

THE OBLIGATIONS IMPOSED BY THE INTERNATIONAL COVENANTS AND OTHER UNIVERSAL HUMAN RIGHTS TREATIES, INCLUDING THE IMPLEMENTATION BY DOMESTIC COURTS¹

AS OBRIGAÇÕES IMPOSTAS PELOS PACTOS INTERNACIONAIS E OUTROS TRADADOS UNIVERSAIS DE DIREITOS HUMANOS, INCLUINDO A IMPLEMENTAÇÃO POR TRIBUNAIS NACIONAIS

LAS OBLIGACIONES IMPUESTAS POR LOS PACTOS INTERNACIONALES Y OTROS TRATADOS DE DERECHOS HUMANOS, INCLUYENDO LA APLICACIÓN POR LOS TRIBUNALES NACIONALES

LES OBLIGATIONS IMPOSÉES PAR LES PACTES INTERNATIONAUX ET D'AUTRES TRAITÉS UNIVERSELS RELATIF AUX DROITS DE L'HOMME SUR LES ETATS CONTRACTANTS, Y COMPRIS LA MISE EN EEUVRE PAR LES TRIBUNAUX NATIONAUX

Johannes van Aggelen²

ÁREA(S) DO DIREITO: Direito Processual Internacional.

Abstract

The evolution of the United Nations human rights program started twenty years before the General Assembly signed the Covenant on Civil and Political Rights and the one on Economic, Social and Cultural Rights, but the work of the first twenty years left a lasting imprint on the final product of the Covenants. However, the implementation of the Covenants had a different pace. The rights contained in the Civil and Political Rights Covenant can be invoked and enforced immediately, while the rights contained in the other Covenant are to be implemented progressively. This is also evident in the adoption of the Optional Protocols to both Covenants. The Optional Protocol to the Civil and Political Rights Covenant was adopted at the same day as the Covenants, while the Optional Protocol to the Economic, Social and Cultural Covenant took 42 years to mature. This is also because the Committee on Economic, Social and Cultural Rights does not find its origin in the Covenant itself, but within the ECOSOC created in May 1985. It is therefore considered a “quasi-judicial” Committee. The Vienna Convention guides the implementation of the rights contained in the Covenants and the adoption of subsequent human rights treaties, which refine the rights contained in the Covenants, on the Law of Treaties. The obligations of State parties are a trias of obligations, namely to respect, to protect and to fulfill the rights contained in the treaties. Human Rights Committees

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² Professor of international law in Brasília, former senior UN staff member in Geneva, doctor of Civil Law University, McGill, Montreal, Canada. E-mail: <jgcvanaggelen@hotmail.com>.

also have obligations towards state parties such as promoting cooperation among them in the implementation of rights; summarizing the experience gained in the consideration of state reports; stimulating the improvement of reporting procedures through the adoption of General Comments. The obligation of state parties to master the international norms starts with proving an effective solution for alleged violations. It is the realization of international human rights through a State's national legal and institutional system. As far as the hierarchy of rights in the implementation, Brazil accords constitutional status to human rights treaties and consequently requires that constitutional provisions should be interpreted in the light of international human rights law. States are guided by specific general comments in the implementation of civil and political rights. The Human Rights Committee is still considered the "primus inter pares" among the human rights committees. The main problem for State parties to implement such rights remains in the accumulation of state reports. In addition, they should provide a solution respecting the future of the status, form supervising committees and establish the competence of national authorities as well as the members of the human rights committee.

Keywords: International treaty law. International human rights law.

Resumo

A evolução do programa de direitos humanos das Nações Unidas iniciou-se vinte anos antes que a Assembleia Geral assinasse os Acordos de direitos humanos que diziam respeito aos Direitos Civis e Políticos e aos Direitos Econômicos, Sociais e Culturais, mas o trabalho desses primeiros vinte anos deixou um legado duradouro na versão final de tais tratados. Entretanto, a implementação dos Pactos não foi feita ao mesmo tempo. Os direitos contidos no Acordo dos Direitos Civis e Políticos foram implementados de forma imediata, enquanto que a implementação dos Direitos Econômicos, Sociais e Culturais do outro foi feita de modo progressivo. Isso fica evidente na adoção dos Protocolos Opcionais de ambos. O Protocolo Opcional do Acordo dos Direitos Civis e Políticos foi adotado no mesmo dia dos Acordos, enquanto que o Protocolo Opcional do Acordo dos Direitos Econômicos, Sociais e Culturais levou 42 anos para amadurecer. Isso se deve ao fato de que o Comitê dos Direitos Econômicos, Sociais e Culturais não se origina no Acordo em si. Ele foi criado em maio de 1985 pela ECOSOC. Logo, ele é considerado um Comitê "quasi-judicial". A implementação dos direitos contidos nos Acordos e a subsequente adoção dos tratados de direitos humanos que aprimoram os direitos contidos nos Acordos são orientados pela Convenção de Viena no que se refere à Lei de Tratados. Os Estados Signatários devem respeitar, proteger e fazer cumprir tais direitos. Os Comitês de Direitos Humanos têm a obrigação de promover a cooperação entre os estados signatários na implementação de tais direitos. Eles deveriam apontar os pontos principais da experiência adquirida pelos Estados e estimular a melhora dos procedimentos de confecção de relatórios através da adoção de Comentários Gerais. A obrigação dos Estados Signatários em conhecer as normas internacionais começa em dar soluções efetivas para supostas violações. Isso significa o estabelecimento dos direitos humanos internacionais através de um sistema nacional legal e institucional desenvolvido pelo Estado. No que tange a hierarquia dos direitos quando de sua implementação, o Brasil concorda com o status constitucional dos tratados de direitos humanos e exige que eles sejam interpretados conforme o direito internacional de direitos humanos. Os Estados se guiam por comentários feitos na implementação de direitos civis e políticos. O Comitê de Direitos Humanos também é considerado o "primus inter pares" entre os comitês de direitos humanos. O maior problema para os Estados Signatários em tal implementação se refere ao acúmulo de relatórios feitos pelos Estados. Além disso, eles deveriam dar uma solução que respeitasse o futuro do status, a formação de comitês de supervisão, estabelecer a competência das autoridades nacionais bem como dos membros do comitê de direitos humanos.

Palavras-chave: Direito internacional de direitos humanos. Direito internacional dos tratados.

Resumen

La evolución del programa de derechos humanos de las Naciones Unidas se inició veinte años antes de que la Asamblea General firmara los Acuerdos de derechos humanos que se referían a los Derechos Civiles y Políticos y a los Derechos Económicos, Sociales y Culturales, pero el trabajo de esos primeros veinte años dejó un legado duradero en la versión final de tales tratados. Sin embargo, la implementación de los Pactos no se hizo al mismo tiempo. Los derechos contenidos en el Acuerdo de Derechos Civiles y Políticos se implementaron de forma inmediata, mientras que la aplicación de los Derechos Económicos, Sociales y Culturales del otro fue hecha de modo progresivo. Eso es evidente en la adopción de los protocolos opcionales de ambos. El Protocolo Opcional del Acuerdo de Derechos Civiles y Políticos fue adoptado el mismo día de los Acuerdos, mientras que el Protocolo Opcional del Acuerdo de Derechos Económicos, Sociales y Culturales llevó 42 años para madurar. Eso se debe al hecho de que el Comité de los Derechos Económicos, Sociales y Culturales no se origina en el Acuerdo en sí. Fue creado en mayo de 1985 por ECOSOC. Por lo tanto, es considerado un Comité "cuasi-judicial". La aplicación de los derechos contenidos en los Acuerdos y la posterior adopción de los tratados de derechos humanos que mejoran los derechos contenidos en los Acuerdos están orientados por la Convención de Viena en lo que se refiere a la Ley de Tratados. Los Estados Signatarios deben respetar, proteger y hacer cumplir dichos derechos. Los Comités de Derechos Humanos tienen la obligación de promover la cooperación entre los estados signatarios en la implementación de tales derechos. Deben apuntar los puntos principales de la experiencia adquirida por los Estados y estimular la mejora de los procedimientos de elaboración de informes a través de la adopción de Comentarios Generales. La obligación de los Estados Signatarios en conocer las normas internacionales comienza en dar soluciones efectivas para supuestas violaciones. Eso significa el establecimiento de los derechos humanos internacionales a través de un sistema nacional legal e institucional desarrollado por el Estado. En lo que se refiere a la jerarquía de los derechos cuando de su implementación, Brasil concuerda con el status constitucional de los tratados de derechos humanos y exige que sean interpretados conforme al derecho internacional de derechos humanos. Los Estados se guían por comentarios hechos en la implementación de derechos civiles y políticos. El Comité de Derechos Humanos también es considerado el "primus inter pares" entre los comités de derechos humanos. El mayor problema para los Estados Signatarios en dicha implementación se refiere a la acumulación de informes hechos por los Estados. Además, deberían dar una solución que respetara el futuro del estatus, la formación de comités de supervisión, establecer la competencia de las autoridades nacionales, así como de los miembros del comité de derechos humanos.

Palabras clave: Derecho internacional de derechos humanos. Derecho internacional de los Tratados.

Resumé

L'évolution du programme des droits de l'homme des Nations Unies commença vingt ans avant l'adoption des deux pactes des droits de l'homme. La mise en oeuvre du pacte civil et politique était immédiate, mais l'implémentation du pacte des droits économiques, sociaux et culturels prenait beaucoup plus de temps dû la réalisation progressive des droits. La création du Comité des droits économiques, sociaux et culturels ne figure pas dans le pacte, comme prévu pour le Comité des droits de l'homme; le Comité est considéré comme un comité "quasi-

judicial". La mise en oeuvre par les états est guidé par la Convention de Vienne sur les traités. Les Comités ont l'obligation de promouvoir la coopération entre les états partis, utiliser leur expérience pendant la considérations des rapports des états et stimuler à améliorer la procédure através de l'adoption des observations générales. Les états ont l'obligation de fournir des recours efficaces aux individus contre une violation présumé des droits de l'homme. Le Brésil donne status constitutionnel aux traités des droits de l'homme et exige que les droits constitutionnels sont interprétés conform le droits de l'homme international. Le problème le plus important pour les états reste le nombre de reports à presenter, la forme et compositions des comités dans l'avenir et la compétence des autorités nationaux comme la compétence des membres des comités.

Paroles clé: droits international des droits de l'homme; droit international des traités.

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INTRODUCTION

1. The year 2016 marked the 50th anniversary of two Covenants³, considered the bedrock of the international human rights treaty system, as subsequent treaties generally refined rights contained in them. The history of the drafting of the two Covenants was greatly influenced by the Cold War and the different conceptions of the nature and essence of human rights. The initial idea of bringing the two sets of rights together in one document appeared untenable and the

² International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights, adopted by the General Assembly on December 16, 1966 by resolution 2200 A (XXI); see in this connection Human Rights Council resolution HRC/RES/29/1 adopted on 2 July 2015, marking the 50th anniversary of the Covenants, henceforth referred to as the Council.

UN General Assembly, in early 1952, decided to embark on two Covenants,⁴ the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁵

2. Civil and political rights could be considered as law to be implemented immediately while economic, social and cultural rights are understood in a more flexible way, as expressed in article 2(1) of the ICESCR: "Each State party to the present Covenant undertakes to take steps [...] with a view to achieving progressively the full realization of the rights recognized."

3. The clearest proof of this assessment is that while the first optional protocol to the ICCPR, giving the Human Rights Committee the right to consider individual petitions, was adopted on the same day, but it took 42 more years for the General Assembly to adopt an optional protocol to the ICESCR.⁶

4. The optional protocol was opened for signature and ratification on September 24, 2009 and entered into force on May 5, 2013. At its 51st session, the CESCR⁷ established a working group to consider communications. Nine communications have been registered up to the present time, two views have been adopted and seven have been declared inadmissible.⁸ The main difference, and at the same time the major stumbling block in the elaboration of the protocol, is that optional protocols to other human rights treaties are centered on individual petitions, while article 2 of this protocol provides that "communications may be submitted by or on behalf of individuals or groups of individuals". In addition, if a communication is "on behalf" of a victim, it must be with his or her consent, unless the authors can justify acting on their own behalf without such consent.

I INITIAL DIFFERENCE IN IMPLEMENTATION

5. Although the ICESCR, after ratification by 35 states, entered into force on January 3, 1976, two and a half months before the ICCPR on March 23, 1976, its

³ General Assembly Res. 543(VI) 4 February 1952, GAOR, 6th Session, Supp., paras. 20, 36.

⁵ Henceforth ICCPR and ICESCR, respectively.

⁶ General Assembly Resolution 63/117, 10 December 2008; see Catarina de Albuquerque, "Chronicle of an Announced Birth: The Coming Into Life of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: the Missing Piece of the International Bill of Human Rights", *Human Rights Quarterly* 32 (2010), 144-178.

⁷ The Committee under the ICESCR.

⁸ Communication 1/2013, Doc. E/2015/22; E/C.12/2014/3, para. 66; E/C.12/57/D1/2013; communication. 2/2014; E/C.12/55/D2/2014

process of implementation continued to suffer from the difference in perceptions between East and West. The Human Rights Committee,⁹ established by article 28 ICCPR, composed of individual experts, could start its work almost immediately in accordance with article 40(4) and its subsequent adopted rules of procedure¹⁰. Its first session took place on March 21, 1977 and the 120th session took place in July 2017.

6. The implementation of the ICESCR started in 1978 when its parent organ, ECOSOC, established a Sessional Working Group of Governmental Experts "for the purpose of assisting the Council in the consideration of reports submitted by states parties to the Covenant."¹¹ Unfortunately, this working group did not do justice to the status of the Covenant. Scrutiny of state reports did not meet legal standards and the working group lacked efficiency and independence. In May 1985, the ECOSOC decided to convert the working group into a human rights treaty body, composed of independent experts.¹²

7. In view of the fact that this committee did not find its origin in the treaty, it is considered as a quasi-judicial treaty body, although in practice it functions as a normal one.

8. The CESCR held its inaugural session on March 9, 1987 and has up to now held 61 sessions. State reports are considered under articles 16 and 17 of the Covenant and its subsequent rules of procedure.¹³

II GENERAL APPROACHES TO IMPLEMENTATION

9. There is no doubt that the UN human rights treaties are subject to the general rules of interpretation found in the Vienna Convention on the Law of Treaties, articles 27-33.¹⁴ The individual complaint procedures under the Covenants and the

⁹ Henceforth the "committee"; see for a general overview D. McGoldrick: "The Human Rights Committee: Its Role in the Development of the International covenant on civil and Political Rights", Oxford, Clarendon Press, 1994, and Manfred Nowak: "U.N. Covenant on Civil and Political Rights: CCPR Commentary, 2nd ed., Kehl (N.P.Engel Publisher), 2005.

¹⁰ Its first session took place on 21 March 1977. The latest revision of its rules of procedure was adopted at its 103rd session in October 2011, Doc. CCPR/C/3 Rev. 10.

¹¹ ECOSOC Resolution, 1978/10, p. 1.

¹² ECOSOC Resolution 1985/17, 28 May 1985, ECOSOC Reports, 1985, Supp. 1, pp.15-16

¹³ Rules of procedure adopted at its third session in 1989, Doc. E/C 12/1990/4/Rev. 1; the rules of procedure for the Optional Protocol were adopted at its 49th session in October 2012, Doc. E/C 12/49/3. The Optional Protocol entered into force on 5 May 2013.

¹⁴ Henceforth VCLT; see also, e.g., the General Comment, henceforth GC, adopted by the Committee on the Rights of the Child at its 34th session in October 2003, Doc. CRC/GC/2003/5, paras. 14-15, with respect to reservations to the Convention; see also article 51(2) CRC.

complaint procedures under other human rights treaties¹⁵ also fall under the general rules of interpretation as they were already recognized in an early stage by the Human Rights Committee in the case *Alberta Union versus Canada*.¹⁶ One can also find support in the *Velasquez-Rodriguez* case handed down by the Inter-American Court of Human Rights in 1988 where the Court stated: "under international law the state is responsible for the acts of its agents undertaken in their individual capacity or for their omissions".¹⁷

10. A related question is how one perceives the obligations in the two Covenants. In the past, the ICCPR was referred to as containing in general negative obligations¹⁸ as State parties are obliged not to interfere in the enjoyment of the human rights of those under their jurisdiction, while the ICESCR was referred to as containing positive obligations for state parties. However, in practice one might call it a "trias of state obligations", namely the obligation to respect, the obligation to protect and the obligation to fulfill the human rights through positive legislative, administrative, judicial and practical measures. State reporting practices under the two Covenants and under the other eight treaty bodies currently operating, demonstrate that rights can only be guaranteed through a combination of negative as well as positive state obligations.

11. General Comment (GC) 1 adopted by the Committee on reporting obligations briefly noted that only a small number of states had submitted their reports on time. This general comment foreshadowed a process, which in time became cumbersome to resolve when it stated, "States should pay immediate attention to their reporting obligations since the proper preparation of a report, which covers many civil and political rights, does necessarily require time".¹⁹ In view of the

¹⁵ The Optional Protocol procedure under ICESCR is still in its infant stage as consideration of communications only started at its 53rd session in 2014. Until now, nine communications have been registered, two views adopted and seven have been declared inadmissible and one has been declared admissible, see footnote 7 above.

¹⁶ Communication 118/1982, para. 6 (3). The petition was nevertheless considered inadmissible *ratione materiae*, because the right to strike was not protected by ICCPR, but rather by ICESCR. Five members disagreed and submitted dissenting opinions, arguing that the right to strike could fall under article 22 (2) of the ICCPR.

¹⁷ Series C No.4, para. 188.

¹⁸ In this sense also C. Tomuschat, *International Covenant on Civil and Political Rights*(1966), *Encyclopedia of Public International Law*, vol.IV, pp.639-650, at p.643, para.15, Oxford (OUP) 2012.

¹⁹ GC 1, adopted 28 July 1981, 13th session; see the words in para. 2 (1) "to respect and to ensure within its territory and subject to as jurisdiction"; the Convention on the Rights of Migrant Workers and their Families (CMW) states in article 7 "to respect and to ensure within their territory or subject to their jurisdiction" (emphasis added). The convention on the Rights of the Child (CRC) provides that "states parties shall respect and ensure the rights set forth in the present convention [...] within their jurisdiction without discrimination of any kind"; see also CERD General Recommendation

fact that some initial reports were short and general in nature, the committee found that, it had the obligation to elaborate general guidelines regarding their form and content. The committee considered that the reporting obligations embraced the requirement by article 2 of the Covenant to adopt such legislative or other measures. In addition, the practices and decisions of courts and other organs of the state party are able to show how difficult the actual implementation is, and the enjoyment of the rights recognized in the Covenant.²⁰

12. Regarding implementation at the national level, the committee drew the attention of states parties to the fact that the obligations of the Covenant were not confined to the respect of human rights, but that state parties have also undertaken to ensure the enjoyment of these rights to all individuals under its jurisdiction, which is an obligation to fulfill.²¹

13. CESCR adopted its GC 1 on reporting obligations by states parties in 1989.²² It contains seven objectives for states parties to attain in the gradual realization of the rights. It is to ensure that the comprehensive review is undertaken with respect to national legislation, administrative rules and procedures and practices in an effort to ensure the fullest possible conformity with the Covenant. This general comment was an effort to demonstrate that the ideas of general comments should not be seen as threatening to states. Consequently, this first GC on the purpose of reporting was relatively abstract and academic. The committee subsequently adopted GC 3 on the nature of states parties' obligations under article 2 paragraph 1 of the Covenant.²³ It describes the nature of the general legal obligations to be undertaken by state parties as obligations of conduct and obligations of result. It requested states parties to report not only on all the measures taken, but also on the basis on which they are considered the most "appropriate" under the circumstances. Reference in this connection is made, in addition to legislation, to judicial remedies with respect to rights, which could be considered justiciable²⁴.

14. Other treaties have jurisdictional rules only in respect of specific rights or obligations arising under the treaty, instead of the single applicability of rules for the treaty as a whole. CERD and CAT²⁵ are appropriate examples of this type.

No.23 concerning indigenous peoples of 18 August 1997, para. 4, where state parties are requested to ensure the rights pertinent to that community.

²⁰ GC 2 adopted at the same meeting.

²¹ GC 3 adopted at the same meeting.

²² GC 1 adopted at its third meeting in 1989.

²³ Adopted at its next session in February 1990.

²⁴ *Ibid.*, para. 5.

²⁵ The committees under ICERD and ICAT. CERD in article 3 provides "states parties particularly condemn [...] and undertake to prevent [...] in territories under their jurisdiction. ICAT contains no

15. These obligations of states have been clearly articulated in a general recommendation by the Committee on the Elimination of All Forms of Discrimination against Women²⁶. It stated that the obligation to respect requires that state parties refrain from making laws, policies, regulations, programs, administrative procedures and institutional structures that directly or indirectly result in the denial of the equal enjoyment of women of their civil, political, economic, social and cultural rights.

16. The obligation to protect requires that state parties protect women from discrimination by private actors and take steps directly aimed at eliminating customary and all other practices that prejudice and perpetuate the notion of inferiority or superiority of either of the sexes, and of stereotyped roles for men and women.

17. The obligation to fulfill requires that state parties take a wider variety of steps to ensure that women and men enjoy equal rights de jure and de facto, including, where appropriate, the adoption of temporary measures in line with article 4 (1) CEDAW. This entails obligations of means or conduct and obligations of result.²⁷ However, that convention does not have a jurisdiction clause limiting its scope of application, yet article 2 of the optional protocol mentions that communications may be submitted by individuals or "on behalf of individuals, or groups of individuals" under the jurisdiction of the state party". Consequently, with regard to this particular treaty, its scope of obligation is not limited by a jurisdiction clause, but the right to individual petition on the treaty is. It also stated that these obligations do not cease in periods of armed conflict or in states of emergency resulting from political events or natural disasters.²⁸

18. These criteria have also been adopted by the Committee in GC 31 on the nature of general legal obligation imposed on state parties to the Covenant, adopted

less than nine jurisdiction clauses with the obligation of a contracting State confined to "any territory under its jurisdiction".

²⁶ Henceforth CEDAW, see footnote 26 infra.

²⁷ General Recommendation 28 on the obligations of State parties, Doc. CEDAW/C/GC.28, adopted at its 47th session in October 2010, para.9; see also the general comment of the committee on the Rights of Persons with Disabilities, adopted at its 11th session in March/April 2014, Doc. cRPD/c/Gc,1, para. 24, where it reads: "States parties have the obligation to respect, protect and fulfill the rights of persons with disability". In addition, in GC 16 adopted by the CRC in 2013 on states obligations regarding the impact of the business sector on children's rights, the committee reported that under international human rights law there exist three obligations on states parties: to respect, to protect and to fulfill human rights. In addition, states have an obligation to provide effective remedies and reparation for violations of the rights of the child, including by third parties such as business enterprises, Doc. CRC/C/GC/16, 17 April 2013.

²⁸ Doc. CEDAW/C/GC/28 at para. 11.

at its 80th session in March 2004, replacing GC 3 of July 1981²⁹. The committee subsequently adopted GC 33 on the obligations of states parties under the optional protocol.³⁰ Pursuant to views under article 5 paragraph 4, the state party is under the obligation to provide an effective remedy and other measures taken within 180 days. The character of the views by the committee is further determined by the obligation of states parties to act in good faith. Most states parties do not have specific enabling legislation to transform the views into the domestic legal order. States parties, however, must use whatever means within their power to give effect to the view. Some states reject the committee's views and the committee tends to have continued dialogue with the state party in order to convince it to implement its views.³¹

19. On rare occasions, the Committee has to admit a breach of state party's obligations under the protocol. A glaring example can be found in the case *Ashby v. Trinidad and Tobago*, where the state party ignored interim measures of protection and executed the prisoner.³² In addition, the Committee adopted a general comment on non-discrimination practices, which should be read together with GC 31.³³ The CESCR also adopted a GC on non-discrimination practices in the implementation of its Covenant.³⁴

20. Concern has been expressed that, despite the clear intention not to imply any notion of relative value by separating the Covenants, it has nevertheless reinforced claims as to the hierarchical ascendance of civil and political rights. During the first years of the work of the CESCR, its first chairperson Philip Alston lamented that economic, social and cultural rights in practice still were largely ignored.³⁵ This

²⁹ Adopted 29 March 2004, where it reads in para. 8: 'However, the positive obligations on states parties to ensure Covenant rights will only be fully discharged if individuals are protected by the states, not just against violations of Covenant rights by its agents [...]'.

³⁰ Adopted at its 94th session in October 2008, see in particular paras. 10, 14-15, 18 and 20.

³¹ In many cases, however, the state party does offer a remedy to victims and consider it a positive obligation towards compliance with the optional protocol; see e.g. communication 163/1983, *Herrera Rubio v. Colombia*, where the Committee in its views stated that the state party was under the obligation in accordance with the provisions of article 2 of the Covenant "to take effective measures to remedy the violation and to ensure that similar violations do not occur in the future". Views of 2 November 1987, para. 12 and the state party followed suit. See also the death row cases, communication 232/1987, *Daniel Pinto v. Trinidad and Tobago*, para. 13 (2), and *Carlton Reid v. Jamaica*, communication 250/1987, para. 12 (2), where two prisoners had been sentenced to death under an irregular procedure and were subsequently released.

³² Communication 580/1994, HRC 2002 Report, vol. II, Annex IX, Section A para. 10 (9) and 10 (10).

³³ General Comment 18, adopted in November 1989.

³⁴ General Comment 20, adopted in July 2009.

³⁵ See his contribution to the second world conference on human rights entitled: "The Importance of the Interplay between Economic, Social and cultural Rights and Civil and Political Rights", in UN

concern was also expressed in a statement by the Committee itself to the Second World Conference on Human Rights.³⁶

21. The notion that civil and political rights are considered first-generation rights and economic, social and cultural rights second-generation rights was in the early 80s, complemented by so-called third-generation solidarity rights, a concept championed by Karel Vasak. He argued that some gaps and vagueness in the implementation of the two sets of rights needed another category of rights. However, the myth of categorizing human rights was already discarded when the General Assembly adopted a resolution stating that all human rights are universal, interdependent and indivisible.³⁷ Philip Alston dismissed categorically this unnecessary categorization of Human rights.³⁸

III OBLIGATIONS OF HUMAN RIGHTS COMMITTEES TOWARDS STATE PARTIES

22. Committees deploy four principal activities: Examination of state party reports, adjudication of individual complaints, follow-up procedures and interpretation and progressive development of the provisions of the Covenants and other human rights conventions, called general comments. Originally, general comments were framed as part of the reporting procedure established by article 40 ICCPR.³⁹

23. Christian Tomuschat, who served on the Human Rights Committee during its first decade of operation, considered that general comments emerged as the constructive outcome of a confrontation that took place in the committee over the correct interpretation of article 40 (4) ICCPR. Seen originally as some kind of replacement for a proper assessment of state reports, general comments soon guided states with respect to problems arising out of implementation of the Covenant.⁴⁰ The committee itself in a statement on its duties under article 40

Doc. A/CONF.157/PC/66/Add.1, pp.25-26; see for a more optimistic view M. Abram, "Human Rights and the United Nations: Past as Prologue", Harvard Human Rights Journal 4 (1991), 69.

³⁶ UN Doc. E/1993/22, p. 83 para. 5.

³⁷ General Assembly Resolution 32/130, adopted 16 December 1977; see also paragraph 7 of the preamble to Council Resolution 29/1, referred to in footnote 1 above.

³⁸ P. Alston, "A Third Generation of Solidarity Rights: Progressive Development or Obfuscation of International Human Rights Law", Netherlands International Law Review 29 (1982), 307-322.

³⁹ I. Boerefijn, *The Reporting Procedure under the Covenant on civil and Political Rights*, Antwerp (Intersentia) 1999, especially chapter XIV, General Comments, pp. 285-302.

⁴⁰ C. Tomuschat, *Human Rights: Between idealism and Realism*, 2nd ed. Oxford (OUP), p. 189. See also Philip Alston, "The Historical Origins of the concept of General Comments in Human Rights

specified that in formulating general comments it would be guided by the following principles:

- they should promote cooperation between states parties in the implementation of the ICCPR,
- they should summarize the experience the committee has gained in considering state reports,
- they should draw the attention of states parties to matters relating to the improvement of the reporting procedure and the implementation of the ICCPR and
- they should stimulate activities of states parties and international organizations in the promotion of protection of human rights.⁴¹

24. These criteria have later, on *grosso modo*, been followed by CESCR and other human rights committees.

25. An important assistance given to state parties in their obligations to implement treaties have been provided by the so-called "meetings of chairpersons of treaty bodies." The ongoing attempts to reform the treaty body system, in my opinion, also have a positive impact on the performance of states to carry out their obligations under the respective treaties.

26. In this connection, the study by the ILA Committee on international Human Rights Law and Practice, which was entrusted in 2000 with a study on the impact of findings of the United Nations human rights treaty bodies, should be briefly discussed. The interim report presented in New Delhi, requested the committee to discuss in its final report inter alia the use of a treaty body output by national courts and tribunals as well as international courts and tribunals. It also presented illustrative examples of a treaty body output by other courts and tribunals. A subsequent expert meeting in Turku recommended, in addition, that the final report should consider how treaty body outputs would fit into the traditional approaches and sources for the interpretation of treaties as well as the implementation of a treaty body output in individual cases and their increased use by international and national bodies.⁴²

Law", in *The International Legal System in Quest of Equity and Universality*, Liber Amicorum Georges Abi-Saab, L. Boisson de Chazournes and V. Gowland-Debbas eds, Leiden (BOI) 2001, pp. 763-776, and my book review in *Canadian Yearbook of International Law* 2001, 621-637, at 636-637.

⁴¹ Statement of 30 October 1980, Report of the Human Rights Committee, Doc. A/36/40 Supp., p.101.

⁴² Final Report presented to the Berlin Conference in 2004, paras 1-7.

27. As far as the status of general comments/recommendations and decisions of treaty bodies was concerned, many national courts noted that treaty body findings are relevant and useful. However, there was no obligation to follow treaty bodies interpretations, even where there was a view expressed on a specific case, because the treaty bodies are not courts and not in themselves formerly binding interpretations of the treaty.⁴³ Nevertheless, the Human Rights Committee and the Committee against Torture on many occasions have stated that the legal norms contained in the treaty bodies are binding obligations on states parties. These views are more than mere recommendations, which cannot be readily disregarded, simply because the state party disagreed with the committees' interpretations.

28. Whether treaty interpretations could be considered subsequent practice in the application of the treaty according to article 31 (3) or a means of supplementary means of interpretation pursuant to article 32 VCLT, one may refer to replies of states parties to the findings of the committees in order to answer this question in the positive. In addition, States frequently refer to case law in their submissions to treaty bodies under various complaint procedures. It includes even the international Court of Justice where in their oral proceedings before the court in the La Grand case, they cited the jurisprudence of the human rights committee on procedural guarantees in a fair trial and the right to life.⁴⁴ In turn, 1CJ judges also refer often to jurisprudence of the human rights committee.⁴⁵

⁴³ *Ibid.*, paras.8-16. A remarkable example can be found in the case Ahani v. Canada (Atty. Gen) where in 2002 the Court of Appeal's Judge Laskin, who later sat on the Canadian Supreme Court, commented on the status of the ICCPR and its optional protocol. The judge reported that Canada in signing the Optional Protocol had not agreed to be bound by the final views of the Committee, nor did it even agree that it would stay its own domestic procedures until the Committee had given its views. He concluded therefore that neither the Committee's views nor its interim measures were binding on Canada as a matter of international law, much less as a matter of domestic law. In other words to convert a non-binding request in a protocol which had never been part of Canadian law, into a binding obligation enforceable in Canada by Canadian courts, would be contrary to principles of fundamental justice. (2002)58 OR 3d, 107, Ontario Reports, LEXIS38, paras.32-33. Mr. Ahani subsequently filed a complaint with the Committee, communication 1051/2002. In its views adopted on 29 March 2004, during its 80th session, the Committee found inter alia that the deportation of the petitioner back to Iran violated article 13. The state party had failed to provide him with the required procedural protection as the state party did not have compelling reasons of national security to justify expulsion; HRC 2004 Report vol. II, Annex IX, Section. BB, paras. 10.5-10.8.

⁴⁴ La Grand Case (Germany v. United States of America,) oral pleadings of 13 November 2000.

⁴⁵ For instance former president of the ICJ Rosalyn Higgins, who was also a member of the Committee from 1984-1995, in many proceedings refers to treaty bodies views. See also ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Rep. 2004, paras. 109-112 and 136, where the Court referred to case law of the Human Rights Committee, including concluding observations and GC 27.

29. Despite the fact that states parties are required to implement decisions in good faith (art.26 VCLT), some countries face difficulties in implementation, irrespective of whether the state party considers the norms self-executing or not. There appeared to be relatively few countries where formal procedures adopted by legislation give effect to treaty body decisions or in which constitutional provisions can be used in case the remedy cannot be provided by administrative measures. This may even be so in countries where treaties are directly enforceable as domestic law. However, a positive dialogue between the committees and state parties national courts may result in the adaptation of national law to conform to the Covenant. However, the status of the treaty bodies themselves and the status of the decisions as not being legally binding in formal terms could contribute to the difficulty to implement the decision at the national level.⁴⁶

30. The ILA committee's final report's conclusions stated inter alia: while national courts have generally not been prepared to accept to be formerly bound by Committees' interpretations of treaty provisions, most states parties agreed that they should be given considerable weight in the case of violations. The views of the Human Rights Committee would continue to be the predominant source. In countries with common law jurisdictions, subsequent adopted bills of rights referring to provisions of the Covenants and public awareness of treaty reporting procedures could also have a positive impact before the courts and other national institutions.⁴⁷ The recommendations reflected most of the issues discussed in the previous section of the article.⁴⁸

IV THE OBLIGATIONS OF STATES PARTIES AND THE DOMESTICATION OF THE INTERNATIONAL NORMS

31. The primary obligation of the States to implement human rights law is reflected in the right to an effective remedy ordered by a human rights treaty body after the exhaustion of local remedies⁴⁹, including in cases of violation of a human

⁴⁶ See Doc. HRI/Mc/2015/2 of 13 April 2015 (Implementation by treaty bodies of the conclusions and recommendations of the treaty body chairpersons at their 26 meeting in the framework of General Assembly resolution 68/268, note by the secretariat), at paras. 17-26 and the final report at paras. 15-43, giving many examples of domestic implementation and their difficulties, of mainly the views by the Committee under the Optional Protocol procedure.

⁴⁷ ILA Final Report (footnote 41), paras. 175-182.

⁴⁸ *Ibid.*, para.184.

⁴⁹ The reference book on the issue, even after more than 30 years, remains the doctoral thesis by current ID judge Antonio Cançado Trindade defended on 28 November 1977 at

right under a communication procedure⁵⁰. It can be described as the realization of international human rights through a State's national legal and institutional system. Remedies proposed by human rights bodies also fill a gap when domestic mechanisms fail or prove insufficient, despite the fact that translating the international human rights norms into domestic law and practice continues to be the central challenge of international human rights law.

32. For that reason, state reporting remains the bedrock of the system. The ICCPR provides that states parties must report "on the measures they have adopted which give effect to the rights recognized therein and on the progress made in the enjoyment of those rights. ICESCR, CAT, CRC and their optional protocols have similar provisions. CEDAW (art.18), ICERD (art.9) and CMW (art.73) require states to report on the legislative, judicial, administrative or other measures they have adopted to give effect to the provisions of the conventions.

33. Initial reports are due one year after the entry into force of the treaty for the reporting state. The exceptions are CRC and its protocols as well as CRPD for which the period is two years. With respect to ICESCR, ECOSOC resolution 1988/4 provided that initial reports were due within two years of entry into force of the Covenant.⁵¹ Regarding periodic reports, the human rights committee initially established a timeframe of five years, but subsequently, when it started to adopt concluding observations, it indicated when the next report was due. Other conventions require periodic reports within a fixed time frame.⁵²

34. The non-reporting states remain a serious concern as under the conventions themselves there is no express authority to monitor state compliance. The treaty bodies have developed practices in this respect because of their "implied powers"⁵³. There is, however, one exception. Under article 36 (2) CRPD, its

Cambridge University law school and subsequently published under the title *The Application of the Rule of Exhaustion of Local Remedies in International Law*, Cambridge (CUP) 1983.

⁵⁰ In accordance with the *adagium* "ubi ius ibi remedium est", see Dinah Shelton, "Human Rights, Remedies", *Encyclopedia Public International Law*, vol.V, pp.1097-1104, esp. paras.1-12 and 19.

⁵¹ ESCOR 1988, supp. 1, at 8, 24 May 1988.

⁵² ICERD: two years; CEDAW, CAT, CRPD: four years; CRC and ICESCR, CMW: five years; but over the years, the relevant committee requests the next submission of a report during the discussion.

⁵³ See ICJ *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, ICJ Reports, 1949, 174-188, at 182; *Certain Expenses of the United Nations*, Advisory Opinion, ICJ Reports 1962, 151-168, at 167-168 and the cited jurisprudence. It might be worth to note that, in the year 2000, the Human Rights Committee adopted a procedure where it decided to draw up

committee is authorized to examine the situation in the state party in the absence of report.

35. With regard to long overdue reports, I would like to recall that CERD, CESCRC and the Human Rights Committee had decided to rely on previous concluding observations in those circumstances. And committees established by younger conventions, such as CRC, CMW and CRPD are authorized to request written information from specialized agencies and other bodies concerned on matters falling within the scope of their activities in order to be as well informed as possible during the consideration of a state party report.

36. Domestic implementation has also become more relevant as international human rights law itself has matured. It is a continuing process as human rights law is not static but develops as values in society change. Under general international law, there is no duty to incorporate or transform an international norm into domestic law, unless explicitly or implicitly provided for. Although states according to article 27 VCLT cannot invoke their internal legal system for a failure to perform their international obligations, they are free to choose the means of ensuring compliance through the concepts of monism or dualism.

37. As a rule, in monist countries treaties become directly part of domestic law upon ratification, while in dualist countries an additional legal act of transforming the international norm into the domestic system is necessary. Once international standards have become part of domestic law, the question arises whether the right is considered sufficiently precise that it can be directly invoked without further legislation, i.e. whether the norm is self-executing.⁵⁴ This question arose in particular during the discussion of the fourth report submitted by the United States under ICCPR in 2012.

38. After discussion of this report⁵⁵, the committee noted in its concluding observations, regarding the applicability of the Covenant at the national level, "it regrets that the state party continues to maintain the position that the Covenant does

provisional concluding observations regarding non-reporting states, which were subsequently sent to the state party.

⁵⁴ See A. Bleckmann, "Self -Executing Treaty Provisions", in Encyclopedia of Public International Law, vol. IV, pp. 374-377 Amsterdam (Elsevier),2000; generally Jordan Paust, "Self-Executing Treaties", A.J.I.L. 82 (1988), 760 et seq.; David Sloss, "The Domestication of International Human Rights, Non-Self-Executing Declarations and Human Rights Treaties, Yale Journal of International Law 24 (1999), 129 et seq.

⁵⁵ Doc. CCPR/C/USA/4 and Corr.1, 22 May 2012.

not apply with respect to individuals under its jurisdiction. But outside its territory, despite the interpretation to the contrary of article 2, paragraph 1, supported by the committee's established jurisprudence, the jurisprudence of the international Court of Justice and state practice".

39. The committee further noted that the state party has only limited avenues to ensure that state and local governments respect and implement the Covenant and that its provisions have been declared non-self-executing at the time of ratification. It recommended to the state party, taking into account the latter reiteration that the provisions of the Covenant are non-self-executing to ensure that effective remedies are available for violations of the Covenant. It includes those that do not, at the same time, constitute violations of the domestic law of the United States, and undertake a review of such areas with a view to proposing to Congress implementing legislation to fill any legislative gaps.⁵⁶

40. Article 2 (2) ICCPR requires states to adopt such laws and other measures as may be necessary to give effect to the rights recognized in the Covenant. Neither the duty to take measures to give effect to the rights nor the right to a remedy contained in human rights treaties have been held to imply a duty to make the treaty norm a direct part of domestic law. Studies on domestication of human rights treaties confirm the importance of incorporation or transformation. Treaties tend to have the greatest impact if made part of domestic law in a broader process of legal and constitutional reform combined with the remedial effective measures for their enforcement⁵⁷.

41. GC 31 adopted by the committee in 2004⁵⁸ clarifies that, unless Covenant rights are already protected by their domestic laws or practices, state parties are required on ratification to make such changes to domestic laws and practices as are necessary to ensure their conformity with the Covenant. Where there are inconsistencies between domestic law and the Covenant, article 2 requires that

⁵⁶ Doc. CCPR/C/USA/CO/4, 23 April 2014, para. 4. The same problem also arises under ICAT as the government, upon ratification, made a declaration that articles 1-16 of the convention were non-self-executing.

⁵⁷ See generally C. Heyns and F. Viljoen, "The Impact of the United Nations Human Rights Treaties on the Domestic Level", *Human Rights Quarterly* 23 (2001), 483-535. See also their book published the following year, under the same title, *The Hague* (Kluwer); Anja Seibert-Fohr, "Domestic Implementation of the International covenant on Civil and Political Rights Pursuant to its article 2 paragraph 2", *Max Planck Yearbook of United Nations Law* 5 (2001), 399-472.

⁵⁸ *Supra*, note 28.

the domestic law or practice be changed to meet the standards imposed by the Covenant's substantive guarantees. State parties are allowed to pursue this process in accordance with their own domestic constitutional structure and consequently do not require that the Covenant be directly applicable in the courts, by incorporation of the Covenant into domestic law. The committee takes the view, however, that Covenant guarantees may receive enhanced protection in those states where the Covenant is automatically applicable or through specific incorporation in part of the domestic legal order.⁵⁹

42. Brazil, among other states, accords constitutional status to human rights treaties and consequently requires that constitutional provisions should be interpreted in the light of international human rights law.⁶⁰ Other jurisdictions have given a higher rank to human rights treaties than their ordinary statutes, but lower than their constitution. In many jurisdictions, however, human rights treaties have only the status of ordinary law, which hampers efficiency of remedies to violations of human rights.⁶¹

43. CESCR also adopted a general comment on the domestic application of its Covenant.⁶² It considered that legally binding international human rights standards should operate directly and immediately within the domestic legal system of each state party, thereby enabling individuals to seek enforcement of their rights before national courts and tribunals. The rule requiring the exhaustion of domestic remedies reinforces the primacy of national remedies in this respect. Although there is no provision obligating its comprehensive incorporation, direct incorporation avoids problems that might arise in the translation of treaty obligations into national law. It added that the rights could be considered self-executing in systems where this option is provided for. The Committee warned that one should avoid any *a priori* assumption that the norm should be considered to be non-self-executing.⁶³

44. CERD only adopted the general recommendation concerning the application of article 9 of the convention requiring state parties to submit reports on measures taken by them to give effect to the provision of the convention.⁶⁴ It is my

⁵⁹ *Ibid*, para. 13

⁶⁰ Amendment 45 to the 1988 Brazilian Constitution, 30 December 2004.

⁶¹ See also GC 31, paras. 15-16.

⁶² GC 9 of 3 December 1998, Doc. E/C.12/1998/24.

⁶³ *Ibid.*, paras. 4,7-8 and 11.

⁶⁴ General Recommendation XVI adopted at its 42nd session in 1993, in Doc. A/48/18.

view that subsequent state practice and recommendations provided by the chairpersons have given a more detailed and substantive interpretation of state obligations under that convention.

45. Further to what has been discussed, concerning GC 28 adopted by CEDAW⁶⁵, a few additional remarks on article 2 of that convention, which obliges states parties to implement the convention in a general way, are considered necessary. Under subparagraph a, f and g, state parties undertake to incorporate the convention into the domestic legal system or to give it otherwise appropriate legal effect within their domestic legal order in order to secure the enforceability of its provision at the national level.

46. Sub-paragraph b contains the obligation of states parties to ensure that legislation prohibiting discrimination and promoting equality of women and men provides the proper remedies for persons who are subjected to discrimination contrary to the convention. Such remedies should include monetary compensation, restitution, rehabilitation and reinstatement. According to subparagraph c states parties must ensure that courts are bound to apply the principle of equality as embodied in the convention and to interpret the law in line with the obligations of states parties to the convention. However, where this is not possible, courts should consider any inconsistency between national law and the state party's obligation under the convention as a violation of the latter, since domestic laws can never be used as justification for failure by states parties to carry out their international obligations.⁶⁶

47. Subparagraph d establishes an obligation to abstain from engaging in any act or practice of direct or indirect discrimination against women and subparagraph e obliges states parties to eliminate discrimination by any public or private actor. The obligations, incumbent upon states parties require them to establish legal protection between men and women on an equal basis.⁶⁷

48. CRC had adopted its GC 5 in October 2003.⁶⁸ The committee stated that a comprehensive, reviewable domestic legislation and related administrative guidance should be necessary to ensure full compliance with the Convention. State

⁶⁵ See *supra* note 26, paras. 22-24.

⁶⁶ CEDAW/C/GC/28, paras. 30-34.

⁶⁷ *ibid.*, paras 35-36.

⁶⁸ See *supra* note 14 and accompanying text.

parties need to ensure, by all appropriate means, that the provisions of the convention are given legal effect within their domestic legal systems. It conceded that this remained a challenge in many states parties. It noted that it was important to clarify the extent of applicability of the convention in states where the principle of “self-executing” norms exists and others where it is claimed that the convention has constitutional status or it has been incorporated into domestic law. Incorporation should mean that the provisions of the Convention could be directly invoked before the courts and applied by national authorities and that the convention will prevail where there is a conflict with domestic legislation or common practice. Incorporation by itself does not avoid the need to ensure that all relevant domestic law be brought into compliance with the Convention and in case of any conflict in legislation, predominance should be always be given to the Convention in light of article 27 VCLT.⁶⁹

49. CAT adopted its GC 2 on the implementation of article 2 by states parties.⁷⁰ It noted that serious discrepancies between the convention's definition and that incorporated into domestic law create actual or potential loopholes for impunity. In some cases, although similar language may be used, its meaning may be qualified by domestic law or by judicial interpretation and thus the committee calls upon each state party to ensure that all parts of its government adhere to the definitions set forth in the convention for the purpose of defining the obligations of the state. At the same time, the committee recognizes that broader domestic definitions also advance the object and purpose of the Convention as long as they are applied in conformity with the standards of the convention.⁷¹

50. An additional concern, impinging upon the obligation of states parties, is the extra-territorial application of ICCPR and ICAT. This has been a problem since the question of detainees in Guantanamo arose. During the discussion of the second and third report of the United States in July 2006 submitted to the Committee, the US delegation rejected the application of the Covenant to Guantanamo Bay⁷². The US representative maintained that his delegation found it difficult to accept that the conjunction in the phrase 'within its territory and is subject to its jurisdiction" could be interpreted as meaning "and/or".⁷³

⁶⁹ CRC/GC/C/2003/5, paras.18-20.

⁷⁰ CAT/C/GC/2 of 24 January 2008.

⁷¹ *Ibid.*, para. 9.

⁷² HRC, 87th session, 2380th meeting, 27 July 2006, Doc. CCPR/C/SR.2380.

⁷³ *Ibid.*, para. 8.

51. The late Sir Nigel Rodley explained in a meticulous analysis the Committee's position. He maintained that its interpretation of article 2 coincided with that of the ICJ, namely that states parties were required to ensure rights for all individuals within its territory and to all individuals subject to their jurisdiction⁷⁴. In this connection, he referred to articles 31 and 32 VCLT and maintained for purposes of applicability that the persons concerned must be under the state party's control, which was the case with respect to Guantánamo.

52. Guidance on the issue of extra-territoriality can be found in GC 31. The committee observed that "while article 2 is couched in terms of obligations of state parties towards individuals as the right-holders under the Covenant, every state party has a legal interest in the performance by every other state party of its obligations.⁷⁵ This follows from the fact that the rules concerning the basic rights of the human person are *ergo omnes* obligations.⁷⁶ The obligations of the Covenant in general and article 2 in particular are binding on every state party as a whole.⁷⁷ In addition, the beneficiaries of the rights recognized by the Covenant are individuals and state parties are required by article 2 (1) to respect and to ensure that Covenant rights to all persons within their territory and subject to their jurisdiction⁷⁸. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that state party, even if not situated within the territory of the state party.⁷⁹

53. The Committee discussed in March 2014 the fourth report of the United States⁸⁰. In its concluding observations the committee regretted that the state party continued to maintain the position that the Covenant does not apply with respect to individuals under its jurisdiction, but outside its territory, despite interpretations to the contrary of article 2 paragraph 1, supported by the Committee's established jurisprudence, the jurisprudence of the international Court of Justice and state practice. The committee further noted that the state party has only limited avenues to ensure that state and local governments respect and implement the Covenant, and that its provisions have

⁷⁴ *Ibid.*, para. 65.

⁷⁵ GC 31, para. 2.

⁷⁶ *Ibid.*, para. 2.

⁷⁷ *Ibid.*, para. 4.

⁷⁸ *Ibid.*, para. 9-10.

⁷⁹ *Ibid.*

⁸⁰ Doc. CCPR/C/USA/4 and Corr.1 of 22 May 2012.

been declared non-self-executing at the time of ratification. Taken together, these elements considerably limit the legal range and practical relevance of the Covenant.⁸¹

54. In this connection, it recommended that the state party should interpret the Covenant in good faith, in accordance with the ordinary meaning to be given to its terms in their context, including subsequent practice, and in light of the object and purpose of the Covenant. Also, review its legal position so as to acknowledge the extraterritorial application of the Covenant under certain circumstances, as outlined, *inter alia*, in the Committee's GC 31 on the nature of the general legal obligations imposed on state parties.⁸²

55. In addition, it stated that taking into account its declaration that provisions of the Covenant are non-self-executing, the state party should ensure that effective remedies are available for violations of the Covenant. It should also include those that do not, at the same time, constitute violations of the domestic law of the United States and undertake a review of such areas with a view to proposing to Congress implementing legislation to fill any legislative gaps. It also recommended becoming a party to the first Optional Protocol.⁸³

56. Finally, as part of the obligations of states to implement the international norms in domestic courts, I would like to come back shortly to the issue of reservations. Reservations to treaties could void the meaning of a treaty if the state party attaches too many declarations or reservations upon ratification.⁸⁴ When the United States finally ratified the ICCPR on June 8, 1992, it caused some waves among the international human rights community.⁸⁵

⁸¹ Doc. CCPR/C/USA/CO/4 of 23 April 2014, para. 4.

⁸² *Ibid.*

⁸³ *Ibid.* The issue of non-self-execution has drawn quite some attention lately among academics. See David Kaye, "State Execution of the International Covenant on Civil and Political Rights", *UC Irvine Law Review*, vol. 3 (2013), 95-124, who argues that because the Covenant is non-self-executing, implementing legislation is required in order for litigants to rely on its provisions in federal and state courts. To date, however, Congress has adopted no such legislation and none seems likely in the foreseeable future. As a result, no domestic mechanism exists for litigants to test state and federal compliance with the Covenant (*ibid.* at p.96). See also Ralph Wilde, "The extraterritorial application of international human rights law on civil and political rights", *Routledge Handbook on International Human Rights Law*, London (Routledge) 2013, chapter 35. Beth van Schaack: *The United States Position on the Extraterritorial Application of Human Rights Obligations: Now is the Time for change*, *International Law Studies* 90 (2014), 20-65; see also Bleckmann (*supra* note 53); Paust (*supra* note 53); Sloss (*supra* note 53).

⁸⁴ See Liesbeth Lijnzaad, *Reservations to UN Human Rights Treaties: Ratify or Ruin*, Leiden (Brill) 1994.

⁸⁵ See e.g. Willem van Genugten, *The United States Reservations to the ICCPR; International Law versus God's Own constitution*, in *The Role of the Nation-State in the 21st century*, M.

57. Insiders confirm that the adoption of GC 24 by the committee was triggered by the fact that on November 1, 1994, 46 of the then 127 states parties to the Covenant had entered 150 reservations of varying significance between them to their acceptance of the obligations contained in the Covenant⁸⁶.

58. This general comment, in my opinion, shines as a beacon upon the obligation of state parties to interpret the question of reservations in accordance with general international law by taking into account the special nature of international human rights law, being of a vertical structure: state versus the individual.

59. It considers that reservations could serve a useful function to enable states to adapt specific elements in their laws to the inherent rights of each person as articulated in the Covenant. The absence of a prohibition on reservations does not mean that any reservation is permitted. Reservations that offend peremptory norms would not be compatible with the object and purpose of the Covenant. The committee stated that essentially, a reservation precludes the operation as between the reserving and other states of the provision reserved; and an objection thereto leads to the reservation being in operation as between the reserving and objecting states only to the extent that it has not been objecting to. States should institute procedures to ensure that each and every proposed reservation is compatible with the object and purpose of the Covenant. It is desirable for a state entering a reservation to indicate in precise terms the domestic legislation or practices which it believes to be incompatible with the Covenant obligation.⁸⁷

V OBLIGATIONS IMPOSED ON DOMESTIC COURTS CONCERNING THE IMPLEMENTATION OF HUMAN RIGHTS ARISING FROM THE ICCPR

60. With respect to domestic courts the obligations deriving from the ICCPR, are dealt with in the Committee's GC 31 and GC 33.

Castermans et al. eds, *The Hague* (Kluwer) 1998, pp.35-46; I. Ziemele/L. Liede, Reservations to Human Rights Treaties: From Draft Guideline 3.1.12 to Guideline 3.1.5.6, *EJIL* 24 (2013), 1135-1152. Previously expectations had been high in anticipation of the ratification, see the roundtable organized by the Georgia Law School in 1990 under the title "The United States Constitution and the Adoption of international Human Rights instruments: Freeing the Political Logjam", published in the *George Journal of international and Comparative Law* 20 (1990). Giving special to the articles presented to Panel 1 "The process of and Obstacles to United States Ratification of International Human Rights Instruments".

⁸⁶ GC 24/52 on Reservations and Declarations, adopted 4 November 1994.

⁸⁷ paras.4,6,8,10,16 and 20.

61. As mentioned above, GC 31 starts from the general obligation incumbent upon the State parties to respect the Covenant rights and to ensure them to all individuals in their territory and subject to their jurisdiction [...]“⁸⁸. Thus, State parties must refrain from violation of the rights recognized by the Covenant [...]“⁸⁹ (negative obligation) and „article 2, paragraph 3, requires that State parties make reparation to individuals whose Covenant rights have been violated.“⁹⁰ Another point is that [...] State parties adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfill their legal obligations.“⁹¹ Thus, domestic courts have a special role to play. The standard of compliance expressed in the requirement „to give effect to the obligations under the Covenant in good faith“⁹² can be understood as a guideline of interpretation for courts. Courts also have the duty, „where the investigations [...] reveal violations of certain Covenant rights, [to] ensure that those responsible are brought to justice“⁹³. The Committee notes “that the enjoyment of the rights recognized under the Covenant can be effectively assured by the judiciary in many different ways, including direct applicability of the Covenant, application of comparable constitutional or other provisions of law, or the interpretative effect of the Covenant in the application of national law.“⁹⁴

62. In addition, GC 33 spells out that „[...] State parties are obliged not to hinder access to the Committee and to prevent any retaliatory measures against any person who has addressed a communication to the Committee.“⁹⁵ The „[...] State Party, against which a claim has been made by an individual under the Optional Protocol is to respond to it within the time limit of six months set out in article 4 (2).“⁹⁶ In conclusion, GC 33 describes that „in any case, States parties must use whatever means lie within their power in order to give effect to the views issued by the Committee.“⁹⁷

⁸⁸ GC 31, The Nature of the General Obligation Imposed on State Parties to the Covenant, Doc. CCPR/C/Rev.1/Add. 13, 26 May 2004, para. 3.

⁸⁹ *Ibid*, para. 6.

⁹⁰ *Ibid*, para. 16.

⁹¹ *Ibid*, para. 7.

⁹² *Ibid*, para. 3.

⁹³ *Ibid*, para. 18.

⁹⁴ *Ibid*, para. 15.

⁹⁵ GC 33, The Obligation of State Parties under the Optional Protocol to the International Covenant on Civil and Political Rights, CCPR/GC/33, 5 November 2008, para. 4.

⁹⁶ *Ibid*, para. 8.

⁹⁷ *Ibid*, para. 20.

VI CONCLUDING REMARKS

63. As Manfred Nowak observed in 2005 in his consideration of article 40 of the Covenant, “the crisis of the reporting procedure cannot be just explained by a lack of willingness of states parties to comply with the reporting obligations. It is a structural problem inherent to the UN treaty monitoring system in general and to the ongoing financial crisis of the world organization and its human rights program in particular”. In his opinion, “only a major structural reform could help to solve the ongoing crisis. Such a far-reaching reform might reduce the reporting obligations to one comprehensive report per state every five years and a few special reports in case of need, and might aim at replacing the existing treaty monitoring system by one single examination body composed of a sufficient number of full-time experts”.⁹⁸

64. Another expert, Philip Alston, commented on the domestication of international human rights norms. In 2001, he observed, “the existing state of domestic implementation is, for the most part, highly unsatisfactory. There is a well-documented trend among states to resort increasingly to techniques designed to minimize the domestic impact of treaty obligations. They include reliance upon excessively broad reservations, insistence by either the executive or the courts and that treaty provisions are non-self-executing, failure to incorporate or otherwise amend domestic legislation as to take genuine account of treaty obligations”. In addition, “the assumptions that different formulations contained in international standards can safely be interpreted as having an identical meaning to preferred domestic norms. Also, the insistence that administrative decision-makers cannot be expected to take account of treaty obligations unless they are legislatively required to do so, rejects the dynamic approaches to interpretation in favor of insistence upon original intent, and non-translation, non-publication, or non-proclamation of ratified treaties”.⁹⁹

65. One of the members of the ILA Human Rights Law Committee, Jernej Cernic, correctly observed, confirmed by my own experience, “The main problems lie in the lack of knowledge and understanding of ICCPR among states parties. It seems that a vast majority of states parties does not possess sufficient knowledge to respond adequately to challenge rights under the ICCPR in respective national legal

⁹⁸ Nowak, *supra* note 9, pp.718-719; as Stoll concludes, “the key question is likely to be whether the enforcement and further development of human rights protection is best serviced by adopting a holistic approach or by emphasizing and appreciating individual commitments under individual agreements”; see Stoll (2012), para. 47.

⁹⁹ Alston, *supra* note 37; see also W. Kàlin: “Implementing Treaties in Domestic Law: From ‘Pacta Sunt Servanda’ to Anything Goes”, in V.Gowlland- Debbas ed., *Multilateral Treaty-Making*, Heidelberg (Springer) 2000, p. 111.

orders. Identifying obligations and responsibilities is only one aspect of the protection of ICCPR rights.¹⁰⁰

66. A last issue is the purported limited efficiency of concluding observations, which has become standard practice by all human rights treaty bodies. In a very critical analysis, focusing on the Netherlands, Jasper Krommendijk maintains that the Dutch government barely adopts additional legislative measures because of treaty bodies' concluding observations. Based on research, he concludes that the government often defends itself that adequate measures of protection already exist. The same approach is taken in the lower house of Parliament, in his opinion.¹⁰¹ He also criticized the lack of preparation by some members of the committee during the discussion of the Dutch reports in 2001 and 2009 as well as their limited knowledge of the legal situation in the Netherlands, despite abundant available material.¹⁰²

67. Louis Henkin, a former member of the Committee, observed in 1994, "human rights treaties continue to increase, a reflection of the system's steady drift toward human values. It is a reflection, too, of the new sensitivity of states and of the state system to pressures leading to consent".¹⁰³

68. As Lord McNair, former judge at the ICJ, observed, "I do not propose to enter into the question whether a human being is subject of international rights and

¹⁰⁰ Jernej Letnar Cernic, "The domestic implementation of 'views' of the United Nations Human Rights Committee", manuscript on file with the author; a detailed discussion on the views of the committee under the optional protocol is found in Möller and de Zayas (2009). The book demonstrates an innovative approach, especially in its two last chapters on the follow-up to the Committee's views and the evolution and changes in the Committee's case law; see my book review van Aggelen (2010), 237-240.

¹⁰¹ Jasper Krommendijk, "De Beperkte Effectiviteit van Aanbevelingen van het VN Mensenrechten Comité in Nederland nader bekeken en verklaard" (the limited efficiency of the recommendations by the human rights committee in the Netherlands: a closer look and explanation), available at the SSRN website under the item "The Human Rights Committee on Civil and Political Rights". Fortunately, other scholars have a more optimistic view; see M. O'Flaherty, "The Concluding Observations of United Nations Treaty Bodies", *Human Rights Law Review* 2006, 27-52; W. Kalin, "Examination of state reports", in H. Keller and G. Ulfstein eds., "UN human rights treaty bodies, Law and Legitimacy, Cambridge (CUP) 2012, pp. 16-72, at 31-32.

¹⁰² See also M. O'Flaherty and P. Tsai, "Periodic Reporting: the Backbone of the UN Treaty Body Review Procedures", in M.C. Bassiouni and W.A. Schabas eds, "New challenges for the UN Human Rights Machinery, Antwerp (intersections) 2011, pp.37-56, at 46. Having served different human rights treaty bodies, I have to come to the conclusion that the Human Rights Committee, despite being sometimes criticized, remains the "primus inter pares" among the human rights treaty bodies. The committee, over the years, also has maintained a high level of intellectual craftsmanship among its members. See A.F. Bayefsky, "The UN Treaty body system in the 21st century", The Hague (Kluwer) 2000, ch. 1-3, where three analyses are provided on the system of state reporting.

¹⁰³ Louis Henkin: "Human Rights and State Sovereignty", Sibley Lecture, March 1994, published in *The Georgia Journal international and Comparative Law* 25 (199b), 31-45, at 36.

duties or merely the object. What really matters is the remedies which are open to him before an international tribunal, and that depends on the constitution and powers of the tribunal.”¹⁰⁴

69. Introducing a high level segment on the 50th anniversary of the two Covenants at the 31st Council meeting on 1 March 2016, the current High Commissioner for Human Rights, Dr. Zeid, reported that as of the 27 countries had not yet become party to either of the Covenants, while eight States had ratified only one Covenant. There is still work ahead for states concerning the compliance of their obligations under the different human rights treaties.

REFERENCES

- Abram, M (1991) Human Rights and the United Nations: Past as Prologue. Harvard Human Rights Journal 4: 69-84
- Alston, P (1982) A Third Generation of Solidarity Rights: Progressive Development or Obfuscation of International Human Rights Law. Netherlands International Law Review 29: 307-322
- Alston, P (2001) The Historical Origins of the Concept of General Comments in Human Rights Law. In: Boisson de Chazournes, L, Gowland-Debbas, V (eds), The International Legal System in Quest of Equity and Universality, Liber Amicorum Georges Abi-Saab, Brill, Leiden, p. 763-776.
- Bayefsky, A F, (2000) The UN Treaty body system in the 21st century. Kluwer, The Hague.
- Bleckmann, A (2000) Self -Executing Treaty Provisions. In: Bernhardt R (ed) Encyclopedia of Public International Law, vol. IV, Elsevier, Amsterdam, p 374-377
- Boerefijn, I (1999) The Reporting Procedure under the Covenant on Civil and Political Rights. Intersentia, Antwerp.
- Cançado Trindade, A (1983) The Application of the Rule of Exhaustion of Local Remedies in International Law, CUP, Cambridge.
- de Albuquerque, Catarina (2010) Chronicle of an Announced Birth: The Coming Into Life of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: the Missing Piece of the International Bill of Human Rights. Human Rights Quarterly 32:144-178.

¹⁰⁴ A.D. McNair, Selected Papers and Bibliography, Leyden (Sijthott) 1974, p. 329.

- Henkin, L (1996) Human Rights and State Sovereignty. *The Georgia Journal International and Comparative Law* 25: 31-45.
- Heyns, C, Viljoen, F (2001) The Impact of the United Nations Human Rights Treaties on the Domestic Level. *Human Rights Quarterly* 23: 483-535
- Heyns, C, Viljoen, F (2002) The Impact of the United Nations Human Rights Treaties on the Domestic Level. Kluwer, The Hague.
- Kälin, W (2000) Implementing Treaties in Domestic Law: From 'Pacta Sunt Servanda' to Anything Goes. In: Gowlland- Debbas, V (ed), *Multilateral Treaty-Making*, Springer, Heidelberg, pp.111-128.
- Kälin, W (2012) Examination of state reports. In: Keller, H, Ulfstein, G (eds) *UN human rights treaty bodies, Law and Legitimacy*, CUP, Cambridge (CUP) pp. 16-72.
- Kaye, D (2013) State Execution of the International Covenant on Civil and Political Rights. *UC Irvine Law Review* 3: 95-124
- Krommendijk, J (2013) De Beperkte Effectiviteit van Aanbevelingen van het VN Mensenrechten Comité in Nederland nader bekeken en verklaard (The close examination and explanation of the limited effectiveness of the concluding observations of the UN human rights committee in the Netherlands). *NTM/NJCM-Bull* 38(2): 212-228
- Lijnzaad, L (1994), *Reservations to UN Human Rights Treaties: Ratify or Ruin*. Brill, Leiden
- McGoldrick, D. (1994). *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights*. Clarendon Press, Oxford.
- McNair, A D (1974) *Selected Papers and Bibliography*, Sijthoff, Leyden.
- Möller, J, de Zayas, A, (2009), *The United Nations Human Rights Committee Case Law 1977-2008: A Handbook*. N.P.Engel, Kehl
- Nowak, M (2005) *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, 2nd ed., N.P.Engel Publisher, Kehl.
- O'Flaherty, M (2006) The Concluding Observations of United Nations Treaty Bodies. *Human Rights Law Review* 6(1):27-52
- O'Flaherty, M, Tsai, P (2011) Periodic Reporting: the Backbone of the UN Treaty Body Review Procedures. In: Bassiouni, M C, Schabas, W A (eds) *New Challenges for the UN Human Rights Machinery*, Intersentia, Antwerp, p.37-56.
- Paust, J (1988) Self-Executing Treaties. *AJIL* 82(4): 760-783

- Seibert-Fohr, A (2001) Domestic Implementation of the International Covenant on Civil and Political Rights Pursuant to its article 2 paragraph 2. In: Frowein, A, Wolfrum R, Philipp C E (eds) Max Planck Yearbook of United Nations Law 5, Kluwer, The Hague, p. 399-472
- Shelton, D (2012) Human Rights, Remedies. In: Wolfrum, R (ed), Encyclopedia Public International Law, Vol.V, OUP, Oxford, p.1097-1104.
- Sloss, D (1999) The Domestication of International Human Rights, Non-Self - Executing Declarations and Human Rights Treaties. Yale Journal of International Law 24(1): 129-222.
- Stoll, P T (2012) Human Rights, Treaty Bodies. In: Wolfrum R (ed) Encyclopedia of Public International Law, Vol. V, OUP, Oxford, p. 5-14.
- Tomuschat, C (2008) Human Rights: Between Idealism and Realism. 2nd ed., OUP, Oxford.
- Tomuschat, C (2012) International Covenant on Civil and Political Rights (1966). In: Wolfrum, R (ed), Encyclopedia of Public International Law, Vol. V, OUP, Oxford, p.639-650.
- Van Aggelen, J (2002) Book review. In: McRae, D M, De Mestral, A L C, Canadian Yearbook of International Law 2001, Vol. 39, UBC Press, Vancouver/Toronto, p. 621-637.
- Van Aggelen, J (2010), Möller, J, de Zayas, A, (2009), The United Nations Human Rights Committee Case Law 1977-2008: A Handbook (review). Human Rights Quarterly 32:237-240
- Van Genugten, W (1998) The United States Reservations to the ICCPR; International Law versus God's Own Constitution. In: Castermans, M et al (eds) The Role of the Nation-State in the 21st century, Kluwer, The Hague, p.35-46
- Van Schaack, B (2014) The United States' Position on the Extraterritorial Application of Human Rights Obligations: Now is the Time for Change. International Law Studies 90: 20-65
- Wilde, R (2013) The extraterritorial application of international human rights law on civil and political rights. In: Sheeran, S, Rodley, Sir N (eds) Routledge Handbook of International Human Rights Law, Routledge, London, p.635-662.
- Ziemele, I, Liede, L (2013) Reservations to Human Rights Treaties: From Draft Guideline 3.1.12 to Guideline 3.1.5.6. EJIL 24: 1135-1152