

THE RIGHT TO PETITION THE UNITED NATIONS BECAUSE OF ALLEGED VIOLATIONS OF HUMAN RIGHTS

TON J.M. ZUIJDWIJK*
Montreal

The purpose of this article is to draw the attention of Canadian lawyers to the procedure for submitting petitions under the Optional Protocol to the International Covenant on Civil and Political Rights.¹ Canada is one of the very few Western countries that have adhered to this Protocol and have thereby given "individuals subject to [their] jurisdiction"² the right to submit petitions to the United Nations because of alleged violations of human rights, as set forth in the International Covenant on Civil and Political Rights. Therefore, Canadian residents and others probably as well³ have since 1976 had the right to take their case from the national to the international level if they can allege a violation of any of the rights or freedoms set forth in the Covenant.

In this article, the enforcement mechanisms of the Covenant will be reviewed, the procedure for the examination of petitions under the Optional Protocol will be examined, and finally two recent decisions by the Human Rights Committee upon petitions filed against Uruguay will be discussed.

I. Enforcement Mechanisms of the Rights Guaranteed in the Covenant.

The International Covenant on Civil and Political Rights constitutes a catalogue of basic civil and political rights in treaty form. In the codification scheme of the United Nations the adoption of the International Covenants in 1966 (one on Civil and Political Rights; the other on Economic, Social and Cultural Rights) constituted the completion of the United Nations Bill of Rights, the first step thereto having been the adoption of the Universal Declaration of Human

*Ton J.M. Zuijdwijk, of the Faculty of Law, McGill University and of the Ontario Bar. This article was completed in June 1980.

¹ The International Covenant on Civil and Political Rights and the Optional Protocol thereto were adopted by the General Assembly in Resolutions 2200 and 2200A (XXI) of Dec. 16th, 1966, 21 GAOR Supp. 16, at p. 49, U.N. Doc. A/6316 (1966), and opened for signature on Dec. 19th, 1966.

² Art. 1 of the Optional Protocol.

³ The term "individuals subject to [their] jurisdiction" is wide enough to include even visitors to Canada or persons who are in Canada illegally and are about to be deported.

Rights by the General Assembly in 1948. The Universal Declaration includes both civil and political rights and economic, social and cultural rights. The original idea was that the Declaration was to be followed by the adoption of one Covenant which would enact all these rights in the form of a treaty. In 1952, however, the General Assembly decided to separate the civil and political rights from economic, social and cultural rights.⁴ This decision eventually resulted in two separate Covenants, which were adopted by the General Assembly in 1966 and opened for signature, ratification and accession. It took almost ten years for both Covenants to enter into force following their adoption by the General Assembly. The Covenant on Economic, Social and Cultural Rights entered into force on January 3rd, 1975,⁵ and the Covenant on Civil and Political Rights on March 23rd, 1976.⁶ Canada acceded to the latter Covenant on May 19th, 1976.⁷ Therefore, it became binding on Canada on August 19th, 1976.⁸

The Covenant on Civil and Political Rights has found wide adherence. On June 12th, 1980, Nicaragua became the sixty-second party to the Covenant. Among the parties to the Covenant are Bulgaria, Czechoslovakia, Hungary, the German Democratic Republic, Romania and the Soviet Union. This means that under international law these countries are obliged to observe *inter alia* the freedom of everyone "to leave any country, including his own".⁹ Human rights activists should not forget this instrument when pointing the finger at the U.S.S.R. In this context, it is the Helsinki

⁴ G.A. Res. 543 (VI) and 547 (VI), of Feb. 5th, 1952, 6 GAOR Supp. 20, at pp. 36 and 37, U.N. Doc. A/2119 (1952).

⁵ In accordance with art. 27, para. 1 of the International Covenant on Economic, Social and Cultural Rights, three months after the deposit of the thirty-fifth instrument of ratification.

⁶ In accordance with art. 49, para. 1, of the International Covenant on Civil and Political Rights, three months after the deposit of the thirty-fifth instrument of ratification. See Schwelb, Entry into Force of the International Covenant on Human Rights and the Optional Protocol to the International Covenant on Civil and Political Rights (1976), 70 Am. J. Int. L. 511.

⁷ See the list of parties to the International Covenant on Civil and Political Rights as at Aug. 17th, 1979, in Annex I, Part A, to the (third) Report of the Human Rights Committee of 27th Sept. 1979, 34 GAOR Supp. 40, at p. 110, U.N. Doc. A/34/40 (1979). In footnote (a) it is indicated that Japan ratified the Covenant on June 21st, 1979 and that it would therefore enter into force for Japan on Sept. 21st, 1979. Subsequent information received from the U.N. Secretariat, Human Rights Division, indicates that Iceland and El Salvador ratified the Covenant on Aug. 22nd, 1979 and Nov. 30th, 1979 respectively and that Nicaragua acceded on March 12th, 1980. For Iceland the Covenant entered into force on Aug. 22nd, 1979, for El Salvador on Nov. 30th, 1979 and for Nicaragua on June 12th, 1980.

⁸ In accordance with art. 49, para. 2.

⁹ Art. 12, para. 2 of the International Covenant on Civil and Political Rights.

Declaration which is usually invoked. This Declaration, however, is a legally non-binding instrument.¹⁰ In the Covenant advocates of human rights have a treaty which binds the U.S.S.R. under international law.

The problem with countries like the U.S.S.R. is that they have not accepted any of the enforcement mechanisms contained in the Covenant itself and the Optional Protocol annexed thereto, except that all state parties to the Covenant are without exception obliged to submit a report on the measures they have adopted to implement their obligations under the Covenant.¹¹ The real enforcement provisions only operate on an optional basis. Firstly, each state party to the covenant can make an express declaration "that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another Party is not fulfilling its obligations under the . . . Covenant".¹² Such a recognition of the inter-state complaint procedure of course only operates on the basis of reciprocity.¹³ As of August 17th, 1979 the inter-state complaint procedure had been accepted by the following ten states, which was the minimum number required for this procedure to come into force:¹⁴ Austria, Denmark, Finland, the Federal Republic of Germany, Italy, the Netherlands, New Zealand, Norway, Sweden and the United Kingdom. By April 15th, 1980 similar acceptances had been received from Iceland and Canada.¹⁵

Important as the inter-state complaint procedure may be, the second, more interesting enforcement mechanism is the scheme laid

¹⁰ This conclusion is drawn from one of the final clauses of the Final Act, in which "the Government of Finland is requested to transmit to the Secretary-General of the United Nations the text of this Final Act, which is not eligible for registration under Article 102 of the Charter of the United Nations, with a view to its circulation to all the members of the United Nations, with a view to its circulation to all the members of the Organization as an official document of the United Nations", and from statements made by delegates at the Conference. See Schachter, *The Twilight Existence of Non binding International Agreements* (1977), 71 *Am. J. Int. L.* 296, at p. 296. The Final Act of the Conference on Security and Co-operation in Europe, of Aug. 1st, 1975, is reproduced in (1975), 14 *Int. Leg. Mat.* 1292.

¹¹ Art. 40 of the Covenant. States are required to submit such a report within one year of the entry into force for that particular state and thereafter whenever the Human Rights Committee so requests.

¹² Art. 41, para. 1 of the Covenant.

¹³ *Ibid.*

¹⁴ Art. 41, para. 2 of the Covenant.

¹⁵ Information as of Aug. 17th, 1979, Annex I to the (third) Report of the Human Rights Committee, *op. cit.*, footnote 7. The tenth state which recognized the procedure of art. 41 was New Zealand which made a declaration to this effect on Dec. 28th, 1978, the same date as its ratification of the Covenant. In accordance with art. 41, para. 2 of the Covenant the interstate complaint procedure therefore entered into

down in the Optional Protocol, under which individuals can themselves petition the United Nations and set into motion a procedure under which the compliance of a state's domestic legal system with its international obligations contained in the Covenant can be scrutinized. As the name of the Protocol indicates, the procedure is optional in the sense that separate adherence to the Protocol by a state, which is already a party to the Covenant, is required in order to enable persons subject to that state's jurisdiction to complain to the Human Rights Committee¹⁶ about alleged violations by that state of its obligations under the Covenant. The Committee (not to be confused with the Human Rights Commission of the United Nations) is a relatively new body of eighteen independent experts, established under the International Covenant on Civil and Political Rights. It is obvious that a state must feel quite confident that its house is in order before it will allow its citizens to refer specific cases to the Human Rights Committee. As of April 15th, 1980, twenty-three states had accepted this procedure, Canada being one of them.¹⁷ There are only seven other Western countries that have adhered to the Protocol, namely Denmark, Finland, Norway, Iceland, Italy, the Netherlands and Sweden. Canada has since 1976 opened the possibility for "persons subject to [Canadian] jurisdiction" to take their case to the Human Rights Committee if they contend that the law in Canada, be it statutory or common, provincial or federal, as applied by the Canadian courts, is in contravention of the rights and freedoms set forth in the Covenant. This important procedure opens the possibility for persons subject to Canada's jurisdiction to take their case one step further after duly exhausting domestic remedies. The existence of this right to "appeal" to the United Nations Human Rights Committee is still largely unknown to Canadian lawyers and the Canadian public

force on March 28th, 1979. The update as of April 15th, 1980 was received from the U.N. Secretariat, Human Rights Division.

¹⁶ Established pursuant to art. 28 of the Covenant. The Committee has one Canadian member: Prof. Walter Tarnopolsky. The role of the Committee is threefold: it reviews the reports from state parties pursuant to art. 40, it deals with inter-state complaints pursuant to arts 41 and 42, and it considers the communications received from individuals under the Optional Protocol.

¹⁷ See the list of twenty-one parties to the Optional Protocol as at Aug. 17th, 1979, in Annex I, Part B, to the (third) Report of the Human Rights Committee, *op. cit.*, footnote 7, at p. 112. The status of the Optional Protocol as at Nov. 30th, 1979 was reported in (1980), 19 Int. Leg. Mat. 267. Iceland, on Nov. 22nd, 1979 became the twenty-second party to the Protocol. Canada acceded to the Optional Protocol and the Covenant at the same time, namely on May 19th, 1976. Therefore, both instruments entered into force for Canada on Aug. 19th, 1976. An update as of April 15th, 1980, received from the U.N. Secretariat, Human Rights Division, states that Nicaragua acceded to the Protocol on March 12th, 1980 and that for Nicaragua the instrument will enter into force on June 12th, 1980.

generally. More lawyers should examine the text of the Covenant to see if their clients' rights and freedoms, as guaranteed by the Covenant, have been violated. Filing a complaint is a very inexpensive legal step to take. There are no costs involved in filing the document with the Secretariat of the Human Rights Committee. The person who files a complaint does not need to be a lawyer; any person can send in such a complaint provided he is the victim of a violation of one of the rights guaranteed by the Covenant. The only cost involved therefore is a thirty-five cent stamp to send the letter by air-mail to the Palais des Nations in Geneva, where the Human Rights Division of the United Nations Secretariat is now located, plus \$1.50 extra if one wants to send the letter by registered mail. Admittedly, some skill is required in drafting a complaint so as to comply with the admissibility criteria set forth in the Protocol itself and the Rules of Procedure of the Human Rights Committee. Even in this respect a lawyer's or individual's task can be facilitated by the standard form that will be supplied by the Secretary of the Human Rights Committee upon request. (The Model Communication has been reproduced in the Annex to this article.) The procedure itself does not involve much expense either: it is entirely in written form. No appearance by the individual or his lawyer before the Human Rights Committee in Geneva or New York is required.

II. Questions of Admissibility and Procedure.

Having received the communication from the individual concerned, the Human Rights Committee will not immediately proceed to examine the merits of the complaint. It will first examine if the criteria for admissibility, laid down in the Protocol, have been met. The Protocol itself of course requires that the complaint concern a state party to the Covenant.¹⁸ The second hurdle, which may constitute a formidable one, is the requirement that domestic remedies be exhausted before a complaint is filed with the Committee.¹⁹ The Protocol itself states that this rule shall not apply "where the application of the remedies is unreasonably prolonged".²⁰ Presumably, the requirement that domestic remedies be exhausted first, will be interpreted in the usual sense applied under international law, namely that a petitioner is not required to fight his way through the domestic courts, if it is clear that this would be ineffective. This will be the case if a rule of Canadian domestic law, as interpreted by the Supreme Court of Canada, is allegedly not in conformity with the provisions of the Covenant. In fact, the only

¹⁸ Art. 1 of the Protocol.

¹⁹ Arts 2 and 5, para. 2(b) of the Protocol.

²⁰ Art. 5, para. 2(b), last sentence.

complaint against Canada currently being examined on its merits by the Committee, was filed by an Indian woman living in New Brunswick, Mrs. Sandra Lovelace, who did not try to fight her case in the Canadian courts. She complained to the United Nations about losing her Indian status by virtue of her marrying a non-Indian. The relevant section of the Indian Act had previously been tested and found by the Supreme Court of Canada to be in conformity with the Canadian Bill of Rights in *Attorney-General of Canada v. Lavell*.²¹

As to the exhaustion of domestic remedies, the Committee in a policy statement made it clear that once the author of a communication states that domestic remedies have been exhausted, the onus is on the state party to demonstrate specifically that this is not the case:

Article 5, paragraph (2) (b), of the Optional Protocol provides that the Committee shall not consider any communication from an individual unless it has ascertained that all available domestic remedies have been exhausted. The Committee considers that this provision should be interpreted and applied in accordance with the generally accepted principles of international law with regard to the exhaustion of domestic remedies as applied in the field of human rights. If the State party concerned disputes the contention of the author of a communication that all available domestic remedies have been exhausted, the State party is required to give details of the effective remedies available to the alleged victim in the particular circumstances of this case. In this connexion, the Committee has deemed insufficient a general description of the rights available to accused persons under the law and a general description of the domestic remedies designed to protect and safeguard these rights.²²

Other factors that will make petitions addressed to the Human Rights Committee inadmissible are: anonymity,²³ if the petition is considered by the Committee to be an abuse of the right of petition or incompatible with the Covenant,²⁴ or if the same matter is being examined under another provision of international investigation or settlement.²⁵ The question of another international inquiry looking into the same case has already given rise to interpretation by the Committee in a policy statement. The problem had arisen whether

²¹ (1974), 38 D.L.R. (3d) 481. See s. 12(1) (b) of the Indian Act, R.S.C., 1970, c.I-6, as am. With respect to Canada it was stated in the Committee's third report, *op. cit.*, footnote 7, para. 454, that by the end of the Committee's seventh session, eight communications had been discontinued or declared inadmissible without referral to the Canadian government, three had been discontinued or declared inadmissible after such referral, two had been transmitted to the Canadian government for further information pending a decision as to admissibility and only one communication had been declared admissible.

As to the *Lovelace* case, see the *Globe and Mail*, Sat., June 14th, 1980, p. 13 ('Indian women's status after marrying whites becomes issue at UN').

²² (Second) Report of the Human Rights Committee, 33 GAOR Supp. 40, para. 586, U.N. Doc. A/33/40 (1978).

²³ Art. 3 of the Protocol.

²⁴ *Ibid.*

²⁵ Art. 5, para. 2(a) of the Protocol.

the examination of the same petition under the general United Nations procedure for the examination of communications from individuals, established under ECOSOC Resolution 1503 (XLVIII), constituted such an examination that would prevent the examination of the same petition under the Protocol.²⁶ In fact, Resolution 1503 (XLVIII), in paragraph 10, makes it clear that the procedure 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". This language could have provided ammunition for those states that would like to eliminate the procedure of Resolution 1503 (XLVIII) but do not wish to become parties to the Optional Protocol. Fortunately, these efforts have been unsuccessful so far. There are good legal grounds for the co-existence of the 1503 procedure and the Optional Protocol. The subject-matter of the two procedures is different: the 1503 procedure is concerned with consistent patterns, not with individual cases. The latter are dealt with under the Protocol. The Human Rights Committee itself has recognized this by holding that the examination of communications under the 1503 procedure is not "another procedure" in the sense of article 5(2) under which "the same matter" is being investigated:

²⁶ In 1970, the Economic and Social Council, by Resolution 1503 (XLVIII), established a general procedure to deal with petitions from individuals. 42 U.N. ECOSOC Supp. 1A, at 8, U.N. Doc. E/4832/Add. 1 (1970). The crucial term in this resolution is "consistent patterns of gross and reliably attested violations of human rights". The procedure is aimed at singling out situations where such a pattern exists.

ECOSOC Resolution 1503 (XLVIII) constituted a reversal of a decision by the Human Rights Commission of 1947 in which it decided that it had no power to take any action concerning these complaints. Commission on Human Rights, Report of the First Session (E/259), para. 22. This decision was endorsed by ECOSOC in Resolution 75(V) of August 5, 1947, 5 ECOSOC, Resolutions, at 20, U.N. Doc. E/573.

Resolution 1503 (XLVIII) sets out a three-step procedure. Petitions are initially dealt with by the Sub-Commission. The Sub-Commission has a mandate to examine these petitions through a working group of no more than five of its members, for a period of no more than ten days once a year, immediately before its annual session. The Working Group is authorized to single out those situations which *appear* to reveal a consistent pattern. These situations are then referred to the full Sub-Commission, which can then determine if a consistent pattern exists on the basis, not only of petitions, but also of other *relevant information*.

If the Sub-Commission decides that a pattern exists, the situation is referred to the Human Rights Commission. The Commission has the option to study the problems itself or to establish an *ad hoc* committee to conduct an inquiry. The *ad hoc* committee of inquiry, however, can only be established with the consent of the state being investigated.

Once the Human Rights Commission has concluded that a consistent pattern exists, it can refer the situation to the Economic and Social Council with recommendations. The ECOSOC can finally make a recommendation addressed to the country concerned.

Article 5, paragraph (2) (a), of the Optional Protocol provides that the Committee shall not consider any communication from an individual "unless it has ascertained that the same matter is not being examined under another procedure of international investigation or settlement". In connexion with the consideration of some of the communications which have been submitted under the Optional Protocol, the Committee has recognized that cases considered by the Inter-American Commission on Human Rights under the instruments governing its functions were under examination in accordance with another procedure of international investigation of settlement within the meaning of article 5, paragraph (2) (a). On the other hand, the Committee has determined that the procedure set up under Economic and Social Council resolution 1503 (XLVIII) does not constitute a procedure of international investigation or settlement within the meaning of article 5, paragraph (2) (a) of the Optional Protocol, since it is concerned with the examination of situations which appear to reveal a consistent pattern of gross violations of human rights and a situation is not "the same matter" as an individual complaint. The Committee has also determined that article 5, paragraph (2) (a), of the Protocol can only relate to procedures implemented by inter-State or intergovernmental organizations on the basis of inter-State or intergovernmental agreements or arrangements. Procedures established by non-government organizations, as for example the procedure of the Inter-Parliamentary Council of the Inter-Parliamentary Union, cannot, therefore, bar the Committee from considering communications submitted to it under the Optional Protocol.²⁷

Another distinction between the two procedures is that under article 1 of the Optional Protocol complaints can only be filed by those persons who are victims of the alleged violation of the Covenant while under the Rules of Admissibility for the 1503 procedure²⁸ a complaint can be filed not only by those who are victims of human rights violations but by "any person or group of

²⁷ *Op. cit.*, footnote 22, para. 152, italics added. On the same question the Committee noticed in its second report, *ibid*, paras 583-585 that art. 5, para. (2) (a) in its Chinese, English, French and Russian versions states that a communication shall not be considered "unless it has ascertained that the same matter is not being examined" under another procedure of international investigation. The Spanish text means that examination under the Protocol may proceed after the Commission has certified that the communication "has not been examined" under another international procedure. The Committee decided that the Spanish version was the result of an editorial oversight and decided to base itself on the other language versions. Accordingly, the Committee decided that it is not precluded from examining a communication submitted under another international procedure if at the time of the decision as to admissibility it has been withdrawn from or is no longer being considered under the other international procedure. In order to co-ordinate the examination of communications under the Protocol with that under other procedures an exchange of information has been established with the Secretariats of the European and Inter-American Conventions of Human Rights.

For a study of the co-existence of the Optional Protocol and the Inter-American system see M.E. Tardu, *The Protocol to the United Nations Covenant and the Inter-American System: A Study of Co-existing Petition Procedures* (1976), 70 Am. J. Int. L. 778.

²⁸ Sub-Commission Res. 1 (XXIV), Rule 2(a), Report of the Twenty-fourth Session of the Sub-Commission for the Prevention of Discrimination and Protection of minorities U.N. Doc. E/CN. 4/1070, at p. 50.

persons who have direct and reliable knowledge of those violations, or non-governmental organizations acting in good faith in accordance with recognized principles of human rights, not resorting to politically motivated stands contrary to the provisions of the Charter of the United Nations and having direct and reliable knowledge of such violations". The harsh provision in article 1 of the Protocol has been mitigated somewhat in rule 90 (1) of the Human Rights Committee's Provisional Rules of Procedure, which provides:²⁹

With a view to reaching a decision on the admissibility of a communication, the Committee shall ascertain: . . . (b) that the individual claims to be a victim of a violation by that State party of any of the rights set forth in the Covenant. Normally, the communication should be submitted by the individual himself or by his representative; the Committee may, however, accept to consider a communication submitted on behalf of an alleged victim when it appears that he is unable to submit the communication himself.

The policy of the Committee was restated in its second report, in which it was made clear that the Committee was willing to relax the requirement of article 1 that the victim himself submit the communication to the Committee. The Committee does not always require the victim to have signed the complaint himself.³⁰ The complainant may act "through a duly appointed representative", for instance his lawyer.³¹ The Committee is even willing to infer such an agency on the basis of circumstances; it stated expressly:³²

The Committee regards a close family connexion as a sufficient link to justify an author acting on behalf of an alleged victim.

The Committee, however, has declined to consider communications presented by others than the alleged victims if no link has been established between the author of the communication and the victim.³³

Through the drafting of rule 90 and the subsequent policy statement in its second report, the Committee has clearly manoeuvred itself into a position from which it can decide on a case by case basis what constitutes a sufficient nexus between the author of the communication and the alleged victim for the petition to be admissible. This approach on the Committee's part is very promising.

III. *The Examination of the Merits as Set Forth in the Protocol.*

Once a petition from an individual is considered admissible, the Committee will bring the complaint to the attention of the state party

²⁹ (First) Report of the Human Rights Committee, 32 GAOR, Supp. 44, at p. 64, U.N. Doc. A/32/44 (1977).

³⁰ Second Report, *op. cit.*, footnote 22, para. 580.

³¹ *Ibid.*

³² *Ibid.*

³³ *Ibid.*

concerned.³⁴ The respondent state must, within six months, "submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by [it]".³⁵ Thereafter, the Committee will consider the petition in a closed meeting,³⁶ "in the light of all written information made available to it by the individual and by the State Party concerned".³⁷ It is remarkable that the one and only procedure for petitions within the United Nations system based on a treaty, does not provide for a hearing of the petitioner and the respondent state. There are a multitude of United Nation bodies, such as the Trusteeship Council, the Fourth Committee of the General Assembly, the General Assembly's Decolonization Committee, the *Ad hoc* Working Groups on southern Africa and Chile, and the Special Committee on Israeli practices in occupied territories, which have all heard witnesses or petitioners. It can therefore safely be said that hearings have become an acceptable method of fact-finding within the United Nations system. These hearings can serve a very useful purpose in "judicializing" and "depoliticizing" a fact-finding process, particularly if both sides are given the opportunity to be heard. This "judicializing" is particularly desirable in a procedure as laid down in the Optional Protocol, which is concerned with a state's violation of the provisions of the Covenant in the petitioner's case only and not with a pattern. Although the absence of a hearing keeps the cost down for the individual petitioner it is unfortunate that the procedure under the Protocol is one based merely on documents. After its deliberations, the Human Rights Committee will "forward its view" to the individual and to the respondent state.³⁸

IV. *The Rules of Procedure of the Human Rights Committee with Respect to Petitions under the Protocol.*

The Human Rights Committee came into being on January 1st, 1977 after elections held by the states parties to the Covenant on September 20th, 1976.³⁹ During 1977 it held two sessions and submitted its first annual report to the General Assembly in the fall.⁴⁰ During that year the Committee adopted rules of procedure, as it was required to do by article 39(2) of the Covenant.⁴¹ Further

³⁴ Art. 4, para. 1 of the Protocol.

³⁵ Art. 4, para. 2 of the Protocol.

³⁶ Art. 5, para. 3 of the Protocol.

³⁷ Art. 5, para. 1 of the Protocol.

³⁸ Art. 5, para. 4 of the Protocol.

³⁹ In accordance with arts 28 to 32 of the Covenant.

⁴⁰ Pursuant to art. 45 of the Covenant.

⁴¹ First Report, *op. cit.*, footnote 29, Annex II. The rules are named "Provisional Rules of Procedure".

rules were adopted in August 1979, dealing with the inter-state complaint procedure.⁴² As part of the rules some important provisions were adopted which refined the examination process for communications.

Under rule 78(2), the Secretary-General was given the authority to seek clarification from the author of a communication in case of doubt as to his wish to have the communication submitted to the Committee under the Protocol. If after correspondence there is still doubt, the rule decides in favour of an examination under the Protocol: "In case there is still doubt as to the wish of the author, the Committee shall be seized of the communication."

Rule 79(1) provides that the Secretariat will prepare lists of the communications received, give a brief summary of their contents and circulate these lists to the members of the Human Rights Committee "at regular intervals". The full text of any communication is available to them upon request.⁴³

The Secretary-General has been authorized under rule 80(1) to seek clarification from an author "concerning the applicability of the Protocol to his communication", in particular regarding:

- (a) The name, address, age and occupation of the author and the verification of his identity;
- (b) The name of the State Party against which the communication is directed;
- (c) The object of the communication;
- (d) The provision or provisions of the Covenant alleged to have been violated;
- (e) The facts of the claim;
- (f) Steps taken by the author to exhaust domestic remedies;
- (g) The extent to which the same matter is being examined under another procedure of international investigation or settlement.

When the information is requested a time-limit can be set by the Secretariat "with a view to avoiding undue delays".⁴⁴ The fact that additional clarification is sought does not preclude inclusion of the communication in the list of summaries of communications prepared under rule 79.

Rule 84 provides when a member of the Committee should disqualify himself:

1. A member shall not take part in the examination of a communication by the Committee:
 - (a) If he has any personal interest in the case; or
 - (b) If he has participated in any capacity in the making of any decision on the case covered by the communication.

⁴² Third Report, *op. cit.*, footnote 7, Annex III.

⁴³ Rule 79(2).

⁴⁴ Rule 80(2).

2. Any question which may arise under paragraph 1 above shall be decided by the Committee.

As to questions of admissibility, the Committee decided in rule 89(1) that one or more Working Groups of a maximum of five members could be established to make recommendations to the Committee regarding the fulfillment of the conditions laid down in articles 1, 2, 3 and 5(2). Working Groups of five members met for a week prior to the Committee's second session in 1977 and the third and fourth sessions in 1978.⁴⁵ Due to lack of budgetary provision this practice was not followed for the fifth session, also held in 1978. However, pursuant to a decision by the Committee one member (Sir Vincent Evans) screened petitions received for a few days prior to the session and made recommendations on them to the Committee.⁴⁶ For the sixth and seventh session in 1979 the Committee continued its practice of examining these communications through a working group.⁴⁷

The Working Group or the Committee itself may through the Secretariat request additional information or observations from either the complainant or the respondent state so as to decide the question of admissibility.⁴⁸ A request of this kind must be accompanied by a statement that the request "does not imply that any decision has been reached on the question of admissibility".⁴⁹ It was decided by the Committee at its fourth session that a decision by the Working Group to seek such additional information need not be placed before the full Committee for approval.⁵⁰ The time-limit set by the Committee for the submission of this information is six weeks.⁵¹

A request for further information or observations addressed to the author of the communication is a matter within the discretion of the Committee. However, unless the Committee declares the petition inadmissible immediately, it is under an obligation to transmit to the respondent state a copy of the communication and to give it an opportunity "to furnish information or observations".⁵² This is a condition precedent for the admissibility of the communication.⁵³

⁴⁵ First Report, *op. cit.*, footnote 29, paras 11 and 148; Second Report, *op. cit.*, footnote 22, paras 8-10.

⁴⁶ Second Report, *ibid.*, para. 11.

⁴⁷ Third Report, *op. cit.*, footnote 7, para. 441.

⁴⁸ Rule 91(1).

⁴⁹ Rule 91(3).

⁵⁰ Second Report, *op. cit.*, footnote 22, para. 588.

⁵¹ By decision of the Committee at its second session. First Report, *op. cit.*, footnote 29, para. 154.

⁵² Rule 91(2).

⁵³ *Ibid.*

In the drafting process of rule 90(2) a question arose as to the meaning of the last sentence of article 5(2) of the Covenant, which reads as follows:

The Committee shall not consider any communication from an individual unless it is ascertained that:

(a) the same matter is not being examined under another procedure of international investigation or settlement;

(b) the individual has exhausted all available domestic remedies. This shall not be the rule where the application of the remedies is unreasonably prolonged.

In the debate opposing views were expressed as to whether the Committee or its Working Group could declare a communication admissible which was also pending under another international procedure because that procedure was unreasonably prolonged.⁵⁴ In other words the question was: did the last sentence apply to the whole of paragraph 2 of article 5 or only to subparagraph (b)? In the debate the argument was made that a United Nations body should not pass judgment on or compete with other international procedures.⁵⁵ This issue was resolved by an official opinion of the legal counsel, who held the view that the last sentence of paragraph 2 of article 5 of the Protocol should be read in conjunction with the whole of the preceding sentence which combined both subparagraphs (a) and (b).⁵⁶ This opinion was based on the legislative history of article 5(2) in the Third Committee of the General Assembly as well as on an argument derived from a typesetting discrepancy in different official languages. The fact that the last sentence appeared on the same line as provision (b) in the original English text was considered by the Legal Counsel to be a typographical error.⁵⁷ Rule 90(2), as adopted, did not clarify the matter but merely restated the effect of article 5(2) of the Protocol:

The Committee shall consider a communication, which is otherwise admissible, whenever the circumstances referred to in article 5(2) of the Protocol apply.

Rule 92(1) requires the Secretariat to inform the author of the communication of a decision that a communication is inadmissible. The same rule applies to the respondent state but only if a copy of the communication had been transmitted to it.

Decisions determining the inadmissibility of petitions under article 5(2) due to non-exhaustion of domestic remedies or concurrent examination of the communication under another international procedure are reversible. The complainant may at a later date supply information that these reasons for inadmissibility no longer apply.⁵⁸

⁵⁴ First Report, *op. cit.*, footnote 29, paras 68-73.

⁵⁵ *Ibid.*, para. 69.

⁵⁶ *Ibid.*, para. 71.

⁵⁷ *Ibid.*, para. 72.

⁵⁸ Rule 92(2).

Before considering the merits of the case the Committee may inform the respondent state "of its views whether interim measures may be desirable, to avoid irreparable damage to the victim of the alleged violation".⁵⁹ This is the equivalent of interim relief in a domestic court, except that the Committee cannot grant a true remedy. Therefore, all it can do is to forward its views that interim measures are desirable.

Once a communication has been declared admissible, the respondent state will be informed of this decision.⁶⁰ In accordance with article 4(2) of the Protocol, the state concerned has to reply within six months "with written explanations or statements clarifying the matter under consideration and the remedy, if any, that may have been taken by that state".⁶¹

The author of the communication will also be informed of a decision declaring his communication admissible.⁶² A copy of the explanation or statements by the respondent state will be transmitted to the author of the communication.⁶³ He may, in turn, submit "any additional written information or observations within such time-limit as the Committee shall decide".⁶⁴ Even at this stage, the Committee may change its mind and declare a communication inadmissible⁶⁵.

The final stage is for the Committee to consider all the written evidence and to formulate its views on the communication.⁶⁶ The Committee may decide to have this work done in a Working Group of not more than five of its members. This Group will then make recommendations to the full Committee.⁶⁷

The Committee's views, when they have been formulated, will be communicated by the Secretariat to the individual and the respondent state.⁶⁸ These views need not be shared by all members of the Committee. Particularly, since pursuant to article 39(2) (b) and rule 51, decisions can be taken by a majority vote, dissenting opinions in the Committee will probably not be rare with respect to

⁵⁹ Rule 86.

⁶⁰ Rule 93(1).

⁶¹ Rule 93(2).

⁶² Rule 93(1).

⁶³ Rule 93(3).

⁶⁴ *Ibid.*

⁶⁵ Rule 93(4), enacted at the third session, Second Report, *op. cit.*, footnote 22, para. 587.

⁶⁶ Rule 94(1), in accordance with art. 5(1) and (4) of the Protocol.

⁶⁷ Rule 94(1).

⁶⁸ Rule 94(2), in accordance with art. 5(4) of the Protocol.

communications considered by the Committee.⁶⁹ Rule 94(3) allows an individual member to express his dissent in a particular case:

Any member of the Committee may request that a summary of his individual opinion shall be appended to the views of the Committee when they are communicated to the individual and to the State party concerned.

V. *What Can be Achieved.*

The Human Rights Committee is not an international court. Therefore, the Committee is in a different position than for instance the European Court of Human Rights, set up under the European Convention for the Protection of Human Rights and Fundamental Freedoms.⁷⁰ This court has decided some spectacular cases. For instance, in April of 1979 the court decided that the House of Lords decision in the contempt of court case of the *Sunday Times* violated the freedom of the press as laid down in the European Convention.⁷¹ After a finding of this type, the country concerned has to bring its national law in conformity with the judgment of the court.⁷² Such a far-reaching result cannot be achieved under the Optional Protocol. The Human Rights Committee can examine the cases brought before it. After hearing both sides through written submissions, all the Protocol allows the Committee to do is "to forward its views to the State Party concerned and to the individual".⁷³ In spite of this weak language in the Protocol, the impact of a finding against the respondent state will be substantial. It will cause the government concerned considerable embarrassment. The Committee so far has made two rulings, in August and October of 1979, against a country under the Optional Protocol and the Covenant. The country concerned was Uruguay. The petition which set into motion the procedure resulting in the Committee's decision of August 1979, was filed on February 15th, 1977 by a Uruguayan national residing in Mexico, on her own behalf and on behalf of her husband, her stepfather and her mother. The views of the Committee in this case were published as an annex to its report to the General Assembly

⁶⁹ Even though the Committee in the First Report, *op. cit.*, footnote 29 para. 32, expressed the view that its methods of work should normally allow for attempts to reach decisions by consensus before voting.

⁷⁰ Reproduced in Louis B. Sohn and Thomas Buergenthal, *Basic Documents on International Protection of Human Rights* (1973), p. 125.

⁷¹ *The Sunday Times v. The United Kingdom* (1979), 2 E.H.R.R. 245, (1979), 18 Int. Leg. Mat. 931. The House of Lords decision is *Attorney-General v. Times Newspapers Ltd.*, [1973] 3 All E.R. 54, rev'ing the C. of A., [1973] 1 All E.R. 815.

⁷² Art. 53 of the European Convention provides as follows: "The High Contracting Parties undertake to abide by the decision of the Court in any case to which they are parties".

⁷³ Art. 5, para. 4 of the Optional Protocol.

submitted in the fall of 1979.⁷⁴ The part of the complaint relating to the petitioner's own detention was ruled inadmissible by the Committee since it related to facts which allegedly occurred prior to the date on which the Covenant entered into force for Uruguay.⁷⁵ The Committee made specific findings with respect to the other persons mentioned in the petition. With regard to her husband the Committee made the following findings of fact:⁷⁶

Luis Maria Bazzano Ambrosini was arrested on 3 April 1975 on the charge of complicity in "assistance to subversive association". Although his arrest had taken place before the coming into force of the International Covenant on Civil and Political Rights and of the Optional Protocol thereto, on 23 March 1976, his detention without trial continued after that date. After being detained for one year he was granted conditional release, but this judicial decision was not respected and the prisoner was taken to an unidentified place, where he was confined and held incommunicado until 7 February 1977. On that date he was tried on the charge of subversive association and remained imprisoned in conditions seriously detrimental to his health. His lawyer twice attempted to obtain his provisional release, but without success.

On the basis of these facts the Committee found violations of a number of provisions in the Covenant, specifically cited by the Committee,⁷⁷ because:

- "he had been detained under conditions seriously detrimental to his health";⁷⁸
- "he was kept in custody in spite of a judicial order of release";⁷⁹
- "he was not brought to trial within a reasonable time and was tried in circumstances in which he was denied the requisite safeguards of [a] fair trial";⁸⁰
- "he was denied any effective remedy to challenge his arrest and detention";⁸¹
- "he was held incommunicado for months and was denied the right to be visited by a family member".⁸²

As to her stepfather the Committee found the following facts:⁸³

José Luis Masera, a professor of mathematics and former Deputy to the National Assembly, was arrested in October 1975 and has remained imprisoned

⁷⁴ The text of the Committee's views can be found in Annex VII to its third report, *op. cit.*, footnote 7, p. 124.

⁷⁵ *Ibid.*, paras 4 and 5.

⁷⁶ *Ibid.*, para. 9(e) (i).

⁷⁷ *Ibid.*, para. 10(i).

⁷⁸ Violations of arts 7 and 10(1) of the Covenant.

⁷⁹ Violation of art. 9(1) of the Covenant.

⁸⁰ Violations of arts 9(3) and 14(1), (2) and (3) of the Covenant.

⁸¹ Violation of art. 9(4) of the Covenant.

⁸² Violation of art. 10(1) of the Covenant.

⁸³ *Op. cit.*, footnote 74, para. 9(e) (ii).

since that date. He was denied the remedy of *habeas corpus*, and another application for remedy made to the Commission on Respect for Human Rights of the Council of State went unanswered. On 15 August 1976 he was tried on charges of "subversive association" and remained in prison. As a result of the maltreatment received, he has suffered permanent injury, as evidenced by the fact that one of his legs is several centimetres shorter than the other. In his double quality as former Deputy and as an accused tried for a political offence, he was deprived of all his political rights."

On the basis of these facts the Committee concluded that violations of a variety of provisions in the Covenant had occurred, because:⁸⁴

- "during his detention he was tortured as a result of which he suffered permanent physical damage";⁸⁵
- "he was not promptly informed of the charges against him";⁸⁶
- "he was not brought to trial within a reasonable time and was tried in circumstances in which he was denied the requisite safeguards of [a] fair trial";⁸⁷
- "he was denied any effective remedy to challenge his arrest and detention";⁸⁸
- "for months he was denied the right to be visited by any family member";⁸⁹
- "unreasonable restrictions on his political rights".⁹⁰

As to the petitioner's mother the Committee found as follows:⁹¹

Martha Valentini de Massera was arrested on 28 January 1976. In September 1976 she was charged with "assistance to subversive association". She was kept in detention and was initially held incommunicado. In November 1976 for the first time a visit was permitted, but thereafter she was again taken to an unknown place of detention. She was tried by a military court and sentenced to three and a half years imprisonment, due to expire on 28 July 1979.

On the basis of these facts, it was concluded that violations of several provisions had taken place:⁹²

- "because she was not promptly informed of the charges brought against her";⁹³

⁸⁴ *Ibid.*, para. 10(ii).

⁸⁵ Violation of arts 7 and 10(1) of the Covenant.

⁸⁶ Violation of art. 9(2) of the Covenant.

⁸⁷ Violations of arts 9(3) and 14(1), (2) and (3) of the Covenant.

⁸⁸ Violation of art. 9(4) of the Covenant.

⁸⁹ Violation of art. 10(1) of the Covenant.

⁹⁰ Violation of art. 25 of the Covenant.

⁹¹ *Op. cit.*, footnote 74, para. 9(3) (iii).

⁹² *Ibid.*, para. 10 (iii).

⁹³ Violation of art. 9(2) of the Covenant.

- “because for months she was held incommunicado and was denied visits by any family member”;⁹⁴
- “because she was tried in circumstances in which she was denied the requisite safeguards of [a] fair trial”.⁹⁵

The Committee stated at the end of its opinion that it was of the view that Uruguay was “under an obligation to take immediate steps to ensure strict observance of the provisions of the Covenant and to provide effective remedies to the victims”.⁹⁶ Thereby the Committee brought its full moral weight to bear on the Government of Uruguay to remedy these violations.

Before the Committee announced its findings against Uruguay, the government of that country, apparently realizing that it had to limit the damage to its national reputation, derogated during the summer of 1979 from certain provisions of the Covenant⁹⁷ under article 4, which provides for such a possibility in times of national emergency. This step, of course, only has legal effect prospectively and cannot undo the findings of the Human Rights Committee. It shows, however, that governments had better not adhere to the Protocol unless they are serious about observing the provisions of the Covenant at home. It also shows that it is dangerous for a government not to reply to the substance of the allegations in the complaint. In this case the Committee accepted the facts as alleged by the petitioner because the Uruguayan government had never commented on the substance of the allegations. It had only raised the procedural objections that the same matter was already being examined by the Inter-American Commission on Human Rights and that none of the alleged victims had exhausted all available domestic remedies.⁹⁸ The Committee ascertained that the cases before the Inter-American Commission had been withdrawn.⁹⁹ As to the exhaustion of domestic remedies, it put the burden on the respondent state to show which further remedies the alleged victims should have pursued.¹⁰⁰ This was in accordance with the Committee’s announced policy in its report of 1978¹⁰¹.

In October 1979, the Committee issued its views on another petition against the government of Uruguay, which alleged denial of

⁹⁴ Violation of art. 10(1) of the Covenant.

⁹⁵ Violations of arts 14(1), (2) and (3) of the Covenant.

⁹⁶ *Op. cit.*, footnote 74, para. 10, last sentence.

⁹⁷ *Ibid.*, para. 65.

⁹⁸ *Ibid.*, para. 4(a) and (b).

⁹⁹ *Ibid.*, para. 5(a).

¹⁰⁰ *Ibid.*, paras 5(b) and 6.

¹⁰¹ Second Report, *op. cit.*, footnote 22, para. 582.

habeas corpus and ill-treatment during detention. It was reported that the findings were the following:¹⁰²

The Committee found that article 9(4) of the Covenant had been violated because the law under which the complainant had been detained did not provide for an effective remedy to challenge the arrest. On the question of ill-treatment the Committee could not find that there had not been ill-treatment and noted that Uruguay had failed to show that it had ensured to the complainant the protection against ill-treatment as required by article 2 of the Covenant. In a case such as this where the senior officials responsible for the alleged act are named, the state party should fully investigate the allegations in accordance with its laws, and general refutations by Uruguay were considered to be insufficient. Six [members] of the Committee went further than this and concluded that in view of the lack of any detailed refutation of the allegations the case of ill-treatment had been established. The six members were the experts from Canada, German Democratic Republic, Jordan, Senegal, Tunisia and Yugoslavia.'

Conclusions

The work of the Human Rights Committee under the Optional Protocol is off to a promising start. The decisions with respect to Uruguay as well as the drafting of the Committee's Rules of Procedure have been encouraging.

Although limited to those states that are parties to the Protocol, the procedure presents the only attempt within the United Nations system to deal with petitions from individuals on a case-by-case basis, in a quasi-judicial manner, and to render an opinion on the merits of each case. This is the best result an individual can obtain within the United Nations system as a result of his petition. Canadian lawyers should therefore take advantage of Canada's adherence to the Protocol and pursue this route after duly exhausting the domestic remedies that are available. A communication under the Protocol gives persons under Canadian jurisdiction the opportunity to have the Canadian legal system tested against the human rights provisions of the International Covenant on Civil and Political Rights. The procedure, as shown, is inexpensive and simple, and should be used much more frequently.

¹⁰² (1979), 23 *The Review*, International Commission of Jurists, December 1979, 26, at p. 29.

Appendix
Model Communication

Communication to:

The Human Rights Committee
c/o Division of Human Rights
United Nations Office
Geneva (Switzerland)

Date:

Submitted for consideration under the Optional Protocol to the
International Covenant on Civil and Political Rights

I. Information Concerning the Author of the Communication.

Name

First Name(s)

Nationality

Profession

Date and place of birth

Present address

Address for exchange of confidential correspondence (if other than present address):

Submitting the communication as:

(a) victim of the violation or violations set forth below

☐*

(b) representative of the alleged victim(s)

☐

(c) other

☐

If the author is submitting the communication as a representative of the alleged victim(s) he should clearly indicate in what capacity he is doing so:

If the author is neither the victim nor his/their representative, he should clearly indicate:

(a) his reasons for acting on behalf of the alleged victim(s)

(b) his reasons for believing that the victim(s) is (are) unable to submit a communication himself (themselves):

(c) his reasons for believing that the victim(s) would approve the author's acting on his (their) behalf:

II. Information Concerning the Alleged Victim(s).
(If other than author)**

Name

First Name(s)

Nationality

Profession

Date and place of birth

Present address or whereabouts

Name

First Name(s)

Nationality

Profession

Date and place of birth

Present address and whereabouts

Name

First Name(s)

Nationality

Profession

Date and place of birth

Present address or whereabouts

Name First Name(s)
Nationality Profession
Date and place of birth
Present address and whereabouts

*III. State Concerned/Articles Violated/Domestic Remedies/
Other International Procedures.*

Name of the State party (country) to the International Covenant and the Optional Protocol against which the communication is directed:

Articles of the International Covenant on Civil and Political Rights allegedly violated:
Steps taken by or on behalf of the alleged victim(s) to exhaust domestic remedies (recourse to the courts or other public authorities, when and with what results — if possible, enclose copies of all relevant judicial or administrative decisions):

If domestic remedies have not been exhausted, explain why:

Has the same matter been submitted for examination under another procedure of international investigation or settlement? If so, when and with what results?

IV. Facts of the Claim.

Detailed description of the facts of the alleged violation or violations (including relevant dates)***

Date:

Author's signature:

*Mark the appropriate box or boxes.

**List each victim individually and add as many pages as necessary to complete the list of victims.

***Add as many pages as needed for this description.
