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The Role of Non-Governmental Organizations

Most of Part C examines intergovernmental human rights organizations—universal ones in Chapters 7 and 9, regional ones in Chapter 10. References to non-governmental organizations (NGOs) inevitably appear in each of those chapters, for NGOs pervade and are a vital part of the broader human rights movement. Above all, human rights NGOs bring out the facts. They also contribute to standard setting as well as to the promotion, implementation and enforcement of human rights norms. They provoke and energize. Decentralized and diverse, they proceed with a speed and decisiveness and range of concerns impossible to imagine for most of the work of bureaucratic and politically cautious intergovernmental organizations.

NGOs operate subject to differing mandates, each responding to its own priorities and methods of action, bringing a range of viewpoints to the human rights movement. It is inconceivable that this movement, whatever its weaknesses, could have achieved as much in its first half century without the spur and inventiveness of NGOs. This chapter explores their character, constitution, functions, methods of work and effects.

Within individual states, it is often the human rights NGOs that call governments to account and compel reconsideration of policies and programs that have been designed in disregard or violation of human rights norms. It is not only the domestic policies of a state that figure in NGO reporting and advocacy. The development in a few states of a foreign economic policy that takes into account human rights violations in other states owes much to the information provided and pressures exerted by NGOs.

At the international level, and particularly in the United Nations context, the frequent reluctance of governmental actors to criticize their counterparts from other countries and the limited supply of independent sources of information have contributed to making NGOs the lynchpins of the system as a whole. In situations in which NGO information is not available or where the NGOs are either unable or unwilling to generate political pressures upon the governments concerned, the chances of a weak response by the international community, or of none at all, are radically increased. A high proportion of the most significant initiatives to draft new international instruments, to establish new procedures and machinery, and to identify specific governments as

violators have come as a result of concerted NGO campaigns designed to mobilize public opinion and lobby governmental support.

Of course the term non-governmental organization, standing alone, reaches too broadly for this chapter. It includes myriad types of organizations that are (more-or-less, depending on the state) independent of the state: economic interest groups like labor unions, consumer unions or industrial associations; racial, gender and religious groups; issue-oriented groups like environmental or educational organizations; groups representing the elderly or the young; public interest groups that are anti-corruption or pro-universal health care; and so on—the many types of associations of citizens and of non-state institutions that some theorists view as the essential ingredients of so-called civil society.

This chapter is concerned with a subset of NGOs that are involved with human rights issues—a category that, as we shall see, can have porous boundaries. The chapter first explores the range of work of NGOs before concentrating on large international NGOs and their relationships with the UN human rights system.

A. NGOs: DIVERSITY IN CHARACTER AND WORK

Section A both explores the diverse character of NGOs, and the complex relationships between domestic NGOs and international ones (INGOs).

HENRY STEINER, DIVERSE PARTNERS: NON-GOVERNMENTAL ORGANIZATIONS IN THE HUMAN RIGHTS MOVEMENT

(1991), at 5.

[These excerpts are taken from the report of a retreat for human rights NGO activists from around the world, held in Crete in 1989.]

. . .

A. What Makes a Group a 'Human Rights' NGO?

Participants distinguished between 'national' NGOs limiting their activities to their home country, and 'international' NGOs (INGOs) that act in two or more countries. . . .

Our discussions about threshold definitions underscored how diverse were the participants' understandings of the human rights movement. Certain

questions recurred. For a public interest group to qualify as a 'human rights' NGO, must it base its criticism of state conduct on international human rights law—the Universal Declaration of Human Rights (UDHR), the Civil–Political Rights Covenant, and so on? Most participants thought not. They were more persuaded by the nature of the claims made and the goals advanced by a group than by the formal source of the norms that it invoked to criticize state conduct.

In fact, some participants noted, the choice between relying on a national legal system or on international law norms to support advocacy before national institutions often amounts to a question of strategy. Employing domestic standards rather than international law might be politically expedient—more political clout, less risk that an NGO will be viewed as inspired by alien doctrine. On the other hand, international law has strategic advantages in countries whose domestic legal norms are of little assistance. . . .

Participants suggested other reasons for national NGOs to rely on domestic law. In countries that have ratified few covenants, NGOs arguing before national courts can criticize domestic law or conduct as violating international norms only by invoking the less determinate customary international law. . . . [P]ublic interest groups in the U.S. that vindicate civil and political rights—for example, the American Civil Liberties Union (ACLU), or the NAACP Legal Defense and Education Fund (LDF), an NGO committed to ending discrimination against blacks—base their advocacy on domestic constitutional law and only rarely refer to international human rights. Nonetheless, from an international perspective, these groups are as much 'human rights' NGOs as, say, Tutela Legal in El Salvador, which invokes primarily international standards and has close links with INGOs.

Public interest groups in fields like consumer or environmental protection or workers' safety regulation fall within more ambiguous categories. Whether they are classified as 'human rights' organizations does not, however, appear to have operational significance.

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Many participants concluded that self-perception and self-definition by NGOs constitute the only sensible method of identifying human rights organizations. It would be impractical and unwise to maintain a protective boundary around some core or traditional preserve of human rights work, such as the protection of individuals against violence or discrimination. Who would define and monitor such a boundary, and what sanctions could be imposed on organizations crossing it but still claiming to be human rights NGOs? An attempt at authoritative definition could block a natural and important growth of the human rights movement, such as its earlier evolution toward economic and social rights, or its present initiatives toward linking human rights concerns with developmental and environmental issues. Other participants, however, stressed that to be effective, it was important for NGOs to hold to clearly defined mandates based on consensual legal norms.

Like the human rights movement itself, NGOs are in a state of flux. The costs of such change and uncertainty—a threat to the human rights movement's core identity, a blurring of fields, disagreements about whether employing the rhetoric of 'human rights' for certain goals will strengthen or hurt the movement as a whole—inhere in a dynamic, decentralized, multicultural, universal movement.

ARYEH NEIER, NOT ALL HUMAN RIGHTS GROUPS ARE EQUAL

Letter to the Editor, New York Times, May 27, 1989, p. 22.

. . .

A phenomenon that has concerned the human rights movement is the proliferation of groups claiming to speak in the name of the human rights cause but actually engaged in efforts to promote one or another side in a civil conflict. Nowhere has this been more of a factor than in Nicaragua. On both sides, the human rights issue has been a weapon to use against the enemy.

It may be useful, accordingly, to suggest a few questions to raise in distinguishing partisan efforts from genuine efforts to promote human rights. These include:

- Is the organization funded by or otherwise linked to any party to the conflict?
- Is it impartial? If it is an international group, does it regularly criticize abuses by governments of all political persuasions and geopolitical alignments? In situations of sustained armed conflict, does it criticize violations of the laws of war by both sides according to the same criteria?
- Does it engage in systematic field research and does it avoid sweeping comments, except to the degree that these are sustained by its detailed findings through field research?
- Does it exercise care in the use of language? For example, does it refer to 'torture' when the word 'mistreatment' would be more appropriate? When does it allege 'atrocities' as a 'strategy'?
- Does it acknowledge contradictory evidence, such as a government's prosecutions of its own personnel for abuses, or the statements of one witness that cast doubt on the statements of another?

Above all, of course, it is the record that an organization has compiled over time that indicates whether it deserves credence when it reports on human rights. . . .

RAJNI KOTHARI, HUMAN RIGHTS—A MOVEMENT IN SEARCH OF A THEORY

in Smitu Kothari and H. Sethni, Rethinking Human Rights: Challenges for Theory and Action 19 (1989).

[Rajni Kothari is a leading Indian intellectual, long associated with the Indian civil rights movement. This analysis is directed specifically to the Indian situation.]

. . .

An essential paradox afflicts the human rights scene. On the one hand, everyone associated with this movement or that—women, ecologists, trade unionists, peasantry, tribals, even exponents of state's right's—claims to be struggling for civil liberties and democratic rights. On the other hand, when it comes to the growth of the human rights 'movement', most of these tend to hold back, keen on retaining their specialized identities and afraid of being swamped by a generalised platform or body. In insisting on their diverse specializations, they have pushed human rights activists towards playing a specialized role. Many of the human rights activists have themselves contributed to such an image by insisting that a human rights body should confine itself to fighting against atrocities committed by the state, not in dealing with the sources of these atrocities in the structure of the state and of civil society. While individual activists may involve themselves in political activities, including in party politics, it is not the role of human rights bodies to get so entangled. So both by the reckoning of others and by their own, human rights activists are a breed apart. And, I may add, a breed that is shrinking in number, influence and, to an extent, even legitimacy.

. . .

Two important reasons lie behind [the failure of human rights NGOs to have a greater impact] and the general state of institutional decay and paralysis of will, each of which also brings out the conceptual flaws in the human rights movement as it has developed in India. First, it is quite clear that the movement has entered a state of exhaustion. The struggle against the state is becoming an unequal one, constantly frustrating and causing depletion in ranks, in turn leaving the field to an ageing leadership that is still living in the past as far as its grasp of the human rights problematique is concerned. State violence and state terror are on the increase, the judiciary is proving insensitive to real suffering, and middle class opinion (including the bulk of the national Press) is strongly conditioned by the spectre of terrorism and the slogan of national unity in danger. Human rights activists in the various regions have been found to fight increasingly losing battles. . . .

The 'flaw' behind this state of affairs lies in a conception of human rights

that is essentially state-centred. The very state that the human rights movement is trying to struggle against defines the terms of the latter's thinking and action, and in fact receives further endorsement from it. Organisations of civil liberties and democratic rights have done little to reduce the all-embracing and monopolistic role and character of the modern state. They do expose its misdemeanours and tendentious nature; they bring out its malfunctioning; they occasionally lay bare the interests that shape and influence its behaviour; . . . . But they have done precious little in bringing out either the nature of the state's undermining of civil society, or the extent to which the state has become an instrument of national chauvinism on the one hand and arrogant majoritarianism on the other; even less the manner in which the state has been used for speeding the neurosis about 'national interest' and 'national security' and in the process weakened the deeper roots of national cohesion and cultural integrity. . . .

The second major reason that lies behind the decline and disarray in the human rights movement is in many ways conceptual, and can be traced to the very genesis and historic antecedents of the idea of human rights. Some of the other social movements that also employ the phraseology and rhetoric of 'rights', such as the women's movement, also suffer from the same historic legacy. This is the legacy of universal human rights grounded in the western conception of rights, that is at once grounded in an individualistic ethic and takes as a philosophical given that social formations are homogeneous and hence amenable to universal formulations of individual and community, liberty and democracy. This, in my view, is a basic flaw when it comes to highly diverse, plural and continental size societies like ours that also happen to be predominantly rural. Even the distinction between legal and political rights and social and economic rights the U.N. Charter talks about, fails to get over this negative legacy from the West. The tradition of civil liberties and even of democratic rights is too grounded in this conception of 'universal man', whereas the more powerful assertions of 'rights' that have occurred have been either community based or class based. There is therefore, a hiatus between theory and practice. And yet many of the 'demands' that continue to be voiced are couched in either citizen versus state terms, or in terms of one class of citizens versus another class (not 'class' as a collective category but rather a statistical one).

. . .

. . . [I]n India a 'civil society' has not yet emerged (or is confined to the narrow elite strata in a few metropoles), and the only organized form in which castes, communities and tribes are seen to be brought together is the state. The result is that in absence of a vibrant and self conscious civil society, the state is found to impinge directly on diverse communities and imposes, a centralised and homogeneous structure and culture, forcing in turn the latter to express their voices of protest and dissent in separate, regional and often sectarian and communal forms, both fomented by the agents of the state and

provoking a backlash from it on behalf of an imagined majority called the 'Hindus'. . . .

[The author then argues that if the non-governmental human rights movement in India is to transcend its marginality and become the 'catalyst of a renewed democratic political struggle'], it will need to give up both its state-centredness and its Western pedigree, become relevant to the fundamental task of constructing a civil society that it is rooted in the unique social and ecological constellation of India, and with this in view, develop a comprehensive strategy. But first it must develop a relevant political theory of democratic transformation that can provide the basis for a movement in a radically different social setting than one that obtains in the West. The imported theory of human rights is already proving counter-productive.

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HENRY STEINER, DIVERSE PARTNERS: NON-GOVERNMENTAL ORGANIZATIONS IN THE HUMAN RIGHTS MOVEMENT

(1991), at 19.

[These excerpts are taken from the report of a retreat for human rights NGO activists from around the world, held in Crete in 1989.]

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Criticisms of First World NGOs

Most criticisms of the mandates and activities of First World NGOs came from Third World participants. . . .

Individualistic orientation and inattention to structural factors

Critics stressed the tendency of First World NGOs to concentrate on individual cases involving governments' violations of identifiable persons' rights to personal security. This individualistic orientation characterizes most well-known INGOs. . . .

It was a shared perception that emphasis on individual cases has a humane foundation and appeal. It grounds an NGO's activities in graphic facts or events—a murdered or tortured or jailed victim, 'human rights with a human face.' Others can empathize with that victim, and support for the victim's cause can more readily be organized. Not only is the victim graspable, as a person rather than a statistic, but the problem itself seems manageable. The task is not to save society but to save a victim or punish a victimizer. . . .

A main point of the critics was that stress on individual cases, even as those

cases are aggregated into statistical data, may blur the big picture, the systemic and structural issues that underlie and in some sense explain violations: land-holding patterns, rooted forms of control through intimidation of workers and rural labor, ethnic and class discrimination, unrepresentative political formations, maldistribution of resources and power. . . .

In situations of mass violations such as those a few decades ago in Indonesia or Uganda, stress by NGOs on the individual victims may even be counter-productive in that it can deflect attention from systematic abuse. The critics agreed that statistics and social analysis may be less persuasive than flesh-and-blood victims in mobilizing opposition to a government's actions. They insisted, however, that only through such analysis could one gain the understanding of violations' causes that was necessary for basic change.

For many First World NGOs, seeking that understanding lies outside the formal and legitimate scope of human rights work. It belongs to the realm of political, economic and social theory and analysis. A prominent example is Amnesty International, whose reports inquiring into human-rights conditions in many countries suffer from a failure to probe the contexts for violations in any among them.

Too narrow a mandate

It was argued that Western-derived norms stressing individual rights stem from a historical experience and from social formations that are alien to the Third World. Most of that world lacks a civil society that is both vital and relatively autonomous from the state, and that has the resources enabling it to influence and contain state policies. The conditions are lacking for the political life assumed by Western constitutionalism—namely, voluntary formation of political and other associations, interest groups giving a voice to many constituencies, and widespread citizen participation through elections.

For the First World, the assumption may well be valid that rights of speech, association and participation will bring about a vibrant and democratic political process. NGOs can efficaciously direct their resources to the protection of such rights. Those same protections would not have the same effects in many Third World countries where fundamental violations of rights can coexist with apparent freedoms of speech. The victims of violations may remain outside the scope of debate and political contest.

. . .

In particular, the critics continued, economic and social rights—and in the view of a few participants, group rights—must figure as parts of an integrated view of needs and rights in Third World societies. Properly understood, civil and political rights are necessary but insufficient conditions for progress toward the ideals expressed in the full range of the postwar human rights instruments.

B. Third World NGOs

. . . Many Third World NGOs may speak a different language from the West to describe the character of the human rights movement and the explanations for violations. Thus the participants from Tutela Legal in El Salvador, the Vicaria de la Solidaridad in Chile, and the Servicio Paz y Justicia (SERPAJ) in Uruguay, held a range of views about which factors best explained the failure of governments to respect human rights. For example, one of these Latin American participants described the underlying human rights problem as one of North-South economic relations and stressed that without their reform no significant progress was likely in observing human rights norms.

Nonetheless, such NGOs often act in ways comparable to their Western counterparts. During the periods of extreme repression in these three states, the principal activity of each NGO involved the protection of human life. Exigent circumstances, and the notion of first things first, led to their exclusive attention to the same gross matters that occupied First World INGOs doing investigative work in those countries. As severe repression ended in, say, Uruguay, differences between Third World NGOs and INGOs surfaced as SERPAJ sought new directions in social and economic work.

. . .

Some participants urged a more active, reform-oriented conception of NGOs—not an exclusive conception, for the critics agreed that functions now performed by NGOs should be continued. A larger number of human rights organizations should address needs not now met by the NGO community.

. . . As noted by a Latin American participant, 'When you look at the wider situation, protests about individual cases don't lead to an independent judiciary. How do we create effective democratic reforms? The international community is not as strong on these issues. This requires some form of mass mobilization, some economic leverage.'

. . .

Economic, political and social theory applied to social analysis and prescription could lead in many directions. For example, a participant suggested that an NGO believing that much governmental repression was traceable to conditions stemming from an export-led model of economic development should face that problem directly, rather than stop at the defense of particular victims or at urging a government to ratify a convention prohibiting torture. Such legal aid and standard setting are helpful only so far as they go, palliative rather than cure. Another illustration involved NGOs that bring court actions to require a government to enforce existing laws protecting rural labor or a low caste. If government officials and agencies consistently ignore these laws because of the dominant position of elites hostile to their enforcement, such NGO activity becomes futile and other avenues toward structural

change must be pursued. A further example involving violence against leaders of rural labor led to the claim that NGOs must examine patterns of land control that perpetuate master-slave relationships.

Participants addressed the violence stemming from economic development plans that unsettle peoples long rooted in the affected land, destroying their economy or even property. NGOs believing that such development plans violate the group rights of minorities or indigenous peoples, or even nondiscrimination rights, should challenge those plans directly rather than stop at protesting identifiable violence.

. . .

. . . The Western practice of invoking judicial processes to challenge violations rests on deep political traditions. . . .

In the Third World, however, not many genuine solutions will be found through the judiciary. Many judiciaries will respond from fear or tradition to executive pressure, or will observe self-limitations that insulate them from troubling issues with political consequences. The exceptional judiciaries that address basic issues of human rights are apt to have their decrees in favor of human rights plaintiffs ignored to the extent that those decrees require structural reform. Nor will significant reforms be achieved through proceedings instituted by individuals or NGOs before organs of IGOs. Third World NGOs must follow other routes.

Criticisms of Positions of Third World NGOs

Reporting of facts and analysis of social structure. Several observations . . . responded to the criticism of a 'case-by-case' approach. Continuing reporting of individual violations reveals a pattern, one with human faces rather than only statistics. As evidenced by the work of groups like the Madres de la Plaza de Mayo in Argentina, persistent attention to such violations can create the political space in which to challenge the system of oppression as a whole. . . .

Nor was it accurate to draw so sharp a contrast between attention to violations and analysis of their causes. Reports of INGOs, such as those of the LCHR [Lawyers Committee for Human Rights] or Human Rights Watch, briefly refer to such factors as military control over civilian government, unequal power among ethnic groups, and concentration of economic resources in a small elite. To be sure, social or political analysis is not the primary thrust of these reports, which are meant to bring violations to public light. In addition, INGOs do work in advocating sanctions and educating the public. The principal INGOs are more than the statisticians of violence that some participants seemed to suggest.

Moreover, there is the problem of 'first things first.' Who will report facts if most NGOs, national and international, did not? Facts are the point of departure, the essential primary information, for any serious human rights work. . . .

] ·ergovernmental human rights organs, caught up in global or regional po · struggles. are not nearly as effective as NGOs in investigating and repo ing facts. . . .

A ·other aspect of 'first things first' is important. Social analysis and reform are ·g run necessities. But the immediate necessity for human rights groups is t ·op atrocities, to give support to victims subjected to abuse by their own go· nments while an apathetic world goes about its business. Which groups we ·i perform this function if NGOs deserted their missions and reports for des think? Did not the performance of such functions give courage to actual an· potential human rights fighters in many countries? If not exactly a protective shield. NGOs' investigative missions and widely distributed reports giv some measure of international protection to dissidents.

Goals of NGOs.

. .

·en though conceptions of right are surely relevant to broad-ranging ad ·ocacy for social change, proposals that NGOs challenge basic political and ec· ·omic structures of a society differ dramatically from the NGO work of tw decades. Where, it was asked, could a mandate for so enveloping a task be ·ound within the corpus of human rights law? Was not the strength and su· ·ss of the human rights movement attributable partly to the fact that no·ms were relatively discrete, set only basic ground rules, expressed no final vis ·n of the good or just society, and rested largely on consensus?

. . .

To the extent that NGOs base their prescriptions for society not solely on a b·dy of human rights norms but on broader social analysis, how are they to · distinguished from other institutions in the vast and controverted world of ·cial analysis—think tanks, academics, government policy makers? As one co·mentator among many on political choices, an NGO might repel or enlist ou· sympathies. But it would shed the objectivity that traditional human rights groups claim in their reporting of facts and judgments about violations. A claim of 'accurate' analysis, of accurate diagnosis and prognosis, could not be sup·orted in the way that, say, Amnesty International could support its acc·unt of violations and its condemnation of governmental action under a widely acknowledged norm prohibiting torture. The public interest sector of the human rights movement could lose its character as a defender of legality and readily merge into the broad political process.

NOTE

Consider the following observations in Issa Shivji, *The Concept of Human Rights in Africa* (1989), at 59:

> Western NGOs and scholarship, no doubt, concentrate a lot of time and energy on exposing human rights violations in Africa by African states. In itself this is a useful activity, for publicity may hopefully, to whatever small extent, act as a deterrent to potential violators. But, since this is not done in the context of imperialism, this activity, we submit, objectively reproduces imperialist ideology of human rights.

[The author then quotes from Noam Chomsky and Edward Herman, who criticize the failure of Western intellectuals to focus on the violations committed by their own governments.]

> . . . [T]he same 'hypocrisy and opportunism' is reproduced within the African scholarship and activity on human rights. The few African NGOs, funded as they are by their Western counter-parts or other Western funding agencies, rarely touch on the role of imperialism. They do not even expose the crimes of their own states. Instead much time is spent on refining legal concepts of human rights and the machinery for implementation.

MICHAEL POSNER AND CANDY WHITTOME, THE STATUS OF HUMAN RIGHTS NGOs

25 Colum. Hum. Rts L. Rev. 269 (1994), at 272.

II. Obstacles Confronting Human Rights NGOs

A. Government Reaction to NGOs

In spite of the critical contribution which NGOs make to the strengthening of civil society and to upholding the rule of law, governments often seek to limit or prevent their effective operation. This is particularly true for local human rights groups. . . . Some governments, especially those with poor human rights records, perceive 'non-governmental' organizations to be 'anti-government' organizations which are a threat to security and stability. Government with poor human rights records are particularly sensitive to criticism from independent groups in their own society. While criticism from abroad can be easily dismissed as propaganda or as influenced by governments hostile to the country concerned, public denouncement of a government's acts by its own citizens is harder to dismiss. In such situations, NGOs routinely face government-created obstacles in their efforts to operate freely, including restrictions on their rights to raise funds from abroad, on their ability to disseminate

materials freely and on their ability to gain permission to operate as a legal entity. Even a government that is publicly committed to allowing NGOs to operate freely may react with hostility when national NGOs draw attention to their abuses of human rights.

The reaction of many other governments is less subtle. State-sponsored physical attacks on and persecution of human rights advocates are well-documented and widespread. In 1993, the Lawyers Committee for Human Rights documented over 250 cases of attacks on lawyers and judges, involving some 450 people in fifty countries.

. . .

A further frustration for many local NGOs is their inability to achieve accountability for human rights violations through domestic means of redress. In many cases, they are turning to intergovernmental fora to aid them in finding effective remedies.

B. Current Law: Examples of Restrictions On NGOs

1. The People's Republic of China

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Current PRC law condemns 'counter-revolutionaries' who would 'sabotage' the 'people's democratic dictatorship' or 'disclose state secrets.' These terms are not defined. The 1993 National Security Law specifically includes 'stealing, prying into or illegally transmitting state secrets' in its definition of 'behavior that endangers national security.' The government has deemed independent human rights reporting to constitute counterrevolutionary propagandizing and disclosure of important state secrets. Even mere reporting of events unfavorable to the government is considered to be disclosure of state secrets.

2. Singapore

Independent human rights advocacy groups are forbidden by law in Singapore. Organizations such as the Singapore Law Society, which have attempted to address human rights issues, have often been the target of harassment and intimidation by the Singaporan government.

. . .

3. Egypt

. . . Egyptian Law 32 of 1964 requires that all non-governmental organizations seek official permission if they wish to operate freely. Even if an association has been granted this permission, the Ministry of Social Affairs has intrusive powers that enable it to prohibit the organization from affiliating with groups outside Egypt, to change the composition of its board of directors, and to require organizations to merge against their will.

Some human rights organizations have been denied permission to register under the law.

. . .

6. Tunisia

. . . [I]n 1991, after the Tunisian League for Human Rights (LTDH) had issued a number of public statements critical of the government's human rights policies, government-owned newspapers discontinued their coverage of LTDH activities. With the government enjoying a virtual monopoly over mass media outlets, this severely impeded the LTDH's ability to disseminate its findings.

. . .

QUESTIONS

1. Is Kothari's diagnosis of the dilemma in which the human rights movement finds itself valid only in relation to the Indian situation or is it transferable to most Third World countries, and perhaps even beyond?

2. The report by Steiner expresses the strongly held views of many Western commentators who emphasize the importance of objectivity, accuracy and measurability for assuring the credibility of the reporting of a human rights NGO. Does the choice of such criteria beg the question as to the 'proper' focus of the non-governmental side of the human rights movement?

3. 'Human rights NGOs, local or international, should do what they were set up to do, and nothing more. They find the facts. For most of history, horrific events in one part of the world were not at that time known about elsewhere. At least that has changed today, both because of the investigations and reporting of NGOs and the revolutionary developments in media. Perhaps states and international organizations do too little, often nothing, to arrest the massive violations that can no longer be hidden. But at least they and their populations *know*. That knowledge is the predicate to debate, publicity, and possible action. Let NGOs stay with their essential mission and not weaken themselves and confuse the world by attempting more.' Comment.

4. 'International NGOs are but another method for imposing Western concepts upon the Third World. Originating in the developed world, they inevitably remain alien in such other settings. Their agendas are dictated by external assumptions, and they ignore or suppress vital issues like exploitation by their home states in the Third World and the responsibility of those states for human rights violations abroad.' How do you respond to such an analysis?

5. 'INGOs, transient in a foreign state because their representatives arrive only to gather facts and then leave, are incapable of bringing about basic change in that state, such as a change in political structure. At best their activity can lead

to modest, often short-lived improvement. Only the local NGOs can achieve the basic political change that is essential for long-run respect for human rights. That is where the energy and funds ought to go.' Do you agree?

NOTE

One of the recurrent themes in analyses of the prospects of democratization in the post-Cold War era concerns the actual or potential role of 'civil society'. That term has been widely used to describe the role played by the non-state actors that have emerged to fill the space left by the demise of the Communist Party in Eastern and Central Europe.

Most readings in Section A of this chapter contain at least a passing reference to the term. Some of them seem to use it as though it were synonymous with non-governmental organizations as a collective group, while others apparently mean it to encompass 'social movements' in the broadest sense as well as NGOs in particular, without necessarily specifying the differences between the two. An example of the latter approach is the 1995 report of the Commission on Global Governance, which indeed expanded its conception of civil society to the transnational stage. It asserted that global governance,

> once viewed primarily as concerned with intergovernmental relationships, now involves not only governments and intergovernmental institutions but also non-governmental organizations (NGOs), citizens' movements, transnational corporations, academia, and the mass media. The emergence of a global civil society, with many movements reinforcing a sense of human solidarity, reflects a large increase in the capacity and will of people to take control of their own lives.[1]

The concept of civil society is vigorously debated in the theoretical literature: its historical origins, its relation to liberal or conservative thought, its role in democratization, and so on.[2] It has been described so broadly as to encompass all non-state sectors—some would say, 'society' as opposed to the formal structure of the 'state'. It has been portrayed as mediating between the state and its citizens. It has been associated with the more limited sphere of the market through which individuals seek to maximize their private interests. It has been described as the voluntary, self-generated collective action of citizens in a public sphere to articulate their ideas and interests, monitor and

[1] Our Global Neighborhood: The Report of the Commission on Global Governance 335 (1995).

[2] See, e.g., Jean Cohen and Andrew Arato, Civil Society and Political Theory (1992); Ernest Gellner, Conditions of Liberty: Civil Society and Its Rivals (1994); Adam Seligman, The Idea of Civil Society (1992).

influence the state, and participate in different forms of political life. Exploration of this complex concept is beyond our present intention; we mean only to call attention to ways in which it has been used in the literature about NGOs in general and human rights NGOs in particular.

QUESTIONS

1. The Commission on Global Governance puts immense faith in the concept of 'global civil society' which it considers to be 'best expressed in the global non-governmental movement' (p. 254). Consider the large variety of institutions that would fall within the notion of a 'non-governmental movement.' Are there risks in placing immense faith in such a movement as part of a trend toward global governance? What risks? Are human rights NGOs part of those risks?

2. The Commission also calls upon the international community 'to create the public–private partnerships that enable and encourage non-state actors to offer their contributions to effective global governance' (p. 255). One commentator, however, has called for caution as local NGOs 'proliferate under encouragement of or incentives from foreign donors, operate increasingly as consulting firms, and lose touch with, or accountability to, their local constituencies.'[3] Can the local human rights NGO community be 'encouraged', supported and brought by outside funders directly into the processes of 'effective global governance' (as paid monitors, as participants in humanitarian assistance projects, and so on) without losing some essential characteristics for a human rights NGO?

B. INGOs AND THE UNITED NATIONS

Part B examines the work of the large international NGOs and their relations with the United Nations. Amnesty International is the pre-eminent example of an INGO on which these readings concentrate.

COMMENT ON INGOs

Although the following readings use Amnesty International (AI) as a case study, there is a wide range of INGOs, the majority of which do not follow the AI model of being a membership-based organization. The spectrum of major human rights INGOs includes:

- the International Committee of the Red Cross, a predominantly Swiss organization with close links to the Swiss Government;

[3] Yash Ghai, Human Rights And Governance: The Asia Debate, 15 Aust. Y.B. Int'l L. 1, 32 (1994).

- the International Commission of Jurists, based in Geneva with national affiliates but dependent primarily upon grants, including from governments;
- the Lawyers Committee for Human Rights, based in New York and drawing financial support from foundations and law firms; and
- the Anti-Slavery International, based in London, originally established in the 1840s as the Anti-Slavery Society.

For the most part, INGOs' activities focus on the preparation of reports on country situations throughout the world as well as on generic problems involving many countries like censorship or prison conditions. INGOs distribute these reports, provide the information in them to the media, and use that information to engage in lobbying or other forms of advocacy before national executive officials or legislatures and international organizations. Sometimes they initiate or join (as *amicus curiae*) in litigation. Their other activities include the drafting of proposed legislation and of international standards, human rights education, conferences and other forms of promotion, protests and demonstrations, letter-writing and urgent action campaigns, monitoring and critiquing the work of governmental and intergovernmental human rights agencies, and working with and strengthening their local affiliates.

The largest of the INGOs based in the United States is Human Rights Watch (HRW). In its Human Rights Watch World Report 1994 (1995), HRW characterizes itself in the following way (at vii):

> Human Rights Watch conducts regular, systematic investigations of human rights abuses in some seventy countries around the world. It addresses the human rights practices of governments of all political stripes, of all geopolitical alignments, and of all ethnic and religious persuasions. In internal wars it documents violations by both governments and rebel groups. Human Rights Watch defends freedom of thought and expression, due process and equal protection of the law; it documents and denounces murders, disappearances, torture, arbitrary imprisonment, exile, censorship and other abuses of internationally recognized human rights.
>
> Human Rights Watch began in 1978 with the founding of its Helsinki division. Today, it includes five divisions covering Africa, the Americas, Asia, the Middle East, as well as the signatories of the Helsinki accords. It also includes five collaborative projects on arms transfers, children's rights, free expression, prison conditions, and women's rights.

HRW's advocacy has traditionally been centred on the executive branch of the U.S. Government and the Congress, as well as on the U.S. media. In recent years, it has enhanced its international profile through the establishment of offices in London and Brussels (to monitor and influence the human rights policies of the governments of the European Union), in Moscow (both to investigate and influence Russian human rights policy), in Hong Kong (primarily focused on China), and in Belgrade, Zagreb, Rio de Janeiro and Dushanbe (Tajikistan).

NOTE

The following readings start with reflections on problems of fact-finding growing out of an investigative mission in Nicaragua of Human Rights Watch/America. Of course such missions raise the problems in fact-finding that were examined in Chapter 7 with respect to the UN human rights system—that is, problems in investigations and reports by rapporteurs appointed by the UN Commission or by working groups of that Commission. Recall (pp. 394–401, *supra*) the different suggested criteria for fact-finding, and the tension between an ideal of objectivity and the reality of political contexts and possibilities.

The readings continue with a general description of INGOs' work before turning to a closer look at Amnesty International.

TOM FARER, LOOKING AT LOOKING AT NICARAGUA: THE PROBLEMATIQUE OF IMPARTIALITY IN HUMAN RIGHTS INQUIRIES

10 Hum. Rts. Q. 141 (1988), at 142.

. . .

THE PROBLEMATICS OF HUMAN RIGHTS ASSESSMENT

Particularly in the context of domestic conflict, balanced assessment is difficult enough when vehement political interests do not intrude. The various human rights treaties allow governments temporarily to suspend such important rights as free speech, press, and association in order to maintain public order. Moreover, respected intergovernmental enforcement agencies like the Inter-American Commission on Human Rights and the European Court of Human Rights have conceded to governments a considerable margin of discretion in deciding whether conditions require suspension. In any event, the possibility of lawful suspension removes what would otherwise be a helpful, bright-line distinction between permissible and delinquent behavior by governments.

Certain rights can never be suspended—in legal argot they are 'non-derogable.' They include the right to life, the right to be protected from torture, and the right not to be convicted or punished without due process. Despite the categorical character of these rights, their violation may nevertheless leave a fact-finding and assessing body with uncertainties that can only be resolved with the aid of assumptions about credibility, about the meaning and implications of evidence, that are immanent in the fact finder's value system and symbiotic with his or her political orientation.

To indict the regime, it is not enough that people die violently or disappear. In addition, you must conclude that senior officials either have ordered the delinquencies or tolerate them. Some or all parts of the security forces may be

out of control. In that event, the central question is whom to treat as the government—occupants of what the constitution labels the country's highest offices or occupants of the headquarters of the armed forces. Moreover, particularly in the course of an armed conflict, even fairly effective governments may find it difficult to enforce relatively humane combat and interrogation guidelines on its troops and security operatives.

. . .

A third obstacle to accurate portrayal of human rights in a given country is the sheer difficulty of getting the basic facts straight. The most bestial governments deem the costs of exposure sufficiently high to justify measures of concealment. Torture can be carried out on a large-scale without benefit of elaborate and readily identifiable plant and equipment. Military schools, abandoned warehouses, and all sorts of other innocuous venues are readily adaptable. Use the existing electrical outlets, add a few hooks, attach a few extra tubs to the plumbing system and, without any prodigies of improvisation, you have a perfectly adequate and easily dismantled interrogation center. In developing countries, many alleged violations occur in the countryside. Rudimentary systems of communication and transportation delay word of alleged violations from reaching fact finders and impede access once a charge has been filed. The trails may be very cold and, in the short time available to fact finders, it may be possible to follow only a few trails and they may be the wrong ones.

A fourth difficult feature of human rights assessment that makes it terribly vulnerable to ideological and political pressure is the universality of imperfection. Look closely at any country in the world and you will find violations of human rights. The comparatively handsome performance of capitalist democracies in Western Europe has not deprived the region's human rights Commission and Court of sufficient business to keep them busy. . . .

One nevertheless requires the aid neither of an elaborate brief nor of preternatural insight to appreciate that the condition of human rights in the United States circa 1987 is qualitatively better than in South Africa or that Malaysia was paradise compared to Pol Pot's Cambodia. But a great many nations do, of course, offer less stark contrasts.

Virtually all the respective private, as well as public, human rights monitoring bodies have rejected interstate comparisons. In doing so, they have attempted to avoid exposing themselves to charges of political bias and to disputes that would shift attention from the bedrock finding of human rights violations. Moreover, by eschewing comparison, they have sought in good faith to neutralize their own predispositions. They have, in addition, argued that the existence of still worse conditions elsewhere is simply irrelevant. Violations are violations wherever and however frequently they occur; the international community should do what it can to terminate them.

The considerable virtues of this principled refusal to compare must be weighed against a considerable vice. Exposure alone is a weapon of limited effect, particularly if its use does not signal the coming deployment of the

more tangible forms of coercion available only to states. Since the application of coercive measures is not cost-free, and since even the most morally sensitive of governments has many other foreign policy interests, national action on behalf of human rights is necessarily selective. The comparative severity of present or prospective violations being one factor influencing choice, comparisons will be made with or without the aid of human rights monitoring bodies.

. . .

Except in the fairly rare cases of mass murder and torture (by any definition of the term)—Cambodia under the Khmer Rouge, Uganda under Idi Amin, the Soviet Union under Stalin, Europe during the Nazi occupation—comparisons require the exercise of problematic etiologies and value judgments about the relative importance of different rights and the mitigating effect (if any) of the domestic and international context. How, for instance, do you compare governments that kill with guns to governments that allow people to die of starvation and malnutrition? Or governments that maintain themselves by suppressing free speech and free association with those that use death squads to that end? Should you compare governments without reference to each country's political culture and institutional heritage? One reason Pinochet's night-and-fog regime in Chile evokes more active hostility than fetid conservative governments in places like Zaire and Paraguay is the country's tradition of democratic rule and its evident potential for the renewal of democracy.

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FRAMING THE NICARAGUAN CASE

When I visited Nicaragua in December 1986 as part of a four-member fact-finding group dispatched by Americas Watch, a private human rights monitoring agency, I had behind me eight years of fact-finding experience as a member and the first gringo president of the Inter-American Commission on Human Rights. In that capacity I had already visited Nicaragua three times, twice since the fall of Somoza. From the outset of this fourth visit, I felt a peculiarly intense self-consciousness about the assessment process itself. This strong feeling of bifurcation into observer and participant did not stem exclusively from my awareness of those problematic features of fact-finding and assessment I have sketched here. They had haunted me in the past. The peculiar sensitivity I felt on this occasion testified both to the tarnished hopes for the country I had shared with so many other Americans at the time of Somoza's fall and to the confidence-shaking intellectual offensive of the anti-Sandinista coalition in the United States.

. . .

In the case of Third-World countries like Nicaragua that on the basis of the raw facts, would seem to stand somewhere among the broad middle ranks of

human rights performers, ideologically determined frames for organizing the data invariably influence, and not infrequently govern, overall assessments of government behavior. (I speak of persons making a good faith effort at objectivity. Ideology—by which I mean a cluster of ideas, ordered by some normative vision, that purport to explain the way the world works and how people should live—may also induce observors to lie about the raw facts in the unexpressed name of higher purposes.) These middling cases give fullest rein to ideological influence over assessment precisely because the facts, by themselves, do not confirm the goals of the regime's dominant personalities and the means they are prepared to use for their attainment. Nor do they speak clearly concerning the direction the society is likely to take irrespective of its leaders' intentions. They are ambiguous even with respect to the propriety of a good deal of current behavior.

[Farer points out the alternative explanations that are available for certain policies or actions of a government under investigation, such as (in the case of the Nicaraguan Sandinista government) closing down an opposition newspaper or expelling some church officials. One's judgment about such acts may depend on one's worldview, ideological orientation, or general belief or disbelief in the good faith of a government. He concludes that, in the case of Nicaragua, numbers of governmental acts about which he was required to make a judgment in his report for Americas Watch involved 'genuinely tough issues to resolve, particularly since . . . governments enjoy a margin of discretion in choosing means for dealing with threats to public security.']

NIGEL RODLEY, THE WORK OF NON-GOVERNMENTAL ORGANIZATIONS IN THE WORLD-WIDE PROMOTION AND PROTECTION OF HUMAN RIGHTS

90/1 U.N. Bulletin of Human Rights 84 (1991), at 85.

Organization

There are probably as many organizational structures as there are human rights organizations. However, three general models may be identified: (*a*) a group of individuals form and control the organization, with provision for self-renewal; (*b*) a number of organizations federate to combine their activities; (*c*) a centralized 'democratic' structure is created, with the constituent units both controlling the organization and carrying out its activities. The national/international mix may vary. Most will have permanent secretariats.

Thus, the ICRC [International Committee of the Red Cross] and the Anti-Slavery Society fall into the first category, with their controlling membership coming from nationals of one country—Switzerland and the United Kingdom respectively. The International Federation of Human Rights falls into the sec-

ond category, since it is composed of national leagues working to defend human rights in their various countries and electing an international board. Amnesty International (AI) falls into the third category, having national sections which elect an international executive and work against human rights violations in any country but their own. . . .

What all these organizations have in common is their work to defend human rights internationally. Their financing will also generally reflect their non-governmental nature, though some will take substantial sums of Government money, especially if, like the ICRC, they have governmentally assigned responsibilities, while others, such as AI, will not accept government donations.

The NGOs also have to determine the area of specialization that they will undertake, since the broad field of human rights covers the pursuit of justice in many forms and requires priority-setting. Most NGOs, including all those just mentioned, specialize in the area of civil and political rights. . . .

This orientation is understandable: it is easier to identify and prescribe a remedy for a violation of civil rights than economic rights. Nevertheless, most of the organizations recognize the interrelationship of politico-civil and socio-economic rights. Several, such as the ICJ and the ILHR, are increasingly addressing issues of socio-economic rights, by such means as seminars, segments of country reports and so on. . . . A new organization, Rights and Humanity, deals with economic and social rights as a central aspect of its mandate.

Information

By far the most important product of human rights NGOs is information, particularly information about human rights violations. . . .

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Action

Most NGO action is aimed at disseminating information and is determined by strategies followed by the particular NGO, which may be general or country-specific. For example, the International Committee of the Red Cross operates under a principle of confidentiality. Its reports, generally the product of visits to prisoners within its mandate, are addressed to the Government in question, not to the public. The Government is free to publish the reports, but if it does so selectively, the ICRC retains the right to publish them in full. Even NGOs that tend to publish as a normal technique may well first send a text intended for publication to the authorities concerned. . . .

Most NGOs see publication of their documentation as the principal means of putting an end to the human rights violations they record. The form of such publication will be determined by two main factors: one, the nature of the material, and two, the perceived efficacy of the available modes of publication. For urgent situations a news release or press conference may be used. For specific country studies, a book or monograph-style format can be appropriate . . . .

Much work is done by issuing brief documents on individual cases. Some NGOs use their own membership and the networks of other NGOs to make urgent appeals. . . .

. . . Some times it may be appropriate to address the judiciary, although it is important to avoid appearing to bring extraneous influence to bear on a specific court considering a specific case (this assumes that the judiciary is independent, often a politically necessary assumption, however far from reality it may be).

Some activities may also be directed at the legislature. . . .

Increasingly, NGOs are becoming interested in short- and long-term preventive work. For instance, they may seek to oppose the sending of people from one country to another where there is the risk of a human rights violation occurring in the receiving country. They may also promote human rights awareness in the general population, in formal education, or in the education of particular professional sectors, such as lawyers, judges, the police and the armed forces.

Nevertheless, the executive arm of government will remain the main addressee of NGO activities, for the executive is the branch of government most involved in human rights violations and the one most likely to be sensitive to public opinion. And public opinion, both national and international, is the main forum in which human rights violations may be judged. . . .

. . . NGOs may well target their information on one Government towards other Governments. International NGOs are particularly well placed to do this: their national affiliates are a means of communication to their own Governments, and often the very fact that they represent part of the domestic constituency may oblige those Governments to take the information in question into account. This does not mean that NGOs necessarily advocate 'sanctions' against Governments accused of violating human rights: some do, usually selectively; others do not. Nevertheless, the more excessive a Government's resort to human rights violations, the harder it becomes for other Governments to maintain the 'atmosphere' necessary for business-as-usual.

NGOs and the UN

. . .

NGOs have been able to be actively involved in . . . norm-creating exercises. Indeed, it has sometimes been their public activities that have demonstrated the need for the United Nations to take action. . . . [T]his was manifestly the case with regard to the problem of torture, the United Nations first having taken up the issue in response to a 1973 NGO campaign aimed at abolishing the practice. Furthermore their consultative status has permitted NGOs to participate, without vote, in the drafting discussions. They can propose ideas for inclusion and can explain, on the basis of their experience, why those ideas need to be incorporated in the text. They can also approach the drafting

Governments at the national level with a view to influencing the instructions given to their representatives in the drafting body. Prominent recent examples of such NGO participation are that of Amnesty International, the International Commission of Jurists and the International Association of Penal Law in the drafting of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and that of a NGO group led by Defence for Children International in the drafting of the Convention on the Rights of the Child.

Another facet of United Nations preventive work is its programme of advisory services and technical assistance, which in recent years has undergone major expansion, especially since the establishment of a voluntary fund to finance it. The fund can, among other things, help Governments acquire the necessary training and resources to assist them to respect human rights. This can be useful to NGOs which are often asked by Governments for such assistance, or at least advice in obtaining it. At the same time, NGOs have pointed to the need to ensure that the advice and assistance programme is not exploited by Governments engaged in extensive human rights violations. . . .

The area of United Nations human rights activity of most concern to NGOs has come to be that of protection or implementation. Until some 20 years ago, such activity was virtually non-existent. The United Nations did not take up individual cases, ignored most situations of human rights violations, however serious, and did not even permit NGOs at United Nations meetings to document human rights violations, either orally or in writing. . . .

Successive heads of the Human Rights Centre . . . have acknowledged the preponderant role played by NGOs in furnishing the information on human rights violations that constitute the subject-matter of the various procedures. . . .

QUESTIONS

1. Consider some of the problems in investigative missions by INGOs that Farer identifies. (a) Does the question of political assumptions and ideological beliefs arise only when a NGO report must go beyond 'stating what happened' (say, a newspaper was closed by the government during a proclaimed 'public emergency' under Article 4 of the ICCPR) to reach the 'legal' conclusion whether or not such action amounted to a human rights violation (say, whether that closure was 'strictly required by the exigencies of the situation' under Article 4)? (b) Does this illustration merely suggest that INGOs frequently and inevitably interpret treaty provisions (like Article 4 of the ICCPR) in order to write their reports, and that such traditional interpretation/application should not prejudice the claim of an INGO to apolitical objectivity in its country report?

2. Do you agree with Rodley that the orientation of most INGOs towards civil and political rights 'is understandable'? In what ways does an INGO face

different tasks in reporting about a country with respect to (a) torture and disappearances, and (b) the homeless and the right to housing? Does the second task seem more complex, less manageable? Why?

NOTE

The mandate is among the most significant aspects of a NGO. It states the purposes of the organization, the subject matter or region of special concentration, and so on. Mandates differ significantly; the mandate of AI that appears below as part of its Statute is in important respects distinctive. Of course mandates need not remain constant over time. They change with an organization's growth and shifting purposes, as well as in response to the evolving global context for its activities. The following readings trace the manner in which the AI mandate has been interpreted and expanded since AI was founded in 1961.

Some background information about AI will be helpful. At the beginning of 1994 it had over 1,100,000 members in over 150 countries, with 4,349 local groups based in over 80 countries. In 1993 it recorded 922 cases involving the release of prisoners of conscience and initiated 551 new 'urgent action' procedures and repeated 318 such actions. Its central budget in London was close to £13 million (approximately U.S. $22 million). In total, four times that amount was raised by national sections. *Amnesty International Report 1994*, at 352.

STATUTE OF AMNESTY INTERNATIONAL

Amnesty International Report 1994, at 332–3.

Object and Mandate

1. The object of Amnesty International is to contribute to the observance throughout the world of human rights as set out in the Universal Declaration of Human Rights.

In pursuance of this object, and recognizing the obligation on each person to extend to others rights and freedoms equal to his or her own, Amnesty International adopts as its mandate:

To promote awareness of and adherence to the Universal Declaration of Human Rights and other internationally recognized human rights instruments, the values enshrined in them, and the indivisibility and interdependence of all human rights and freedoms;

To oppose grave violations of the rights of every person freely to hold and to express his or her convictions and to be free from discrimination by reason

of ethnic origin, sex, colour or language, and of the right of every person to physical and mental integrity, and, in particular, to oppose by all appropriate means irrespective of political considerations:

(a) the imprisonment, detention or other physical restrictions imposed on any person by reason of his or her political, religious or other conscientiously held beliefs or by reason of his or her ethnic origin, sex, colour or language, provided that he or she has not used or advocated violence (hereinafter referred to as 'prisoners of conscience'); Amnesty International shall work towards the release of and shall provide assistance to prisoners of conscience;

(b) the detention of any political prisoner without fair trial within a reasonable time or any trial procedures relating to such prisoners that do not conform to internationally recognized norms;

(c) the death penalty, and the torture or other cruel, inhuman or degrading treatment or punishment of prisoners or other detained or restricted persons, whether or not the persons affected have used or advocated violence;

(d) the extrajudicial execution of persons whether or not imprisoned, detained or restricted, and 'disappearances', whether or not the persons affected have used or advocated violence.

Methods

2. In order to achieve the aforesaid object and mandate, Amnesty International shall:

(a) at all times make clear its impartiality as regards countries adhering to the different world political ideologies and groupings;

(b) promote as appears appropriate the adoption of constitutions, conventions, treaties and other measures . . . ;

(c) support and publicize the activities of and cooperate with international organizations and agencies which work for the implementation of the aforesaid provisions;

(d) take all necessary steps to establish an effective organization of sections, affiliated groups and individual members;

(e) secure the adoption by groups of members or supporters of individual prisoners of conscience . . . ;

(f) provide financial and other relief to prisoners of conscience and their dependants and to persons who have lately been prisoners of conscience . . . ;

(g) provide legal aid, where necessary and possible, to prisoners of conscience . . . ;

. . .

(i) investigate and publicize the 'disappearance' of persons where there is reason to believe that they may be victims of violations of the rights set out in Article 1 hereof;

(j) oppose the sending of persons from one country to another where they can reasonably be expected to become prisoners of conscience or to face torture or the death penalty;

(k) send investigators, where appropriate, to investigate allegations that the rights of individuals under the aforesaid provisions have been violated or threatened;

(l) make representations to international organizations and to governments whenever it appears that an individual is a prisoner of conscience or has otherwise been subjected to disabilities in violation of the aforesaid provisions;

(m) promote and support the granting of general amnesties of which the beneficiaries will include prisoners of conscience;

(n) adopt any other appropriate methods for the securing of its object and mandate.

PETER BAEHR, AMNESTY INTERNATIONAL AND ITS SELF-IMPOSED LIMITED MANDATE

12 Neths Q.H.R. 5 (1994).

Amnesty International is today the largest international non-governmental organization in the field of human rights in the world. . . .

. . .

. . . The Statute may be amended by the International Council, which represents the international membership and which nowadays meets once every two years, by a majority of two thirds of the votes cast. The Council can also, by ordinary majority, adopt resolutions to further specify or interpret the Statute.

. . .

2. Meaning of the Mandate

. . . [Since 1991] a distinction has been made between the notions of *object*, *mandate*, and *methods*. [See Statute, *supra*.]

. . .

Mandate issues—though generally considered of great importance—are notoriously difficult. The average Amnesty-member usually lacks the experience and the knowledge of decisions taken in the past which may have created

precedents. Only very few members and certain individuals in the International Secretariat have the necessary command over the intricacies of the mandate to give knowledgeable interpretations of the existing mandate and develop options that are sufficiently clear for the membership to act upon.

. . .

3. Criteria

The mandate should be sufficiently flexible to develop with changing circumstances in the world. . . . At the same time, such changes should not be too radical in order to reach the necessary consensus among the membership.

. . .

Political impartiality is seen as contributing to Amnesty's credibility and thus to its effectiveness. The need for maintaining its political impartiality as well as the wish to avoid even the *appearance* of such partiality, was the main reason why Amnesty has not found it possible to condemn the best known legally based system of human rights violations in the world: Apartheid in South Africa. It wanted to avoid having to take up all kinds of discriminatory legislation in other parts of the world as well and limited itself to '. . . condemning and opposing those laws and practises of Apartheid which permit the imprisonment of people on grounds of conscience or race; the denial of fair trial to political prisoners; torture; or the death penalty.' This compromise text was arrived at with considerable difficulty. It has been challenged at regular intervals at meetings of the membership. Especially African members of the organization, but also members of other sections, have found it difficult to accept that Amnesty did not outright condemn Apartheid.

. . .

5. Three Illustrations

Below, three illustrations are offered of mandate discussions within Amnesty International. . . .

5.1. The Violence Clause

From the beginning, Amnesty's mandate has included what has come to be known as the 'violence clause', which means that the organization will not call for the unconditional release of any persons who have used or advocated violence. . . . Although the exact reasons for adopting the clause are difficult to retrieve, the following are usually given for the retention of the clause;

– *character of the membership*: Amnesty's membership is composed of people of different persuasions, pacifists as well as non-pacifists. . . . The non-violence clause enables people of such different persuasion to

work together for the common goal: achieving respect for human rights within Amnesty's mandate.

- *political impartiality*: Amnesty's influence with regard to Governments depends on the fact that they tend on the whole to accept its political impartiality with regard to intergovernmental relations and internal relations between Governments and opposition groups. If Amnesty would demand the release of persons engaged in violent opposition to the government, it could become identified with the opposition and thereby risk losing its credibility and its influence.
- *distinguishing political from criminal actions*: it is sometimes difficult . . . to distinguish political from purely criminal actions and Amnesty wants to avoid getting into a position where it has to sort out the types of violence that are and that are not legitimate.
- *ethical considerations*: in many circumstances the use of violence may cause the loss of life or limb, which is seen as morally repugnant by many, if not most people.

Amnesty makes an effort to point out that the above does not mean that it is opposed to the use of violence as such. It has 'no views' on such use, but it refuses to work for the release of persons who have used or advocated violence. Indeed this limitation is not considered when it is asking for a prompt and fair trial for *all* political prisoners and in its fight against the death penalty (which is in fact usually applied to persons who have used violence) and torture or other cruel, inhuman or degrading treatment or punishment.

. . .

5.2. Political Non-Governmental Entities

[In this omitted section, the author examines AI's changing attitude toward investigating and reporting about the actions (killings, torture) of non-governmental entities with a political character, such as a group in a civil war claiming partial political control, or an armed opposition to a government that exercises some degree of control over a territory and its population. The author's illustrations include Hezbollah in Lebanon, the FMLN in El Salvador, Sendero Luminoso in Peru and the IRA in Ireland, and thus includes groups whose authority was often 'transient in character.' AI gradually moved from the position that international human rights norms were binding only on states and began to deal with abuses by non-governmental entities. 'The 1991 International Council decided . . . that henceforth Amnesty would deal with abuses by political non-governmental entities, whether or not the entity has the attributes of a government. . . .']

. . .

5.3. Homosexuality

For many years the issue was debated, whether Amnesty should work for the release of persons imprisoned or detained for their homosexual identity or orientation or for homosexual acts committed in private and between consenting adults. This issue even threatened to split up the organization along multicultural lines. While members in Western Europe and North America tended to consider it rather obvious that Amnesty should work for such persons, many people in Asian, African as well as some Latin American countries thought otherwise.

Agreement existed only to work for (a) persons imprisoned or detained for advocating equality for homosexuals, (b) persons charged with homosexuality as a pretext, while the real reason for their imprisonment was the expression of their political, religious or other conscientiously held beliefs, (c) persons subjected to medical treatment while in prison with the aim of modifying their homosexual orientation without their agreement.

The issue was hotly debated for a number of years, resulting in various voluminous studies of the matter. The differences of view can be roughly summarized as follows. Those in favour of working for imprisoned homosexuals argued that '(homo)sexual orientation' and '(homo)sexual identity' are attributes similar or subordinate to the category of 'sex', which has for many years been in the mandate and that it would only be logical to add this category of persons to the mandate. The opponents felt that in societies where homosexuality is considered a physical ailment or a reflection of socially deviant behaviour, activities on behalf of such individuals would be seen as not related to human rights and make Amnesty look ridiculous; moreover, if Amnesty were to work for imprisoned homosexuals, this would risk to involve it in having to deal with all sorts of other sexual practices.

. . . The International Council adopted by consensus a simple resolution deciding 'to consider for adoption as prisoners of conscience persons who are imprisoned solely because of their homosexuality, including the practice of homosexual acts in private between consenting adults'. The resolution expressed the realization that this decision would increase the difficulty of the development of Amnesty in many parts of the world and instructed the International Executive Committee to draft guidelines regarding action on behalf of imprisoned homosexuals, 'taking into consideration the cultural background of various areas where we have sections and groups or countries in which AI is proposing development.'

Thus ended the major internal debate on the issue of homosexuality. The result had certain features of a political compromise. It was not explicitly decided how the position taken related to the text of the Statute. There is nothing in the Statute, except for a broad interpretation of the word 'sex,' which would cover such activities. The issue of whether the consequence of the decision on homosexuality would indeed open the debate on other sexual practices, was never faced. Nor was a fundamental debate held on the issue of

whether Amnesty's new stand on homosexuality meant a departure from its emphasis on universal human rights values. Politically, it was also a matter of attracting one constituency (the gay community) at the risk of possibly losing another (potential Amnesty International-members in the Third World).

. . .

6. Conclusion

. . .

[As one expert on Amnesty International's mandate] has rightly pointed out, there exists an inherent tension between logic of the Amnesty movement and the logic of human rights. While the logic of the movement is its specificity, the logic of human rights consists of their inseparability from each other. He has also made the point that Amnesty International could not become a general human rights organization—promoting all human rights equally—without destroying its identity, losing its membership and abandoning its techniques.

NOTE

In its 1994 Report, Amnesty International observed (p. 4):

> The patterns of human rights abuses that Amnesty International seeks to combat have become more and more complex in recent years. . . . A spate of local wars, often accompanied by the virtual disintegration of state authority, have spread turmoil and terror.
>
> . . .
>
> Nationalist, ethnic and religious conflict, famine and repression have led to massive movements of refugees. More and more countries, especially wealthy ones, have closed their doors to people who need and deserve sanctuary.
>
> These horrific events illuminate the interdependence and indivisibility of human rights more powerfully than any abstract argument. In this increasingly volatile human rights environment, Amnesty International offers a structure for people from all continents to campaign for human rights and influence events worldwide as well as in their own regions. Amnesty International is determined to adapt to the evolving realities by adjusting its responses. It must play its role within the broader human rights movement. And it must transcend its Western roots and continue to develop as a truly international, multicultural human rights movement.
>
> . . .
>
> Top of the agenda for Amnesty International's members and supporters in the coming decade is a worldwide campaign against political killings and 'disappearances'. . . .

PHILIP ALSTON, THE FORTIETH ANNIVERSARY OF THE UNIVERSAL DECLARATION

in J. Berting et al. (eds.) Human Rights in a Pluralist World, Individuals and Collectivities 1 (1990), at 12.

. . . Amnesty . . . has been extraordinarily effective . . . . Its success has been linked inextricably to its narrowly defined mandate resulting in a focus on a very specific range of civil and political rights. . . .

. . .

. . . [It] is my contention that the result, albeit not the intention, of Amnesty's efforts is the widespread dissemination of a conception of human rights which is partial (in the sense of being incomplete) and is not a faithful reflection of the Universal Declaration and the assumptions underpinning that document (from which the Declaration derives its strength and standing). I would suggest that the great majority of Amnesty members and activists would, if pressed, provide a rather distorted list of basic human rights which would reflect the list of core 'mandate' issues pursued by Amnesty and little more. This distortion is essentially a consequence of the enormous success of the organization's determination not to be diverted from the core issues as it sees them. If that consequence could be characterized as intentional then Amnesty should not claim fidelity to the Universal Declaration and should concede that its concerns, far from being a reflection of universal minorities, mirror more closely values associated with the Western liberal tradition. In that case, any pretense to ideological blindness or neutrality should be abandoned. I believe, however, that for the most part that consequence is entirely unintended. If that is the case, it is time for the organization squarely and openly to address the issue of how it can best combat the risk of being perceived to endorse an unduly selective conception of human rights, while at the same time maintaining its core focus which can be justified in terms of manageability, legal specificity and operational potential.

I would not suggest that this will be an easy task, and there will be some among its membership who will resist it fiercely (for reasons of both effectiveness and ideology). Nevertheless, there are some relatively straightforward and painless first steps which could be taken by way of an expanded public information and education campaign . . . . [A] very widely distributed booklet entitled *What Does Amnesty International Do?* notes that Amnesty's 'work is based on principles set forth in the . . . Universal Declaration.' It states that while the organization's focus on prisoner's rights leads it to concentrate 'on a specific program in the human rights field' this 'does not imply that the rights it does not deal with are less important.' But at no point in the twenty-five-page booklet is any indication given as to what those other rights are. It is hard to believe that a brief educational reference to those other rights would in any way impair Amnesty's need to maintain a limited range of concerns.

The principal retort to my objection is likely to be that Amnesty, like all other human rights NGOs, is entitled to be specific in its focus and that other groups can better fill the gaps that Amnesty leaves. But this argument overlooks the fact that Amnesty, whether it likes it or not, is the single dominant force in the entire field. It is bigger, richer, better organized, more representative and more influential than most of the other groups put together. As a result, it is precluded from taking refuge in a justification which, when proffered by smaller NGOs, must (reluctantly) be accepted. As the great powers themselves often need to be reminded, with power and influence comes responsibility. Much of that responsibility may be unwanted, but it cannot simply be shrugged off.

QUESTIONS

1. Amnesty's Statute and the development of its mandate are fraught with underlying complexity. (a) What other solutions might AI have adopted in relation to the question of *apartheid*? (b) What practical difficulties do you see in relation to the application of the 'violence clause'? (c) Do you consider the policy on homosexuality to be a sell-out or an appropriate compromise? Or do you believe that it is wrong since Amnesty, in order to achieve its goals, must draw only on accepted universal human rights standards and hence should stay out of this field?[4]

2. There was strong resistance to the extension of Amnesty's mandate to cover non-governmental entities. Some major NGOs continue to resist this trend (although Human Rights Watch was a pioneer in embracing the broader focus). In 1995 the Commission on Global Governance urged recognition of the reality that 'governments are only one source of threats to human rights and [that often] government action alone will not be sufficient to protect many human rights. This means that all citizens . . . should accept the obligation to recognize and help protect the rights of others' (p. 56). What are the implications of such a development of the conceptual framework of international human rights law?

3. What are some of the practical consequences for its mandate and operations that might flow from Amnesty's commitment to 'transcend its western roots and continue to develop as a truly international, multicultural human rights movement'?

[4] The issue of the consistency of legislation barring homosexual acts (even between consenting adults) with human rights norms arises in the following chapters. See the opinion of the ICCPR Committee in the Toonen case, p. 545, *infra*, and the decision of the European Court of Human Rights in the Norris case, p. 618, *infra*.

NOTE

The following readings examine the attitude, or perhaps contradictory attitudes, of the UN to INGOs. On the one hand, Article 71 of the UN Charter acknowledges the important role of NGOs. Moreover, the UN mechanisms for responding to violations rely heavily on INGOs to provide alternative sources of information, as well as to heighten the external pressures on states that are indispensable to those mechanisms' effectiveness. On the other hand, NGOs have only grudgingly been accorded speaking and other lobbying 'rights,' and their status before UN bodies is regularly challenged by hostile governmental forces. At the same time, the existing 'consultative arrangements' within the UN system are overloaded and unsustainable. We therefore turn, at the end of this chapter, to the challenge of devising appropriate reforms.

ARRANGEMENTS FOR CONSULTATION WITH NON-GOVERNMENTAL ORGANIZATIONS

UN ECOSOC Resolution 1296 (XLIV) (1968).

The following principles shall be applied in establishing consultative relations with non-governmental organizations:

1. The organization shall be concerned with matters falling within the competence of the Economic and Social Council with respect to . . . human rights.

2. The aims and purposes of the organization shall be in conformity with the spirit, purposes and principles of the Charter of the United Nations.

3. The organization shall undertake to support the work of the United Nations and to promote knowledge of its principles and activities . . . .

4. The organization shall be of representative character and of recognized international standing; it shall represent a substantial proportion, and express the views of major sections, of the population or of the organized persons within the particular field of its competence, covering, where possible, a substantial number of countries in different regions of the world. Where there exist a number of organizations with similar objectives, interests and basic views in a given field, they shall, for the purposes of consultation with the Council, form a joint committee or other body authorized to carry on such consultation for the group as a whole. It is understood that when a minority opinion develops on a particular point within such a committee, it shall be presented along with the opinion of the majority.

5. The organization shall have an established headquarters, [and] a democratically adopted constitution . . . .

. . .

7. Subject to paragraph 9 below, the organization shall be international in its structure. . . .

Any international organization which is not established by inter-governmental agreement shall be considered as a non-governmental organization for the purpose of these arrangements, including organizations which accept members designated by governmental authorities, provided that such membership does not interfere with the free expression of views of the organization.

8. The basic resources of the international organization shall be derived in the main part from contributions of the national affiliates or other components or from individual members. Where voluntary contributions have been received, their amounts and donors shall be faithfully revealed to the Council Committee on Non-Governmental Organizations. . . . Any financial contribution or other support, direct or indirect, from a Government to the international organization shall be openly declared. . . .

9. National organizations shall normally present their views through international non-governmental organizations to which they belong. . . . National organizations, however, may be admitted after consultation with the Member State concerned in order to help achieve a balanced and effective representation of non-governmental organizations reflecting major interests of all regions and areas of the world, or where they have special experience upon which the Council may wish to draw.

. . .

36. The consultative status . . . shall be suspended up to three years or withdrawn in the following cases:

(a) If there exists substantiated evidence of secret governmental financial influence to induce an organization to undertake acts contrary to the purposes and principles of the Charter of the United Nations;

(b) If the organization clearly abuses its consultative status by systematically engaging in unsubstantiated or politically motivated acts against States Members of the United Nations contrary to and incompatible with the principles of the Charter;

(c) If, within the preceding three years, an organization had not made any positive or effective contribution to the work of the Council or its commissions or other subsidiary organs.

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MICHAEL POSNER AND CANDY WHITTOME, THE STATUS OF HUMAN RIGHTS NGOs

25 Colum. Hum. Rts. L.Rev. 269 (1994), at 283.

Perhaps as part of a backlash by governments hostile towards the idea of more open participation by NGOs within the United Nations system, there have been . . . recent moves by some governments to diminish the protection offered by international law to human rights defenders.

In June 1993, during the Second World Conference on Human Rights in Vienna (Vienna Conference), much time was spent on drafting the passage which relates to the contribution of NGOs. From the viewpoint of NGOs, the final text represents a significant setback for human rights advocates. It states that

> [n]on-governmental organizations *genuinely* involved in the field of human rights should enjoy the rights and freedoms recognized in the Universal Declaration of Human Rights and the protection of the national law. . . . Non-governmental organizations should be free to carry out their human rights activities, without interference, within the framework of national law and the Universal Declaration of Human Rights.

The reference to national law undermines a fundamental premise of international human rights law: international standards are necessary precisely because national law so often offers inadequate protection.

. . .

To be effective participants in the international debate on human rights, NGOs—local and international—need effective access to the key players in the U.N. system. Yet such access is still hard, if not almost impossible, to come by for most local NGOs.

. . .

The implications of the current arrangements for formal NGO relations with the United Nations are significant. Two questions, in particular, arise: (1) does consultative status provide NGOs effective access to the United Nations system? and (2) how can the NGOs who do not have, or are not eligible for, consultative status, obtain effective access? Those with consultative status need to assess whether it grants them effective and meaningful participation in United Nations fora. For example, NGOs were excluded from the drafting sessions at the Vienna Conference where the final document, the Vienna Declaration and Programme of Action, was negotiated. Moreover, many of the 'rights' granted are, in practice, less useful than they might at first appear. The right to make oral statements at the United Nations Commission on Human Rights, for example, is often rendered virtually useless because of the

fact that the debate is so crowded, with so many governments and NGOs wanting to speak, that NGOs are frequently allotted the least popular time, late at night, when there are few government delegates to hear or respond to them.

Even this situation compares favorably with that of the majority of local NGOs that are unable to obtain consultative status at all. In most cases it is only if a local NGO is affiliated with an NGO with consultative status that is willing to let the local group speak or circulate documents under its name can a local group obtain even informal access to meetings such as those of the United Nations Commission on Human Rights. Attending such meetings simply to lobby delegates is not an option unless a national NGO can persuade an international one to give it accreditation.

On the other hand, NGOs do not need consultative status to participate in many of the other human rights activities of the United Nations. They may, for example, submit information to various thematic rapporteurs and treaty-monitoring bodies. . . .

The question of access to the United Nations is becoming increasingly important and complex as the number of local human rights groups continues to grow. At present there are over 900 NGOs in consultative status . . . and the great majority of these are international NGOs. Up until the early 1980s, when there were few local NGOs, the system could cope with the numbers. In recent years, the number of NGOs has increased dramatically—over 1500 NGOs were represented at the Vienna Conference alone. If all these groups were to be awarded consultative status and given the same rights and privileges as those with such status now enjoy, it is arguable that the system would collapse . . . How can the situation be remedied, with a greater number of NGOs [being] granted more effective access, without overloading the system to the breaking point?

The question of access for NGOs is currently being addressed within a new intergovernmental working group within the United Nations. In July 1993, ECOSOC established an open-ended working group consisting of representatives of all interested states to undertake a 'general review' with 'a view to updating, if necessary, Council Resolution 1296 (XLIV), as well as introducing coherence in the rules governing the participation of non-governmental organizations in international conferences convened by the United Nations.'

. . .

REPORT OF THE OPEN-ENDED WORKING GROUP ON THE REVIEW OF ARRANGEMENTS FOR CONSULTATION WITH NON-GOVERNMENTAL ORGANIZATIONS

UN Doc. A/49/215 (1994), at 12.

. . .

55. Many representatives of Member States noted that the review of arrangements for consultations with non-governmental organizations was timely and necessary, especially in view of recent developments, in order to reflect the current needs and realities. Some were of the view that Council resolution 1296 (XLIV) needed updating to enable an increasing number of non-governmental organizations to participate in United Nations activities while retaining a reasonable filter to exclude those non-governmental organizations whose objectives were incompatible with those of the Charter of the United Nations.

56. One delegation stressed that non-governmental organizations considered for consultative status should strictly adhere to the principles and purposes of the Charter of the United Nations, and that organizations indulging in terrorism to destabilize legitimate Governments should have no place whatsoever in the United Nations system. It suggested that a set of rights and responsibilities and a code of conduct for non-governmental organizations should be considered.

. . .

63. . . . Concern was expressed at the recent practice of asking non-governmental organizations to form 'coalitions' and 'constituencies' and to speak through a spokesperson. Such forced consensus would result in destroying the diversity of opinions. It was suggested that those participatory rights, warranted by Council resolution 1296 (XLIV), be fully reinstated. . . .

. . .

66. A number of representatives of Member States stressed the need for a broader and more diverse participation of non-governmental organizations from developing countries in the consultative relationship. In that regard, several Member States suggested the establishment of a fund to assist the participation of non-governmental organizations from developing countries in United Nations meetings, in particular United Nations conferences and their preparatory meetings. Others, while agreeing that there was a need to facilitate the participation of non-governmental organizations from developing countries, expressed doubts about establishing a trust fund.

67. Several delegations opposed the establishment of a trust fund based on compulsory financial contributions from non-governmental organizations.

. . .

69. Some delegations suggested that in order to increase the representation of non-governmental organizations from developing countries so as to reflect the principle of equitable geographical distribution, the Committee on Non-Governmental Organizations, when considering applications for consultative status, should give priority to those emanating from non-governmental organizations in developing countries.

. . .

71. One delegation suggested that measures should be taken to ensure that a certain percentage of non-governmental organizations participating in United Nations conferences were from developing countries. However, several delegations expressed their opposition to the idea of establishing quotas for non-governmental organizations.

. . .

75. One non-governmental organization called for the creation of 'umbrella national networks' at the regional and national levels, which would include representatives of the poor, disadvantaged or marginalized sectors, particularly from developing countries. Those 'umbrella networks' should be eligible for consultative status.

. . .

84. Many representatives of Member States suggested that consultative arrangements with non-governmental organizations be extended beyond the Economic and Social Council and its bodies in order to encompass the General Assembly and its Main Committees and subsidiary bodies. Several delegations suggested that the Security Council and other bodies dealing with peace, security and disarmament should be encompassed.

. . .

89. Another delegation stated that the participation of non-governmental organizations in conferences should be decided on a case-by-case basis, and that it was essential to get a 'no objection' clearance for this from the States concerned.
90. Many speakers stressed the importance of including non-governmental organizations in national delegations and expressed the hope that the practice would be widely followed.

ERSKINE CHILDERS AND B. URQUHART, WE, THE PEOPLES

in Renewing the United Nations System 171 (1994), at 172.

Until quite recently the hauteur of most secretariat and diplomatic officials about NGOs was matched by the disinterest and disdain of large portions of

the NGO community for the UN as merely 'another bureaucracy'. The very UN phrase for them—'non-governmental'—has been seen as two-edged: negative, distancing on the part of an intergovernmental body, but perhaps usefully protective against officious outsiders.

. . .

A turning-point

Quite suddenly, however, there is a new dynamic between the UN system and 'the peoples of the United Nations' reflected in various popular movements. It is stimulated by six main forces:

> • The thousands (at least 25,000) of NGOs working on Environment in its now enlarged dimension have perceived the indispensable role of multilateral machinery. They have become impatient that the United Nations has been kept so marginalized in global economic issues, which they are not prepared to entrust to the Bretton Woods institutions (or the G-7).
>
> • After many years of holding 'the UN' at arms' length, the constantly expanding human rights NGO community has decided to assert itself in all relevant UN bodies. The 1993 UN Human Rights Conference in Vienna was perhaps the decisive illustration of this significant trend.
>
> • A huge number of citizen supporters of humanitarian relief have seen their NGOs working alongside the UN in more and more crises, not always in happy circumstances. Humanitarian NGO leaders want to get involved in UN policy issues. Senior UN officials and UN diplomats have increasingly acknowledged that this NGO community is indispensable to the UN's humanitarian and even perhaps to its peacekeeping work.
>
> • NGOs of the international women's movement have mobilized the interest of hundreds of thousands of women in a wide range of international political, economic and social issues. They have perceived the centrality of the UN system in these issues. Their leaders are equally determined to take a hand in the future of the UN.
>
> • The world parliamentary community is increasingly engaged. Parliamentarians for Global Action, with some 700 member-MPs from 45 countries, has discussed some form of parallel assembly. Other groups are also interested. . . .
>
> • Underlying these developments are the general transnational expansion of the democratic idea, ever larger popular concern for human rights and UN promotion of them, and the constantly increasing sense of solidarity among young people through transnational media and music.

There are two main reasons why these developments must be actively nourished and built upon.

A wider support base for the UN

. . .

The United Nations has frequently suffered severely from inadequate public knowledge and awareness of its work, especially at critical moments when member-governments have misused the organization or impugned its activities.

Governments are, for the most part, represented in the UN system by national civil servants, making an additional layer between citizens and the world institution. The UN is therefore very remote from its ultimate constituents, and far too dependent on how (and whether) a small number of national officials and media commentators interpret it to them.

. . .

Citizens have as much right to be informed, and to be heard, about their governments' policies in the UN system as about any other policies.

. . .

Enfranchisement by necessity

. . .

The second reason . . . is that governments can no longer make effective progress without citizen involvement.

In many cases the citizenry are so poorly informed that when large additional funds are needed for UN work, the public support base for such decisions is perilously small. The political confusion in many countries over the need for larger contributions of military and other personnel for UN operations has recently also exposed the effects of inadequate public knowledge and debate.

Governments are already faced with the need to ratify far-reaching global ecology treaties. If citizens and their NGOs had not educated themselves on these issues, their governments would have little or no public support for such accords. In the next two decades governments, if they wish to face up to the future, will also have to adopt genuinely global macro-economic policies through the UN, as national commitments. Their citizens will have to be far better informed and engaged in these global issues, if they are to support such policies.

. . .

The NGO dilemma

By the end of 1993 their recent successes had confronted the NGO community with serious new problems. Several hundred additional environmental NGOs had been accredited to the UN. Other 'issue-oriented' international NGOs were clamouring for greater access.

On one hand, even the most sympathetic governments were having to point out that it would hardly be manageable for UN organs and subsidiary bodies, with their own membership from a few dozen to a maximum of 184, to hear spoken representations from hundreds of NGOs; and that their delegations could not even cope with the volume of official documents, leave alone every NGO's individual proposal-paper.

On the other hand, the older-accredited NGOs were beginning to feel overwhelmed and even 'sidelined' by the energetic and often very well-prepared newcomers from the fields of environment, women's rights, humanitarian relief and other high-profile issue areas. Governments still not particularly well-disposed towards NGOs could find ample ammunition from within these tensions and disarrays. . . .

There is thus a considerable danger that the major gains the NGO community has recently made could be seriously dissipated if it is unable to agree on efficient proposals for improved access and representation.

The essence of the change facing the NGO community may be summarized as requiring the best possible answers to a number of strategic questions:

. . .

a. The optimum *places* of NGO influence on governmental decision-making in the system, as between pressure and advocacy within member-countries, lobbying key delegations at UN organs or other bodies, and representation to the total intergovernmental community including at UN world conferences;

b. How NGOs working in a given issue-area can best consolidate their analyses and proposals in order to mount an effective representation, given that they outnumber by many thousands the number of Delegations at any UN body;

c. What facilities of the Secretariat itself must NGOs, in their now greatly increased numbers, minimally seek, and how they can propose these in the most cogent manner;

d. How the NGO community can more generally help to build bridges of communication between the citizens whom they variously but not electorally represent, and the member-governments in the UN system.

QUESTIONS

1. What reforms would you propose to the Resolution 1296 arrangements governing the role of NGOs *vis-à-vis* UN bodies? What about setting aside a percentage of seats (at least 10%, perhaps as much as 40%) in all UN bodies to be occupied by NGO representatives?

2. 'The position of NGOs in relation to the UN human rights system is guaranteed to be a no-win situation. The UN can do very little without the mass, popular support that only the NGOs can provide, but if the latter are given any serious influence, governments will simply withdraw their support from the system. Either the UN itself or the NGOs must be marginalized; governments will never tolerate the two of them working together in tandem.' Discuss with particular reference to human rights NGOs.

3. Various authors have noted the important role played by NGOs in the drafting of international standards. An assessment of the role of NGOs in drafting environmental standards reached the following conclusion:

> One lesson for the future is that although a greater participation of NGOs in regime-building processes in the areas of environment and development should be welcomed and encouraged, the terms of access for NGOs need to be carefully assessed. It is necessary to consider that the character of a multilateral negotiation usually changes drastically from its initiation to the conclusion of a final agreement that terminates the process. For example, the demand for new knowledge and information is much more limited at the end of the negotiation, when concessions are exchanged and deals are made, than when the agenda is set and issues are clarified in the earlier stages of the process. Some NGOs may be capable of performing a constructive role from the beginning to the end of the process. However, it may be more reasonable to constrain or circumscribe the activities of certain NGOs in the regime-building process or negotiation. For instance, some scientific organizations that are in a position to supply significant information during the process stage of issue clarification may have little to contribute when hard bargaining and the exchange of concessions prevail. In contrast, other NGOs may have but a layman's knowledge about the technical issues, but can be in a position to communicate the agreements reached in the negotiation to the general public or to certain social strata. Maybe distinctions such as these should be taken into consideration when access rules are formulated for NGOs.[5]

To what extent, if any, might a similar analysis be warranted in relation to human rights standard-setting?

ADDITIONAL READING

D. Shelton, *The Participation of Nongovernmental Organizations in International Judicial Proceedings*, 88 Am. J.Int'l L. 611 (1994); *Put Our World To Rights: Towards a Commonwealth Human Rights Policy* (1991); Jerome Shestack, *Sisyphus*

[5] Gunnar Sjöstedt et al, in B. Spector et al (eds.), *Negotiating International Regimes: Lessons Learned from the United Nations Conference on Environment and Development* 233, 238 (1994).

Endures: The International Human Rights NGO, 24 N.Y.L.S.L.Rev. 89–124 (1978); R. Lagoni, *Article 71*, in B. Simma *et al* (eds.), *The Charter of the United Nations: A Commentary* 902–15 (1994); P. Chiang, *Non-Governmental Organizations at the United Nations* (1981); Howard Tolley Jr., *The International Commission of Jurists: Global Advocates for Human Rights* (1994); Manfred Nowak, *World Conference on Human Rights: The Contribution of NGOs, Reports and Documents* (1994); Lowell Livezey, *Non-Governmental Organizations and the Idea of Human Rights* (1988); Arthur Blaser, *Human Rights in the Third World and Development of International Nongovernmental Organizations*, in Shepherd and Nanda (eds.), *Human Rights and Third World Development* (1985); D. Weissbrodt and J. McCarthy, *Fact-Finding by International Nongovernmental Human Rights Organizations*, 22 Va. J. Int'l L. 1–89 (1981); Theo van Boven, *The Role of Non-Governmental Organizations in International Human Rights Standard-Setting: A Prerequisite of Democracy*, 20 Calif. Western Int'l L.J. 207–25 (1990); Amnesty International, *'Disappearances' and Political Killings, Human Rights Crisis of the 1990s: A Manual for Action (1994)*; *idem*, *Human Rights Watch World Report 1995* (1994); Fund for Peace and Jacob Blaustein Institute for the Advancement of Human Rights, *Human Rights Institution-Building* (1994).

9

Treaty Organs: The ICCPR Human Rights Committee

Chapter 9 continues the inquiry begun in Chapter 7 into the structure, roles, functions and processes of international human rights bodies. We continue to emphasize the relationships among human rights norms, institutions and processes, as well as the reasons and techniques for 'institutionalization' of norms.

The Commission on Human Rights (UN Commission) created under the UN Charter (hence a 'Charter' organ) and examined in Chapter 7 remains the most complex and politically interesting of the specifically human rights organs with universal reach. It differs markedly in organization, functions and powers, as well as notoriety, from the six organs (or bodies) related to six universal human rights treaties on civil and political rights, economic and social rights, racial discrimination, gender discrimination, torture and children's rights. Each such body is distinctive in some respects; each has functions only with respect to the treaty creating it or for which it was created; each such treaty regime is now to some extent 'administered' or 'implemented' or 'developed' by that body.

Chapter 9 selects one such 'treaty' organ, the Human Rights Committee created by and functioning within one of the world's two principal human rights treaties, the International Covenant on Civil and Political Rights. We continue to use the abbreviation 'ICCPR Committee.'

Similar questions to those in Chapter 7 arise. Why has the ICCPR Committee assumed the character, structure and functions that are here described and analyzed? What purposes are served by the present arrangements? Are there other purposes that should be served? In which respects, and why, does the ICCPR Committee differ from the UN Commission? Should the structure and functions of the ICCPR Committee now be reconsidered, in the light of a half century of experience of the human rights movement and two decades of experience with this Committee?

In thinking about such questions, two thoughts should be kept in mind. (1) The ICCPR Committee forms part of a complex of Charter and treaty organs. Should it be understood and evaluated as an isolated organ functioning within one treaty, or as part of this larger complex? If the latter, should one ask whether the Committee's performance and functions should be evaluated as

complementary to those of other organs—that is, be best understood as part of a universal system of institutions? (2) Even within the ICCPR, can we understand each of the Committee's powers or functions discussed below in isolation from the others, or should all the functions be seen as part of a treaty system, hence as complementary and as occupying different parts of a scheme within the treaty?

Section A examines the ICCPR Committee. Section B develops comparisons with the five other universal human rights treaties that also create special organs.

A. POWERS, FUNCTIONS, AND PERFORMANCE OF THE ICCPR COMMITTEE

1. INTRODUCTION

COMMENT ON THE FORMAL ORGANIZATION OF THE ICCPR COMMITTEE

You should now read the provisions bearing on the organization and functions of the ICCPR Committee, set forth in Articles 28–45 of the Covenant and in its First Optional Protocol. The following discussion incorporates some of those provisions.

Bear in mind the three dominant functions of the Committee set forth in these instruments. (1) Article 40 requires states parties to 'submit reports' on measures taken to 'give effect' to the undertakings of the Covenant and on progress in the enjoyment of rights declared by the Covenant. The Committee is to 'study' these reports. (2) The same article instructs the Committee to transmit 'such general comments as it may consider appropriate, to these states parties. (3) The Optional Protocol—a distinct agreement requiring separate ratification—authorizes the Committee to receive and consider 'communications' from individuals claiming to be victims of violations by states parties of the Covenant, and to forward its 'views' about communications to the relevant individuals and states. The materials in this chapter consider each of these principal activities of the Committee.

Articles 28–31 of the Covenant provide the crucial information about the Committee's membership. The 18 members are to have 'high moral character and recognized competence in the field of human rights.' Consideration is to be given to the utility of including 'some persons having legal experience.' In fact, all members of the Committee have had such experience in some capacity: private practice, the academy, public interest work, diplomacy, judicial

offices, or government. Note the characteristic provisions of Article 31(2) that consideration in elections 'shall be given to equitable geographical distribution of membership and to the representation of the different forms of civilization and of the principal legal systems.'

Under Article 28(3), all members are to be 'elected and shall serve in their personal capacity.' The UN term for such members is 'experts,' as opposed to the 'representatives' of states who sit on the UN Commission on Human Rights. If we link the references to 'personal capacity' to references to 'high moral character' and 'recognized competence' of members with an emphasis on their legal experience, the compelling inference is that Committee members are to act independently of the governments of their states, not under orders of their government—as does, for example, a state's representative (often with a rank of ambassador) on the UN Commission.

Generally this aspiration appears to have been realized, but in many contexts, 'independence' in the sense identified has been a relative rather than absolute concept. Consider members who are nationals of (and originally nominated for election by) states of an authoritarian character directed, say, by a single party, a military clique, or a personal dictator. Moreover, since membership on the Committee is a part-time business, members have continued to hold government (diplomatic and other) posts, again qualifying the degree of possible independence from their governments' positions on given issues.

The Committee meets for three sessions annually, each three weeks long, at UN headquarter in Geneva (twice) and New York. Working groups referred to below meet for one week prior to the start of each session. Since emoluments (effectively salaries) paid by the UN are low and the work is part-time, members hold jobs, closer to full time, and must fit the Committee's work into already busy schedules. Most meetings (the dominant exceptions being meetings considering 'communications' under the Optional Protocol or considering drafts of General Comments) are public, are poorly attended by outsiders and gather little press coverage. The ICCPR Committee has never enjoyed or indeed sought the publicity and notoriety of the UN Commission.

Decisions of the Committee should formally be by majority vote pursuant to Article 39(2). In fact, all decisions to date have been taken by consensus, although as a formal matter any member could demand a vote on any issue. This unbroken practice of reaching decisions by consensus (say, on decisions about the Committee's observations on a state's report, p. 505, *infra*, or about the text of a General Comment, p. 522, *infra*) meets with varying reactions from Committee members. Its advantages in avoiding the factional battles that have dominated much of the life of the UN Commission and in permitting the Committee to move ahead as a unit are obvious. Its undoubted if indeterminate historical effects on the action taken by the Committee are as obvious: compromise, the blunting of positions, the failure to take the bolder step.

Committee members have said that the practice has had the general effect of not permitting an individual member to hold out for a different position

from the large majority, but also has generated a lot of give-and-take while encouraging members holding minority views to go along with a clear trend or dominant opinion. In one activity, the writing of 'views' about communications discussed at p. 535, *infra*, Committee practice has allowed individual members to write dissenting opinions.

Like the UN Commission but not over so long a period (the Covenant entered into force only in 1976), the ICCPR Committee has witnessed vast changes in global politics. The ideological disputes and at times sharp discord that characterized the years of drafting of the Covenant and the Committee's first decade during the full sway of the Cold War have now become blunted or have disappeared. Nor has North–South controversy erupted as forcefully on the Committee as within the UN Commission with its less precise, more extensive mandate and broadly political character. Nonetheless, the earlier disputes and compromises, particularly those during the period of drafting of the ICCPR and Optional Protocol when the Committee's basic structure and functions were determined, have left a strong imprint on the Committee today. History's traces are indeed everywhere in the Committee's activities.

NOTE

Consider the following brief summaries by two authors of the nature of the earlier disputes and their continuing influence. The first is taken from Dominic McGoldrick, *The Human Rights Committee* (1991) at 13:

> 1.18 There was general agreement during the drafting that the primary obligation under the ICCPR would be implementation at the national level by States. There was continuing disagreement, however, on the question whether there should also be international measures of implementation. A minority of States, principally the Soviet bloc, insisted that there should be provisions to ensure implementation but that there should be no international measures of implementation. It was argued that such measures were a system of international pressure intended to force States to take particular steps connected with the execution of obligations under the Covenant. They were, therefore, contrary to the principle of domestic jurisdiction in article 2(7) of the United Nations Charter, would undermine the sovereignty and independence of States and would upset the balance of powers established by the UN Charter. Moreover, the establishment of petitions systems would transform complaints into international disputes with consequent effects upon peaceful international relations.
>
> 1.19 Against these views it was argued that the undertaking of international measures of implementation was an exercise of domestic jurisdiction and not an interference with it. International measures were essential to the effective observance of human rights, which were matters of international concern. However, even within those States that agreed that international measures were essential, there were significant differences of

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

. . .

1.21 The lengthy drafting process of the ICCPR largely coincided with the depths of cold war confrontation, the explosive development of notions of self-determination and independence, the accompanying political tensions of large scale decolonization, and the consequential effects of a rapidly altering balance of diplomatic power within the United Nations. In retrospect then it must be acknowledged that it was much more difficult to agree on the text of a Covenant containing binding legal obligations and limited measures of international implementation than it had been to agree upon the statement of political principles in the Universal Declaration in 1948. . . .

The second summary is by Torkel Opsahl, The Human Rights Committee, in Philip Alston (ed.), The United Nations and Human Rights (1992) at 371:

> . . . The draft Covenant prepared in 1954 by the Commission envisioned a quasi-judicial Human Rights Committee quite different in its powers and functions from that which actually came into existence. It was another twelve years before the General Assembly's Third Committee debated the proposed implementation provisions, at which time they were drastically altered. The majority was opposed to making obligatory the procedure for interstate communications. . . .
>
> All of the various positions, except that of dispensing with the Committee altogether, were taken into account by a formula worked out by the Afro-Asian group. According to this version, the Committee's only compulsory role would be to study and comment generally upon the reports of States Parties, a function originally intended for the Commission on Human Rights. Many of the details of this proposal were amended, which later caused doubts and disagreements about the proper role of the Committee in the reporting system. The functions relating to communications were made entirely optional, and arrangements providing for the consideration of individual complaints of violations were separated from the Covenant and put in the Optional Protocol. In other words, the result was a compromise between those States which favoured strong international measures and those which emphasized the primacy of national sovereignty and responsibility. As is inevitably the case with such compromises, many specific issues were left unresolved, perhaps inten-

tionally. As a result the subsequent evolution of the arrangements has had to be shaped by a continuing give-and-take within the Committee over many years.

QUESTION

'The lesson to be learned from the drafting of the ICCPR provisions bearing on the Committee's functions is straightforward. Those terse, inevitably ambiguous provisions are a product of international power politics—the cold war between East and West, the major powers resisting serious enforcement of the ICCPR, other states wanting a more significant international regime, and so on. Power shifts, issues shift, possibilities change. The Committee ought to interpret these provisions of the ICCPR in the light of today's context of politics, power and ideology, not in the light of the transient context at the time of drafting.'

Do you agree? Why, or why not? Keep the implications of this position in mind as you read the later materials in this chapter.

2. STATE REPORTING

COMMENT ON PERIODIC REPORTS OF STATES

Submission by states of reports to a treaty organ about their internal implementation of human rights obligations has now become a familiar requirement. But consider how revolutionary a practice this must have appeared at the time of the first proposals. As little as 60 years ago, it would have seemed nearly inconceivable that most of the world's states would periodically submit a report to an international body about their internal matters involving many aspects of relations between government and citizens, and then participate in a discussion about that report with members of an international body drawn from all over the world.

The critical provision is Article 40, requiring states to 'submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights.' Reports shall 'indicate the factors and difficulties, if any, affecting the implementation of the present Covenant.' The ICCPR Committee is to 'study' the reports and transmit its 'general comments' to the states parties.

Discussions of reports are public proceedings, though attended by few persons other than Committee members. The proceedings amount less to a systematic 'study' (to use the term of Article 40) than to an examination of the report with members speaking individually, making comments and posing questions. The representative of the state responds to comments and

questions. Reports are now presented by a state party every five years, though the Committee has exercised its authority to request reports at shorter intervals in cases such as national emergencies.

The requirements for reports and the processes for discussing them depend on the purposes that the reports and the discussions thereof are meant to serve. One can imagine two polar purposes: (1) confront the state with facts about it derived from other sources than the report, condemn the report if it fails to describe and account for violations, and possibly condemn the state as well, particularly for ongoing violations; *or* (2) view the report as an occasion for one of a series of ongoing discussions between the state and the Committee looking toward improvement of the human rights situation—as an occasion for 'constructive dialogue,' to use the term employed by a number of Committee members. There are many formulations in between, some of which are suggested in the two reports of Iraq and Austria that follow.

The General Comments at p. 522, *infra*, indicate some of the many problems that the Committee has encountered in the reports submitted to it: incomplete coverage, abstraction and formality that lead states to stress their unenforced constitutional or statutory provisions rather than to offer a realistic description of practices; great delays in filing reports. Delays have been particularly troublesome. As of May 1993, 65 states had failed to submit initial or periodic reports that had become due. The situation has continued to worsen.

One of the vexing problems for the Committee has been how to acquire knowledge about the reporting country independently of the report of that country. Otherwise, questions would be guesswork rather than informed. Committee members and the Committee as a whole lack a Secretariat and staff that might be helpful in acquiring such knowledge. They rely to an increasing extent on groups about which the Covenant is silent—principally NGOs that provide members with recent investigative reports and similar data. NGOs may attend the open discussions about reports but, unlike NGOs with consultative status before the UN Commission on Human Rights, they have no right of intervention in those proceedings and hence can't formally address the Committee members as a group.

The Covenant makes no provision about the way in which a state should prepare a report, but the Committee has issued guidelines. The reporting process, from preparation through Committee proceedings, gets little publicity. In fact, few states include groups of their citizens—interest groups, particular lobbies, ethnic or gender groups or indigenous peoples, human rights NGOs and so on—in the process of preparation. Little effort is made in a state to give publicity to the Committee's consideration of that state's report. The entire process is poorly understood by the informed public, and, absent a large scandal or exceptional mobilization of interest, public apathy may be unshakable.

The following excerpts from the discussion of periodic reports to the Committee of Iraq and Austria illustrate many characteristics of this process.

Be attentive to: (1) a comparison between the two discussions, with respect to attitudes of members of the Committee and the state representatives; (2) the types of issues raised by the discussions, from the relatively minute and specific to the global; (3) the degree to which the reports and discussions consider human rights instruments, institutions and regimes other than the ICCPR; and (4) the intended purposes and likely effects of these discussions.

REPORT OF IRAQ TO THE HUMAN RIGHTS COMMITTEE

Third Periodic Report under Article 40 of Covenant
UN Doc. A/46/40 (1991), Supp. No. 40, at 150
UN Doc. A/47/40 (1994), Supp. No 40, at 41.

[These excerpts from the Committee's consideration of Iraq's third periodic Report under Article 40 of the ICCPR cover two sessions of the Committee. Consideration began in the Committee's 42nd Session in 1991, and was completed in its 43rd Session later that year.]

620. The report was introduced by the representative of Iraq, who stressed his Government's willingness to pursue a frank and constructive dialogue with all United Nations bodies concerned with human rights, and especially with the Committee in its efforts to enhance the implementation of the Covenant.

. . .

622. Referring to the Committee's special request for information on the application of articles 6, 7, 9 and 27 of the Covenant, the representative pointed out that the recent Kuwait crisis had been the subject of several Security Council resolutions, which Iraq had accepted and would be implementing responsibly and with good will. Matters that were still pending before the Security Council could not be regarded as falling within the Committee's competence.

623. Members of the Committee, for their part, observed that by ratifying or acceding to the Covenant, States parties accepted the Committee's competence and could not evade their obligations under that instrument. The Committee had competence to monitor the implementation of the Covenant independently of any other obligations arising from Security Council recommendations and decisions or international instruments other than the Covenant. The Committee was well aware that the situation of Iraq was difficult. However, the root cause of those difficulties was the Iraqi intervention in Kuwait on 2 August 1990 and not the counter-action undertaken by the international community.

. . .

625. With reference to [the right to life], members of the Committee . . . wished to know whether Revolutionary Command Council Decree No. 840 of 1986, prescribing severe penalties for offences against the President, was still in force; how often and for what offences the death penalty had been imposed since the consideration of Iraq's second periodic report; how often the death penalty had been carried out, in particular with respect to minors; what legal remedies were available to persons sentenced to death; whether there had been any violations of the rules and regulations governing the use of firearms by the police and security forces and, if so, what measures had been taken to prevent their recurrence and what disciplinary and other measures had been taken against those found guilty; whether any investigations had been carried out in respect of alleged disappearances of individuals and killings of persons in the course of military operations by the Iraqi armed forces and, if so, with what results; and what compensation was being made available in respect of casualties and disappearances in Kuwait following the events of 2 August 1990 and for damages resulting from the deliberate setting on fire of oil wells.

626. Recalling also the Committee's concerns about events occurring in Iraq before the Gulf war, which constituted serious violations of the Covenant, particularly of its articles 6 and 14, members of the Committee requested information regarding the reported manufacture of nuclear weapons in Iraq and the alleged use of chemical weapons by the army in 1987 against the population of Halabja and about the current status of Mr. Jan Richtes, a foreigner who had been tried in Iraq in 1987. It was also observed that while the report referred to Iraq's full cooperation with the Special Rapporteur of the Commission on Human Rights on summary or arbitrary executions, it said nothing about the measures the Government had taken to prevent the practice of arbitrary and extrajudicial executions to which the Special Rapporteur had drawn attention. The report was also largely silent about measures adopted to ensure protection of the right to life in connection with the recent 'riots', although it was clear that the taking of hostages, the killing of hundreds of civilians in the Kirkuk region or the massive aerial bombardments in the Kurdish sector could not be considered as actions appropriate to dealing with riots. In the foregoing connection, information was requested on disciplinary and judicial measures that had been taken against those responsible for such acts. Concerning the large number of cases identified by the Working Group of the Commission on Human Rights on Enforced or Involuntary Disappearances that had not yet been elucidated, it was also asked whether appropriate investigations were under way.

. . .

628. In his reply, the representative of the State party said that Revolutionary Command Council Decree No. 840 of 1986 was still in force but was undergoing review by a high-level committee. Criminal courts were obliged to report to the Public Prosecutor all cases in which the death penalty had been imposed for automatic transmission to the Court of Appeal. Prisoners under sentence

could also appeal directly. Death sentences could not be implemented without the issuance of a Decree of the Republic, and sentenced persons also had the right of appeal to the President of the Republic. In the uncertain situation following the end of the Gulf war, Iraq had been obliged to use the armed forces to put down insurrections and maintain the sovereignty of the State. Disappearances of individuals and killings of persons were mainly the work of rioters. Some persons who had been reported to have disappeared, had in fact fled the country.

. . .

631. With regard to the cases of involuntary disappearance that had not been cleared up, the representative said that that matter concerned primarily a tribe in northern Iraq composed of more than 2,300 persons who had collaborated with Iran during its occupation of Iraqi territory and who had left the territory with the occupation forces.

632. The representative further denied that the Iraqi armed forces had used chemical weapons against civilians. . . .

. . .

636. Members of the Committee also referred to the four judgements concerning acts of torture mentioned in the third periodic report of Iraq and to detailed information on the practice of torture in Iraq furnished by the Special Rapporteur on Torture of the Commission on Human Rights, by Amnesty International and by other international organizations. Such allegations could not be refuted by the Iraqi authorities; the members asked whether all the complaints concerning acts of torture had really been investigated and, if so, with what results. They also asked how many Iraqi soldiers had been tried for rape during the occupation of Kuwait; whether Iraq applied the United Nations Standard Minimum Rules for the Treatment of Prisoners; whether representatives of governmental and non-governmental organizations had been permitted to visit detention centres; and whether any persons had died following torture. They also asked what specific measures had been taken to prevent maltreatment in places of detention; whether Iraqi legislation included any provision enabling the State to take action *ex officio* in cases of torture; and whether the Iraqi Government would be prepared to conduct impartial investigations with the assistance of international experts.

637. In his reply, the representative of the State party referred to the provisions of the Iraqi Constitution and Penal Code designed to prohibit and punish any act of torture and to the criminal and civil procedures laid down to enable victims of torture to claim moral or material compensation. Investigations were conducted by the courts, which received complaints of torture and which took the necessary steps within their competence against the offenders. The Attorney-General played an essential role: it was his responsibility to institute proceedings on any information he received concerning acts of torture and to follow up the matter until judgement was passed. . . .

638. In addition, directive No. 4 of 1988 required the Department of Public Prosecution to investigate prison conditions in order to verify that they conformed to the regulations. The Department's representative saw to it that physicians visited detention centres. He received complaints from detainees, whom he met in private and he instituted criminal proceedings against those responsible for ill-treatment or torture.

. . .

[Questions of members about liberty and security of the person have been omitted.]

643. In his reply, the representative of the State party referred to the provisions of the Iraqi Constitution and Penal Code concerning the conditions for lawful arrest and the penalties for unlawful arrest. As soon as he was arrested, a person was entitled to contact relatives and his counsel. The maximum period of detention in custody was 24 hours for offences punishable by three years' imprisonment or less; a detainee could be released on bail or surety. The period of detention in custody could be extended by the court. Bail was not granted where crimes which carried the death penalty were involved. Appeals against all judicial decisions relating to arrest lay with the competent regional criminal court.

. . .

648. Referring to Shiites currently in the marshes, who had been bombed and prevented by brutal means from obtaining assistance, members asked whether the United Nations and Amnesty International would be allowed to have access to them and to assist them. They also wished to know how many members of the Executive Council, established in 1989, were Kurdish and how many belonged to other groups; to what extent the Council was independent in governing the Autonomous Region; what positive measures had been taken to protect the fundamental rights of Kurdish, Shiite and Assyrian minorities; and what the situation was with regard to holy places in the towns that had been subjected to heavy bombardment.

. . .

650. The representative further stated that the State supported the right of persons belonging to minorities to enjoy their own culture by publishing books and by broadcasting on radio and television in the local languages. The Kurdish language was the official language in the Autonomous Region of Kurdistan, and a major university existed in the region. According to the Iraqi Constitution, Kurds were considered not as a minority but as a people on an equal footing with the Arab people. Members of the Executive and Legislative Councils were elected by free and secret ballot. Negotiations between Kurdish representatives and the authorities in Baghdad were proceeding well and

would reach a successful conclusion. Kurds in Iraq had political and cultural rights that did not exist for Kurds in other countries. The Iraqi Constitution enshrined the principle of non-discrimination, and the principle applied to religious matters.

651. Members of the Committee said that while they had hoped that a constructive dialogue between the Committee and Iraq would be possible, unfortunately that had not proven to be the case. Rather, the representative of the State party had engaged in a kind of monologue or 'stonewalling' and had sought constantly to evade certain issues and to avoid responding to the legitimate questions posed by members of the Committee. In the latter connection, they referred to questions they had raised regarding such important issues as disappearances, unlawful executions, including the execution of minors, torture and the existence of political prisoners, which had not received clear replies or had remained unanswered.

652. . . . Members also disagreed with the implication in the report that the difficult situation concerning human rights in the country was due primarily to the Gulf war and to the sanctions that had been adopted against Iraq by the international community, noting in that connection the existence in Iraq of reliably attested human rights violations, including summary executions and arbitrary detention, well before the invasion of Kuwait on 2 August 1990.

653. Members of the Committee also expressed deep concern with regard to the existence in Iraq of special courts, as well as death sentences without any possibility of appeal; the lack of protection of freedom of expression; the situation of the Shiites in the country; and the repressive action of the Government, particularly against the Kurds and the Shiites. Indeed, it was their overall impression that a situation of serious human rights violations that had already been very disturbing in 1987 had persisted and worsened throughout the intervening period.

. . .

655. The representative of the State party reaffirmed his Government's desire to cooperate as fully as possible with the Committee even though he could not accept the criticism that inadequate replies had been given to the questions concerning protection of the right to life.

. . .

[The following excerpts are taken from the completion of consideration by the Committee of Iraq's third periodic report in the following 43rd session of the Committee.]

183. In his introductory statement, the representative of the State party drew the Committee's attention to a number of important developments in the field of human rights that had occurred in his country since the consideration of

the first part of the report. Much of the legislation objected to by the Committee had been repealed. Decree No. 416 of the Revolutionary Command Council had thus been suspended, the Revolutionary Court had been abolished and a decree had been adopted granting amnesty to persons convicted of political crimes, from which 187 persons had benefited. Furthermore, a law on political parties had come into effect on 16 September 1991. A Code of Human Rights, setting out provisions of international human rights instruments as well as those of Iraqi legislation, was in preparation, which would serve as a basis for incorporating such international standards into domestic law. Lastly, there was a continuous dialogue between the Government and the Kurds to seek an improved formula for greater autonomy for Iraqi Kurdistan.

. . .

185. Observing that economic, social and cultural rights and civil and political rights were closely interrelated, the representative said that the current blockade of Iraq was posing a danger to the right of people, particularly children, the elderly and the sick, to health, food and other basic needs. Furthermore, the shortage of medicines and pesticides had increased the incidence of disease. Cases of typhoid, hepatitis and cholera had sharply increased and infant mortality had risen from 5 to 21 per 1,000 between August 1990 and August 1991. Those circumstances had to be taken into account by the Committee in analysing the situation in Iraq. Since it was impossible to enjoy civil and political rights while being denied economic, social and cultural rights, the economic blockade should be lifted so that the Iraqi people could enjoy all their human rights.

. . .

187. In addition, members wished to know what concrete measures had been taken in order to attain the Government's objectives of reconstruction, the establishment of democracy and a multiparty system, freedom of association, freedom of the press and the supremacy of law; whether the Covenant had specifically been taken into consideration in drafting the new Constitution and the law on political parties; whether the Covenant had been incorporated into Iraqi law and could be invoked before the courts; and what the remaining restrictions were under the state of emergency. . . .

. . .

189. In his reply, the representative of the State party explained that, since the submission of the report, the law on political parties had been adopted and that the proposed new Constitution was to be submitted for approval in a referendum once the National Assembly had completed its discussion on it. Under a general rule embodied in a law, international instruments were considered as an integral part of domestic legislation. The purpose of drafting a

code of human rights was precisely to clarify that point for those who applied the law and to remedy shortcomings in national legislation that might be inconsistent with international instruments. The Covenant was now considered to be part of Iraqi legislation and its provisions could be invoked by private individuals before the courts. . . .

. . .

[Questions of Committee members about political participation and parties have been omitted.]

212. In his reply, the representative of the State party explained that Law No. 30/1991 on political parties had been promulgated and was now in force. That law guaranteed the equality of all parties, which had full freedom to establish themselves and to publish their literature, and would lead to an increase in the number of political parties and hence to broader participation by Iraqi citizens in public life. The new Constitution, when promulgated, would certainly be in line with the principles of that Act and would provide an appropriate framework for the encouragement of a multiparty system and consequently a diversity of ideas and opinions. Although nothing was yet known as to the place that was to be attributed under the new Constitution to the party in power, it would be inconceivable for the Constitution to make a distinction between the various political movements. . . .

Concluding observations by individual members

213. Members of the Committee expressed their appreciation to the representative of the State party for his cooperation in presenting the third periodic report of Iraq and for having engaged in an open dialogue with the Committee. Although the report had been somewhat overdue, great efforts had been made in difficult circumstances to submit it on time. Information had been updated as requested and efforts had been made to provide the Committee with answers to its questions. Furthermore, a certain degree of progress in the implementation of the Covenant had been noted, including drafting a code of human rights, abolishing the Revolutionary Court, moves towards permitting the establishment of political parties, formulating a new Constitution and adopting an amnesty law. Iraq was thus making an endeavour to bring its domestic law into line with the Covenant and was taking some steps towards pluralism and democracy.

214. While welcoming those measures, members regretted that many of their questions had not received satisfactory replies and felt that the rights specified in the Covenant were neither adequately protected nor properly implemented. Serious concern was expressed, in particular, regarding the treatment of Kurds in northern Iraq and of Shiites in the south. . . .

REPORT OF AUSTRIA TO HUMAN RIGHTS COMMITTEE

Second Periodic Report under Article 40 of Covenant
UN Doc. A/47/40 (1994), Supp. No. 40, at 26.

[The following excerpts are taken from consideration by the Human Rights Committee at its 43rd Session in 1991 of the second periodic report by Austria.]

81. The report was introduced by the representative of the State party, who drew members' attention, in particular, to the fact that the Second Optional Protocol aiming at the abolition of the death penalty was currently before the Austrian parliament, with ratification expected in early 1992.
82. With reference to that issue, members asked what measures Austria had taken to give effect to the rights recognized in the Covenant and whether there were any difficulties in that regard. Members also inquired about the remedies available to individuals whose rights under the Covenant had been violated. Concerning the promotion of human rights, they wished to know, in particular, whether a commission, ombudsman or similar institution would be established, as well as about measures taken to increase public awareness of the Covenant and the Optional Protocol.
83. Members were concerned about the status of the Covenant, given that Austria had incorporated into its domestic law the European Convention on Human Rights, but not the Covenant. They wondered whether those parts of the Covenant that were not reflected in the European Convention, if not the Covenant in its entirety, could be incorporated into Austria's domestic law. In addition, members wished to know whether there was any governmental machinery for monitoring legislation to ensure its compatibility with Austria's international obligations under the Covenant; how complaints would be handled in the light of the provisions of the Optional Protocol;
84. In his reply, the representative of the State party said that the Covenant, though not an integral part of the domestic law, was recognized as an instrument prescribing obligations under international public law. Fundamental human rights in Austria had been guaranteed since the enactment of the Basic Law in 1867 and the ratification of the European Convention on Human Rights, which in 1964 was made part of domestic constitutional law. Notwithstanding the fact that neither a judge nor an administrative authority was required to apply the provisions of the Covenant directly, there were no difficulties in giving effect to the rights recognized in it. . . .

. . .

86. The Government had no intention to set up a commission on human rights or a special agency to promote human rights. However, the Office of the Ombudsman had been in existence since 1976 and all government institutions were ready to provide information on human rights upon request. While the

public was less aware of the Covenant than of the European Convention on Human Rights, it was generally aware of its provisions and of those of the Optional Protocol. The Austrian Government believed that the provisions of the Basic Law and of the European Convention on Human Rights, as amended by subsequent protocols, would ensure compliance with the provisions of the Covenant. Furthermore, the text of every statute or decree was scrutinized in the light of the fundamental rights and freedoms provided for in the Covenant, the European Convention and domestic law. To ensure that any person whose rights or freedoms were violated would have effective remedies, Austria was prepared to change its domestic legislation to provide for new remedies or to allow the use of existing remedies, if regarded by the Human Rights Committee as suitable, in the same manner as it had done in respect of the decisions of the European Court on earlier occasions.

. . .

88. In connection with that issue, members wished to know how the Austrian Constitution guaranteed the rights provided for in article 2 (1) of the Covenant; whether women received equal pay and what measures had been taken to promote women's participation in the various sectors of society; what was the proportion between the sexes in educational institutions; how the special Federal Constitutional Act against racial discrimination had been applied in practice; . . .

89. In his reply, the representative said that discrimination was prohibited by the Constitution. Since virtually all the rights contained in the Covenant were also embodied in the European Convention, which had become a part of constitutional law, Austrian law necessarily contained provisions similar to those of the Covenant.

. . .

91. The figures for 1988–1989 showed that about 50 per cent of children attending day-care centres and primary and secondary schools were female, and that one third of all university students were female. A report on the measures taken to promote the participation of women in the life of the country would be brought to the attention of the Committee as soon as it was completed. On the issue of equal pay, the representative acknowledged that such equality had not been guaranteed in Austria. The Government had therefore established an Equal Pay Committee and it was expected that matters would improve slowly.

. . .

[Questions of Committee members about the right to life have been omitted.]

95. In his reply, the representative said . . . [that 'a]ctive' euthanasia was regarded as illegal and contrary to medical ethics. Attempted suicide had

ceased to be an offence, but helping a person to commit suicide was still punishable. Termination of pregnancy during the first three months was not punishable by law. The Code of Criminal Procedure had been amended in 1987 with a view to imposing greater penalties for pollution-related offences, but discussion of that sensitive issue was still continuing. A system under which cases of AIDS were registered had been introduced and the principle of anonymity was strictly respected. Homosexual prostitution had also been decriminalized to enable the application of preventive measures and to fight AIDS more effectively. It was also planned to provide drug addicts with substitute products.

96. With reference to that issue, members of the Committee wished to know whether there had been any allegations of violations of obligations under article 7 of the Covenant and whether statistics regarding ill-treatment of detainees were available. Noting that torture had been practised in Austria, members requested information on the measures that had been taken to prevent ill-treatment, on the competent investigative authorities and complaints procedures, and concerning the main problems faced by the prison commissions and how such problems had been addressed. . . .

97. In addition, members wished to know whether there was any procedure providing for the review of compulsory confinement decisions; whether the European Committee for the Prevention of Torture had detected any cases of violations of the provisions of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment; how soon after arrest a detainee was allowed to contact counsel; . . .

98. Replying to the questions raised by members, the representative confirmed that there had been allegations of violations of obligations under article 7 of the Covenant. In 1989 a decree was issued, ordering that justifiable allegations should be the subject not only of a police inquiry, but also of a thorough investigation by an independent examining magistrate. Whilst it was too early to provide statistics on the results of the inquiries (a decree stating that statistics should be kept of allegations of ill-treatment during detention was issued in May 1991), the representative referred to a report published by Amnesty International in 1990 in which 14 individual cases had been mentioned. Even before the publication of that report, a decree containing strict orders concerning the rights of detainees to communicate with counsel and the possibility of warning third parties of the arrest had been given. . . .

. . .

100. On the issue of admissibility of evidence obtained through ill-treatment, the representative explained that the Austrian parliament's declaration, made when the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was ratified, had in effect prohibited the use of statements obtained by torture. The Austrian Government was aware that the Code of Criminal Procedure would have to be amended in the light of article 15 of the European Convention on Human Rights so as to provide

explicitly for the prohibition of the use as evidence of confessions obtained through ill-treatment. In the view of the Austrian authorities, article 15 of the European Convention was even more restrictive than article 7 of the Covenant.

. . .

103. In response to members' queries as to whether the maximum period of pretrial detention could be reduced from five days to three days, the representative said that the Government intended to amend the Code of Criminal Procedure in order to reduce the maximum from five to four days, thus bringing the practice into line with the decisions of the European Court of Human Rights. . . .

. . .

Concluding observations by individual members

120. Members of the Committee expressed warm appreciation for the high quality of the report which was informative and straightforward. They also welcomed the candor and competence of the State party representatives in answering the Committee's questions, which had made for a useful and constructive dialogue.

121. While recognizing Austria's traditions and the Government's efforts to promote respect for human rights, members expressed continuing concern about a number of areas where, in their view, further improvements were needed. One such concern related to the status of the Covenant in relation to Austrian law. . . .

122. Other concerns raised by members related to such matters as the independence of the administrative courts; the inadequacy of protection extended to detainees at the interrogation stage; the impartiality of the mechanisms for investigating cases involving alleged torture and ill-treatment by the police: . . .

123. The representative of the State party said the dialogue had been extremely interesting and thanked the Committee for the warm welcome it had accorded to his delegation.

. . .

COMMENT ON CHANGING PRACTICE OF THE COMMITTEE FOR REPORTS

Consistent with the ICCPR Committee's long-standing practice of not expressing a collective review about a report, the reports of Iraq and Austria conclude with a section entitled 'Concluding observations by individual members.' Those observations are then individual. In 1992, the Committee reconsidered this issue and decided that in future discussions of reports

> comments would be adopted reflecting the views of the Committee as a whole at the end of the consideration of each State Party report. That would be in addition to, and would not replace, comments made by members. . . . Such comments . . . were to provide a general evaluation of the State Party report and of the dialogue with the delegation and to underline positive developments . . . , factors and difficulties affecting the implementation of the Covenant, as well as specific issues of concern. . . . Comments were also to include suggestions and recommendations formulated by the Committee. . . . UN Doc. A/47/40 (1994), at 18, para. 45.

Consider an early instance of this important change in practice in the Committee's consideration of the second periodic report of Peru. UN Doc. A/47/40 (1994), at 69. It concludes with a section entitled 'Comments of the Committee.' The introduction to that section states that the Committee 'regrets that its concerns have not been adequately addressed' and 'notes with disappointment' that promised answers had not been given. After stating that it 'welcomes' certain developments, the Committee observes that the assumption of power by the Peruvian military and the declaration of a state of emergency have 'rendered ineffective the implementation' of certain rights under the Covenant.

> The Committee expresses its deep concern about the terrorism that appears to be part of daily life in Peru. The Committee condemns the atrocities perpetrated by insurgent groups. . . . Nonetheless, the Committee also censures excessive force and violence used by the military, the paramilitary, the police and armed civilian groups. . . . The Committee considers that combating terrorism with arbitrary and excessive State violence cannot be justified under any circumstances.
>
> [With respect to the detention of opposition political and labor leaders and journalists], the Committee does not find the reasons for such detentions convincing. Nor can the unavailability of certain rights to those and other persons . . . be legally justified. The Committee also observes with concern that many people including women and children are held for prolonged periods before trial in police cells. That is not compatible with the rights guaranteed under article 9 of the covenant. . . .

These collective comments, drafted by a rapporteur and then adopted by the Committee as a whole, conclude with the hope 'that the democratic system will be re-established as soon as possible.'

The Committee's collegial comments on Japan's third periodic report, CCPR/C/79/Add.28, 5 Nov. 1993, included several interesting observations. Para. 3 complimented the Japanese Government for giving 'wide publicity' to its report, thus enabling many NGOs 'to become aware of the contents of the report and to make known their particular concerns.' In para. 4, the Committee took note of difficulties experienced by the Government in implementing the ICCPR due to social factors like 'the traditional concept of the different roles of the sexes, the unique relationship between individuals and

the group they belong to, and the unconscious particularities due to the homogeneity of the population.' It went on in para. 10 to express 'concern' at continuing gender discrimination in employment. The comments gave strong attention in para. 11 to 'the discriminatory legal provisions concerning children born out of wedlock.' In a section of the comments entitled 'Suggestions and Recommendations,' the Committee 'recommends that Japan takes measures toward the abolition of the death penalty.' (In fact, spurred by the provisions of the Second Optional Protocol to the ICCPR, effective in 1991 and with 25 states parties as of January 1995, the Committee has shown increasing interest in states' use of the death penalty.)

In its comments on Iran's second periodic report, CCPR/C/79/Add.25, 3 August 1993, the Committee in para. 9 'condemned' the death sentence pronounced without trial against the foreign author Salman Rushdie for having written a book viewed as blasphemous toward Islam. It spoke specifically to various forms of discrimination against women:

> 13. The Committee observes that the persistence and extent of discrimination against women is incompatible with the provisions of article 3 of the Covenant and refers, in particular, to the punishment and harassment of women who do not conform with a strict dress code; the need for women to obtain their husband's permission to leave home; their exclusion from the magistracy; discriminatory treatment in respect of the payment of compensation to the families of murder victims, depending on the victim's gender and in respect of the inheritance rights of women; prohibition against the practice of sports in public; and segregation from men in public transportation.

The comments on the second periodic report of Togo, CCPR/C/79/Add.36, 10 August 1994, included the following observations under the heading 'Suggestions and Recommendations':

> 18. The Committee deems it necessary that specific measures be taken to ensure that human rights are respected by the military and security forces. Vigorous action should be taken to ensure that persons closely associated with human rights abuses do not re-enter the police, army or security forces. Urgent steps should be undertaken to ensure that the composition of the army equitably represents various ethnic groups of the Togolese population, including currently under-represented minority groups and that the army remains subject to the control of the elected civil government.

Other new developments about reports

The ICCPR Committee submitted to the 1993 World Conference on Human Rights in Vienna several documents on its work and plans. One such

document dealt with reports.[1] It reaffirmed that the purpose of the meetings in which reports were discussed with state representatives was to 'establish a constructive dialogue between the Committee and the State party,' and summarized several recent developments in the Committee's approach to reports.

1. The Committee listed the several times it had requested states parties to submit reports urgently about a new situation such as declarations of emergency or widespread violence, generally within three months of the request. The states included Iraq, Peru and parts of the former Yugoslavia.
2. 'The Committee has also given its support to the Secretary-General's proposal that ways should be explored of empowering human rights bodies to bring massive human rights violations to the attention of the Security Council.'
3. In cases where it was unable to obtain required information, and to learn what had happened with respect to its recommendations in its concluding comments, the Committee was considering requesting the state party concerned 'to agree to receive a mission, consisting of one or two members of the Committee, with a view to collecting information the Committee needs to carry out its functions under the Covenant. Such a decision would only be taken after the Committee had satisfied itself that no adequate alternative approach was available . . . .'

NOTE

The Committee's proposal in para. 2 above to bring 'massive human rights violations to the attention of the Security Council' is relevant to the discussion in the Comment on p. 1042, *infra* on of recent decisions by the Security Council about conflicts involving such massive violations.

QUESTIONS

1. Based on these illustrations, how do you evaluate the Committee's purpose of achieving 'constructive dialogue' with the reporting state? With what types of states is it most likely to realize this goal? Indeed, how would one know whether the discussion of the state report had been 'constructive'?

[1] Work of the Human Rights Committee under article 40 of the Covenant on Civil and Political Rights, UN Doc. A/48/40 (1993), Part I, Annex X at 218.

2. If you were a Committee member reviewing a state report, questioning the state representative, and then helping to prepare the Committee's collective comments about the report, how would you decide what the state and others had done, what the facts were? In the discussion of the Iraq report, there were stark differences between the state representative's account of events and what Committee members believed. How did the members 'know'? Did they look to investigations by other institutions? What standard would they have applied in the event of controverted facts—a preponderance of the evidence? What evidence? In para. 652, Committee members referred to 'reliably attested' violations. Attested by whom, by what institutions? Compare in these respects how the UN Commission on Human Rights might gather facts necessary to support, say, a condemnatory resolution.

3. How do you react to the Committee's thoughts (in para. 3 at the end of the preceding Comment) about sending a mission?

4. Para. 651 in the Iraq report is an atypically strong, direct, critical expression by Committee members of their reactions to a reporting state. Why do you think such strong language appeared with respect to Iraq? How do you understand the more typical, milder language of paras. 213–14 at the end of the next discussion session?

5. Consider the different tone of the discussion about the Austrian report, including the members' concluding observations. From the perspective of advancing observance of human rights, which of the reports and discussion about Iraq or Austria is the more helpful, the more 'constructive'? What does your answer suggest about the likelihood that the processes of treaty organs like the ICCPR can bring about structural change in states that commit serious and systematic human rights violations?

6. Do you think that the Committee's new procedure of formulating comments of the Committee as a whole is a useful change? Will it promote 'constructive dialogue'?

7. The Committee comments addressed to Japan, Iran and Togo include a range of matters. Is the Committee going beyond strict 'application' of the ICCPR to these state's report and conduct? Is it developing, elaborating, creatively interpreting the terms of the ICCPR, and viewing its own role as a treaty organ more spaciously? Illustrate your answers.

3. GENERAL COMMENTS

EXCERPTS FROM THE COMMITTEE'S GENERAL COMMENTS

The text of the ICCPR is terse about what is intended. It invites to diverse interpretations. Article 40, after setting forth the undertaking of states to submit periodic reports to the Committee, provides in para. 4 that the Committee 'shall study the reports' submitted by states and 'shall transmit its reports, and such *general comments* as it may consider appropriate' to the states (emphasis added). Under para. 5, states 'may submit to the Committee observations on any comments that may be made' pursuant to para. 4.

So many possibilities existed for the elaboration of this opaque text, depending on how the Committee answered questions like: Are the general comments to be directed only to states' reports? Are they to vary with the report, addressing concretely this or that problem of this or that state? Alternatively, are they to remain truly 'general' in the sense that they do not pertain exclusively to one state but rather address issues of general relevance to all or many states? Are they to deal only with the processes of reporting or also with substantive provisions of the Covenant? Are they to elaborate those substantive provisions?

Within what framework would the Committee seek to answer such questions—clear meaning of the text, *travaux préparatoires* of the Covenant, major purposes of the Covenant, evolving consensus among members of the Committee or among states parties to the Covenant? Partial answers to these questions—of course, the answers are never 'final' but always subject to change over time—have emerged gradually, some of them of critical importance to the entire exercise. For example, it was early decided that a 'general comment' could not be addressed to a specific state but had to speak with a certain generality.

This Comment reviews General Comments (GCs) of the Committee from several perspectives: their functions, what they reveal about the Committee's understanding of the Covenant, the significance of GCs for the elaboration of the Covenant and for the human rights movement in general. It would be helpful to reread the articles of the Covenant that are referred to when you read the excerpts below from several GCs.

The GCs up to 1992 are set forth in UN Doc. HRI/GEN/1, 4 Sept. 1992. 'Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies,' at 1–34. Page references below are to this compilation. The GCs up to 1993 appear in 1 Int. Hum. Rts. Reports (No. 2, 1994). Later GCs on the question of reservations to ratifications of the ICCPR and on Article 27 are set forth at pp. 774 and 992, *infra*.

1. Aid to states in filing reports under Article 40

The most prominent theme since the first General Comment (GC) of 1981 has been instructions to states about the reports to be filed under Article 40. The introduction to UN Doc. CCPR/C/21/Rev.1, 19 May 1989, explains the purposes of GCs as follows:

> The Committee wishes to reiterate its desire to assist States parties in fulfilling their reporting obligations. These general comments draw attention to some aspects of this matter but do not purport to be limitative or to attribute any priority between different aspects of the implementation of the Covenant. . . .
>
> The Committee so far has examined 77 initial reports, 34 second periodic reports and, in some cases, additional information and supplementary reports. . . .
>
> The purpose of these general comments is to make this experience available for the benefit of all States parties in order to promote their further implementation of the Covenant; to draw their attention to insufficiencies disclosed by a large number of reports; to suggest improvements in the reporting procedure and to stimulate the activities of these States and international organizations in the promotion and protection of human rights. . . .

* * * * *

GC No. 2. 'Reporting Guidelines' (1981) (p. 2) provides in para. 3:

> 3. The Committee considers that the reporting obligation embraces not only the relevant laws and other norms relating to the obligations under the Covenant but also the practices and decisions of courts and other organs of the State party as well as further relevant facts which are likely to show the degree of the actual implementation and enjoyment of the rights recognized in the Covenant, the progress achieved and factors and difficulties in implementing the obligations under the Covenant.

* * * * *

A number of GCs underscore the Committee's frustration with the inadequacy of many reports. For example, *GC No. 13, 'Article 14'* (1984) (p. 13), concerned with procedures for a fair trial, states in para. 3:

> 3. The Committee would find it useful if, in their future reports, States parties could provide more detailed information on the steps taken to ensure that equality before the courts, including equal access to courts, fair and public hearings and competence, impartiality and independence of the judiciary are established by law and guaranteed in practice. In particular, States parties should specify the relevant constitutional and legislative

texts which provide for the establishment of the courts and ensure that they are independent, impartial and competent, in particular with regard to the manner in which judges are appointed, the qualifications for appointment, and the duration of their terms of office; the condition governing promotion, transfer and cessation of their functions and the actual independence of the judiciary from the executive branch and the legislative.

* * * * *

GC No. 16, 'Article 17' (1988) (p. 20), concerned with privacy, states in part:

2. In this connection, the Committee wishes to point out that in the reports of States parties to the Covenant the necessary attention is not being given to information concerning the manner in which respect for this right is guaranteed by legislative, administrative or judicial authorities, and in general by the competent organs established in the State. In particular, insufficient attention is paid to the fact that article 17 of the Covenant deals with protection against both unlawful and arbitrary interference. That means that it is precisely in State legislation above all that provision must be made for the protection of the right set forth in that article. At present the reports either say nothing about such legislation or provide insufficient information on the subject.

. . .

6. The Committee considers that the reports should include information on the authorities and organs set up within the legal system of the State which are competent to authorize interference allowed by the law. It is also indispensable to have information on the authorities which are entitled to exercise control over such interference with strict regard for the law, and to know in what manner and through which organs persons concerned may complain of a violation of the right provided for in article 17 of the Covenant. States should in their reports make clear the extent to which actual practice conforms to the law. State party reports should also contain information on complaints lodged in respect of arbitrary or unlawful interference, and the number of any findings in that regard, as well as the remedies provided in such cases.

* * * * *

At times, particularly with respect to provisions of the Covenant that are open-textured and that have been further developed in later human rights declarations or treaties, the GCs develop and clarify the substantive content of an article by specifying the particular information that states are to provide about its implementation. Consider, for example, *GC No. 17, 'Article 24'* (1989) (p. 22), dealing with rights of children. Paras. 5 and 6 make particular requests:

> 5. . . . Reports by States parties should indicate how legislation and practice ensure that measures of protection are aimed at removing all discrimination in every field, including inheritance, particularly as between children who are nationals and children who are aliens or as between legitimate children and children born out of wedlock.
> 6. . . . However, since it is quite common for the father and mother to be gainfully employed outside the home, reports by States parties should indicate how society, social institutions and the State are discharging their responsibility to assist the family in ensuring the protection of the child. . . . The Committee considers it useful that reports . . . provide information on the special measures of protection adopted to protect children who are abandoned or deprived of their family environment in order to enable them to develop in conditions that most closely resemble those characterizing the family environment.

* * * * *

In a similar vein, note the range of information required by para. 9 of GC *No. 18, 'Non-discrimination'* (1989) (p. 25):

> 9. Reports of many States parties contain information regarding legislative as well as administrative measures and court decisions which relate to protection against discrimination in law, but they very often lack information which would reveal discrimination in fact. When reporting on articles 2(1), 3 and 26 of the Covenant, States parties usually cite provisions of their constitution or equal opportunity laws with respect to equality of persons. While such information is of course useful, the Committee wishes to know if there remain any problems of discrimination in fact, which may be practised either by public authorities, by the community, or by private persons or bodies. The Committee wishes to be informed about legal provisions and administrative measures directed at diminishing or eliminating such discrimination.

* * * * *

Finally, note the degree of detail about a system of implementation of a norm that is requested in para. 6 of *GC No. 21, 'Article 10,'* (1992) (p. 32), on conditions of detention.

> States parties should include in their reports information concerning the system for supervising penitentiary establishments, the specific measures to prevent torture and cruel, inhuman and degrading treatment, and how impartial supervision is ensured.

2. Restatement, interpretation and elaboration of provisions of the Covenant

Consider the purposes served by the following excerpts from GCs. Compare those excerpts from the (frequently lengthy) GCs with the terse text of the articles subjected to commentary in order to consider whether the GCs merely restate the articles or, on the other hand, whether they elaborate or interpret the relevant provision in a significant way.

GC No. 4, 'Article 3' (1981) (p. 3) deals with gender equality. Note that the ICCPR as a whole—unlike, say, the Convention on the Elimination of all Forms of Discrimination against Women, Chapter 13, *infra*—makes no reference to affirmative action. Note also, in relation to para. 3, the phrase in Article 3, 'all civil and political rights set forth in the present Covenant.' There is a similar phrase in Article 2.

> 1. Article 3 of the Covenant requiring, as it does, States parties to ensure the equal right of men and women to the enjoyment of all civil and political rights provided for in the Covenant, has been insufficiently dealt with in a considerable number of States reports and has raised a number of concerns, two of which may be highlighted.
> 2. Firstly, article 3, as articles 2(1) and 26 in so far as those articles primarily deal with the prevention of discrimination on a number of grounds, among which sex is one, requires not only measures of protection but also affirmative action designed to ensure the positive enjoyment of rights. This cannot be done simply by enacting laws. Hence, more information has generally been required regarding the role of women in practice with a view to ascertaining what measures, in addition to purely legislative measures of protection, have been or are being taken to give effect to the precise and positive obligations under article 3 and to ascertain what progress is being made or what factors or difficulties are being met in this regard.
> 3. Secondly, the positive obligation undertaken by States parties under that article may itself have an inevitable impact on legislation or administrative measures specifically designed to regulate matters other than those dealt with in the Covenant but which may adversely affect rights recognized in the Covenant. One example, among others, is the degree to which immigration laws which distinguish between a male and a female citizen may or may not adversely affect the scope of the right of the woman to marriage to non-citizens or to hold public office.

* * * * *

GC No. 6, 'Article 6' (1982) (p. 5) and *GC No. 14, 'Article 6'* (1984) (p. 17) both address the right to life, a phrase as central to the human rights corpus as it is elliptic and open to a range of interpretations. Consider the following excerpt from *GC No. 6:*

> 1. The right to life enunciated in article 6 of the Covenant has been dealt with in all State reports. It is the supreme right from which no derogation

is permitted even in time of public emergency which threatens the life of the nation (art. 4). However, the Committee has noted that quite often the information given concerning article 6 was limited to only one or other aspect of this right. It is a right which should not be interpreted narrowly.

. . .

5. Moreover, the Committee has noted that the right to life has been too often narrowly interpreted. The expression 'inherent right to life' cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures. In this connection, the Committee considers that it would be desirable for States parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics.

* * * * *

Compare the preceding provisions from the earlier GC with *GC No. 14*, issued two years later:

3. While remaining deeply concerned by the toll of human life taken by conventional weapons in armed conflicts, the Committee has noted that, during successive sessions of the General Assembly, representatives from all geographical regions have expressed their growing concern at the development and proliferation of increasingly awesome weapons of mass destruction, which not only threaten human life but also absorb resources that could otherwise be used for vital economic and social purposes, particularly for the benefit of developing countries, and thereby for promoting and securing the enjoyment of human rights for all.
4. The Committee associates itself with this concern. It is evident that the designing, testing, manufacture, possession and deployment of nuclear weapons are among the greatest threats to the right to life which confront mankind today. This threat is compounded by the danger that the actual use of such weapons may be brought about, not only in the event of war, but even through human or mechanical error or failure.

. . .

6. The production, testing, possession, deployment and use of nuclear weapons should be prohibited and recognized as crimes against humanity.
7. The Committee accordingly, in the interest of mankind, calls upon all States, whether Parties to the Covenant or not, to take urgent steps, unilaterally and by agreement, to rid the world of this menace.

* * * * *

GC No. 12. 'Article 1' (1984) (p. 11) examines one of the most influential, debated and contested provisions of this Covenant, the right of 'peoples' to 'self-determination'. A central question is the degree to which Article 1 addresses the

issue of so-called 'external' self-determination, the right of a 'people' to independent statehood, as in the process of decolonization. Does it also address more general questions such as the form of government to which the population of a state is entitled in order to achieve 'internal' self-determination? Most of this GC tracks and restates the provisions of the article. Consider what light the following excerpts might shed on the questions noted.

> 1. In accordance with the purposes and principles of the Charter of the United Nations, article 1 of the International Covenant on Civil and Political Rights recognizes that all peoples have the right of self-determination. The right of self-determination is of particular importance because its realization is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights. It is for that reason that States set forth the right of self-determination in a provision of positive law in both Covenants and placed this provision as article 1 apart from and before all of the other rights in the two Covenants.
>
> . . .
>
> 4. With regard to paragraph 1 of article 1, States parties should describe the constitutional and political processes which in practice allow the exercise of this right.

* * * * *

GC No. 13. 'Article 14' (1984) (p. 13) examines numerous provisions of Article 14 on questions of criminal process in particular.

> 7. The Committee has noted a lack of information regarding article 14, paragraph 2 and, in some cases, has even observed that the presumption of innocence, which is fundamental to the protection of human rights, is expressed in very ambiguous terms or entails conditions which render it ineffective. By reason of the presumption of innocence, the burden of proof of the charge is on the prosecution and the accused has the benefit of doubt. No guilt can be presumed until the charge has been proved beyond reasonable doubt. Further, the presumption of innocence implies a right to be treated in accordance with this principle. It is, therefore, a duty for all public authorities to refrain from prejudging the outcome of a trial.
> 8. . . . Article 14 (3) (a) applies to all cases of criminal charges, including those of persons not in detention. The Committee notes further that the right to be informed of the charge 'promptly' requires that information is given in the manner described as soon as the charge is first made by a competent authority. In the opinion of the Committee this right must arise when in the course of an investigation a court or an authority of the prosecution decides to take procedural steps against a person suspected of a crime or publicly names him as such. . . .

* * * * *

GC No. 16. 'Article 17' (1988) (p. 20) elaborates this brief article on interference with privacy. One illustration follows:

> 10. The gathering and holding of personal information on computers, databanks and other devices, whether by public authorities or private individuals or bodies, must be regulated by law. Effective measures have to be taken by States to ensure that information concerning a person's private life does not reach the hands of persons who are not authorized by law to receive, process and use it, and is never used for purposes incompatible with the Covenant. In order to have the most effective protection of his private life, every individual should have the right to ascertain in an intelligible form, whether, and if so, what personal data is stored in automatic data files, and for what purposes. Every individual should also be able to ascertain which public authorities or private individuals or bodies control or may control their files. If such files contain incorrect personal data or have been collected or processed contrary to the provisions of the law, every individual should have the right to request rectification or elimination.

* * * * *

GC No. 17. 'Article 24' (1989) (p. 22) concerns that article's brief and general provision on children's rights. Note that a treaty devoted to such issues was later drafted and is now in effect—the Convention on the Rights of the Child. Consider the following comment:

> 3. In most cases, however, the measures to be adopted are not specified in the Covenant and it is for each State to determine them in the light of the protection needs of children in its territory and within its jurisdiction. The Committee notes in this regard that such measures, although intended primarily to ensure that children fully enjoy the other rights enunciated in the Covenant, may also be economic, social and cultural. For example, every possible economic and social measure should be taken to reduce infant mortality and to eradicate malnutrition among children and to prevent them from being subjected to acts of violence and cruel and inhuman treatment or from being exploited by means of forced labour or prostitution, or by their use in the illicit trafficking of narcotic drugs, or by any other means. In the cultural field, every possible measure should be taken to foster the development of their personality and to provide them with a level of education that will enable them to enjoy the rights recognized in the Covenant, particularly the right to freedom of opinion and expression. . . .

* * * * *

GC No. 18. 'Non-discrimination' (1989) (p. 25) deals with several provisions of the Covenant—Articles 2. 3 and 26 among others—that state the principle of non-discrimination. Note also the references to other human rights treaties.

6. The Committee notes that the Covenant neither defines the term 'discrimination' nor indicates what constitutes discrimination. However, article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination provides that the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life. Similarly, article 1 of the Convention on the Elimination of All Forms of Discrimination against Women provides that 'discrimination against women' shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

7. While these conventions deal only with cases of discrimination on specific grounds, the Committee believes that the term 'discrimination' as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.

8. The enjoyment of rights and freedoms on an equal footing, however, does not mean identical treatment in every instance. In this connection, the provisions of the Covenant are explicit. For example, article 6, paragraph 5, prohibits the death sentence from being imposed on persons below 18 years of age. The same paragraph prohibits that sentence from being carried out on pregnant women. . . . Furthermore, article 25 guarantees certain political rights, differentiating on grounds of citizenship.

. . .

10. The Committee also wishes to point out that the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. For example, in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions. Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population. However, as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant.

. . .

12. . . . In the view of the Committee, article 26 does not merely duplicate the guarantee already provided for in article 2 but provides in itself an autonomous right. It prohibits discrimination in law or in fact in any field

regulated and protected by public authorities. Article 26 is therefore concerned with the obligations imposed on States parties in regard to their legislation and the application thereof. Thus, when legislation is adopted by a State party, it must comply with the requirement of article 26 that its content should not be discriminatory. In other words, the application of the principle of non-discrimination contained in article 26 is not limited to those rights which are provided for in the Covenant.

13. Finally, the Committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.

* * * * *

GC No. 19. 'Article 23' (1990) (p. 27) concerns the protection of the family. Note the limited discussion of family planning. What are its implications, for example, for the right to practice contraception or to abort?

4. . . . The Covenant does not establish a specific marriageable age either for men or for women, but that age should be such as to enable each of the intending spouses to give his or her free and full personal consent in a form and under conditions prescribed by law. In this connection, the Committee wishes to note that such legal provisions must be compatible with the full exercise of the other rights guaranteed by the Covenant; thus, for instance, the right to freedom of thought, conscience and religion implies that the legislation of each State should provide for the possibility of both religious and civil marriages. In the Committee's view, however, for a State to require that a marriage, which is celebrated in accordance with religious rites, be conducted, affirmed or registered also under civil law is not incompatible with the Covenant. . . .

5. The right to found a family implies, in principle, the possibility to procreate and live together. When States parties adopt family planning policies, they should be compatible with the provisions of the Covenant and should, in particular, not be discriminatory or compulsory. . . .

6. . . . During marriage, the spouses should have equal rights and responsibilities in the family. This equality extends to all matters arising from their relationship, such as choice of residence, running of the household, education of the children and administration of assets. Such equality continues to be applicable to arrangements regarding legal separation or dissolution of the marriage.

* * * * *

GC No. 20. 'Article 7' (1992) (p. 29) concerns torture and cruel or degrading treatment or punishment.

2. The aim of the provisions of article 7 of the International Covenant on Civil and Political Rights is to protect both the dignity and the physical and mental integrity of the individual. It is the duty of the State party

to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity. . . .

. . .

5. The prohibition in article 7 relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim. In the Committee's view, moreover, the prohibition must extend to corporal punishment, including excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure. . . .

. . .

11. . . . To guarantee the effective protection of detained persons, provisions should be made for detainees to be held in places officially recognized as places of detention and for their names and places of detention, as well as for the names of persons responsible for their detention, to be kept in registers readily available and accessible to those concerned, including relatives and friends. To the same effect, the time and place of all interrogations should be recorded, together with the names of all those present and this information should also be available for purposes of judicial or administrative proceedings. Provisions should also be made against incommunicado detention. In that connection, States parties should ensure that any places of detention be free from any equipment liable to be used for inflicting torture or ill-treatment. The protection of the detainee also requires that prompt and regular access be given to doctors and lawyers and, under appropriate supervision when the investigation so requires, to family members.

12. It is important for the discouragement of violations under article 7 that the law must prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment.

. . .

15. The Committee has noted that some States have granted amnesty in respect of acts of torture. Amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible.

* * * * *

GC No. 21. 'Article 10' (1992) (p. 32) applies to detained person. Note again the references to other instruments.

4. Treating all persons deprived of their liberty with humanity and with respect for their dignity is a fundamental and universally applicable rule. Consequently, the application of this rule, as a minimum, cannot be

dependent on the material resources available in the State party. This rule must be applied without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

5. States parties are invited to indicate in their reports to what extent they are applying the relevant United Nations standards applicable to the treatment of prisoners: the Standard Minimum Rules for the Treatment of Prisoners (1957), the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988), the Code of Conduct for Law Enforcement Officials (1978) and the Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1982).

. . .

10. As to article 10, paragraph 3, which concerns convicted persons, the Committee wishes to have detailed information on the operation of the penitentiary system of the State party. No penitentiary system should be only retributory; it should essentially seek the reformation and social rehabilitation of the prisoner. . . .

. . .

13. . . . Lastly, under article 10, paragraph 3, juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status in so far as conditions of detention are concerned, such as shorter working hours and contact with relatives, with the aim of furthering their reformation and rehabilitation. Article 10 does not indicate any limits of juvenile age. While this is to be determined by each State party in the light of relevant social, cultural and other conditions, the Committee is of the opinion that article 6, paragraph 5, suggests that all persons under the age of 18 should be treated as juveniles, at least in matters relating to criminal justice. States should give relevant information about the age groups of persons treated as juveniles. In that regard, States parties are invited to indicate whether they are applying the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, known as the Beijing Rules (1987).

NOTE

Consider the following observations of the Committee in its 1994 Report, vol. 1, on its activities, GAOR 49th Sess., Supp. No. 40 (A/49/40), para. 50:

> General comments . . . do not purport to . . . attribute any priority among the different aspects [of the Covenant] in terms of implementation. They are intended to make the Committee's experience available for the benefit of all States parties, so as to promote more effective implementation of the Covenant; to draw their attention to insufficiencies disclosed by a large

number of reports; to suggest improvements in the reporting procedure to clarify the requirements of the Covenant; and to stimulate the activities of States parties and international organizations in the promotion and protection of human rights. General comments are also intended to . . . strengthen cooperation among States in the universal promotion and protection of human rights.

QUESTIONS

1. 'In its General Comments, the Committee has exercised a power of its own creation. It is understandable that the Committee developed formal rules and processes for the submission of reports; such matters affect relations between the Committee and states parties to the ICCPR. It is a different matter for the Committee to express its collective understanding of the content of the ICCPR's substantive provisions regulating what states may do internally—what privacy amounts to, what due process requires, and so on. Modest interpretation of ICCPR articles is perhaps inevitable, but numbers of the General Comments amount to a bold elaboration, an emphatic development of ideas in the Covenant itself, to "legislation by Committee."'

a. Do you agree or disagree? What illustrations from the preceding selection of excerpts from General Comments best support this statement?

b. Some General Comments clearly go beyond the literal text of the ICCPR. Using any illustrations that you choose, how would you describe what the Committee is here doing? Interpretation or elaboration based on the literal meaning of the ICCPR's text, or on the larger internal context of all provisions of the ICCPR and interrelations among them? Interpretation or elaboration in light of the broad object and purpose of the ICCPR as a whole? Creative development in the light of changing world conditions, conflicts and ideologies? Working out the common understanding of representative states parties to the ICCPR of the meaning of various provisions?

c. What arguments could the Committee make to justify this trend toward more significant General Comments that go beyond merely restating the ICCPR's text?

2. (a) What authority do you believe that these General Comments should have before other institutions—say, a General Comment giving a precise interpretation of an ICCPR article? For example, a question of interpretation of that article might arise before the UN Commission on Human Rights in a debate about whether a country was in violation of the ICCPR, before a national court applying the ICCPR to a case before it, before the International Court of Justice in a case where one state accuses another of violating that article. Should the General Comment be treated as decisive? (b) Should the answer depend on which of the descriptions in Question 1(b) of what the Committee is doing seems

most accurate? (c) Does any other national or international institution have such a power of authoritative interpretation of the ICCPR? Should there be one such institution?

3. General Comments can be long debated within the Committee, in closed proceedings, and then be issued in final form—though, as we have seen, subject to revision by a later General Comment on the same ICCPR article. Should the process be changed, so that the Committee issues to states parties, IGOs and NGOs a preliminary version of a proposed General Comment and solicits reactions thereto? The Committee would then take those reactions into account as it thought appropriate when preparing the final form of the General Comment. What advantages and disadvantages do you see in such a process?

4. INDIVIDUAL COMMUNICATIONS

COMMENT ON COMMUNICATIONS UNDER THE OPTIONAL PROTOCOL

As of September 1995, 84 of the 131 states parties to the ICCPR were also parties to this First Optional Protocol. Note some of its critical provisions. The communications must be 'from individuals . . . who claim to be victims of a violation' by a state party to the Protocol 'of any of the rights set forth in the Covenant.' After being notified of the communication, the state party shall 'submit to the Committee written explanations or statements clarifying the matter . . . .' The Committee considers communications 'in the light of all written information made available to it by the individual and by the State Party concerned.' It will not consider a communication before ascertaining that the matter is 'not being examined under another procedure of international investigation or settlement.' Examination of the communications takes place at 'closed meetings.' The Committee is to forward its 'views' to the individual and state concerned.

Note some of the consequences or negative implications of these terse and ambiguous provisions, supplemented by the Committee's own procedural rules:

(1) The proceedings are in no sense a continuation of or appeal from judicial proceedings (if there were any) in the state in which the dispute originated. They are fresh, distinct proceedings that may involve the same two parties to prior proceedings or different parties.

(2) Unlike the requirements for procedures 1235 and 1503 of the UN Commission on Human Rights, the communication to the ICCPR

Committee need not allege that the violation complained of is systemic—that is, involves a consistent pattern in or practice of the state or some recurrent phenomenon. In theory, an isolated, atypical violation suffices to found the communication.

(3) There are no provisions for oral hearings, let alone confrontation between the parties, or for independent fact-finding (such as examination of the parties or witnesses or independent experts, or on-site visits) by the Committee. The Optional Protocol refers only to written proceedings.

(4) There are no hearings or debates of Committee members about how to deal with the communication that are open to the public.

(5) There is no provision setting forth the precise legal effect of 'views' or setting forth what follow-up should take place if the Committee's views indicating that a state should take particular action (such as payment of compensation or release of a prisoner) are ignored by that state. In fact, there have been many instances of states continuing to ignore the Committees 'views,' even in cases of the most serious violations. Recent changes in the Committee's procedure have led it to request the state to advise it within 90 days of what action has been taken with respect to views, and to appoint a Special Rapporteur to monitor compliance by states with the Committee's views and report to the Committee thereon.

The procedure developed by the Committee to handle communications involves the formation of a Working Group of five Committee members who meet a week before each three-week session to consider the admissibility of the communication. Only the Committee can decide that a communication is inadmissible.

The Optional Protocol is one of only three human rights treaties of universal reach, the two others being the conventions on racial discrimination and torture, that provide (some form of) an individual remedy at the international level. As of July 1994, 587 communications had been registered, of which 193 led to the adoption of views by the Committee. In 142 such cases, the Committee found violations of the ICCPR. The Committee had declared 201 communications inadmissible.[2]

Note that the optional provision in Article 41 of the ICCPR for the filing of a communication by one state party against another has never been utilized, although as of January 1995, 44 states had made the necessary declaration under that article.

[2] The figures in this paragraph are taken from the 1994 Report of the Human Rights Committee, Vol. I, GAOR 49th Sess., Supp. No. 40 (A/49/40), at paras. 377 and 459.

TORKEL OPSAHL, THE HUMAN RIGHTS COMMITTEE

in Philip Alston (ed.), The United Nations and Human Rights 369 (1992), at 421.

More ambitious proposals for the handling of such complaints were discarded at an early stage. No private complaints system, to a Court or otherwise, could be made obligatory. Not even in an optional form was any such procedure allowed to become part of the Covenant itself. But a majority of the General Assembly decided at the eleventh hour to create a separate document, the Optional Protocol, allowing for 'communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant'. . . .

. . .

On some points, this system resembles those of the Council of Europe and the Organization of American States, but it is much simpler. The Committee is the only competent organ and its procedure is not very elaborate. Its 'views' are not to be understood as strictly binding in law and cannot be enforced. The Protocol itself seems to consider a case closed as soon as the views have been forwarded to the parties. There is no follow-up procedure leading, as in the European system, from the report of a Commission to binding decisions by other competent organs (such as the European Committee of Ministers or Court of Human Rights).

The consideration of communications takes place in closed meetings. The files and summary records of the Committee's deliberations remain confidential, but the texts of its final decisions, called 'views', have been made public from the beginning. The decision to publish the views was taken without any express authority from the Optional Protocol and did not correspond to any explicit rule in the then Provisional Rules of Procedure. Thus it was a bold and important precedent. . . .

. . .

. . . [D]espite the confidentiality of the proceedings under the Optional Protocol, ample material is now available. However, as a source of case law, the material is less developed than in, for instance, the European system, because the Committee does not go to the same lengths in its published reasoning.

Lack of more widespread publicity may be one of the reasons why individual communications have not arrived in greater numbers, compared to the European system, and which hardly amount to a representative selection of problems in the countries concerned. In the first fifteen years only 468 complaints had arisen from thirty-six States Parties, and their distribution was very uneven. The absence of cases against, for instance, the Central African Republic and the Congo might simply reflect lack of knowledge about the procedure. In other cases, such as the States Parties that are also bound by the

European Convention on Human Rights, the more effective regional procedure may be preferred by most people who wish to complain.

. . .

At the same time, the Committee has not, or not yet, displayed much initiative or allowed for much development of its procedures at the merits stage. Besides recalling the time-limit of six months for the State Party, and transmitting any replies to the author for possible further information or observations, the Committee's decisions reveal that it has remained largely passive. The paucity of the relevant rules on the subject is evidence that the Committee has not taken such an active role as an investigative body might be expected to do. Some members have expressed the opinion that the Optional Protocol does not permit the Committee to take such steps as carrying out a more independent inquiry by specifying its requests, resorting to active fact-finding by sending delegates, arranging for oral hearings of the parties and witnesses, or taking steps towards mediation or settlement of the matter. It is true that the Protocol only refers to the duty of the Committee to consider 'all *written* material made available to it' by the *parties*. But this clause only says what the Committee shall consider, not what, in addition, it *may* consider or do. In the absence of consensus on the Committee's powers and policy as regards a more active role, a minimalist line has again prevailed in its practice.

In its handling of complaints, however, the Committee has been able to reach substantive conclusions on a large number of issues, often unfavourable to States Parties. And a flexible approach may, once the practical need for it is demonstrated, outweigh the cautious interpretation which holds that the Committee cannot do anything not expressly foreseen under the Protocol.

The Committee has in many cases not only expressed its 'view' that there have been violations of specific rights, but also added what in its opinion should follow, stating as a separate conclusion a duty to provide individual reparation and take preventive measures for the future. This is now a settled interpretation of its role. The Committee could go further in seeking solutions in co-operation with the parties. Certainly it might, with their consent, develop its fact-finding role and allow oral pleadings.

. . .

The other side of this approach concerns monitoring *violations* of these rights through complaints procedures. This should not be more than a secondary aim. Universality in such procedures is less necessary and more difficult to apply. It is true that complaints procedures, more than abstract inquiries, may throw specific light even over matters of general interest. Case law can also be more specific than general comments on how provisions ought to be understood. Nevertheless, the Committee will never be able to control violations in all parts of the world through complaints procedures. It would not be practical to develop its machinery to the extent which this control would require, since this would include hearings, fact-finding, visits, investi-

gations, use of many languages, etc. Theoretically the procedures could become permanent and deal annually with thousands of cases rather than dozens. But there is a better alternative; building and strengthening regional complaints systems, like the European, American, and African ones, offers several advantages in the areas of logistics, local trust, and homogeneity. States Parties from the regions which have such systems in place have already shown their preference for them through reservations.

. . .

HERRERA RUBIO v. COLOMBIA

Communication No. 161/1983, Human Rights Committee Views of Committee, November 2, 1987.
UN Doc. A/43/40 (1988), Supp. No. 40, at 190.

[Herrera Rubio, a Colombian citizen and resident, submitted this communication on his own behalf and in respect of his deceased parents. He alleged arrest by members of the armed forces, imprisonment in a military camp, and torture in an attempt to extract information on a guerrilla movement about which he had no knowledge. He described the tortures in horrific detail, and said that he was threatened with his parents' death. His parents were abducted by individuals in military uniform identified as members of the 'counter guerrilla.' Their bodies (the father's decapitated) were later found. Herrera Rubio was released in 1982 pursuant to an amnesty law of that year concerning political detainees.

In this communication, the author asserted that all incidents complained of occurred 'in a region under military control where violations of the rights of the civilian population have allegedly become general practice.' He claimed violations of Articles 6, 7, 9, 10 and 17 of the ICCPR.

In accordance with its usual procedures, a Working Group of the Committee first considered the communication and requested specific information from the state party. No reply was received from the state. The Committee then concluded, on the basis of the information before it, that the communication was admissible.

The state party did reply to further requests for information, alleging that the deaths of the parents 'were duly investigated and that no evidence was found to support charges against military personnel.' Hence the dossier was closed. Colombia also provided the text of the decision of a penal court that had made a judicial investigation concluding that the killings 'had been perpetrated by armed persons, without, however, being able to determine to which group they belonged.'

With respect to the author's allegations that he had been tortured, the Attorney-General Delegate for the Armed Forces decided not to open a formal investigation. That decision, noting the difficulty of obtaining evidence about events five years old, stated in part:

> [Herrera Rubio's] statement on the alleged acts of torture are not credible in view of the fact that three months elapsed from the time of the alleged ill-treatment before the complainant reported it to the Court. On witnessing his statement as an accused person . . . , this office put on record that 'the accused appeared normal physically and mentally . . . .'

The author responded to some of the state party's arguments by claiming that (1) the Government's allegations that a guerrilla group might have killed the parents were 'at odds with the facts of the case,' (2) the Attorney-General had not explained why the author's petitions to government officials while in prison went unanswered, and (3) the delay in filing a complaint about torture was explainable by obvious psychological pressures on prisoners and by strategic considerations.

In light of the 'conflicting statements by the parties,' the Working Group of the Committee requested additional information from Colombia about its investigations of the author's charges. The reply was general and unresponsive to specific requests.

The Committee then decided 'to base its views on the following facts and considerations' as set out below.]

10.3 Whereas the Committee considers that there is reason to believe, in the light of the author's allegations, that Colombian military persons bear responsibility for the deaths of José Herrera and Emma Rubio de Herrera, no conclusive evidence has been produced to establish the identity of the murderers. In this connection the Committee refers to its general comment No. 6 (16) concerning article 6 of the Covenant, which provides, *inter alia*, that States parties should take specific and effective measures to prevent the disappearance of individuals and establish effective facilities and procedures to investigate thoroughly, by an appropriate impartial body, cases of missing and disappeared persons in circumstances which may involve a violation of the right to life. The Committee has duly noted the State party's submissions concerning the investigations carried out in this case, which, however, appear to have been inadequate in the light of the State party's obligations under article 2 of the Covenant.

10.4 With regard to the author's allegations of torture, the Committee notes that the author has given a very detailed description of the ill-treatment to which he was subjected and has provided the names of members of the armed forces allegedly responsible. In this connection, the Committee observes that the initial investigations conducted by the State Party may have been concluded prematurely and that further investigations were called for in the light of the author's submission of 4 October 1986 and the Working Group's request of 18 December 1986 for more precise information.

10.5 With regard to the burden of proof, the Committee has already established in other cases (for example, Nos. 30/1978 and 85/1981) that this cannot rest alone on the author of the communications, especially considering that

the author and the State-party do not always have equal access to the evidence and that frequently the State party alone has access to relevant information. In the circumstances, due weight must be given to the authors' allegations. It is implicit in article 4, paragraph 2, of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violation of the Covenant made against it and its authorities, and to furnish to the Committee the information available to it. In no circumstances should a State party fail to investigate fully allegations of ill-treatment when the person or persons allegedly responsible for the ill-treatment are identified by the author of a communication. The State party has in this matter provided no precise information and reports, *inter alia*, on the questioning of military officials accused of maltreatment of prisoners, or on the questioning of their superiors.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant of Civil and Political Rights, is of the view that the facts as found by the Committee disclose violations of the Covenant with respect to:

> Article 6, because the State party failed to take appropriate measures to prevent the disappearance and subsequent killings of José Herrera and Emma Rubio de Herrera and to investigate effectively the responsibility for their murders; and
>
> Article 7 and article 10, paragraph 1, because Joaquín Herrera Rubio was subjected to torture and ill-treatment during his detention.

12. The Committee, accordingly, is of the view that the State party is under an obligation, in accordance with the provisions of article 2 of the Covenant, to take effective measures to remedy the violations that Mr. Herrera Rubio has suffered and further to investigate said violations, to take action thereon as appropriate and to take steps to ensure that similar violations do not occur in the future.

BWALYA V. ZAMBIA

Communication No. 314/1988, Human Rights Committee
Views of Committee, July 14, 1993.
UN Doc. 4/48/40 (1994), Supp. 40, at 52; 1 Int. Hum. Rts. Reports 84 (No. 2, 1994).

[Bwalya, a Zambian citizen, ran in 1983 for a parliamentary seat on a program committed to changing the Government's policy toward particularly the homeless and unemployed. He claimed that in retaliation for his activism, the authorities threatened him. He was dismissed from employment and with his family expelled from his home. He was later arrested and detained for 31 months on charges of belonging to an organization considered illegal under Zambia's one-party Constitution and of conspiring to overthrow the Government of then President Kaunda.

In his communication to the Committee, Bwalya alleged violations by Zambia of several provisions of the Covenant. He denied participating in a conspiracy against the Government and claimed that he continued to be denied freedom of movement.

The Committee found the communication admissible with respect to claims of violations of Articles 9, 12, 19, 25 and 26 of the ICCPR. It noted 'with concern that, with the exception of a brief note informing the Committee of the author's release, the State party has failed to cooperate on the matter under consideration'—for example, by failing to examine allegations against it or to provide the Committee with relevant information at its disposal. 'In the circumstances, due weight must be given to the author's allegations, to the extent that they have been substantiated.' The Committee continued:]

6.2 In respect of issues under article 19, the Committee considers that the uncontested response of the authorities to the attempts of the author to express his opinions freely and to disseminate the political tenets of his party constitute a violation of his rights under article 19.

6.3 The Committee has noted that when the communication was placed before it for consideration, Mr. Bwalya had been detained for a total of 31 months, a claim that has not been contested by the State party. It notes that the author was held solely on charges of belonging to a political party considered illegal under the country's (then) one-party constitution and that, on the basis of the information before the Committee, Mr. Bwalya was not brought promptly before a judge or other officer authorized by law to exercise judicial power to determine the lawfulness of his detention. This, in the Committee's opinion, constitutes a violation of the author's right under article 9, paragraph 3, of the Covenant.

. . .

6.5 The author has claimed, and the State party has not denied, that he continues to suffer restrictions on his freedom of movement, and that the authorities have refused to issue a passport to him. This, in the Committee's opinion, amounts to a violation of article 12, paragraph 1, of the Covenant.

6.6 As to the alleged violation of article 25 of the Covenant, the Committee notes that the author, a leading figure of a political party in opposition to the former President, has been prevented from participating in a general election campaign as well as from preparing his candidacy for this party. This amounts to an unreasonable restriction on the author's right to 'take part in the conduct of public affairs' which the State party has failed to explain or justify. In particular, it has failed to explain the requisite conditions for participation in the elections. Accordingly, it must be assumed that Mr. Bwalya was detained and denied the right to run for a parliamentary seat in the Constituency of Chifubu merely on account of his membership in a political party other than that officially recognized; in this context, the Committee observes that restrictions on political activity outside the only recognized political party amount to an unreasonable restriction of the right to participate in the conduct of public affairs.

6.7 Finally, on the basis of the information before it, the Committee concludes that the author has been discriminated against in his employment because of his political opinions, contrary to article 26 of the Covenant.

7. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee disclose violations of articles 9, paragraphs 1 and 3, 12, 19, paragraph 1, 25(a) and 26 of the Covenant.

8. Pursuant to article 2 of the Covenant, the State party is under an obligation to provide Mr. Bwalya with an appropriate remedy. The Committee urges the State party to grant appropriate compensation to the author. The State party is under an obligation to ensure that similar violations do not occur in the future.

9. The Committee would wish to receive information, within 90 days, on any relevant measures taken by the State party in respect of the Committee's Views.

PAUGER V. AUSTRIA

Communication No. 415/1990, Human Rights Committee
Views of Committee, March 26, 1992.
UN Doc. A/47/40, Supp. No. 40, at 325.

[Pauger, an Austrian citizen and resident, was a university professor whose wife died in 1984. She had been a civil servant. Pauger submitted a claim under the Pension Act of 1965, which granted preferential treatment to widows who could receive a pension regardless of their income, whereas widowers (surviving husbands) could receive a pension only if they lacked other income. His claim was therefore rejected, a decision upheld by the Constitutional Court of Austria. The legislation was subsequently amended to provide a pension to widowers, retroactively, but in amounts below those received by widows. Pauger again sought a full pension, but the rejection of his claim was again upheld by the Constitutional Court.

In filing his communication with the Human Rights Committee, Pauger alleged a violation of Article 26 of the Covenant, claiming that 'the differentiation between widows and widowers is arbitrary and cannot be said to be based on reasonable and objective criteria.' The Committee declared the communication admissible in March 1991. Excerpts follow from its views under Article 5(4) of the Optional Protocol.]

The State party's explanations and the author's comments thereon

5.1 In its submission, dated 8 October 1991, the State party argues that the former Austrian pension legislation was based on the fact that in the overwhelming majority of cases only the husband was gainfully employed, and therefore only he was able to acquire an entitlement to a pension from which

his wife might benefit. It submits that, in response to changed social conditions, it amended both family legislation and the Pension Act; equality of the husband's position under pension law is to be accomplished in a number of successive stages, the last of which will be completed on 1 January 1995.

5.2 The State party further submits that new legislation, designed to change old social traditions, cannot be translated into reality from one day to the other. It states that the gradual change in the legal position of men with regard to their pension benefits was necessary in the light of the actual social conditions, and hence does not entail any discrimination. In this context, the State party points out that the equal treatment of men and women for purposes of civil service pensions has financial repercussions in other areas, as the pensions will have to be financed by the civil servants, from whom pension contributions are levied.

6.1 In his reply to the State party's submission, the author argues that pursuant to amendments in family law, equal rights and duties have existed for both spouses since 1 January 1976, in particular with regard to their income and their mutual maintenance. He further submits that in the public sector men and women receive equal payment for equal services and have also to pay equal pension fund contributions. The author states that there is no convincing reason as to why a period of nearly two decades since the emancipation of men and women in family law should be necessary for the legal emancipation in pension law to take place.

6.2 According to the author, neither the financial burden on the State's budget, nor the fact that many men are entitled to pensions of their own, can be used as arguments against the obligation to treat men and women equally, pursuant to article 26 of the Covenant. The author points out that the legislator could have established other, such as income-related, criteria to distinguish between those who are entitled to a full pension and those who are not. He further submits that the financial burden caused by the equal treatment of men and women under the Pension Act would be comparatively low, because of the small number of widowers who are entitled to such a pension.

Examination of the merits

. . .

7.2 The Committee has already had the opportunity to express the view [citations to views adopted by the Committee in 1987 have been omitted] that article 26 of the Covenant is applicable also to social security legislation. It reiterates that article 26 does not of itself contain any obligation with regard to the matters that may be provided for by legislation. Thus it does not, for example, require any State to enact pension legislation. However, when it is adopted, then such legislation must comply with article 26 of the Covenant.

7.3 The Committee reiterates its constant jurisprudence that the right to equality before the law and to the equal protection of the law without any discrimination does not make all differences of treatment discriminatory.

A differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26.

7.4 In determining whether the Austrian Pension Act, as applied to the author, entailed a differentiation based on unreasonable or unobjective criteria, the Committee notes that the Austrian family law imposes equal rights and duties on both spouses, with regard to their income and mutual maintenance. The Pension Act, as amended on 22 October 1985, however, provides for full pension benefits to widowers only if they have no other source of income; the income requirement does not apply to widows. In the context of said Act, widowers will only be entitled to full pension benefits on equal footing with widows as of 1 January 1995. This in fact means that men and women, whose social circumstances are similar, are being treated differently, merely on the basis of sex. Such a differentiation is not reasonable, as is implicitly acknowledged by the State party when it points out that the ultimate goal of the legislation is to achieve full equality between men and women in 1995.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the application of the Austrian Pension Act in respect of the author after 10 March 1988, the date of entry into force of the Optional Protocol for Austria, made him a victim of a violation of article 26 of the International Covenant on Civil and Political Rights, because he, as a widower, was denied full pension on equal footing with widows.

9. The Committee notes with appreciation that the State party has taken steps to remove the discriminatory provisions of the Pension Act as of 1995. Notwithstanding these steps, the Committee is of the View that the State party should offer Mr. Dietmar Pauger an appropriate remedy.

10. The Committee wishes to receive information, within 90 days, on any relevant measures taken by the State party in respect of the Committee's views.

TOONEN V. AUSTRALIA

Communication No. 488/1992, Human Rights Committee
Views of Committee, March 31, 1994.
1 Int. Hum. Rts. Reports 97 (No. 3, 1994)

[The author of this communication was an Australian citizen resident in the Australian state of Tasmania, and a leading member of the Tasmanian Gay Law Reform Group. He claimed that he was a victim of violations by Australia of Articles 2(1), 17 and 26 of the ICCPR. Article 2(1) provides that each state party will ensure to all individuals the 'rights recognized in the present Covenant, without distinction of any kind, such as . . . sex . . . political or other opinion . . . or other status.' Article 17 provides that no one shall be subjected 'to arbitrary or unlawful interference with his privacy. . . .' Article

26 provides that all persons 'are equal before the law and are entitled without any discrimination to the equal protection of the law.' Forbidden discriminations are similar to those in Article 2(1).

Toonen challenged in particular two provisions of the Tasmanian Criminal Code (Australia being internationally responsible for acts of a component state within its federal structure) which made criminal 'various forms of sexual conduct between men, including all forms of sexual contacts between consenting adult homosexual men in private.' The Tasmanian police had not charged anyone with violations of these statutes, such as 'intercourse against nature,' but there remained a threat of enforcement. Moreover, the author alleged that the criminalization of homosexuality had nourished prejudice and 'created the conditions for discrimination in employment, constant stigmatization, vilification, threats of physical violence and the violation of basic democratic rights.' Tasmania alone among Australian jurisdictions continued to have such laws in effect, and the Federal Government's position before the Human Rights Committee was critical of those laws.

Excerpts from the Committee's view follow, starting with some of Australia's observations.]

6.5 The state party does not accept the argument of the Tasmanian authorities that the retention of the challenged provisions is partly motivated by a concern to protect Tasmania from the spread of HIV/AIDS, and that the laws are justified on public health and moral grounds. This assessment in fact goes against the Australian Government's National HIV/AIDS Strategy, which emphasizes that laws criminalizing homosexual activity obstruct public health programmes promoting safer sex. The State party further disagrees with the Tasmanian authorities' contention that the laws are justified on moral grounds, noting that moral issues were not at issue when article 17 of the Covenant was drafted.

6.6 None the less, the State party cautions that the formulation of article 17 allows for *some* infringement of the right to privacy if there are reasonable grounds, and that domestic social mores may be relevant to the reasonableness of an interference with privacy. The State party observes that while laws penalizing homosexual activity existed in the past in other Australian states, they have since been repealed with the exception of Tasmania. Furthermore, discrimination on the basis of homosexuality or sexuality is unlawful in three of six Australian states and the two self-governing internal Australian territories. The Federal Government has declared sexual preference to be a ground of discrimination that may be invoked under ILO Convention No. 111 (Discrimination in Employment or Occupation Convention), and created a mechanism through which complaints about discrimination in employment on the basis of sexual preference may be considered by the Australian Human Rights and Equal Opportunity Commission.

6.7 On the basis of the above, the State party contends that there is now a general Australian acceptance that no individual should be disadvantaged on the basis of his or her sexual orientation. Given the legal and social situation

in all of Australia except Tasmania, the State party acknowledges that a complete prohibition on sexual activity between men is unnecessary to sustain the moral fabric of Australian society. On balance, the State party 'does not seek to claim that the challenged laws are based on reasonable and objective criteria'.

. . .

Examination of the merits:

. . .

8.2 Inasmuch as article 17 is concerned, it is undisputed that adult consensual sexual activity in private is covered by the concept of 'privacy', and that Mr. Toonen is actually and currently affected by the continued existence of the Tasmanian laws. . . .

8.3 The prohibition against private homosexual behaviour is provided for by law, namely, Sections 122 and 123 of the Tasmanian Criminal Code. As to whether it may be deemed arbitrary, the Committee recalls that pursuant to its General Comment 16 [32] on article 17, the 'introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by the law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the circumstances'. The Committee interprets the requirement of reasonableness to imply that any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case.

. . .

8.5 As far as the public health argument of the Tasmanian authorities is concerned, the Committee notes that the criminalization of homosexual practices cannot be considered a reasonable means or proportionate measure to achieve the aim of preventing the spread of AIDS/HIV. . . .

8.6 The Committee cannot accept either that for the purposes of article 17 of the Covenant, moral issues are exclusively a matter of domestic concern, as this would open the door to withdrawing from the Committee's scrutiny a potentially large number of statutes interfering with privacy. It further notes that with the exception of Tasmania, all laws criminalizing homosexuality have been repealed throughout Australia and that, even in Tasmania, it is apparent that there is no consensus as to whether Sections 122 and 123 should not also be repealed. Considering further that these provisions are not currently enforced, which implies that they are not deemed essential to the protection of morals in Tasmania, the Committee concludes that the provisions do not meet the 'reasonableness' test in the circumstances of the case, and that they arbitrarily interfere with Mr. Toonen's right under article 17, paragraph 1.

8.7 The State party has sought the Committee's guidance as to whether sexual orientation may be considered an 'other status' for the purposes of article

26. The same issue could arise under article 2, paragraph 1, of the Covenant. The Committee confines itself to noting, however, that in its view the reference to 'sex' in articles 2, paragraph 1, and 26 is to be taken as including sexual orientation.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it reveal a violation of articles 17, paragraph 1, *juncto* 2, paragraph 1, of the Covenant.

10. Under article 2 (3) (a) of the Covenant, the author, victim of a violation of articles 17, paragraph 1, *juncto* 2, paragraph 1, of the Covenant, is entitled to a remedy. In the opinion of the Committee, an effective remedy would be the repeal of Sections 122 (a), (c) and 123 of the Tasmanian Criminal Code.

11. Since the Committee has found a violation of Mr. Toonen's rights under articles 17 (1) and 2 (1) of the Covenant requiring the repeal of the offending law, the Committee does not consider it necessary to consider whether there has also been a violation of article 26 of the Covenant.

12. The Committee would wish to receive, within 90 days of the date of the transmittal of its views, information from the State party on the measures taken to give effect to the views.

QUESTIONS

1. Suppose that a state party to the Optional Protocol makes criminal the sale or use of contraceptives. Under the Committee's view in *Toonen*, are you prepared to say that the statute violates the ICCPR? If you need more information, what kind of information? Suppose that only sale and not use were banned.

2. Should the Committee resolve the problems raised in Question (1) by issuing a revised General Comment interpreting Article 17 that deals specifically with these problems?

3. The United States is a party to the ICCPR (though not to the Optional Protocol). Is the United States in violation of the Covenant because the laws of certain states within the U.S. make sodomy between consenting adults criminal? What are the obligations of the United States under Article 2(1) of the Covenant? If the United States is arguably in violation of the Covenant, how, to what institution, might an individual adversely affected by the sodomy statute make that claim?

COMMENT ON EXHAUSTION OF REMEDIES

One recurrent problem before the ICCPR Committee involves determination of the admissibility of communications with respect to the requirement in

Article 5(2)(b) of the Optional Protocol that '[t]he individual has exhausted all available domestic remedies.' That article further provides: 'This shall not be the rule where the application of the remedies is unreasonably prolonged.'

In *Miango v. Zaire*, Communication No. 194/1985, UN Doc. A/43/40 (1988), Supp. No. 40 at 218, the author alleged the torture and killing by the military of the author's brother. The communication stated that in Zaire only a military tribunal could deal with cases involving soldiers, and the author despaired of any hope that the case of his brother's death would be properly investigated. The Committee, following its normal procedures, transmitted the communication to the state and requested information. It received no submission from Zaire, and then found the communication admissible. In expressing its view (decision of April 2, 1986) that Articles 6 and 7(1) of the ICCPR had been violated, the Committee observed:

> 9. In formulating its views, the Human Rights Committee also takes into account the failure of the State party to furnish any information and clarifications. It is implicit in article 4, paragraph 2, of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violations of the Covenant made against it and its authorities, and to furnish to the Committee the information available to it. The Committee notes with concern that, despite its repeated requests and reminders and despite the State party's obligation under article 4, paragraph 2, of the Optional Protocol, no explanations or statements clarifying the matter have been received from the State party in the present case. In the circumstances, due weight must be given to the author's allegations.

In *D.B.-B v. Zaire*, Communication No. 463/1991, UN Doc. A/47/40 (1994), Supp. No. 40 at 432, the author fled Zaire and was granted refugee status in Switzerland after allegedly witnessing a slaughter of some 100–150 students by the security police. He described several violations of his rights under the Covenant. The author wrote to the Ministry for Citizens' Rights and Freedoms to complain about what he had witnessed, but no action was taken in response to his complaint. The Committee (in its meeting of Nov. 8, 1991) found the communication inadmissible. It stated:

> 4.2 With regard to the requirement of the exhaustion of domestic remedies, the Committee observes that the author, by letter of 7 March 1991, filed a complaint to the Zairian Ministry for Citizens' Rights and Freedoms, and that he has not as yet received any reply. It is, however, a well established principle that a complainant must display reasonable diligence in the pursuit of available domestic remedies. In the instant case, the author has not shown the existence of circumstances which would prevent him from further pursuing the application of domestic remedies in the case.

Consider in this connection the following excerpts from a report by the Lawyers Committee for Human Rights, *Zaire: Repression as Policy* (1990):

> In recent years, the Zairian judiciary has been reduced to a weak and compliant participant in a system of widespread abuse. The goal of judicial independence, which was never reached in Zaire, has been all but destroyed by executive interference, corruption and the requirements of MPR party discipline. . . .
>
> . . . In combating human rights abuses, these problems are compounded by the inability of the Judicial Council to control the excesses of security forces and subject them to the existing body of laws.
>
> According to a number of lawyers and judges interviewed, the executive dictates the outcome of political trials which come before the State Security Court. . . .

NOTE

The record of compliance by states with views rendered by the Committee under the Optional Protocol is patchy. In a document submitted to the 1993 World Conference on Human Rights in Vienna,[3] the Committee expressed its concern and indicated several paths toward dealing effectively with this problem.

The document stressed the significance of the follow-up procedures by the Special Rapporteur, p. 536, *supra*, which were 'not only compatible' with the Committee's mandate but 'essential if the Committee is expected to discharge' its responsibilities. Since the practice began, the Committee had received requested follow-up information in respect of 71 views, but no information had been received in respect of 37 views. Moreover, over half of the replies received were unsatisfactory—terse, vague, unresponsive, and so on.

The Committee endorsed a recommendation issuing from a recent meeting of chairs of human rights treaty bodies, to the effect that '[v]iews and recommendations expressed by the treaty bodies in relation to individual communications should be fully respected.' The Committee believed that calling further on states 'to accept such views as binding would be another, desirable, step.' It suggested that addition of a new paragraph to article 5 of the Optional Protocol could be envisaged, to the effect that '[s]tates parties undertake to comply with the Committee's Views under the Optional Protocol.' The recommendations went further:

> Furthermore, it could be envisaged to broaden the competence of the Special Rapporteur on the follow-up on Views to include a fact-finding mandate. Thus, the Special Rapporteur could be endowed with the authority to make inquiries *in situ*, as to what a given State party has done, or failed to do, to give effect to the Committee's Views.

[3] Follow-up on Views adopted under the Optional Protocol to the International Covenant on Civil and Political Rights, UN Doc. A/48/40 (1993), Part I, Annex X, at 222.

QUESTIONS

1. Compare the function of the Committee in deciding about communications with the role of a national court in deciding a dispute before it. What similarities, what differences? Could this function of the Committee be accurately labelled 'judicial' in character? If not, would you urge such changes in process and powers as would make the proceedings 'judicial'?

2. The four principal views of the Committee appearing above involve Colombia, Zambia, Austria and Australia. In which of these cases are the probabilities greatest that the views would be complied with? In what situations would you tend to assume non-compliance? What do your answers suggest about the role of the Optional Protocol in addressing and correcting serious human rights violations around the world?

3. Be attentive to the fact-finding processes at work in deciding how to resolve a communication. Facts are contested in most of the cases, and often the state is simply silent, or issues a flat denial of the charges, or advances a radically different version of the facts. The question arises of how the Committee should resolve this dilemma of fact-finding. The issue is present in the preceding communications involving Colombia, Zambia and (with respect to the exhaustion of local remedies and issue of admissibility) Zaire.

   (a) Who seems to bear the burden of proof (persuasion)? Does that burden 'shift' to the state if certain conditions are met? What are the consequences of such a shift?

   (b) Do presumptions arise when, say, a state is silent, or when it issues only a general denial in situations where the relevant facts or documents are in its exclusive possession?

   (c) Do you think that the Committee should issue a General Comment on this problem of evidence and proof—that is, how it will handle situations such as those in the communications referred to above? What should the General Comment say?

4. A member of the Committee, after observing that the Optional Protocol says nothing about the legal significance of the Committee's Views, makes the following argument:[4]

> [A]rticle 2(3) of the Covenant provides that, when a violation of an individual right occurs, the state is under a legal obligation to give the victim an effective and enforceable remedy. This provision and the Optional Protocol tend to achieve the same goal, although at different levels, i.e. to provide for an international guarantee in the case of a violation: article 2 sets forth a legal obligation for the state, the Optional Protocol provides for machinery to establish the existence of a violation

[4] Fausto Pocar, Legal Value of the Human Rights Committee's Views, 1991–92 Canadian Human Rights Yearbook 119.

. . . [A]nother point has to be made. Since in the preamble to the Optional Protocol, this international instrument is defined as a means of implementation of the Covenant, the States parties, it may be assumed, are under an obligation to cooperate with the Committee when a violation is brought before it. Such cooperation cannot be considered as confined to the procedure leading to the adoption of the views of the Committee, but must logically include the views themselves.

Do you agree? As a member of the Committee, would you support the issuance of a General Comment to the effect that the Committee's Views under the Optional Protocol constitute binding obligations that states must obey?

5. 'Each of the Committee's general functions—considering state reports, issuing General Comments, expressing its views about communications—leaves separately much to be desired in terms of the goals of effective implementation and development, let alone enforcement, of the ICCPR. But a look at these three functions as a system, in their interrelationships and totality, suggests that the Committee is serving such goals well.'

Comment.

5. EVALUATION

TORKEL OPSAHL, THE HUMAN RIGHTS COMMITTEE

in Philip Alston (ed.), The United Nations and Human Rights 369 (1992), at 39b.

. . .

. . . [T]he best way to describe the functions and role of the [ICCPR] Committee has been a matter of controversy. Is it an organ for promotion and co-operation, or for protection and supervision? Is it quasi-judicial or conciliatory? The Covenant, avoiding any such description of the Committee, states laconically that it 'shall carry out the functions hereinafter provided'. The Committee is careful in its manner of presenting itself so as not to provoke underlying disagreements. The field is, in other words, open for analysis and opinion, and above all for development through practice.

. . .[T]he Committee cannot and does not act *ex officio* in any way, and does not take initiatives outside those functions. It does not intervene in 'situations', however acute or frustrating, unless its functions under the Covenant and Protocol justify the action. What kinds of action are possible within these limits remains a somewhat controversial question.

It is sometimes argued that the Committee cannot do anything which is not explicitly stated in the Covenant and Optional Protocol. But this is misleading. There is an obvious need, confirmed by practice, to fill in many gaps created by the wording of the Covenant and the Optional Protocol. First, the question arises as to the Committee's 'implied' or 'inherent' powers. At the very least, the functions explicitly given to it may imply certain steps which are not expressly mentioned. On this basis, the Committee has often taken such action as has seemed useful for its work.

. . .

As shown above, the Committee has never fully exercised its mandate. The main reasons have been political, administrative, and financial constraints as well as internal disagreements combined with the consequences of the consensus principle. From the Committee's point of view a change of mandate is not foreseeable. The Committee's mandate follows from the Covenant and Optional Protocol, which are not likely to be amended during this century. Extending the Committee's functions through new instruments is a possibility, as shown in practice by the Second Optional Protocol.

The only development which could affect the Committee's general mandate, and which is not wholly unlikely, would be some modification in its present functions, including necessary co-ordination with other bodies. Since these functions are described in terms open to interpretation, the limits of the mandate could be determined in a broad and dynamic manner through the adoption of liberal positions by the Committee itself. This has happened, for example, with the adoption of a rule that the Committee could determine under Article 40 that a State Party had not discharged its obligations, and with the Committee's decision to publish its views and other decisions under the Optional Protocol. The practical implementation of its mandate can be much developed through the active and innovative use of guidelines and specific requests to States Parties. Resistance to the Committee's own interpretation of its mandate is more likely if this interpretation assumes additional or implied duties for States Parties than if it only concerns action that the Committee may take on its own or with their co-operation and consent. . . .

Most of the outside constraints have to be accepted by the Committee, like its own composition and mandate. But is the Committee doomed . . . to 'degenerate into an empty political forum, a familiar fate indeed of United Nations bodies' or will it be able to liberate itself to some extent from the United Nations?

The answer depends to a large degree on the members themselves. They risk not being renominated or re-elected if they antagonize their environment, especially the States Parties. The Committee as such has no way to confront or break away from the United Nations. But this does not mean that it must be silent about its needs and how it wishes to develop.

NOTE

One of the perplexing questions about every international human rights institution (as well as about many national institutions) concerns the effect that it has had or may have on norms and practice in given states, or more grandly on the human rights movement as a whole. That question has several components, including:

> How does one go about assessing, let alone measuring, that effect?
>
> What would constitute proof or at least reasonably persuasive evidence that the ICCPR Committee has influenced the course of events in a given country, perhaps (a) through the experience of that country in formulating its periodic report and through the discussion of that report with the Committee, (b) by the thrust of a General Comment bearing on issues in that country, or (c) by the 'views' of the Committee with respect to communications sent to it by nationals of that country?
>
> How would one assess the influence of the Committee's work on other human rights organs, perhaps the Commission on Human Rights or the European Court of Human Rights? Or assess its influence on the interpretation of particular human rights norms by government officials, or by NGOs?

At the end of his comprehensive, scholarly account of the work of the Human Rights Committee during its initial fifteen years, Dominic McGoldrick writes in *The Human Rights Committee* (1991), at 504:

> It is very difficult to provide positive evidence that the existence of the Covenant and the work of the HRC is having any concrete and positive effect on the human rights position in the States parties. However, many of the State representatives that have appeared before the HRC have stated that the Covenant and the work of the HRC have played an important role at the national level. It would be immensely helpful if the HRC could catalogue and reproduce those claims together with any more specific evidence of wholesale or partial national reviews of the implementation of the Covenant and of account being taken of the Covenant and the HRC, for example, in legislative assemblies, executive decision making, judicial or administrative decisions.

NOTE AND QUESTION

In light of the preceding materials on the ICCPR Committee, and of the analysis of the UN Commission on Human Rights in Chapter 7, you should be in a position to compare and assess the composition, powers, functions and

goals of each organ in relation to the other. That comparison should highlight the choices made in the architecture of these novel international institutions, raise the questions of why they were designed and why they function so differently, and lead us to consider possible revisions.

One threshold question must be considered. Should we analyze the ICCPR Committee solely in terms of its actual or potential role *within* the Covenant, *independently* of all other human rights treaties and organs? If so, we are concluding that each treaty and treaty organ can more usefully be understood and evaluated within its distinctive context. Or should an evaluation take account of the place of the Committee and of the ICCPR itself within a more comprehensive framework of (at least the universal parts of) the human rights movement? That larger framework would include the Charter and its organs, as well as all universal human rights treaties and their organs. Within it, we would inquire into the *complementary* nature of the functions that different organs under different treaties should fill, with the goal of thereby maximizing the effectiveness of the human rights movement as a whole. What consequences in terms of practical proposals for reform might flow from one or the other framework for analysis?

A comparison between the ICCPR Committee and UN Commission can inquire into what the differences between these two institutions are, how they came about, what they say about the institutions and the political frameworks within which they were designed and now function, whether the differences make sense today, and, if not, how the institutions should be changed. The characteristics of the two organs that can be usefully compared include the following:

- which states participate in or are affected by the work of each organ?
- how is membership in each organ determined?
- what powers does each organ have to investigate?
- what powers does each organ have to evaluate, judge, condemn?
- what are the voting techniques and patterns?
- what types of violations are examined?
- are there marked political influences on the agenda and how are they exercised?
- what political pressures, what sanctions, can or does each organ impose on states?
- in what ways, if at all, have the mandates and powers of each organ evolved?
- what role have NGOs in each organ?

Consider whether the answers that you bring to these questions would justify a characterization of the ICCPR Committee as the more 'legal' body, and of the UN Commission as the more 'political'. In responding, be clear about what meanings you are attributing to the two vital terms.

And consider the following excerpt from Dominic McGoldrick, *The Human Rights Committee* (1991), at 54:

> . . .[O]n a number of occasions members of the HRC have indicated their perceptions of the institutional character and nature of the HRC and it is instructive to note some of these.
>
> 2.21 Mr Uribe-Vargas described it as a body whose work was of a 'judicial nature'. Mr Mora-Rojas said that 'The Committee was quite different in nature from other bodies and, even though it was not a court or a tribunal, it did hear testimony and had evidence presented to it'. Mr Tomuschat has commented that, 'The Committee was . . . ruled by the Covenant and while it was true that members were not judges they had the task of applying the provisions laid down in the Covenant and therefore had to exercise judgement. It was the duty of the Committee to ensure that States parties fulfilled their obligations under the Covenant.' Mr Tomuschat has also said that 'The Committee was not an international court but was similar to one in certain respects, particularly in regard to its obligation to be guarded by exclusively legal criteria—which rightly distinguished it from a political body'. Mr Ermacora was concerned that the Committee should avoid giving the impression that it was 'a sort of advisory service, or had technical, assistance functions, whereas in fact its activities were based on legally binding instruments, with all the attendant consequences that that entailed'. Mr Aguilar commented that the Committee 'was not a judicial body' and 'its role was not to find fault'. Mr Bouziri commented that the 'Committee was not a court of law'. Mr Pocar commented that the Committee's function 'was not to judge and then either to condemn or congratulate States parties'. Mr Graefrath 'did not share the view that the work of the Committee could be compared to that of a court . . . Unlike a court the Committee was not required to make judgements, but simply to consider and comment on reports and to act as a conciliatory body in dealing with complaints and communications'. Mr Opsahl has described the HRC as the 'executive organ' of the Covenant. Emphasis is often put on the HRC's role as a promoter, monitor, or supervisory body with respect to improved human rights performances. However, some members have expressed doubts as to whether the HRC can properly be called a 'supervisory body' or a 'parent organ'. Finally, Mr Suy (UN Legal Advisor) believed the HRC to be 'neither a legislative nor a judicial body but that every expert body was sui generis', and Mr Herndl, former Under Secretary-General of the United Nations, recently described the HRC as 'the guardian of the Covenant'.

B. COMPARISONS: OTHER HUMAN RIGHTS TREATY REGIMES

Chapter 9 has examined the ICCPR Committee as a case study. We here make comparisons with the other UN human rights treaty bodies. Not every uni-

versal human rights treaty—for example, the Genocide Convention—has created a special organ to implement the treaty or monitor state conduct. In addition to the ICCPR Committee, there are now five other treaty bodies. They are:

- the Committee on Economic, Social and Cultural Rights (CESCR), established to monitor compliance with the ICESCR (and considered in Chapter 5);
- the Committee on the Elimination of Racial Discrimination (CERD), established under the International Convention on the Elimination of All Forms of Racial Discrimination;
- the Committee on the Elimination of Discrimination against Women (CEDAW), established under the Convention on the Elimination of All Forms of Discrimination against Women;
- the Committee against Torture (CAT), established under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and
- the Committee on the Rights of the Child (CRC), established under the Convention on the Rights of the Child.

COMMENT ON THE REPORTING AND COMPLAINTS PROCEDURES FOR THE SIX HUMAN RIGHTS TREATY BODIES

Although their mandates differ somewhat, reflecting both the respective political climates in which they were adopted and their subject-matters, the five treaty bodies listed above function essentially in ways similar to the ICCPR Committee. The following descriptions of the reporting and complaints procedures under the treaties note the salient differences among them, suggest common problems before them, and sketch current proposals for reform within specific treaties or for the UN human rights treaty system as a whole.

States' Reports

The principal activity of all of the treaty bodies remains the consideration of states parties' reports. For the most part, states must report within two years of becoming a party to the treaty and subsequently at five-year intervals. On occasion, urgent *ad hoc* reports are sought by some of the committees. Initially, the reporting function was envisaged by most governments to be of a relatively *pro forma* nature, but it has since evolved into a much more demanding exercise.

Three examples illustrate how these committees initiated changes in

procedures (some of which we have seen with respect to the ICCPR Committee) that have strengthened the reporting procedures. Perhaps the most significant is the practice, initiated by CERD in 1972, of 'inviting' states to send representatives to respond to questions by Committee members when the report by that state is being considered. This procedure was not foreseen in the treaty but it has since been adopted by all treaty bodies and is now an indispensable and fully accepted part of the process. A second example, initiated by the CESCR in 1991, is the practice of examining the situation in countries that have failed to report, even if no government-provided information is available and no representative is present. This practice removes the pre-existing reward to governments that ratified and never reported, thus avoiding committee scrutiny. The third example is the move from a procedure that was restricted to the examination of 'official' information (i.e. produced by the government or an intergovernmental organization) to one that takes full account of all sources and invites NGOs to provide written, and in some cases oral, information.

Another indication of the extent to which the reporting procedures have been broadened in scope appears in the following statement of the functions of reporting. It was adopted in relation to economic rights but has been generally accepted by other treaty bodies. The functions are:

> [1] . . . to ensure that a comprehensive review is undertaken with respect to national legislation, administrative rules and procedures, and practices in an effort to ensure the fullest possible conformity with the Convenant . . .
> [2] . . . to ensure that the State party monitors the actual situation with respect to each of the rights on a regular basis and is thus aware of the extent to which the various rights are, or are not, being enjoyed by all individuals within its territory or under its jurisdiction . . .
> [3] . . . the principal value of . . . an overview [of the situation in the state] is to provide the basis for the elaboration of clearly stated and carefully targeted policies, including the establishment of priorities which reflect the provisions of the Covenant. . . .
> [4] . . . to facilitate public scrutiny of government policies with respect to economic, social and cultural rights and to encourage the involvement of the various economic, social and cultural sectors of society in the formulation, implementation and review of the relevant policies . . .
> [5] . . . to provide a basis on which the State party itself, as well as the Committee, can effectively evaluate the extent to which progress has been made towards the realization of the obligations contained in the Covenant . . .
> [6] . . . to enable the State party itself to develop a better understanding of the problems and shortcomings [existing] . . .
> [7] . . . to develop a better understanding of the common problems faced by States. . . .[5]

[5] Committee on Economic, Social and Cultural Rights, General Comment No. 1 (1989), UN Doc. HRI.GEN/1/Rev.1 (1994), p. 43.

Whatever the achievements of the treaty system with respect to reporting, there remains scope for great improvement. Critics have pointed to the timidity of the committees in general, and especially to their excessive tolerance of the delinquencies of states. One critic has said of governments that:

> In large numbers they fail to produce timely reports, do not engage in reform activities in the course of producing reports, author inadequate reports, send uninformed representatives to the examination of reports by the treaty bodies, fail to respond to questions during the examinations, discourage greater media attention of the examination of reports, fail to disseminate reports and the results of the examinations within the State, elect non-independent/government employees to treaty body membership, fail to object to reservations, and fail to challenge reservations by additional means.[6]

Another issue about reporting has become pressing, the proliferation of obligations under the different treaty regimes. A state that is party to many or all of these six treaties is subject to distinct duties to report under each, whatever the overlap between, say, parts of its report to the ICCPR Committee and the report to CAT. Observers have questioned whether the system will eventually become—or indeed has already become—unsustainable because of the number of and overlap among these obligations. States are subject to the complex bureaucratic demands associated with a regular dialogue with as many as six separate committees—for example, ensuring normative and policy consistency among treaty bodies, thus risking dilution of already inadequate staffing and financial resources. Moreover, NGOs with sparse resources must deal with the difficulties of monitoring states' compliance with each of these treaties and seeking to give adequate publicity to the work of each.

A report commissioned by the General Assembly has suggested three 'long-term options for reducing reporting burdens . . . : (i) reducing the number of treaty bodies and hence the number of reports required; (ii) encouraging States to produce a single "global" report to be submitted to all relevant treaty bodies; and (iii) replacing the requirement of comprehensive periodic reports with specifically-tailored reports.'[7] Although there has been significant support, at least in the abstract, for reform, many observers have expressed concern about any attempt to overhaul the entire reporting system. Depending on perspective, they fear that proposals for such systematic reform might either be used to mask a significant downgrading of reporting or, alternatively, to strengthen the system of reporting to a politically unacceptable extent.

[6] Anne Bayefsky, Making the Human Rights Treaties Work, in Louis Henkin and J. L. Hargrove (eds.), Human Rights: An Agenda for the Next Century 222, 239 (1994).

[7] Philip Alston, Interim Report on Study on Enhancing the Long-Term Effectiveness of the United Nations Human Rights Treaty Regime, UN Doc. A/CONF.157/PC/62/Add.11/Rev.1 (1993), para. 27.

Complaints Procedures

Initially, an interstate complaints procedure was considered to be an important element in an effective monitoring system. Thus the first of the treaties adopted—CERD—provides for any state party to bring a complaint against another. By the following year, however, when the ICCPR was adopted, a comparable procedure was made dependent upon the specific, separate acceptance by a state of Article 41 of that treaty, setting forth that procedure. The CAT has a similar provision. These procedures are determinedly 'statist' in nature in that they make no provision for involvement by NGOs or individuals. the emphasis is upon achieving a 'friendly solution', and the procedure is undertaken in closed meetings. The ICCPR also provides for the establishment of an *ad hoc* Conciliation Commission, in the event that an amicable solution cannot be found.

Despite the availability of the interstate complaint procedure to all of the 143 parties to CERD (as of September 1995) and the acceptance of Article 41 of the ICCPR by 45 of its 131 states parties (whereas the CAT procedure under Article 21 has been accepted by only one state), no interstate complaint has ever been brought under any of the UN treaty-based procedures. Compare this record with that of the interstate procedure established under the European Human Rights Convention, p. 594, *infra*.

Analogous procedures for individual complaints under the Optional Protocol of the ICCPR are also provided for under the CAT and CERD. Although this chapter has demonstrated the significance of that procedure under the ICCPR, the similar procedures under the other two treaties have generated very few complaints. Over all their years, CAT has considered only 15 complaints while CERD has only dealt with five. Note the dramatic comparison with the statistics under the Optional Protocol, p. 536, *supra*.

One explanation for the discrepancy in the number of complaints received is that the CAT and CERD procedures have been accepted by only 35 and 21 states respectively. Another is that the ICCPR covers much of the same territory as the other two specialized treaties and that its procedures are much better known to NGOs and other potential complainants. This relative under-utilisation notwithstanding, proposals have been endorsed by the CESCR in 1994 and CEDAW in 1995 for optional protocols to establish individual complaints procedures. The proposals are not yet in final form, however, and governmental reactions remain ambivalent.

Investigation Procedures

The Convention against Torture is distinctive among the six treaties in providing for a more intrusive procedure under which one or more of its members may be asked to undertake a confidential inquiry and to report urgently to the CAT Committee in cases in which it 'receives reliable information which

appears to it to contain well-founded indications that torture is being systematically practised in the territory of a State Party' (Art. 20). This procedure applies automatically to all states parties unless, at the time of ratification, they specifically exclude its application. With the agreement of the state concerned, an on-site visit may be undertaken, although all of the relevant proceedings are confidential. The Committee may, however, decide to include a summary account of the results in its annual report. This occurred in relation to Turkey in 1993, and other countries have apparently been under consideration subsequently. UN Doc. A/48/44/Add.1 (1993).

Both CERD and the CESCR have also undertaken on-site missions in order to pursue their dialogue with certain states (compare the proposal for country visits by ICCPR members, p. 520, *supra*). But these missions have been undertaken on the basis of the general monitoring provisions of the relevant treaties, rather than for specific investigations. A proposal has been made by CEDAW to include a specifically mandated on-site fact-finding procedure in relation to that Convention. In addition, an optional protocol to CAT is currently being drafted which would provide for a system of both scheduled and unscheduled visits by that Committee to places of detention or other places where torture or cruel, inhuman or degrading treatment or punishment may be occurring. UN Doc. E/CN.4/1995738.

QUESTIONS

1. Why do you think there has never been an interstate complaint brought under the UN treaty procedures, even in cases of gross violations by relatively powerless states?

2. What are the arguments for and against a consolidation of the treaty system that would result in only one or two treaty bodies dealing with all of the rights covered by the six treaties? Would you support or oppose such a proposal?

3. How many of the seven functions attributed to the reporting system that are noted above are satisfied by the reporting under the ICCPR?

4. From what you have seen of the workings of the Optional Protocol under the ICCPR, do you believe that the adoption of individual complaints procedures—of course by separate protocols requiring ratifications—by each treaty body is sufficiently important to justify the bureaucratic and political energies involved in such an undertaking?

5. Assume that the UN Commission on Human Rights is working on a draft of a proposed Convention on Religious Intolerance that must ultimately be approved by the General Assembly and submitted to states for ratification. The draft Convention provides that everyone has the right to freedom of conscience and religion; that no one shall be subject to coercion impairing freedom to hold a belief of one's choice; that freedom to manifest religious belief shall be limited

only by requirements of public order, health or morals; and that there shall be no discrimination on the basis of religious beliefs. States are obligated to take appropriate measures to eliminate discrimination and to combat intolerance on grounds of religion.

You are on the staff of a member of the Commission, who has asked you to consider what kind of organ (committee) this proposed Convention should create—how the committee is to be constituted, what kinds of members it should have, what functions and powers, and so on. Taking into account whatever special needs this Convention may have, indicate what kind of committee you would propose.