

PART II

PROCEDURES OF THE HUMAN RIGHTS COMMITTEE AND THE COMMITTEE AGAINST TORTURE



2.1 Individual Complaints Procedure

In Part II, we address the most important aspects of the processes relating to the individual complaints procedures under both the ICCPR and the CAT.

2.1.1 Admissibility Criteria

Any successful complaint must satisfy the admissibility criteria of the respective treaty. The admissibility criteria under the ICCPR and the CAT are almost identical. The large majority of the case law on admissibility issues arises from the case law of the HRC. It seems likely that the CAT Committee will, if given the opportunity, follow the HRC's decisions on admissibility. Differences in interpretation, or possible differences, are highlighted in the commentary below.

(a) Standing Rules

Article 1 of the OP to the ICCPR requires that the complaint relate to one or more violations of a particular victim's rights under that treaty. The same requirement is specified in Article 22(1) of CAT. It is therefore not permissible to bring a complaint unless it concerns an actual violation of an identified person's rights under the relevant treaty. For example, it is not permissible for person A to submit a complaint regarding the appalling conditions in a prison if A has never been an inmate of that prison, unless A is authorised to do so on behalf of one of X's inmates or former inmates.⁵¹ It is not permissible to challenge a law or policy in the abstract, without an actual victim.⁵²

The victim must be an individual. That is, he or she must be a natural person, rather than an artificial person such as a corporation, a trade union or a non-governmental organisation ("NGO").⁵³

In General Comment 15, the HRC held that ICCPR rights must be extended to:

"all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves under the territory or subject to the jurisdiction of the State Party."⁵⁴

51 See Section 2.1.2(b).

52 See *Mauritian Women's Case* (35/78), § 9.2.

53 See e.g., *Mariategui v. Argentina* (1371/05).

54 General Comment 31, § 10.

Therefore, one may submit complaints against a State party under the treaties' individual complaints mechanisms even if one is not a national of that State.

It is not possible to submit a complaint anonymously. The relevant Committee however will normally agree, if requested, to suppress the name of the alleged victim in published documents. It is not possible however to keep the name of the alleged victim from the relevant State, as the State cannot investigate the allegations if it does not know who that person is.

The violation does not have to continue throughout the deliberation of the complaint, and indeed the violation can cease prior to submission of the complaint.⁵⁵ For example, a complaint about the appalling conditions of a prison can be submitted on behalf of a former inmate who experienced and suffered from those conditions, but who has since been released and therefore does not experience those conditions anymore. However, a complaint is inadmissible if a violation has been recognised and remedied by the State in question.

The HRC has stated that it has “no objection to a group of individuals, who claim to be similarly affected, collectively to submit a complaint about alleged breaches of their rights”.⁵⁶ Therefore, it is possible to have a complaint decided on behalf of a group of individuals suffering from like circumstances. However, even when proceeding as a group, each individual complainant must identify him- or herself, and agree to the complaint being brought on his or her behalf if represented by another person, such as an advocate. In *Hartikainen v. Finland* (40/78), the complainant was a teacher in a school in Finland and the General Secretary of the Union of Free Thinkers in Finland. The complainant submitted the communication on his own behalf and also on behalf of the Union of Free Thinkers. The HRC held that it could not consider the complaint submitted on behalf of the organisation unless he provided the names and addresses of all the persons he claimed to represent and written authority confirming that he could act on their behalf.

The HRC has also held that domestic legislation may threaten a person even if it has not been directly implemented against that person; that person may still be classified as a “victim” for the purposes of admissibility under the OP.⁵⁷ For example, in *Toonen v. Australia* (488/92), the complainant argued that the existence of Tasmanian laws which criminalized sexual relations between men

55 See *Van Duzen v. Canada* (50/79).

56 *Ominayak, Chief of the Lubicon Lake Band v. Canada* (167/84), § 32.1.

57 Joseph, Schultz, and Castan, above note 31, § 3.36.

stigmatized him as a gay man, despite the fact that the laws had not been implemented for many years. Furthermore, he lived with the constant possibility of arrest under the laws. The HRC found the claim to be admissible, stating that:

“the author had made reasonable efforts to demonstrate that the threat of enforcement and the pervasive impact of the continued existence of these provisions on administrative practices and public opinion had affected him and continued to affect him personally.”⁵⁸

It is possible for somebody to be a victim of a human rights abuse entailed in an act perpetrated upon another. In such cases, the former individual might be termed the “indirect victim” while the latter is the “direct” victim.⁵⁹ For example, in *Quinteros v. Uruguay* (107/81), the complaint arose out of the kidnap, torture, and continued detention (and indeed disappearance) of one Elena Quinteros Almeida by Uruguayan security forces. A violation was also found in regard to the woman’s mother, who submitted the complaint on behalf of her daughter and herself, due to the anguish, stress, and uncertainty caused by her daughter’s continued disappearance: that mental trauma was found to constitute ill-treatment contrary to Article 7 ICCPR.⁶⁰ In *Schedko v. Belarus* (886/99), a similar violation of Article 7 was found in respect of the mother of a man who had been executed by the authorities, as those authorities failed to inform her of the date, hour, place of execution, and site of burial. The HRC stated:

“The Committee understands the continued anguish and mental stress caused to the author, as the mother of a condemned prisoner, by the persisting uncertainty of the circumstances that led to his execution, as well as the location of his gravesite. The complete secrecy surrounding the date of execution, and the place of burial and the refusal to hand over the body for burial have the effect of intimidating or punishing families by intentionally leaving them in a state of uncertainty and mental distress. The Committee considers that the authorities’ initial failure to notify the author of the scheduled date for the execution of her son, and their subsequent persistent failure to notify her of the location of her son’s grave amounts to inhuman treatment of the author, in violation of Article 7 of the Covenant.”⁶¹

58 *Toonen v. Australia* (488/92), § 5.1.

59 See also U. Erdal, H. Bakirci, *Article 3 of the European Convention on Human Rights: A Practitioner’s Handbook*, OMCT, 2006, p. 85.

60 *Quinteros v. Uruguay* (107/81), § 14.

61 *Schedko v. Belarus* (886/99), § 10.2; see also Section 3.2.7.

In some circumstances, a victim is simply unable to submit or authorise the submission of a complaint. For example, the victim may be dead or may be incarcerated in incommunicado detention (where he or she is unable to make contact with the outside world). If this is the case, another person has standing to bring the complaint if he or she can establish that the victim would be likely to have consented to his/her representation before the relevant Committee. A close family connection will normally suffice in this regard. It is less likely that the Committees will recognise the standing of people who are not family members in such a situation.⁶² In *Mbenge v. Zaire* (16/77), for example, the HRC held that the author of the complaint could represent his relatives but he could not represent either his driver or his pharmacist.

If circumstances change so that a victim who has been unable to authorise a complaint becomes able to authorise it, then that victim must give his or her authorisation for the consideration of the complaint to continue. For example, in *Mpandanjila et al v. Zaire* (138/83), the complaint was originally submitted on behalf of 13 people detained incommunicado. These people were released while the HRC's decision was pending. The complaint continued only in respect of 9 of the 13 people, as four people did not explicitly give any authorisation for the complaint to continue on their behalf.⁶³

If a complaint is in the process of being considered by the relevant Committee, and the author dies, an heir of the author may proceed with the complaint.⁶⁴ If no heir instructs that Committee, the case will be discontinued.⁶⁵

(b) Jurisdictional Requirements

i. Ratione Materiae

A person must have a claim under one of the substantive rights of the respective treaty before his/her case can be deemed admissible. For example, a claim over a breach of the right to property could not be brought under either treaty, as the right to property itself is not protected under either treaty.⁶⁶ Allegations

62 T. Zwart, *The Admissibility of Human Rights Petitions*, Martinus Nijhoff, 1994, p. 76.

63 Joseph, Schultz, and Castan, above note 31, § 3.27.

64 See *Croes v. The Netherlands* (164/84); *Hopu and Bessert v. France* 549/1993; *Arenz v. Germany* (1138/02).

65 See e.g., *Wallen v. Trinidad and Tobago* (576/94), § 6.2.

66 See e.g., *O.J. v. Finland* (419/90).

regarding torture, cruel inhuman or degrading treatment or punishment clearly raise issues under both the ICCPR and the CAT. However, the ICCPR protects many more rights, so it is advisable to submit a complaint to the HRC (if the relevant State is a party to the OP) rather than the CAT Committee if one's allegations go beyond the issue of torture and cruel treatment, and extend for example to the issues of arbitrary detention or discrimination.

Even a case regarding torture, cruel, inhuman or degrading treatment or punishment may be dismissed for failure to raise a substantive claim if the alleged ill-treatment is not so severe as to be classified as torture or one of the other prohibited forms of ill-treatment. In this regard, readers should refer to Parts III and IV of this *Handbook* for the law on the meaning of torture, cruel, inhuman or degrading treatment or punishment under, respectively, the ICCPR and the CAT. For example, an insult by a police officer may seem to be degrading to the target of that insult but is probably not severe enough of itself to be deemed a breach of either instrument.⁶⁷

Finally, a person may simply fail to submit enough evidence to establish the admissibility of his or her claims.⁶⁸ Readers are referred to Section 2.1.2 for advice on how to submit a complaint and the type of evidence that might help to establish a case, as well as *Textbox ii* for a model complaint.

ii. Ratione Temporis

Under Article 1 of the OP, complaints may only be submitted against States parties to the OP. Similarly, complaints may only be submitted under CAT against States that have made a declaration under Article 22 of that treaty. One consequence of these requirements is that the violation must relate to an incident that takes place after a particular date. That particular date is:

- with regard to the ICCPR, the date at which the OP enters into force for the State. This date is three months after the State ratifies or accedes to the OP.
- with regard to the CAT, the date at which the Article 22 declaration enters into force for the State.

67 The insult itself could breach human rights if it had an element of vilification. See in this regard, Article 20 of the ICCPR and Article 4 of the International Convention on the Elimination of all Forms of Racial Discrimination 1966.

68 See e.g., *Bazarov v. Uzbekistan* (959/00), § 7.3.

Therefore, if a violation, such as an act of torture, occurs prior to the relevant date, any complaint in respect of that violation is inadmissible. This is known as the “*ratione temporis*” rule.

Importantly, the respective relevant dates relate to the dates at which adherence to the relevant individual complaints mechanism comes into force, rather than the dates at which the respective treaty comes into force. For example, a complaint under the OP will be inadmissible if the violation occurs prior to the entry into force for the State of the OP, even if that date is after entry into force for the State of the ICCPR. See Table 1 above for the dates of entry into force of the individual complaints mechanisms of the ICCPR and the CAT.

There is one exception to the *ratione temporis* rule. A complaint may be admissible if it concerns a violation that began prior to the relevant date, if the violation continues after that relevant date, or if the violation generates effects which themselves violate the treaty.⁶⁹ In *Könye and Könye v. Hungary* (520/92), the HRC held that:

“a continuing violation is to be interpreted as an affirmation, after the entry into force of the OP, by act or by clear implication, of the previous violations of the State Party.”⁷⁰

For example, if one is imprisoned in appalling conditions prior to the relevant date, but the incarceration in those conditions continues after the relevant date, one may submit a complaint in respect of those conditions, claiming a violation from the relevant date. Another example arose in *Sankara et al v. Burkina Faso* (1159/03). The victim complained about the State party’s failure to investigate the assassination of her husband, which had occurred in 1987. Proceedings in respect of that assassination commenced in 1997, and continued after 1999, the year in which the OP came into force for Burkina Faso. The State’s continued failure in those proceedings to properly investigate the death, as well as its continued failure to inform the family of the circumstances of the death or the precise location of the remains of the deceased, or to change the death certificate which listed “natural causes” (a blatant lie) as the cause of death, all amounted to breaches of Article 7 which began before but continued to take place after 1999.⁷¹

69 Joseph, Schultz, and Castan, above note 31, § 2.06.

70 *Könye and Könye v. Hungary* (520/92), § 6.4.

71 *Sankara et al v. Burkina Faso* (1159/03), §§ 6.3 and 12.2.

iii. Ratione Loci

Article 2(1) of the ICCPR states that a State party is responsible for respecting and ensuring the ICCPR rights of individuals “within its territory and subject to its jurisdiction”. Article 1 of the OP and Article 22 of the CAT allow complaints to be heard from individuals “subject to [the relevant State’s] jurisdiction”.

One may submit a complaint against a State party regarding past violations even if one is not inside that State at the time of the submission.⁷²

Unless a declaration is made to the contrary, a State’s ratification of a treaty will extend to a State’s entire territory including its colonies.⁷³ For example, *Kuok Koi v. Portugal* (925/00) concerned the application of the OP to Macao, a former Portuguese territory. Portugal has ratified both the ICCPR and the OP. The HRC held that the OP had applied to Macao when it was under Portuguese authority, stating that:

“as the intention of the OP is further implementation of Covenant rights, its non-applicability in any area within the jurisdiction of a State party cannot be assumed without any express indication (reservation/declaration) to that effect.”⁷⁴

As such, the OP applied to Macao prior to its transfer to the People’s Republic of China in 1999.⁷⁵

A State party is clearly obliged to respect and ensure the treaty rights of those within its sovereign territory. The State party’s obligations also extend to territory over which it has effective control. The State party has to respect the rights of all individuals within “the power or effective control of that State party, even if not situated within the territory of the State party.”⁷⁶ For example, Israel not only has an obligation to those within Israel under the UN human rights treaties that it has ratified, but also to those within the Occupied Territories in the West Bank and Gaza.⁷⁷ The CAT Committee emphasised this rule in Concluding Observations on the U.S. in 2006. It stated:

72 See e.g., *Gorji-Dinka v. Cameroon* (1134/02).

73 See Vienna Convention on the Law of Treaties 1969, Article 29.

74 *Kuok Koi v. Portugal* (925/00), § 6.3.

75 Considerable complexities arose in this case as the fact scenario straddled the transition of Macao from Portuguese to Chinese control. These complexities are not relevant to this *Handbook*.

76 General Comment 31, § 10.

77 Concluding Observations on Israel, (2003) UN doc. CCPR/CO/78/ISR, § 11.

“The Committee notes that a number of the Convention’s provisions are expressed as applying to ‘territory under [the State party’s] jurisdiction’ (Articles 2, 5, 13, 16). The Committee reiterates its previous view that this includes all areas under the de facto effective control of the State party, by whichever military or civilian authorities such control is exercised. ...”⁷⁸

Therefore, for example, the U.S. is responsible for any acts of torture which occur in its detention facility in Guantanamo Bay in Cuba, as well as other detention facilities in Iraq and Afghanistan.⁷⁹ The CAT Committee added that “intelligence activities, notwithstanding their author, nature *or location*, are acts of the State party, fully engaging its international responsibility”.⁸⁰

The HRC has also held that:

“[the State party is responsible for] those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation.”⁸¹

In this regard, the HRC has expressed concern in relation to the behaviour of Belgian soldiers in Somalia, and the behaviour of Dutch soldiers in the events surrounding the fall of Srebrenica in Bosnia and Herzegovina.⁸²

A State’s responsibility under the treaties sometimes extends beyond its borders to territories outside its control. For example, in *López Burgos v. Uruguay* (52/79), the victim was kidnapped and detained in Buenos Aires, Argentina, by members of the Uruguayan Security and Intelligence Forces before being transported across the border to Uruguay where he was detained incommunicado for three months. The HRC held that although the arrest and the initial detention of the victim took place on foreign territory, the HRC was not barred

78 Concluding Observations on U.S., (2006) UN doc. CAT/C/USA/CO/2, § 15. See also the HRC’s Concluding Observations on the U.S., (2006) UN doc. CCPR/C/USA/CO/3, § 10.

79 See on Guantanamo Bay, Concluding Observations on the U.S., (2006) UN doc. CAT/C/USA/CO/2, § 22. See also Concluding Observations on UK, (2004) UN doc. CAT/C/CR/33/3, §§ 3-5.

80 Concluding Observations on the U.S., (2006) UN doc. CAT/C/USA/CO/2, § 17 (emphasis added).

81 General Comment 31, § 10.

82 See, respectively, Concluding Observations on Belgium, (1998) UN doc. CCPR/C/79/Add.99, § 14 and Concluding Observations on the Netherlands, (2001) UN doc. CCPR/CO/72/NET, § 8.

from considering these allegations against Uruguay. The HRC listed the following reasons for allowing that part of the complaint to be heard:⁸³

- The acts were perpetrated by Uruguayan agents acting on foreign soil.
- The reference in the OP to “individuals subject to its jurisdiction” refers to the relationship between the individual and the State regardless of where the violations occurred.
- Nothing in Article 2(1) explicitly asserts that a State party cannot be held accountable for violations of rights which its agents commit upon another state’s territory.
- Article 5(1) of the ICCPR states that:
 - “nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognised herein or at their limitation to a greater extent than is provided for in the present Covenant.”
- It would be unconscionable to assert that a State party can violate its ICCPR obligations on another State’s territory.

In *Montero v. Uruguay* (106/81), the victim’s Uruguayan passport was confiscated by the Uruguayan consulate in West Germany. He alleged that the confiscation amounted to a breach of his rights under Article 12 (freedom of movement) of the ICCPR. Although the act took place in West Germany, the HRC held that “the issue of a passport to a Uruguayan citizen is clearly a matter within the jurisdiction of the Uruguayan authorities and he is “subject to the jurisdiction” of Uruguay for that purpose.”⁸⁴

Therefore, the case law of the HRC and the CAT Committee indicates that States are responsible for violations of rights perpetrated by their agents when those agents operate abroad, at least so long as those agents are acting in their official capacity.

iv. Ratione Personae

States parties are generally responsible for the acts of their own agents. This is so even if the act is perpetrated by an agent who exceeds his or her authority

83 *López Burgos v. Uruguay* (52/79), § 12.1-12.3.

84 *Montero v. Uruguay* (106/81), § 5.

or disobeys instructions.⁸⁵ For example, the HRC found that the State party was responsible for a “disappearance” perpetrated by a corporal who kidnapped the victim in *Sarma v. Sri Lanka* (950/00), despite the State’s contention that the corporal acted beyond authority and without the knowledge of his superior officers.⁸⁶

Furthermore, under the ICCPR, States parties must take reasonable steps to prevent private actors (whether they be natural or artificial persons like corporations) from abusing the Covenant rights of others within their jurisdiction. For example, the HRC has stated that:

“it is ... implicit in Article 7 that States parties have to take positive measures to ensure that private citizens or entities do not inflict torture or cruel, inhuman, or degrading treatment or punishment on others within their power”.⁸⁷

It is possible that the ICCPR is broader than the CAT in this regard, as the CAT is explicitly limited to acts “inflicted by or at the instigation of or with the consent or acquiescence of a public official”.⁸⁸ It is uncertain whether a failure to take reasonable steps to prevent private acts of torture constitutes “acquiescence”.⁸⁹ Therefore, it seems sensible to pursue an individual complaint under the ICCPR rather than the CAT in this respect, if both avenues are open to a prospective complainant.

At present, it seems unlikely that a State is responsible under either treaty for the acts of its private citizens committed outside the territory over which a State has legal or effective control.⁹⁰ However, a State probably is so liable when private actors are acting under its authority, such as pursuant to a military contract. For example, the HRC recently expressed concern to the U.S. over the compatibility of certain interrogation techniques, which were authorised to be used by private military contractors, with Article 7.⁹¹

85 See Draft Articles on the Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission at its Fifty-third Session, (2001) UN doc. A/CN.4/L.602/Rev.1, Article 7.

86 *Sarma v. Sri Lanka* (950/00), § 9.2.

87 General Comment 31, § 8.

88 See Articles 1 and 16, CAT.

89 See Section 4.1.2(e).

90 Joseph, Schultz, and Castan, above note 31, § 4.17.

91 Concluding Observations on the U.S., (2006) UN doc. CCPR/C/USA/CO/3, § 13.

In *H.v.d.P v. The Netherlands* (217/86), the complaint related to the recruitment policies of the European Patent Office. The complainant argued that as France, Italy, Luxembourg, the Netherlands and Sweden were State parties to both the European Patent Convention and the OP to the ICCPR, the HRC was competent to hear the case. The HRC found the case to be inadmissible “the grievances...concern the recruitment policies of an international organization, which cannot, in any way, be construed as coming within the jurisdiction of the Netherlands or of any other State party” to the ICCPR and the OP.⁹² It therefore appears that States are not liable under the UN treaties for the acts of international organizations to which they belong.

States parties are not liable for violations of ICCPR and CAT rights by other States. However, a State can be liable under the treaties if it takes action which exposes a person to a reasonably foreseeable violation of his or her rights by another State. An example of such a violation is when a State deports a person to another State in circumstances where the deportee faces a real risk of torture in the receiving State. Such actions are prohibited under Article 3 of CAT and Article 7 of the ICCPR. In such cases, it is the act of deportation that breaches the treaty, rather than any act of torture which might occur in the receiving State.⁹³

(c) Exhaustion of Domestic Remedies

Article 5(2)(b) of the OP states:

“the Committee shall not consider any communication from an individual unless it has ascertained that...the individual has exhausted all available domestic remedies. This shall not be the rule where the application of the remedies is unreasonably prolonged.”

A similar admissibility requirement is found in Article 22(5)(2) of CAT. Article 22(5)(2) adds that a person does not have to exhaust domestic remedies if they are “unlikely to bring effective relief to the person who is the victim of the violation of this Convention”. Therefore, in order for a complaint to be considered by either Committee, it must be shown that the complainant has genuinely attempted to utilise all available and effective means within the relevant State to gain a remedy for the breach of his or her rights.

92 *H.v.d.P v. The Netherlands* (217/86), § 3.2.

93 If an act of torture subsequently takes place in the receiving State, that State breaches the CAT and/or the ICCPR, depending on whether it is a party to those treaties. For further detail on the *non-refoulement* rule, see discussion in Section 1.1 and Appendix 11.

Sometimes no remedy is available. For example, it may be that certain human rights violations are explicitly authorised by a State's law, and that the law cannot be challenged for any reason in a court. For example, a person is not required to appeal an action if it is clearly authorised by domestic legislation and if there is no avenue to challenge the municipal validity of that legislation.⁹⁴

It may be that domestic remedies are not exhausted at the time of the submission of a complaint, but are exhausted by the time the admissibility of the complaint is actually considered by the relevant Committee. In this situation, the Committee will almost always decide that Article 5(2)(b) has been satisfied. There is little point in deeming such a complaint inadmissible on the basis of Article 5(2)(b), as the complainant can simply resubmit an identical complaint.⁹⁵

If a complaint is deemed to be inadmissible as domestic remedies were not exhausted, the complaint may be resubmitted if available domestic remedies are subsequently exhausted without satisfaction.

i. Types of Remedies

Complainants are generally expected to exhaust domestic judicial remedies.⁹⁶ The Committees are often more lenient with regard to the need to exhaust administrative remedies, as the quality and nature of such remedies vary widely across States. The relevance of an administrative remedy to the domestic remedies rule will depend in each case on its perceived effectiveness. The Committees are not likely to require the exhaustion of highly unusual or “extraordinary” remedies which are outside the mainstream of the relevant State's justice system.⁹⁷ Administrative remedies will be deemed ineffective, meaning a person does not have to exhaust them, if they are highly discretionary. For example, in *Singarasa v. Sri Lanka* (1033/01), the failure to seek a presidential pardon in respect of a long prison sentence was not a domestic remedy that needed to be exhausted in order for the complaint to be admissible.⁹⁸

94 Joseph, Schultz, and Castan, above note 31, § 6.20.

95 An exception arose in *Kuok Koi v. Portugal* (925/00), due to the unusual circumstance of the relevant territory, Macao, changing hands from Portugal to China throughout the currency of the complaint.

96 Joseph, Schultz, and Castan, above note 31, §§ 6.02-6.03; see for example *Patiño v. Panama* (437/90), § 5.2.

97 *Muhonen v. Finland* (89/81). See also M. Nowak, *U.N. Covenant on Civil and Political Rights, CCPR Commentary*, 2nd edn., N.P. Engel, Publisher, 2005, pp. 886-888.

98 *Singarasa v. Sri Lanka* (1033/01), § 6.4.

In *Vicente et al v. Colombia* (612/95), the HRC held that it is necessary to look at the nature of the alleged violation in order to ascertain whether a remedy is effective. If an alleged violation is serious, such as the breach of a person's right to life, administrative and disciplinary measures alone are unlikely to be considered either adequate or effective.⁹⁹ One can assume that a similar requirement exists with regard to allegations of torture, cruel, inhuman or degrading treatment or punishment, given the grave nature of such abuses.

ii. How is One Supposed to Exhaust Domestic Remedies?

In general, a person who wishes to submit a complaint to the HRC or the CAT Committee must raise the substance of his or her complaint before the local authorities in order for the complaint to be admissible.¹⁰⁰ In *Grant v. Jamaica* (353/88), the complaint related to conditions of detention on death row. The HRC held that domestic remedies had not been exhausted because the complainant had not shown the HRC what steps he had taken in order to bring his complaints to the attention of the prison authorities, nor had he outlined whether any investigations had been carried out in response to his complaints.¹⁰¹ In *Perera v. Australia* (541/93), the complainant submitted a complaint to the HRC on the grounds that his trial was unfair because of the presence of a particular judge, and because he had not been provided with an interpreter. The HRC held that domestic remedies had not been exhausted as the judge's participation was not challenged during the trial, nor was the absence of an interpreter brought to the attention of the court during the trial.¹⁰²

In exhausting domestic remedies, a person need not specifically invoke the relevant international provision so long as the substance of the complaint is addressed.¹⁰³ For example, one may successfully exhaust domestic remedies with regard to an allegation of torture without referring explicitly to Article 7 ICCPR or the CAT in domestic proceedings, if those specific provisions have not been incorporated into a State's municipal law.

99 See also *Coronel et al v. Colombia* (778/97), § 6.2.

100 Joseph, Schultz, and Castan, above note 31, § 6.07.

101 Compare the Model Complaint (*Textbox ii*), § 13.

102 See also *Mazón Costa and Morote Vidal v. Spain* (1326/04).

103 *B.d.B v. Netherlands* (273/89), § 6.3.

iii. Procedural Limitations for Domestic Remedies

A complainant is expected to comply with all reasonable procedural limitations regarding the availability of domestic remedies. For example, a person may have a limited time in which to appeal a lower court's decision to a higher court. If he or she fails to do so, it is likely that any subsequent complaint will be deemed inadmissible due to a failure to exhaust domestic remedies. This is so even if the failure to comply with local procedural requirements is the fault of a privately retained lawyer, rather than the complainant.¹⁰⁴ Furthermore, ignorance of the law is no excuse.¹⁰⁵

However, the complainant may sometimes be excused from strict application of the domestic remedies rule if his or her publicly appointed lawyer has failed to comply with local procedural requirements. For example, in *Griffin v. Spain* (493/92), the complainant's court-appointed counsel did not contact him at all, and consequently did not inform him of the remedies available to him. Although the complainant did not seek the relevant remedy within the time limit, the case was not held to be inadmissible on these grounds.

If a person makes a genuine and reasonable yet unsuccessful attempt to comply with local procedural requirements and exhaust domestic remedies, such attempts may satisfy the domestic remedies rule. For example, in *J.R.T. and the W.G. Party v. Canada* (104/81), the complainant failed to file his application for judicial review within the legal time limit because the time limits in question were conflicting and ambiguous. As the complainant had made a reasonable effort to exhaust domestic remedies, the HRC held that he had complied with the requirements of Article 5(2)(b) of the OP.¹⁰⁶

iv. Futile Remedies

A person need not pursue futile appeals. This exception to the normal domestic remedies rule is explicitly found in Article 22(5)(2) of CAT. The exception has also been recognised with regard to the ICCPR by the HRC in its case law.

For example, in *Pratt and Morgan v. Jamaica* (210/86, 225/87), the HRC held that complainants are not required to exhaust domestic remedies which objec-

¹⁰⁴ See e.g., *C.P. and M.P v. Denmark* (CERD 5/1994).

¹⁰⁵ See e.g., *Soltes v. Czech Republic* (1034/01), § 7.4.

¹⁰⁶ See also *Mpandanjila et al v. Zaire* (138/83).

tively have no prospect of success. A person's subjective belief or presumption that a certain remedy is futile does not absolve him/her of the requirement to exhaust all domestic remedies:¹⁰⁷ the relevant remedy must be objectively futile.

It is difficult to establish that a remedy is objectively futile. For example, in *P.M.P.K v. Sweden* (CAT 30/95), the complainant alleged that her proposed expulsion from Sweden to Zaire would expose her to a real chance of torture in Zaire. Within eighteen months, she had already had two applications for asylum rejected. She asserted that a third application would be futile. While she had new evidence of her medical condition, she had no new evidence to counter the grounds upon which she had been previously unsuccessful, that is that she did not face a risk if returned to Zaire. Furthermore, only five percent of new applications were successful. Nonetheless, the CAT Committee found that it could not be conclusively stated that a new application would be ineffective or futile.

In *Arzuaga Gilboa v. Uruguay* (147/83), the HRC stated that "effective" remedies include "procedural guarantees for a fair and public hearing by a competent, independent and impartial tribunal".¹⁰⁸ In this respect, the Committees have recognised that the pursuit of domestic remedies in certain circumstances under certain tyrannical regimes are likely to be futile. The rule of law may simply not apply under such regimes; courts are usually not independent, and may simply act as rubber stamps for governments.¹⁰⁹

One is not required to exhaust domestic remedies if it is dangerous to do so. In *Phillip v. Jamaica* (594/92), the HRC held that due to the complainant's fear of the prison authorities, he was not required to alert these authorities to the poor conditions in detention.¹¹⁰

If the highest domestic tribunal in the land has made a decision in a case where the facts are very similar to those in the relevant case, and if that higher court decision eliminates any prospect of success of an appeal to the domestic courts, complainants will not be required to exhaust that domestic remedy.¹¹¹ In *Pratt and Morgan v. Jamaica* (210/86, 225/87), the complainants claimed that their

107 See *R.T. v. France* (262/87) and *Kaaber v. Iceland* (674/95).

108 *Arzuaga Gilboa v. Uruguay* (147/83), § 7.2.

109 Joseph, Schultz, and Castan, above note 31, § 6.15; see also C. Giffard, *The Torture Reporting Handbook*, Human Rights Centre, University of Essex, 2000, p. 81.

110 *Phillip v. Jamaica* (594/92), § 6.4. See the Model Complaint, *Textbox ii*, § 18.

111 See Joseph, Schultz, and Castan, above note 31, § 6.20.

execution after a long period of time on death row would breach their ICCPR rights. They argued that an appeal to the Supreme Court of Jamaica would inevitably fail due to a prior decision of the Judicial Committee of the Privy Council, the highest court in the Jamaican legal system, which had rejected the legal arguments that the complainants wished to put forward. The HRC held that a constitutional motion in this case “would be bound to fail and there was thus no effective remedy still to exhaust.”¹¹² In *Faurisson v. France* (550/93), the complainant was not required to appeal his case to the French Court of Appeal as his co-accused had already lost his appeal before that court. On the other hand, the Committees may require the complainant to exhaust this remedy if the relevant superior judgment is a weak precedent. An example of a weak precedent may arise where the higher court judgment is decided by a thin majority, or where the law was largely uncharted prior to that decision.¹¹³

v. Expensive Remedies

The Committees sometimes take into account the financial means of the complainant and the availability of legal aid, though the case law in this regard is not entirely clear.¹¹⁴ In *Henry v. Jamaica* (230/87), the complainant argued that he could not pursue a constitutional remedy in the Jamaican Supreme Constitutional Court due to his lack of funds and the fact that legal aid was not available for constitutional motions. The HRC held that “it is not the author’s indigence which absolves him from pursuing constitutional remedies, but the State party’s unwillingness or inability to provide legal aid for this purpose”.¹¹⁵ The HRC consequently held that the complainant did not need to pursue the constitutional motion as it was neither available nor effective. On the other hand, in *P.S. v. Denmark* (397/90), the HRC held that simply because a person may have doubts over the financial considerations of a remedy, he or she is not absolved from exhausting that remedy. This case may be distinguished from *Henry* as the complainant did not even attempt to pursue any judicial remedies nor did he show that he was unable to afford to pursue such remedies.¹¹⁶ If a

112 *Pratt and Morgan v. Jamaica* (210/86, 225/87), § 12.5. Ironically, the Privy Council did ultimately overturn its previous case law on the relevant issue in a case brought by Pratt and Morgan in *Pratt and Morgan v. Attorney-General for Jamaica* (1993) 2 AC 1. See Section 3.2.10(b).

113 See e.g., *Barbaro v. Australia* (CERD 7/95), § 10.5. This case was decided under the individual complaint mechanism under the International Convention on the Elimination of all forms of Racial Discrimination 1966.

114 Joseph, Schultz, and Castan, above note 31, § 6.27.

115 *Henry v. Jamaica* (230/87), § 7.3.

116 Joseph, Schultz, and Castan, above note 31, § 6.27.

person can afford to pursue an available remedy, he or she must do so even if that remedy is expensive.¹¹⁷ Furthermore, a person must actively seek and fail to get legal aid (unless there is no provision for legal aid in the relevant State) before he or she can be absolved from seeking a costly remedy.¹¹⁸

vi. Unreasonable Prolongation of Remedies

The Committees do not expect persons to pursue remedies which are unreasonably prolonged. This exception to the normal domestic remedies rule is expressly found in both the OP and Article 22 of the CAT.

In *R.L. et al v. Canada* (358/89), it was held that even if a complainant anticipates overly lengthy proceedings, he or she must still make a reasonable effort to exhaust domestic remedies. Furthermore, if remedies are prolonged due to the fault of the complainant, then they will not be held to be unduly prolonged.¹¹⁹

There is no standard period of time which is applied to determine whether a remedy is “unreasonably prolonged”: the period will vary according to the complexity of the case. In *Fillastre and Bizoarn v. Bolivia* (336/88), the complaint related to the arrest and prolonged detention of two French private detectives by Bolivian authorities. The HRC held that:

“a delay of over three years for the adjudication of the case at first instance, discounting the availability of subsequent appeals, was “unreasonably prolonged” within the meaning of Article 5, paragraph 2(b) of the OP”.¹²⁰

As the delays were not caused by the complainants and they could not be justified by the complexity of the case, the requirement to exhaust all available domestic remedies was deemed to have been met. In *V.N.I.M. v. Canada* (CAT 119/98), the complainant had been pursuing remedies in immigration proceedings for more than four years; the CAT Committee considered that any further extension of this time period would be unreasonable.¹²¹ In *Blanco v. Nicaragua* (328/88), the complainant had spent nine years in detention by the time he sub-

117 See for example, *R.W. v. Jamaica* (340/88), § 6.2.

118 See for example, *G.T. v. Canada* (420/90), § 6.3.

119 See for example, *H.S. v. France* (184/84).

120 *Fillastre and Bizoarn v. Bolivia* (336/88), § 5.2.

121 *V.N.I.M. v. Canada* (CAT 119/98), § 6.2.

mitted the complaint. No remedies were available to him at that point in time. Whilst the complaint was pending, a new government came to power, and released him after ten years in prison. The new government argued that the complainant now had recourse to new remedies to seek recompense for his detention. The HRC held that the complainant could not be required to pursue further remedies as the application of such remedies would entail an unreasonable prolongation of the complainant's quest for vindication.¹²²

vii. Burden of Proof

The initial burden is with the complainant to prove that he or she has exhausted or genuinely attempted to exhaust all appropriate domestic remedies. The complainant must substantiate any claim that certain remedies are unavailable, ineffective, futile or unreasonably long. Subsequently, the burden shifts to the State party to provide evidence that domestic remedies are still available and effective. This approach is quite flexible and ensures that the burden is shared between the author and the State party.¹²³

(d) No Simultaneous Submission to Another International Body

The ICCPR and CAT will be addressed separately with regard to this ground of inadmissibility, as the rules are materially different.

i. The ICCPR

Article 5(2)(a) of the OP to the ICCPR states that:

“the Committee shall not consider any complaint from an individual unless it has ascertained that the same matter is not being examined under another procedure of international investigation or settlement.”

Therefore, the HRC will not consider complaints that are being considered *at the same time* by a relevant international body. For example, in *Wright v. Jamaica* (349/89), a violation of the complainant's rights had already been found under the Inter-American Convention on Human Rights; he was nevertheless able to subsequently bring the same complaint before the HRC.

¹²² *Blanco v. Nicaragua* (328/88), § 9.2.

¹²³ Joseph, Schultz, and Castan, above note 31, § 6.43.

If a complaint is deemed inadmissible under Article 5(2)(a), the complainant can resubmit the complaint once the consideration of his complaint by the other international body has concluded.

A relevant international procedure for the purposes of Article 5(2)(a) is an analogous international individual complaints procedure, such as those available under the European Convention of Human Rights, the American Convention on Human Rights, the African Charter, the CAT, the International Convention on the Elimination of all forms of Racial Discrimination, or the Convention on the Elimination of all forms of Discrimination Against Women. A complaint under Article 26 of the International Labour Organisation Constitution and the special procedure before the International Labour Organisation's Committee on Freedom of Association may also render a complaint inadmissible.¹²⁴

On the other hand, a study by an intergovernmental organisation of a human rights situation in a given country does not render the complaint inadmissible, even if that study touches on issues that arise in a relevant complaint.¹²⁵ Nor will a study by a Special Rapporteur, such as the Special Rapporteur on Torture, or a procedure established by an NGO, such as Amnesty International, the International Commission of Jurists, or the International Committee of the Red Cross, amount to a "procedure of international investigation or settlement" for the purposes of Article 5(2)(a).¹²⁶

The HRC has held that the words, "the same matter", in Article 5(2)(a) of the OP, have "to be understood as including the same claim concerning the same individual, submitted by him or someone else who has the standing to act on his behalf before the other international body."¹²⁷ For example, in *Unn et al v. Norway* (1155/03), a complaint about the same matter (compulsory religious education in Norwegian schools) was submitted to both the HRC and the European Court of Human Rights. However, the complaints were submitted by different sets of parents and students, so the complaints did not concern "the same matter".¹²⁸ In *Millán Sequeira v. Uruguay* (6/77), a case had been put before the Inter-American Commission on Human Rights relating to hundreds of persons detained in Uruguay; two sentences of that complaint related to the

124 Nowak, above, note 97 p. 879.

125 *Baboeram et al v. Suriname* (146, 148/154/83), § 9.1.

126 *Baboeram et al v. Suriname* (146, 148/154/83), § 9.1.

127 *Fanali v. Italy* (75/80), § 7.2.

128 *Unn et al v. Norway* (1155/03), § 13.3.

victim in the OP complaint. The HRC held that the OP complaint was not comparable as it described the victim's personal complaint in detail.¹²⁹ Therefore, the two cases did not relate to the same matter.

As noted above, Article 5(2)(a) does not preclude the admissibility of a case if a case has been considered under an alternative international complaints mechanism, so long as that consideration is completed. However, numerous European States have entered reservations¹³⁰ to the OP to preclude consideration of cases if they have been *previously* considered under the European Convention on Human Rights (ECHR). Therefore, these reservations generally aim to prevent the UN treaty bodies being used to "appeal" European human rights decisions.¹³¹

The case law on the European reservations is complex.¹³² For example, the HRC has apparently tried to limit the application of such reservations when the facts of a relevant case give rise to different claims under the ICCPR and ECHR, due to substantive differences between the respective treaties.¹³³ Such issues are unlikely to arise with regard to torture, cruel, inhuman or degrading treatment, as both treaties prohibit such acts.¹³⁴ Other complexities have arisen with regard to the HRC's interpretation of the exact words of a relevant European reservation. For example, a reservation that prohibits the HRC from considering cases previously "decided" by the European Court of Human Rights is narrower than a reservation which prohibits the consideration of cases previously "submitted" to the European Court of Human Rights. The latter reservation is broader as it seems to catch complaints that were submitted to the European Court but withdrawn prior to the making of any decision. It is therefore advisable for a complainant to the HRC to scrutinise the wording of any relevant reservation by a European State, if the same matter has been previously dealt with in some way under the ECHR. It may be possible to distinguish the fact situation from the situation referred to in the relevant reservation, depending on the language of that reservation.

129 *Millán Sequeira v. Uruguay* (6/77), § 9.

130 A reservation, which must be entered upon ratification of a treaty, modifies a State's obligations under a relevant treaty. It normally constitutes an intention to opt out of certain provisions of a treaty.

131 P.R. Ghandi, *The Human Rights Committee and the Right of Individual Communication*, Ashgate, 1998, p. 228.

132 Joseph, Schultz, and Castan, above note 31, §§ 5.09-5.17.

133 For example, the ICCPR contains some rights, such as the explicit prohibition on hate speech, which are not in the ECHR.

134 This does not mean that the law under the UN treaties and the ECHR is the same. For example, the HRC and the European Court have taken different views on the death row phenomenon: see Section 3.2.10(b).

ii. *CAT*

Under Article 22(5)(1) of CAT, the CAT Committee may not consider any complaint that has been or is being examined by another procedure of international investigation or settlement. Unlike the ICCPR, this ground of inadmissibility is not limited to situations where a complaint is being simultaneously considered by another international body: the CAT Committee is also precluded from examining complaints that have been considered under an analogous procedure, even if that process is complete. Therefore, the CAT is stricter than the ICCPR in this regard.

It can be expected that the CAT Committee will follow the case law of the HRC with regard to other relevant issues, such as the definition of a relevant international procedure, and the definition of the “same matter”.

(e) Abuse of the Right of Submission

Sometimes a complaint will be found inadmissible because it is an abuse of right of submission. This ground of inadmissibility is rarely invoked. It might arise for example if a purported victim deliberately submits false information to a Committee.¹³⁵ It might also arise if the complaint is submitted after a very long period of time has elapsed since the incident complained of. The case of *Gobin v. Mauritius* (787/97) was dismissed on this ground. The complaint concerned alleged discrimination against the complainant by the State contrary to Article 26 ICCPR, entailed in its failure to acknowledge his election to the Mauritian legislature. The complaint was submitted five years after the relevant election. Though there is no strict time limit in which one should submit a complaint to the HRC, it stated in this case:

“[T]he alleged violation took place at periodic elections held five years before the communication was submitted on behalf of the alleged victim to the Committee with no convincing explanation in justification of this delay. In the absence of such explanation the Committee is of the opinion that submitting the communication after such a time lapse should be regarded as an abuse of the right of submission, which renders the communication inadmissible under Article 3 of the Optional Protocol.”¹³⁶

135 Nowak, above note 97, p. 853.

136 *Gobin v. Mauritius* (787/97), § 6.3. Five dissenting members of the HRC claimed that the majority decision improperly introduced a “preclusive time limit” to the Optional Protocol.

2.1.2 How to Submit a Complaint to the HRC and the CAT Committee

Individual complaints, sometimes referred to as “individual communications”, can be submitted under the OP to the ICCPR and Article 22 of the CAT regarding alleged violations by States parties of their obligations under the respective treaties with respect to particular individuals.

Individual complaints must be sent to the relevant Committee at the following addresses.

ICCPR

Human Rights Committee,
c/o Office of the UN High Commissioner for Human Rights,
Palais Wilson,
52 Rue des Pâquis,
1211 Geneva, Switzerland
Fax: (41 22) 917-9022
Email: tb-petitions.hchr@unog.ch

or

CAT

Committee Against Torture,
c/o Office of the UN High Commissioner for Human Rights,
Palais Wilson,
52 Rue des Pâquis,
1211 Geneva, Switzerland
Fax: (41 22) 917-9022
Email: tb-petitions.hchr@unog.ch

A complaint regarding an allegation of torture, inhuman or degrading treatment cannot be sent to both Committees at the same time. Therefore, an individual must choose which treaty body to submit the complaint to.¹³⁷

The treaty body to which the complainant wishes to send the complaint must be clearly specified. Complaints must be in writing, and may be submitted by fax or email, but they will not be registered until the Secretariat receives a signed hard copy.

¹³⁷ See Section 2.1.3(c).

(a) Basic Guide to Submission of a Complaint

A model complaint form is available at <http://www.unhcr.ch/html/menu6/2/annex1.pdf>. It is not compulsory to use this form, but correct completion of this form does ensure that basic necessary information is conveyed to the relevant Committee. The Model Complaint in *Textbox ii*, below, provides an alternative example how to submit a complaint.

The complaint form provided on the OHCHR's website specifies that the following information should be given:

- name of the treaty body to which the complaint is addressed
- name of the person submitting the complaint
- State against whom the complaint is made. (Regarding the ICCPR, a communication can only be submitted against a State if that State has ratified the OP. Regarding CAT, a communication may only be submitted against a State that has made the requisite declaration under article 22 of the treaty.)
- the nationality, date and place of birth, occupation of the author
- signature of the person submitting the complaint
- address for correspondence regarding the complaint
- the name of the victim, if different from the person submitting the complaint. This person is also known as 'the author' or, in this *Handbook*, 'the complainant'. If the victim is uncontactable (e.g. he/she is dead), a person with a close relationship to that victim, such as a close family member, has standing to be the author.¹³⁸
- author's nationality, date and place of birth, and occupation
- author's address, if known
- authorisation for a person (if not the author) to submit the complaint
- explanation as to why there is no such authorisation, if that is the case
- request for anonymity in publication of any decisions, if necessary

¹³⁸ See Section 2.1.1(a).

- a list of the articles of the relevant treaty (ICCPR or CAT) that the person maintains have allegedly been violated. Ensure that the State party has not made reservations to the relevant articles.¹³⁹
- a description of how domestic remedies have been exhausted
- an explanation of why domestic remedies have not been totally exhausted, if that is the case¹⁴⁰
- a statement that the complaint is not simultaneously before another procedure of international investigation of settlement¹⁴¹
- if the events have taken place outside a State's territory, an explanation as to why the State should be held responsible for those events.¹⁴²
- if some or all of the events have taken place prior to entry into force of the individual complaints procedure for a State, an explanation as to why the violations are 'continuing violations'.¹⁴³
- a request for interim measures, if such a request is being made, along with an explanation as to why such measures are being requested.¹⁴⁴
- a detailed statement of the facts
- a description of the remedy requested
- relevant supporting documentation

b) Legal Advice and Representation

An author may authorise another person to act on his or her behalf in submitting the complaint, and in liaising with the Committee throughout the consideration of the complaint. Such authorisation should be in writing with a signature. There is no formal authorisation form.

139 If a State enters a 'reservation' to a treaty provision, it is signalling that it does not consider itself bound by that provision. Reservations must be entered upon ratification. Reservations to UN human rights treaties may be found at <http://www.unhchr.ch/tbs/doc.nsf>

140 See Section 2.1.1(c).

141 See Section 2.1.1(d).

142 See Section 2.1.1(b)(iii).

143 See Section 2.1.1(b)(ii).

144 See Section 2.2.

It is not necessary for a communication to be submitted by a qualified lawyer. However, if possible, it is preferable for a victim to seek legal assistance in drafting and submitting his or her complaint. The involvement of a lawyer in the drafting process should improve its quality and therefore its chances of success.¹⁴⁵

c) Costs of Submission

The process of submitting a complaint is free: there are no costs incurred as such if a UN treaty body should consider one's complaint. However, costs may be incurred in preparing the complaint. For example, costs may be incurred in procuring legal advice or retaining a lawyer to handle the communication, in translating documents, and in obtaining copies of relevant documentation. No legal aid is available from the UN. Access to legal aid will depend on its availability under the relevant national legal system.¹⁴⁶ In some instances local lawyers or NGOs may be willing to assist on a *pro bono* basis.

d) Pleadings

To date, every complaint has been decided on the basis of written submissions. Though the rules of the CAT Committee make provision for the giving of oral evidence,¹⁴⁷ this has never happened.

All of the facts upon which the claim is based should be set out in chronological order and in clear, concise language. It should also be easy to read, so paragraphs should be numbered and, if necessary, cross-referenced,¹⁴⁸ with double spacing. Supporting documentary evidence should be appended to the complaint, such as police records or medical records. If necessary, translated copies should be included. Such evidence is discussed more in Section 2.1.2(e).

There is no time limit within which to bring a claim. However, it is preferable for a complaint to be brought to the relevant Committee as soon as possible after the exhaustion of the final relevant domestic remedy in respect of the

145 UN Fact Sheet No.7/Rev.1, "Complaint Procedures", at: www.ohchr.org/english/about/publications/sheets.htm

146 "How to Complain about Human Rights Treaty Violations: Introduction to Complaints Procedures" at http://www.bayefsky.com/complain/9_procedures.php

147 Rules of Procedure of the Committee Against Torture, (2002) UN doc. CAT/C/3/Rev.4, (hereinafter referred to as "CAT Rules of Procedure"), Rule 111.

148 See Model Complaint, *Textbox ii*, e.g., §§ 4, 21, 38.

complaint. In *Gobin v. Mauritius* (787/97), the HRC found that an inexplicable delay of five years in submitting the complaint rendered the complaint inadmissible as an abuse of the right of submission.¹⁴⁹ Significant delay in the submission of a complaint can render one's story less credible, as evidence may be very old, and can prejudice the State party's ability to respond.

There is no word limit to a complaint. If it is especially long, it may be advisable to include a short summary of the contents of the complaint.¹⁵⁰

The complaint should be submitted in one of the working languages of the Committees, which are English, French, Spanish, and Russian.¹⁵¹ Therefore, the complaint, along with relevant documentation, should be translated into one of these languages. In fact, consideration of a complainant is likely to be delayed if it is submitted in a language other than English, French, or Spanish. With regard to supporting documentation, copies in the original language should also be forwarded.

The author should explain why the facts amount to a breach of named provisions of the relevant treaty. It is not strictly necessary to identify the articles that have allegedly been violated, but it is preferable to do so. If possible, the author should refer to the previous case law or other jurisprudence (e.g. General Comments, Concluding Observations) of the relevant Committee.¹⁵² If there is no such favourable jurisprudence, the author could refer to the favourable jurisprudence of another UN treaty body, a regional human rights court or even a comparative decision from another State's domestic courts.¹⁵³ In short, the author should try to include references to legal precedents that support his or her case. If the previous case law of the relevant Committee undermines the author's case, the author should acknowledge that fact and try to distinguish the previous case law, or put forward an argument as to why it should not be followed. The author should also, if possible, point out if the facts raise a novel issue that has not been previously addressed by the relevant Committee.

The author must confirm that the complaint satisfies all of the admissibility criteria. In particular, the author should detail how domestic remedies have

149 Section 2.1.1(e)

150 Giffard, above note 109, 66-67.

151 Rules Of Procedure of the Human Rights Committee, (2005) UN doc. CCPR/C/3/Rev.8, (hereinafter referred to as "HRC Rules of Procedure"), Rule 28; CAT Rules of Procedure, Rule 26.

152 See, Model Complaint, *Textbox ii*, at, e.g., §§ 40-41.

153 See Model Complaint, *Textbox ii*, § 46.

been exhausted. The author should specify whether he or she has sought a remedy from the highest court of the relevant State; in doing so, the author should not assume that committee members are familiar with the judicial hierarchy in the relevant State.¹⁵⁴ If no relevant domestic remedies were available, that fact should be explained in the account. If domestic remedies have not been exhausted, the author should explain why they were not exhausted.¹⁵⁵ The rule is waived where pursuance of a remedy is clearly futile, or is unreasonably prolonged. The author should explain why a remedy is futile, or why he or she believes it is unreasonably prolonged. Bald assertions (e.g. ‘the courts are unfair’; ‘the courts are corrupt’) in this regard are unlikely to be accepted at face value by the Committees.

The author must also confirm that, in accordance with article 5(2)(a) of the OP, the complaint is not being examined by another procedure of international investigation or settlement.¹⁵⁶

The author must also be aware of other reasons for inadmissibility, and address them if they are relevant. For example, if the alleged violation takes place before the date for which the relevant individual complaints mechanism came into force for the relevant State, the author must explain why there is a continuing violation on the facts of the case.¹⁵⁷ If the alleged violation takes place outside the territory of the relevant State, the author must explain why the State should be held responsible for those extraterritorial actions.¹⁵⁸

Many cases before the treaty bodies have concerned allegations which have been tested before a national court, which decides that the allegations are not proven. For example, a person may claim that he or she was tortured by police, and may seek to prove that allegation before a court, which ultimately finds that the allegation is unfounded. Due to the need to exhaust domestic remedies, this scenario has arisen often. In general, the treaty bodies are very unlikely to overrule the decision of a national court if that court has addressed the substance of the complaint. For example, the HRC stated in *R.M. v. Finland* (301/88):

“The Committee ... is not an appellate court and ... allegations that a domestic court has committed errors of fact or law do not in themselves raise questions of violation of the Covenant ...”¹⁵⁹

154 See Model Complaint, *Textbox ii*, § 31.

155 See Model Complaint, *Textbox ii*, § 32.

156 See Model Complaint, *Textbox ii*, § 28.

157 Section 2.1.1(b)(ii).

158 Section 2.1.1.(b)(iii).

159 *R.M. v. Finland*, (301/88), § 6.4.

The Committees' fact finding processes compare poorly with those of national courts, which have the benefit of seeing witnesses and assessing their demeanour, and hearing oral evidence. The Committees will generally only 'overrule' a national court's decision if it can be established that the court's decision is clearly arbitrary or manifestly unjust, or has suffered from a procedural defect (e.g. the judge had a conflict of interest). Therefore, if an author must challenge a local court decision in order to have his or her complaint upheld, the author should explain how:

- (a) the court did not address the substance of the complaint before the treaty body,¹⁶⁰
- (b) the court's decision was manifestly arbitrary or unjust. Such an argument might be made if a decision neglects a crucial piece of evidence. For example, in *Wright v. Jamaica* (349/89), § 8.3, a breach of the right to a fair trial was entailed in the judge's failure, in giving instructions to a jury in a criminal trial, to remind the jury of a potential alibi for the author, who was accused of murder.
- (c) the court's decision suffers from a significant procedural defect, such as the participation in the decision of a decision-maker who has clearly manifested bias against the victim.¹⁶¹

It is possible that the CAT Committee, in considering cases under Article 3 of CAT (concerning deportation to a State where a victim faces a real risk of torture), adopts a less deferential approach. It has explicitly stated that in such cases, while it will give "considerable weight" to "findings of fact that are made by organs of the State party concerned" (such as refugee review tribunals), it "is not bound by such findings", and may independently assess the facts and circumstances in every case.¹⁶² Nevertheless, the CAT Committee has departed from domestic court decisions in this regard in only a small portion of Article 3 cases.

Unless a complaint is not registered, or is dismissed by the relevant Committee as clearly inadmissible, the State party will be given an opportunity to respond

160 This argument could in turn raise issues regarding the exhaustion of domestic remedies. Therefore, the author should explain why the substance of the international complaint was not addressed by a local court. In many cases it will be because the actual issue is not effectively justiciable before a national court (i.e. there is no legal ground to challenge the issue in national law).

161 See, eg, *Karttunen v. Finland* (387/89), § 7.1-7.3.

162 General Comment 1 (CAT), § 9(a) and 9(b).

to the initial complaint. The author will then have an opportunity to respond to the State's submissions, and this process may happen more than once. Often a State party will contest some or even all of the author's assertions. In responding to such contentions, the author should address the State's arguments point by point. The author should highlight any flaws or inconsistencies in the State's reasoning, and any gaps in the evidence that it puts forward (e.g. an absence of relevant documentary evidence).

The author's reply will then be sent to the State, and often the two parties (State and author) will have another 'round' of arguments. A party is always given the opportunity, within time limits, to respond to any new arguments submitted by the other. On each occasion that an author responds to a State, he or she should address its arguments point by point, highlighting flaws and inconsistencies if any.

Finally, an author should inform the Committee of any significant developments which arise during the currency of the complaint such as, for example, the passage of relevant new legislation by a State, developments in an investigation, the release or death of a person, and so on.

e) Establishment of Facts

An author should submit as detailed an account of the facts as possible, even though this might be a painful experience to record. All relevant information, such as relevant dates, names, and locations, should be included.¹⁶³ An account is more credible if it includes salient details. For example, it is essential to describe the relevant acts of ill-treatment, rather than to simply say that the victim was subjected to 'torture'. Do not make any assumptions about the implications that the relevant treaty body should draw from the facts as presented. Emotional language, bald assertions without supporting evidence, and assumptions will detract from the credibility of the account.

For example, the following are examples of relevant details in a scenario where a victim is arrested by police, driven to a place of detention, detained in a cell, and subjected to ill-treatment:¹⁶⁴

- How many police officers were involved in a particular assault?
- What type of vehicle did the officers drive?

¹⁶³ See Model Complaint, *Textbox ii*, §§ 1 – 25.

¹⁶⁴ These details have been adapted from Giffard, above note 109, 40-46.

- What time of day was the victim arrested?
- How long did it take to get from the place of arrest to the place of detention?
- Did anyone witness the arrest?¹⁶⁵
- What was said to the victim at the time of the arrest?
- Approximately how big was the cell in which the victim was held?¹⁶⁶
- Was any other detainee in the cell?

Was there any light in the cell?¹⁶⁷

- Other relevant details of the cell (describe bed, colour and state of walls, fixtures etc)?¹⁶⁸
- Where did the ill-treatment take place (e.g. in the cell, elsewhere)?¹⁶⁹
- If a device was used to torture the victim (e.g. a device that delivers an electric shock), describe the device (e.g. size, shape, colour, the way it worked, its effect on the victim)¹⁷⁰
- What, if anything, was said to the victim at the time of the ill-treatment?¹⁷¹
- If possible, identify the perpetrators of the ill-treatment, or describe what they looked like.¹⁷²

In many instances, a torture victim will not be able to supply all of the above information. For example, the victim might be highly disoriented at the time of the torture, and may not remember the colour of a torture device. Nevertheless, it is advisable to record as many details as possible.

In its General Comment 1 (CAT), the CAT Committee outlined, at paragraph 8, the different types of information that help a person establish a violation of Article 3 of the CAT, that is that his or her deportation to another State would expose him or her to torture by that State. Applicants seeking Article 3 *non-*

165 See Model Complaint, *Textbox ii*, § 2.

166 See Model Complaint, *Textbox ii*, § 3.

167 See Model Complaint, *Textbox ii*, § 3.

168 See Model Complaint, *Textbox ii*, § 3.

169 See Model Complaint, *Textbox ii*, § 4.

170 See Model Complaint, *Textbox ii*, § 4.

171 See Model Complaint, *Textbox ii*, §§ 4, 5.

172 See Model Complaint, *Textbox ii*, § 2.

refoulement protection should therefore look carefully at this General Comment.¹⁷³

The author should anticipate the supporting documentation that might be needed to bolster the case. For example, the author should submit copies, including copies translated into a working language if necessary, of relevant local laws that are referred to in his or her narrative.¹⁷⁴ Other types of documentary evidence that might be relevant, depending on the facts, include copies of the following: witness statements, police reports, decisions by local courts or tribunals, photographs, medical and psychological reports including autopsies if relevant, and other official documentation.¹⁷⁵

If the author cannot submit certain relevant documents, he or she should explain why that is the case. For example, it may be that the details of a certain arrest warrant are relevant to the facts of a complaint. In such a case, it would be advisable, and indeed expected, that a copy of the warrant be submitted. If however a copy of the warrant is not made available to the author by the State party, the author should explain that this is the case.¹⁷⁶

Ancillary material, which is not specifically related to the facts of the case, may be helpful. For example, an NGO report about conditions inside a particular prison provides support for an author who is alleging that the conditions in that prison are so bad as to violate the rights of a particular detained per-

173 In General Comment 1 (CAT), the CAT Committee listed the following types of information as pertinent to an Article 3 claim:

- (a) Is the State concerned one in which there is evidence of a consistent pattern of gross, flagrant or mass violations of human rights ... ?
- (b) Has the author been tortured or maltreated by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity in the past? If so, was this the recent past?
- (c) Is there medical or other independent evidence to support a claim by the author that he/she has been tortured or maltreated in the past? Has the torture had after-effects?
- (d) Has the situation referred to in (a) above changed? Has the internal situation in respect of human rights altered?
- (e) Has the author engaged in political or other activity within or outside the State concerned which would appear to make him/her particularly vulnerable to the risk of being placed in danger of torture were he/she to be expelled, returned or extradited to the State in question?
- (f) Is there any evidence as to the credibility of the author?
- (g) Are there factual inconsistencies in the claim of the author? If so, are they relevant?"

174 See Model Complaint, *Textbox ii*, §§ 6, 19.

175 See *Kouidis v. Greece* (1070/02) for an example of a complaint where the author failed to submit adequate information to bolster his claims. See Model Complaint, *Textbox ii*, List of Annexes.

176 See Model Complaint, *Textbox ii*, § 22.

son.¹⁷⁷ An NGO report, or a report by an international organisation, the media, or a government report (e.g. U.S. State Department human rights report) which highlights the frequency of incidents of torture in a State will bolster an author's contention that the victim has been tortured by agents of that State. However, do not overestimate the effect of such general evidence; it remains crucial to include evidence that relates personally to the victim and the facts of the actual case.¹⁷⁸ It is not enough, for example, to simply establish that one is a member of an ethnic group which has historically suffered from human rights abuses at the hands of a particular State government, without establishing that one has suffered personal abuse.¹⁷⁹

The Committees recognise that "complete accuracy is seldom to be expected by victims of torture."¹⁸⁰ Nevertheless, the author should be careful in drafting the claim, and in drafting responses to State arguments, to avoid inconsistencies in his or her account of the facts. For example, it is possible that the author might assert in the initial submission that an incident took place on a certain date. The State may respond by proving that it took place on a different date. If inconsistencies do arise inadvertently, they should be acknowledged and, if possible, explained. The CAT Committee has stated that it "attaches importance to the explanations for ... inconsistencies given by the complainant",¹⁸¹ as well as a person's failure to explain inconsistencies.¹⁸²

In *Kouidis v. Greece* (1070/02), the author failed to establish that he had been mistreated in violation of article 7. The following comments from the HRC demonstrate how the evidence submitted by the author was inadequate:

"The Committee observes that the evidence provided by the author in support of his claims of ill-treatment are a newspaper photograph of poor quality, that he allegedly spent fourteen months in hospital from related medical treatment, the lack of interrogation by the prosecution of the landlords of the apartment mentioned in his confession, and reports of NGOs and the CPT. On the other hand, the State party indicates that the author did not request to be examined by a medical officer with the purpose of establishing ill-treatment, which has not been contested by the author. The Committee further notes that despite spending

177 See Model Complaint, *Textbox ii*, § 11.

178 See, e.g., *Arkauz Arana v. France* (CAT 63/97) and *A.S. v. Sweden* (CAT 149/99) as examples where both types of evidence were submitted, and the claims ultimately upheld.

179 See, e.g., *Z.Z. v. Canada* (CAT 123/99), § 8.5.

180 *Tala v. Sweden* (CAT 43/96), § 10.3.

181 *Ahmed Karoui v. Sweden* (CAT 185/01), § 10.

182 See, e.g., *H.K.H v. Sweden* (CAT 204/02), § 6.3.

such a long time in hospital so soon after the alleged ill-treatment, and despite being in possession of medical certificates concerning his treatment in hospital of haematuria and arthropathy of his knees, back and spine, these certificates do not indicate that any of these sufferings resulted from actual ill-treatment. Nor do any of these certificates mention any traces or consequences of beatings on the author's head or body. The Committee considers that the author, who had access to medical care, had the possibility of requesting a medical examination and did so for the purpose of proving that he was a drug addict. However, he failed to request a medical examination for the purpose of establishing ill-treatment.

... Finally the NGO and Committee on the Prevention of Torture reports submitted by the author [about torture in Greece] are of a general character and cannot establish ill-treatment of the author."¹⁸³

In *Bazarov v. Uzbekistan* (959/00), one claim related to torture perpetrated during a pre-trial investigation. It was found to be inadmissible as it was largely unsubstantiated. For example, there was no evidence that a medical examination was sought at any stage, or that the alleged victim had complained of torture in his subsequent trial, or that his relatives or his lawyer had complained of any acts of torture during the pre-trial investigation.¹⁸⁴

Regarding the burden of proof, the author must initially make out a credible prima facie case. If such a case is made out, the State party is expected to properly investigate the claims.¹⁸⁵

“The Committee has consistently maintained that the burden of proof cannot rest alone on the author of the communication, especially considering that the author and the State party do not always have equal access to the relevant information. It is implicit in article 4, paragraph 2 of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violation of the Covenant made against it and its authorities and to furnish the Committee the information available to it. In cases where the allegations are corroborated by evidence submitted by the author and where further clarification of the cases depends on information exclusively in the hands of the State party, the Committee may consider the author's allegations as substantiated in the absence of satisfactory evidence and explanation to the contrary submitted by the State party”.¹⁸⁶

183 *Kouidis v. Greece* (1070/02), §§ 7.3 and 7.4. See also *Singh v. New Zealand* (791/97).

184 *Bazarov v. Uzbekistan* (959/00), § 7.3.

185 *Lanza v. Uruguay* (8/77), § 15.

186 *Bousroual v. Algeria* (992/01), § 9.4. This quote has been repeated in numerous OP cases, such as *Bleier v. Uruguay* (30/78), § 13.3. See also Nowak, above note 97, 873-4.

A State must respond to specific allegations with specific responses and relevant evidence: “denials of a general character do not suffice”.¹⁸⁷

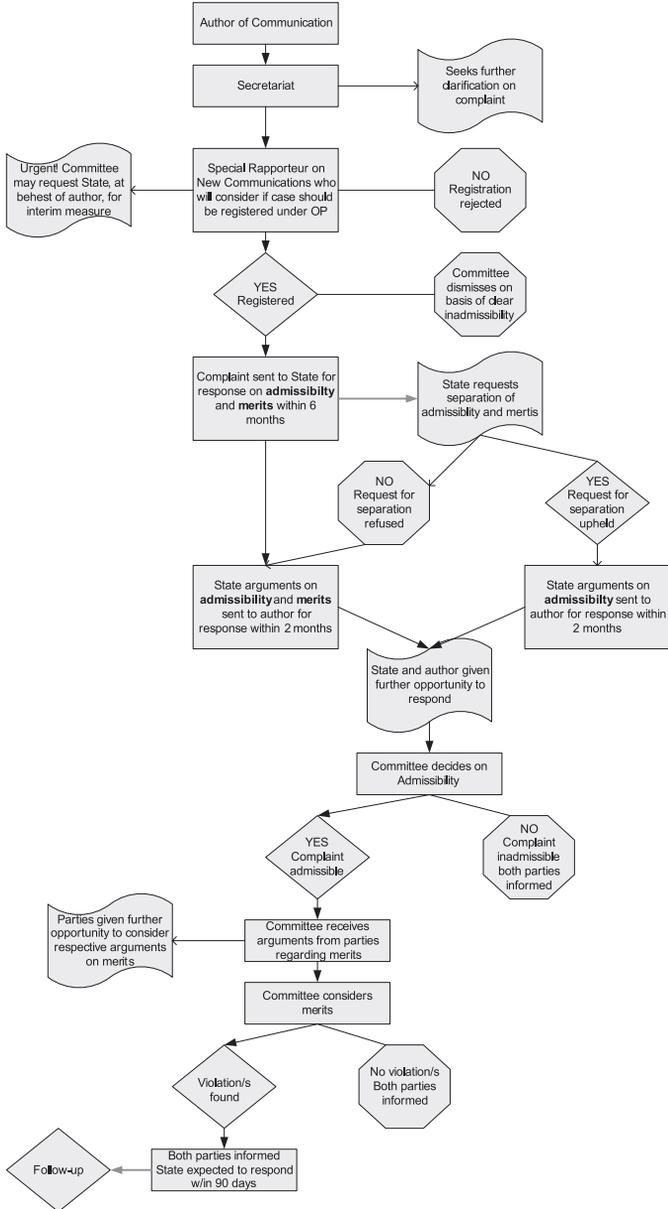
Therefore, if the State party fails to cooperate with the relevant treaty body in providing information about the author’s allegations, the burden of proof is often effectively reversed.¹⁸⁸

In non-refoulement cases under Article 3 of CAT, the CAT Committee has outlined in General Comment 1 (CAT) the different types of information that

187 See, e.g., *Weismann v. Uruguay* (8/77), § 15.

188 See, e.g., *Zheikov v. Russian Federation* (889/1999), § 7.2; *Sultanova v. Uzbekistan* (915/2000), § 7.2; see also Nowak, above note 97, 873-4.

Textbox i: Flowchart Process for Consideration of an OP Complaint



2.1.3 The Process of the Consideration of a Complaint

a) Procedure within the Human Rights Committee

The complaint is originally submitted to the Secretariat of the Office of the High Commissioner for Human Rights. An author should explicitly request the complaint to be forwarded to the HRC for consideration under the OP.

The complaint is reviewed by the Secretariat to ensure that it complies with basic informational requirements. The Secretariat may seek clarifications on numerous issues if the author has failed to give crucial information, such as that outlined at Section 2.1.2(a). Therefore, failure to properly outline the complaint can lead to delays or a decision not to register the complaint. The Secretariat may impose a time limit on the submission of clarifying information,¹⁸⁹ but in practice there are no sanctions for non-compliance with such timelines.¹⁹⁰ Nevertheless, it is in the interests of the author to comply with any timelines if possible. Delay will postpone the registration of the case, which delays its consideration by the HRC.

Once the Secretariat believes it has sufficient information to proceed, it forwards a summary of the case to the HRC member serving as the Special Rapporteur on New Communications. The Special Rapporteur decides whether to register the case or whether to request more information prior to registration. The Special Rapporteur will not register a case if it clearly fails to conform with the admissibility criteria set out in the OP.¹⁹¹

A complaint is considered in two stages: admissibility and merits. Admissibility criteria are discussed in Section 2.1.1, and every successful complaint must satisfy these criteria. If a case is declared wholly inadmissible, that is the end of its consideration. If a case is found admissible, in whole or in part, the HRC will then consider the “merits” of the case. That is, it will consider whether the facts give rise to a violation of the ICCPR. The ultimate merits decision will contain either a finding or findings of violation, a finding or findings of non-violation, or a mixture of such findings.

189 HRC Rules of Procedure, Rule 86(2).

190 See “How to Complain about Human Rights Treaty Violations: The Covenant on Civil and Political Rights – Description” at http://www.bayefsky.com/complain/10_ccpr.php, § 2.

191 See “How to Complain about Human Rights Treaty Violations: The Covenant on Civil and Political Rights – Description” at http://www.bayefsky.com/complain/10_ccpr.php, § 2.

i. Preliminary Decisions regarding Registration and Admissibility

The Special Rapporteur may decide that a case should be registered, but nevertheless recommend immediate dismissal on the basis of inadmissibility to the HRC. The HRC will generally adopt this recommendation. Such recommendations arise when the complaint clearly fails to comply with admissibility requirements.

Otherwise the communication is considered by a Working Group on Communications. This Working Group consists of five Committee members and meets for one week prior to the HRC's regular plenary meetings. This Working Group may also recommend to the HRC that the case be declared inadmissible without seeking a response from the relevant State party if it believes that it clearly fails the admissibility criteria.¹⁹² The HRC tends to adopt such a recommendation, though it can choose to reject it.

Otherwise the complaint is transmitted to the relevant State party for its responses.

ii. Interim Measures

In some circumstances, an author may want the HRC to request a State to take interim measures to prevent actions which might cause the author irreparable harm.¹⁹³ For example, a person on death row who is challenging that sentence might be executed, or a person challenging his/her deportation might be deported. If so, this request for interim measures should be made clear on the front of the initial communication to the Secretariat.¹⁹⁴ Given the urgency of such situations, a request can be sent in advance of the main complaint, such as by email, and followed up with a hard copy.¹⁹⁵ The Special Rapporteur on New Communications then decides whether a request is warranted in the circumstances. If he or she believes a request is warranted, he or she will request that the relevant State take appropriate interim measures to preserve the author's rights. Interim measures have been requested on most occasions where an author has asked for them, and the record of State parties in comply-

192 See "How to Complain about Human Rights Treaty Violations: The Covenant on Civil and Political Rights – Description" at http://www.bayefsky.com/complain/10_ccpr.php, § 2.

193 See Section 2.2.

194 Giffard, above note 109, p. 83.

195 See "How to Complain about Human Rights Treaty Violations: Introduction to Complaints Procedures" at http://www.bayefsky.com/complain/9_procedures.php

ing with such measures is quite good.¹⁹⁶ A request for interim measures by the Special Rapporteur to the State “does not imply a determination on the merits of the communication”.¹⁹⁷

iii. Transmittal to the State Party

If the complaint is not deemed to be manifestly inadmissible, it will be transmitted by the Special Rapporteur to the State party for a reply. The State party has six months to respond with regard to the issues of both admissibility and the merits.

A State party may request within two months that the issues of admissibility and merits be separated. The Special Rapporteur then considers whether to grant the request, which will only occur in exceptional cases. The State party will generally be given an extension of time regarding its submissions on the merits if the Special Rapporteur agrees to separate the issues of admissibility and merits. Of course, such separation will mean that the process of deciding the complaint will take longer if it proceeds to the merits stage. In most cases, the issues are not separated, so the parties (i.e. the author and the States) are required to submit their observations on both admissibility and merits at the same time.

The author is given two months to respond to the State party’s initial submissions. All subsequent new arguments by either party are transmitted to the other party to give that party an opportunity to respond. The Special Rapporteur, the Working Group, or the HRC itself may request further written responses from both the author and the State party within specified time limits under Rule 97(4) of the HRC’s Rules of Procedure. Eventually, the HRC will decide that it has enough information to make its determinations.¹⁹⁸ Though the relevant time limits are not always strictly enforced, it is in the interests of the author to comply if possible to avoid delay, or to avoid his or her response failing to reach the HRC in time. If compliance with timelines is difficult, it is advisable to warn the HRC of this circumstance.¹⁹⁹

196 Joseph, Schultz, and Castan, above note 31, §§ 1.54, 1.55.

197 HRC Rules of Procedure, Rule 91.

198 See “How to Complain about Human Rights Treaty Violations: The Covenant on Civil and Political Rights – Description” at http://www.bayefsky.com/complain/10_ccpr.php, § 2.

199 Giffard, above note 109, p. 83.

Once enough information has been received by the HRC, the case is prepared by the Secretariat and the Case Rapporteur, who is a Committee member appointed to draft the decision regarding the relevant complaint. The Case Rapporteur's draft is considered by the Working Group. The Working Group may accept or reject the Case Rapporteur's conclusions regarding either the admissibility or (if relevant) the merits.

iv. Admissibility

The Working Group, after considering the submissions of the parties regarding admissibility and the recommendations of the Case Rapporteur, may unanimously declare a case to be admissible. Unanimous agreement amongst the Working Group regarding inadmissibility is not decisive, but must be confirmed by the HRC, who may confirm it without formal discussion.²⁰⁰ If the Working Group cannot reach a unanimous decision regarding the admissibility of the complaint, the decision is taken in plenary session by the HRC. The majority decision will prevail,²⁰¹ though members may append separate or dissenting opinions regarding the admissibility of a complaint. All debates and decisions regarding admissibility are taken in closed session. If a complaint is deemed to be wholly inadmissible, that is the final decision. The decision, and the reasons for it, as well as any dissenting or separate opinions, are made public.

Exceptionally, the HRC may reverse its decision that a complaint is admissible. This circumstance may arise if the State party submits further information which establishes that the admissibility requirements have not been satisfied.²⁰²

v. Consideration of the Merits of a Complaint

If the complaint is found to be admissible, and an extension of time has exceptionally been given to the State regarding its submissions on the merits, the State party and the author are given opportunities to make further submissions on the merits after being informed of the admissibility of the decision. A decision that a complaint is admissible is not made public until the merits are decided.

200 HRC Rules of Procedure, Rule 93.

201 There must be a quorum of twelve HRC members; see HRC Rules of Procedure, Rule 37.

202 Such a reversal occurred, for example, in *Oshivand v. Netherlands* (1289/04).

Normally, the HRC will have all submissions on admissibility and merits at the time of its admissibility decision, and may then proceed to decide the complaint on the merits. Alternatively, the case may be referred back to the Working Group for further recommendations on the merits. If the issues have been separated by decision of the Special Rapporteur, the HRC will then receive merits arguments from both the State and the author, with both parties given a chance to respond to each other's arguments. As with admissibility, the HRC eventually will decide it has enough information to decide the case. The case will then be referred to the Working Group and/or the Case Rapporteur to draft recommendations on the merits for the HRC. The Working Group can accept or reject the recommendations of the Case Rapporteur, and the HRC can accept or reject the recommendations of the Working Group.

All debates regarding the merits by the Working Group or the HRC proceed in closed meetings. Ultimately, the decision of the majority will prevail. However, members commonly append separate and dissenting opinions to the majority decision. The final decision (or "views"), including any separate or dissenting opinions, is transmitted to both the author and the State party under Article 5(4) of the OP, and is eventually made public.

If the HRC finds that a person's rights have been violated, the HRC will request the State to inform them within 90 days (from the date of the transmittal of the decision) of the remedy provided to the victim. The final views may recommend a particular remedy, such as compensation, repeal of particular legislation, the release of a person, or leave the determination of a remedy to the State party.²⁰³

vi. Follow-up of Views under the Optional Protocol

The HRC is not a court. Its final views under Article 5(4) of the OP are not strictly binding on a State. However, the HRC is the authoritative interpreter of the ICCPR, which is binding on States parties. Non-compliance by States parties with Committee views is evidence of a bad faith attitude with regard to those obligations.²⁰⁴ In 1990, the HRC adopted a procedure to "follow-up" its findings of violation under the OP. The follow-up process serves to place sustained pressure on recalcitrant States, and is discussed in Section 2.4.1(b).

203 See "How to Complain about Human Rights Treaty Violations: The Covenant on Civil and Political Rights – Description", http://www.bayefsky.com/complain/10_ccpr.php, § 2.

204 S. Joseph, "Toonen v. Australia: Gay Rights under the ICCPR", (1994) 13 *University of Tasmania Law Review* 392, p. 401.

vii. *Miscellaneous Issues*

The OP process is confidential until a final decision is made (either regarding inadmissibility or merits). However, authors are generally allowed to make their submissions public, though they may be requested to refrain from doing so by the Special Rapporteur in some circumstances.²⁰⁵ Information furnished in respect of follow-up is not generally confidential, unless the HRC decides otherwise.²⁰⁶

Though victims may not be anonymous, published records of the complaint may refer to the victim under a pseudonym, if so requested by the author, as for example occurred in *C v. Australia* (900/99).

There are certain circumstances where a particular HRC member will not take part in the consideration of a complaint. The member must not participate if the complaint is against the State party that nominated the member, if he or she has a personal interest in the case, or if the member has participated somehow in national decisions which are referred to in the complaint.²⁰⁷ Unusual examples of committee members withdrawing from a complaint have arisen in *Judge v. Canada* (829/98)²⁰⁸ and *Faurisson v. France* (550/93).²⁰⁹

There is no appeal from the final decision of the HRC regarding inadmissibility or merits. Of course, a complaint may be resubmitted if it was originally found to be inadmissible, if the reasons for inadmissibility should cease to apply. For example, if the case is dismissed due to failure to exhaust local remedies, that reason will cease to apply if local remedies should subsequently be exhausted without satisfaction.

b) Procedure under the Convention against Torture

The procedure for considering a complaint under the CAT is very similar to that under the ICCPR. The CAT Committee operates with a Working Group on Complaints, which functions very much like the HRC's Working Group on Communications. There is a Rapporteur on New Complaints and Interim

205 HRC Rules of Procedure, Rule 102(3).

206 HRC Rules of Procedure, Rule 103.

207 HRC Rules of Procedure, Rule 90.

208 The complaint concerned a prospective deportation from Canada to the U.S. The Canadian HRC member did not take part, in accordance with the normal HRC practice. Given the indirect involvement of the U.S. in the case, the U.S. member did not take part either.

209 The U.S. member of the HRC did not take part in this case, which concerned holocaust denial, because he had been a prisoner in a concentration camp in World War II.

Measures whose functions resemble those of the Special Rapporteur for New Communications on the HRC. Case rapporteurs perform similar functions for both Committees. A follow up procedure has been adopted under Rule 114 of the CAT Rules of Procedure. Due to the similarities in procedures, we will focus here only on instances where the CAT procedure is notably different to that of the HRC.

The Working Group on Complaints is established under Rule 105 of the Rules of Procedure of the CAT Committee. It may consist of three to five Committee members. The Working Group may declare a complaint to be admissible by a majority vote,²¹⁰ and may declare a complaint to be inadmissible by a unanimous vote.

Under Rule 111 of the CAT Rules of Procedure, it is possible for the CAT Committee to invite the author to submit evidence in closed session in person, that is to submit oral evidence. In such a case, the State party would be invited to send a representative to attend as well. Non-attendance does not prejudice either party. Of course, many authors may not be able to afford to travel to the Committee's sessions. To date (1 September 2006), a Rule 111 oral hearing has never taken place.

i. Interim Measures

The interim measures procedure functions similarly under CAT as it does under the ICCPR. It is worth noting that interim measures are frequently sought under the CAT, as the majority of its cases have concerned allegations that a proposed deportation will expose the deportee to torture in the receiving State.²¹¹ Interim measures have commonly been requested by the CAT Committee (in practice by the Rapporteur for New Complaints and Interim Measures) to a State to refrain from deporting a particular person until the complaint is concluded, when an author has asked for such a request.

c) Choice of Forum

An author may often have a choice over whether to refer a complaint to the HRC or to the CAT Committee.

210 Of course, a decision that a case is admissible can only be taken after the State party has been given an opportunity to submit arguments regarding admissibility.

211 See Section 4.3.

In deciding which forum to choose, the following issues should be borne in mind:

- check that the State party allows individual communications under both treaties.
- check the reservations of the State party
- check the case law and other jurisprudence of the relevant body, to see if there are precedents that are favourable or unfavourable to one's case²¹²

The admissibility requirements of the two treaties are almost identical. The only difference is that the HRC can examine complaints that have been considered by another international body, so long as that body's deliberations are complete. The CAT Committee cannot consider any complaint that has ever been before another procedure of international investigation or settlement. Clearly, it is preferable for an author to submit a complaint to the HRC instead of the CAT Committee if the complaint has ever been considered by another quasi-judicial or judicial international human rights body.

The CAT has a narrower focus than the ICCPR. Therefore, it is preferable to submit a complaint to the HRC if a fact situation gives rise to violations of other rights beyond the right to be free from torture cruel inhuman or degrading treatment or punishment.²¹³

The HRC currently receives many more cases than the CAT Committee, and consequently takes longer to decide cases. Though it has one more meeting per year, that does not make up for the higher number of complaints it must deal with. On average, merits decisions by the HRC take four years, while merits decisions by CAT take only two.²¹⁴

i) Regional Treaties

It is often possible for an author to submit a complaint to a regional treaty body (e.g. the European Court of Human Rights) instead of a UN treaty body.

212 In this respect, please refer to Parts III and IV of this book, amongst other sources.

213 See "How to Complain about Human Rights Treaty Violations, Choosing a Forum" at http://www.bayefsky.com/complain/44_forum.php, § 3.

214 How to Complain about Human Rights Treaty Violations, Choosing a Forum, http://www.bayefsky.com/complain/44_forum.php, § 3.

Relevant considerations, in choosing a regional forum over a UN forum, are summarized as follows from www.bayefsky.com:²¹⁵

- the likelihood of obtaining a favourable decision
- the substantive reach and content of the treaty
- the competence of the particular body to deal with the substantive issue
- the past practice of the body in dealing with similar cases
- the likelihood that the state party will implement the decision of the particular forum
- the likelihood of obtaining injunctive relief in the form of requests for interim measures in the context of emergencies
- the speed of the process
- the cost of the procedure
- the availability of legal aid
- the availability of oral hearings

It has to be noted that the record of compliance by States with the decisions of the European Court of Human Rights is excellent. The record of State compliance with regard to the decisions of the Inter-American and African bodies is less impressive. Nevertheless, decisions by the Inter-American Court have the advantage of being legally binding. It seems unlikely that a State that refuses to obey a regional court is going to abide by the recommendations of a quasi-judicial UN treaty body. Therefore, it is more probable that a complainant will get a satisfactory remedy after a favourable regional court decision.

On the other hand, it must be noted that the regional bodies generally take a longer time to deal with a case than the UN bodies.²¹⁶ Furthermore, it seems that the UN treaty bodies are historically more likely to decide in favour of a complainant.²¹⁷ Authors should also be aware of substantive differences between the relevant global and regional treaties, and divergences in jurispru-

215 See list in, “How to Complain about Human Rights Treaty Violations, Choosing a Forum” at http://www.bayefsky.com/complain/44_forum.php, § 3.

216 How to Complain about Human Rights Treaty Violations, Choosing a Forum, http://www.bayefsky.com/complain/44_forum.php, § 3.

217 How to Complain about Human Rights Treaty Violations, Choosing a Forum, http://www.bayefsky.com/complain/44_forum.php, § 3.

dence, which may shed light on whether a UN forum might be more appropriate than a regional forum. Though such jurisprudential divergences exist, there have not been great divergences in jurisprudence on the issue of torture, or cruel inhuman or degrading treatment or punishment.²¹⁸

2.2 Interim Measures

As part of the process of considering individual complaints, the HRC and the CAT Committee are both able to request that a State takes particular action, or refrains from taking certain actions, in order to preserve the status quo for an author, so as to prevent that person from suffering irreparable harm to his or her human rights while the complaint is being considered.²¹⁹ A Committee may make such a request to the relevant State when the author requests the Committee to do so: it is however up to the Committee to decide whether such a request is warranted in the circumstances. These positive measures or deliberate acts of restraint constitute “interim measures”. They may also be referred to as “provisional measures”.

The duration and scope of interim measures will depend on the specific circumstances of the case. The relevant Committee will assess the situation and request an interim measure for the period of time necessary to protect the individual/s under threat. Normally, that period lasts throughout the entire process of considering the complaint, that is until the complaint is found inadmissible or until final views on the merits are issued. A request for an interim measure may relate to only one individual, or to a group of individuals.

If a person wishes the relevant Committee to make a request to a State for interim measures, this should be made clear when the individual complaint is submitted. If the situation is particularly urgent, such that measures must be undertaken immediately to prevent irreparable damage to the victim, the com-

218 The European Court of Human Rights has been more sympathetic to arguments that prolonged periods of time on death row breach the right to be free from inhuman or degrading treatment (see, e.g., *Soering v. UK*, No. 14038/88, Eur. Ct. of Hum. Rts. (7 July 1989)). The HRC has not generally accepted that a prolonged wait on death row is of itself a breach of that right (see *Johnson v. Jamaica* (588/94)). Recent decisions, as well as minority opinions, may indicate that the HRC may depart from its previous case law and embrace the European approach (see *Persaud and Rampersaud v. Guyana* (812/98)). The compatibility of the death row phenomenon with CAT has not yet been tested in an individual complaint. See sections 3.2.10(b) and 4.5.

219 CAT Rules of Procedure, Rule 108 and HRC Rules of Procedure, Rule 92.

plaint should be sent by the fastest means possible (often email) and followed up with a hard copy.²²⁰

2.2.1 In what circumstances might Interim Measures be required?

Interim measures function to protect the rights of an individual (or individuals) while his or her complaint is processed and considered by the relevant treaty body. A request from the HRC or the CAT Committee to a State for an interim measure to be implemented does not presuppose its final views on the merits of the case.

In practice, requests for interim measures are made by the Special Rapporteur on New Communications within the HRC and the Rapporteur on New Complaints and Interim Measures within the CAT Committee, normally at the time that a complaint is transmitted to the relevant State party.²²¹ Such requests are prompted by requests from the author; the relevant Rapporteur will only act if he/she believes that the request is warranted in the circumstances.

The State may be given an opportunity to present its perspective on the issue, but there is no obligation for this to occur.²²² The protection of international human rights processes and of the individual in question takes priority over any short term inconvenience caused to the State.

The vast majority of interim measures requests by these two treaty bodies have arisen in two situations. The first situation is when the relevant State party proposes to deport an individual to a country where the deportee claims that he or she faces a foreseeable risk of torture. The deporting State is often requested to refrain from deportation throughout the currency of the complaint. The second situation is when the complainant is facing the death penalty, and seeks to argue that the imposition of this penalty breaches his or her rights. The State is normally requested to refrain from executing the individual throughout the currency of the complaint. While these categories reflect the most common cir-

220 'How to Complain about Human Rights Treaty Violations: Introduction to Complaints Procedures', http://www.bayefsky.com/complain/9_procedures.php. Readers are referred to section 2.1.2 for relevant addresses.

221 Nowak, above note 97, p. 849.

222 J. Pasqualucci, "Interim Measures in International Human Rights: Evolution and Harmonization" (2005) 38 *Vanderbilt Journal of Transnational Law* 1, p 40. Such occurred in *Weiss v. Austria* (1086/02).

cumstances giving rise to a request for interim measures there are many other situations in which they could be required, such as provision of medical assistance to an ill person, or provision of protection for persons at high risk within a community.²²³ In *Ominayak v. Canada* (167/84), the HRC requested that the State party take interim measures to prevent irreparable damage being done to the traditional lands of the Lubicon Lake Band; the complaint concerned alleged violations of Article 27 minority rights entailed in the destruction of those homelands by commercial activities authorised by the State.

In deciding whether to request an interim measure, the relevant Committee Rapporteur will consider the imminence of the threat to the individual or group, and whether the consequences of such action would be irreparable. A consequence is considered to be irreparable where it cannot be reversed, and where there would be no remedy which could provide adequate compensation. Thus interim measures will not be issued “where compensation would be an adequate remedy or in deportation cases where the author of the communication would be able to return should there be a favorable finding on the merits”.²²⁴ For example, in *Canepa v. Canada* (558/93), the author challenged his proposed deportation from Canada to Italy. He argued that the anguish he would experience in being separated from his family and from his life in Canada would violate his rights under the ICCPR, and requested that the HRC request an interim measure to prevent his deportation while his situation was considered. His application “was refused ... because he had failed to establish that his deportation would bar his re-entry to Canada in the event that a violation was found.”²²⁵

2.2.2 Purpose of Interim Measures

A request for an interim measure is aimed at protecting the rights and integrity of the individual/s to whom it relates by ensuring that the status quo is preserved thereby preventing actions or omissions which might irreparably damage the person’s rights. Individual human rights complaints can frequently take years to be resolved, whereas this mechanism provides for prompt and preventative temporary action.

223 *Ibid*, pp. 26-34.

224 J. Harrington, “Punting terrorists, assassins and other undesirables: Canada, the Human Rights Committee and requests for interim measures of protection”, (2003) 48 *McGill Law Journal* 55, p. 62.

225 *Ibid*, p. 62.

The importance of acting expeditiously in these cases was painfully highlighted in *Staselovich and Lyashkevich v. Belarus* (887/1999). In this case a complaint was submitted by the mother of the victim in November 1998. The HRC did not respond until October 1999 when it requested that an interim measure be undertaken by the State. However, the victim had already been executed in March 1999. The HRC subsequently promised that “cases susceptible of being subject of [interim measures] will be processed with the expedition necessary to enable its requests to be complied with”.²²⁶

2.2.3 Legal Status of Interim Measures

Given the quasi-judicial status of the HRC and the CAT Committee it may seem doubtful that interim measures are legally binding upon States. However where a State has accepted the competence of the HRC or CAT to receive and consider individual communications, it surely must comply with any procedures which allow for this mechanism to function. Where a request for an interim measure is not respected the Committee is prevented from fulfilling its role and the individual complaints process is rendered meaningless.²²⁷

For example, in *Piandong v. Philippines* (869/99), the HRC issued a request that the execution of three men not be carried out while their complaint regarding their death sentences was under consideration. The three men were executed despite that request. The HRC responded by stating that:

“having been notified of the communication, the State party breaches its obligations under the Protocol, if it proceeds to execute the alleged victims before the Committee concludes its considerations and examination, and the formulation and Communication of its views.”²²⁸

It emphasized that this breach was “particularly inexcusable”²²⁹ given the request for interim measures. The HRC’s position in this regard has also been reinforced in its Concluding Observations.²³⁰

226 *Staselovich v. Belarus* (887/1999), § 1.3.

227 “When States accept the competence of an international enforcement organ to consider individual petitions they commit themselves to support the petition procedure. The *de jure* right to petition international bodies must not be nullified by the State’s *de facto* act or failure to act. The right to petition is a nullity if the participants in the proceedings have died or can be intimidated into withdrawing a complaint”: J. Pasqualucci, “Interim Measures in International Human Rights: Evolution and Harmonization” (2005) 38 *Vanderbilt Journal of Transnational Law* 1, p. 49.

228 *Piandong v. Philippines* (869/99), § 5.2.

229 *Piandong v. Philippines* (869/99), § 5.2.

230 See e.g., Concluding Observations on Uzbekistan, (2005) UN doc. CCPR/CO/83/UZB, § 6.

The CAT Committee has taken a similar position to the HRC. In *Brada v. France* (CAT 195/02), the CAT Committee stated:

“The State party’s action in expelling the complainant in the face of the Committee’s request for interim measures nullified the effective exercise of the right to complaint conferred by Article 22, and has rendered the Committee’s final decision on the merits futile and devoid of object. The Committee thus concludes that in expelling the complainant in the circumstances that it did the State party breached its obligations under Article 22 of the Convention.”²³¹

The CAT Committee made this decision in the face of the State party’s denial of any binding effect of requests for interim orders.²³²

The CAT Committee went further in *Agiza v. Sweden* (CAT 233/03). In that case, the victim was deported to Egypt in breach of Article 3 of CAT. He was deported immediately after the deportation decision was made, which denied him the ability to meaningfully appeal the decision.²³³ The CAT Committee also found that the swiftness of the deportation denied the complainant a real opportunity to seek interim measures under CAT, and was therefore a breach of Article 22.²³⁴

The case law discussed above reflects that adherence to requests for interim measures should be considered as binding by States that have authorised the relevant Committee to receive individual complaints, as non-compliance with interim measures undermines the integrity of those individual complaints systems.

Indeed, the record of compliance regarding interim measures from the HRC and the CAT Committee is quite good in comparison to the general record of States in complying with final views.²³⁵ For example, States Parties had uniformly complied with more than 100 requests for interim measure sent by the HRC before Trinidad and Tobago ignored such an order in *Ashby v. Trinidad and Tobago* (580/94).²³⁶

231 *Brada v. France* (CAT 195/02), § 13.4.

232 See France’s arguments at *Brada v. France* (CAT 195/02), § 8.2.

233 This circumstance entailed a separate procedural breach of Article 3. See Section 4.3.8.

234 *Agiza v. Sweden* (CAT 233/03), § 13.9.

235 See statement of Mr Martin Scheinin (HRC member) in “Summary Record of the First Part (Public) of the 487th Meeting”, (2003) UN doc. CAT/C/SR.487, § 3.

236 See “Summary record of the 1352nd meeting: Trinidad and Tobago”, (1996) U.N. Doc. CCPR/C/SR.1352.

Textbox ii: Model Complaint on Torture**INDIVIDUAL COMPLAINT TO THE HUMAN RIGHTS COMMITTEE UNDER THE OPTIONAL PROTOCOL****I. INFORMATION CONCERNING THE PETITION****The Author**

Name: Victim
 Nationality: X
 Profession: Unemployed
 DOB: 12 February 1965.
 Address: Capital City, X.
 (See passport at Annex 1)

The author requests that he be identified as ‘V’.

The Victim

Name: Victim

State Party

X

Violations

Articles 7 and 10, in conjunction with Article 2(3) of the ICCPR²³⁷

Representation

Name: Mr. L
 Nationality: X
 Address: Law Firm,
 Capital City, X.
 (See authorization letter at Annex 2)

II. STATEMENT OF FACTS**A. CHRONOLOGY OF EVENTS**

1. The author was born on 12 February 1965 in X (see passport at Annex 1). He is represented in this communication by his lawyer, Mr L (see letter of authorization signed by the author at Annex 2)

²³⁷ This complaint is a hypothetical scenario and is not based on any actual cases. This model complaint in fact raises issues under other provisions of the ICCPR, such as article 9 concerning arbitrary detention. For the purposes of this Handbook, we will limit the model to illustrating presentation and arguments relating to torture and ill-treatment only. An actual complainant would naturally raise the other ICCPR issues.

The Arrest

2. On 23 September 2002, the author was arrested by two police officers in the City Square. The police officers did not inform the author of the reasons for his arrest, nor did they inform the author of his rights at the time of arrest. The police officers were not wearing any form of personal identification at the time of arrest and consequently their identity cannot be confirmed. The author can recall that one of the officers had a scar on his nose. He cannot remember any other distinguishing features of the officers. Three people, who were in the City Square at the time of the arrest, witnessed the arrest of the author (see Annexes 3, 4 and 5 for witness statements of the three witnesses, Mrs. A, Mr. B and Mrs. C).

Detention at City Police Station

3. The author was taken to the detention facility of the City Police Station where he was detained incommunicado for four consecutive days. He was not permitted to contact anybody, including his family or his lawyer. The author was detained in an underground cell which measured one metre by two metres, and had a ceiling height of four metres. A bright light in the cell remained lit at all times. There was no toilet or sink in the cell. The walls of the cell were white and soundproof. The author's only form of contact was with his interrogators and the prison guards. The author's cell had a small, one-way spy-hole through which the prison guards could watch the author. The author was not provided with a mattress or bedding, natural light, recreational facilities, decent food or adequate medical treatment.
4. During these four days, the author was interrogated in an interrogation room several times by the same police officers as had arrested him regarding his alleged involvement in the murder of a high-ranking police officer. The author maintained his innocence which caused the police officers to become enraged and to subject the author to physical and emotional abuse. The author was systematically beaten with clubs and batons which resulted in severe bruises and scarring. On at least two occasions, the author lost consciousness. It is possible and perhaps likely that bones were broken or fractured as healed fractures were subsequently revealed in medical examinations immediately after his release from detention (see below, paragraph 15 and Annex 6 for Dr. H's medical report, dated 13 January 2003). The author was required to stand for great lengths of time whilst being deprived of food and water and he was stripped naked and suspended by his arms for lengthy periods. On one occasion, the author was placed in what appeared to be an electric chair and was falsely led to believe that he was to be executed.
5. On 27 September 2002, the police officers in the detention facility at the City Police Station threatened the author that if he did not sign a piece of paper, he would be exposed to 'even worse' physical abuse, and possibly 'beaten to death'. The police officers provided the author with a pen and showed the author only the line on which he was required to sign his name. The author signed the paper, without being able to read it and without having access to a lawyer (see Annex 7 for a copy of the document signed under duress by the author).

6. This document was a ‘confession’ to the murder of a police officer, an offence which comes within the jurisdiction of the recently amended *National Security and Public Order Act 1998* (see Annex 8 for a copy of the *National Security and Public Order Act 1998*). Interrogation of the author had been authorized by the *National Security and Public Order Act* which ordains that indefinite interrogation is permitted in the case of a threat to the community.

Detention at City Prison

7. On 27 September 2002, the author was formally charged with murder at the City Magistrate’s Court (see Annex 9 for a copy of the charge sheet). He was then transferred from the detention facility at the City Police Station to City Prison. On the same day, the author’s arrest was recorded in the database of City Prison (see Annex 10 for a copy of the entry in City Prison’s database relating to the author’s arrest).
8. On 27 September 2002, the author was given a cursory medical examination. During the examination, the author was not permitted to remove his clothing. He remained in long pants, long-sleeves, and shoes throughout the examination. The doctor asked the author very few questions, and was not interested in any of the author’s complaints about the abuse that had occurred, and seemed to be ‘going through the motions’. Despite evident bruises on areas of the author’s body that must have been visible to the medical examiner, such as on his face, neck and hands, as well as the traumatized state of the author, the doctor assessed the author to be in a fit and healthy condition (see Annex 11 for a copy of the Prison Doctor’s report).
9. On 27 September 2002, the author’s wife and two sons, and Mr. L, his lawyer, were notified that the author was being held in City Prison. Mr. L was notified that the author had been charged with the murder of a police officer under the *National Security and Public Order Act 1994*. On 28 September 2002, the author’s family and his lawyer visited him in City Prison. The author told both Mr. L and his family of the abuse that he had endured. It was evident to both the author’s family and to Mr. L that the author was in severe physical and mental distress. They noticed severe bruising on his forearms, his face and his neck and he appeared both anxious and depressed.
10. Due to the author’s evident physical and mental distress, on 28 September 2002, the author’s family and Mr. L submitted a request for the author to have an alternative medical examination (see Annex 12 for a copy of the request submitted to the prison authorities for an alternative medical examination). The prison authorities stated that the ‘comprehensive medical examination’ conducted on 27 September 2002 provided incontrovertible evidence that the author did not suffer from either a physical or a mental illness (see Annex 13 for refusal of medical examination by prison authorities).

Conditions at City Prison

11. The conditions in City Prison were not suitable for human habitation. City Prison is capable of housing four-hundred inmates, however at the time of the author’s internment, City Prison was housing six-hundred and fifty inmates. Prisoners awaiting

trial, prisoners serving sentences, refugees and juvenile prisoners all shared the same facilities and were housed together. Up to fifteen prisoners were housed together in cells measuring fifteen square metres together. There was one toilet and one sink in the corner of the cell which was not enclosed by a partition. Prisoners were not provided with a mattress or bedding, and they had to take turns sleeping as there was insufficient room to lie down. Metal shutters were placed in front of cell windows in order to prevent natural light and ventilation entering the cells. Prisoners were only allowed out of their cell for one hour a day. The author's allegations in this respect are supported by a report on City Prison by the non-governmental organization, NGO, see Annex 14). NGO's report details the testimony of numerous former inmates of City Prison over the period from 2000-2004, which includes the period of time that the author was imprisoned at City Prison. The report details allegations of severe overcrowding, as well as virtually identical descriptions of the cells and the other conditions of detention as those given by the author (see in particular pp 17-25 of that report at Annex 14).

12. In addition to the appalling prison conditions at City Prison, the author was also physically threatened and abused on numerous occasions by the prison guards, namely Mr P and Mr Q. For example, he was subjected to beatings about his head and torso unless he obeyed their orders immediately and without question. Some of the orders made were plainly for the purpose of aggravating the author.
13. The author conveyed his concerns about the prison conditions and the ill-treatment by the prison guards to Mr L, who submitted a formal complaint to the prison authorities on 5 November 2002 (see copy of complaint at Annex 15). The complaint detailed concerns regarding the conditions at City Prison, and about the treatment the author had received at the hands of Messrs P and Q. The author was interviewed one week later on 12 November by the prison governor, who expressed outrage at the 'slanderous comments' about the prison, and about two 'fine upstanding' guards in Messrs P and Q. The author was confined to his cell (for 24 hours instead of 23 hours) as a 'punishment' for submitting the complaint. On the night of 12 November 2002, he was taken from his cell by Mr P, and subjected to his most severe beating, involving multiple blows to his torso, by Messrs P and Q.

Release from City Prison

14. The author was held in detention at City Prison in appalling conditions, and continued to endure ill-treatment at the hands of Messrs P and Q, for just over three months. On 12 January 2003, the author was released without being told why. It later transpired that all charges against him had been dropped. The police had apparently caught the real perpetrator of the murder of the police officer on 7 January 2003.

Post-Release Medical Examinations

15. On 13 January 2003, the author was given a medical examination by Dr. H, his physician. Dr H noted that there were signs of fresh bruising on the upper part of his torso, his neck and his head, which indicated that he had been beaten in that anatomical

region. Scars, which were ‘a few months old’, were also noted. X-rays also revealed healed fractures indicating that some of the beatings had either fractured or broken the author’s bones (See Annex 6 for Dr. H’s medical report).

16. On 15 January 2003 the author underwent a psychiatric assessment from Dr J which affirmed that the author had a severe psychotic condition. He has since undergone five more psychiatric assessments, including one by an alternative psychiatrist, Dr K, who was asked for a ‘second opinion’ (see Annexes 16, 17, 18, 19, 20, 21 for all psychiatric reports). The first three reports (two by Dr J and one by Dr K) confirm that the author was extremely depressed and anxious in the first few months after his release. They indicate that his behaviour was not atypical in individuals who have been exposed to severe abuse. Furthermore, the reports indicate that it was evident that the author had not experienced any symptoms prior to his arrest and that he had no family history of mental illness.
17. The author has been treated with anti-depressants since his early psychiatric diagnoses, and his condition has improved, as recorded in the latest report from Dr J dated 14 August 2005 (see Annex 21). He remains however reliant on anti-depressants. On the one time, in January 2005, in which his dosage was decreased, his depression and anxiety levels rose markedly (see Annex 20).

Exhaustion of Domestic Remedies

18. As noted above (see above, paragraph 13), Mr L complained in writing to prison authorities about the author’s treatment in prison (see Annex 15) This complaint merely resulted in further persecution of the author, and no remedy whatsoever.
19. On 1 October 2002, Mr. L wrote a letter of complaint to the Chief Prosecutor pursuant to the Investigations (Human Rights) Act 1990 outlining the torture and other cruel, inhuman and degrading treatment to which the author was being subjected whilst he was detained at the City Police Station (See Annex 22 for a copy of the letter written by Mr. L and Annex 23 for copy of the Act). Mr. L advised the Chief Prosecutor that ‘a prompt investigation into the issue [was] required in order to ensure that the evidence of the torture of the author did not disappear’. For example, the physical harm would heal. Further, there was a need for urgency due to the (then) ‘pending trial of [the author] for the murder of the police officer, and the need to challenge the veracity of the confession’. Mr. L requested the Chief Prosecutor to investigate the matter, identify the relevant police officers, and hold them responsible for the abuse inflicted on the author during the four days of incarceration at City Police Station. Mr. L submitted that the witnesses to the initial arrest were willing to testify as to the author’s good physical condition immediately prior to his arrest and that the author’s family was willing to testify in relation to the evident signs of abuse, including severe bruising, upon the author’s body. The author too was willing to testify as to the abuse he had suffered. Mr L did not receive a reply from the Chief Prosecutor in respect of the complaint until 5 June 2003 (see annex 24 for copy of reply from Chief Prosecutor).

20. Mr L submitted a fresh complaint to the Chief Prosecutor on 15 January 2003 (see Annex 25 for a copy of the second complaint to the Chief Prosecutor) regarding the author's treatment in prison, outlining the prison conditions and the treatment received from Messrs P and Q, as well as the reaction by the warden to the complaint to prison authorities. The complaint was submitted after the author's release from City Prison, due to the fear of retribution if the author had remained incarcerated at the time of the complaint. This fear of retribution was reasonable, given the retribution suffered as a result of the submission of the complaint to the prison authorities (see above paragraph 13). No reply was received from the Chief Prosecutor in respect of that complaint until 17 September 2003. (see Annex 26 for a copy of the second reply received from the Chief Prosecutor).
21. The investigation into the allegations of ill-treatment at both City Police Station and City Prison by the Chief Prosecutor proceeded extremely slowly. As noted, the replies to both complaints were delayed without any explanation. Indeed, on almost every occasion in which there was communication between the Chief Prosecutor and the author, it was initiated by Mr L on his behalf. That is, the Chief Prosecutor's office rarely contacted the author or Mr L of its own volition, and indeed rarely replied to the communications from Mr L at all (see Annex 27 for diary notes of Mr L, documenting contact with the Chief Prosecutor's office). On the other hand, Mr L contacted the Chief Prosecutor to inquire about the progress of the investigation and to submit evidence, such as the written medical and psychiatric reports of Dr H, Dr J, and Dr K. The letters written by Mr. L are listed below as are the responses from the Chief Prosecutor's Office:
 - I. Letter of Complaint to Chief Prosecutor, dated 1 October 2002 (Annex 22)
 - II. Reply to Letter of Complaint from Chief Prosecutor, dated 5 June 2003 (Annex 24)
 - III. Letter of Complaint to Chief Prosecutor, dated 15 January 2003 (Annex 25)
 - IV. Reply from Chief Prosecutor to Letter of Complaint, dated 17 September 2003 (Annex 26)
 - V. Letter by Mr. L to the Chief Prosecutor inquiring as to the progress of the investigation, dated 7 January 2003 (Annex 28)
 - VI. Letter by Mr. L to the Chief Prosecutor inquiring as to the progress of both investigations and including written medical and psychiatric reports of Dr. H, Dr. J and Dr. K, dated 18 March 2003 (Annex 29)
 - VII. Letter by Mr. L to the Chief Prosecutor inquiring as to the progress of the investigation, dated 17 April 2003 (Annex 30)
 - VIII. Letter by Mr. L to the Chief Prosecutor inquiring as to the progress of the investigation, dated 20 June 2003 (Annex 31)
 - IX. Letter by Mr. L to the Chief Prosecutor inquiring as to the progress of the investigation, dated 30 August 2003 (Annex 32)
 - X. Letter by Mr. L to the Chief Prosecutor inquiring as to the progress of the investigation, dated 21 September 2003 (Annex 33)

- XI. Letter by Mr. L to the Chief Prosecutor inquiring as to the progress of the investigation, dated 27 December 2003 (Annex 34)
 - XII. Letter from Chief Prosecutor's Office to organise an interview with the author on 15 March 2004, dated 26 February 2004. (Annex 35) (see below, paragraph 22)
 - XIII. Letter from Mr. L to the Chief Prosecutor requesting a copy of a transcript of the interview between Mr. T and the author, dated 17 March 2004. (Annex 36) (see below, paragraph 22)
 - XIV. Letter of discontinuance from the Office of the Chief Prosecutor informing the author of the Chief Prosecutor's decision to drop the investigations, dated 17 April 2005 (Annex 37)
 - XV. Letter from Mr. L to the Chief Prosecutor outlining the inadequacies and delays of the investigation and formally requesting a reopening of the investigation, dated 19 April 2005 (Annex 38)
 - XVI. Letter from Mr. L to the Chief Prosecutor outlining the inadequacies and delays of the investigation and formally requesting a reopening of the investigation, dated 23 June 2005 (Annex 39)
 - XVII. Letter from the Office of the Chief Prosecutor stating its refusal to reopen the investigation, dated 1 August 2005 (Annex 40)
22. The Chief Prosecutor initiated contact on only two occasions. The first occasion was to organize an interview with the author on 15 March 2004 (see Annex 35). At this interview, Mr T, a 'senior investigator' within the Chief Prosecutor's Office, interviewed the author for only ten minutes, and did not query any aspects of his assertions regarding ill-treatment. No transcript of that interview has ever been presented to the author or Mr L, despite requests for such a transcript.
23. The second instance of contact initiated by the Chief Prosecutor occurred on 17 April 2005 when Mr L and the author were informed of the decision to discontinue the investigations for lack of evidence (see annex 37). The Chief Prosecutor's letter explained that the following evidence indicated that the author's claims were ill-founded: evidence from Messrs P and Q, police at City Police Station, and the report of the prison doctor dated 27 September 2002 (see Annex 11). The Chief Prosecutor explained that note had been taken of the documentary evidence submitted on behalf of the author, such as the medical and psychiatric reports of Dr H, Dr J, and Dr K. However, the Chief Prosecutor said that such reports were highly contentious, and that there was nothing to prove that the author had not been assaulted by other prisoners, 'if indeed [he] had been assaulted at all'. Therefore, the Chief Prosecutor inferred that the author had either never been subjected to ill-treatment, or that any such ill-treatment had most likely been perpetrated by other prisoners at City Prison.
24. Mr L followed up this letter of discontinuance with two further communications, pointing out the inadequacies and delays in the investigation, and both formally requesting a reopening of the investigation (see Annexes 38 and 39). The Chief Prosecutor's Office responded with an apparent 'form' letter to the second of these

communications, stating that no such reopening would occur (see Annex 40). No response was received to the first letter.

25. The author submits that the Chief Prosecutor's investigation was grossly inadequate. In particular, none of the witnesses to the author's arrest, nor Dr H, nor either of the psychiatrists, Dr J or Dr K, were contacted by the Chief Prosecutor. Neither Mr L nor any member of the author's family was interviewed. Furthermore, the assertion that any ill-treatment could have been perpetrated by other prisons was never put to the author by Mr T. Indeed, when the author was interviewed, Mr T listened passively to his account and never challenged any aspect of it. The only other witnesses that were personally interviewed by the Chief Prosecutor's office were those who were likely to favour the State (and themselves), such as Messrs P and Q, the police officers at City Police Station, the prison doctor and the prison governor. It is therefore submitted that the investigation was not impartial.

B. ADMISSIBILITY

26. It is submitted that this communication satisfies all of the admissibility requirements under the ICCPR.
27. X ratified the ICCPR on 12 January 1992, and ratified the Optional Protocol on 28 September 1996. The Optional Protocol came into force on 28 December 1996. The facts alleged clearly took place after this date, so the Human Rights Committee is competent to examine the present case. Furthermore, all of the alleged facts took place within the territorial jurisdiction of X.
28. This complaint is not being examined (and has never been examined) by another procedure of international investigation and settlement, and thus complies with the requirements of article 5(2)(a) of the Optional Protocol.
29. Regarding the exhaustion of domestic remedies (article 5(2)(b) of the Optional Protocol), the author's attempts to prompt an investigation by the Chief Prosecutor into his ill-treatment, with a view to obtaining a remedy, are detailed directly above (paragraphs 19-25).
30. The author, in accordance with the procedure set out in Part VI the Human Rights (Investigation) Act (see Annex 23), appealed the Chief Prosecutor's decision to drop the investigation to the Court of Appeal (see Annex 41 for statement of claim). The Court of Appeal dismissed the case without giving detailed reasons on 12 November 2005 (see Annex 42).
31. The author sought leave to appeal the decision of the Court of Appeal to the highest court in X's legal system, the Supreme Court of X (see Annex 43 for statement of claim in Supreme Court). Leave was refused by the Court on 13 April 2006 (see Annex 44). With the refusal of leave to appeal by the highest court in X, the author has exhausted domestic remedies.

32. An application to court for a civil claim to damages is ineffective because, according to the law of X, the civil courts have no powers to identify those responsible for crimes and to hold them responsible and accountable. There are insurmountable hurdles to a civil claim if the perpetrators cannot be identified in the proceedings. Therefore, an application for a civil remedy is neither an adequate nor an available remedy for the purposes of admissibility.
33. The author therefore asserts that this communication complies with the requirements of article 5 of the Optional Protocol.

C. DISCUSSION OF RELEVANT PROVISIONS OF THE ICCPR

34. Article 7 of the ICCPR states that:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

35. General Comment 20 of the Human Rights Committee states that:

The aim of the provision of Article 7 of the [ICCPR] is to protect both the dignity and the physical and mental integrity of the individual. It is the duty of the State party to afford everyone protection through the legislative and other measures as may be necessary against the acts prohibited by Article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity...The prohibition in Article 7 relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim.

36. It is submitted that the jurisprudence of the Human Rights Committee regarding Article 7 should be influenced by the jurisprudence of the Committee against Torture.
37. The author submits that state X has breached the author's rights under Article 7 of the ICCPR in the following ways:
- (i) In exposing him to severe beatings and other ill-treatment during his interrogation at the City Police Station.
 - (ii) In keeping him in incommunicado detention and solitary confinement for four consecutive days at City Police Station.
 - (iii) In exposing him to beatings and other ill-treatment at City Prison
 - (iv) In exposing him to inhuman and degrading conditions of incarceration at City Prison.
 - (v) In failing to properly investigate his allegations of ill-treatment at both City Police Station and City Prison.

38. In addition, and in the alternative, it is argued that the above circumstances amount to a breach of Article 10 of the ICCPR (see below paragraph 57).

First Breach of Article 7: Beatings at City Police Station

39. The author submits that the accumulation of his treatment while in the City Police Station amounts to torture, or at least cruel inhuman and degrading treatment, contrary to Article 7 of the ICCPR.

40. The author was subjected to beatings with club and batons at City Police Station. In *Bailey v. Jamaica* (334/88), the Human Rights Committee held that severe and systematic beatings with clubs, iron pipes and batons, which caused severe physical trauma (including bruises and scarring and probably broken bones) breached Article 7. The lack of medical treatment in *Bailey*, as occurred in the author's circumstances, also breached Article 7. As noted, the author was, at least twice, beaten unconscious, which was found to breach Article 7 in *Linton v. Jamaica* (255/87).

41. At City Police Station, the author was subjected to a mock execution. Mock executions administered with other forms of cruel and inhuman treatment were deemed to amount to cruel and inhuman treatment in *Linton v. Jamaica* (255/87). In General Comment 20, the Human Rights Committee held at paragraph 11 that "State parties should ensure that any places of detention be free from any equipment liable to be used for inflicting torture or ill-treatment". The City Police Station's possession of a mock electric chair manifestly contradicts this statement. Death threats, as experienced by the author in the form of the mock execution, and on the day that the author signed the false confession, also breach Article 7. For example, in *Hylton v. Jamaica* (407/90), severe beatings coupled with death threats were found to breach Article 7.

42. The author submits that being required to stand for great lengths of time whilst being deprived of food and water amounts at least to inhuman and degrading treatment.²³⁸ The degrading nature of the treatment is exacerbated by the fact that the author was naked at the time, adding to the extreme vulnerability of his situation.

43. State X may argue that as the *National Security and Public Order Act* authorizes the interrogation of individuals in the case of a threat to the community, the interrogation of the author was valid. However, Article 7 is a non-derogable right and consequently State X is obliged, in all circumstances, to respect its obligations under Article 7. In General Comment 20 at paragraph 3, the Human Rights Committee stated that "no justification or extenuating circumstances may be invoked to excuse a violation of Article 7 for any reasons, including those based on an order from a superior officer or public authority." Furthermore, Article 2 of the CAT underlines

²³⁸ *Ireland v. United Kingdom*, No. 5310/71, Eur. Ct. of Hum. Rts. (18 January 1978).

that torture is not permitted in any circumstances. The prohibition of torture is not only a non-derogable right under ICCPR but widely recognized as a peremptory norm (*ius cogens*) of international law.²³⁹

44. The author was severely traumatized, both physically and mentally, as a result of his detention and treatment at City Police Station. This trauma was evident to his lawyer and his family on 28 September 2002, the day they first visited him after his arrest. The complaint submitted to the Chief Prosecutor by Mr L on 1 October 2002 (see Annex 22) is also evidence of that treatment. The reports upon his release from prison of his physician, as well as the psychiatrists, provide further evidence of the ill-treatment (see Annexes 6 and 16-21).

Second breach of Article 7: incommunicado detention

45. The author submits that his incommunicado detention for four consecutive days from 23 September 2002 to 27 September 2002 constituted a breach of Article 7 of the ICCPR. The dates of this detention are supported by the statements of the three eye witnesses to the author's arrest on 23 September (Annexes 3-5), and the date of the formal charge of 27 September (Annex 9).
46. The Human Rights Committee stated in General Comment 20 at paragraph 11 that '[p]rovisions should be made against incommunicado detention'. Though the shortest period of incommunicado detention that has been found to breach Article 7 is eight months (*Shaw v. Jamaica* (704/96)), the Committee Against Torture has held that *incommunicado* detention of up to thirty-six hours, without being brought before a judge, is of concern.²⁴⁰ At the least, the combination of incommunicado detention with the ill-treatment suffered during that confinement should be found to breach Article 7.²⁴¹
47. Furthermore, incommunicado detention facilitates the practice of torture and ill-treatment. As noted by the Human Rights Committee in *Mojica v. Dominican Republic* (449/91) at paragraph 5.7, 'the disappearance of persons is inseparably linked to treatment that amounts to a violation of article 7'. Indeed, the author's effective disappearance for four days facilitated gross breaches of his rights under Article 7.

239 See, eg, *Prosecutor v. Furundzija*, ICTY Trial Chamber, IT-95-17/1-t (10 December 1998) 38 ILM 317, § 144; *Cantoral Benavides case* (Peru), Series C No. 69, judgment of the Inter-American Court of Human Rights of 18 August 2000, § 96; *Doebbler v. Sudan*, African Commission, Communication No. 222/99, (15 Jul 2003) extracted from Interights database at <http://www.interights.org/searchdatabases.php?dir=databases> Relevant decisions of the European Court of Human Rights include *Tomasai v. France*, No. 12850/87, Eur. Ct. of Hum. Rts (17 August 1992), § 115; *Aksoy v. Turkey*, No. 21897/96, Eur. Ct. of Hum. Rts. (18 December 1996), § 62; *Chahal v. UK*, No. 22414/93, Eur. Ct. of Hum. Rts. (15 November 1996), § 79.

240 Concluding Observation on Colombia, CAT, A/59/44 (2003) 32 at § 67.

241 See, eg, *Tekin v. Turkey*, No. 22496/93, Eur. Ct. of Hum. Rts. (9 June 1998), decision of the European Court of Human Rights. Detention for four days in total darkness with blindfold, combined with beatings, breached Article 3, the European equivalent of Article 7.

Third breach of Article 7: beatings at City Prison

48. The repeated beatings suffered by the author in City Prison at the hands of the prison guards, Messrs P and Q, amount to a breach of Article 7 in the same way as the beatings endured at the hands of police officers at City Police Station. The evidence of these beatings is the formal complaint made by Mr. L to the prison authorities (see Annex 15), the medical report of Dr. H which indicates the existence of recent and fresh bruising (see Annex 6), and the author's consistent account of events at City Prison.

Fourth breach of Article 7: Prison Conditions

49. The author submits that the conditions of his incarceration at City Prison amounted to a breach of Article 7.

50. In *Vuolanne v. Finland* (265/87), the Human Rights Committee held that:

For punishment to be degrading, the humiliation or debasement involved must exceed a particular level and must, in any event, entail other elements beyond the mere fact of deprivation of liberty.

As such, in order for detention to violate Article 7 of the ICCPR, it is not sufficient for a prisoner to only be deprived of their liberty; there must be an added element of 'humiliation or debasement' in the treatment of the individual. The author submits that the conditions of his detention went far beyond those inherent in the deprivation of liberty, and amounted to a breach of Article 7.

51. In the case of *Deidrick v. Jamaica* (619/95), the author of the Communication was locked in his cell for twenty-three hours a day, without a mattress, bedding, adequate sanitation, natural light, recreational facilities, decent food or adequate medical care, and this amounted to cruel and inhuman treatment. The conditions of detention in *Deidrick* are analogous to the conditions of detention suffered by the author in this case. The conditions are also similar to those described in *Mukong v. Cameroon* (458/91), *Edwards v. Jamaica* (529/93), and *Brown v. Jamaica* (775/97); the Human Rights Committee found that the relevant prison conditions breached Article 7 in all three of those cases.

52. The evidence of the conditions described is found in the complaints submitted (without satisfaction) on behalf of the author to the prison authorities (see Annex 15), and to the Chief Prosecutor (see Annexes 22 and 25). NGO's report also backs up the evidence of the author on this matter (see Annex 14)

Fifth Breach of Article 7: Failure to investigate complaints

53. The State party has failed in its duty under Article 7, in conjunction with the duty to provide a remedy under Article 2(3), to properly investigate the claims of ill-treatment of the author. At paragraph 14 of General Comment 20, the Human Rights Committee stated:

Article 7 should be read in conjunction with Article 2, paragraph 3, of the Covenant. In their reports, States parties should indicate how their legal system effectively guarantees the immediate termination of all the acts prohibited by Article 7 as well as appropriate redress. The right to lodge complaints against maltreatment prohibited by Article 7 must be recognized in the domestic law. Complaints must be investigated promptly and impartially by competent authorities so as to make the remedy effective. The reports of States parties should provide specific information on the remedies available to victims of maltreatment and the procedure that complainants must follow, and statistics on the number of complaint and how they have been dealt with.

54. Most cases on this issue have arisen under the analogous provisions of the Convention Against Torture, Articles 12 and 13, rather than under the ICCPR. As noted above (paragraph 36), it is submitted that the Human Rights Committee should be influenced by the case law developed under the CAT.
55. The States failure in this regard is evident in a number of ways. First, the Chief Prosecutor failed to respond promptly to either of the submitted complaints. In both cases, no official reply was received by the author for approximately eight months (see Annexes 24 and 26). No justification has ever been given for the delay in interviewing the author; he was not interviewed until 14 months after the submission of his second complaint. Delays in an investigation also breached CAT in *Halimi-Nedzibi v. Austria* (CAT 8/91). Secondly, the investigation of those complaints by the Chief Prosecutor was plainly inadequate, in that he did not interview a number of relevant witnesses, as outlined in paragraph 25 above. The interview with the author was also unsatisfactory. For example, the author did not get a chance to respond to the contention that the ill-treatment could have been caused by other prisoners. The investigation was plainly not impartial as the Chief Investigator only personally interviewed witnesses who would favour the State. The failings of the Chief Prosecutor in the investigations resemble those that were found to breach the Articles 12 and 13 of the CAT in *Baraket v. Tunisia* (CAT 60/96) and *Blanco Abad v. Spain* (CAT 59/96). The Human Rights Committee also found a breach of Article 7 due to a State's failure to undertake a prompt and adequate investigation of torture allegations in *Herrera Rubio v. Colombia* (161/83). Thirdly, the Court of Appeal compounded the poor investigation, by failing to reinstate the investigation, and giving no reasons for its decision. Fourthly, the complaint about prison conditions to the prison authorities was not taken seriously. Indeed, it only resulted in reprisals against the author. The Human Rights Committee has condemned Brazil in Concluding Observations for failing to provide witnesses with protection against reprisals in respect of complaints of torture.²⁴² Finally, the failure of the City Prison doctor to

242 (1996) CCPR/C/79/Add. 66, paragraph 12.

undertake a proper medical examination of the author (see above, paragraph 8) breaches Article 7. Any standard medical examination involves the removal of some clothing, and the doctor was plainly not interested in listening or responding to the author's allegations. The superficial and selective nature of the medical examination rendered it clearly inadequate. Its inadequacy was compounded by the refusal of the prison authorities to permit an independent medical examination (see annex 13), which thwarted the author's ability to obtain evidence of his ill-treatment.

56. The author's allegations regarding these breaches of Article 7 are supported by the documentation relating to the complaints, as well as the medical examinations conducted after the author's release.

Breach of Article 10 of the ICCPR

57. Article 7 is supplemented by Article 10, which details the rights of detainees to receive humane treatment in detention. If any of the above arguments are not accepted with regard to Article 7, it is submitted that the above impugned treatment breaches Article 10. In respect of the violation of Article 10, the author re-alleges his arguments above in paragraphs 39-44, 48, and 53-56 regarding the beatings and the failure to investigate complaints, without repeating them here. The author adds further arguments below of particular relevance to Article 10 regarding prison conditions and incommunicado detention.

Prison Conditions

58. Numerous statements by the Human Rights Committee indicate that the Standard Minimum Rules for the Treatment of Prisoners are effectively incorporated within Article 10.²⁴³ The conditions at City Prison breach numerous provisions of the Standard Minimum Rules.
59. For example, Rule 9 states that each prisoner should, in general, have his or her own cell. Though exceptions are permitted, it is clearly inappropriate to have thirty people in one cell, sharing beds. The overcrowding in City Prison amounts to a breach of Article 10. In its Concluding Observation on Portugal, the Human Rights Committee expressed concern in regard to overpopulation of twenty-two percent.²⁴⁴ In City Prison, at times, overpopulation amounted to over fifty percent (see above, paragraph 11). NGO's report supports the author's allegations in this respect (see Annex 14).
60. Contrary to Rules 10-21, adequate bedding, clothing, food and hygiene facilities were not supplied. Adequate medical care was not provided, contrary to Rules 22-26 (a copy of the Standard Minimum Rules for the Treatment of Prisoners is contained in Annex 45 for the convenience of the Committee members).

243 See, eg, *Mukong v. Cameroon* (458/91), paragraph 9.3; Concluding Observations on the USA, CCPR/C/79/Add. 50, paragraph 34.

244 Concluding Observation on Portugal, A/58/40, Vol.1 (2003) 56 at § 83.

61. In its Concluding Observation on Uganda, the Human Rights Committee expressed concern about the overcrowded conditions, the lack of food, the poor sanitary conditions and inadequate material available to inmates.²⁴⁵ Similar conditions prevailed in this case.

62. Finally, State X was in clear violation of Article 10(2)(a) as remand prisoners, such as the author, were not segregated from convicted prisoners.

Incommunicado Detention

63. In the event that incommunicado detention is not held to be a breach of Article 7 of the ICCPR, the author submits that his incommunicado detention is in breach of Article 10 of the ICCPR. In *Arutyunyan v. Uzbekistan* (917/00), two weeks' incommunicado detention was found to breach Article 10. It is submitted that even shorter periods of incommunicado detention breach Article 10, as incommunicado detention is simply an unacceptable and inhumane way of treating prisoners. There is no conceivable justification for denying the author access to the outside world for four days. Therefore, the four days of incommunicado detention in this case constitute a violation of Article 10.

D. CONCLUSION

64. In light of the above, the Author respectfully requests that the Committee:

- *Declare* that the State Party, X, has breached the following Articles of the International Covenant on Civil and Political Rights: 7, 10, and has breached Article 2(3) when read in conjunction with Articles 7 and 10.
- *Recommend* that X adopt all necessary action to:
 - a) Fully investigate the circumstances of the torture and ill-treatment of the Author and, based on the results of such investigation, take appropriate measures against those responsible for that treatment;
 - b) Adopt measures to ensure that the Author receives full and adequate compensation for the harm he has suffered.

Dated the day of 2006.

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Mr. L

Counsel for Victim

²⁴⁵ Concluding Observation on Uganda, (2004) CCPR/C/80/UGA.

LIST OF ANNEXES

Annex No.	Document
1	Passport of Victim
2	Authorisation letter for Mr. L to act as Legal Counsel for Victim
3	Witness Statement of Mrs. A
4	Witness Statement of Mr. B
5	Witness Statement of Mrs. C
6	Medical Report of Dr. H, dated 13 January 2003.
7	Document ('confession') signed under duress by the author, dated 27 September 2002.
8	Copy of the <i>National Security and Public Order Act</i> 1998.
9	Copy of Charge Sheet, dated 27 September 2002
10	Copy of entry in City Prison's database relating to the author's arrest, dated 27 September 2002.
11	Copy of Prison Doctor's report, dated 27 September 2002.
12	Copy of request submitted to the prison authorities for an alternative medical examination, dated 28 September 2002.
13	Refusal of medical examination by prison authorities.
14	Report on City Prison by NGO.
15	Formal complaint by Mr. L to prison authorities, dated 5 November 2002.
16	Psychiatric Report of Dr. J, dated 15 January 2003.
17	Psychiatric Report of Dr. K, dated 17 March 2003.
18	Psychiatric Report of Dr. J, dated 23 July 2003.
19	Psychiatric Report of Dr. J, dated 15 August 2004.
20	Psychiatric Report of Dr. J, dated 15 January 2005.
21	Psychiatric Report of Dr. J, dated 14 August 2005.
22	Letter of complaint to the Chief Prosecutor by Mr. L, dated 1 October 2002.
23	Copy of the <i>Investigations (Human Rights) Act</i> 1990.
24	Letter of Reply from Chief Prosecutor, dated 5 June 2003.
25	Letter of complaint to the Chief Prosecutor by Mr. L, dated, 15 January 2003.
26	Letter of Reply from Chief Prosecutor, dated 17 September 2003.
27	Diary notes of Mr. L documenting his contact with the Office of the Chief Prosecutor.
28	Letter by Mr. L to the Chief Prosecutor inquiring as to the progress of the investigation, dated 7 January 2003

- 29 Letter by Mr. L to the Chief Prosecutor inquiring as to the progress of the investigation, and containing written medical and psychiatric reports of Dr H, Dr J, and Dr K, dated 18 March 2003.
- 30 Letter by Mr. L to the Chief Prosecutor inquiring as to the progress of the investigation, dated 17 April 2003.
- 31 Letter by Mr. L to the Chief Prosecutor inquiring as to the progress of the investigation, dated 20 June 2003.
- 32 Letter by Mr. L to the Chief Prosecutor inquiring as to the progress of the investigation, dated 30 August 2003.
- 33 Letter by Mr. L to the Chief Prosecutor inquiring as to the progress of the investigation, dated 21 September 2003.
- 34 Letter by Mr. L to the Chief Prosecutor inquiring as to the progress of the investigation, dated 27 December 2003.
- 35 Letter from the Office of the Chief Prosecutor to organise an interview with the author on 15 March 2004, dated 26 February 2004.
- 36 Letter from Mr. L to the Chief Prosecutor requesting a copy of a transcript of the interview between Mr. T and the author, dated 17 March 2004.
- 37 Letter of discontinuance from the Office of the Chief Prosecutor informing the author of the Chief Prosecutor's decision to drop the investigations, dated 17 April 2005.
- 38 Letter from Mr. L to the Chief Prosecutor outlining the inadequacies and delays of the investigation and formally requesting a reopening of the investigation, dated 19 April 2005.
- 39 Letter from Mr. L to the Chief Prosecutor outlining the inadequacies and delays of the investigation and formally requesting a reopening of the investigation, dated 23 June 2005.
- 40 Letter from the Office of the Chief Prosecutor stating its refusal to reopen the investigation, dated 1 August 2005.
- 41 Statement of claim in Court of Appeal
- 42 Transcript of Court of Appeal decision dismissing the author's case without reasons, dated 12 November 2005.
- 43 Statement of claim seeking leave to Supreme Court
- 44 Transcript of the refusal of the Supreme Court to grant leave to the author, dated 13 April 2006.
- 45 Standard Minimum Rules for the Treatment of Prisoners.

2.3 Other Procedures

2.3.1 Reporting Procedures under the ICCPR and the CAT

a) Overview of Reporting System

The only compulsory monitoring mechanism under the ICCPR and the CAT is the “reporting” system. A State party must submit an initial report within one year of the treaty coming into force for that State, and thereafter it must submit periodic reports at intervals dictated by the relevant Committee. Under the ICCPR, the HRC has tended to request reports every five years. Under the CAT, the CAT Committee has tended to request reports every four years.

In its report, a State party should outline how it implements the rights in the respective treaty. It should give details of relevant legislation, policies, and practices. It is not sufficient to simply outline legislation without commenting on how, or if, that legislation is enforced. It should also highlight areas where implementation is deficient or problematic.²⁴⁶

Each State party should also submit a “core document” which outlines basic information about that State, such as its geography, demography, its constitutional, political and legal structure, and other general information.²⁴⁷ The same core document can suffice for reports to all UN human rights treaty bodies. The core document should be updated when necessary.

A State report is a public document, and is available via the Treaty Bodies Website at <http://www.unhchr.ch/tbs/doc.nsf>. This website also details the dates at which future reports are due.

Once a report is submitted, a dialogue between the State’s representatives and the relevant Committee regarding the contents of a report and other matters relating to its record regarding compliance with the relevant treaty will be scheduled. In conducting these dialogues, Committee members will often make use of alternative sources of information, including information from NGOs. During this dialogue, State party representatives will clarify aspects of the report, and its implementation of the relevant treaty, for the Committee.

246 See UN Fact Sheet 15, Rev. 1, “Civil and Political Rights: The Human Rights Committee” at <http://www.ohchr.org/english/about/publications/sheets.htm>, pp. 10-12 for instructions on how a State should prepare a report.

247 UN Fact Sheet 15, Rev. 1, «Civil and Political Rights: The Human Rights Committee», at <http://www.ohchr.org/english/about/publications/sheets.htm>, p. 11.

At the conclusion of the session in which a report is examined, the Committee will adopt Concluding Observations on the relevant State party. These Concluding Observations are divided into various sections: Introduction, Positive Aspects, and Principal Subjects of Concern and Recommendations.

The Concluding Observations, particularly the Principal Subjects of Concern and Recommendations, are then “followed up” by the relevant Committee. That is, a Committee member will engage in ongoing dialogue with a State as to how or if it is implementing those recommendations, and addressing subjects of priority concern. Follow-up information is publicly available via the treaty bodies website. The follow-up process is discussed in Section 2.4.1(a).

The Concluding Observations also highlight areas that should be the focus of the next report. Periodic reports do not have to cover every treaty right in the same detail as the initial report, though significant developments between reports must be explained.²⁴⁸

The cycle of State reporting is as follows:

- State submits report to relevant Committee.
- A dialogue between the Committee and State representatives is scheduled.
- Committee members may also receive information on the State from other sources, such as NGOs.
- The Committee and representatives from the State party have a constructive dialogue over the contents of the report.
- The Committee adopts Concluding Observations on the report and the dialogue.
- The Concluding Observations, and particularly any priority areas of concern noted in those Observations, are “followed up” by the relevant Committee. The State party provides follow-up information on the Principal Subjects of Concern and Recommendations within one year of the issuance of the Concluding Observations.
- If necessary, there is ongoing follow-up dialogue between the Committee and the State party.
- State party submits its next report as requested by the Committee, and process begins again.

248 UN Fact Sheet 15, Rev. 1, “Civil and Political Rights: The Human Rights Committee”, at <http://www.ohchr.org/english/about/publications/sheets.htm>, p. 11.

In addition, a State should submit its core document either before or at least with its initial report, and should update that document when necessary.

Exceptionally, a Committee will request an emergency report, when it believes that a human rights crisis of some form is under way in a relevant State.²⁴⁹ A Committee may also call for an earlier report as part of the process of “following up” the Concluding Observations.

b) Reform of Reporting System

The reporting system has been the subject of much criticism due to its unwieldy nature. For example, even with the high number of late reports, there can still be a considerable time gap between the submission of a report and its examination. The Committees’ part time nature does not allow them sufficient time to address reports in a timely manner. Often States will be requested to submit updated information prior to the dialogue, due to the time gap between submission and dialogue.

The reporting process has been subjected to significant reform in recent years. For example, a Committee may now examine a State’s human rights record under the relevant treaty even in the absence of report, as a way of countering a State’s chronic failure to submit.²⁵⁰ The reforms to the reporting system largely concern the internal workings of the various Committees, and are beyond the scope of this *Handbook*.²⁵¹

c) Use of the Reporting Process by and on behalf of Torture Victims

The Committees make use of alternative sources of information in conducting dialogues with States parties over their reports. It is of course crucial that the Committees do so in order to uphold the integrity and credibility of the reporting system. It would be highly unsatisfactory if the only source of information about a State’s human rights record was the State itself.

249 See generally, S. Joseph, “New Procedures concerning the Human Rights Committee’s Examination of State Reports” (1995) 13 *Netherlands Quarterly on Human Rights*, p. 5, pp. 13-23.

250 General Comment 30, § 4(b).

251 See e.g., UN Fact Sheet 15, Rev. 1, “Civil and Political Rights: The Human Rights Committee”, at <http://www.ohchr.org/english/about/publications/sheets.htm>, pp. 10-15, particularly Box 111.2 ‘Where is the reporting process headed?’ p. 15.

Individuals and groups can make use of the reporting system to bring instances of torture and other ill-treatment in a State to the attention of the relevant Committee. There are a number of reasons why one might wish to use the reporting process rather than the individual complaints process for this purpose.

- The relevant State may not allow individual complaints against it under a particular treaty
- One cannot otherwise satisfy the admissibility criteria for an individual complaint

Perhaps most importantly, the individual complaints system is geared towards addressing abuses at an individual level and is less suitable for highlighting large scale human rights abuses. The reporting process offers a better outlet for the submission of information regarding large scale or systemic human rights abuses. For example, statistics that reveal a high suicide rate in prison for persons of a certain ethnic group will not of themselves prove that a particular individual member of that group has suffered human rights abuse. They do however provide evidence of a systemic problem regarding the treatment of members of that group in prisons.

In submitting information pursuant to the reporting process, it is recommended that organisations do the following:²⁵²

- Keep track of when reports are due
- Submit information in a timely fashion to ensure that Committee members have time to digest it. For example, do not submit a 100 page report on the day that the relevant dialogue is taking place.
- Be concise
- Give necessary contextual background information to supplement the State's core document if necessary
- Structure information around the provisions of the treaty
- Refer to the previous Concluding Observations of the Committee if relevant
- Refer to any previous individual complaints if relevant

252 Giffard, above note 109, pp. 72-75.

- Comment on the State report itself, and present additional important information if necessary. Do not respond to every point made by the State; focus only on important points.
- Use concrete examples and statistics
- Suggest questions that the Committee might ask of the State party representatives
- Make constructive suggestions for improvement within a State party

It is important not to inundate a Committee with information. The Committee members operate on a part time basis and may not have the time to absorb large amounts of information. Ideally, civil society organisations should cooperate with each other in submitting information to ensure against overlap and duplication. Indeed, NGOs are encouraged to submit a common “shadow report”, often in the same format as the State report. Such a submission streamlines the information for the Committee, and also benefits from greater credibility due to the participation of more than one group in its preparation.²⁵³

Information submitted to the Committees is presumed to be public, so one must inform the Committee if one would rather the information be kept confidential. Submissions by NGOs and other interested non-State parties are not treated as formal UN documents, and so they will not be translated by the UN.²⁵⁴ Multiple hard copies, and an electronic copy, of the submission should be provided, as “the secretariat does not have the capacity to reproduce NGO materials.”²⁵⁵

It is possible to attend the meeting in which the relevant dialogue is taking place, as these dialogues take place in public session. One will need authorisation to get into the UN building (whether in Geneva or New York City), so one must contact the Secretariat in advance of one’s visit to arrange for such authorisation. During the dialogue, one is not entitled to intervene; the only speakers permitted are Committee members and the State party representa-

253 UN Fact Sheet 15, Rev. 1, “Civil and Political Rights: The Human Rights Committee”, at <http://www.ohchr.org/english/about/publications/sheets.htm>, p. 12. See also Office of the UN High Commissioner for Human Rights, ‘Working with the Office of the United Nations High Commissioner for Human Rights: A Handbook for NGOs’, (2006) HR/PUB/06/10, p. 68.

254 Office of the UN High Commissioner for Human Rights, ‘Working with the Office of the United Nations High Commissioner for Human Rights: A Handbook for NGOs’, (2006) HR/PUB/06/10, p. 69.

255 *Ibid*, p. 70.

tives. However, both Committees do provide for specific times during their sessions when NGOs may make oral submissions about particular State reports. These oral briefings normally take place in closed sessions.²⁵⁶ Furthermore, there are opportunities, during breaks in Committee sessions, for informal briefings of Committee members.²⁵⁷

2.3.2 CAT inquiry procedure

Article 20 of CAT acts as a monitoring mechanism which can be invoked when the CAT Committee (“the Committee” in this section) receives information suggesting that systematic acts of torture are occurring within a State. Persons wishing to utilise Article 20 should submit their evidence and information to the U.N. Secretary-General who will bring it before the Committee. Such information must meet certain criteria in order to be considered by the Committee. First, the State concerned must have recognised the competence of the Committee to respond to information submitted under Article 20. Under Article 28(1), States parties may deny such competence to the Committee at the time of ratification or accession of the treaty. A State which has so opted not to recognise competence may later recognise the competence of the Committee under Article 28(2). Second, the submitted information must be “reliable” and “well founded”, and must reflect the existence of a systematic practice of torture within the relevant State.

The type of treatment which falls under the scope of Article 20 is limited to torture, as described in Article 1 of the CAT. It does not extend to cruel, inhuman or degrading treatment as per Article 16.

a) Gathering Information

Article 20 inquiries should operate with the full consent of, and in co-operation with, the State under scrutiny. Once the Committee has established that the information meets the requisite criteria, the Committee will forward the information to the State in question and invite it to respond. The Committee may also decide that it requires further information in order to make an informed assessment of evidence it has received. In such a case, it may request additional information from the State, NGOs, or other concerned parties. Once it

²⁵⁶ *Ibid*, pp. 71, 75, 79.

²⁵⁷ *Ibid*, pp. 71, 75.

has gathered sufficient information the Committee will make a decision over whether an independent inquiry is required.

b) An Independent Inquiry

Independent inquiries are conducted by one or more of the members of the CAT Committee. The State will be informed of this decision and will be invited to assist through the provision of further information. The Committee may also request permission for some of its members to visit the State for the purpose of making on-site investigations, such as meeting with prisoners, and visiting places of detention. A visit to the State's territory can only occur with the consent of the State involved. The Committee does not possess any prescribed powers to call witnesses or request documents which may assist in its inquiry. At the conclusion of the inquiry the Committee will review the evidence and make suggestions and comments as to how the State may improve the situation. The State is then invited to respond to the findings and to inform the Committee of how it intends to address the issues raised.

c) Confidentiality

The inquiry itself and any findings made as a result are confidential in accordance with rule 72 and 73 of the Committee's Rules of Procedure. This rule of confidentiality extends to any relevant documents, meetings or proceedings. However, the Committee may choose to include a summary of the findings in its public annual report under Article 20(5).

d) Criticism of the Procedure

The requirement of consent for visits to the territory and the confidential nature of the operation of Article 20 have been the subject of criticism from commentators, who argue that such rules may undermine the procedure's effectiveness. While such provisions operate to protect the sovereignty of the State concerned, they arguably do so at the cost of human rights protection and the eradication of torture.²⁵⁸

258 For example Ahcene Boulesbaa states: "It is highly unlikely that States which practice torture will allow the Committee to inspect their places of detention and examine conditions of the prisoners who are alleged to have been tortured since they have the power of veto....the Committee is thereby denied access to the very evidence it needs to ascertain whether torture has or has not occurred": see A. Boulesbaa., *The U.N Convention on Torture and the Prospects for Enforcement*, M. Nijhoff Publishers, 1999, p. 265.

e) Submitting Information for an Article 20 Inquiry

In submitting information designed to prompt an Article 20 inquiry, individuals or organisations must present credible information that signals the potential existence of systematic practices of torture in a State: the information should indicate that torture is “habitual, widespread and deliberate” and arises in “at least a considerable part of the territory in question”.²⁵⁹ It is not sufficient to present information on isolated instances of torture, though it is important to include a large number of concrete examples of torture. Information should be organised so as to be easy to read and understand.²⁶⁰

Furthermore, an individual or organisation should submit important background information on a State, such as (if relevant) a history of ethnic conflict and discrimination, the inadequacies of existing legislation, and any inadequacies in governance such as within the court system.²⁶¹

In advance of an inquiry, persons should submit suggestions to the Committee on places that the relevant members should visit, as well as people that they should contact, such as government officials, torture victims, detainees, lawyers, and NGOs.²⁶² If one is meeting with an inquiry team, one should tell one’s story succinctly and apolitically, and present copies of relevant documentation if possible. One should address important points first in case time runs out. A written submission should be prepared to ensure that all points have been conveyed, even if one does run out of time during a face to face meeting.²⁶³

f) Article 20 in Action

In its 2004 Annual Report, the Committee gives a summary account of findings in relation to Serbia and Montenegro arising from an Article 20 inquiry. The inquiry was sparked by the submission of information in December 1997, from the Humanitarian Law Centre (HLC), an NGO based in Belgrade, alleging that systematic torture was being practised in Serbia and Montenegro, and requesting an Article 20 investigation by the Committee. After requesting further information from the HLC, the Committee launched an independent inquiry.

259 Giffard, above note 109, p. 98.

260 Giffard, above note 109, p. 98.

261 Giffard, above note 109, p. 98.

262 Giffard, above note 109, pp. 74-75.

263 Giffard, above note 109, p. 75.

This inquiry began in November 2000 and included a visit, with government permission, to Serbia and Montenegro from the 8 to 19 July 2002. During the visit, Committee members met with many government officials, members of the judiciary, state representatives, representatives of the Organisation for Security and Cooperation in Europe, and NGOs. They also visited prisons and police stations to observe log books, medical records, and interrogation rooms, and to conduct interviews with detainees, pre-trial detainees and former detainees. The Committee members reported that “the ... authorities were supportive of the visit and very cooperative. The members visited prisons and places of detention without prior notice and talked in private with detainees”.²⁶⁴

In its summary account the Committee found that under the previous regime of President Slobodan Milosevic, torture had been widely practised and documented. In the post Milosevic era, “the incidence of torture appeared to have dropped considerably and torture was no longer systematic”.²⁶⁵ Nevertheless, the Committee noted that acts of torture continued to occur and reminded the State of its “obligation to spare no effort to investigate all cases of torture [including acts under the Milosevic government], provide compensation for the loss or injury caused and prosecute the persons responsible”.²⁶⁶ In conclusion, it provided a list of 20 recommendations which the State should adopt in order to meet its CAT obligations. The Committee then invited the State to report back regarding the course of action it intended to undertake in response. The State subsequently responded, informing the Committee of various measures it had taken, and was in the process of undertaking, to ensure its obligations were met. In 2003 and 2004, the Committee received further information from NGOs in the region. This information indicated that acts of torture were still occurring and that the State continued to shun its responsibility to investigate and persecute those responsible for earlier war crimes. The Committee noted this information with concern in its annual report for 2004.²⁶⁷

264 Annual Report of the Committee against Torture, (2004) U.N. Doc. A/59/44, § 160.

265 *Ibid.*, § 212.

266 *Ibid.*, § 212.

267 *Ibid.*, §§ 236-239.

2.3.3 Optional Protocol to the CAT

The Optional Protocol (the Protocol) aims to prevent torture, cruel, inhuman or degrading treatment or punishment through the establishment of domestic and international mechanisms which will consistently monitor the treatment of individuals deprived of their liberty, primarily through visits to places of detention. Detainees are peculiarly vulnerable to acts of torture and other ill-treatment. The Protocol was adopted and opened for signature, ratification and accession on 18 December 2002. It came into force on 22 June 2006.

a) Objective of Protocol

Article 1 of the Protocol states the objective of the Protocol:

“the objective of the present Protocol is to establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.”

The Protocol provides for the creation of a new international body, namely the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Subcommittee), which will work together with domestic monitoring bodies, the National Prevention Mechanisms (NPMs), to prevent torture and other mistreatment by States parties. It is intended that both bodies will be able to conduct visits to detention centres. This emphasis on prevention through co-operation between an international mechanism and domestic bodies differentiates the Protocol from other existing anti-torture mechanisms.

b) The Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

The Subcommittee will consist of ten members nominated and subsequently elected by the States Parties in a secret ballot to four year terms. As with the HRC and the CAT Committee, the Subcommittee members will operate in an independent expert capacity. A Subcommittee member should have experience in the area of justice administration, including criminal law, police or prison administration or in a field which relates to the treatment of individuals who are deprived of their liberty.²⁶⁸ The fundamental principles which should

guide all members of the Subcommittee in their actions and approach are “confidentiality, impartiality, non-selectivity, universality and objectivity”.²⁶⁹

Under Article 11 of the OP, the Subcommittee has two main tasks. The first is to visit places of detention and communicate with the State Parties regarding what they observe. The second is to liaise with and assist in the operation of the National Preventive Mechanism.

i. Visiting Places of Detention

Under Article 11, the Subcommittee shall:

- (a) Visit the places referred to in Article 4 and make recommendations to State Parties concerning the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment.

“Places of detention” is defined in Article 4(1) as:

“...any place under its jurisdiction and control where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiesce.”

“Deprivation of liberty” is defined in Article 4(2):

“deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority.”

Thus the definition is broad, to ensure that the Subcommittee may visit:

“prisons and police stations, detention centres, psychiatric institutions (where persons have been hospitalized on involuntary basis), detention areas in military bases, detention centres for asylum seekers and immigration centres, centres for juveniles and places of administrative detention”.²⁷⁰

Furthermore, “the list is not closed”²⁷¹ so the definition can be applied flexibly to new contexts in which an individual is deprived of his or her liberty.

268 Article 5.2.

269 Article 2(3), CAT OP.

270 Amnesty International, “Preventing Torture Worldwide- The Optional Protocol to the Convention Against Torture”, (June, 2003), AI Index: IOR 51/002/2003, <http://web.amnesty.org/library/index/ENGIOR510022003>.

Visits should occur regularly, however the Protocol does not specify a time frame for this criteria. The first round of visits to States parties shall be established by lot, after which they will fall into a regular program.²⁷² The procedure for arranging visits is found in Article 13(2):

“After consultations, the Subcommittee on Prevention shall notify the State Parties of its programme in order that they may, without delay, make the necessary practical arrangements for the visits to be conducted.”

As noted below in Section 2.3.3(c), States parties are obliged to cooperate with the Subcommittee in giving it access to relevant places of detention. The visits themselves will be conducted by at least two members of the Subcommittee²⁷³ and if necessary the members will be accompanied by an expert selected from a roster compiled on the basis of suggestions made by State Parties, the Office of the UN High Commission for Human Rights and the United Nations Centre for International Crime Prevention.²⁷⁴ Such an expert must have “demonstrated professional experience and knowledge in the fields covered by the present Protocol.”²⁷⁵ The State Party may object to the choice of expert for the visit in which case the Subcommittee will propose another expert.²⁷⁶

The Subcommittee may decide under Article 13(4) that a short follow up visit is required to ensure that the State Party has implemented or is working towards implementing its recommendations. No criteria for such visits are spelled out in Article 13(4), so the Subcommittee seems to have considerable discretion in this respect.

The recommendations and observations which the Subcommittee makes during its visit must be confidentially communicated to the State Party and if relevant also to the NPM.²⁷⁷ If the State Party requests it to do so the Subcommittee must publish its report. This publication should include any comments of the State Party. If the State Party itself makes part of the report

271 M. Evans, ‘Signing the Optional Protocol to the Torture Convention’, (October, 2004) *The New Zealand Law Journal* 383, p. 384.

272 Article 13 (1), CAT OP.

273 Article 13 (3), CAT OP.

274 Article 13 (3), CAT OP.

275 Article 13 (3), CAT OP.

276 Article 13 (3), CAT OP.

277 Article 16 (1), CAT OP.

public, the Subcommittee has the right to publish any part or even the whole of the report.²⁷⁸

An annual report given by the Subcommittee to the CAT Committee shall be publicly available.²⁷⁹ It is as yet uncertain how that report will be structured, or how detailed it will be with regard to the Subcommittee's activities.

c) Obligations of the State Party

The successful operation of the Protocol is dependent upon cooperation between the State Party and the Subcommittee. The central obligations and undertakings of the State Party are outlined in Article 12 and Article 14. The State Party must grant to the Subcommittee unrestricted access to all places of detention and their installations and facilities.²⁸⁰ Further, the State Party must give the Subcommittee full access to the places it chooses to visit and the people it wishes to interview.²⁸¹ The State Party must also ensure that interviews with persons deprived of their liberty, or with anyone whom the Subcommittee feels may have relevant information, can be conducted privately without witnesses.²⁸²

The State Party must give unrestricted access to information concerning the number of persons deprived of their liberty and the treatment of persons in places of detention, including their conditions of detention and the location and number of such places.²⁸³ Any other relevant information which the Subcommittee may request "to evaluate the needs and measures that should be adopted to strengthen the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment" must also be provided to the Subcommittee by the State Party.²⁸⁴

278 Article 16 (2), CAT OP.

279 Article 16 (3), CAT OP.

280 Article 14 (c), CAT OP.

281 Article 14 (1)(e), CAT OP.

282 Article 14 (d), CAT OP.

283 Article 14 (1) (a), (b), CAT OP.

284 Article 12 (b), CAT OP.

The State Party may object to visits on certain narrow grounds as specified in Article 14(2):

“Objection to a particular place of detention may be made only on urgent and compelling grounds of national defence, public safety, natural disaster or serious disorder in the place to be visited that temporarily prevent the carrying out of such a visit. The existence of a declared state of emergency as such shall not be invoked by the State Party as a reason to object to a visit.”

Professor Malcolm Evans suggests that, “[t]here will be a heavy burden upon a State wishing to restrict the right of access on these grounds.”²⁸⁵

After the visit to the State, the Subcommittee must communicate its recommendations and observations to the State Party.²⁸⁶ These communications are confidential, but the NPM may also be advised if the Subcommittee deems it relevant.²⁸⁷ The State Party must then examine the recommendations of the Subcommittee and enter into a dialogue with it regarding possible implementation measures.²⁸⁸

The only sanction for non-compliance by a State party with its Protocol obligations arises under Article 16(4). The CAT Committee may decide by majority vote, at the request of the Subcommittee, to make a public statement on the non compliance of the State Party, or publish any relevant report of the Subcommittee. This threat of public exposure of torture or mistreatment of detainees will provide some incentive for cooperation and compliance with the Subcommittee’s recommendations.

d) The National Preventive Mechanism

The National Preventive Mechanism (NPM) is a body or group of bodies which work in conjunction with the Subcommittee towards preventing torture in a particular State. An NPM is established, designated and maintained by the State Party itself²⁸⁹ and operates from within its territory. The type of this mechanism will vary between State Parties:

285 M. Evans, ‘Signing the Optional Protocol to the Torture Convention’, (October, 2004) *The New Zealand Law Journal*, p. 383, p. 384.

286 Article 16(1), CAT OP.

287 Article 16(1), CAT OP.

288 Article 12(d), CAT OP.

289 Article 17, CAT OP.

“some may have a single Human Rights Commission or Ombudsman Office which already enjoys most or all of the visiting capacities required. Others will have an extensive patchwork of bodies operating in different sectors that, in combination, produce an appropriate overall coverage.”²⁹⁰

Therefore, the type of mechanism utilised by the State Party will largely depend upon the nature of pre-existing bodies, and the approach of authorities towards this aspect of implementation.

The domestic location of an NPM will enable it to closely monitor developments in the State; an NPM is “more likely [than the Subcommittee] to be able to identify problems and apply pressure over time”.²⁹¹ They will also provide a valuable source of up-to-date and reliable information for the Subcommittee. Their presence gives new strength to the operation of international law domestically, as they will facilitate ongoing reinforcement of the recommendations and standards of the Subcommittee. They will operate to generate a national culture of human rights which is shaped by international standards.²⁹²

The State Party has a crucial role in creating and maintaining NPMs. The State Party must ensure that experts of the NPMs have the “required capabilities and professional knowledge”.²⁹³ Regarding the composition of an NPM, the State should “strive for a gender balance and the adequate representation of ethnic and minority groups in the country”.²⁹⁴ To be effective it is also essential that the mechanisms operate independently of the State Party. To this end, the State Party must guarantee both the “functional independence” and “independence of their personnel”.²⁹⁵ The State Party must also provide the NPMs with the “necessary resources” for their functioning.²⁹⁶

290 M. Evans, “Signing the Optional Protocol to the Torture Convention”, (October, 2004), *The New Zealand Law Journal* 383, p. 385.

291 M. Evans, “International visitors in UK Cells”, (November, 2004), *The New Zealand Law Journal* 433, p. 434.

292 As noted by Malcolm Evans, “Those national mechanisms designated by the state become part of the international framework of torture prevention and the boundaries between the national and international suddenly become malleable and permeable”, in *ibid*, p. 434.

293 Article 18(2), CAT OP.

294 Article 18(2), CAT OP.

295 Article 18(1), CAT OP.

296 Article 18(3), CAT OP.

i. Functions of the NPM

An NPM will work with the Subcommittee and the State Party to establish practices which will prevent acts of torture, cruel, inhuman or degrading treatment or punishment from occurring within that State. They will have three central roles. First, NPMs will regularly monitor the treatment of detainees in that State; this role includes making visits to places of detention.²⁹⁷ Second, they will make recommendations and submit proposals and observations to the State party relating to current or drafted legislation.²⁹⁸ Third, the NPM will communicate with and exchange information with the Subcommittee.²⁹⁹

The NPMs' role in monitoring the treatment of detainees is very similar to that of the Subcommittee in visiting places of detention.³⁰⁰ States parties must cooperate with NPMs in permitting and facilitating such visits. Furthermore, States must examine recommendations by NPMs, in regards to treatment of detainees and also with regard to State party laws and policies, and engage in a dialogue with the NPM on possible ways of implementing its recommendations.³⁰¹

It is envisaged that NPMs will publish annual reports, which must be distributed by the relevant States parties.³⁰² The Protocol is not specific as to the requisite content of such reports.

The powers granted to the NPM in relation to monitoring detainees and making recommendations and proposals reflect the minimum powers which must be granted to the NPM under the Protocol;³⁰³ a State Party may choose to authorise further powers to its NPM/s.

ii. The Relationship between the Subcommittee and the NPMs

A strong working relationship between the Subcommittee and the NPM is crucial for the optimal functioning of the Protocol. The State party should encourage and facilitate such contact and communication.³⁰⁴ Such communication

297 Article 19(a), CAT OP.

298 Article 19(b) and (c), CAT OP.

299 Article 20(f) and Article 11(b)(ii) and Article 16(1), CAT OP.

300 Article 20, CAT OP.

301 Article 22, CAT OP.

302 Article 23, CAT OP.

303 Article 19, CAT OP.

304 Article 12(c), CAT OP.

may, if necessary, be kept confidential.³⁰⁵ The general role of the Subcommittee in relation to the NPMs is “one of general oversight, exercising something of a paternalistic interest in the operation and functioning of NPMs”.³⁰⁶ For example, the Subcommittee may assist the State party to establish the NPM, and may offer training and technical assistance to an NPM.³⁰⁷ The Subcommittee should also make recommendations and observations to State Parties in relation to strengthening the capacity and the mandate of an NPM.³⁰⁸

e) Protecting Those who Communicate or Provide Information

In order for the Subcommittee and the NPMs to assess the true situation in relation to the practice of torture within a State they must be able to have uncensored and open communication with relevant individuals and groups. Therefore, such individuals and groups must be able to speak freely with the Subcommittee and NPMs, without fear of reprisal or punishment. Article 15 therefore states:

“No authority or official shall order, apply, permit or tolerate any sanction against any person or organization for having communicated to the Subcommittee on Prevention or to its delegates any information, whether true or false, and no such person or organization shall be otherwise prejudiced in any way.”

Article 21(1) ensures that the same degree of protection is offered in relation to NPMs. With both the Subcommittee and NPMs, no personal data will be published without the explicit consent of the individual or persons concerned.

f) Conclusion

It is of course premature to assess the functioning of the Protocol, given that it has only very recently come into force. It is hoped that the approach envisioned under the Protocol of visiting countries combined with the complementary relationship between international and domestic mechanisms will “be the final stone in the edifice which the United Nations has built in their campaign against torture”.³⁰⁹

305 Article 11(b)(ii), CAT OP.

306 M. Evans, “Signing the Optional Protocol to the Torture Convention”, (October, 2004) *The New Zealand Law Journal* 383, p. 385.

307 Article 11(b)(iii), CAT OP.

308 Article 11(b)(iv), CAT OP.

309 Report of the Special Rapporteur on Torture, (Mr. P.Kooijmans), (1998) UN doc. E/CN.4/1988/17, § 65.

2.3.4 The UN Special Rapporteur on Torture

The position of Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (“Special Rapporteur on Torture”) was created by the United Nations Commission on Human Rights in 1985 in order to examine issues relating to torture and other ill-treatment. Each Rapporteur serves in his or her individual capacity, independent of government or other organisations. To date, there have been four Special Rapporteurs on Torture. The choice of Rapporteur is “crucial to the credibility of the mandate”³¹⁰, so the position of Special Rapporteur requires “individuals of high standing and deep knowledge of human rights.”³¹¹ The current Special Rapporteur is Professor Manfred Nowak who was appointed by the United Nations Commission on Human Rights on 1 December 2004.

The original mandate of the Special Rapporteur was described in Commission Resolution 1985/33, and has evolved in succeeding resolutions. The ultimate parameters of the work of the Special Rapporteur are outlined in the International Bill of Human Rights and other UN instruments which prohibit acts of torture or cruel, inhuman or degrading treatment or punishment.³¹² The main function is to present the Commission (and now the Commission’s replacement, the Human Rights Council) with as accurate a report as possible on the practice of torture in the world.³¹³ The types of issues which the Special Rapporteur has addressed include anti-terrorism measures, the Convention Against Torture, corporal punishment, disappearances, effective investigation of torture, gender-specific forms of torture, torture equipment, impunity, incommunicado detention, the role of medical personnel, non-refoulement and the exclusionary rule.³¹⁴

310 UN Fact Sheet No. 27, “Seventeen Frequently Asked Questions about United Nations Special Rapporteurs”, at <http://www.ohchr.org/english/about/publications/sheets.htm>, p. 6.

311 UN Fact Sheet No. 27, “Seventeen Frequently Asked Questions about United Nations Special Rapporteurs”, at <http://www.ohchr.org/english/about/publications/sheets.htm>, p. 6.

312 Methods of Work of the Special Rapporteur on Torture, Annex to UN doc. E/CN.4/1997/7 (hereinafter referred to as “Methods of Work”), §1. These “methods of work” were approved by the Commission on Human Rights in Resolution 2001/62. (2001) UN doc. E/CN.4/RES/2001, § 30.

313 Giffard, above note 109, p. 92.

314 A list of “Issues in Focus” and related reports available at <http://www.ohchr.org/english/issues/torture/rapporteur/issues.htm>

The mandate of the Special Rapporteur allows him or her to uniquely respond in situations where other human rights bodies working against torture may not be able. For example, there is no requirement that the State in question be a party to CAT or any other treaty, so the Special Rapporteur may respond to allegations of torture against any State.

(a) Central Functions of the Special Rapporteur

i. Urgent Appeals

This arm of the Special Rapporteur's mandate is intended to operate as a preventative mechanism in situations where the Special Rapporteur receives information indicating that an individual or group of individuals is at risk of torture or ill-treatment. In this situation, the Special Rapporteur will only take action upon determining that such information is credible. In making an assessment as to whether there are reasonable grounds to believe that a risk of torture or ill-treatment is present, the Special Rapporteur may consider:

- The previous reliability of the source of the information;
- The international consistency of the information;
- The consistency of the information with other information received by the Special Rapporteur relating to this particular country;
- The existence of authoritative reports of torture practices from national sources, such as official commissions of inquiry;
- The findings of other international bodies, such as those established in the framework of the UN human rights machinery;
- The existence of national legislation, such as that permitting prolonged incommunicado detention, that can facilitate torture;
- The threat of extradition or deportation, directly or indirectly to a State or territory where one or more of the above elements are present.³¹⁵

³¹⁵ Methods of Work, § 3.

The action taken by the Special Rapporteur generally takes the form of an urgent appeal through a letter to the relevant State's Minister of Foreign Affairs, requesting the investigation of the allegations, and the taking of steps to ensure the physical and mental integrity of the individual/individuals concerned.³¹⁶ This communication does not amount to an accusation, rather it seeks to enlist the cooperation and assistance of the government in ensuring that international human rights standards are upheld in the specific circumstance. An urgent appeal can be used to complement a request for interim measures by another human rights body, such as the HRC or the CAT Committee.³¹⁷ In 2005, the Special Rapporteur on Torture sent, both jointly with other mandates and individually, 190 urgent appeals to 55 countries.³¹⁸

ii. Allegation Letters

Upon receiving allegations of acts of torture and determining that they are credible, the Special Rapporteur will endeavour to open up a dialogue with the respective government by sending it an "allegation letter", which requires that the government respond to the allegations and provide details of any subsequent investigation. Upon receipt of such information, the Special Rapporteur will consider the details of the response and will communicate the information to the individuals or group who made the allegation (as appropriate). The Special Rapporteur will also consider whether to pursue further dialogue with the State party.³¹⁹ In 2005, the Special Rapporteur sent, both jointly with other mandates and individually, 93 allegation letters on torture to 47 countries.³²⁰ The Special Rapporteur's conclusions regarding such communications are compiled in an annual report (see Section 2.3.4(b)).

316 Methods of Work, § 4.

317 See Section 2.2.

318 "Special Procedures of the Commission on Human Rights – 2005 Communications" at <http://www.ohchr.org/english/bodies/chr/special/Facts%20and%20figures%20on%202005%20Special%20Procedures%20communications.pdf>, p. 3

319 Methods of Work, § 8.

320 "Special Procedures of the Commissioner on Human Rights – 2005 Communications" at <http://www.ohchr.org/english/bodies/chr/special/Facts%20and%20figures%20on%202005%20Special%20Procedures%20communications.pdf>, p. 3

iii. Fact-finding Visits

An integral part of the Special Rapporteur's mandate is to undertake fact-finding visits to States. These visits are always carried out with the consent of the State involved and may be arranged in two ways. A State's government may invite the Special Rapporteur to visit, or the Special Rapporteur may seek to solicit an invitation from a government due to the "number, credibility and gravity of the allegations received, and the potential impact that the mission may have on the overall human rights situation".³²¹ NGOs may play an active role in lobbying the Special Rapporteur to visit a particular State.

Country visits provide the Special Rapporteur with the opportunity to gain a first-hand understanding and insight into the human rights situation in relation to practices of torture and ill-treatment, and in relation to the particular States visited. The type of investigation undertaken by the Special Rapporteur include visits to places of detention, and meetings with relevant individuals and groups, such as victims, their families, NGOs, journalists, lawyers, and government authorities.

In order to ensure that the visit of the Special Rapporteur will enable him or her to gain a true perspective of the situation and that the visit will not generate or aggravate situations of abuse, the Rapporteur asks for certain guarantees from the government of the State before the visit commences. These include:

- Freedom of movement throughout the country;
- Freedom of inquiry, especially regarding access to places of detention;
- Freedom of contact with government officials, members of NGOs, private institutions and the media;
- Full access to all relevant documentary material;
- Assurances that no persons who are in contact with the Special Rapporteur will suffer consequent retribution.³²²

For example, the Special Rapporteur cancelled a planned visit to the U.S.'s detention facility in Guantanamo Bay in late 2005 as the U.S. would not allow him free access to privately interview detainees in that facility.³²³

321 See Office for the High Commissioner on Human Rights, "Special Rapporteur on Torture, Country Visits" at <http://www.ohchr.org/english/issues/torture/rapporteur/visits.htm>

322 See Office for the High Commissioner on Human Rights, "Special Rapporteur on Torture, Country Visits" at <http://www.ohchr.org/english/issues/torture/rapporteur/appeals.htm>

323 See 'Human Rights experts issue joint report on situation in Guantanamo Bay', UN Press Release, 16 February 2006.

b) Reports

The Special Rapporteur's findings are not legally binding. However, the public nature of his findings puts pressure on States to conform to his or her recommendations.³²⁴ The Special Rapporteur compiles an annual report on his work throughout the year, including accounts of visits to States, communications received, and on salient issues related to torture and ill-treatment.³²⁵ These reports identify the factors and practices which cause and sustain acts of torture or other ill-treatment, and recommend measures regarding the eradication of such practices. These recommendations are subject to limited follow-up by the Special Rapporteur who will:

“periodically remind Governments concerned of the observations and recommendations formulated in the respective reports, requesting information on the consideration given to them and the steps taken for their implementation, or the constraints which might have prevented their implementation.”³²⁶

The Special Rapporteur used to report annually to the Commission on Human Rights.³²⁷ These reports will now be submitted to the UN Human Rights Council. The Special Rapporteur also submits an annual report to the UN General Assembly.³²⁸

c) Practical Information for submitting a communication to the Special Rapporteur

When submitting a communication to the Special Rapporteur on Torture there is certain basic information which must be included in order for a submission to be considered;

- Full name of the victim;
- Date on which the incident(s) of torture occurred (at least as to the month and year);
- Place where the person was seized (city, province, etc.) and location at which the torture was carried out (if known);
- Indication of the forces carrying out the torture;

324 Giffard, above note 109, p. 93.

325 To access these reports go to http://ap.ohchr.org/documents/dpage_e.aspx?m=103

326 Methods of Work, §13.

327 See e.g., UN doc. E/CN.4/ 2006/6, 23 December 2005.

328 See e.g., UN doc. A/60/316, 30 August 2005.

- Description of the form of torture used and any injury suffered as a result;
- Identity of the person or organization submitting the report (name and address, which will be kept confidential).³²⁹

A very useful tool to assist someone who is writing a submission to the Special Rapporteur is the model questionnaire available in English, French and Spanish at <http://www.ohchr.org/english/issues/torture/rapporteur/model.htm>. Although it is not compulsory to submit the communication in this style, the questionnaire is very helpful in identifying the information which should be included if possible. As much detail as possible should be given in any communication to the Special Rapporteur. However, if precise details are not known or unclear, this should not preclude a communication from being made (subject to the basic informational requirements outlined above). Other information which should be included are any copies of documents which support the allegations, such as police or medical reports.

The postal and email address for communications to the Special Rapporteur is:

Special Rapporteur on Torture
c/o Office of the High Commissioner for Human Rights
United Nations Office at Geneva
CH-1211 Geneva 10
Switzerland

Email: urgent-action@ohchr.org

For further information on the work of the Special Rapporteur and procedures for submitting a complaint please refer to the United Nations website at <http://www.ohchr.org/english/issues/torture/rapporteur/index.htm>

and <http://www.ohchr.org/english/bodies/chr/special/complaints.htm>

2.3.5 The Working Group on Arbitrary Detention

The Working Group on Arbitrary Detention seeks to investigate instances of and the phenomenon of arbitrary detention. Examples of such detention include where an individual has been imprisoned without an arrest warrant and without being charged or tried by an independent judicial authority, or without

³²⁹ See “Model questionnaire to be completed by persons alleging torture or their representatives”, available at <http://www.ohchr.org/english/issues/torture/rapporteur/model.htm>

access to a lawyer, or where he or she has been detained without the fundamental guarantee of a fair trial.³³⁰ Arbitrary detention is prohibited under Article 9 ICCPR. It is often a prelude to acts of torture or other ill-treatment.

The Working Group was established in 1991 by the Commission on Human Rights.³³¹ The Working Group is made up of five independent experts who meet three times per year for a period of five to eight working days.

“Detention” is defined in Commission Resolution No. 1997/50 as any “deprivation of liberty”, and includes instances of arrest, apprehension, detention, incarceration, prison, reclusion, custody and remand. It extends to a “deprivation of freedom either before, during or after the trial...as well as deprivation of freedom in the absence of any kind of trial (administrative detention)”, as well as house arrest.³³²

The Working Group has adopted the following criteria in determining whether a detention is arbitrary:

1. “When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his sentence or despite an amnesty law applicable to him)”.
2. “When the deprivation of liberty results from the exercise of rights or freedoms guaranteed by Articles 7, 13, 14, 18, 19, 10 and 21 of the Universal Declaration of Human Rights and insofar as States Parties are concerned, by Articles 12, 18, 19, 21, 22, 25, 26, and 27 of the International Covenant on Civil and Political Rights (ICCPR)”.
3. “When the total or partial non observance of the international norms relating to the right to a fair trial, spelled out in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character”.³³³

330 UN Fact Sheet, No. 26, “The Working Group on Arbitrary Detention”, at <http://www.ohchr.org/english/about/publications/docs/fs26.htm>

331 Commission on Human Rights, Resolution 1991/42.

332 UN Fact Sheet, No. 26, “The Working Group on Arbitrary Detention”, at <http://www.ohchr.org/english/about/publications/docs/fs26.htm>, Part IV.

333 UN Fact Sheet, No. 26, “The Working Group on Arbitrary Detention”, at <http://www.ohchr.org/english/about/publications/docs/fs26.htm>, Part IV.

a) The Mandate of the Working Group on Arbitrary Detention

The mandate of the Working Group, as determined by the Commission on Human Rights, involves three central areas of operation.³³⁴ First, it investigates cases where an individual has been deprived of his or her liberty in circumstances which appear to be arbitrary. Second, the Working Group will seek and receive information regarding situations of arbitrary detention occurring throughout the world. Third, the Working Group compiles a public annual report on its activities, including recommendations and conclusions about the factors which lead to instances of arbitrary detention. The report includes the Working Group's opinions on individual communications submitted to it, and reports of field visits and relevant statistics for that period. The report is then considered by the Commission on Human Rights in its annual session. The Commission's replacement, the UN Human Rights Council, will take over that role.

b) Method of Operation

i. Individual Complaints

The Working Group on Arbitrary Detention is the only non-treaty-based mechanism whose mandate expressly provides for consideration of individual complaints. It can therefore act on complaints regarding any State, regardless of the treaties it has ratified.³³⁵

The process of consideration of individual complaints is as follows. The Working Group receives the complaint from a concerned party, such as the victim or a representative. The Working Group will then determine if the claim appears to be sufficiently substantiated to proceed. If it does proceed, it forwards a copy of the communication to the State concerned, and requests a response within 90 days. The government's response is then forwarded to the complainant. Ultimately, the Working Group determines its opinion on the basis of all of the information received. It may decide that the detention is arbitrary (even if the person has since been released), and will then recommend an appropriate remedy. It may determine that the particular detention was not

334 UN Fact Sheet, No. 26, "The Working Group on Arbitrary Detention", at <http://www.ohchr.org/english/about/publications/docs/fs26.htm>, Part IV.

335 UN Fact Sheet, No. 26, "The Working Group on Arbitrary Detention", at <http://www.ohchr.org/english/about/publications/docs/fs26.htm>, Part IV.

arbitrary. Finally, it may determine that more information is required, so the case is filed until the information is received. It will notify the government of its opinion and three weeks later will also notify the author.³³⁶

A very useful tool to assist someone who is writing a communication to the Working Group on Arbitrary Detention is the model questionnaire available at <http://www.ohchr.org/english/about/publications/docs/fs26.htm#A5> in Annex 5.

ii. Deliberations

The Working Group also produces “deliberations”, which are designed to develop consistent precedents to assist States to identify practices which may lead to, or constitute, arbitrary detention.³³⁷ Recent deliberations of the Working Group include Deliberation 8 on deprivation of liberty linked to/resulting from the use of the internet (2006)³³⁸ and Deliberation 7 on issues related to psychiatric detention (2005).³³⁹

iii. Urgent Action

Where the Working Group receives information indicating that a situation urgently requires its attention it may issue an urgent appeal. The Working Group will engage in this process where it receives sufficiently reliable allegations that a person is being arbitrarily detained, and that the detention constitutes a serious threat to the person’s life or health, or in other exceptional circumstances where the Working Group decides that such an appeal is warranted. In these situations, the Working Group will send the Minister for Foreign Affairs of the relevant State an urgent appeal requesting him or her to take all appropriate action to ensure that the physical and mental integrity of the individual/s concerned is protected. These appeals do not assume guilt on the part of the State, and have no effect on any subsequent decision by the Working Group regarding the relevant detention.³⁴⁰

336 See Working Group on Arbitrary Detention, “Individual Complaints, Urgent Appeals, Deliberations” at www.ohchr.org/english/issues/detention/complaints.htm, Part I.

337 See Working Group on Arbitrary Detention, “Individual Complaints, Urgent Appeals, Deliberations” at www.ohchr.org/english/issues/detention/complaints.htm, Part III.

338 Working Group on Arbitrary Detention, Deliberation 8, (2006) UN doc. E/CN.4/2006/7.

339 Working Group on Arbitrary Detention, Deliberation 7, (2005) UN doc. E/CN.4/2005/6.

340 www.ohchr.org/english/issues/detention/complaints.htm, Part II.

iv. Field Missions

The Working Group also conducts visits to the territory of States upon invitation of State governments. Through meeting with detainees, government officials, members of the judiciary and NGOs, the Working Group gains a first hand understanding of the political, cultural and social situation in that country and also an insight into the factors leading and contributing to instances of arbitrary detention.³⁴¹

c) Avoiding Duplication with other Human Rights Mechanisms

To ensure that two bodies are not simultaneously dealing with the same case or set of circumstances a procedure has been set in place:

“as soon as a case is brought before the Group, the secretariat checks whether it does indeed fall under the Group’s mandate. If the principal violation suffered by the detained person falls under the practice of torture, summary execution or enforced disappearance, the case is forwarded to the appropriate special rapporteur or working group.”³⁴²

A case will otherwise be sent to the Working Group, unless it is possible that the communication is meant for the HRC, which of course has the power to make determinations regarding individual communications under Article 9 ICCPR if the complaint concerns a State party to the OP. In such a case the author will be contacted and he or she can choose which mechanism (HRC or Working Group) he or she wishes to utilise.³⁴³

d) Practical Information

For further information on the Working Group on Arbitrary Detention including reports, press releases, relevant international standards and guidelines for submission of a communication (model questionnaire) see their web site at: <http://www.ohchr.org/english/issues/detention/complaints.htm>

341 UN Fact Sheet, No. 26, “The Working Group on Arbitrary Detention”, at <http://www.ohchr.org/english/about/publications/docs/fs26.htm>, Part V.D.

342 UN Fact Sheet, No. 26, “The Working Group on Arbitrary Detention”, at <http://www.ohchr.org/english/about/publications/docs/fs26.htm>, Part VII.

343 UN Fact Sheet, No. 26, “The Working Group on Arbitrary Detention”, at <http://www.ohchr.org/english/about/publications/docs/fs26.htm>, Part VII.

For an individual case or cases, the communication should be sent to:

Working Group on Arbitrary Detention
c/o. Office of the UN High Commissioner for Human Rights
United Nations Office at Geneva
CH-1211, Geneva 10
Switzerland

Communications requesting the Working Group to launch an urgent appeal on humanitarian grounds should also be sent to the above address or preferably, by facsimile to: +41 (0)22 917 9006.

2.4 Follow-up Procedure

Follow-up measures refer to the procedures of the HRC and the CAT Committee to “follow up” the responses and reactions of States parties to their Concluding Observations or their findings of violation in individual complaints.

Prior to the instigation of follow-up measures, the Committees had little knowledge about the actual impact of their findings upon the practice of States parties. States were left to develop their own ways of acting (or not acting) upon the findings of the Committee and implementing the recommendations that were made.³⁴⁴ Without a monitoring mechanism in place there was occasionally little incentive for a State to put such recommendations into practice. The Committees aim to facilitate, encourage and supervise compliance through the implementation of follow-up measures.

“The issue of follow-up to concluding observations has been identified as of central importance for the effectiveness of the work of treaty bodies...without such efforts the likelihood of implementation of recommendations is greatly diminished”.³⁴⁵

The development of follow-up procedures means that States are subjected to continued scrutiny after they have been found in violation of the relevant

344 M. Schmidt, “Follow-up Mechanisms Before UN Human Rights Treaty Bodies and the UN Mechanisms Beyond”, in A.F. Bayefsky (ed), *UN Human Rights Treaty System in the 21 Century*, Kluwer Law International, 2000, p. 234.

345 M. O’Flaherty, “The Concluding Observations of United Nations Human Rights Treaty Bodies” (2006) 6 *Human Rights Law Review* 27, p. 47.

treaty, which should improve the overall record of compliance with the treaty bodies' decisions.

2.4.1 Follow-up by the Human Rights Committee

There are two contexts in which the HRC will implement follow-up procedures. The first is after it releases its Concluding Observations on a particular State pursuant to the reporting process. The second is in relation to views issued in response to individual complaints under the OP.

a) Follow-up on Concluding Observations

Concluding Observations are issued at the conclusion of the reporting process. The HRC now routinely requests the relevant State party to give priority to particular “concerns and recommendations” in its Concluding Observations, which provides the starting point for the “follow-up” procedure in relation to those Concluding Observations. In 2002, the HRC appointed a Special Rapporteur on Follow-Up to Concluding Observations (referred to under this heading as Special Rapporteur) to oversee this procedure;³⁴⁶ his or her role is to “establish, maintain or restore dialogue with the State party”.³⁴⁷

After the HRC has identified the priority issues, the relevant State is required to respond with regard to those issues within twelve months. In its response the State should provide the HRC with information indicating the measures taken to address and improve on its performance in the priority areas. The information provided by the State in its response is labeled as “follow-up information” and is made publicly available on the Treaty Bodies Database (at <http://www.unhchr.ch/tbs/doc.nsf>) and in the HRC's Annual Reports.

The Special Rapporteur will then assess this follow-up information and any other credible information which is submitted by third parties, such as NGOs, and make recommendations to the HRC regarding any further steps which should be taken. The HRC will consider these recommendations and then decide on whether further action needs to be taken. Suggestions will vary depending on the particular situation and needs of the State in question. Examples of action which may be taken include face to face discussions

346 Report of the Human Rights Committee, (1992) UN doc. A/57/40 (Vol. I), § 54 and Annex III A, §§ 3-5.

347 General Comment 30, § 5.

between the Special Rapporteur and State representatives, and bringing the due date of the next periodic report forward.³⁴⁸

Where a State fails to respond to the priority issues within ten months of receiving the Concluding Observations, the Secretariat will contact the State party informally. If the State party still fails to respond, the Special Rapporteur will then send a formal reminder in writing. If the State still fails to respond, the Special Rapporteur will try to arrange a meeting with a representative of that State to discuss the situation. In some circumstances a State may not respond at all; this fact is reported in the Annual Report of the HRC.³⁴⁹

In its Annual Report for 2005, the HRC stated that:

“it views this procedure as a constructive mechanism by which the dialogue initiated with the examination of a report can be continued, and which serves to simplify the process of the next periodic report on the part of the State party”.³⁵⁰

b) Follow-Up on “Views” under the Optional Protocol

The follow-up to views issued under Article 5(4) of the OP is overseen by the “Special Rapporteur on Follow-up on Views”³⁵¹ (referred to as the Special Rapporteur under this heading). The mandate of the Special Rapporteur is to:

“make such contacts and take such action as appropriate for the due performance of the follow-up mandate. The Special Rapporteur shall make such recommendations for further action by the Committee as may be necessary”.³⁵²

The scope of the mandate allows for flexibility in the implementation of the Special Rapporteur’s duties.

Where a violation is found to have occurred, the State is requested to provide the HRC with information regarding its course of action within 90 days of the finding being communicated to it. The Special Rapporteur will then commence a dialogue with the State party regarding the ways in which it may provide a

348 UN Fact Sheet, No. 15 (Rev. 1), “Civil and Political Rights: The Human Rights Committee” at <http://www.ohchr.org/english/about/publications/sheets.htm>, p14.

349 M. O’Flaherty, “The Concluding Observations of United Nations Human Rights Treaty Bodies” (2006) 6 *Human Rights Law Review* 27, p. 47.

350 Report of the Human Rights Committee, (2005) UN doc. A/60/40 (Vol. 1), p. 139.

351 The Special Rapporteur on Follow-up on Views was appointed by the HRC in July 1990.

352 HRC Rules of Procedure, Rule 101 (2).

remedy to the author of the communication, and otherwise implement the HRC's findings. The response of the State party in this situation is labeled a "follow-up reply". Information regarding the compliance of the State with the recommendations is often received from sources other than the State party, including the author of the relevant complaint, his or her representative, and NGOs.

When a State fails to reply, the Special Rapporteur may attempt to establish communication or request a visit to the State territory. The lack of response and/or unwillingness of a State party to cooperate will be made public in the Annual Report of the HRC. Such bad publicity is a soft yet real sanction; all States wish to avoid such international embarrassment.

The Special Rapporteur also makes recommendations and presents regular follow-up progress reports to the HRC. These reports provide a "detailed overview of the state of implementation of the Committee's views".³⁵³ The information on which these recommendations and reports are based includes information from the State party, NGOs, and any personal follow-up missions or consultations conducted by the Special Rapporteur.

2.4.2 Follow-up by the CAT Committee

The CAT Committee also has processes to follow up its Concluding Observations pursuant to the reporting procedure, as well as individual complaints decided under Article 22.

a) Follow-up to Concluding Observations

As part of its conclusions and recommendations issued pursuant to the reporting process under Article 19 of CAT, the CAT Committee may request that a State party take action within a set period of time to improve a situation where it is failing to meet its obligations under CAT. A Rapporteur is appointed by the CAT Committee to follow-up on State compliance with such recommendations.³⁵⁴

353 M. Schmidt, "Follow-up Mechanisms Before UN Human Rights Treaty Bodies and the UN Mechanisms Beyond", in A.F. Bayefsky (ed), *UN Human Rights Treaty System in the 21 Century*, Kluwer Law International, 2000, p. 236.

354 CAT Rules of Procedure, Rule 68(1).

In 2002, the CAT Committee appointed two of its members as Rapporteurs to oversee compliance with conclusions and recommendations. Another task for these Rapporteurs is to “maintain contacts with representatives of non-reporting States in order to encourage the preparation and submission of reports”.³⁵⁵ The role of these Rapporteurs was further defined in the CAT Committee’s 2002 Annual Report:

“these Rapporteurs would seek information as to a State party’s implementation of and compliance with the Committee’s conclusions and recommendations upon the former’s initial, periodic or other reports and/or would urge the State party to take appropriate measures to that end. The Rapporteurs would report to the Committee on the activities they have undertaken pursuant to this mandate.”³⁵⁶

In general, the follow-up process under CAT is very similar to that under the ICCPR.

b) Follow-up of Individual Communications submitted under Article 22 of CAT

Under Article 114 of its Rules of Procedure, the CAT Committee may appoint one or more Rapporteurs to follow-up on the actions of a State in response to a finding of a violation under Article 22 of CAT. The Rapporteurs have a broad mandate, as outlined in Rule 114 (2):

“The Rapporteur(s) may make such contacts and take such action as appropriate for the due performance of the follow-up mandate and report accordingly to the Committee”.

The specific types of action which may be undertaken by the Rapporteur were outlined in the CAT Committee’s Annual Report in 2004.³⁵⁷ They included:

- Requesting information from the State parties regarding action taken in response to the findings of the Committee.
- Advising the Committee on possible courses of action where States have failed to respond to inquiries from the Rapporteur or the Rapporteur receives

355 “Overview of the working methods of the Committee Against Torture”, at <http://www.ohchr.org/english/bodies/cat/workingmethods.htm#n3> , Part V.

356 Report of the Committee Against Torture, (2002) UN doc. A/57/44, Annex X (Amended Rule of Procedure 68, § 15).

357 Report of the Committee Against Torture, (2004) UN doc. A/59/44, § 264.

information that indicates the State has not upheld the Committee's recommendations.

- Engaging with State representatives to encourage implementation and to provide advice or assistance from the Office of the High Commissioner for Human Rights, if the Rapporteur considers that it is necessary.
- Visiting the territory of the State in question, with the approval of the CAT Committee and the State.

The Rapporteur must regularly report to the Committee on his or her activities.³⁵⁸ Information from these reports is then included in the CAT Committee's Annual Report.

In general, the functions of the Rapporteur on following up Article 22 Views is similar to that of the HRC's Rapporteur on Follow-up on (OP) Views.

2.4.3 Gauging Compliance with HRC and CAT Recommendations

One of the purposes of the follow-up process is to gauge the level of compliance with decisions and recommendations by the relevant Committee. An overview of the chapter on Follow-up to OP Views in the 2005 HRC Annual Report by the current authors revealed that the HRC had received a totally satisfactory response in only about 20% of OP cases. However, this figure is skewed by the fact that follow-up in many of the early cases was undertaken many years after the original views were issued; it was probably difficult for some States to provide satisfactory follow-up information in such situations. Further, dialogue was "ongoing" in a number of cases, so it is perhaps premature to classify some of the recent such cases as "unsatisfactory". Finally, the figure is skewed by the many unsatisfactory responses of certain States, such as Jamaica, Uruguay and Trinidad and Tobago, which together account for a large percentage of adverse OP views. In any case, the ways in which States have responded to the HRC's views under the OP and the subsequent follow-up procedure is difficult to quantify. The HRC acknowledged in its 2005 Annual Report:

358 CAT Rules of Procedure, Rule 114 (3).

“[a]ll attempts to categorise follow-up replies by State parties are inherently imprecise and subjective; it is therefore not possible to provide a neat statistical breakdown of follow-up replies.”³⁵⁹

The HRC in its 2005 Annual Report noted the variety of reasons given by State parties for non-implementation of OP views:

“[Some] replies cannot be considered satisfactory because they either do not address the Committee’s Views at all, or only relate to certain aspects of them. Certain replies simply note that the Victim has filed a claim for compensation outside statutory deadline and that no compensation can therefore be paid. Still other replies indicate that there is no legal obligation on the State party to provide a remedy, but that a remedy will be afforded to the complaint on an *ex gratia* basis. The remaining follow-up replies challenge the Committee’s Views and findings on factual or legal grounds, constitute much-belated submissions on the merits of the complaint, promise an investigation of the matter considered by the Committee or indicate that the State party will not, for one reason or another, give effect to the Committee’s Views”.³⁶⁰

A primary issue preventing implementation may relate to a lack of process and understanding, within a State, of how to implement the recommendations. For example, de Zayas suggests that:

“[t]he main obstacle to implementation is not the unwillingness of state parties to cooperate but the lack of a mechanism in domestic law to receive and implement decisions emanating from a foreign entity”.³⁶¹

In such situations, the follow-up process is an invaluable means of not only rendering a State accountable, but also in helping a State to comply with the Committees’ findings.

359 Report of the Human Rights Committee, (2005) UN doc. A/60/40 (Vol. 1), p. 120.

360 Report of the Human Rights Committee, (2005) UN doc. A/60/40 (Vol. 1), p. 120.

361 A. de Zayas, “Petitioning the United Nations” (2001) *Proceedings of the 95th Annual Meeting of the American Society of International Law* 82, p. 86.

2.4.4 Conclusion

Both the HRC and the CAT Committee present a summary of all follow-up replies in their annual reports. Such information is also available via the Treaty Bodies Website at <http://www.unhchr.ch/tbs/doc.nsf>. Follow-up replies provide very useful information regarding a State's attitude to certain human rights issues. Furthermore, the recording of such information places subtle pressure on States to conform with the findings of relevant Committees, which can only help to improve the level of overall compliance.