# THE PROCEDURE AND PRACTICE OF THE HUMAN RIGHTS COMMITTEE UNDER THE FIRST OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

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## I. INTRODUCTION

New Zealand became party to the United Nations International Covenant on Civil and Political Rights[1] on 28 December 1978.[2] Under the Covenant New Zealand undertook not only to respect and ensure the rights guaranteed therein, but also submitted itself to the machinery established to supervise and ensure the States Parties' compliance with their obligations.

The Covenant and its First Optional Protocol contains three supervisory mechanisms for ensuring that a State Party's behaviour is in conformity with its international obligations. Only one of the mechanisms is mandatory, the others are optional. The first, mandatory, means of supervision is a periodic reporting procedure in Article 40(1) under which states undertake 'to submit reports on the measures they have adopted which give effect to the rights recognised [in the Covenant] and on the progress made in the enjoyment of those rights.'[3] Such reports are made to the Human Rights Committee,[4] a body of independent experts, elected from among the State Parties to the Covenant which usually sits Geneva.[5] Since becoming party to the Covenant New Zealand has made two periodic reports to the Committee, the first in 1982 and the second in 1989.

The second, optional, method of supervision to which New Zealand committed itself in 1978 is contained in Article 41 of the Covenant. This is an inter-state complaint procedure under which states may recognise the competence of the Committee to receive communications to the effect that another State Party is not fulfilling its obligations under the Covenant. This optional procedure, although designed to function as a means of conciliation

1 Hereafter 'Covenant'.

2 *NZTS 1978, No 19.* (1967) 6 *ILM* 368. For some of the potential domestic effects of the Covenant see J B Elkind, 'Application of the International Covenant on Civil and Political Rights in New Zealand', (1981) 75 *AJIL* 169.

3 For appraisals of the state reporting procedure under Article 40(1) see D McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights*, (Oxford: OUP, 1991), pp 62-98; E Schwelb, 'Civil and Political Rights: International Measures of Implementation', (1968) 62 *AJIL* 827; M Nowak, 'The Effectiveness of the International Covenant on Civil and Political Rights: Stocktaking After the First Eleven Sessions of the UN Human Rights Committee' (hereafter *'Effectiveness'*), (1980) 1 *Human Rights Law Journal (HRLJ)* 136, pp 146-51; D D Fisher, 'Reporting under the Covenant on Civil and Political Rights: The First Five Years of the Human Rights Committee', (1982) 76 *AJIL* 142; F Jhabvala, 'The Practice of the Covenant's Human Rights Committee, 1976-82: Review of State Party Reports', (1984) *Human Rights Quarterly (HRQ)* 95; L B Sohn, 'Human Rights: Their Implementation and Supervision by the United Nations', in T Meron, *Human Rights in International Law*, (1984), pp 369-401; D L Shelton, 'Supervising Implementation of the Covenants: The First Ten Years of the Human Rights Committee', (1986) 80 *ASIL Proc* 413.

4 Hereafter 'Committee'.

5 Article 37(3) Covenant : 'The Committee shall normally meet at the headquarters of the United Nations or the United Nations Office in Geneva.' On the composition of the Committee see *infra.*

as well as supervision, has never been utilised by the States Parties which have made declarations under it.[6] Like other inter-state complaint procedures under the European and American regional human rights conventions, the reason for the non-use of the Article 41 mechanism probably lies in the political sensitivity associated with direct complaints of a human rights character.[7]

The third method of supervision and, in this case, enforcement of the rights guaranteed in the Covenant is established in its First Optional Protocol,[8] which allows individuals in those states which have become party to the Protocol to address communications to the Committee denouncing violations of the Covenant.[9] The Protocol did not enter into force until 1979,[10] and New Zealand did not become party to it until 26 May 1989.[11] While no communications concerning New Zealand have yet been dealt with under the recently ratified Protocol, it would be idle to assume that the state of civil rights in New Zealand, even after the passing of the Bill of Rights Act 1990,[12] is free from criticism or that it is unlikely that communications involving New Zealand will arise.[13] With this in contemplation it is intended here to examine the procedure and practice of the Committee in dealing with individual complaints under the Protocol which it has developed since 1979. After a decade of functioning, the Committee has established clearly defined procedures and practices and has begun to accumulate an impressive jurisprudence under the Covenant and its First Optional Protocol. The primary focus here will be upon those developments, in particular the criteria for admissibility of any communication by an individual alleging a violation of the Covenant and the mechanisms employed by the Committee for assessing the evidence presented to it.

## 1. *Preliminary issues*

### i. The Covenant

The Covenant contains twenty seven articles defining the substantive rights which a State Party undertakes 'to respect and to ensure to all individuals within its territory and subject to its jurisdiction.'[14] These rights, some of

6 See Schwelb, *op cit*, pp 850-860 and Nowak, *Effectiveness*, pp 151-2.

7 All the regional human rights conventions provide mechanisms which allow inter-state complaints. Both The European Convention on Human Rights (Article 24) and The Organisation of African Unity's Charter of Human and Peoples' Rights (Article 47) allow such complaints without condition. Under the American Convention on Human Rights (Article 45) the procedure is optional and requires reciprocity between the states involved in the complaint. Under the European Convention there have been only six inter-state complaints: *Ireland v United Kingdom* 21 YBECHR 602; *Greece v United Kingdom* 2 YBECHR 186; *Austria v Italy* 6 YBECHR 796 *Cyprus v Turkey* 20 YBECHR 98 and *Denmark, Norway, Sweden and The Netherlands v Greece* 12 YBECHR (Special Volume); *Denmark, France, The Netherlands, Norway and Sweden v Turkey* 85 YBECHR 21. It is arguable that all but the latter two of these cases were motivated by a large degree of political hostility or ill-will on the part of the complaining states. See R Beddard, *Human Rights and Europe*, (1980), pp 6-8.

8 Hereafter 'Protocol'. 999 *UNTS* 383; (1967) 6 *ILM* 383.

9 The right of individual communication is contained in the Optional Protocol because of the objections of some states, notably the USSR, to the idea of individuals being granted *locus standi* in international proceedings. See Schwelb, *op cit* p 861. This position is founded upon the theory that individuals are *objects* and not *subjects* of international law. See *infra*.

10 In accordance with Article 49 under which 35 ratifications or accessions were required before the Protocol could enter into force.

11 *Hansard, New Zealand Parliamentary Debates*, Supp No 7, 1989. Reply to an oral question by the Hon Russell Marshall.

12 1990, No 19.

13 See J B Elkind, 'The Optional Protocol: A Bill of Rights for New Zealand', [1990] *NZLJ* 96.

which have been directly incorporated in the New Zealand Bill of Rights Act 1990, cover a broad range of civil and political rights. They include the right to life; freedom from torture; freedom from slavery and servitude; the right to liberty and security of the person; the right to due process; the right to freedom of movement; freedom from ex post facto penal laws; the right to privacy; freedom of thought conscience and religion; the right to peaceful assembly and freedom of association; protection of the child and the family; the right to participate in public affairs and freedom from discrimination. While the rights enumerated above may be classified as individual rights, it should also be noted that the Covenant seeks to ensure the fundamental collective right of self-determination of peoples.[15] This collective right has given rise to a number of communications under the Protocol but its potential potency has been minimised by the Committee as will be demonstrated subsequently. Derogation from a number of the rights protected is permitted in times of 'public emergency which threatens the life of the nation',[16] but such derogations must be communicated to the Secretary-General of the United Nations and be supported by the reasons for which they were taken.[17] Certain rights are, however, non-derogable under any circumstances. These are the right to life;[18] freedom from torture, inhuman or degrading treatment;[19] freedom from slavery and servitude;[20] non-imprisonment for failure to fulfil a contractual obligation;[21] freedom from retroactive penal laws;[22] the right to recognition as a person before the law[23] and freedom of thought conscience and religion.[24]

### ii. The Committee

As indicated above, the body charged with ensuring that the States Parties comply with their obligations under the Covenant is the Human Rights Committee. This is composed of eighteen members who must be nationals of the parties to the Covenant and 'persons of high moral character and recognised competence in the field of human rights.'[25] Although members need not necessarily be lawyers, Article 28 stipulates that 'consideration should be given to the usefulness of the participation of some persons having legal experience.'[26] In fact, the Committee has, since its inception, been staffed entirely by lawyers, usually of some distinction. Members of the Committee are elected for a four year period by secret ballot from nominations by the State Parties to the Covenant.[27] No two persons elected may be from

14 Article 2(1) Covenant.
15 Article 1. It should be noted that this article is contained in Part I of the covenant whereas all other rights are contained in Part II. This has led to some doubt whether it was envisaged that the right of self-determination is a protectable right for the purposes of the Protocol. See *infra*.
16 Article 4 Covenant.
17 On this point see *Landinelli Silva v Uruguay*, Communication No R 8/34 in which the Committee ruled (at para 8.3) that a state was 'duty bound' to give a detailed account of the relevant facts concerning derogations.
18 Article 6 Covenant.
19 Article 7 Covenant.
20 Article 8 Covenant.
21 Article 11 Covenant.
22 Article 15 Covenant.
23 Article 16 Covenant.
24 Article 18 Covenant.
25 Article 28 Covenant.
26 Initially, members of the Committee were to be required to have had judicial experience, but this was deleted by the Third Committee of the UN General Assembly following a proposal from a number of Afro-Asian states. See Schwelb, *op cit*, 826.
27 Articles 29(1) and 32(1) Covenant.

the same state[28] and each serves in their personal capacity and not as state nominees.[29] The personal nature of the duties undertaken by Committee members is reinforced by the requirement that each must, on appointment, make a solemn declaration that they will perform their functions impartially and conscientiously.[30] In order to ensure the widest possible representation of legal cultures, Article 31(2) provides that in the election of the Committee, consideration must be given to equitable geographical distribution and to the representation of different forms of civilisation and of legal systems. Given the diverse origins of the members, it might be presumed that political and ideological disputes would have manifested themselves in the Committee. As Nowak indicates, however, the Committee works on the basis of consensus, and although disputes over legal doctrine and methodology have arisen, there has been surprisingly little political confrontation.[31]

## 2. *Individual communications under the Optional Protocol*

In traditional international law the individual was regarded not as a subject of the law, but simply as an object. In other words, individuals derived neither rights nor duties directly from international law; they were merely recipients of benefits granted or duties imposed by states.[32] Coupled to the lack of substantive rights accorded to individuals, was the absence of any procedural mechanisms with which to enforce any benefits which might be granted by states at international law.[33] States might, at their discretion, espouse the claims of maltreated individuals, but this depended on the nationality of claims rule and the willingness of the state to act.[34] While the controversy of whether individuals are subjects or objects of international law still exists, there is no doubt that the position of the individual has improved since the end of World War II. There are now a number of human rights instruments which not only confer rights on individuals, but also provide the institutions and procedural mechanisms which allow individuals to enforce such substantive rights.[35] It should be noted, however, that in nearly all cases, the right of individual application to international human rights institutions depends on states declaring their acceptance of such a right. The Protocol falls into this category since state adherence to it is not obligatory. Thus, whatever the doctrinal arguments over the status of individuals in international law, the fact remains that, from the procedural point of view at least, states determine whether or not the individual enjoys access to the Committee.

28 Article 31(1) Covenant.

29 Article 28(3) Covenant.

30 Article 38 Covenant. Schwelb, *op cit,* at p 836 makes the point that although members serve in their personnel independent capacity, this does not mean that they are independent of their governments. This fine distinction seems difficult to justify in the light of the requirement that members must act with impartiality.

31 Nowak, *Effectiveness,* pp 163-4.

32 For a detailed consideration of the theoretical difficulties associated with this see Norgaard, *The Position of the Individual in International Law,* (1962).

33 Although if states specifically provided procedural rights for a defined class of persons within a treaty this would be binding on the states involved. See *Jurisdiction of the Courts of Danzig Case* (1928), Series A No 17 in which certain Polish Railway Officials were given procedural rights to enforce provisions made for their benefit in a treaty.

34 The nationality of claims rule states that there must be a genuine link between an individual and a state wishing to espouse his claim. A grant of citizenship by the claimant state will not suffice. See *Nottebohm Case (Merits) (Liechtenstein v Guatemala)* ICJ Rep 1955, p 4.

35 The 'duties' side of the equation should not be forgotten. Individuals are now personally responsible under international law for the commission of war crimes, genocide, torture and piracy.

### 3. *Admissibility and procedure*

The conditions for admissibility of a communication and the procedures to be followed in dealing with it are established in hierarchical order by the Protocol, the Committee's Rules of Procedure and the accumulated jurisprudence of the Committee. Under Article 1 a State Party to the Protocol 'recognises the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant.' Such communications are addressed to the Secretary-General of the UN, but are, in practice, dealt with by the UN's Human Rights Division. All decisions on admissibility are, however, taken by the Committee. In order to declare a communication admissible, thus allowing the Committee to proceed to the second stage of its procedure and consider the merits of a case, a number of criteria must be met:[36]

a. It must be shown that the written communication is from an *individual* who claims to be a *victim*.[37]
b. The communication must not be under consideration under any other procedure of international investigation or settlement.[38]
c. The victim must show that he has *exhausted all local remedies*.[39]
d. The communication must not be *anonymous, abusive of the right of submission* or *incompatible with the provisions of the Covenant.*[40]
e. The communication must not be *manifestly ill-founded*.[41]

It should be noted that there are no definitions of the criteria stipulated for admissibility contained in the Protocol, and it has therefore been left to the Committee to develop its own jurisprudence in this area. It should also be noted that there is no time-limit on making a communication as in other human rights instruments,[42] but this does not appear to have caused problems for the Committee to date. If a case of undue tardiness were to present itself to the Committee in the future, it is arguable that it could apply the general principle of *abus du droit* and declare the communication inadmissible.[43]

A further omission from the Protocol concerning the criteria for admissibility concerns the scope of the Covenant *ratione temporis*. This, again, has not proved problematic. The Committee has decided that it cannot take account of violations which took place before the entry into force of the Covenant for the state in question, unless those violations have a continuing

36 See generally P R Ghandi, 'The Human Rights Committee and the Right of Individual Communication', (1986) LVII *BYIL* 201

37 Articles 1 and 2(1) Protocol.

38 Article 5(1)(a) Protocol. This effectively means those instruments which provide the right of individual application. To date these are the European Convention on Human Rights, the Organisation of American States Charter, the American Convention on Human Rights, the African Charter of Human and Peoples Rights and the UN Convention on the Elimination of Racial Discrimination.

39 Articles 2 and 5(2)(b) Protocol.

40 Article 3 Protocol.

41 This does not appear in the Protocol, but has been developed in the jurisprudence of the Committee. See *infra.*

42 *Cf* Article 26 European Convention on Human Rights and Article 46(1) (b) American Convention on Human Rights. Article 56(6) of the OAU Charter states that communications must be submitted 'within a reasonable period from the time local remedies are exhausted or from the date the [African] Commission is seized [sic] of the matter.'

43 As will be seen subsequently, the Committee has demonstrated that, like other tribunals, it is prepared to resort to the application of general principles in order to avoid a *non liquet*.

character or have produced continuing effects.[44] This is clearly consistent with Articles 4 and 28 of the Vienna Convention on the Law of Treaties, which provide for non-retroactivity of treaties. It is also consistent with the practice of other human rights institutions.[45]

## II. Procedure of the Committee

Except in the case of rejection under the criteria established by Articles 3 and 5(2) of the Protocol, all communications must be brought to the attention of the affected State Party.[46] The Committee's Rules of Procedure further provide that no communication may be ruled admissible until the State Party concerned has been given opportunity to comment upon it.[47] Once declared admissible, however, the State Party must within 6 months furnish the Committee with written explanations or statements clarifying the matter and any remedial action which it has taken.[48]

The major feature of the Committee's procedure both at the admissibility and merits stages is that it is written and confidential.[49] Tomuschat, a former Committee member has commented that this procedure 'has not stood the test of viability' since it severely curtails the processes for proving evidence.[50] The Covenant, however, does not permit oral argument by the parties, nor is there authority providing an opportunity for the Committee to clarify issues or resolve contradictions through the process of oral investigation, although it remains possible that such a system might be introduced in the future through an amendment to the Protocol.[51] In cases of doubt, it is probably open to the Committee to obtain further written clarifications, but it would clearly be loath to resort to this since it would retard proceedings, and may give an opportunity to a state to employ delaying tactics. Since the procedure is so heavily dependent on written procedure it behoves states to supply the fullest and most detailed information possible.[52] However, the Committee has, on a number of occasions, had to deal with states which have either failed to respond to requests for written information or simply provided information of the barest kind. The Committee's response to such failures will be addressed below in the section concerning evidence and the burden of proof.

Once the Committee has examined the written evidence before it, it makes its views known to the State Party and the individual concerned.[53] Although Article 6 envisages that the Committee should simply include a summary of its activities under the Protocol in its annual report to ECOSOC[54] and the General Assembly of the UN, it has, in fact, published complete versions of its procedures and views in every communication. An important point to note

44 See, for example *Torres Ramirez v Uruguay*, Communication No R 1/4; *Massera v Uruguay*, Communication No R 1/5; *Lovelace v Canada*, Communication No 6/24; *M A v Italy*, Communication No R 26/117; *Luyeye Magana ex-Philibert v Zaire*, Communication No R 22/90.

45 See *De Becker v Belgium* 2 YBECHR 214.

46 Article 4 Protocol.

47 Rule 91(2).

48 Article 4(2) Protocol.

49 Article 5(3) Protocol provides 'The Committee shall hold closed meetings when examining communications under the present protocol.'

50 Christian Tomaschat, 'Evolving Procedural Rules: The UN-Human Rights Committee's First Two Years of Dealing with Individual Communications', (1980) 1 *HRLJ* 249, p.255.

51 On the likely problems which such an amendment would create see *infra*.

52 Indeed, the Committee has indicated that this obligation is implied in Article 4(10 Protocol. See *infra*.

53 Article 5(4) Protocol. The legal status of these final views will be considered in detail *infra*..

54 The Economic and Social Council of the United Nations.

about the process and format of the final views is that they resemble well-constructed legal decisions. This is confirmed by Tomuschat who states:

> None of the decisions [sic] hitherto handed down reads like a diplomatic communique. Obviously they have all been drafted on the pattern of a judicial decision.[55]

## 1. *Communications from 'individuals' who are 'victims'.*

The requirement in Articles 1 and 2 of the Protocol that communications alleging violations of the rights contained in the Covenant be from individuals who claim to be victims raises a number of issues of interpretation:

### i. Must the author of the communication be the victim of the alleged violation in all cases?[56]

Clearly Articles 1 and 2 cannot be taken too literally since to do so would lead to a denial of the right of communication under the Protocol in certain circumstances. A victim arbitrarily arrested and held incommunicado or, in an extreme case, a victim who is arbitrarily deprived of his or her life, would not, on a strict interpretation of the relevant provisions of the Protocol, be able to avail him or herself of the right of communication. To permit the right of third party communication on their behalf would not only accord with the overall object and purpose of the Protocol, it would also ensure that states were not able to evade their obligations under the Covenant by 'disappearing' victims.[57]

These cogent policy arguments are, however, underpinned by sound legal principles. As Tomuschat argues,[58] Article 31(1) of the Vienna Convention on the Law of Treaties requires treaties to be interpreted in good faith, and denial of third party representation of a victim would amount to a breach of good faith by a delinquent state party. He further argues that such a denial would amount to an abuse of rights by a state under the Covenant.[59] This position is also supported by the Committee's Rules of Procedure which state that a communication should 'normally be submitted by the individual himself or by his representative'[60] and that it may be submitted on behalf of an alleged victim 'when it appears that he is unable to submit [it] himself'.[61] Indeed, the Committee has accepted third party communications on behalf of alleged victims in a number of cases. In *Massera v Uruguay*,[62] for example, the

55 Tomuschat, *op cit,* p 255. Since the Committee's views are not legally binding *stricto sensu,* it is perhaps wrong to call them decision. See *infra.*

56 This is not a problem which is unique to the covenant. The European Convention On Human Rights also requires by Article 25 that the petitioner be a 'victim'. The Commission and the Court have attempted to minimise problems here by developing the concept of the indirect victim ie those relatives whose rights are also affected by the treatment of the victim. The drafters of the ACHR, learning from the errors of the European Convention On Human Rights and Covenant drafted Article 44 in much broader terms:

> Any person or group of persons, or any nongovernmental entity legally recognised in one or more member states of the Organisation [of American State], may lodge petitions with the Commission containing denunciations or co plaints of violation of this Convention by a State Party.

57 A common practice in certain Latin American states in the 1970s. The *desaparecidos* were commonly persons suspected of left-wing political activity or sympathies. They were usually detained arbitrarily by state agents at night and incarcerated in prisons or military barracks where they were subjected, in most cases, to torture and extra-judicial execution. See, for example, American Commission on Human Rights, *Report on the Situation of Human Rights in Argentina,* OEA/Ser.L/V/II.49, doc 19 corr 1, 11 April 1980, especially chapter III.

58 *Op cit,* p 250.

59 Ibid.

60 Rule 90(2)(b).

61 Rule 90(1)(b).

62 Communication No R 1/5.

Committee accepted a communication from a woman alleging the arbitrary detention and torture of her husband, mother and stepfather in Uruguay saying:

> The author of the communication was justified by reason of close family connexion in acting on behalf of the ... alleged victims.[63]

This formulation, which has been reiterated in subsequent cases, does not mean that the third party representative of an alleged victim need necessarily be a member of his family, but it is clear that the author will need to prove an interest in the proceedings.[64] It will be easy to show an interest where the representative has the explicit consent of the alleged victim, as in the case of a lawyer representing him,[65] but rather more difficult where consent is to be implied. A friend would probably have *locus standi*, but would a member or representative of an organisation of which the alleged victim was also a member enjoy legal standing? It appears that he would not. In *A Group of Associations for the Defence of the Rights of Disabled and Handicapped Person in Italy v Italy*,[66] the Group (*Coordinamento*) sought to challenge an Italian law providing for compulsory employment of disabled and handicapped persons. The Committee held the communication inadmissible on the grounds that under Article 1 of the Protocol only individuals may submit a communication. The *Coordinamento* not being an individual therefore lacked personal legal standing.[67]

It is certainly clear that no *actio popularis* is permitted under the Protocol.[68] In the *Mauritian Women Case*[69] a number of women complained about the discriminatory effect of a 1977 immigration law which affected the residence rights of the foreign husbands of Mauritian women, but not the foreign wives of Mauritian men. Many of the women complainants refused to be named in the communication, and it was brought on their behalf by some women who were willing to identify themselves. The Committee declared:

> A person can only claim to be a victim if he or she is actually affected. It is a matter of degree how concretely this requirement should be taken. However, no individual can in the abstract, by way of an actio popularis, challenge a law or practice that has not already been concretely applied to the detriment of that individual, it must in any event be applicable in such a way that the victim's risk of being affected is more than a theoretical possibility.[70]

63 Ibid, para 5(a).

64 Tomuschat, *op cit*, p 255 suggests that a third party is really acting on the presumed consent of the victim, and that as soon as the victim is able to act for himself he should espouse the communication or reject it. Indeed, in *Sendic v Uruguay*, Communication No R 14/63 the Committee ruled that a State Party was under an obligation to allow an individual who was being held incommunicado to deal with the Committee directly.

65 As has occurred in a number of cases. A priest has also been regarded as competent to author a communication on behalf of an alleged victim: *J M v Jamaica*, Communication No 165/1984.

66 Communication No 163/1984.

67 See also *Taylor v Canada*, Communication No R 24/104, para 8 in which a political party was declared incompetent to submit a communication.

68 Compare the positions under the European Convention on Human Rights which does not permit an *actio popularis*, and the American Convention on Human Rights which does. For the position under the European Convention see the judgments of the European Court of Human Rights in *Klass v Federal Republic of Germany (Telephone Tapping* Eur Court HR, Series A, No 28 and *Marckx v Belgium (Consequences of Illegitimacy)* Eur Court HR Series A, No 31. On the position under the American Convention see T Buergenthal, 'The Inter-American Court of Human Rights', (1982) 76 *AJIL* 231 at 236 and R Norris, 'Bringing Human Rights Petitions Before the Inter-American Commission', (1980) 20 *Santa Clara Law Review* 733.

69 R 9/35.

70 Ibid para 9.2.

The Committee decided in this case that there were a number of women who were not affected by the law, whereas others were affected even though the law had not been applied to their husbands. The Committee's reasoning here was that the mere existence of the law created uncertainty as regards the residence status for the foreign husbands of these women.

Another clear case of an absence of interest is *D F v Sweden*.[71] Here, a Swedish citizen complained that Arabs and Muslims resident in Sweden were constantly the victims of discrimination and abuse. The Committee declared the Communication inadmissible on the grounds that it did not disclose that the author was personally a victim or that he had 'any authority to speak on behalf of other persons, whose rights he purports to protect.'[72]

**ii. Need the victim be an individual?**

The majority of rights contained in the Covenant are of an individual nature, but there are four articles which explicitly assure collective rights. These are Article 1 which guarantees the right to self-determination, Article 18 which secures the right to exercise religious beliefs in community with others, Article 22 which assures the right of freedom of association and Article 27 which guarantees the rights of ethnic, religious or linguistic minorities within a state to enjoy their culture, religion and language together with other members of the group. Article 1, however, differs from the other 'collective rights', in particular, Articles 22 and 27. While these provisions recognise the prior existence of a group, they nonetheless focus, in terms of the rights assured, upon the right of the individual to join in the activities of the group or in the group's manifestation of its collective identity. Thus, it is where an individual is denied his or her enjoyment of an individual right in community with others, that a breach of the Covenant will occur. Article 1 on the other hand expressly assures a collective right, the right of 'all peoples ... [to] ... freely determine their political status and freely pursue their economic, social and cultural development.' In a substantive sense this would seem to confer a right upon a cognate group of people to create their own political entity, normally a state. It is not, however, the interpretation of the substantive right which concerns us here, but whether the Protocol confers procedural competence upon the group for the purposes of enforcing the right before the Committee.

There have been a number of cases in which a group has attempted to bring a claim of denial of the right of self-determination before the Committee. In all cases the Committee has denied that the group possesses any competence to enforce the right under the procedures contained in the Protocol. In *A D v Canada*[73] the author, who claimed to be Grand Captain of the Mikmaq Tribal Society, complained that the Mikmaq people had been denied the right to self-determination of peoples contained in Article 1 of the Covenant, in that they were entitled to form an independent state separate from Canada. The Committee rejected the communication as inadmissible on the grounds that A D had not demonstrated that he was competent or authorised to act on behalf of the tribe.[74] By focusing on the lack of competence of the author of the communication to represent the tribe, the Committee was able to avoid some of the complex admissibility issues inevitably arising from such a communi-

71 Communication 183/84.

72 Ibid, para 3. Similarly in *J H v Canada*, Communication No 187/1985 it was held by the Committee that since the applicant had not demonstrated that he was personally a victim of discrimination, they could not consider the claim *in abstracto*.

73 Communication No 78/1980.

74 Ibid, para 8.2.

cation. In Ominayak and the Lubicon Lake Band v Canada,[75] however, the Committee was obliged to face these issues directly.[76] Here, Ominayak, who was the undisputed chief of the Lubicon Lake Cree Indians, claimed that the band, had been denied its right to self determination since it had been prevented from freely disposing of its natural wealth and resources. The Committee took the view in this case that only individuals *qua* individuals were able to avail themselves of the procedures contained in the Protocol, since Articles 1 and 2 made it perfectly clear that it was concerned only with the protection of *individual* rights. This view was confirmed by the Committee in its decision in *A B et al v Italy (South Tirol) Case.*[77]

It would seem therefore, that although self-determination is a right protected by the Covenant, it is not one which can be enforced *via* the mechanisms of the Optional Protocol. While there might be some logic in restricting the right of communication to individuals, one suspects that the motives of the Committee for adopting such a restrictive approach may be located in the policy of wishing to avoid difficult problems concerning a state's internal political organisation and claims to a right of secession by certain ethnic, religious or linguistic groups. These issues will clearly have to be dealt with by the Committee under its other supervision mechanisms.

**iii. Need the author be within the territorial jurisdiction of the state against which the complaint is made either (a) at the time the violation occurred or (b) at the time of submitting the communication?**

Before considering these questions in detail, a preliminary point which should be noted is that an individual may complain of a violation of his rights by a state even though he is not a citizen of that state, as long as he is subject to its jurisdiction. This flows from the wording of Article 2 of the Covenant and Article 1 of the Protocol. In most cases this will involve the alleged violation of the rights of an alien who is, or was, within the territorial jurisdiction of a state when the alleged violation occurred.[78]

(a) A number of communications have arisen where individuals have been the subjects of violations of rights by states of which they are citizens, although they have been resident in the territory of another state at the time. Examples of this have ranged from kidnap of victims by the agents of their own state acting in violation of the sovereignty of the state of residence at the more serious end of the spectrum, to refusal to renew a passport at the less serious end. In an early communication involving the latter,[79] Uruguay refused to renew the passport of one Vidal Martins who was at the time resident in

75 Communication No 167/84

76 See D McGoldrick, 'Canadian Indians, Cultural Rights and the Human Rights Committee', (1991) 40 *ICLQ* 658.

77 Communication No 413/1990

78 Cases of extradition, deportation and expulsion clearly fall into this category. See eg the European Convention cases of *Amekrane v United Kingdom* (16 YBEHR) 356 in which the deportation of an individual to a state where he was certain to be executed was alleged to be a violation of Article 3 the Convention (torture, inhuman and degrading punishment). This case was resolved by friendly settlement between the parties and an *ex gratia* payment of compensation by the UK. In the recent case of *Soering v UK*, Eur Court HR, Series A, 195; reprinted (1989) 28 *ILM* 1069, extradition of a German citizen from the UK to the US for alleged murder, and the consequent exposure to the 'death row' phenomenon was held by the European Court of Human Rights sitting *in plenum* to be a violation of Article 3. See J Quigley and S Adele Shank, 'Death Row as a Violation of Human Rights: Is it Illegal to Extradite to Virginia?', (1990) 30 *Virginia Journal of International Law*, p 241.

79 *Vidal Martins v Uruguay*, Communication R 13/57.

Mexico. Uruguay claimed that the Committee lacked competence to consider the communication since the author was not within the jurisdiction of Uruguay. Although it appears that the form of jurisdiction which Uruguay had in mind was territorial only, the Committee took a wider view indicating that the issue of a passport was a matter which was entirely subject to the jurisdiction of the state since it alone was competent to determine whether or not it should be issued.[80]

This personal nature of the jurisdiction referred to in Article 1 of the Protocol and Article 2 of the Covenant was established unequivocally by the Committee in *Celiberti v Uruguay*.[81] Here a Uruguayan citizen had been abducted by agents and returned to Uruguay where he was arbitrarily imprisoned and tortured. Uruguay, in contesting the admissibility of the communication, complained that the act had not taken place within the jurisdiction of Uruguay. The Committee, rejecting this contention, stated that the reference in Article 1 of the Optional Protocol was 'not to the place where the violation occurred, but rather to the relationship between the individual and the State in relation to the rights set forth in Covenant wherever they occurred.'[82]

(b) There is no requirement in the Protocol that the author of a communication must be within the state complained of at the time it is submitted. A scrutiny of the origin of many communications indicates that they have been made by refugees or the relatives of victims who are themselves refugees. A number of the early communications involving Uruguayan citizens were authored in Mexico to which they had fled from Uruguay's right-wing military regime. The Committee has accepted such communications without demur, and it is suggested that there are good reasons in law and policy for it having done so. First, the Protocol makes no mention of any residential requirement for the author of a communication, and second, in certain circumstances the author would be placed at serious risk if he was required to submit his communication from the territory of the alleged delinquent state. Clearly, the safety of the author should be paramount.

### 2. *Overlapping systems of international investigation*

A communication may not be considered by the Committee if it contains the same matter as that which is being examined under another procedure of international investigation.[83] The reason for this requirement is to prevent a proliferation of proceedings among the various human rights institutions which now exist. In most cases the Committee will have no difficulty in determining whether or not this requirement has been fulfilled. In a number of cases, applications have been submitted to the Inter-American Commission on Human Rights or the European Commission on Human Rights and the corresponding inadmissibility before the Committee has ensued. In cases of

80 This was also the claim in *Waksman v Uruguay*, Communication No R 7/31. The Committee did not investigate the merits of the claim here since Uruguay granted a remedy by way of the issue of a passport to the author of the complaint. See also *Varela v Uruguay*, Communication No R 25/108.

81 Communication No R 13/56.

82 Ibid, para 10(2). The Committee also went on to say in para 10(3): 'it would be unconscionable to so interpret the responsibility under Article 2 of the Covenant as to permit a State party to perpetrate a violation of the Covenant on the territory of another state, which violation it could not perpetrate on its own territory." See also *Quinteros v Uruguay* Communication No R 24/107 (abduction of a Uruguayan citizen from the Venezuelan Embassy in Montevideo) where the same point was made.

83 Article 5(2)(a) Protocol. See *supra*, note 31.

dual applications it is always open to applicants to withdraw their cases from one procedure or the other, thus rendering the communication admissible. In some circumstances the Committee has shown a willingness to be flexible. In Millan Sequeira v Uruguay[84] for example, a two line reference to the author of a complaint in a list of over one hundred named persons who had been arbitrarily detained by Uruguayan authorities which had been submitted by a third party, was not held to breach the requirements of Article 5(2)(a). This may be seen as an application of the de minimis principle. Further, in Celiberti,[85] the Committee held that it was not precluded from examining a communication by reason of the subsequent opening of a case before the Inter-American Commission by a third party who was unrelated to the alleged victim. The Committee showed itself to be even more creative in Grille Motta[86] where it found that a communication which was before the American Commission could not contain the same matter as that currently before it, since the communication before the American Commission concerned events which had taken place prior to the entry into force of the Covenant for the state in question.

Difficulties of another kind have arisen for the Committee in cases where the subject matter is the same as that which has been considered previously by either the American or European Commissions and rejected. Is the Committee competent to reconsider such a case? In the communications which have come before it the Committee has decided that it does have competence to consider a case *de novo,* but has declined to do so on the basis of reservations by the States Parties in question to the Protocol which preclude the Committee from considering cases which have already been considered by the European Commission.[87] These views have turned, however, very much on the precise language employed by the reserving states and the interpretation of the language by the Committee has not always enjoyed unanimity.[88] The failure of the Committee to develop a doctrine of *res judicata* is most unsatisfactory since it is evident that the potential exists, at least in theory, for divergent opinions springing from the various institutions established for the protection of human rights. Such divergence could possibly lead to a kind of 'forum shopping' by individual complainants, but at a more serious level it could also lead to a weakening of respect for the Committee if it is seen to review decisions of well-respected and firmly established institutions. It is to be hoped that the Committee would not reach a finding different to that already made by an analogous institutions unless there were good reasons for doing so.

On a different but related issue, it should be noted that the Committee itself will not generally review its own admissibility decisions, but if new information comes to light which might have affected its decision, its rules of procedure give it the right to do so.[89]

### 3. *Exhaustion of domestic remedies*

It is a requirement in all human rights instruments that a complainant be required to exhaust all available domestic remedies before international proceedings may be properly engaged.[90] As the Inter-American Court of

84 Communication No R 1/6.
85 Communication No R 13/56.
86 Communication No R 2/11.
87 *A M v Denmark*, Communication No R 26/121; *V M O v Norway*, Communication No 168/1984.
88 See the Individual Opinion of Bernhard Graefrath in both cases cited at note 50.
89 Rule 93(4). For application of this rule see *J M v Jamaica*, Communication No 165/1984 and *C F et al v Canada*, Communication No 113/1981.
90 Article 26 European Convention on Human Rights; Article 46 American Convention of Human

Human Rights explained in *Viviana Gallardo v Costa Rica*,[91] the rationale for the rule is that a state is excused from 'having to respond to charges before an international body for acts which have been imputed to it before it has had the opportunity to remedy them by internal means.'[92] The Protocol is no exception to this requirement, and although Article 5(2)(b) does not expressly mention that the author of a communication must exhaust domestic remedies 'in accordance with the accepted rules of international law',[93] it is clear that this has been implied in the Committee's jurisprudence. Thus remedies which are unduly tardy or remedies which in reality do not provide redress for violations, will not be a bar to admissibility on this ground.

Given that the procedure before the Committee is written, problems arise in determining conclusively whether or not the alleged victim of a violation has indeed exhausted all domestic remedies. Clearly a state wishing to avoid consideration of a communication by the Committee need, in theory, only allege that the author of a communication has not exhausted all remedies available to him. Indeed, in many of the early communications involving Uruguay, the state simply argued that applicants had not availed themselves of available remedies and this disbarred the Committee from admitting the communication. The Committee was not, however, prepared to accept such general statements, usually couched in vague and dismissive language, as being conclusive and decided to place the burden of demonstrating that domestic remedies had been exhausted upon the alleged delinquent state. It was not enough for the state to respond simply by referring to general categories of remedies; the Committee obliged it to detail the specific remedies available to the alleged victim in his particular case. This was made clear in *Lanza v Uruguay*[94] where the Committee said:

> Specific responses and pertinent evidence (including copies of the relevant decisions of the courts and findings of any investigations which have taken place into the validity of the complaints made) in reply to the contentions of the author.[95]

As Nowak has observed,[96] placing the burden of proof on the state has become a remarkably efficient tool with which to counter the lack of cooperation by State Parties.

### 4. *Further conditions for admissibility*

Article 3 provides that the Committee shall consider inadmissible any communication which is anonymous or which it considers to be abusive of the right of submission of communications or to be incompatible with the provisions of the Covenant. There have been few communications which have been declared inadmissible on the broad grounds of abuse of process or incompatibility, but one such is *Taylor v Canada.*[97] Here Taylor complained

Rights; Article 56(5) OAU Charter of Human and Peoples' Rights.

91 Decision of the Inter-American Court of Human Rights, November 13, 1981.

92 Ibid, para 26.

93 Cf. the instruments referred to *supra* note 90.

94 Communicating No R 2/8.

95 Ibid, para 15. See also *Torres Ramirez v Uruguay,* Communication No R 1/4 in which the same observation was made at para 5.

96 *Effectiveness,* p 158.

97 Communication No R 24/104. On abuse of process see M A v Italy, Communication No R 26/117 in which a person who was convicted and imprisoned pursuant to a law forbidding the reorganisation of the dissolved fascist party was found to fall without the Covenant ratione materiae by virtue of Article 5. Article 5 provides:
Nothing in the present Covenant may be interpreted as implying for any State, group or person

of an infringement of his right to hold opinions freely and freedom of expression under Article 19 of the Covenant in that he had been prohibited from transmitting recorded messages over his telephone warning of the dangers of international Jewry. The Committee found that this communication was clearly incompatible with the provisions of the Covenant, since State Parties were under an obligation by virtue of Article 20(2) to prohibit any advocacy of national, religious or racial hatred.

It is apparent that the Committee has also extended its competence to declare inadmissible communications which are, in the words of Article 27(2) of the European Convention, 'manifestly ill-founded.' This has been entirely a function of the Committee's own jurisprudence since nowhere in the Protocol does this condition for admissibility occur. In adopting this course of action the Committee has of necessity been obliged to examine the merits of a case as a preliminary to determining its admissibility. While this again is not specifically provided for in the Protocol, it is a necessary consequence of its decision to extend its competence and mirrors closely the practice of other human rights bodies. There are a number of examples of the Committee's approach in recent communications. In *J D B v The Netherlands*[98] a communication by an unemployed television repair man that Dutch law discriminated against him by punishing him for failing to take employment not related to his trade was held inadmissible on the grounds that no facts had been admitted which substantiated the claim that the applicant had suffered a violation of any of the rights guaranteed by the Covenant.[99] Perhaps a clearer case of rejection on the grounds that a communication is manifestly ill-founded is that of *L T K v Finland*[100] in which the author of the communication alleged that the failure of the Finnish authorities to recognise him as a conscientious objector, thus leading to his criminal prosecution and imprisonment, violated Articles 18 and 19 of the Covenant. In finding the claim inadmissible the Committee simply declared that 'the Covenant does not recognise the right to conscientious objection.'[101]

While the declaration of communications as inadmissible on their being manifestly ill-founded provides a useful screening mechanism, it can on occasion lead to premature decisions on the merits of a case.[102] In *L T K v Finland*, for example, the declaration of the communication as inadmissible failed to take into account that in considering an earlier communication[103] the Committee had left open the question of whether Article 18(1) of the Covenant guaranteed a right of conscientious objection. As Nowak rightly points out, this should not have been dealt with at the admissibility stage in *L T K*[104] Although it is apparent that the Committee is developing a *jurisprudence constante*, fortunately it is not bound by its previous decisions. This leaves the question of Article 18(1) to be considered in a future case, although one feels that injustice may have occurred in *L T K*.

any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognised herein...

98 Communication No 178/1984.

99 The same reason for declaring a communication inadmissible was adduced by the Committee in *J H v Canada*, Communication No 187/95.

100 Communication No 185/1984.

101 Ibid, para 5.2.

102 See M Nowak, 'UN Human Rights Committee: Survey of Decisions Given up till July 1986' (hereafter *Survey 1986*), (1986) 7 *HRLJ* 287, pp 304-5.

103 *Muhonen v Finland*, Communication No R 22/89.

104 Nowak, *Survey 1986*, pp 304-5.

## 5. *Proving evidence*

Under Article 5(1) the Committee is required to consider communications 'in the light of all written information made available to it by the individual and by the State Party concerned.' As indicated above, there is no authority within the Protocol which permits the Committee to take oral testimony either from the state parties, victims, or witnesses to clarify issues or to resolve contradictions. In order to grant the Committee such power, not only would an amendment to the Protocol be necessary, but the manner in which the Committee functions, and was anticipated to function, would have to be totally reconsidered. The Committee would become closer to a judicial model, the calling of witnesses and the need for representation would arise, which in turn would retard decision-making and increase costs for all concerned. It is clear that the Committee was not designed to operate this way: the written procedure was calculated to be expeditious and cheap for all the parties involved.

It has been apparent, however, that the written procedure suffers from inherent deficiencies other than those of resolving contradictions. The major problem is the lack of appropriate mechanisms to enforce State Party compliance with the obligation to provide information under Article 4(2) of the Protocol. The proper operation of the procedure depends entirely on the cooperation of states and the provision of the fullest and most detailed information by them in order allow the Committee to achieve a properly reasoned decision. Unfortunately, a number of states have been less than cooperative with the Committee. In the early days of the Committee Uruguay, in the words of Tomuschat, 'demonstrated a deplorable lack of cooperation'.[105] This included the failure to respond to the Committee's requests for information, general tardiness in the provision of information and the supply of information of the most general kind. In order to deal with this lack of cooperation, the Committee developed a number of practices. In the case of non-provision of requested information, the Committee in the first communication with which it dealt, *Massera v Uruguay*,[106] simply compiled its final views by accepting all the evidence that had been supplied by the author of the communication. By non-compliance Uruguay had not contradicted the evidence which the Committee had in its possession.[107]

Where there has been a paucity of information or information of a general nature supplied by the alleged delinquent state, the Committee has proceeded rather more cautiously. It has pointed out that it is implied in Article 4(2) that states are under an obligation to provide the most detailed information possible within the given time limit of 6 months.[108] It has further been argued that it is only natural to place the burden of disproving the alleged victim's allegations upon the state since it is the state which generally has access to the appropriate information. Thus in *Santullo*,[109] the Committee decided to accept as proved:

105 *Op cit* p 252. More recently, Zaire has proved to be unreliable. See *Ngalula Mpandanjila et al v Zaire*, Communication No 138/1983 and *Andre Alphonse Mpaka-Nsusu v Zaire*, Communication No 157/1983.

106 Communication No R 1/5.

107 For similar conclusions see the cases involving Zaire *supra*, note 95.

108 See, for example, *Quinteros v Uruguay* Communication No R 24/107 in which the Committee said:
'The Committee reiterates that it is implicit in article 4(2) of the Optional Protocol that the State Party has the duty to investigate in good faith all allegations of violations of the Covenant made against it and its authorities ... and to furnish to the Committee the information available to it.'

109 Communication No R 2/9.

... facts which have either been essentially confirmed by the State Party or are unrepudiated or uncontested except for denials of a general character offering no particular information or explanation.[110]

In its final views therefore the Committee decided to phrase its findings in a negative way and indicated that it 'could not find that there has *not* been any violation [of the Covenant]'.[111]

The Committee has also decided that where specific allegations are made against particular government agents by the author of a communication, those allegations should be fully investigated by the state concerned.

In *Grille Motta v Uruguay*,[112] the victim alleged that he had been subjected to electric shocks, *submarino*,[113] insertion of bottles and the barrels of automatic weapons into his anus, standing hooded and handcuffed with a piece of wood thrust into his mouth for several days and nights by identifiable individuals. Uruguay dismissed these allegations as 'a figment of the imagination of the author.'[114] The Committee found, however, that since the allegations had not been duly investigated by Uruguay, they remained unrefuted. The state should have demonstrated that it had investigated the allegations in accordance with its domestic law and brought those found to be responsible to justice.[115]

Given the limitations inherent in the written procedure, it is arguable that the Committee has been remarkably successful in overcoming the difficulties involved. Its placing the burden of proof on the state to disprove the allegations made by the author of a communication once again finds justification in law and policy. Under the Protocol, which, it is worth recalling, is an optional instrument to which states have freely acceded, States Parties are required to comply with certain obligations. The requirement that they provide written explanations or statements clarifying alleged violations of the Covenant to the Committee under Article 4(2) requires cooperation in the utmost good faith. Failure to do so would deprive the Protocol of its efficacy, if states were able to avoid their obligations by recalcitrance or tardiness. As the Committee has also had occasion to point out, states are in a dominant position when particulars of a case are required. They have both the information and the means of communicating that information which an individual could not possibly possess.[116]

While it may be argued that the Committee's procedure here favours the author of a communication excessively, it has nonetheless maintained that its

110 Ibid, para 7. See also *Bleier v Uruguay*, Communication No R 7/30 and *Quinteros v Uruguay*, Communication No R 24/107.

111 Ibid Emphasis added. Mr Tarnopolsky in an individual opinion was not so reticent and found that a violation of the Covenant had been proved. Five other Committee members associated themselves with Mr Tarnopolsky's view.

112 Communication No R 2/11.

113 Immersion of the victim's head in foul water until the victim is close to drowning.

114 Ibid, para 10.

115 Ibid, para 15. See also *Lopez Burgos v Uruguay*, Communication No R 12/52.

116 See *Dermit Barbato v Uruguay*, Communication No R 21/84, para 9.6 where the Committee said: With regard to the burden of proof, the Committee has already established in its views in other cases that said burden cannot rest alone on the author of the communication, especially considering that the author and the State party do not always have equal access to the evidence and that frequently the State party alone has access to relevant information. It is implicit in article 4(2) of the ... Protocol that the State Party has the duty to investigate in good faith all allegations of violation of the Covenant made against it and its authority.
See also *Bleier v Uruguay*, Communication No R 7/30.

procedures conform to the standards of natural justice as far as allegedly delinquent states are concerned. In *Quinteros v Uruguay*[117] it said:

> In accordance with its mandate under article 5(1) of the ... Protocol, the Committee has considered the communication in the light of the information made available to it by the author of the communication and by the State party concerned. In this connection the Committee has adhered strictly to the principle *audiatur et altera pars* and has given the State party every opportunity to furnish information to refute the evidence presented by the author.[118]

It thus behoves states which are party to proceedings before the Committee to provide the fullest information available by way of the written procedure if they are to counter complaints successfully.

### 6. *Legal status of final views*

The Committee concludes its process of considering a communication by presenting its 'views', usually referred to as 'final views', on the allegations made. This has been criticised as the weakest part of the procedure since it is argued that the views are not legally binding *stricto sensu.* Tomuschat[119] has argued that even so, the views have immense authority which 'proceeds from their inner qualities of impartiality, objectiveness and soberness'.[120] While technically it is open to a state to challenge the Committee's final views and to refuse to implement them, this would expose it to the criticism that it had disregarded the authoritative pronouncement of an independent tribunal to whose jurisdiction it had freely submitted. Further, there can be no doubt that the Committee's views are authoritative. It alone is given exclusive competence to rule on compliance or breach of the Covenant under the Protocol, and although its views may not be binding *stricto sensu*, a finding of breach is to all intents and purposes a potent declaration of international delinquency.

Since the views of the Committee are not legally binding, and in the absence of any positive provision for remedies in either the Covenant or the Protocol, it is not open to the Committee to decide that a state must grant reparation to a victim of a violation of any of the rights contained in the Covenant. In line with its practice of declaring breaches however, the Committee has also declared that delinquent states are required to grant remedies to victims in order to comply with their obligations under the Covenant. In general the Committee has used the following formula:

> The Committee ... is of the view that the State Party is under an obligation to provide the victim with effective remedies, including compensation, for the violations which he has suffered and to take steps to ensure that similar violations do not occur in the future.

While a state is not under a legal duty to comply with the views of the Committee, it is under an obligation to comply with the obligations established by the Covenant. Again, it would be difficult to argue that the ruling of the Committee here is not authoritative.

## III. Conclusions

Any assessment of the work of the Committee must take account of the fact that it operates in an area which all states find particularly sensitive. Few nations welcome the exposure of their domestic shortcomings in the field of

117 Communication No R 24/107.
118 At para 10.8.
119 Op cit, p 255.
120 Ibid.

human rights to the intrusive glare of the international community. State sovereignty is still jealously guarded by the great majority of states and even after becoming party to the Protocol many states wish to exercise unfettered power over individuals within their domestic jurisdiction. Why then do states become party to the Protocol? In the case of democratic states with a commitment to the ideal of the rule of law, the decision to ratify or accede to the Protocol usually represents a conscious act designed to strengthen that commitment. Military and totalitarian regimes sometimes find themselves inconveniently burdened by the Protocol to which their states became bound during an interlude of democratic government. It is always open for such governments to denounce the Covenant and the Protocol, but as the junta of Greek colonels discovered in 1970 when it denounced the European Convention on Human Rights, this does little to enhance a flagging international reputation.[121] Some states, however, simply do not appear to understand the significance of the obligations into which they are entering when they bind themselves to the Protocol. Uruguay and Zaire are perhaps prime examples here. Participation by these states in the Covenant and Protocol was possibly perceived as a means of diverting the attention of the international community from the reality of their domestic human rights situation. The outcome for these states proved to be rather different to their expectations with both initially cast in the role of recalcitrants, who worsened their international credibility by failing to comply with the Committee's reasonable demands for co-operation.

What then has the Committee achieved in this varied but relatively inhospitable climate? Above all, it might be argued that it has gone some way towards redressing the powerlessness of the individual in the face of state supremacy. The first step in this process was the conferring of positive rights in the Covenant, the second was the empowerment of individuals to enforce these rights through the appropriate procedural devices of the Protocol. These alone, however, would not have tilted the balance susbstantially in favour of the individual, since the power of the state would still have allowed it to frustrate the operation of the system and undermine its integrity, for example, by refusing to respond to requests for information or by physically hindering individual communications. It is the development of appropriate procedures and practices by the Committee which has minimised the likelihood of such occurrences. The most important of these is, arguably, the placing of the burden of proof on the state to demonstrate quite specifically that an individual has exhausted identifiable local remedies, and requiring the state to disprove allegations in a communication. It is perhaps more difficult to refute allegations than to prove them, but the Committee's philosophy here is clear: the state has the means at its disposal to exculpate itself while individuals may have difficulty in obtaining evidence to support their claim. The race will always be unequal, but the Committee has ensured that the stronger participant bears the greater handicap.

That the Committee has been able to develop these practices and that its jurisprudence has been accepted by even the most obstinate of governments bears witness to the general esteem in which it is held. The composition and demeanour of the Committee has been decisive here. Although it is not described in the Covenant as an adjudicative body, it clearly functions as such.

121 Greece denounced the Convention following a number of complaints against the junta alleging, *inter alia*, torture and inhumane treatment of political dissidents. See Beddard, *op cit*, pp 7, 19-20.

It is not a court of law, but it behaves as if it were. It follows accepted rules of legal procedure and applies the principles of natural justice. Its members owe no allegiance to anyone but the Committee itself and it is significant that their impartiality has never been challenged nor has there been any indication that states have sought to place external pressure on individual members.

This is not to say that the Committee is free from criticism or that all areas of its activity are unblemished. It is possible to point to the evolving practice of determining the merits of a communication at the admissibility stage as increasing the possibility of error and consequent injustice in certain cases. It is also possible to question whether it is wise policy to reconsider communications which have already been disposed of by other means of international settlement.

Other problems which the Committee has experienced can be laid at the feet of the Protocol's drafters. The written procedure is clearly weak and could be improved, although the introduction of an oral stage is obviously impractical. The burden of work which the Committee also has to bear is excessive and is increasing with each new accession to the Protocol. The formulation of the Committee's final views can now take up to three and a half years and it is reasonable to anticipate that the time lag here will increase unless some way is found to expedite procedure.[122] Nonetheless, if, or more likely when, New Zealand's first individual communication is lodged with the Human Rights Committee, both the individual and the state will find that it is submitted to a fair and rigourous appraisal under well-defined practices and procedures.

122 By allowing the Committee to sit in chambers of nine, for example. This would require an amendment to the Covenant, which might prove difficult to achieve.