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## The Emerging Jurisprudence of the Human Rights Committee

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# Articles

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B. G. Ramcharan\*

The Emerging Jurisprudence  
of The Human Rights  
Committee

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## I. *Introduction*

Referring to the role of the Human Rights Committee in the examination of reports submitted by States parties to the International Covenant on Civil and Political Rights, the Canadian representative in the Third Committee of the General Assembly in 1966, expected that the Committee would “examine, analyse, appraise and evaluate the reports . . . in a searching and critical fashion.”<sup>1</sup> After two years, during which five sessions of the Human Rights Committee were held, how does the Committee measure up to this standard? This will be the main inquiry of the present article during the course of which the following aspects will also be kept in mind: (1) What are the basic lines of approach of the Human Rights Committee in discharging its functions? (2) How is the Committee seeking to ensure the fullest attainable compliance with the Covenant and its Optional Protocol? (3) To what extent can it be said that the Committee is following a judicial approach or judicial standards in the discharge of its functions? (4) Is the Committee pursuing a liberal or a conservative approach in applying the provisions of the Covenant and the Protocol?

## II. *The Obligation of States parties and the Functions of the Human Rights Committee*

Under the Covenant each State party undertakes to *respect* and to *ensure* to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant without any distinction of any kind. In article 40, the States parties undertake to submit reports on the measures they have adopted which give effect to the rights recognized in the Covenant and on the progress made in the enjoyment of those rights, within one year of the entry into force of the Covenant for the States parties concerned and thereafter

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1. Prof. R. St. J. MacDonald, A/C.3/SR.1426, para. 22

whenever the Human Rights Committee so requests. Reports should also indicate the factors and difficulties, if any, affecting the implementation of the Covenant. The word "measures" was meant to have "broad connotations and to comprise all spheres of activities" including legislation, judicial and other actions.<sup>2</sup> The "progress made" refers to the "progress . . . made as a result of the measures adopted by States", and does not refer to the progressive implementation of the rights contained in the Covenant.<sup>3</sup>

Article 28 of the Covenant provides for the establishment of a Human Rights Committee consisting of 18 members, who are persons of high moral character and recognized competence in the field of human rights. This Committee is entrusted with: (i) the "study" of reports submitted by States parties and the making of "general comments" thereon; (ii) the consideration of communications by a State party to the Covenant under article 41 complaining that another State party is not fulfilling its obligations under the Covenant;<sup>4</sup> (iii) the receipt and consideration of communications submitted under the Optional Protocol to the Covenant, and the presentation of its "views thereon". (Under the Optional Protocol a State party to the Covenant that becomes a party to the Protocol recognizes the competence of the Human Rights Committee, subject to certain conditions, to receive and consider communications from individuals subject to its jurisdiction, who claim to be victims of a violation by that State party of any of the rights set forth in the Covenant.)

### III. *The Approach of the Human Rights Committee*

The Human Rights Committee began operations in 1977 and has so far held five sessions. In accordance with article 45 of the Covenant, the Committee has, thus far, submitted two annual reports to the General Assembly of the United Nations.<sup>5</sup>

The Committee considers itself an expert body mindful, *inter alia*, of judicial, fact-finding, conciliation, diplomatic and political elements in its functions. At its first session the question arose

2. A/C.3/SR.1126-1427

3. A/C.3/SR.1427, paras. 45 and 46

4. The procedure of inter-State complaints entered into force on March 28, 1979. It has been accepted so far by the following States: Austria, Denmark, Finland, Germany, Federal Republic of; Italy, Netherlands, New Zealand, Norway, Sweden and the United Kingdom.

5. A/32/44; A/33/40

whether the Committee is a judicial body. One of its members, Mr. Uribe Vargas considered that its “work was of a judicial nature”.<sup>6</sup> Other members also referred expressly or impliedly to judicial elements in its functions. However, another member, Mr. Graefrath “did not share the view that the work of the Committee could be compared with that of a court . . . Unlike a court, the Committee was not required to make any judgements,<sup>7</sup> but simply to consider and comment on reports and to act as a conciliatory body<sup>8</sup> in dealing with complaints and communications.”<sup>9</sup> Mr. Suy, (United Nations Legal Counsel) “believed that the Human Rights Committee was neither a legislative nor a judicial body and that every expert body was *sui generis*”.<sup>10</sup>

The Committee has underlined its independence by pointing out, in its first report, that it is not a subsidiary organ of the United Nations but a conventional organ established by the States parties to the Covenant.<sup>11</sup> The approach which has prevailed in the Committee thus far is a pragmatic one. Issues are faced as they arise, and approaches and techniques adopted which are likely to produce the best attainable results.

The approach of the Committee in its relationship with governments is “to develop a constructive dialogue with each State party in regard to the implementation of the Covenant and thereby contribute to mutual understanding and peaceful and friendly relations among nations in accordance with the Charter of the United Nations.”<sup>12</sup>

6. CCPR/SR. 6, para. 72

7. Cp. Mrs. Harris (USA), A/C.3/SR.1417, para. 53: “The role of the Human Rights Committee was essentially to act as a conciliation body available to the States concerned; however, it was not competent to determine whether a State party had failed to fulfil its commitments”. Similarly, Mr. Paolini (France) A/C.3/SR.1418, para. 7, “The Committee should limit itself to general comments”.

8. Cp. Mr. Hanga, CCPR/C/SR.13, para. 11: “he considered whether it was possible to compare the Committee to a conciliation body.” Mr. Suy, the Legal Counsel, replied “that conciliation was only one aspect of the Committee’s work”, *Id.* at para. 15

9. CCPR/C/SR.7, para. 1. Cp. Mr. Saksena (India), A/C.3/SR.1428, para. 10 who drew attention to the non-judicial character of the Committee. Mr. Nasinovsky (USSR), A/C.3/SR. 1425, para. 53, felt that “the Committee was not a judicial body”. However, Mr. Egas (Chile), *Id.* at para. 57, envisaged the possibility that the Committee might exercise judicial functions.

10. CCPR/C/SR. 13, para. 6

11. *Official Records of the General Assembly*, 32nd session, Supplement No. 44, A/32/44, para. 90

12. A/32/44, Annex IV

A heartening feature of the Committee is its recognition of the need for a close rapport with the public. The Committee has agreed that its reports, formal decisions and all other official documents shall be documents of general distribution unless the Committee decides otherwise. In its first annual report, the Committee expressed the opinion that, although the principle of confidentiality should govern their deliberations when dealing with complaints, a minimum of information should be made available in its reports without divulging the contents of the communications, the nature of the allegations, the identity of the author or the name of the State party against which the allegations were made. It was felt that the general public had a legitimate interest in knowing the main trends in the approach of the Committee in its consideration of communications. This was in line with the intention of the drafters of the Covenants who envisaged them "generating information and focussing public opinion on human rights matters".<sup>13</sup>

As regards the Committee's approach to the examination of reports, it has generally agreed that the main purpose of such examination should be to assist States parties in the promotion and protection of the human rights recognized in the Covenant.<sup>14</sup> The examination of reports considered thus far has been fairly detailed. Searching questions are asked of the representatives of the Governments present at the examination such as:

- What was the legal technique of incorporation of the Covenant into domestic law?
- Whether, and if so under what conditions, an individual could request the courts or administrative authorities to apply the Covenant against a law or regulation contrary to its provisions.
- Are there people not convicted of crimes who are detained for political reasons?
- What is the meaning of the concept of "socialist legality"?

In most instances the Government representative was requested, and undertook, to provide supplementary information to the Committee. The Committee's intention, after completing its study of each State's report, is to call for subsequent reports. The aim of such further reports will be to bring the situation up to date in respect of each State.

The committee has drawn up a set of general guidelines regarding the form and contents of reports to be submitted by States parties in the future. Among the questions in which it is interested in receiving

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13. A/32/44, para. 170

14. *Id.* at para. 105

information is whether the provisions of the Covenant can be invoked before, and directly enforced by, the courts, other tribunals or administrative authorities, or whether they first have to be transformed into internal laws and administrative regulations. The Committee is also interested in knowing of derogations, restrictions or limitations on the rights contained in the Covenant.

#### *IV. The Relationship Between International Law and Municipal Law: Incorporation of the Provisions of the Covenant into Municipal Law*

In the Commission on Human Rights in 1948, during the drafting of the International Covenants on Human Rights, an opinion was requested of the United Nations Legal Counsel on the following questions: "Is it proper and permissible for a State which accedes to, and ratifies an international convention to state that it will subsequently adapt its municipal law to the provisions of the Convention, or is it necessary that the adaptation of the municipal law precede the ratification of the Convention?" The Legal Counsel replied that ". . . as far as international law is concerned, the adaptation of municipal law is not a condition precedent to a State binding itself internationally. A State may properly undertake an international obligation and then subsequently take the necessary domestic legislative measures to ensure the fulfilment of the obligation undertaken." He added, "In considering this matter a clear distinction must be made between international law and the requirements of municipal law. It is recognized that under the municipal law of many countries an international convention or treaty does not become binding in domestic law or enforceable by the courts until it has been 'incorporated' or 'transformed' by legislative action into the municipal law and thus made a part of the law of the land. This does not affect in any way the international obligation of the State to carry out the treaty. In other words, even though the necessary enabling legislation is not enacted the treaty is binding internationally and there would clearly be a duty to make reparation for any resulting breach of the obligation.

"The question of the Commission also presents implicitly another question, namely: If a State has not adapted its municipal law to the provisions of the Covenant prior to, or at the time of, its ratification or accession, has it failed to carry out its obligations under the Covenant? Or, in other words, what is the legal situation during the interval between the date on which a treaty enters into

force for a particular State and the enactment of the necessary municipal legislation? In the light of the principles discussed above the answer to this question is quite clear. A State is under a duty to execute the provisions of a treaty from the date at which the treaty becomes binding upon that State. The fact that there may be omissions or deficiencies in municipal law would not, in international law, justify the failure of the State to fulfil its treaty obligations. The only exception to this arises, of course, where the treaty itself contains a provision that there shall be no duty to carry out the obligation prior to the enactment of the required municipal legislation. But where this exception does not exist a party is under a duty to enact such legislation as may be necessary to carry out the treaty obligations; consequently, it may not rely on the absence of such legislation to avoid responsibility for carrying out the requirements of the treaty. As a corollary to this it may be noted that the obligation is not discharged by a mere recommendation by the Executive to the Legislature requesting the necessary legislative action. In short, the obligation of a State arises at the moment it becomes a party to the treaty regardless of what its municipal law may require.”

The position that seems to be emerging in the Committee is that “the method used to integrate the provisions of the Covenant in domestic law is a matter for each State party to decide in accordance with its legal system and practice, the essential consideration being that no domestic system or practice could be invoked as a reason for failing to implement the Covenant.”<sup>15</sup> During the consideration of the Danish report, for example, Mr. Ganji, member from Iran, said that “he shared the view expressed by some members of the Committee that the provisions of an international treaty did not necessarily have to be incorporated into domestic law . . . The incorporation of treaty provisions into domestic law became necessary only when such provisions were not in keeping with a pre-existing legal situation.”<sup>16</sup>

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15. A/33/40, para. 117

16. CCPR/C/SR.54, para. 47. In reply to a question put on the subject by the Government of the United States, the International Labour Office replied, on November 13, 1950, that “the competent bodies of the International Labour Organization have regarded the question of whether or not legislation is, in fact, necessary to make effective the provisions of such a Convention as being a matter for decision by each Member of the Organization in the light of its constitutional practice and its existing law.” Similarly, in a letter dated October 18, 1929 sent by Albert Thomas, the Director, of the International Labour Office, to the

Members of the Committee are, however, particularly interested in whether a citizen is able to initiate legal proceedings invoking the provisions of the Covenant directly and how much weight courts can give to its provisions. Thus, during the examination of the Swedish report, Mr. Hanga of Romania, referring to a statement in the report that it had not been necessary to lay down provisions equivalent to those of the Covenant in an independent Swedish statute because existing domestic law was in full accord with the obligations to be assumed by Sweden under the Covenant, asked whether it would be possible for an individual to invoke the provisions of the Covenant before a court or administrative tribunal, or to call for the annulment of a law which ran counter to the Covenant under a procedure similar to that used to declare laws unconstitutional.<sup>17</sup>

An interesting point was made by Mr. Tomuschat, member from the Federal Republic of Germany, who found rather bold the assertion that “existing Swedish law, save on the three points where a reservation was made, was in full accord with the obligations which were to be assumed by Sweden under the Covenant.” It would be interesting, he felt, to know whether there was any procedure in Sweden under which an individual could lodge a complaint to the effect that Swedish law was not in harmony with the Covenant. Even if the two had been in full accord at the time of ratification, the provisions of the Covenant might well evolve in the course of their interpretation and application, and care should be taken to ensure that there was complete consistency at all times between the international legal order, as embodied in the Covenant and the domestic legal order. The Swedish Government had chosen a technique of implementation which consisted of bringing domestic legislation into line with the Covenant without, however, formally incorporating the latter into the domestic legal order. In his view, the rights accorded by the Government to the individual could not

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Government of the Irish Free State, in reply to that Government’s question whether, since a rest period of 24 hours was already granted to industrial workers in Irish practice, the enactment of a law was specifically necessary in order to give effect to the requirements of articles 2, 3 and 4 of Convention No. 14 of 1921 concerning the Application of the Weekly Rest in Industrial Undertakings, it was pointed out that although the course most usually adopted to secure the effective application of the Convention was that of passing legislation, Ireland was free to follow whatever method would in fact ensure effective application of the provisions of the Convention.

17. CCPR/C/SR.52, para. 30



be dependent upon the way in which they were incorporated in the legislation of various countries. Consequently, even in a country which had not made the covenant part of its domestic law, an individual should have the right directly to invoke its provisions before the Courts. Similar views were expressed by Mr. Hanga of Romania.<sup>18</sup> Replying to these comments the representative of Sweden said that his country "accepted the supervision exercised by the Human Rights Committee."<sup>19</sup> There is a strong tendency in the Committee in favour of the view that the Covenant should be made directly applicable in internal law.

Articles 20, 21 and 23 of the draft articles on the law of international responsibility elaborated by the International Law Commission are highly pertinent to the issues under discussion. Article 20 reads: "*Breach of an international obligation requiring the adoption of a particular course of conduct:* There is a breach by a State of an international obligation requiring it to adopt a particular course of conduct when the conduct of that State is not in conformity with that required by that obligation." Article 21 reads: "*Breach of an international obligation requiring the achievement of a specified result:* 1. There is a breach by a State of an international obligation requiring it to achieve, by means of its own choice, a specified result if, by the conduct adopted, the State does not achieve the result required of it by that obligation. 2. When the conduct of the State has created a situation not in conformity with the result required of it by an international obligation, but the obligation allows that this or an equivalent result may nevertheless be achieved by subsequent conduct of the State, there is a breach of the obligation only if the State also fails by its subsequent conduct to achieve the result required of it by that obligation." Article 23 reads: "*Breach of an international obligation to prevent a given event:* When the result required of a State by an international obligation is the prevention, by means of its own choice, of the occurrence of a given event, there is a breach of that obligation only

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18. CCPR/C/SR/52, para. 38. Cf. para. 70 of the Report of the Committee for 1978 (A/33/40): "Some members asked whether it was possible for an individual to directly invoke the provisions of the Covenant before a court or administrative tribunal or to call for the annulment of a law which ran counter to the Covenant." Also, para. 120: "It was asked whether there existed any means by which an individual contesting the Government's interpretation of the Covenant could have his point of view heard and considered." Similarly, para. 412

19. CCPR/C/SR. 53, para. 2

if, by the conduct adopted, the State does not achieve that result.”<sup>20</sup>

In the view of the ILC, there are international obligations which require the State to perform or to refrain from a specifically determined action and there are other cases in which the international obligation only requires the State to bring about a certain situation or result, leaving it free to do so by whatever means it chooses. Obligations of the first kind are called obligations “of conduct” or “of means”, and those of the second kind obligations “of result”.<sup>21</sup> What distinguishes the first type of obligation from the second is not that obligations “of conduct” or “of means” do not have a particular object or result, but that their object or result must be achieved through action, conduct or means “specifically determined” by the international obligation itself, which is not true of international obligations of result. However, the specific determination of the required action which identifies an international obligation as an obligation “of conduct” or “of means” may vary in its degree of precision. For example, an international obligation may specify that the State shall enact “a law”, or it may require the State to adopt “legislative measures”. In the latter situation the obligation, while remaining an obligation “of conduct” or “of means” nevertheless leaves the State some latitude enabling it to proceed either by enacting a law proper or by some other normative means peculiar to its legal system. Examples of international obligations requiring specified legislative action may be found in human rights treaties. Thus, the Commission cites article 2, paragraph 1 (c), of the International Convention on the Elimination of All Forms of Racial Discrimination, which provides that “Each State Party shall take effective measures . . . to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists.” It also cites article 3a. of the 1960 Convention against Discrimination in Education, in which States undertake to “abrogate any statutory provisions and any administrative instructions . . . which involve discrimination in education.”

In the opinion of the Commission where the action or omission<sup>2</sup> found to have occurred is in fact not in conformity with the conduct

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20. Report of the International Law Commission on the work of its 29th session, A/32/10 at 20-21

21. This discussion of the position of the International Law Commission is etropolated from the report of the International Law Commission on the work of its 29th session. A/32/10 at 20-64

specifically required of the organ responsible for the action or omission, there is a direct breach of the obligation in question, without any other condition being required for such a finding. This finding is not influenced by the fact that the non-conformity of the conduct adopted with the conduct which should have been adopted did or did not have consequences that were actually harmful. The ILC cites as an example article 10, paragraph 3, of the International Covenant on Economic, Social and Cultural Rights of 1966, which imposes on a State an obligation to recognize that the employment of children and young persons “in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be *punishable by law*.” This obligation, the ILC asserts, is breached simply by the fact that a law providing for punishment of such practices has not been enacted, even if no specific instance of the employment of children in such work is found in the country concerned. Similarly, if, as in the case of article 2, paragraph 1 (c), of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination, a convention obliges a State to rescind legislative provisions which have the effect of creating such discrimination, this obligation is breached simply by the fact that the provisions in question have not officially been rescinded, even if they would never actually have been applied or no longer could be.

State practice and international jurisprudence, the ILC adds, confirm the validity of the above conclusions. From this practice and jurisprudence it concludes that, where the international obligation requires from the State a particular course of conduct in the form of an action or omission on the part of one of its organs, the conduct of a State organ which is not in conformity with that required of it by the obligation in question is sufficient to constitute a breach of the obligation.

International obligations “of result,” the Commission continues, do not require a particular course of conduct on the part of the State or, in other words, a course of conduct on the part of specified State organs. It is possible, within the wide and varied range of international obligations “of result” to make further distinctions according to the different degrees of permissiveness of these obligations in regard to the achievement of the result they require. The permissiveness may, first of all, take the form of an initial freedom of choice:

“The permissiveness as to means, which is characteristic of

international obligations “of result”, sometimes extends to giving the State an opportunity to apply a remedy *a posteriori* to the effects of an initial course of conduct which has led to a situation incompatible with the result required by the obligation. It is thus possible that international law may require only a final result, not only leaving the State free to choose the means it will use initially, but also allowing it, if it has not achieved the result by the first means chosen, to resort to other means to that end. Under all obligations belonging to this second group of obligations “of result” the State which initially adopted a course of conduct consisting in acts or omissions incompatible with the result required of it, is allowed a fresh opportunity to discharge its obligation. In other words, under certain conditions and in so far as the required result has not been rendered permanently unattainable by the initial conduct, such obligations allow the State to remedy the situation temporarily created and to ensure the same result, albeit belatedly, by adopting as an exceptional measure a different course of conduct capable of obliterating the consequences of the initial conduct.

“In the cases mentioned, the possibility of applying a remedy *a posteriori* to the adverse effects of a State’s initial conduct is coupled with initial freedom in the choice of means. But that is not always so. In other cases, the opportunity of still achieving a result in conformity with that required by the international obligation by remedying, through different means, the incompatible result temporarily brought about, is not accorded to the State solely where it has had initial freedom to choose between various normal means of discharging the obligation. The State may be given that opportunity even where it had no such initial freedom of choice. In such a case, it is, precisely, the faculty of subsequently making good, by different conduct, the consequences of the initial action or omission which marks the latitude allowed to the State . . .”<sup>22</sup>

The Commission points out that there are also cases in which, when the initial conduct has made the main required result henceforth unattainable, the international obligation allows the State to consider itself discharged by achieving an alternative result. The Commission cites in this connexion article 9, paragraph 1, of the International Covenant on Civil and Political Rights, which provides that no one shall be subjected to arbitrary arrest or detention. It asserts that the obligation here set out should be read in

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22. *Id.* at 39

conjunction with paragraphs 4 and 5 of the same article, which provide respectively that “Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful,” and that “Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation”. This juxtaposition of provisions shows, it feels, that the State can consider that it has acted in conformity with its international duties even if, having failed to achieve the main result required by the obligation stated in article 9, it has nevertheless achieved the alternative result of making reparation for the injury caused to the person who suffered wrongful arrest or detention.

According to the Commission the full freedom of choice enjoyed by the State sometimes derives from the fact that the international obligation generally requires the State bound by it to take “all appropriate measures” to achieve a given result, without giving any indication of what the appropriate measures may be. For example, the International Convention on the Elimination of All Forms of Racial Discrimination provides in article 2, paragraph 1 that: “States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms . . .” In other cases, the freedom of choice accorded to the State is implicit in the fact that the international obligation only specified the result to be achieved, the text imposing the obligation making no reference at all to the means of achieving it. It cites as examples the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms and certain international labour conventions.

The ILC also identifies obligations which, although not requiring recourse to a specified means, nevertheless indicate a preference for one means or another. The Commission cites article 2, paragraph 1, of the International Covenant on Economic, Social and Cultural Rights, which provides that “Each State Party to the present Covenant undertakes to take steps . . . with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures”, or article 2, paragraph 2, of the International Covenant on Civil and Political Rights, which provides that

“Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.”

There can be no doubt it asserts that in these cases legislative means are expressly indicated at the international level as being the most normal and appropriate for achieving the purposes of the Covenant in question, though recourse to such means is not specifically or exclusively required. The State is free to employ some other means if it so desires, provided that those means also enable it to achieve *in concreto* the full realization of the individual rights provided for by the Covenants.

Illustrating the case of an international obligation which the State may, in exceptional circumstances, still discharge by resorting to different means of achieving the required result if the course of conduct initially adopted has failed, the ILC mentions instances in which this further degree of permissiveness is merely an addition to the normal initial freedom of choice of the means to be used to fulfil the obligation. Such initial freedom of choice, it asserts, “is characteristic of, for example, the majority of international obligations concerning the protection of human rights. When the International Covenant on Civil and Political Rights provides that “Everyone shall be free to leave any country, including his own” (article 12, paragraph 2), that “Everyone shall have the right to recognition everywhere as a person before the law” (article 16), or that “Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests” (article 22, paragraph 1), the first conclusion to be drawn from the very object of these provisions and from their formulation is that the State is free to adopt whatever measures it deems most appropriate, in its own particular case, to guarantee these freedoms and rights to individuals. In the extreme case it may refrain from adopting any measures at all, provided that the result is achieved in practice, *i.e.* that any man or woman who wishes to leave the country is in fact free to go, that he or she is not denied recognition as a person before the law, that his or her freedom of association is not obstructed, and so on. But the Covenant as a whole points to another conclusion. Assuming, for example, that the State has chosen to fulfil its obligations by the

administrative means, an adverse decision concerning the right of an individual taken by the first authority called upon to rule in recognitionis case does not normally make it definitively impossible for the State to achieve the result internationally required of it. That result may be considered to have been achieved even if a higher authority has had to intervene and set aside the first authority's decision, and only this subsequent action has secured, for the individual, recognition of the right he sought to exercise.<sup>23</sup>

## V. *The Examination of Reports*

### 1. *The Approach to Supervision*

According to the author of a recent treatise on international supervision,

Supervision has two aspects: review and correction. The first aspect bears on the testing of the behaviour of States for its conformity with international law. The other aspect relates to the correction or termination of behaviour (an act or an omission) which is found to be contrary to international law.

Supervision is part of legal technique . . . . (t)he principal purpose of supervision is to ensure observance of law and regular functioning of a public service under the conditions laid down by law. Supervision is an organic task which makes it possible to rectify errors, either of interpretation or of action, which might compromise the stability and the security of social existence. It therefore serves to assure the necessary public order. Supervision ends when conformity with the rules has been found. When an irregularity has been found, supervision does not end until a

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23. A footnote in the ILC reports adds:

“If any doubt should persist as to the soundness of this conclusion, the fact that the Covenant contains a clause concerning the exhaustion of domestic remedies (article 41, paragraph 1 (c)) would suffice to remove it. A similar conclusion naturally holds good for all obligations imposed by conventions which contain an explicit clause of this kind, such as the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (article 26) and the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (article 11, paragraph 3, of article 14, paragraph 7 (a)). The effect of this clause is, precisely, to prevent the establishment of final failure to achieve the result required of the State by the obligation which the clause accompanies, so long as it is still possible to obtain that result by one of the other means at the State's disposal. It would, however, be wrong to believe that the conclusion stated is justified only in cases covered by the specific provisions of article 22 of the present draft, where the agreement from which certain obligations derive contains a clause expressly providing that the State cannot be charged at the international level with not having fulfilled its obligations, so long as the available local remedies have not been exhausted.”

redress has been made which has brought the contested behaviour into conformity with the legal rule. In general such a result is achieved by means of persuasion.<sup>24</sup>

As was seen above, the Human Rights Committee strives to establish a dialogue with Governments and to assist them in complying with their obligations under the Covenant. At its third session, held in 1978, the Committee held an exchange of views on whether, and if so, in what form, it should express its views on the reports it had considered, to the Governments of the States parties concerned. It may be recalled that under article 40, paragraph 4 of the Covenant, the Committee is required to study the reports submitted by the States parties and to "transmit its reports, and such general comments as it may consider appropriate, to the States parties." Under article 45 the Committee is required to submit an annual report on its activities.

Some members of the Committee were of the opinion that the Committee should, before examining the substance of the reports submitted by States parties, first satisfy itself that they provided all the information required under article 66 of its rules of procedure. Divergent views were expressed as to whether, under article 40, paragraph 4 of the Covenant, the Committee was under an obligation to prepare in respect of each report which it examined, specific reports to the States parties in which it could evaluate the situation, in law as well as in fact, and make suggestions and recommendations with a view to promoting the observance and enjoyment of the rights guaranteed under the Covenant; or whether the purpose of reporting to the States parties as mentioned under article 40, paragraph 4, of the Covenant would be served by reflecting the views of the Committee in its annual report to the General Assembly under article 45 of the Covenant. Some members were of the opinion that in its annual report to the General Assembly, the Committee could only indicate whether or not it was satisfied with a report submitted by a State party, but could not indicate that a State party had failed to comply with its obligations or that certain national actions were contrary to the provisions of the Covenant.

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24. H. A. H. Audretsch, *Supervision in European Community Law* (1978), at 206. See generally, Asbeck, F.M. van. "Quelques aspects du contrôle international non-judiciaire de l'application par les gouvernements de conventions internationales," *Liber amicorum in honour of JPA François* (Leyden: 1959), at 27-41



- Barav, A. "Failure of Member States to fulfill their obligations under Community Law", (1975) 12 *Common Market Law Review*, 369-383
- Bebr, G. "Judicial Remedy of Private Parties Against Normative Acts of the European Communities: The Role of the Exception of Illegality," 4 *Common Market Law Review*, at 7-13.
- Berthoud, P. *Le contrôle international de l'exécution des conventions collectives* (Genève 1946)
- Buergethal, T. "Implementing the United Nations Racial Convention", (1977) 12 *Texas International Law Journal* Nos. 2-3, at 187-221.
- Brierly, J.L. *The Basis of Obligation in International Law* (Oxford 1958) Das, K. "Measures of Implementation of the International Convention on the Elimination of All Forms of Racial Discrimination with special reference to the provisions concerning reports from States parties to the Convention", IV *Human Rights Journal*, Nos. 2-3 at 213-262
- Dehousse, F. "Report of the Legal Affairs Committee on the application of Community Law by the Member States", (1967-1968) *European Parliament document*, at, 38. Dijk, P. "The implementation and application of the law of the European Communities within the legal order of the Netherlands" (1969), 6 *Common Market Law Review* at 283-308
- EFTA — "How international treaties are implemented in EFTA countries", EFTA Bulletin 1971, nos. 7, 8, 9 and EFTA Bulletin 1972, nos. 1, 2. Ferriere, G. *Le contrôle de la légalité des actes étatiques par la Cour de Justice des Communautés européennes* (Paris 1968)
- Goodrich, L. M. and Hambro, E. *Charter of the United Nations* (London: 1969)
- Hahn, J. C. *Le contrôle de l'exécution des obligations dans les organisations internationales économiques* (Paris, Pedone 1973)
- Henkin, L. *How Nations behave* (London: 1968)
- Kravis, I. B. *Domestic Interests and international obligations: Safeguards in international trade organizations* (Philadelphia: 1963)
- Landy, E.A. *The Effectiveness of International Supervision: Thirty Years of ILO Experience* (London, New York: 1966)
- Mashaw, J.L. "Ensuring the observance of law in the interpretation and application of the EEC Treaty", (1970), 7 *Common Market Law Review*, at 423-453
- Merle, M. "Le contrôle exercé par les organisations internationales sur les activités des Etats membres" *AFDI* 1959, 411-431.
- Mertens de Wilmars, J. and Verougstraete, I.M. "Proceedings against Member States for failure to fulfil their obligations" (1970), 7 *Common Market Law Review* at 385-406
- Monaco, R. "Le contrôle dans les organisations interationales", *Festschrift für Walter Schätzel* (Düsseldorf: 1960), at 329-339.
- Morand, C.A. "Les recommandations, les résolutions et les avis du droit communautaire", *CDE* (1970), at 623-644
- Much, W. "La Commission, gardienne des traités", La Commission et l'élargissement de l'Europe (Bruxelles: 1974), at 85-109
- Questiaux, N. "La procedure des rapports triennaux devant la Commission des droits de l'homme des Nations Unies" I *Revue des droits de l'homme* (1968), No. 4, at 544-548
- Reuter, P. *Institutions internationales* (Paris: 1956)
- Scelle, G. "Théorie et pratique de la fonction exécutive en droit international", *RCADI*, t. 55, (1936), at 91-202.
- Schermers, H. G. *International Institutional Law* (Leyden: 1972-1974): The law as it stands against treaty violations by States, *LIEI* 1974/2 111-139

The members of the Committee were, however, generally in agreement that regardless of methods to be formulated and followed in its examination of reports, such methods should be motivated by the firm belief of the Committee that a fruitful and constructive dialogue with States parties was essential for the realization of the rights and freedoms provided for in the Covenant; that it was premature, at this early stage of the Committee's experience, to formulate rigid methods for examining reports from States parties; and that information on the experience and methods of other bodies engaged in similar supervisory functions, such as the Committee on the Elimination of Racial Discrimination (CERD) and the ILO's Committee of Experts on the Application of Conventions and Recommendations, could prove to be useful for that purpose. In this connection the Committee was provided with information on the procedures and methods of work followed by the Committee on the Elimination of Racial Discrimination in its examination of reports and information submitted to it by States parties under article 9 of the International Convention on the Elimination of All Forms of Racial Discrimination.<sup>25</sup>

The Committee has, so far, not forwarded any 'general comments', to States parties whose reports it has examined. Neither has it made such comments in its annual report to the General Assembly. Its annual reports contain descriptions of the consideration of each State's report, questions asked by individual members and additional information requested by them.

## 2. *The Standard of Supervision*

In a round-up on its fifty years of experience in the supervising of the implementation of international labour standards, the ILO

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Tammes, A.J.P. "The Ensurance of Community Law By the National Judge; Individual Legal Protection in the European Communities," *EM* 1 (Deventer 1964) 157-166

Usher, J.A. "The Influence of National Concepts on Decisions of the European Court" (1976), *European Law Review* at 359-374

Valticos, N. "Un système de contrôle international: la mise en oeuvre des conventions internationales du travail", du *RCADI*, t. 123 (1968-I), 311-407;

"Après de certains grands problèmes du contrôle international (spécialement à propos des conventions internationales du travail)", *Mélanges MARIDAKIS* (Athènes 1964), vol. III, 543-586

Herbert, J. "Le nouveau système de contrôle de sécurité", *RTDE* 1977, 282-291

Nafilyan, G. "La position des états membres et les recours en manquements", *RTDE* 1977, 214-243

25. For the discussion of these issues see CCPR/C/SR.48, 49, 50, 55 and 73

Committee of Experts on the Application of Standards emphasized in 1977 that its “function is to determine whether the requirements of a given convention are being met, whatever the economic and social conditions existing in a given country.” “These are international standards,” it added, “and the manner in which their implementation is evaluated must be uniform and must not be affected by concepts derived from any particular economic or social system”.<sup>26</sup> In similar vein, in 1977 the General Assembly in a resolution adopted after consideration of the first annual report of the Human Rights Committee, appreciated that the Committee “strives for uniform standards of implementation of the Covenant”. During the study of the Swedish report in the Human Rights Committee, however, the representative of Sweden expressed the view “that no uniform world-wide solutions could be found to all the problems which States have to deal with in their reports under article 40 of the Covenant”.<sup>27</sup> Asked what was meant by a “democratic society” in chapter 2, section 12 of the Swedish constitution, he replied that “that concept must be interpreted in the light of the Swedish Constitution”.<sup>28</sup>

It is apparent that we are here in a delicate area involving the reconciliation of uniform standards of implementation with diversity of methods for implementing the Covenant. The Committee’s records so far show that it has not yet had to pronounce itself on this matter. So far it has merely undertaken the first examination of reports and requested additional information. The issue may arise when it returns to these reports and begins to evaluate them. It is, however, an important issue to be watched in the future. To illustrate the type of problem that might be encountered, let us cite the question of the standard for determining the independence of judges. During the study of the Libyan report, for example, one member observed that the principle of legality was dependent on the existence, in accordance with article 14 of the Covenant, of independent and impartial courts and wished to know how judges were appointed, whether they were appointed for life or could be dismissed, and, if they could, by what authority. Another member of the Committee noted, however, that the best means of

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26. Report of the Committee of Experts on the Application of Conventions and Recommendations to the 63rd session of the International Labour Conference (1977), at 12-13

27. CCPR/C/SR.53, para. 2

28. *Id.*

guaranteeing the independence of the courts and judges consisted not so much in appointing judges for life as in giving every citizen the possibility of becoming a judge.<sup>29</sup> Will the Committee need, eventually, to reconcile these two approaches?

Although there are few instances where the Committee has thus far pronounced itself on general standards of supervision, individual members of the Committee have offered their views on the matter. Thus, according to Mr. Movchan, “the Committee . . . had an obligation to consider not only the measures already adopted by States in order to fulfil their obligations under the Government, but also the progress achieved in that respect”.<sup>30</sup>

During the consideration of the Byelorussian report, Mr. Tomuschat noted that

the meetings being held by the Committee marked a turning-point in the history of human rights: for the first time, a procedure had been established which applied to the States of all regions in the world, irrespective of the ideological and political differences separating them, and which was designed to exercise, through a friendly and constructive dialogue a kind of international control.<sup>31</sup>

The Committee was not an international court but was similar to one in certain respects, particularly in regard to its obligation to be guided exclusively by legal criteria — which rightly distinguished it from a political body. Its function was to improve the human rights performance of all countries, mainly by bringing into the open the deficiencies of their systems and thereby perhaps causing States to review their position and to correct situations that were not in accordance with the provisions of the Covenant.<sup>32</sup> On an earlier occasion Mr. Tomuschat expressed the view that the Committee “alone could find a common denominator in the different concepts of the exercise of human rights and ensure that the Covenant was

29. Report of the Committee, 1978, A/33/40, para. 58; CCPR/C/SR.51, paras. 44 and 69

30. CCPR/C/SR.111, para. 13

31. Cf. Mr. Opsahl, CCPR/C/SR.109, para. 9: The report of the USSR “represented a milestone in the history of the international protection of human rights, for its submission had given the lie to the pessimists who had asserted that the socialist states, and particularly the USSR, would never submit to international supervision of the implementation of civil and political rights within their territories and it marked the beginning of a new era of co-operation in the implementation of the Universal Declaration of Human Rights”

32. CCPR/C/117, para. 35

being applied in a consistent manner’’.<sup>33</sup>

Mr. Graefrath has expressed the view that the obligation upon States parties under article 2 was

sufficiently broad to allow States with different social systems to co-operate in the field of human rights and did not raise any political system to the level of a model which alone would make it possible to fulfil the obligations deriving from the Covenant. The Committee’s role was not to assess the situation of different States, commending some and condemning others for their policies in the matter of civil and political rights; the international community had established other procedures for that purpose. Under article 40, the Committee’s task was to study the reports submitted by States parties and to encourage States to implement the provisions of the Covenant.<sup>34</sup>

However,

Article 2 of the Covenant did not confine itself to requesting States to refrain from infringing human rights but laid an obligation on them to ensure respect for those rights. A State used its power when it took life by imposing the death penalty, but it also used it when it did nothing, or not enough, to reduce infant mortality. It was, of course, necessary to take account of the economic and technical possibilities of States, but what was important for the Committee was that mere formal recognition of a right without practical measures for its implementation was not enough and it was only in relation to the right to life, set forth in article 6, that that was true.’’<sup>35</sup>

### 3. *Fact-finding*

During the consideration of the Danish report, a member of the Committee noted that in considering the reports discussed so far, the

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33. CCPR/C/SR.109, para 47

34. CCPR/C/SR.117, para. 52

35. CCPR/C/SR. 117, para. 54, Cf. the International Law Commission: “What matters is that the result required by the obligation should in fact be achieved; if it is not, a breach has been committed, whatever measures are taken by the State. We have seen for example that article 2, paragraph 1, of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination provides that “States parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms . . .”. Now it is obvious that, if the administrative authorities of a State party to the Convention in fact commit acts of racial discrimination, the State will not escape the consequence of being charged with a breach of the Convention by taking refuge behind some law which it may have enacted prohibiting such acts. It is not sufficient to enact a law because, if a practice contrary to the obligation is continued in, the result intended by the obligation is not achieved *in concreto*”. Report of the ILC on the work of its 29th session, A/32/10, at 59.

Committee had been dealing with prevailing legal situations and trying to determine whether those situations were in keeping with the provisions of the Covenant. He felt, however, that the Committee should be more interested in finding out what the factual situation was in the States parties to the Covenant. States parties might actually be applying their domestic laws in ways that were fully consistent with the provisions of the Covenant, but the Committee could never be absolutely sure whether that was so unless it received reports dealing with the *de-facto* situation in those States, not the legal situation. He was, therefore, of the opinion that the guidelines which the Committee requested States parties to follow in the submission of their reports had to go farther than they did at present.<sup>36</sup>

Going beyond the legal facade is a task that the Committee has not yet had time to deal with, but it may prove in the long term to be one of the most challenging parts of its responsibilities.

#### 4. *International Control*

In its consideration of reports, the Committee is, so far, still at the stage of 'review' and has not yet reached the stage of 'control' in respect of any State party. Although individual members of the Committee have on occasions expressed the view that some parts of the reports examined seemed to indicate contradictions of the Covenant, the Committee itself has not yet approached such a pronouncement. Up to its fifth session it had had only one instance of a second report presented by a State party. In that instance it was felt desirable not to follow the procedure hitherto adopted for initial reports and to concentrate instead on certain particular points. In order to achieve more orderly deliberations, it was suggested that members should concentrate on a limited number of points since the Committee had already spent considerable time examining the report in questions (Ecuador). The members who wished to do so were invited to inform the Chairman in advance of those aspects which they would particularly like to be dealt with, so that they could be brought to the attention of the Committee as a whole.<sup>37</sup> Some members did provide such lists of questions which were put to the representative of the Government who thereupon replied to them. The Committee did not make any further pronouncements at

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36. Mr. Ganji, CCPR/C/SR.54, at paras. 48-50

37. CCPR/C/SR.117, para. 60

the end of this second phase.<sup>38</sup>

### 5. *Reservations*

It is a clear principle of international law that a State, upon ratifying or acceding to a treaty, may enter reservations provided that they do not negate the essential object and purpose of the treaty. Assuming that the latter proviso has been satisfied, is a body charged with supervising the implementation of the treaty entitled to question the reservations entered by a State party? This is an issue which arose early in the Committee. In considering the report of Finland, some members of the Committee expressed the view that some of the reservations made by it were not really necessary and feared that too many reservations may distort the meaning of the Covenant. They stressed that under the Vienna Convention of the Law of Treaties (1969), a State may not make reservations incompatible with the essential object and purpose of a treaty. Other members, however, were of the view that ratification and implementation of the Covenant with reservations is better than its non-ratification. In their opinion the making of reservations may usefully clarify the legal situation wherever there was an obvious discrepancy between the Covenant and existing domestic legislation.

An interesting approach was taken on another report by Mr. Movchan of the USSR. Commenting on Sweden's reservation to article 20, paragraph 1, of the Covenant pertaining to the prohibition of war propaganda, he asked

whether Sweden intended to enact legislation to eliminate the contradiction between international law and domestic law constituted by its reservation to that article. The speedy enactment of such legislation would enable Sweden to fulfil its international obligations under the Charter of the United Nations and the 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, which prohibited war and the threat or use of force, which were fraught with war propaganda.<sup>39</sup>

Similarly, Messrs. Hanga and Koulishhev regretted that the Swedish Government had found it necessary to enter a reservation to article 20 because, they pointed out, war propaganda was prohibited under several international instruments. They hoped that the Government

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38. CCPR/C/SR.118

39. CCPR/C/SR.52, para. 15

would find it possible to withdraw its reservation.<sup>40</sup> Here we see a reservation being challenged on the ground that it was inconsistent with international customary law.

An interesting issue which has not yet been discussed in the Committee is the permissibility of reservations to rights referred to in article 4 of the Covenant. It may be recalled that this article provides that no derogations should be made to certain rights enumerated therein. In its instrument of adherence the Government of the Federal Republic of Germany entered a reservation to article 15 (1), one of the articles in respect of which no derogation is permissible under article 4.<sup>41</sup> Is a reservation to a right from which no derogation is possible compatible with the object and purposes of the Covenant? It will be interesting to see the Committee's reaction to this question.<sup>42</sup>

#### *6. The Inter-dependence and Indivisibility of Civil and Political Rights and Economic, Social and Cultural Rights and the Relevance of Economic and Social Conditions*

In its report to the Committee, the Government of the German Democratic Republic asserted that the basic economic and social rights were the decisive precondition for the full implementation of civil and political rights. This led to an interesting exchange in the Committee. According to one viewpoint, it was more accurate to say that the full enjoyment of civil and political rights might depend on the degree to which economic, social and cultural rights were enjoyed, in view of the more immediate character of the basic obligation embodied in article 2 of the International Covenant on Civil and Political Rights as compared with that of article 2 of the International Covenant on Economic, Social and Cultural Rights. On the other hand, some members expressed full agreement with the basic premise in the report and reference was made in this respect to the relevant paragraph of General Assembly resolution 32/130 of 16 December 1977 which stated that the full "realization of civil and political rights, without the enjoyment of economic,

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40. *Id.*, at paras. 31, 35

41. See CCPR/C/2, at 5

42. On reservations to the International Convention on the Elimination of All Forms of Racial Discrimination, see United Nations document CERD/C/R.93 — 29 July 1976: Reservations, Declarations and Statements of Interpretation Made by States Parties to the International Convention on the Elimination of All Forms of Racial Discrimination: Note by the Secretary-General



social and cultural rights is impossible.” Thus, Mr. Ganji pointed out that: “it should be borne in mind that the views of over two-thirds of the world’s inhabitants could not be articulated through the Committee, which was a restricted body of experts. He fully shared the views expressed by Mr. Prado Vallejo and Mr. Opsahl concerning the interdependence of human rights and fundamental freedoms, which were in fact inseparable. In order to exercise any of the rights with which the Committee was concerned, an individual had to exist and, in order to exist, he must die neither before nor after birth and he must receive a minimum of food, education, health care, housing and clothing. There was undoubtedly an interconnexion between the right to life, the requirements of which were material, and the right to exercise all other freedoms.

“The reason for which there were two Covenants on human rights were well known. At the outset, there had been only one draft covenant, but the cold war and the views of two separate groups of States had led to the adoption of two texts, the interdependence of which was nevertheless borne out by the almost identical wording of the third preambular paragraph of each.

“The need to adopt a realistic approach to the issues with which the Committee was concerned could not be overstressed. Twenty-five of the 45 States parties to the Covenant on Civil and Political Rights were Asian, African or Latin American States. While those States must certainly comply with the obligations they had assumed, it should be clearly understood that even the most perfect laws could not be applied unless a proper legal infrastructure existed and unless there were judges and administrators who understood the full import of the rights they were required to protect.

“Had the international community been adopting the Covenants today, the result would certainly be one instrument instead of two. In that connection, he drew attention to General Assembly resolution 32/130 which had been adopted on 16 December 1977 by 123 votes to none, with 15 abstentions. Forty-two of the 45 States parties to the Covenant on Civil and Political Rights had voted in favour of that resolution, the eleventh preambular paragraph of which stated that the continuing existence of an unjust international economic order constituted ‘a major obstacle to the realization of the economic, social and cultural rights in developing countries.’ Furthermore, paragraph 1 (a) of the resolution stated that all human rights and fundamental freedoms were indivisible and interdependent. That was reality, and he was not prepared to accept anything

else. The resolution went on to state, in paragraph 1 (b) that ‘The full realization of civil and political rights without the enjoyment of economic, social and cultural rights is impossible.’

It would be the States parties themselves that would determine the fate of the Committee’s deliberations, and they would be attentive to the approach adopted by the Committee to the performance of its task. He did not wish to suggest that underdevelopment could be a pretext for permitting torture and inequality; indeed, certain of the rights embodied in the Covenant did not depend entirely upon the level of development reached in a country, even though an administrative and judicial infrastructure as well as properly educated judges, lawyers and administrators were required in order to put into effect any system of justice. However, the Covenant was also concerned with a certain number of rights and freedoms which could not be exercised in the absence of an adequate social and economic infrastructure.’<sup>43</sup>

An interesting case arose during the examination of the report of Libya. One member, Mr. Hanga of Romania, asked: ‘‘Did the provisions of the Covenant really form an integral part of the national legal system and was their implementation facilitated by the prevailing social and economic conditions?’’<sup>44</sup> Mr. Graefrath of the German Democratic Republic felt that ‘‘it would be useful for the Committee to know what were the achievements of the Libyan revolution, whether structural changes had been made in society and legislation, and if so, whether those changes had had any effects on human rights.’’<sup>45</sup> Mr. Movchan of the USSR thought that ‘‘the report and the explanations given by the representative of the Libyan Arab Jamahiriya bore witness to significant economic and social changes in that country intended to satisfy the fundamental needs of the individual and to ensure observance of the international instruments relating to human rights.’’<sup>46</sup>

Another interesting case arose during the study of the Swedish report. Mr. Tomuschat of the Federal Republic of Germany, referring to article 19 of the Covenant which guarantees the right to freedom of expression, drew attention to a statement made in the Swedish report that freedom of expression and information may be restricted in the interests of the security of the realm and of the

43. CCPR/C/SR.67, paras. 78-82

44. CCPR/C/SR.51, para. 58

45. *Ibid.*, para. 56

46. CCPR/C/SR. 51, para. 72

economic well-being of the people. He asked whether any public acts had been based on that reservation. For example, if an economist stated that the Swedish economy was not as sound as claimed by the Government, could his scientific statement be prohibited on the grounds that it might be detrimental to the economic well-being of the people?<sup>47</sup> Several other members made the same point. The Swedish representative replied that the expression “economic well-being of the people” in the Swedish constitution related to grounds for discrimination which were applicable only in the event of a serious crisis; it would certainly not be used in order to censor economists, for example. That criterion would, in fact, be applied in only one of the situations referred to in article 5 of the Covenant. He added that no law had been passed under which the economic well-being of the people could be invoked to justify discrimination.<sup>48</sup>

The report of Madagascar is of particular interest to the present issue. In introducing the report before the Committee, the representative of that country pointed out that the promotion of civil and political rights in his country had been hampered by the lack of judicial facilities, the sharp rise in crime and the worsening of the economic situation as a result of the world economic crisis. The last two factors necessitated the adoption of measures restricting the enjoyment of certain rights and freedoms in order to protect society and the economic order. These measures included, according to ordinances issued in 1976 and 1977, the suspension of the publication of newspapers and periodicals guilty of disturbing public order, of undermining national unity or of offences against public morality; the establishment of six special economic courts and special criminal courts aimed at controlling the crime wave. He also referred to two ordinances that had been enacted as exceptional measures to restrict the movement, or fix the residence, of persons regarded as a threat to public order or known to engage in acts of banditry. He pointed out, however, that the resort to these two measures, had been very rare. The report of the Committee to the General Assembly stated simply that the members of the Committee “expressed their appreciation for the straightforward manner in which the representative of Madagascar had explained the difficulties that his country had encountered in guaranteeing the

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47. CCPR/C/SR.52, para. 43

48. CCPR/C/SR.53, paras. 21, 44

rights and freedoms laid down in the Covenant.’’<sup>49</sup> It would be unfortunate if such a position were to be accepted without the most careful scrutiny.

The consideration of the report of Iran is also instructive. Commenting on a statement in the Iranian report to the effect that certain cultural, economic, geographic and religious factors had made it difficult for the Iranian Government to attain effective implementation of all the provisions of the Covenant, one member of the Committee observed that the absence of a provision in Iranian legislation relating to the prohibition of war propaganada, or the fact that certain judgements were not subject to appeal to a higher court, seemed to indicate that there were cases where the failure to implement certain provisions of the Covenant could not be attributed to those factors.<sup>50</sup>

The members of the Committee as a whole are duly mindful of the interdependence and indivisibility of civil and political rights and economic, social and cultural rights. Thus, during the consideration of the report of Mauritius, Mr. Tomuschat stated that ‘‘civil and political rights must be enjoyed together with economic, social and cultural rights, since both categories formed an inseparable whole within which a balance had to be struck.’’<sup>51</sup> Similarly, during the consideration of the report of Ecuador, Mr. Opsahl stated that the Committee should ‘‘focus attention on the indivisibility of all human rights — economic, social and cultural on the one hand, and civil and political on the other. The Committee should stress the interdependence of those rights, and might consider undertaking or sponsoring a study showing how, in a country like Ecuador, the exercise of such rights as the right to health and the right to education was directly linked to the implementation of civil and political rights.’’<sup>52</sup>

## *VI The Examination of Petitions under the Optional Protocol*

With regard to its work under the Optional Protocol a number of procedural and substantive issues which have been the subject of decisions by the Committee are recorded in its two annual reports. Four significant decisions are indicated in its first report.<sup>53</sup> First, as

49. A/33/40, para. 26

50. A/33/40, para. 15

51. CCPR/C/SR.110, para. 4

52. CCPR/C/SR. 118, para. 36

53. A/33/44

to the role of lawyers in representing complainants, the Committee has decided that normally complaints should be submitted by the individual himself or by his representative but that it may consider a communication submitted on behalf of an alleged victim by others when it appears that he is unable to submit the communication himself (para. 67). Second, as to the exhaustion of prior remedies, the Committee adopted the view that it may, under Article 5 (2) of the Protocol, consider a communication where the application of remedies is unreasonably prolonged either at the national or international level (pars. 68-72). Third, Rule 86 of the Committee's rules of procedure provides for the indication of interim measures to avoid irreparable damage to the victim of an alleged violation. Fourth, the Committee has decided that individual opinions may be appended to its views on complaints submitted to it.

Four significant decisions are also recorded in its second report.<sup>54</sup> These decisions concern *first*, the standing of the author of the communication and particularly the circumstances in which one individual may submit a communication on behalf of another individual; *secondly*, the considerations that arise from the fact that the Covenant and the Optional Protocol became binding on the States parties concerned as from a certain date; *thirdly*, the provision in article 5(2)(a) of the Protocol which requires the committee to ascertain that the same matter is not being examined under another procedure of international investigation or settlement; and *fourthly*, the provision in article 5(2)(b) of the Protocol which requires the Committee to ascertain that the individual has exhausted all available domestic remedies.

### 1. *The Standing of the Author*

Article 1 of the Optional Protocol provides that the Committee can receive communications from individuals who claim to be victims of violations of the rights set forth in the Covenant. In the Committee's view this does not mean that the individual must sign the communication himself in every case. He may also act through a duly appointed representative and there may be other cases in which the author of the communication may be accepted as having the authority to act on behalf of the alleged victim. For these reasons rule 90(1)(b) of the Committee's provisional rules of procedure provides that normally the communication should be submitted by

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54. A/33/40

the alleged victim himself or by his representative (e.g. the alleged victim's lawyer), but the Committee *may* accept a communication submitted on behalf of an alleged victim when it appears that he is unable to submit the communication himself. The Committee regards close family connexion as a sufficient link to justify an author acting on behalf of an alleged victim. On the other hand, it had declined to consider communications where the authors have failed to establish any link between themselves and the alleged victims.

*2. Considerations Arising From the Fact That the Covenant and the Optional Protocol Became Binding on the States Parties as From a Certain Date*

The Committee has declared communications inadmissible, if the events complained about took place prior to the entry into force of the Covenant and the Optional Protocol for the State parties concerned. However, a reference to such events may be taken into consideration if the author claims that the alleged violations have continued after the date of entry into force of the Covenant and the Optional Protocol for the State party concerned, or that they have had effects which themselves constitute a violation after that date. Events which took place prior to the critical date may indeed be an essential element of the complaint resulting from alleged violations which occurred after that date.

*3. The Application of Article 5(2) (a) of the Optional Protocol*

Article 5(2)(a) of the Optional Protocol provides that the Committee shall not consider any communication from an individual "unless it has ascertained that the same matter is not being examined under another procedure of international investigation or settlement". In connection with the consideration of some of the communications which have been submitted under the Optional Protocol, the Committee has recognized that cases considered by the Inter-American Commission on Human Rights under the instruments governing its functions were under examination in accordance with another procedure of international investigation or settlement within the meaning of article 5(2)(a). On the other hand, the Committee has determined that the procedure set up under the Economic and Social Council resolution 1503 (XLVIII) does not constitute a procedure of international investigation or settlement within the

meaning of article 5(2)(a) of the Optional Protocol, since it is concerned with the examination of situations which appear to reveal a consistent pattern of gross violations of human rights and a situation is not "the same matter" as an individual complaint. The Committee has also determined that article 5(2)(a) of the Protocol can only relate to procedures implemented by inter-State or intergovernmental organizations on the basis of inter-State or intergovernmental agreements or arrangements. Procedures established by non-governmental organizations, as for example the procedure of the Inter-Parliamentary Council of the Inter-Parliamentary Union, cannot, therefore, bar the Committee from considering communications submitted to it under the Optional Protocol.

With regard to the application of article 5(2)(a) of the Optional Protocol the Committee has further determined that it is not precluded from considering a communication, although the same matter has been submitted under another procedure of international investigation or settlement, if it has been withdrawn from or is no longer being examined under the latter procedure at the time that the Committee reaches a decision on the admissibility of the communication submitted to it.

In the course of its consideration of communications, the committee became aware of a language discrepancy in the text of article 5(2)(a) of the Optional Protocol. The English, French, Russian and Chinese texts of the article provided that the Committee shall not consider any communication from an individual unless it has ascertained that the same matter *is not being examined* under another procedure of international investigation or settlement, whereas the Spanish text of the article employs language meaning "*has not been examined*". The Committee has ascertained that this discrepancy stemmed from an editorial oversight in the preparation of the final version of the Spanish Text of the Optional Protocol. Accordingly, the Committee had decided to base its work in respect of article 5(2)(a) of the Optional Protocol on the English, French, Russian and Chinese language versions.

To ensure efficient and expeditious implementation of the provisions of article 5(2) (a) of the Optional Protocol, the Committee has requested the Secretariat to engage in such exchange of information with other international bodies and their representative secretariats, as may be necessary to enable the Committee to ascertain whether the same matter as that submitted to the

Committee under the Optional Protocol is being examined under another procedure of international investigation or settlement. The Committee has recorded its sincere appreciation for the helpful co-operation received in this connection from the Inter-American Commission on Human Rights and the European Commission of Human Rights.

#### *4. The application of article 5(2)(b) of the Optional Protocol*

Article 5(2)(b) of the Optional Protocol provides that the Committee shall not consider any communication from an individual unless it has ascertained that all available domestic remedies have been exhausted. The Committee considers that this provision should be interpreted and applied in accordance with the generally accepted principles of international law with regard to the exhaustion of domestic remedies as applied in the field of human rights. If the State party concerned disputes the contention of the author of a communication that all available domestic remedies have been exhausted, the State party is required to give details of the effective remedies available to the alleged victim in the particular circumstance of his case. In this connection the Committee has deemed insufficient a general description of the rights available to accused persons under the law and a general description of the domestic remedies designed to protect and safeguard these rights.

At its third session the Committee adopted an amendment to its provisional rules or procedure, by adding a paragraph to rule 93 concerning the procedures for the consideration of communications. The new paragraph, rule 93(4), provides that a decision declaring a communication admissible under the Optional Protocol may be reviewed at a later stage in the light of any explanations or statements submitted by the State party under article 4(2) of the Protocol. At the same time the Committee revised the wording of the first sentence of the following rule, rule 94, to take into account the new rule 93(4).

Under rule 91(1) of the provisional rules of procedure, the Committee or a Working Group established under rule 89 may request the State party concerned or the author of a communication to submit additional written information of observations relevant to the question of admissibility of a communication. At its fourth session the Committee agreed that, in order to expedite the consideration of communications, a Working Group could



henceforth apply rule 91(1) of the provisional rules of procedure, without placing its decision relating thereto before the Committee for approval.

With regard to the question of compliance with various time-limits (normally four to six weeks) established by decisions of the Committee or its Working Group under the provisional rules of procedure requesting States parties or authors of communications to submit information, comments or observations, the Committee agreed that a reasonable degree of flexibility was called for, to take into account, for instance, delays in the despatch and delivery of mail. On the other hand, the Committee has no authority to depart from the time-limit of six months laid down in article 4(2) of the Optional Protocol and it must require States parties to comply with it.

In order to assist individuals who wish to submit communications to the Committee under the Optional Protocol, the Committee has authorized the Secretariat to draw up and make use of guidelines and a model form of communications as appropriate. It is however explained to the individuals concerned that they are not obliged to use the model form which is merely intended to serve as a guide to facilitate their task.

## VII *Conclusions*

The following conclusions may be offered:

(1) The Human Rights Committee is pursuing a pragmatic approach, duly mindful of judicial, fact-finding, conciliation, diplomatic and political elements in its functions.

(2) It is possible to detect a quasi-legal approach in the Committee. Issues which are purely legal have to be approached accordingly. So far, individual members of the Committee have taken positions on such legal issues but the Committee as a whole has pronounced on very few of them.

(3) The Committee seeks to build up a dialogue with Governments with a view to assisting them to comply with their obligations under the Covenant.

(4) The practice of the Committee is too short to enable a conclusion as to whether it intends to follow a firm or a flexible approach to the question of compliance by Governments with the provisions of the Covenant. The Committee has not yet had to decide on any core issues of principle or policy. It is still at the stage

of 'review' and has not yet approached the stage of 'control'. For the time being it is probably preferable for the Committee to adopt a flexible position, without compromising its position.

(5) It will be interesting to observe how the Committee manages to strike a balance between uniform standards of implementation of the Covenant and the diversity of States parties, including their levels of development.

(6) There are discernible differences between the approaches of 'Western' members of the Committee and 'Socialist' members from the East European countries. This was seen, for example, in differing criteria for testing the independence of the judiciary. Will the Committee need to take a position on such issues? However the East-West encounter of ideas in the Committee could lead to cross-fertilization and enrichment of the human rights concept.

(7) It can be said that the Committee is following a fairly liberal policy in applying the provisions of the Covenant and the Protocol.

(8) Returning to the standards for testing the performance of the Committee which were suggested by the Canadian representative and to which reference was made at the beginning of this paper, is the Committee carrying out its tasks in a 'searching and critical fashion'?

—As for the *examination* of reports the answer is 'YES'

—As for *analysis*, the answer is 'NOT YET'

—As for *appraisal and evaluation*, the answer is 'NOT YET'

—As to whether the Committee is carrying out its tasks in a '*searching fashion*', the answer is 'YES'

—As to whether the Committee is carrying out its tasks in a '*critical fashion*', the answer is 'LITTLE SO FAR'.

The issues examined in this article suffice to demonstrate that the practice of the Human Rights Committee has significant implications for the theory of international law and relations. For the first time in the history of the international community, governmental, political and legal systems of States Parties are being tested for their compliance with international human rights standards, irrespective of the ideology or social system of the country concerned. In their examination of the reports submitted by States parties, members of the Human Rights Committee have scrutinized national legislation to see that they are in compliance with the Covenant, to see that the substance of the Covenant is embodied in national legislation and invokable before national courts, and to see that governmental institutions do not operate in such a manner as may lead to breaches

of human rights guarantees. Techniques of incorporation of international treaties in national legislation have also been subject to scrutiny.

The Committee has examined the relationship of international law and municipal law and may have to decide in the future whether States whose legislations provide for priority of municipal over international law are in compliance with the Covenant should it turn out that in particular instances national law is not in accordance with the Covenant. Another area where new ground is being entered in international law is the question of reservations. As was seen above, in the consideration of the reports members of the Committee have questioned the need for some reservations entered into by States parties and whether or not they were compatible with the Covenant. In other instances, for example regarding the prohibition of war propaganda, members of the Committee have expressed the view that a reservation to this provision of the Covenant is of no effect since the prohibition of war propaganda is part of customary international law. Members of the Committee have also questioned limitations imposed by some States parties on the enjoyment of human rights.

The General Assembly has expressed its appreciation of the Committee's efforts to strive for uniform standards of supervision in examining the reports of States parties. How will this principle of uniformity of the standards of supervision be reconciled with countries at different levels of economic and social development? What is the relevance of economic and social conditions in this context?

All of this indicates that we are here in an area of development where the whole theory of international law and relations is coming under practical scrutiny and where the *point de depart* is the international law of human rights. Some pertinent questions may be posed in this regard: What will the Covenants mean for the law schools of States parties and their curricula? What will it mean for the content of teaching syllabuses and programmes? Will it not be necessary to evolve a human rights theory of law and human rights approaches to particular branches of the law?