THE INTERNATIONAL RIGHT OF PETITION AND THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

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ABSTRACT

The United Nations Charter includes an undertaking by member states to promote and encourage respect for human rights. This paper examines the international right of petition, which is one specific, and perhaps the most important, international method of implementing human rights.

The first chapter looks at the relationship between national and international "implementation". The second chapter examines some legal and ideological objections to the right of petition, while chapter three is a discussion of some non-legal arguments for and against the right. The fourth chapter traces chronologically the development of the United Nations non-treaty procedures for the right of petition

The Optional Protocol to the International Covenant on Civil and Political Rights provides exclusively for the right of petition. In order to assess its relative importance and possible effectiveness as a method of international implementation, the fifth chapter examines generally its provisions, which will have been in force since March 1976.

La Charte des Nations Unies exige de la part de ses états membres, une entreprise de promotion et d'encouragement du respect des droits universels de l'homme. Cette composition examine le droit international de petition en tant que méthode

spécifique de grande importance pour la "mise en oeuvre" de ces droits.

Le premier chapitre examine la relation entre la mise en application de la legislation nationale et internationale. Le second examine certaines objections légales et idéologiques au droit de petition, alors que le troisième relève quelques arguments pour et contre ce droit, et que le quatrième poursuit le dévelopement chronologique des procédés sans traité des Nations Unies envers le droit de petition.

Le Protocole facultatif se rapportant au Pacte International relatif aux droits civils et politiques fait exclusivement provision envers le droit de petition. En vue d'évaluer son importance relative et ses possibilitées effectives en tant que méthode de mise en oeuvre internationale, le cinquième chapitre examine en general les provisions du Protocole mises en vigueur depuis le mois de Mars, 1976.

ABBREVIATIONS

American Convention- The American Convention on Human Rights.

A.J.I.L.- American Journal of International Law.

Commission- United Nations Commission on Human Rights.

Committee- Human Rights Committee (U.N.).

Committee on Racial Discrimination- Committee on the Elimination of all Forms of Racial Discrimination.

Convention on Racial Discrimination- International Convention on the Elimination of all Forms of Racial Discrimination.

CP Covenant- The International Convention on Civil and Political Rights.

ECOSOC- Economic and Social Council (U.N.).

ESC. Covenant- The International Covenant on Economic, Social and Cultural Rights.

European Convention- The European Convention for the Protection of Human Rights and Fundamental Freedoms.

ILO- International Labour Organization

NGO- Non Governmental Organization .

Protocol- The Optional Protocol to the International Covenant on Civil and Political Rights.

Sub-Commission- The Sub-Commission on the Prevention of Discrimination and Protection of Minorities.

U.N.- United Nations.

T A B L E OF C O N T E N T S

PREFACE

This paper is based on the premise that the right of petition, as the most vital and important aspect of international implementation, is the most effective means the United Nations has of restraining violations of human rights.

That violations of human rights and fundamental freedoms are continuing and increasing is known to most people. They have been substantiated and documented by publications released to the public, mainly by non-governmental organizations (N.G.O.'s), prominent amongst which are those of Amnesty International[1] and International Commission of Jurists[2].

Amnesty International's report on Torture[3], for example, reveals that torture is not simply an indiginous activity, but has become international to the extent that experts and their modern torture equipment are exported from one country to another, and schools of torture have been established to explain and demonstrate methods[4]. Torture has been a world-wide phenomenon, the report concludes, "and the torture of citizens regardless of sex, age, or state of health in an effort to retain political power is a practice encouraged by some governments and tolerated by others in an increasingly large number of countries".

If violations are essentially a state activity, how can the United Nations hope to protect the citizens of a member state which ignores its undertaking to promote respect for human rights and fundamental freedoms?[6]

The right of petition, especially as it is provided for in the Optional Protocol to the International Covenant on Civil and Political Rights,[7] may provide a way. More significantly, the right of petition, incorporated as it is in a treaty, may signal the beginning of a time in which states will agree by recognizing the individual as a legitimate subject of international law, and by accepting his right to petition an international authority for protection of his rights, to submit to international supervision of its citizens' rights.

Many commentators have insisted that effective international implementation of human rights is impossible without the right of petition.[8] The procedures of the European Convention on Human Rights and Fundamental Freedoms,[9] and those of the American Convention on Human Rights[10] are based on that right. The most important single facter in guaranteeing the international protection of human rights is that the individual be given the capacity to petition an international authority, to pursue an action in person, in his own name, before that authority, against his own or another offending government. The acquisition of rights is not enough. The real test for the International Covenantson Human Rights is not whether they bestow certain rights on the individual, but whether they provide him with an effective means of protecting those rights. Hopefully, the Optional Protocol, or the United Nations non-treaty right of petition, or preferably both together, will provide such a means.

Much has been written about different aspects of the international implementation of human rights, including the United Nations non-treaty right of petition. There has been no examination of the meaning of the word"implementation"; nor has there been a study of the right of petition, in english, which attempts to cover in one work the legal and ideological aspects of the right, the resolution 1503 non-treaty procedures, and the Optional Protocol. Further, there are very few works which have undertaken an analysis of the provisions of the Optional Protocol.

It is in these three areas that this paper makes some original contribution to available material on the right of petition. Implementation is the most important aspect of international human rights, so that it is important to understand the implications of both national and international implementation. Secondly, this paper brings together the writings of some other commentators on the advantages and disadvantages of the right, on the inherent legal and ideological problems, and on the development of the United Nations non-treaty right of petition. This second part, as represented by chapters two, three and four of the paper, is the least original in substance, but is original in form.

Thirdly, by means of limited comparison with regional Conventions on Human Rights and the United Nations non-treaty procedures, it examines thoroughly the Optional Protocol and its provisions, for the purpose of assessing its possible effectiveness as an international means of implementing

human rights. This third part of the paper is most relevant to international implementation today because the States Parties to the International Covenant on Civil and Political Rights meet on the 20eth of September 1976 in New York for the initial election of members for the Human Rights Committee, the instrument authorized to receive petitions.

There are many excellent studies available on international human rights generally, only three of which I will list first as works which form a sound basis for a study of the right of petition or for any study on human rights. Evan Luard[11] has edited, and contributed to, a book in which he has drawn together contributions from men who are not only among the best known in the field, but who were actually there and making the movement work; John Humphrey, Sir Samuel Hoare, A.H. Robertson, C.Wilfred Jenks and J.E.S. Fawcett. The second is a collection, edited by Messrs. Eide and Schou,[12] of papers as they were presented at the Seventh Nobel Symposium in Oslo, 1967. Like the first, this work also features some of the leaders in international human rights, from different parts of the world, all of whom gave informative and stimulating addresses, each on a different aspect of international human rights. It is impossible to list all of the participants, and it would be unfair to name a few. The third is an article by Professor Bilder[13] in which he raises basic questions applicable to international human rights, among them, the meaning of human rights, why they are an international problem, government attitudes, legal techniques, and strategies.

Professor Bilder has a wonderful appreciation of the problems, the frustrations, the delicacies of compromise, the foreign policy implications, and the tightrope walked by those within the movement. This article, and the two works above should be mandatory reading for every person embarking on any study of international human rights.

The works most relevant to this paper are as follows. On the right of petition generally, its advantages, and the ideological objections, Dean Macdonald[14] and Professor Murphy[15] must be read. On the legal aspects of the right, Nørgaard[16] has produced the most thorough work, and compilation of opinions to 1962; while the works of Gormley[17], on the individual's procedural status in international law; and Lauterpacht[18] (on this and all aspects of human rights in 1950) are important reading. Murphy discusses the possible creation of a world general criminal law, and the divergent fundamental principles which are the main obstacles to its creation.

On the non-treaty right of petition before and after resolution 1503 was adopted by ECOSOC in 1970, there have been many studies, most of which are referred to in chapter 4 of this paper. I will refer here only to those of Humphrey[19], Carey[20], and Sohn and Buergenthal.[21] The first two have written in some detail on the right of petition in the United Nations, and are recommended as the writings of men who participated actively in the United Nations human rights movement, from its beginning. Messrs. Sohn and Buergenthal have put together a voluminous and most valuable collection of opinions,

commentaries, summaries of discussions held at all levels of of the United Nations Organization, and relevant resolutions.

Only Robertson[22] and Schwelb[23] have written in any detail on the Optional Protocol specifically. Robertson compares it with the petition procedure of the European Convention; and Schwelb analyzes the Optional Protocol as a part of the international machinery for implementing civil and political rights. In the space of a few pages, he goes to the very heart of the forces which created the Protocol, and its provisions.

I wish to acknowledge the assistance of Ilhan Lütem, a member of the Division of Human Rights in the United Nations for up-to-date and helpful information on the question of reservations to treaties, received in a letter dated the 11th of August 1976; and the advice given me on the federal-state constitutional question by M.G.M. Bourchier and Yvon Beaulne, from the Department of Foreign Affairs, Canberra, Australia, and the Department of External Affairs, Ottawa, Canada, respectively. I wish also to thank Professor Humphrey, former Director of the Human Rights Division at the United Nations, for information, advice and assistance given, beyond that of normal supervision of this thesis.

NOTES TO THE PREFACE.

1. see for example, its more specific reports such as Chile, An Amnesty International Report, London (1974), and the A.I.Canada report Prisoners of Conscience in the USSR (1975); and its publications of a more general and comprehensive nature, the Newsletter, Bulletin, and Chronicle of Current Events.

2. see for example its report Violations of Human Rights and the Rule of Law in Uganda(1974); the I.C.J.Review, which in recent past editions has condemned violations in many different countries of the world; and its many press releases. For a world survey of human rights see Veenhoven ed. Case Studies on Human Rights and Fundamental Freedoms: A World Survey, The Hague (1975). For a record of findings by the European Commission, the European Court of Human Rights, and the Committee of Ministers see The Yearbook of the European Convention on Human Rights. There are also daily press reports, for example, the recent finding by the European Commission that British troops and police tortured and mistreated suspected Irish Republican Army members during the last 5 months of 1971, was reported, The Montréal Star, Fri.3/9/76, A-1.

3. Amnesty International Report on Torture, London (1973)

4. ibid. 17, 218

5. ibid.7

6. UN Charter, San Francisco, 26th June 1945, Preamble, Articles 1(3), 55,56.

7. G.A. Res.2200A(XX1) 16 Dec. 1966; UN Doc. A/6316 (1966)

8. see Lauterpacht, International Law and Human Rights, 1973 reprint of 1950 ed. Garland Publishing, 244-51; Moskowitz, Human Rights and World Order (1958) 113

9. Signed at Rome, 4 Nov. 1950; entered into force 3 Sept. 1953.

10. Signed at Costa Rica, 22 Nov. 1969.

11. Luard, ed. The International Protection of Human Rights, London (1967).

12. Eide and Schou, eds., International Protection of Human Rights (1968). Stockholm.

13. Bilder, "Rethinking International Human Rights:Some Basic Questions", Wisc. L.Rev.(1969)171.

14. Macdonald, "Petitioning an International Authority", in Gotlieb ed., Human Rights, Federalism and Minorities, Toronto (1970).

15. Murphy, "Ideological Interpretations of Human Rights" 21 DePaul L.Rev. (Winter 1971)286.

16. Nørgaard, Position of the Individual in International Law, Copenhagen (1972).

17. Gormley, The Procedural Status of the Individual Before International and Supranational Tribunals, The Hague (1966)

18. Lauterpacht, International Law and Human Rights (1950)

19. Humphrey,"The Right of Petition in the United Nations" Revue des droits de l'Homme (1971) 463

20. Carey, UN Protection of Civil and Political Rights,(1970).

21. Sohn and Buergenthal, International Protection of Human Rights (1973)

22. Robertson, Human Rights in the World,(1972).

23.Schwelb, "Civil and Political Rights:The International Measures of Implementation", A.J.I.L. (1968)827.

INTRODUCTION

Almost thirty years after the General Assembly adopted the Universal Declaration of Human Rights[1] we are about to enter into a new stage in the development of human rights- that of their international implementation by treaty. Will this next generation be subjected to more of the disillusion, frustration and compromise which characterized the last, and will international human rights movement and the Third Committee remain a forum for political opportunism? What of the hopes of those who have sought sincerely to develop a system of protection which would function not as a facade, but as a reality? Will the ridiculous denials, and representations of virtuosity be tolerated by listeners seemingly indiffirent to the realities of civil violations of every conceivable human right and fundamental freedom, occurring in those states, the representatives of which, at times, most loudly espouse freedom and justice? Or will the next generation be witness to a revitalized human rights movement which is positive and decisive in its protection of human rights?

The answer depends to a large extent, on the implementation procedures of the International Covenant on Civil and Political Rights (hereinafter referred to as the CP Covenant), the International Covenant on Economic, Social and Cultural Rights (hereinafter referred to as the ESC Covenant), and the Optional Protocol to the CP Covenant(hereinafter referred to as the Protocol), all of which were adopted by the General Assembly in 1966.[2]

The ESC Covenant received its 35th ratification (Jamaica) on the 3rd of October 1975 and entered into force three months later in accordance with its Article 27 on the 3rd of January 1976. The CP Covenant received its 35th ratification (Chechoslovakia) on the 23rd of December 1975 and entered into force three months later in accordance with its Article 49 on the 23rd of March 1976. The Protocol entered into force on the same date as the CP Covenant, having already obtained more than the 10 ratifications required by its Article 9.[3]

The Protocol is purely procedural in substance, providing for one specific aspect of implementation, the right of petition. Apart from these treaty procedures the United Nations already has a functioning non-treaty procedure for receiving petitions, and in light of the success of the European Convention, which relies solely for its implementation on the systems of state and individual complaints, it is reasonable to assume that the international implementation of human rights will stand or fall according to the effectiveness of the Protocol and the non-treaty procedures.

This paper therefore willfocus solely on the right of individual petition, with emphasis on the treaty procedures of the Protocol now in force, and in doing so will attempt to anticipate the effectiveness of the Protocol as an international means of implementing human rights and fundamental freedoms.

The word "petition" is used interchangeably in this paper with the word "communication", as it is in the United Nations; and refers to a non-government document addressed to the United Nations in which an allegation is made against a state or group of persons claiming violations of the petitioner's rights. The early proposals used the word "petition"[4] but were replaced later by "communications".[5] Although the replacement of the word "petitions" by the word "communications" may not represent any substantive change,[6] as was the view of the representative from Uruguay, it is Professor Schwelb's view that "the change of the term may nevertheless be taken as indicative of the intention to make the institution and procedure less formal".[7] It is reasonable to assume that the word "petition" was not used in the Protocol for the same reasons that the right of petition was not incorporated in the draft Covenant.[8] Both were attempts to avoid giving formal recognition to the process of petition.

As far as the petitioner is concerned, the purpose of the petition, or communication, may be to demand compensation, to prevent a violation, to give notice of violations, to request assistance or protection, or to make a suggestion. Dean Macdonald gives a rather more elevated justification for the right of petition in the following descriptive lines:

> "In International law, the object of the right of petition is to persuade or compel states to honour their obligations in the field of human rights and fundamental freedoms. It is designed to bring municipal law and practice into line with the petitioner's rights under international law".[9]

Without detracting from the importance of legal objectives

obviously those of the petitioner will be more immediate and practical than those of the international lawyer.

NOTES TO THE INTRODUCTION

1. G.A. Res. 217A(111) 10 Dec. 1948;UN Doc.810, at56 (1948).

2. G.A. Res. 2200A, 16 Dec.1966; UN Doc.A/6316 (1966);21GAOR Supp.16, at 49.

3. As of 10th Aug.'76 the ESC has been ratified or acceded to by 40 states, the CP Covenant 38 states, and the Protocol by the following 13 states:Barbados, Columbia, Costa Rica, Denmark, Ecuador, Madagascar, Mauritius, Norway, Sweden, Uruguay, Finland, Jamaica and Canada.

4. see later in this paper Chapter 5 part (4) for a discussion of proposalsfor a right of petition to be included in the draft Covenant; Third Committee debates (1966)

5. UN Doc.A/C.3/L.1394;1418th meeting Third Committee,para.8.

6. 1438th meeting, para.44, Third Committee.

7. Schwelb, "Civil and Political Rights:The International Measures of Implementation", A.J.I.L. (1968)827 at 864.

8. see below, Chapter 5, part (4).

9. Macdonald, "Petitioning an International Authority", in Gotlieb ed. Human Rights, Federalism and Minorities, Toronto (1970) 121.

CHAPTER ONE

"IMPLEMENTATION"?

What did the Commission on Human Rights mean exactly when it decided in 1947 that the proposed International Bill of Rights should consist of three parts; a Declaration, a Covenant, and measures of implementation?[1] Some observations may be made.

First, one might wonder whether or not there is such a word as "implementation" for it does not appear in Black's Law Dictionary, the Oxford Shorter Dictionary, or the Oxford English Dictionary. The verb "implement" does appear and means "to complete, perform, to carry into effect".[2] However, Websters Third New International Dictionary does include the word and gives as its meaning "to carry out, to give practical effect to and ensure of actual fulfillment by concrete measures".[3]

Secondly, our minds having been put at ease by the Americans as to the existence of the word, it seems that its use is confusing. When referring to the CP and ESC Covenants, it is a contradiction of terms to speak of "international implementation". Accepting Websters definition of the word, implementation of human rights is a national responsibility, and is certainly not a function of the United Nations.[4] It is for States Parties to procure for their nationals the rights enumerated in the CP and ESC Covenants by performing

their obligations as signatories. Article 2 of each Covenant makes this quite clear. Each State Party undertakes, in the case of the ESC Covenant "...to take steps, individually and through international assistance and co-operation" to achieve full realization of the rights therein, "by all appropriate means, including particularly the adoption of legislative measures". In the case of the CP Covenant, each State Party "undertakes to respect and to ensure to all individuals," and "to take the necessary steps...to adopt such legislative or other measures as may be necessary to give effect to the rights...".

International implementation must mean something else, for the United Nations has no such legislative powers. It is incorrect semantically to speak in turn of national and international implementation, the State and the United Nations having quite separate and distinct responsibilities. Surely what the Commission meant, back in 1947, was that there must be international control, supervision and promotion of human rights to guarantee effective implementation at the national level.

International implementation has taken on a meaning of its own since 1947. Through United Nations practice and usage its meaning now includes international supervision by such means as periodic reporting, state and individual complaints, education and seminar programmes, coercion, and exposure to world public opinion. Proposals for international implementation have included the creation of a World Court of Human Rights,

and a United Nations High Commissioner for Human Rights.[6] Hopefully, as procedures for international implementation are strengthened and accepted by more States, its meaning will incorporate more of enforcement. Professor Schwelb writes,

> The expression 'measures of implementation' has acquired a technical meaning in the sense that it now denotes, in addition to measures taken under municipal law, measures for the international supervision of the observance of commitments.[7]

Accordingly, the words "international implementation" will be used to convey the meaning acquired by international usage and acceptance. Thirdly, it is essential that it not be overlooked that the protection of human rights is first and foremost a domestic matter, which is the reason for raising the above semantic and seemingly academic discussion on the meaning of "implementation". Implementation in its most important sense can be easily neglected or overlooked by those who strive to improve the procedures for international implementation. This is dangerous. Recognition of, and respect for, human rights is a domestic and grass-roots matter. If implementation is rejected at the grass-roots level and unrealized at the level of domestic government, then the United Nations is rendered almost powerless to intervene on behalf of individuals. The international human rights movement must therefore be directed at people, and their educators, the purpose being always to reduce the instances where an individual finds it necessary to look for protection beyond the system of his own State.

> If there is any overriding requirement, it may be... an awareness that the achievement of human rights is ultimately the responsibility of each society itself, and that no international programme can promote or protect human rights when the society itself is not itself prepared to demand, work for and defend them. Thus the success of international efforts will not be measured by the quality or noise-level of international activities, but by what actually happens within the countries concerned. We must not confuse the one with the other. [8]

In a time when violations are increasing at such a distressing rate around the world, and when so many governments appear not only oblivious to their duties as protector, but openly condone violations of individual rights, it may seem idealistic to hope for the day when international control will be unnecessary. This may well be, but to accept that does not make the goal any less worthwhile.

Finally, and as an illustration of the confusion which may arise from use of the word "implementation" as it is now understood in international parlance, let us look briefly at the Soviet attitude to implementation of human rights. The Soviets maintain that implementation of human rights is for states alone,[9] which if we are guided by a dictionary definition of that word, and the explicit directives of the CP and ESC Covenants, is an argument which cannot be faulted. Indeed, the state must carry the primary responsibility for implementing human rights.

But what the Soviets, and those to whom they are speaking, mean when they refer to "implementation" is actually "international supervision". Which is a different question. Of course there should be national implementation, but should

there be international supervision? The Soviet answer to that question, in words accepted and adopted by international usage, is that, no, there should be no international implementation of human rights.

CHAPTER ONE NOTES

1. Commiss., Res. 9 (11) sec. 7; Ecosoc., 2nd Sess., Official Records, 521-522; see Starr, "International Protection of Human Rights and UN Covenants", Wisc. Law Review (1967), 863 at 864.

2. The Oxford English Dictionary, Vol. 5, 1961.

3. Websters Third New International Dictionary, 1966, G & C Merriam Co., USA.

4. On this question see Capotorti, "The International Measures of Implementation Included in the Covenants on Human Rights", in Eide & Schou eds., International Protection of Human Rights, Oslo 1967 at 132; and Schwelb, "Civil & Political Rights: The International Measures of Implementation," A.J.I.L. (1968), 827 at 828.

5. Originally an Australian proposal: see UN Doc. E/CN. 4/Sr. 15. 5 Feb. 1947, 2-3.

6. see Clark, A UN High Commissioner for Human Rights, The Hague 1972; Macdonald, "The UN High Commissioner for Human Rights", Canadian Yr. Bk. of International Law (1967); Macdonald, "The Decline & Fall of an Initiative", Canadian Yr. Bk. of International Law (1973).

7. Schwelb, op. cit., 828, footnote 4.

8. Bilder, "Rethinking International Human Rights; Some Basic Questions", Wisc. L. Rev. (1969), 171 at 217.

9. Moskowitz, Human Rights and World Order, (1958), 93 and footnote 1 at 185; and see the statements of the USSR in the 1397th, 1399th and 1415th meetings of the Third Committee, G.A.O.R., 21st Session (1966).

CHAPTER TWO

LOCUS STANDI OF THE INDIVIDUAL IN INTERNATIONAL LAW: LEGAL AND IDEOLOGICAL OBJECTIONS

Assessment of the Protocol and its possible effectiveness must be made with two important considerations in mind. First, it is still argued by some states and persons that the individual is not a legitimate subject of international law. Secondly, socialist ideology, which has no real concept of the single person, but which espouses a state-individual collectivity, is hardly reconcilable with international control and protection of the individual. The most obvious expression of these two problems is that the right of individual petition was not included in the CP Covenant, but was relegated to a separate Protocol as a concession to those states which for legal or ideological reasons opposed international protection of the individual.

(1) Legal Position of the Individual

The theory was developed in the late nineteenth century that international law, of its nature, and as a matter of fact, addresses itself to states, which therefore are the proper subjects of international law. It followed that the individual was a mere object of that law.[1] It seems to be Professor Schwarzenberger's view, expressed in 1967, that the

individual is an object of international law, with perhaps the potential to become a subject.[2] He says that by recognition, individuals may be transformed into subjects of international law, but that this has not happened at the level of customary international law (because his rights are dependent on a state, which alone is competent to assert his rights), nor nas it happened on the level of organized international society. Protection of human rights, by the United Nations, he says, "is still so embryonic as not to alter the picture."[3]

Professor Brownlie also uses the criterion of legal capacity to cast doubt upon the individual's locus standi in international law. A subject of the law, he writes, "is an entity capable of possessing international rights and duties and having the capacity to maintain its rights by bringing international claims."[4] He does say however, that "it is obvious that states can agree to confer special rights on individuals...".[5]

Three comments may be made on Professor Brownlie's premise. First, Professor Brownlie correctly recognizes that the substance of human rights treaties, the rights themselves, are separate from the procedural right, or capacity of the individual. But to deny the individual procedural rights should not necessarily be declaratory of the legality of the substantive rights, or of his status as a subject of international law. Secondly, a State Party to the Protocol does in fact confer upon "individuals, subject to its jurisdiction"[6] the

capacity to bring a claim before the Human Rights Committee. Thirdly, there is some indication that the individual is achieving procedural capacity. In his discussion of the individual's procedural status in the United Nations and regional organizations, Professor Gormley observes that "the trend of national, regional and international law is to recognize the worth and dignity of the private person",[7] and that he is obtaining the essential right of action. "The immediate goal" he says, for guaranteeing effective protection of the individual, "must be to extend this individual right of action to all conflict-resolving tribunals...".[8]

The Soviet view of the individual's locus standi, as expressed by its representative to the International Law Commission in 1953 was that "the individual lay outside the direct scope of international law, and it was only by virtue of the legal bond which existed between the individual and the State that his rights could be protected."[9] Again, as Bokor expresses the Soviet attitude in 1966, the primary function of international law,

> is to authorize and oblige the states directly, and not single persons. The direct elevation of individuals to the international plane, and their rise to the status of derivative subjects of law is an unnecessary and dangerous procedure. 10

Of the mounting practice of recognizing individual rights and duties Grzybowski dismisses the European Convention on Human Rights because, he says, it was "outside the Soviet sphere of influence."[11] Of the Nuremberg trials he says, that as well as war crimes against humanity, the defendants

violated international laws against aggression, and propaganda in preparation of aggression, and for these were deservedly punished. However, he says, this "is no way meant that the individual thereby became a subject of international law".[12]

In 1976 the "object-subject" debate seems somewhat academic and legalistic. It is impossible to deny categorically the individual's locus standi, for he has too often been recognized as the subject of rights and duties in international law. There is no doubt that the international human rights movement since the second world war has done more than anything else to bring this legalistic debate nearer to a realistic end.

Professor Cohen confirms the views of Professors Lauterpacht, Hyman and O'Connell when he says of the distinction that "an air of unreality pervaded theory because legal systems, whether municipal or international, were made by men for men."[13] Moses Moskowitz wrote in 1958 that the notion that international law existed only for states has long been successfully challenged. In 1907, he says, the individual was recognized for the first time as having locus standi in international judicial proceedings under Article 2 of the Treaty of Washington of 20th December 1907, which brought into being the Central American Court of Justice at Cartago, Costa Rica. Then says Moskowitz, there were the Minorities and Mandates systems, which developed a procedure for dealing with petitions. The Minorities System is especially significant, says Moskowitz, in that it first

brought into full focus the basic question of the role of the individual in international proceedings affecting his rights; and further, it constituted the first major systematically implemented effort to limit the absolute power of the state over its citizens or subjects.[14]

The 1966 Human Rights Covenants and the Protocal are themselves a new defining and affirmation of rights and duties attributed to the individual in earlier practice relating to aliens, humanitarian intervention, minorities, slavery, piracy, prisoners of war, genocide and war crimes,[15] not to mention the undertakings and affirmations of States in the Universal Declaration of Human Rights, the International Convention on the Elimination of all Forms of Racial Discrimination, the European Convention on Human Rights, the American Convention on Human Rights, and the International Labour Organization. The United Nations Charter is especially relevant. First, in its preamble, States have determined "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person", and for that end to employ "international machinery".[16] Secondly, Article 87 of the Charter recognizes the right of petition from individuals in Trust territories. The fact is that the development of a vast and significant body of human rights law has brought us to a new understanding of the individual's place in international law.

The summary of a discussion in the Sub-Commission on the Prevention of Discrimination and Protection of Minorities

in August of 1971 is revealing:-

> In the course of the general debate, several members observed that the individual had become a subject of international concern whose rights were recognized in a number of international instruments, including the Charter of the United Nations. After noting that the rights of individuals were being violated in many parts of the world in the most brutal manner, they expressed the opinion that the need for the implementation of the individual rights on an international level clearly existed... [17]

Although the members did not quite bring themselves to the expression "subject of international law", the statement reveals explicitly the best argument for international recognition of the individual. If abuses persist, then there must be protection. And if protection means giving locus standi in international law to the individual, then so it should be. "Does it suffice to admit that the individual's good is the ultimate end of law but refuse the individual any capacity in the realization of that good?" [18]

No state will deny that abuses continue, if not within its own territories, then in that of some other state. Just as domestic law evolved to regulate the behaviour of individuals and to protect them from one another so, the traditionalists will argue, did international law evolve to do the same for States. But if, for whatever reason, the state in so many instances is unable or unwilling to intervene to protect and compensate the wronged individual, then that individual must be given the necessary locus standi in international law. The concept of international law must be, and in fact already had been, broadened to encompass not only the state, but the

individual as well.

(2) Ideological Obstacles

The second and related obstacle, that of the Socialist states reconciling their ideologies with the individual's new status in international law, is a more serious problem. Dean Macdonald considered it so serious in 1970 that he was led to conclude, in his assessment of the problem (coloured as it was by the Soviet occupation of Czechoslovakia in 1968) that "it is apparent that not only communist doctrine but also Soviet practice...makes East-West agreements on the right of individual petition impossible at the present stage of developments".[19]

This ideological obstacle which, from the beginning of the course has threatened at every hurdle to throw the Protocol, is spotlighted by Grzybowski who emphasizes that the co-existence of the two major economic systems must be recognized and reckoned with. International law, he says, cannot be "a system of legal rules imposed by the states"[20] of one economic system upon the other; for international law cannot "contain rules which (are) incompatible with the principles of one of the two main economic systems".[21] Again, Korowicz stresses the ideological problem;

> ...I would like to emphasize that human rights and fundamental freedoms are among those problems which constitute the deepest division between the democratic and Soviet Marxist conceptions of law and justice. 22

The conflict of ideologies has gone beyond mere differences and has taken on greater dimensions for the Socialist states. Again, from Grzybowski,

> The movement for the emancipation of the individual in the field of international relations was clearly a result of adherence to the individualistic tradition. As such, it was unacceptable to collectivist concepts of individual state relations, because it ran counter

...cont. p. 17

> to the principle of exclusive jurisdiction in internal affairs. 23

And Bokor sees in the right of individual petition an imperialist threat. Above all, she says,

> The tendency to grant an individual the status of a subject of international law is condemnable for the very reason that the clandestine ends of the imperialist powers are lurking behind it. The imperialist states thought the juxtaposition of the individual and his own state on the international plane to be an excellent means for an interference in the domestic affairs of other states, whenever possible. 24

An ideology is usually presented by its exponents as the truth about all phases of life; economic, political, spiritual. Confrontation with another ideology inevitably results in antagonism and inflexibility. How can the international human rights movement progress at all in such an environment, and a fortiori, how can the Protocol, in which ideological conflict intensifies on the issue of individual petition hope to succeed?

What are these conflicting ideologies, which are so relevant to the Protocol's success? First, and to state the obvious, the origins of the two most prominent ideologies, Marxist socialism and western democracy, are different. Unlike the western democracies, marxist ideoligy rejects any natural law basis for human rights. It is "unwilling to deduce them from the nature of man... and roots these rights squarely in the phenomena of superstructure". 25 Natural law is no law at all, says Szabo, but gives us human rights which are "moral ideals, or... pretensions conceived of as rights,

formulated in respect of the law-to-be-created".[26] The socialist concept he says, knows no distinction between citizen rights, which are derived from the state, and "human rights", that is, those inalienable rights which derive from mankind, even in the absence of the state.[27] For the socialist, all rights are derived from the state, and he will not accept "human rights" as legitimate rights (as do the exponents of western democracy) because their characterization is dependent upon the nature of the state. The west for example, has endeavoured to impose on the world its concept of those inalienable human rights which "were of fundamental importance for the said social system",[28] such as private ownership, free enterprise and freedom of expression. Socialist theory recognizes the different economic systems, but "it does not project such claims or pretensions into rights, much less human rights".[29]

Secondly, and whether or not this be the case, it is a fact that the notion of individualism sits more easily today, in the two great ideologies as they are delineated, with the western democracies and their tradition of individualism.[30] An example of which is the contrasting attitudes to private property. Private ownership is of paramount importance in western democracy, and will tolerate very little legislative limitation. Indeed, one of the objectives of government is to facilitate the pursuit and protection of wealth and property. Socialist ideology, on the other hand, requires that private property be subject to legislative

limitations, encacted for reasons of social progress and welfare.[31] "This emphasis upon community and social solidarity" explains, says Professor Murphy, the socialist fervour in supporting "the economic, social and cultural phases of the human rights programs". To guarantee them, "socialist theory assigns an important role to the active intervention of government."[32]

In the western democracies, sovereignty remains with the people, the state having been created to serve the individual and to provide a representative forum for expression of approval or dissent. Professor Murphy describes the western philosophy as "radically individualistic". The result is, he says, that "man has been placed at the centre of political and social existence", and constitutional guarantees have evolved to protect that individualism.[33] The western state-individual relationship he continues, should be viewed in terms of three basic concepts; government depends upon the consent of the governed; government is an agent of the public; and democracy maintains a negative view of the state.[34]

In the socialist state, sovereignty lies with the party or state. The Marxist knows only social man, his ideology having no "integral conception of the singular person".[35] The individual must serve the party, which was created as an expression of the collective interest. What the party does therefore, is an expression of the collective will, and in the best interests of the individual. It follows

that socialist ideology does not look favourably upon individual expression of dissent, because even though he may feel wronged, the individual must stifle his objections to laws which are enacted not for his particular good, but for that of the collectivity. Even less will the socialist ideology tolerate appeal by an individual to a tribunal of review beyond the state. "The environment in which he lives and works", says Dean Macdonald of the individual within the socialist society, "remains unsympathetic to a civil liberties concept that would enable him to question the validity of any major act of the party or of the state".[36]

Thirdly, the gap between socialist and western democratic ideologies widens on examination of the judicial systems of each. Soviet Courts are bound by all party resolutions because they are not an independent branch of the state, and party policy is an expression of the interests of the socialist population".[37] Mr. Korowicz continues;

> ...in our Soviet State the courts have always been considered as part of the machinery of political leadership, and care must be taken through the appropriate measures that the courts are in fact tools of the policy of the Communist Party and of the Soviet Government. 38

All of which leads to the conclusion that the processes of justice in Soviet law,

> are used more deliberately than in the liberal democracies to create and to mould private attitudes and opinions into an official ethic and mode of operation in which the citizen will identify, largely if not completely, with the aims of the state. 39

Fourthly, and as alluded to above, emphasis on social rights, or the traditional political and civil rights is a reflection of the conflict between individual and collective rights.[40] Although both are important, each of the ideologies finds expression of its values in one or the other. "The present tendency", says Professor Humphrey, "is to give importance to the rights of groups and of the collectivity, sometimes to the disadvantage of the individual."[41] The right of individual petition therefore, as with the traditional civil and political rights, continues to take a back seat to social and economic rights for not only the socialist countries, but the young states as well. These young states, said an African delegate,

> know better than anyone else that there can be no human rights where there is no state. That is why our countries are particularly concerned with the security of the state - in other words the collectivity at the expense of the individual. 42

If we predicate that a general criminal law can only be established if first there exists a community which shares common values, as Professor Murphy does, then it is obvious that ideological differences are of paramount importance, first, in drafting international laws, and secondly, in enforcing those laws. "Such a consensus", Professor Murphy says, "often difficult to obtain within a national community, has never been attained at the level of international society."[43] Perhaps this is a little overstated. At the drafting stage, a sufficient number of states have been able to agree on some aspects of fundamental human rights, the result being

that racism, slavery, apartheid, torture and genocide are condemnable by most states and by international law. It is at the level of implementation that the consensus has been wanting,[44] and this is why the 1966 Human Rights Covenants and the Protocol are so important today. What is the solution to this ideological conflict? The Protocol's success, and that of the single most important means of implementation, the right of individual petition (a western ideological opinion?), depends on our finding an answer.

If there is to be a solution, it is essential, first, that we examine and understand the different ideological values and the reasons for ideological conflict. Secondly, having admitted that different values exist as part of a "larger vision of human rights",[45] then, and only then, will we begin to accept and appreciate those differences. Thirdly, this appreciation and new perception may eventually create a climate of communication and feeling which will lead to a narrowing of the ideological gap. All of this assumes of course, that all parties are more interested in taking the difficult road to an intellectual solution, than in heating the fires of ideological conflict.

It is Professor Murphy's view that this narrowing of the gap between ideological values is occurring in fact. As an example he says, Westerners are "now aware of the public character of the natural resources which an earlier age was willing to commit to the private domain".[46] Freedom of speech he says, "which is projected by the ideology as

an absolute value, has limits which are being acknowledged within democratic countries".[47]

If each major system is prepared to admit that it holds no monopoly on truth and will accept the values of the other as being an integral part of the "larger vision of human rights", then "we shall gain that community of shared values which is the sine qua non of effective law."[48]

By way of conclusion, it is useful to look at what Moses Moskowitz said of this ideological dilemma in 1959, as the United Nations struggled to formulate Covenants which would be acceptable to a majority of its member states. He describes the problem most clearly:

> ...the Covenants are not the product of a single mind, conceived and executed within the framework of a definite philosophy. They are the expression of many creeds and many philosophies. ...In general it may be said that the civil and political Covenant reflects the philosophy of the eighteenth century and its emphasis on the individual's so-called natural rights. The economic, social and cultural Covenant reflects the nineteenth century struggle for economic and social equality. Article 1 of both Covenants on the right of people to self-determination reflects the twentieth century struggle for equality among nations. The Articles on implementation articulate certain advanced thoughts on the responsibilities of the organized international community. 49

CHAPTER TWO NOTES

1. See O'Connell, International Law, 2nd ed. 1970, 106-7; and see also Manner, "The Object Theory of the Individual in International Law", A.J.I.L. (1952) 428.

2. Schwarzenberger, A Manual of International Law, 5th ed. 1967, Stevens & Sons, 80-86, 139-144.

3. Ibid. 8-81.

4. Brownlie, Principles of Public International Law, 2nd ed. 1973, 60; and Brownlie, 'The Place of the Individual in International Law', 50 Virg. Law Rev. (1964) 435.

5. Ibid. 536.

6. Optional Protocol to the CP Covenant, Article 1.

7. Gormley, The Procedural Status of the Individual Before International And Supranational Tribunals, The Hague, Martinus Nijhoff, 1966, 194. This is the conclusion arrived at by Prof. Gormley after his examination of the procedures of the European Court of Human Rights, the International Court of Justice, and the EEC Tribunal.

8. Ibid. 194; see Carey, "Implementing Human Rights Conventions - The Soviet View", 53 Ky. L. J. (1964), 115.

9. Kozhevnikov, I. L. C. (1953), 172-3.

10. Bokor, "Human Rights and International Law" in Kiado ed. Socialist Concept of Human Rights, Budapest 1966, 293.

11. Grzybowski, Soviet Public International Law, 1970, p. 66.

12. Ibid. 67.

13. Cohen, "The Individual and International Law", in Gotlieb ed., Human Rights, Federalism and Minorities, 1970, 111;
see also Humphrey, "The World Revolution and Human Rights", in ed. Gotlieb, Ibid;
O'Connell, op. cit., 106-112, 742, 958-9, 1029-31;
Lauterpacht, International Law and Human Rights, Garland Publishing 1973, reprint of 1950 ed. 27-72;
Kelsen, Principles of International Law, 1959, 96-100, 124 ff.;
Hyman, "Constitutional Aspects of the Covenant", Law & Contemp. Problems, 1949, 466-7;
Clark, A UN H gh Commissioner for Human Rights, The Hague 1972, 134-6;

Tucker, "Has the Individual Become the Subject of International Law?", 34 U. Cin. L. Rev. 341.

14. Moskowitz, Human Rights and World Order, (1958), 15, 116-7.

15. See Clark, ibid., 135-6, who says that, "In short, there is a substantial body of practice denying any flat assertion that individuals cannot be subjects of international law." See also, Humphrey, "The International Law of Human Rights in the Middle Twentieth Century", in Bos ed., The Present State of International Law and Other Essays, 1973, 75-105 for a discussion of exceptions to the traditional theory that individuals are beyond the reach of international law.

16. UN Charter, San Francisco, 26th June 1945.

17. Reported by Sohn & Buergenthal, International Protection of Human Rights, 1973, 845-6.

18. O'Connell, op. cit., 107-8.

19. Macdonald, "Petitioning an International Authority", in Gotlieb ed., Human Rights, Federalism and Minorities, 1970.

20. Grzybowski, op. cit., 66.

21. Ibid. 66.

22. Korowicz, "Protection and Implementation of Human Rights within the Soviet Legal System", (1959), 53, Proc. Soc. of Int. Law, 248.

23. Grzybowski, op. cit., 66; and see Liskofsky, "Coping with the 'Question of the Violation of Human Rights and Fundamental Freedoms'", 8 Revue Des Droits de l'Homme (1975) at 881, 904 footnote, 12.

24. Bokor, op. cit., at 293-4; See also Humphrey op. cit. at 102 where he records the statement of an African delegate who abstained in the voting on the Optional Protocol and explained her country's apprehension concerning use of civil and political rights for political propaganda.

25. Macdonald, op. cit., 133.

26. Szabo, "The Theoretical Foundations of Human Rights", in Eide & Schou eds., International Protection of Human Rights, Oslo, 1967, 36.

27. Szabo, ibid, 39.

28. Szabo, ibid. 39.

29. Szabo, ibid. 40.

30. Macdonald, op. cit., 122.

31. Murphy, "Ideological Interpretations of Human Rights", 21, De Paul Law Review, 1971, 286 at 291.

32. Ibid, 302; and see Cranston, What are Human Rights?, 1973.

33. Murphy, ibid. 297.

34. Ibid. 297-8.

35. Ibid. 301.

36. Macdonald, op. cit., 133.

37. Korowicz, op. cit., 249.

38. Ibid. 249.

39. Macdonald, op. cit., 133.

40. See Humphrey, "The International Law of Human Rights in the Middle Twentieth Century", ed. Bos. op. cit. at 102.

41. Ibid. 102 and Cranston op. cit.

42. Humphrey, ibid. 102, and Humphrey, op. cit. in ed. Gotlieb at 174.

43. Murphy, op. cit., 286.

44. See Humphrey op. cit., "The International Law of Human Rights in the Middle Twentieth Century" at p. 89.

45. Murphy, op. cit., 306.

46. Murphy, ibid. 300.

47. Murphy, ibid. 300.

48. Murphy, ibid. 306.

49. Moskowitz, "The Covenants on Human Rights: Basic Issues of Substance", Proc. Am. Soc. of Int. Law (1959-60), 230.

CHAPTER THREE

GENERAL ARGUMENTS FOR AND AGAINST THE RIGHT OF INDIVIDUAL PETITION

Moving from the more specific arguments concerning the individual's locus standi and Marxist ideology, there are less legalistic and more general arguments to be made for and against the right of petition.

But first let us dispose of Article 2 (7), briefly, because much has been written on the question, and because it is not at home in the non-legal section of this paper. Article 2 (7) of the United Nations Charter prohibits the United Nations from intervening in matters which are essentially within the domestic jurisdiction of any state.

The defence of "domestic jurisdiction" to the international implementation of human rights has been somewhat discredited by international practice. Professor Bilder says of Article 2 (7) that the question is no longer a matter for useful debate, and that "claims by governments that treatment of their own citizens is solely within their own domestic jurisdiction may be given short shrift".[1] The question, he says, has been answered by two decades of international practice.[2] In order to assess its validity as a defence we must look both at the opinions of reputed commentators on international law, and at international practice. Maya Prasad is even more direct than Professor Bilder, and says that

the Assembly "has acted on the premise that it does have the competence to deal with such situations on the ground that the Charter provisions dealing with human rights are being violated".[3]

Professor Lauterpacht gave early expression to these views in 1950 when he wrote of Article 2 (7), first, that receipt of a petition, and a United Nations recommendation does not amount to an "intervention"; and secondly, that states did not intend the Article to exclude those matters which are the subject of international obligations, such as human rights. A different interpretation, he said, would reduce the Charter "to an absurdity".[4]

Professor Humphrey gave recent expression to this view. It can no longer be argued, he says, "that violations of human rights which shock the conscience of mankind are essentially within domestic jurisdiction".[5]

In his examination of the Soviet attitude to international implementation of human rights, Mr. Tedin finds however, that for the Soviets the question of Article 2 (7) is not a dead issue. He wrote in 1972 that the Soviets persist with the attitude that any form of international implementation of human rights was contrary to Article 2 (7), and amounted to an intervention in a matter essentially within the domestic jurisdiction of a state; unless, the Soviets reasoned, the violations were such as to amount to a threat to world peace, as was the case in South Africa.[6] This argument ignores, first, the evidence of continued and

worsening violations by states of their citizens' rights, and secondly, the raison d'être of the international human rights movement, that is, to prevent state violations by superimposing on state obligations an international system of supervision.

But the Soviet attitude may have changed. They have ratified the CP and ESC Covenants, although not the Protocol. Further, Mr. Brezhnev himself made human rights a matter for legitimate international concern when he signed the Helsinki agreement in 1975.[7] The Soviets cannot therefore, "shut off all discussion of human rights and contacts by indignantly asserting that these are domestic matters."[8]

The Helsinki agreement supports an argument used by the Australian representative against Soviet reliance on Article 2 (7). As summerized by Professor Lauterpacht, the representative of Australia,

> a country which had played a prominent role in the adoption of Article 2 (7) was fully in favour of the international right of petition. He pointed out that there was nothing irrevocable about the sphere of domestic jurisdiction; that the transfer of the latter to international jurisdiction would constitute not a violation but an exercise of national sovereignty... [9]

Professor Starr adopts this reasoning, and says of the Soviet argument that all such international implementation machinery would run afoul of Article 2 (7); "this was a groundless legal argument, since there is nothing in the Charter that prevents member states from agreeing to restrictions on their sovereignty..."[10]

In view of international practice, culminating recently in the Helsinki agreement of 1975, it seems safe to conclude,

as do most western international lawyers, that Article 2 (7) cannot be raised as a valid defence against international supervision of human rights.

Professor Lauterpacht could not imagine a successful Bill of International Rights without a right of petition:

> There is no prospect of the fulfillment...of human rights and freedoms unless an effective right of petition is accepted as being the essence of the system established by the Charter. [11]

Denial of this right, he said, "is tantamount to a withdrawal, to a large extent, of the principal benefit conferred by the Bill."[12] Accordingly, Article 7 was included in his 1945 draft International Bill of the Rights of Man: "There shall be full freedom of petition to the national authorities and to the United Nations".[13] The merits of individual petition have been argued ever since.

The first and most persuasive argument for the right of individual petition is that the individual is the obvious person to bring the complaint. First, he is most familiar with the circumstances of his allegation. Secondly, we should hardly expect a state which has allegedly violated a citizen's rights to become the champion of that individual's claims before the Human Rights Committee. Further, it is only a little more probable that another state will intervene on behalf of that individual and risk either harm to its peresent relations with the offending state, or retaliation in a like manner. It could be argued also that a system of state complaints may in fact be the cause of hostility between

states and therefore dangerous to world peace. For these reasons, the right of individual petition is essential. It will allow the victim to present his own case, and will ensure the depolitization of human rights violations. As made abundantly clear by the recent allegations of a British doctor that she was tortured while being held as a political prisoner in Chile, evidence given by the victim is a very effective stimulus to world attention, and is less likely to be greeted with the cynicism which state complaints may invite.

Professor Lauterpacht comments keenly on the substitution of state complaints for that of individual petition. When a state takes up a victim's case, it assumes immediately a political complexion, and the "original nature of the issue becomes obliterated by considerations and stratagems of international politics".[14] Is the matter, he asks, to "become a test of the friendliness of a Signatory state whether it refrains from taking up charges of violations of the Covenant?"[15] The individual's right to petition goes beyond the academic arguments on his status as a subject of international law. The insistence on his right of petition, says Professor Lauterpacht, "is due to a practical assessment of the merits of the procedure initiated by individuals, as compared with that of governmental authorities".[16]

Professor Humphrey says of the system of state complaints that it "is one of the weakest techniques for enforcing human rights law...it is unlikely that, unless there is some

political motivation for doing so, states will interfere..."[17]

A concluding condemnation of the state complaint system comes from Moses Moskowitz who believes it axiomatic that states are prompted mainly, if not exclusively, by political considerations:[18]

> Nothing could be more detrimental to the future of the covenant, or more destructive of its purposes than its being used as a pawn in the game of power politics, or a means to disturb friendly relations among states. But these consequences are almost unavoidable if the right to invoke the covenant is restricted to states and states alone. [19]

It seems that with developments since the fifties in the right of petition, states do accept now the inherant dangers of an implementation system based on state complaints.

A second and compelling argument for individual petition is that since its inception, the Human Rights Commission has received each year, thousands of complaints alleging violations.[20] If we accept that relatively few people are even aware of the possibility of approaching the United Nations with their complaints, and of those who are, many are unable to communicate, or fear reprisals for doing so, then this adds weight to the argument that the numbers of people seeking protection alone, is justification for an effective petition procedure.[21]

Thirdly, an effective right of petition will bring us closer to that time when the individual will maintain his own action against a state, in his own name, be it before a International Court or a quasi-judicial Human Rights Committee. The most important factor, says Professor Gormley, "in

guaranteeing the effective protection of human rights...is that private individuals and groups be capable of maintaining a judicial action against any Sovereign State causing them injury..."[22] The right of petition is an integral part of that procedural capacity, and should be developed for that reason.

Fourthly, the reason most often given for rejecting the right of individual petition is that it would open the "floodgates" to communications which are malevalent, malicious, unfounded or insignificant; the system would be abused and converted into a vehicle for political propaganda; the result being that the Human Rights Committee would be reduced to chaos, and its work made impossible.[23]

At least two things should be said in reply to this. It is an illusion, Professor Lauterpacht wrote, "to assume that petty, ill-founded, or malevolent petitions can come from indiviudals and not from governments".[24] Secondly, the European Commission on Human Rights, the Trusteeship Council, and "the non-judicial bodies in connection with the protection of minorities, the system of mandates..."[25] have all been able to devise adequate machinery to cope with the procedural problems of individual petitions. It is "essentially a matter of machinery",[26] the creation of which may be difficult, but which must not be permitted to stifle the essential right of petition. The immediate submission of complaints to the state involved has, for example, in the European case, proven effective in quickly

clarifying issues and in sorting out the valid from the ill-founded complaints.

Fifthly, it has been said that the right of petition will undermine the authority of local courts and laws, and will encourage disloyalty.[27] Frank Holman, President of the American Bar Association in 1948, although speaking on the proposed International Bill of Rights in general and not on the right of petition specifically, expressed such fears in no uncertain terms. He warned of United Nations interference in the internal affairs of the United States,[28] and declared that the people of the United States "will emphatically not be willing to put our system to the hazard of subjecting it to the interpretation of any international organization presently existing."[29] He criticized the omission from the Covenants of such basic rights as private ownership of property,[30] and expressed his fear that a totalitarian majority in the United Nations may seek to enforce its concepts upon American jurisprudence.[31] This raises many interesting questions about the desirability or otherwise of a World Government, and is particularly relevant today when it might seem to westerners that the balance of opinion in the United Nations no longer functions in their best interests, and wnen its impartiality is so often questioned by those same westerners.

Dean Macdonald's reply to this, is that to the extent the argument is based on notions of sovereignty, it is less cogent today. The importance of territoriality, he says, is giving way to growing internationalism, and the growing need

for the international protection of human rights.[32] With respect to human rights Dean Macdonald may be correct, but one might question whether in fact territoriality is giving way to a growing internationalism. However, in answer to the argument that the right to petition will undermine local authority, it is true that access to a rational process of appeal for those who are critical of their national law, will strengthen that individual's support for his state, rather than weaken it, and reduce the possibility of confrontation and violence. The emphasis however, is on a rational process of appeal, and we should assume that the Human Rights Committee will provide that. The Committee will be examined later in this paper. To conclude on this point, Dean Macdonald says,

> ...a political system that permits individuals...to challenge its laws and procedures internationally, against previously accepted standards, may well stimulate rather than destroy rational foundations for political obligation on the part of the citizen. It will (paradoxically) foster more loyalty and respect, not less. 33

Finally, it could be argued that a system of petition will act to the prejedice of those societies which are most open and free. The United Nations will be flooded with petitions from states where individuals need not fear government retaliation, and yet will receive few petitions from states, the people of which are either afraid to speak out, or who will never even learn of their right to make such a petition. Of this latter point it should be said however, that a state which ratifies the Protocol, thereby consenting to its

people having that right, will presumably make known to its people that right. It may well be true that the more liberal governments may suffer embarrassment before world public opinion, especially in the earlier years of international implementation. But then leading the way is seldom easy. Hopefully, it will take only a short time for people to realize that submission by a state to international scrutiny is a sign of freedom, a sign of confidence in strong judicial and governmental systems. It is appropriate to repeat some of what Dean Macdonald has written on this matter.

> ...a state's willingness to summit certain of its activities to scrutiny...represents the vigour and confidence of a political system that is willing and able to countenacne impartial review, and, on occasion, embarrassment from world public opinion. 34

Although an appearance before an international authority reflects a failure of the national system (from the complainant's point of view), and is regrettable because implementation has failed at the level where it counts most, perhaps the day will be not long in coming when representatives at the United Nations will speak with some pride of the availability to their nationals, and their use of, a system of "final appeal". Dean Macdonald speaks of the internal and external benefits which will accrue to a state which recognizes the right of petition. Of the external effects he says:

> In terms of the issue of moral advantages as crucial to the struggle for the minds of men in the future, the gains would appear to outweigh the losses. From this perspective, the right of petition advances the value systems of the liberal democracies externally as well as internally...It is a step forward in the

> continuing struggle to develop a uniform legal conscience on matters of fundamental human rights, regardless of the accident of nationality. [35]

Of the internal effects, Dean Macdonald hopes that the right of petition may work "to cleanse and elevate the national system".[36] The feed-back, he says, "tends to keep the local law open, honest and in step with the state's wider obligations... it encourages vigilance and responsiveness on the part of governments",[37] which has been described by Comte, with reference to the European Convention, as "the hidden efficacy of the Convention, the influence of its provisions on the day to day practice of administration and of justice in the countries in which it is in force...".[38]

To answer the claim that those countries in which the right of petition is made most readily available will be unduly embarrassed, and their internal orders subjected to disruption, it seems clear that the democractic image of states such as the United Kingdom, Belgium and West Germany has not been unduly tarnished by the several actions which have been brought successfully against them under the provisions of the European convention.

The conclusion to be drawn from the above arguments, it is submitted, is that the right of an individual, who has been the victim of a violation of his fundamental rights, to petition an international authority is fundamental to, and essential for, the protection of those rights.

CHAPTER THREE NOTES

1. Bilder, "Rethinking International Human Rights: Some Basic Question", Wisc. L. Rev. (1969), 171 at 181.

2. Ibid. 180-181.

3. Prasad, "The Role of NGO's in the New UN Procedures for Human Rights Complaints", 5 J. of Int. Law and Policy (1975) 441 at 458 and footnote 73, where he cites authorities as support for his opinion.

4. Lauterpacht, International Law and Human Rights (1973 reprint of 1950 ed.) at 169, 173-188, 230.

5. Humphrey, Forward to Humanitarian Intervention and the United Nations, ed. Lillich, (1973) VIII; see also Fawcett, "Human Rights and Domestic Jurisdiction" in Luard ed. The International Protection of Human Rights, (1967), 286; Higgins R., The Development of International Law through the Political Organs of the United Nations, (1963), Pt. 2.

6. Tedin, "The Development of the Soviet Attitude toward Implementing Human Rights under the Charter", 5 Revue des Droits de l'Homme (1972), 400, 401, 402, 408. The Soviets were not alone in opposing international implementation; see a speech by the President of the American Bar Association, Holman, "An "International Bill of Rights: Proposals have dangerous Implications for U.S.", 34 A. B. A. J. (1948), 984. Holman attacked the International Bill as an unwarranted interference in domestic matters, and quoted Professor Humphrey (then Director of the UN Division of Human Rights) to support his views. For Professor Humphrey's answer, see his address to the A. B. A., "The Revolution in the International Law of Human Rights", 4 Human Rights (Spring 1975) at 205,209.

7. Conference on Security and Co-operation in Europe: Final Act (signed Helsinki 1 Aug. 1975)

8. The Montreal Star, 3 Aug. 1976 at A-9; and see Russell, "The Helsinki Declaration: Brobdingnag or Lilliput?" 70 A.J.I.L. (April 1976) 242 at 260, 268, 269.

9. Lauterpacht, op. cit., 247 footnote 63; A/c.3/SR. 15q, 4.

10. Starr, "International Protection of Human Rights and the UN Covenants", Wisc. Law Rev. (1967), 863 at 873 and footnote 63.

11. Lauterpacht, op. cit. at 244: see generally 244-251; 286-291.

12. Ibid. at 287.

13. Ibid. at 315; see also 313, 321.

14. Ibid. at 288-9.

15. Ibid. at 289.

16. Ibid. at 289; see also Hoffmann, "Implementation of International Instruments on Human Rights", Proc. of the Am. Soc. of Int. Law (1959)-60), 235 at 236.

17. Humphrey, "The International Law of Human Rights in the Middle Twentieth Century" in The Present State of International Law, ed. Bos. (1973), 86-7.

18. Moskowitz, Human Rights and World Order, (1958), 110; and see Bilder, op. cit. supra at footnote 1, at 182-7, and at 183 in particular where he says "...when support for foreign victims of human rights may involve substantial foreign policy risks, human rights considerations will be sacrificed".

19. Moskowitz Ibid. at 110.

20. UN Doc. E/CN.4/Sr. 967 (1967), estimate of 250,000 communications from 1945 to 1967; Bruegel, "The Right to Petition an International Authority", 2 Int. and Comp. Law Quart. (1953) at 542-3, who says that from 28 April 1952 to 31 March 1953 the UN Secretariat received 2,118 petitions, and from 3 April 1951 to 7 May 1952 it received over 25,000 communications; UN Doc. E/CN.4 1101 (1973), indicates that 20,000 petitions were received in 1972.

21. see Bruegel Ibid. 543; and Humphrey, "The Right to Petition in the United Nations", 4 Revue des Droits de l'Homme (1971) 463.

22. Gormley, The Procedural Status of the Individual before International and Supranational Tribunals, The Hague (1966) Preface, V.

23. see Macdonald, "Petitioning an International Authority", in Human Rights, Federalism and Minorities, ed. Gotlieb (1970) at 137-8; Moskowitz op. cit. 115; Lauterpacht op. cit. 243; Bruegel op. cit. 556.

24. Lauterpacht Ibid. 289.

25. Ibid. 242, 375; and Macdonald op. cit. 138.

26. Lauterpacht Ibid. 291.

27. For a complete discussion of this, and the following arguments see Macdonald op. cit. 139-41.

28. Holman op. cit. 1948 A.B.A.J. at 985.

29. Ibid. 986.

30. Ibid. 986.

31. Ibid. 1079.

32. Macdonald op. cit. 139.

33. Ibid. 140.

34. Ibid. at p. 140.

35. Ibid. at p. 141.

36. Ibid. 141.

37. Ibid. 141.

38. Ibid. 141; Comte, "The Application of the European Convention on Human Rights in Municipal Law" (1962-3), Int. Commiss. of Jurists 94 at 128.

CHAPTER FOUR

DEVELOPMENT OF THE UNITED NATIONS RIGHT OF PETITION

In order to assess the possible effectiveness of the Optional Protocol it is helpful to look briefly at the United Nations' non-treaty procedures for receipt of individual petitions, and the use made by the United Nations of those procedures. Much has been written on the subject of individual petition,[1] but this paper will survey the subject by reference first, to the Trusteeship Council; secondly, to the several resolutions leading up to and culminating in ECOSOC resolution 1503; and thirdly, to a treaty procedure provided in the International Convention for the Elimination of all Forms of Racial Discrimination (hereinafter referred to as the Convention on Racial Discrimination). Some comparisons with the procedure for individual petition provided for by the European Convention will be made later in this paper.

Except for that of the Trusteeship Council, the non-treaty procedures for individual petition have enjoyed limited success in the United Nations. Although the reasons are varied, it is important to examine and understand them, first, because in so doing perhaps some important lessons may be learned which will contribute to the Protocol's effectiveness; and secondly, the fact that non-treaty procedures have enjoyed limited success makes it imperative

(a) THE RIGHT OF PETITION IN TRUST TERRITORIES

Article 87 of the United Nations Charter authorizes the General Assembly and Trusteeship Council to accept petitions from individuals in a trust territory and to examine them in consultation with the administering authority. The Trusteeship Council is an offshoot of the League's Mandate System, which developed a procedure for receiving and acting upon petitions from persons in a territory under mandate. There was also some precedent for the Trusteeship Council's procedure in the League's Minorities System (established immediately after the first World War), and the Geneva Convention signed on the 15th of May 1922 by Germany and Poland, in respect of Upper Silesia. Although it is not the purpose of this paper to examine the pre-World War I right of petition, it should be noted that both of the above, the Minorities System and the Convention on Upper Silesia, granted individuals and private groups legal standing as parties in quasi-judicial proceedings against their own governments. Although the success of each is debatable, many have accepted that the right of petition was invaluable in each.[2]

Under Article 87, and in accordance with the Trusteeship Council's Rules of Procedure, the petitioner need not be an inhabitant of the trust territory, and the Council will accept petitions from individuals or organizations.[3] The Standing Committee on Petitions, set up by the Council on

the 13th of March 1952, examined the complaints and if necessary would conduct oral hearings (the petitioner was permitted to request leave to make oral presentations in support of a written communication) and carry out on-the-spot investigations through the agency of a visiting Mission.[4] The Trusteeship Council has dealt with many hundreds of petitions in this way, and has been able to manage them effectively and usually to the satisfaction of the parties concerned.[5] As stated in the previous chapter, fears that the Council would be swamped by an enormous number of irrelevant petitions were unfounded,[6] suggesting that the Protocol should not be discounted for that reason, and that the Human Rights Committee, like the Trusteeship Council before it, will be able to cope with the separation of valid and invalid petitions.

(b) THE DOUBLE STANDARD

The willingness of member states of the United Nations to accept the right of individual petition for individuals in trust territories opens some interesting questions. First, it creates the somewhat paradoxical situation where "there is a wider and more explicit measure of international enforcement of - some - human rights and fundamental freedoms of inhabitants of trust territories than in other parts of the world."[7] Secondly, and more importantly, although commendable in itself, the granting of such a right to these particular

individuals is indicative of a significant trend in the United Nations, the "double standard", a fact which undermines the logic and sincerity of those states which oppose the right of individuals to petition the United Nations. This problem has been discussed at length by several authors[8] and need not be re-examined, beyond referring to some of the comments made by those same authors. According to Professor Humphrey, the "double standard" is in part the reason why the non-treaty procedures, such as ECOSOC Resolution 1235 (XLII), adopted in 1967,[9] have not been effective. Their ineffectiveness, he says, results not so much from the procedural defects, as from the fact that **questions** of human rights violations and resulting condemnatory resolutions "are usually discussed as political matters in an atmosphere of political controversy, and the action taken depends as much on political as on legal factors."[10] The result, he says, is that doors are left open "for the introduction of double standards and discriminatory treatment".[11]

John Carey describes the ambiguity or double standard as follows:

> Until 1965 the United Nation's double standard on Human Rights meant simply that individuals' complaints could be lodged publicly with a United Nations body only when directed against colonial governments or against the South African government, and not when directed by persons generally against their own domestic governments. 12

In his discussion of petitions being received from Non-Self-Governing Territories, Kent Tedin describes the Soviet attitude towards those petitions. The Soviet delegate, he

says, "praised the contribution of the petitioners and chastised the United States and other Western powers for not supporting the Committee's action".[13] The Soviet Union has hardly been consistent in its attitude towards the right of petition, but is not alone in that inconsistency.[14] The double standard has been referred to often in United Nations debates. In the 1975 debates in ECOSOC's Social Committee on the Programme for the United Nations Decade for Combating Racial Discrimination, the Italian and American representatives condemned racism in Southern Africa, but spoke also of more subtle forms of racism and neo-colonialism in other parts of the world which were related to ethnic, religious, linguistic and traditional differences, and which "took the form of political tutelage... backed up by enormous military strength..."[15]

Hopefully, the treaty procedures provided by the International Covenants on Human Rights, and the Protocol especially, will help bring about the disappearance of this double standard. If the victim is able to bring a complaint on his own initiative to the Human Rights Committee then perhaps there is a much greater chance for "objective consideration in an atmosphere of judicial impartiality".[16]

(c) NON-TREATY PROCEDURES FOR RIGHT OF PETITION

The right of petition has been a continuous subject for debate in the United Nations, and its development as a

non-treaty procedure for the international implementation of human rights must be traced. The right to petition a national authority, says Professor Humphrey, is at least as "old as the Magna Carta", and is for westerners more than a procedural device for the protection of individuals.[17] It is, he continues, an essential "part of the right to participate in government and a manifestation of freedom of assembly and expression."[18]

The right of petition was a part of the 1947 "Secretariat Outline" for the International Bill of Rights, or Universal Declaration of Human Rights[19] as it came to be known, and there were in fact, several attempts to incorporate the right into the Declaration.[20] This Outline was used by the Drafting Committee of the Commission on Human Rights in June of 1947 as the basis for its work.[21] But when the Commission on Human Rights decided that the International Bill of Rights should consist of "the Declaration", the "Convention" (later called "Covenant"), and the "Measures of Implementation",[22] the United Kingdom suggested that discussion of the right of petition be postponed until it came time to discuss the measures of implementation.[23] From that time the right of petition became a procedural matter, apparently not a right sufficiently essential in itself to be included in the Declaration, but an essential part of implementation procedures. The Commission on Human Rights therefore, helped ensure that it would not be included in the Declaration, says Professor Humphrey, "by thus narrowly defining the right of

petition, and associating it exclusively with implementation..."[24]

Obviously states were somewhat ambivalent in their attitudes to the right of petition because, although it was not included in the Universal Declaration, on the very day that the Declaration was adopted by the General Assembly, the Assembly also adopted resolution 217 (111)B, requesting ECOSOC to ask the Commission on Human Rights to continue its examination of the right of petition, the preamble of which stated that "the right of petition is an essential human right, as is recognized in the constitutions of a great number of countries."[25] On the same day therefore, the right of petition was both rejected and accepted as an essential human right. Those voting against the preamble to resolution 217 (111)B included the representatives of the USSR (and her allies), Sweden, China, the United Kingdom, and the United States of America - a formidable combination.[26] Why the apparent contradiction? The real reason was that states feared public exposure.[27] Opposition to inclusion of the right of petition in the Declaration was too great. The matter had clearly become one of implementation; and while states in resolution 217 (111)B were prepared to give it the label of "essential human right" and to postpone the question for later intensive examination in debates on implementation, they were not prepared to enshrine the right of petition then and there, in the Universal Declaration.

We should go back to 1947 to better understand the reluctance of states to fully accept the right of petition.

In its first session, from the 10th to the 24th of February 1947 at Lake Success, the Commission on Human Rights had already abdicated its right to take any action on petitions received, declaring specifically that it "had no power to take any action in regard to complaints concerning human rights".[28] This proposal was affirmed by ECOSOC Resolutions 75(V) at the Council's fifth session at Lake Success in August 1947, and by the Council again on the 30th of July 1959 in Resolution 728 F.[29]

Why did the Commission and ECOSOC take these decisions? These were the very instrumentalities created to protect human rights, and surely the protection of individuals was an essential part of that function.[30] It is not difficult to find reasons, and Bruegel gives three of them.[31] First, the Commission consisted of eighteen government representatives,[32] acting under the restraint of government policies. Secondly, the Commission's sessions were limited to one of 6 to 8 weeks duration per year, and was unable to cope with the great number of complaints. Thirdly, the Commission was not created as an investigative or enforcement body, but rather for the purposes of drafting. Its first great goal was to draft an International Bill of Rights.[33]

It is submitted that the real reason was one of politics. The second reason above, that of too little time, was a symptom of the real reason rather than part of the reason itself. The General Assembly and its subsidiary instrumentalities have normally been able to find time for those matters which

really interest them. There has always been sufficient time to study apartheid, and today, there is usually sufficient time to debate the Palestinian question. The fact that the Commission consisted of 18 government representatives, and not of independant experts, was part of the political reason. The Commission was just not interested.

But if this choice to take no action on complaints was political, there was justification for it in the Commission's origins. Being a newly created body there is no doubt that it was well aware of its mandate. At its first session in 1947, the Commission established a Sub-Committee on the Handling of Communications, the function of which was to consider how communications should be handled.[34] It's report contained the earliest, or original, statement that "the Commission has no power to take any action in regard to any complaints regarding human rights".[35] This statement was unanimously adopted by the Commission.[36]

There were legitimate grounds for this decision, all based on a belief that the Commission was not created as an investigative body. Article 68 of the United Nations Charter provides that "the Economic and Social Council shall set up commissions in economic and social fields and for the promotion of human rights..." Accordingly, the Commission on Human Rights was established by ECOSOC resolution 5 (1) on the 16th of February 1946, to assist ECOSOC in discharging its responsibility of promoting universal respect for, and observance of, human rights (Article 62 (2) UN Charter).

The terms of reference of the Commission, approved by ECOSOC resolution 5 (1) of February 1946, direct that the work of the Commission shall be directed towards submitting proposals, recommendations and reports to the Council regarding several matters, including an international bill of rights, the protection of minorities and any other matter concerning human rights.[37]

So there was some basis in the Commission's mandate for its decision not to take any action on complaints. However, the submission that the decision resulted from a lack of interest, rather than an insufficient mandate, stands. Just as states feared the inclusion in the Universal Declaration of the right of petition in 1948,[38] so had they feared in 1946 a procedure which would have encouraged individuals to petition the Commission on Human Rights. Professor Schwelb believes that the obstacles to taking action based on the human rights provisions of the Charter have proved to be far less formidable than one might assume. Neither the vagueness and generality of the human rights clauses of the Charter, he says,

> nor the domestic jurisdiction clause have prevented the United Nations from considering, investigating, and judging concrete human rights situations, provided there was a majority strong enough and wishing strongly enough to attempt to influence the particular development. 38a

The same could be said of the Commission's mandate. Professor Schwelb proceeds to illustrate his point by reference to several cases where action of this type was taken.

This then, was the attitude of both the Commission and ECOSOC towards the right of petition, and it persisted until 1967. It persisted in spite of another request in 1950 by the General Assembly that the Commission consider again the right of individual petition.[39]

This period between 1947 and 1967 was characterized by the prevailing double standard, and states' determination not to make any use of complaints received. There was always an overriding fear by states that the right of petition would lead to their being exposed publicly before an international forum.[40] Of course the Secretary-General continued to receive many thousands of complaints during these years, and ECOSOC did circulate confidential lists of these communications to its own members.[41] Despite directions from ECOSOC in resolution 728 F (XXVIII)[42] that its lists of communication be used by the Commission and the Sub-Commission on the Prevention of Discrimination and Protection of Minorities (hereinafter referred to as the Sub-Commission), the Commission persisted with the attitude that it had no power to take any action in regard to those petitions. The system for receiving petitions for those 20 years has been described as "the world's most elaborate waste-paper basket".[43]

What initiated the breakthrough in 1967? Roger Clark sees the change in attitude towards individual petition as "a cautious attempt to circumvent the double standard...",[44] but Sidney Liskofsky and Professor Humphrey view the change rather as a new expression of the double standard, in

re-vitalized form. Liskofsky sees the renewal of interest as a "by-product of African pressures for action on Southern Africa",[45] and says of later resolutions that the ambiguous style in which they are framed "resulted from the need to reflect in them the preference of the Communist and most African and Asian states for narrow terms of reference focused on colonialism and racial discrimination in Southern Africa...".[46] Professor Humphrey also attributes the new surge of interest in the right of petition to a change in political climate. By the late sixties, he says:

> ...many new states became so motivated by other factors, that they were ready in respect to certain situations at least to create precedents which would open up new possibilities for the international protection of human rights and the recognition of an international right of petition. 47

The move towards strengthening the procedures for individual petition actually began with Resolution 2144 A (XXI) in 1966 when on the 26th of October the General Assembly invited ECOSOC and the Commission urgently to consider "ways and means of improving the capacity of the United Nations to put a stop to violations whenever they might occur."[48] The door had been opened; finally procedures were created whereby the United Nations could consider specific allegations of violations of human rights.

On the 16th of March 1967, the Commission responded with Resolution 8 (XXIII).[49] There is some confusion in writings as to what exactly the resolution said.[50] The relevant parts of Resolution 8 are as follows:

> The Commission on Human Rights, ...
>
> Having regard to General Assembly resolution 2144 (XXI) of 26 October 1966...
>
> 1. Decides to give annual consideration to the item entitled 'Question of vioations of human rights...in all countries...';
> 2. Requests the [Sub-Commission] to prepare, for the use of the Commission...a report containing information on violations of human rights and fundamental freedoms from all available sources; ...
> 4. Requests [ECOSOC] to authorize the Commission and the Sub-Commission...to examine information relevant to gross violations of human rights...contained in the communications listed by the Secretary-General pursuant to [ECOSOC] resolution 728 F (XXVIII);...
> 5. Further requests authority...after careful consideration of the information thus made available to it...to make a thorough study and investigation of situations which reveal a consistent pattern of violations of human rights, and to report with recommendations thereon to [ECOSOC];
> 6. Invites the Sub-Commission to bring to the attention of the Commission any situation which it has reasonable cause to believe reveals a consistent pattern of violations of human rights and fundamental freedoms in any country,... [51]

ECOSOC RES. 1235:

On the 6th June 1967 ECOSOC adopted resolution 1235 (XLII)[52] which noted resolution 8 of the Commission and authorized the Commission and the Sub-Commission to examine information relevant to gross violations of human rights, contained in the communications listed by the Secretary-General pursuant to [ECOSOC] resolution 728 F.[53] In paragraph three ECOSOC authorized the Commission, after careful consideration of the information thus made available to it, to make a thorough study of situations which reveal a consistent pattern of

violations, and to report, with recommendations, to ECOSOC. By authorizing the Commission and the Sub-Commission to take action concerning complaints in the matter of human rights, ECOSOC had reversed the position which it had taken in resolution 75 (V), and for that reason must be regarded as the real turning point in United Nations procedures for individual petitions, and a break through for advocates of the right.

The Sub-Commission went to work immediately, and in October 1967, it adopted resolution 3 (XX), relying on the mandate given it by ECOSOC resolution 1235 and Commission resolution 8.[54] The resolution recorded in general terms that flagrant violations of human rights were continuing, and specified certain states which were in violation of their obligations under the United Nations Charter. Again, much has been written on this resolution; its condemnation of Greece and Haiti together with South Africa, Southern Rhodesia, Angola, Mozambique and Guinea Bissau; and on the Commission's reaction.[55] Expectations were short-lived and hopes were dashed. The old double standard prevailed, as too many members of the Commission were only interested in investigation of violations in the colonies and in South Africa. Records of the discussion, resulting from the Sub-Commission's resolution, in the Commission during February of 1968 make sad reading.[56] The good faith of the Sub-Commission was attacked; allegations and counter-allegations were fired in quick succession; and most retreated behind a

defence of Article 2 (7) and "intervention" while at the same time crying out for investigation and condemnation of South Africa.[57]

Obviously, the next step for the Sub-Commission was to devise some satisfactory procedure which would enable it to carry out its mandate under resolution 1235. As usual, it had been a struggle to achieve sufficient consensus on the substantive provisions of ECOSOC resolution 1235, but it was, and still is, an even greater struggle to make them work. The Sub-Commission could not afford to "rock the boat" again. It went to work and in October 1968 adopted a resolution on procedures for receiving complaints, known as "the Humphrey rules",[58] which was submitted to the Commission, which in turn submitted a draft resolution on procedures to ECOSOC in 1969.[59] The main provisions of these two texts were adopted by ECOSOC on the 24 May 1970 in resolution 1503 (XLVIII).[60]

ECOSOC RESOLUTION 1503

This resolution directs the movement of a petition through three distinct stages; from Working Group, to Sub-Commission, to Commission. It further authorizes reports to ECOSOC, or the creation of an ad hoc committee of investigation.[61]

The Sub-Commission is authorized to appoint a Working Group of not more than five of its members to meet once a year in private for a period not exceeding 10 days immediately before the Sub-Commission itself meets to consider all

communications (the original petitions received by the Secretary-General pursuant to ECOSOC Resolution 728 F (XXVIII))[62] with a view to referring to the Sub-Commission those communications which, in the opinion of the Working Group, "appear to reveal a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms..."[63] The enormous number of petitions, is of course, the justification for the Working Group.[64]

The Sub-Commission must then meet in private and on the basis, first, of the communication referred to it; secondly, any government replies; and thirdly, any "other relevant informationm" must decide which of them will be referred to the Commission.[65]

The Commission must then decide, first, whether a communication requires further study by the Commission and a report with recommendations to ECOSOC, or secondly, whether an ad hoc committee should be appointed by the Commission to investigate.[66] The conditions of investigation however, are first, that the government concerned consents; secondly, that the investigation is carried out with the co-operation of the government concerned; thirdly, that all available means of remedy at the national level have been exhausted; fourthly, that the situation must not be one which is already being dealt with by a regional organization or by an instrument or agency of the United Nations; and finally, that it must not be one which the state concerned wishes to submit to other procedures in accordance with international agreements to which it is a party.[67]

Important as resolution 1503 is, there was still the rules on admissability to be drawn up. Resolution 1503 had directed the Sub-Commission to devise "appropriate procedures for dealing with the admissability of communications received by the Secretary-General under" ECOSOC resolutions 728 F and 1235.[68] In other words, how should the petitions be screened, and by what criteria should they be judged proper or improper?

SUB-COMMISSION RESOLUTIONS 1 and 2 (XXIV)

The Sub-Commission finally adopted the necessary rules of admissability in resolutions 1 and 2 (XXIV),[69] which represent the most recent major development in United Nations non-treaty procedures for receipt and examination of individual petitions.[70] It follows that much has been written about them.

The standards and criteria established by Resolution 1 for the admissability of communciations may be summarized as follows. The object of the communication must not be inconsistent with United Nations human rights instruments, and will be admissable only if they may reasonably reveal a consistent pattern of gross and reliably attested violations.[71] Communications may originate from a person or group of persons who are victims, or from a person or group of persons who have direct and reliable knowledge of violations, or from NGO's not resorting to politically motivated stands.[72] Anonymous communications are inadmissable, as are those which

are abusive, manifestly political or based exclusively on media reports.[73] Further, communications will be inadmissable if domestic remedies have not been exhausted (unless those remedies are ineffective or have been delayed unreasonably), or if the communication is not submitted within a reasonable time after the exhaustion of domestic remedies.[74] Resolution 2 states that the Working Group shall consist of 5 Sub-Commission members, to be selected by the Chairman, and representing the geographical areas of Africa, Asia, East Europe, West Europe and other States, and Latin America.[75]

What do all of these words mean; how effective has the procedure been since the Sub-Commission resolutions were adopted; and how effective will they be? It is impossible here to analyze in total the two resolutions, besides it has already been done.[76] But it is helpful to look at what some of the commentators have written, and to make some observations.

First, it must be recognized that the wording of the two Sub-Commission resolutions is loose, and as Professor Guggenheim says of them, "the interpretation given those provisions will determine whether the resolution has created a forum for the consideration of human rights violations in fact or in form only".[77] Professor Newman criticizes the Sub-Commission resolutions, but concludes that they are deserving of a fair chance, and "cry out for interpretations that are nurturing and not niggardly".[78]

Secondly, their great handicap is their confidentiality. It is difficult to assess the effectiveness of the Sub-

Commission's work because of this very secrecy. Looking beyond the Sub-Commission's obvious drafting problems in 1970 and 1971, Professor Newman describes what actually happens to an author's petition today and recognizes confidentiality as the greatest dilemma confronting a petitioner and his counsel. The Sub-Commission's meetings are private, the Working Group's work shall be communicated to the Sub-Commission confidentially. The governing rule is one of confidentiality.[79] Where does that leave authors and their lawyers, Professor Newman asks, to which he replies,

> In hopelessly complete ignorance, unhappily. They get absolutely none of the protections that due process, natural justice, and similar concepts rightfully are presumed to ensure.[80]

And yet, Professor Newman believes that the rules can be made effective. His solutions to this problem of confidentiality, and his recommendations for interpretation, are that petitioners must be told when no action will be taken, or postponed, or what action has been taken; that the accused government has received the petition; that all attached documents have been forwarded to the government in question, and to the Working Group in the working languages; and finally, Professor Newman says, "neither they nor the accused government (or counsel) should witlessly be excluded from meetings of the Working Group and Sub-Commission."[81]

Thirdly, there are some problems connected with the Working Group as it was organized by resolution 2 (XXIV). In 1972 the 5 members were asked to examine 27,577 communications,

of which it considered approximately 20,000, and singled out a few.[82] Ten days is insufficient time for so few members to consider so many petitions. Further, there is no provision to prevent the member examining a petition from being a national of the state involved. Despite the fact that members are experts who must act as independents, and not as representatives of their respective governments, in the absence of such a provision there will be some valid petitions that will never be considered on the merits.[83] Professor Cassese reveals that the expert from Ecuador did make a suggestion to this effect, but it was apparently passed over or just not accepted.[84] Professor Cassese suggests that there should be a system of temporary disqualification to prevent a member from examining a complaint against his own government, as there is in the I.L.O. procedure for protecting trade union rights, and that an alternate to each member of the Working Group should be appointed each year from the same geographical area. In this way the geographical balance would be maintained when the alternate is called upon to replace a member with regard to the particular case for which the latter is disqualified.[85]

Fourthly, and to return to resolution 1 (XXIV), a petition shall be inadmissable if "inconsistent with the relevant principles of the Charter".[86] Surely this does not imply that a state against which a communication was directed could avoid responsibility by relying on Article 2 (7) of the Charter and stating that the matter was one within domestic

jurisdiction. Professor Cassese says not, because only those communications which reveal a consistent pattern of gross violations come within the Sub-Commission's competence, and the Article 2 (7) defence in these circumstances would not be justified, "since it is definitely the practice of the United Nations to take the position that massive and flagrant infringements of human rights are of international concern."[87]

Fifthly, paragraph 3 (a) of resolution 1 requires that the communication "contain a description of facts and must indicate the purpose of the petition and the rights that have been violated". What are the "rights that have been violated"? It does not mean the facts of the violation because the preceding clause already requires a statement of the facts. Whether or not a petitioner has correctly included a "right" which has been violated, Professor Guggenheim says,

> will thus ultimately depend on the individual reaction of the members, a situation that creates great potential for abuse. Some enumeration of the rights intended to be protected, providing that enumeration is not construed as a limitation, would be preferable." [88]

Presumably the members will look to the Universal Declaration and all other relevant United Nations Conventions and Declarations for direction, despite the fact that some member states may question their legality, or have not ratified them. Another matter for concern is that the petitioner may be unable to state in legal terms (and such appears to be required) the nature of the right violated. Professor Guggenheim notes that a draft resolution was submitted by Fergusen, Humphrey

and Javigry providing that "no particular format shall be required for admissability", but it was not adopted.[89] Professor Cassese's opinion of paragraph 3 (a) is that it is to be hoped that its condition "will be regarded by the Working Group as minor requirements, whose absence will not involve per se a rejection of communications."[90]

A sixth matter is that of paragraph 3 (c) which makes inadmissable a communication which "has manifestly political motivations". It is Professor Guggenheim's opinion that this exclusion can, "perhaps more than any other criterion, be used to bar consideration of any claim a state desires suppressed".[91] This restriction is not defined, vests too much discretionary power in the Working Group, and may preclude examination of too many communications, as most violations of human rights occur in the context of political struggles. Further, how is the Working Group to ascertain the petitioner's motive, or decide whether or not the complaint is "manifestly" political? If the Working Group will interpret "manifestly" as meaning "only political", that is, if its only purpose is to attack the state, then perhaps it will not be too great a threat to the procedures' effectiveness. But despite the political motivations, a violation may still have occurred, and surely the criterion in this regard should be simply, did a violation occur?[92] If so, then the petitioner's motive is irrelevant.

One might examine ECOSOC resolution 1503 and the Sub-Commission resolutions 1 and 2 of 1971 in much greater detail.

But what does a theoretical evaluation of these non-treaty procedures for receipt of individual petitons reveal? Are treaty procedures as provided for in the Protocol necessary? It can be said in favour of these non-treaty procedures that they have established firmly the basic principle that the United Nations does share some responsibility for the protection of human rights, and they have established the right of individual petition as a means of international implementation. Secondly, they have undoubtedly had a restraining influence on some states in some circumstances.[93] Thirdly, although it is easy to criticize the loopholes which have resulted from collective drafting, the results in terms of eventual acceptance of the right of petition may be positive. In Professor Cassese's words:

> The importance of their being adopted with virtual unanimity should not be underestimated; it is obviously true that general consent on a legal text is more relevant for its effective implementation than if it had been more properly drafted but lacking in broad-scale acceptance.[94]

One might wonder if this is such an obvious truth, but the question of drafting compromises, and ratification, is discussed elsewhere in this paper.

Fourthly, and an important achievement of the Sub-Commission rules, is that they have taken a wide and liberal view concerning the source of communications.[95] The inclusion, in the four categories of sources, of NGO's having direct and reliable knowledge,[96] and of individuals with a second-hand knowledge of the violations,[97] is most

commendable. Obviously, there will be many victims who for reasons of fear, imprisonment, or inadequate resources, will be unable to benefit, without assistance, from the new United Nations procedures.[98]

Most of the criticisms of the non-treaty procedures have already been mentioned. First, they suffer from terminology which is more political than legal, and which provides too many opportunities for an interpretation unfavourable to the petitioner (examples being the references to "rights which have been violated", "contrary to the provisions of the Charter", and "manifestly political motivations").

Secondly, the proceedings are too confidential, which appears not to serve their purpose. Failure to provide the petitioner with notice of action taken may discourage victims, and harm the authority of the United Nations regarding its responsibility for protecting human rights.

Thirdly, the rules provided by resolution 2 for the Working Group are inadequate.[99] Fourthly, it appears that complaints can be filed only after the violations,[100] and there are no provisions for prompt consideration of urgent violations, that is, those that are taking place, or are about to take place.

Fifthly, the new procedures will only permit examination of "a consistent pattern of gross and reliably attested violations", or it must be supported by other communications alleging similar violations, which together, reveal a consistent pattern of violations.[101] Further, it may be difficult to

establish this "consistent pattern:, especially, as Prasad says, "by the victims of torture who are still under detention, not to mention the victims who have already been killed".[102]

Sixthly, turning to ECOSOC resolution 1503, there is the requirement that an investigation by the Commission's ad hoc Committee "shall be undertaken only with the express consent of the state concerned and shall be conducted in constant co-operation with that state and under conditions determined by agreement with it",[103] which, although politics is the art of the possible, and this requirement was no doubt essential to the Sub-Commission's successful compilation of rules, seems to be self-defeating and unlikely to result in a genuine investigation.

Finally, resolution 1503 limits the Commission to the compilation of a report with recommendations (whether it be as a result of its own thorough study, or a result of an ad hoc Committee's investigation) which will be forwarded to ECOSOC. The Council in turn, is directed by Article 62 of the Charter to make recommendations on matters of human rights to the General Assembly, to the Members of the United Nations, and to the specialized agencies concerned.[104] One wonders what action will be taken by these more politically motivated bodies to stop and prevent human rights violations wherever they might be found. The record does not speak well for future positive action.

Having made a brief theoretical assessment of the new procedures, they should be evaluated in light of what has

actually happened since their adoption. Have the Sub-Commission and Commission made them work, and do the procedures have some practical function?[105]

The procedures have been used, but due to their confidentiality, the results cannot be fully known or examined. Without access to the private meetings it is impossible to ascertain the positions taken by members of the Working Group, Sub-Commission or Commission. The work done is traceable only from press reports, arising from newsleaks.[106] Liskofsky summarizes Sub-Commission and Commission activities as follows. In the summer of 1972 the working group referred several cases to the Sub-Commission which returned them for further study. In the summer of 1973 the Sub-Commission transmitted some cases to the Commission which at its 1974 session decided to postpone action on them, and established another working group, its own, to examine the cases and to submit recommendations at its February-March session in 1975.[107] This new working group transmitted eleven cases to the Commission in 1975, but the Commission established a new working group with instructions to meet a week before its 1976 session to examine eight of the eleven situations.[108]

What indeed is being done? Now we understand the frustrations of Professor Newman (legal counsel in the 1972 Greek case for four private organizations, and a group of Americans and Europeans),[109] and his criticism of the rules requiring confidentiality. It is Liskofsky's opinion that the double standard pervades any work attempted under the new

procedures. The Commission's failure to recommend any action by ECOSOC confirms, he says, "that the East European and Third World blocs have not relinquished significantly their resistence to a meaningful, general complaint procedure applicable to all gross violations... they prefer the approach of special procedures applied ad hoc to situations to which the majority may wish the Commission to devote attention."[110]

Undoubtedly, there is room for a mixture of pessimism and hope when one reviews what little information there is to review, on the implementation of resolution 1503 and the Sub-Commission resolutions. It is clear that confidentiality poses a genuine dilemma.[111]

However, every effort must be made to make these non-treaty procedures work effectively. The Convention on Racial Discrimination and the CP Covenant bind only those states which ratify them. Nor can states be forced to accept the optional provisions of the Convention on Racial Discrimination and the Protocol. As Professor Humphrey said in his report to the International Law Association, "since it is precisely those states in which human rights are most likely to be violated that will probably withhold their agreement",[112] every effort must be made to establish implementation procedures independently of treaty obligation. The small number of ratifications places the Protocol at a great disadvantage when one compares its possible effectiveness with the non-treaty procedures.

(d) THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

The Convention on Racial Discrimination (as it is referred to hereinafter) gives us some idea of how the Protocol may be accepted by states. Article 14 of this Convention provides that a State Party may recognize the competence of the Committee on the Elimination of all Forms of Racial Discrimination (hereinafter referred to as the Committee on Racial Discrimination) to reveive communications alleging violations by that State Party from individuals or groups of individuals within its jurisdiction.[113]

This Article was adopted in the Third Committee by 66 votes to none with 19 abstentions,[114] but of the 85 subsequent ratifications only 4 States Parties have made the declaration under Article 14 (Costa Rica, Netherlands, Sweden and Uruguay).[115]

The relevant sub-provisions of Article 14 are as follows. The state making the declaration may establish or indicate a body within its national legal order which will receive petitions and keep a register of such petitions, copies of which will be filed annually with the Secretary-General, who will not publicly disclose them. If the petitioner fails to obtain satisfaction from this body, he may communicate the matter to the Committee on Racial Discrimination within 6 months, whereupon the Committee on Racial Discrimination shall, without revealing the petitioner's identity, confidentially

bring such communication to the notice of the state concerned. The state must submit its explanation by way of reply, on receipt of which the Committee on Racial Discrimination shall consider both communications and then forward its suggestions and recommendations to both parties. The Committee on Racial Discrimination shall also include in its annual report to the General Assembly (see Article 9 (21) summaries of the communications and of its own suggestions and recommendations. Paragraph 9 of Article 14 says that the Committee on Racial Discrimination shall be competent to receive petitions only when 10 States Parties have made the appropriate declaration.[116]

The Committee on Racial Discrimination consists of 18 experts of high moral standing and acknowledged impartiality elected by States Parties from among their nationals, who shall serve in their personal capacity (Article 8 (1)). The Convention does not however, set forth any provisions to give effect to the requirements of impartiality and independence; there is nothing to stop a state from influencing members of the Committee on Racial Discrimination. Each State Party may nominate only one candidate (Article 8 (2)), and that candidate, if elected, owes his election to his state.[117] States Parties are responsible for the expenses of its national who is a member of the Committee on Racial Discrimination (Article 8 (6)), and is in fact therefore, his employer. Indeed, Professor Schwelb recounts one instance in which a member of the Committee on Racial Discrimination "participated in the consideration of the Committee's report

by the General Assembly (26th Session) as representative of his government".[118]

Comparison might be made with the ILO Committee of Experts whose members are disqualified if they also hold a position which makes them dependent on a government. They must enjoy in practice complete security of tenure as members of the Committee of Experts.[119]

Comparisons will be made later in this paper in an examination of the Human Rights Committee established under Article 28 of the CP Covenant. But what does the Convention on Racial Discrimination, and in particular the optional procedure for receipt of individual communications, tell us about the Protocol?

The very limited number of declarations recognizing the Committee on Racial Discrimination's competence to receive communications from individuals or groups of individuals, is not encouraging. First, the Convention has been widely ratified. Second, the Convention by its nature is more specific than the CP Covenant. It does not cover the wide range of civil and political rights which are the substance of the CP Covenant, and which therefore, are more likely to invite opposition from more states than is the Convention of Racial Discrimination. Third, the Convention espouses a cause, or rights, which have enjoyed greater support from members of the United Nations during the fifties, sixties and seventies than have the civil and political rights of the CP Covenant. Why then, one wonders, should the Protocol be more successful

than the Convention on Racial Discrimination in providing an effective procedure for complaints by individual petition? Perhaps individual petition will not be a significant part of international implementation for a long time yet?

CHAPTER FOUR NOTES

1. See Humphrey, "The Right of Petition in the United Nations", 4 Revue des Droits de l'Homme, (1971), 463; Humphrey, "The International Law of Human Rights in the Middle Twentieth Century", in Bos. ed., The Present State of International Law The Netherlands, (1973), 75; Sohn & Buergenthal, International Protection of Human Rights, 1973, 739-856; Moskowitz, Human Rights and World Order, (1958), Ch. 10; Report, "An Analysis of the Procedures of the United Nations Regarding Individual Petitions with respect to Human Rights", 4 Human Rights, (Spring 1975), 217; Clark, A United Nations High Commissioner for Human Rights, The Hague 1972, 21-27; Lauterpacht, International Law and Human Rights, Garland Publishing 1973 reprint of 1950 ed., 234-251; Bruegel, "The Right of Petition an International Authority", 2 Int. & Comp. L. Quart., (1953), 542; "Individual Petitions: the Irresolution of Governments", The Review I.C.J., (Dec. 1975), 36; Nørgaard, The Position of the Individual in International Law, (1962).

2. see L. of Nations Official J., Special Supplement No. 73, (1929), for documents relating to the Protection of Minorities; UN Doc. E/CN 4/Sub. 2/6 - Report by the Secretary-General on the International Protection of Minorities under the League of Nations. For a description of the League's Mandate and Minorities systems see Nørgaard, op. cit., 109-116, 121-128; Moskowitz op. cit. Ch. 10. German-Polish Convention, 15th May 1922, re Upper Silesia; see L. of Nations Doc. C.L. 110 (1927), I Annex, 64-87; see Nørgaard, op. cit., 116-119.

3. Bruegel, op. cit., 555; Nørgaard, op. cit., 132.

4. Trusteeship Council Rules of Procedure, UN Doc. T /1/ Rev. 5 (1958), which ammended the 1947 Trusteeship Council Rules of Procedure, see UN Yearbook (1946-47), 581-589. The Standing Committee on Petitions was set up by the Trusteeship Council (see Report of the Tee Ship Council to the Gen. Ass. A(2150) on the advice of the General Assembly (res. 552 (VI) 18 Jan. 1952). For commentaries on the Trusteeship System and its Rules of Procedure providing for the right of petiton see Nørgaard, op. cit., 131-137; Bruegel, op. cit., 555; Moskowitz, op. cit., 132; Lauterpacht, op. cit., 243, footnote 51.

5. see generally Lauterpacht Ibid. 242-4; Bruegel op, cit., 555-6; Carey, UN Protection of Civil and Political Rights, (1970), 144-5.

6. Bruegel, Ibid., 555-6; Moskowitz op. cit., 131-2 who says that to July 1954 the Council had dealt with 1668 petitions from individuals and organized groups in trust territories.

7. Lauter pacht, op. cit. at 161.

8. see Carey op. cit., Ch. 12; Humphrey "The Right of Petition in the United Nations" op. cit. at 472; Humphrey "The Revolution in the International Law of Human Rights" 4 Human Rights, (Spring 1975) 205 at 213; Clark op, cit. at 23-24; Tedin, "The Development of the Soviet Attitude toward Implementing Human Rights Under the Charter", 5 Revue des Droits de l'Homme, (1972), 399; Liskofsky, "Coping with the 'Question of the violation of Human Rights and Fundamental Freedoms'", 8 Revue des Droits de l'Homme, (1975), 883 at 893-4.

9. ECOSOC Res. 1235, (XLII) of 6 June 1967, E.S.C.O.R. 42nd Sess., Supp. No. I at 17, UN Doc. E/4392 (1967).

10. Humphrey "The Revolution...etc", op. cit. at 213.

11. Ibid. at 213.

12. Carey op. cit. at 151.

13. Tedin op. cit. at 413; GAOR, 17th Session, 4th Committee, 1404th meeting, 30 Nov. 1962, 516.

14. The Soviet argument was that petition from Trust territories was justified because these territories were not governed in accordance with the sovereign will of their inhabitants; see Lauterpacht op. cit. at 246-7, footnote 63.

15. Liskofsky op. cit. at 887, 904 footnote 12; E/AC/7/SR 759-60, 17 April 1975.

16. Humphrey, "The Revolution in the International Law of Human Rights" op. cit. at 213.

17. Humphrey "The Right of Petition in the United Nations" op. cit. 463.

18. Ibid. 463; and see Lauterpacht op. cit. 244-51 for a brief history of the right of petition in England and France, from the mid 18th Century until WW II, during which time, he writes, it has always been an essential part of democratic government, depsite intermittent opposition.

19. Universal Declaration of Human Rights, approved by Gen. Ass. Res. 217 A (III) 10th Dec. 1948.

20. see Humphrey op. cit. 464-5.

21. Humphrey Ibid. 464.

22. Com. on Human Rights, 2nd Sess. Dec 1947; 6 ECOSOC Supp. I para 18; UN Doc. E/600 (1948); see Schwelb, "Entry into force of the International Covenants as Human Rights and the Optional Protocol to the CP Covenant" 70 AJIL (July 1976) 511 at 511.

23. Humphrey op. cit. 464-5.

24. Ibid. 464.

25. G.A. RES. 217 (III) B; G.A.O.R. A/PV. 185, 167; UN Yearbook (1948-49), 539-42; and see Humphrey op. cit. 465; Lauterpacht op. cit. 247.

26. Lauterpacht op. cot. 247, 279; Humphrey op. cit. 465; UN Yearbook (1948-49) 540-41.

27. Humphrey, Ibid. 465.

28. Commission on Human Rights, 1st Sess. 1947; proposals to ECOSOC, Ch. 5; see the UN Yr. Bk. on Human Rights (1947), 437, 464.

29. ECOSOC res. 75 (V) 5 Aug. 1947, Preamble: see UN Yr. Bk. on Human Rights (1947) 512; ECOSOC res. 728 F (XXVIII), ECOSOC 28 th SESS. Supp. No. I at 19 (1959), UN Doc. E/3290 (1959).

30. For criticism of res. 75(V) see the well known and oft-quoted opinions of Professor Lauterpacht op. cit. 229-236; see also UN Doc. E/CN. 4/165 (1949) in which the Secretariat criticizes the resolution (Report by the Secretary-General on the Present Situation with Regard to Communications concerning Human Rights).

31. Bruegel op. cit. 546.

32. ECOSOC resolutions 9 (II) and 12 (II), 21 June 1946.

33. ECOSOC res. 5 (I), 16 Feb. 1946; Schwelb op. cit. 511.

34. E/CN. 4/SR.4, p. 4 and E/CN.4/14 Rev. 2 para. 1.

35. E/CN.4/14/Rev. 2 para. 3.

36. see footnote 28 supra, and UN Action in the Field of Human Rights, United Nations, New York (1974) 177.

37. UN Action in the Field of Human Rights, Ibid. 137; Un Yearbook (1966) 523

38. see for example the statements of the representative of the USSR, UN Yearbook (1948-49) 540.

38a. Schwelb, "The International Court of Justice and the Human Rights Clauses of the Charter", A.J.I.L. (1972), 337 at 341.

39. G. Ass. res. 421 (V), Sect. F. para. 8, in which the Gen. Ass. adopted the Third Committee draft resolution on the draft Covenant and measures of implementation: UN Yr. Bk. (1950), 531.

40. Humphrey, op. cit. 470.

41. Humphrey Ibid. 466-70.

42. ECOSOC res. 728 F(XXVIII), 30 July 1959; see supra footnote 29. For a list of amendments to res. 75 (V), and a description of UN action under res. 728 F. see UN Action in the Field of Human Rights, op. cit., 177-81.

43. Humphrey op. cit. 470; I am grateful for advice from Professor Humphrey, former Director of the Division of Human Rights at the United Nations, who recalls that during this time the lists of complaints circulated by the Secretariat were not even used by the Commission as a source of information. Governments represented on the Commission were just not prepared to take any action on the complaints.

44. Clark, op. cit., 24.

45. Liskofsky, op. cit., 891; and see Carey, op. cit., 84.

46. Ibid. at 892; see for example Commiss. Res. 8 (XXII), para. 6 in which the Commission invites the Sub-Commission to report to it any situation revealing a consistent pattern of violations, in any country, with particular reference to colonial and other dependent countries (UN Doc. E/4322, 1967).

47. Humphrey, op. cit., at 470.

48. Res. 2144 A (XXI), para. 12, GAOR Supp. 16, at 46; UN Doc. A/6316, para. 12, (1966); see Humphrey, op. cit. at 470; Carey op. cit. at 85; and United Nations Action in the Field of Human Rights, op. cit. at 180; UN Yr. Bk. (1966) 450.

49. Commission on Human Rights Res. 8(XXIII) 16 Mar. 1967; UN Doc. E/4322 (1967); E.S.C.O.R., 42nd Sess., Supp. No. 6 at 131-2.

50. see UN Yr. Bk. (1967) at 508; UN Action in the Field of Human Rights, op. cit. at 180; Humphrey op. cit. at 471; Carey, op. cit., at 85.

51. see footnotes 46 and 49 supra, and Sohn & Buergenthal, International Protection of Human Rights, (1973) at 797-799.

52. 42 E.S.C.O.R., Supp. No. I (E/4393), at 17-18; Sohn & Buergenthal, Ibid. at 800-801; UN Yr. Bk. (1967), 512.

53. op. cit., footnotes 29 and 42, para. 2.

54. Sub. Commiss. res. 3 (XX), 6 Oct. 1967, 525th meeting; UN Doc. E/CN.4/947 - E//N.4 Sub. 2/286 (1967); the resolution was introduced by Prof. Humphrey, and ammendments were submitted by Messrs. Carey, Ketvzynski, and Bejasa. The draft, as ammended was adopted 13 votes to none with 3 abstentions - see Sohn & Buergenthal, op. cit., 801-6.

55. see Humphrey, "The UN Sub-Commission on the Prevention of Discrimination and the Protection of Minorities", 62 AJIL, (1968) 869; Carey, op. cit., 86-90; Clark, op. cit., 24-27.

56. E.S.C.O.R., 44th Sess., Supp. No. 4 at 58-79, UN Doc. E/4775 (1968); and see Sohn & Buergenthal, op. cit., 806-822.

57. see Humphrey, "The UN Sub-Commission..." op. cit.

58. see Carey, op. cit., 91-2: Res. 2(XXI), E/CN.4/976 (1968) paras. 71-94.

59. E.S.C.O.R., 46th Sess. para's 407-435, Res. 17(XXV); see UN Action in the Field of Human Rights, op. cit. at 181.

60. ECOSOC Res. 1503(XLVIII), 27 May 1970; 48 E.S.C.O.R., Supp. No. IA(E/4832/Add. I) at 8-9; see Sohn & Buergenthal, op. cit. at 841-4.
For a "legislative" history of res. 1503 see Humphrey, Report of the International Committee on Human Rights to the Fifty-fifth Conference of the International Law Association (1972). in Report of the Fifty-Fifth Conference held at New York (London 1974) 571.

61. Ibid. Res. 1503.

62. Ibid. para. 4(b).

63. Ibid. para. I.

64. Over 20,000 individual petitions were received in 1972; see UN Action in the Field of Human Rights, op. cit. at 183; By 1969 there were over 100,000 petitions stored in the UN, New York Times, 12th May 1969, at 17 col. 2; see UN Doc. E/CN.4/1101 (1973).

65. ECOSOC res. 1503 op. cit. para. 5.

66. Ibid. para. 6.

67. Ibid. para. 6.

68. Ibid. para. 2.

69. Sub-Commiss. res. I(XXIV) & 2(XXIV) 14 Aug. 1971: UN Doc. E/CN.4/1070 (1971).

70. For a bibliographical list see Sohn & Buergenthal op. cit. 855-6; see in particular, Sohn & Buergenthal op. cit. 845-55; Cassese, "The Admissability of Communications to the UN on Human Rights Violations" 5 Revue des Droits de l'Homme (1972) 375; Guggenheim, "Key Provisions of the New UN Rules Dealing with Human Rights Petitions", N.Y.U.J. of Int. Law & Politics (Winter 1973) 427;
Report, An Analysis of the Procedures of the UN regarding Individual Petitions with Respect to Human Rights, 4 Human Rights (Spring '75) 217; Newman, "The New UN procedures for Human Rights: Reform, Status quo, or Chambers of Horror?" 1-2 Annales de Droit (1974) 129; Prased, "The Role of NGO's in the new UN Procedures for Human Rights Complaints", 5J. of Int. Law & Policy (1975) 441;
Liskofsky, "Coping with the 'Question of the Violations of Human Rights & Fundamental Freedoms'", 8 Revue Des Droits de l'Homme (1975) 883; Ruzie, "Du Droit de petition individuelle en matière de droits de l'Homme" 4 Revue des Droits de l'Homme (1971) 89.

71. Sub-Commiss. Res. I(XXIV) op. cit., para I.

72. Ibid. para. 2.

73. Ibid. para. 3.

74. Ibid. para's 4 & 5.

75. Sub-Commiss. Res. 2(XXIV) op. cit. para. I.

76. see footnote 70 supra for list of commentators.

77. Guggenheim op. cit. at 432.

78. Newman op. cit. at 143.

79. Ibid. at 132; see res. I op. cit. para. 8.

80. Ibid. at 132.

81. Ibid. at 142.

82. Ibid. at 136.

83. Guggenheim op. cit. at 445.

84. Cassese op. cit. at 390, footnote 3; E/CN.4/1070, 26, para 43.

85. Ibid. at 376-7.

86. res. I(XXIV) para I (a); and see para 3 (c) also.

87. Cassese op. cit. 379; see also Guggenheim op. cit. 438-41; Report op. cit. supra. footnote 70, 220-2, 242-5.

88. Guggenheim, Ibid. 436, footnote 36.

89. UN Doc. E/CN.4/Sub.2/L.540 (1971); see also Guggenheim , Ibid. at 437, footnote 39; for a discussion of this matter, and the other requirements of para. 3 (a) ('description of facts' and 'purpose of the petition') see Report, op. cit. at 231-6.

90. Cassese op. cit. at 383.

91 Guggenheim op. cit. at 441.

92. Guggenheim, Ibid. at 442.

93. see Prasad op. cit. at 459, footnote 76.

94. see Cassese op. cit. at 389.

95. see Cassese Ibid. at 377-8 for an explanation of the sources.

96. res. I, para. 2 a.

97. res. I, para. 2 c.

98. see Guggenheim op. cit. at 225, and footnote 21: UN Doc. E/CN.4 Sub. 2/SR.615, at 45,47 (1971).

99. see above 27-28 re: resolution 2 and the Working Group.

100. see Prasad op. cit. at 457; and Guggenheim op. cit. at 438.

101. see Cassese op. cit. at 378.

102. Prasad op. cit. at 457.

103. res. 1503, para. 6 b.

104. Art. 62 (I) and (2) UN Charter.

105. There has been some examination of the new procedures in practice; see Prasad op. cit. at 450-2; Liskofsky op. cit.; and the Review, International Commission of Jurists (Dec. 1975).

106. see Liskofsky op. cit. at 892, and footnote 33 in which he lists the press reports of the Sub-Commission activities under the new procedures during 1972, 73 & 74.

107. Liskofsky op. cit. at 893.

108. Ibid. at 893.

109. Ibid., 906, footnote 33.

110. Ibid., 893, 893-903, in which he cites examples, including that of a spokesman of WCRP (World Conference on Religion and Peace) who committed the cardinal sin of alluding to Soviet and Syrian Jews, and not the by-now mandatory ritual criticism of Israel.

111. see Guggenheim, "On the Right to Emigrate and Other Freedoms: the Feldman Case", 5 Human Rights (Fall 1975) 75, for an illustration of this dilemma. After 12 months there was still no confirmation from the UN that a petition filed under the new UN procedures had been deemed admissable.

112. Humphrey, Rapporteur's report from the International Committee on Human Rights to the International Law Association, 1966, 31.

113. G.A. res. 2106 A(XX) 21 Dec. 1965; entered into force 4 Jan. 1969; G.A.O.R. Supp. No. 14 (A/6014) 47.

114. A/C.3/SR 1363 p. 433 para. 19.

115. see "individual Peitions: the Irresolution of Governments", The Review, I.C.J. (Dec '75) 36 at 39.

116. On the Convention on Racial Discrimination generally see Schwelb, "The International Convention on the Elimination of all Forms of Racial Discrimination", 15 Int. & Comp. L. Quart. (1966) 996; Schwelb, The Implementation of the International Convention on the Elimination of all Forms of Racial Discrimination, a paper prepared for the Am. Soc. of Int. Law Panel on Int. Human Rights and Its Implementation (March 1972); Lerner, The United Nations Convention on the Elimination of All Forms of Racial Discrimination, 1950.

117. see Schwelb, Ibid., paper for Am. Soc. of Int. Law, 10.

118. see Schwelb, Ibid. 13.

119. Jenks, The International Protection of Trade Union Freedom, (1957) 146.

Chapter 5: THE OPTIONAL PROTOCOL

The purpose of this last chapter is to examine the provisions of the Protocol and to determine whether they are capable of breathing life into the treaty and non-treaty procedures for individual petition, and making them a viable and effective means of international implementation. There being very little United Nations judicial or quasi-judicial precedent to which reference can be made, it will be necessary to look to the procedures of the ILO and the European Convention for some guidance as to how the Protocol provisions may be interpreted. But first, some general comments concerning the Protocol.

Whereas the United Nations non-treaty procedures permit the consideration of communications which allege a consistent pattern of violations, or those which are supported by others alleging similar violations, the great appeal of the Protocol is that it authorizes the Human Rights Committee, established under Article 28 of the CP Covenant, to admit and consider petitions which allege an isolated violation of human rights. On the other hand, its weakness at present is that only those individuals who find themselves within the jurisdiction of one of the 13 States Parties may petition the Committee. Fortunately, this limited number of ratifications may be a transitory weakness only, and with more ratifications the Protocol will become a truly international means of implementation.

The Protocol has brought us back to the individual victim. Not only is the system of state complaints too political to be effective, but it is reasonable to assume that if a State chose to act, it would only do so if the violations were on such a scale and of such enormity as to justify the involvement of a foreign state. Perhaps even this is assuming too much; and certainly, few states, if any at all, would offer their services as petitioner to prevent a single violation, no matter how outrageous the violation.

It was for this reason that Professor Lauterpacht saw in the state complaint system, a system which amounted in effect to a renunciation of the "principle that a fundamental right of a single individual is as absolute and as sacrosanct as aggregates of rights or aggregates of persons!"[1] The same could be said of United Nations non-treaty procedures, but to a lesser degree, because although they recognize the right of individual petition, an individual violation will be ignored unless the communication alleges a consistent pattern of gross violations,or is part of a pattern of gross violations. The Protocol is the product in part, of an attempt to restore that principle of which Professor Lauterpacht wrote.

In examining the Protocol we should remember that like most human rights legislation, it was created out of dilemma, the solutions to which gave birth to new and continuing dilemmas. The original dilemma of conflict and confrontation is well known. There was conflict between particularization and comprehensiveness, conflict over confronting legal and ideological

principles, and conflict over whether the Protocol should be optional and therefore avoidable. Compromise and modification were the solutions to conflict, which in turn have left us with the new dilemma of ambiguity and questionable justiciability. Dean Macdonald explains the problem thus:

> "In order to find general approval, an international authority, empowered to deal comprehensively and systematically with complaints of individuals and groups of individuals against their own governments, must be built on the unambiguous provisions of an agreement freely accepted by the states concerned".[2]

One of the handicaps of the Protocol is that it is not built on unambiguous provisions, the very nature of the General Assembly and the United Nations Organization precludes any such "legislation"; and another is that it was surely not freely accepted by all states concerned, in the sense that some accepted it because it was as much as they could get, and others accepted it because it was as little as they could get.

How important is the Protocol to the CP and ESC Covenants? We have looked at many of the reasons why the right of individual petition might be significant; and the shortcomings of the non-treaty procedures suggest that a more positive treaty right of petition is necessary. But will the Protocol really make the CP Covenant function? Discussing the Covenants in 1959 Moses Moskowitz described them as representing the status quo, the product of yesterday's facts and ideas. He bemoaned the absence of a right of petition - the only new and exciting idea for the protection of human rights. Further, he said, the Covenants were weighted heavily in favour of the state. The permissable limitation clauses left the individual at the mercy

of the state: as a result the rights included in the Covenants had less to do with the inalienable rights of man, thanwith the right of the state to determine these rights and limit them for the good of the community.[3] However, it is difficult to see how the right of petition could alter the substance of the CP Covenant and free the individual from the situation where he is at the mercy of the state. At best, recognition of the right marks the "beginning at least of the juridical emancipation of man!"[4]

It is difficult to assess the practical importance of the Protocol as means of implementation today, and perhaps too easy to dismiss it because of the small number of ratifications. But the ratifications will grow in number, and with each one, there is a greater chance that the Protocol will be employed to help someone. If an individual is protected, then in keeping with the spirit of the right of individual petition, the Protocol immediately assumes some significance.

Further, the Protocol represents something new, a treaty by which States Parties are bound to respond to admissable petitions from persons within their jurisdiction. On a wider scale, it represents, as do the non-treaty right right of petition procedures, a new attitude by states towards the international protection of human rights.

1. LIMITATIONS AND DEROGATIONS IN THE CP COVENANT.

The limitations and permissable derogations in the CP Covenant relate more to the individual's substantive rights than to his procedural rights, and therefore will not be discussed in detail.[1] The justification for making some general, rather than specific, comments on them however, is that they will determine largely whether or not a victimwill petition the Committee.

Article 4 of the CP Covenant permits a State Party to derogate from its obligations under the Covenant "in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed..."but only to the extent strictly required by the exigencies of the situation. Certain obligations may not in any circumstances be derogated from.[2]

Several Articles in the CP Covenant restrict or limit a person's rights. They may be subjected to restrictions provided by law; the necessities of national security,or of public order ("ordre public"); the requirements of public health and good morals; and the fundamental rights and freedoms of others.[3]

Part 5 of the CP Covenant contains two particular qualifications to the rights therein. Article 46 requires that nothing in the Covenant should be interpreted so as to impair the provisions of the Charter,ortheconstitutions of specialized agencies themselves. Article 47 requires that nothing in the Covenant be interpreted so as to impair the inherent right of

all peoples to enjoy and utilize freely their natural wealth and resources.

Judicial interpretation of these derogations and limitations is needed urgently, but such clarification will be slow in coming. It took the ILO over 50 years to develop its present relatively efficient implementation procedures.[4]

In 1959 Moses Moskovitz was very critical of the limitation clauses which had been proposed for the Covenants, because they afforded "governments sufficient latitude to encroach upon the rights and liberties of the individual without necessarily infringing the Covenants!"[5] The Commission he said,"appeared to be more concerned with safeguarding the freedom of action of the government than with safeguarding thr rights of the individual against governmental encroachment!"[6]

But drafting Covenants which were acceptable to a majority of states was yesterday's problem, and the fact is that all legal systems impose some limitations on the exercise of rights. Today's problem is to determine whether the limitations as we have them in the CP Covenant are relevant, reasonable and workable, remembering always that interpretation of the limitation clauses is critical to the future of the CP Covenant.

An example in point is the Soviet Union's emigration laws, and its assertion that the limitations it has imposed for reasons of national secutity are justified by the CP Covenant.[7] Of this it should be said first, that it is not for the government of any state to make such an arbitrary assertion;

secondly, the presumption should actually lie in favour of the individual right, with the government having the burden of justifying the restrictions; thirdly, the Soviet Union's interpretation of the limitations clause deliberately confuses the rule with the exception;[8] and fourthly, there must be safeguards against arbitrary denial of the right to emigrate on the ground of national security. For example, a person's activities should be deemed prejudicial to national security only if such activities are punishable under penal law and the person is actually being prosecuted for the offence.

Moskovitz did take an extreme view of the limitation clauses and Liskofsky does highlight the problems surrounding their interpretation, but what really matters is the atmosphere in which the Human Rights Committee interprets and applies the limitations. An atmosphere favourable to implementation in the United Nations in general, and the Human Rights Committee in particular, will result in interpretations favourable to the individual. It is submitted that such an atmosphere is developing, and the Protocol is an important part of it. One positive result of the Soviet Union's ratification of the CP Covenant, which guarantees that right to leave one's country subject to national security and other limitations,[10] and the Soviet Union's interpretation of that right, is that it may "be taken as an invitation to an international debate concerning the relationship between this basic right and the state's claim to limit it on various grounds!"[11]

In conclusion, two short observations might be made concerning the limitations to civil and political rights.

First, who decides whether or not there is an emergency which threatens the life of a nation? The answer is important, for if it is the state which decides, then there is the danger that it will do so whenever it is called upon to answer allegations that it has violated the rights of an individual within its jurisdiction.

Article 15 of the European Convention is in similar terms to those of Article 4 of the CP Covenant, although it does not expressly require that the existence of the public emergency be "officially proclaimed" as does Article 4. Article 15 has not rendered the European Convention ineffective, nor should Article 4 the CP Covenant. The European Commission in the first Cyprus case,[12] considered that it was "competent to pronounce on the existence of a public danger which, under Article 15, would grant to the Contracting Party concerned the right to derogate;"[13] and added that "the Government should be able toexercise a certain measure of discretion in assessing the extent strictly required by the exigencies of the situation.[14]" This role of the Commission was confirmed by the Court of Human Rights in the Lawless case,[15] which held that it was"for the Court to determine whether the conditions laid down in Article 15 for the exercise of the exceptional right of derogation have been fulfilled."[16]

What is this "measure of discretion"? Its effect is to qualify, but not exclude, the control by the Commission and the Court of the Application of Article 15.[17] It does not mean that there is a presumption in favour of the state, because

by normal legal principles, this would place the burden upon the applicant to show that there was not a situation of emergency at the time. This is not the case, because in the Greek case[18] the Commission decided that the "burden lay upon the respondent government to show that the conditions justifying measures of derogation under Article 15 had been and continued to be set."[19] Professor Jacobs' interpretation is that the Court or Commission must consider whether the government had "sufficient reason to believe that a public emergency existed."[20]

It appears that Article 15 requires the Commission or Court to make judgments of an essentially political character, which was one of the reasons why the French governments refused to ratify for many years.[21] Although the Committee under Article 28(3) of the Covenant is composed of members who"shall serve in their personal capacity", in an atmosphere more politically charged than in Europe, the past record of the United Nations Organization generally indicates that the Committee may be reluctant to follow the European precedent. If that is the case, and it is perhaps unfair to attempt an assessment of what the Committee of experts may decide in the future, and it is left to states alone to determine when a national emergency exists, then Article 4 and the right of derogation may be open to some abuse by states.

Apart from the right to derogate, the second cause for concern is the limitation incorporating the notion of "ordre public". The notion of public order (the absence of disorder)

has been confused by the addition of a french translation which was added in an attempt to give meaning to the english. This concept of "ordre public" allows a government greater discretion because, it is submitted, the concept is one which may change according to the government's perception of society and morality at any particular time. In other words, the concept is as fluid as the morés of today's rapidly changing society.[22]

2- THE PROTOCOL PROCEDURE.

The Human Rights Committee, established under Article 28 of the CP Covenant, and hereinafter referred to as the Committee, may receive and consider written communications from individuals within the jurisdiction of a state which has ratified the Protocol, claiming to be victims of violations of any of the rights in the CP Covenant.[1]

Communications are inadmissable if anonymous, an abuse of the right of submission, or incompatible with the provisions of the CP Covenant.[2] Further, the Committee will not consider a communication unless it has ascertained that all domestic remedies have been exhausted, and that it is not being examined under another procedure of international investigation.[3]

The Committee shall bring admissable communications to the notice of the State Party concerned, which must within six months provide the Committee with written explanations clarifying the matter and the remedy taken, if any.[4] The Committee shall consider the written submissions of both parties in closed meetings,[5] shall forward its views to each, andshall include in its annual report (submitted to the General Assembly, through ECOSOC, under Article 45 of the CP Covenant) a summary of its activities under the Protocol.[6]

In the event that the matter referred to the Committee has not been resolved to the satisfaction of both parties, there is no provision in the Protocol, as there is in the CP Covenant (Article 42), for the appointment of an ad hoc

Conciliation Commission (with the prior consent of the parties) to make available its "good offices" with a view to an amicable solution.

Article 10 of the Protocol requires that provisions of the Protocol extend to all parts of federal states; Article 11 provides for amendments; and Article 12 for denunciations by States Parties.

3. PROGRESSIVE OR IMMEDIATE IMPLEMENTATION OF RIGHTS?

While it is generally understood that the economic, social and cultural rights of the ECS Covenant are "progressive" in nature, that is, to be implemented by States Parties over a period of time,[1] it is said that enjoyment of civil and political rights, on the contrary, is guaranteed immediately a state becomes a party.[2]

Article 2 of the CP Covenant is an undertaking in the first place, "to respect and to ensure to all individuals" within a State Party's territory and subject to its jurisdiction the rights in the Covenant, without discrimination. Secondly, it is an undertaking, in sub-paragraph 2,"to take the necessary steps", in accordance with the constitutional processes of the State Party "to adopt such legislative or other measures as may be necessary to give effect to the rights" recognized in the Covenant.

There seems little doubt that at the time of drafting, it was intended that these undertakings were to ensure immediate application of civil and political rights. But do they? Could not the CP Covenant be interpreted to justify progressive implementation by a State Party? What would be the effect of such an interpretation on the Protocol, which is only procedural, and not concerned with substantive civil and political rights?

To answer the second question first, the progressivity or immediacy of one's rights is not a matter which will affect the

right of petition. The question is discussed here because, like the substantive matter of derogations and limitations, although it will not affect directly the process of communication, it will certainly affect the outcome of the petition once it has been accepted by the Committee and is being considered with the government response to the allegations.

It Professor Schwelb's opinion that the question whether the CP Covenant "is one of immediate application or whether States Parties are free to apply it 'progressively' goes to the very essence of the instrument"[3]. But perhaps we need not despair unduly should interpretation favour progressive national implementation. First, such a defense will be good only for the first or second years immediately following a state's ratification. It cannot be maintained indefinitely, and having waited this long for the Covenants to come into force we should not lose faith in the effectiveness of the CP Covenant because of a further comparatively short wait. Secondly, it will take that time, and considerably more, for the Committee to develop and perfect its implementation procedures. Thirdly, perhaps we should not expect some developing countries to implement immediately those civil and political rights which have arrived at their present status in other countries, only after centuries of nurture. Finally, although perhaps it should be[4], it seems that adoption of the necessary measures to ensure immediate implementation is not a condition precedent to a State's ratification of the CP Covenant.[5]

Moving to the second question, what is there in the CP Covenant to support an interpretation that civil and political rights may be implemented progressively rather than immediately?

First, Article 23(4) provides that States Parties"shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution". This is by its very terms a "promotional provision", and the preparatory work leaves no doubt that it was intended to permit States Parties to take appropriate measures progressively to assure the equality of spouses.[6] Professor Schwelb maintains however, that as such, it is an "exception to the general rule of the Covenant that the guarantee of the enjoyment of rights takes effect as soon as a state becomes a party to the Covenant !"[7]

Secondly, Article 2(2) appears to imply a progressive rather than an immediate application. Where not already provided for by existing legislative or other measures, each State Party undertakes to take the necessary steps to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the Covenant. Article 2(2) must however, be read subject to Article 2(1), which requires States Parties "to respect and to ensure" civil and political rights irrespective presumably, of whether or not there is legislation giving effect to those rights. It is submitted that, if there is no such legislation, then not only are the rights guaranteed immediately in accordance with sub-paragraph 1, but they must be seen to be guaranteed in accordance with sub-paragraph 2, by the adoption

of the necessary legislation at the earliest possible time by which citizens will fully comprehend the nature of their rights, and the protection of those rights. Whether this was in the minds of those who drafted the Covenants, or whether sub-paragraph 2 was included as the result of attempts to weaken the immediacy of civil and political rights is uncertain, but it is an interpretation which may be made today.

Thirdly, progressive implementation might be discerned in Article 40(1) by which States Parties undertake to submit reports not only on the measures they have adopted to give effect to the civil and political rights, but also "on the progress made in the enjoyment of those rights". Article 40(2) requests that reports indicate "the factors and difficulties, if any, affecting the implementation of the present Covenant". According to Schwelb this interpretation is not borne out by the legislative history of the CP Covenant.[8] Further, it seems apparent that if States Parties are to report on their citizens' enjoyment of rights, then those citizens must already have been endowed with those rights, and connotations other than immediacy which might be attached to the Article are unwarranted. Moreover, on reflection, it seems entirely appropriate that a provision should have been included in the Covenant compelling States Parties to report on progress made, and developments, in ensuring the protection of civil and political rights, at a time when it seemed unlikely that States would accept the right of petition as a means of implementation.

Finally, there is the "colonial clause!" Although Article 1(1) states that "all peoples have the right of self-determination", Article 1(3) elaborates by adding that States Parties, "including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right..." These words might suggest that the right may be implemented progressively. It is submitted however, that again sub-paragraph 3 must be read subject to sub-paragraph 1 which clearly indicates that the right of self-determination is an immediate one. The same reasoning may be applied in this case, as in the case of Articles 2(1) and 2(2) above. The existing right of self-determination must be promoted in these territories, presumably by appropriate legislation and by bringing to the attention of persons in such territories the fact that they may exercise their right of self-determination. It simply means that these persons must not be left in ignorance of their rights.

It is safe to conclude that, apart from Article 23(4), the civil and political rights of the CP Covenant take effect immediately upon a state's ratification. The Committee should not therefore, concern itself with the possible state defense of progressivity, and we need not wait that extra one or two years while States Parties proceed with the progressive implementation of civil and political rights. Similarly, the practitioner may advise his client to proceed with his communication under the Protocol, immediately when his rights have been infringed, so long as the matter in dispute is not one of equality of spouses.

4. RATIFICATION - OPTIONAL AND SEPARATE

The fact that the Protocol is optional and separate may cause the pessimist to doubt its effectiveness as a means of international implementation. This, he may say, is its most obvious characteristic, because as a separate instrument it can be avoided more easily by states who choose to ignore the right of petition. How and why was the Protocol separated from the CP Covenant?

The right of petition was not included in the draft Covenant as submitted by the Commission in 1954, and it was not until 1966 that it received serious consideration, when the representative from the Netherlands proposed that the Third Committee include the right of petition as a method of international implementation.[1] This proposal was supported by a group of Afro-Asian states which had, so to speak, entered the implementation debates as mediator between the extreme views of those states who, on the one side, advocated strong international measures, and those on the other, who advocated national sovereignty undiminished by international implementation measures.[2] Even this Afro-Asian bloc however, viewed the right of petition as the fourth and final stage in implementation, for which states were not yet ready. Its inclusion was to allow for a development in attitudes and changing conditions, which would, some time in the future permit the use of individual petitions.[3]

A draft article was prepared;[4] but on a motion by

Lebanon, the Third Committee decided by 41 votes to 39, with 16 abstentions that the draft article be included in a separate Protocol.[5] Finally the Third Committee approved by 59 votes to 2, with 32 abstentions,[6] a separate Protocol which was to be annexed to the CP Covenant.

The Protocol was separated from the CP Covenant because the USSR, its allies, and some other states opposed the concept of individual locus standi in international matters.[7] Insertion of even an optional right of petition in the CP Covenant would have implied recognition of the individual, and therefore prevented states from ratifying the CP Covenant. The provision of a separate Protocol ensured the unanimous adoption of the CP Covenant, and also the adoption of the Protocol.

The result was that the General Assembly adopted resolution 2200A(XXI) unanimously on the 16th of December 1966. In separate votes the ESC Covenant was adopted by a vote of 105 to 0, the CP Covenant by 106 votes to 0, and the Protocol by a vote of 66 to 2, with 38 abstentions.[8]

The large number of abstentions may lead to the assumption that because the Protocol is optional and separate it will be ignored by so many states as to render it quite ineffective. There is some basis for such an assumption. First, only 4 of the States Parties to the Convention on Racial Discrimination have made the declaration under Article 14 which recognizes the right of individuals to petition the Committee on Racial Discrimination, and that Convention was adopted unanimously.

Secondly, it is a long way from the adoption of a resolution, even if without dissent, to its ratification. This has been especially so with Article 14 of the Convention on Racial Discrimination, the CP and ESC Covenants, and the Protocol. Of the 66 states which voted for the Protocol in 1966, only 13 have ratified, which indicates the huge gap between words and action. The International Commission of Jurists has said of this dilemma:

> Each year the General Assembly adopts without dissent resolutions calling on member States which have not yet done so to ratify the Covenants and the Convention on the Elimination of Racial Discrimination. Many of the governments which vote for these resolutions each year are the very ones which have made no serious attempt so far to ratify these instruments. 9

Certainly these are reasons to assume the worst.

However, there are several reasons why this assumption should not be made too readily. First, it is apparent that the locus standi of the individual is being accepted by more states as time passes,[10] as indicated by the growing number of international agreements which recognize individual rights. Further, it is reasonable to assume that an increasing number of states will be persuaded by the continuing success of the European Convention to give serious consideration to ratifying the Protocol. Obviously momentum is very important to the development of a successful system of international implementation, and for the Protocol in particular.

Secondly, the defence of "domestic jurisdiction" is losing its credibility under weight of the argument, among others, that there is nothing to prevent member states from

surrendering their sovereignty in certain instances to the United Nations.

The third reason is that over the course of several years, and as people become better educated in human rights, ratification of the Protocol will be looked upon not only as a political necessity, but as a prestigious event by an increasing number of states. This however, is based on an assumption, first, that the machinery for receiving individual petitions will become effective and efficient; and secondly, that people will muster sufficient self-interest to demand from their governments the right of "appeal" to an international authority.

Finally, there is no difference in law between the insertion of an optional right of petition in the CP Covenant, and the establishment of a separate Protocol, except that by inserting it in the main instrument there is an implied recognition by ratifying states of the right of petition. The existence of a separate Protocol may even be more conducive to state ratification. Rather than being "out of sight, and therefore out of mind", as some states had hoped, the Protocol as a separate entity in its own right may better attract the attention of people and states. The fact is that the Protocol has been ratified by more states than have declared their recognition of the right of petition under Article 14 of the Convention on Racial Discrimination, despite the apparent popularity of the latter Convention.[11] Perhaps Article 14 is overshadowed by the implementation systems of reporting and state complaints

which are incorporated into the Convention on Racial Discrimination and which enjoy greater acceptance by a greater number of states.

Now that the Protocol is in force, and the Committee will soon be receiving petitions, it is imperative that the attention of states be brought to the urgent matter of ratification. As a treaty for the international implementation of human rights, the Protocol now depends for its international effectiveness on the maximum possible number of ratifications.

5. SOURCES AND "VICTIMS

Unlike the procedures of the European Convention, the Convention on Racial Discrimination, and the United Nations non-treaty procedures, it appears that the only source from which individual petitions may be received under the Protocol is the individual claiming to be the direct victim of the violation. But is this in fact so? What interpretation will the Committee give to the word "individual", and how effective will the right of petition be, if limited to the direct victim?

The Protocol provides that the Committee may "receive and consider, as provided in the present Protocol, communications from individuals claiming to be victims of violations...". Article 25 of the European Convention is much more liberal in its direction that the Commission may receive petitions from "any person, non-governmental organization or group of individuals claiming to be the victim of a violation". Article 44 of the American Convention provides that "any person or group of persons, or any non-governmental entity legally recognized in one or more member States of the Organization, may lodge petitions...". Article 14 of the Convention on Racial Discrimination authorizes its Committee to "receive and consider communications from individuals or groups of individuals" within the jurisdiction of a state making the necessary declaration.[1] Finally, and perhaps the most liberal of all, Sub-Commission resolution 1, approved at its

24th Session in 1971 (hereinafter referred to as the Sub-Commission resolution) states in Article 2 (a) that "admissable communications may originate from a person or group of persons who, it can be reasonably presumed, are victims of the violations...any person or group of persons who have direct and reliable knowledge of those violations, or non-governmental organizations acting in good faith... and having direct and reliable knowledge of such violations".[2]

First, what interpretation will the Committee give to the word "individual" in the Protocol which, when compared with the procedures for receiving petitions listed above, appears extremely limited?

The Third Committee records offer no clue as to what exactly states meant, except that the preamble (which, with Article 1 of the Protocol) contains the word, was adopted by 57 votes to none, with 22 abstentions.[3] Under the European Convention and the Protocol the "person", or "individual" making the petition must be a "victim". The European Commission has held that the individual need not be a direct victim, but will accept petitions from indirect victims, such as a mother whose complaint related to the conviction and sentence of her son,[4] or where a woman whose husband had been detained in a mental institution.[5] Similarly, the Commission (without answering the question of whether the petitioner was a "victim" within Article 25 of the Convention) heard the complaint of an uncle, that his nephew and niece were being educated contrary to his wishes;[6] and the

complaint of an applicant who claimed that as a member of the general public his rights had been affected by an alleged radio and television monopoly in Sweden.[7]

It is the opinion of Messrs. Boyle and Hannum, counsel in the Donnelly case[8] (brought before the European Commission in 1972) that under Article 25, "victim" also includes a future victim.[9] They also make the point that an individual may raise not only allegations that his own particular rights have been violated, but also the issue of whether or not a particular administrative practice is compatible with the European Convention.[10] It is impossible to anticipate the reaction of the Committee to such an allegation, brought under the Protocol; just as it is difficult to predict whether or not the Committee will be persuaded by European jurisprudence to go beyond the apparent meaning of the word "individual" in the Protocol, and give it a more liberal interpretation.

Schwelb says of the Protocol that if an individual can submit a communication, then so may a group of individuals.[11] He does not extend the interpretation to include N.G.O.'s, they being legal persons different from the individuals who form them.[12] It is submitted that in view of past strong opposition to the right of petition, the Committee will most likely interpret "individual" to mean the direct victim only. But much will depend on the composition of the first Committee to be elected (which is discussed later in this paper), and its general attitude towards the right of petition. The

Committee might be influenced to some extent in its interpretation by the reasonable and more general terms of the 1971 Sub-Commission resolution,[13] which includes as legitimate petitioners persons or groups of persons having direct and reliable knowledge of the alleged violations, and NGO's. Perhaps the Sub-Commission resolution is indicative of a change in attitude towards the right of petition since 1966.

If the Committee decides to consider petitions only from direct victims, then the Protocol will not be as effective in this respect, as all of those instruments above which will admit petitions from groups of persons or NGO's; which is the answer to the second question posed above. The Protocol is remiss in denying the possibility of group support to those individuals, who for fear or circumstances cannot or will not act alone, and is the weaker for the omission.

Surely there is a role for the NGO in the right of peition. The NGO receives explicit recognition in Article 71 of the United Nations Charter as a source of information to be utilized by ECOSOC, and which in fact is utilized by the ILO[14] and by UNESCO[15] as a source of information. It is impossible here to examine the important, and sometimes invaluable, contribution made by NGO'S since the second World War (and before) to the human rights movement,[16] but to deny them access to the right of petition, which the Protocol has done, detracts from what has been a progressive trend in human rights protection, in spite of strong forces which have sought to limit their role,[17] especially in

bringing the complaints of individuals to the notice of the United Nations Organization. In short, it may not be an exaggeration to assert, that because of its greater economic and investigative resources, the NGO must take the major responsibility for the international protection of individuals, under both the Protocol and the non-treaty procedures of the United Nations. If they are prevented by formal provisions, such as the Protocol, from intervening on behalf of individuals, then they must use all of their available resources to work behind the scenes to advance human rights, by publication of violations, by persuading government representatives, by educating the public, and by advising petitioners.

It should be noted that although the ILO does not accept complaints from individuals, the individual may petition the ILO through an organization, "an industrial association of employees or workers",[18] provided the organization is situated in the country to which the complaint relates.[19]

The conclusion is that the Protocol should be strengthened in this respect, either by a very liberal interpretation of the words "individuals claiming to be victims" to include indirect and future victims, or by amendment, which the Protocol provides for, to include groups of persons and NGO's as sources from which petitions will be accepted.

6. "SUBJECT TO JURISDICTION"

A State Party to the Protocol recognizes the competence of the Committee to receive and consider communications from individuals, "subject to its jurisdiction" (Article 1). These words, the representative of Sweden explained, without being contradicted, refer only to physical control and nationality. That is, he said, "complaints could be lodged only by persons under the physical control of" a State Party to the Protocol, "or by nationals, whether or not they were within their State's physical control".[1] He then expressed his regret that the draft article 41 did not include a non-national whose human rights had been violated in a country from which he had been forced to flee.[2]

This interpretation of "physical control and nationality" overlooks however, the undertaking by States Parties in Article 2 (1) of the CP Covenant to "respect and to ensure to all individuals <u>within its territory</u> and subject to its jurisdiction the rights..."; which limits the responsibility of States Parties. Although the Protocol refers only to "individuals, subject to a territorial limitation, the conclusion must be that "the scope of the procedural protection afforded by the Protocol cannot be wider than that of the substantive protection provided by the Covenant".[3] The result is that even though nationals of a State Party might petition the Committee, if at the time of the alleged violation they were not within its territory, then they will obtain no relief.

There was considerable time spent in debating whether the words "within its territory" should be included in the CP Covenant, but in a separate vote the words were retained.[5] The European and American Conventions have no territorial limitations.[6] The States Parties undertake, in Article 1 of each Convention, in the case of the European Convention to "secure to everyone within their jurisdiction the rights..."; and in the case of the American Convention to "ensure to all persons subject to their jurisdiction...",

The words "within its territory" are an unnecessary territorial limitation and should be deleted from Article 2 (1) of the CP Covenant, by the process of amendment as provided in Article 51 of the Covenant. It is bad enough that a non-national cannot take some action to protect rights which have been violated by a state from which he has been forced to flee; but surely there is no justification for distinguishing between those violations which are perpetrated upon a national within his state's territory, and those perpetrated beyond his states's territory. The second is no less a violation than the first.

7. RULES OF ADMISSABILITY

The Protocol distinguishes between grounds of "admissability" in Article 3, and those grounds for which the Committee "shall not consider a communication" in Article 5 (2).

A communication is inadmissable, first, if it is anonymous; secondly, if it is an abuse of the right of submission of such communication; and thirdly, if it is incompatible with the provisions of the Covenant. Each of these three grounds shall be examined in turn, with reference mainly to similar provisions of the European Convention, and to the non-treaty procedures of the Sub-Commission resolution, for some indication of how the Committee might interpret Article 3 of the Protocol.

(1) Anonymous Applicants

The first speaks for itself. A basic test of the applicant's sincerity and good faith is that he is prepared to identify himself. Article 21 (1) (a) of the European Convention is in the same words, but there is very little jurisprudence on the subject. The Commission did reject an application from Ireland signed "lover of tranquillity",[1] but stated that "it considered that an application should be rejected as anonymous only if the file contains no element enabling identification of the applicant to be made".[2] The Commission may also proceed to the examination of an application on the assumption that the procedural defect of anonymity will be corrected,[3] although it is not certain in what circumstances it will do this.

(2) Abuse of the right of Submission of Communications

The Protocol uses the same words as Article 27 (2) of the European Convention in this respect, except that the Convention uses the word "petition", so that it might be assumed they have the same, or a similar meaning. Although the rule is framed in different words in the Sub-Commission resolution, it was apparently based on Article 27 (2) of the European Convention. [4]

Paragraph 3 (b) of the Sub-Commission resolution states that communications shall be inadmissable if their language is essentially abusive and in particular if they contain insulting references to the state against which the complaint is directed. This stipulation is modified somewhat by the provision that the communication may still be considered if it meets the other criteria of admissability after deletion of the abusive language. Although there is no such proviso in the Protocol, it is submitted that the Committee should adopt a similar attitude towards abusive petition. Based on the legislative history of paragraph 3 (b), [5] the provision was included to exclude communications containing derogatory or unfavourable statements inserted without just cause (for certain seemingly malicious statements may be a necessary part of the accusations).

As for the abuse of the right of submission of communications in Article 3 of the Protocol, very little was said on this matter in the Third Committee, although the representative of Upper Volta did enquire as to who, the Committee or another body, would determine whether a communication constituted an abuse, and in accordance with what principle

such determination would be made. [6] Legal Counsel replied that it would be for the Committee to decide whether a communication constituted an abuse. [7] The words were approved at a later time by a separate vote of 49 to 2, with 30 abstentions. [8] The legislative history of the Protocol gives no other indication of how the words should be interpreted, except that Article 3 of the Protocol was influenced by Article 27 (2) of the European Convention. [9]

Article 27 (2) of the European Convention has similar terms to those of the Protocol. European Jurisprudence reveals at least four types of cases which may be rejected as "an abuse of the right of petition". First, an application should not be made merely for the purposes of political propaganda. The Commission did not so find in the Iversen Case, but considered that an application would be inadmissable if undue emphasis was given to the political aspect of the case. [10] The Commission had stated in the earlier Lawless case that the fact that the "Application was inspired by motives of publicity and political propaganda, even if established, would not by itself necessarily have the consequence that the Application was an abuse of the right of petition". [11]

Secondly, the Commission will reject as an abuse of the right of petition an application the facts of which obviously do not indicate a violation. Such a case was that of Ilse Koch who, the Commission found, made application merely to escape the consequences of her conviction. [12]

Thirdly, the Commission has treated as an abuse of the right of petition an application which contained defamatory statements against the respondent government, especially where the Commission had warned the

applicant, as it had in the case of Rafael V Austria. [13] There the Commission found the applicant's statements "provocative and insulting to the Austrian Government" which amounted to an abuse of the right of petition. [14]

Finally there are those cases in which the applicant has been un-co-operative, or has instituted frivolous and vexatious proceedings.[15] In application 244/57 the Commission stated that "persistent and negligent disregard for the rules laid down to enable the Secretariat to prepare applications for presentation was an abuse of the right of petiton". [16]

Although a screening process is necessary, to prevent the Committee wasting its time on frivolous or abusive petitions, there is some danger that the members in this case may be vested with too great a discretion, but again, we should not pre-judge the interpretations and decisions of the Committee's members. It is submitted that a petition should only be inadmissable as an abuse of that right of petition if it will impede the proceedings of the Committee; and further, that the Committee should hesitate before attaching persuasive authority to the third situation above, as represented by Rafael V Austria. As recognized by the Sub-Commission resolution only those petitions containing derogatory statements without just cause should be excluded, for it may be that a statement which is apparently derogatory is a necessary part of the allegation, and as such goes to the merits of the petition rather than to its admissability.

It is interesting to note that the American Convention, in its

articles on admissability,[17] makes no reference to the "abuse of the right of petition", or is a petition inadmissable because its language is insulting or violent.

(3) Incompatible with the provisions of the Covenant

Article 3 of the Protocol provides that a communication will be inadmissable if incompatible with the provisions of the Covenant. Paragraph 1 (a) of the Sub-Commission resolution states: "the object of the communication must not be inconsistent with the relevant principles of the Charter, of the Universal Declaration of Human Rights and of the other applicable instruments...". Article 27 (2) of the European Convention is in identical words to those of the Protocol.

The provision is a standard one, and at first glance, self-explanatory. Paragraph 1 (a) of the Sub-Commission resolution, it has been said, "is aimed at guarding against the use of the communication procedure for the purpose of impairing or infringing those human rights that the procedure is designed to protect".[18] This could be said of the same provision in the Protocol. However, the complexity of the provision is indicated by the jurisprudence accumulated over the few short years of the European Convention. As it is impossible to survey it all here, this paper will adopt 6 types of inadmissability which have arisen from the European provision, and which have been set out by Ralph Beddard in his study of the European Convention.[19]

An application is incompatible with the Convention, first, when it claims the violation of a right not guaranteed by the Convention. Under Article 25 of the Convention an individual applicant must claim to be a

victim of "the rights set forth in this Convention" (Section 1). This applies equally to a petition under the Protocol.

Secondly, an application is incompatible if the applicant or respondent are persons or states incompetent to appear before the Commission. The individual must show that he is a "victim", [20] and that the state has made the necessary declaration recognizing the right of petition (Article 25 European Convention). [21]

Thirdly, an application is incompatible with the Convention if properly covered by a reservation[22] of a contracting party, made under Article 64 of the Convention. Fourthly, it is incompatible when dealing with an Article which is the subject of a valid derogation[23] made under Article 15 of the Convention.

Fifthly, a communication will be incompatible if it falls under Article 17, that is, if it claims the right to engage in activities which would destroy other rights granted in the Convention. The CP Covenant contains a similar provision in Article 5 (1). Such a complaint is the clearest example of a petition incompatible with the CP Covenant, because a petition the purpose of which was to subvert the rights guaranteed would be incompatible literally with the CP Covenant. The best European example of this was the Commission's rejection of an application from the banned German Communist Party in 1957.[24]

Finally, an application is incompatible if it attempts to use the Commission as a Court of final appeal. The Committee will no doubt take a similar attitude towards petitions under the Protocol. It will not reassess local judgments, unless one of the civil and political

rights of the CP Covenant has been violated in the rendering of that judgment, that is, unless there has been a denial of justice.

These then, are the three grounds of inadmissability under Article 3 of the Protocol. If the Committee finds that any of these grounds exist it will not bring the communication to the attention of the state involved, and in fact, will take no action. If none of these grounds intervene to make the communication inadmissable, then the state is made aware of the allegations, to which it must make written reply within 6 months. At this stage, and before the Committee deals with the merits of the case, or "considers" the communication it must ascertain, in accordance with Article 5 (2) of the Protocol, first, that the same matter is not being examined under another procedure of international investigation or settlement; and secondly, that the petitioner has exhausted all available domestic remedies.[25]

(4) Examination by another international procedure

The Protocol differs significantly from the European Convention in this respect. Article 5 (2) of the Protocol reads: the Committee shall not consider any communication unless it has ascertained that the same matter is not being examined under another international procedure. Article 27 (1) (b) of the Convention reads: The Commission may not deal with any petition submitted under Article 25 which is substantially the same as a matter which has already been examined by the Commission or another international procedure.

The Protocol must be read with Article 44 of the CP Covenant which says in effect, that the jurisdiction of the Committee in inter-state

proceedings is not ousted by the existence, availability or invocation of procedures under other instruments. The Protocol prohibits the consideration of a matter which is being examined by another international instrument at the same time. However, it does not prevent an alleged victim (if his state is a party to the Protocol) from bringing his complaint to the United Nations if he has been unsuccessful under that other procedure. In contrast, the European Convention ousts the Commission's jurisdiction when the subject of the complaint is one which has already been examined by another procedure of international investigation (unless new evidence is produced).

The result is that an individual in a state which has ratified the Protocol and recognized the competetence of the Commission under Article 25 of the European Convention has a choice between the two systems. He may not go to them both at the same time, so that his choice will be determined by the scope of the rights protected by each, and by their relative effectiveness. If he petitions under the Convention and fails, then he may petition under the Protocol. But if he petitions under the Protocol first and fails, then he may not petition under the Convention.

It has been argued that although an individual should have the right to choose between the United Nations and the European Convention, once the decision has been made, the individual should accept the consequences of his decision.[26] An "appeal" to the United Nations from a decision of the European Commission, says Robertson, would "undermine, to some extent, the authority of those organs", and would be contrary to the intent of the European Convention. Secondly, dual proceedings would protract the proceedings for an unreasonable and unnecessary length of time. Thirdly, is it reasonable,

Robertson asks, "to think that the applicant has a meritorious case if first the national courts and then the European organs have already decided against him?" [27]

These arguments sound a little like those used as objections to the right of international petition in general,[28] and although they have some merit in this instance, one might wonder whether Robertson would feel the same if there were an East European Council with a Socialist Convention of Human Rights. Would he not support a "appeal" to the United Nations from an individual whose petition under the Socialist Convention had been rejected?

5. Exhaustion of domestic remedies

This is a standard rule of international law,[29] of which Lord McNair has written: "it is both ancient and common place...is so fundamental that it has become almost a cliché and it is difficult to find any real analysis of its meaning." [30] This requirement is included in the Protocol to discourage frivolous petitioners;[31] and to provide the state with every opportunity to investigate the petitioner's allegations and if necessary to rectify the problems.[32] It is also included in recognition of the fact that human rights are essentially a matter between an individual and his state, and that international protection should only be sought by the petitioner as a last resort. [33] The Protocol qualifies the requirement that domestic remedies be exhausted by excluding the rule where "the application of remedies is unreasonably prolonged", which is also a generally recognized principle of international law.

In the case of the Protocol, this is a rule fraught with dangers.

It could be too strictly interpreted. It could be used too readily as an easy means of refusing doubtful petitions. In many cases a victim will be unable to avail himself of domestic remedies; he may be afraid to , he may not have the finances or the assistance of counsel, he may be imprisoned.

Much has been written on the obligation to exhaust local remedies,[34] so this paper will be limited to suggested quidelines which the Committee might consider in its application of the rule to a petition. No doubt the rule will be a standard defence used by states in response to allegations, which makes it of the utmost importance that the Committee establish as quickly as possible a jurisprudence on the question which will not only be clear, concise and effective, but fair to both parties.

First, the Committee should follow the European Commission in permitting states to waive the requirement that an individual exhaust all domestic remedies.[35] Secondly, where domestic law offers no remedy at all, then of course, there is no obligation to exhaust.[36] Thirdly, not all domestic remedies need be tried; only those which are capable of providing an effective and efficient means of correcting the wrong. [37] Similarly, if the case-law of an appeal court indicates an appeal has no chance of success, then there should be no obligation to appeal. [38]

Fourthly, a respondent state should be permitted to raise the defence of non-exhaustion only in the initial written communications, although the Protocol is unclear as to whether or not there will be more than one exchange of written communciations permitted.

Fifthly it should be the state's responsibility to raise the defence, that is, the petitioner should not have to show that he has exhausted

domestic remedies unless the state raises the question.[39] That this is the intention of the Protocol is indicated by the order of procedure (that is, the Committee does not consider the exhaustion of domestic remedies until it has received a reply from the state).

Sixthly, the government should carry the onus of proving to the Committee that domestic remedies were available,[40] that they provided an effective means of relief, and that there was some chance of a reasonable review. Once it is established by the state that an effective domestic remedy does exist, then the onus will move to the applicant to show the Committee that he has exhuasted them as required. [41]

This is a most important rule effecting admissability of petitions, and as stated above, the Committee must devise effective rules on the exhaustion of domestic remedies and develop them by jurisprudence.

8. FEDERAL -STATE CLAUSE:

Because ratifications are so important to the Protocol it is interesting to look at Article 10 and to examine whether or not it is a contributing factor in the decision of some states not to ratify. Article 10 might be referred to as an anti-federal state clause, and is to the effect that the provisions of the Protocol shall extend to all parts of federal States without any limitations or exceptions.

This direction represents the culmination of arguments presented by non-federal states, who believe that it is up to the federal states to make their own systems work rather than to the international body to find new ways to overcome or circumvent the constitutional factors which might prevent ratifications by federal states. Further, a federal-state clause, they argued, could result in greater obligations being imposed on unitary states than on federal states.[1] These arguments, in the case of human rights treaties, have prevailed; and to make sure that they prevailed, Article 10 was included in the Protocol.

Much has been written on the efforts of federal states to persuade other states to accept as part of multilateral treaties the federal-state clause, and on the argument made by federal states that ratification of human rights treaties was impossible unless a clause was included which rendered the central government responsible only for those rights which fell within its jurisdiction under a constitutional division of legislative powers.[2]

In 1950 the federal movement was strong enough to obtain the General Assembly approval of a resolution directing ECOSOC to request the Commission on Human Rights to undertake a study of federal-state clauses, the purpose of which was to secure the maximum number of ratifications.[3]

In 1948 Mr. Pearson explained Canada's abstention in a Committee vote on the Universal Declaration of Human Rights by saying that it encroached upon "the rights of the Provincial governments, to which Canadian people attached as much importance as they did to the principles contained in the Declaration."[4]

Federal states have urged the inclusion of a federal-state clause similar to paragraph 7, Article 19 of the ILO Constitution; or similar to Article 28 of the more recent American Convention on Human Rights. Article 28 reads in part:

> "Where a State Party is constituted as a Federal state, the national government of such State Party shall implement all the provisions of the Convention over whose subject matter it exercises legislative and judicial jurisdiction.
>
> With respect to the provisions over whose subject matter the constituent units of the federal state have jurisdiction, the national government shall immediately take suitable measures in accordance with its constitution and its laws, to the end that

> the competent authorities of the constituent units may adopt appropriate provisions to comply with the Convention."[5]

In 1955 Dr. Looper wrote that "the tension between treaty obligations and federal Constitutions is perhaps the most important current aspect of the perennial problem of the relationship between international and municipal law."[6] How significant today is the absence of a federal-state clause in the decision of some federal states not to ratify the ESC and CP Covenants? Is it the major reason,or just one of several?

It has been said of Australia, Canada and the United States of America that their constitutional and ratification problems have unnecessarily eclipsed the practical aspects of ratification. Each, to its detriment, has allowed the Human Rights Covenant to become a debating ground for jurists, thus obscuring the real objectives and value of the treaties.[7]

A short comparative analysis of the problems posed by the absence of a federal-state clause for Australia, Canada and the U.S.A., and the relative importance attached by each to its absence, is useful, because of the 13 states to ratify the Protocol (asof 10 August 1976) only Canada is a federal state, and of the 38 states to ratify the CP Covenant only 6 are federal states.[8] It would be unfortunate for the human rights movement in general, and for the Protocol in particular, if

Dr. Looper's assessment of the problem is as relevant today as it was in 1955.

Before taking a look at these three states, one might speculate as to why Article 10 was included in the Protocol at all. There are no substantive provisions in the Protocol to which Article 10 might refer, and if it was intended to refer to the substantive provisions of the CP Covenant then it is redundant because the same clause appears there in Article 50. Presumably Article 10 was intended to refer to the provisions of the CP Covenant, and was included under pressure from the unitary states to ensure that federal states would not be able to invoke their constitutions as a defence to allegations that one of their constitutent units has violated obligations undertaken by the central government on ratification. Of course it is well established that a federal government may be held responsible internationally for violations by one of its units.[9]

Australia:

Australia has not ratified the CP Covenant, and was one of those countries which argued most strongly for the inclusion of a federal-state clause. There is no problem where the subject matter of the treaty is clearly within federal jurisdiction, but under The Commonwealth of Australia Constitution Act 1900(hereinafter referred to as the Australian Constitution) most of the rights specified in the Covenants lie primarily within the jurisdiction of the constituent states. Accordingly,

in the early 1950s Australia considered the inclusion of a federal-state clause essential if it was to ratify.[10] In 1953, the Australian delegate, Mr. Whitlam, (father of the present leader of the Opposition Labour Party) stated at the UN that the decision not to include a federal clause precluded Australia from ratification of the then draft Covenants.[11] Has the Australian attitude changed, and what is the Australian constitutional problem?

Like the United States system, and unlike the Canadian, the Australian Constitution allocates to the central government the power to legislate on "external affairs" (Section51 $_{(29)}$)[12] and it also gives it the power to legislate on matters incidental thereto (Section 51$_{(39)}$). Accordingly, it is difficult for other states to understand Australia's tardiness in ratifying the CP Covenant and the Protocol, although it did ratify the ESC Covenant on the 10th December 1975.[13] His Honour Mr. Justice Joske wrote of the external affairs power in Australia that, to Australia's detriment, its scope is not yet determined, and the Commonwealth Government is uncertain as to how far it can go,without state co-operation, in implementing treaties. These doubts and Australia's failure to ratify conventions, according to His Honour, have "led to the opinion in overseas countries that Australia is not a socially advanced country and (have) affected Australia's reputation and led to less regard being paid to Australia's views".[14]

The problem in Australia comes with implementation of a treaty. While the Executive is competent to negotiate international agreements and undertake international obliga-

tions on behalf of Australia[15], it may not be able to legislate upon, or implement, the treaty within Australia, unless the matter is clearly one of "external affairs" within Section $51_{(29)}$. And ratification without implementation would be pointless.

Professor Sawer's summation of the situation is as follows:

> Australian Governments sometimes use the federal difficulty as an alibi for not committing the country to agreements when the Government dislikes the agreement on policy grounds but does not want to say so, whether for external or internal political reasons. If an Australian federal Government strongly approves an international commitment in an area not normally the subject of Commonwealth action... it should take its constitutional courage in its hand and ratify without federal reservations, relying on S.51(29) and the Henry case. It would still be appropriate to persuade the States that they should take any necessary action, perhaps providing federal financial help for the purpose, but in the last resort the Commonwealth should perform the obligation itself".[16]

The High Court decision in the case of RvBurgess[17] is the leading authority on the the Australian external affairs power, and is authoritative despite the division of opinion.

Evatt and McTiernan JJ. took a wide view of S.51(29): "the fact of an international agreement having been duly made about a subject brings that subject within the field of international relations so far as such a subject is dealt with by the agreement".[18] Latham CJ. expressed a similar view: "the possible subjects of international agreement are infinitely various", making it "impossible to say a priori that any subject is necessarily such that it could never properly be dealt with by the international agreement".[19] Starke J. interpreted the section more restrictively. The power is limited to cases where the matter is "of sufficient international interest to make it a legitimate subject for international co-operation and agreement".[20] Dixon J. used the criterion of "some matter indisputably international in character"[21] to ascertain when the subject of a treaty might be a legitimate matter for federal implementing legislation. "On the other hand" he said,

> "it seems an extreme view that merely because the Executive Government undertakes with some other country that the conduct of persons in Australia should be regulated in a particular way, the legislature thereby obtains a power to enact that regulation, although it relates to a matter of internal concern which, apart from the obligation undertaken by the Executive, could not be considered as a matter of external affairs."[22]

It is Professor Lane's opinion that all of the Judges focused on "a mutuality or reciprocity of international interest and concern in what is to be described as an 'external affair' ".[23]

In the more recent case of Airlines of NSW v The State of NSW[24] the High Court adopted the more restrictive views of Dixon and Starke JJ. in the earlier case.

The answer seems to be then, that the Federal Parliament may legislate on the subject of a treaty, even if that subject appears to be within State jurisdiction, so long as it is of international interest and a legitimate subject for international co-operation, or a matter indisputably international in character. There must be a mutuality or reciprocity of international interest in the particular treaty.

Surely the provisions of the CP Covenant are matters of international concern, and it is, as Professor Sawer says, time for the Australian government to take its constitutional courage and ratify, even though most of the matters dealt with relate to the operation of the ordinary criminal law which comes within state jurisdiction.[25] As Messrs Lumb and Ryan have said:

> "...while in practice the adherence to the view that the exercise of power in the fields of human rights and labour relations only by way of state co-operation promotes the federal principle, it cannot be used to deny power to the Commonwealth to legislate unilaterally with regard to a matter where that matter has become a matter of international concern today eventhough

> some years ago it may have not had the significance it has at present."[25]

The Australian Department of Foreign Affairs has chosen not to follow the recommendations of Sawer and Lumb and Ryan, but places more emphasis on the reservations made by His Honour Mr. Justice Dixon, and cited above. On the question of ratification Mr. Bourchier, of the Department of Foreign Affairs, says that the absence of a federal-state clause in the CP Covenant and the Protocol"is not, as such, a determining factor in Australia's reluctance to ratify these instruments at this stage...the reason... is to be found not so much in an abstract constitutional problem but in the fact that all the detailed standards of (the CP Covenant) are not yet fully met thoughout Australia."[27] It is Australia's practice in relation to treaties that have implications for domestic law, he continues, to become a Party only when satisfied that the relevant laws and practices are in accord with the detailed requirements of the treaty in question."[28]

On the question of implementation of treaties, Mr. Bourchier says that:

> "although it is open to the Federal Parliament to implement in legislation treaties --- which affect matters coming within the exclusive or concurrent jurisdiction of the constituent States, the practice of the Government has been to consult with the States on the question of the ratification and implementation of such treaties."[29]

The decisive factor then, in Australia's reluctance to

ratify, is the importance which it places on federal-state consultations and agreement, which it considers an essential characteristic of its federal system of government. Australia will not ratify until state legislation complies with the requirements of the Human Rights Treaties.

Canada:

In 1937 Professor Scott wrote that "Canada is practically incompetent "insofar as the making of international agreements dealing with matters under provicial heads of jurisdiction.[1] Professor Eayrs took a similar view in 1950 when he wrote that certain obligations which fell into provincial jurisdiction could not be accepted in good faith by the Canadian Government.[2]

In Canada, as in the United States and Australia, the power to contract international obligations is now held to be the exclusive preserve of the federal government[3]; but the British North America Act 1867 (hereinafter referred to as the BNA Act) makes no express allocation of a foreign affairs, or treaty-implementing power. If the subject of the treaty is within those powers specifically allocated to the Canadian Government, then it may legislate to implement. But neither S132 (British Empire Treaties), nor S.91$_{(1)}$, which provides a residual power to legislate for the "Peace, Order and Good Government of Canada," will support an exclusive legislative power on matters of foreign affairs.[4] Moreover, unlike the Australian Constitution,

the BNA Act confers specific and exclusive powers on the Canadian Provinces, leaving the residual powers to the Federal Government, the result of which is that there has been a stricter adherence in Canada to the principle of jurisdictional division of legislative powers.

Whereas the Australian High Court held in the case of Rv Burgess that it is wrong to assert in advance that there are certain matters which are excluded from Commonwealth legislation in its exercise of the external affairs power,[5] the Privy Council in the Labour Conventions case,[6] on appeal from the Supreme Court of Canada, held that "the distribution(of legislative powers between the Dominion and the Provinces) is based on classes of subjects so will the legislative power of performing it be ascertained."[7]

In Canada therefore it is necessary to look first at the subject of the treaty. In Australia the "question is not whether the Commonwealth Parliament can carry out ILO Conventions or not, but what kind of ILO Conventions it can carry out."[8]

In the 1950s Canada fought hard for the inclusion of federal-state clauses in multilateral treaties.[9] It ratified the Convention on the Political Rights of Women 1953 subject to a federal-state clause, introduced by way of reservation.[10] At the same time, Canada has ratified several human rights instruments, after consultation with the Provinces concerning their legislation (or proposed legislation), which constitutes an important development in Canadian constitutional practice -

a development which was foreseen and advocated by the Privy Council in its Labour Conventions case decision many years before.[11] In fact, when Article 50 of the CP Covenant was adopted unanimously in the Third Committee, Canada voted for the Article.[12] Since then Canada has flowed with the tide of opinion against the inclusion of federal-state clauses, and Canadian delegates have limited their statements to the effect that there is a constitutional problem, and that in considering ratification, Canada would consult the Provinces with a view to obtaining their assurances that those provisions within Provincial jurisdiction would be implemented.[13]

What then has been the Canadian solution to Lord Atkin's direction "that the Dominion cannot, merely by making promises to foreign countries, clothe itself with legislative authority inconsistent with the constitution which gave it birth?"[14] Lord Atkin himself provided part of the answer:

> "...the legislative powers remain distributed, and if...Canada incurs obligations they must, so far as legislation be concerned, when they deal with Provincial classes of subject, be dealt with by the totality of powers, in other words by co-operation between the Dominion and the Provinces."[15]

The result seems to be that the Canadian federal legislation is subject to many more limitations in its treaty implementing powers than are Australia and the United States, although her record of ratifications compares well.[16]

Despite this, Canada has forged ahead of Australia and the United States and has ratified the Covenants and the Protocol (19th May 1976). Like the Australian Department, the Canadian Department of External Affairs does not give too much weight to the absence of a federal-state clause.[17] The reason for Canada's delayed ratification"has very little to do with international law or domestic law but quite a lot with the division of responsibilities in a federal state and the establishment of appropriate machinery for consultation and concertation".[18] The conclusion must be then, that while the Australian Government is subject to fewer restrictions than in Canada, in implementing by legislation the human rights treaties which each has ratified, both have taken the route of federal-state consultation and agreement as a pre-condition to ratification. Canada has been more successful in this to date.

United States:

There are reasons other than the absence of a federal-state clause for the United States' reluctance to ratify the Covenants and the Protocol. But how important are the constitutional reasons?

> "It has long been a commonplace that Americans, when confronted with proposals for solving a political social or economic problem of any magnitude, tend to become obsessed with the question of constitutionality." [1]

The Constitution of the United States of America empowers

the President, with Senate consent, to make treaties (Art.2 Section 2,Clause 2), to the exclusion of the states (Art.1, Section 10, clause 3). The Constitution makes no provision for Congress to enact implementing legislation, but where the treaty is self-executing it becomes part of the supreme law of the land (Art. 6, clause 2), and where it is not self-executing, it has been held in Missouri v Holland that Congress may so legislate.

Although the United States State Department still favours a federal-state clause[3], there seems to be no valid constitutional reason why the United States should not ratify the Human Rights Covenants. A Special Committee has so reported in 1969,[4] and Missouri v Holland has not been overruled. The reasons are mainly legal.

Senator Bricker argued in the early fifties that ratification of the Covenants would require a surrender of the United States' exclusive jurisdiction over its internal order, and secondly, that the Covenants might enhance federal powers at the expense of states.[5] The Special Committee referred to above has refuted these arguments and said that it has been clear since Missouri v Holland "that the treaty-making power of the federal government is not limited by powers reserved to the states pursuant to the Tenth Amendment"[6] Hyman had written in 1949 that U.S. ratification "would not be held unconstitutional for the reason that it might increase national power over relations otherwise

within the exclusive control of the states".[7]

It has also been argued that human rights conventions are not proper subjects for the exercise of the treaty-making power. The relevant test, as enunciated by the U.S. Supreme Court in Geofroy v Riggs is whether a treaty deals with a matter "which is properly the subject of negotiation with a foreign country,"[8] which as a criterion seems more vague than that devised by the Australian High Court. As already stated above, it seems that human rights and their implementation by petition are proper subjects for negotiation with a foreign country.[9]

Richard Gardner and William Korey have enunciated the policy reasons which should influence the United States' decision on the matter of ratification.[10] Each is of the opinion, first, that as a non-participant the United States will remain relatively ineffective in the international protection of human rights, and subject to constant diplomatic embarrassment should it attempt to involve itself. Secondly, some other parts of the world see human rights as a fundamental ingredient of United States traditions and are disappointed by its refusal to ratify; "our friends cannot understand it. Our adversaries exploit it"[11] Perhaps, as Korey suggests, too many people in the State Department believe that power is the only way to peace, and human rights treaties have little to do with power. But there are others who believe that law in general, and human rights protection in particular are the only real foundations for peace.[12]

The United States seems best able of the three countries to overcome its constitutional problems, but the most reluctant to do so. Hyman prophesied well in 1949 when he wrote that "a good part of the world may, perhaps, decide to go ahead without us."[13] The three federal states do have constitutional problems with ratification, so for them, and other federal states, Article 10 is a legitimate consideration. Inclusion of a federal-state clause would have made it easier to ratify, but would a ratification under those terms be preferable? Australia and Canada appear to have accepted Article 10, and have also accepted that a full commitment to the treaties by resolution of the constitutional difficulties is preferable to the incomplete commitment which would have resulted from ratification of a Protocol which had contained a federal-state clause.

9. RESERVATIONS

The subject of reservations to the Protocol follows naturally from that of the federal-state clause, because it has been suggested that the solution to the constitutional problems of federal states may be to ratify with a reservation in terms which amount to a federal-state clause. The Protocol makes no provision for reservations.

The question of reservations is of the greatest importance, as the effectiveness of the Covenants and the Protocol will depend not only on the number of ratifications, but the reservations which may accompany those ratifications. It seems proper to use as the basic premise, for discussion of reservations, that the integrity of the Protocol must prevail. That is, while it is desirable that the Protocol should be ratified by as many states as is possible, it is more important that there be uniformity in the obligations undertaken, and that the minimum protection provided by the human rights instruments be not weakened further by reservations. The danger posed by reservations, wrote the late Wilfred Jenks, is that the Covenants "may disintegrate into a series of bilateral agreements expressed in two common instruments but binding in different degrees between differant parties". [1]

Professor Lauterpacht proposed in 1950 that the U.S. might ratify the International Bill of Rights with a reservation which specified a limited period of exemption from those obligations which fell within state jurisdiction. Within that time the U.S. could amend its Constitution enabling the Federal government to give effect to the Bill.[2] Might this

in fact provide a solution for federal states?

Returning to the basic premise, I think not. No ratification at all is preferable to one which is not given legislative and practical application. An ineffective ratification will not only fail to protect human rights, but will also undermine respect for the international obligations undertaken, and the integrity of the instruments. Secondly, it could be argued that Article 10 of the Protocol not only excludes concessions being made to federal states, but also denies to them "the possibility of making reservations to meet their particular constitutional problems". [3] Thirdly, it follows from this that if States had contemplated the possibility of only minimal adherence to the Protocol, they would have provided for it by adding an article permitting reservations.

What is the effect of a reservation to a multilateral treaty? In the absence of a provision for reservations, and there is no such provision in the Protocol, the general rule of international law may be as pronounced by the majority in the International Court of Justice's Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, that is, that in the absence of a provision on reservations in a multilateral treaty, a state may formulate reservations which are not incompatible with the object and purpose of the treaty.[4] Despite this pronouncement, the law appears to be in a rather uncertain state.[5]

The majority and minority opinions of the International Court represent the two important policy approaches. The five dissenting Judges took the more traditional view of reservations, which is that only acceptance of a reservation by all other contracting states constitutes the reserving

state a party to the treaty. [6] The policy reason being that reservations to such an important undertaking as the Genocide Convention would be improper and destructive. The majority held that a state which has made a reservation, to which some, but not all others, have objected, may be regarded as a party as between itself and those states not objecting, to the convention, provided that the reservation is compatible with the object and purpose of the convention.[7] The seven judges comprising the majority obviously believed that for policy reasons, the Genocide Convention would be served best by obtaining the maximum number of ratifications possible, even if accompanied by reservations. The final opinion seems to have been an acknowledgment of the fact "that it is an inevitable feature of the system whereby large scale political issues are reduced to agreed formulas in multilateral conventions". [8]

It must be said of this opinion, first, that the Court restricted it specifically to the Genocide Convention; secondly, the Court, by reference to debates and the character of the Convention itself, found an implied right to make reservations; [9] thirdly, five of the twelve judges gave a strong dissenting opinion, and in fact, a report submitted by the International Law Commission just three months after the Court's opinion, adopted the view of the minority. [10] The conclusion must be therefore that the opinion is of limited persuasive force as precedent for a decision on the effectiveness of reservations to the Protocol.

As for what comprises a reservation "incompatible with the object and purpose" of a convention, that is for the States Parties to decide. As a result the concept, by its subjectivity, loses some of its justiciability.

The alternative solution is for the Secretary-General to rule on a particular reservation, which in fact is what he does, because he must consider the validity of reservations when counting reservations for the purpose of bringing a convention into force. The Secretary-General is actually required to seek an Advisory opinion of the World Court before ruling on any particular reservation, but this procedure is so cumbersome "that the inevitable result is to consolidate the tendency towards allowing States to ratify treaties and merely append a list of subjective reservations".[11]

O'Connell suggests that in order to satisfy the criterion of compatability, a reservation should be "limited to incidental matters, those, for example, of a procedural, jurisdictional or remedial character".[12] This may be a fair observation for treaties in general, but a reservation of this nature to the Protocol, which is in substance procedural and remedial, should only be permitted in extreme circumstances.

What is the Secretary-General's attitude to reservations, and what reservations have been made by States Parties to the Protocol? In his capacity as depositary, the Secretary-General acts only as the representative of the Parties, and is in no way competent to make a final judgment as to the exact nature of a communication; declaratory, interpretative or reservation. However, if it appears to expand or diminish the scope of the treaty, or to exclude or modify the legal effect of certain provisions, then it will be regarded as a reservation, the validity of which is for the States Parties to determine for themselves within the time limited by the treaty.[13]

Of the 13 States which have ratified the Protocol (as of 10 August 1976) Denmark, Norway and Sweden have all made the same reservation in similar

words, that is, that the Committee shall not consider a communication which is already being examined under other procedures of international investigation.

It is submitted that a state making a reservation to the Protocol, should not be permitted to become a party to the Protocol unless all other States Parties have consented to the reservation. No objections have been made to the reservation entered by Denmark, Norway and Sweden so that they may be considered to be legitimate Parties to the Protocol. Had their been objections however, they would in all probability have remained States Parties, first, because of the Advisory Opinion on reservations to the Genocide Convention referred to above; secondly, because this is the practice of the United Nations; and thirdly, because the Federal Republic of Germany is a State Party to the CP and ESC Covenants, despite the several objections made by other States Parties to Germany's declaration.[14] Although described as a declaration, and in fact it is a declaration because it does not purport to exclude or modify the legal effect of provisions of the Covenant,[15] the States Parties attribute to it the legal effects of a reservation in thier objections.[16]

Despite United Nations practice, the submission stands. A state should not become a Party to the Protocol by reservation, where there are objections from States Parties to that reservation. First, there is no provision in the Protocol for reservations, and the only implication which should be drawn from the instrument itself is that reservations are unacceptable. Secondly, the nature of the Protocol precludes reservations. Thirdly, the Protocol provides only minimal protection for the individual now, and should not be weakened further.

10. AMENDMENTS

Article 11 of the Protocol provides a procedure for amendment. Any State Party may propose an amendment whereupon, if one-third of the State Parties require, a conference shall be convened, and the amendment may be adopted by a majority vote. An amendment shall come into force if it is then approved by the General Assembly and accepted by two-thirds of the States Parties to the Protocol, but shall only be binding on those States Parties which accept the amendment.

This provision is probably of little consequence, although one can only hope that as popular attitudes force changes in Government policies, then it may be used to strengthen some, and perhaps even several of the Protocol's terms of reference. Whether or not this provision may be used to strengthen the Protocol will depend primarily on the Human Rights Committe, its composition, and the seriousness with which it approaches the task of investigation and resolving individual allegations.

Obvious targets for amendment are, first, the expansion of sources of communications (preamble) to include groups of individuals and NGO's. Secondly, the procedure in Article 5 should be amended to include oral examinations, and to authorize on-the-spot investigation of legitimate complaints. Third, Article 5 (3) should be amended to allow public hearings, at the request of the individual. Fourth, the Human Rights Committee might be authorized to include its "findings" in its annual report.

But this is not the place to continue with suggestions for amendments. That will be done in the course of examining each of the Protocol's provisions. It is enough to record here, that there is a provisiom for amendments of the Protocol.

11. DENUNCIATION

In accordance with Article 54 of the Vienna Convention on the Law of Treaties, which provides that treaties may include a provision for unilateral termination, the Protocol contains a denunciation clause (Article 12). In this respect it follows the European and American Conventions on Human Rights, the Genocide Convention, and the Convention on the Elimination of all Forms of Racial Discrimination, but not the CP and ESC Covenants. Although the Protocol is a procedural Convention, there is, as Dr. Weiss says, "something repugnant in the possibility of denouncing Conventions embodying most basic human rights...". [1]

The denunciation clause may have been included in the Protocol because, although some states were prepared to support and ratify the Protocol, this was a relatively new and untried method of international implementation. States had not bound themselves by treaty since the second world war, to respect the right of individuals to petition an instrument of the United Nations, and to abide by the "views" of the Committee, which in effect may amount to a form of international censure. The inclusion of a denunciation clause in a treaty was not unusual, and in the circumstances it was not unreasonable that states should leave themselves a way out of their obligations should the Protocol fail to operate effectively.

But if we were to assume, and to do so is speculation, that Article 12 was included in the Protocol as a response to those states which opposed the right of petition, and was a compromise intended, first, to soften its impact, and secondly, to encourage ratifications by offering a way out

after a trial period, then the denunciation clause provides just one of several opportunities which have arisen in this paper to examine two alternatives. Political considerations often lead to the same dilemma in matters of human rights, and to the same choice between alternatives. The choice is between an instrument of implementation on the one hand which is precise, effective and justiciable, but which few states will ratify; and an instrument on the other which, in accomodating by compromise the many and varied demands of different states, is less precise, less justiciable, perhaps as much political as legal, and in reality little more than a recommendation with ratifications.

Obviously, a sound and justiciable instrument which will be widely ratified is the most desirable solution (for those who support the right of petition). But if that is impossible, which of the above courses should states adopt? It appears at first sight the first alternative is the easier of the two. If the instrument is ineffective, if it is imprecise and lacks justiciability, then let there be no Protocol.

Supporters of this view will argue that the alternative is self-defeating and illusory. To them, it is of no use to base the protection of human rights on an instrument which, although widely ratified, will never provide an effective and enforceable right of petition. It is essential to look beyond the formative stages, they will say, and if at the stage of implementation States Parties will too easily be able to avoid their obligations, then the drafting will have been in vain and of no practical purpose. The whole movement to procure for the individual the right of petition will founder if the Protocol, despite its ratifications, by its very terms will not support and give effect to that right.

The second alternative apparently offers a more difficult course because we must go beyond the realm of pure human rights, and sacrifice some of its idealism to the cold war of international politics. It seems, at least in the initial or formative stages of international human rights law, to be the more pragmatic approach. It accepts the reality of international politics, and the compromises which are of its very essence. Those that choose this alternative and believe that the Protocol will be effective only if there are a large number of ratifications,[2] even if that means an instrument weakened by compromise, justify that belief as follows.

First, an international instrument by its very nature can be no more than a collection of compromises. Secondly, protection by treaty is the best way to promote the development of an international human rights movement. As the number of ratifications grows, objections to the individual's locus standi diminish, and a consensus develops that individual petition is an effective and legitimate means of protecting human rights, the Protocol will take on a stronger appearance. So much, of course, will depend on the attitude of States Parties, their acceptance of this developing mood, and their willingness to respect their obligations. Thirdly, the result will be that Article 12 is less likely to be invoked, as to do so will invite greater and increasing opposition from people of that offending state. Fourthly, if this reasoning is correct, and carried to its conclusion, then Article 12 may be removed eventually by the amendment procedure of Article 11. This might be referred to as "the momentum theory" of the human rights movement and perhaps is the only hope for the development of an effective international human rights law.

The second paragraph of Article 12 contains an important qualification to the right to withdraw unilaterally. A State Party's denunciation will not prejudice a complainant's right to be heard where his communication was submitted before the effective date of denunciation. Dr. Weiss, in discussing denunciation of the European Convention, cites the example of Greece which on the 12th of December 1969 denounced that Convention and the Statute of the Council of Europe, after the Commission had found it in violation of the Convention. Greece however, "remained bound by its obligations under the Convention while the Convention was in force for Greece". [3] This finding was somewhat academic after Greece had denounced and withdrawn from the Convention because it was no longer susceptible to whatever censure the Committee of Ministers might have imposed.

Which raises a concluding observation on Article 12. Assuming the Protocol procedure is effective, the censure by the Human Rights Committee will at most, be a mild one. Why should any State Party, which has already undertaken to submit to the hearing of an individual's allegations, and which is even minimally interested in protecting human rights, choose to denounce the Protocol? The Protocol carries the evidence of hasty and last minute negotiations and compromises by delegates on behalf of their states.

12. POWERS OF THE COMMITTEE

The preliminary matters of admissability having been disposed of, it remains to examine and make an assessment of the mandate which the Protocol gives the Committee, for surely the success or failure of the right of petition as an international means of implementing civil and political rights will depend first,on that mandate, and secondly, on the use made of it by the Committee. At this point we shall examine the mandate given the Committee.

The Committee shall bring the petition to the attention of the state concerned, which has 6 months in which to submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that state. Having ascertained that the same matter is not being examined by another international instrument, and that all domestic remedies have been exhausted, the Committee shall consider and examine in closed meetings, all written information made available to it by the alleged victim and the state concerned. The Committee shall then forward its views to the petitioner and the state, and include in its annual report to the General Assembly a summary of its activities under the Protocol.[1]

Article 39 of the CP Covenant authorizes the Committee to establish its own rules of procedure, which no doubt, will be drafted at its first session between the 21st March and 1st April 1977 in New York. The Committee will not be concerned with

individual communications only, but also with the reports which must be submitted to it by States Parties under Article 40 of the CP Covenant, and with communications from and against states which have each made the necessary declaration under Article 41 of the CP Covenant.

"All written information"

First, the Committee shall consider the individual's communication "in the light of all written information made available to it by the individual and by the State Party concerned" (Article 5(1)). The question arises as to whether the specific reference to written information excludes the possibility of the Committee conducting a hearing at which both parties may appear, or be represented, to present their arguments. The Committee will probably not undertake any hearings, first, because there is no express authority in the Protocol to do so; secondly, because in the inter-state procedures the CP Covenant expressly authorizes states to make oral representations to the Committee (Article $41_{(1)}$(g)) thereby highlighting its absence in the Protocol; and thirdly, because the Committee is neither judicial nor quasi-judicial in structure or functions.

There is an obvious contrast in this respect with Article 28 (a) of the European Convention which authorizes the Commission "with a view to ascertaining the facts (to) undertake together with the representatives of the parties an examination of the

petition ..."; and with Article 48 (1) (e) of the American Convention which authorizes the Inter American Commission on Human Rights, if requested, to hear oral statements from the parties concerned. One can only continue to speculate about the Committee and the rules of procedure which it may adopt but as suggested above, and for the reasons above, the Committee will probably make no provision for a hearing of the parties.

A second question arises as to whether the Committee will accept replies from each party, that is, additional exchanges. The Protocol does not say that the Committee should do so, but the authority to do so may be implied from the direction that the Committee consider "all written information available to it" from each party. Had the drafters of the Protocol intended that only the communication and the state reply should be considered then they would have said so. Moreover, it would be most irregular to refuse to accept a right of reply from each of the parties.

Closed Meetings

This is a major defect of the United Nations non-treaty petition procedures and of the Protocol, but is indicative of the fear member states of the United Nations have of public exposure and condemnation. Perhaps a Committee working behind closed doors is as much as can be expected of a United Nations procedure, although Article 33 of the European Convention states that the European Commission shall meet in camera, which includes

its procedure for examining petitions. The American Convention is silent on the matter. But whereas the Committee may forward its "views" (still confidential), and submit an annual report to the General Assembly (discussed later), both the European Commission and the Inter-American Commission may publish their findings, as follows. Article $51_{(3)}$ authorizes the Inter-American Commission to publish a report (setting forth the Commission's opinion, conclusions and recommendations) if a matter is not resolved to the Commission's satisfaction. Article $32_{(3)}$ of the European Convention makes a similar authorization, the report in this case containing a decision by the Commission as to whether there has been a violation of the Convention (Article 32 (1)). Whereas therefore, the Committee's examination remains confidential throughout, the European and American Conventions will make public a state's refusal to remedy or cease its violations, even though proceedings may be behind closed doors.

There is no reason to expect any change in the Protocol procedure in this respect. Of course, the petitioner may not wish the matter to be made public, in which case his wishes should be respected; but at the same time, it is submitted that the Protocol would have been more effective had the whole matter, or at least, the Committe's "views", been open and available to the public.

"Views"

On completion of the Committe's examination of the communications it shall forward its "views" to the state concerned and

to the individual. This seems a very harmless provision, which makes it more difficult to understand why more states have not ratified the Protocol. The Committee is not authorized to make a finding, in the judicial sense, or any kind of condemnation, and even the expression of its views is confidential. Presumably the individual may take it upon himself to publish the Committee's "views" if they are favourable to his cause, and if he has no reason to fear retaliation from the state. What does "views" mean?

Under Article $42_{(7)}(c)$ of the CP Covenant the ad hoc Conciliation Commission, in considering a state complaint, is authorized to forward a report to the states containing "its findings on all questions of fact relevant to the issues between the States Parties concerned, as well as its views on the possibilities of amicable solution of the matter". Schwelb appears to overlook the first part of this provision, when he says that Article 5 of the Protocol authorizes the Committee to make a pronouncement wider in scope than the pronouncement of the Conciliation Commission in an inter-state situation,[2] because the Conciliation Commission may make a finding on all questions of fact, as well as providing its "views" on an amicable settlement.

It could be however, that the Committee has the same mandate under the Protocol, as does the Conciliation Commission under the

CP Covenant,even though worded differently, and even though the Committee is not an organ of conciliation. As Schwelb suggests, the Committee probably will include its "views" on the substance of the matter, on the whole complex of facts and questions of law, will evaluate the situation and let both parties know the result of the evaluation.[3]

Something may also be made of the French translation of the word "views", because the powers of an international organ authorized to make "constatations" are stronger than those of an organ called upon to express its "views".[4] In the Third Committee debates on Article 42 of the CP Covenant (inter-state complaints) in 1966, it was the representative of France who proposed the text "--- ainsi que ses constatations sur les possibilités de règlement aimable de l'affaire" which he translated in English as: "and containing its views on the possibilities of an amicable solution to the matter."[5] This proposal was adopted by a vote of 50 to 22, with 18 abstentions in the Third Committee.[6] Article $5_{(4)}$ of the Protocol also uses the word "views" and the Third Committee agreed "after a discussion on the co-ordination of the terminology used in the various languages and the authenticity of the different versions --- that the word "views" in Article 5, paragraph 4, should be rendered in the French and Spanish texts by 'constatations' and 'observaciones' respectively."[7]

The French word "constater" means "to prove, verify, to ascertain and to establish undeniably",[8] whereas the ordinary English meaning of "views" is "opinion, ideas or theories, a

survey, a general or summary account."[9] The French is certainly much stronger. The Committee will have to make a choice it seems, between the two, although in the Protocol the English version is the original. Will it proceed on the basis of "constatations" and interpret the English word "views" accordingly, or will they give the meaning of the word "views" to "constatations"?

Annual Report

It must be assumed that the Committee's annual report will not specify the states involved in its examination of petitions, nor will it specify that state's violations, if any. The Committee cannot take this apparent opportunity to expose publicly state violations, first, because it is not authorized to make a finding which would permit a public announcement, and secondly, it must be implied from Article 5 $_{(3)}$ of the Protocol requiring examination in closed meetings, that the Committee's examinations are not to be made public.

The Committee's expression of its views or "constatations" is the crux of the Protocal procedure, because since the Protocol provides for no further action, it will be the last action taken on petitions.

13. THE HUMAN RIGHTS COMMITTEE

The Committee was elected on the 20th of September 1976 and will meet for its first session in March and April of 1977.[1] The Committee is established under Article 28 of the CP Covenant, its functions being to receive reports from States Parties, to hear complaints from states against other states (optional, Article 41 CP Covenant), to receive and consider communications from individuals within the jurisdiction of States Parties to the Protocol, and finally, to make an annual report to the General Assembly on its activities (Article 45 CP Covenant, and Article 6 Protocol).

The Committee consists of 18 individuals serving in their personal capacity, who are elected by the States Parties for a term of four years.[2] The members are nationals of the States Parties to the CP Covenant and shall be persons of high moral character and recognized competence in the field of human rights.[3] Consideration was to have been given, in the election of members, to equitable geographical distribution of membership and to representation of the different forms of civilization as well as of the principal legal systems.[4] Article 39 of the Covenant authorizes the Committee to establish its own rules of procedure. These will be the earliest indicator of the Committee's potential; above all they must be divised as a buttress for impartiality, for only by proven impartiality will the Committee command the respect of states, and the Protocol attract further ratifications.

The right of petition will be only as effective as the Committee is dedicated and impartial. Among the most important things that the Committee will have to do will be to interpret the provisions of the Protocol and answer some of the questions raised above on derogations, progressivity or immediacy, the sources of complaints, the rules of admissability, the possibility of amendments and hearings, and its "views". Schwelb says of the Committee and its members that if they

> "will approach this difficult and responsible task with impartiality, integrity, attention to detail and ingenuity, the Committee, a unique institution potentially called upon to consider human rights situations all over the world, will be able to make a great contribution towards the achievement of the aim of the Charter 'to reaffirm faith in fundamental human rights and in the dignity and worth of the human person'"[5]

What is there about the Committee and its members which may offer some indication of how it will function?

First, the Commission's draft Covenant had contained the words "a judicial or legal experience" as requirements for members of the Committee, but the reference to judicial experience was deleted by a vote of the Third Committee at its 21st Session.[6] Further, when speaking of the Committee's

functions, the representative of France said:

> "...the Protocol would not empower the human rights committee to act as a judge between States and individuals; but the Committee's role could be to express a different point of view from that held by States. The purpose of the communications procedure would be once again to direct a State's attention to a particularly serious matter involving the civil and political rights of an individual..."

All of which makes quite clear that the Committee was not intended to have anything like a judicial function, although neither was it intended that it should be merely conciliatory.[8] Its responsibilities lie somewhere between. It must come to some decision on the substance of materials made available to it, but if a violation is evident, it may direct the state's attention to that violation, without having the means to enforce its decision.

Secondly, there is limited guarantee of a member's independence. Although he"will receive emoluments from United Nations resources,"[9] and must"make a solemn declaration in open committee that he will perform his functions impartially and conscientiously "before taking up his duties,[10] and although the Covenant requires that he shall serve in his personal capacity;[11] and be a person of "high moral character and recognized competence in the field of human rights",[12] he may still be an employee of

his state. A member of the ILO Committee of Experts in contrast, is disqualified from membership if he holds a position which makes him dependent on a government. One key to the successful experience of the ILO in implementation, says Korey,

> "is the independence and integrity of those persons comprising the various parts of its enforcement machinery. Objectivity is the lifebreath of inquiry and, to the extent that the machinery of inquiry is insulated from buffeting political winds, that machinery can acquire the necessary respect that will enable it to assume an authoritative posture viv-à-vis governments".[13]

The strengths of the ILO are, its objectivity in investigation, its freedom from political pressures, and the respect it demands from governments. The ILO provides a challenge for the Committee but one must be somewhat concerned about the Committee meeting the same standards of impartiality because the Covenant requires no guarantees of independence. There are however, limitations to the use of the ILO as a comparison for the Committee, which is an instrument of the highly political United Nations. First, the ILO has a very specific function in supervising labour standards; and secondly, it is impossible

to reproduce in the Committee the tripartite system of representation which is characteristic of for example, the Interantional Labour Conference.[14]

Article 58 of the European Convention provides that the expenses of the European Commission shall be borne by the Council of Europe, but that, like the Covenant, does not guarantee the independence of members of the Commission, who may still be employees of their respective states. Article 71 states that the position of members of the Inter-American Commission" is incompatible with any other activity that might effect the independence or impartiality" of a member; and Article 72 provides that members shall "receive emoluments and travel allowances" which shall be determined in the budget of the Organization of American States.

Thirdly, It should be noted that the 18 members of the Committee are elected from States Parties to the CP Covenant, with the result that nationals of states which are not parties to the Protocol will participate in the Committee's consideration of petitions. In view of the fact that there will be some members of the Committee who are nationals of states which openly oppose the right of petition, this seems a little unreasonable. It had been suggested that a separate sub-Committee be established to consider petitions,[15] but regrettably the issue was not pursued. However, as Schwelb points out, this is not an uncommon arrangement,

the same being the case in the European Convention and for the Committee on the Elimination of Racial Discrimination.[16]

Fourthly, consideration is to be given in the election of the Committee "to equitable geographical distribution of membership and to the representation of the different forms of civilization as well as of the principal legal systems" (Article $31_{(2)}$). Of the thirty-eight parties to the CP Covenant on the 10th of August 1976, seven (Denmark, Finland, Federal Republic of Germany, Norway, Sweden, United Kingdom and Canada) belong to the group of "Western European and other states."Ten are members of the Soviet bloc, fourteen are from Asia and Africa, and seven are members of the Organization of American States. The numbers are not too unevenly distributed, unless it should happen, first, that the Soviet bloc and the group from Asia and Africa find themselves taking a similar stand, and secondly, that those views are not in accordance with those of the nationals from the western group.

Members of the first and subsequent Committees are elected for four years, and are eligible for re-election if nominated (Article 32 CP Covenant), so that it is too late now for any significant change in the Committee's geographical representation. However, the terms of nine of the members elected at the first election shall expire at the end of two years, which may see a change in geographical representation in two years time.

The Committee rules have not yet been adopted, but it is to be hoped that they will include a provision to prevent a member examining a petition from his own state. This problem has been referred to above in the discussion of the Working Group to consider petitions under Ecosoc resolution 1503 and Sub-Commission resolution 2(XXIV) of 1971,[17] and will not be considered again.

Finally, there is the question of investigations. The fact is that the Committee has no mandate to carry out an investigation of allegations, and for this reason it has no basis on which to render a finding or judgment, after examination of communications received. If this is a weakness of the Protocol, if it has no real teeth, if it can make no positive finding, this is the way it was meant to be. As seen above, people with "judicial experience" were not considered to be necessary, and although the Committee may express its "views" (which surely include a decision), that decision, or those"views" carry very little authority,certainly not the judicial authority of a decision rendered within a legal system. If the offending state chooses to ignore the Committee's "views", then the Committee is powerless to take further action.

In this respect, the provisions of the Protocol are a long way from the ideals expressed by Lauterpacht in 1950, who apparently took for granted that investigation would be an

essential part of the international control of human rights:

> "A finding which is not accompanied by a legal recommendation is a deficient method of enforcement because a state can put its own interpretation on the results of investigation. It is illogical to adopt the Bill as a legal obligation, and to decline, at the same time, to accept the legal duty to act upon the finding of the bodies whose function is to assist in giving effect to them."[18]

The procedures of the European and American Conventions, and of the ILO are in direct contrast to those of the Protocol. The Inter-American Commission may "conduct an investigation,"[19] and if no solution is reached, it may publish its report[20] in which it shall "set forth its opinion and conclusions concerning the question." [21] The European Commission is authorized to "undertake... an investigation,"[22] and if no solution is reached the Committee of Ministers, on the proposals of the Commission, is authorized to decide whether there has been a violation of the Convention,[23] and to publish the Report.[24] The European Commission's authority to state whether the facts disclose a breach by the respondent state of its obligations, writes Schwelb, "constitutes its most patent weapon...".[25]

The basic features of implementation are built into the constitutional structure of the ILO; fact finding, exposure, conciliation and adjudication. As a result, the record is one of concrete results. The ILO has not found it necessary to make extensive use of its fact finding powers, but on-the-spot inquiries have been carried out; in the USSR (1955); Japan (1964); in Libya (1962); in Costa Rica(1963); and in Greece (1965).[26] As a consequence of its flexible investigative machinery the ILO is respected as a conciliator, is feared for its exposure of violations, its recommendations are sought, and its findings have the authority of law for States Parties.[27]

How the Committee will interpret its mandate and its functions; whether the members will prove to be independent in fact; what the result will be of members who are nationals of states not parties to the Protocol examining petitions; whether the geographical representation will change or will affect the Committee's work; and how the absence of a mandate to investigate allegations will affect the Committee's decisions; are questions which will all be answered soon when the Committee adopts its rules of procedure, and goes to work.

14. REVIEW

The relationship between the Protocol and the non-treaty provisions for the right of petition must be considered, now that the Protocol is in force. ECOSOC resolution 1235 (XLII)[1] states in paragraph 4 that the Council will review the contents of resolution 1235 "after the entry into force of the International Covenants on Human Rights." ECOSOC resolution 1503 (XLVIII)[2] states that the procedures of resolution 1503 "should be reviewed if any new organ entitled to deal with such communications should be established within the United Nations or by international agreement."

Presumably the opportunity for review of the non-treaty procedures was provided in the event that there should be unnecessary duplication in the consideration of petitions. If this was the case, then it must be assumed that any contemplated review of the non-treaty procedures will take into account, first, that whereas at present only 13 states have bound themselves to recognize the right of petition under the Protocol, the ECOSOC resolutions apply to all member states of the United Nations. Secondly, the Protcol and the ECOSOC resolutions are essentially different in that the Committee may receive communications from an individual victim within the jurisdiction of a State Party to the Protocol; whereas the ECOSOC resolutions regulate procedures for dealing with communications that appear to reveal a consistent

pattern of gross and reliably attested violations of human rights and fundamental freedoms. These are distinct functions and must be permitted to proceed and develop separately.

However, if the provisions for review were included in the E.C.O.S.O.C resolutions, not simply to prevent future procedural problems, but to provide an opportunity at some later time for states to conveniently remove the resolutions, then they assume a real significance. An argument for review, made on the basis that the non-treaty procedures are unnecessary now that the 1966 International Human Rights Covenants are in force, is spurious. The treaties are not of universal application, as are the E.C.O.S.O.C resolutions; and as this essay shows, the implementation procedures of the Protocol and the Covenants are not very strong, so that the non-treaty right of petition may eventually prove to be the more successful and effective of the two procedures.

NOTES TO CHAPTER 5: THE OPTIONAL PROTOCOL

1. Lauterpacht, International Law and Human Rights(1970) 121-2

2. Macdonald, "Petitioning an International Authority", in Gotlieb ed. Human Rights, Federalism and Minorities,(1970)121-2

3. Moskowitz, "The Covenants on Human Rights: Basic Issues of Substance," Proc. of the Am.Soc. of Int. Law(1959-60)230@232-4

4. Ibid. 234.

1. LIMITATION AND DEROGATIONS IN THE CP COVENANT

1. see Robertson, Human Rights in the World (1972)69-70; Smith,"The European Convention on Human Rights and the Right of Derogation: A Solution to the Problem of Domestic Jurisdiction," 11 How.L.J.594 (1965); Jacobs, The European Convention on Human Rights (1975) 204-9.

2. CP Covenant, 16 Dec. 1966, Arts.4(1) & 4(2).

3. CP Covenant, Articles 12,18,19,21,22.

4. created 1919; see Jenks,"Human Rights, social justice and peace:The broader significance of the ILO experience," in Eide & Schou eds. International Protection of Human Rights Oslo (1968) 227@253

5. Moskovitz, "The Covenants on Human Rights: Basic Issues of Substance," Proc. of the Am. Soc. of Int.Law(1959-60)230@232.

6. Ibid 232

7. Liskofsky, The Soviet Ratification of the UN Covenant on Civil and Political Rights,an address to the American Jewish Committee (1973)1

8. Ibid, 3-4

9. Ibid, 6; from Judge Ingles report to the UN Sub-Commission, on the Right of Emigration p.40.

10. CP Covenant, Art 12(2).

11. Liskofsky, ibid.7.

12. Two cases brought by the Greek Government against the United Kingdom when Cyprus was still under British rule; Applications 176/57, Yearbook 2, 174& 182; 299/57, Yearbook 2 178 & 186.

13. Appl. 176/57, ibid. 176.

14. Ibid. 176.

15. Judgment, Yearbook 4, 438.

16. Ibid. 472

17. Jacobs op.cit. 205.

18. Applications 3321/67 (Denmark); 3322/67 (Norway); 3323/67 (Sweden); 3344/67 (Netherlands); Report of the Commission, Yearbook 12.

19. Ibid, Yearbook 12 @ 72.

20. Jacobs op.cit.206.

21. Ibid. 209.

22. For discussion of the concept see, Meersch, "Does the Convention have the force of 'ordre public' in Municipal Law?", in Robertson ed. Human Rights in National and International Law (1968) 97.

2- THE PROTOCOL PROCEDURES

1. Protocol, Preamble, Arts.1,2.
2. Art. 3
3. Art. 5(2)
4. Art. 4.
5. Arts. 5(1), 5(3).
6. Arts. 5(4), 6.

3. PROGRESSIVE OR IMMEDIATE IMPLEMENTATION OF RIGHTS?

1. see Art. 2(1) ESC Cov. in which States Parties undertake to take steps "with a view to achieving progressively the full realization of the rights recognized"in the Covenant...

2. see Humphrey "The United Nations and Human Rights", 11 HOw.L.J.(Spring'65) 373@373; Schwelb,"Civil and Political Rights: The International Measures of Implementation" AJIL(1968) 827@839-42; Cranston, What are Human Rights? (1973)Chs.10,11.

3. Schwelb, ibid. 840

4. Schwelb, **ibid.** 840-841; statement by representative of Ireland, Third Committee, 1427th meeting, para.2.

5. Starr, "International Protection of Human Rights and the United Nations Covenants", Wisc.L.R. (1967) 863@886; see Art.2(2) CP Covenant.

6. Schwelb, "Some Aspects of the International Covenants on Human Rights of December 1966", in Eide & Schou eds. International Protection of Human Rights, Oslo (1967) 103 @ 108 and footnote 29 @ 125.

7. Schwelb, op.cit. AJIL @ 839.

8. UN Doc.A/C. 3/SR.1427; Schwelb, ibid.AJIL,841; GAOR,Third Committee, 21st session, statement by Miss Hart (New Zealand), 1426th meeting para.33; Statements made by reps. of Ireland, Uruguay and Madagascar, 1427th meeting,paras. 2,8,29 & 30. Schwelb,in Eide & Schou eds. op.cit. 108, footnote 30a @ 125- the exchange of statements between sponsors indicate that it is not open to States Parties to give progressive effect to civil and political rights.

4. RATIFICATION - OPTIONAL AND SEPARATE

1. UN Doc. A/C.3/L.1355, 17th Oct. 1966; Report of the Third Committee (A/6546) para. 474; G.A.O.R., Twenty-First Session, Third Committee, 1414th meeting, para. 24.

2. UN Doc. A/C.3/L.1402.

3. Statement by Mr. Sinha (India), 1416th meeting, Third Committee, para. 1 (1966).

4. Un Doc. A/C.3/L.1402/Rev. 2 (Draft Art. 41).

5. Third Committe, 21st. Session, 1440th. meeting, paras. 32,42, & 52; A/6546, para. 485.

6. Ibid. 1451st. meeting, para. 16.

7. Ibid. 1439th meeting, para. 5 (Bulgaria), para.34 (USSR).

8. 21 G.A.O.R. Supp. 16 at 49; UN Doc. A/6316 (1966); UN Yearbook (1966) 418-419.

9. "Individual Petitions: the Irresolution of Governments", The Review ICJ (Dec. 1975) 36 at 40.

10. see Chapter 2 above,

11. see Chapter 4 above.

5. SOURCES AND "VICTIMS"

1. see above Ch. 4.

2. Ibid.

3. G.A.O.R., Third Committee, 1446th. meeting, para. 33 (twenty-first Session).

4. Application 4007/69, unpublished: see "Case-Law Topics", No. 3, 5.

5. Appl. 4185/69, Collection of Decisions 35,140.

6. Appl. 3110/67, Yearbook II, 494 at 518 F.

7. Appl. 3071/67, Collection of Decisions 2b, 71.

8. Donnelly et al. V the United Kingdom, Appl's. 5577/72-5533/72, 43 Coll. of Decisions (1973) 122.

9. Boyle and Hannum, "Individual Applications under the European Convention on Human Rights and the Concept of Administrative Practice: The Donnelly case", A.J.I.L. (1974) 440 at 442.

10. Donnelly Case, Ibid. at 146; Boyle and Hannum Ibid. 447.

11. Schwelb, "Civil and Political Rights: the International Measures of Implementation", A.J.I.L. (1968) 827, at 864.

12. Ibid. 864.

13. see above Ch. 4.

14. ILO Constitution, Articles 24 and 25.

15. UN Doc. E/CN.4/Sub.2/283, at 2(1967).

16. On NGO's generally see Carey, UN Protection of Civil and Political Rights, (1970) 130-5; Prasad, "The Role of NGO's in the new United Nations Procedures for Human Rights Complaints," J. of Int. Law and Policy (1975) 441; Liskofsky, 'Coping with the "Question of the Violation of Human Rights and Fundamental Freedoms'", 8 Revue des Droits de l'Homme (1975) 883.

17. see Com. on Human Rights, res. 7, 24 Feb. 1975; Liskofsky, Ibid., 897-8.

18. ILO Constitution, Art. 24; it should be noted however that the ILO does include other organs, such as the Fact-finding and Conciliation Commission on Freedom of Association which was established by the Governing Body of the ILO in 1950 after an agreement with ECOSOC; after which a new Committee on Freedom of Association was set up in 1951 by the Governing Body. The objective of the Committee is to investigate (without the consent of governments) allegations of violations which are submitted to it; see C.W. Jenks, The International Protection of Trade Union Freedom, (1957) London 180-191; and Poulantzas, "International protection of Human Rights - Implementation Procedures within the Framework of the International Labour Organization", Revue Hellénique de Droit International (25 ème année, no. 1-4), 110, at 127-9.

19. 52 I.L.O. Aff. Bull., No. I, Supp. at 19 (1969).

6. "SUBJECT TO JURISDICTION"

1. G.A.O.R., 21st. Session, Third Committee, 1439th. meeting, para. 2.

2. Ibid.

3. Schwelb, "Civil and Political Rights: The International Measures of Implementation", A.J.I.L. (1968) 827 at 863.

4. G.A.O.R., 18th. Session, Third Committee (1963) 1257th meeting, 1258th meeting.

5. Ibid. 1259th meeting, para. 30, 55 votes to 10, with 19 abstention

6. Note however, that Art. 63 of the European Convention directs that a State Party may, by means of declaration, extend the Convention to all or any of its "territories for whose international relations it is responsible", which implies of course that with respect to such territories there is a territorial limitation.

7. RULES OF ADMISSABILITY

1. Appl. 361/58 (unplublished), see "Case-Law Topics" No. 3, p. 10.

2. see Beddard, Human Rights and Europe, (1974), 73.

3. Appl. 3798/68, Yearbook 12, 306 at 318.

4. statement by Cassese in the Sub-Commission, UN Doc. E/CN.4/Sub.2/SR. 615, at 36-7 (1971).

5. see Report of the 24th Session of the Sub-Commission, UN Doc. E/CN.4/ 1070 (1971)

6. G.A.O.R., 21st Session, Third Committee, 1438th meeting, para. 55.

7. Ibid. para. 59.

8. 1446th meeting op. cit. para. 34.

9. 1438th meeting op. cit. para. 58.

10. Appl. 1468/62, Yearbook 6, 278 at 326.

11. Appl. 332/57, Yearbook 2, 308 at 338.

12. Koch case, Appl. 1270/61, 126 at 134-6.

13. Appl. 2424/64, Yearbook 9, 426 at 430.

14. Ibid. 434-6; on this case, and the abuse of the right of petition generally see Schwelb, "The Abuse of the Right of Petition", Revue des Droits de 1'Homme, (Juin 1970) 313.

15. Applications 26/55, 169/56, and 244/57, European Commission of Human Rights, Documents and Decisions (1955-56-57) 194-6.

16. Appl. 244/57 Ibid.; see Beddard op. cit. 84.

17. Articles 46, 47.

18. Report, "An Analysis ofthe Procedures of the United Nations Regarding Individual Petitions with respect to Human Rights", Human Rights (Spring 1975) 217 at 222.

19. Beddard, op. cit. 75-80.

20. discussed above Ch. 5 (5).

21. see appl. 262/57, European Commission of Human Rights, Documents and Decisions (1955-56-57) 170, which amounted to an action against Czechoslovakia. Beddard refers also, in this second category of inadmissable communications, to inadmissability ratione loci, where the alleged violation took place within territory to which the Convention does not apply; and to inadmissability ratione temporis, where the alleged violation took place before the Convention came into force; see Beddard op. cit. 79.

22. see below Ch. 5 (a).

23. see above Ch. 5 (1).

24. Appl. 250/57, European Commission of Human Rights, Documents and Decisions (1955-56-57).

25. see Schwelb, "Civil and Political Rights: The International Measures of Implementation", A.J.I.L. (1968) 827 at 865.

26. Robertson, Human Rights in the World, (1972), 106-10.

27. Ibid., 108.

28. see above Ch.'s 2 & 3.

29. see Haester, The Exhaustion of Local Remedies in the Caselaw of the International Courts and Tribunals, (1968).

30. McNair, International Law Opinions, Vol. 1 (1956), 312.

31. UN Doc. E/CN.4/Sub.2/SR.615 at 35 (1971).

32. Nielsen V Denmark, Appl. 343/57, Yearbook 2, 412 at 438; Interhandel Case, ICI Reports (1959) at 27.

33. UN Doc. E/CN.4/Sub.2/SR.618, at 71 (1971); UN Doc. E/CN.4/Sub.2/SR.616 at 56 (1971); UN Doc. E/CN.4/Sub.2/SR.625 at 14 (1971), in which Mr. Cristescu stated that without exhaustion of domestic remedies, international consideration would be illegal under the Charter and an interference in the domestic affairs of a state.

34. see O'Connell, International Law, 2nd ed. (1970) 1053-59; Beddard op. cit., 60-72; Jacobs, The European Convention on Human Rights, (1975) 235-41.

35. Appl. 1994/63, Yearbook 7, 252 at 258-60.

36. East African Asians case, Yearbook 13, 928 at 998.

37. Appl. 343/57, Yearbook 2, 413 at 436.

38. Appl. 514/59, Yearbook 3, 196 at 202.

39. Contrary to rule 41 (2) of the Commission's Rules of Procedure.

40. Pfunders case, Yearbook 4, 116 at 166-8.

41. Ibid.

8. FEDERAL-STATE CLAUSE

1. GAOR , 5th Session, Third Committee, 107-269; G.A.O.R., 8th session, Third Committee, 198-269

2. see Looper, "Federal State clauses in Multilateral Instruments," 32 Br. Yearbook of Int. Law (1955-56) 162; Liang, "Colonial Clauses and Federal Clauses in UN Multilateral Instruments", 45A.J.I.L(1951) 108; McWhinney, "The Constitutional Competence within Federal Systems as to International Agreements," I Can. Leg. Studies (1966): Sabourin, "Le Fédéralisme et les Conventions Internationales des droits de l'Homme , " in Gotlieb ed., Human Rights, Federalism and Minorities, (1970) 67

3. G. Ass. res 421 (v), 4th Dec. 1950; UN Docs. A/ 1620, and A/PV 317; UN Yearbook (1950) 530-1

4. G.A.O.R.,Third Session, Third Committee,
U N Doc. A/771 (1948)
and see Humphrey, "The Revolution in the Internal Law of Human Rights", 4 Human Rights (Spring 1975) 205 at 206

5. for other federal-state clauses see,the Convention Relating to the Status of Refugees, 28 July 1951, UN Treaty Series 189/137; the Convention Relating to the Status of Stateless Persons, 28 Sept. 1954, UN Treaty Series 360/117

6. Looper op.cit., 162

7. see Gotlieb op.cit., 17; Sawer, " Australian Constitutional Law in Relation to International Relations and International Law," in O'Connell ed., International Law In Australia (1966) 47; MacChesney, "Should the US ratify the Covenants?," A.J.I.L. (1968), 912-917.

8. Cyprus, Federal Rupublic of Germany, U.S.S.R., Yugoslavia, Czechoslovakia, Canada.

9. Looper op.cit., 191; Brownlie, Principles of Public Internationa Law, 2nd ed. (1973) 36-38, ch. 5 sect. 8

10. For reading on the implementation of treaties in Australia see Sawer op. cit; O'Connell, "The Evolution of Australia's International Personality", in O'Connell ed.op.cit; Howard, Australian Federal Constitutional Law 2nd ed.(1972); Joske

Australian Federal Government, 2nd ed. (1971) 213-15; Lumb & Ryan, The Constitution of the Commonwealth of Australia (1974); Lane, "The External Affairs Power," 40 A.L.J. (1966) 257; DeStoop, "Australia's approach to International Treaties on Human Rights," The Aust. Yearbook (1970-73) 27; Connell, "International Agreements and the Australian Treaty Power," The Aust. Yearbook (1968-69)83

11. UN Doc. E/CN. 4/SR. 341, 9 May 1953, at p.4

12. Section 51 of the Australian Constitution is that section which enumerates those matters on which the Australian Government may legislate. Section 51(29) is just one of those listed, and it was for a long time argued that where the subject of a treaty was not one specifically allocated to the Australian Government by another sub-paragraph of Section 51, then it must seek the cooperation of the states.

13. letter from Mr. Lütem, Division of Human Rights, United Nations, 11th August 1976.

14. Joske op.cit. 213

15. De Stoop op.cit.29

16. Sawer op.cit. 47

17. Rv Burgess ex parte Henry (1936) 55 C.L.R. 608

18. ibid. 681

19. ibid. 641

20. ibid. 658-9

21. ibid. 669

22. ibid. 669

23. Lane op. cit. 261

24. (1965) 113 C.L.R. 54

25. Sawer op.cit.47

26. Lumb and Ryan op.cit. 151

27. letter dated 6th July 1976 to the writer from M.G.M. Bourchier, Acting First Assistant Secretary, Legal and Treaties Division Department of Foreign Affairs, Camberra.

28. ibid.; and see Richardson, Patterns of Australian Federalism, Research Monograph No. 1, The A.N.U., Canberra (1973) 41-2

29. Ibid

Canada

1. Scott, " The Privy Council and Mr. Bennett's'New Deal Legislation;" (1973) 3 Can. J. of Eco. and Pol. Science,228

2. Eayrs, "Canadian Federalism and the United Nations," 16 Can. J. of Eco. and Pol. Science (1950) 174

3. see Russell ed.,Leading Constitutional Decisions, (1973) 133; Gotleib, Canadian Treaty-Making , (1968) 4-15; Lumb & Ryan, The Constitution of the Commonwealth of Australia, (1974) 146

4. Radio case P.C. (1932) A.C., 304; Labour Conventions Case P.C. (1937) A.C., 327

5. Rv.Burgess ex parte Henry (1936) 55 C.L.R., 608 at 680 per Evatt and McTiernan JJ.

6. Attorney General for Canada v Attorney General for Ontario (1937) A.C. 326 P.C.

7. ibid. 351

8. Lane, "The External Affairs Power" 40 A.L.J. (1966) 257 at 265

9. see UN Doc. E/CN.4/515/Add. 13, 16th March 1951; Canada and the United Nations,(1953-54)48

10. Canada Treaty Series (1957) No.3; adopted at New York, 31 March 1953

11. Gotlieb, "The Changing Canadian Attitude to U N Role in Protecting and Developing Human Rights," in Gotlieb ed., Human Rights, Federalism and Minorities (1970) 16 at 44

12. Gotlieb, Canadian Treaty-Making (1968) 80, footnote 40

13. ibid 80

14. Labour Conventions Case op.cit. 352

15. ibid 354

16. Gotlieb, Canadian Treaty-Making (1968),82-3; and on the Canadian Treaty-Making power see Laskin, "Some International Legal Aspects of Federalism: The Experience of Canada," in Currie ed. Federalism and the New Nations of Africa (1964; Head, " The Canadain Offshore Minerals Reference," Uni.of Toronto Law J.(1968) 131;
Russell ed., Leading Constitutional Decisions,(1973) 131-161; Abel, Laskin's Canadian Constitutional Law, 4th ed., (1973) 202-220

17. letter to the writer, 21st June 1976 from Yvon Beaulne, Department of External Affairs, Ottawa

18. ibid.

United States

1. Hyman, "Constitutional Aspects of the Covenant," 14 Law & Contemp. Problems (1949) 451 at 451. For analysis of US non-ratification see MacChesney, "Should the US ratify the Covenants?" A.J.I.L. (1968) 912; Fox, "The American Convention on Human Rights and Prospects for U.S. Ratification", 3 Human Rights, (Fall 1973) 243;

   Korey, "Human Rights Treaties: Why is the US Stalling?, 45 Foreign Affairs (1967) 414;
   Gardner " A Costly Anachronism," 53 A.B.A.J. (1967) 907;
   Chafey, "Federal and State Powers under th UN Covenant on Human Rights" Wisc. Law Rev. (1951) 389

2. 252 US 416 (1920)

3. Van Dyke, Human Rights, The US and World Community (1970)245

4. Special Committee for the Observance of Human Rights Year 1968

5. Senate Hearing, Treaties and Executive Agreements 825 (1953)

6. A Report in support of the Treaty-Making Power of the US in Human Rights Matters (1969); see Fox op.cit at 247-8

7. Hyman, op.cit. 459

8. 133 US 258 at 267 (1890)

9. see Gardner op.cit. for a discussion of this matter

10. Gardner op. cit.; Korey op.cit.

11. Gardner ibid. 907

12. Korey op.cit. 422

13. Hyman op.cit.477

9. RESERVATIONS

1. Jenks, "Human Rights, Social Justice and Peace", in Eide & Schou eds., International Protoection of Human Rights, Oslo, 1968, 246.

2. Lauterpacht, International Law and Human Rights, 1973 reprint of 1950 ed., 363.

3. Looper, op. cit., 199-200; and Draft International Covenants on Human Rights, Annotation prepared by the Secretary-General, Doc. A/2929 (1 July 1955) 370.

4. ICJ Reports (1951), 22; UN Doc. A/6309/Rev.1, at 35-39 (1966); see Starr, "International Protection of Human Rights and the UN Covenants" Wesc. Law Rev. (1967) 863 at 873.

5. see O'Connell, International Law, 2nd ed. (1970), 229-39; Fenwich, "Reservations to Multilateral Treaties: The Report of the International Law Commission" 46 A.J.I.L. (1952) 119; Fitzmaurice, "Reservations to Multilateral Conventions", 2 Int. & Comp. Law Quart. (1953).

6. ICJ Reports, 28 May 1951.

7. Ibid. 15.

8. O'Connell op. cit. 230.

9. Ibid. 232.

10. UN Gen. Ass., 6th Sess. Official Records, Supp. No. 9 A/1858.

11. O'Connell, op. cit. 236.

12. Ibid., 236.

13. see the Secretary-General's note on reservations, declarations and statements of interpretation in a restricted doc. CERD/C/R.93 before the Committee on the Elim. of Rac. Discrim. at its 14th session (July 1976); which in turn refers to Pt.2 Doc. A/5687, which is reproduced in the Yr. Bk. of the International Law Commission. Vol. 2 (1965).

14. The Federal Republic of Germany ratified with the following declaration"... The said Covenant shall apply also to Berlin (West) with effect from the date on which it enters into force for the Federal Republic of Germany..."

15. see footnote 13 supra, doc. CERD/C/R.93 at 3 para. 8.

16. documents provided to the writer by LLhan Lütem, Officer of the Divisional Human Rights, United Nations, by letter dated 11th. August 1976; objection from the USSR on 5 July 1974 to Germany's declaration, and describing it as illegal.

11. DENUNCIATION

1. Weiss P., "The Denunciation of Human Rights Treaties", 8 Revue des droits de l'homme (1975), 3 at 6; see also on denunciation generally, O'Connell, International Law, 2nd ed. (1970), 266-268; Wright, "Termination and Suspension of Treaties", A.J. Vol. 61 (1967); Briggs, "Unilateral Denunciation of Treaties: The Vienna Convention and the International Court of Justice", A.J.I.L. (1974) 51.

2. see a discussion recorded by Eide & Schou eds. International Protection of Human Rights, Oslo 1967 at 297, where Prof. Cassin says that there is "nothing more important than to have a maximum of ratifications and that nothing should be done which could cause delay".

3. Weiss, op. cit. at 5.

12. POWERS OF THE COMMITTEE

1. see Ch. $5_{(5)}$ above on the Protocol procedure

2. Schwelb, "Civil And Political Rights: The International Measures of Implementation," A.J.I.L. (1968) 827at 868

3. ibid. 868

4. ibid. 857-60, 867-68; Professor Schwelb's article contains a complete discussion of the implications of the word "views" and its french translation of constatations".

5. G.A.O.R., 21st. Session, Third Committee, 1430th meeting, para. 51, and 1431st. meeting, para.33

6. ibid. 1431st meeting, para. 36

7. ibid. 1446th meeting, para. 36

8. Cassell's Dictionary 8th ed. (1974) London

9. Oxford Dictionary 2nd ed. 1939 London

13. THE HUMAN RIGHTS COMMITTEE

1. letter to the writer dated 11th August 1976 from Ilhan Lutem, Officer of the United Nations Division of Human Rights, New York
2. Articles $28_{(1)}$, $28_{(3)}$ C P Covenant
3. Article $28_{(2)}$
4. Article $31_{(2)}$
5. Schwelb, "Civil and Political Rights: The International Measures of Implementation", A.J.I.L. (1968) 827 at 868
6. G.A.O.R., 21st Session, Third Committee, 1420th meeting, para.11
7. ibid. 1441st meeting, para. 27
8. see above also, the discussion of the Committee's "views"
9. Article 35 CP Covenant
10. Article 38 CP Covenant
11. Article $28_{(3)}$ CP Covenant
12. Article $28_{(2)}$ CP Covenant
13. Korey, "The Key to Human Rights - Implementation"- Internat. Concil ., (Nov. 1968) 39-40
14. see Poulantzas, "International Protection of Human Rights Implementation Procedures within the Framework of the ILO." (1973) Revue Hellénique de Droit International, no 1-4, 110 at 112
15. G.A.O.R., 21st. Session, Third Committee, 1438th meeting para. 3 (Nigeria), and 1441st. meeting para.51 (USSR)

16. op.cit 865-6

17. see Ch. 4 above

18. Lauterpacht, International Law and Human Rights , (1973 reprint of 1950 ed.), 293

19. Article 48 $_{(1)}$(d) American Convention

20. Article 51 (3)

21. Article 51 (1)

22. Article 28 (a) European Convention

23. Article 32 (3)

24. Articel 32 (1)

25. Schwelb A.J.I.L. (1968) op. cit. at 854

26. see Poulantzas op.cit. 128-9

27. see Jenks, "The International Protection of Trade Union Rights" in Luard ed., The International Protection of Human Rights (1967); and Jenks, "Human Rights, Social Justice and Peace The Broader Significance of the I.L.O. Experience", in Eide & Schou eds. International Protection of Human Rights, (1968) Stockholm

14. REVIEW

1. 6th June 1967, UN Yearbook (1967) 512, see Chapt. 4 of this paper above

2. 27th May 1970, UN Yearbook (1970) 530, see Chapt. 4 of this paper above

CONCLUSION

There is now a solid basis of international human rights law, which is ready for implementation at the national and international levels. While national implementation is of primary importance, the fact is that it often fails; and for that reason this paper has dealt with the international promotion, supervision, protection and enforcement of human rights, which in international usage has come to be known as the international implementation of human rights.

Before proceeding to the conclusions, it is important to stress again the significance of the implementation of human rights at the national level. The state is closest to the violation, often as the perpetrator, and it must make available to those within its jurisdiction the necessary judicial, legislative or administrative machinery for effective protection of the individual's human rights. Only when the state fails in its obligations, does implementation at the international level become necessary.

The entry into force of the 1966 International Covenants on Human Rights, and the Optional Protocol to the International Covenant on Civil and Political Rights, represent a significant development in the international implementation of human rights. The United Nations and its member states now have increased opportunities to make that international human rights law effective.

The object of this paper has been to look at one specific aspect of international implementation, the right of petition. This was chosen, first, because the Human Rights Committee may receive and consider its first petitions in March of 1977. Secondly, it is the writer's contention that the right of petition is the essential, and most significant, aspect of international implementation. Thirdly, as the most important aspect of international implementation, the right of petition is relevant not only because it begins to operate under treaty in March 1977, but because instead of decreasing, human rights violations persist, and appear to be increasing in many parts of the world.It is unnecessary to elaborate on the horror of these violations.

When we look back over the thirty years since the second World War it is difficult to be optimistic about the Protocol as an effective means of implementation. First, and above all, there is the conflict between one's hopes and the reality of a very political United Nations. An example of this occurs above, in the examination of the Protocol and CP Covenant for guarantees which will ensure the political independence of Committee members. There are several so-called guarantees, and yet instead of anticipating an independent Committee, free from political persuasions, we conclude somewhat pessimisticly that despite those provisions, the members may still be employees of their states and therefore subject to political pressures. It is

difficult to shake off the experiences of the past thirty years, and we need refer to only one example, that of the 1967 Sub-Commission resolution 3(xx) which in accordance with its mandate, recorded the occurrence of violations in several states. This was completely unacceptable to the Commission and to ECOSOC, because they, in accordance with the persuasions of General Assembly politics at the time, would accept condemnations of certain countries only (see chapter four above on ECOSOC resolution 1235 in 1967). But neither should it be concluded, in looking back, that the United Nations has not made great progress in the field of human rights, albeit slow progress. The United Nations has created a whole new international law of human rights; it has done much to educate people, and much in bringing violations to the attention of member states and the world public. But one is left with the conviction that it could have done so much better had it not been for, among other things, the incessant political and ideological rivalry of member states.

Secondly, and to move to the present, the provisions of the Protocol, and the mandate given the Committee, are not strong. They are subject to too many limitations and questionable interpretations, some of which have been discussed above, and the most important of which relate to the limitations and derogations incorporated in the CP Covenant, the source of

complaints, the rules of admissability, and the mandates to investigate, make a finding, and enforce that finding, which are missing.

Thirdly, it is difficult to assess the effectiveness of the non-treaty right of petition because of its confidentiality. It seems however, that little action has been taken since 1971 on petitions received and considered; and secondly, that the workings of the Sub-Commission and its Working Group are very susceptible to political winds from above.

A fourth reason for muted optimism is the realization that a successful treaty, and non-treaty, right of petition will only develop and become apparent over the course of another generation. It will probably take that time, first, to obtain a respectable number of ratifications to the Protocol; secondly, for the Committee to become an efficient and respected body; thirdly, for the accumulation of an acceptable body of case-law (jurisprudence) on the interpretation of the Protocol provisions; and finally, for the development of an aura of confidence, so essential to the Committee's relationship with States Parties.

Having given these reasons for pessimism, it is the conclusion of this paper, that the arguments against an effective right of petition are weakening. United Nations performance in human rights generally is beginning to improve as its investigative procedures advance. The mandate given the Committee by the Protocol, and the provisions of the non-treaty procedures, may

be strengthened by an enthusiastic andaggressive Committee and Sub-Commission, and by increasing support from States Parties and member states. The problem of time must be accepted, but inevitably, that problem will diminish in significance. Further, and most importantly, it is the writer's submission that the attitude of states and persons towards the international protection of human rights will respond to increased education on human rights matters, increased dissemination of information, and their increased involvement in human rights matters. The effect will be to weaken the attacks against international implementation and the right of petition specifically, as for example, can be seen in the slow breaking down of the legal and ideological barriers to the right of petition.

It follows therefore, that the right of petition will not stand as that part of the international implementation of human rights which will succeed alone. Neither the treaty, nor the non-treaty right of petition will be an isolated success, but will depend on other measures of international implementation, which have not been the subject of discussion in this paper. A successful right of petition depends to a large extent on an effective United Nations policy of education, and on an effective United Nations system of reporting. The second is essential, as a source of information for the United Nations, which will facilitate enquiry into, and response to, complaints, and will

make that response more effective. The first is important, because like all things worthwhile, the right of petition must be experienced and learned. Education is also an effective means of changing and developing world opinion, which is so essential to the promotion of state acceptance of international implementation. If the United Nations is unable to make people aware of their rights, then governments are less likely to be subjected to political demands for protection, and will simply avoid their obligations.

An effective Protocol is also dependent upon an increased number of ratifications without reservations, otherwise it will not be a truly international means of implementation. It depends also of course, on how seriously the Committee takes its work. These matters have been discussed. On looking backwards it is difficult to be optimistic about the right of international petition. But on looking forward there is room for optimism; optimism on the condition that world opinion develops as anticipated, and on the condition that the many doubts surrounding the terms of the Protocol are resolved progressively and aggressively in favour of the individual's protection.

While it may be objectionable to wait, knowing that violations of individual human rights are continuing, we must accept the fact that patience and time are part of the international protection of human rights. To the inevitable question "why?", the reply must be that such is a fact, a reality of international politics, an explanation of which is not the subject of this paper.

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