



Institute for International
Law and Justice

IILJ International Legal Theory Colloquium Spring 2010
The Turn to Governance:
The Exercise of Power in the International Public Space

Professors Benedict Kingsbury and Joseph Weiler

NYU Law School

Straus Institute for the Advanced Study of Law and Justice

Wednesdays 2pm-3.50pm on dates shown

Pollack Colloquium Room, Furman Hall 9th Floor, 245 Sullivan Street
(unless otherwise noted)

(additional seminar for students et al is Thursdays 4pm-5.50pm, on GAL)

Topics are indicative and are subject to change.

- January 20 Andrew Hurrell, Oxford University
Topic: Emerging Powers, Global Order and Global Justice
- January 27 Richard Stewart, NYU Law School
Topic: The World Trade Organization: Multiple Dimensions Of
Global Administrative Law
- February 3 Robert Keohane, Princeton University
Topic: The Regime Complex for Climate Change (paper with David Victor,
UC San Diego)
- February 10 No Colloquium - Postponed due to weather conditions
- February 17 No Colloquium
- February 24 Gianluigi Palombella, University of Parma, Law Faculty
Topic: Rule of Law in Extra-National Governance
- March 3 Joseph Weiler, NYU Law School
Topic: On the Distinction between Values and Virtues in the Process of
European Integration
- March 10 David Kretzmer, Hebrew University/Ulster**
Topic: The UN Human Rights Committee and International Human Rights Monitoring
- March 11 (SPECIAL SESSION, 4pm-5.50pm, Pollack Colloquium Room, Furman Hall 900)
Jan Klabbers, University of Helsinki
Topic: Controlling International Bureaucracies
- March 17 No Colloquium – Spring Break
- March 24 Marta Cartabia, University of Milan
Topic: Rights in Europe
- March 31 No Colloquium
- April 7 Grainne de Burca, Fordham Law School
Topic: EU External Relations: Foreign Policy or Governance?
- April 14 Beth Simmons, Harvard Government Department
Topic: Effects of Investor-State Treaty Regimes and Arbitral Processes
- Thurs April 15- (SPECIAL SESSION, 4pm-5.50pm, Furman Hall 214)
Daryl Levinson, Harvard Law School
Topic: Public Law: Constitutional and International
- April 21 Benedict Kingsbury, NYU Law School
Topic: Techniques of Global Governance

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***The Turn to Governance:
The Exercise of Power in the International Public Space***

Benedict Kingsbury and Joseph Weiler

NYU Law School
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Paper to be discussed on March 10, 2010

The UN Human Rights Committee and International Human Rights

Monitoring

David Kretzmer

'and now for something completely different'

Monty Python

This paper is part of larger ongoing research project, being carried out together with Professor Eckart Klein of Potsdam University, which examines the workings of one institution: the Human Rights Committee, established under the International Covenant on Civil and Political Rights, 1966. In the present paper I examine one function of the Committee – consideration of states parties' reports, under article 40 of the Covenant. The questions I examine are how the Committee itself has perceived its role in fulfilling this function, and to what extent this perception is likely to promote compliance with the Covenant.

One personal note: both Professor Klein and the writer were members of the Human Rights Committee from 1995-2002. The chapter on the progression of the Committee's approach to consideration of states parties' reports is based on a joint draft prepared by Professor Klein and myself. This is work in progress.

Introduction

In 1990 Professor Louis Henkin published a book of essays entitled 'The Age of Rights'.¹ As the name of the book indicates, Henkin presented the thesis that with the dramatic development of international human rights law in the post WWII era, we were now living in the 'age of rights'. Human rights were 'the only political-moral idea that has received universal acceptance.'² The human rights regime had 'matured into a global ideology, common to elites everywhere, limiting and channeling the exercise of public power automatically, without the machinery of enforcement'.³

While Henkin conceded that there was no effective machinery of enforcement on the international level, he argued that there were nevertheless less formal remedies that increased the chance of states complying with international human rights standards. He opined that the institutional remedies for violation of the rights 'are at best no stronger than those operating in international law generally', but claimed that there are 'ever waiting in the wings, other forces inducing compliance – political criticism by other states and international bodies....;criticism by nongovernmental organizations ... and world-press available to mobilize hostile opinion.'⁴ Henkin asked whether these might not qualify as 'remedies' because they enhance the likelihood that the rights will be enjoyed in fact.

In a highly perceptive and provocative review of Henkin's book, Professor Henry Steiner expressed the feeling that Henkin's 'perspective ... yields a portrait in which noble norms overshadow ignoble events, thereby giving us undue comfort about what the human rights movement has achieved.'⁵ Examining Amnesty International reports, and through them looking at what is happening in the real world, rather than at the declared norms of international covenants and conventions on human rights, Steiner related to 'the relationships among the rules and standards of human rights law, the conduct of states

¹ Louis Henkin, *The Age of Rights* (Columbia U. Press, 1990)

² *Ibid.*, ix

³ See David Kennedy, 'The Mystery of Global Governance' in Jeffrey L. Dunoff and Joel P. Trachtman, *Ruling the World? Constitutionalism, International Law, and Global Governance* (CUP, 2009), 37, 46. D

⁴ *Ibid.*, 39.

⁵ See Henry J. Steiner, Book Review, *104 Harv. L. Rev.*(1991) 917, 922

that is relevant to them, and the means of enforcement to make that conduct conform to international norms.’⁶

Despite his reservations whether description of our age as the ‘age of rights’ is apt, Steiner accepted that a new discourse of human rights had been institutionalized and that human rights have become part of our international political and legal culture. There are few who doubt this today. Human rights are now a major theme of international law and play an important role in international discourse and politics. They have become a matter of concern to the international community.⁷

Yet the differences between Henkin and Steiner reflect two opposing trends in attitudes towards the effectiveness of international human rights instruments in strengthening compliance by states with human rights norms. In the one camp there are the skeptics, ranging from conservative to radical Marxists. The conservatives have tried to show that adherence by states to human rights conventions simply does not make a difference to their human rights record.⁸ In fact, it may serve as a guise for greater repression by a regime.⁹ Radical critics argue that the whole rhetoric of international human rights serves the political interests of dominant groups in the existing order and that rather than furthering the cause of human rights protection ‘the once subversive idea of human rights is now used to lend legitimacy to the practices of powerful global economic actors.’¹⁰ These critics are joined by voices of academics and activists from the Southern hemisphere, who question whether the essentially western concepts of human rights have advanced the cause of social justice in the developing world.¹¹

⁶ Ibid., 923

⁷ See David P. Forsythe, *Human Rights in International Relations* (CUP, 2000). And see Charles R. Beitz, *The Idea of Human Rights* (OPU, 2009). In drawing up a schema of human rights, Beitz argues that in order to be recognized as a human right a claim must meet three conditions. The third is that the failure by a state to protect that claim would be a suitable object of international concern.

⁸ See, e.g., Oona Hathaway, ‘Do Human Rights Treaties Make a Difference?’, 111 *Yale L.J.* (2002) 1935.

⁹ See, e.g., Hafner-Burton and Tsutsui, ‘Human Rights in a Globalizing World: The Paradox of Empty Promises’, 110 *American Journal of Sociology* (2005) 1373, who argue that adherence of a state to international human rights conventions ‘may at times lead governments to use global laws as a shield for increasingly violence domestic behaviors’. (Ibid., 1383).

¹⁰ Tony Evans, *The Politics of Human Rights, A Global Perspective*, 2nd edition (Pluto Press, 2005), 126

¹¹ See, e.g., Upendra Baxi, *The Future of Human Rights* (New Delhi: Oxford University Press, 2nd edn, 2006.); William Twining, ‘Law, Justice and Rights: Some Implications of a Global Perspective’ (2007) unpublished paper, available at http://www.ucl.ac.uk/laws/academics/profiles/twining/Law_Justice%20_Rights.pdf

In the other camp, there is a growing number of scholars who paint a much more complex and nuanced picture that examines the role both the very idea of human rights and the various players in the international human rights arena play in domestic internalization of human rights norms.¹² Those belonging to this camp have used well-accepted social science methodologies in order to examine whether and to what extent international human rights conventions, norms and mechanisms can and do make a difference. Much of this research paints a less pessimistic picture. The research tends to show that while international human rights law is certainly not a panacea for all the wrongs committed by states, it can, and does, have some influence on state practice. As presented by my colleague, Professor Beth Simmons, in concluding her seminal study of the issue:

International human rights treaties have helped to nudge the human race in the right direction.¹³

The issue that I pursue in this paper is what contribution the Human Rights Committee can make in furthering compliance with human rights standards, in this case, those enshrined in the International Covenant on Civil and Political Rights, 1966 (ICCPR). I confine myself for the moment to consideration of states parties' reports under article 40 of the ICCPR. In further chapters Professor Klein and I discuss other elements of the Committee's work, namely consideration of communications under the Optional Protocol and publication of General Comments.

The paper is divided into the following parts:

1. International human rights law and its limitations;
2. Global governance and human rights;
3. Human Rights Committee – its powers;
4. Consideration of states parties' reports – an historical introduction;

¹² See, e.g., Andrew Moravcsik, 'Explaining International Human Rights Regimes: Liberal Theory and Western Europe', 1 *European Journal of International Relations* (2005) 157; Risse, Ropp and Sikkink (editors), *The Power of Human Rights: International Norms and Domestic Change* (CUP, 1999); Hafner-Burton and Tsutsui, note 9 *supra*; Sonia Cardenas, *Conflict and Compliance: State Responses to International Human Rights Pressure* (UPenn, 2007); Hafner-Burton and Ron, 'Seeing double: Human Rights Impact through Qualitative And Quantitative Eyes', 61 *World Politics* (2009) 360; Ryan Goodman and Derek Jinks, 'How to Influence States: Socialization and International Human Rights Law' 54 *Duke L.J.* (2004) 621.

¹³ Beth A. Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (CUP, 2009), 380.

5. Monitoring human rights practices

1. International Human Rights and its Limitations

The story of the rise of international human rights law is well-known. The relationship between the organs of government and individuals in a state were traditionally perceived as a domestic political, constitutional and legal issue. As long as governments were dealing with their own citizens, subjects or residents, that relationship was regarded as a domestic affair that was of no concern to other states or to the international community. The duty of states to respect and protect human rights of their citizenry was not a matter to be regulated by international law, which dealt with the relations between nations. While there were some exceptions to the general principle (first and foremost amongst these were the anti-slavery conventions of the late 19th Century and the labour conventions adopted after establishment of the ILO in 1919), until WWII human rights were not the subject of international conventions. The change came as a result of the horrors of WWII and the Holocaust, when largely as a result of pressure by NGOs the founding members of the UN decided to make the issue of human rights part of the international agenda.¹⁴ The UN Charter specifically states that one of the purposes of the UN is '[t]o achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion;' (article 1 (3)). Article 55 declares that '[w]ith a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

...

¹⁴ Most scholars agree that NGOs did indeed play a major role in persuading states to include the human rights provisions in the Charter. William Korey claims that these provisions were 'products of NGO determination and persistent lobbying in which the American Jewish Committee played the leading role.' *NGOs and the Universal Declaration of Human Rights: 'A Curious Grapevine'* (NY: St Martin's Press, 1998), 2. Also see John P. Humphrey, 'The UN Charter and the Universal Declaration of Human Rights', in Evan Luard (editor), *The International Protection of Human Rights*, (Praeger, 1967) 40. However, it has been claimed that officials in the Truman administration were primarily responsible for those provisions: see David P. Forsythe, *supra* note 7, 19, citing Cathal Nolan, *Principled Diplomacy: Security and Rights in US Foreign Policy*

c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction.’

One of the functions and powers of the Economic and Social Council (ECOSOC) is to ‘make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all.’ (article 62). ECOSOC was directed to set up a commission for the promotion of human rights (article 68).

Following establishment of the UN the Universal Declaration of Human Rights was adopted by the General Assembly in December 1948, and subsequently the two International Covenants on Civil and Political Rights, and on Economic, Social and Cultural Rights were adopted in 1966 and entered into force in 1976. A long series of other human rights conventions were adopted both on the universal level and the regional level in Europe, America and Africa.

Use of international conventions between states in order to create a regime of international human rights law involved a major departure from the traditional function of international agreements. Like all other contractual agreements, international conventions serve as a vehicle for regulating the relationship between the parties to those conventions, needed when there are either common or clashing interests that the parties wish to regulate or to create inter-state institutions that can serve their common interests. Such agreements are based on reciprocity, or the notion that each party has an interest in the other party or parties abiding by the agreement, and that their interests will therefore be affected by violation of the treaty’s terms.¹⁵ Many of these agreements are largely self-enforcing, in the sense that state parties’ interests in compliance by the other party or parties create incentives for them to comply. Even agreements which some modern scholars like to see as antecedents of human rights conventions, namely the Geneva Conventions on humanitarian norms in war,¹⁶ are agreements which fit the traditional

¹⁵ See Bruno Sima, ‘Reciprocity’, in *Max Planck Encyclopedia of Public International Law*: ‘From a purely formal point of view, reciprocity governs every international agreement, independently of its content, and consequently underlies the rules concerning the conclusion and entry into force of treaties, and their application, termination, amendment and modification.’

¹⁶ See, e.g., Forsythe, *supra* note 7, 21. Forsythe mentions three other ‘exceptions’ to the principle that international law did not address the relationship between the government of a state and the individual. Two of these are also cases that addressed the mutual interests of states: the situation of aliens and the minorities regime that existed in Europe between the two world wars (the minorities protected were the national minorities whose national states perceived that they had an interest in protecting them). Only the

model: they regulate the relationship between states which find themselves at war, and rest on notions of reciprocity and symmetry.

In the field of human rights, international conventions are not used as a mechanism for regulating the relationship between the states parties. In an international system that is based on horizontal relations between states and that lacks a hierarchical structure for legislation of new norms, international conventions in the human rights field are used as a mechanism for legislation of international norms.¹⁷ This does not mean that those conventions do not create a relationship between the states parties. They do.¹⁸ But this is neither their primary purpose or function.

It is important to appreciate the implications of the above description. The states parties to human rights treaties do not have an interest, as that term is generally meant, in compliance by other states with their treaty obligations.¹⁹ In normal circumstances (and there are obviously exceptions) violation by one state of its most important human rights obligations does not impede on the interests of other states. This does mean to say that states have no *concern* whether other states comply with human rights standards or not. For various reasons, some ideological, others moral or political, both governments of states and their peoples may be concerned with what happens in other countries, including violations of human rights norms. If states did not have such a concern, there would not have been human rights conventions in the first place.

This point was succinctly put by Peter J. Spiro in his article on NGOs and human rights:

State compliance with human rights norms is difficult to explain from the perspective of state interests. Unlike in other areas (including comparatively new global issues such as environmental protection and antiterrorism policies), states have no clear motivation to prefer that other states treat their own nationals in a right-respecting fashion. There are no reciprocal interests involved, nor is there any gain from co-operation. This is why human

fourth exception, the ILO conventions, may be said to constitute a real precedent for regulating human rights practices of states.

¹⁷ On the legislative function of international treaties see Alan Boyle & Christine Chinkin, *The Making of International Law* (OUP, 2007) 233-62

¹⁸ See Human Rights Committee, *General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, para. 2, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004)

¹⁹ See Sima, note 15 *supra*: 'What makes pure-bred social, human rights or humanitarian conventions differ from traditional treaties is to be seen outside the formal instrumentalities of international law: in the sociological-political circumstance that the mutual rights of the States Parties are not accompanied by any material benefits accruing to them.'

rights poses a challenge to rational actor models of international relations; game theory cannot explain why human rights norms would have any traction.²⁰

This phenomenon has implications on a number of levels. In the first place, when the concern of states with the human rights practices of other states clashes with their economic or political interests, those interests are likely to be dominant.²¹ International concern with human rights may take a back seat, or no seat at all. One only has to look at the selective way the UN's political bodies, be it the now defunct Commission on Human Rights, its successor, the Human Rights Council, or the General Assembly, deal with different countries' human rights records, in order to illustrate this point.²² Other examples, if needed, relate to the soft stance Western democratic governments take towards severe human rights violations in China.²³ Clearly their economic interests with China are more important to them than their concern with those violations. In the so-called 'war on terror' Western states have been prepared to ignore the abominable human rights practices of regimes that have co-operated in taking action favored by those states.²⁴ The human rights records of strategic states, such as Saudi Arabia and Egypt, are consistently ignored by Western liberal democracies.²⁵

²⁰ Peter J. Spiro, 'NGOs and Human Rights: Channels of Power', (2009), Research paper available at <http://ssrn.com/abstract=1324971>

²¹ See Simmons, note 13 *supra*, 122. Also see R.J. Vincent, *Human Rights and International Relations* (CUP, 1986), 136. Writing before the end of the Cold War Vincent claimed that we might expect human rights to 'surface principally in two kinds of situation: when it serves the interest of the state (the provision, for example, of a stick with which to beat the Russians) and when attention to it endangers no other interest of the state...'

²² Perhaps the most extreme recent example was the refusal of the UN Human Rights Council to adopt the proposal of the UN High Commissioner for Human Rights to establish an independent international investigation into allegations of severe violation of IHL and human rights law during the fighting in Sri Lanka, in the course of which, according to UN estimates, 7000 civilians were killed. See Human Rights Watch, *Sri Lanka: UN Rights Council Fails Victims*, May 27, 2009, available at <http://www.hrw.org/en/news/2009/05/27/sri-lanka-un-rights-council-fails-victims>

²³ See, e.g., 'Clinton Paints China Policy with a Green Hue', *NYTimes*, 21 February 2009. In response to criticism of NGOs that she was soft-pedaling on human rights issues in China during her visit to the country, Secretary of State Hilary Clinton was reported to have said that she did not want these issue to interfere with critical challenges like the global economic crisis, climate change and security concerns.

²⁴ See, e.g., Amnesty International. *Pakistan: Human Rights ignored in the 'war on terror'*, 28 September 2006, available at <http://www.amnesty.org/en/library/info/ASA33/036/2006/en>.

²⁵ See Joshua Kurlantzick, 'The Downfall of Human Rights', *Newsweek*, February 19, 2010, available at <http://www.newsweek.com/id/233914>

The lack of a real interest of states parties to human rights conventions in compliance by other states has legal implications. It is also reflected in state practice relating to provisions in such conventions which assume existence of such an interest.

The legal implications are manifest when it comes to reservations by states parties.

Under the Vienna Convention on the Law of Treaties, 1969, when a convention does not prohibit reservations, whether a reservation is acceptable or not depends on the consent of the other contracting parties. According to article 20 (5) of the Convention ‘a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.’ Experience shows that since the reservations by states parties to human rights conventions do not affect the interests of other states, the number of objections to reservations is extremely low. In General Comment No. 24, dealing with reservations, the Human Rights Committee contended with this phenomenon, after being faced with states that were appending a long list of reservations to their instrument of ratification or adherence, many of which were highly problematical.²⁶ The Committee expressed its view that

it is the Vienna Convention on the Law of Treaties that provides the definition of reservations and also the application of the object and purpose test in the absence of other specific provisions. But the Committee believes that its provisions on the role of State objections in relation to reservations are inappropriate to address the problem of reservations to human rights treaties. Such treaties, and the Covenant specifically, are not a web of inter-State exchanges of mutual obligations. They concern the endowment of individuals with rights. The principle of inter-State reciprocity has no place, save perhaps in the limited context of reservations to declarations on the Committee's competence under article 41. And because the operation of the classic rules on reservations is so inadequate for the Covenant, States have often not seen any legal interest in or need to object to reservations. The absence of protest by States cannot imply that a reservation is either compatible or incompatible with the object and purpose of the Covenant.²⁷

²⁶ *General Comment No. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant:* 04/11/94. (CCPR/C/21/Rev.1/Add.6)

²⁷ *Ibid.*, para. 17.

In these circumstances the Committee expressed the view that it was its function to determine whether a given reservation was compatible with the object and purpose of the Covenant. This view was rejected by a number of states, all permanent members of the UN Security Council.²⁸

Article 41 of the Covenant allows states parties to declare that they recognize the competence of the Human Rights Committee 'to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Covenant.' As of July 2008, 48 states had made declarations under article 41 but the procedure of inter-state communications has never been invoked. This tends to show how little interest states parties have in compliance by other states parties.²⁹

The internationalization of human rights cannot change the very nature of human rights, which remain first and foremost a domestic political, constitutional and legal issue. The state, with its monopoly over the use of force, is not only the institution that most threatens human rights; it is the only institution that can effectively protect them.³⁰ This is what Hannah Arendt was apparently referring to when she claimed that the first right of every human being is the 'right to have rights', which can only be realized when one belongs to an organized community.³¹ Michael Walzer explains that before arguing about what states should or should not do, a prior right must be recognized: 'namely, the right to have a state, or some other collective agency, that is obligated to its citizens in specific ways.' He adds: 'States serve many purposes. But some states protect rights some of the time, and no other political agency does that much.'³²

²⁸ See Observations of State Parties under article 40, paragraph 5, of the Covenant: United States of America, United Kingdom of Great Britain and Northern Ireland, *Annual Report of Human Rights Committee for 1995*, (A/50/40), Vol. I, Annex VI; France, *Annual Report of Human Rights Committee for 1996*, (A/51/40), Vol.1, Annex VI, paras. 10-11.

²⁹ The ECHR also incorporates a system of inter-states complaints. While this procedure has been used in a number of cases, it is still extremely rare. For discussion of inter-states complaints under human rights conventions see Scott Leckie, 'The Inter-State Complaint Procedure in International Human Rights Law: Hopeful Prospects or Wishful Thinking?' 10 *Human Rights Q.* (1988) 249.

³⁰ This theme has recently been developed by Charles R. Beitz, *The Idea of Human Rights* (OUP, 2009).

³¹ Hannah Arendt, *The Origins of Totalitarianism (new edition with added prefaces)* (Harcourt, 1968), 290 – 299. And see Jan Klabbers, 'Possible Islands of Predictability: The Legal Thought of Hannah Arendt', 20 *Leiden J. of Int'l Law* (2007) 1.

³² Michael Walzer, *Human Rights In Global Society. How much enforcement should international society assume?* 6 *International Politik Transatlantic Edition* (2005), 4, 7. For development of this theme see James

The intimate connection between the respect and protection of human rights and the state, and the essential right to belong to a state as a prior condition for protection of one's rights were implicitly recognized in Article 15 (a) of the Universal Declaration of Human Rights, which declares that everyone has the right to a nationality. The UDHR was adopted as 'a common standard of achievement for all peoples and all nations' and had no specific addressee which had the duty to respect and protect the rights enshrined therein. In the move to the International Covenants, which defined not only rights, but the addressees of the duty to respect and ensure those rights, namely states, it proved impossible to translate the right to a nationality into a right that is enforceable against a specific state. In the absence of a state which has the duty to respect and protect one's theoretical right to a nationality the right itself is in effect a 'non-right.'³³

Given the 'home' of human rights, namely the state, it is self-evident that the road to furthering protection of human rights must be geared towards influencing domestic politics, law and policy. Much of the recent literature on the potential or real influence of international human rights law has examined how this can best be achieved. Clearly there is no one answer that is applicable to all states and all situations. In democratic states with a vibrant civil society, and a plethora of actors who are eager and able to lobby in the political arena, providing such actors with international human rights norms and the views of international decision-making bodies, may help to legitimize their demands and to mobilize forces for change in law, practices and policies.³⁴ In other societies, in which the political system is less open, or even hostile, to domestic political pressures, outside pressure from international NGOs and foreign governments may be needed. But whatever way one looks at the matter, the purpose and function of

D. Ingram, 'What is a 'Right to Have Rights'? Three Images of the Politics of Human Rights' 102 *American Political Science Review* (2008) 401.

³³ The one general human rights convention which does recognize the right to a nationality is the Inter-American Convention on Human Rights. Article 20 (a) declares that everyone has the right to a nationality and article 20 (b) states that every person has the right to the nationality of the state in which he or she was born if he or she does not have the right to another nationality. Also see European Convention on Nationality, 1997, that entered into force in 2000. Most of the larger countries in Europe, including Russia, France, Poland, Spain, Italy, Switzerland and the UK are not parties to this Convention. The UNHCR assesses that there are about 15 million stateless people in the world: <http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=464dca3c4&query=stateless>. As of October 2009 only 37 states had joined the UN Convention on the Reduction of Statelessness, 1961.

³⁴ For development of the idea of international human rights treaties as a force for mobilizing domestic promotion of human rights see Beth Simmons, note 13 *supra*.

international human rights mechanisms should be to optimize the influence of international human rights norms on domestic politics. This will be our premise in examining the role and function of the Human Rights Committee.

2. Global Governance and Human Rights

The meaning of the term ‘global governance’ is far from clear. Various definitions have been proposed, but none of them have gained general acceptance. There are, however, certain features of the term that are common to all definitions, and it is those that are worth stressing.

First and foremost is the idea that there is a plethora of actors who play a role in the international arena, in creating norms, managing the affairs of nations and exercising control over matters that have transnational repercussions. The idea that in international law and international relations states are the only actors is no longer tenable. Alongside states, inter-governmental institutions, non-governmental organizations and institutions, private institutions and multinational corporations all play a part, of one sort or another. Second, in the absence of a hierarchical structure of governmental institutions with formal legal powers to bind all actors in the arena, it is not possible to speak of global government. Hence the term ‘governance’, which encompasses the formal and informal horizontal mechanisms that contribute to regulating, guiding and restraining the way the diverse interests of the parties in the international arena are accommodated.

There is very little discussion in the literature of how international human rights fit into this vision of world affairs. I suggest that we distinguish between a number of spaces that human rights occupies in the geography of global governance.

a. Creation of norms.

This is clearly the sphere in which there has been the most dramatic advancement, part of which has been briefly described above. Both on the universal and regional level we now have a wide range of human rights conventions. The list grows year by year as new conventions are adopted either strengthening existing norms or creating new ones. The first aspect of global governance mentioned above, namely the plethora of actors who take an active role in formulating and negotiating human rights conventions, has become

a dominant feature of ‘international human rights legislation.’ The most obvious example in recent years was the Rome Statute for the creation of the International Criminal Court, in which a coalition of NGOs played a major role in placing the establishment of an international criminal court on the international agenda, and in framing the terms of the Statute.³⁵ Other examples include the Convention on the Rights of the Child and the Optional Protocol on the Involvement of Children in Armed Conflicts and the Convention on the Rights of Persons with Disabilities.³⁶

Creation of norms is not confined to drawing up formal treaties. Numerous bodies, including UN bodies, domestic courts, international courts, treaty bodies, arbitration panels, and international NGOs are involved in interpreting norms and creating ‘soft law.’

b. Operation of human rights institutions

A range of international institutions have been established to monitor compliance with human rights standards, and in some cases to grant remedies to victims of human rights violations. These include regional human rights courts - the ECtHR, the Inter-American Court of Human Rights and the African Court of Human and People’s Rights; treaty bodies, such as the Human Rights Committee, the Committee on Economic, Social and Cultural Rights and the Committee Against Torture; political bodies, such as the UN Human Rights Council; and UN special procedures, such as the Working Group on Arbitrary Detention and Thematic and Country Special Rapporteurs or Independent Experts. These institutions are obviously part of the complex of global governance.³⁷

³⁵ See Kristie Barrow, ‘The Role of NGOs in the Establishment of the International Criminal Court’, 2 *Dialogue* (2004) 11, available at <http://www.polsis.uq.edu.au/dialogue/vol-2-1-4.pdf>; William R. Pace and Mark Thieroff, ‘Participation of Non-Governmental Organizations’ in Roy S. Lee (editor), *The International Criminal Court – The Making of the Rome Statute* (Kluwer, 2002), 391; William R. Pace, ‘The Relationship between the International Criminal Court and Non-Governmental Organizations’, in Von Hebel, Lammers and Schukking (editors), *Reflections on the International Criminal Court: Essays in Honour of Adriann Bos* (T.M.C. Asser Press, 1999), 189.

³⁶ See Claire Breen, ‘The Role of NGOs in the Formulation of and Compliance with the Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflicts’ 25 *Human Rights Q.* (2003) 453; Shamina Ahmed and David M. Potter, *NGOs in International Politics* (Kumarian Press, 2006) 184.

³⁷ For discussion of whether human rights institutions constitute a form of global governance see James. W. Nickel, ‘Is Today’s International Human Rights System a Global Governance Regime?’ 6 *Journal of Ethics* (2002) 353.

Alongside these are major human rights NGOs which sometimes have a greater impact than formal international institutions. There is a growing literature on the way these NGOs operate, what forms of accountability there are for their activities and how they influence the international human rights scene.³⁸

c. Human rights as factors in decision-making of global institutions

Human rights are first and foremost a matter for states. Human rights conventions are addressed to states and are open only to ratification by or accession of states. However, human rights should play a growing role in the operation of other bodies that have the formal or informal power to effect the enjoyment of human rights. This became an issue, of course, for the UN Security Council, when it embarked on its path of imposing obligations on states to adopt measures to combat terrorism.³⁹ It is a major issue for other international institutions, including the WTO, the World Bank, the IMF and the EU.⁴⁰ In 1999 Secretary General Kofi Annan and High Commissioner for Human Rights Mary Robinson adopted a policy that human rights be mainstreamed in all UN bodies and agencies.⁴¹ The Secretary General also appointed a special representative on the issues of human rights and transnational corporations and other business enterprises.⁴²

³⁸ See, e.g., Christine Chinkin, 'The Role of Non-Governmental Organizations in Standard Setting, Monitoring and Implementation of Human Rights', in Joseph J. Norton, Mads Andenas and Mary Footer (editors), *The Changing World of International Law in the Twenty-First Century* (Kluwer Law International 1998), 45; Claude E. Welch (editor), *NGOs and Human Rights: Promise and Performance* (UPenn Press, 2001); Shamima Ahmed and David M. Potter, *NGOs in International Politics* (Kumarian Press, 2006); Stephen Hopgood, *Keepers of the Flame: Understanding Amnesty International* (Cornell University Press, 2006).

³⁹ See, e.g., Andrea Bianchi, 'Assessing the Effectiveness of the UN Security Council's Anti-terrorism Measures: The Quest for Legitimacy and Cohesion' 17 *Eur.J.of Int'l L.* (2006) 881.

⁴⁰ See, e.g., Robert Howse & Makau Mutua, 'Protecting Human Rights in the Global Economy: Challenges for the World Trade Organization' (2000), available at <http://www.d-d.ca/english/commdoc/publications/globalization/wtoRightsGlob.html>; Holger Hestermeyer, *Human Rights and the WTO: The Case of Patents and Access to Medicines* (OUP, 2007); Willem van Genugten, Paul Hunt and Susan Mathews, (eds), *World Bank, IMF and Human Rights*, (Nijmegen: Wolf Legal Publishers, 2003)

⁴¹ See Third Interagency Workshop on Implementing a Human Rights-Based Approach, Background Paper, 'Human Rights Mainstreaming within the United Nations' (undated), available at http://hrbportal.org/?page_id=929.

⁴² In April 2009 the Special Representative presented a report to the Human Rights Council, setting out his views on the topic: *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development – Protect, Respect and Remedy: A Framework for Business and Human Rights* (A/HRC/8/5).

d. Human rights and domestic practices

As stated above the effect of international human rights standards and procedures on domestic practices of states was, and remains, the *raison d'être* of international human rights law. Human rights conventions place obligations on states and human rights courts and other bodies are concerned with the laws, policies and practices of states.

International mechanisms are in place to deal with situations in which domestic mechanisms have failed to protect rights. Hence, the fundamental principle before international human rights courts and treaty bodies that a complaint regarding violation of an individual right by a state is not admissible unless domestic remedies have been exhausted, or are unavailable.

Notwithstanding the growing importance of human rights as constraining factors in the activities and policies of international institutions and multi-national corporations the practice of states remains the fundamental concern of international human rights law. The connection between this concern and the concept of global governance is not self-evident. For while the essence of global governance relates to the international arena, and the exercise of power therein, on the *substantive* level international human rights law is concerned with aspects of state practices that mostly have no effect in that arena. However, the role of international players, international human rights institutions and international NGOs, in promoting compliance by states with their international human rights obligations, must certainly be seen as part of the loose framework of global governance. It is in this context that this paper looks at one of those institutions, the Human Rights Committee, and seeks to examine the role that body does, could and should play, in the whole global system of furthering state compliance with international human rights norms.

3. The Human Rights Committee

The Human Rights Committee is established under the ICCPR. It is made up of eighteen persons who are required to be 'persons of high moral character and recognized competence in the field of human rights'. (Art. 28 (2)). While members are nominated as candidates by their own states and elected by the states parties to the Covenant, they

serve in their personal capacity and not as representatives of their states. Members are elected for terms of four years and may be re-elected for an unlimited number of terms. At present there is one member of the Committee who has served on the Committee since its establishment in 1977 (with a short interval of two years).

Although the substantive requirement of the Covenant is that members have 'recognized competence in the field of human rights' there is no system in place for vetting candidates and making sure that they meet this requirement. In practice the election of members is based to a large extent on wheeling and dealing between states parties, who often trade their votes for support for election to other UN bodies. While the majority of members from the Western countries are either academics or presiding or retired judges, there are cases in which members from Latin American, African or Middle Eastern countries are or have been senior civil servants, presiding ambassadors of their countries or retired diplomats. In a few cases members have even been deputy ministers in their home governments. Fortunately, members with institutional ties to their own governments have never formed a significant proportion of the Committee members.

Under the Covenant itself the Committee has two functions: a. considering states reports submitted under article 40 of the Covenant; b. considering inter-state complaints under article 41 of the Covenant. No such complaints have ever been submitted. The Committee has interpreted its powers under article 40 to allow it to issue General Comments, which do not relate to specific states, but to wider issues related to reporting or to the obligations of states parties to the Covenant.

Under the Optional Protocol (OP) to the Covenant the Committee is competent to receive individual communications from persons who claim to be victims of violation of Covenant rights by states that are parties to the OP. After affording both the alleged victim and the state party concerned the opportunity to present their arguments, the Committee may express its Views on the communication.

In this paper we consider the Committee's function in considering states parties' reports.

4. States' Reports: What is it all about?

a. Legal Framework

The first international instrument that demanded reports from States on the measures they had taken to comply with human rights obligations was the International Labour Organization (ILO) Constitution, adopted at the Versailles Peace Conference in April 1919. Under the ILO Constitution, each member of the ILO agrees 'to make an annual report to the International Labour Office on the measures which it has taken to give effect to the provisions of Conventions to which it is a party' (Art. 22 ILO Constitution). The League of Nations Covenant required all mandatory powers to submit an annual report to the League's Council 'in reference to the territory committed to its charge' (Art. 22 League of Nations Covenant). A permanent commission was established 'to receive and examine the annual reports of the Mandatories and to advise the Council on all matters relating to the observance of the mandates' (Art. 22 League of Nations Covenant).

After establishment of the United Nations (UN), reports on State compliance with international human rights standards were requested by the UN Economic and Social Council (ECOSOC) as a mechanism for monitoring compliance with its recommendations. Acting on the recommendation of the UN Commission on Human Rights in August 1956 ECOSOC passed a resolution instituting periodic reporting on State compliance with human rights standards (UN ECOSOC Res 624 [XXII] [1 August 1956] ESCOR 22nd session Supp 1, 12). States were asked to submit a report every three years, in which they described human rights developments and progress. The reports were to discuss rights mentioned in the Universal Declaration of Human Rights (1948) as well as the right to self-determination. This system was amended in 1965 and States were now required to report annually in a three-year continual cycle. In the first year they were to report on civil and political rights, in the second on economic, social and cultural rights and in the third on freedom of information.

With these precedents in place it was only natural that when the UN bodies began drawing up human rights conventions in the fifties and sixties the system of states reports was incorporated. During the drafting stages of the two Covenants there was a debate on the question of the body to which such reports would be submitted. Some states favoured submission to existing UN Charter bodies, namely ECOSOC or the Commission on

Human Rights, both of which were highly political bodies made up of the representatives of states; others favoured establishment of a more professional body, along the lines of the Committee of Experts that examines reports submitted on ILO conventions. Eventually it was decided that the reports relating to the ICCPR would be submitted to a committee of independent experts established under the Covenant, while reports on the ICESCR would follow the existing model and would be submitted to ECOSOC. The latter model did last long, and while the terms of the ICESCR remain unchanged, in 1985 ECOSOC established the Committee on Economic, Social and Cultural Rights (CESCR) and authorized it to consider all State reports (UN ECOSOC Res 1985/17 [28 May 1985] ESCOR [1985] Supp 1, 15–16).

The provisions in the ICCPR dealing with the functions and purpose of the reporting procedure are laconic. After laying down the duty of states parties to the Covenant to submit both an initial report 'on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights' and subsequent periodic reports article 40 of the Covenant states as follows:

4. The Committee shall study the reports submitted by the States Parties to the present Covenant. It shall transmit its reports, and such general comments as it may consider appropriate, to the States Parties. The Committee may also transmit to the Economic and Social Council these comments along with the copies of the reports it has received from States Parties to the present Covenant.

5. The States Parties to the present Covenant may submit to the Committee observations on any comments that may be made in accordance with paragraph 4 of this article.

While States parties to the ICCPR may choose whether or not they recognize the competence of the Committee to receive and consider Communications from other States parties (art. 41 CCPR) or individuals (see Optional Protocol), they all have to comply with their reporting obligations under art. 40. Hence, the examination of States reports is the centrepiece of the Committee's functions.

States parties are obligated to report 'on the measures they have adopted which gave effect to the rights recognized herein and on the progress made in the enjoyment of those rights' (art. 40, para. 1). They have to submit their initial report within one year of the entry into force of the Covenant for them, and thereafter whenever the Committee so

requests. The Committee rather early developed a rule of periodicity (YBHRC 1980-1982, vol. II (1989), p. 297) requesting the States parties to submit further reports after a certain period of time, usually three to five years later, but the Committee may also ask for an earlier report, e. g. after particular events have taken place in the country.

In describing the Committee's function in relation to states reports article 40 of the Covenant gives little guidance. All it says is that the Secretary General shall transmit reports received from states to the Committee for consideration, that the Committee shall study the reports and 'shall transmit its reports, and such general comments as it may consider appropriate, to the States Parties.' Given this terse description of the Committee's function in studying state reports, there was clearly room for the Committee to develop its own approach as to how it perceived that function. In this section we sketch the progression of the Committee's approach on this issue.

b. Committee's Original Approach – Friendly Relations and Constructive Dialogue

The tone for the initial approach of the Committee was set at its first meeting on 21 March 1977. Welcoming the members the Temporary Chairman and Under-Secretary General for Political and General Assembly Affairs, William Buffum, declared: 'It was to be hoped that in examining reports submitted by States parties under art. 40 of the International Covenant on Civil and Political Rights, the Committee would establish a continuing and constructive dialogue with each of those States, with a view to fulfilling the obligations set out in the Covenant'. (YBHRC 1977-1978, vol. I (1986), p. 1).

The notion of a 'constructive dialogue' with states parties was adopted by Committee members without discussion. Members from communist countries, particularly Anatoly Movchan (USSR) and Bernhard Graefrath (GDR), tried to tie the 'constructive dialogue' on the reports to the general goal of enhancing cooperation and friendly relations between States.⁴³ Thus, according to the summary records of the second session (August 1977), Mr Movchan found that 'consideration should be constructive and should aim at

⁴³ Article 55 of the UN Charter states: With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

....

....

c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

strengthening friendly relations between States instead of engendering hostility. In general, application of the principles of the Charter [of the UN] should constitute the basis of the Committee's work, since all the human rights instruments which had been adopted, including the Covenants, were based on the Charter' (ibid, p. 91). Mr Graefrath also favoured a 'constructive dialogue that would help to promote cooperation between States in the field of human rights despite the diversity of systems of government and historical conditions' (ibid, p. 93).

Accordingly, para. 7 of the Guidelines on State reports, adopted on 29 August 1977, read: 'On the basis of the reports prepared according to the above guidelines, the Committee is confident that it will be enabled to develop a constructive dialogue with each of the States parties concerned in regard to the implementation of the Covenant and that the Committee's aim was to contribute to the development of friendly relations between States in accordance with the provisions of the Charter of the United Nations.' (ibid, p. 154).

Following this approach, when the first States reports were discussed (Syria, Cyprus, Tunisia, Finland, Equador, Hungary – during the second session), Committee members did not consider that it was the Committee's function to monitor compliance of states parties with their Covenant obligations. Rather the perception was that examination of state parties' reports was somehow part and parcel of the obligation of all States to establish friendly relations between themselves.

Focusing on this element enabled some Committee members to resist any attempt by the Committee to criticize States parties because of their human rights record, on the basis of the argument that this could easily lead to a confrontational rather than a cooperative atmosphere. Thus Mr Movchan (USSR) expressly stated that 'no value judgements after examining the reports' should be made (second session, YBHRC 1977-1978, vol. 1, p. 94).

During the third session (January/February 1978) it became apparent that some members were uncomfortable with this approach. The discussion now centred on art. 40, para. 4, of the Covenant and disclosed a 'sharp division of opinion among members of the Committee' (Rajsoomer Lallah, ibid, p. 174). Art. 40, para. 4, provides that the Committee, having studied the reports, 'shall submit its reports, and such general

comments as it may consider appropriate, to the States parties'. Relying on this wording, Christian Tomuschat (FRG), argued that the Committee 'should therefore prepare specific reports in respect of each State party' (p. 172). This opinion was strenuously opposed by Mr Graefrath (p. 173), who received the support of Mr Kulichev (Bulgaria) (p. 173). Mr Graefrath opined that 'the provisions of article 40 did not mean that the Committee was to submit a special report in respect of each State report.' The term 'reports' in art. 40, para. 4 cl. 2, would refer to the 'annual reports' the Committee had to submit to the General Assembly, where specific observations on certain States were inappropriate. Mr Graefrath concluded that the 'Committee was not called upon to make an appraisal or to indicate whether or not a given State had fulfilled its obligations. Nor could it say that a State had failed to fulfil its obligations or that certain national actions were contrary to the Covenant. To do so would be to go beyond its mandate' (p. 173).

While Sir Vincent Evans (UK) still supported the 'constructive dialogue approach' he did not accept the narrow view of Mr. Graefrath. Sir Vincent argued that the 'obligation under art. 40 was meaningful only if the Committee could, in cooperation with the State concerned, study and evaluate the situation and make recommendations and suggestions with a view to promoting the observance and enjoyment of human rights in that State. If the functions of the Committee were interpreted as being any less than that, it would be unable to act in the manner intended by States parties when they had adopted art. 40' (p. 173).

In its first annual report to the General Assembly, the HRC found a formula that tried to gloss over the controversy: 'It was generally agreed that the main purpose of the consideration of the reports should be to assist States parties in the promotion and protection of the human rights recognized in the Covenant. The debate of the Committee on the reports of the States parties should be conducted in a constructive spirit, taking fully into account the need to maintain and develop friendly relations among States members of the United Nations, as well as to achieve real progress in the enjoyment of human rights in States parties to the Covenant' (YBHRC 1977-1978, vol. II (1986), p. 229). In practice the Committee had never submitted a specific report on a State party after concluding discussion of the State's report. Only during the discussion members had

asked questions to get a better understanding of the situation, but no 'value judgements' (Movchan) had been made.

As evident from the view of Sir Vincent Evans quoted above, members from the Western countries did not share the narrow view of their colleagues from the Soviet bloc.

However, they did not press the issue. The name of the game during this period of the Committee's work was consensus. Hence the lowest common denominator prevailed.

The states parties were invited to send representatives to answer questions that arose from their reports, but at the end of the questioning period the Committee refrained from drawing conclusions as to whether the states were complying with their obligations or not. The Committee bowed to the view of the Soviet bloc members that assessing whether states were complying with the Covenant would turn the Committee 'into an instrument for interference in the internal affairs of States.'⁴⁴

c. Cracks in the Wall of Friendly Relations

'Neutrality' of a human rights body on the compliance of states with their human rights obligations could not have lasted. Hence it was only a matter of time before cracks in the Committee's 'non-confrontational' approach appeared.

During its sixth session in April 1979, the Committee examined the initial report of Chile, at a time when the military junta was still in power in that country. Some time before Chile submitted its report, an *Ad Hoc* Working Group on Chile, established by the Commission on Human Rights, had visited Chile, and had submitted two condemnatory reports in which it dwelled on systematic torture, disappearances and other severe human rights violations.⁴⁵ The UN General Assembly had also passed a number of resolutions condemning human rights violations in Chile. In their 'questions' to the Chilean delegation Committee members referred extensively to the reports of the *Ad Hoc* Working Group in order to back up claims that Chile was violating provisions of the Covenant. Even members from the Soviet bloc, who in principle opposed the notion that

⁴⁴ 231st meeting, page 399.

⁴⁵ See Progress report of the Ad Hoc Working Group established under resolution 8 (XXXI) of the Commission on Human Rights to Inquire into the Present Situation of Human Rights in Chile, 4 September 1975, A/10285; Report of the Ad Hoc Working Group established under resolution 8 (XXXI) of the Commission on Human Rights to Inquire into the Present Situation of Human Rights in Chile, 4 February 1976, E/CN.4/1188.

the Committee was empowered to make findings of violations by states parties, felt free to inform the Chilean delegation that many actions by its government involved violation of the Covenant. Thus, Mr Graefrath stated that '(t)here was abundant evidence available to world public opinion of serious violations of human rights in Chile' (YBHRC 1979-1980, vol. I (1988), p. 17). He added that while 'the Committee was not a fact-finding body, that did not mean that it should turn a blind eye to the facts,' and went on to decry the fact that the state party's report ignored the serious findings of the *Ad Hoc* Working Group. (Ibid.) Mr Movchan stated that 'in the view of the international community, there was not a word of truth in the report submitted by Chile; it was a hypocritical attempt to conceal its policy of terror and injustice' (ibid, p. 23). Other members were also highly critical of the situation in Chile, Mr Lallah (Mauritius) speaking of 'serious violations' (ibid, p. 28)

Members of the Chilean delegation had obviously done their home-work and were well aware of the prevailing approach of Committee members towards article 40. Hence, the condemnatory statements by members evinced the response by the head of the Chilean delegation that it was not for the Committee or for any one of its members to express an opinion as to whether Chile was complying with the Covenant. He argued that the Committee had no power under article 40 to decide whether Chile was in compliance with the Covenant.

Despite the condemnatory tone of many of the members in questioning the Chilean delegation, the Committee did not reach any conclusions regarding compliance by Chile with substantive provisions of the Covenant. Rather, after the Chilean delegation had responded to questions posed by members, in an unprecedented move the chairperson announced that consideration of matters arising out of article 40 would be delayed to a further session. Two weeks later the Chilean delegation was invited back to the Committee. The chairperson read out a statement in which the Committee informed the state party that having studied its reports and 'taking into account the reports of the *Ad Hoc* Working Group and the resolutions of the General Assembly of the United Nations on the human rights situation in Chile', it finds 'that the information provided on the enjoyment of human rights set forth in the Covenant and the impact of the state of emergency is still insufficient.' The Committee invited the state party to submit a further

report in which it would furnish more information on the restrictions applicable to rights and freedoms during the prevailing period of the state of emergency.⁴⁶

The approach of Committee members to Chile's report is revealing. On the one hand, it was quite clear to all members that they could not pretend that the military regime in Chile was complying with its obligations under the Covenant, especially in light of the serious reports by the *Ad Hoc* Working Group and the resolutions passed by the General Assembly. They therefore used the question period as an opportunity to give clear expression to their view that Chile was responsible for severe violations of Covenant rights.⁴⁷ On the other hand, the Committee was not prepared to reach a formal decision that the state party was violating certain Covenant rights. All that members could agree on was that Chile's report did not reflect the real situation in the country, and that the state party had therefore to submit another report. The implication seemed to be that members regarded the duty to report as an end in itself, and not a mechanism for monitoring compliance by a state party with its substantive obligations under the Covenant.

The manner in which the Committee dealt with Chile's report was somewhat of a watershed in the development of the Committee's working methods under article 40. Just over a year after consideration of Chile's report, the Committee devoted two meetings to review of its methods of work in considering state parties' reports under article 40. There was a wide range of views among members of the Committee on the interpretation of article 40 and definition of the Committee's mandate in considering reports. Despite the way the Committee had approached the report from Chile, members appeared to agree that article 40 was not a vehicle for condemnation of a state for violations of the Covenant. Only one member (Birame Dieye from Senegal) 'wondered whether it was possible to make a general assessment without at the same time noting certain individual violations.'⁴⁸ Even members who had taken quite an active stance in the Chilean case maintained that the 'Committee's sole mandate was to assist the States parties in

⁴⁶ In response the Foreign Ministry of Chile issued a statement claiming that Chile had submitted its report in accordance with the requirements of article 40. Nevertheless, Chile did subsequently submit a periodic report.

⁴⁷ See, e.g., the statement by Committee Member Movchan (USSR): 'In view of the continuing mass violations of human rights in Chile, it was the Committee's urgent duty to seek to bring an end to such violations and to uphold the provisions of the Covenant.': 128th meeting, p. 23, para. 62.

⁴⁸ 231st meeting, p. 401, para. 33.

promoting universal respect for, and observance of, human rights and freedoms.⁴⁹ In an obvious attempt to move the Committee forward without breaking with the prevailing consensus Christian Tomuschat argued that the Committee 'was not competent to make any condemnations, but that it should nevertheless be able to express concern.'⁵⁰ This preference for 'expressions of concern' rather than outright condemnations has been reflected in the rhetoric of the Committee since it began adopting Concluding Observations in the early nineties.

The Committee debates on the nature of its functions under article 40 took place during the 10th and the 11th session (July and October, 1980). There was clear disagreement between those who felt the Committee had to fulfil a more active monitoring role and the Soviet bloc members, who still held out for the 'friendly relations' approach. Once again, however, the consensus-seeking philosophy prevailed. In its 'Statement on the Duties of the Human Rights Committee under Article 40 of the Covenant' (YBHRC 1981-1982, vol. II (1989) p. 296) all the Committee could agree upon was the nature of 'General Comments.' The Committee, in formulating such General Comments would be guided by the following principles: the General Comments should be addressed to the States parties, they should promote co-operation between States parties in the implementation of the Covenant, they should summarize experience of the Committee as gained in considering State reports, they should draw the attention of States parties to matters relating to the improvement of the reporting procedures and the implementation of the Covenant, and they should stimulate activities of States parties and international organizations in the promotion and protection of human rights. While this statement did not support the view that the Committee should (also) address specific reports to each State party, it did at least imply that the examination of reports could not be understood merely as a means of establishing friendly relations between States, but was tied to the implementation of the Covenant and the promotion and protection of the rights enshrined therein. Besides, the Committee's agreement on the statement was reached on the understanding that it would be 'without prejudice' to the further consideration of the Committee's duties under art. 40, para. 4, of the Covenant.' Therefore it was justified to

⁴⁹ Tomuschat, 232nd meeting, p.406, para. 38.

⁵⁰ Ibid., para. 40

refer to the statement as ‘a compromise document’ (Julio Prado Vallejo, YBHRC 1981-1982, vol. I (1989), p. 47) that left a lot to be desired by some members. Nevertheless, it was generally seen as a reasonable basis for the Committee's work.

The divergence of views among Committee members could not be suppressed. It re-emerged unfailingly when, at the next (12th) session, the topic ‘Consideration of Reports Submitted By States Parties under Article 40 of the Covenant’ was discussed again (YBHRC 1981-1982, vol. I (1989), p. 82 et seq.). A new Committee member, Felix Ermacora (Austria) showed clear misgivings with the consensus agreed upon at the previous session. In his opinion ‘the General Comments should be directed, first, to the specific reports of States parties and, secondly, to the development of uniform standards in the implementation of the provisions of the Covenant’ (ibid, p. 83). Similarly, Christian Tomuschat doubted whether the Committee could confine itself to General Comments or whether it was required to make specific references to specific States (ibid, p. 84). Taking the opposing view again, Bernhard Graefrath stood by his position that ‘the General Comments should refer to States parties in general rather than individual States’, but the consensus would ‘not exclude further consideration of the interpretation of art. 40, paragraph 4, of the Covenant’ (ibid, p. 88).

The discussion on this topic continued at the 13th session (July 1981). During this session the first five General Comments were to be adopted (see YBHRC 1981-1982, vol. II (1989), p. 298 et seq.) Some members opined that art. 40, para. 4, of the Covenant demanded that the Committee draft its reports on particular States before turning to General Comments (YBHRC, 1981-1982, vol. I (1989), p. 166). Birame Dieye (Senegal) strongly argued that it would obviously not be right for the Committee ‘to set itself up as a court of certain malefactors with penalties, but it must be realized that it was its duty, under art. 40 of the Covenant, to address any general remarks if considered appropriate to States parties, which in a way was tantamount to supervising the implementation of the Covenant by States parties. In order to carry out that task properly, it should not confine itself to making General Comments which each State would only heed in so far as it saw fit; it should also make individual comments, as it had in the case of Chile. The Committee should, however, avoid treating certain States too harshly, since no régime could pride itself to being the champion of human rights’ (ibid, p. 164). Waleed Sadi

(Jordan) mentioned the way the Committee had dealt with the report of Chile and asked whether when the Committee unanimously believed that a particular State party was not respecting a specific provision of the Covenant, it could not address General Comments on that particular point to that State. (ibid, p. 163). Again, Bernhard Graefrath held to his view that 'there was no provision of the Covenant which authorized the Committee to address General Comments to a particular State party.' Chile was not an example to the contrary as its report had not given rise to General Comments; the Chairman, on behalf of the Committee, had only read out a statement requesting the government of Chile to submit a new report (ibid, p. 165).

Gradually the disparity grew between the type of questions posed to the delegations and the theory that it was not the duty of members to reach findings regarding violations by state parties. Members patently used their right to pose questions as a means of conveying to the state their opinion that it was violating provisions of the Covenant. In at least one case, in which it was only too clear that behind the questions lay serious criticism of the state's actions, one Committee member felt the need to preface his critical comments by expressly stating that all he was doing was asking questions. During consideration of Romania's report in 1979, a dark period during the Ceausescu dictatorship in Romania, Rajsoomer Lallah prefaced his questions by stating that it 'would be unhelpful at the present stage for members of the Committee to make individual comments on the report other than those designed to obtain further information with a view to assisting the Government in its implementation of the Covenant.'⁵¹ He added that his comments should be 'understood in that light, and not as an expression of views on the merits or demerits of the Government's legislation.'⁵² Mr. Lallah then proceeded to raise searching questions about control of political thought, the death penalty for a range of crimes, the number of persons subjected to certain forms of psychiatric treatment, telephone taps, and loss of nationality for leaving the country. The condemnation implied in Mr. Lallah's questions was obviously so glaring that after he had concluded his statement the chairperson saw fit to emphasize that, as Mr. Lallah himself had stated, his 'comments were advanced for the sole purpose of obtaining

⁵¹ 136th meeting, p. 60, para. 1

⁵² Ibid.

additional information from government representatives, and did not come within the meaning of article 40, paragraph 4, of the Covenant.⁵³ (namely General Comments – D.K).

A further stage of development was reached, when, for the first time, at the 20th session (October/November 1983) a periodic report of a State party (Yugoslavia) was considered. Members now took the floor at the end of the discussion in order to express some general remarks on the conduct of the debate and the way the State delegation had responded to the written and oral questions (YBHRC 1983-1984, vol. I (1991), p. 372 ff.).

The same procedure was followed by members after the consideration of the second report of the GDR at the 22nd session in July 1984 (ibid., p. 541 ff.), and was also applied at the occasion of the consideration of Panama's initial report (ibid., p. 495 f.). At this session the Committee generally agreed on the approach and procedure for consideration of second periodic reports which were to be examined at three meetings; the last half hour of the 3rd meeting should always be reserved for final comments by members (ibid., p. 551 et seq.)⁵⁴

From the records themselves it is clear that the original idea of final comments by members was that these comments would address adequacy of the state party's reports and the nature of the 'dialogue' that had taken place between the state party's delegation and Committee members.⁵⁵ Once again consideration of Chile's report was a catalyst for change.

The Committee considered the second periodic report of Chile in 1984. At the end of the consideration of the report, after the Chilean delegation had provided members with answers to their questions, members were given the opportunity to express 'general observations.' As noted, this procedure had previously been used during examination of periodic reports in order to allow members to comment on the nature of the report and the dialogue that had taken place. However, in this case, a few members used the opportunity to state in no uncertain terms that Chile was not complying with its obligations under the Covenant, especially in relation to article 25. Torkel Opsahl even

⁵³ Ibid., p. 61, para. 11

⁵⁴ Also see 8th Annual Report of the HRC, YBHRC 1983-1984, vol. II (1992), p. 548; Th. Buergenthal, 'The UN Human Rights Committee', 5 *Max Planck Yearbook of United Nations Law*, (2001), 341, 351.

⁵⁵ See, e.g. the final comments after consideration of the periodic reports of Yugoslavia (Yearbook, 1983-1984, p.373-373) and of the GDR (ibid., p. 543).

saw fit to state that the Committee would have to 'consider how it intended to reflect those views in its report in accordance with its functions under article 40 of the Covenant.'⁵⁶ In the end, this matter did not seem to generate much discussion in the Committee. In its Ninth Annual Report the Committee reported on consideration of Chile's report, and included a section entitled 'General observations' in which it stated that members of the Committee had pointed out that the situation of human rights in Chile remained serious, and mentioned their particular concerns.

While substantive 'General observations' of Committee members did not become standard practice after consideration of Chile's periodic report, within a short time such observations began to catch on, especially in relation to 'problematic countries', such as the USSR and the Bylerussian SSR. Of course, when it came to these countries, the general observations of members were mixed. Alongside the critical remarks of members from the Western democracies, one finds members from Communist countries expressing regret that 'the dialogue had been hampered by politically motivated statements which did not advance the Committee's discussions.'⁵⁷

Beginning in 1985, the chairperson began inviting members to make general observations at the end of the consideration of each state party report. These eventually became known as 'concluding observations'.

The practice of allowing general or concluding observations by individual Committee members was not a mere technical change. It signified a move in a direction quite different from that perceived as the object of consideration of state reports during the initial period of the Committee's work. Clearly, such observations implied that the members' task was to monitor implementation of the Covenant by states parties. Such monitoring included expressing an opinion on whether or not the state was complying with its obligations.

As long as the Cold War continued and the Committee stuck steadfastly to its tradition of consensus, there was no way to proceed even further and to turn members' general observations into conclusions of the Committee itself. However, soon after the dramatic changes in global politics the Committee took the next step.

⁵⁶ 549th meeting, p. 19, para. 43.

⁵⁷ See the remarks of Mr. Graefrath (GDR), in general observations on USSR report, 570th meeting, p. 114, para. 48.

d. The End of the Cold War and the Move to Monitoring Compliance

After the dramatic changes in global politics and the dissolution of the Soviet Union, the way was paved for further changes. In March, 1992, the Committee was scheduled to consider the state report of Algeria. A short time before consideration of the report the army had staged a coup, deposed President Chadli Benjedid, cancelled a second round of parliamentary elections in order to prevent accession to power of the Islamic Salvation Front, and declared a state of emergency. These events were not reflected in Algeria's report, which had been submitted in April 1991.

The day before consideration of the Algerian report the Committee decided that 'comments would be adopted reflecting the views of the Committee as a whole at the end of the consideration of each State party report.' (Report of the Human Rights Committee, General Assembly, Official Records, Forty-seventh Session Supplement No. 40 (A/47/40), para. 45). These comments would not replace the general remarks of individual members but would be an addition (YBHRC 1991/92, vol. I (1995), p. 147 et seq., 153 et seq.). The first time this procedure was implemented was after consideration of the Algerian report. Much of the discussion with members of the Algerian delegation had revolved around the events that occurred after submission of the report, and this was reflected in the Comments submitted to the State party. In an unprecedented move, in these Comments the Committee expressed its concern regarding suspension of the democratic process, the high number of arrests and 'the abusive use of firearms by members of the police in order to disperse demonstrations.' (Ibid., para 297). It recommended that Algeria 'put an end as promptly as possible to the exceptional situation that prevails within its borders and allow all democratic mechanisms to resume their functioning under free and fair conditions.' (Report, para. 299).

The Committee's 16th Annual Report summarized the new procedure of Concluding Comments as follows: 'Such comments were to be embodied in a written text and dispatched to the State party concerned as soon as practicable before being publicized and included in the annual report of the Committee. They were to provide a general evaluation of the State report and of the dialogue with the delegation and to underline positive developments that had been noted during the period of review, factors and

difficulties affecting the implementation of the Covenant, as well as specific issues of concern regarding the application of the provisions of the Covenant. Comments were also to include suggestions and recommendations formulated by the Committee to the attention of the State party concerned' (YBHRC 1991/92, vol. II (1995), p. 275).

Since the new procedure was immediately put into effect, 'comments of the Committee' were discussed (at the 44th and 45th session in public meetings!) with regard to all States reports, whether initial or periodic, which had been discussed during the session, namely Algeria (YBHRC 1991/92 vol. II p. 306), Columbia (ibid., p. 319), Belgium (ibid., p. 323), and Yugoslavia (ibid., p. 328). In the Committee's discussions Nisuke Ando (Japan) had proposed that 'recommendations must be specific, since their proposal under article 40 of the Covenant was to encourage ongoing dialogue with the State party. The concluding observations should reflect the Committee's evaluation of the report and the State party's replies to questions' (YBHRC 1991/92, vol. I, p. 154). Nevertheless, the recommendations of the Committee were rather general and broad. This deficiency essentially remains until today, though by a later change of the format of the Committee's concluding observations (as the comments of the Committee are now called) the recommendations nowadays immediately follow the concerns expressed by the Committee and are expressed in stronger wording ('the State party should...').

Since the institution of concluding observations by the Committee in 1992, the system has been reviewed many times and a number of significant changes have been introduced. Initially the concluding observations of the Committee did not replace the observations of individual members, who retained the right, at the end of the consideration of a state party's report, to express their own observations. This led in some cases to different approaches by Committee members, and in other cases even to contradictory opinions on whether certain policies or actions of a particular state were compatible with the Covenant. The Committee soon realized that individual concluding observations had become superfluous. Without a formal decision on the matter, the practice of individual observations was abandoned and replaced entirely by the concluding observations of the Committee itself.

The original format of the concluding observations involved division into a number of sections, which included 'Principle subjects of concern' and 'Suggestions and

Recommendations.' At first the Suggestions and Recommendations were rather general, but later they generally took the form of recommending steps to address the matters raised in 'Principle subjects of concern.' This led to unnecessary repetition and the Committee decided to combine matters of concern and recommendations. Thus the format adopted, and employed until today, is a section dealing with the concerns and the steps that should be taken to address them.

Even the rhetoric of the Committee underwent a subtle change. While the initial approach was to phrase recommendations with the term 'The Committee recommends', some members felt somewhat uneasy when the substantive recommendation involved a step which the state party was clearly obligated to take, such as limiting the offences subject to the death penalty to the most serious crimes,⁵⁸ or undertaking a systematic and impartial investigation into all complaints of ill-treatment and torture.⁵⁹ Thus the Committee began to differentiate between clear statements of actions which it was of the opinion that the state party was obligated to take under the Covenant, and recommendations of mechanisms the Committee felt would assist the state in complying with its obligations.

The impact of the change in the very philosophy of the Committee, which now clearly saw its role in considering state parties' report as a monitoring role, was not restricted to the important institution of concluding observations. It also manifested itself in the following ways:

1. One of the issues which had concerned the Committee from early on was the failure of some states to submit initial reports, and the huge delay by other states in submitting periodic reports. The Committee employed various methods to pressure recalcitrant states to submit their reports, mainly by members of the Bureau meeting with members of the UN missions of those states and trying to impress upon them the importance of the state's meeting its obligations. While these methods of pressure were successful in some cases, many states failed to respond and remained oblivious to their reporting obligations. In March, 2001 the Committee amended its Rules of Procedure to allow for it 'to examine...the measures taken by the [non-reporting] State party and to give effect to the

⁵⁸ See Concluding Observations on India, 04/08/97, CCPR/C/79/Add.81, para. 20

⁵⁹ See Concluding Observations on Georgia, 05/05/97, CCPR/C/79/Add.76, para. 26

rights recognized in the Covenant...'⁶⁰ If the state concerned failed to submit a report and to send a representative to the session set down for examination of the situation there by the Committee, the Committee could proceed to draw up provisional concluding observations which would be submitted to the state party for its comments.

Examination of the situation in a state that had not submitted a report is not within the express mandate of the Committee under article 40. As noted above, the only mandate of the Committee under that provision is to study state reports and to 'transmit its reports, and such general comments as it may consider appropriate, to the States Parties.' When the original proposal for dealing with non-reporting states was discussed, some members expressed their opinion that in the absence of a state report the Committee did not have a mandate to discuss compliance of that state with the Covenant. These members were prepared to go along with the new rules of procedure, provided they were seen as a means of inducing states to submit their reports, which, those members argued, could be regarded as legitimate action by the Committee. As a result, the original amended rules left vague what would happen if the state party did not respond to the provisional concluding observations. There was no provision which allowed the Committee to adopt the provisional observations as final observations.⁶¹ However, in August 2003, after the method had been used in respect to one state, which failed to respond to the provisional concluding observations, the Committee amended its rules of procedure. The amended Rules now state expressly that the provisional concluding observations may be replaced by final ones, which shall be communicated to the state party and made public.⁶² This provides the most dramatic illustration of the change in the way the Committee perceives its function. Whilst it originally worked on the assumption that its only function was to study states parties' reports, without making any 'value judgment' about states' compliance with their obligations, the Committee now monitors the compliance of states parties that have not even submitted a report.

2. As mentioned above the Committee has since 1992 seen fit to include in its concluding observations recommendations for state action required to ensure compliance with

⁶⁰ Rule 70, Rules of Procedure of the Human Rights Procedure, 22 September 2005, CCPR/C/3/Rev.8

⁶¹ See Rule 69A, Rules of Procedure of the Human Rights Procedure, 24 April 2001, CCPR/C/3/Rev.6

⁶² See Rule 70, para.3, Rules of Procedure of the Human Rights Procedure, 22 September 2005, CCPR/C/3/Rev.8

Covenant obligations. Originally the Committee expected to receive information on implementation of these recommendations in the state party's subsequent periodic reports. In an attempt both to streamline the procedures and to induce state parties to address the matters of concern to the Committee and its recommendations, it decided in 2001 to institute a new procedure. According to this procedure, at the end of each set of concluding observations, a state party may be requested by the Committee to inform it within a stipulated period of time (generally one year) what action it has taken to address the concerns of the Committee or to implement specific recommendations.⁶³ The Committee decided that information would not necessarily be requested from all reporting states, but that it would 'focus in particular on the urgency of the concern addressed to the State party, as well as the State party's ability to take remedial action in a short time frame.'⁶⁴

3. Finally, in the same set of amendments to its Rules in which it made provision for dealing with non-reporting states and for requesting information on steps taken within a stipulated period, the Committee decided to appoint one of its members as Special Rapporteur for Follow-Up on Concluding Observations. The task of this rapporteur is to follow-up on compliance by states parties with requests of the Committee for the information requested by the Committee within the stipulated time and to report to the Committee on his or her findings.

The above developments reveal the radical change that has come about in the function of the reporting procedure, as perceived by the Human Rights Committee itself. From a body that was reluctant to make any findings on whether a reporting state was complying with its Covenant obligations or not, it has become a body which sees its function as monitoring state compliance with the Covenant, and trying to make sure that when it finds that states are not complying it will inform them of the steps required to bring them into compliance and will monitor whether they adopt these steps or not. The Committee considers that its function is not only to locate 'problematical' areas and to assist states in finding ways to comply with the Covenant, but to exert pressure on states to comply with their obligations. While this monitoring function is generally carried out through the

⁶³ This procedure is covered by Rule 71, para. 5, which states that the Committee may request a state party to give priority to such aspects of its concluding observations as it may specify.

⁶⁴ See Annex III, Report of the Human Rights Committee for 2001-2002, (A/57/40), Vol.1, p. 153.

reporting process, and the examination of state parties' reports, it is not totally dependent on that process. The function has a life of its own and will be performed even when a state party fails to meet its reporting obligations.

5. Monitoring Compliance and Constructive Dialogue: Do they go together?

a. Constructive dialogue as a means of monitoring

The present writers are convinced that the progression in the Committee's working methods under article 40 has been positive. Submission of states parties' reports and appearance of the representatives of the states parties to answer questions relating to their states' human rights practices creates a system of international accountability for states' human rights practices and policies. This in itself has some positive value.

The Committee's function is clearly to monitor states parties' compliance with the Covenant. There is not much point to the reporting duties of state parties and examination of the reports by the Committee unless they are seen in this light. The Committee should consider whether or not a state is complying with its obligations under the Covenant and should where possible express its opinion on the measures or steps required to ensure compliance. The questions in our mind are therefore not whether the direction is the right one, nor whether this process was indeed contemplated by article 40 of the Covenant. They are 1. whether the theory and practice of the Committee are best-suited to this function, given the various constraints of the system itself and the institutions involved; and 2. given the proliferation of bodies involved in monitoring compliance, what niche it is that the Committee should occupy. This depends first and foremost on its relative advantages, when compared to other institutions or organizations. It is worthwhile dwelling on some of the more important constraints that face the Committee's work. As we have mentioned, the Committee originally perceived its role as one of conducting a 'constructive dialogue' with states parties. We have shown that the notion of 'constructive dialogue' was developed as part of a philosophy that regarded the whole idea of international human rights and international human rights institutions as part and parcel of the policy of friendly relations between nations. The real motive behind this philosophy was to prevent international monitoring of compliance with human rights norms, mainly by states which had very good reason to avoid monitoring of

their own human rights records. Given the premises that the function of the Committee is indeed monitoring compliance, and that such monitoring must be aimed at having an effect on domestic political and legal processes, does the idea of constructive dialogue retain any force?

It seems to us that there are two conceivable arguments in favour of retaining some notion of constructive dialogue between Committee members and representatives of states parties. Firstly, one may argue that despite the obvious abuse and misuse of the concept, the idea of promoting friendly relations between nations should still have a place in the work of the Human Rights Committee. Secondly, and more importantly in our mind, one may argue that such dialogue is the most effective way of promoting enforcement of Covenant rights by states parties.

As to the first argument. The Human Rights Committee is not an organ of the United Nations. It is an independent treaty body, whose functions must be determined in the light of the object and purpose of the specific treaty under which it was created, namely, the International Covenant on Civil and Political Rights. The object and purpose of the Covenant are clear: they are, in the words of the Preamble 'to promote universal respect for, and observance of, human rights and freedoms...' The functions of the Committee must be geared towards achieving this object and purpose.

When seen in this light, the State reporting procedure should not be regarded as part of the diplomatic game. One would hope that the work of the Human Rights Committee does not stir up hostility between States, but it should not be defined as a mechanism for furthering friendly relations between states. Unfortunately, until the beginning of the 1990s, the Committee's work was highly politicized. States parties, with the effective help of a few Committee members, could hide behind the veil of 'friendly relations' so as to prevent monitoring of their abysmal human rights records. Only when the particular regime was anathema to the Soviet bloc, as in the case of Chile, was this veil lifted. Fortunately, that period has ended and the influence of the political interests of governments on the positions taken by Committee members has waned. To the extent that it does exist, it is kept discrete.

The more important argument about the possible effectiveness of constructive dialogue rests on a number of assumptions, some of which are of dubious validity. The first

assumption is that the governments of state parties that have joined the Covenant and have submitted a report are genuinely interested in improving compliance with Covenant rights. Many states that join the Covenant or other human rights instruments do indeed do so with the sincere intention of making an attempt to comply with their obligations or at least of binding future governments that may be tempted to violate those obligations. However, it is clear that other states do so for other reasons, mainly concerned with gaining international legitimacy.⁶⁵ Some research tends to show that adherence of such states to human rights conventions may even serve as cover to allow them to increase repressive measures.⁶⁶ Decision-makers in states of the latter kind are generally indifferent to the question of whether their policies and actions are compatible with their Covenant obligations. Their representatives will blatantly deny that state authorities are involved in torture or systematic cruel, inhuman or degrading treatment and punishment; unlawful killings; arbitrary detentions and other gross and systematic violations. They will try to cover up severe human rights violations, and will use every argument to justify government policies and actions that are clearly incompatible with Covenant rights. They do not regard consideration of their report as a mechanism to assist them in complying with their Covenant obligations, but as an exercise in public relations, whose object is to get past the Committee with as clean a slate as possible. In some cases of countries ruled by dictators or tyrannical regimes, members of the state's delegation during consideration of its report are not free to answer the questions posed by Committee members as they see fit. They either avoid answering questions or provide answers that are manifestly untrue. Speaking of constructive dialogue with the delegations of such states is meaningless. There is little dialogue at all, let alone constructive dialogue.

Another assumption is that the persons with whom the 'constructive dialogue' is being held, namely the persons (generally civil servants) sent to represent their states before the Committee, indeed represent the state in any meaningful way, and that by persuading them that the state is not complying with its obligations the Committee can influence state policy or practices. In some cases senior civil servants who are persuaded in the

⁶⁵ For discussion of the varied reasons why states ratify human rights treaties see Simmons, *supra* note 13, chapter 3; Stephen D. Krasner, *Sovereignty: Organized Hypocrisy* (Princeton U. Press, 1999), 121-123.

⁶⁶ Hafner_Burton and Tsutsui, at 1383-84; and Oona A. Hathaway, "Do Human Rights Treaties make a Difference?" 111 *Yale Law Journal* (2002) 1935, who shows that in some cases adherence to a human rights treaty has a negative effect on compliance with human rights standards.

course of ‘dialogue’ that policies, laws or practices should be changed, may have both the will and the power to initiate political processes that could lead to change. This is unlikely to be the case, however, when the pro-violation constituencies in the society are strong;⁶⁷ when, as is often the case, the issues involved are highly contentious in the domestic political arena of the state involved, or when the very policies or practices which the Committee finds objectionable enjoy wide political support in the country involved. Dialogue in such cases is often futile.

As we have seen above, the notion of ‘constructive dialogue’ was originally developed as part of a Cold War strategy by countries of the Soviet bloc of presenting the purpose of states’ reports as promoting friendly relations among nations. The object of this strategy was to *prevent* monitoring a state’s human rights record, rather than to promote the state’s compliance with its human rights obligations. The Cold War ended, but the term was retained. There are, however, indications that the Committee has begun the process of detaching itself from this rhetoric. In its latest *Consolidated guidelines for State reports* the Committee abandoned use of the term ‘constructive dialogue’ and replaced it with the term ‘constructive discussion’. While the change in terminology might seem purely semantic, it reflects an attempt to abandon the notion of ‘constructive dialogue’ as the be all and end all of the process.⁶⁸ On the other hand, on the website of the Human Rights Committee, the section on guidelines for state reporting still refers to ‘constructive dialogue’.⁶⁹

More importantly, even while retaining the notion of ‘constructive dialogue’ or ‘constructive discussion’, the Committee now clearly perceives its role as one of monitoring states’ compliance with their Covenant obligations. This raises a number of issues that require discussion.

The objections expressed above to the rhetoric of constructive dialogue should not be taken to imply that the discussions between the Committee and delegations of states parties should not be conducted in a constructive way. Our fundamental premise is that

⁶⁷ On the place of pro-violation constituencies in preventing compliance with human rights standards see Cardenas, *supra* note 12, 27- 31.

⁶⁸ On the other hand in the *Concept Paper in the High Commissioners’ Proposal for a Unified Standing Treaty Body* published in March 2006. (HRI/MC/2006/2), the High Commissioner still presents „constructive dialogue“ as the object of consideration of states parties reports by treaty bodies.

⁶⁹ <http://www2.ohchr.org/english/bodies/hrc/workingmethods.htm>

if the monitoring process is to be effective, it must be used in order to have an influence in the domestic political and legal systems of the states whose reports are being considered. Given this premise the Committee cannot afford to be seen as a body which is antagonistic to the state involved and insensitive to the political and social constraints of the particular society. The question is whether in this context there is still place for some kind of 'constructive dialogue' or 'constructive discussion', and if so, what this implies.

Our fundamental premise that the purpose and function of consideration of reports should be to maximise the chances of influence on domestic politics and law has a number of implications. In the first place, there are significant differences between states on this issue. In some cases, mainly of democratic or partially democratic regimes which are interested in smoothing out issues in which there may be a discrepancy between their domestic legal system and the requirements of the Covenant, a dialogue with the civil servants who represent the state may have some influence on later proceedings in that state. In other cases, especially those of repressive regimes in which the persons who appear before the Committee are unlikely to be in a position to have any influence on decision-making in that state, the exchange with the delegation generally takes the form of a boxing match, rather than a dialogue. A *dialogue* with the delegation in such cases is futile.

The treaty body system rests on an assumption of equality between states. This sometimes leads to ludicrous situations, in which the same amount of time is spent considering the reports of Lichtenstein, with a population of approximately 35,000 people, Monaco, with a population of 33,000, and India, with a population of over one billion people. In the present context the implications of this assumption is that it would not be acceptable to adopt two different forms of considering states' parties reports, depending on the assessment of whether a meaningful dialogue of some sort with the state party's delegation is feasible or not. The procedure adopted has ostensibly to be the same for all states. This means, of course, that either the Committee goes through the motions of a dialogue with all states parties, or it abandons it altogether. We return to this issue below.

Another implication of the ‘domestic effect’ premise is that the ‘state’ cannot be regarded as a monolithic body, with one institution capable of making decisions on questions of human rights. Within the executive branch of government itself, there is often a struggle between pro-violation forces and forces interested in greater compliance with international human rights norms. This is especially the case in issues of security and public order, in which formidable institutions, agencies and individuals within the executive branch of government often resist attempts by other agencies to change laws, policies and practices in the name of international human rights norms.⁷⁰ Furthermore, within parliament itself there may be pro-violation and pro-compliance factions. The latter may be interested in challenging legislation and government policies that are incompatible with international human rights standards. In many countries, the courts play an important role in furthering human rights and there is a growing tendency in domestic courts to rely on international human rights law and decisions or views of international human rights tribunals or bodies. Finally, of course, in countries with thriving civil societies there are likely to be NGOs, labor unions and other groups that may mobilize to promote specific or general human rights issues. While the formal ‘exchange’ is between Committee members and members of the state party’s delegation, that exchange, whether in the form of a dialogue or a boxing match, cannot be directed solely towards the government of the state involved. It must aim to take into account disaggregation of the state into various elements, which do not necessarily share the same interests or perspectives. Dialogue with representatives of the government is not always compatible with this aim.

b. Enter Universal Periodic Review (UPR)

In April 2006 the UN General Assembly decided to establish the Human Rights Council, which would replace the Commission on Human Rights (A/Res/60/251). In this resolution the GA also decided that the Council should

Undertake a universal periodic review, based on objective and reliable information, of the fulfilment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States; the review shall be a cooperative mechanism, based on an interactive dialogue, with the full involvement of the country

⁷⁰ See Cardenas, *supra* note 12, 27-32.

concerned and with consideration given to its capacity-building needs; such a mechanism shall complement and not duplicate the work of treaty bodies;

As can be seen this resolution expressly states that UPR shall be based on an ‘interactive dialogue’. The process began operating in April 2008 and some 80 states have so far been subject to review. There are clear differences between the process of review by the highly political Council and the professional treaty bodies. This is reflected in the records of the discussions with states under review, in which the political aspects of questions when dealing with loaded situations (such as Israel and the Democratic Republic of Korea (North Korea)) are glaring. As opposed to the procedure before the treaty bodies, the procedure before the Council does indeed seem to be based on interaction between the representatives of states and the delegation of the state under review. The Report of the Working Group that reviews the state simply lists the concerns expressed by different states and the replies provided by the state under review. However, the Report also includes either recommendations that enjoy the support of the state under review, or recommendations that are to be examined and responded to by the state under review. In the latter case the Report states that the response of the state will be included in the outcome report of the Human Rights Council. The Human Rights Council passes a formal resolution on the outcome which refers both to the Report of the Working Group and the views of the state involved concerning the recommendations and/or conclusions of the Working Group.

In preparation for review of a state’s human rights record the Office of the High Commissioner for Human Rights presents ‘a compilation prepared by the Office of the High Commissioner for Human Rights of the information contained in the reports of treaty bodies, special procedures, including observations and comments by the State concerned, and other relevant official United Nations documents, which shall not exceed 10 pages...’⁷¹ The concluding observations of treaty bodies, including the Human Rights Committee, have a dominant place in the compilation and subsequently serve as the basis for questions posed to the state under review and for some of the recommendations adopted by the Working Group.

⁷¹ Human Rights Council Res. 5/1, 2007, Annex, para. 15 (b). A compilation of materials submitted by NGO’s is also prepared.

Were there any remaining doubt whether the exchange between the Human Rights Committee and representatives of states parties should be perceived as a form of ‘constructive dialogue’ it seems that with the institution of UPR this doubt has been dispelled. There is now a form of ‘interactive dialogue’ with states regarding their human rights records and it is carried out by an overtly political body. For a political body such as the Human Rights Council, this may indeed be appropriate, since any expectations of objectivity or impartiality by such a body are doomed to be disappointed. Conducting an ‘interactive dialogue’ at the end of which recommendations accepted by the state under review are adopted may be the most that such a body could be expected to achieve. But this serves to emphasize that the Human Rights Committee, composed as it is of independent experts who do not represent their states, must fulfill another function. Providing the Human Rights Council with authoritative conclusions about states’ human rights policies and practices should be part of that function.

6. Monitoring State Compliance: Alternatives to Constructive Dialogue

Dismissing the notion of ‘constructive dialogue’ as the format or procedure in consideration of state parties’ reports necessarily requires one to offer alternative visions of the exercise. A number of alternatives present themselves.

a. Naming and Shaming

States do seem to care about what is said about them, especially by international bodies. Why they do so is complicated, but even when one examines the record of the Human Rights Committee alone, this phenomenon is glaring. It has become quite common for states parties to react to the concluding observations of the Committee by submitting a detailed document in which they attempt to refute the critical comments of the Committee. Should the whole process of considering states parties’ reports be aimed and naming and shaming those states whose records of compliance with the ICCPR are particularly abysmal?

The Committee has generally adopted ‘diplomatic language’ in dealing with ‘matters of concern’ in states parties. Rather than condemning practices that are clearly incompatible with Covenant rights, and may even involve gross and systematic human rights

violations, the Committee expresses its criticism as a matter with which it is concerned. Thus, for example, in dealing recently with the Report of Rwanda, the Committee stated:

*The Committee is concerned at reported cases of enforced disappearances and summary or arbitrary executions in Rwanda and about the impunity apparently enjoyed by the police forces responsible for such violations.*⁷²

In discussing the Report of Georgia the Committee had this to say:

*The Committee is concerned about allegations of deaths caused by use of excessive force by police and prison officials. The Committee is particularly concerned at the Tbilisi prison No. 5 disturbance, in March 2006, in which at least seven inmates allegedly died (art. 6).*⁷³

In its Concluding Observations on the Report of the Libyan Arab Jamahiriya the Committee declared:

*The Committee reiterates its concern regarding the allegedly large number of forced disappearances and cases of extrajudicial, summary, or arbitrary executions and the lack of clarification on the part of the State party in this respect.*⁷⁴

Obviously the mild nature of the language used in the condemnatory remarks of the Committee does not of itself imply that no naming and shaming is implied. Both the summary records of the Committee and its Concluding Observations on states parties' reports are public documents and the statements that a state is sanctioning enforced disappearances and summary or arbitrary executions or excessive use of force causing deaths by police and prison officials may be considered as a form of shaming. But once again it must be recalled that the commitment of the Committee to treating states equally is generally perceived as requiring use of 'fixed terms' of condemnation (the Committee is concerned, and sometimes deeply concerned), without any leeway for distinguishing between the most serious gross and systematic violations and other less egregious violations.

Over and above the question of whether the Committee does or does not consciously resort to naming and shaming, it must be questioned whether such a tactic would be likely to have a beneficial affect on improving states parties' compliance with their

⁷² See *Annual Report of Human Rights Committee, 2009 (A/64/40/Vol 1)*, at 46.

⁷³ See *Annual Report of Human Rights Committee, 2008 (A/63/40/Vol 1)*, at 20.

⁷⁴ *Ibid.*, 25.

Covenant obligations. While the answer to this question is fairly complex, existing evidence of naming and shaming used by other international human rights institutions would seem to cast serious doubt on its likely effectiveness.

Given the widely accepted assumption that states do care what is said about them in and by international bodies, one may assume that naming and shaming would be likely to have some effect on state action. And indeed some writers do argue that shaming may in some cases have a beneficial effect on the willingness of a state to mitigate human rights violations. Thus, in their seminal essay on international human rights norms and domestic change, Thomas Risse and Stephen C. Ropp write:

We find that shaming as a mechanism of moral consciousness-raising works in many cases. Very few governments are prepared to live with the image of a pariah for long.⁷⁵

Risse and Ropp were referring to shaming by other governments, spearheaded by transnational advocacy networks. When it comes to naming and shaming by international human rights institutions the evidence points in a different direction.

The assumption that states care what is said about them does indeed mean that they are likely to react in some way to being named and ostensibly shamed. It does not necessarily mean that they will be prepared to rectify the policies or practices for which they were shamed. Their reaction often takes the form of attacks on the institution involved, denying any truth to the allegations or arguing that the information on which the allegations are based was provided by hostile elements.

A number of writers have undertaken a systematic examination of the effect of naming and shaming by another human rights institution, the now defunct UN Commission on Human Rights. Being an overtly political body, made up of the representatives of states, rather than independent experts, this body is different from the expert treaty bodies, and the differences have important potential implications for the chances of shaming having an impact on state behaviour.⁷⁶ Nevertheless, their findings have important implications for treaty bodies, such as the Human Rights Committee.

⁷⁵ Thomas Risse and Stephen C. Ropp, 'International human rights norms and domestic change: conclusions' in Risse, Ropp and Sikkink (editors), *The Power of Human Rights: International Norms and Domestic Change* (CUP, 1999) 234, 245.

⁷⁶ The implications of the political nature of the UN Commission on Human Rights when it comes to shaming is examined by James H. Lebovic and Erik Voeten, 'The Politics of Shame: The Condemnation of Country Human Rights Practices in the UNCHR', 50 *International Studies Quarterly* (2006) 861. In a

In the most detailed and serious study of shaming Emilie M. Hafner-Burton examines a number of hypotheses relating to the expected effects of naming and shaming on the willingness of states to change their human rights practices or legislation. Her careful statistical analysis of the data collected leads her to the conclusion that shaming may have some positive affect on protection of political rights, ‘but they rarely stop or appear to lessen acts of terror. Worse, terror sometimes increases after publicity.’⁷⁷ She ends her study with the following conclusions:

As human rights idioms become mainstream, global shaming efforts grow. Placing countries in a spotlight for human rights violations, though, is followed by complex politics of human rights abuse and enforcement. This study...shows that governments subjected to global publicity efforts often behave in contradictory ways, reducing some violations of political rights afterwardyet some governments continue or expand their use of political terror – sometimes because terror is less in governments’ control or can be used to cancel out other improvements governments make but do not want to work.⁷⁸

A somewhat more optimistic picture of the possible influence of shaming is painted by James C. Franklin in his study of Latin American countries.⁷⁹ As opposed to the other studies which examined the influence of shaming by formal human rights institution, the UN Commission on Human Rights, Franklin examines what he terms ‘contentious political challenges’ to governments’ human rights policies or practices. These challenges are defined as ‘collective, unconventional actions taken by inhabitants of a country to express opposition against their government, its policies or personnel, or the political regime itself.’⁸⁰ These challenges may be by NGOs, religious groups, intergovernmental organizations and governments.

subsequent article these writers examine the effects of being named and shamed on foreign aid. They find that they is ‘virtually no evidence in the models that the human rights record of a country directly affects its aid receipts’ and that ‘public UNCHR resolutions do not have a significant negative impact on overall bilateral aid commitments.’ See James H. Lebovic and Erik Voeten, ‘The Cost of Shame: International Organizations and Foreign Aid in the Punishing of Human Rights Violators’, 46 *Journal of Peace Research* (2009), 79, 89. On the other hand, they find that UNCHR resolutions that condemn a state for poor human rights performance are correlated with large reductions in World Bank and multilateral loan commitments: *ibid.*, at 93.

⁷⁷ Emilie M. Hafner-Burton, ‘Stick and Stones: Naming and Shaming the Human Rights Enforcement Problem’, 62 *International Organization* (2008) 689, 707.

⁷⁸ *Ibid.*, 713.

⁷⁹ James C. Franklin, ‘Shame on You: The Impact of Human Rights Criticism on Political Repression in Latin America’, 52 *International Studies Quarterly* (2008) 187.

⁸⁰ *Ibid.*, 192.

Franklin shows that ‘all sources of human rights criticism are positively and statistically significantly related to the subsequent repression against contentious political challenges.’⁸¹ As human rights criticism is more likely to target governments that have used repression in the past, these governments are more likely to continue to use repression in the future. On the other hand, for countries that receive greater amounts of foreign aid and foreign investment human rights criticism tends to significantly decrease subsequent repression. But the most interesting finding, from the point of view of the present study, is that human rights criticism emanating from domestic and international NGOs and religious groups ‘was slightly more effective at reducing subsequent repression than criticism emerging from foreign governments, while criticism from inter-governmental organizations was ineffective.’⁸²

Where does all this lead us when considering naming and shaming by the Human Rights Committee? It seems that the answer is almost self-evident. While such naming and shaming may lead some governments to reduce violation of political rights, it is unlikely to affect the serious violations of repressive regimes, and may even exacerbate them. Furthermore, as the effect of naming and shaming is contingent on a variety of factors, successful use of the tactic would require tailoring its use to specific states, in which there are indications that it could be effective. Even if the Human Rights Committee had the information and expertise necessary to make an educated assessment of the chances that naming and shaming a particular state could have a positive influence on its human rights practices, on grounds of principle it could not adopt a policy which differentiates between states. It must be seen to employ the same format and style in considering all states. Any approach to its function in considering states parties’ reports must meet this demand. Naming and shaming does not.

b. Setting the Record Straight

Once the Cold War constraints against monitoring states parties’ compliance with their Covenant obligations had been removed, it became more or less self-evident that the first function of the Committee should simply be to create an authoritative record of the

⁸¹ Ibid., 201.

⁸² Ibid., 207.

human rights situation in each state party. To what extent was the particular state complying with its Covenant obligations, and more importantly, in which matters was the state violating those obligations? This function of the Committee reflects more accurately the procedures it has adopted in recent years, as well as the real dynamics of the exchange between Committee members and the delegations of states. That exchange rests on answers, some written and submitted to the reporting state well in advance of the meeting with the Committee, and others presented orally during the sessions devoted to meeting with the state party's delegation. It is also reflected in the Concluding Observations that are drawn up by the Committee and submitted to states parties after consideration of their reports.

The dynamics of trying to elicit authoritative and accurate information from members of the state party's delegation are quite different from the supposed dynamics of 'constructive dialogue' between Committee members and representatives of the state parties. While it is clear that some delegations are far more forthcoming, well-informed and co-operative than others, the procedure itself can be used for all states, with no need to make any distinctions between those with whom dialogue is possible or potentially fruitful and those with whom it is an exercise in futility. All delegations are supposed to be qualified to answer the questions put to them, and the Committee has often included a note of criticism in its Concluding Observations when a delegation has not met the required standards. In many cases when the delegation is unable to answer questions they submit written answers prepared by persons back home who have more knowledge in the field.

If the Committee is to create an accurate record of states parties' compliance with their Covenant obligations, it must have reliable sources of information on which to base its findings. The ostensible assumption of the Covenant is that the State party report is the only source of information the Committee will have. During the Cold War years there were indeed members who argued that the Committee did not have a mandate to relate to any other sources of information, as its sole task was to examine the reports themselves. Interestingly enough, however, when it came to Chile's initial report even the most conservative members of the Committee conceded that the Committee could not ignore the reports of the *Ad Hoc* Working Group and other United Nations decisions. This

concession opened the door to introduction of alternative information on state parties' compliance that can be compared with and supplement the information provided by the states parties themselves.

From the modest beginnings with Chile, in this matter there has been dramatic progress in the Committee's methods of work. Until the early nineties Committee members received alternative information from NGOs in their personal capacities, and regularly used that information as the background to questions that they posed to state party delegations. However, they never explicitly referred to the NGO reports and NGOs could not formally distribute their materials to the Committee. Instead they simply sent them to individual members.

As time passed the practice changed in two important respects. First, Committee members sometimes openly began referring to NGO reports and asking delegations for their reaction to specific allegations contained therein. Second, after a long period in which informal briefings for Committee members by NGOs were held outside Committee hours, the Committee now openly solicits information from non-governmental organizations and national human rights institutions. The Country Task Force that prepares the list of issues to be submitted to states parties before consideration of their reports considers information provided by the Office of the High Commissioner for Human Rights, other UN agencies, and both international and national NGOs.⁸³ Receiving and considering 'shadow reports' prepared by NGOs has become a standard feature in the Committee's work. The Committee devotes the first morning of every session to a meeting with representatives of NGOs, who can provide information relating to the situation in states whose reports are to be considered in that session.

By providing alternative sources of information on implementation of Covenant rights in state parties the NGOs play an essential role in the monitoring process. In many, if not all, cases, the state report itself is not an adequate source for assessing whether the reporting state is meeting its Covenant obligations. Many reports are self-serving and hide, gloss over or distort practices, legal arrangements and policies that are incompatible with the Covenant. The Committee's guidelines make it quite clear that the state is required to report not only on laws and legal arrangements, but on 'the factual situation

⁸³ See Annual Report, 2009, 3.

and the practical availability, effect and implementation of remedies for violation of Covenant rights...' Nevertheless, in many cases states with highly problematical human rights situations report solely on their laws and try to create the impression that the situation is no less than ideal. In one case, a dictatorial state with an abominable human rights record was represented before the Committee by a professor of law. The state party's report referred only to legal provisions and the professor restricted his remarks to the law. When, relying on credible and detailed NGO reports, Committee members asked about the practice of torture, arbitrary detentions and other severe human rights violations, the professor informed the Committee that he had no knowledge of such cases. He had therefore approached the authorities and they had assured him that all the allegations were untrue. In its concluding observations the Committee noted that the report of this state lacked information on the human rights situation in actual fact, which made it 'difficult for the Committee to determine whether the State party's population is able fully and effectively to exercise its fundamental rights under the Covenant.'⁸⁴

Despite the central role NGO materials play in the examination of state reports, one must concede that the system itself suffers from a number of deficiencies. In the first place, the Committee has no mechanism or procedure for examining the credibility of specific NGOs or of their reports. It is true that in theory the NGO materials only serve as prima facie evidence of state practices and the state's representatives are given the opportunity to contest or refute the evidence. However, in actual practice there does at times appear to be a tendency among Committee members to take NGO allegations as proven facts and to rely on them even when they have no way of checking their credibility. On the other hand, when there is a clear clash between the allegations of NGOs and the state party's denials, the Committee is in no position to make a finding. Sometimes it can nevertheless declare that the state party has not done anything (or enough) to investigate the allegations,⁸⁵ but even this is not always possible.

Another serious problem is that there is no consistency in the pattern of NGO reports and alternative information. In some countries there are both many local human rights NGOs and an interest by major international NGOs, such as Amnesty International and Human

⁸⁴ Concluding Observations on the Syrian Arab Republic, 24/04/2001/, CCPR/CO/71/SYR, para. 2

⁸⁵ See, e.g., Concluding Observations on the Syrian Arab Republic, 24/04/2001/, CCPR/CO/71/SYR, para. 10; Concluding Observations on Algeria, 18/08/1998, CCPR/C/79/Add.95, para. 6, 7.

Rights Watch. In these cases the Committee is literally flooded with alternative information regarding implementation of Covenant rights. In other cases, there are no local NGOs, or at least not ones that submit reports or information to the Committee, and international NGOs either display little interest in the situation in the state, or for various reasons possess little knowledge about the human rights situation there. In such cases, the Committee is forced to rely on the state party's report alone, the answers to its questions by the state's delegation and maybe some information from UN agencies. The result may very well be that the concluding observations paint a rosy picture (mainly by omission) of the situation in a country which is guilty of severe and systematic violations of Covenant rights. Besides the fact that this means that the monitoring in respect to that state has failed, it creates a disparity between states. States with moderate human rights records may look much worse than states with ghastly records. In an international political arena in which the concluding observations of the Committee will hopefully play a role, this disparity is not desirable. It may contribute to undermining the credibility and legitimacy of the Committee itself.

In order to monitor states parties' compliance with their Covenant obligations Committee members need both information and expertise on the situation in each country. The Committee examines 4 – 6 reports in each session. That amounts to about 15 -18 reports a year. It is impossible for members to gain sufficient knowledge about each of these states to allow for each one of them to engage in meaningful monitoring. Once again, this was recognized by the Committee, which decided in 2001 to establish task forces for each country report. The country task forces, which consist of four to six members, have the primary responsibility for preparing the list of issues presented to the state party in preparation for consideration of its report and in posing questions to the members of the state party's delegation. This innovation was a welcome development, which certainly could enhance the quality of questions posed to the state parties and avoid the unnecessary repetitions that plagued consideration of state parties' reports in the past. Notwithstanding this obvious improvement in the working methods of the Committee, the issue of expertise remains. The Committee consists of eighteen members, while at the moment there are 165 states parties to the Covenant. Members cannot possibly acquire the expertise necessary to monitor the situation in all of these states. The

working languages of the Committee are English, French and Spanish. In many of the states parties none of the Committee members, nor officials in the support staff provided by the Office of the High Commissioner for Human Rights, have access to the language spoken. They are incapable of reading primary sources, such as legislation and court decisions, or newspapers published in the particular state, and become totally reliant on the information supplied by the state party itself, or by local NGOs.

Expertise issues are not confined to the language question. Human rights issues are intimately connected to domestic political processes and developments. An understanding of these processes and developments is often essential if one wishes to address the issues in an adequate fashion and to establish a record which is contextual and meaningful. This is most obvious when the questions relate to situations of ethnic or religious conflict, states of emergency and rights of persons belonging to minorities. Many of these issues are highly loaded and information provided both by the states parties and NGOs rest on perceptions and biases of which Committee members may not be aware. It is not surprising that some of the weakest concluding observations of the Committee are those that relate to situations of conflict and to article 27 of the Covenant, which protects the rights of persons belonging to ethnic, religious or linguistic minorities to enjoy, in community with other members of their group, their own culture, to profess their own religion and to use their own language.⁸⁶

c. Standard setting

The kind of issues that arise in consideration of states parties' reports are varied. Many raise no legal questions of consequence and the Committee's questions and observations are based on repeating well-accepted and uncontroversial norms. However, in a significant number of cases questions arise which require the Committee to take a position on the interpretation of provisions in the Covenant. In doing so the Committee is involved in standard setting, or creating what has generally become known as 'soft law'.

⁸⁶ See, e.g., Concluding Observations on Third and Fourth Periodic Reports submitted by Australia, adopted by the Human Rights Committee on 28 July, 2000, (CCPR A/55/40 (2000)), paras. 509 – 512.

This has become quite an important part of the Committee's work as international and domestic courts begin relying on the Concluding Observations of the treaty bodies.⁸⁷

The question is not whether standard setting should or should not be part of the function of the Committee in considering states parties' reports. Once the Committee adopted the practice of Concluding Observations, setting standards became an inherent part of its function. The real question is rather whether the process itself is conducive to setting of standards which are well thought-out and are suitable for general application. And this is where doubts must arise.

A few difficult cases will illustrate the reasons for doubts. They display a tendency of the Committee to express concern about complicated issues, but then throw the ball back to the state concerned without giving clear guidance on the standards required by the Covenant.

Following are two examples:

a. *The Netherlands Law on Euthanasia*

In April 2002, shortly before consideration of the state report of the The Netherlands, the Dutch law permitting both euthanasia and assisted suicide came into force.⁸⁸ This law allows euthanasia and assisted suicide when a patient has made a voluntary and carefully considered request that his life be ended and the attending doctor 'holds the conviction that the patient's suffering is lasting and unbearable.' The decision to end the patient's life must be approved by another doctor who is not involved in treating the patient and must be reported after the person's life has been terminated to a special review committee.

The issue of euthanasia clearly presented the Committee with a challenge. The States parties to the Covenant undertake to respect and to ensure to all individuals in their territory and subject to their jurisdiction the rights in the Covenant, including, of course, the right to life. What does this imply? Is this right an inalienable right, or one that a

⁸⁷ See, e.g., ICJ, Advisory Opinion on the *Legal Consequences of Construction of a Wall in the Occupied Territory*, 9 July 2004, para. 109; *Canadian Foundation for Children, Youth and the Law v Canada* (Attorney-General), Judgment of the Supreme Court, (2004) 1 SCR 76; ILDC 177 (CA 2004)

⁸⁸ The formal name of the law is *Termination of Life on Request and Assisted Suicide (Review Procedures) Act, 2001*. The terms of the Act are described in a pamphlet published by the Netherlands Ministry of Health available at http://www.minvws.nl/en/folders/ibe/euthanasia_the_netherlands_new_rules.asp

person can waive? Does the consent of the person concerned imply that his/her right has not been violated? And how does one assess consent in such delicate situations?

The Committee was incapable of resolving these issues and providing clear standards on what may or may not be done by state parties. It phrased its Concluding Observations in the following way:

5. (a) The Committee discussed the issue of euthanasia and assisted suicide. The Committee acknowledges that the new Act concerning review procedures on the termination of life on request and assisted suicide... is the result of extensive public debate addressing a very complex legal and ethical issue. It further recognizes that the new law seeks to provide legal certainty and clarity in a situation which has evolved from case law and medical practice over a number of years. The Committee is well aware that the new Act does not as such decriminalize euthanasia and assisted suicide. However, where a State party seeks to relax legal protection with respect to an act deliberately intended to put an end to human life, the Committee believes that the Covenant obliges it to apply the most rigorous scrutiny to determine whether the State party's obligations to ensure the right to life are being complied with (articles 2 and 6 of the Covenant).

(b) The new Act contains, however, a number of conditions under which the physician is not punishable when he or she terminates the life of a person, inter alia at the 'voluntary and well-considered request' of the patient in a situation of 'unbearable suffering' offering 'no prospect of improvement' and 'no other reasonable solution'. The Committee is concerned lest such a system may fail to detect and prevent situations where undue pressure could lead to these criteria being circumvented. The Committee is also concerned that, with the passage of time, such a practice may lead to routinization and insensitivity to the strict application of the requirements in a way not anticipated. The Committee learnt with unease that under the present legal system more than 2,000 cases of euthanasia and assisted suicide (or a combination of both) were reported to the review committee in the year 2000 and that the review committee came to a negative assessment only in three cases. The large numbers involved raise doubts whether the present system is only being used in extreme cases in which all the substantive conditions are scrupulously maintained.

(c) The Committee is seriously concerned that the new law is also applicable to minors who have reached the age of 12 years. The Committee notes that the law provides for the consent of parents or guardians of juveniles up to 16 years of age, while for those between 16 and 18 the parents' or guardian's consent may be replaced by the will of the minor, provided that the minor can appropriately assess his or her interests in the matter. The Committee considers it difficult to reconcile a reasoned decision to terminate life with the evolving and maturing capacities of minors. In view of the irreversibility of euthanasia and assisted suicide, the

Committee wishes to underline its conviction that minors are in particular need of protection.

(d) The Committee, having taken full note of the monitoring task of the review committee, is also concerned about the fact that it exercises only an ex post control, not being able to prevent the termination of life when the statutory conditions are not fulfilled.

The State party should re-examine its law on euthanasia and assisted suicide in the light of these observations. It must ensure that the procedures employed offer adequate safeguards against abuse or misuse, including undue influence by third parties. The ex ante control mechanism should be strengthened. The application of the law to minors highlights the serious nature of these concerns. The next report should provide detailed information as to what criteria are applied to determine the existence of a ‘voluntary and well-considered request’, ‘unbearable suffering’ and ‘no other reasonable alternative’. It should further include precise information on the number of cases to which the new Act has been applied and on the relevant reports of the review committee. The State party is asked to keep the law and its application under strict monitoring and continuing observation.

One can sympathize with the Committee which felt that it had to express concern and could not simply accept the Netherlands law as compatible with the Covenant. However, its observations are hardly helpful in setting standards on the issue of principle itself. What can other states who are contemplating adopting laws on euthanasia and assisted suicide learn from the Concluding Observations of the Committee on this issue? It is implicit in the Committee’s approach that in principle, if the person involved does express proper consent and there is no fear of undue pressure allowing euthanasia and assisted suicide would not be incompatible with the state party’s obligation to ensure the right to life. On such a sensitive question one would have expected a more considered statement.

b. Targeted killings of suspected terrorists

The issue of whether a state may target suspected terrorists who are in territory that is not under its control is a highly contentious issue that has stimulated a debate in the academic literature. Most NGOs and some governments regard all such targeted killings as ‘extrajudicial executions’ or ‘assassinations’, while the states that have employed this tactic (mainly Israel and the USA) have argued that they are a legitimate act within the

context of an armed conflict.⁸⁹ This issue arose during consideration of Israel's report in 2003. The Committee had this to say about Israel's policy:

15. The Committee is concerned by what the State party calls 'targeted killings' of those identified by the State party as suspected terrorists in the Occupied Territories. This practice would appear to be used at least in part as a deterrent or punishment, thus raising issues under article 6. While noting the delegation's observations about respect for the principle of proportionality in any response to terrorist activities against civilians and its affirmation that only persons taking direct part in hostilities have been targeted, the Committee remains concerned about the nature and extent of the responses by the Israeli Defence Force (IDF) to Palestinian terrorist attacks.

The State party should not use 'targeted killings' as a deterrent or punishment. The State party should ensure that the utmost consideration is given to the principle of proportionality in all its responses to terrorist threats and activities. State policy in this respect should be spelled out clearly in guidelines to regional military commanders, and complaints about disproportionate use of force should be investigated promptly by an independent body. Before resorting to the use of deadly force, all measures to arrest a person suspected of being in the process of committing acts of terror must be exhausted.⁹⁰

This observation of the Committee reads as an attempt to have one's cake and eat it. On the one hand, the Committee expresses concern that the practice of targeted killings would appear to be used in part as a deterrent or punishment, 'thus raising issues under article 6' (which protects the right to life –DK). The implication would clearly appear to be that if used as a means of frustrating a future attack (as Israel claims) the policy would not raise an issue under article 6, a conclusion that is far from uncontroversial. On the other hand, in its recommendation the Committee states that before resorting to use of deadly force, all measures to arrest a person suspected 'of being in the process of committing acts of terror must be exhausted.' This would seem to imply that even when not used as a form of deterrence or punishment deadly force may only be used when the person is in the process of committing acts of terror. The problem is, of course, that the real question relating to the legality of a targeted killing of a suspected terrorist arises precisely when the person is not at the time in the process of committing an act of terror.

⁸⁹ I have tried elsewhere to examine the parameters of this issue: See David Kretzmer, 'Targeted Killings of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Self-Defence?' 16 *European Journal of International Law* (2005)171

⁹⁰ *Concluding Observations of the Human Rights Committee on Report of Israel*, 21/08/2003, (CCPR/CO/78/ISR)

So what standard was the Committee setting here: may a state that cannot reasonably apprehend a person active in planning or executing acts of terror against its citizens target that person even when he/she is not in the process of committing such acts? The Committee leaves this, the main question, unanswered.

d. Required Action and Recommendations

Once the Committee adopted the procedure of Concluding Observations, it did not restrict itself to stating whether the state party was complying with its Covenant obligations or not, but usually expressed its view on actions that should be taken by the state party to rectify situations in which it had found lack of compliance. As mentioned above, at the initial stage most such views were phrased as recommendations, a term which was grossly inappropriate when the action was clearly required under the Covenant. Later the Committee refined its use of language and began roughly to distinguish between action which the state party was obligated to carry out ('the state should do x, y, z...') and action which the Committee recommended on basis of its assessment that this would promote further compliance with the state party's obligations. Many of the problems we mentioned above in the discussion of setting the record straight and standard setting arise in the case of stipulating action required by the state and especially when it comes to recommendations. When the statements are too general, they are often meaningless. On the other hand, when they are specific they may be off the mark, or far removed from the political reality of the society of the state involved, and therefore unlikely to be helpful and possibly counter-productive.

A few examples might illustrate this point.

a. In October 2007 the Committee considered the third periodic report of Georgia. It expressed concern that the populations of Abkhazia and Tskhinvali Region/South Ossetia 'do not fully enjoy the Covenant provisions (arts. 1 and 2).' It added:

The State party should continue to take all possible measures, without discrimination, to enhance protection under the Covenant for the population of these regions by the Abkhazia and Tskhinvali Region/South Ossetia de facto authorities.

The Committee itself obviously did not know which measures were required or would be effective. It is highly unlikely that the state party involved, or anyone else who wished to pressure the state party to comply with the Committee's 'command' would do so either.

b. In dealing with the initial report of Bosnia and Herzegovina the Committee made the following recommendation:

The State party should intensify its efforts to adopt a systematic approach to re-establishing mutual trust between different ethnic groups and accounting for past human rights abuses.

Who could disagree with this statement? But how is a country that has lived through a horrendous ethnic conflict supposed to adopt 'a systematic approach to re-establishing mutual trust between different ethnic groups'? Did anyone on the Committee have a clue what was involved?

The truth is that when dealing with complex issues relating to serious group conflict and strife the Committee is rarely, if ever, in a position to say anything meaningful, and instead it resorts to platitudes. There is a world of difference between the expertise needed to inform a state party that it must improve conditions in its prisons so as to avoid systematic violation of its obligation under article 10 of the Covenant; that it must institute independent and credible investigations into cases of deaths caused by law enforcement authorities, or that it must take measures to prevent discrimination against gays, and recommendations on steps that should be taken in situations of ethnic or other group tensions or violence. Perhaps what is called for here is a modicum of modesty on the part of Committee members. In some cases, pointing to matters of concern may be as much as the Committee can and should do. Making empty statements about the action called for by states parties does not contribute to the Committee's credibility.

Setting the record straight and standard setting do not necessarily imply that the Committee should take a position on the steps necessary in order for the state party to bring itself into compliance with its Covenant obligations. Despite our reservations about many types of statements and recommendations, it seems to us that such statements and recommendations can and should still fulfill an important function in the work of the Committee. They may provide domestic groups and forces with rallying points and legitimize demands for the changes demanded or recommended by the Committee. They also provide a focal point for follow-up on the Concluding Observations, as states parties

are asked to inform the Committee what they have done to implement demands or recommendations. Even if the reply of the states parties is one in which they reject the demands or recommendations, at least they have been forced to give the matter some thought and to muster up arguments explaining why they have chosen to act as they did.⁹¹ But as, stated above, such statements and recommendations will not be able to fulfill these functions unless they are more than platitudes, and are well-based in the political reality of the societies involved. In the absence of an ability to draw up meaningful statements of required action the Committee should simply stick to setting the record straight by pointing out in which way the state party concerned is not complying with its Covenant obligations.

Some ‘Concluding Observations’

The Human Rights Committee is only one of the treaty bodies. But dealing with the whole range of civil and political rights, it plays a prominent role in the field of international human rights monitoring.

States reports to the Human Rights Committee and to other treaty bodies create a system of international accountability for human rights practices of states. This is probably the most impressive part of the system, even if it is difficult to pin-point the concrete effect it has on state practice and compliance with international norms. The very fact that states, including the large powers and players in the international arena, USA, Russia, India, Brazil, UK, France, Germany and Japan, to name a few, send representatives to defend and explain their human rights legislation, practice and policies before a body of independent experts in public meetings in Geneva and New York has a important symbolic function.

While states parties are accountable towards the Human Rights Committee, that body itself has neither the effective power nor the capacity to effect changes in the practices or policies of the accountable states. The accountability must be linked to the society in the reporting state party, the members of whom are the intended beneficiaries of the ICCPR.

⁹¹ See, e.g., Follow up remarks of Albania (CCPR/CO/82/ALB/Add.1 15 January 2007; Israel (CCPR/CO/78/ISR/Add.1 24 January 2007; and Syria (CCPR/CO/84/SYR/Add.1 15 September 2006)

It is their rights that each government has the responsibility to respect and ensure. Hence our fundamental premise that in order to be effective international monitoring must be aimed towards achieving an optimal effect on domestic politics and law. The question that has interested us is what 'system of monitoring' by a professional body such as the Human Rights Committee would be most likely to have such an effect.

In discussing its function in consideration of states parties reports we have argued that the notion of constructive dialogue, developed as part of the Cold War philosophy of consensus and lack of criticism of states' human rights records, has little, if any, value in the present constellation. Monitoring state parties' compliance with the ICCPR would best be carried out by concentrating on setting the record straight, providing an authoritative statement of the areas in which the reporting state is failing to comply, using the process in order to set and refine standards, and, in those cases in which something meaningful can be said, recommending action that should or could be taken by the state party in order to further compliance with its Covenant obligations. In this process the Committee should not display deference to states, but it should adopt a modicum of modesty in relation to its capacity to be helpful in highly complex situations, especially those relating to issues of ethnic, religious or national conflict.

The Committee does not stand alone in the international monitoring process. Regional mechanisms exist in Europe, America and Africa and other international bodies are also involved in the process. The jury is still out on the value of the UPR process of the Human Rights Council, but the relationship between this process and the consideration of reports by treaty bodies will require further research. In the next stage of the research we widen the picture in an attempt to present a more holistic view of international monitoring mechanisms and the interconnections between the different bodies and institutions involved in the process.