RESOURCE PAPERS

"INTERNATIONAL HUMAN RIGHTS NORMS"

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INTERNATIONAL HUMAN RIGHTS NORMS

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INTERNATIONAL HUMAN RIGHTS NORMS

1. General Background

This colloquy being a meeting of highly experienced persons in the daily application of laws in the field of human rights, it might be more fruitful to concentrate on norms that are by now generally accepted and only refer, necessarily briefly, to matters of purely historical or academic interest for the purpose of reviewing the development of those norms from what, it is hoped, is the right perspective in a field of international law which, in the last 40 years or so, has known a most remarkable and vigorous growth.

Historically, concern for the protection of human rights found expression almost exclusively at the national or domestic level in accordance with the varying notions of changing times. Even in the national sphere prevailing power structures in many countries resisted acceptance, beyond the purely metaphysical or philosophical, of the very notion of human rights, the dignity of the human person and the humanity of man. Violations occurred and were wide-ranging. In the result great popular upheavals took place and gave birth to charters in some states e.g. Magna Carta, the French Declaration of the Rights of Man and of the Citizen of 1789, followed two years later by the American Bill of Rights. These instruments were by modern standards, undeniably limited in content and focus and were not perceived as being of universal application though they undoubtedly inspired and influenced reform in many countries in the field of human rights.

At the international level before the turn of this century, notions of human rights were no more than selective extensions of certain rights which powerful nations wanted their own co-religionists or nationals to enjoy elsewhere and hence their justification for certain religious wars or, upon the expansion of international commerce, the inclusion in bilateral treaties of provisions for the protection of their nationals. Again, humanitarian laws regulating the conduct of war depended on mutual agreement between states. It could not be said, therefore, that the norms of human rights on which states acted had any claim to universality or were other than those which some states bilaterally accepted or else found it convenient to impose, not from any ethical considerations but rather from the practical need to safeguard their own national interests.

After the First World War, however, the beginnings of universality, though still restricted in content and scope, began to emerge. This was, in great measure, due to the founding of the League of Nations and the imposition of certain safeguards in peace treaties in the treatment of minorities. But it was not until the aftermath of the Second World War that the international community became dramatically convinced of the real and pressing need to protect and promote human rights. The promotion and protection of human rights were seen as an integral and essential element for the preservation of world peace and co-operation, not only within the confines of particular states but universally. To achieve this end, the need was also felt to create the necessary mechanisms to deal with the highly complex questions that would inevitably arise in the systematic

quest for generally acceptable norms and their implementation within all national jurisdictions. There were two catalytic factors and, at the risk of repeating the obvious, these may perhaps be recalled.

First, unlike in the past when there was no permanent institutional machinery for the regular discussion of matters of common concern and when international meetings only took place at ad hoc diplomatic conferences with well defined and limited mandates (e.g. the Vienna Congress (1815), the Berlin Conference (1855), the Hague Conferences (1899 and 1907)), the creation of the United Nations system after the Second World War provided a permanent structure for systematic work in the fulfilment of its mandate.

Secondly, following the horrors of the Second World War which humanity had inflicted upon itself and possibly, as well, the need felt to extend to everyone the benefits of the protection given to minorities in those provisions of peace treaties which had been imposed on certain states in the inter-war period, the promotion and the protection of human rights were seen as an inseparable part of the principal objectives which states set for themselves (Articles 1(3) and (4) and 55 of the UN Charter). To achieve this end, they pledged themselves "to take joint and separate action in co-operation with the Organisation" for the achievement of that objective (Article 56 of the Charter). Further, within the system, functional machinery was specifically assigned particular tasks (ECOSOC and its subordinate bodies, specially the Commission on Human Rights and its expert Sub-Commission) to assist the General Assembly in its quasi-legislative functions in the human rights field (adoption of conventions, some eventually with independent treaty supervisory bodies like the Human Rights Committee, adoption of resolutions or declarations of general application). In addition, there was the general mandate of the General Assembly to ensure that the Article 56 pledges were fulfilled by states in which the situation of human rights became a matter of concern to the international community (e.g. in the case of Chile in these past years).

To conclude this general background, mention should be made of the enormously useful parallel work accomplished in the field of human rights by the UN specialised agencies within their field of competence (ILO and UNESCO in particular, the former even before the General Assembly came into being) and by regional organisations like the Council of Europe, the Organisation of American States and the Organisation of African Unity.

2. Sources and Content of Human Rights Norms

Enough has been said so far to suggest that, in relation to human rights norms, customary international law in the orthodox or traditional sense of unwritten non-treaty law based on state practice has largely, if not completely, been overtaken or else subsumed in an ever growing corpus of norms fixed in the form of instruments like resolutions, declarations or else conventions, all adopted by the great majority of states through the international machinery they have created, whether at the regional or global level.

This is not to say that, at any rate with regard to declarations or resolutions which by their very nature do not have the binding character of a multilateral treaty provision, doubt may not be cast on a particular norm. The result may still depend on certain factors e.g. whether the resolution or declaration was adopted by consensus or a substantial majority, with only unimportant abstentions in terms of numbers or whether, on the other hand, it was adopted against strong opposition. In the latter case, state practice would still be relevant. With regard to declarations and resolutions, although great efforts are deployed in the preparatory work with a view to obtaining consensus or universality even at the cost of compromises and minimalist achievements, their value as legal norms always remains uncertain when compared with provisions of widely accepted treaties. This is why, as later indicated, treaties are subsequently worked out to incorporate norms which first achieve some degree of recognition by way of a declaration or a resolution.

Some idea of the quasi-legislative activity of the UN and the specialised agencies may be gathered from both the number of instruments adopted in the last 40 years or so as well as the variety of particular aspects of human rights that they deal with. These instruments are listed in Annex 8 to this paper and the list does not purport to be complete. As may be seen from a quick reading of the list, the Universal Declaration (1948) and its two implementing International Covenants of 1966 on Civil and Political Rights and on Economic Social and Cultural Rights (hereinafter referred to as the ICCPR and ICESCR respectively) cover what, at the time of their adoption, was considered to be the whole range of basic or fundamental rights which states agreed the individual should have. These three instruments together have come to be known as the International Bill of Human Rights and, in view of their global importance, they are reproduced in Annexes 1 to 3 and will be discussed below.

It is interesting to note that, although a particular right is covered in an instrument of general application, it can nevertheless also be the subject matter of another instrument on its own, in a more complete form and having enforcement or monitoring machinery of its own. This is also the case with regard to instruments governing matters which also fall within the competence of specialised agencies (e.g. the 1957 ILO Convention No. 105 on the Abolition of Forced Labour c.f. Article 8(3) of the ICCPR). This is also the case with regard to some UN instruments (e.g. Article 7 of the ICCPR on the prohibition of torture or of cruel, inhuman or degrading treatment or punishment c.f. the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment).

It is worth noting that, in very much the same way as was the case with the Universal Declaration and its two Covenants (the ICCPR and the ICESCR), some rights achieve recognition by way of a general Declaration first and are subsequently made the subject matter of a specialised Convention. Such has been the case with the 1963 Declaration and the 1965 Convention on the Elimination of All Forms of Racial Discrimination, including the subsequent (1973) Convention on the Suppression and Punishment of the Crime of Apartheid, the 1967 Declaration on the Elimination of Discrimination against Women and its 1979 Convention and, lastly, the 1975 Declaration and the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Work is in progress on draft Conventions to give effect to the 1959 Declaration on the Rights of the Child and the 1967 Declaration on Territorial Asylum.

Before I conclude on the aspect of sources of international law with regard to human rights and go on to review the content of generally accepted norms, it would not be out of place to refer, if only in brief terms, to significant regional international concerns relating to the evolution of the norms of human rights and the Conventions that have been born out of those concerns. These concerns have exercised all continents.

Because Europe was the main theatre of the horrors of the Second World War, following an era spanning centuries of internecine conflict often extending beyond its borders, the need for greater political, economic and social unity was most felt there. It was also deeply felt, as is clear from the preamble to the Convention that it adopted, that a meaningful common human rights policy in addition to arrangements covering other fields, would be one of the means of achieving that unity. It was understandable, therefore, that the first regional instrument (1950) concerning a broad spectrum of fundamental rights came into being there shortly after the adoption of the Universal Declaration by the General Assembly. As is evident from the express terms of the preamble to the European Convention and the contents of the Convention itself, the latter was greatly inspired and influenced by the Universal Declaration. Although Europe chose to adopt at the time only the civil and political rights proclaimed in the world instrument, it did a decade later (1961) adopt the European Social Charter which is the equivalent of the ICESCR. The European Convention and the European Social Charter are reproduced as Annexes IV and V. What has so far been said should not give the impression that the world had thrust upon Europe its global philosophy and concepts of human rights. Although the Universal Declaration had provided the inspiration, and the first draft of the implementing Covenants (the ICCPR and the ICESCR) had already been produced, it remains true that Europe or the West exercised a dominating influence in those early years of the UN.

The second regional instrument, in point of time, that requires to be mentioned is the American Convention on Human Rights, 1969. That Convention is reproduced as Annex VI. It was inspired by the global instruments of the UN and of the European Convention.

The most recent regional instrument to have come into force is the African Charter on Human and Peoples' Rights is reproduced as Annex VII. It did so only in 1987 although it had been approved in 1981 by the Heads of State and Government, in Nairobi. The determining reason would appear to have been that the minimum ratifications required to trigger its coming into force was a majority (26) of member states of the OAU membership, whereas the level generally required for such treaties is a quarter or at most a third. This leaves only Asia to have a regional charter of its own.

Insofar as the Commonwealth is concerned, the Singapore Declaration of 1971 incorporates the resolute commitment by the Commonwealth to the effective enjoyment and protection of human rights. At the Lusaka Meeting of 1979, Commonwealth Heads of Government appointed a Working Party to examine and make recommendations on a memorandum by The Gambia for the establishment of a Commonwealth Commission for Human Rights. Commonwealth Heads of Government considered the Report of the Working Party at the Melbourne HGM in 1981 and, after further consideration by Commonwealth Law Ministers in 1983, it was decided to establish a Human Rights Unit within the Commonwealth Secretariat to undertake such activities as might assist member states in the promotion of human rights, leaving for further study

and deliberation the question of appropriate machinery for the protection of human rights.

3. Content of Human Rights Norms

As is apparent from the above discussion of the sources of human rights norms, there is a whole host of instruments and quite a number of rights. This paper will restrict itself to civil and political rights as these are rights which most states are bound to implement within their legal system. Economic, social and cultural rights will be dealt with only to a limited extent. It may be said that international law regards these as matters for progressive achievement and protection. In effect, therefore, this part of the paper will deal with the Universal Declaration (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic Social and Cultural Rights (ICESCR), the European Convention (EHR), the American Convention (AMR) and the African Charter (AFR).

Though the Universal Declaration is of prime importance, it is not a treaty and therefore technically it is weak as an instrument of protection. But its moral force and persuasive character have never been in doubt and it is universally regarded as expounding generally accepted norms. It is a charter for objectives and policy and was drafted in broad and general terms. That was the reason which made it necessary to implement those objectives by more precise and detailed formulation in the form of conventions which would be binding on states parties and hence the adoption of the two International Covenants (ICCPR and ICESCR) which, in the original draft, were one. It will be recalled that the sister Covenants were split into two since the ICCPR created civil and political rights which would be immediately enforceable whereas the ICESCR imposed obligations "to take steps..... to the maximum available resources, with a view to achieving progressively the full realisation of the rights" (Article 2(1) of ICESCR). The ICCPR gives treaty effect to the substance of Articles 1 to 21 of the UDHR whereas the ICESCR, broadly speaking, gives effect to Articles 22 to 28 of the UDHR.

The following is a comparative list of rights recognised in the several instruments to which this part of the paper relates, with indications in abbreviated form of the relevant instrument and the relevant article of the instrument:

Right of peoples to self-determination	ICCPR 1(1), ICESCR 1(1), AFR 20.
Right of peoples to dispose of its natural wealth and resources	ICCPR 1(2), ICESCR 1(2), AFR 21.
Right to equality and non-discrimination	UDHR 1,2,& 7, ICCPR 2(1), 3 & 26, EHR 14, AMR 1(1) & 24, AFR 2 & 3.
Right to effective judicial remedies	UDHR 8, ICCPR 2(3), EHR 6 & 13, AMR 25, AFR 7(1)(a) & 26.
Right to life	UDHR 3, ICCPR 6, EHR 2, AMR 4, AFR 4.

Protection from torture or cruel, inhuman or degrading treatment or punishment	UDHR 5, ICCPR 7 & 10, EHR 3, AMR 5(2) to (6), AFR 5.
Protection from servitude and forced labour	UDHR 4, ICCPR 8, EHR 4, AMR 6, AFR 5.
Right to liberty and security of the person	UDHR 3 & 9, ICCPR 9, EHR 5, AMR 7, AFR 6.
Protection from imprisonment for inability to fulfil a contractual obligation	ICCPR 11, EHR Protocol 4 Art. 1, AMR 7(7).
Freedom to movement	UDHR 13, ICCPR 12, EHR Protocol 4, Art. 2, AMR 22(1) to (5), AFR 12(1) to (3).
Protection of alien from arbitrary expulsion	ICCPR 13, EHR Protocol 4, Art. 4 (restricted to collective expulsions), AMR 22(6) to (8), AFR 12(4) & (5).
Fair and public hearing, presumption of innocence, procedural guarantees, protection from double jeopardy	UDHR 10 & 11(1), ICCPR 14, EHR 5 & 6, AMR 8, AFR 7(1).
Non-retroactivity of offences and punishments	UDHR 11(2), ICCPR 15, EHR 7, AMR 9, AFR 7(2).
Recognition as a person before the law	UDHR 6, ICCPR 16, AMR 3, AFR 5.
Protection of right to property	UDHR 17, EHR First Protocol Art. 1, AMR 21, AFR 14.
Protection of privacy, family, home, correspondence, honour and reputation	UDHR 12, ICCPR 17 & 19(3)(a), EHR 8 & 10(2), AMR 10 & 14, AFR 18 & 27.
Freedom of thought, conscience and religion	UDHR 18, ICCPR 18, EHR 9, AMR 12, AFR 8.
Freedom of opinion and expression and of seeking, receiving and imparting information	UDHR 19, ICCPR 19, EHR 10, AMR 13, AFR 9.
Freedom of Assembly	UDHR 20, ICCPR 21, EHR 11, AMR 15.

Freedom of association and to form and join trade unions	UDHR 20, ICCPR 22, EHR 11, AMR 16, AFR 10.
Right to marry, equality of rights of spouses and protection of the family	UDHR 16, ICCPR 3 & 23, EHR 12, AMR 17, AFR 18.
Rights of the child	ICCPR 24, AMR 17(4) & (5), 18, 19 & 20, AFR 18(3).
Political rights and access to public office	UDHR 21, ICCPR 25, EHR First Protocol Art. 3, AMR 23, AFR 13.
Right of ethnic, religious or linguistic minorities with regard to culture, religion or language	ICCPR 27.
Prohibition of war propaganda and protection from advocacy of racial or religious hatred.	ICCPR 20.
Limitations on derogation in emergencies	ICCPR 4, EHR 15, AMR 27.

It will have been apparent that, although these instruments generally have much in common, there are some differences which might perhaps be highlighted. First, as between the UDHR and the ICCPR, the former instrument does not whereas the latter does cover the right to self-determination, the right for a people to dispose of its natural wealth and resources, protection from imprisonment for a civil debt, the protection of the alien from arbitrary expulsion, the rights of the child, certain rights of minorities and the outlawing of war propaganda and racial or religious hatred. These matters, with the exception of imprisonment for civil debts, are also excluded from the EHR. These were developed in the aftermath of the adoption of the UDHR. Secondly, the ICCPR contains the notable omission of protection of property rights, which initially was also absent from the EHR but was later included in the EHR's First Protocol with certain limitations. Thirdly, both the rights and the permissible limitations are formulated in greater detail in the ICCPR than in the UDHR and become susceptible of better implementation in national legal systems.

As between the ICCPR and the EHR, the AFR and, to a lesser extent, the AMR (which appears much closer to the ICCPR), the ICCPR appears to give wider protection with regard to the treatment of detainees (Article 10), recourse to the death penalty, access to public office, as well as the right of free consent as a pre-condition to marriage and the equality of spouses as to their rights in marriage.

It remains to be seen whether certain new concepts of a collective character such as the right to development and the rights of peoples as set out in Articles 20 to 26 of the AFR would be so interpreted as to narrow rather than strengthen the scope of the rights and freedoms of the individual. These concepts are not, from the strictly juridical point of view, entirely new. There are certain rights already recognised which could be exercised by the individual in community with others, for example

self-determination (ICCPR 1), freedom of association (ICCPR 22) or minority rights (ICCPR). What is worth noting also is the concept of duties formulated in express terms in the African Charter, whereas these remain implied in similar instruments. The extent to which this notion of duties will or will not have an adverse impact on the content of individual rights remains to be seen.

Although there are differences in content and scope as between the various regional instruments and as between these instruments and the ICCPR, it nevertheless remains a fact that a great many states from all regions (88 as at March 1988) are already parties to the ICCPR. Of these, 17 are from Western Europe, 10 from Eastern Europe, 19 from Africa, 21 from the Americas (USA signed in 1977 but has not so far ratified), 10 from Asia and 11 from the Middle East. There are some 19 states parties to the Inter-American Convention, 21 to the European Convention and about 27 to the African Convention.

Insofar as the Optional Protocol to the ICCPR is concerned, whereby states parties have accepted the competence of the Human Rights Committee to receive individual petitions against them, there are 40 states parties of which 11 are from Africa, 17 from the Americas and 12 from Western Europe.

4. Regional and International Mechanisms

The European Convention has established three organs "to ensure the observance of the engagements undertaken" by states parties. These organs are the Commission, the Committee of Ministers, and the Court. The Commission may receive applications either from a state party against another (Article 24), or from an individual, group or organisation (Article 25) concerning a violation. The jurisdiction of the Commission is integral or automatic under Article 24 but depends on whether or not the state concerned has accepted its jurisdiction under Article 25. The difference between an inter-state application and an individual one is that the complaining state need not show that it is in any way a victim whereas an individual must do so in order to have *locus standi*. The other difference also is that an inter-state application may be in respect of alleged incompatibility between the laws and practices of the respondent state and the Convention whereas the individual must establish that those laws or practices, in their application to him, have been violated. There are a number of provisions relating to the admissibility of an application before it is considered on the merits. Briefly, it may be rejected because:

(a) it is incompatible with the provisions of the Convention, for example, the complaint relates to a right not provided for by the Convention,

(b) domestic remedies have not been exhausted,

(c) the application has not been lodged within six months of the exhaustion of domestic remedies, or

(d) because it is manifestly ill-founded (no *prima facie* case disclosed in the application),

(e) the application is anonymous.

The Commission has developed a rich jurisprudence on the rules governing admissibility. Once the Commission has declared an application admissible, it ascertains the facts and proceeds to examine the matter on the merits. It then offers an opportunity to the parties to settle the matter. If a friendly settlement is not achieved, the Commission refers a detailed but confidential report to the parties and the Committee of Ministers, together with its opinion on whether there has been a breach of the Convention. Within three months, the Commission or the state party whose national is alleged to be a victim or either party in an inter-state dispute (but not private parties) may refer the matter to the Court, provided that the state or states concerned have accepted its jurisdiction.

Where the matter is not referred to the Court, the Committee of Ministers, here acting in a quasi-judicial capacity, decides by a two-thirds majority whether there has been a violation of the Convention. Occasionally the Committee of Ministers overturns the finding of a violation. It does not, however, find a violation where the Commission has found none. Its decision is binding and, where it does find a violation, it is empowered to prescribe a time period within which the offending state must take remedial measures. If these are not compiled with in time, the Committee decides upon further measures and usually publishes the report of the Commission. However, the Commission may do nothing as a result of the Commission's findings and is sometimes seen as a weak link.

When a matter is referred to the Court, the Commission assists the Court in very much the same way as an advocate-general and not in the spirit of an advocate for the individual applicant. All decisions of the Court are binding and the Committee of Ministers supervises the execution of the Court's judgment.

The Inter-American machinery under the American Convention on Human Rights is somewhat similar to that of the European Convention, but does not have a Committee of Ministers. Its two organs are the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. The American Convention reverses the traditional pattern utilised by the European Convention in that the right of individual petition to the Commission is the norm (Article 44 of the Convention) whereas an inter-state petition is only admissible by special acceptance (Article 45 of the Convention). It should be noted that the Commission is empowered to undertake promotional activities for the better observance of human rights and to make on-site visits. It is unfortunate, as regards the competence of the Court, that there have so far been only a few acceptances of its contentious jurisdiction. The Court has, in addition to its contentious jurisdiction, broad advisory jurisdiction at the request of any OAS member state (and not just states parties to the American Convention), as well as all organs of the Organisation of American States.

The African Charter came into force very recently (1986) and it is too early to speculate on its implementation in practice. All that can be said at the moment is that the Charter provides, like the ICCPR which will be next examined, for a single organ - the African Commission, which has functions relating to the promotion (by research and studies on which states may base their legislation, co-operation with kindred institutions, dissemination of information etc.) and protection of human rights. In this

latter regard, there is a procedure for inter-state and individual petitions with reports on the result to the Assembly of Heads of State and Government. The Commission is charged, inter alia, with responsibility to report to the Assembly of Heads of State and Government any special cases revealing the existence of serious and massive violations of human rights which the Commission encounters in the consideration of petitions.

The machinery established by the Covenant on Civil and Political Rights is a single organ called the Human Rights Committee consisting of 18 members periodically elected or re-elected by the states parties. As in the case of the regional mechanisms, members of the Committee serve in their personal capacity. The functions of the Committee are three-fold:

(a) It examines the periodic reports of states parties regarding implementation of the Covenant and adopts general comments in the light of experience gathered in the course of the examination of States Reports.

(b) It considers communications from individuals complaining of a breach of the Covenant by a state party which has acceded to the Optional Protocol to the Covenant.

(c) It considers communications lodged by one state party against another but only in the case of states which have accepted this kind of jurisdiction under Article 41 of the Covenant.

Regarding its functions under (a) above, it must be noted that the reports are required to be extremely detailed covering the particular laws, regulations and administrative practices adopted by the state to give effect to each and every right recognised in the Covenant and any limitations to which the various rights may be subject. The Committee has issued guidelines to ensure that the reports are comprehensive. The examination of a report of a state party takes place in public in the presence of its representatives who are questioned over a number of meetings. As is apparent from the terms of Articles 2 and 40 of the Covenant, the report deals not only with legal but also other measures designed to give effect to the Covenant and, in particular, deals with any factors or difficulties encountered in the implementation of the Covenant within the internal system of the state.

Since the reports are from states which cover all continents and thus a much wider spectrum of political ideologies, of economic, social and cultural situations and of constitutional and legal systems than would have been possible under regional instruments, the general comments adopted by the Human Rights Committee from this enormously varied and rich source of experience has been the result of extremely patient and extensive deliberations from the 18 experts who come from a wide variety of systems and countries. For this reason, these general comments are, from an unpretentious start, gradually being regarded as representing the best attainable standards of universality in the evolution of human rights norms.

The inter-state communications procedure at (c) above has not so far been engaged in the absence of any communication, but communications under the Optional Protocol have been quite substantial and the jurisprudence evolved by the Committee is growing in importance, both at

the international level and the domestic level, in the case of states which are parties to the Optional Protocol. Over the last ten years, communications have been received from some 23 out of the 38 states that are parties to the Optional Protocol. It may very well be that individuals or even the legal profession in the remaining states are not aware of the Optional Protocol or of the fact that their countries are parties to it.

5. Emerging Jurisprudence on International Norms

As already noted in the part of this paper dealing with the content and sources of human rights norms, although the various regional instruments are all inspired from the Universal Declaration, they differ somewhat in substance, formulation and detail not only as between themselves but also as between themselves and the International Covenant on Civil and Political Rights. This part of the paper will deal only with the jurisprudence and standards evolved by the Human Rights Committee in the performance of its functions under the Covenant. Even then only some idea of its jurisprudence could be given in a paper of this kind, since the period covered is one of some 11 years and the number of cases placed before the Committee is 236 of which some 190 have been completed. Suffice it to indicate that the work of the Committee is recorded in the following among other documents:

(a) Official Records of the UN bearing General Assembly Supplement No. 40 for the years 1978 to 1987.

(b) Human Rights Committee Selected Decisions under the Optional Protocol No. CCPR/C/OP/1 obtainable from the Centre for Human Rights, UN, Geneva.

(c) "Application of the International Covenant on Civil and Political Rights" by A de Zayas, J Moller and T Opsahl published in the Canadian Human Rights Yearbook (1986). The first two authors are part of the Secretariat serving the Committee and Mr Ophsal was a member of the Committee for ten years and also a member of the European Commission.

(d) Periodic surveys in the Human Rights Law Journal (HRLJ) published by N P Engel in Strasbourg (France) and in Arlington (USA).

(e) Interights Bulletin published by INTERIGHTS of Kingsway Chambers, 46 Kingsway, London WC2B 6EN.

With regard to the question whether a communication is admissible or not, more or less the same rules apply to the ICCPR as to individual communications under the EHR. Briefly the rules regarding admissibility relate to:

(a) The standing of the author (Articles 1 and 2 of the Optional Protocol), i.e., the communication must emanate from the victim himself or, if he is unable to present the communication himself (if he e.g. is held incommunicado or has "disappeared") from a relative or next friend or else a legal representative. On the other hand, "busy-bodies" cannot submit communications on behalf of others. Any third party submitting a communication would have to justify his

personal authority: J T v/s Canada (104/81), C and Ors v/s Italy (163/84);

(b) the violation complained of affects the victim and is not a complaint about law or practices in general which are alleged to violate human rights recognised under the Covenant. In other words, the Covenant does not recognise an actio popularis: Aumeeruddy-Cziffra and Ors v/s Mauritius (35/78); further the violation complained of must be supported by sufficiently precise factual averments: J H v/s Canada (187/85);

(c) The violation complained of was committed after the entry into force of the Covenant and the Optional Protocol with regard to the State Party concerned or else a previous violation continues to have effect after the date of entry into force, i.e., the ratione temporis rule: J Manera v/s Uruguay (123/82). There is not, as in Article 26 of the EHR, a limit of six months from the exhaustion of domestic remedies;

(d) The victim was at the time of the violation subject to the jurisdiction of the State Party against which the complaint is made. Territoriality or residence is not always a deciding factor as rights recognised under the Covenant may be violated even when the victim is outside the territory of the respondent State. This is the case where the right which is claimed to have been violated is regulated by the law of the state concerned e.g. the refusal by a state to renew the passport of a national who is abroad and who finds his freedom of movement thereby affected: Martins v Uruguay (57/79).

(e) The complaint is not already under investigation under another procedure of international investigation or settlement (e.g. the regional mechanisms): A Estrella v/s Uruguay (74/79), except where the complaint under the other procedure was by an unrelated third party without the authority of the alleged victim;

(f) The victim has exhausted all domestic remedies except when these remedies are ineffective or would require unreasonable delay. An extraordinary remedy of seeking the annulment of a decision of the Ministry of Justice would not qualify as an effective remedy within the meaning of Article 5(2)(b): Mulhonen v/s Finland (89/81);

(g) The subject matter of the complaint is not incompatible with the rights recognised under the Covenant, the ratione materiae rule : I M v/s Norway (129/82);

(h) The alleged violations are sufficiently supported by at least prima facie allegations, more or less the equivalent of the "manifestly ill founded" rule applicable under the European Convention.

Jurisprudence and standards on some of the substantive issues considered under the Covenant which may be mentioned relate to the rights referred to below.

Right to Life (Article 6). The general comments made by the Human Rights Committee reject a narrow interpretation of the right to life as not being restricted simply to the abolition of capital punishment. The Committee has interpreted the commitment undertaken by states under this Article to include, for example, a duty to take steps to reduce infant mortality, to eliminate malnutrition, to prevent epidemics and to banish weapons of destruction. These issues however, are not easily justiciable. With regard to the death penalty as a form of punishment, there is a resolution of the General Assembly (32/61) proclaiming that the objective is that of "progressively restricting the number of offences for which the death penalty may be imposed" until its eventual abolition. The Committee has observed that, while Article 6(2) and (6) does not require states to abolish capital punishment totally, they are obliged to limit its use and, in particular, to abolish it for other than the most serious crimes. Article 7 which is designed to prevent cruel and inhuman treatment would obviously also have an impact on the kind of offences for which the death penalty may be imposed. The Committee has further observed that the right to life cannot, under Article 4, be derogated from even during an emergency.

The cases that have come before the Committee have generally been violations of the right to life by law enforcement officials: (P Camargo v/s Columbia (45/79) or else by the phenomenon of "disappearances": Eduardo Bleier v/s Uruguay (30/78). In such cases, the Committee has held that the law must strictly control and limit the circumstances in which a person may be deprived of his life by the authorities since the state has a duty to protect life and that, where violations occur, there is a duty to establish what has happened and to bring the culprits to justice and to pay compensation.

Torture or Other Prohibited Treatment (Article 7). The numerous cases that have come before the Committee mostly concerned Uruguay, under its previous repressive regime, where victims were held incommunicado and were subjected to treatment outlawed under this Article and from which no derogations can be made even in times of emergency. It has sometimes been difficult to characterise particular treatment as amounting to torture or some other form of treatment and the Committee has on a few occasions applied this Article together with Article 10(1) which imposes an obligation to treat detainees with humanity and respect the inherent dignity of the human person: D Marais v/s Madagascar (49/79).

The Committee has issued a general comment about the obligations imposed upon states parties in addition to the enactment of legal provisions. Since violations occur in spite of legal provisions, the Committee has held that states must ensure effective protection through effective administrative machinery for control and special measures of investigation when complaints are made. Among other safeguards which may make controls effective are provisions against incommunicado detention, the allowing of visits to detainees by doctors, lawyers and relatives, the requirement that detainees should be held in places that are publicly recognised, measures requiring the names of the detainees and the places of their detention to be entered in a special register available to relatives

and officials alike, provisions in the law or judicial practice making confessions or other evidence obtained as a result of violations of this Article inadmissible as evidence and, lastly, the effective training and instruction of law enforcement officials so as to ensure that they do not resort to this kind of treatment.

Right to Liberty and Security of Individuals (Article 9). The Committee has adopted a general comment on this Article indicating that paragraph one of the Article applies to all deprivations of liberty, whether in criminal or other cases such as mental illness, vagrancy, drug addiction, educational purposes, and immigration control, among others. The Committee has indicated that the individual must have a right in these cases to have the reasons for his or her detention investigated by a court and to be given compensation or other effective remedy in cases of a violation (Articles 2(3) and 9(5)).

Complaints have so far touched on three main aspects of the Article. Firstly, many communications have been made under Article 9(1) complaining of arbitrary arrest and detention, for example, without a warrant, release not having been effected promptly after an order to that effect: Soriano de Bouton v/s Uruguay (37/79), abduction in another country and bringing the victim over, the combined effect amounting to arbitrary arrest and detention: Lilian Celiberty v/s Uruguay (56/79) or detention for months without charge: Mbenge v/s Zaire (16/77). Secondly, some complaints have related to a failure to bring the victim to a judicial authority within a reasonable time either for the purposes of a trial or of a remand in custody, in breach of Article 9(3): Barbato v/s Uruguay (84/81) and Lueye v/s Zaire (90/81). Thirdly, some complaints have related to the unavailability of the remedy of habeas corpus or amparo to challenge the lawfulness of detentions (Article 9(4)): Fals Borda and Ors v/s Columbia (46/79).

Human treatment during detention, imprisonment (Article 10). In its general comment, the Committee has indicated that this Article requires positive action by the state to ensure humane treatment and is thus a supplement to Article 7 which prohibits torture and other like treatment. The Standard Minimum Rules for the Treatment of Prisoners adopted under the aegis of the UN is also relevant, but the scope of the Article is broad enough to ensure humane treatment.

Cases before the Committee have involved solitary confinement in small cells for prolonged periods: Marais v/s Madagascar (49/79) or else incommunicado detention over a prolonged period at an unknown place of detention: Romero v/s Uruguay (85/81).

The Right of an Alien not to be expelled arbitrarily from his Country of Residence (Article 13). In its general comment on this Article, the Committee has noted that it is applicable to all procedures leading to the obligatory departure of an alien, whether this departure is described in the national law of a state as expulsion or otherwise. If such procedures entail arrest, the safeguards of the Covenant relating to deprivation of liberty (Articles 9 and 10) may also be applicable. If the arrest is for the particular purpose of extradition, other provisions of national and international law would also apply. The Committee has also indicated that the Article applies only to aliens who are lawfully in states, but not illegal entrants or aliens who have overstayed their

permits. However, if the legality of an alien's entry or stay is in dispute, any decision on this point leading to his deportation ought to be taken in accordance with Article 13. Although the Article directly regulates only the procedure and not the substantive grounds for expulsion, nevertheless by recognising only those decisions carried out "in pursuance of a decision reached in accordance with law", its purpose is clearly to prevent arbitrary expulsions. The Committee has also understood from the nature of Article 13 that its provisions would not be satisfied by laws or decisions providing for mass or collective expulsions and that the procedures for appeal or review against expulsions may only be departed from when "compelling reasons of national security" so require.

Very few cases have been brought before the Committee concerning this Article. In one case, the Committee has held that, in order to determine whether an expulsion was effected in accordance with law, the Committee could not substitute itself for the national courts in the interpretation of national laws, unless there are indications that those laws were not applied in good faith or else that there has been an abuse of power: Anna Marafidou v/s Sweden (58/79).

The Right to a Fair Hearing (Article 14). This right constitutes the basic guarantee made available to the individual who, more often than not, is in an unequal situation vis-a-vis the state. It is not surprising that the Committee has made a general comment compromising about 20 paragraphs, which would be too long to reproduce. A few points may, however, be highlighted in conjunction with communications which have been considered. First, in view of the different words used for the term "suit at law" in the various language texts of the Covenant, the Committee has been faced with the difficulty of deciding to what extent this Article applies to proceedings of an administrative nature but which nevertheless involves a civil right, particularly, in common law systems where there is no strict division between administrative and civil jurisdiction. The Committee decided to give a broad meaning to the term, in order to ensure to the individual a fair hearing where primary jurisdiction regarding the right that is in dispute has been conferred by statute to a tribunal other than a court of law where the right concerned is essentially a civil one: Y L v/s Canada (112/81). The Committee has further indicated that all the guarantees would apply not only where normal courts exercise jurisdiction but also where special courts, like military courts or tribunals, have jurisdiction.

Secondly, most of the cases in which the first paragraph has been invoked have in the past come from repressive regimes. Thus the Committee has found violations of Article 14(1), where the trial took place in camera or in the absence of the accused, or else where the judgment was not made public: Altesor v/s Uruguay (10/77), Cubas v/s Uruguay (70/80).

Thirdly, the Committee has found violations where, because of the conditions of his detention, an accused party could not have access to legal assistance or did not have adequate time and facilities to prepare his defence (Article 14(3)(b): Wight v/s Madagascar (115/82).

Fourthly, the Committee has held that the right to a review of a conviction or sentence as provided in Article 14(5) does not leave the existence of the right to review to be regulated by domestic law, but rather the modalities of the review: Salgar de Montego v/s Colombia

(64/79). The Committee has further held that "the right under Article 14(3)(c) to be tried without undue delay should be applied in conjunction with the right under Article 14(5) to review by a higher tribunal and that, consequently, there was in this case a violation of these provisions taken together. The case in question, Pinkney v/s Canada (27/78), concerned a complaint that the exercise of an appellant's right of appeal had been prejudiced because the transcripts of the lower court's proceedings had taken two-and-a-half years to be produced.

The Right to Freedom from Interference with Privacy, Family, Home or Correspondence (Article 17). In one case where immigration laws provided less generous treatment to foreign husbands than to foreign wives, the Committee held that, since the common residence of husband and wife is normal, the exclusion of one of the spouses from a country where close members of the family normally live can amount to an interference within the meaning of Article 17(1), even though the spouse is an alien : Aumeeruddy Cziffra v/s Mauritius (35/78). In that case, the Committee considered that the precarious residence of a foreign husband amounted to an interference with the family life of his wife and, although this interference could not be described as "unlawful or necessarily arbitrary", nevertheless the position resulted from an adverse distinction based on sex, in violation of Articles 2(1) and 3 taken in conjunction with Article 17(1). In another case, Estrella v/s Uruguay (74/90), the Committee had occasion to hold that, although the authorities were entitled to exercise control over the correspondence of prisoners, that control had to be subject to legal safeguards against arbitrary application and that the degree of restriction exercised had to be consistent with the standard of humane treatment of detained persons as prescribed under Article 10(1).

The Right to hold Opinions and to Freedom of Expression (Article 19). Few cases have come before the Committee concerning this right. Violations of Article 19(2) have been found in a case where a person was detained for having disseminated information relating to trade union activities: Weiz v/s Uruguay (28/78) and in another case where a person had been arrested on a charge of subversive association and conspiracy, when in fact he had only been engaged in the conduct of political and trade union activities: Pietroroia v/s Uruguay (44/79).

In a general comment concerning this Article, the Committee has stressed that, under Article 19(3), the exercise of the right carries with it special duties and responsibilities and may be subject to restrictions which relate either to the interest of others or those of the community, but that, where restrictions are imposed, they may not put in jeopardy the existence of the right itself. Paragraph (3) lays down conditions and restrictions may only be imposed subject to those conditions. In any case, those conditions must be "provided by law" and must be justified as being necessary for one of the purposes described in Article 19(3) sub-paragraphs (a) or (b).

Freedom of Association (Article 22). The freedom of association of the individual under this Article includes in express terms "the right to form and join trade unions for the protection of his interests". In J B and Ors v/s Canada (118/82), members of The Alberta Union of Provincial Employees complained that a law depriving them of their right to strike constituted a breach by Canada of this Article. The Committee, by a majority, declared the communication inadmissible ratione materiae on the

ground that the right to strike was not protected by the Covenant on Civil and Political Rights but by the Covenant on Economic, Social and Cultural Rights. The minority was of the opinion that, inter alia, in covering the "right to form and join trade unions", Article 22 expressly envisaged the purpose for which this right was to be exercised by the individual, i.e., "for protection of his interests" and that this necessarily included the means by which that protection could be achieved. Article 22 also expressly made provisions for the permissible limitations on the exercise of the right, but that was a question relating to the merits of the communication and not to its admissibility.

The Right of the Family to Protection (Article 23). In the case already referred to under Article 17 (Aumeeruddy Cziffra v/s Mauritius (35/78)), the Committee also considered the matter in the perspective of Article 23. The Committee held that a couple, the more so where there are children, constitutes a "family" and as such is "entitled to protection by society and the State". Although the content of that protection may vary from country to country depending on different social, economic and other conditions, the principle of equal treatment of the sexes applies by virtue of Articles 2(1), 3 and 26, the last of which is also relevant because it guarantees the "equal protection of the law". Where the Covenant requires a substantial protection of the kind referred to in Article 23, it follows that the protection must be equal and not discriminatory since the protection of the family cannot vary with the sex of the one or the other spouse. The Committee therefore found a violation of Articles 2(1), 3, and 26 of the Covenant in conjunction with Article 23(1).

Equality before the Law and Equal Protection of the Law (Article 26). The Committee had long been in doubt as to whether this Article guarantees merely formal equality before the law rather than substantive equality protected by the law. In a case Zwaan de Vriez v/s The Netherlands (182/84), where the law granting social security rights treated men and women differently, the Committee came to the conclusion that the question at issue was not whether the Covenant on Civil and Political Rights imposed an obligation on states to provide social security but whether, where a state decided to institute a system of social security, it could do so in breach of Articles 2(1), 3 and 26 read together. In effect, the Committee considered that Article 26 imposed a code of behaviour on the state, whether in the exercise of its legislative, administrative or judicial activity.

6. Incorporation of International Norms into National Legal Systems

6.1 International law leaves it to states to adopt such legislative and other measures, consistent with their own constitutional processes, to give effect to the obligations which they undertake to implement and, more importantly, to ensure that any person whose rights or freedoms are violated have an effective remedy justiciable before independent and impartial tribunals. This is reflected in Article 2(2) of the Covenant on Civil and Political Rights.

Three main methods have generally been discussed for the implementation of the Covenant in domestic law:

(a) Direct incorporation of the rights recognised in the Covenant into what may be called a "bill of rights" in the national legal order.

(b) Enactment of different legislative measures in the civil, criminal and administrative laws to give effect to the different rights recognised in the Covenant.

(c) Self-executing operation of the Covenant in the national legal order.

Two sets of problems have bedevilled the question of implementation. The first of these arises from the fact that law-making powers are vested in Parliament and not the Executive, except to the extent that the latter has delegated powers. These powers may not, however, be exercised contrary to the Constitution and existing law. Furthermore, it is the Executive which enters into treaties. Such treaties therefore can only have legal effect to the extent that they have been implemented in one way or another in domestic law, since the Courts will only apply the law. Even in systems where the Constitution itself provides that a treaty which has been entered into in accordance with the constitutional processes will be binding internally, the problem still arises where there is an inconsistency between the Constitution and the treaty.

There is, in this regard, a difference in perspective between a domestic court and, for example, the Human Rights Committee established under the Covenant. Whereas the domestic court will pronounce on the constitutionality of legislative or other measures, the Committee has jurisdiction to pronounce on their (if I may coin a word) "covenantability" or their consistency with the Covenant. In other words the Committee has jurisdiction to pronounce on the consistency of the national constitution itself with the Covenant. In practice, there need be no conflict between the two jurisdictions if the technique of interpretation is resorted to by the domestic jurisdiction so as to avoid any inconsistency with the treaty provisions. But this may not always be possible.

The second set of problems arises from the fact that treaty provisions are often general in character and need to be implemented by specific detailed provisions in the internal law. For example, the right to life, liberty and security of the person requires to be implemented not simply by a legal provision proclaiming the right but also by detailed provisions in the criminal, civil and administrative laws to provide appropriate remedies, sanctions and other measures designed to guarantee this right. In the same way, family, social, economic and other rights require a whole corpus of family codes, including welfare and industrial codes to ensure implementation which will, in turn, depend on the particular circumstances and traditions of each country.

6.6 For those states which are parties to, for example, the Optional Protocol, it is essential that the rights recognised in the Covenant should be given effect to in the legal system for two reasons. First, because of the rule relating to the exhaustion of domestic remedies, states thereby ensure that alleged violations are investigated in the first place, within their own internal system, and if need be, remedied. Secondly, the international control mechanism will have had the benefit of the thinking of the highest courts in the country against which violations are alleged.

In the case of those countries which are not parties to the Covenant, it is still relevant for the courts to ensure that generally accepted standards of human rights prevail since, by virtue of the obligations which states have undertaken under the UN Charter, they might still, in certain circumstances, be answerable to the various procedures established within the United Nations system in the perspective of the mandate of the General Assembly under sections 55 and 56 of the UN Charter.

One last thought needs perhaps to be expressed. Far too often in the past, the question of human rights at the international level has tended to be dealt with solely by foreign ministries, admittedly with the assistance of Home Office legal advisers. It is to be wondered whether that is enough. It is the courts which normally deal with the implementation of human rights or their violations at grassroots level. The time has perhaps come to ensure that the thinking of the judiciary should be tapped in a systematic way, and that it should be involved at the international level.