

The International Covenant on Civil and Political Rights

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2.1 General issues

2.1.1 Basic features

The International Covenant on Civil and Political Rights (ICCPR) was adopted by the United Nations General Assembly in 1966, and, after the required number of ratifications, it entered into force on 23 March 1976.¹ To a large extent the Covenant, together with the simultaneously adopted International Covenant on Economic, Social and Cultural Rights,² codifies in the form of a legally binding international treaty the human rights enshrined in the Universal Declaration of Human Rights of 1948.³

The rights protected under the Covenant range from the right to life (article 6) to the right of public participation (article 25), from the right of all peoples to self-determination (article 1) to rights of members of minorities (article 27). Despite its name, the Covenant is not restricted to 'civil and political rights' in the narrow sense. The above-mentioned provisions on self-determination and minority rights include important dimensions related to economic resources. The prohibition against discrimination (article 26) is overarching in nature, hence extending, for instance, to social, economic and cultural spheres. The provision on the right to freedom of association (article 22) explicitly covers also trade union rights. The right of all persons deprived of their liberty to humane treatment (article 10) addresses also the practical

conditions of detention and hence the obligation of the State to allocate economic resources to secure that its prison conditions meet international standards.

Most of the substantive provisions on human rights protected by the Covenant are to be found in Part III of the instrument (articles 6–27). In addition to the rights already mentioned above, they relate to the prohibition against torture and cruel, inhuman or degrading treatment or punishment (article 7), the prohibition against slavery, servitude and forced labour (article 8), the right to liberty and security of the person (article 9), the prohibition against imprisonment for inability to fulfil a contractual obligation (article 11), freedom of movement (article 12), procedural guarantees against expulsion (article 13), the right to a fair trial (article 14), the principle of legality in criminal law, including the prohibition against its retroactive application (article 15), the right to recognition as a person before the law (article 16), the protection of privacy, family, home and correspondence (article 17), the freedom of thought, conscience and religion (article 18), the freedom of opinion and expression (article 19),⁴ the right of peaceful assembly (article 21), the protection of the family and the equality of spouses (article 23) and the rights of the child (article 24).

Although the provision on the right to life (article 6) includes several conditions and restrictions for the application of the death penalty, it does not on its own prohibit capital punishment. Such a prohibition is established by the Second Optional Protocol to the Covenant.⁵

Another substantive human rights provision outside Part III of the Covenant is the right of all peoples to self-determination (article 1). As a right of 'all peoples' it is a human right of truly collective nature and, according to the interpretation by the Human Rights Committee, not subject to the procedure for individual complaints under the Optional Protocol.⁶ In contrast, the Covenant's unique provision on minority rights

⁴ This provision is accompanied by art. 20, which establishes an obligation to prohibit propaganda for war as well as advocacy of national, racial or religious hatred.

⁵ Concluded 15 December 1989, in force 11 July 1991, UN Doc. A/RES/44/128. As of 9 December 2002, there were forty-nine parties to the Second Optional Protocol.

⁶ Optional Protocol to the International Covenant on Civil and Political Rights, New York, 16 December 1966, in force 23 March 1976, 999 UNTS 171; *Bernard Ominyak, Chief of the Lubicon Lake Band v. Canada* (Communication No. 167/1984), Views adopted 26 March 1990, Report of the Human Rights Committee, vol. II, GAOR, 45th Session, Supp. No. 40 (A/45/40), pp. 1–30.

¹ International Covenant on Civil and Political Rights, New York, 16 December 1966, in force 23 March 1976, 999 UNTS 171.

² International Covenant on Economic, Social and Cultural Rights, New York, 16 December 1966, in force 3 January 1976, 993 UNTS 3. ³ GA Res. 217 A (III) of 10 December 1948.

(article 27),⁷ which is formulated as an individual right with collective dimensions, has given rise to a number of important cases under the Optional Protocol.

Article 2 is a provision on the general State obligations under the Covenant, including a general duty to 'respect and ensure' the rights enshrined in the Covenant without discrimination and an obligation to ensure an effective and enforceable remedy for any violation of the Covenant.⁸ Article 3, in turn, supplements the Covenant's other provisions on equality and non-discrimination with an undertaking to ensure the equal enjoyment of all Covenant rights by men and women.⁹

The Covenant itself provides for two mechanisms of compliance control, namely, a periodic reporting procedure (article 40) and an inter-State complaint procedure (articles 41 and 42). Furthermore, the (first) Optional Protocol to the Covenant provides for a third mechanism, a procedure for individual complaints. There are 154 States parties to the Covenant and 106 of them are also parties to the Optional Protocol allowing for individual complaints.¹⁰

The Human Rights Committee is an independent expert body composed of eighteen persons elected by the States parties to the Covenant (see article 28). All mechanisms of compliance control are functions of the Committee.

The procedure for periodic reports is the only mandatory mechanism of compliance control under the Covenant. According to article 40, each State party is to submit an initial report within one year from the entry into force of the Covenant in respect of it, and thereafter a report whenever the Human Rights Committee so requests. The latter part of the provision is interpreted to give the Committee authority to request both regular periodic reports and, when the need arises, also so-called special reports that deviate from the normal cycle of periodicity. For a long time, the Committee requested all States parties to provide periodic reports every five years. Since 2001, this approach has been replaced by a system where

⁷ 'In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.' Emphasis added.

⁸ General Comment No. 31 (80), adopted in 2004, UN Doc. HRI/GEN/1/Rev.7, pp. 192-7.

⁹ General Comment No. 28 (68), adopted in 2000, UN Doc. HRI/GEN/1/Rev.7, pp. 178-84.

¹⁰ See, Status of Ratifications of the Principal International Human Rights Treaties, 3 June 2005, available at www.ohchr.org.

the Committee decides for each State, at the end of its consideration of one periodic report, the due date of the following report.

According to article 40(1), States are to report 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. According to paragraph 2 of the same article, reports shall indicate the factors and difficulties, if any, affecting the implementation of the Covenant.

The Covenant is silent on the modalities of the consideration of a report by the Human Rights Committee. In practice, a written report is translated into and issued in at least three United Nations languages and thereafter scheduled by the Committee for consideration during one of its three annual sessions. One session prior to this consideration, the Committee adopts a list of issues which is transmitted to the State party. That list of issues forms the basis for the oral consideration of the report in a public meeting of the Committee. As a rule, three meetings (nine hours) are allocated for an initial report and two meetings (six hours) for subsequent reports. Towards the end of the three-week session in which a report was considered, the Committee adopts, in closed meetings, its 'Concluding Observations' on the report. This document forms the basis of a follow-up dialogue between the Committee and the State party, and subsequently a starting-point for the preparation of the following periodic report.

The procedure for inter-State complaints is optional in nature. It is applicable only in respect of those States parties that have given a separate declaration to that effect under article 41. Furthermore, the procedure may be resorted to only by those States that have themselves given such a declaration. At the moment, forty-eight States have given the declaration under article 41, recognizing the competence of the Human Rights Committee to receive inter-State complaints that the declaring State is not fulfilling its obligations under the Covenant. So far, the procedure has never been resorted to. Hence, it is not possible to give a detailed account of how the provisions in articles 41 and 42 would be applied in practice. Textually, articles 41 and 42 point towards a procedure that is geared towards a friendly settlement,¹¹ includes oral hearings,¹² and restricts the role of the Committee to the establishment of the facts if no friendly settlement is reached,¹³ unless the parties have consented to the establishment of an

¹¹ Art. 41(1)(b) and (c) and art. 42.

¹² Art. 41(1)(g).

¹³ Art. 41(1)(h).

ad hoc Conciliation Commission which thereby is authorized to formulate its views on the substance of a settlement even if the parties do not agree.¹⁴

The procedure for individual complaints is optional in nature, enabling the Human Rights Committee to receive and consider complaints by individuals subject to the jurisdiction of a State party to both the Covenant and its (first) Optional Protocol, claiming to be victims of a violation of any of their rights under the Covenant. The Optional Protocol spells out the conditions of admissibility of complaints as well as the basic rules related to the procedure. The proceedings are adversarial in nature and, at least so far, only in writing. The result of the procedure is either an inadmissibility decision by the Committee or a set of 'Views'.¹⁵ in which the Committee gives its reasoned assessment as to whether one or more provisions of the Covenant were violated. The Optional Protocol contains no provisions on the legal effect of the Views, the authority of which hence rests on the position of the Committee as the monitoring body established through article 28 of the Covenant. Nevertheless, it is to be noted that article 2(3) of the Covenant guarantees the right to an effective remedy whenever an individual has suffered a violation of his or her rights under the Covenant. With reference to this provision, the Committee systematically addresses the right to a remedy whenever it establishes a violation in its Views. The Committee has established a fairly informal follow-up procedure for its Views, based on the appointment of one member of the Committee as special rapporteur on follow-up under the Optional Protocol. This rapporteur engages in bilateral exchanges with States parties about the implementation of the Committee's Views and reports back to the Committee on these exchanges. In addition, the article 40 procedure for periodic reports serves as a follow-up mechanism in respect of Views adopted under the Optional Protocol.

2.1.2 Secondary norms and guidelines

Article 30(4) of the Covenant creates an institution of a meeting of States parties. However, that meeting has restricted itself to the task provided in articles 30-34, namely, the election of the members of the Human Rights Committee. Hence, only the Committee operates as an organ of compliance control, and only the Committee has issued secondary rules or

guidelines related to it. The Covenant provides a legal basis for two types of secondary rules: rules of procedure and general comments. In addition, the Committee has in practice adopted also other types of documents that serve as guidelines for its compliance control functions.

Article 39(2) of the Covenant authorizes the Committee to adopt its own Rules of Procedure.¹⁶ These Rules of Procedure regulate the Committee's own work, and also regulate its mechanisms for compliance control. Part II of the Rules of Procedure includes the relevant rules on the functions of the Committee, so that Chapter XV (rules 66-73) deals with the procedure for State party reports, Chapter XVI with inter-State complaints (rules 74-83) and Chapter XVII with individual complaints (rules 84-104).

According to article 40(4) of the Covenant, the consideration of State party reports may lead to the adoption by the Committee of 'such general comments as it may consider appropriate'. To date, the Committee has adopted thirty-one General Comments, most of them on specific substantive provisions of the Covenant but some of them on cross-cutting issues such as reservations to the Covenant (General Comment No. 24). While the General Comments are legally binding neither for the Committee nor for the States parties, they nevertheless consolidate the lines of interpretation adopted by the Committee when dealing with State party reports or individual communications. General Comment No. 30 deals specifically with the modalities of the reporting procedure under article 40 of the Covenant.¹⁷

For the purposes of compliance control, the most important other guidelines adopted by the Committee are the Consolidated Guidelines for State party reports¹⁸ and certain decisions on the Committee's own working methods. These documents are fairly technical in nature but nevertheless illustrate the practice of the Committee in the performance of its functions.

2.2 Dispute resolution

The Covenant does not provide for a compulsory mechanism of dispute settlement. Furthermore, the Covenant has no clause that would mention

¹⁶ Currently, UN Doc. CCPR/C/3/Rev.7.

¹⁷ UN Doc. CCPR/C/21/Rev.2/Add.12. For a compilation of general comments by the UN human rights treaty bodies, including the Human Rights Committee, see UN Doc. HRI/GEN/1/Rev.7.

¹⁸ CCPR/C/66/GUI/Rev.2.

¹⁴ Art. 42(6)(c).

¹⁵ Optional Protocol, art. 5(4).

the role of the International Court of Justice in the resolution of disputes that arise under it. Nevertheless, in two of its Advisory Opinions the ICJ has referred to the provisions of the Covenant, and to relevant General Comments and other pronouncements by the Committee.¹⁹ According to article 44, the provisions for the implementation of the Covenant shall not prevent the States parties from having recourse to other procedures for settling a dispute in accordance with general or special international agreements in force between them.

Articles 41 and 42 of the Covenant provide for a mechanism for resolving disputes between States parties. Article 41 prescribes the modalities for a settlement procedure applied by the Human Rights Committee itself, while article 42 enables the establishment of a subsidiary body, an *ad hoc* Conciliation Commission. Although the fairly complex provisions of articles 41 and 42 are explained below in some detail, it must be pointed out that so far there has not been a single inter-State complaint submitted pursuant to them. Consequently, it is not possible to comment on issues of interpretation that may arise based on the treaty provisions.

Under article 41 of the Covenant, the handling of an inter-State complaint will proceed in the following manner:

1. As a first step, the complaining State shall bring the matter to the attention of the State subject to a complaint. The State subject to a complaint has three months in which to make a response (article 41(1)(a)).
2. After that three-month period and a subsequent period of another three months has elapsed, the complaining State may initiate the proceedings before the Human Rights Committee (article 41(1)(b)).
3. The Committee shall ascertain that all available domestic remedies have been exhausted, in accordance with the general principles of international law (article 41(1)(c)).
4. The Committee shall make available to the parties its good offices, in order to reach a friendly solution. The Committee has a duty to ensure that any friendly solution is based on respect for human rights and fundamental freedoms as recognized in the Covenant (article 41(1)(e)).
5. The Committee shall, within twelve months after the complaint was filed, issue a report on either the friendly solution reached or, if no

¹⁹ International Court of Justice, Advisory Opinion of 8 July 1996 on the *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 9 July 2004 on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.

such solution is reached, on the facts of the dispute. The text of the Covenant seems not to enable the Committee to take any substantive position to the dispute if no friendly solution is reached (article 41(1)(h)).

The *ad hoc* Conciliation Commission, established pursuant to article 42 of the Covenant, will consist of five persons who are not nationals of the States that are parties to the dispute but of other States that have accepted the competence of the Human Rights Committee under article 41. The members shall primarily be appointed with the approval of the parties to the dispute but if such approval is not reached within three months they shall be elected by the Committee from among its members. In any case, a Conciliation Commission may be resorted to only with the agreement of the parties to the dispute.²⁰

The Conciliation Commission will proceed as follows:

1. It will make its good offices available to the parties with a view to reaching an amicable solution based on respect for the provisions of the Covenant (article 42(1)(a)).
2. The Commission will make use of the information already obtained by the Committee pursuant to article 41, but it may nevertheless obtain further submissions by the parties (article 42(6)).
3. Within twelve months, the Commission will submit through the chairperson of the Committee to the States parties a report the substance of which has three options:
 - a. the Commission concludes that it is unable to complete its consideration of the matter within the prescribed period of twelve months, in which case its report is confined to a brief statement of the status of its consideration of the matter (article 42(7)(a));
 - b. an amicable solution is reached and the report consists of a brief statement of the facts and of the solution reached (article 42(7)(b)); or
 - c. in the absence of a solution the Commission moves to a report on its findings on all questions of fact relevant to the issues between the States parties concerned, and on its views on the possibilities of an amicable solution of the matter (article 42(7)(c)).

²⁰ Art. 42(1) and (2).

4. In the last-mentioned case, the States parties concerned shall, within three months of the receipt of the report, notify the chairman of the Committee whether or not they accept the contents of the report of the Commission (article 42(7)(d)).

According to article 41, a State party to the Covenant that has made the declaration under article 41 that it accepts the competence of the Human Rights Committee to receive inter-State complaints, is entitled to submit an inter-State complaint ('a communication') in respect of a similarly situated State party if it claims that that State is not fulfilling its obligations under the Covenant.

The Covenant provisions related to the inter-State complaint procedure (articles 41–42), as well as the Rules of Procedure, are silent as to *amici curiae*. However, the Committee has taken the position that autonomous third-party interventions are not accepted in the Optional Protocol procedure for individual complaints.²¹ As article 5(1) of the Optional Protocol explicitly prescribes that the Committee shall base its decision on the written submissions by the parties, and as no corresponding provision exists in articles 41–42, the same approach does not necessarily apply in the inter-State complaint procedure.

Articles 41–42 of the Covenant have never been resorted to. Among the reasons why States have not made use of the inter-State complaint procedure are the following: (a) as the procedure is optional in nature and the number of States that have made the relevant declaration relatively small in comparison to the total number of States parties to the Covenant, the available permutations of a State party submitting a complaint and a State party subject to such a complaint may not be the most relevant ones; (b) as the procedure has never been resorted to and there therefore exists no precedent, States may feel reluctant to resort to this procedure before an independent expert body and choose instead to resort either to political procedures or to the International Court of Justice; and (c) as the Human Rights Committee is composed of eighteen members and there is no provision on *ad hoc* members appointed for the inter-State complaint procedure, States that resort to the procedure would not necessarily have a national on the Committee when it deals with the complaint.

²¹ This was the practice of the Committee in 1997–2004 when the author was a member of the Committee.

2.3 Compliance control

2.3.1 The reporting procedure

Pursuant to article 40(1) of the Covenant, all States parties have a duty to report on their implementation of their substantive obligations under the treaty, initially within one year after the entry into force of the Covenant in respect of the State concerned and thereafter whenever the Human Rights Committee so requests.

The main function of the Human Rights Committee is to consider periodic reports by the States parties. The reporting obligation prescribed in article 40 of the Covenant is the main procedural obligation of States that have ratified the Covenant. Under the terms of article 40, an initial report is to be submitted within one year of the entry into force of the Covenant in respect of the State in question. Thereafter, periodic reports are due 'whenever the Committee so requires'. For a long time, the Committee applied a uniform periodicity of five years between the submission of two consecutive reports. In July 2001, however, the Committee adopted a new approach of specifying separately for each State the due date of its next periodic report. In addition, the Committee may request a so-called special report irrespective of the decided due date, for instance, if the human rights situation appears to deteriorate rapidly.²²

In the terms of article 40, a periodic report shall consist of information on the measures adopted by a State party to give effect to the rights recognized in the Covenant and the progress made in the enjoyment of those rights (article 40(1)). Reports shall also indicate the factors and difficulties, if any, affecting the implementation of the Covenant (article 40(2)).

The modalities of the consideration of a report are not spelled out in the Covenant. In practice, the system of periodic reporting operates as a continuous cycle in which the consideration of a report in a public hearing before the Committee forms a high point, followed by the Committee's Concluding Observations. Usually, the Committee allocates two meetings (six hours) to each report, during which time a delegation sent by the reporting State answers written and oral questions posed by the Committee and its individual members. The Committee prepares for the oral hearing by hearing non-governmental and intergovernmental organizations, by studying written information from these and other sources and by drawing

²² See also Rules of Procedure, rule 66.2.

up a written list of issues which is sent to the State party three to four months before the oral hearings. Since 2002, the Committee has appointed, from among its members, a so-called task force of four to six members to handle the consideration of a report.

The Concluding Observations adopted by the Committee after its consideration of a State party report²³ give recognition to positive aspects in the implementation of the Covenant but the main part of them is devoted to expressions of concern and recommendations. The State party is expected to publicize the Concluding Observations and to use them as a starting-point for the next reporting cycle. The reporting guidelines adopted by the Human Rights Committee recommend so-called focused reports, which are based on the Committee's Concluding Observations from the previous round and any new developments that emanate from the national human rights discussion. The due date of the next periodic report is set at the end of the Committee's Concluding Observations.

In 2002, two further reforms were introduced by the Human Rights Committee. First, the Committee has started to tackle the problem of overdue reports by scheduling a country to be considered by the Committee even in the absence of a report.²⁴ By mid-2005, this procedure had been applied in a handful of cases, either with the benefit of the presence of a delegation sent by the State party (Suriname) or with neither a report nor a delegation (Gambia). Contrary to its normal practice under article 40, the Committee does not issue public Concluding Observations in respect of non-reporting States but Provisional Observations that are transmitted to the State party concerned in order to assist it in performing its reporting obligation.²⁵ If the State party continues to fail in performing its reporting obligations, the Provisional Observations may be converted into public Concluding Observations.²⁶

Secondly, the Committee instituted a follow-up procedure to its Concluding Observations.²⁷ At the end of the Concluding Observations, a follow-up submission is requested within twelve months on some of the concerns identified by the Committee. One member of the Committee serves as the Committee's Special Rapporteur on follow-up under article 40. Based on follow-up submissions received, the Special Rapporteur recommends to the Committee what further measures should be taken in

²³ *Ibid.*, rule 71.3.

²⁴ *Ibid.*, rule 70.

²⁵ *Ibid.*, rule 70.

²⁶ *Ibid.*, rule 70.3.

²⁷ *Ibid.*, rule 72.

respect of a State party. These may include the adjustment of the due date of the next periodic report.

Although the mandatory reporting procedure under article 40 is initiated by the submission of a State party report, non-governmental organizations have several points of entry into the processing of a report. They may appear before the Committee in a separate NGO hearing held on the first day of a session; they may submit so-called shadow reports or commentaries to the State party report; they may arrange informal lunch-hour briefings for the Committee members; and they may attend the actual consideration of a State party report.

There is great variation in the degree of NGO involvement in the consideration of reports. In respect of some reports, there are no NGO submissions whatever; whereas on some occasions there might be a high degree of interest by both national and international human rights NGOs. From the perspective of the Committee, shadow reports or commentaries submitted several months before the consideration of a report are the most useful form of NGO involvement, as they can be taken into account in formulating the Committee's list of issues that is adopted one session ahead of the actual consideration and that largely shapes the agenda for the oral consideration. For media and domestic policy impact, however, the oral consideration of a report before the Human Rights Committee might be the most important moment for active NGO presence, although at that point it is usually too late to influence the actual questioning by Committee members.

The track record of the effectiveness of the reporting procedure is mixed. A majority of States parties to the Covenant are in delay in submitting their reports, such delays amounting to, in extreme cases, up to fifteen years. The Committee addresses the problem of failures or delays in reporting by issuing reminders and, in extreme cases, by scheduling a country for consideration even in the absence of a report. The current working methods of the Committee allow for the annual consideration of fifteen to eighteen reports, which is roughly half of the number of reports that should be submitted according to the decisions of the Committee. If all States were to submit their reports on time, the Committee would need to adjust its working methods, for instance by meeting in two parallel chambers simultaneously. This, in turn, would have financial implications.

In respect of reports that are submitted, the procedure functions fairly well and effectively. There is no backlog of submitted reports, although some delay is often caused by the process of translating the report into three

UN languages before it is scheduled for consideration and a task force is convened for drawing up the list of issues. In general, States parties and NGOs demonstrate considerable interest in the reporting procedure, thus contributing to the Committee's ability to examine the State's compliance with the Covenant and arrive at pertinent and focused Concluding Observations. Since the follow-up procedure of requesting the State party to address within twelve months selected concerns of the Committee was introduced, almost all concerned States have made use of this opportunity.

In sum, the reporting procedure functions well in respect of those States parties that wish to co-operate with the Committee in good faith. In general, they may not be the most problematic countries in respect of human rights violations. Nevertheless, in all countries, there is room for continuous improvement in the implementation of the Covenant, and the reporting procedure provides for an opportunity for regular review and feedback on the international level. This is highly conducive to a national discourse and the development of a culture of human rights in respective countries.

2.3.2 *The procedure for individual complaints*

Only individuals claiming to be victims personally of an alleged violation of the Covenant have the right to initiate the complaints procedure under the (first) Optional Protocol. Hence, corporations, associations or other juridical persons cannot initiate the proceedings on their own, neither in the form of *actio popularis* nor with the claim that the juridical person itself would have rights under the Covenant which would have been violated.²⁸ However, there is no obstacle to human rights NGOs or other juridical persons acting as the *representative* of the alleged individual victim. Such representation requires authorization, generally by the alleged victim but in some situations alternatively by a family member. Further, several individuals can jointly act as complainants and one person may due to his or her position in a community be entitled to initiate a complaint on behalf of all the members of the group.²⁹ Nevertheless, this possibility does not

²⁸ See e.g. *A Publication and a Printing Company v. Trinidad and Tobago* (Communication No. 361/1989), declared inadmissible on 14 July 1989, Report of the Human Rights Committee, GAOR, 44th Session, Supp. No. 40 (A/44/40), pp. 307-8.

²⁹ See e.g. the case of *Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada* (Communication 167/1984), where the Committee treated Mr Ominayak as the author of the communication and the Lubicon Lake Band as the victim.

extend so far that it would enable complaints under the truly collective right of peoples to self-determination.³⁰

The consideration of an individual complaint consists of the following phases:

1. Receipt and pre-registration considerations. The Human Rights Committee is assisted by a small Petitions Unit in the Office of the High Commissioner for Human Rights. This unit screens incoming correspondence for letters that explicitly or implicitly are individual communications under the Optional Protocol. If needed, the Petitions Unit corresponds with potential complainants in order to clarify whether a letter qualifies as such a communication.³¹
2. Registration. One member of the Committee acts as its Special Rapporteur on New Communications, and is authorized to decide on the registration of new cases. The Special Rapporteur may decline registration for manifest failure to meet the admissibility requirements, or seek more information from the author prior to registration.³²
3. Possible transmission to the State party (main rule) or Special Rapporteur's draft on inadmissibility. Upon registration, a communication is usually transmitted to the State party in order to receive its submissions on the admissibility and merits of a communication.³³ However, sometimes, the Special Rapporteur instructs the Petitions Unit to proceed towards an inadmissibility decision by the Committee without hearing the State party.
4. Possible request for interim measures of protection. Requests for interim measures of protection due to the risk of irreparable damage to the alleged victim are usually dealt with at the stage of registration.³⁴ The Committee's Special Rapporteur on New Communications exercises this authority, most often in cases that involve the death penalty.
5. State party submission on admissibility and merits (main rule) or admissibility only and a request for a so-called 'split' (separation of admissibility and merits). After the registration of a communication

³⁰ *Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada* (Communication 167/1984); *Apirana Mahuika et al. v. New Zealand* (Communication No. 547/1993). Views adopted 27 October 2000, Report of the Human Rights Committee, Vol. II, GAOR, 17th Session, A/56/40, pp. 11-29. However, in the latter case, it was recognized that the collective right of self-determination (ICCPR, art. 1) may affect the interpretation of other provisions of the ICCPR.

³¹ See also Rules of Procedure, rules 84.2 and 86. ³² *Ibid.*, rule 95.3. ³³ *Ibid.*, rule 97.

³⁴ *Ibid.*, rule 92.

and its transmission to the State party concerned, the State can either separately contest the admissibility of the communication within two months or present within six months its observations on both the admissibility and the merits of the case.³⁵ The main rule nowadays is that the plenary Committee deals only once with a communication, addressing at the same time its admissibility and, if appropriate, the merits of the case.

6. Possible Special Rapporteur's decision on a split. If a State party has separately addressed questions of admissibility, the Special Rapporteur on New Communications may decide on a 'split', whereafter the Committee will decide on admissibility prior to seeking the State party's observations on the merits. The admissibility requirements are prescribed in a fairly unsystematic way in articles 1, 2, 3 and 5 of the Optional Protocol and systematized in rule 96 of the Rules of Procedure. Some of the grounds for inadmissibility are recoverable in nature.³⁶

7. Preparation of a draft decision on admissibility or of a joint decision on admissibility and merits, under the guidance of a Committee member acting as case rapporteur.

8. Consideration by a pre-sessional working group of the Committee.³⁷ The working group has the power to declare cases admissible, which means that a case need not be discussed in the plenary Committee before the merits stage.³⁸ Otherwise, the role of the working group is merely preparatory in respect of plenary consideration. In recent years, the pre-sessional working group has on occasion been replaced by an additional week of the plenary session, in order to deal with the backlog of cases ready for final decision.

9. Plenary consideration of a draft inadmissibility decision, or a joint decision on admissibility and merits, or a final decision on the merits where a separate admissibility decision has been taken earlier. When dealing with individual communications, the Committee has no oral hearings but restricts itself to 'written information made available to it by the individual and the State Party concerned'.³⁹ The Optional Protocol also specifies that the Committee 'shall hold closed meetings when examining communications'.⁴⁰ While these provisions do not

³⁵ Optional Protocol, art. 4(2); and Rules of Procedure, rule 97.

³⁶ See Rules of Procedure, rule 98.2.

³⁷ *Ibid.*, rule 95.

³⁸ *Ibid.*, rule 93.2.

³⁹ Optional Protocol, art. 5(1).

⁴⁰ *Ibid.*, art. 5(3).

legally exclude the possibility of having oral hearings as a preliminary phase before the submission of written final briefs by the parties and their examination in a closed meeting, the resource constraints on the work of the Committee and the backlog of communications have so far prevented the taking of this step. The final decision including the assessment of the merits of a case is called 'Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights'. These Views include the Committee's reasoned determination whether there has been a violation of one or more provisions of the Covenant and, if so, what the State party should provide as the remedy.

10. The Views establishing a violation call for a follow-up response by the State party within a period of ninety days. The Committee also appoints one of its members as Special Rapporteur on Follow-up under the Optional Protocol.⁴¹ Based on follow-up responses by States and actions taken by the special rapporteur, reports on follow-up are compiled for the plenary Committee which then decides to highlight positive experiences of best practices and problematic cases of non-compliance in its annual report to the General Assembly.

The assessment of the effectiveness of the procedure for individual complaints has many dimensions. Some States parties fail to provide their observations on the admissibility and merits of a communication, despite their voluntary ratification of the Optional Protocol. Such a failure to co-operate may often lead to considerable delays in the consideration of a case but does not prevent the Committee from assessing on the basis of materials submitted by the complainant whether there has been a violation of the Covenant.

In certain cases, States have failed to comply with the Committee's request for interim measures of protection. Some States have proceeded to the execution of a complainant subject to capital punishment, disregarding the Committee's request not to do so. In 2000, the Committee for the first time addressed the issue of the legal consequences of a State's non-compliance with a request for interim measures of protection. In the case of *Dante Piandiong et al. v. The Philippines*,⁴² the Committee concluded that,

⁴¹ Rules of Procedure, rule 101.

⁴² *Dante Piandiong et al. v. Philippines* (Communication No. 869/1999), Views adopted on 19 October 2000, Report of the Human Rights Committee, Vol. II, GAOR, 17th Session (A/56/40), pp. 181-90.

by ratifying the Optional Protocol on the procedure for individual communications, a State undertakes to co-operate with the Committee in good faith so as to permit and enable it to consider the communication and that a State party commits a 'grave breach' of its obligations under the Optional Protocol if it acts to prevent or frustrate consideration by the Committee of a communication. Specifically, a State breaches its obligations under the Optional Protocol if, having been notified of the communication, it proceeds to execute the alleged victim. The Committee based itself directly on State obligations under the Optional Protocol and not on its own Rules of Procedure, which instrument, although based on a provision in the Covenant,⁴³ is not an international treaty binding on States.

Many States provide information on the individual and system-level measures taken subsequent to the adoption of Views establishing a violation of the Covenant. Some States have specific legislation (Colombia) or case law (Finland) providing the right to compensation in such cases. The annual reports by the Human Rights Committee include examples of best practice in the implementation of the Committee's Views. On the other hand, States may fail to report any measures taken, or they may challenge the interpretation or authority of the Human Rights Committee. The Committee addresses such challenges through its follow-up procedure under the Optional Protocol but also in the context of its consideration of a periodic report by the State party in question.⁴⁴

2.4 Enforcement

There are no treaty provisions that would attach legally binding force to the findings made by the Committee. Article 28 of the Covenant on the establishment of the Committee and article 40 on the reporting procedure lack

⁴³ Art. 39(2).

⁴⁴ One example of such challenge is the case of *A v. Australia* (Communication No. 560/1993), Views adopted on 3 April 1997, Report of the Human Rights Committee, Vol. II, GAOR, 52nd Session, Supp. No. 40 (A/52/40), pp. 125–46. In this case, the government in question contested the Committee's interpretation of ICCPR, art. 9, after receiving the Views. The Human Rights Committee commented in its Concluding Observations on the report by Australia: 'The Committee is concerned over the approach of the State party to the Committee's Views in Communication No. 560/1993 (*A v. Australia*). Rejecting the Committee's interpretation of the Covenant when it does not correspond with the interpretation presented by the State party in its submissions to the Committee undermines the State party's recognition of the Committee's competence under the Optional Protocol to consider communications.' UN Doc. A/55/40, paras. 498–528, at para. 520.

any such element and appear deliberately vague in respect of the authority of the Committee. Under article 40, the Committee is empowered to 'consider' and 'study' State party reports, adopt 'general comments' and transmit these to the States parties and to ECOSOC. The post-1992 practice of adopting country-specific Concluding Observations, with findings of 'concern' or 'incompatibility' and with specific recommendations to the State party, is not even mentioned in the text of the treaty.

The Committee has no authority to set aside the treaty obligation to comply with the Covenant. Nevertheless, article 2 of the Covenant uses the notion of 'jurisdiction' when prescribing the States parties' general obligation to respect and ensure the rights under the Covenant. Consequently, the Committee may take the position that a human rights violation has taken place in circumstances that are beyond the control of the State party and hence not within its effective jurisdiction. In the reporting procedure, such situations may be reflected in a section of the Concluding Observations entitled 'Factors and Difficulties' or 'Introduction'.⁴⁵ The trend, however, has been towards commenting only on 'positive aspects' and on 'concerns and recommendations' in the implementation of the Covenant.

The follow-up procedures developed under both the reporting procedure and the procedure for individual complaints provide an opportunity for a direct exchange of information and views between the State party and the Committee member who exercises the respective follow-up mandate.

⁴⁵ See para. 3 of the Committee's Concluding Observations on Serbia and Montenegro (CCPR/CO/81/SEMO), 2004: 'The State party explained its inability to report on the discharge of its own responsibilities with regard to the human rights situation in Kosovo, and suggested that, owing to the fact that civil authority is exercised in Kosovo by the United Nations Interim Administration Mission in Kosovo (UNMIK), the Committee may invite UNMIK to submit to it a supplementary report on the human rights situation in Kosovo. The Committee notes that, in accordance with Security Council resolution 1244 (1999), Kosovo currently remains a part of Serbia and Montenegro as successor State to the Federal Republic of Yugoslavia, albeit under interim international administration, and the protection and promotion of human rights is one of the main responsibilities of the international civil presence (para. 11(j) of the resolution). It also notes the existence of provisional institutions of self-government in Kosovo that are bound by the Covenant by virtue of article 3.2(c) of UNMIK Regulation No. 2001/9 on a Constitutional Framework for Provisional Self-Government in Kosovo. The Committee considers that the Covenant continues to remain applicable in Kosovo. It welcomes the offer made by the State party to facilitate the consideration of the situation of human rights in Kosovo and encourages UNMIK, in co-operation with the Provisional Institutions of Self-Government (PISG), to provide, without prejudice to the legal status of Kosovo, a report on the situation of human rights in Kosovo since June 1999.'

Another form of 'soft enforcement' is the provision of training or other assistance by the Office of the High Commissioner for Human Rights. Members or former members of the Committee, as well as staff members familiar with the work of the Committee, may participate in such assistance, which is usually geared towards facilitating the respective government's ability to prepare its periodic report.

There are no real sanctions at the disposal of the Human Rights Committee. In principle, the findings made by the Committee could lead to action by the United Nations Security Council, including those available under Chapter VII.

2.5 Overall evaluation

The record of effectiveness of the monitoring mechanisms under the Covenant is mixed. There are huge problems in States' delays or outright failures to perform their reporting obligations. These failures can be remedied only in selected instances through requests for a special report or through proceeding to the examination of a country situation in the absence of a report. There are huge problems also in the implementation of the findings made by the Human Rights Committee in its Concluding Observations on countries. The same applies in respect of the implementation of Views adopted under the Optional Protocol procedure. Quite often, States simply choose to ignore the Views by not even reporting back to the Committee, let alone taking effective measures to remedy the human rights violation established by the Committee.

The other side of the coin, however, relates to a track record of success stories. In particular, in respect of States that choose to co-operate with the Committee in good faith, the periodic reporting procedure has developed into a regular stock-taking exercise that entails a critical assessment of treaty implementation and engages not only the Committee and the government of the country concerned but also a range of State and civil society entities in the respective country. At its best, exposure before an international expert body serves as a catalyst for domestic human rights discussion, review and reform. There are numerous instances where the findings by the Human Rights Committee have resulted in the amendment of domestic law.

Two more specific positive experiences of the effectiveness of the reporting procedure relate to the fairly recent modifications made to the

procedure, namely, the possibility to schedule a country for consideration before the Committee even in the absence of a report, and the follow-up mechanism under the reporting procedure. In both cases, States parties have proven to be highly responsive. In almost all instances, States have made use of the possibility to submit a follow-up response within the twelve months after the Committee has adopted its Concluding Observations on a periodic report. Likewise, the scheduling of a country for consideration in the absence of a report has in a high proportion of the cases resulted either in the submission of a long-overdue report or in the appearance of a government delegation before the Committee even in the absence of a report.

The experiences under the procedure for individual complaints are similarly mixed. All Views by the Committee contribute to the accumulation of case law on the substantive interpretation of the material human rights provisions of the Covenant. Hence they may serve as a source of inspiration and even authority for the domestic courts all over the world by clarifying the evolving meaning of human rights provisions. Nevertheless, in a fairly large proportion of cases there is no track record whatever of amendments to the law or of an individual remedy to the victim after a finding of a violation. The follow-up procedure developed by the Committee under the Optional Protocol is fairly weak, as, in the absence of funds, it is primarily based on bilateral meetings between the respective members of the Committee and the Geneva- or New York-based diplomatic representatives of the State party. In relation to those States parties that participate in the reporting procedure in good faith, the consideration of a periodic report provides an additional opportunity for following up on individual cases and also on addressing the institutional framework the State party concerned has adopted in respect of implementing the Committee's Views. The flipside of these positive experiences is that many governments remain ignorant and do not even report on whether any measures were taken because of a finding of a violation.

One of the strongest arguments for the usefulness of the Optional Protocol procedure is its proven relevance for persons awaiting execution. Cases involving the death penalty represent one of the main categories of communications under the Optional Protocol. In a great majority of such cases, the Committee concluded that there was a violation of one or more substantive provisions of the Covenant and that the complainant's right to an effective remedy requires that he must not be executed. There is not a single case where a State party to the Optional Protocol has disregarded this

aspect of the remedy by proceeding to the execution of an individual whose rights under the Covenant were found to be violated.

The reporting procedure under ILO Conventions was an important source of inspiration for drafting the treaty provisions on the reporting procedure under UN human rights treaties, and for their practical application. The drafting process of the Covenant was long, and during that time further treaties, for instance the European Convention on Human Rights⁴⁶ and the Convention for the Elimination of Racial Discrimination,⁴⁷ were drafted, including their provisions on monitoring mechanisms.

Within the UN human rights treaty framework, the practice of the Human Rights Committee has often served as a model for other treaty bodies. Hence, in spite of the fact that the legal basis in the treaties may be different, other treaty bodies have followed the Human Rights Committee in their decisions to start issuing country-specific Concluding Observations at the end of the consideration of a government report, as well as general comments or general recommendations.

The Optional Protocol to the Covenant has been an important source of inspiration in the drafting of the Optional Protocol to the Convention on the Elimination of Discrimination Against Women,⁴⁸ and the (future) Optional Protocol to the Covenant on Economic, Social and Cultural Rights. In both processes, lessons have been drawn not only from the text of the ICCPR's Optional Protocol but also from the evolving practice by the Human Rights Committee. Hence, deficiencies have also been identified and turned into stronger treaty provisions than those in the ICCPR's Optional Protocol. The provisions on admissibility requirements and interim measures of protection in the CEDAW Optional Protocol may be mentioned as examples of improvements made based on the experiences under the ICCPR's Optional Protocol.

The ICCPR Optional Protocol experience was also used in designing the World Bank Inspection Panel.

There are certainly several lessons to learn from the Covenant regime. One of them relates to the historical experience of living with fairly open-ended

treaty provisions for more than twenty-five years. In this respect, the Covenant combines a set of legally binding and at best precise substantive human rights norms with weak treaty provisions on compliance control. The establishment and operation of an independent expert body has resulted in the accumulation of institutionalized practices of interpretation and a gradually expanding view of the competencies of the monitoring body. 'Implied powers' could be used as a doctrinal underpinning for the growing importance of the Human Rights Committee as an organ for compliance control.

A second lesson relates to the absence of treaty provisions and of institutionalized practice when it comes to the collective responsibility of the States parties, or of the political organs of the United Nations to come to the support of the implementation of the positions taken by the treaty-based expert body. In the absence of actual enforcement mechanisms in the treaty itself, it seems essential for the effective implementation of the findings made through an expert review that they should receive impartial and unconditional backing by the community of States parties or by an international governmental body with political authority. For this reason, it is not necessarily the lack of treaty provisions on the formally binding legal force of findings made by the Human Rights Committee that is the cause of the insufficiently efficient implementation. Equally efficient implementation could be achieved through providing systematic political backing for the findings made through the existing procedures of compliance control.

⁴⁶ Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, in force 3 September 1953, 213 UNTS 222.

⁴⁷ Convention on the Elimination of All Forms of Racial Discrimination, New York, 7 March 1966, in force 4 January 1969, 660 UNTS 195.

⁴⁸ Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, New York, 6 October 1999, in force 22 December 2000, A/RES/54/4.