institutions should be involved in the legislative process, however, and whether they should be asked to screen draft laws or regulations before they enter into force, remain debated, not least because such an involvement creates the risk of narrowing down the political debate to questions of human rights compatibility. The following conclusions emerged from a study of the extent to which NHRIs were involved in the legislative process:

Olivier De Schutter, *The Role of National Human Rights Institutions in the Human Rights Proofing of Legislation*, 4th Roundtable of European National Human Rights Institutions and the Council of Europe Commissioner for Human Rights, CommDH/NHRI(2006)2, Strasbourg, 28 September 2006:

Where the consultation of the NHRI prior to the adoption of legislation is ... not compulsory ..., it is resorted to selectively. In order to ensure that the legislation or regulations they adopt will comply with the requirements of human rights, States rely preferably either on expertise within ministerial departments, or on the evaluation made in the course of the parliamentary procedure, quite frequently by specialist units or parliamentary committees. A number of [Council of Europe] States, moreover, ensure a systematic or quasi-systematic human rights proofing of draft legislation by an independent instance (such as in Belgium or in the Netherlands, the Council of State, whose consultation in many cases is obligatory).

What this seems to illustrate is that verification of compliance is perceived as a technical issue, not requiring input by an instance representative of a wide range of societal interests and, especially, of different segments of the civil society; and requiring a purely legalistic approach, rather than an approach informed by the grass-roots knowledge civil society organizations may provide. Another indicia of this is the very weak role played by human rights impact assessments in such pre-legislative scrutiny for compatibility of draft legislation with human rights.

However, there is no need to make a choice between these two approaches. On the contrary, it is their complementarity which should be stressed. While the appreciation of the compatibility with human rights of certain draft legislative proposals requires a legal scrutiny, to be performed, preferably, by experts, such an evaluation also should be informed by an understanding of the impact the implementation of such proposals could have, for instance, on certain communities or in certain local settings. Indeed, each of the different institutional devices for human rights proofing of legislation which have been reviewed present certain advantages. [I]deally, they should be combined with one another rather than a choice having to be made between these techniques [see the table presented on the next page]:

It is probably unrealistic to expect that all these devices will be used, at least on a systematic basis, in combination with one another. At the same time, it is important to note that the advantages of relying on each of these techniques may add up, where they are used in combination.

There are certain risks attached to the multiplication of fora where such human rights screening takes place. In particular, the authority of the findings made by each instance (for instance, by an independent body such as the legislative section of the Council of State in Belgium) may be threatened if another (such as, for instance, a NHRI or a parliamentary committee) arrives at a different conclusion as to the same question of compatibility.

Human rights proofing performed by	Advantages
Ministerial department taking the initiative of the proposal	Ensures a better understanding of human rights implications of their legislative proposals by public servants (serves the mainstreaming of human rights within public administration and the building of a culture based on human rights)
Specialized unit within the government	Ensures an expert approach to the human rights issues raised by the proposal, and an adequate use of the existing international and European standards
Parliamentary committee	Ensures a transparency in the evaluation and facilitates control by the public opinion and the media, facilitates societal debate Opens up the possibility of consultation of external experts, including NHRIs
Specialized, independent instance located outside both government and Parliament	Guarantees an independency in the evaluation and ensures that the evaluation will not be subordinated to the need to reach political compromises Insulates the evaluation from the pressure of public opinion
NHRI of equivalent institution	Ensures that the impact of the proposed legislation on a wide range of interests will be taken into account, and that the existing standards of international and European human rights law will be taken into account

Similarly, if various procedures coexist through which the human rights compatibility of a draft proposal can be vetted, the Executive may be tempted to 'forum shop', and choose the procedure which it considers the least potentially damaging to its proposal. However, while such a risk should not be underestimated, in most cases the advantages of multiplying procedures will by far compensate for any potential handicap such multiplication might imply. In fact, the most promising route may be not to organize simply the coexistence of these mechanisms, but to achieve their interaction, as when the opinion of a NHRI forms the basis for the work of a parliamentary committee or of a unit within government in charge of verifying compliance. What should be avoided in any case is to fall into the trap of thinking that the more one instance is consulted, the less any other instance will be influential in the debate concerning the compatibility with the requirements of fundamental rights of any legislative proposal: for instance, a parliamentary committee will be better equipped to deliver a robust position if this is based on an opinion sought from a NHRI; the explanatory memorandum attached to a governmental legislative proposal will be richer, better informed, and more convincing, if it provides answers to certain concerns raised in consultations, for instance of an independent institution for the promotion and protection of human rights.

In general, it has been found that NHRIs pay far greater attention to civil and political rights than to economic, social and cultural rights, even when their mandate covers both sets of rights (see C. Raj Kumar, 'National Human Rights Institutions and Economic, Social and Cultural Rights: Toward the Institutionalization and Developmentalization of Human Rights', *Human Rights Quarterly*, 28 (2006), 755). Yet, as noted by the Committee on Economic, Social and Cultural Rights, the value added of NHRIs may be significant in the area of economic, social and cultural rights:

Committee on Economic, Social and Cultural Rights, General Comment No. 10, *The Role of National Human Rights Institutions in the Protection of Economic, Social and Cultural Rights* (1998):

The following list is indicative of the types of activities that can be, and in some instances already have been, undertaken by national institutions in relation to these rights:

(a) The promotion of educational and information programmes designed to enhance awareness and understanding of economic, social and cultural rights, both within the population at large and among particular groups such as the public service, the judiciary, the private sector and the labour movement;
(b) The scrutinizing of existing laws and administrative acts, as well as draft bills and other proposals, to ensure that they are consistent with the requirements of the International Covenant on Economic, Social and Cultural Rights;
(c) Providing technical advice, or undertaking surveys in relation to economic, social and cultural rights, including at the request of the public authorities or other appropriate agencies;
(d) The identification of national-level benchmarks against which the realization of Covenant obligations can be measured;
(e) Conducting research and inquiries designed to ascertain the extent to which particular economic, social and cultural rights are being realized, either within the State as a whole or in areas or in relation to communities of particular vulnerability;
(f) Monitoring compliance with specific rights recognized under the Covenant and providing reports thereon to the public authorities and civil society; and
(g) Examining complaints alleging infringements of applicable economic, social and cultural rights standards within the State.

2.4 Mainstreaming human rights

The institutionalization of human rights through impact assessments and an enhanced role for NHRIs could be further strengthened by systematically integrating human rights into daily policy-making, even in areas which, on their surface, may seem to present little or no relationship to the fulfilment of human rights. This is what the concept of mainstreaming refers to. In the area of gender equality, for instance, mainstreaming has been defined as 'the reorganisation, improvement, development and evaluation of policy processes, so that a gender equality perspective is incorporated in all policies at all levels and at all stages, by the actors normally involved in policy-making'

(Council of Europe, Gender Mainstreaming: Conceptual Framework, Methodology and Presentation of Good Practices. Final Report of the Activities of the Group of Specialists on Mainstreaming (EG-S-MS (98)2), Strasbourg 1998, p. 6). Mainstreaming may serve a number of functions (see further O. De Schutter, 'Mainstreaming Human Rights in the European Union' in P. Alston and O. De Schutter (eds.), *Monitoring Fundamental Rights in the EU. The Contribution of the Fundamental Rights Agency* (Oxford: Hart Publishing, 2005), p. 37, on which the following paragraphs draw):

1. *Mainstreaming is an incentive to develop new policy instruments*. Mainstreaming displaces questions which were sectorialized from the vertical to the horizontal, from the policy margins to their centre. It therefore requires policy-makers to ask new questions about old themes. For instance, the mainstreaming of disability issues would oblige the policy-makers to identify how, in their particular sector, they could contribute to the social and professional integration of persons with disabilities: rather than remedying the exclusion from employment of persons with disabilities, mainstreaming seeks to combat such exclusion by tackling the phenomenon at its root, in the market mechanisms which produce it. An obligation imposed on all policy-makers to identify how they could facilitate the realization of the objective which is mainstreamed, in this sense, is a first step towards identifying means by which the mechanisms producing undesirable outcomes may be modified: it therefore is a lever for political imagination.
2. *Mainstreaming is a source of institutional learning*. To the extent that they must mainstream human rights into decision-making, policy-makers are obliged to identify issues which are present in the policies they pursue or the sectors these policies impact upon, but which would otherwise be obliterated and marginalized. As they get acquainted with the new tools mainstreaming requires, these actors will learn about these implications which previously may have gone unnoticed. They will gradually gain an expertise in the issues mainstreaming requires them to consider. The objective is that, in time, the institutional culture within the organization will evolve, and that both awareness to fundamental rights issues and the capacity to address them will augment.
3. *Mainstreaming improves the implication of civil society organizations in policy-making*. As decision-makers are obliged to identify the policies which best take human rights into account, although they have no specialized knowledge in the issue, they will be required to consult externally. They may of course limit that consultation to experts. But they may also be incentivized to consult more widely, within the community of stakeholders, in order not only better to evaluate the impact the proposed policies may have (as such an impact may be difficult to anticipate and often will be impossible to measure), but also to stimulate the formulation of alternative proposals, better suited to the conciliation of the different objectives pursued and, therefore, more satisfactory in a mainstreaming perspective.
4. *Mainstreaming improves transparency and accountability*. In formulating policies or legislative proposals, policy-makers will have to refer to the impact they may have on the realization of human rights. This will not only incentivize them to develop alternatives they may have had no good reason previously to consider, it will also

lead the proposals to be more richly justified, as the policy-maker will have to explain why a particular route was chosen and preferred above alternative possibilities, after having examined those possibilities and evaluated their potential impact. Most often, mainstreaming will therefore be combined with an assessment of the impact on human rights of the different routes available to the policy-maker (on human rights impact assessments, see above, section 2.2.), since only by measuring such impacts can an informed choice be made. In turn, this will equip the stakeholders participating with the informational resources they require for their participation to be effective.

5. *Mainstreaming improves co-ordination between different services*. The sectoralization of policies, although inevitable in any large organization, may lead to the development of policies effectively contradicting one another. For instance, States may be under an obligation to adopt regulations ensuring health and safety at work, while at the same time having to guarantee the principle of equal treatment with respect to person with disabilities in employment – although it is well documented that the two objectives may conflict with one another, and that some form of co-ordination between the two sets of rules may be therefore desirable. Similarly, States are encouraged to promote diversity in business, yet at the same time the rules relating to the protection of personal data may constitute an obstacle for employers seeking to develop such diversity policies by monitoring the representation of ethnic groups in the workforce (see chapter 7, section 4, and box 7.5.). Because it is transversal and creates horizontal bridges between vertical sectors, mainstreaming may serve to identify such tensions, in order to remedy them. It is a way to restore communication between different services or departments, as one of its tools may consist in the organization of common meetings with representatives from different services to compare the schemes they are proposing and identify potential conflicts or redundancies, or other failures in coherence.
6. *Mainstreaming aims at the causes of the problems identified rather than at their surface manifestations*. Mainstreaming addresses the definition of policies at their initial stages and throughout their implementation. Therefore its transformative character is much more powerful than that of *post hoc* monitoring, where the impact of policies is measured. Although, like mainstreaming, impact assessment may also operate *ex ante*, i.e. in the initial stages of policy-selection, mainstreaming goes one step further in that it imposes on authorities a positive duty to identify how they may contribute to achieving the objective pursued. It therefore obliges them not only to examine whether the policy they have been pursuing or which they intend to pursue adversely impacts upon human rights, but also to ask how they may positively contribute to the realization of human rights: the promotion and protection of human rights thus becomes part of the set of objectives that they are pursuing and which, in combination with other objectives, will dictate the shape of policies. Again, the mainstreaming of disability may serve to illustrate this: it is one thing to measure the impact of certain policies on persons with disabilities, and choose the policy which appears to have the least adverse impact on them – for instance, where policies are devised which seek to create incentives to work and therefore to raise the level of activity of the active segment of the population; it is quite another to consider

that employment policies should contribute actively to the professional integration of persons with disabilities, and that the absence of adverse impact on persons with disabilities – or the adoption of measures mitigating any adverse impact there may be – is therefore necessary, but not sufficient.

8.4. Questions for discussion: tools to prevent human rights violations

1. The Committee on the Rights of the Child took the view that 'every State needs an independent human rights institution with responsibility for promoting and protecting children's rights' (General Comment No. 2 (2002), *The Role of Independent National Human Rights Institutions in the Promotion and Protection of the Rights of the Child*, HRI/GEN/1/Rev.9 (vol. II), p. 391, para. 7). Similarly, the Committee on the Elimination of Racial Discrimination considers that States should establish NHRIs in order to facilitate the implementation of the Convention for the Elimination of All Forms of Racial Discrimination (General Recommendation XVII (1993), Establishment of national institutions to facilitate implementation of the Convention). What are the respective advantages of establishing NHRIs with a broad mandate, covering all human rights, and of establishing NHRIs with a mandate covering only a limited set of rights, or focusing on one category of rights-holders?
2. Which body is best placed to perform human rights impact assessments prior to the adoption of certain policies or regulatory measures? Should this be done by the competent decision-maker, or by an independent body?
3. Are there any risks associated with attempts to mainstream human rights in all sectoral policies? Would it be recommended, for instance, to include in debates about the penitentiary policy of the government considerations related to the right to work of the prison staff? In public procurement, would it be recommended to choose as a sub-contractor for public contracts the economic operator that has the best internal human rights policy in place, rather than the operator making the most economically advantageous offer? Is there a risk that mainstreaming human rights distorts public policy-making in a way that underestimates the weight of other considerations, competing with the need to promote human rights?

9

The United Nations Human Rights Treaties System

INTRODUCTION

This chapter offers an overview of the role of the expert bodies set up under the core UN human rights treaties (see generally G. Alfredsson *et al*. (eds), *International Human Rights Monitoring Mechanisms* (The Hague: Kluwer Law International, 2001); P. Alston and J. Crawford (eds.), *The Future of the UN Human Rights Treaty System* (Cambridge University Press, 2000); P. Alston (ed.), *The United Nations and Human Rights: a Critical Appraisal*, second edn (Oxford: Clarendon Press, 2004)). Seven such bodies are currently in operation. These are the Committee on the Elimination of Racial Discrimination (CERD), which has been functioning since 1969, the Human Rights Committee (CCPR) (1976), the Committee on Economic, Social and Cultural Rights (CESCR) (1987), the Committee on the Elimination of Discrimination Against Women (CEDAW) (1981), the Committee Against Torture (CAT) (1987), the Committee on the Rights of the Child (CRC) (1990), and the Committee on Migrant Workers (CMW) (2003). All but one of these expert bodies have their role and composition defined in the respective treaties with which they supervise compliance. The exception is the Committee on Economic, Social and Cultural Rights (CESCR), which was established by Resolution 1985/17 of the Economic and Social Council (Ecosoc) and which was modelled on the Human Rights Committee created by the International Covenant on Civil and Political Rights (ICCPR).

The main competence of these expert bodies is to receive State reports about the implementation of the human rights treaties they monitor, and to adopt Concluding Observations on the basis of this information. In addition, most of the human rights treaty bodies (as they are generally referred to) may receive individual communications from victims of violations of the said treaties. In general, the other powers of these bodies play a comparatively much minor or even insignificant role. These are the powers to receive inter-State communications (a possibility which has been dormant since the origins); to make enquiries into certain situations, which may comprise a visit on the territory of the State concerned with the latter's consent; or, in the case of the Subcommittee on Prevention established under the 2002 Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (which entered into force on 22 June 2006), to visit places where persons are detained and to

make recommendations concerning the protection of these persons against torture and other cruel, inhuman or degrading treatment or punishment, as well as to support the national preventive mechanisms which the States parties to the said Protocol have to set up. In addition, under the 2006 International Convention for the Protection of All Persons from Enforced Disappearance, the Committee on Enforced Disappearances may decide urgently to bring the matter to the attention of the General Assembly of the United Nations, if it receives information which appears to contain well-founded indications that enforced disappearance is being practised on a widespread or systematic basis in the territory under the jurisdiction of a State party (Art. 34).

The following table presents the different UN treaty bodies and the competences they have been attributed:

	State reports	Individual communications	Inter-State communications	Enquiries or other
ICERD	Art. 9	Art. 14 (optional declaration)	Arts. 11–13	
ICCPR	Art. 40	OP-1	Arts. 41–43 (optional declaration)	
ICESCR	Art. 16 (Ecosoc)	Optional Protocol	OP Art. 10 (optional declaration)	OP Art. 11 (optional declaration)
CEDAW	Art. 18	OP Art. 1–7	Art. 29 (arbitration or submission to the ICJ)	OP Arts. 8–9 (but opt-out possible)
CAT	Art. 19	Art. 22 (optional declaration)	Art. 21 (optional declaration)	Art. 20
CRC	Arts. 44–45			
CMW	Arts. 73–74	Art. 77 (optional declaration)	Art. 76 (optional declaration)	
CFD	Art. 29	Art. 30 (urgent requests) and Art. 31 (optional declaration)	Art. 32 (optional declaration)	Arts. 33 and 34 (visit and bring to the attention of the UN GA)
CRPD	Arts. 35–36	OP Arts. 1–5		OP Arts. 6–7 (but opt-out possible)

This chapter is divided into four sections. First, we examine the role of the UN human rights treaties expert bodies in receiving States' reports and commenting upon those reports. Second, we look at their role in the examination of individual communications. Third, we briefly examine the questions raised by the follow-up given by States to the findings or recommendations of the human rights treaty bodies, whether in the concluding observations adopted on the basis of State reports or in the views they express on individual communications. Fourth, we revisit the debate on the reform of

the human rights treaty bodies. With the exception of the fourth section, this chapter focuses on the concluding observations the UN human rights treaty bodies adopt on States' reports and on the views they express on the individual communications they receive. In addition, the treaty bodies adopt General Comments (labelled 'General Recommendations' in the context of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)), in which they clarify their understanding of the States' obligations under the treaties they supervise, thus facilitating compliance by the guidance they provide: while no specific section is dedicated to this function, such General Comments have been extensively relied on in the other chapters of this volume, and they shall therefore not be studied further (see P. Alston, 'The Historical Origins of the Concept of "General Comments" in Human Rights Law' in L. Boisson de Chazournes and V. Gowland Debbas (eds.), *The International Legal System in Quest of Equity and Universality:* Liber Amicorum *George Abi-Saab* (Leiden: Brill Academic Publishers, 2001), p. 763).

1 STATE REPORTING

1.1 The objectives of State reporting

All the UN human rights treaties provide that States parties submit reports about the measures adopted in order to implement their treaty obligations. The initial reports are to be submitted within one or two years from the entry into force of the treaty for the State concerned, and thereafter, generally, every four or five years. The State reports are to 'indicate the factors and difficulties, if any, affecting the implementation' of the treaty concerned (see *Manual on Human Rights Reporting* (Geneva: Office of the High Commissioner for Human Rights, 1997); and, for the most up-to-date compilation of the reporting guidelines issued by the human rights treaty bodies, HRI/GEN/2/Rev.5 (2008)). Indeed, the identification of such obstacles may guide the UN specialized agencies when they can assist States overcoming them. Article 40 para. 3 ICCPR thus states that the Secretary-General of the United Nations 'may, after consultation with the Committee, transmit to the specialized agencies concerned copies of such parts of the reports as may fall within their field of competence'. The International Covenant on Economic Social and Cultural Rights (ICESCR) provides, even more explicitly, that the Economic and Social Council – which, in the ICESCR, is identified as the addressee of the States' reports (Article 16 para. 2) – 'may bring to the attention of other organs of the United Nations, their subsidiary organs and specialized agencies concerned with furnishing technical assistance any matters arising out of the reports referred to in this part of the [International Covenant on Economic, Social and Cultural Rights] which may assist such bodies in deciding, each within its field of competence, on the advisability of international measures likely to contribute to the effective progressive implementation of the present Covenant' (Art. 22; see also Art. 16 para. 2(b)). On the basis of these reports, the expert committees prepare concluding observations, which identify both positive aspects and areas of concern. During the 1970s and 1980s, the 'observations'

in fact consisted of disparate observations made by the members of the committees in their individual capacity. The practice of adopting concluding observations reflecting the position of the committee as a whole was pioneered in 1990 by the Committee on Economic, Social and Cultural Rights. The Human Rights Committee followed suit in 1992, and so did the Committee on the Elimination of Racial Discrimination in 1993. This is now the general practice.

In its first General Comment, the Committee on Economic, Social and Cultural Rights offered a useful list of the functions fulfilled by the reporting procedure:

Committee on Economic, Social and Cultural Rights, General Comment No. 1, *Reporting by States Parties* (1989) (E/1989/22):

1. The reporting obligations which are contained in part IV of [the International Covenant on Economic, Social and Cultural Rights] are designed principally to assist each State party in fulfilling its obligations under the Covenant and, in addition, to provide a basis on which the Council, assisted by the Committee, can discharge its responsibilities for monitoring States parties' compliance with their obligations and for facilitating the realization of economic, social and cultural rights in accordance with the provisions of the Covenant. The Committee considers that it would be incorrect to assume that reporting is essentially only a procedural matter designed solely to satisfy each State party's formal obligation to report to the appropriate international monitoring body. On the contrary, in accordance with the letter and spirit of the Covenant, the processes of preparation and submission of reports by States can, and indeed should, serve to achieve a variety of objectives.

2. A first objective, which is of particular relevance to the initial report required to be submitted within two years of the Covenant's entry into force for the State party concerned, is to ensure that a comprehensive review is undertaken with respect to national legislation, administrative rules and procedures, and practices in an effort to ensure the fullest possible conformity with the Covenant. Such a review might, for example, be undertaken in conjunction with each of the relevant national ministries or other authorities responsible for policy-making and implementation in the different fields covered by the Covenant.

3. A second objective is to ensure that the State party monitors the actual situation with respect to each of the rights on a regular basis and is thus aware of the extent to which the various rights are, or are not, being enjoyed by all individuals within its territory or under its jurisdiction. From the Committee's experience to date, it is clear that the fulfilment of this objective cannot be achieved only by the preparation of aggregate national statistics or estimates, but also requires that special attention be given to any worse-off regions or areas and to any specific groups or subgroups which appear to be particularly vulnerable or disadvantaged. Thus, the essential first step towards promoting the realization of economic, social and cultural rights is diagnosis and knowledge of the existing situation. The Committee is aware that this process of monitoring and gathering information is a potentially time-consuming and costly one and that international assistance and cooperation, as provided for in article 2, paragraph 1 and articles 22 and 23 of the Covenant, may well be required in order to enable some States parties to fulfil the relevant obligations. If that is the case, and the State party concludes that it does not have the capacity to undertake the monitoring process which is an integral part of any process designed to promote accepted goals of public policy and is indispensable to the effective

implementation of the Covenant, it may note this fact in its report to the Committee and indicate the nature and extent of any international assistance that it may need.

4. While monitoring is designed to give a detailed overview of the existing situation, the principal value of such an overview is to provide the basis for the elaboration of clearly stated and carefully targeted policies, including the establishment of priorities which reflect the provisions of the Covenant. Therefore, a third objective of the reporting process is to enable the Government to demonstrate that such principled policy-making has in fact been undertaken. While the Covenant makes this obligation explicit only in article 14 in cases where 'compulsory primary education, free of charge' has not yet been secured for all, a comparable obligation 'to work out and adopt a detailed plan of action for the progressive implementation' of each of the rights contained in the Covenant is clearly implied by the obligation in article 2, paragraph 1 'to take steps ... by all appropriate means ...'

5. A fourth objective of the reporting process it to facilitate public scrutiny of government policies with respect to economic, social and cultural rights and to encourage the involvement of the various economic, social and cultural sectors of society in the formulation, implementation and review of the relevant policies. In examining reports submitted to it to date, the Committee has welcomed the fact that a number of States parties, reflecting different political and economic systems, have encouraged inputs by such non-governmental groups into the preparation of their reports under the Covenant. Other States have ensured the widespread dissemination of their reports with a view to enabling comments to be made by the public at large. In these ways, the preparation of the report, and its consideration at the national level can come to be of at least as much value as the constructive dialogue conducted at the international level between the Committee and representatives of the reporting State.

6. A fifth objective is to provide a basis on which the State party itself, as well as the Committee, can effectively evaluate the extent to which progress has been made towards the realization of the obligations contained in the Covenant. For this purpose, it may be useful for States to identify specific benchmarks or goals against which their performance in a given area can be assessed. Thus, for example, it is generally agreed that it is important to set specific goals with respect to the reduction of infant mortality, the extent of vaccination of children, the intake of calories per person, the number of persons per health-care provider, etc. In many of these areas, global benchmarks are of limited use, whereas national or other more specific benchmarks can provide an extremely valuable indication of progress.

7. In this regard, the Committee wishes to note that the Covenant attaches particular importance to the concept of 'progressive realization' of the relevant rights and, for that reason, the Committee urges States parties to include in their periodic reports information which shows the progress over time, with respect to the effective realization of the relevant rights. By the same token, it is clear that qualitative, as well as quantitative, data are required in order for an adequate assessment of the situation to be made.

8. A sixth objective is to enable the State party itself to develop a better understanding of the problems and shortcomings encountered in efforts to realize progressively the full range of economic, social and cultural rights. For this reason, it is essential that States parties report in detail on the 'factors and difficulties' inhibiting such realization. This process of identification and recognition of the relevant difficulties then provides the framework within which more appropriate policies can be devised.

9. A seventh objective is to enable the Committee, and the States parties as a whole, to facilitate the exchange of information among States and to develop a better understanding of the common problems faced by States and a fuller appreciation of the type of measures which might be taken to promote effective realization of each of the rights contained in the Covenant. This part of the process also enables the Committee to identify the most appropriate means by which the international community might assist States, in accordance with articles 22 and 23 of the Covenant...

These views remain fully valid today. In 2005, the objectives of the reporting process were summarized in almost identical terms:

Harmonized Guidelines on Reporting under the International Human Rights Treaties, including Guidelines on a Common Core Document and treaty-specific targeted documents (HRI/MC/2005/3, 1 June 2005):

9. States parties should see the process of preparing their reports for the treaty bodies not only as the fulfilment of an international obligation, but also as an opportunity to take stock of the state of human rights protection within their jurisdiction for the purpose of policy planning and implementation. The report preparation process offers an occasion for each State party to:

(a) Conduct a comprehensive review of the measures it has taken to harmonize national law and policy with the provisions of the relevant international human rights treaties to which it is a party;
(b) Monitor progress made in promoting the enjoyment of the rights set forth in the treaties in the context of the promotion of human rights in general;
(c) Identify problems and shortcomings in its approach to the implementation of the treaties;
(d) Assess future needs and goals for more effective implementation of the treaties; and
(e) Plan and develop appropriate policies to achieve these goals.

10. The reporting process should encourage and facilitate, at the national level, popular participation, public scrutiny of government policies and constructive engagement with civil society conducted in a spirit of cooperation and mutual respect, with the aim of advancing the enjoyment by all of the rights protected by the relevant convention.

11. At the international level, the reporting process creates a framework for constructive dialogue between States and the treaty bodies. The treaty bodies, in providing these guidelines, wish to emphasize their supportive role in fostering effective implementation of the international human rights instruments and in encouraging international cooperation in the promotion and protection of human rights in general.

In addition to the objectives listed above, State reports should serve as an opportunity to review any reservations or declarations made by the State upon ratification, since States are requested to justify the maintenance of such reservations or declarations. Moreover, where there exists an individual communications mechanism before the expert committee concerned, the State report should provide an opportunity for the

State to explain which follow-up was given to any views adopted by the committee on the basis of such communications (on the follow-up to individual communications, see further section 3.2. in this chapter). Consider, for instance, the Consolidated Guidelines for State reports under the ICCPR, adopted in 2001 by the Human Rights Committee.

Human Rights Committee, Consolidated Guidelines for State Reports under the International Covenant on Civil and Political Rights (26 February 2001)(CCPR/C/66/GUI/Rev.2) (excerpts):

C. General guidance for contents of all reports

C.1 The articles and the Committee's general comments. The terms of the articles in Parts I, II and III of the Covenant must, together with general comments issued by the Committee on any such article, be taken into account in preparing the report.

C.2 Reservations and declarations. Any reservation to or declaration as to any article of the Covenant by the State party should be explained and its continued maintenance justified.

C.3 Derogations. The date, extent and effect of, and procedures for imposing and for lifting any derogation under article 4 should be fully explained in relation to every article of the Covenant affected by the derogation.

C.4 Factors and difficulties. Article 40 of the Covenant requires that factors and difficulties, if any, affecting the implementation of the Covenant should be indicated. A report should explain the nature and extent of, and reasons for every such factor and difficulty, if any such exist; and should give details of the steps being taken to overcome these.

C.5 Restrictions or limitations. Certain articles of the Covenant permit some defined restrictions or limitations on rights. Where these exist, their nature and extent should be set out.

C.6 Data and statistics. A report should include sufficient data and statistics to enable the Committee to assess progress in the enjoyment of Covenant rights, relevant to any appropriate article.

C.7 Article 3. The situation regarding the equal enjoyment of Covenant rights by men and women should be specifically addressed.

C.8 Core document. Where the State party has already prepared a core document (see HRI/CORR/1, 24 February 1992), this will be available to the Committee: it should be updated as necessary in the report, particularly as regards 'General legal framework' and 'Information and publicity' (see HRI/CORR/1, paras. 3 and 4).

D. The initial report

D.1 General This report is the State party's first opportunity to present to the Committee the extent to which its laws and practices comply with the Covenant which it has ratified. The report should:

- Establish the constitutional and legal framework for the implementation of Covenant rights;
- Explain the legal and practical measures adopted to give effect to Covenant rights;
- Demonstrate the progress made in ensuring enjoyment of Covenant rights by the people within the State party and subject to its jurisdiction.

D.2 Contents of the report D.2.1 A State party should deal specifically with every article in Parts I, II and III of the Covenant; legal norms should be described, but that is not sufficient: the

factual situation and the practical availability, effect and implementation of remedies for violation of Covenant rights should be explained and exemplified.

D.2.2 The report should explain:

How article 2 of the Covenant is applied, setting out the principal legal measures which the State party has taken to give effect to Covenant rights; and the range of remedies available to persons whose rights may have been violated;

Whether the Covenant is incorporated into domestic law in such a manner as to be directly applicable;

If not, whether its provisions can be invoked before and given effect to by courts, tribunals and administrative authorities;

Whether the Covenant rights are guaranteed in a Constitution or other laws and to what extent; or

Whether Covenant rights must be enacted or reflected in domestic law by legislation so as to be enforceable.

D.2.3 Information should be given about the judicial, administrative and other competent authorities having jurisdiction to secure Covenant rights.

D.2.4 The report should include information about any national or official institution or machinery which exercises responsibility in implementing Covenant rights or in responding to complaints of violations of such rights, and give examples of their activities in this respect.

D.3 Annexes to the report

D.3.1 The report should be accompanied by copies of the relevant principal constitutional, legislative and other texts which guarantee and provide remedies in relation to Covenant rights. Such texts will not be copied or translated, but will be available to members of the Committee; it is important that the report itself contains sufficient quotations from or summaries of these texts so as to ensure that the report is clear and comprehensible without reference to the annexes.

E. Subsequent periodic reports

E.1 There should be two starting points for such reports:

The concluding observations (particularly 'Concerns' and 'Recommendations' on the previous report and summary records of the Committee's consideration) (insofar as these exist);

An examination by the State party of the progress made towards and the current situation concerning the enjoyment of Covenant rights by persons within its territory or jurisdiction.

E.2 Periodic reports should be structured so as to follow the articles of the Covenant. If there is nothing new to report under any article it should be so stated.

E.3 The State party should refer again to the guidance on initial reports and on annexes, insofar as these may also apply to a periodic report.

E.4 There may be circumstances where the following matters should be addressed, so as to elaborate a periodic report:

There may have occurred a fundamental change in the State party's political and legal approach affecting Covenant rights: in such a case a full article by article report may be required;

New legal or administrative measures may have been introduced which deserve the annexure of texts and judicial or other decisions.

F. Optional protocols

F.1 If the State party has ratified the Optional Protocol and the Committee has issued Views entailing provision of a remedy or expressing any other concern, relating to a communication

received under that Protocol, a report should (unless the matter has been dealt with in a previous report) include information about the steps taken to provide a remedy, or meet such a concern, and to ensure that any circumstance thus criticized does not recur.

F.2 If the State party has abolished the death penalty the situation relating to the Second Optional Protocol should be explained.

G. The Committee's consideration of reports

G.1 General The Committee intends its consideration of a report to take the form of a constructive discussion with the delegation, the aim of which is to improve the situation pertaining to Covenant rights in the State.

G.2 List of issues On the basis of all information at its disposal, the Committee will supply in advance a list of issues which will form the basic agenda for consideration of the report. The delegation should come prepared to address the list of issues and to respond to further questions from members, with such updated information as may be necessary; and to do so within the time allocated for consideration of the report.

G.3 The State party's delegation The Committee wishes to ensure that it is able effectively to perform its functions under article 40 and that the reporting State party should obtain the maximum benefit from the reporting requirement. The State party's delegation should, therefore, include persons who, through their knowledge of and competence to explain the human rights situation in that State, are able to respond to the Committee's written and oral questions and comments concerning the whole range of Covenant rights.

G.4 Concluding observations Shortly after the consideration of the report, the Committee will publish its concluding observations on the report and the ensuing discussion with the delegation. These concluding observations will be included in the Committee's annual report to the General Assembly; the Committee expects the State party to disseminate these conclusions, in all appropriate languages, with a view to public information and discussion.

G.5 Extra information G.5.1 Following the submission of any report, subsequent revisions or updating may only be submitted:

(a) No later than 10 weeks prior to the date set for the Committee's consideration of the report (the minimum time required by the United Nations translation services); or,
(b) after that date, provided that the text has been translated by the State party into the working languages of the Committee (currently English, Spanish and French).

If one or other of these courses is not complied with, the Committee will not be able to take an addendum into account. This, however, does not apply to updated annexes or statistics.

G.5.2 In the course of the consideration of a report, the Committee may request or the delegation may offer further information; the secretariat will keep a note of such matters which should be dealt with in the next report.

1.2 The role of non-governmental organizations

Non-governmental organizations play a key role in the reporting process, by providing the Committee members with first-hand information, in the form of 'shadow reports'

which are now often as well or even better documented than the official State report. The system thus becomes increasingly triangular, shifting from a dialogue between the Committee members and the State's delegation to an exchange during which the Committee members confront the State with information obtained from other sources that may contradict the presentation made in the official report. The Committee on the Rights of the Child has been particularly eager to encourage the involvement of non-governmental organizations in the reporting process:

Committee on the Rights of the Child, General Comment No. 5 (2003), *General Measures of Implementation of the Convention on the Rights of the Child* (Arts. 4, 42 and 44, para. 6) (CRC/GC/2003/5, 27 November 2003):

The Committee welcomes the development of NGO coalitions and alliances committed to promoting, protecting and monitoring children's human rights and urges Governments to give them non-directive support and to develop positive formal as well as informal relationships with them. The engagement of NGOs in the reporting process under the Convention, coming within the definition of 'competent bodies' under article 45(a), has in many cases given a real impetus to the process of implementation as well as reporting. The NGO Group for the Convention on the Rights of the Child has a very welcome, strong and supportive impact on the reporting process and other aspects of the Committee's work. The Committee underlines in its reporting guidelines that the process of preparing a report 'should encourage and facilitate popular participation and public scrutiny of government policies' (para. 3). The media can be valuable partners in the process of implementation.

The Rules of Procedure of the human rights treaty bodies may specify what role non-governmental organizations may play in the reporting process. Consider for instance the Rules of Procedure of the Committee on Economic, Social and Cultural Rights, as initially adopted in 1989 and since revised on a number of occasions:

Committee on Economic, Social and Cultural Rights, Rules of the procedure of the Committee (provisional rules of procedure adopted by the Committee at its third session (1989), embodying amendments adopted by the Committee at its fourth (1990) and eighth (1993) sessions) (E/C.12/1990/4/Rev.1, 1 September 1993):

Rule 69. Submission of information, documentation and written statements

1. Non-governmental organizations in consultative status with the Council may submit to the Committee written statements that might contribute to full and universal recognition and realization of the rights contained in the Covenant.
2. In addition to the receipt of written information, a short period of time will be made available at the beginning of each session of the Committee's pre-sessional working group to provide NGOs with an opportunity to submit relevant oral information to the members of the working group.
3. Furthermore, the Committee will set aside part of the first afternoon at each of its sessions to enable it to receive oral information provided by NGOs. Such information should: (a) focus

specifically on the provisions of the Covenant on Economic, Scocial and Cultural Rights; (b) be of direct relevance to matters under consideration by the Committee; (c) be reliable, and (d) not be abusive. The relevant meeting will be open and will be provided with interpretation services, but will not be covered by summary records.

4. The Committee may recommend to the Council to invite United Nations bodies concerned and regional intergovernmental organizations to submit to it information, documentation and written statements, as appropriate, relevant to its activities under the Covenant.

1.3 The problem of overdue or lacking reports

States have regularly been late in submitting their reports to the human rights treaties expert bodies (see the concerns expressed by the Human Rights Committee in its General Comment No. 1, *Reporting Obligation* (27 July 1981)). The problem of overdue reporting or even lack of reporting by States has been plaguing the system, since its origins in the 1980s. 'As of 31 January 2004, 185 initial reports of States parties required under the various treaties were overdue, of which 114 had been overdue for more than five years. Furthermore, a total of 660 periodic reports from States parties were overdue' (*Effective Functioning of Human Rights Mechanisms Treaty Bodies. Note by the Office of the United Nations High Commissioner for Human Rights*, E/CN.4/2004/98, 11 February 2004, para. 10). Already in 1996, remarking that the 'present supervisory system can function only because of the large-scale delinquency of States which either do not report at all, or report long after the due date', Philip Alston commented on this in the following terms:

Effective functioning of bodies established pursuant to United Nations human rights instruments. Final report on enhancing the long-term effectiveness of the United Nations human rights treaty system, by Mr Philip Alston, independent expert (E/CN.4/1997/74, 27 March 1996):

43. Broadly stated, there are two reasons why States do not report: administrative incapacity including a lack of specialist expertise or lack of political will, or a combination of both. In the first situation, repeated appeals are, almost by definition, unlikely to bear fruit. Instead, the solution lies in a more serious, more expert and more carefully targeted advisory services programme in relation to reporting ...

44. In the second situation, a lack of political will translates essentially into a calculation by the State concerned that the consequences, both domestic and international, of a failure to report are less important than the costs, administrative and political, of complying with reporting obligations. In that case, the only viable approach on the part of the treaty bodies and/or the political organs is to seek to raise the 'costs' of non-compliance. A failure to devise appropriate responses of this nature has ramifications which extend well beyond the consequences for any individual State party. Large-scale non-reporting makes a mockery of the reporting system as a whole. It leads to a situation in which many States are effectively rewarded for violating their obligations while others are penalized for complying (in the sense

of subjecting themselves to scrutiny by the treaty bodies), and it will lead to a situation in which a diminishing number of States will report very regularly and others will almost never do so.

45. The key question, however, is what types of measures designed to raise the costs of non-compliance might be appropriate, potentially productive in terms of upholding the integrity of the system, consistent with the legal framework of the relevant treaty, and politically and otherwise acceptable. Various palliatives are available ... They include: the elimination of reporting and its replacement by detailed questions to which answers must be given; the preparation of a single consolidated report to satisfy several different requirements; and the much wider use of a more professional advisory services programme designed to assist in the preparation of reports. Ultimately, however, none of these might make a difference in hard-core cases. Under those circumstances the only viable option open to the treaty bodies is to proceed with an examination of the situation in a State party in the absence of a report. This has been done for a number of years by the Committee on Economic, Social and Cultural Rights and the Committee on the Elimination of Racial Discrimination has adopted a very similar approach. The situation has not yet become chronic for either the Committee on the Rights of the Child, because it is still much younger than the others, or for the Committee against Torture which has many fewer States parties than the other committees. And the Committee on the Elimination of Discrimination against Women has had so little meeting time, until very recently, that it was unlikely to take any steps that would increase its workload.

46. It seems inevitable, however, that each of these committees, and certainly the Human Rights Committee, will have to contemplate taking such a step sooner or later. While the precise legal basis for such measures will need to be rooted in the text of each of the relevant treaties, the principal foundation is to be found in a teleological approach to interpretation which acknowledges that any other outcome is absurd in that it enables a delinquent State party to defeat the object and purpose of the implementation provisions. In that regard, it is pertinent to recall that the General Assembly, in its resolution 51/87, specifically 'encourage[d] the efforts of the human rights treaty bodies to examine the progress made in achieving the fulfilment of human rights treaty undertakings by all States parties, without exception' ...

47. In implementing such an approach, the experience of the Committee on Economic, Social and Cultural Rights is instructive. Ample notice has been given to the States concerned and, in a majority of the cases taken up so far, reports which had been dramatically overdue have suddenly materialized. For the rest, it is particularly important that the Committee is in a position to undertake detailed research work and to be able to base its examination upon a wide range of sources of information. The resulting 'concluding observations' must be detailed, accurate and comprehensive. If they are not, States can again be rewarded for a failure to report by a routine or mechanistic response which fails to establish genuine accountability in any way. In this respect it is not clear that the conclusions adopted to date in such cases by the Committee on the Elimination of Racial Discrimination meet such criteria.

The delinquency of States as regards the submission of their reports has led the committees concerned to react, in line with what was proposed in para. 45 of the 1996 report by the independent expert Philip Alston:

Human Rights Committee, Consolidated Guidelines for State Reports under the International Covenant on Civil and Political Rights (26 February 2001) (CCPR/C/66/GUI/Rev.2):

G.6.1 The Committee may, in a case where there has been a long-term failure by a State party, despite reminders, to submit an initial or a periodic report, announce its intention to examine the extent of compliance with Covenant rights in that State party at a specified future session. Prior to that session it will transmit to the State party appropriate material in its possession. The State party may send a delegation to the specified session, which may contribute to the Committee's discussion, but in any event the Committee may issue provisional concluding observations and set a date for the submission by the State party of a report of a nature to be specified.

G.6.2 In a case where a State party, having submitted a report which has been scheduled at a session for examination, informs the Committee, at a time when it is impossible to schedule the examination of another State party report, that its delegation will not attend the session, the Committee may examine the report on the basis of the list of issues either at that session or at another to be specified. In the absence of a Delegation, it may decide either to reach provisional concluding observations, or to consider the report and other material and follow the course in para. G4 above.

Human Rights Committee, General Comment No. 30, *Reporting Obligations of States Parties under Article 40 of the Covenant* (16 July 2002):

1. States parties have undertaken to submit reports in accordance with article 40 of the Covenant within one year of its entry into force for the States parties concerned and, thereafter, whenever the Committee so requests.
2. The Committee notes, as appears from its annual reports, that only a small number of States have submitted their reports on time. Most of them have been submitted with delays ranging from a few months to several years and some States parties are still in default, despite repeated reminders by the Committee.
3. Other States have announced that they would appear before the Committee but have not done so on the scheduled date.
4. To remedy such situations, the Committee has adopted new rules:
   (a) If a State party has submitted a report but does not send a delegation to the Committee, the Committee may notify the State party of the date on which it intends to consider the report or may proceed to consider the report at the meeting that had been initially scheduled;
   (b) When the State party has not presented a report, the Committee may, at its discretion, notify the State party of the date on which the Committee proposes to examine the measures taken by the State party to implement the rights guaranteed under the Covenant:
      (i) If the State party is represented by a delegation, the Committee will, in presence of the delegation, proceed with the examination on the date assigned;
      (ii) If the State party is not represented, the Committee may, at its discretion, either decide to proceed to consider the measures taken by the State party to implement the guarantees of the Covenant at the initial date or notify a new date to the State party.

For the purposes of the application of these procedures, the Committee shall hold its meetings in public session if a delegation is present, and in private if a delegation is not present, and shall follow the modalities set forth in the reporting guidelines and in the rules of procedure of the Committee.

5. After the Committee has adopted concluding observations, a follow-up procedure shall be employed in order to establish, maintain or restore a dialogue with the State party. For this purpose and in order to enable the Committee to take further action, the Committee shall appoint a Special Rapporteur, who will report to the Committee [on the follow-up to concluding observations, see further, section 3.1. in this chapter].
6. In the light of the report of the Special Rapporteur, the Committee shall assess the position adopted by the State party and, if necessary, set a new date for the State party to submit its next report.

It is clear that part of the answer resides in the building of the adequate institutional framework at national level.

Harmonized Guidelines on Reporting under the International Human Rights Treaties, including Guidelines on a Common Core Document and treaty-specific targeted documents (HRI/MC/2005/3, 1 June 2005):

12. All States are parties to at least one of the main international human rights treaties, and more than seventy-five per cent are party to four or more. As a consequence, all States have considerable reporting obligations to fulfil and should benefit from adopting a coordinated approach to their reporting for all treaty bodies.

13. The treaty bodies recommend that States consider setting up an appropriate institutional framework for the preparation of their reports. These institutional structures – which could include an inter-ministerial drafting committee and/or focal points on reporting within each relevant government department – should support all of the State's reporting obligations under the international human rights instruments and related international treaties (for example Conventions of the International Labour Organization and the United Nations Educational, Scientific and Cultural Organization), and should provide an effective mechanism to coordinate follow-up to the concluding observations of the treaty bodies. They should allow for the involvement of sub-national entities where these exist and should be established on a permanent basis.

14. These institutional structures should develop an efficient system – supported by modern technologies – for the collection (from the relevant ministries and government statistical offices) of all statistical and other data relevant to the implementation of human rights, in a comprehensive and continuous manner. Technical assistance is available from the Office of the United Nations High Commissioner for Human Rights (OHCHR) in collaboration with the Division for the Advancement of Women (DAW), and from relevant United Nations agencies.

15. Permanent institutional structures of this nature could support States in meeting other reporting commitments, for example to follow up on international conferences and summits, monitor implementation of the Millennium Development Goals, etc. Much of the information collected and collated for such reports may be useful in the preparation of States' reports to the treaty bodies.

9.1. Questions for discussion: State reporting

1. The Paris Principles relating to the Status of the national institutions for the promotion and the protection of human rights adopted by General Assembly Resolution 48/134 of 20 December 1993 (see chapter 8, section 2.3.) provide that one of the missions of the national human rights institution should be to 'contribute to the reports which States are required to submit to United Nations bodies and committees, and to regional institutions, pursuant to their treaty obligations and, where necessary, to express an opinion on the subject, with due respect for their independence' (para. 3(d)). The Committee on the Elimination of Racial Discrimination also takes the view that, where national institutions have been established in accordance with the Paris Principles in order to contribute to the implementation of the International Convention for the Elimination of All Forms of Racial Discrimination, 'they should be associated with the preparation of reports and possibly included in government delegations in order to intensify the dialogue between the Committee and the State party concerned' (General Recommendation XVII (1993), establishment of national institutions to facilitate implementation of the Convention). In your view what role should national human rights institutions play in the preparation of States' reports before the UN human rights treaty bodies?
2. Non-governmental organizations have an important role to fulfil in the reporting procedure, by providing the independent experts sitting on the human rights treaty bodies with information which the government may have preferred to suppress or which it ignored. On the other hand, the human rights treaty bodies encourage the wide participation of civil society in the preparation of the reports and in the discussion of its content. Are these contradictory roles? To what extent should the report be owned by the government, or be the result of a consensus between the State authorities and civil society?

2 INDIVIDUAL COMMUNICATIONS

The Human Rights Committee (HRC), the Committee on the Elimination of Racial Discrimination (CERD), the Committee against Torture (CAT), the Committee on the Elimination of Discrimination against Women (CEDAW), and the Committee on Migrant Workers (CMW), all may receive communications from individuals claiming to be victims of violations under the respective treaties which they monitor. Such a competence has also been attributed to the Committee on Economic, Social and Cultural Rights (CESCR), under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, adopted by the UN General Assembly on 10 December 2008 (A/RES/63/117). The admissibility of such communications, however, is subject to a number of conditions: the violation must not have taken place prior to the entry into force of the treaty concerned as regards the State against which the communication is addressed; the author of the communication must be a 'victim' of the violation he/she denounces; he/she must have exhausted the local remedies available; the communication may not be anonymous, nor may it constitute an abuse of the

right to communication; the same matter must not have been examined under another procedure of international investigation or settlement or, at least – in the more flexible wording of the Optional Protocol to the International Covenant on Civil and Political Rights – it must not be under examination under such procedure at the time of the communication. Four of these conditions warrant further consideration. This will be done here primarily on the basis of the jurisprudence of the Human Rights Committee.

Box 9.1. Who may file communications?

The Optional Protocol to the ICESCR (OP-ICESCR), adopted in 2008, enables the Committee on Economic, Social and Cultural Rights to examine individual communications, thus aligning the competences of this committee with those of the Human Rights Committee under the ICCPR (for significant contributions on this issue and the process leading up to the adoption of this new instrument, see P. Alston, 'Establishing a Right to Petition under the Covenant on Economic, Social and Cultural Rights' in *Collected Courses of the Academy of European Law: the Protection of Human Rights in Europe* (Florence: European University Institute, 1993), vol. IV, book 2, p. 115; W. Vandenhole, 'Completing the UN Complaint Mechanisms for Human Rights Violations Step by Step: Towards a Complaints Procedure Complementing the International Covenant on Economic, Social and Cultural Rights', *Netherlands Quarterly of Human Rights*, 21, No. 3 (2003), 423; O. De Schutter, 'Le Protocole facultatif au Pacte international relatif aux droits économiques, sociaux et culturels', *Revue belge de droit international* (2006), 1; M. Scheinin, 'The Proposed Optional Protocol to the Covenant on Economic, Social and Cultural Rights: a Blueprint for UN Human Rights Treaty Body Reform – Without Amending the Existing Treaties', *Human Rights Law Review*, 6 (2006), 131; C. Mahon, 'Progress at the Front: the Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights', *Human Rights Law Review*, 8 (2008), 617).

Under Article 2 of OP-ICESCR, such communications may be submitted 'by or on behalf of individuals or groups of individuals, under the jurisdiction of a State Party, claiming to be victims of a violation of any of the economic, social and cultural rights set forth in the Covenant by that State Party. Where a communication is submitted on behalf of individuals or groups of individuals, this shall be with their consent unless the author can justify acting on their behalf without such consent.' This formulation is identical to the one in Article 2 of the Optional Protocol to the International Convention on the Elimination of All Forms of Discrimination against Women, and it also corresponds to what is provided for under the CERD and, in the HRC's Rules of Procedure, under the ICCPR. In contrast, Article 1, para. 1 of the Optional Protocol to the Convention on the Rights of Persons with Disabilities (OP-CRPD) provides that the Committee on the Rights of Persons with Disabilities may receive communications 'from or on behalf of individuals or groups of individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of the provisions of the Convention'.

The choice made in the OP-ICESCR goes further than the possibility provided for under the OP-CRPD, since non-governmental organizations, in particular, will have the option of filing communications on behalf of groups of individuals whose economic, social and cultural rights

under the ICESCR have been violated but are unable to take action – for instance due to a fear of reprisals, or because of the material conditions in which they find themselves. At the same time, the initial proposal made by the Portuguese Catarina de Albuquerque, Chairperson of the Intergovernmental Open-Ended Working Group on the OP-ICESCR – the group within which the OP-ICESCR was prepared between February 2004 and June 2008 – went further. The first draft OP-ICESCR submitted by the Chairperson provided for the possibility of collective complaints filed by NGOs (see A/HRC/6/WG.4/2, 23 April 2007). In her revised proposal of December 2007, the Chairperson suggested the insertion of a provision according to which 'Where appropriate, the Committee may receive and consider communications from non-governmental organizations with relevant expertise and interest, alleging a violation of any of the rights set forth in the Covenant' (proposed Art. 1*ter*, in the Revised Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, A/HRC/8/WG.4/2, 24 December 2007). These proposals were inspired by the collective complaints mechanisms established in 1998 under the Council of Europe European Social Charter, which allows the European Committee on Social Rights to receive complaints from non-governmental organizations or unions, about the alleged incompatibility of certain measures or policies with the undertakings of the State concerned under the European Social Charter (on this procedure, see in chapter 11, box 11.1.). Yet, the idea of collective communications was not retained, despite the insistence of certain States that the ICESCR contained certain rights which, due to their collective nature – trade union rights in particular – would only be enforceable if organizations had the standing to file communications with the Committee on Economic, Social and Cultural Rights.

9.2. Questions for discussion: standing to file communications

How would you weigh the pros and the cons of allowing non-governmental organizations to file communications to denounce human rights violations, without having to prove that they are acting on behalf of direct victims of violations (or that the victims are unable to act directly)? Consider the following arguments in favour of the idea of allowing such collective communications:

1. Certain rights, particularly among social and economic rights, are of a collective nature, and can only be effectively enforced through communications if these can be filed by organizations, such as trade unions.
2. The expertise of non-governmental organizations will ensure that communications filed by them will be better prepared than communications filed by direct (individual) victims.
3. Allowing non-governmental organizations to file communications directly ensures that communications will be filed even where direct victims of violations face obstacles to their filing of individual communications.
4. Collective communications will improve the involvement of non-governmental organizations in the UN human rights system.

5. Collective communications will ensure that the human rights bodies concerned will not be overwhelmed by a flood of individual communications concerning the same issue, when the violation stems from a general measure or policy affecting a wide range of people.
6. Collective communications will ensure that, when the violation stems from a general measure or policy affecting a wide range of people, a problem of collective action will be solved: in the absence of standing for organisations, no single individual victim may have a sufficient incentive to act for the benefit of all the individuals aggrieved.

Consider also the arguments against the introduction of a mechanism allowing for collective communications:

1. Allowing non-governmental organizations to file communications alleging violations of human rights treaties may not be workable, since it cannot be reconciled with the obligation to exhaust domestic remedies prior to filing an international claim.
2. Allowing non-governmental organizations to file communications alleging violations of human rights treaties will deprive victims of their right to choose whether or not to denounce a particular violation affecting them.
3. Allowing non-governmental organizations to file communications alleging violations of human rights treaties will lead to human rights treaty bodies being flooded with communications, often motivated by political purposes.
4. Collective communications would only be feasible if the NGOs allowed to file them were selected, on the basis of objective criteria ensuring that they have the required expertise and/or representativity. However, it is very delicate to apply such criteria, or to draw up a list of such NGOs, and this would infringe upon the independence of NGOs.

2.1 The '*ratione temporis*' rule

Claims may be brought against States parties to human rights treaties only when they relate to violations alleged to have occurred after the entry into force of the treaty on the basis of which the communication is filed (for instance, the Optional Protocol to the International Covenant on Civil and Political Rights) as regards the defending State. This does not exclude the possibility of human rights treaty bodies examining 'continuing violations', i.e. violations which, while they have begun prior to the entry into force of the treaty on which the complaint is based, have continued after that date. Article 2(f) of the Optional Protocol to the Convention on the Rights of Persons with Disabilities makes this doctrine explicit, by providing that the Committee on the Rights of Persons with Disabilities shall consider a communication inadmissible when 'The facts that are the subject of the communication occurred prior to the entry into force of the present Protocol for the State Party concerned unless those facts continued after that date.' This rule is not always easy to apply, however, since the distinction between 'continuing violations' and violations whose effects have not been erased may be contested. The following cases illustrate the difficulty.

Human Rights Committee, *J. L.* v. *Australia*, Communication No. 491/1992 (final views of 28 July 1992) (CCPR/C/45/D/491/1992 (1994)):

[The author is a solicitor. In the State of Victoria, the practice of law is regulated by the Legal Profession Practice Act of 1958, section 83(1) of which provides that no one may practise law unless he/she is duly qualified and holds a certificate issued by the Law Institute of Victoria. In 1986, after he was denied such certificate due to his refusal to pay the required insurance premium, J. L. was prohibited by a judicial injunction from continuing to practise. Since he continued to practise, he was fined for contempt of court, and then imprisoned between September and November 1991 for having refused to pay the fine. The Optional Protocol entered into force for Australia on 25 December 1991. However, when J. L. complained to the Human Rights Committee that he had been denied proceedings before an independent and impartial tribunal, in violation of Article 14 of the Covenant on Civil and Political Rights, he claimed that this violation has continuing effects, in that he remained struck off the roll of solicitors of the Supreme Court, without any prospect of being reinstated. Although finding the application inadmissible on other grounds, the Human Rights Committee agreed with the author on this point.]

4.2 The Committee has noted the author's claim that his detention between 1 September and 29 November 1991 was unlawful. It observes that this event occurred prior to the entry into force of the Optional Protocol for Australia (25 December 1991), and that it does not have consequences which in themselves constitute a violation of any of the provisions of the Covenant. Accordingly, this part of the communication is inadmissible *ratione temporis*. As to the author's contention that he was denied a fair and impartial hearing, the Committee notes that although the relevant court hearings took place before 25 December 1991, the effects of the decisions taken by the Supreme Court continue until the present time. Accordingly, complaints about violations of the author's rights allegedly ensuing from these decisions are not in principle excluded *ratione temporis*.

This may be contrasted with the following case:

Human Rights Committee, *E. and A. Könye* v. *Hungary*, Communication No. 520/1992 (final views of 7 April 1994) (UN Doc. CCPR/C/50/D/520/1992 (1994)):

[The authors' property was expropriated in 1984, after the municipal police of Budapest declared Mr and Mrs K. to be citizens staying abroad unlawfully, since the author's work permit allowing him to be employed abroad (he was a public servant for the ILO) expired on 30 June 1984.
On the basis of this decision, the administration of the Budapest City Council confiscated the authors' apartment property as well as the family home and took them into State ownership. The authors were denied compensation. Their subsequent appeals were rejected by the City Council of Budapest, acting as an Administrative Court, on the grounds that under the then applicable rules and regulations, property of individuals found to be unlawfully staying or residing abroad had to be taken into State ownership. The Optional Protocol entered into force for Hungary on 7 December 1988. In January 1990, the authors requested the newly appointed Minister of Justice

to reopen their case. The Minister's reply was negative. Towards the end of 1991, the authors wrote to the Secretariat for Rehabilitation attached to the Prime Minister's Office and asked that their case be reconsidered. Although the Secretariat's reply presented an apology on behalf of the new Government and promised assistance with respect to the recovery of the authors' property, and although the authors' passports were returned to them, there was no subsequent follow-up on the property issue. The authors sought to exercise remedies before the Hungarian courts in 1990–2, but neither the Constitutional Court, which declared itself incompetent, nor the Budapest Central District Court, which dismissed the petition on 15 January 1992 without summoning any of the parties, nor the Court of Appeal, accepted to entertain the case.

The authors state before the Human Rights Committee that they did not get a fair and public hearing before an independent and impartial tribunal, whether under the former communist regime or under the present democratically elected Government. Until the change of Government in 1989, the judicial decisions were handed down 'without a public hearing and by incompetent administrative authorities'. The decisions of these authorities were final, and the authors allegedly did not have any possibility of appealing against them. Under the new Government, in 1990–1, the authors' request for reopening of the matter was again rejected in proceedings which did not include a public hearing. This again is said to constitute an on-going and continuing violation of Article 14 of the International Covenant on Civil and Political Rights. Instead, the Government points out to the Committee that the events complained of occurred prior to 7 December 1988, the date of entry into force of the Optional Protocol for the State party. It therefore considers the case inadmissible *ratione temporis*.]

6.4 The Committee begins by noting that the State party's obligations under the Covenant apply as of the date of its entry into force for the State party. There is, however, a different issue as to when the Committee's competence to consider complaints about alleged violations of the Covenant under the Optional Protocol is engaged. In its jurisprudence under the Optional Protocol, the Committee has held that it cannot consider alleged violations of the Covenant which occurred before the entry into force of the Optional Protocol for the State party, unless the violations complained of continue after the entry into force of the Optional Protocol. A continuing violation is to be interpreted as an affirmation, after the entry into force of the Optional Protocol, by act or by clear implication, of the previous violations of the State party.

6.5 In the present case, it is not possible to speak of such a continuing affirmation, by the Hungarian authorities, of the acts committed by the State party prior to 7 December 1988. For one, the authors' passports have been returned to them, and such harassment as they may have been subjected to prior to 7 December 1988 has stopped.

6.6 The only remaining issue, which might arise in relation to article 17 [right to respect for private and family life], is whether there are continuing effects by virtue of the State party's failure to compensate the authors for the confiscation of their family home or apartment. However, the Committee recalls that there is no autonomous right to compensation under the Covenant (see decision of 26 March 1990 on case No. 275/1988, *S. E.* v. *Argentina*); and a failure to compensate after the entry into force of the Optional Protocol does not thereby constitute an affirmation of a prior violation by the State party.

7. In the light of the above, the Human Rights Committee considers that the authors' claims are inadmissible *ratione temporis*.

[One member of the Committee, Ms Christine Chanet, filed the following individual opinion, dissenting from the majority:]

The authors' allegations under article 14 [fair trial] referred to procedure that took place during a period subsequent to the entry into force of the Optional Protocol, since they were contesting the procedure followed by the Central District Court in 1991, while the Optional Protocol entered into force for Hungary in December 1988.

The Committee could certainly have found that the allegations were not sufficiently supported, but not that article 14 could not be invoked because of the *ratione temporis* rule.

With respect to article 14, the contents of the case submitted to the national court can be evaluated by the Committee only in terms of the criteria listed in the text itself, i.e. in this particular case, rights and obligations in a suit at law.

With the exception of this criterion relating to substance, article 14 refers to the conditions under which the procedure is conducted, and it is the dates on which the various procedural acts took place that should be taken into consideration when analysing the communication *ratione temporis*. The dates relating to the substance of the case brought before the national court should not be taken into consideration when applying the *ratione temporis* rule.

Finally, it is my view that when the Committee considers a communication under the Optional Protocol, its decisions should be guided only by the legal principles found in the provisions of the Covenant itself, and not by political considerations, even of a general nature, or the fear of a flood of communications from countries that have changed their system of Government.

The following decision is distinguishable from *Köyne* v. *Hungary* since, in this latter case, the procedural defects of the remedies exercised by the authors were denounced under Article 14 ICCPR. In the following case, the complaint is based on the continuing effects of what are alleged to be past violations of the rights protected under the Covenant:

Human Rights Committee, *Kurowski* v. *Poland*, Communication No. 872/1999 (CCPR/C/77/D/872/1999 (2003)), final views of 18 March 2003:

[On 31 July 1990, E. Kurowski was dismissed pursuant to the State Protection Office Act of 6 April 1990, apparently because he was a member of the Polish United Workers' Party. Reinstatement could take place only after a regional qualifying commission issued a positive assessment or through an appeal to the Central Qualifying Commission in Warsaw. However, on 22 July 1990, the Bielsko-Biala Qualifying Commission declared that the author did not meet the requirements for officers or employees of the Ministry of Internal Affairs, and it again confirmed this opinion, on appeal from the author, in September 1990. The Optional Protocol to the International Covenant on Civil and Political Rights entered into force for Poland on 7 February 1992. On 25 April 1995, the author requested the Minister of Internal Affairs to overturn the decisions of the qualifying commissions and to reinstate him in the police force, but the Minister replied that he had no authority to alter decisions by the qualifying commissions or to recruit anyone who did not receive a positive assessment from them. An appeal lodged with the Central Administrative Court was equally unsuccessful, since the Court considered that it was not competent to give a ruling on decisions taken by the qualifying commissions.]

6.3 The Committee notes that the State party claims that the communication is inadmissible *ratione temporis*, since the qualification proceedings for the author ended on 5 September 1990, that is, before the Optional Protocol entered into force for Poland on 7 February 1992. The

author challenges that argument and replies that the State was party to the Covenant since June 1977, that the Optional Protocol entered into force in 1992 and that he did not take legal action against his dismissal until 1995 (after the Optional Protocol had come into force).

6.4 The Committee recalls that the obligations that the State party assumed when it signed the Covenant took effect on the date on which the Covenant entered into force for the State party. Following its jurisprudence, the Committee considers that it cannot consider violations that took place before the Optional Protocol entered into force for the State party, unless such violations persisted after the entry into force of the Optional Protocol. A persistent violation is understood to mean the continuation of violations which the State party committed previously, either through actions or implicitly.

6.5 In the present case, the author was dismissed from his post in 1990, under the law in force at the time, and the same year he presented himself as a candidate, without success, before one of the regional qualifying commissions in order to determine whether he satisfied the new statutory criteria for employment in the restructured Ministry of Internal Affairs. The fact that he did not win his case during the proceedings which he initiated in 1995, after the Optional Protocol came into force, does not in itself constitute a potential violation of the Covenant. The Committee is unable to conclude that a violation occurred prior to the entry into force of the Optional Protocol for the State party and continued thereafter. Consequently, the Committee declares the communication inadmissible ratione temporis, in accordance with article 1 of the Optional Protocol.

By contrast, both this decision and the preceding one are difficult to reconcile with the following:

Human Rights Committee, *Aduayom et al.* v. *Togo*, Communications Nos. 422/1990, 423/1990 and 424/1990 (final views of 12 July 1996) (UN Doc. CCPR/C/51/D/422/1990, 423/1990 and 424/1990):

[The three authors were arrested in September and December 1985 for transparently political reasons; they were released in April and July 1986. Their wages were suspended under administrative procedures after their arrest, on the ground that they had unjustifiably deserted their posts. The authors claim that both their arrest and their detention were contrary to Article 9, para. 1 ICCPR. They further contend that the State party has violated Article 19 in respect to them, because they were persecuted for having carried, read or disseminated documents that contained no more than an assessment of Togolese politics, either at the domestic or foreign policy level. The Committee stated that the communications were not inadmissible *ratione temporis*, although the Optional Protocol to the International Covenant on Civil and Political Rights only entered into force for Togo on 30 June 1988:]

6.2 The Committee noted the authors' claims under article 9 and observed that their arrest and detention occurred prior to the entry into force of the Optional Protocol for Togo (30 June 1988). It further noted that the alleged violations had continuing effects after the entry into force of the Optional Protocol for Togo, in that the authors were denied reinstatement in their posts until 27 May and 1 July 1991 respectively, and that no payment of salary arrears or other forms of compensation had been effected. The Committee considered that these continuing

effects could be seen as an affirmation of the previous violations allegedly committed by the State party. It therefore concluded that it was not precluded *ratione temporis* from examining the communications and considered that they might raise issues under articles 9, paragraph 5; 19; and 25(c), of the Covenant.

2.2 The 'victim' requirement

In principle, individual communications must be presented to the human rights treaty expert bodies by those who have been directly affected by the violations complained of. Challenges in the abstract to the laws or practices of a State, by individuals or groups which pretend to act in the public interest by filing an *actio popularis*, are not allowed. The most recent instruments, however, have taken into account the difficulties which certain individual victims may be facing due to this requirement, if it is interpreted too strictly. For example, as we have seen (box 9.1. above), Article 2 of the 1999 Optional Protocol to the Convention on the Elimination of Discrimination against Women, which entered into force on 22 December 2000, provides that

> Communications may be submitted by or on behalf of individuals or groups of individuals, under the jurisdiction of a State Party, claiming to be victims of a violation of any of the rights set forth in the Convention by that State Party. Where a communication is submitted on behalf of individuals or groups of individuals, this shall be with their consent unless the author can justify acting on their behalf without such consent.

A problem may result from the fact that, in order to be a 'victim', and thus to possess the required standing in the context of individual communications, the complainants may have to make serious sacrifices and accept, temporarily, a violation of their rights. In the case of *Tadman* v. *Canada*, the authors were non-Catholics complaining that the Roman Catholic schools were the only non-secular schools receiving full and direct public funding. Their communication was considered inadmissible by the Committee, since – although they belonged to different religious denominations, i.e. United Church of Canada, Lutheran Church, Serbian Orthodox Church and Humanist – their children were attending public secular schools, which are funded like Catholic schools. But the implication is that, in order to challenge the Canadian legislation on this point, the authors of the complaint in *Tadman* would have had to place their children in non-public, non-Roman Catholic schools, with the financial implications this would have entailed for them.

Human Rights Committee, *Tadman et al.* v. *Canada*, Communication No. 816/1998 (final views of 4 November 1999) (UN Doc. CCPR/C/67/D/816/1998):

6.2 The State party has challenged the admissibility of the communication on the basis that the authors cannot claim to be victims of a violation of the Covenant. In this context, the Committee

notes that the authors while claiming to be victims of discrimination, do not seek publicly funded religious schools for their children, but on the contrary seek the removal of the public funding to Roman Catholic separate schools. Thus, if this were to happen, the authors' personal situation in respect of funding for religious education would not be improved. The authors have not sufficiently substantiated how the public funding given to the Roman Catholic separate schools at present causes them any disadvantage or affects them adversely. In the circumstances, the Committee considers that they cannot claim to be victims of the alleged discrimination, within the meaning of article 1 of the Optional Protocol.

[Four Committee members (P. Bhagwati, E. Evatt, L. Henkin and C. Medina Quiroga) disagreed with the majority:]

The situation is that the Province of Ontario provides a benefit to the Catholic community by incorporating their religious schools into the public school system and funding them in full. This benefit is discriminatory in nature as it prefers one group in the community on the ground of religion. Those whose religious schools are not funded in this way are clearly victims of this discrimination (as in the *Waldman* case [see chapter 7, section 1.1.]).

But that does not exhaust the scope of those who may claim to be victims. Parents who desire religious education for their children and are not provided with it within the school system and who have to meet the cost of such education themselves may also be considered as victims. The applicants in this case include such persons, and the claims of at least those persons should, in my view, be considered admissible.

The limits of the views adopted by the majority in *Tadman* v. *Canada* become clear if we compare this with its decision in *Toonen* v. *Australia*. There, the author complained about two provisions of the Tasmanian Criminal Code, namely sections 122(a) and (c) and 123, which criminalize various forms of sexual contacts between men, including all forms of sexual contacts between consenting adult homosexual men in private. Mr Toonen, an activist for the promotion of the rights of homosexuals in Tasmania, agreed that 'in practice the Tasmanian police has not charged anyone either with "unnatural sexual intercourse" or "intercourse against nature" (section 122) nor with "indecent practice between male persons" (section 123) for several years'. However, he argued that 'because of his long-term relationship with another man, his active lobbying of Tasmanian politicians and the reports about his activities in the local media, and because of his activities as a gay rights activist and gay HIV/AIDS worker, his private life and his liberty are threatened by the continued existence of sections 122(a), (c) and 123 of the Criminal Code'. The Committee agreed that he could be considered a victim of the alleged violation of Article 17 ICCPR although the challenged provisions had not been applied to him:

Human Rights Committee, *Toonen* v. *Australia*, Communication No. 488/1992 (final views of 31 March 1994) (UN Doc. CCPR/C/50/D/488/1992 (1994)):

5.1 [T]he Committee considered the admissibility of the communication. As to whether the author could be deemed a 'victim' within the meaning of article 1 of the Optional

Protocol, it noted that the legislative provisions challenged by the author had not been enforced by the judicial authorities of Tasmania for a number of years. It considered, however, that the author had made reasonable efforts to demonstrate that the threat of enforcement and the pervasive impact of the continued existence of these provisions on administrative practices and public opinion had affected him and continued to affect him personally, and that they could raise issues under articles 17 and 26 of the Covenant. Accordingly, the Committee was satisfied that the author could be deemed a victim within the meaning of article 1 of the Optional Protocol, and that his claims were admissible *ratione temporis*.

8.2 Inasmuch as article 17 is concerned, it is undisputed that adult consensual sexual activity in private is covered by the concept of 'privacy', and that Mr Toonen is actually and currently affected by the continued existence of the Tasmanian laws. The Committee considers that sections 122(a), (c) and 123 of the Tasmanian Criminal Code 'interfere' with the author's privacy, even if these provisions have not been enforced for a decade. In this context, it notes that the policy of the Department of Public Prosecutions not to initiate criminal proceedings in respect of private homosexual conduct does not amount to a guarantee that no actions will be brought against homosexuals in the future, particularly in the light of undisputed statements of the Director of Public Prosecutions of Tasmania in 1988 and those of members of the Tasmanian Parliament. The continued existence of the challenged provisions therefore continuously and directly 'interferes' with the author's privacy.

Thus, the chilling effect created by the existence of legislation which could be applied in order to repress the exercise of certain fundamental rights suffices to establish the quality of 'victim', even where the said legislation has not been effectively applied to the person concerned.

The 'victim' requirement would be easy to circumvent if non-governmental organizations were authorized to claim that they are victims of violations which they have chosen to denounce, by defining their activities as aiming to combat such violations. In the following case presented to the Committee on the Elimination of Racial Discrimination, the applicant was a non-governmental organization, represented by the head of its board of trustees. The NGO alleged that the State party had violated its obligations under Articles 4 and 6 of the Convention on the Elimination of All Forms of Racial Discrimination, as it failed to investigate whether a job advertisement constituted an act of racial discrimination. It argued that it 'should be recognized as having status of victim under article 14 of the Convention [on the Elimination of All Forms of Racial Discrimination], since it represents "a large group of persons of non-Danish origin discriminated against by the job advertisement in question"'. They noted in support of this claim 'that both the police and the Regional Public Prosecutor have accepted it as a party to domestic proceedings'.

Committee on the Elimination of Racial Discrimination, *Documentation and Advisory Centre on Racial Discrimination* v. *Denmark*, Communication No. 28/2003, U.N. Doc. CERD/C/63/D/28/2003 (2003):

6.4 The Committee does not exclude the possibility that a group of persons representing, for example, the interests of a racial or ethnic group, may submit an individual communication, provided that it is able to prove that it has been an alleged victim of a violation of the Convention or that one of its members has been a victim, and if it is able at the same time to provide due authorization to this effect.

6.5 The Committee notes that, according to the petitioner, no member of the board of trustees applied for the job. Moreover, the petitioner has not argued that any of the members of the board, or any other identifiable person whom the petitioner would be authorized to represent, had a genuine interest in, or showed the necessary qualifications for, the vacancy.

6.6 While Section 5 of Act No. 459 [of 12 June 1996 on prohibition against discrimination in respect of employment and occupation etc. in the employment market] prohibits discrimination of all persons of non-Danish origin in job advertisements, whether they apply for a vacancy or not, it does not automatically follow that persons not directly and personally affected by such discrimination may claim to be victims of a violation of any of the rights guaranteed in the Convention. Any other conclusion would open the door for popular actions (*actio popularis*) against the relevant legislation of States parties.

6.7 In the absence of any identifiable victims personally affected by the allegedly discriminatory job advertisement, whom the petitioner would be authorized to represent, the Committee concludes that the petitioner has failed to substantiate, for purposes of article 14, paragraph 1, its claim that it constitutes or represents a group of individuals claiming to be the victim of a violation by Denmark of articles 2, paragraph 1(d), 4, 5 and 6 of the Convention.

There are two important exceptions to the requirement that communications may only be filed by the 'direct' victims, however. First, where the direct victim is unable to act, the complaint may be filed by a person who has sufficiently close links to him/her, so that it may be presumed that the wishes of the victim are adequately taken into account and that, if he/she could have done so, the victim would have consented to being represented. This will allow the relatives of the victim, in particular, to represent the latter, by filing a claim on their behalf. As illustrated by the case of *Mbenge* v. *Zaire* decided by the Human Rights Committee, an extension beyond the family circle will be difficult to justify, even in situations where the other persons on behalf of which a complainant seeks to act have been victims of a similar treatment, linked to the same string of facts on which the complaint is based (Human Rights Committee, *Mbenge* v. *Zaire*, Communication No. 16/1977 (final views of 25 March 1983) (UN Doc. Supp. No. 40 (A/38/40) at 134 (1983))). Second, where the violation has not occured yet but may be considered both imminent and sufficiently certain – where the violation would be the foreseeable and necessary consequence of the challenged measure, in the words of the Human Rights Committee – a communication may be filed in anticipation of the violation which is about to occur.

Human Rights Committee, *Cox* v. *Canada*, Communication No. 539/1993 (CCPR/C/52/D/539/1993 (1994)), final views of 31 October 1994:

2.1 On 27 February 1991, the author was arrested at Laval, Quebec, for theft, a charge to which he pleaded guilty. While in custody, the judicial authorities received from the United States a request for his extradition, pursuant to the 1976 Extradition Treaty between Canada and the United States. The author is wanted in the State of Pennsylvania on two charges of first-degree murder, relating to an incident that took place in Philadelphia in 1988. If convicted, the author could face the death penalty, although the two other accomplices were tried and sentenced to life terms ...

3. The author claims that the order to extradite him violates articles 6, 14 and 26 of the Covenant [ICCPR]; he alleges that the way death penalties are pronounced in the United States generally discriminates against black people. He further alleges a violation of article 7 of the Covenant, in that he, if extradited and sentenced to death, would be exposed to 'the death row phenomenon', i.e. years of detention under harsh conditions, awaiting execution ...

10.4 With regard to the allegations that, if extradited, Mr Cox would be exposed to a real and present danger of a violation of articles 14 and 26 of the Covenant in the United States, the Committee observed [in its decision of 3 November 1993 on the admissibility of the communication] that the evidence submitted did not substantiate, for purposes of admissibility, that such violations would be a foreseeable and necessary consequence of extradition. It does not suffice to assert before the Committee that the criminal justice system in the United States is incompatible with the Covenant. In this connection, the Committee recalled its jurisprudence that, under the Optional Protocol procedure, it cannot examine *in abstracto* the compatibility with the Covenant of the laws and practice of a State. [Views in Communication No. 61/1979, *Leo Hertzberg et al.* v. *Finland*, para. 9.3.] For purposes of admissibility, the author has to substantiate that in the specific circumstances of his case, the Courts in Pennsylvania would be likely to violate his rights under articles 14 and 26, and that he would not have a genuine opportunity to challenge such violations in United States courts. The author has failed to do so. This part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

10.5 The Committee considered that the remaining claim, that Canada violated the Covenant by deciding to extradite Mr Cox without seeking assurances that the death penalty would not be imposed, or if imposed, would not be carried out, may raise issues under articles 6 and 7 of the Covenant which should be examined on the merits.

[Canada questioned, however, whether Mr Cox did satisfy the criterion of being a 'victim' within the meaning of article 1 of the Optional Protocol:]

12.4. ... Firstly, it has not been alleged that the author has already suffered any violation of his Covenant rights; secondly, it is not reasonably foreseeable that he would become a victim after extradition to the United States. The State party cites statistics from the Pennsylvania District Attorney's Office and indicates that since 1976, when Pennsylvania's current death penalty law was enacted, no one has been put to death; moreover, the Pennsylvania legal system allows for several appeals. But not only has Mr Cox not been tried, he has not been convicted, nor sentenced to death. In this connection the State party notes that the two other individuals who were alleged to have committed the crimes together with Mr Cox were not given death sentences but are serving life sentences. Moreover, the death penalty is not sought in all murder cases. Even if sought, it cannot be imposed in the absence of aggravating factors which must outweigh any mitigating factors. Referring to the Committee's jurisprudence in the *Aumeeruddy-*

Cziffra case that the alleged victim's risk be 'more than a theoretical possibility', the State party states that no evidence has been submitted to the Canadian courts or to the Committee which would indicate a real risk of his becoming a victim. The evidence submitted by Mr Cox is either not relevant to him or does not support the view that his rights would be violated in a way that he could not properly challenge in the courts of Pennsylvania and of the United States. The State party concludes that since Mr Cox has failed to substantiate, for purposes of admissibility, his allegations, the communication should be declared inadmissible under article 2 of the Optional Protocol.

[This argument failed to convince the majority of the members of the Committee to review their decision on the admissibility of the communication. However, six members of the Committee dissented from the decision on admissibility, stating (individual opinion by Mrs Rosalyn Higgins, co-signed by Messrs Laurel Francis, Kurt Herndl, Andreas Mavrommatis, Birame Ndiaye and Waleed Sadi (dissenting); a similar opinion was filed by Ms Elisabeth Evatt):]

... it is not always necessary that a violation already have occurred for an action to come within the scope of article 1. But the violation that will affect him personally must be a 'necessary and foreseeable consequence' of the action of the defendant State.

It is clear that in the case of Mr Cox, unlike in the case of Mr Kindler, this test is not met. Mr Kindler had, at the time of the Canadian decision to extradite him, been tried in the United States for murder, found guilty as charged and recommended to the death sentence by the jury. Mr Cox, by contrast, has not yet been tried and *a fortiori* has not been found guilty or recommended to the death penalty. Already it is clear that his extradition would not entail the possibility of a 'necessary and foreseeable consequence of a violation of his rights' that would require examination on the merits. This failure to meet the test of 'prospective victim' within the meaning of article 1 of the Optional Protocol is emphasized by the fact that Mr Cox's two co-defendants in the case in which he has been charged have already been tried in the State of Pennsylvania, and sentenced not to death but to a term of life imprisonment. The fact that the Committee – and rightly so in our view – found that Kindler raised issues that needed to be considered on their merits, and that the admissibility criteria were there met, does not mean that every extradition case of this nature is necessarily admissible. In every case, the tests relevant to articles 1, 2, 3 and 5, paragraph 2, of the Optional Protocol must be applied to the particular facts of the case.

The Committee has not at all addressed the requirements of article 1 of the Optional Protocol, that is, whether Mr Cox may be considered a 'victim' by reference to his claims under articles 14, 26, 6 or 7 of the Covenant.

We therefore believe that Mr Cox was not a 'victim' within the meaning of article 1 of the Optional Protocol, and that his communication to the Human Rights Committee is inadmissible.

The duty to address carefully the requirements for admissibility under the Optional Protocol is not made the less necessary because capital punishment is somehow involved in a complaint.

9.3. Questions for discussion: the 'victim' requirement under the International Covenant on Civil and Political Rights

1. Is the decision adopted by the Human Rights Committee in *Tadman et al.* v. *Canada* consistent with its approach in *Waldman* v. *Canada*? The latter case was examined in chapter 7,

section 1.1.: Waldman enrolled his children in a private Jewish day school, and complained that in the province of Ontario, Roman Catholic schools are the only non-secular schools receiving full and direct public funding. The Committee found a violation of the non-discrimination requirement, noting that 'the Committee observes that the Covenant does not oblige States parties to fund schools which are established on a religious basis. However, if a State party chooses to provide public funding to religious schools, it should make this funding available without discrimination' (para. 10.6. of its final views, adopted on 5 November 1999). Would Waldman's situation be improved if Canada were to cut off funding for the Roman Catholic schools, in order not to discriminate against other faiths?

2. Is the understanding the Human Rights Committee offers of the notion of 'victim' of a violation of the ICCPR in *Toonen* v. *Australia* compatible with its position in the case of *Tadman et al.* v. *Canada*?

2.3 The exhaustion of local remedies

Complainants filing individual communications before human rights treaty bodies are required to demonstrate that they have unsuccessfully sought remedies before the national authorities, prior to filing their claim at international level. The requirement is that they invoke, at least in substance, the violation of the rights recognized in the international human rights treaty concerned, and that they thus provide the national authorities with an opportunity to address the claim before it is presented to a human rights treaty expert body. Only remedies which have a reasonable chance of success, however, must be exhausted. In addition, remedies which are not effective, because they will not provide a protection before irreparable harm is caused, do not have to be exercised, as illustrated in the following case:

Human Rights Committee, *Chief Bernard Ominayak and the Lubicon Lake Band* v. *Canada*, Communication No. 167/1984 (Supp. No. 40 (A/45/40) at 1 (1990)), final views of 26 March 1990:

[A summary of the context of this case is offered above (chapter 7, section 5.2.). Chief Ominayak is the leader and representative of the Lubicon Lake Band, a Cree Indian band living within the borders of Canada in the Province of Alberta. They allege that the Provincial Government of Alberta has been allowed to expropriate the territory of the Lubicon Lake Band for the benefit of private corporate interests and that this violates the Lubicon Lake Band's right of self-determination. One of the questions raised in the procedure before the Committee was whether pending litigation and negotiation for a settlement of the case constituted an effective remedy available to the applicants and whether, therefore, the communication was not filed prior to the exhaustion of local remedies. As will be seen below, the Human Rights Committee takes the view that in such a situation, only interim measures may be considered to constitute an effective remedy, which must be exhausted as a condition of admissibility of the Communication before

the Committee. It is, however, noteworthy that, while finding that Article 27 ICCPR is violated, the Committee concludes by stating that 'The State party proposes to rectify the situation by a remedy that the Committee deems appropriate within the meaning of article 2 of the Covenant.']

15. [Canada] requests the Committee to review its decision on admissibility, submitting that effective domestic remedies have not been exhausted by the Band. It observes that the Committee's decision appears to be based on the assumption that an interim injunction would be the only effective remedy to address the alleged breach of the Lubicon Lake Band's rights. This assumption, in its opinion, does not withstand close scrutiny. The State party submits that, based on the evidence of the Alberta Court of Queen's Bench and the Court of Appeal – the two courts which had had to deal with the Band's request for interim relief – as well as the socio-economic conditions of the Band, its way of life, livelihood and means of subsistence have not been irreparably damaged, nor are they under imminent threat. Accordingly, it is submitted that an interim injunction is not the only effective remedy available to the Band, and that a trial on the merits and the negotiation process proposed by the Federal Government constitute both effective and viable alternatives. The State party reaffirms its position that it has a right, pursuant to article 5, paragraph 2(b), of the Optional Protocol, to insist that domestic redress be exhausted before the Committee considers the matter. It claims that the terms 'domestic remedies', in accordance with relevant principles of international law, must be understood as applying to all established local procedures of redress. As long as there has not been a final judicial determination of the Band's rights under Canadian law, there is no basis in fact or under international law for concluding that domestic redress is ineffective, nor for declaring the communication admissible under the Optional Protocol. In support of its claims, the State party provides a detailed review of the proceedings before the Alberta Court of Queen's Bench and explains its long-standing policy to seek the resolution of valid, outstanding land claims by Indian Bands through negotiation.

16.5 With respect to the requirement of exhaustion of domestic remedies, the author rejects the State party's assertion that a trial on the merits would offer the Band an effective recourse against the Federal Government and redress for the loss of its economy and its way of life. First, this assertion rests upon the assumption that past human rights violations can be rectified through compensatory payments; secondly, it is obvious that the Band's economy and way of life have suffered irreparable harm. Furthermore, it is submitted that a trial on the merits is no longer available against the Federal Government of Canada since, in October 1986, the Supreme Court of Canada held that aboriginal land rights within provincial boundaries involve provincial land rights and must therefore be adjudicated before the provincial courts. It was for that reason that, on 30 March 1987, the Lubicon Lake Band applied to the Alberta Court of Queen's Bench for leave to amend its statement of claim before that court so as to be able to add the Federal Government as a defendant. On 22 October 1987, the Court of Queen's Bench denied the application. Therefore, despite the fact that the Canadian Constitution vests exclusive jurisdiction for all matters concerning Indians and Indian lands in Canada with the Federal Government, it is submitted that the Band cannot avail itself of any recourse against the Federal Government on issues pertaining to these very questions ...

17.2 With respect to the effectiveness of available domestic remedies, the State party takes issue with the author's submission detailed in paragraph 16.5 above, which it claims seriously misrepresents the legal situation as it relates to the Band and the Federal and Provincial Governments. It reiterates that the Band has instituted two legal actions, both of which remain

pending: one in the Federal Court of Canada against the federal Government; the other in the Alberta Court of Queen's Bench against the province and certain private corporations. To the extent that the author's claim for land is based on aboriginal title, as opposed to treaty entitlement, it is established case law that a court action must be brought against the province and not the Federal Government.

17.3 The State party adds that in the action brought before the Alberta Court of Queen's Bench: 'The communicant sought leave to add the Federal Government as a party to the legal proceedings in the Alberta Court of Queen's Bench. The Court there held that, based on existing case law, a provincial court is without jurisdiction to hear a claim for relief against the Federal Government; rather, this is a matter properly brought before the Federal Court of Canada. The plaintiff has in fact done this and the action is, as already indicated, currently pending. Therefore, recourse against the Government of Canada is still available to the Band, as it has always been, in the Federal Court of Canada. Moreover, the communicant has appealed the decision of the Court of Queen's Bench to the Alberta Court of Appeal.' ...

27.1 In his comments of 2 October 1989 on the State party's reply to the Committee's interim decision, the author contends ... that no domestic remedy exists which could restore the Lubicon Lake Band's traditional economy or way of life, which 'has been destroyed as a direct result of both the negligence of the Canadian Government and its deliberate actions'. The author submits that from the legal point of view, the situation of the Band is consistent with the Committee's decision in the case of *Munoz* v. *Peru* [Communication No. 203/1986, UN Doc. Supp. No. 40 (A/44/40) at 200 (1988), final views of 4 November 1988], in which it was held that the concept of a fair hearing within the meaning of article 14, paragraph 1, of the Covenant necessarily entails that justice be rendered without undue delay. In that case, the Committee had considered a delay of seven years in the domestic proceedings to be unreasonably prolonged. In the case of the Band, the author states, domestic proceedings were initiated in 1975. Furthermore, although the Band petitioned the Federal Government for a reserve for the first time in 1933, the matter remains unsettled. According to the Band, it was forced to bring 14 years of litigation to an end, primarily because of two decisions that effectively deny the Band an opportunity to maintain aboriginal rights claim against the Federal Government ...

27.2 As to the State party's reference to a negotiated settlement, the author submits that the offer is neither equitable nor does it address the needs of the Lubicon community, since it would leave virtually all items of any significance to future discussions, decisions by Canada, or applications by the Band; and that the Band would be required to abandon all rights to present any future domestic and international claims against the State party, including its communication to the Human Rights Committee. The author further submits that the agreement of October 1988 between the Band and the Province of Alberta does not in the least solve the Band's aboriginal land claims, and that the State party's characterization of the agreement has been 'deceptive'. In this context, the author argues that, contrary to its earlier representations, the State party has not offered to implement the October 1988 agreement and that if it were willing to honour its provisions, several issues including the question of just compensation would have to be settled ...

29.4 Insisting that no irreparable damage to the traditional way of life of the Lubicon Lake Band had occurred and that there was no imminent threat of such harm, and further that both a trial on the merits of the Band's claims and the negotiation process constitute effective and viable alternatives to the interim relief which the Band had unsuccessfully sought in the courts,

the State party, in October 1987, requested the Committee, under rule 93, paragraph 4, of the rules of procedure, to review its decision on admissibility, in so far as it concerns the requirement of exhaustion of domestic remedies. The State party stressed in this connection that delays in the judicial proceedings initiated by the Band were largely attributable to the Band's own inaction. The State party further explained its long-standing policy to seek the resolutions of valid, outstanding land claims by Indian bands through negotiations...

29.7 Accepting its obligation to provide the Lubicon Lake Band with reserve land under Treaty 8, and after further unsuccessful discussions, the Federal Government, in May 1988, initiated legal proceedings against the Province of Alberta and the Lubicon Lake Band, in an effort to provide a common jurisdiction and thus to enable it to meet its lawful obligations to the Band under Treaty 8. In the author's opinion, however, this initiative was designated for the sole purpose of delaying indefinitely the resolution of the Lublcon land issues and, on 6 October 1988 (30 September, according to the State party), the Lubicon Lake Band asserted jurisdiction over its territory and declared that it had ceased to recognlze the jurisdiction of the Canadian courts. The author further accused the State party of 'practicing deceit in the media and dismissing advisors who recommend any resolution favourable to the Lubicon people'.

29.8 Following an agreement between the Provincial Government of Alberta and the Lubicon Lake Band in November 1988 to set aside 95 square miles of land for a reserve, negotiations started between the Federal Government and the Band on the modalities of the land transfer and related issues. According to the State party, consensus had been reached on the majority of issues, including Band membership, size of the reserve, community construction and delivery of programmes and services, but not on cash compensation, when the Band withdrew from the negotiations on 24 January 1989. The formal offer presented at that time by the Federal Government amounted to approximately $C45 million in benefits and programmes, in addition to the 95 square mile reserve.

29.9 The author, on the other hand, states that the above information from the State party is not only misleading but virtually entirely untrue and that there had been no serious attempt by the Government to reach a settlement. He describes the Government's offer as an exercise in public relations, 'which committed the Federal Government to virtually nothing', and states that no agreement or consensus had been reached on any issue. The author further accused the State party of sending agents into communities surrounding the traditional Lubicon territory to induce other natives to make competing claims for traditional Lubicon land.

29.10 The State party rejects the allegation that it negotiated in bad faith or engaged in improper behaviour to the detriment of the interests of the Lubicon Lake Band. It concedes that the Lubicon Lake Band has suffered a historical inequity, but maintains that its formal offer would, if accepted, enable the Band to maintain its culture, control its way of life and achieve economic self-sufficiency and, thus, constitute an effective remedy. On the basis of a total of 500 Band members, the package worth $C45 million would amount to almost $C500,000 for each family of five. It states that a number of the Band's demands, including an indoor ice arena or a swimming pool, had been refused. The major remaining point of contention, the State party submits, is a request for $C167 million in compensation for economic and other losses allegedly suffered. That claim, it submits, could be pursued in the courts, irrespective of the acceptance of the formal offer. It reiterates that its offer to the Band stands...

31.1 The Committee has seriously considered the State party's request that it review its decision declaring the communication admissible under the Optional Protocol 'in so far as

it may raise issues under article 27 or other articles of the Covenant'. In the light of the information now before it, the Committee notes that the State party has argued convincingly that, by actively pursuing matters before the appropriate courts, delays, which appeared to be unreasonably prolonged, could have been reduced by the Lubicon Lake Band. At issue, however, is the question of whether the road of litigation would have represented an effective method of saving or restoring the traditional or cultural livelihood of the Lubicon Lake Band, which, at the material time, was allegedly at the brink of collapse. The Committee is not persuaded that that would have constituted an effective remedy within the meaning of article 5, paragraph 2(b), of the Optional Protocol. In the circumstances, the Committee upholds its earlier decision on admissibility.

Individual opinion submitted by Mr Bertil Wennergren:
The rationale behind the general rule of international law that domestic remedies should be exhausted before a claim is submitted to an instance of international investigation or settlement is primarily to give a respondent State an opportunity to redress, by its own means within the framework of its domestic legal system, the wrongs alleged to have been suffered by the individual. In my opinion, this rationale implies that, in a case such as the present one, an international instance shall not examine a matter pending before a court of the respondent State. To my mind, it is not compatible with international law that an international instance considers issues which, concurrently, are pending before a national court. An instance of international investigation or settlement must, in my opinion, refrain from considering any issue pending before a national court until such time as the matter has been adjudicated upon by the national courts. As that is not the case here, I find the communication inadmissible at this point in time.

It has also been recognized that remedies which are inaccessible in practice because of the absence of legal aid do not have to be exhausted:

Human Rights Committee, *Henry* v. *Jamaica*, Communication No. 230/l987 (CCPR/C/43/D/230/1987 (1991)), final views of 1 November 1991:

[The author is awaiting execution at a prison in Jamaica. He claims to be the victim of a violation by Jamaica of his rights under Article 14 of the International Covenant on Civil and Political Rights. The State party argues that the Communication is inadmissible on the ground of non-exhaustion of domestic remedies, since the author failed to take action under the Jamaican Constitution to seek enforcement of his right, under section 20 of the Constitution, to a fair trial and legal representation.]

6.4 In respect of the absence of legal aid for the filing of constitutional motions, the State party submits that nothing in the Optional Protocol or in customary international law would support the contention that an individual is relieved of the obligation to exhaust domestic remedies on the grounds that there is no provision for legal aid and that his indigence has prevented him from resorting to an available remedy. In this connection, the State party observes that the Covenant only imposes a duty to provide legal aid in respect of criminal offenses (article 14, paragraph 3(d)). Furthermore, international conventions dealing with economic,

social and cultural rights do not impose an unqualified obligation on States to implement such rights: article 2 of the International Covenant on Economic, Social and Cultural Rights, for instance, provides for the progressive realization of economic rights and relates to the 'capacity of implementation' of States. In the circumstances, the State party argues that it is incorrect to infer from the author's indigence and the absence of legal aid in respect of the right to apply for constitutional redress that the remedy is necessarily nonexistent or unavailable. Accordingly, the State party requests the Committee to review its decision on admissibility ...

7.3 The Committee recalls that by submission of 10 October 1991 in a different case, the State party indicated that legal aid is not provided for constitutional motions. In the view of the Committee, this supports the finding made in its decision on admissibility, that a constitutional motion is not an available remedy which must be exhausted for purposes of the Optional Protocol. In this context, the Committee observes that it is not the author's indigence which absolves him from pursuing constitutional remedies, but the State party's unwillingness or inability to provide legal aid for this purpose.

7.4 The State party claims that it has no obligation under the Covenant to make legal aid available in respect of constitutional motions, as such motions do not involve the determination of a criminal charge, as required by article 14, paragraph 3(d), of the Covenant. But the issue before the Committee has not been raised in the context of article 14, paragraph 3(d), but only in the context of whether domestic remedies have been exhausted.

Although the individual filing a communication should have exhausted all available domestic remedies, Article 5, para. 2(b), of the Optional Protocol to the ICCPR adds that 'This shall not be the rule where the application of the remedies is unreasonably prolonged.'

Human Rights Committee, *Hendriks* v. *Netherlands*, Communication No. 201/1985 (27 July 1988), UN Doc. Supp. No. 40 (A/43/40) at 230 (1988):

[Article 23, para. 4 ICCPR provides that 'States Parties ... shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage ... and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.' Mr Hendriks claims that this article has been violated by the courts of the Netherlands which granted exclusive custody of his son, Wim Hendriks, Jr., born in 1971, to the mother without ensuring the father's right of access to the child. The author claims that his son's rights have been and are being violated by his subjection to one-sided custody; moreover, the author maintains that his rights as a father have been and are being violated and that he has been deprived of his responsibilities *vis-à-vis* his son without any reason other than the unilateral opposition of the mother. The marriage was dissolved in September 1974 by decision of the Amsterdam District Court, without settling the questions of guardianship and visiting rights. After six years of procedures, the arrangement according to which Wim Hendriks, Jr. would remain with his mother was confirmed. The Dutch courts considered that 'a number of years have passed since the parents were divorced, both have remarried, but there is still serious conflict between the parents', and that 'in such a case, it is likely that an access order will lead to tension in the family of the parent who has custody of the child and that the child can easily develop

a conflict of loyalties', so that it would not be in the best interests of the child to grant access rights to his father. Challenging the admissibility of the Communication for failure to exhaust local remedies, the Netherlands submitted that 'there is nothing to prevent the author from once again requesting the Netherlands courts to issue an access order, basing his request on "changed circumstances", since Wim Hendriks, Jr. is now over 12 years old, and, in accordance with the new article 902(b) of the Code of Civil Procedure which came into force on 5 July 1982, Wim Hendriks, Jr. would have to be heard by the Court in person before a judgement could be made'. The Committee rejected this argument:]

6.3 Article 5, paragraph 2(b), of the Optional Protocol precludes the Committee from considering a communication unless domestic remedies have been exhausted. In that connection, the Committee noted that, in its submission of 9 July 1986, the State party had informed the Committee that nothing would prevent Mr Hendriks from once again requesting the Netherlands courts to issue an access order. The Committee observed, however, that Mr Hendriks' claim, initiated before the Netherlands courts 12 years earlier, had been adjudicated by the Supreme Court in 1980. Taking into account the provision of article 5, paragraph 2(b), *in fine* of the Optional Protocol regarding unreasonably prolonged remedies, the author could not be expected to continue to request the same courts to issue an access order on the basis of 'changed circumstances', notwithstanding the procedural change in domestic law (enacted in 1982) which would now require Hendriks, Jr. to be heard. The Committee observed that, although in family law disputes, such as custody cases of that nature, changed circumstances might often justify new proceedings, it was satisfied that the requirement of exhaustion of domestic remedies had been met in the case before it.

9.4. Question for discussion: the exhaustion of domestic remedies under the International Covenant on Civil and Political Rights

Should the position of the Human Rights Committee in *Chief Bernard Ominayak and the Lubicon Lake Band* v. *Canada* be interpreted as meaning that, in order to be effective – and thus as having to be exercised for the purposes of the rule on the prior exhaustion of domestic remedies – a remedy should provide interim protection to the individual?

2.4 Non-duplication with other international procedures

There exists a notable difference of wording between the (First) Optional Protocol to the International Covenant on Civil and Political Rights and other international human rights instruments as regards the requirement that, in order for a communication to be admissible, it must not have been examined already under another international procedure. Article 5, para. 2(a), of the OP-ICCPR provides that 'The Committee shall not consider any communication from an individual unless it has ascertained that: (a) The same matter *is not being examined* under another procedure of international investigation or settlement.' In contrast, the other UN human rights treaties that refer to this condition

provide that the expert bodies they establish shall not consider individual communications unless they have ascertained that 'the same matter *has not been, and is not being examined* under another procedure of international investigation or settlement' (emphasis added: see, e.g. Art. 22, para. 5(1) CAT; Art. 4, para. 2(a) OP-CEDAW; Art. 2(b) OP-CPRD). Hence, in principle, this admissibility condition is formulated in the OP-ICCPR in terms that are significantly less restrictive than in these other treaties. However, most States parties to the European Convention on Human Rights, and a number of other States, have included one reservation on that point, upon ratifying the OP-ICCPR, stating in the reservation that the competence of the Human Rights Committee does not extend to communications which have already been considered under another procedure of international investigation or settlement, even if the proceedings under that procedure are definitively closed. It is therefore primarily on the basis of these reservations, which it considers acceptable as they do not run counter to the object and purpose of the Covenant or the procedure of individual communications, that the Human Rights Committee has interpreted the meaning of the expression 'same matter'.

In the case of *Sánchez López* v. *Spain* (Communication No. 777/1997 (CCPR/C/67/D/777/1997) (final views of 25 November 1999)), the Human Rights Committee had taken the view that 'The words "the same matter", within the meaning of article 5, paragraph 2(a), of the Optional Protocol, must be understood as referring to one and the same claim concerning the same individual, as submitted by that individual, or by some other person empowered to act on his behalf, to the other international body.' It confirmed this reading in the following case, even extending it further.

Human Rights Committee, *Leirvåg* v. *Norway*, Communication No. 1155/2003 (CCPR/C/82/D/1155/2003), final views of 23 November 2004:

[The authors complain of the introduction by the Norwegian Government, in August 1997, of a new mandatory religious subject in the Norwegian school system, entitled 'Christian Knowledge and Religious and Ethical Education', which only provides for exemption from certain limited segments of the teaching. The newly introduced subject is to be based on the schools' Christian object clause and it should provide 'thorough knowledge of the Bible and Christianity as a cultural heritage and Evangelical-Lutheran Faith'. The Leirvåg and the other authors of the Communication have a non-religious humanist life stance and do not wish to see their daughter participate in such classes. In the challenge brought against the new scheme before the national courts, the authors were joining with the Norwegian Humanist Association as well as with other parents, three of whom presented their claim to the European Court of Human Rights following a rejection of their action by the Norwegian courts. The following excerpts focus exclusively on the question of admissibility raised by the Norwegian Government.]

8.1 On 3 July 2003, the State party commented on the admissibility of the complaint. It challenges the admissibility on the basis that the same matter is already being examined under another procedure of international investigation or settlement, for non-exhaustion of domestic remedies and for non-substantiation of their claims.

8.2 The State party notes that before the Norwegian courts, the authors' claims of exemption from the school subject named 'Christian Knowledge and Religious and Ethical Education'

[CKREE subject] were adjudicated in a single case, along with identical claims from three other sets of parents. The different parties were all represented by the same lawyer (the identical to counsel in this case), and their identical claims were adjudicated as one. No attempts were made to individualize the cases of the different parties. The domestic courts passed a single judgment concerning all the parties, and none of the courts differentiated between the parties. Despite having pleaded their case jointly before the domestic courts, the parties opted to send complaints both to the European Court of Human Rights (ECHR) and to the Human Rights Committee. Four sets of parents lodged their communications with the Human Rights Committee, and three others with the ECHR on 20 February 2002. The communications to the Human Rights Committee and to the ECHR are to a large extent identical. Thus it appears that the authors stand together, but that they are seeking a review by both international bodies of what is essentially one case.

8.3 While the State party acknowledges the Committee's findings on communication 777/1997, it submits that the present case should be held inadmissible because the same matter is being examined by the ECHR. It contends that the present case differs from the case of Sanchez Lopez in that the authors in that case argued that 'although the complaint submitted to the European Commission of Human Rights relates to the same matter, [they differ] in that the complaint, the offence, the victim and, of course, the Spanish judicial decisions, including the relevant application for amparo, were not the same'. In the present case the same judgment by the Norwegian Supreme Court is being challenged before both bodies. The Norwegian Supreme Court judgment concerned an issue of principle, whether or not the CKREE subject violated international human rights standards.

8.4 If the communication is deemed admissible, the international bodies will need to take a general approach, i.e. they have to ask whether or not the subject as such, in the absence of the right to a full exemption, is in violation of the right to freedom of religion. As the primary objective of article 5, paragraph 2(a), of the Optional Protocol is to prevent a duplication of examination by international bodies of the same case, such duplication is exactly what the different parties to the case adjudicated by Norwegian courts are operating.

[The Committee responded as follows:]

13.3 The State party has contested the admissibility also on the ground that the 'same matter' is already being examined by the ECHR as three other sets of parents have lodged a similar complaint with the ECHR and that before the Norwegian courts, the authors' claims for full exemption from the CKREE subject were adjudicated in a single case, along with identical claims from these three other sets of parents. The Committee reiterates its jurisprudence that the words 'the same matter' within the meaning of article 5, paragraph 2(a), of the Optional Protocol, must be understood as referring to one and the same claim concerning the same individual, as submitted by that individual, or by some other person empowered to act on his behalf, to the other international body. That the authors' claims were joined with the claims of another set of individuals before the domestic courts does not obviate or change the interpretation of the Optional Protocol. The authors have demonstrated that they are individuals distinct from those of the three sets of parents that filed a complaint with the ECHR. The authors in the present communication chose not to submit their cases to the ECHR. The Committee, therefore, considers that it is not precluded under article 5, paragraph 2(a), of the Optional Protocol from considering the communication.

Human Rights Committee, *Karakurt* v. *Austria*, Communication No. 965/2000 (CCPR/C/74/D/965/2000 (2002)), final views of 4 April 2002:

[The author, a Turkish national, alleges to be a victim of a breach by the Republic of Austria of Article 26 ICCPR. Indeed, although he was elected to one of the two positions open in the work council (*Betriebsrat*) of the Association for the Support of Foreigners in Linz, where he is employed, section 53(1) of the Industrial Relations Act (*Arbeitsverfassungsgesetz*) limited the entitlement to stand for election to such work councils to Austrian nationals or members of the European Economic Area (EEA). Accordingly, the author, satisfying neither criteria, was excluded from standing for the work council. After having failed in his remedies before the Austrian courts, Mr Karakurt applied to the European Court of Human Rights. On 14 September 1999, the Third Chamber of the Court, by a majority, found application 32441/96 manifestly ill founded and accordingly inadmissible. The Court held that the work council, as an elected body exercising functions of staff participation, could not be considered an 'association' within the meaning of Article 11 ECHR, and that the statutory provisions in question did not interfere with any such rights under this article. Like a number of Member States of the Council of Europe who have also ratified the ICCPR, Austria had made a reservation upon entering the Covenant on 10 December 1987, under the terms of which: 'further to the provisions of article 5(2) of the Protocol, the Committee provided for in Article 28 of the Covenant shall not consider any communication from an individual unless it has been ascertained that the same matter has not been examined by the European Commission on Human Rights established by the European Convention for the Protection of Human Rights and Fundamental Freedoms.']

5.4. As to the State party's contention that its reservation to article 5 of the Optional Protocol excludes the Committee's competence to consider the communication, the Committee notes that the concept of the 'same matter' within the meaning of article 5(2)(a) of the Optional Protocol must be understood as referring to one and the same claim of the violation of a particular right concerning the same individual. In this case, the author is advancing free-standing claims of discrimination and equality before the law, which were not, and indeed could not have been, made before the European organs. Accordingly, the Committee does not consider itself precluded by the State party's reservation to the Optional Protocol from considering the communication.

[The Committee concludes in this case that Austria is in violation of Article 26 ICCPR, since nationals of the EEA Member States are not excluded from sitting in work councils and 'it is not reasonable to base a distinction between aliens concerning their capacity to stand for election for a work council solely on their different nationality'.]

The same reservation made by Austria upon entering the ICCPR was discussed in the case of *Kollar* v. *Austria* (Communication No. 989/2001 (CCPR/C/78/DR/989/2001), final views of 30 July 2003). In the views it adopted in that case, the Human Rights Committee made it clear that it would be reluctant to examine a case already considered by the European Court of Human Rights insofar as the provisions of the ICCPR and those of the ECHR invoked by the alleged victim converge, even though certain differences of interpretation may exist between the Human Rights Committee and the European Court of Human Rights respectively: as regards the right to a fair trial invoked by the author of the communication, for instance, the Committee notes that 'despite certain

differences in the interpretation of article 6, paragraph 1, of the European Convention and article 14, paragraph 1, of the Covenant by the competent organs, both the content and scope of these provisions largely converge. In the light of the great similarities between the two provisions, and on the basis of the State party's reservation, the Committee considers itself precluded from reviewing a finding of the European Court on the applicability of article 6, paragraph 1, of the European Convention by substituting its jurisprudence under article 14, paragraph 1, of the Covenant' (para. 8.6.). The Committee also confirmed that, although the non-discrimination requirement of Article 26 ICCPR possessed a free-standing quality Article 14 ECHR did not possess, it would not consider admissible communications based on Article 26 ICCPR for that sole reason, where Article 14 ECHR could be invoked before the European Court of Human Rights in combination with another right of the Convention.

9.5. Questions for discussion: the 'same matter' examined under another procedure of international investigation or settlement

1. Consider the position of the Human Rights Committee in *Leirvåg* v. *Norway*. Is this position defensible from a legal point of view? Is it opportune, from a pragmatic point of view? Will it result in human rights bodies being put in competition with one another, by victims gaming on differences in approaches adopted by the various bodies concerned? In *Leirvåg*, the Committee went on to find that Article 18(4) ICCPR had been violated. The European Court of Human Rights arrived at the same conclusion in the parallel application it was presented with, on the basis of Article 2 of Protocol No. 1 to the ECHR which guarantees the parents' right to ensure that their children's education will be in conformity with their own religious and philosophical convictions (Eur. Ct. H.R. (GC), *Folgerø and others* v. *Norway* (Appl. No. 15472/02), judgment of 26 June 2007). In its admissibility decision of 14 February 2006, the Court found that the complaints made respectively to the European Court of Human Rights and to the Human Rights Committee 'concerned substantially the same matters ... The essential parts of their complaints were the same, word by word.' It held nevertheless that the application was admissible, since 'notwithstanding the common features between the application lodged under the Convention in Strasbourg and the communication filed under the UN Covenant in Geneva', the two groups of families were different: therefore, the rule regarding inadmissibility of any application to the European Court of Human Rights that 'has already been submitted to another procedure of international investigation or settlement and contains no relevant new information' (Article 35 para. 2(b) of the Convention) did not apply. This position of the Court was criticized by two members of the Court, Messrs Zupančič and Borrego Borrego, in a separate opinion to the judgment of 26 June 2007. They stated:

   'Both the Human Rights Committee (without a prior decision of the ECHR) and the European Court of Human Rights (aware of the Human Rights Committee's decision) came to the conclusion that the key issue was not whether there had been a single set of domestic proceedings, or whether the single judgment had been examined by two different international bodies, or whether the facts submitted before the two organs were identical. No. What really mattered

was the fact that, as the applicants were a group of individuals, some of them had opted to petition the Human Rights Committee and some of them had submitted an application to the European Court of Human Rights. To put it briefly, different applicants of the same party had addressed different international bodies. International litispendence exists if the case concerns "the same matter", "the same judgment", "the same complaint", "the same party" and the like. In this case, according to the interpretation given by the majority, international litispendence ceases to exist when different individuals of the original group of applicants decide to separate in two groups to submit the same matter before different international organs.

Nevertheless, the risk of contradictory decisions, in which international litispendence has its origin, does exist. This is an example of what the Convention and the Optional Protocol tried to avoid. Unfortunately, their subsequent interpretation by the competent international organs has deprived them of their original sense.'

2. Is the position of the Human Rights Committee in *Kollar* v. *Austria* compatible with the refusal of the Committee to follow the interpretation of the European Court of Human Rights, even where the rights of the ECHR are drafted in essentially the same terms as the equivalent provision of the ICCPR? Consider for instance the case of *Carlos Correia de Matos* v. *Portugal* (Communication No. 1123/2002 (CCPR/C/86/D/1123/2002), final views of 18 April 2006). Here, the author complained before the Committee that he was not permitted to defend himself in person. This, he considered to be in contravention of Article 14, para. 3(d), of the Covenant, which provides that everyone accused of a criminal charge shall be entitled 'to defend himself in person or through legal assistance of his own choosing'. He had made a similar argument before the European Court of Human Rights on the basis of Article 6, para. 3(c) ECHR – which is worded in similar terms – and had failed. Yet, the Human Rights Committee agreed to examine the merits of the application, because Portugal had entered no reservation to Article 5, para. 2(a), of the Optional Protocol, and the Committee thus was not precluded from examining a case already examined under another international procedure provided the examination has been completed. The Committee went on to find a violation of Article 14, para. 3(d), of the Covenant, by interpreting this provision in a way that totally contradicts the view adopted on the equivalent provision of the ECHR, leading three members of the Committee to regret that 'two international instances, instead of trying to reconcile their jurisprudence with one another, come to different conclusions when applying exactly the same provisions to the same facts'. However, if Portugal had filed a reservation concerning the competence of the Committee to examine communications when 'the same matter has been, or is being examined under another procedure of international investigation or settlement', the Committee would have refused to examine the application of Mr Correia de Matos, consistent with its position in *Kollar* v. *Austria* (see C. Phuong, 'The Relationship Between the European Court of Human Rights and the Human Rights Committee: Has the "Same Matter" Already Been "Examined"?', *Human Rights Law Review*, 7 (2007), 385). Is this consistent? Or rather does that reveal an uncertain and ambivalent relationship between the Human Rights Committee and the European Court of Human Rights?
3. The positions adopted by the Human Rights Committee in *Leirvåg* v. *Norway* and *Carlos Correia de Matos* v. *Portugal*, taken together, show a willingness of the Committee both to entertain communications that are identical, or pose identical questions, to the European Court of Human

Rights, and yet not to align itself with the interpretation of the European Court of Human Rights. What are the consequences? Should forum-shopping by victims of human rights violations, including the successive submission of petitions in various forums, be discouraged? It has been suggested that the interest of 'forum shopping, and successive petition forum shopping in particular, lies in reducing the chances of … divergences and conflicts by providing jurists with a structured setting in which to communicate with each other about common legal questions. When the same factual allegations are submitted before two different tribunals consecutively, the second set of jurists cannot ignore the fact that another tribunal is wrestling with issues that they too must consider in their own treaty regimes. In exercising their discretion to decide whether to dismiss the petition or hear it on the merits, these jurists can benefit enormously from the first tribunal's reasoning and conclusions. The second tribunal can use them either to confirm similarities in the two treaties, or as a point of departure from which to justify a divergent approach based on the differing text, structures, or objectives of the two agreements. By adopting an openly deliberative approach and candidly weighing the persuasive value of decisions from outside their own treaty regime, jurists can fashion a forum shopping policy that not only does justice between the parties, but also builds a more fully informed and coherent human rights jurisprudence' (L. R. Helfer, 'Forum Shopping for Human Rights', *University of Pennsylvania Law Review*, 148 (1999), 285 at 398). Do you agree?

4. If improved co-ordination between the approaches of various human rights bodies, at both UN and regional levels, is desirable, how could this be achieved? Consider the proposals made in 1993 by Philip Alston (*Effective Implementation of International Instruments on Human Rights, Including Reporting Obligations under International Instruments on Human Rights*, UN GAOR World Conference on Human Rights Preparatory Committee, fourth session, Annex, Agenda Item 5, paras. 139–55, A/CONF.157/PC/62/Add. 11/Rev.1 (1993)). He suggested (a) preparing a 'programme of action designed solely to ensure that the United Nations treaty bodies and the relevant regional bodies are kept reasonably well informed of one another's activities'; (b) strengthening 'exchanges between the United Nations and regional intergovernmental organisations dealing with human rights', at the initiative of the UN Secretary-General; (c) convening regular meetings between the members of UN human rights treaty bodies and their counterparts in bodies established in regional organizations; (d) developing legal databases to facilitate mutual information and ensure that the jurisprudence developed by each body is accessible and known to the others. Are these proposals desirable, and can they achieve the desired outcome? What obstacles or disadvantages do they present?

3 THE IMPLEMENTATION OF FINDINGS OF UN HUMAN RIGHTS TREATY BODIES

The UN human rights treaty bodies adopt concluding observations, views (on the basis of individual communications), and general comments (or general recommendations). Even where civil society organizations and the public authorities, including the judiciary, have a good knowledge of the standards contained in the treaties to which

the State concerned is a party, the findings of the treaty bodies themselves are often ignored. These findings, however, do serve to clarify the normative content of the requirements stipulated in the treaties; and a better understanding of these requirements would greatly facilitate an improved compliance, in the future, with those international obligations of the State. States may thus be expected to translate the findings concerning them into their national language; to disseminate these findings widely; to organize a public debate on the implementation measures which they call for; and, on that basis, to adopt the measures required to ensure compliance.

3.1 The follow-up of Concluding Observations

Human Rights Committee, Concluding Observations: Canada (CCPR/C/CAN/CO/5, 20 April 2006), para. 6:

6. The Committee notes with concern that many of the recommendations it addressed to the State party in 1999 remain unimplemented. It also regrets that the Committee's previous concluding observations have not been distributed to members of Parliament and that no parliamentary committee has held hearings on issues arising from the Committee's observations, as anticipated by the delegation in 1999 (art. 2).

The State party should establish procedures, by which oversight of the implementation of the Covenant is ensured, with a view, in particular, to reporting publicly on any deficiencies. Such procedures should operate in a transparent and accountable manner, and guarantee the full participation of all levels of government and of civil society, including indigenous peoples.

The view thus expressed by the Human Rights Committee has been adopted on a number of occasions, not only by that Committee, but also by other UN human rights treaty bodies (see, e.g. Concluding Observations of the Human Rights Committee on: Australia (A/55/40, paras. 498–528, para. 528); Canada (CCPR/C/79/Add. 105 (1999)), para. 21; Czech Republic (CCPR/CO/72/CZE (2001)), para. 26; Finland (CCPR/C/79/Add. 91 (1998)), para. 22; Sweden, (CCPR/CO/74/SWE (2002)), para. 16; Concluding Observations of the Committee against Torture on: Czech Republic (A/56/44, paras. 106–14, para. 114(h)); Spain (CAT/C/CR/29/3 (2002)), para. 18; Sweden (CAT/C/CR/28/6 (2002)), para. 9; Concluding Observations of the Committee on the Elimination of All Forms of Racial Discrimination on: Australia (A/49/18, paras. 535–51, para. 550 and CERD/C/304/Add. 10 (2000), para. 19); Canada (A/57/18, paras. 315–43, para. 342); Czech Republic (CERD/C/304/Add. 47 (1998), para. 25, and CERD/C/304/Add.109 (2001), para. 17); Sweden (CERD/C/304/Add. 37 (1997), para. 21, and CERD/C/304/Add. 103 (2001), para. 19); Concluding Observations of the Committee on Economic, Social and Cultural Rights on: Australia (E/C.12/1993/9 (1993), para. 15, and E/C.12/1/Add. 50 (2000), para. 37); Canada (E/C.12/1/Add. 31 (1998), para. 60); Spain (E/C.12/1/Add. 2 (1996), para. 19); Concluding Observations of the Committee on the Rights of the Child on Canada (CRC/C/15/Add. 37 (1995)), para. 27). The reasons for this are

obvious: adequate implementation of the Concluding Observations adopted by the UN human rights treaty bodies will only occur if not only the parliamentarians, but also civil society organizations and the media have full knowledge of the content of these observations, and thus are able to put pressure on the public authorities, including both the Government and Parliament, to take them into account. And indeed, the Optional Protocol to the CEDAW includes a provision under which 'Each State Party undertakes to make widely known and to give publicity to the Convention and the present Protocol and to facilitate access to information about the views and recommendations of the Committee, in particular, on matters involving the State Party'; Article 36(4) of the Convention on the Rights of Persons with Disabilities provides that 'States Parties shall make their reports widely available to the public in their own countries and facilitate access to the suggestions and general recommendations relating to these reports.' In addition, as we have seen in section 1, the treaty bodies suggest that States set up an inter-departmentmental taskforce to prepare the State report, and that this structure, if established on a permanent basis, 'should provide an effective mechanism to coordinate follow-up to the concluding observations of the treaty bodies' (Harmonized Guidelines on Reporting under the International Human Rights Treaties, including Guidelines on a Common Core Document and treaty-specific targeted documents (HRI/MC/2005/3, 1 June 2005), para. 13).

In order to improve the follow-up to their Concluding Observations adopted on the basis of States' reports, the human rights treaty bodies have developed 'follow-up activities', which seek to create incentives for States to co-operate in the implementation of the recommendations. Thus, Rule 71, para. 5 of the Rules of Procedure of the Human Rights Committee provide that: 'The Committee may request the State party to give priority to such aspects of its concluding observations as it may specify.' Rule 72 in turn states that where the Committee has thus specified that priority should be given to certain aspects of its Concluding Observations on a State party's report, 'it shall establish a procedure for considering replies by the State party on those aspects and deciding what consequent action, including the date set for the next periodic report, may be appropriate'.

Human Rights Committee, Annual Report to the UN General Assembly, A/63/40 (2008):

Follow-up to Concluding Observations

196. For all reports of States parties examined by the Committee under article 40 of the Covenant [in 2007], the Committee has identified, according to its developing practice, a limited number of priority concerns, with respect to which it seeks the State party's response, within a period of a year, on the measures taken to give effect to its recommendations. The Committee welcomes the extent and depth of cooperation under this procedure by States parties ... Over the reporting period, since 1 August 2007, 11 States parties (Bosnia and Herzegovina, Brazil, Hong Kong Special Administrative Region (China), Mali, Paraguay, Republic of Korea, Sri Lanka, Suriname, Togo, United States of America and Ukraine), as well as the United Nations Interim

Administration Mission in Kosovo (UNMIK), have submitted information to the Committee under the follow-up procedure. Since the follow-up procedure was instituted in March 2001, 10 States parties (Barbados, Central African Republic, Chile, Democratic Republic of the Congo, Equatorial Guinea, Gambia, Honduras, Madagascar, Namibia and Yemen) have failed to supply follow-up information that has fallen due. The Committee reiterates that it views this procedure as a constructive mechanism by which the dialogue initiated with the examination of a report can be continued, and which serves to simplify the process of the next periodic report on the part of the State party ...

198. The Committee emphasizes that certain States parties have failed to cooperate with it in the performance of its functions under Part IV of the Covenant, thereby violating their obligations (Gambia, Equatorial Guinea).

In order to increase the quality of follow-up on its conclusions and recommendations addressed to the States parties to the Convention against Torture, the Committee against Torture established the post of Rapporteur for follow-up to conclusions and recommendations adopted under Article 19 of the Convention against Torture. The following excerpts of the 2008 Annual Report of the Committee against Torture describe this development:

Committee against Torture, Annual Report to the UN General Assembly, A/63/44 (2008):

49. The Rapporteur has emphasized that the follow-up procedure aims 'to make more effective the struggle against torture and other cruel, inhuman and degrading treatment or punishment', as articulated in the preamble to the Convention. At the conclusion of the Committee's review of each State party report, the Committee identifies concerns and recommends specific actions designed to enhance each State party's ability to implement the measures necessary and appropriate to prevent acts of torture and cruel treatment, and thereby assists States parties in bringing their law and practice into full compliance with the obligations set forth in the Convention.

50. In its follow-up procedure, the Committee has identified a number of these recommendations as requiring additional information specifically for this procedure. Such follow-up recommendations are identified because they are serious, protective, and are considered able to be accomplished within one year. The States parties are asked to provide within one year information on the measures taken to give effect to its follow-up recommendations which are specifically noted in a paragraph near the end of the conclusions and recommendations on the review of the States parties' reports under article 19.

51. Since the procedure was established at the thirtieth session in May 2003, through the end of the fortieth session in May 2008, the Committee has reviewed 67 States for which it has identified follow-up recommendations. Of the 53 States parties that were due to have submitted their follow-up reports to the Committee by 16 May 2008, 33 had completed this requirement (Albania, Argentina, Austria, Azerbaijan, Bahrain, Bosnia and Herzegovina, Canada, Chile, Czech Republic, Colombia, Croatia, Ecuador, Finland, France, Georgia, Germany, Greece, Guatemala, Hungary, Republic of Korea, Latvia, Lithuania, Monaco, Morocco, Nepal, New Zealand, Qatar,