that have taken place in the world in the last few years. Similarly, the changes which have occurred in the previously socialist European countries, as also in the policies of many third world countries, seem to have so far had no impact on Cuba's internal policy. On the other hand, the abrupt breakdown in the flow of aid previously received from abroad, as well as the almost total exclusion of Cuba as a beneficiary of the multilateral financing and technical assistance agencies, have not given the Government much room for manoeuvre in this field. In the opinion of the

Special Rapporteur, a policy *vis à vis* Cuba based on economic sanctions and other measures designed to isolate the island constitute, at the present stage, the surest way of prolonging an untenable internal situation, as the only remedy that would be left for not capitulating to external pressure would be to continue desperate efforts to stay anchored in the past. International sanctions, especially if accompanied by conditions implying the adoption of specific measures, be they political or economic, are totally counterproductive if it is the international community's intention to improve the human rights situation and, at the same time, to create conditions for a peaceful and gradual transition to a genuinely pluralist and civil society. Any suggestion along the lines that the future sovereignty of the Cuban people could be contingent on external powers or forces would, in the collective memory of the Cuban people, evoke traumatic experiences of their not-very-distant history and their fight for independence, and would be a very effective obstacle to the achievement of changes which could be very welcome in other circumstances.

. . .

QUESTIONS

1. The extent to which the Special Rapporteur must depend upon NGO sources is apparent from these brief extracts. What are the implications for the report, if any, of that dependence?

2. In the case of Cuba, implementation of the Special Rapporteur's recommendations would be tantamount to a radical change in the country's system of government. Is it appropriate for this implication to be neither recognized nor addressed? On what basis—that is, on what human rights norms or other principles—has the Special Rapporteur made this recommendation?

3. Given that the U.S. embargo is not mentioned in the Commission's resolution, is it an appropriate matter for the Special Rapporteur to raise? To what extent should underlying structural influences be addressed in such 'fact-finding' reports? In other words, how discrete (limited to the precise human rights violations at issue) or how broad-ranging (looking to a country's total situation) should UN inquiry be?

REPORT OF THE SPECIAL REPRESENTATIVE ON IRAN

UN Doc. E/CN.4/1991/35.

[The Commission on Human Rights appointed a Special Representative to investigate and report on the human rights situation in Iran. The Special Representative's mandate was contained in Commission Resolution 1984/54

and was several times extended. In 1990, the Commission requested the Special Representative, Reynaldo Pohl from El Salvador, to submit to it a final report at its 47th (1991) Session. There follow excerpts from that report.]

. . .

B. Written communications concerning allegations received by the Special Representative and transmitted to the Government

. . .

12. On 17 December 1990 the Special Representative wrote the following letter to the Permanent Representative of the Islamic Republic of Iran to the United Nations Office at Geneva:

. . .

'Since I intend to finalize my report by mid-January 1991, I would be most grateful if any further replies your Government might wish to submit could be communicated to the Centre for Human Rights not later than 10 January 1991, so that they may be included in my report and be taken into consideration in the conclusions and recommendations I intend to place before the Commission.'

14. On 10 January 1991, the Permanent Representative of the Islamic Republic of Iran to the United Nations Office at Geneva addressed to the Special Representative the following letter:

'. . . [I] would like to draw your attention to the fact that the deadline for submission of replies set forth for 10 January 1991 is absolutely impractical to meet as investigations of this nature are time consuming. The time, therefore, needs to be extended to a reasonable date.'

. . .

15. By letter dated 11 January 1991, the Permanent Representative of the Islamic Republic of Iran to the United Nations Office at Geneva transmitted replies to the letters dated 27 June and 9 July 1990 addressed to him by the Special Representative, as follows:

'. . . I have the pleasure to inform you that since 10 December 1990, the following persons have been released: Reza Sadr, Ezatollah Sahabi, Farhad Behbahani, Abbas Ghaem Al-Sabahi, Mahmoud Naimpoor, Nour Ali Tabandeh and Hossein Shah-Hosseini.

'With regard to the other detainees, as soon as the judicial proceedings are concluded, you will be informed of the final results.'

16. By letter dated 14 January 1991, the Special Representative replied to the letter of the Permanent Representative dated 10 January 1991 as follows:

'. . .

While I appreciate the difficulty of investigating fully the most recent allegations transmitted by letter dated 28 December 1990, I have to remind you that the majority of the allegations received in 1990 were communicated to you by letters dated 20 August and 8 October 1990 and for certain individual cases even earlier. In addition, replies are still outstanding for allegations sent to you in previous years.'

. . .

II. Information Received by the Special Representative

29. The following paragraphs contain allegations of human rights violations received by the Special Representative and transmitted to the Government of the Islamic Republic of Iran by memoranda dated 20 August, 8 October, 28 December 1990 and 29 January 1991. Replies received from the Government with regard to the alleged incidents and cases have also been reflected in this section. . . .

A. Right to life

30. According to a report by the daily *Abrar*, a man condemned for fornication was publicly executed in Mashad in early 1990. Agence France Presse reported on 16 January that a 31-year-old woman convicted of prostitution had been stoned to death in Bandar Anzali. On 31 January *Jomhouri Islami* published a declaration of the Komiteh Commander of the Province of West Azerbaijan, according to which five persons engaged in prostitution and corruption had been stoned to death. According to a report by *Ressalat* on 15 February 1990, Gholam Reza Masouri was hanged in Arak for pederasty.

31. *Jomhouri Islami* reported on 17 February 1990 that Bolouch Ismalel Zehi had been executed for drug-trafficking. On 10 January Radio Tehran announced that 31 persons convicted of drug-trafficking had been executed, 23 of them in Tehran, 3 at Shiraz, 3 at Sabzevar and 2 at Saveh. According to *Ressalat* of 11 February, a married couple accused of drug-trafficking was sentenced to death in Saveh.

32. Dailies from various countries published the statement of Mitra Moazez (21), claiming that she had been forced to witness the death by burning of a 37-year-old woman and two 18-year-old men in an Iranian prison. . . .

. . .

36. On 28 April 1990, the newspaper *Kayhan* published a report by the Islamic Republic News Agency to the effect that the Prosecutor General of the Tehran Revolutionary Court had announced that 10 persons accused of

espionage would be executed in the next few days. Other sources reported directly to the Special Representative that Mr. Jamshead Amiry Bigvand, former Director of the Marodasht Shiraz Petrochemical Laboratory, and 13 other persons had allegedly been convicted on the charge of espionage for the United States of America, an offence for which capital punishment might be applied. Reportedly these persons had been held for months in solitary confinement at Evin prison, and had not been allowed to avail themselves of legal assistance of their own choosing. It was further alleged that confessions had been extracted under torture and that some of them had been compelled to make extrajudicial confessions which were broadcast by Iranian television. The Special Representative requested the Government, by a letter dated 8 May 1990, to enable all 14 persons to benefit from all the procedural safeguards provided for in articles 6 and 14 of the International Covenant on Civil and Political Rights. . . .

38. By a letter dated 5 June 1990, the Permanent Representative of the Islamic Republic of Iran to the United Nations Office at Geneva forwarded to the Special Representative the following response of the judicial authorities of the Islamic Republic of Iran:

> 'According to the article 37 of the Constitution of the Islamic Republic of Iran, and as contained in the second paragraph of article 14 of the International Covenant on Civil and Political Rights, no person shall be considered guilty by law unless the accusation against him is proved by a competent court and the courts are naturally obliged to act accordingly;
>
> 'In the light of information received by the Islamic Revolutionary Court, those people were arrested and tried in accordance with the law. In addition, they were entitled to appoint a legal counsel and they duly and freely defended themselves during the trial;'

. . .

42. It has further been reported that on 14 February 1990 a judicial panel sent to Hamadan on behalf of the Head of the Judiciary issued the following sentences:

> (a) Gholamhossein Golzar, 27 years old, discharged employee of the Agricultural Bank of Hamadan: 74 lashes for committing robbery; 92 lashes for participation in a forbidden act, and decapitation by the just sword of the Imam Ali;
>
> . . .
>
> (c) Reza Khanian, 23 years old, fruit and vegetable centre clerk: 74 lashes for committing robbery; 50 lashes for participation in a forbidden act; amputation of hand for committing assault and battery and hanging by scaffold.

43. The newspaper *Kayhan* announced on 3 January 1990 that Khodakaram Zamani, given a retributory death sentence for the murder of Morad-Ali Rezai, was executed in the main square of Khorramabad.

. . .

53. It has also been widely reported that the Iranian Government has endorsed the death sentence against the British author Salman Rushdie. On 5 June 1990, the Leader of the Islamic Republic of Iran reportedly stated that the *fatwa* (religious verdict) of the late Imam Khomeini concerning the author was based on divine rulings and remained irrevocable. On 26 December 1990 the Leader of the Islamic Republic of Iran reiterated that the *fatwa* cannot be revised or repealed by anyone at any time.

54. By a letter of 22 January 1991, the Permanent Representative of the Islamic Republic of Iran also referred to the Rushdie case, as follows:

> '. . . It should be pointed out that as a result of the criminal act of Mr. Rushdie which was a direct insult to the most sacred values of Muslims, tens of people lost their lives in different parts of the world. It is very surprising to note that the Special Representative addressed this political issue under the humanitarian mandate without making any reference whatsoever to those whose blood was spilled in protest to this criminal act. The Special Representative is expected to show as much sensitivity to the right to life of those Muslims who lost their lives as that which he extends to the culprit.'

. . .

59. It has been reported that as of January 1990 persons have been executed in the Islamic Republic of Iran for their homosexual or lesbian tendency.

60. In its reply of 22 January 1991, the Government of the Islamic Republic of Iran stated that 'according to the Islamic Shariat, homosexuals who confess to their acts and insist on that are condemned to death'.

. . .

B. Enforced or involuntary disappearances

73. The Special Representative wishes to refer to the report of the Working Group on Enforced or Involuntary Disappearances (E/CN.4/1991/20), which has transmitted to the Government of the Islamic Republic of Iran 451 cases of missing persons, 7 of which were reported to have occurred in 1990. So far only one case has been clarified by information received from non-governmental sources.

C. Right to freedom from torture or cruel, inhuman or degrading treatment or punishment

74. Reports on torture and ill-treatment during imprisonment have continued to be received since the first visit of the Special Representative to the Islamic

Republic of Iran. It was also alleged that mutilations and corporal punishment are being applied. In this context, it is pertinent to note an Agence France Presse report that, according to *Kayhan*, a person convicted of robbery suffered the amputation of four fingers on his right hand in Ghasr prison at Tehran. . . .

75. In the letter of 22 January 1991, the Government of the Islamic Republic of Iran stated that 'any physical abuse or torture under any name is denied in the prisons and they are totally baseless. But in regard to amputations, it is worth mentioning that the divine religion of Islam permits certain punishments for certain crimes and in the field of *Qesas* which entails amputations'.

. . .

IV. Conclusions and Recommendations

. . .

464. The Special Representative has expressed the view, which is also his belief, that, on the basis of existing international principles and known facts, a critical analysis should be made in order to arrive at some recommendations and conclusions in the light of criteria of probability. The aim is, of course, to base conclusions and recommendations not on findings similar to those of a court of justice, but, rather, on probability and reasonable belief. . . .

465. This exercise is particularly complex and complicated because of the specific circumstances which characterize the monitoring of human rights in the Islamic Republic of Iran. It is obvious that there are persons who are making every effort, and even going to any lengths, to politicize this exercise, politicization being taken to mean a departure from the objective consideration of the facts and their consequences and the use of human rights as an instrument in the struggle for political power. Reports on international monitoring procedures may be used for political purposes and such use is beyond the scope of the competent United Nations bodies, but the aim of the exercise is not to support or destabilize Governments, but, rather, to encourage the fulfilment of international obligations relating to human rights. The purpose of international monitoring is to bring about fulfilment of international human rights obligations by gathering information and evaluating, analysing and criticizing it.

466. The mandate relating to Iran is one of the most controversial of all the mandates on which international monitoring has focused in particular countries in recent years. This is probably the result of the radical polarization of political forces, the conflict between opinions that have turned into pre-established, inflexible, intransigent credos and the struggle between national and international political interests. The situation is being followed attentively and even passionately in and outside the United Nations and in the media throughout the world.

. . .

468. The Special Representative has concentrated on objective consideration of the facts and the preparation of observations and recommendations on the basis of critria of probability without giving in to the pressure and Manichaeism of persons or groups not connected with international monitoring. However, every voice which has expressed an opinion or criticism and drawn attention to procedures has been listened to. This task is one plagued by doubts, questions, conflicts of conscience and contradictory requests and it is a difficult one because the aim is to guarantee objective and independent international monitoring and compliance with international instruments, without complacency or fear.

. . .

471. During the second visit, information was received on the categories of acts which have been considered in previous reports, such as executions, the lack of a defence lawyer, failure to notify detainees of the charges against them immediately following arrest, difficulties in making trials public and ill-treatment and torture. Consistent information was also received on restrictions on freedom of the press, the publication of books and artistic creation, and delays and difficulties in exercising the right to freedom of association, including the right to form political parties. . . .

. . .

473. It should be noted that the laws governing political parties in particular and associations in general, contain provisions which in theory refer to the safeguarding of the Constitution and moral and religious principles, but whose practical effect is that associations whose objective is political propaganda and participation in electoral activities or the protection of human rights are not legally recognized. . . .

474. The positive measures adopted by the Government include: (a) the replies to many allegations which were communicated to it and which are reproduced *in extenso* in the present report; (b) the favourable outcome in a number of cases submitted by the Special Representative for consideration on humanitarian grounds; (c) the periodic adoption of clemency measures which benefit both ordinary prisoners and political prisoners; (d) the release of seven of the signers of the so-called 'Letter by the 90'; and (e) the decree of 31 December 1990, which requires a defence lawyer to be present at all stages in criminal proceedings. . . .

. . .

476. The Government acknowledged 113 executions between the first and second visits. Calculations based on the gathering of information broadcast on the official radio indicate that about 500 persons were executed between January and October 1990. The second visit had barely ended when Iranian radio reported further executions. The media reportedly announced several

dozen executions in January 1991. It is also known that some missing persons were in some way linked with executed persons and their disappearance is thus a matter of concern to their families and friends.

477. According to the information received, most of the executions concern persons accused of drug trafficking and the others are for ordinary offences of various kinds and political offences. The study of Iranian legislation clearly indicates that, because there are no gradations in the penalties for various types of criminal involvement and as a result of very general wording, the death penalty tends to be applied on a large scale. . . .

. . .

478. Executions in the Islamic Republic of Iran continue to go beyond the narrow limits within which the International Covenant on Civil and Political Rights allows the application of capital punishment.

. . .

483. The situation of followers of the Baha'i faith continues to be uncertain, given the unequal treatment they receive in different provinces and cities, depending on the ideas and temperament of individual officials. No reports of executions have been received in recent months. There do not appear to be any exception to the prohibition on admission to universities and there have been very few exceptions to refusals to grant legal recognition to inheritance rights . . . The General Assembly requested the Government to ensure that all individuals within its territory and subject to its jurisdiction, including religious groups, enjoy the rights recognized in international instruments (resolution 45/173).

484. During his second visit to the country, the Special Representative talked in private homes to people unconnected with the Government who lead a normal life and have no judicial or police problems. These people agreed to be interviewed after taking precautions to preserve their anonymity since they feared reprisals if it became known that they had given information about the human rights situation prevailing in the country. They said they feared mainly the activities of irregular groups and of Komiteh and Pasdarán agents who use intimidatory tactics. Other people interviewed at the United Nations Development Programme offices and the Esteghlal Hotel voiced the same fear.

. . .

492. The Special Representative is of the opinion and belief that there are arguments in favour of extending the international monitoring of the situation of human rights in the Islamic Republic of Iran with the objective of assuring, through co-operation, criticism, international public opinion and measures adopted by the Iranian authorities, that Iranian legislation, administration and practice are brought fully into line with the international instruments in force.

493. On the basis of the aforementioned information, the Special Representative, as in previous reports, ventures to make a number of recommendations. . . . The Special Representative states opinions and cannot act as a substitute for the Government, the General Assembly or the Commission on Human Rights, whose respective attributions include decision-making powers. It is for them to consider the recommendations and decide on them.

494. The Special Representative wishes to state that, in his view, it would be appropriate to adopt the following measures:

(a) The Government should take immediate action to reduce drastically the application of the death penalty, and, while technical reforms are being introduced into penal legislation, clemency and the right of pardon should be exercised broadly;

(b) Just as the penalty of flogging is being gradually replaced by a fine or imprisonment, consideration should be given to replacing the penalties regarded by the international organizations as forms of torture, including stoning and amputation;

(c) The Government should be urged to initiate forthwith or to speed up the pace of legislative and administrative reform to make national institutions compatible with the international human rights instruments, beginning with the introduction of technical reforms to penal legislation, as well as to introduce remedies to make moral and economic redress effective and to assign responsibility for abuses or excesses of power;

(d) The Government should carefully supervise the enjoyment of equal rights and equal treatment for all citizens, regardless of their political opinions or their religious beliefs;

(e) The Government should be urged to take, immediately and urgently, effective measures to establish a climate of confidence and legal certainty in institutions to enable citizens to express themselves without fear or intimidation;

(f) The Government should take care to apply the rules of due process of law . . . ;

(g) A specific agreement should be concluded soon with the International Committee of the Red Cross so that prison visits may be carried out regularly and without exceptions;

(h) The legal functioning of independent organizations should be authorized, including political organizations and organizations that seek to defend human rights;

(i) The prior examination of books and forms of artistic creation in general should end;

(j) Measures should be adopted to guarantee genuine freedom for the media and journalists should enjoy full guarantees for their professional activities;

(k) Compensation should be granted to persons affected by violations of human rights or to members of their families.

. . .

QUESTIONS

1. On what human rights instruments or bodies of norms does the rapporteur draw in criticizing Iran's actions? What norms, indeed, ought the UN Commission invoke in assessing state conduct? Is there 'one' decisive instrument? Is it relevant whether the state involved has ratified a particular treaty?

2. Are any concessions made in this report to Iran's distinctive situation as an Islamic state, to cultural relativism?

3. Given the rapporteur's inability to enter Iran, how does he 'find' the facts? Are there identified procedures for resolving conflicting assertions? What standard or burden of proof does the rapporteur appear to employ to determine if allegations are proven?

4. What functions are the recommendations meant to serve? To whom are they realistically addressed?

3. THE EVOLUTION OF TECHNIQUES FOR PROMOTING COMPLIANCE: 'THEMATIC' MECHANISMS AND BEYOND

COMMENT ON RANGE OF THEMATIC MECHANISMS

The 1503 procedure is extremely time-consuming and, in principle at least, deals only with overall 'situations' rather than with individual cases. The 1235 procedure, by contrast, is in principle capable of addressing any type of case. However, until such time as a specific fact-finding procedure (such as a rapporteur) is established for the relevant country, the procedure is limited to general debate within the many constraints of the Commission's annual session.

It is then obvious that these two procedures leave a serious gap in terms of the Commission's ability to respond to the plight of individuals or groups in countries that are not under specific 1235 investigations. The 'thematic' mechanisms that have been developed by the Commission since 1980 go a long way towards filling that gap. Each mechanism focuses on a particular 'theme' or genre of violations rather than on a particular country. By the end of the

Commission's 1995 session the following 'thematic' mandates were in existence:

> Working Groups: *Enforced or involuntary disappearances*—5 members; *Arbitrary detention*—5 members.
>
> Special Rapporteurs: *Extrajudicial, summary or arbitrary executions*—Mr Ndiaye, Senegal; *Freedom of opinion and expression*—Mr Hussain, India; *Racism, racial discrimination and xenophobia*—Mr Glele-Ahanhanzo, Benin; *Torture and other cruel, inhuman or degrading treatment*—Mr Rodley, UK; *Religious intolerance*—Mr Amor, Tunisia; *Use of mercenaries*—Mr Bernales-Ballesteros, Peru; *Sale of children, child prostitution and child pornography*—Ms. Calcetas-Santos, Philippines; *Internally displaced persons*—Mr Deng, Sudan; *Independence and impartiality of the judiciary*—Mr Cumaraswamy, Malaysia; *Violence against women*—Ms Coomaraswamy, Sri Lanka; and *Effects of Toxic and Dangerous Products on Human Rights*.

In their quest for effectiveness, the thematic mechanisms have developed certain techniques that include: requests to governments for information on specific cases; an urgent action procedure involving a request that a government take immediate action to rectify or clarify a case; and on-site visits for a more intensive and enduring examination of a series of cases. The manner in which these techniques are used, if at all, varies enormously from one mechanism to another. The mechanisms also vary in the extent to which they have sought to explore the doctrinal aspects of the issues, to develop the applicable normative framework, and to apply political pressure to individual governments.

The following materials provide an overview of the different approaches adopted by three of the mechanisms—those dealing with disappearances, arbitrary detention, and violence against women. Our objectives are to understand the techniques used; to consider the reasons and pros and cons for such diversity; to evaluate the overall system that has developed in a piecemeal and *ad hoc* manner; and to consider what changes might be made in these approaches.

One last consideration is vital. Given the range of UN responses—the 1503 procedure, the 1235 procedure and the different methods of implementing it through country-specific investigations, and the thematic mechanisms—is it now appropriate in evaluating the UN human rights system to consider any one of these responses separately, independently of its relation to the others within this larger evolving system?

COMMENT ON THE DISAPPEARANCES WORKING GROUP

We turn to the first of these mechanisms to be established—the Working Group on Disappearances. It provides a classic and unusually well-documented case

study of the legal, political and other factors that have enabled, or compelled, the Commission to act. In addition, it raises important doctrinal questions relating to state responsibility for human rights violations.

In the late 1970s it proved extremely difficult to mobilize sufficient political support within the United Nations to mount an investigation of the disappearances that were taking place in Argentina during its 'dirty war'. Representatives of the military junta then in control were skilful in their manipulation of the relevant international fora. Many governments were ambivalent about 'naming' Argentina, for a variety of reasons ranging from trade interests to fear that they might be next on the list. The means used by the UN to get around this array of obstacles was to avoid a country-specific inquiry by establishing the first 'thematic' mechanism. Argentina was optimistic that the thematic approach would avoid singling out any one country, demonstrate that not just Argentina but many countries had problems, and give a significant number of governments a strong incentive to ensure that the new mechanism would be kept under careful political control so as not to become effective.

Since that time the Disappearances Working Group has played an important role in developing certain dimensions of the international human rights system. It has also served as a model for the creation of a growing range of thematic mechanisms.

Before exploring the techniques used by these groups, one should obtain a sense of the circumstances that made this breakthrough possible. Although it is tempting in this field to attribute most successes and failures to political factors, legal issues are often either of genuine concern or are sufficiently compelling that they can be used as shields by governments seeking to avoid scrutiny. One such issue of major importance in the 1970s was whether a government could legally, and should politically, be held accountable for violations for which it was not directly responsible—in other words for acts that were not committed directly by government officials or their properly delegated agents. The practice of disappearances that became common in some Latin American countries in the 1970s raised this issue. The disappearances were said to have been the responsibility of vigilante groups or death squads that were not linked to the government. Could the Commission then hold the government accountable?

The issue first arose in relation to Chile. An Expert appointed by the Commission, Mr Dieye of Senegal, tackled the issue directly in a 1979 report to the General Assembly.[11] Although his analysis of the issue of state responsibility for violations of human rights is less comprehensive than that of the Inter-American Court of Human Rights in 1988 in the *Velásquez-Rodríguez* Case (see p. 650, *infra*), it laid the groundwork for some important international legal developments required for effective action in response to gross violations. The Expert concluded that a state is responsible in international law

[11] UN Doc. A/34/583/Add.1 (1979), paras. 168–72.

for a range of acts or omissions if a person disappears subsequent to being detained by a state authority; if the state authorities do not react promptly to reliable reports of disappearances; if the relevant legal remedies are ineffective or non-existent; if, in the face of reliable evidence, the state does not act to clarify the situation; or if it takes no action to establish individual responsibility within the national framework.

The Expert concluded that the situation in Chile satisfied all the necessary conditions for establishing governmental responsibility. He relied on various facts, including: (1) the cases of at least 600 persons arrested by state authorities had not been clarified; (2) in making arrests, the secret police (the DINA) were not subject to restrictions compatible with international law; (3) available remedies were ineffective; (4) the Government had done nothing to strengthen the investigative system; (5) the Government had not cooperated fully with the UN and other international organizations.

The conclusions reached by the Expert were accepted by the Assembly and the Commission. Their implications were not confined to the situation in Chile, and they played a crucial role in setting the scene for action against Argentina.

ANTONIO CASSESE, HUMAN RIGHTS IN A CHANGING WORLD

(1990), at 128.

. . .

The first documented reports on the forced disappearances and tortures in Argentina reached the UN Sub-Commission in August 1976, in the course of its annual session. Some representatives of Argentinian human rights groups consigned voluminous documentation to various members of the Sub-Commission, trusting that they would take some initiative. I was then a member of the Sub-Commission, and along with the French expert, Nicole Questiaux (later a Minister in the first year of Mitterrand's presidency), we decided to check the reports and, should they prove well-founded, draw up a draft resolution expressing the UN's concern at what was happening in Argentina. A rather mild initiative; nevertheless, it aroused a great deal of alarm in the Argentine Embassy to the UN. The Ambassador immediately tried to speak to us, and even invited us to lunch. His invitation was flatly refused, but he continued to do everything he could to dissuade us from pursuing the initiative. His arguments, accusing the authors of the documentation distributed to us of being known terrorists, certainly did nothing to sway us. The following day, each of us was called before our respective Ambassadors in Geneva, who had received strongly-worded messages from their capitals: Buenos Aires had telephoned the capitals of our two countries, to have our Ambassadors to Geneva direct us to stop what we were doing. Fortunately,

both the Ambassadors took note of our status as independent experts and simply conveyed to us the steps the Argentinian authorities had taken. The Argentinian Ambassador to Geneva, having heard of our decision not to retreat from our initial position, called another meeting, where he quickly moved from polite 'recommendations' to the most open threats (he was then chairman of the 'Group of 77', i.e. of the Third World states, a position that gave him considerable influence as regards our possible re-election and our 'diplomatic' future within the UN). These Argentinian protests and threats, far from discouraging us, only served to strengthen our resolve to persist. . . .

NOTE

The Sub-Commission subsequently adopted a resolution (Res. 2A (XXIX) of 1976) expressing deep concern that human rights appeared to be in jeopardy in Argentina and 'expressed the hope that international standards' would be respected. In 1978 the Inter-American Commission on Human Rights issued a damning indictment of the situation and set the scene for a more energetic UN response. The report by the Expert on Chile, described above, provided the legal basis on which UN organs could hold the Government of Argentina accountable for the disappearances which it persisted in attributing to unknown, private agents with no governmental connections. The UN General Assembly expressed concern in December 1978 and called for action by the Commission.

Clever manœuvering by Argentina, however, prevented the Commission from adopting a resolution in March 1979 and it returned to the matter in 1980. In the meantime, significant pressure for action had been generated by a campaign by Argentinean and international NGOs. The following excerpt describes the relevant events in the UN Commission in 1980.

DAVID KRAMER AND DAVID WEISSBRODT, THE 1980 UN COMMISSION ON HUMAN RIGHTS AND THE DISAPPEARED

3 Hum. Rts. Q. 18 (1981), at 20.

. . .

[S]trong interest in the issue of disappearances among all the Western delegates caused difficulties as the delegates squabbled among themselves to determine who would take a leadership role in formulating and sponsoring a resolution on disappearances. France, having come to the Commission with a prepared draft resolution, took the initiative. The French proposed that a group of three experts acting in their individual capacities would examine all reports of disappearances in any part of the world. The experts would be empowered to seek information from the governments and families concerned

and to take appropriate action, in consultation with the governments concerned. . . . The Western bloc reached agreement on all the provisions contained in the draft except for paragraph 6(a), which defined disappeared persons. To several of the Western countries—the United States, Canada, Australia, and the Netherlands—broadly defining disappeared persons as those who cannot be located immediately or following a brief investigation once an abduction was reported to the government was an open invitation to other countries to find the resolution imprecise and unworkable. The definition seemed to cover all *missing* persons, instead of all *disappeared* persons. It did not exclude a voluntary disappearance by someone who, for personal reasons, might wish to hide from the authorities or perhaps from their family. Nor did it exclude those cases in which it was thought that a person had voluntarily left the country. Yet the French insisted on their language. . . .

The indecision of the Western bloc created a vacuum which Argentina tried to fill with a resolution of its own. . . .

[That] resolution urged governments to inform the Secretary-General of the measures they were adopting to cope with the problem of disappearances. It called upon governments to express their opinion as to what procedures might be appropriate to deal with disappeared persons without encroaching upon the sovereignty of any nation. A working group of five persons would then meet a week before the 1981 session of the Human Rights Commission to evaluate the submissions of the government and to make appropriate recommendations to the Commission. The Argentine proposal, essentially postponing any action for at least a year, was circulated just before the beginning of public debate.

On 22 February 1980 at the end of the third week of the Commission session, the public debate on disappearances began. The Western nations had still not agreed among themselves on the text of a resolution. The nonaligned nations were still reacting to the Argentine proposal. The socialist bloc was waiting to see what the nonaligned countries would do. As a consequence, no nation was prepared to speak.

The floor then unexpectedly went to the NGOs. The representative of Amnesty International (AI) spoke first. He defined the nature of the problem and described AI's efforts in collecting and submitting to the United Nations thousands of names of disappeared persons in Argentina, Afghanistan, Democratic Kampuchea, Ethiopia, Nicaragua, and Uganda. He then proceeded to discuss the case of two Argentines, who had been disappeared, tortured, and imprisoned in a secret camp, but who had escaped to tell of their experiences. Argentina harshly interrupted the speech and demanded to know from the Chairman what right an NGO had to attack a government in front of the Commission. . . . [Uruguay and Ethiopia both supported Argentina's position, while Canada and the U.S. supported Amnesty.] The Chair . . . ruled that although NGOs may not attack particular countries, they may provide the Commission with information about particular countries.

This initial public debate of 22 February 1980 revealed several things about

how the issue of disappearance was to fare before the Human Rights Commission. First, the debate exemplified just how critical the issue was for countries—such as Argentina—accused of disappearing persons. Second, the public debate disclosed a strategy that might defeat any action to establish a U.N. mechanism for handling disappearances. It was clear that the NGOs, which seemed to be primarily Western in orientation, advocated an effective resolution. It was also clear that they had the full support of the Western nations. If the initiative surrounding the issue of disappearances was viewed as Western, there was a significant danger that, for that reason alone, Third World countries might not support it. Clearly, no resolution could pass the Commission without the support of a good number of Third World nations.

. . .

[A proposal drawn up by Iraq, with the help of Cuba, was eventually accepted by the Western countries with several amendments. The key issue was whether the Working Group to be established would be authorized to respond to specific 'cases' or only to urgent 'situations'. The final compromise authorized the Group to 'examine questions relevant to' disappearances. After much drama, the draft was adopted without a vote, thus preserving a shaky consensus and not requiring individual states to vote for or against it.]

The battle over the meaning of the proposal immediately began. In explaining their position after the adoption of the resolution, the USSR, Argentina, and Ethiopia urged a restrictive reading of the resolution. The USSR, for instance, pointedly referred to the fact that the working group had been created for one year only. It presumed that the group would work by strict consensus and that the duration of any meetings would be limited. It saw no need for the group to meet at all until two to three weeks before the 1981 session of the Human Rights Commission.

A reading that would allow the working group to consider individual cases of disappearances was urged by the U.S., Australia, Cyprus, Netherlands, and Canada. The United States specifically pointed out that the mandate of the working group of experts would allow it to consider the thousands of individual cases in existence.

. . .

NOTE

The debates that took place in the Commission in 1980 led to the establishment of the Working Group with the mandate (or terms of reference) contained in Resolution 20 (XXXVI)(1980). In implementing such a mandate, much depends on the interpretation given by the members of the Working Group to terms that are vague or open-ended, and in turn on their perception of the political climate in the Commission.

The mandate is currently renewed every three years. In 1993, a fairly aver-

age year, the Group met three times for a total of less than four weeks. It met with governments, NGOs and others and transmitted 3,162 new cases to governments. Of these '523 had been received in 1993, while the rest were part of the . . . backlog; 122 . . . were reported to have occurred in 1993; 151 were transmitted under the urgent action procedure, of which 18 were clarified during the year' (UN Doc. E/CN.4/1994/26, para. 30). On average the Group undertakes one or two on-site visits each year. It sends a single report annually to the UN Commission.

COMMISSION RESOLUTION 20 (XXXVI)(1980)

. . .

1. *Decides* to establish for a period of one year a working group consisting of five of its members, to serve as experts in their individual capacities, to examine questions relevant to enforced or involuntary disappearances of persons;
2. *Requests* the Chairman of the Commission to appoint the members of the group;
3. *Decides* that the working group, in carrying out its mandate, shall seek and receive information from Governments, intergovernmental organizations, humanitarian organizations and other reliable sources;
4. *Requests* the Secretary-General to appeal to all Governments to co-operate with and assist the working group in the performance of its tasks and to furnish all information required;
5. *Further requests* the Secretary-General to provide the working group with all necessary assistance, in particular staff and resources they require in order to perform their functions in an effective and expeditious manner;
6. *Invites* the working group, in establishing its working methods, to bear in mind the need to be able to respond effectively to information that comes before it and to carry out its work with discretion;
7. *Requests* the working group to submit to the Commission at its thirty-seventh session a report on its activities, together with its conclusions and recommendations;

. . .

COMMISSION RESOLUTION 1992/30

. . .

2. *Takes note* of the report of the Working Group and thanks the Working Group for continuing to improve its methods of work and for recalling the humanitarian spirit underlying its mandate;
3. *Decides* to extend for three years the mandate of the Working Group . . .

4. . . . reminds the Working Group of the obligation to discharge its mandate in a discreet and conscientious manner;

. . .

7. *Reminds* the Working Group of the need to observe, in its humanitarian task, United Nations standards and practices regarding the receipt of communications, their consideration, their evaluation, their transmittal to Governments and the consideration of Government replies;

8. *Notes with concern* that some Governments have never provided substantive replies concerning disappearances alleged to have occurred in their countries;

9. *Deplores* the fact that, as the Working Group points out in its report, some Governments have not acted on the recommendations contained in the Working Group's reports concerning them nor replied to its requests for information on those matters, and requests the Working Group to continue to provide the Commission with all information on action taken further to its recommendations;

10. *Urges* the Governments concerned, particularly those which have not yet responded to communications transmitted to them by the Working Group, to cooperate with and assist the Working Group so that it may carry out its mandate effectively, and in particular to reply expeditiously to its requests for information;

. . .

14. *Encourages* the Governments concerned to give serious consideration to inviting the Working Group to visit their countries so as to enable the Working Group to fulfil its mandate even more effectively;

. . .

METHODS OF WORK

Report of the Working Group on Disappearances
UN Doc. E/CN.4/1988/19, paras. 16–30.

16. The Working Group's . . . main objective . . . is to assist families in determining the fate and whereabouts of their missing relatives. . . . To this end, the Working Group endeavours to establish a channel of communication between the families and the Governments concerned, with a view to ensuring that sufficiently documented and clearly identified individual cases which the families, directly or indirectly, have brought to the Group's attention, are investigated and the whereabouts of the missing person clarified. The Group's role ends when the fate and whereabouts of the missing person have been clearly established as a result of investigations by the Government or the search by the family, irrespective of whether that person is alive or dead. The

Group's approach is strictly non-accusatory. It does not concern itself with the question of determining responsibility for specific cases of disappearance or for other human rights violations which may have occurred in the course of disappearances. In sum, the Group's activity is humanitarian in nature.

. . .

19. In transmitting cases of disappearances, the Working Group deals exclusively with Governments, basing itself on the principle that Governments must assume responsibility for any violation of human rights on their territory. If, however, disappearances are attributed to terrorist or insurgent movements fighting the Government on its own territory, the Working Group has refrained from processing them. The Group considers that, as a matter of principle, such groups may not be approached with a view to investigating or clarifying disappearances for which they are held responsible.

. . .

21. In order to enable Governments to carry out meaningful investigations, the Working Group provides them with information containing at least a minimum of basic data. In addition, the Working Group constantly urges the sources of reports to furnish as many details as possible on the identity of the missing person (if available, identity card numbers) and the circumstances of the disappearance. The Group requires the following minimum elements:

(a) Full name of the missing person;

(b) Date of disappearance, i.e., day, month and year of arrest or abduction or day, month and year when the missing person was last seen. When the missing person was last seen in a detention centre, an approximate indication is sufficient (i.e. March or spring 1980);

(c) Place of arrest or abduction or where the missing person was last seen (at least indication of town or village);

(d) Parties presumed to have carried out the arrest or abduction or to hold the missing person in unacknowledged detention;

(e) Steps taken to determine the fate or whereabouts of the missing person or at least an indication that efforts to resort to domestic remedies were frustrated or have otherwise been inconclusive.

22. Reported cases of disappearances are placed before the Working Group for detailed examination during its sessions. Those which fulfil the requirements as outlined above are transmitted, upon the Group's specific authorization, to the Governments concerned requesting them to carry out investigations and to inform the Group about their results. . . .

. . .

24. At least once a year the Working Group reminds every Government concerned of the cases which have not yet been clarified. . . .

25. All replies received from Governments on reports of disappearances are examined by the Working Group and summarized in the Group's annual report to the Commission . . . . Any information given on specific cases is forwarded to the sources of those reports who are invited to make observations thereon or to provide additional details on the cases.

26. If the reply clearly indicates where the missing person is (whether alive or dead) and if that information is sufficiently definite for the family to be reasonably expected to accept it, the Working Group considers the case clarified. . . .

. . .

30. The Working Group retains cases on its files as long as the exact whereabouts of the missing persons have not been determined. . . . This principle is not affected by changes of Government in a given country. However, the Working Group accepts the closure of a case on its files when the competent authority specified in the relevant national law pronounces, with the concurrence of the relatives and other interested parties, on the presumption of death of a person reported missing.

THE QUESTION OF DISAPPEARANCES IN THE FORMER YUGOSLAVIA

Report of the Working Group on Disappearances
UN Doc. E/CN.4/1993/25, paras. 38-44.

. . .

38. From the very early years of its existence, the Working Group has consistently taken the view that cases occurring in the context of an international armed conflict should not be taken up by the Group. That position was occasioned by the Iran–Iraq war. The Group argued at the time that taking up all cases of disappearance occurring in international armed conflicts, including the disappearance of combatants, would be a task far surpassing the resources of the Group. It also argued that, in any event, there already existed an international agency, namely the International Committee of the Red Cross, entrusted with the duty of tracing disappeared persons in such circumstances.

. . .

39. As regards the situation in the former Yugoslavia, the Working Group is not aware of any authoritative position within the United Nations system which might give it guidance as to whether the armed conflict in that area is of an international or an internal character, nor as from what date it assumed such a character, nor whether the conflict might be characterized differently

for different parts of the area at any given time. The Security Council consistently refers to 'the armed conflict' and avoids qualifying it as either international or internal. Legal advisers differ on the subject. The Working Group has no independent means of establishing the character of the conflict and acting accordingly.

40. . . . It is obvious that if the Group were asked to involve itself in the situation in the former Yugoslavia, its resources would be totally inadequate to meet an influx of such magnitude. Even at present, due to the scant human resources at the Centre for Human Rights, the Working Group is trying to cope with an existing backlog of over 8,000 cases of disappearance waiting for transmission to the Governments concerned.

41. Apart from the question of resources, the methods of work of the Working Group . . . are not really geared to handling situations of the size and nature of the one in the former Yugoslavia. The Group's approach has consistently been to consider cases on an individual basis; this would, of course, become an illusion if attempted in a situation where the disappearances are on a very large scale, an experience the Group already suffered in the case of Iraq regarding disappearances that occurred after the end of the war with Iran.

. . .

43. The world is looking at one of the most dramatic episodes of humanitarian crisis and large-scale violation of human rights since the Second World War. The United Nations is bound to concern itself eventually with all aspects of the situation and can hardly turn a blind eye on one particular aspect, such as the occurrence of thousands of disappearances. Relatives, interested parties and the public at large would fail to understand the absence of significant action on the part of the United Nations. On the other hand, when the United Nations does take steps in the matter, its action should be commensurate to the situation addressed. Action which failed to meet the minimum standards of effectiveness, and therefore failed to contribute significantly towards resolving the problem of disappearances, might equally be harmful to the image of the world organization. If the Working Group were to assume the responsibility itself, its involvement in the matter would amount, at best, to a bookkeeping exercise, which would hardly do justice to the proportions of the problem.

NOTE

Although the Working Group sought the Commission's advice on this matter, it was left to find its own solution. Thus, in its 1994 report (UN Doc. E/CN.4/1994/26, para. 43), it proposed the following approach which the Commission subsequently endorsed:

. . .

(a) All cases of missing persons in any part of the former Yugoslavia should be considered under the same special procedure, geared to the exigencies of the situation;

(b) That special procedure should be implemented as a joint mandate by one member of the Working Group on Enforced or Involuntary Disappearances and the Special Rapporteur on the situation of human rights in the former Yugoslavia, resulting in joint reports to be submitted to the Commission on Human Rights;

(c) The Secretary-General should provide sufficient financial and personnel resources to the special procedure in order to guarantee its effective functioning.

A CASE STUDY

Report of the Working Group on Disappearances, UN Doc. E/CN.4/1994/26, paras. 237–54.

India

. . .

238. During the period under review, the Working Group transmitted 45 newly reported cases of disappearance to the Government of India, of which 14 were reported to have occurred in 1993. Twenty of these cases were transmitted under the urgent action procedure.

. . .

242. The newly reported cases of disappearance were submitted by Amnesty International, Human Rights Trust, the Sikh Human Rights Group and the International Human Rights Organization. These organizations reported that during 1993 most reported cases of disappearance took place in the Punjab region.

243. . . . The forces named as being responsible are, primarily, the army and the police. The missing persons include persons suspected of belonging to separatist groups, members of trade unions, lawyers, judges, journalists and human rights workers. Many other allegations of disappearances reported to have occurred in Kashmir and Jammu were also received, but owing to the methods of work of the Working Group, which require that all of the essential elements of the case be provided, these cases were not transmitted to the Government. It was reported to the Working Group that the situation in Kashmir and Jammu did not allow for a comprehensive compilation of information on cases, and that relatives of disappeared persons and human rights workers were often concerned about their own physical safety, in part because of harassment, threats or attacks often directed against them. For example, it

was alleged that one human rights worker who had frequently represented the families of disappeared persons before the Jammu and Kashmir High Court, was extrajudicially executed in Srinagar at the end of 1992.

244. Two laws which have allowed for preventive detention were particularly cited as contributing to the conditions in which disappearances were likely to take place: the Terrorist and Disruptive Activities Act (TADA) and the Public Security Act (PSA). In addition to allowing for preventive detention, these laws allow for prolonged detention without the many other normal safeguards available under the criminal codes. . . . Widespread torture, alleged to have occurred during periods of prolonged and incommunicado detention, was also reported to be an important element contributing to the phenomenon of disappearance. It was further noted that during these periods of detention women were particularly vulnerable to rape.

245. In regard to responsibility for human rights violations and in particular disappearances, it was reported to the Working Group that the police and other authorities acted with almost total impunity. Official investigations were reportedly rare and the Working Group was informed that the trial and conviction of authorities held responsible for such violations has occurred in approximately 1 per cent of all reported cases. Compensation to the victim or to the victim's family, most often without criminal prosecution, was reported to have been awarded in some cases.

Information and views received from the Government

246. By letter dated 7 January 1993, the Government of India informed the Working Group that in one case of disappearance the authorities had not detained the person concerned.

. . .

248. By letter dated 17 November 1993, the Government transmitted information to the Working Group concerning the newly constituted National Human Rights Commission. . . .

249. By letters dated 25, 26 and 30 November 1993, the Permanent Mission of India to the United Nations Office at Geneva provided information on 36 cases of disappearances. In six cases the Working Group decided to apply the six-month rule, while the information provided on the 30 other cases was considered by the Working Group insufficient to constitute a clarification.

250. By letter dated 30 November 1993, the Permanent Mission of India to the United Nations Office at Geneva responded to the general allegations contained in the Working Group's letter of 20 October 1993. It was stressed that the Indian Constitution established all the relevant institutions to safeguard democracy, namely an independent judiciary, a parliamentary form of government, a free press and commitment to the rule of law. All actions of State officials were subject to judicial review. In particular, a magisterial inquiry was mandatory for deaths in custody, and by means of a 'public interest litigation'

any individual or group could bring instances of violations of human rights to the attention of the High Court and the Supreme Court.

251. This commitment to pluralist democracy and the rule of law was, however, confronted with terrorism. According to the Government, in the past decade, terrorist violence had taken a toll of about 12,000 lives in Punjab and 4,000 lives in Jammu and Kashmir, including nearly 2,000 policemen and security forces personnel. In addition, systematic religion-based extremism had resulted in an exodus of 250,000 persons from the Kashmir valley to other parts of India.

252. Against this background, special legislation such as the . . . TADA . . . had had to be enacted in so-called 'disturbed' areas.

253. Nevertheless, the right to habeas corpus remained in force in all circumstances, and detainees always remained under judicial custody. There was thus no provision guaranteeing any form of impunity to security forces, and in Jammu and Kashmir alone, disciplinary action had been taken against 170 officers and men of the army and security forces. Custodial rape, if proven, could carry a life sentence.

254. According to the Government, the extrajudicial execution of a human rights worker, Mr. H. N. Wanchoo, in Srinagar on 5 December 1992, had been carried out by persons belonging to the terrorist organization Jamait-UV-Mujahideen, who had distorted these events to blame the authorities.

NOTE

Statistics in the report indicate that, of 213 cases transmitted to the Government over a five year period, specific responses had been received in relation to 66. As a result, 19 cases had been clarified by the Government and one by a NGO.

ABUSE OF HUMAN RIGHTS COMMISSION

The Economist, Feb. 4, 1995, p. 24.

. . .

To coincide with the start of the annual meeting of the United Nations Commission on Human Rights, Amnesty International has published yet another report on brutality in Kashmir. It contains details of 715 cases in which, it claims, people have been shot or tortured to death in Kashmir since the current insurgency started there in 1989.

These reports infuriate the Indian government. In the past, it has responded either by denying their truth, or by insisting that it was taking action to improve matters. The denials do not wash. . . . [T]here are enough detailed dossiers, including evidence from doctors and policemen, to convince any impartial observer that many terrible things have taken place.

The government has tried to show that it is making amends. In July 1993, it said that allegations of deaths in custody would be investigated. By May 1994, it announced that action had been taken in 174 cases, but refused to say what offences had been involved, or to name those who had been punished.

In October 1993, it appointed a National Human Rights Commission, an independent body with a brief to investigate brutality. But the commission is not allowed to investigate allegations against the army and the paramilitary forces, which are involved in almost all the cases at issue in Kashmir.

Given the Indian government's sensitivity to public discussion of the issue, the United Nations Commission on Human Rights could play an influential role. The UN's Special Rapporteur . . . has produced some carefully worded documents about the allegations, expressing 'serious concerns' and asking for an invitation to investigate them. None has been forthcoming. A resolution from the commission criticising Indian behaviour in Kashmir, which would probably sting the government more sharply than anything else, has not been forthcoming either.

At last year's meeting of the commission, Pakistan's prime minister, Benazir Bhutto, tried to table a resolution. The many countries that were either friends of India's, or had something to hide, made it clear that they would vote against it. China and Iran (friends of Pakistan's, with much to hide) persuaded Pakistan to 'defer' the resolution. In India, the government's avoidance of censure was splattered across the front pages of newspapers as a triumph.

Because the UN's Commission on Human Rights has failed to condemn India's brutality in Kashmir, it has, by default, sanctioned it.

REPORT OF THE WORKING GROUP ON DISAPPEARANCES

UN Doc. E/CN.4/1993/25, Paras. 74–88.

. . .

74. On 18 December 1992 the General Assembly, in resolution 47/133, adopted the United Nations Declaration on the Protection of all Persons from Enforced Disappearance. The Working Group, which participated actively in the elaboration of this Declaration, welcomes it as a milestone in the united efforts to combat the practice of disappearance and considers that it constitutes an important basis for its own future work. Many proposals and recommendations which the Working Group has adopted over the years and published in its annual reports have been reflected in the Declaration. In accordance with the Declaration, the systematic practice of disappearance is of the nature of a crime against humanity and constitutes a violation of the right to recognition as a person before the law, the right to liberty and security of the person, and the right not to be subjected to torture; it also violates or constitutes a grave threat to the right to life. States are under an

obligation to take effective legislative, administrative, judicial or other measures to prevent and terminate acts of enforced disappearance, in particular to make them continuing offences under criminal law and to establish civil liability.

75. The Declaration also refers to the right to a prompt and effective judicial remedy as well as unhampered access of national authorities to all places of detention, the right to habeas corpus, the maintenance of centralized registers of all places of detention, the duty to investigate fully all alleged cases of disappearance, the duty to try alleged perpetrators of disappearances before ordinary (not military) courts, the exemption of the criminal offence of acts of enforced disappearance from statutes of limitations, and special amnesty laws and similar measures leading to impunity.

. . .

87. . . . The Working Group . . . recommends that the Commission on Human Rights establish a reporting system by which all Governments are requested to submit to the Secretary-General periodic reports on all measures they have adopted to implement the Declaration and on all difficulties affecting its implementation.

88. It further recommends that the Commission on Human Rights entrust the Working Group with the task of examining these reports and transmitting comments and recommendations to the Governments concerned. Whenever requested by the Working Group, Governments should send representatives for the examination of their reports.

NOTE

Note the following excerpts from Commission on Human Rights Resolution 1994/39:

> 17. *Requests* the Working Group, in the exercise of its mandate, to take into account the provisions of the Declaration on the Protection of All Persons from Enforced Disappearance, and to modify its working methods if necessary;
>
> . . .
>
> 19. *Encourages* States, as some have already done, to provide concrete information on measures taken to give effect to the Declaration, as well as obstacles encountered;



COMMENT ON ON-SITE VISITS: THE CASE OF EAST TIMOR

Beginning in 1985, the Working Group on Disappearances pioneered the practice of conducting on-site visits to enable it to examine cases in greater depth, to galvanize public interest in its work and to apply greater pressure, both domestically and internationally, to governments. Most of the other thematic mechanisms subsequently adopted the same practice. Governments are not obliged to accept such missions, although a refusal might be taken as a lack of good faith and provide justification for criticism. No established procedures govern the initiation, organization or methodology of such visits. Nonetheless, the standards developed in relation to fact-finding under Resolution 1235 are generally applicable.

A visit to Indonesia and East Timor in July 1994 by the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Mr. Bacre Waly Ndiaye, is reasonably typical of such undertakings.[12] The Special Rapporteur had sought to visit other regions of Indonesia as well as East Timor, but the Government restricted his visit to the latter. The visit was initiated by a request from the Rapporteur in November 1993, based upon the killings that had occurred at the Santa Cruz Cemetry in Dili, the capital of East Timor, in November 1991. The killings had been filmed by a British photographer and the footage got widespread coverage in the West. The Rapporteur based his mission on human rights treaty provisions; the Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, adopted by the ECOSOC in 1989 (Res. 1989/65); and the Declaration on the Protection of All Persons from Enforced Disappearance (see p. 435, *supra*).

The Rapporteur spent ten days in Indonesia, including four and a half days in East Timor. He met with a range of Government Ministers, the most senior military officers, NGO and other Timorese leaders, church officials and the Ambassadors of the United States and the Netherlands. He noted that his only purpose was 'to examine respect for the right to life,' irrespective of the political status or level of economic development of East Timor. He observed that at least three other of the UN's 'thematic mechanisms' had focused on the Santa Cruz killings and called upon the Government to take various measures.

The Indonesian authorities had reported 19 persons killed in the incident, while a National Commission of Inquiry had estimated the number at about 50. The Rapporteur observes that according to testimonies he gathered, the total was 'between 150 and 270, although some estimated it to be around 400.' He noted that the 'Indonesian Government and military authorities expressed regret for the Santa Cruz killings, which they consider as a tragic accident that

[12] UN Doc. E/CN.4/1995/61/Add.1 (1995).

arose out of a provocative action by anti-integration [of East Timor into Indonesia] elements.'

The Rapporteur recommended that, in the future, all cases of executions and disappearances should be investigated in a thorough, prompt and impartial manner, according to international standards. He called for the creation of 'a civilian police force as a matter of urgency,' and recommended the creation of a new commission of inquiry composed of independent and impartial experts, including some who are 'internationally recognized,' with full powers of investigation, an adequate budget, and powers to protect witnesses and their families. In addition to ascertaining the facts the new commission should determine 'the chain of command and the identity of all the perpetrators and their superiors, and their individual responsibility [for] the human rights violations.' He also recommended that, in order to restore popular confidence in the government and to end the impunity enjoyed by the Indonesian armed forces, the civil courts should deal with all relevant matters, the independence of the judiciary should be improved and guaranteed,' and equitable compensation should be granted to victims and their families.

In attaching particular importance to the role of NGOs, he made the following recommendation:

> 84. The Special Rapporteur believes that the involvement of non-governmental organizations in all questions relating to human rights in East Timor—e.g. investigation, monitoring, legal assistance, information and training—should be allowed and encouraged by the Indonesian authorities:
>
> (a) Independent NGOs should be created in East Timor and allowed to operate freely throughout the territory. At this stage, the Special Rapporteur feels that the involvement of the Catholic clergy (which at the moment is the only institution whose involvement with human rights questions is tolerated by the Indonesian authorities) in such organizations would be essential;
>
> (b) Indonesian and international human rights NGOs should be granted full access to East Timor.
>
> 85. The Special Rapporteur believes that the National Human Rights Commission is not the most appropriate mechanism to deal with human rights violations in East Timor. Its mandate, the means of action at its disposal and its methods of work are insufficient. Furthermore, it is not trusted by the population of East Timor. . . .

COMMENT ON THE WORKING GROUP ON ARBITRARY DETENTION

We now examine the mandates and the 1993 report of one of the more recently created thematic mechanisms—the Working Group on Arbitrary

Detention. The Group initially considered adopting the same working methods as the Disappearances Working Group, but its 1993 report indicates a radically different approach. We look at the Group's mandate, its own explanation of its working methods, a case study involving the United States and the Group's conclusions and recommendations.

The Group's original mandate was stated in the following terms by the UN Commission (Res. 1991/42):

> . . .
>
> 2. *Decides* to create, for a three-year period, a working group composed of five independent experts, with the task of investigating cases of detention imposed arbitrarily or otherwise inconsistently with the relevant international standards set forth in the Universal Declaration of Human Rights or in the relevant international legal instruments accepted by the States concerned;
> 3. *Decides* that the working group, in carrying out its mandate, shall seek and receive information from Governments and intergovernmental and non-governmental organizations, and shall receive information from the individuals concerned, their families or their representatives;
> 4. *Invites* the working group to take account, in fulfilling its mandate, of the need to carry out its task with discretion, objectivity and independence; . . .

By 1993 the Commission had endorsed the principal elements contained in the strategy developed by the Working Group. Note the rather casual terms in which the Commission (in Res. 1993/36) provides its imprimatur and considers whether, on the basis of the readings that follow, the Working Group has succeeded in balancing the various directives it has been given.

> 1. *Expresses its appreciation* to the Working Group on Arbitrary Detention for the way in which it carries out its task, more particularly for the importance that it attaches to respect for the adversarial procedure in its dialogue with States, and to seeking the cooperation of all those concerned by the cases submitted to it for consideration;
>
> . . .
>
> 4. *Considers* that the Working Group, within the framework of its mandate, and aiming still at objectivity, could take up cases on its own initiative;
>
> . . .
>
> 6. *Takes note* of the 'deliberations' adopted by the Working Group . . . ;
>
> . . .
>
> 9. *Requests* Governments concerned to give the necessary attention to the 'urgent appeals' addressed to them by the Working Group on a strictly

humanitarian basis and without prejudging its final decision on the character of the detention;

10. *Calls upon* Governments concerned to pay due heed to the Working Group's decisions and, where necessary, to take appropriate steps and inform the Working Group, within a reasonable period of time, of the follow-up to the Group's recommendations so that it can report thereon to the Commission;

The Working Group's methods of work are, in form, very similar to those of the Disappearances Working Group. Thus, it meets three times a year for a total of up to four weeks. It bases its legal analysis upon applicable treaty provisions and various declarations, in particular the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by the UN General Assembly in 1988. In determining the range of cases it will consider, the Working Group has identified the following three categories:

I. Cases in which the deprivation of freedom is arbitrary, as it manifestly cannot be linked to any legal basis (such as continued detention beyond the execution of the sentence or despite an amnesty act, etc.); or

II. Cases of deprivation of freedom when the facts giving rise to the prosecution or conviction concern the exercise of the rights and freedoms protected by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights; or

III. Cases in which non-observance of all or part of the international provisions relating to the right to a fair trial is such that it confers on the deprivation of freedom, of whatever kind, an arbitrary character.

The Working Group receives information from all sources. It requires a minimum amount of information for admissibility of a case, and transmits cases to the government concerned for a reply. During 1993, the Group considered 335 cases, of which 231 were declared to be arbitrary and 59 were pending. It undertakes urgent action procedures (1) where there are 'sufficiently reliable allegations' that a person's arbitrary detention constitutes a 'serious danger to that person's health or even life:' and (2) 'where the particular circumstances of the situation warrant' it. The Group undertakes on-site visits where invited, and it reports annually to the Commission.

In practice, however, it has developed an approach which is radically different from those of other thematic mechanisms.[13] The Group considers that its 'investigation [of cases] should be of an adversarial nature so as to assist it in obtaining the cooperation of the State concerned.' Each case is characterised as a 'communication.' At least 90 days after transmitting the case to the government, the Group issues a 'decision' which is presented in a quasi-

[13] See generally 'Report of the Working Group on Arbitrary Detention', UN Doc. E/CN.4/1994/27, Annex I.

judicial fashion. Even if the person concerned is subsequently released 'the Working Group reserves the right to decide, on a case-by-case basis, whether or not the deprivation of liberty was arbitrary' and, if so, it 'shall make recommendations to the Government' which will also be included in the annual report. In addition, the Group adopts formal 'deliberations', designed to develop the doctrinal underpinnings of it work. The Group will generally not deal with situations of international armed conflict.

The Working Group has explained the function of its 'deliberations' in the following terms (UN Doc. E/CN.4/1993/24, p. 9):

. . .

> [In its reports, the Working Group has] identified certain legal situations which deserved particular attention. . . . [T]he Working Group felt that it would then consider whether these legal situations could characterize a detention as arbitrary. The Working Group deemed that this would make it possible for the Governments concerned to appreciate, not in the abstract but with reference to the identity of the legal situations prevailing in their respective jurisdictions, why detentions in the context of these legal situations were declared arbitrary. In addition, the Working Group felt that consideration of these situations would help formalize certain principles which might hitherto not have been considered relevant for the purposes of declaring a particular detention arbitrary.

DELIBERATION 02

Report of the Working Group on Arbitrary Detention,
UN Doc. E/CN.4/1993/24, p. 9.

[In 1991 the Cuban Government challenged the working methods of the Group on several grounds. The most significant legal challenge was directed toward reliance by the Group on 'documents of a merely declaratory nature' (i.e. the 1988 Body of Principles) and on the provisions of treaties such as the ICCPR that Cuba had not ratified. The Working Group responded as follows.]

. . .

15. The Working Group would point out that resolution 1991/42, which lays down its mandate, refers expressly to 'the . . . international legal instruments accepted by the States concerned' as an international reference standard for the Working Group, in addition to the Universal Declaration of Human Rights. . . .

(a) Legal definition of 'instrument'

16. As interpreted in legal writings generally, the term 'legal instruments' covers all legal texts, whether they are conventional, that is to say binding,

instruments, such as conventions, covenants, protocols and other treaties or such forms of agreement as resolutions or gentlemen's agreements. . . .

. . .

18. The use of the word 'instruments' without further qualification in paragraph 2 of resolution 1991/42 therefore shows that it was not the intention of the Commission on Human Rights to confine the reference standards of the Working Group to treaties and other similar instruments but that it also wished to include in it acts of agreement, such as resolutions.

(b) 'Declaratory' nature

. . .

20. The Body of Principles is an instrument declaratory of pre-existing rights, inasmuch as the main purpose of many of its provisions is to set forth, and sometimes develop, principles already recognized under customary law.

21. It should be noted that, in the case of mere acts of agreement (and this applies to General Assembly resolutions), legal writers draw a distinction between those which are declaratory of pre-existing rights (as in the above-mentioned example of most of the provisions of the Body of Principles or the Declaration on Territorial Asylum or the Declaration on Torture, etc.) and those—purely declaratory—instruments whose purpose is not to produce such an effect (for example, resolutions which take note of a report of a working group, or which institute a decade on a given theme).

22. The Working Group also wishes to point out in this connection that, according to legal writers, in the case of a non-party State, the same applies to any convention. . . . [T]o take the case of the Covenant again, it has a binding effect with respect to States parties and a declaratory effect with respect to non-party States.

23. In the light of the foregoing, the Working Group considers that, when it takes a decision on whether a case of detention is arbitrary, it is justified in referring, in categories I, II and III which it established in connection with its methods of work both to:

> the International Covenant on Civil and Political Rights, even if the Working Group has before it a case concerning a non-party State, in view of the tenacity of the declaratory effect of the quasi-totality of its provisions;
>
> and the Body of Principles, again on account of the declaratory effect of its substantive provisions.

(c) The concept of 'accepted' instrument

24. When it comes not to treaty instruments having binding force but to acts of agreement, the question is whether they can still be regarded as having been 'accepted'. . . .

DECISION NO. 48/1993 (UNITED STATES OF AMERICA),

Report of the Working Group on Arbitrary Detention, UN Doc. E/CN.4/1994/27, p. 135.

Communication addressed to the Government of the United States of America on 6 November 1992.

Concerning: Humberto Alvarez Machain, on the one hand, and the United States of America, on the other.

. . .

2. The Working Group notes with appreciation the information forwarded by the Government concerned in respect of the case in question, received with slight delay. . . .

. . .

5. The Working Group considers that:

(a) Regarding the facts, there are no substantial differences. . . between the complainant's version and the version supplied by the Government. Accordingly, the Group holds it true that Dr. Humberto Alvarez Machain, a doctor of Mexican nationality living in Mexico, was abducted (the expression used by the United States Government and in the ruling of the United States Supreme Court) on 2 April 1990 . . . at his medical office in Guadalajara, Mexico. . . . According to the complainant, the persons who seized him were 'paid agents of the DEA' (Drug Enforcement Administration, a United States Government agency to investigate and suppress drug trafficking). . . . According to the complaint, after being held incommunicado for over 20 hours and being physically and psychologically abused—something the Government denies—he was taken by private plane to the border town of El Paso, Texas, where he was arrested by DEA officials.

(b) Nor is there any controversy about the grounds invoked for the deprivation of freedom: on 31 January 1990 a United States Federal Grand Jury charged Dr Alvarez Machain with taking part in the kidnapping and murder of DEA Special Agent Enrique Camarena Salazar in Mexico. Alvarez Machain is said to have administered drugs to Camarena to facilitate his continued torture and interrogation. In the opinion of the Grand Jury, these acts constitute [various] crimes . . . covered by United States federal laws.

(c) When he was brought before . . . the District Court for the Central District of California . . . Alvarez Machain said that his abduction . . . had been a violation of the 1978 Extradition Treaty between [the US and Mexico]. This allegation was admitted by the Court . . . [The Ninth Circuit Court of Appeals rejected an appeal by the US Government, but in June

1992 the Supreme Court, by a 6–3 majority] reversed the decisions of the lower courts and held that 'forcible abduction does not prohibit . . . trial in a United States court for violation of criminal law.'

. . .

(e) . . . Dr Alvarez Machain was tried . . . and . . . acquitted on all counts on 14 December 1992 and released. . . .

(g) In view of the importance of . . . principles presented by this case, the Working Group deems it advisable to declare whether or not the deprivation of freedom . . . was arbitrary.

(h) [For that purpose] the Working Group must basically weigh up the following issues:

(1) Whether international treaty law governing relations between the United States of America and Mexico permits or prohibits the abduction of one person from the territory of one country to the territory of another, in order for him to be tried;

(2) If the matter is not resolved in treaty law, whether customary international law permits or prohibits abduction of this kind.

. . .

(n) [I]t may be maintained that the Extradition Treaty does not explicitly prohibit abduction, just as it does not prohibit someone being held under an extradition application from being tortured or executed by the requested country. However, it is obvious that this is implicitly prohibited when the subject matter—cooperation in the struggle against crime by surrendering offenders—is regulated in all dimensions by the treaty in question.

Abduction is the opposite of surrender. . . .

. . .

. . . [T]he object and purpose of the Treaty, and an analysis of the context, lead to the unquestionable conclusion that abduction . . . is a breach of the 1978 Treaty.

(o) Furthermore, both Mexico and the United States are also parties to the [OAS] Convention on Extradition . . . [of] 1933. . . .

This . . . is a comprehensive legal text which regulates the grounds and the procedures for surrendering wanted persons and it details cases in which extradition can be denied. Obviously, abduction is prohibited.

The deprivation of freedom, as a consequence of the arrest, is therefore arbitrary.

(p) The foregoing conclusion makes it pointless to analyse the second issue mentioned in paragraph (h) of this decision. Nevertheless, the importance of the matter is such that it needs to be resolved.

[C]ustomary international law . . . is unquestionably part of the internal law of the [USA] . . . .

Another basic principle of international law and of international rela-

tions is respect for the territorial sovereignty of States, a principle which, in addition to prohibiting the use of force and intervention by one State in the affairs of another—includes refraining from committing acts of sovereignty in the territory of another State, particularly acts of coercion or judicial investigation.

[Relying upon international judicial decisions as well as resolution 138 (1960) of the Security Council in the Eichmann case, the Working Group concluded that the deprivation of Alvarez Machaín's freedom] is not justified in customary international law.

Accordingly, with all the more reason it must be inferred that the deprivation of the freedom of Humberto Alvarez Machain is not justified in customary international law.

(q) There are further considerations. First, the United States never tried to request the extradition of Alvarez Machaín or of any of the other participants. . . .

Nor did the United States have grounds for doubting the courts in Mexico. Indeed, everything indicates that Mexico scrupulously tried, in its courts, the persons responsible for the death of DEA agent Enrique Camarena. . . .

(r) In [this case] no legal basis whatsoever can be found to justify the deprivation of freedom . . . since [it] took place without the orders of any authority whatsoever and, indeed, both the District Court and the Court of Appeals declared it unlawful. In the circumstances, the deprivation of freedom is a breach of article 9 of the Universal Declaration of Human Rights and article 9 of the International Covenant on Civil and Political Rights, and principle 2 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. Accordingly, the detention is arbitrary, falling within category I of the principles applicable in the consideration of the cases submitted to the Working Group.

7. [T]he Working Group requests the Government of the United States of America to take the necessary steps to remedy the situation. . . .

NOTE

In 1994 the Commission of Human Rights, responding to a decision of the Vienna World Human Rights Conference and concerted lobbying by women's and other human rights groups, appointed a Special Rapporteur on Violence against Women. Questions relating to that issue are further considered in Chapter 13, *infra*, within the framework of the Convention on Elimination of All Forms of Discrimination against Women.

COMMISSION ON HUMAN RIGHTS, RESOLUTION 1994/45

. . .

6. *Decides* to appoint, for a three-year period, a special rapporteur on violence against women, including its causes and its consequences, who will report to the Commission on an annual basis beginning at its fifty-first session;
7. *Invites* the Special Rapporteur, in carrying out this mandate, and within the framework of the Universal Declaration of Human Rights and all other international human rights instruments, including the Convention on the Elimination of All Forms of Discrimination against Women and the Declaration on the Elimination of Violence against Women, to:

(a) Seek and receive information on violence against women, its causes and its consequences from Governments, treaty bodies, specialized agencies, other special rapporteurs responsible for various human rights questions and intergovernmental and non-governmental organizations, including women's organizations, and to respond effectively to such information;
(b) Recommend measures, ways and means, at the national, regional and international levels, to eliminate violence against women and its causes, and to remedy its consequences;
(c) Work closely with other special rapporteurs, special representatives, working groups and independent experts of the Commission on Human Rights and the Sub-Commission on Prevention of Discrimination and Protection of Minorities and with the treaty bodies, taking into account the Commission's request that they regularly and systematically include in their reports available information on human rights violations affecting women, and cooperate closely with the Commission on the Status of Women in the discharge of its functions.

PRELIMINARY REPORT SUBMITTED BY THE SPECIAL RAPPORTEUR ON VIOLENCE AGAINST WOMEN, ITS CAUSES AND CONSEQUENCES

UN Doc. E/CN.4/1995/42.

[Excerpts from the report of Ms. Radhika Coomaraswamy follow:]

7. The different forms of violence against women include, as spelled out in the above resolution, all violations of the human rights of women in situations of armed conflict, and in particular, murder, systematic rape, sexual slavery

and forced pregnancy, as well as all forms of sexual harassment, exploitation and trafficking in women, the elimination of gender bias in the administration of justice and the eradication of the harmful effects of certain traditional or customary practices, cultural prejudice and religious extremism.

8. The Special Rapporteur has understood her mandate to contain two components. The first consists of setting out the elements of the problem before her, the international legal standards and a general survey of incidents and issues as they relate to the many problem areas. The second component consists of identifying and investigating factual situations, as well as allegations which may be forwarded to the Special Rapporteur by concerned parties.

9. With regard to the second component, the Special Rapporteur deems it useful to take a more specific approach by endeavouring to identify more precisely situations of violence against women. For this purpose the Special Rapporteur, in a spirit of dialogue, will approach concerned Governments and request clarifications on allegations regarding violence against women that she may have received. . . .

10. Taking into consideration the alarming situation of violence against women throughout the world, the Special Rapporteur intends to establish dialogue with Governments concerning allegations and prospective field missions with a view to assisting the Governments concerned to find durable solutions for the elimination of violence against women in their societies.

11. In addition . . . the Special Rapporteur is planning to undertake a number of field missions . . .

. . .

317. Finally, the Special Rapporteur encourages the formulation of an optional protocol to the Convention on the Elimination of All Forms of Discrimination against Women allowing for an individual right of petition once local remedies are exhausted. This will ensure that women victims of violence will have a final recourse under an international human rights instrument to have their rights established and vindicated.

QUESTIONS

1. What accounts for the different approaches adopted under these three procedures within the broad category of thematic mechanisms? Are they required by the mandates, do they follow logically from the subject matter, are they a reflection of the different levels of sensitivity of governments in relation to these different issues? Can you offer other explanations?

2. Which of the approaches do you favor and why? What changes would you propose in the procedures followed by one or another of the Groups?

3. What are the differences between the 1503 procedure and the 'communications' approach adopted by the Working Group on arbitrary detention? Does the latter initiative put the 1503 procedure in a different light?

4. The Commission asked the Disappearances Working Group 'to carry out its work with discretion' (1980) and 'in a discrete and conscientious manner' (1992). It also recalled the 'humanitarian spirit underlying' the Group's mandate. Similar terms were used with respect to the Working Group on Arbitrary Detention. What is the reason for and significance of such terminology? In what ways does the Arbitrary Detention Working Group follow an 'adversarial' as opposed to an 'accusatorial' approach 'in its dialogue with States'?

5. How do you assess the report and recommendations on East Timor, from the perspective of both the international community and the Indonesian Government?

6. Is it a good thing for so many mechanisms to focus on the same case, as illustrated by the East Timor case, or is there a saturation point? Consider a situation involving abuses which comes under the purview of several different thematic mechanisms, each looking at the situation from its own mandate. From the perspective of effective and efficient enforcement of human rights norms, what do you see as the advantages and disadvantages of having so many different thematic mechanisms?

7. Do you agree with an observation in *The Economist* that, when the UN Commission fails to condemn a situation, it endorses it by default?

D. OVERVIEW AND EVALUATION

PHILIP ALSTON, APPRAISING THE UNITED NATIONS HUMAN RIGHTS REGIME,

in Alston (ed.), The United Nations and Human Rights: A Critical Appraisal 1 (1992), at 14.

. . .

What then are the key questions that need to be asked in evaluating the effectiveness of the UN regime. It is generally accepted in the academic literature that there are five such questions: When? Where?, For Whom?, What?, and Why? *When?* raises the issue of an appropriate time-frame. The 1993 World Conference, for example, has been asked 'to review and assess progress . . . since the adoption of the Universal Declaration' in 1948. It is indisputable that

by almost any measure immense progress has been achieved since that time. But other time-frames could equally well have been chosen. Since the first World Conference in 1968, for example, or over the last decade, the results might look significantly different, although much would still depend on how the other questions were framed. . . .

Where? refers to the scope and focus of the evaluation. Donnelly, for example, in his analysis of the human rights regime looks specifically only at the Human Rights Committee and the Commission on Human Rights. From a feminist perspective this immediately biases the outcome by excluding the Commission on the Status of Women and CEDAW. Excluding the other treaty bodies as well as the Assembly and the Sub-Commission also ensures the presentation of only a partial picture. On the other hand, . . . attempting to cover the entire regime provides a potentially unmanageable focus.

The question *for whom?* poses an immediate problem in terms of the human rights regime. The outcome of the evaluation will be radically different depending on whether the standpoint adopted is primarily that of the victims of violations, human rights activists, governments, UN officials, or the press. The answer is by no means self-evident when the UN is asked to undertake the evaluation, since its approach in general seeks to balance the concerns of its different constituencies, while at the same time playing down any suggestion that trade-offs are being made. For this reason, another question is appropriately added in the present context: *by whom?* On occasion, the UN uses independent experts, but more often than not such people will be 'insiders' of one kind or another with strong vested interests in maintenance of the status quo. Should members of the expert committees, for example, be asked to evaluate their own activities . . . ? How objective, or outspoken, can the Secretariat be in such a context? What weight should be placed on NGO evaluations? Presumably, evaluators from a range of backgrounds are required but then the frame of reference of each can still differ radically from those of others, thereby diminishing the comparability of the results.

What? adds another level of questions after *where?* Having determined, for example, that the focus will be on the Human Rights Committee it must still be decided whether its interstate complaints jurisdiction is best ignored as being certainly unproductive or is carefully examined in the hope of breathing life into a potentially important procedure. Similarly, should the task of developing a sophisticated jurisprudence based on the Covenant be treated as being of primary or only secondary importance? A focus on the Commission raises an even more complex array of issues, particularly the question of the importance attached to its function of responding to violations.

Finally, the question *why?* will be answered rather differently by an academic, an activist, a government minister, and an international official. The answers might range from a general quest to gain a better understanding of modes of international co-operation, or a desire to increase efficiency defined in managerial terms, or a mandate 'to formulate concrete recommendations for improving [overall] effectiveness' (as in the case of the World Conference),

through to a desire to ensure an immediate and productive response to all future reports of alleged violations.

A more formal or legalistic approach to evaluation, and one more consonant with the past practice of the UN, is to ignore most of these questions (implicitly dismissing them as practically or politically unanswerable) and to seek to compare existing practice with the stated objectives of the system. The problem, of course, is that the 'system' *per se* does not exist in such terms. Thus, the evaluator might turn either to the mandate provided in the UN Charter or to the more specific terms of reference outlined in the constituent instruments relating to each of the organs in question. But in the case of the principal Charter-based organs, the terms of the Charter provisions give little practical guidance for evaluation purposes and the constituent instruments may not be a great deal more helpful. In the case of the Commission, for example, its standard-setting mandate refers only to three specific issues, with respect to one of which (freedom of information) it has been able to achieve virtually nothing. . . . Similarly, the word 'protection' is only mentioned in relation to 'minorities', but it is unthinkable that the Commission's success in providing 'protection' could be evaluated solely in that regard. In reality, most of the Commission's activities are justified by reference to the catch-all provision in its mandate referring to 'any other matter concerning human rights'. That hardly constitutes a meaningful yardstick for evaluation purposes, however.

JACK DONNELLY, INTERNATIONAL HUMAN RIGHTS: A REGIME ANALYSIS

40 Int'l Org. 599 (1986), at 613.

4. Political foundations of the international human rights regime

The international human rights regime is a relatively strong promotional regime, composed of widely accepted substantive norms, largely internationalized standard-setting procedures, some general promotional activity, but very limited international implementation, which rarely goes beyond information exchange and voluntarily accepted international assistance for the national implementation of international norms. There is no international enforcement. Such normative strength and procedural weakness, however, is the result of conscious political decisions.

Regimes are political creations to overcome perceived problems arising from inadequately regulated or insufficiently coordinated national action. Robert O. Keohane offers a useful market analogy: regimes arise when sufficient international 'demand' is met by a state (or group of states) willing and able to 'supply' international norms and decision-making procedures. The shape and strength of an international regime reflect who wants it, who opposes it, and why—and how the conflicting objectives, interests, and capa-

bilities of the parties have been resolved. As Krasner puts it, in each issue-area there are makers, breakers, and takers of (potential) international regimes; understanding the structure of a regime (or its absence) requires that we know who has played which roles, when and why, and what agreements they reached. In this section I shall examine the interaction of supply and demand which has led to the international human rights regime. . . .

. . .

A cynic might suggest, with some basis, that these postwar 'achievements' simply reflect the minimal international constraints and very low costs of a declaratory regime: decision making under the Universal Declaration remained entirely national, and it would be more than twenty years until resolution 1503 and nearly thirty years before even the rudimentary promotion and monitoring procedures of the Covenants came into effect. Yet prior to the war even a declaratory regime had rarely been contemplated. In the late 1940s, human rights became, for the first time, a recognized international issue-area.

Moving much beyond a declaratory regime, however, has proved difficult. As we have seen, procedural innovations have been modest. Even the legal elaboration of substantive norms has been slow and laborious: for example, it took nine years to move from a declaration to a convention on torture: work on stronger, more precise norms on religious liberty is now in its third decade. It is in this relative constancy of the regime—critics and frustrated optimists are likely to say stagnation—that the weakness of the demand is most evident.

To the extent—probably considerable—that the international human rights regime arose from postwar frustration, guilt, or unease, the very proclamation ('supply') of the Declaration, along with the adoption of the Genocide Convention, seems to have satisfied the demand. To the extent—again probably considerable—that it rested on an emotional reaction to the horrors of Hitler and the war, time sadly but predictably blunted the emotion. Time also revealed both the superficial, merely verbal commitment of many states and substantive disagreements over particular rights, causing enthusiasm to wane further. And with the cold war heating up, not only was the desire to move on to other issues strong, but East–West rivalry itself soon came to infect and distort the discussion of human rights.

The most important problem, however, was and remains the fact that a stronger international human rights regime does not rest on any perceived material interest of a state or coalition willing and able to supply it. In the absence of a power capable of compelling compliance, states participate in or increase their commitment to international regimes more or less voluntarily. Barring extraordinary circumstances, states participate in an international regime only to achieve *national* objectives in an environment of perceived international interdependence, to address national problems caused by the existing international state of affairs.

Both theory and practice suggest that states will relinquish authority only to obtain a significant benefit beyond the reach of separate national action or

to avoid bearing a major burden. Furthermore, relinquishing sovereign authority must appear 'safe' to states who are notoriously jealous of their sovereign prerogatives. A stronger international human rights regime simply does not present a safe prospect of obtaining otherwise unattainable national benefits.

Moral interests such as human rights may be no less 'real' than material interests. They are, however, less tangible, and policy, for better or worse, tends to be made in response to relatively tangible national objectives. . . .

Furthermore, the extreme sensitivity of human rights practices makes the very subject intensely threatening to most states. National human rights practices often would be a matter for considerable embarrassment should they be subject to full international scrutiny, and compliance with international human rights standards in numerous countries would mean the removal of those in power.

In addition, and perhaps most important, human rights are ultimately a profoundly *national*—not international—issue. States are the principal violators of human rights and the principal actors governed by the regime's norms; international human rights are concerned primarily with how a government treats inhabitants of its own country. . . .

Human rights are also a national matter from the perspective of practical political action. . . . Who is to prevent a government from succumbing to the temptations and arrogance of position and power? Who can *force* a government to respect human rights? The only plausible candidates are the people whose rights are at stake.

Foreign actors may overthrow a repressive government. With luck and skill, foreign actors may even be able to place good people in charge of finely crafted institutions based on the best of principles. They may provide tutelage, supervision, and monitoring: moral and material support: and protection against enemies. This scenario, however, is extremely unlikely, especially if we do not impute unrealistically pure motives and unbelievable skill and dedication to external powers, for whom 'humanitarian intervention' usually amounts to little more than a convenient cover for partisan politics. And in any case, a regime's ultimate success—its persistence in respecting, implementing, and enforcing human rights—depends on *internal* political factors.

A government that respects human rights is almost always the legacy of persistent national political struggles against human rights violations. Most governments that respect human rights have been created not from the top down, but from the bottom up. Domestically, paternalistic solutions, in which human rights are given rather than taken, are likely to be unstable. Internationally, paternalism is no more likely to be successful.

But if international regimes arise primarily because of international interdependence—the inability to achieve perceived national objectives by independent national action—how can we account for the creation and even modest growth of the international human rights regime? First and foremost, the 'moral' concerns that brought the regime into being in the first place per-

sist. Butchers such as Pol Pot and Idi Amin still shock the conscience of mankind and provoke a desire to reject them as not merely reprehensible but prohibited by clear and public, authoritative international norms; even regimes with dismal human rights records seem to feel impelled to join in condemning the abuses of such rulers, and lesser despots as well.

Although cynics might interpret such uses of the language of human rights as merely craven abuse of the rhetoric of human rights, it can just as easily be seen as an implicit, submerged, or deflected expression of a sense of *moral* interdependence. Although states—not only governments but often the public as well—often are unwilling to translate this perceived moral interdependence into action or into an international regime with strong decision-making powers, they also are unwilling (or at least politically unable) to return to treating national human rights practices as properly beyond all international norms and procedures.

. . .

States also may miscalculate or get carried away by the moment, and procedures may evolve beyond what the regime's participants originally intended. For example, ECOSOC resolution 1235, which provides the principal basis for the Commission on Human Rights' public study and discussions of human rights situations in individual countries, was explicitly established in 1967 to focus principally on the pariah regimes in Southern Africa, but it has evolved into a procedure with universal application (or at least, one that may be applied to any country that a majority of members decide to consider). Although procedures seldom expand to such an extent, the possibility should not be overlooked.

The current international human rights regime thus represents a politically acceptable international mechanism for the collective resolution of principally national problems. Because perception of the problem rests on a politically weak sense of *moral* interdependence, however, there is no powerful demand for a stronger regime: even policy coordination seems too demanding, and there is little reason for states to accept international monitoring, let alone authoritative international decision making.

. . .

This is not to belittle the importance of international procedures—the more effective the monitoring and enforcement procedures, the stronger the regime and the more likely it is to achieve its objectives—but, rather, to stress the fact that regime procedures largely reflect underlying political perceptions of interest and interdependence. Compliance with regime norms rests primarily on authority and acceptance, not force or even enforcement.

. . .

PHILIP ALLOTT, EUNOMIA: NEW ORDER FOR A NEW WORLD (1990), at 287.

. . .

15.66. But, as so often in human social experience, the installation of human rights in the international constitution after 1945 has been paradoxical. The idea of human rights quickly became perverted by the self-misconceiving of international society. Human rights were quickly appropriated by governments, embodied in treaties, made part of the stuff of primitive international relations, swept up into the maw of an international bureaucracy. The reality of the idea of human rights has been degraded. From being a source of ultimate anxiety for usurping holders of public social power, they were turned into bureaucratic small-change. Human rights, a reservoir of unlimited power in all the self-creating of society, became a plaything of governments and lawyers. The game of human rights has been played in international statal organizations by diplomats and bureaucrats, and their appointees, in the setting and the ethos of traditional international relations.

15.67. The result has been that the potential energy of the idea has been dissipated. Alienation, corruption, tyranny, and oppression have continued wholesale in many societies all over the world. And in all societies governments have been reassured in their arrogance by the idea that, if they are not proved actually to be violating the substance of particularized human rights, if they can bring their willing and acting within the wording of this or that formula with its lawyerly qualifications and exceptions, then they are doing well enough. The idea of human rights should intimidate governments or it is worth nothing. If the idea of human rights reassures governments it is worse than nothing.

15.68. But, once again, there is room for optimism, on two grounds. (1) The idea of human rights having been thought, it cannot be unthought. It will not be replaced, unless by some idea which contains and surpasses it. (2) There are tenacious individuals and non-statal societies whose activity on behalf of the idea of human rights is not part of international relations but is part of a new process of international reality-forming.

. . .

NOTE

In April 1994, the first UN High Commissioner for Human Rights (HCHR), José Ayala Lasso of Ecuador, took office. The General Assembly (Res. 48/141) created the post while providing it with inadequate resources. The key provision instructs the HCHR to play 'an active role . . . in preventing the

continuation of human rights violations throughout the world . . . .' As of mid-1995, the role that the HCHR would play in practice had not yet been defined, although the first HCHR has indicated that his role is to supplement and not replace the work of the Commission's Special Rapporteurs and thematic mechanisms. The principal challenges for the new post include defining its relationship to the rest of the UN system including the General Assembly and Commission on Human Rights, receiving adequate resources for staff and active work, and implementing the mandate in the face of governmental resistance to an active role. See generally Helena Cook, *The Role of the High Commissioner for Human Rights: One Step Forward or Two Steps Back?*, appearing in 89 Proc. Ann. Mtg. Am. Soc. Int. L. (1995); and UN Doc. E/CN.4/1995/98.

QUESTIONS

1. Why do governments participate in the universal human rights system? Do they indeed have a choice?

2. How would you identify what you believe to be the major weaknesses in the institutional structures and processes for enforcement of human rights norms? Which of them do you believe can realistically be improved, and what such realistic improvements would you propose?

3. Should the criteria for effectiveness be the same in relation to all the procedures and mechanisms considered in this chapter? Or do they aim at different goals that imply different measures of effectiveness?

ADDITIONAL READING

For an extensive bibliography, see Philip Alston (ed.), *The United Nations and Human Rights: A Critical Appraisal* (1992) 677–748; Asbjorn Eide, *The Sub-Commission on Prevention of Discrimination and Protection of Minorities*, in *ibid*, 311–64; Iain Guest, *Behind the Disappearances: Argentina's Dirty War Against Human Rights and the United Nations* (1990); Howard Tolley Jr., *The U.N. Commission on Human Rights* (1987); Theodor Meron, *Human Rights Law-Making in the United Nations: A Critique of Instruments and Processes* (1986); Nigel Rodley, *The Treatment of Prisoners Under International Law* (1987); Menno Kamminga, *Inter-State Accountability for Violations of Human Rights* (1992); Thomas Franck and H. Scott Fairley, *Procedural Due Process in Human Rights Fact-finding by International Agencies*, 74 Am. J. Int'l L. (1980) 308; B. G. Ramcharan (ed.), *International Law and Fact-Finding in the Field of Human Rights* (1982); Kurt Herndl, *Recent Developments Concerning United Nations Fact-finding in the Field of Human Rights*, in Manfred Nowak *et al* (eds.), *Progress in the Spirit of Human Rights* (1988) 1–36; Rudolf Bernhardt and J. A. Jolowicz (eds.), *International Enforcement of Human Rights* (1987); Richard Bilder, *Rethinking Human Rights: Some Basic Questions*, [1969] Wis. L. Rev. 171.