IILJ International Legal Theory Colloquium Spring 2010

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

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Paper to be discussed on March 10, 2010

The UN Human Rights Committee and International Human Rights Monitoring

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'and now for something completely different'
Monty Python

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

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

[...]

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

a. Legal Framework

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

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

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

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

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

> 4. The Committee shall study the reports submitted by the States Parties to the present Covenant. It shall transmit its reports, and such general comments as it may consider appropriate, to the States Parties. The Committee may also transmit to the Economic and Social Council these comments along with the copies of the reports it has received from States Parties to the present Covenant.
>
> 5. The States Parties to the present Covenant may submit to the Committee observations on any comments that may be made in accordance with paragraph 4 of this article.

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

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

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

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

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

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

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

[43] Article 55 of the UN Charter states: With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:
....
....
c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

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

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

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

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

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

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

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

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

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

As evident from the view of Sir Vincent Evans quoted above, members from the Western countries did not share the narrow view of their colleagues from the Soviet bloc. However, they did not press the issue. The name of the game during this period of the Committee's work was consensus. Hence the lowest common denominator prevailed. The states parties were invited to send representatives to answer questions that arose from their reports, but at the end of the questioning period the Committee refrained from drawing conclusions as to whether the states were complying with their obligations or not. The Committee bowed to the view of the Soviet bloc members that assessing whether states were complying with the Covenant would turn the Committee 'into an instrument for interference in the internal affairs of States.'[44]

c. **Cracks in the Wall of Friendly Relations**

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

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

[44] 231st meeting, page 399.
[45] See Progress report of the Ad Hoc Working Group established under resolution 8 (XXXI) of the Commission on Human Rights to Inquire into the Present Situation of Human Rights in Chile, 4 September 1975, A/10285; Report of the Ad Hoc Working Group established under resolution 8 (XXXI) of the Commission on Human Rights to Inquire into the Present Situation of Human Rights in Chile, 4 February 1976, E/CN.4/1188.

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

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

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

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

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

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

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

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

[48] 231st meeting, p. 401, para. 33.

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

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

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

[50] Ibid., para. 40

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

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

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

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

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

[51] 136th meeting, p. 60, para. 1
[52] Ibid.

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

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

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

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

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

[53] Ibid., p. 61, para. 11
[54] Also see 8th Annual Report of the HRC, YBHRC 1983-1984, vol. II (1992), p. 548; Th. Buergenthal, 'The UN Human Rights Committee', 5 *Max Planck Yearbook of United Nations Law*, (2001), 341, 351.
[55] See, e.g. the final comments after consideration of the periodic reports of Yugoslavia (Yearbook, 1983-1984, p.373-373) and of the GDR (ibid., p. 543).

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

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

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

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

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

[56] 549th meeting, p. 19, para. 43.
[57] See the remarks of Mr, Graefrath (GDR), in general observations on USSR report, 570th meeting, p. 114, para. 48.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

a. Constructive dialogue as a means of monitoring

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[69] http://www2.ohchr.org/english/bodies/hrc/workingmethods.htm

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

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

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