the Optional Protocol concerning the authors of communications within its jurisdiction. Like the other members of the Committee, she hoped that the last reservations formulated by the Government of the Republic of Korea would rapidly be withdrawn.

10. With regard to the implementation of article 6 of the Covenant, she welcomed the plans to amend criminal law in order to abolish the death penalty. She would like to know what instructions were given to members of the police in connection with the use of force during public demonstrations. Referring to the implementation of article 7 and to paragraph 136 of the report, she asked whether studying the Constitution was really enough to make law enforcement officers refrain from the practice of torture and whether it might not also be a good idea for instruction to be provided on the international undertakings of the Republic of Korea with regard to the prohibition of torture. She noted that paragraph 137 of the report indicated that 29 public officials had been prosecuted for inflicting torture, but there was no indication of what the outcome of those proceedings had been. She therefore asked how many officials had been found guilty and what penalties had been imposed on them. She would also like to know who conducted interrogations and by virtue of which powers, whether the Government ensured that accused persons were not tried by their own superiors and whether there were any plans to set up an independent body to carry out inquiries into cases of that kind.

11. Referring to the implementation of article 9 of the Covenant, she requested information on the draft amendments to the Criminal Code, which had last been revised in 1975, and on the revision of the Code of Criminal Procedure. As to arrest before investigation, she noted that the Constitution Court had called for the amendment of some articles of the National Security Law because it had considered that detention lasted too long. In her view, however, a minimum reduction of the length of time that could be as long as 50 days was still not enough, bearing in mind the provisions of article 9, paragraph 3, of the Covenant, as well as the general comments and decisions of the Committee. She would also like to know whether there were any real obstacles to the reopening of the cases of persons who had been detained for many years and who claimed that they had been convicted in the past on the basis of confessions obtained under torture. Could such persons not benefit from the positive changes in the situation that had recently occurred in the Republic of Korea?

12. In the case of the implementation of article 14 of the Covenant, she asked whether the fact that there were special prosecutors and special public security legislation might not jeopardize the implementation of the principle of the presumption of innocence and what instructions were given to the courts in order to ensure that that principle was respected, particularly for persons accused under the National Security Law. She also asked whether it was true that some trials were held in prisons. If there were not enough lawyers, as was the case in many other countries in the world, the accused had to be defended by members of his family and by friends and such persons therefore had to be given every facility for access to prisons, but that appeared to give rise to some problems.

13. With regard to the implementation of article 19 of the Covenant, she believed that there were still some 40 political prisoners in the Republic of Korea. In that connection, she was not sure that the condition under which such prisoners could not be released unless they had given up their opinions and their beliefs was compatible with the provisions of the Covenant. She also wondered whether some provisions of the National Security Law did not specifically apply to persons whose opinions were different from those of the Government or to trade union members or political dissidents. Referring to the implementation of article 21 of the Covenant, she noted that the Act Concerning Assembly and Demonstration had recently been amended, in 1989. She nevertheless wished to know why an authorization had to be obtained in advance in order to organize meetings or demonstrations, in how many cases such an authorization was refused and why. As to the Social Surveillance Act, which had been promulgated in 1989 only and applied to persons released after having served their sentence, her view was that, as a rule, persons who had paid their debt to society should be free from any surveillance. She therefore asked why such an act had been promulgated and, in particular, whether its provisions were compatible with those of the Covenant.

14. Mr. PRADO VALLEJO welcomed the ratification of the Covenant and the Optional Protocol by the Republic of Korea, which was thus demonstrating its willingness to make progress towards full respect for human rights. He also welcomed with satisfaction the report by the State party, which had been prepared in accordance with the Committee's guidelines. Although the report contained full information on domestic laws, which did not seem to have many gaps, it provided little information on the problems and difficulties encountered in the practical application of the laws.

15. Like the other members of the Committee, he hoped that the Republic of Korea would withdraw the reservations it had made to some provisions of the Covenant and, in particular, to article 14, paragraph 5, a natural and essential provision which merely referred to the right to review by a higher court in the event of an error committed by an ordinary court.

16. In addition to the considerable development efforts it had been making, the Republic of Korea had also been working hard to ease tensions with neighbouring North Korea and to reduce antagonism and violence that could only lead to human rights violations. In that connection, he would like to know what stage had been reached in the negotiations being held to solve the serious problem of the separation of families and to bring about their reunion.

17. He was concerned about the fact that, under the National Security Law, it was possible to arrest anyone who had spoken with North Koreans and that particularly harsh measures were taken against persons imprisoned for that reason. In his view, those were practices that should no longer be used. He was also concerned about the fact that the National Security Law required political prisoners who had left prison after serving their sentences to report to the police every three months, that it made it possible to prohibit demonstrations, even peaceful ones, and that it allowed detention by the police for up to 50 days (para. 154), which was much longer than usual.

18. There had been many complaints of torture in respect of the Republic of Korea. It was pointed out, for example, that the authorities took a long time to institute an investigation in the case of a complaint of acts of torture. He would like to have some clarifications on the rules adopted to prevent such acts and on the complaints to which he had just referred because those were important elements for assessing the implementation of the Covenant. In the event of a complaint that detainees were being tortured, was it possible for independent bodies such as the Red Cross to enter prisons and visit prisoners to determine whether the complaint had any basis in fact?

19. Paragraph 89 of the report relating to article 4 of the Covenant stated that, under the Constitution, the freedom and rights of citizens could be restricted by law only when absolutely necessary for national security, the maintenance of law and order or "public welfare". He would like to know what was meant by "public welfare". He also wished to know the maximum period authorized for pre-trial detention and how the remedy of habeas corpus worked, since periods of detention could be very long.

20. He asked how many political prisoners there were in the Republic of Korea, since the figures quoted varied greatly. In that connection, attention had been drawn to the case of some prisoners of opinion who had been detained for 30 years. He wished to know whether any of them had been given reductions in sentence or other types of pardon provided for the benefit of some prisoners in many pieces of legislation. In the Republic of Korea, political prisoners could apparently not benefit from such measures if they were communist or regarded as such and if they did not give up their ideas, and that was not in conformity with recognized basic human rights standards.

21. When the Republic of Korea had ratified the Covenant, he would like to know whether the text had been published and disseminated so that all persons would be informed of their rights and the remedies and guarantees available to them, even under international instruments. Such dissemination was important for the implementation of the Covenant.

22. Mr. WENNERGREN, referring to article 107 of the Constitution and administrative remedies and, in particular, to paragraph 14 of the report, which stated that "The Supreme Court has the power to make a final review" of the constitutionality of decrees and administrative regulations, asked whether that meant that there were no administrative courts in the Republic of Korea and that the Supreme Court was, as it were, a supreme administrative court. He also wished to know the procedure for bringing a case before the Supreme Court.

23. With regard to article 6 and the death penalty, he had been suprised to learn from paragraph 112 of the report that the minimum age for the death penalty was now 18 years and that there was also a possibility of "the death sentence of a juvenile who is less than 18 years of age". He would like some clarifications on that point and asked whether the death penalty was carried out by hanging or otherwise. As to abortion, paragraph 110 of the report stated that the voluntary interruption of pregnancy was authorized for "eugenic" reasons. He would like to know what that meant, whether a woman could be required to have an abortion for such reasons and whether a diagnosis of the foetus was carried out.

24. Referring to article 7 and torture, he requested statistics on the prosecution and punishment of officials who had committed acts of torture and on the penalties imposed on them. With regard to article 8 and forced labour during detention, paragraph 145 of the report stated that the Criminal Code provided for penal servitude "with a certain amount of labour", which should be defined. He would also like some statistics on solitary confinement, cases in which it was used and conditions under which prisoners were subjected to that regime.

25. Paragraph 246 of the report referred to the National Security Law under the heading of freedom of expression, but the commentary in the report suggested that the authors were actually dealing with freedom of conscience in the context of freedom of expression. Moreover, article 37 of the Constitution provided that fundamental rights could be subjected to restrictions when necessary for national security, the maintenance of law and order and public welfare, but, even in that case, the restrictions must not jeopardize any essential aspect of the right in question (para. 244 of the report). Freedom of conscience or opinion was, however, a fundamental right that must be respected. Under the heading "penitentiary system" (para. 165), reference was made to the purpose of the Penal Administration Act, which was to reform and rehabilitate convicted persons to return them to a normal life in society through moral training and the cultivation of a sound and stable personality. In his view that was a kind of indoctrination.

26. The CHAIRMAN said that the first phase of the consideration of the initial report of the Republic of Korea had now been completed, since the members of the Committee had asked their questions, which the delegation of the State party would answer later. The meeting would be suspended to enable the Committee to welcome the delegation of Belarus.

The meeting was suspended at 11.10 a.m. and resumed at 11.30 a.m.

Third periodic report of Belarus (CCPR/C/52/Add.8)

27. At the invitation of the Chairman, Mr. Dashuk, Mr. Ogurtsov and Mr. Galka (Republic of Belarus) took places at the Committee table.

28. Mr. DASHUK (Republic of Belarus), Minister of Justice, introducing his country's third periodic report, said that, since the consideration of the second periodic report and the submission of the third periodic report to the Committee in July 1990, enormous changes had taken place in the political, social and economic life of Belarus. He would therefore give a brief description of the many reforms that had been under way for the past two years, drawing attention to the most important. As far as details and the implementation of the Covenant were concerned, his delegation would then try to give exhaustive replies to the questions the members of the Committee would ask.

the Constitution in force. For example, it had amended article 72, which now provided that the Constitution of the Republic took precedence over all other laws and that the legislation of the former Soviet Union continued to be in force as long as it was not incompatible with the national Constitution. It had also amended article 73 guaranteeing the indivisibility of the territory, which could not be changed or used in any way without the agreement of the Republic. In that connection, all boundary problems were settled by agreement between the Republic and the States concerned.

40. A Supreme Soviet decree dated 25 August 1991 also guaranteed the economic and political independence of the Republic. All enterprises, organizations and institutions established in the territory of the Republic were its property, except for those whose management had been transferred to the competent bodies of the former Soviet Union, in accordance with the law on the transfer of authority which had entered into force on 1 January 1992.

41. In 1991, Parliament had adopted a nationality act which determined the conditions for the acquisition, retention and loss of citizenship of the Republic. It had also adopted a law on the crest and flag of the Republic in 1991 and had organized a competition for the composition of the national anthem.

42. A new customs law had been enacted in April 1992 and a text governing banking activity, bankruptcy and the protection of tax payers' interests had been adopted on 14 December 1991.

43. Popular voting by referendum had been regulated in detail in a legislative text adopted on 13 June 1991 and, at its 1992 winter session, Parliament had drafted a set of texts on military service. On 20 September 1991, the Supreme Soviet had issued a decree on relations between local bodies and the military authorities, as well as between those authorities and the State Security Committees of the former Soviet Union.

44. A law on self-management and the local economy establishing the basic principles and general orientation of the economy had been adopted on 20 February 1991 and had already been amended several times because its implementation had revealed some negative aspects. On 27 February 1992, Parliament had adopted a very important law establishing that the people held power and was the only source of the authority of the State, such sovereignty being exercised directly or through the intermediary of bodies set up to represent it. The law stipulated that the most important task of State bodies was to provide all the services the people needed and to guarantee that its rights, freedoms and legitimate interests were safeguarded. It prohibited any interference in the activities of State associations and bodies and vice-versa, except as otherwise expressly provided, prohibited the State from financing political parties and other political associations and guaranteed every citizen access in full quality to public service, as well as the right to join social associations.

45. The requirements for the publication and entry into force of all legislative texts of the Republic adopted by the Supreme Soviet were also provided for in a law which made their publication compulsory within 10 days of their adoption. International treaties concluded by the Republic also had to be published in the newspapers in Belarusian and in Russian so that each citizen might be informed of them.

46. One of the most important laws adopted since the submission of the third periodic report was the law putting an end to the monopoly of the Communist Party and establishing a multi-party system. The transition to a market economy had required other changes in the Constitution and a number of new laws had been drafted and adopted to govern matters such as land ownership, leases, activities of enterprises, foreign investments, bankruptcy, employment, culture, the possibility of concluding international treaties, education, the legal regime governing the territory contaminated as a result of the Chernobyl disaster and the protection of veterans, disabled persons, young persons and the family.

47. By decision of Parliament, the draft Constitution of the Republic of Belarus had been published in the media and the result had been tens of thousands of replies by citizens expressing their wishes. All the competent experts and State bodies had also studied the draft, on which a constitutional commission had been working for two years. The details of the text were not known, but, having taken part in its preparation, he could assure the Committee that one of its basic features was that it took account of all the international obligations assumed by the Republic of Belarus and that the protection of human rights occupied a very important place. A mechanism had been set up to guarantee the protection of human rights and there were plans to organize voting to elect deputies according to a multi-party system. The Republic would thus have a Parliament, a constitutional court and a court of appeal. The separation of the three powers would be fully guaranteed. In April 1992, Parliament had undertaken a legal reform and, although there was still a great deal to be done, many new texts already existed, such as the Criminal Code, the Civil Code, the Code of Criminal Procedure, the Code of Civil Procedure, a law containing the judiciary regulations, the Labour Code, the Family Code and the Administrative Code.

48. On 14 January 1992, the Supreme Soviet had ratified the Optional Protocol to the International Covenant on Civil and Political Rights and had made the declaration provided for in article 41 of the Covenant. He also drew attention to the ratification of ILO Convention No. 160 (on labour statistics), the Convention on the Rights of the Child and the Convention on Psychotropic Substances. As a State party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Byelorussian Soviet Socialist Republic had submitted a report to the Committee against Torture in 1989.

49. His delegation was at the disposal of the Committee for any clarifications and explanations it might like to have.

50. The CHAIRMAN invited the delegation of Belarus to reply to the questions contained in section I of the list of issues (M/CCPR/92/32), which read:

"I. Constitutional and legal framework within which the Covenant is implemented; right to self-determination; non-discrimination and equality of the sexes; and rights of persons belonging to minorities (articles 1, 2, 3 and 27)

(a) Please clarify the legal and practical consequences of the dissolution of the Soviet Union and the establishment of the Commonwealth of Independent States on the implementation of the rights set forth in the Covenant and their enjoyment by individuals in Belarus. What is the actual status of legislation in the field of human rights in Belarus?

(b) What has been the impact on the actual implementation of the Covenant of the adoption of the Act on the Status of Judges of 4 August 1989, the Contempt of Court Act of 2 November 1989, and the Foundations of Legislation on the Judicial System of 17 November 1989 (paras. 50 to 58 of the report)?

(c) What is the position of Belarus regarding the first Optional Protocol to the Covenant?

(d) Please elaborate on the new systems of power being established both nationally and locally, in provinces, cities and rural areas (para. 84 of the report).

(e) What measures have been taken or contemplated to ensure consistency between any new constitutional provisions or other legal instruments and the Covenant?

(f) Please comment on what improvements, if any, have occurred in the situation of minorities since the consideration of the second periodic report. Please provide statistical data on minorities described in the Covenant.

(g) Please elaborate on the activities undertaken to enhance the role and status of women during the reporting period, particularly by the women's councils mentioned in paragraph 29 of the report."

51. Mr. DASHUK (Republic of Belarus) said that the Declaration of Sovereignty confirmed the exercise of the right to self-determination, which, until the adoption of the Declaration, had been only a principle that had had no effect. The Declaration guaranteed the rights of citizens and minorities and strengthened them even more. The dissolution of the USSR had, of course, given rise to economic disruptions, but, as far as the rights of citizens were concerned, there had been an enormous step forward, although that did not necessarily mean that there had been serious violations of human rights in Belarus before 1990. After the ratification of the Covenant, many texts had

been adopted to guarantee the exercise of human rights. At present, those guarantees were being expanded and increased. It should be pointed out that nearly all the laws enacted since 1990 included a provision stating that, if a particular question was not covered by a law, the international rule applied.

52. With regard to question (b), he pointed out that, since the third periodic report had been submitted to the Committee, the Republic of Belarus had equipped itself with new laws, particularly on conditions of admission to the profession of judge. Since 3 July 1990, when a law had been adopted along those lines, judges and assessors of the Republic were qualified and had to be sworn in. As part of the reform of the judicial system, there were plans to establish a court of appeal and eliminate the institution of people's assessors. It was also being proposed that some minor criminal offences should come within the jurisdiction of a single judge, whereas more complex cases would be tried by three judges. Various measures had been taken to guarantee the independence of judges and strengthen their authority. For example, the Criminal Code penalized any interference in the powers of judges and established criminal responsibility in the event of threats against judges, contempt of court, refusal to testify, withholding evidence, obstruction of the operation of the court and refusal to enforce a court decision. According to another recommendation, judges had to be appointed without delay. Judges were elected at the regional level for 10 years, and that was an improvement compared to the past situation, although it was not a complete guarantee. In any event, the Government and Parliament were fully aware of the importance of the independence of the judiciary and would do everything possible to strengthen it even more.

53. With regard to the question asked in paragraph (c), he said that the Republic of Belarus had ratified the first Optional Protocol to the Covenant on 14 January 1992.

54. As to paragraph (d), the question of regional and local autonomy was important and complex. In February 1991, Parliament had adopted various texts on that question and there were many legislative provisions relating to it. In general, an end had been put to the representation of what had been known as the "nomenklatura" of the Communist Party within the organs of power. At present, those bodies were composed of persons who had a spirit of initiative and cared about respect for democracy. The legislation in force prohibited being both a deputy and a member of a party. At all levels of power, efforts were being made to improve the economic situation of citizens and guarantee respect for their rights. The Soviets now were very different from those of the past. Deputies no longer systematically adopted the texts submitted to them, as they had done before. In appointing judges, they carefully considered each file, taking account primarily of the qualifications of candidates, and they made very specific recommendations in every case.

55. There were differences and oppositions within each Soviet and they were to be welcomed.

56. Although he had partially answered the question asked in paragraph (e), he added that, on the whole, the provisions of the Covenant had been respected in his country since the submission of the second periodic report. However, the legislation in force still had some important gaps. For example, in the event of unlawful arrest or detention, it did not provide for adequate remedies and, in that sense, its provisions were not up to international standards. Moreover, the rights and interests of citizens were not always sufficiently protected by the law. The new legislation being prepared would fill all those gaps and be designed particularly to protect rights and freedoms. He assured the Committee that each provision of the Covenant was being carefully studied as part of the legislative reform and that his country's next periodic report would provide further information on all those questions. A set of draft laws would be submitted to Parliament at its autumn session and their adoption should make it possible to bring national legislation more fully into line with the provisions of the Covenant. Other problems included the under-representation of lawyers in court, the fact that the Supreme Court sometimes heard cases which were within the jurisdiction of a court of first instance and the fact that the Ministry of the Interior exercised functions that were not within its terms of reference, such as issuing passports and permits or registering citizens. The role of the police would also have to be reappraised, for its task was basically to prevent delinquency and guarantee the security of citizens. It was also necessary to redefine the functions of the public prosecutor, who had to assist judges in their work, not impose his views on them. There could be no independence of the judiciary if the public prosecutor could be made responsible for investigations. There were also not enough lawyers. They numbered about 1,000, but they did not meet needs, far from it. Moreover, the profession of lawyer should be exercised more and more in the private sector. The reform that was under way was moving in that direction. He also noted that the State Security Committee (KGB) was now undergoing a complete restructuring, which had been badly needed.

57. Referring to paragraph (f), he said that 77 nationalities now lived together in Belarus. The four main minorities were Ukrainians, Russians, Poles and Jews. As a general rule, the rights of national minorities were fully respected in the Republic, which had a long tradition of political stability. The Belarusian people had suffered greatly during the Second World War, one out of four - some said one out of three - having been killed, and it knew the price of friendship among peoples. The authorities therefore set great store by ensuring harmonious coexistence with the different national minorities. A draft law on the question of minorities would, moreover, probably be adopted on second reading at the autumn session of Parliament. He also noted that the members of national minorities in Belarus enjoyed the same rights as all other citizens of the Republic. In addition, Belarusians who left the new Baltic Republics because of the harsh requirements they had to meet, particularly as far as knowing the language of the country was concerned, could freely return to Belarus, where they were welcomed. He had no knowledge of any case of the denial of Belarusian citizenship. Many Ukrainian, Polish and Jewish social and trade union organizations, _inter alia_, had been officially registered by the authorities of the new Republic. The aim of those organizations was to defend the rights and interests of the minorities they represented. Under the legislation in force, moreover, national minorities could request Parliament to include the consideration of important questions of concern to them in its agenda.

58. Replying to the question contained in paragraph (g), he said that the legislative provisions on the status of women, pregnancy, children and adolescents had been amended considerably. The law of 28 June 1992 relating to the family, pregnancy and women's work contained a number of provisions which usefully supplemented the existing legislation. Pregnant women were thus better protected and their working conditions had been made more flexible, without any reduction in wages. For example, women were entitled to one year of maternity leave. Mothers below age 18 were entitled to 18 months' paid leave to raise a child and, throughout that period, received allowances from the State for themselves and for their children. After that, a woman could take unpaid leave to raise her child until it had reached the age of three. She then received allowances for the child only. It was also prohibited to dismiss a pregnant woman or a woman whose children were below the age of three. If the enterprise where she had been working before her pregnancy was closed down, the management of the enterprise or the State then had to find her another job.

59. Under the Family Code, women and children enjoyed legal protection by the State. As a general rule, everything was done so that women could combine bringing up children and work, especially by giving them advantages in the workplace.

60. As an even more general rule, women took an active part in the political life of the country. Many of them held posts as ministers, deputies, physicians, etc. and the authorities paid a great deal of attention to the economic problems they encountered. The status of women had never given rise to any real problems in Belarus, where women's committees played an important role and women were generally particularly dynamic.

61. The CHAIRMAN thanked the Belarusian delegation for its detailed replies to the questions contained in section I of the list. He invited the members of the Committee to continue their consideration of the third periodic report of Belarus (CCPR/C/52/Add.8) at a subsequent meeting.

The meeting was called to order at 1.05 p.m.

UNITED
NATIONS

CCPR

International covenant on civil and political rights

Distr.
GENERAL

CCPR/C/79/Add.6
25 September 1992

Original: ENGLISH

HUMAN RIGHTS COMMITTEE

CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 40 OF THE COVENANT

Comments of the Human Rights Committee

REPUBLIC OF KOREA

1. The Committee considered the initial report of the Republic of Korea (CCPR/C/68/Add.1) at its 1150th, 1151st and 1154th meetings, held on 13, 14 and 15 July 1992, and adopted* the following comments:

A. Introduction

2. The Committee expresses its appreciation for the State party's well-documented report which had been submitted within the specified time-limit. The report contained detailed information on the laws and regulations relating to the implementation of the Covenant. However, the Committee notes that the report does not include sufficient information about the implementation of the Covenant in practice and about factors and difficulties which might impede the application of the Covenant. At the same time the Committee appreciates the clear and comprehensive oral replies and detailed clarifications given by the delegation.

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* At the forty-fifth session (1173rd meeting), held on 29 July 1992.

GE.92-17652 (E)

B. Positive aspects

3. The Committee notes with satisfaction that in recent years the Republic of Korea has become a party to a number of international human rights instruments, including the Covenant and its Optional Protocol, and that it has made the declaration provided for in article 41 of the Covenant. It has also joined the International Labour Organisation. The Committee also notes with satisfaction that currently consideration is being given to the possibility of withdrawing the Republic of Korea's reservations to the Covenant. Additionally, progress has been made in regard to the provision of legal aid and towards narrowing the scope of operation of the National Security Law. Internal political dissent is now more accepted. The Constitutional Court, an independent organ, is playing a vigorous and important role.

C. Factors and difficulties impeding the application of the Covenant

4. The Committee notes that the relations between the two Koreas still appear to be an important factor affecting the human rights situation in the Republic of Korea. The recent conclusion of the Agreement on Reconciliation, Non-Aggression and Exchanges and Co-operation appears to constitute a positive step. According to the authorities, the Republic of Korea is, however, still coping with a very real threat of destabilization and military provocation and, therefore, the Government continues to hold the view that it is essential to retain the National Security Law in order to protect the security and integrity of its liberal democratic system.

D. Principal subjects of concern

5. The Committee expresses its concern over the fact that the Constitution does not incorporate all the rights enshrined in the Covenant. Also, the non-discrimination provisions of article 11 of the Constitution would seem to be rather incomplete as compared with articles 2 and 26 of the Covenant. These concerns are not allayed by the argument that, pursuant to article 37 of the Constitution, various rights and freedoms not enumerated therein are not to be neglected.

6. The Committee's main concern relates to the continued operation of the National Security Law. Although the particular situation in which the Republic of Korea finds itself has implications on public order in the country, its influence ought not to be overestimated. The Committee believes that ordinary laws and specifically applicable criminal laws should be sufficient to deal with offences against national security. Furthermore, some issues addressed by the National Security Law are defined in somewhat vague terms, allowing for broad interpretation that may result in sanctioning acts that may not be truly dangerous for State security and responses unauthorized by the Covenant.

7. The Committee wishes to express its concern regarding the use of excessive force by the police; the extent of the investigatory powers of the National Security Planning Agency; and the implementation of article 12, particularly in so far as visits to the Democratic People's Republic of Korea are concerned. The Committee also considers that the conditions under which prisoners are being

re-educated do not constitute rehabilitation in the normal sense of the term and that the amount of coercion utilized in that process could amount to an infringement of the provisions of the Covenant relating to freedom of conscience. The broad definition of State secrets in connection with the definition of espionage is also potentially open to abuse.

8. The Committee also expresses concern about the still high number of offences liable to the death penalty. In particular, the inclusion of robbery among the offences carrying the death penalty clearly contravenes article 6 of the Covenant. The very long period, allowed for interrogation before charges are brought, is incompatible with article 9, paragraph 3, of the Covenant. Other areas of concern relate to the continued imprisonment of persons on grounds of their political opinion; the persistence of discrimination against women in certain respects; problems relating to the principle of the lawfulness of the penalties covered by article 15 of the Covenant; and the requirement for advance authorization of assemblies and demonstrations.

E. Suggestions and recommendations

9. Taking into account the positive developments regarding respect of human rights that have taken place in the State party over the last years, the Committee recommends that the State party intensify its efforts to bring its legislation more in line with the provisions of the Covenant. To that end, a serious attempt ought to be made to phase out the National Security Law which the Committee perceives as a major obstacle to the full realization of the rights enshrined in the Covenant and, in the meanwhile, not to derogate from certain basic rights. Furthermore, measures should be taken to reduce the cases in which the death penalty is applied; to harmonize to a greater extent the Penal Code with the provisions of article 15 of the Covenant; and to reduce further the restrictions on the exercise of the right to peaceful assembly (art. 21). Finally, the Committee suggests that the Government actively consider withdrawing its sweeping reservation in respect of article 14 and take additional steps with a view to enhancing public awareness of the Covenant and the Optional Protocol in the State party.

Distr.
GENERAL

CRC/C/15/Add.51

COMMITTEE ON THE RIGHTS OF THE CHILD

Eleventh session

Concluding observations of the Committee on the Rights of the Child
Republic of Korea

1. The Committee considered the initial report of the Republic of Korea (CRC/C/8/Add.21) at its 266th, 267th and 268th meetings (CRC/C/SR. 266-268), held on 18 and 19 January 1996 and adopted[1] the following concluding observations:

A. Introduction

2. The Committee expresses its appreciation to the State party for engaging, through a high-level and multidisciplinary delegation, in an open and fruitful dialogue with the Committee. It welcomes the written information submitted by the delegation in reply to the questions included in its list of issues, as well as the additional information provided by the State party following the dialogue held with the Committee.

B. Positive aspects

3. The Committee notes with satisfaction that the Convention is directly applicable in the domestic legal order and can be invoked before the courts.

[1]. At the 287 th meeting, held on 26 January 1996

4. The Committee welcomes the development of a National Plan of Action for children and its incorporation in the Seventh Five-Year Social-Economic Development Plan for 1992-1996, as well as the recent establishment of the National Committee on the Rights of the Child.

5. The Committee notes with satisfaction the importance recognized by the Government to education, considered as the "driving force of social and economic development".

6. The Committee also welcomes the openness reflected in the written replies and reaffirmed by the delegation during the dialogue to consider the possibility of withdrawing the reservations entered by the State party to the Convention. The Committee is encouraged by the undergoing revision of the Civil Code aimed at incorporating the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis. It is further encouraged by the fact that, as stated by the delegation, such a measure will enable the State party to withdraw its reservation pertaining to article 9, para.3 of the Convention.

C. Factors and difficulties impeding the implementation of the Convention

7. The Committee notes the difficulties facing the Republic of Korea in the present period of political and economic transition. The efforts in securing a rapid economic growth have not always been matched by an appropriate level of realization of economic, social and cultural rights, in particular in relation to children belonging to the most disadvantaged groups affected by growing poverty. The recent emergence from a period of military rule has had a negative impact on the enjoyment of the fundamental rights and freedoms of children.

D. Principal subjects of concern

8. The Committee is of the view that the reservations made by the State party to articles 9 paragraph 3, 21 paragraph (a) and 40 paragraph 2 (b) (v) raise questions about their compatibility with the principles and provisions of the Convention, including the principles of the best interests of the child and respect for the views of the child.

9. The Committee is concerned at the insufficient measures adopted to ensure a permanent and effective coordinating and monitoring mechanism. The Committee also notes the insufficient measures taken to gather reliable quantitative and qualitative data on all areas covered by the Convention, to evaluate progress achieved and to assess the impact of policies adopted on children, in particular in relation to the most vulnerable groups of children.

10. The Committee is concerned about the insufficient measures taken to ensure that the principles and provisions of the Convention are widely known to children and adults. The lack of adequate training on the contents of the Convention of the various professional groups working with and for children, including teachers, social workers, judges, law enforcement officials, psychologists and health personnel, is also noted with regret.

11. As regards the implementation of article 4 of the Convention, the Committee notes with concern the inadequacy of measures taken to ensure the implementation of children's economic, social and cultural rights to the maximum extent of available resources. Insufficient attention has been paid in this regard to the areas of social and human development of children and to the needs of the most vulnerable groups of children.

12. The Committee is also concerned that the basic principles of the Convention, namely the provisions of its articles 2, 3 and 12, have not been adequately reflected in legislation, policies and programmes. Insufficient measures have been adopted to create awareness on these basic values of the Convention with a view to changing, as recognised by the report, the prevailing consideration and treatment of the child simply "as a mini-adult or immature adult". The Committee notes with concern the persistent discriminatory attitudes affecting girls - including in relation to the minimum age for marriage, disabled children and children born out of wedlock.

13. The Committee notes with concern the insufficient assistance provided for families to assume their responsibilities in the protection of children's rights.

14. The Committee expresses its concern at the insufficient measures adopted, including of a legal nature, to ensure effective implementation of the civil rights and fundamental freedoms of children, such as in relation to the right to a nationality, freedom of expression,

thought, conscience and religion, as well as well to freedom of association and peaceful assembly. The threats to national security invoked by the Government have hampered the enjoyment of such fundamental freedoms.

15. The Committee is of the view that the approach in the field of adoption and the prevailing system of dissolution of adoption, raises questions as to its compatibility with the Convention, including in relation to the principle of the best interests of the child as the paramount consideration, as well as to the legal safeguards established by article 21. In this regard, the Committee is particularly concerned at the insufficient measures taken to ensure that adoption is authorized by competent authorities, on the basis of all pertinent and reliable information and of the informed consent of all persons concerned, including the child. The high rate of inter-country adoption is also of concern to the Committee. With regard to child abuse and domestic violence, the Committee is concerned at the lack of preventive policies and of adequate reporting mechanisms. Abandonment of children, the high rate of child headed families and the persistence of corporal punishment widely envisaged by parents and teachers as an educational measure, are other subjects of concern to the Committee.

16. The Committee is concerned at the insufficient consideration given in the education system to the aims of education as reflected in article 29 of the Convention. The highly competitive nature of the education system risks to hamper the development to its fullest potential of the abilities and talents of the child, and the child's preparation for responsible life in a free society.

17. Concern is also expressed at the insufficient measures adopted, including in the field of legal reform, to prevent situations of child labour. In this regard, the discrepancy between the age for completion of compulsory education and the minimum age for admission to employment is noted with particular concern.

18. The Committee is also concerned about the existing juvenile justice system and its lack of compatibility with the Convention, including articles 37, 39 and 40.

E. Suggestions and recommendations

19. The Committee encourages the Government to continue to consider reviewing its reservations to articles 9 paragraph 3, 21 paragraph (a) and 40 paragraph (b) (v), with a view to withdrawing them.

20. The Committee recommends that the Government strengthen its efforts aiming at promoting advocacy and creating awareness and understanding of the principles and provisions of the Convention in the light of its article 42. The Committee suggests that the Government develop public campaigns with a view to effectively addressing the problem of persisting discriminatory attitudes in particular towards girls, disabled children, children born out of wedlock, and that it adopts pro-active measures to improve the status and protection of these groups of children.

21. The Committee also encourages the State party to ensure training activities on the Convention to professional groups working with and for children, including teachers, social workers, judges, law enforcement officers, health personnel and officials entrusted with the task of ensuring data collection in the areas covered by the Convention. In the spirit of the United Nations Decade for Human Rights Education, the Committee further encourages the Government to give consideration to the incorporation of the rights of the child in the school curricula.

22. The Committee encourages the Government to pursue its efforts in order to ensure full compliance of its national legislation with the provisions and principles of the Convention, including non-discrimination (article 2), best interests of the child (article 3) and respect for the views of the child (article 12). The Committee particularly recommends that legislative measures be adopted with a view to ensure an equal minimum age for marriage for girls and boys in the light of article 2; to ensure the basic rights of all disabled children, in particular the right to education, in the light of article 23; to abolish any discrimination towards children born out of wedlock; to prevent any risk of statelessness for a child born from a Korean mother; to clearly prohibit any form of corporal punishment and to raise the minimum age for employment with a view to adjust it to the age of compulsory education. In the field of national and inter-country adoption, the Committee encourages the State party

to undertake a comprehensive legal reform to ensure its full compatibility with the principles and provisions of the Convention, as well as to consider ratifying the 1993 Hague Convention on Protection of Children and Cooperation in respect of Inter-country Adoption.

23. The Committee recommends that a permanent and multidisciplinary mechanism be developed for coordination and monitoring of the implementation of the Convention, both at the national and local levels, in urban and rural areas. The Committee encourages the State party to give further consideration to the establishment of an Ombudsperson for children or any equivalent independent complaint and monitoring mechanism. The Committee further encourages the promotion of a closer cooperation with non-governmental organizations.

24. The Committee also recommends that the system of data collection be improved and appropriate disaggregated indicators identified with a view to addressing all areas covered by the Convention, and evaluating progress achieved, while paying due regard to the situation of children belonging to the most disadvantaged groups.

25. The Committee strongly recommends that the Government of the Republic of Korea pay particular attention to the full implementation of article 4 of the Convention, and undertake all appropriate measures to the maximum extent of available resources for the implementation of the economic, social and cultural rights of children. Special attention should be paid to the situation of the most disadvantaged groups of children in the light of the principles of non-discrimination and the best interests of the child.

26. The Committee considers that greater efforts should be made to promote the participation of children in family, school and social life, as well as the effective enjoyment of their fundamental freedoms, including freedom of opinion, expression and association, which should be subject only to the restrictions as provided by the law and which are necessary in a democratic society.

27. The Committee encourages the State party to adopt further measures to ensure assistance for the family to ensure its responsibilities in the upbringing and development of the child, in particular in the light of articles 18 and 27 of the Convention . Special attention should be paid to the prevention of child abandonment, as well as to the prevention of, and

appropriate assistance to, child-headed families.

28. In the area of child abuse and domestic violence, the Committee recommends that the State adopts further measures to prevent such situations, and to protect and ensure appropriate physical recovery and social reintegration of children affected thereby. Consideration should be given to the establishment of a system of early detection, surveillance and referral.

29. The Committee encourages the State party to review its education policy, with a view to fully reflect the aims of education as reflected in article 29 of the Convention.

30. In the area of child labour, the Committee encourages the State party to adopt appropriate measures with a view to fully reflect the Convention, in particular article 32, in its legislation and practice. It recommends that consideration may be given to the ratification of ILO Convention No.138 on minimum age for admission to employment and encourages the State party to consider pursuing such actions in consultation with ILO.

31. The Committee recommends that the State party envisage undertaking a comprehensive reform of the system of juvenile justice in the spirit of the Convention, in particular articles 37, 39 and 40, and of other United Nations standards in this field, such as the "Beijing Rules", the "Riyadh Guidelines" and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty. Particular attention should be paid to the consideration of deprivation of liberty only as a measure of last resort and for the shortest period of time, to the protection of the rights of children deprived of liberty, to a due process of law as well as to full independence and impartiality of the judiciary. Training programmes on the relevant international standards should be organized for all those professionals involved with the system of juvenile justice. The Committee would like to suggest that the Government of the Republic of Korea consider seeking international assistance in this area of the administration of juvenile justice, from the Centre for Human Rights and the Crime Prevention and Criminal Justice Branch.

32. The Committee recommends that the report submitted by the State party, the summary records of its consideration and the concluding observations of the Committee be

disseminated as widely as possible within the country.

COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLES 16 AND 17 OF THE COVENANT

Concluding observations of the Committee on Economic, Social and Cultural Rights

REPUBLIC OF KOREA

1. The Committee considered the initial report of the Republic of Korea on articles 1 to 15 of the Covenant (E/1990/5/Add.19) at its 3rd, 4th and 6th meetings (E/C.12/1995/SR.3, 4 and 6) held on 2 and 3 May 1995 and adopted* the following concluding observations.

A. Introduction

2. The Committee expresses its appreciation to the State party for its comprehensive report, prepared largely in conformity with the Committee's guidelines, and for the written replies to the list of questions made available to it before the session. The State party is also to be commended for sending a large high level delegation to discuss the report and for its useful dialogue with the Committee. The Committee, however notes, that the report, although comprehensive in form provided information which in many areas was excessively general in content. Accordingly, the offer of the Government to furnish further and precise written responses to questions posed is welcomed. The Committee appreciates the subsequent prompt submission of those replies on 5 of May 1995 by the Government of the Republic of Korea.

B. Positive aspects

3. The Committee notes, with satisfaction, the significant and rapid economic growth during the past 30 years in the Republic of Korea and that the considerable material progress achieved should lay the foundation for the enhanced enjoyment of economic, social and cultural rights. The

* At its 27th meeting (twelfth session) held on 18 May 1995.

Committee further notes the first steps taken towards the development of a social security system appropriate to a country at Republic of Korea's stage of development. Further positive developments in the Korean society are evidenced by the virtual eradication of illiteracy among all sectors of society other than older persons, the increase in the level of life expectancy and the efforts to increase the national housing pool.

4. The Committee takes note of the recent legislative attempts to address the problem of violence against women in the family and the attempt to recognize the rights of women to inheritance.

5. The Committee welcomes establishment of human rights focal points in the major government ministries, including the provision of legal aid through the introduction of the Public Legal Officers System .

C. Factors and difficulties impeding the application of the Covenant

6. The Committee recognises that Korea is passing through a period of social and political transition. The developments in each of these areas have not been sufficiently balanced. The efforts and achievements in securing outstanding and rapid economic growth have not always been matched by an appropriate level of protection of economic, social and cultural rights. It is also acknowledged that the country has only recently emerged from a sustained period of military rule to a system of democratic government and that it faces a heavy agenda of changes in the establishment of a civic society, particularly in the face of deeply entrenched social prejudices. Finally, problems deriving from the political partition of the Korean peninsula continue to impose a pervasive fortress mentality arising from perceived threats to national security.

D. Principal subjects of concern

7. The Committee is concerned as to the status of the Covenant in national law. Although representatives of the Republic of Korea have asserted that all domestic legislation is consistent with the provisions of the Covenant, the Committee remains concerned that no mechanisms exist

permitting the verification of compatibility between domestic legislation and the provisions of the Covenant.

8. The Committee is of the view that restrictions concerning the right to form trade unions are not consistent with the obligations assumed by the Republic of Korea under article 8 of the Covenant. There is no apparent reason for the ban on the formation of trade unions by groups such as the teaching profession, particularly where the prohibition does not apply to other groups including workers in the defence industry. Similarly, the regulations concerning the right to strike are excessively restrictive and would appear to leave to the authorities an almost absolute discretion in the determination of the legality of incidents of industrial action. Whilst acknowledging the cultural traditions of the Republic of Korea, including the high esteem in which teachers are held, the Committee finds this to be a wholly unacceptable basis on which to defend the excessive limitation on the freedom of significant sectors of the Korean society to enjoy the basic right to belong to unions of their choice.

9. The Committee is also greatly disturbed by reports of dismissals for engaging in industrial action and of police attacks on trade unionists engaged in peaceful activities.

10. Despite the Government's stated policy and its range of special programmes, the Committee views the situation of women in Korean society as very unsatisfactory. In all areas of life women suffer from discriminatory practices due to many factor, including long standing cultural prejudice. In the home, the subjugation of women is evidenced by the very high levels of domestic violence against them which is disclosed in the Government's report. Notice is also taken of such anachronistic rules as the legal inability of a woman in certain cases to vest her nationality in her child. In education the disparities between the percentages of men over women in second and third level institutions is disturbing. In this regard the Committee observes that the lack of access to and high cost of secondary and higher education contribute to the low

rate of female participation.

11. Particular concern is expressed as to the wage differential between men and women and to other discriminatory practices in the workplace including an apparently high rate of sexual discrimination in recruitment. The Committee expresses its concern with regard to the non-enforcement by the Government of its own policies and legislation in these matters.

12. The Committee is alarmed that there has been a relatively high incidence of accidents in the workplace in Korea and that there has been a failure to adequately address the problem. It is especially disturbing that various work-place regulations do not apply to enterprises with fewer than 10 employees. The failure of minimum wage regulations to extend to staff of these enterprises is to be regretted and the Committee welcomes the Government's stated intention to review the situation. The conditions and treatment of those non-nationals in the Korean workforce give cause for concern and the information made available to the Committee by the Government does not disclose an adequate range of legal measures to protect such workers.

13. The Committee is disturbed by a range of features of the Korean education system. Only primary education is provided free of charge. However, given the strength of the Korean economy it appears appropriate that free education should also extend to the secondary and higher sectors. The Committee also notes the acknowledgement made orally by the Government's representative that there is a severe problem of under supply of places in higher education resulting in extremely competitive entry requirements. One consequense of this situation is that private institutions are likely to raise their charges and thus force the children of the lower groups to stay out of the system.

14. Le Comité est préoccupé par la situation du logement en Corée et considère qu'il n'a pas reçu d'informations suffisantes à ce propos, notamment sur les logements inadaptés, le nombre des personnes sans abri et

les expulsions forcées. Il note que, selon des sources non gouvernementales internationales, 720.000 personnes auraient été expulsées à l'occasion des jeux olympiques de Séoul et qu'aucun renseignement n'a été fourni sur ce qu'il était advenu de leur situation par la suite; 16.000 auraient été expulsées depuis février 1992; enfin, selon d'autres sources non gouvernementales nationales, il y aurait eu 4.000 expulsions en 1994. Malgré les préoccupations du Comité, il n'a pas été apporté de réponse à ses questions et, plus généralement, aux problèmes concernant le droit au logement.

15. The Committee is of the view that the Government, in view of its economic resources, has inadequately addressed the economic, social and cultural rights of the most marginalised members of society. Among categories of person who are in need of greater attention and concern are the very poor, the homeless and especially victims of severe physical and mental handicap.

E. SUGGESTIONS AND RECOMMENDATIONS

16. The Committee draws attention to the obligation on the Republic of Korea to ensure the status of the Covenant in the field of economic, social and cultural rights as superior to all national law whether precedent or antecedent. It recommends that all laws be examined in order to ensure conformity with the provisions of the Covenant. It also recommends that programmes of education be extended in order to increase awareness of the provisions of the Covenant throughout society and to ensure its application in the judicial process as well as its observance by the law enforcement agencies.

17. The Committee recommends that the Government immediately amend its laws and regulations concerning the freedom to form trade unions and the right to strike in order to bring them into compliance with the Covenant and with other applicable international standards. In particular, measures should be taken to ensure that teachers, civil servants and others have the right to form trade unions and to take strike action.

18. The Committee, though acknowledging the value of existing governmental programmes, urges that priority be given to the promotion of the role of women in the society. It is strongly recommended that in order to deal with discrimination against women, it is necessary to allocate resources to carry out a range of initiatives in the fields, inter alia, of juvenile and adult education, enhanced job opportunities, law reform and the administration of justice. It is also recommended that programmes should be introduced with a view to redressing the imbalances in the status of women in the Korean society.

19. The Committee recommends that the Republic of Korea extend the regulations on safety in the workplace and on minimum wages to enterprises with fewer than 10 employees. All improvements in conditions of work should be applied equally to national and non-national workers and existing discriminatory practices against those non-nationals currently employed should be eradicated.

20. Le Comité recommande de prendre des mesures propres à mieux assurer le droit au logement, et, en particulier, d'éviter les expulsions sans proposition de relogement, conformément à l'observation générale No. 4 du Comité. Il souhaite obtenir des renseignements complémentaires sur l'application de l'article 11 du Pacte en Corée, et en particulier sur le droit au logement.

21. The Committee also recommends that immediate attention be given to problems in the field of education and in particular to enhancing the access of the most vulnerable and disadvantaged groups, and especially women, to secondary and higher education, the need for an expanded higher education sector. The Committee recommends that greater attention be given to the provision of human rights education at all levels in the school system.

22. While it is acknowledged that the Republic of Korea has introduced elements of a social welfare system, it is urged to proceed swiftly with

its expansion to meet the needs of those on the margins of society including foreign workers. The protection of foreign workers needs, in its turn, particular attention especially considering their social isolation and vulnerability. Particular attention is drawn to the very poor, the homeless and the victims of severe mental or physical illness.

UNITED
NATIONS

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Economic and Social
Council

Distr.
GENERAL

E/CN.4/1996/39/Add.1
21 November 1995

Original: ENGLISH

COMMISSION ON HUMAN RIGHTS
Fifty-second session
Agenda item 8 of the provisional agenda

QUESTION OF THE HUMAN RIGHTS OF ALL PERSONS SUBJECTED TO ANY FORM OF DETENTION OR IMPRISONMENT

Report on the mission to the Republic of Korea of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Mr. Abid Hussain, submitted pursuant to Commission on Human Rights resolution 1993/45

CONTENTS

	Paragraphs	Page
Introduction	1 - 5	2
I. Recent developments	6 - 10	3
II. Principal observations and concerns	11 - 45	4
III. Recommendations	46	12
Annex. Persons with whom the Special Rapporteur met during his visit		14

GE.95-14542 (E)

Introduction

1. This report has been prepared pursuant to resolution 1993/45 of the Commission on Human Rights and decision 1993/268 of the Economic and Social Council. It analyses the information received by the Special Rapporteur on the right to freedom of opinion and expression, Mr. Abid Hussain, during his visit to the Republic of Korea from 25 to 30 June 1995, as well as information received from non-governmental organizations and individuals active in the field of his mandate concerning allegations of violations of the right to freedom of opinion and expression.

2. It had been the Special Rapporteur's intention to visit both the Republic of Korea and the Democratic People's Republic of Korea. However, the Government of the Democratic People's Republic of Korea indicated it was unfortunately not in a position to receive the Special Rapporteur at the time suggested by him. The Special Rapporteur expresses his sincere hope that such a visit will take place in due course, at the Government's earliest convenience.

3. The Special Rapporteur would like to express his gratitude for the cooperation extended to him by the Government of the Republic of Korea in discharging his mandate. He highly appreciates the assistance received from the Government in the organization of his visit. He would like to convey his gratitude especially to the Minister for Foreign Affairs and his staff who arranged meetings with Cabinet members and helped make his visit successful. All but a few of the Special Rapporteur's requests for meetings with government officials were met, even though these requests were forwarded to the Government at very short notice. Furthermore, the Special Rapporteur notes and appreciates the atmosphere of openness in which his visit took place, both in respect of its organization, whereby he was at great liberty to meet with all parties of concern to his mandate, and with respect to the substantive discussions concerning his mandate, which were invariably frank and constructive.

4. The Special Rapporteur would also like to express his appreciation to the Resident Representative and staff of the United Nations Development Programme in Seoul for their efficient organization of his visit.

5. During his visit, the Special Rapporteur met with representatives of the Government and Administration of the Republic of Korea, representatives and members of non-governmental human rights organizations, representatives and members of both officially recognized and unrecognized trade unions, representatives of the media and related organizations, members of the academic community, the judiciary and the legal profession, as well as with individuals who, through their professional activities or other experience, have a special knowledge of the subject-matter of the Special Rapporteur's mandate. He would like to refer especially to meetings, organized by non-governmental organizations, with former detainees and family members of detained persons convicted on charges relating to the National Security Law and involving their exercise of the right to freedom of opinion and expression. The Special Rapporteur was impressed by the courage and determination of the many men and women active in non-governmental organizations. A list of the persons with whom the Special Rapporteur met is

to be found in annex I to this document. It should be noted that this list is not exhaustive. The Special Rapporteur had the opportunity to meet with many other persons in the course of his visit. He would like to thank all persons with whom he met for their generous efforts to assist him during his visit to their country. Furthermore, he would like to clarify that no person with whom he spoke indicated a wish to remain anonymous. At the close of his visit, the Special Rapporteur gave a press conference at which he presented his initial views on the visit. In the present report, the Special Rapporteur considers those issues that were at the forefront of his discussions during his visit and that he deems most important in relation to his mandate.

I. RECENT DEVELOPMENTS

6. At the outset, the Special Rapporteur would like to mention that many measures have been taken by the Government of the Republic of Korea to strengthen the promotion and protection of human rights in general. The Special Rapporteur wishes to mention briefly some important steps, as well as other developments in recent years that have been brought to his attention. This brief account does not aim to present a complete picture of the current state of affairs regarding the protection of human rights in the Republic of Korea. It rather serves to illustrate the context in which his visit took place relating to the protection and promotion of the right to freedom of opinion and expression.

7. In 1993, the Government promulgated an amnesty for some of the prisoners convicted under previous regimes. In the same year, Cabinet Ministers initially expressed a willingness to examine the possibility of replacing the National Security Law with a law on the protection of public order in a democratic society. Some weeks later, however, the Government considered it necessary to retain the National Security Law for as long as the highly precarious security situation of the country would continue. Also in 1993, the Government acknowledged the necessity of revising interrogation procedures in order to prevent ill-treatment of detainees. Thereupon, the Prosecutor General's office announced guidelines to prevent obstruction of the visits of lawyers to detainees under interrogation. Later that year the Supreme Court established the Judicial System Development Committee for the purpose of examining the reform of the judiciary and the National Assembly passed a law restricting the investigative powers of the Agency for National Security Planning. In 1994, a parliamentary Intelligence Committee was established to oversee the Agency's work. In 1995, two months before the Special Rapporteur's visit, the Seoul Appellate Court acquitted defendant Mr. Lee Chang-bok, who had previously been sentenced to a 10-month prison term under the National Security Law. This was a landmark decision as it recognized the obligation to safeguard the right to freedom of expression of the defendant.

8. These steps reflect the extent to which human rights considerations are becoming part of the political and juridical agenda of the Republic of Korea. The Special Rapporteur recalls the general state of affairs of human rights protection in the 1980s and before, and notes the changes that have taken place since then, especially under the current, democratically elected

President, Kim Young-sam, who took office in December 1992 and who has, on many occasions, publicly committed himself to the cause of democracy and human rights.

9. The Special Rapporteur also recalls the comments of the Human Rights Committee on the occasion of its consideration of the initial report submitted by the Republic of Korea under article 40 of the International Covenant on Civil and Political Rights (CCPR/C/79/Add.6). The Human Rights Committee considered ordinary laws and criminal laws to be sufficient to deal with offences against national security. It did not see the necessity for a separate law on national security. It expressed its concern at the continued imprisonment of persons on grounds of their political opinions and recommended that the Republic of Korea should bring its legislation more into line with the provisions of the International Covenant on Civil and Political Rights. The Special Rapporteur also recalls decisions Nos. 29/1994 and 30/1994 adopted, on 29 September 1994, by the Working Group on Arbitrary Detention concerning the cases of three persons detained on charges under the National Security Law, among them Mr. Hwang Sok-yong (see para. 11 below). The Working Group decided these cases of detention were arbitrary in view of their contravening the right to freedom of expression guaranteed under article 19 of the International Covenant on Civil and Political Rights.

10. The Republic of Korea, in recent years, has shown a growing commitment to the values of democracy and respect for human rights, but remains a subject of concern to human rights mechanisms of the United Nations. The Special Rapporteur notes the astonishing level of economic development of the Republic of Korea, which could serve to strengthen further the country's commitment to human rights. It was in this context that the Special Rapporteur visited the Republic of Korea. With the intention of assisting the Government of the Republic of Korea in its continuing efforts to strengthen the protection of human rights, he would like to express his principal observations and concerns on a number of issues regarding the right to freedom of opinion and expression.

II. Principal observations and concerns

The case of Mr. Hwang Sok-yong

11. In his most recent report to the Commission on Human Rights (E/CN.4/1995/32, paras. 116-118), the Special Rapporteur referred to allegations received concerning infringements of the right to freedom of opinion and expression of the writer Mr. Hwang Sok-yong, who has been convicted and sentenced to a seven-year prison term under the National Security Law. The Special Rapporteur appreciated the opportunity of being able to meet in prison with Mr. Hwang, who appeared to be in good health and who shared valuable information with him. In the present report, for the purpose of clarifying some of his concerns, the Special Rapporteur at times refers to statements Mr. Hwang addressed to him. He would like to stress, however, that these references are without prejudice to the examination of the issue of the detention of Mr. Hwang, concerning which the Special Rapporteur is seeking to continue his dialogue with the Government of the Republic of Korea.

The National Security Law

12. The Special Rapporteur was informed of a number of controversies that have arisen over the exercise of the right to freedom of opinion and expression by certain persons as related to the safeguarding of the national security of the Republic of Korea.

13. The Special Rapporteur notes that article 7(1) of the National Security Law makes it an offence, punishable by up to seven years' imprisonment, for any person to praise, encourage, propagandize or side with the activities of an anti-state organization. Articles 4, 5 and 8 of the National Security Law furthermore make it a punishable offence to collect, divulge or transmit state secrets or materials benefiting the enemy, to receive materials or money from anti-state organizations, and to meet or communicate with members of anti-state organizations.

14. Reportedly, at the time of the Special Rapporteur's visit, several hundred people were either facing arrest or had been arrested, charged or convicted under the National Security Law, mostly under article 7 thereof. Many cases where the right to freedom of expression of defendants has been restricted on the grounds of protecting national security have been brought to the attention of the Special Rapporteur. These cases include convictions on the following grounds: visiting the Democratic People's Republic of Korea without the prior authorization of the authorities of the Republic of Korea; contacting or speaking with citizens or officials of the Democratic People's Republic of Korea and passing on information of a general character to these persons; expressing socialist views in general; criticizing government policy with regard to the Democratic People's Republic of Korea.

15. The Special Rapporteur notes that the right to freedom of expression can, under international human rights law, be restricted only in the most serious cases of threats to national security. He refers in this regard to paragraphs 48 to 51 of his second report to the Commission on Human Rights (E/CN.4/1995/32).

16. The Special Rapporteur notes that only in highly exceptional cases can a nation's security be directly threatened by a person's exercise of the right to freedom of expression. Such a threat would require, at the very least, the clear establishment of the person's ability and intention to cause the taking of actions directly threatening national security, in particular by propagating or inciting the use of violence. In no instance may the exercise of the right to freedom of expression be punished on the mere ground that it might, possibly, jeopardize national security. It is for the State to establish what consequences would ensue and why they would constitute a direct threat to national security.

17. The Special Rapporteur observes a lack of precision with respect to the scope and meaning of some key concepts which arise in the application of the National Security Law. These include "praising, encouraging and propagandizing of activities of an anti-State organization", and "materials benefiting the enemy". He notes with concern that the National Security Law, as interpreted by the courts, criminalizes the expression of thoughts, beliefs or opinions on public matters, including government policies, as well as the

possession of publicly available materials of a general or academic nature. He profoundly regrets that the quotation of publicly available materials and statements of a highly general or even trivial character are being sanctioned on the assumption that, in some way that is not explicitly specified, they benefit an anti-state organization. Moreover, he notes with concern that the rules of evidence applied in cases concerning the National Security Law do not require the establishment of intent or definite awareness on the part of defendants that the acts for which they have been charged (as stipulated in art. 4, paras. (1) to (4) were actually "benefiting the enemy". The Special Rapporteur notes that persons have been convicted on the basis that they should have been aware that their actions, including the mere possession of publicly available academic works, were "benefiting the enemy".

18. The Special Rapporteur notes with great concern that in most of the cases referred to him concerning the application of the National Security Law not very convincing arguments have been presented to justify the restrictions imposed on the right to freedom of expression. He also notes with concern the apparent absence of any consideration of the State's obligation to protect the defendant's right to freedom of expression or of the right to information of the public at large in legal proceedings involving the exercise of the right to freedom of expression and the upholding of national security. The above-mentioned case of Mr. Lee Chang-bok (see para. 7) is a rare exception. Furthermore, to the knowledge of the Special Rapporteur, in none of these cases has a convincing causal link been established between the content of opinions for the expression of which persons have been charged and convicted and a serious and direct political or military threat to the nation. No reference is made to clearly identifiable, adverse consequences for the nation's security of the expression of the opinions in question. Consequently, the necessity for and effectiveness of the restrictions imposed on the right to freedom of opinion and expression cannot be properly considered in these legal proceedings.

19. The Special Rapporteur further notes with concern the broad discretion of the Agency for National Security Planning to investigate cases concerning the safeguarding of national security, and fears its arbitrary exercise. Unfortunately, the Special Rapporteur was not provided with the opportunity to meet officials of the Agency to seek information and clarification on its position with regard to the protection of national security and its application of the powers entrusted to it. The Special Rapporteur learned, however, that officers of the Agency for National Security Planning are apparently in a position to put pressure on persons who are arrested, charged or convicted for statements considered criminal under the National Security Law. The Special Rapporteur fears this might lead to unwarranted interference by the Agency with the due process of the law.

20. The case of Mr. Hwang Sok-yong (see para. 11 above), illustrates this point. He informed the Special Rapporteur that his wife and son were living in the United States of America and could not return to the Republic of Korea because they feared being arrested upon their arrival. Mr. Hwang was convicted on the charge inter alia of having visited the Democratic People's Republic of Korea without authorization from the competent authorities of the Republic of Korea, i.e. the Agency for National Security Planning. His wife and son accompanied Mr. Hwang on this visit and thus, presumably, face similar charges. However, according to Mr. Hwang, officers of the Agency for National Security Planning promised him his wife and son could return to their country without being arrested if he would cooperate with the Agency's investigation into his case. More recently, it appears, officers of the Agency informed Mr. Hwang that the time was not yet appropriate for the return of his wife and son. The Special Rapporteur fears that the Agency's officers were motivated by considerations quite independent of the case of Mr. Hwang.

21. On the basis of the above considerations, the Special Rapporteur is compelled to conclude that the wording and implementation of the National Security Law of the Republic of Korea fail to offer adequate protection of the right to freedom of opinion and expression as provided for by applicable international human rights law, including article 19 of the Universal Declaration of Human Rights and article 19 of the International Covenant on Civil and Political Rights, to which the Republic of Korea became a party in 1990.

Freedom of opinion

22. It has been brought to the attention of the Special Rapporteur that prisoners who allegedly hold particular political convictions are requested by prison authorities to renounce those convictions. According to the information received by the Special Rapporteur, this practice is based on an administrative regulation issued by the Ministry of Justice in 1969, the purpose of which is to facilitate the social rehabilitation and monitoring of prisoners after their release.

23. If prisoners do not comply with this request, they face sanctions. These include their applications for release on parole not being considered, being deprived of their privileges, and restrictions on their rights with respect to correspondence and visits.

24. The Special Rapporteur considers that this practice, irrespective of its purpose, is in breach of the right to freedom of opinion provided for in article 19 of the Universal Declaration on Human Rights and article 19 of the International Covenant on Civil and Political Rights. In this respect, the Special Rapporteur refers to chapter I, section B of his previous report to the Commission on Human Rights (E/CN.4/1995/32), which deals with restrictions and limitations of the right to freedom of expression. He specifically refers to paragraph 39 of that report, wherein he states that no interference with the right to hold opinions is allowed.

25. The Special Rapporteur considers, furthermore, that the said practice violates the right to freedom of opinion and expression of detainees. The Special Rapporteur would like to refer to Principle 6 (1) of the 1957 Standard Minimum Rules for the Treatment of Prisoners and Principle 2 of the 1990 Basic Principles for the Treatment of Prisoners, which prohibits discrimination on grounds of political or other opinion. The practice of sanctioning the non-compliance of prisoners with the request to renounce their ideological convictions is not in conformity with these internationally recognized principles.

26. In some cases brought to the attention of the Special Rapporteur where prisoners do not comply with the request to renounce their political convictions, they apparently do not wish to do so because they consider this as admitting to an opinion which they claim never to have possessed. Quite apart from the consideration that international human rights law does not permit any sanction, legal, administrative or otherwise, for merely holding a political opinion, the subsidiary question arises here of prisoners effectively being asked to incriminate themselves retroactively, which is in contravention of Principle 21.1 of the 1988 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, which prohibits, inter alia, taking undue advantage of the situation of a detained or imprisoned person for the purpose of compelling him to incriminate himself.

Freedom of expression of detainees

27. The Special Rapporteur has been pleased to learn that, in general, prison conditions have improved considerably in recent years. Yet, he would like to express his concern on some issues relating to the freedom of expression of detainees.

28. The Special Rapporteur notes that the general regime for the administration of prisons is in large measure based on a law on prisons promulgated under Japanese occupation in 1923. He was furthermore informed that prisoners, as well as prison warders, were generally of the opinion that the regime resulting from this law should be changed and adapted to developments that have since taken place in the protection of human rights in general and the rights of prisoners in particular.

29. In reply to a request of the Special Rapporteur, the detained Mr. Hwang Sok-yong informed the Special Rapporteur of a number of incidents relating to his writing activities in prison. Mr. Hwang explained that he needed the approval of the Ministry of Justice for the publication of his books. Mr. Hwang cited as an example his attempt to reprint one of his publications with an updated preface, to be written in prison. He explained that in reply to his request for paper, the prison authorities asked him to indicate the number of pages he envisaged writing and added that if he wanted to write 10 pages they would provide him with 10 blank pages and if he wanted to write 20 pages they would provide him with 20. Mr. Hwang informed the prison authorities that if that were the case he preferred to write the preface in the form of a letter, whereupon the prison authorities provided him with two postcards. After having written his preface using the space available on the two postcards provided to him, Mr. Hwang stated, the prison authorities requested him three times over to rewrite what he had written on those two postcards. In the end, Mr. Hwang explained, after having revised his preface three times, he had effectively been able to use the space available on one of those two postcards.

30. Mr. Hwang furthermore explained that before receiving approval from the prison authorities to write on whatever subject, or even to keep notes or to write on anything personal and not intended for publication, he first had to indicate the subject on which he wanted to write. The subject had then to be reviewed by the Ministry of Justice before paper was made available to him by the prison authorities. Furthermore, what he had written was reviewed by the prison authorities after completion. Mr. Hwang concluded that he preferred not to write at all under these circumstances, which in his opinion merely led to discussions on what topics were the most appropriate for him to write on.

31. The testimony of Mr. Hwang captures the atmosphere of the prison regime. The Special Rapporteur observes that Mr. Hwang Sok-yong is not free to engage in his writing activities within limits reasonably necessitated by his incarceration. He is concerned that prison conditions in general do not fully reflect applicable standards, including those governing the right to freedom of opinion and expression of detainees. In this connection, the Special Rapporteur would like to refer to the 1990 Basic Principles for the Treatment of Prisoners, of which Principle 5 reads in full:

> "Except for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration on Human Rights, and, where the State concerned is a party, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and the Optional Protocol thereto, as well as such other rights as are set out in other United Nations covenants."

Freedom of expression in the workplace

32. The Special Rapporteur was informed of a number of problems in the exercise of freedom of expression in the workplace. He notes that article 13 (2) of the Labour Dispute Mediation Act prohibits anyone who has no immediate connection to a workplace where a dispute between workers and employers is taking place from intervening in that dispute. Violation of this prohibition on what is commonly referred to as "third party intervention" carries a maximum penalty of five years' imprisonment. He also notes that article 3 of the Trade Union Law prohibits the establishment of trade unions or trade union federations if these duplicate or interfere with the work and purpose of existing trade unions or trade union federations.

33. The Special Rapporteur notes with concern that a number of persons who have been imparting information to workers on legitimate trade union action or the Government's labour policies have been arrested or are facing arrest on charges of illegal intervention in a labour dispute.

34. The Special Rapporteur holds the view that freedom to associate in trade unions is a prerequisite of the effective collective expression of labour-related opinions, including grievances. Trade unions assist individual workers, among others, in their exercise of the right to seek and receive information for the purpose of arriving at a well-informed opinion on their professional circumstances and activities related thereto. Trade unions, furthermore, make possible public discussion on issues that regard not only their members but society at large, such as legislation on labour, taxation and welfare. As such, they perform an essential function in a democratic society that respects human rights.

35. The Special Rapporteur, taking into account the purpose of trade unions, which is principally to protect the interests of their members, considers that there must be room for more than one union. A worker must be able to choose the union which, in his opinion, protects his interests best. He must also have the freedom to associate with other workers to form a new trade union if he considers that existing trade unions do not effectively protect his interests. In such cases, the forming and joining of a new trade union cannot be construed as interference with the work of pre-existing trade unions.

36. The Special Rapporteur observes that article 3 of the Trade Union Law effectively amounts to a general prohibition on forming or joining a trade union of one's choice. It impairs the legitimate exercise of the right to freedom of opinion and expression in the workplace.

37. The Special Rapporteur also observes that the legal regime covering trade union activities in practice prevents workers from freely seeking, receiving and imparting information essential for forming a balanced opinion on matters relating to their professional activities and development. This includes advice given to workers, irrespective of their union membership, about their labour rights. In addition, the Special Rapporteur has found that this legal regime in practice prevents the full enjoyment of the right to freedom of assembly and association, which is intimately linked to the full enjoyment of the right to freedom of opinion and expression. He refers in particular to the status of the Korean Council of Trade Unions, which is seeking to be established alongside the only legally established nationwide trade union, the Federation of Korean Trade Unions.

38. The Special Rapporteur, considering his mandate, does not wish to address questions uniquely or mainly relating to freedom of assembly and association. Yet, noting the close connection of these freedoms to the freedom of opinion and expression, he would like to recall the recommendations offered to the Government of the Republic of Korea by the Committee on Freedom of Association of the International Labour Organization (ILO) in 1993, which called, inter alia, for the repeal of the ban on "third party intervention". Due regard should also be given to two important ILO Conventions: Convention No. 87 concerning Freedom of Association and Protection of the Right to Organise and Convention No. 98 concerning the Application of the Principles of the Right to Organise and to Bargain Collectively. Both Conventions have been elaborated upon and clarified by the competent organs of the ILO.

Performance Ethics Committee

39. The Special Rapporteur notes that performing artists in the Republic of Korea are required to submit the text or recording of their performance, prior to its publication, to the Performance Ethics Committee. Under the Performance Act, the Movies Act and the Act concerning Records and Video Materials, the Performance Ethics Committee is empowered to withhold authorization for publication on various grounds, including the upholding of public morals. In practice, the Performance Ethics Committee at times requests performing artists to review their submissions before authorizing publication.

40. The Special Rapporteur considers that any system of prior restraint on freedom of expression carries with it a heavy presumption of invalidity under international human rights law. Any institutionalization of such restraint adds further weight to this presumption. In his opinion, the protection of the right to freedom of opinion and expression and the right to seek, receive and impart information would be better served, not by routinely submitting specific types of expression to prior scrutiny, as is currently the case under the Performance Ethics Committee, but rather by initiating action after publication, if and when required. Such an approach would bring the Committee's considerations on the protection of the public interest into the public arena, which would considerably enhance the degree of public knowledge and appreciation of any necessary protection. It would, furthermore, offer an adequate safeguard against possible unduly restrictive administrative measures. While not excluding the possibility of legitimate and necessary prior restraint on the exercise of the right to freedom of expression, the Special Rapporteur would want to express his concern about leaving such prior constraints on this right, which is vital to a democratic society, to administrative procedure and not public legal procedure.

41. The Special Rapporteur recalls paragraph 55 of his previous report (E/CN.4/1995/32) where he stresses the importance of the protection of freedom of expression of minority views, including those views that might be offensive or disturbing to a majority. Such protection applies especially to views expressed by means of the performing arts, as well as to the arts in general, in view of the special character and function of artistic expression.

Press and media

42. The Special Rapporteur was informed that the situation of the press and media had improved since the previous regime. At the same time, the press today seems to face a number of pressures. These are in part related to its own success, which leads to fierce competition, and in part due to financial difficulties faced by certain press organs, especially those owned by small companies. In other part these pressures stem from the structure of ownership of the press. Press management appears to align closely with the interests of the owner companies, mostly local businesses that have profited from the building boom in recent years. The absence of a strong tradition of editorial independence and balanced labour relations leads to a working climate that can at times cause difficulties for press professionals.

43. In addition, the Special Rapporteur was informed of cases where libel suits have led to the arrest of journalists who reported critically on members of the Government. He was also informed of the imposition of fines following critical news reports. These fines are reportedly of an amount that could threaten the survival of the press and media institutions concerned. In a democratic society, government institutions should be open and responsive to all criticism, even when at times it is critical of personalities. The function of the press as a public watchdog and the right of the public to be informed are of great importance. They should not suffer from a climate in which the press and media fear the consequences of their statements delivered in good faith and in the interest of the public.

Cases of concern to the Special Rapporteur

44. The Special Rapporteur is seeking further information from the Government of the Republic of Korea on a number of persons about whom information received by the Special Rapporteur, both before and during his visit, appears to indicate undue restriction of their right to freedom of opinion and expression. After having carefully considered all information necessary to arrive at a well-informed opinion, the Special Rapporteur will present his observations on these cases, if he sees it to be appropriate.

45. The Special Rapporteur has noted with appreciation the special amnesty granted by the Government, as of 15 August 1995, six weeks after his visit, to a large number of prisoners on the occasion of the fiftieth anniversary of the independence of Korea. He has been informed that some of the persons about whom he expressed his concern have had their prison sentences suspended and have been released.

III. RECOMMENDATIONS

46. On the basis of the principal observations and concerns described in the previous section, the Special Rapporteur would like to make the following recommendations. The Special Rapporteur recalls the constructive nature of the exchange of views with the Government during his visit and is confident that his recommendations will be received in a spirit of mutual commitment to strengthening the protection and promotion of the right to freedom of opinion and expression.

(a) The Government of the Republic of Korea is strongly encouraged to repeal the National Security Law and to consider other means, in accordance with the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, to protect its national security.

(b) The practice of requesting prisoners who allegedly hold political opinions repugnant or unpalatable to the establishment to renounce such opinions should cease. All sanctions under prison or social rehabilitation regimes emanating from non-compliance on the part of prisoners with this request should cease.

(c) All prisoners who are held for their exercise of the right to freedom of opinion and expression should be released unconditionally. The cases of prisoners who have been tried under previous Governments should be reviewed, due account being taken of obligations arising under the International Covenant on Civil and Political Rights. In this respect, the obligation to protect the right to freedom of opinion and expression cannot be seen in isolation from other obligations arising under the Covenant, notably concerning the right to a fair trial.

(d) The Government is encouraged to revise the Labour Dispute Mediation Act and the Trade Union Act so as to facilitate legitimate trade union activities, including the expression of well-informed collective opinions by workers on matters relating to labour disputes and collective bargaining.

(e) The Government is encouraged to continue its efforts to align its national law with the provisions relating to freedom of opinion and expression of the International Covenant on Civil and Political Rights, in particular by introducing more explicit national legislation to facilitate the attainment of a proper balance in the judiciary's efforts to protect human rights in general and the right to freedom of opinion and expression in particular.

(f) The Government is encouraged to take steps to enhance the systematic application of international human rights law in the national legal system, especially concerning the right to freedom of opinion and expression. The Government is invited to consider disseminating appropriate human rights materials, including case-law, to the judiciary and the larger legal profession, and to seek the participation of practising judges and lawyers in seminars or courses on the application of international human rights law.

(g) The Government of the Republic of Korea is encouraged to take the necessary steps to bring its prison regime into accordance with established international principles on the administration of justice so as to protect effectively the right to freedom of opinion and expression of detainees.

(h) The Government is encouraged to limit administrative interference with the right to freedom of expression and to substitute public legal procedure for existing administrative procedure, especially with regard to prior constraints on this right.

Annex

PERSONS WITH WHOM THE SPECIAL RAPPORTEUR MET DURING HIS VISIT

The Government of the Republic of Korea

Mr. GONG Ro-myong	Minister for Foreign Affairs
Mr. KIM Do-hyun	Vice-Minister of Culture and Sports
Mr. KIM Jong-koo	Vice-Minister of Justice
Mr. LEE Kyeong-jae	Vice-Minister of Information

Non-governmental human rights organizations

Mr. KANG Je-yoon	Secretary, Catholic Human Rights Committee
Mr. LEE Sock-bum	Lawyer, Catholic Human Rights Committee
Ms. NAM Kyu-sun	Secretary-General, Human Rights Group "MINKAHYUP"
Mr. LEE Seong-hoon	International Coordinator, Korean Human Rights Network "KOHRNET"
Mr. NOH Tae-hoon	Secretary-General, Centre for Human Rights "SARANBANG"
Ms. CHOI Eun-ah	Member, Centre for Human Rights "SARANBANG"
Mr. LEE Suk-tae	Attorney at law, Secretary-General of "MINBYUN" - Lawyers for Democracy
Mr. LEE Don-myung	Senior member, "MINBYUN"
Mr. MOON Dok-su	President, International PEN, the Korean Centre
Mr. LEE Tae-dong	General Secretary, International PEN, the Korean Centre
Mr. CHANG Baek-il	Vice-President, International PEN, the Korean Centre
Mr. KIM Si-chul	Vice-President, International PEN, the Korean Centre
Mr. KIM Moon-soo	Vice-President, International PEN, the Korean Centre

Trade unions and trade union activists

Mr. HEO Young-koo	General Secretary, Korean Council of Trade Unions
Mr. LEE Yong-bum	Executive Committee Member, Korean Council of Trade Unions

Ms. JUNG Hae-sook	President, Korean Teachers and Educational Workers Union "CHUNKYOJO"
Mr. LEE Dong-jin	Chairperson of Solidarity Committee, "CHINKYOJO"
Mr. SHON Seok-choon	Director of Policy Planning, Korean Federation of Press Unions

Media, press and related organizations

Mr. NAM Si-uk	President, Korea Newspaper Editors' Association
Mr. HWANG Myong	Poet, President, Korean Literary Writers' Association
Mr. JONG Chul-park	Secretary-General, Korean Literary Writers' Association
Mr. AHN Jae-hwi	President, Journalists' Association of Korea

Academic community

Mr. CHIANG Sang-hwan	Assistant Professor, Department of Economics, Gyeong Sang National University
Mr. KIM Chong-yang	President, Hanyang University
Mr. KIM Kyung-min	Vice-Dean, Office of International Cooperation, Hanyang University
Mr. CHOI Sung-chul	Dean, College of Social Sciences, Hanyang University
Mr. OH Myeung-ho	Vice-President, Department of Political Science and Diplomacy, Hanyang University
Mr. HAN Sung-joo	President, International Relations Institute "ILMIN", Korea University Former Minister for Foreign Affairs.

Members of the judiciary and the legal profession

Mr. LEE Young-mo	Secretary-General, Constitutional Court
Mr. SEO Sang-ho	Senior Research Officer of the Constitutional Court, Presiding High Court Judge
Mr. SUH Sung	Vice-Minister of Court Administration, Supreme Court
Mr. PARK Il-hoan	Judge
Mr. KIM Yong-dug	Judge of Seoul High Court Planning Director, Ministry of Court Administration, Supreme Court of Korea

Mr. KIM Sung-nam	Attorney at law Secretary-General, Korean Bar Association
Mr. HA Kyung-chull	Attorney at law Executive Director of Human Rights, Korean Bar Association
Mr. CHANG Soo-kil	Attorney at law Executive Director of Public Relations, Korean Bar Association
Mr. KIM Seon-soo	Attorney at law
Mr. CHUN Jung-bae	Attorney at law, representing the singer Joung Tae-choon

Selected individuals

Mr. JOUNG Tae-choon	Singer
Mr. HWANG Sok-yong	Writer, serving a seven-year prison sentence under the National Security Law
Mr. KIM Dae-jung	Chairman, Kim Dae-jung Peace Foundation for the Asia-Pacific Region

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UNITED
NATIONS

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International Covenant
on Civil and Political Rights

Distr.
RESTRICTED */

CCPR/C/54/D/518/1992
3 August 1995

Original: ENGLISH

HUMAN RIGHTS COMMITTEE
Fifty-fourth session

VIEWS

Communication No. 518/1992

Submitted by:	Jong-Kyu Sohn (represented by counsel)
Victim:	The author
State party:	Republic of Korea
Date of communication:	7 July 1992 (initial submission)
Documentation references:	Prior decisions - Special Rapporteur's rule 91 decision transmitted to the State party on 4 January 1993 (not issued in document form) - CCPR/C/50/D/518/1992 (Decision on admissibility, dated 18 March 1994)
Date of adoption of Views:	19 July 1995

On 19 July 1995, the Human Rights Committee adopted its Views under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 518/1992. The text of the Views is annexed to the present document.

[ANNEX]

*/ Made public by decision of the Human Rights Committee.

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ANNEX

Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights
- Fifty-fourth session -

concerning

Communication No. 518/1992

Submitted by: Jong-Kyu Sohn (represented by counsel)

Victim: The author

State party: Republic of Korea

Date of communication: 7 July 1992 (initial submission)

Date of decision on admissibility: 18 March 1994

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 19 July 1995,

Having concluded its consideration of communication No. 518/1992 submitted to the Human Rights Committee on behalf of Mr. Jong-Kyu Sohn under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts its Views under article 5, paragraph 4, of the Optional Protocol.

1. The author of the communication is Mr. Jong-Kyu Sohn, a citizen of the Republic of Korea, residing at Kwangju, Republic of Korea. He claims to be a victim of a violation by the Republic of Korea of article 19, paragraph 2, of the International Covenant on Civil and Political Rights. He is represented by counsel.

The facts as submitted by the author:

2.1 The author has been president of the Kumho Company Trade Union since 27 September 1990 and is a founding member of the Solidarity Forum of Large Company Trade Unions. On 8 February 1991, a strike was called at the Daewoo Shipyard Company at Guhjae Island in the province of Kyungsang-Nam-Do. The

Government announced that it would send in police troops to break the strike. Following that announcement, the author had a meeting, on 9 February 1991, with other members of the Solidarity Forum, in Seoul, 400 kilometres from the place where the strike took place. At the end of the meeting they issued a statement supporting the strike and condemning the Government's threat to send in troops. That statement was transmitted to the workers at the Daewoo Shipyard by facsimile. The Daewoo Shipyard strike ended peacefully on 13 February 1991.

2.2 On 10 February 1991, the author, together with some 60 other members of the Solidarity Forum, was arrested by the police when leaving the premises where the meeting had been held. On 12 February 1991, he and six others were charged with contravening article 13(2) of the Labour Dispute Adjustment Act (Law No. 1327 of 13 April 1963, amended by Law No. 3967 of 28 November 1987), which prohibits others than the concerned employer, employees or trade union, or persons having legitimate authority attributed to them by law, to intervene in a labour dispute for the purpose of manipulating or influencing the parties concerned. He was also charged with contravening the Act on Assembly and Demonstration (Law No. 4095 of 29 March 1989), but notes that his communication relates only to the Labour Dispute Adjustment Act. One of the author's co-accused later died in detention, according to the author under suspicious circumstances.

2.3 On 9 August 1991, a single judge of the Seoul Criminal District Court found the author guilty as charged and sentenced him to one and a half years' imprisonment and three years' probation. The author's appeal against his conviction was dismissed by the Appeal Section of the same court on 20 December 1991. The Supreme Court rejected his further appeal on 14 April 1992. The author submits that, since the Constitutional Court had declared, on 15 January 1990, that article 13(2) of the Labour Dispute Adjustment Act was compatible with the Constitution, he has exhausted domestic remedies.

2.4 The author states that the same matter has not been submitted for examination under any other procedure of international investigation or settlement.

The complaint:

3.1 The author argues that article 13(2) of the Labour Dispute Adjustment Act is used to punish support for the labour movement and to isolate the workers. He argues that the provision has never been used to charge those who take the side of management in a labour dispute. He further claims that the vagueness of the provision, which prohibits any act to influence the parties, violates the principle of legality (*nullum crimen, nulla poena sine lege*).

3.2 The author further argues that the provision was incorporated into the law to deny the right to freedom of expression to supporters of labourers or trade unions. In this respect, he makes reference to the Labour Union Act,

which prohibits third party support for the organization of a trade union. He concludes that any support to labourers or trade unions may thus be punished, by the Labour Dispute Adjustment Act at the time of strikes and by the Labour Union Act at other times.

3.3 The author claims that his conviction violates article 19, paragraph 2, of the Covenant. He emphasizes that the way he exercised his freedom of expression did not infringe the rights or reputations of others, nor did it threaten national security or public order, or public health or morals.

The State party's observations on admissibility and author's comments thereon:

4.1 By submission of 9 June 1993, the State party argues that the communication is inadmissible on the grounds of failure to exhaust domestic remedies. The State party submits that available domestic remedies in a criminal case are exhausted only when the Supreme Court has issued a judgement on appeal and when the Constitutional Court has reached a decision on the constitutionality of the law on which the judgement is based.

4.2 As regards the author's argument that he has exhausted domestic remedies because the Constitutional Court has already declared that article 13(2) of the Labour Dispute Adjustment Act, on which his conviction was based, is constitutional, the State party contends that the prior decision of the Constitutional Court only examined the compatibility of the provision with the right to work, the right to equality and the principle of legality, as protected by the Constitution. It did not address the question of whether the article was in compliance with the right to freedom of expression.

4.3 The State party argues, therefore, that the author should have requested a review of the law in the light of the right to freedom of expression, as protected by the Constitution. Since he failed to do so, the State party argues that he has not exhausted domestic remedies.

4.4 The State party submits, in addition, that the author's sentence was revoked on 6 March 1993, under a general amnesty granted by the President of the Republic of Korea.

5.1 In his comments on the State party's submission, the author maintains that he has exhausted all domestic remedies and that it would be futile to request the Constitutional Court to pronounce itself on the constitutionality of the Labour Dispute Adjustment Act when it has done so in the recent past.

5.2 The author submits that if the question of constitutionality of a legal provision is brought before the Constitutional Court, the Court is legally obliged to take into account all possible grounds that may invalidate the law. As a result, the author argues that it is futile to bring the same question to the Court again.

5.3 In this context, the author notes that, although the majority opinion in the judgement of the Constitutional Court of 15 January 1990 did not refer to the right to freedom of expression, two concurring opinions and one dissenting opinion did. He submits that it is clear therefore that the Court did in fact consider all the grounds for possible unconstitutionality of the Labour Dispute Adjustment Act, including a possible violation of the constitutional right to freedom of expression.

The Committee's admissibility decision:

6.1 At its 50th session, the Committee considered the admissibility of the communication. After having examined the submissions of both the State party and the author concerning the constitutional remedy, the Committee found that the compatibility of article 13(2) of the Labour Dispute Adjustment Act with the Constitution, including the constitutional right to freedom of expression, had necessarily been before the Constitutional Court in January 1990, even though the majority judgement chose not to refer to the right to freedom of expression. In the circumstances, the Committee considered that a further request to the Constitutional Court to review article 13(2) of the Act, by reference to freedom of expression, did not constitute a remedy which the author still needed to exhaust under article 5, paragraph 2, of the Optional Protocol.

6.2 The Committee noted that the author was arrested, charged and convicted not for any physical support for the strike in progress but for participating in a meeting in which verbal expressions of support were given, and considered that the facts as submitted by the author might raise issues under article 19 of the Covenant which should be examined on the merits. Consequently, the Committee declared the communication admissible.

The State party's observations on the merits and author's comments thereon:

7.1 By submission of 25 November 1994, the State party takes issue with the Committee's consideration when declaring the communication admissible that "the author was arrested, charged and convicted not for any physical support for the strike in progress but for participating in a meeting in which verbal expressions of support were given". The State party emphasizes that the author not only attended the meeting of the Solidarity Forum on 9 February 1991, but also actively participated in distributing propaganda on 10 or 11 February 1991 and, on 11 November 1990, was involved in a violent demonstration, during which Molotov cocktails were thrown.

7.2 The State party submits that because of these offences, the author was charged with and convicted of violating articles 13(2) of the Labour Dispute Adjustment Act and 45(2) of the Act on Assembly and Demonstration.

7.3 The State party explains that the articles of the Labour Dispute Adjustment Act, prohibiting intervention by third parties in a labour dispute, are meant to maintain the independent nature of a labour dispute between employees and employer. It points out that the provision does not prohibit counselling or giving advice to the parties involved.

7.4 The State party invokes article 19, paragraph 3, of the Covenant, which provides that the right to freedom of expression may be subject to certain restrictions inter alia for the protection of national security or of public order.

7.5 The State party reiterates that the author's sentence was revoked on 6 March 1993, under a general amnesty.

8.1 In his comments, the author states that, although it is true that he was sentenced for his participation in the demonstration of November 1990 under the Act on Assembly and Demonstration, this does not form part of his complaint. He refers to the judgment of the Seoul Criminal District Court of 9 August 1991, which shows that the author's participation in the November demonstration was a crime punished separately, under the Act on Assembly and Demonstration, from his participation in the activities of the Solidarity Forum and his support for the strike of the Daewoo Shipyard Company in February 1991, which were punished under the Labour Dispute Adjustment Act. The author states that the two incidents are unrelated to each other. He reiterates that his complaint only regards the "prohibition of third party intervention", which he claims is in violation of the Covenant.

8.2 The author argues that the State party's interpretation of the freedom of expression as guaranteed in the Covenant is too narrow. He refers to paragraph 2 of article 19, which includes the freedom to impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print. The author argues therefore that the distribution of leaflets containing the Solidarity Forum's statements supporting the strike at the Daewoo Shipyard falls squarely within the right to freedom of expression. He adds that he did not distribute the statements himself, but only transmitted them by telefax to the striking workers at the Daewoo Shipyard.

8.3 As regards the State party's argument that his activity threatened national security and public order, the author notes that the State party has not specified what part of the statements of the Solidarity Forum threatened public security and public order and for what reasons. He contends that a general reference to public security and public order does not justify the restriction of his freedom of expression. In this connection he recalls that the statements of the Solidarity Forum contained arguments for the legitimacy of the strike concerned, strong support for the strike and criticism of the employer and of the Government for threatening to break the strike by force.

8.4 The author denies that the statements by the Solidarity Forum posed a threat to the national security and public order of South Korea. It is stated that the author and the other members of the Solidarity Forum are fully aware of the sensitive situation in terms of South Korea's confrontation with North Korea. The author cannot see how the expression of support for the strike and criticism of the employer and the government in handling the matter could threaten national security. In this connection the author notes that none of the participants in the strike was charged with breaching the National Security Law. The author states that in the light of the constitutional right to strike, police intervention by force can be legitimately criticised. Moreover, the author argues that public order was not threatened by the statements given by the Solidarity Forum, but that, on the contrary, the right to express one's opinion freely and peacefully enhances public order in a democratic society.

8.5 The author points out that solidarity among workers is being prohibited and punished in the Republic of Korea, purportedly in order to "maintain the independent nature of a labour dispute", but that intervention in support of the employer to suppress workers' rights is being encouraged and protected. He adds that the Labour Dispute Adjustment Act was enacted by the Legislative Council for National Security, which was instituted in 1980 by the military government to replace the National Assembly. It is argued that the laws enacted and promulgated by this undemocratic body do not constitute laws within the meaning of the Covenant, enacted in a democratic society.

8.6 The author notes that the Committee of Freedom of Association of the International Labour Organization has recommended that the Government repeal the provision prohibiting the intervention by a third party in labour disputes, because of its incompatibility with the ILO constitution, which guarantees workers' freedom of expression as an essential component of the freedom of association.[1]

8.7 Finally, the author points out that the amnesty has not revoked the guilty judgment against him, nor compensated him for the violations of his Covenant rights, but merely lifted residual restrictions imposed upon him as a result of his sentence, such as the restriction on his right to run for public office.

9.1 By further submission of 20 June 1995, the State party explains that the labour movement in the Republic of Korea can be generally described as being politically oriented and ideologically influenced. In this connection it is stated that labour activists in Korea do not hesitate in leading workers to extreme actions by using force and violence and engaging in illegal strikes in order to fulfil their political aims or carry out their ideological principles. Furthermore, the State party argues that there have been frequent instances where the idea of a proletarian revolution has been implanted in the minds of workers.

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[1] 294th Report of the Committee on Freedom of Association, June 1994, paragraphs 218 to 274. See also the 297th Report, March-April 1995, paragraph 23.

9.2 The State party argues that if a third party interferes in a labour dispute to the extent that the third party actually manipulates, instigates or obstructs the decisions of workers, such a dispute is being distorted towards other objectives and goals. The State party explains therefore that, in view of the general nature of the labour movement, it has felt obliged to maintain the law concerning the prohibition of third party intervention.

9.3 Moreover, the State party submits that in the instant case, the written statement distributed in February 1991 to support the Daewoo Shipyard Trade Union was used as a disguise to incite a nation-wide strike of all workers. The State party argues that "in the case where a national strike would take place, in any country, regardless of its security situation, there is considerable reason to believe that the national security and public order of the nation would be threatened."

9.4 As regards the enactment of the Labour Dispute Adjustment Act by the Legislative Council for National Security, the State party argues that, through the revision of the constitution, the effectiveness of the laws enacted by the Council was acknowledged by public consent. The State party moreover argues that the provision concerning the prohibition of the third party intervention is being applied fairly to both the labour and the management side of a dispute. In this connection the State party refers to a case currently before the courts against someone who intervened in a labour dispute on the side of the employer.

Issues and proceedings before the Committee:

10.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

10.2 The Committee has taken note of the State party's argument that the author participated in a violent demonstration in November 1990, for which he was convicted under the Act on Assembly and Demonstration. The Committee has also noted that the author's complaint does not concern this particular conviction, but only his conviction for having issued the statement of the Solidarity Forum in February 1991. The Committee considers that the two convictions concern two different events, which are not related. The issue before the Committee is therefore only whether the author's conviction under article 13, paragraph 2, of the Labour Dispute Adjustment Act for having joined in issuing a statement supporting the strike at the Daewoo Shipyard Company and condemning the Government's threat to send in troops to break the strike violates article 19, paragraph 2, of the Covenant.

10.3 Article 19, paragraph 2, of the Covenant guarantees the right to freedom of expression and includes "freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media". The Committee considers that the author, by joining others in issuing a statement supporting

the strike and criticizing the Government, was exercising his right to impart information and ideas within the meaning of article 19, paragraph 2, of the Covenant.

10.4 The Committee observes that any restriction of the freedom of expression pursuant to paragraph 3 of article 19 must cumulatively meet the following conditions: it must be provided for by law, it must address one of the aims enumerated in paragraph 3(a) and (b) of article 19, and must be necessary to achieve the legitimate purpose. While the State party has stated that the restrictions were justified in order to protect national security and public order and that they were provided for by law, under article 13(2) of the Labour Dispute Adjustment Act, the Committee must still determine whether the measures taken against the author were necessary for the purpose stated. The Committee notes that the State party has invoked national security and public order by reference to the general nature of the labour movement and by alleging that the statement issued by the author in collaboration with others was a disguise for the incitement to a national strike. The Committee considers that the State party has failed to specify the precise nature of the threat which it contends that the author's exercise of freedom of expression posed and finds that none of the arguments advanced by the State party suffice to render the restriction of the author's right to freedom of expression compatible with paragraph 3 of article 19.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, finds that the facts before it disclose a violation of article 19, paragraph 2, of the Covenant.

12. The Committee is of the view that Mr. Sohn is entitled, under article 2, paragraph 3(a), of the Covenant, to an effective remedy, including appropriate compensation, for having been convicted for exercising his right to freedom of expression. The Committee further invites the State party to review article 13(2) of the Labour Dispute Adjustment Act. The State party is under an obligation to ensure that similar violations do not occur in the future.

13. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

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EXTERNAL (for general distribution) Summary of AI Index: IOR 03/01/87
Distr: SC/PG

Amnesty International
International Secretariat
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LONDON WC1X 8DJ
United Kingdom

April 1987

PROTECTING HUMAN RIGHTS: INTERNATIONAL PROCEDURES AND HOW TO USE THEM

(A SERIES OF AMNESTY INTERNATIONAL PAPERS)

SUMMARY: 1A. THE HUMAN RIGHTS COMMITTEE

(This is a summary of a paper with the same title which, if not attached, is available from the Amnesty International office in your country or from the London address above. Ask for AI Index IOR 03/01/87.)

WHAT IS THE HUMAN RIGHTS COMMITTEE?

The Human Rights Committee is the body created by the International Covenant on Civil and Political Rights to monitor implementation by governments of the provisions of the Covenant and its Optional Protocol. The Covenant is a treaty requiring governments to ensure specified human rights, including the rights to: life, fair trial, freedom from torture and ill-treatment, freedom from arbitrary arrest, freedom of conscience, expression and association. The Optional Protocol is a separate treaty establishing a procedure for individuals to submit written complaints to the Committee alleging that their rights under the Covenant have been violated. Governments which have ratified or acceded to these treaties (called "States Parties") are legally bound to follow their provisions. States Parties to the Covenant and Protocol are listed in Appendix 3 of the attached paper. (The Human Rights Committee should not be confused with the United Nations Commission on Human Rights, which is the central human rights body at the UN composed of representatives of 43 governments).

WHEN WAS THE COMMITTEE FORMED?

The Committee was established in 1976, the year the Covenant and its Optional Protocol came into force.

WHO ARE THE MEMBERS OF THE COMMITTEE?

The 18 members are experts elected by States Parties to the Covenant to serve in their personal capacities. The present membership includes individuals from a wide range of political, social and legal systems, some

of whom are leading scholars of international and comparative law. Appendix 4 of the attached paper lists the Committee members.

WHEN DOES THE COMMITTEE MEET?

The Committee meets at the UN buildings in Geneva or New York three times a year for three weeks per session: March-April, July, and October-November.

WHAT ARE THE COMMITTEE'S FUNCTIONS?

The four main tasks are:

i) Examining reports about implementation submitted at five-year intervals by States Parties. The examination takes place at public meetings where a representative of the government introduces the report, then responds to questions put by Committee members.

ii) Issuing "general comments" regarding the reports by States Parties, including comments on the scope and meaning of specific provisions of the Covenant.

iii) Considering complaints from individuals under the Optional Protocol. These complaints may be filed only by the victim or someone closely linked to the victim (normally a close family member or appointed lawyer). Individual complaints may be made only against a state which is party to the Optional Protocol. The Committee examines individual complaints at closed meetings, but makes public its final decision (referred to as its "views") on the merits of a complaint.

iv) Examining inter-state complaints, i.e., a complaint by one state that another state is not fulfilling its obligations under the Covenant. No inter-state complaints have yet been received by the Committee.

WHAT IS THE ROLE OF NON-GOVERNMENTAL ORGANIZATIONS (NGOs) AT THE COMMITTEE?

The Covenant is silent on this subject. To date, NGOs have had no formal role and have not been allowed to make interventions. NGOs and concerned members of the public may attend the meetings and make information available informally to individual Committee members.

FOR FURTHER INFORMATION: See papers 1A, 1B and 1C cited below.

PAPERS IN THIS SERIES ISSUED TO DATE:

1A. "The Human Rights Committee" (April 1987, IOR 03/01/87)

1B. "The Human Rights Committee: Examination of individual complaints under the Optional Protocol" (April 1987, IOR 03/02/87)

1C. "'General comments' of the Human Rights Committee" (April 1987, IOR 03/03/87)

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These papers are available from the Amnesty International office in your country or from the London address above. Amnesty International intends to issue the papers in English, French and Spanish. They will be updated occasionally.

This series provides practical information about international organizations and procedures which deal with allegations of human rights violations. To some extent the focus of each paper may reflect the mandate of Amnesty International; the organization:

- seeks the release of "prisoners of conscience" (men and women detained anywhere for their beliefs, colour, sex, ethnic origin, language or religion, provided they have not used or advocated violence);

- advocates fair and early trials for all political prisoners and works on behalf of such persons detained without charge or without trial; and

- opposes the death penalty and torture or other cruel, inhuman or degrading treatment or punishment of all prisoners without reservation.

- What procedures are available for inspecting prison conditions and investigating complaints by prisoners?

- How long can a person be detained without trial?

- To what extent has the right of habeas corpus been maintained during the state of emergency?

- Are certain laws used to detain persons on account of their political views?

- How has the government guaranteed the independence and impartiality of the judiciary?

- Is the death penalty applied, and if so, to what extent?

Committee members have expressed their disappointment at the fact that a number of States Parties have failed to submit their reports on schedule. Some reports are long overdue. The UN General Assembly has adopted resolutions urging States Parties that have not yet done so to submit their reports to the Committee as speedily as possible.

The Committee has also voiced concern that some States Parties have submitted inadequate reports which are too brief and general. Many such reports simply cite national laws which guarantee Covenant rights, without any discussion of whether and how such rights are actually implemented and enjoyed in practice. The Committee has encouraged States Parties to submit reports which frankly discuss difficulties in implementation as well as progress achieved.

The Committee has offered to assist states with drafting their reports, and (in cooperation with the advisory services program of the UN Centre for Human Rights) to assist with their efforts to promote human rights. In response to Guinea's request for assistance in preparing its initial report, Committee member Birame N'Diaye visited the country in March 1985 to meet with relevant officials. The United Nations Institute for Training and Research (UNITAR) is organizing training programmes to assist state officials with the preparation and submission of reports to the Human Rights Committee and other international bodies. The first such training programme was held in 1985 in Barbados for the Caribbean sub-region, the second was held in September 1986 in Senegal for the francophone West Africa subregion, and the third took place in December 1986 in Manila for the Asia and Pacific region.

It has been emphasized to states that the Committee's purpose in examining reports is not to condemn or expose states for past violations of the Covenant, but rather to seek an open and constructive dialogue with states about difficulties in implementing the Covenant and how they might be overcome. The Committee seeks to provide a forum where states can learn from one another's experience.

4.2 "General comments"

Under Article 40 of the Covenant, the Committee may transmit to States Parties "such general comments as it may consider appropriate". The Committee has so far adopted 15 "general comments". The text of these general comments is contained in an Amnesty International paper entitled "'General comments' of the Human Rights Committee" (April 1987, AI Index IOR 03/03/87). The following articles of the Covenant have been the subject of general comments issued to date: Articles 1, 2, 3, 4, 6, 7, 9, 10, 14, 19, and 20. Also, Article 13 is discussed extensively in the Committee's general comment on the position of aliens under the Covenant.

The first two general comments issued by the Committee draw attention to problems with the reports by States Parties (overdue reports, inadequate reports, etc.). The others deal with particular articles of the Covenant, usually containing the Committee's understanding of the scope and meaning of certain provisions and noting whether or not the State Party reports which had been reviewed, taken as a whole, provided sufficient information about how the provisions have been implemented in practice.

The Committee's comments on the scope and meaning of Covenant provisions are considered authoritative because:

- the general comments are based on the Committee's experience of reviewing a large number of reports by states representing different regions of the world with different political, social and legal systems;

- the Committee itself is composed of experts from a wide range of political, social and legal systems, some of whom are leading scholars of international and comparative law; and

- the Committee has adopted general comments by consensus after very careful consideration and debate, sometimes involving considerable compromise by various members.

The Committee described its aim in issuing its first set of general comments as follows:

> "The purpose of these general comments is to make [the Committee's experience in examining State Party reports] available for the benefit of all States parties in order to promote their further implementation of the Covenant; to draw their attention to insufficiencies disclosed by a large number of reports; to suggest improvements in the reporting procedure and to stimulate the activities of these States and international organizations in the promotion and protection of human rights. These comments should also be of interest to other States, especially those preparing to become parties to the Covenant and thus to strengthen the co-operation of all States in the universal promotion and protection of human rights."

4.3 Communications from individuals

The Optional Protocol (Appendix 2) establishes a procedure whereby individuals may submit a written complaint to the Committee alleging that their rights under the Covenant have been violated. The Committee's examination of individual complaints is explained in more detail in a separate circular entitled "The Human Rights Committee: Examination of individual complaints under the Optional Protocol" (April 1987, AI Index IOR 03/02/87).

Such complaints may be filed by the victim or someone closely linked to the victim (normally a close family member or an appointed lawyer), and may only be made against a state which is party to the Optional Protocol.

One of the requirements for a communication to be admissible is that the author must show that he/she has exhausted all available remedies at the local and national level, or that it would take an unreasonable amount of time to get a result from such remedies, or that there are no such remedies that would be genuinely effective.

The process by which the Committee considers an individual complaint is lengthy and cautious, involving a number of stages during which the author of the complaint and the government are invited to comment in writing on one another's submissions. Often it takes 2 to 3 years or more from the time of the complaint until the Committee issues its final decision.

In order to prevent states from rendering the Protocol ineffective, when a government does not provide a substantive refutation of allegations in the complaint, the Committee bases its views on credible facts presented by the complainant. The Committee has indicated in several cases that, when a complainant makes specific allegations, such as allegations of torture and ill treatment, the state should investigate such allegations and provide the Committee with the results of such investigations.

The Committee examines communications from individuals and responses from states in closed meetings. However, the Committee makes public its final "views" on the merits of a complaint. Copies of the views issued by the Committee on two particular communications are provided by way of example as an appendix to the above-mentioned Amnesty International paper (AI Index IOR 03/02/87). At the end of its views in each case the Committee identifies which articles of the Covenant have been violated and calls on the government to provide the victim with appropriate effective remedies, including compensation, and to take steps to ensure that similar violations do not occur in the future.

When forwarding its views to a State Party the Committee invites the government to inform the Committee of any action taken pursuant to the views. Some governments have provided such information. For example, the Government of Canada notified the Committee about legislative amendments taken in response to the Committee's view that the Indian Act was discriminatory with regard to Indian women. After the Committee expressed the view that the Immigration and Deportation Acts of Mauritius had the effect of being discriminatory on grounds of sex toward women married to foreign nationals, the Government of Mauritius informed the Committee that those acts had been amended to remove the discriminatory effects. In 1985, the new Government of Uruguay transmitted to the Committee a list of persons released from imprisonment and the text of the general amnesty law of 8 March 1985.

In a number of Optional Protocol cases the Committee has issued views concluding that the facts disclosed violations of Covenant articles protecting rights which are of direct concern to the work of Amnesty International, including:

- Article 6: the right to life;
- Article 7: the right to be free from torture and ill-treatment;
- Article 9: the right to be free from arbitrary arrest or detention;
- Article 10(1): the right of all prisoners to be treated with humanity;
- Article 14: the right to a fair trial;
- Article 15: the right not to be prejudiced by retroactive penal laws;
- Article 19: the right to freedom of opinion and expression; and
- Article 22: the right to freedom of association.

A listing of cases in which the Committee found violations of these rights is contained in an appendix of AI Index IOR 03/02/87.

4.4 Inter-state complaints

Article 41 of the Covenant establishes an optional procedure whereby a state may submit a communication to the Committee alleging that another state "is not fulfilling its obligations under the present Covenant". Both of those states, however, must have made a declaration recognizing the competence of the Committee to take such action.

Communications received under Article 41 are to be examined at closed meetings. Article 41 provides that the Committee "shall make available its good offices to the States Parties concerned with a view to a friendly solution of the matter... ". If a solution is not reached under Article 41, the states may consent to the Committee's appointment of a conciliation commission as provided by Article 42.

Although the interstate procedure came into effect in 1979, so date it has not been used. This is partly explained by the fact that so few states have made a declaration recognizing the competence of the Committee to consider state complaints. As of April 1987, 21 states had made such a declaration.* Many observers have suggested that the lack of utilization of interstate complaint systems is due to the general reluctance of governments to risk impairing their bilateral relations with other governments.

5. THE ROLE OF NON-GOVERNMENTAL ORGANIZATIONS

The Covenant is silent on the subject of the relationship between the Committee and non-governmental organizations. It does not provide for a relationship, nor does it prohibit one. To date non-governmental organizations have had no formal role at the Committee's meetings and have not been allowed to make interventions.

Non-governmental organizations and concerned members of the public, including national and local human rights organizations from countries whose reports are under review, may attend Comittee meetings and make their information available to members of the Committee. Amnesty International representatives regularly attend the public meetings of the Committee both in Geneva and New York. The organization's external information about its concerns in specific countries is made available informally to each of the Committee members.

International non-governmental organizations have a role in serving as a "bridge" between the Committee and those whose rights are being discussed, by helping to ensure that organizations and human rights groups at the national level are kept informed of the Committee's work.

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* - The states which as of April 1987 had made a declaration under Article 41 recognizing the competence of the Human Rights Committee to consider inter-state complaints are: Argentina, Austria, Belgium, Canada, Denmark, Ecuador, Federal Republic of Germany, Finland, Iceland, Italy, Luxembourg, Netherlands, New Zealand, Norway, Peru, Philippines, Senegal, Spain, Sri Lanka, Sweden, UK.

6. THE SIGNIFICANCE OF THE COMMITTEE

Approximately half of the world's nations are now, for the first time in history, obliged to report publicly to an international body of experts responsible for examining what those states are doing to give effect to a full range of fundamental civil and political rights. The state reports are looked at carefully, difficult questions are raised in a constructive and serious manner, and governments are required to give an account of their human rights record. The Committee offers its assistance to States Parties which are having difficulties implementing certain provisions of the Covenant.

Under the Optional Protocol, the Committee has established an individual complaints system which provides a remedy at the international level for victims of human rights abuses.

States can no longer seriously claim that human rights issues are limited to their domestic jurisdiction. The Human Rights Committee has been an important factor in that development.

Unfortunately, at the national and local level people are often unaware of the Committee's work. Governments often fail to publicize their State Party reports. Committee meetings are poorly attended by the media and the public. But a positive sign is that the national press of some countries has covered the Committee's review of its government's report (see Appendix 5), thereby encouraging domestic debate and dialogue about the protection of basic human rights.

It has become increasingly clear that for the work of the Committee to have lasting and real impact, it is important that it takes place in a context of constructive dialogue at the national level.

7. FOR FURTHER REFERENCE

A. Official United Nations documents

(These documents should be available at United Nations depository libraries. Alternatively, they can be ordered from: United Nations Publications, Palais des Nations, CH-1211 Geneva 10, Switzerland).

A record of the Committee's activities is contained in the annual reports which it submits to the UN General Assembly. These reports summarize the Committee's examination of State Party reports and reproduce the Committee's "general comments" and its views in Optional Protocol cases.

The reference for the Committee's annual reports is:

United Nations, Report of the Human Rights Committee, Official Records of the General Assembly:
33rd Session, Supplement No. 40 (A/33/40) (1978).
34th Session, Supplement No. 40 (A/34/40) (1979).
35th Session, Supplement No. 40 (A/35/40) (1980).
36th Session, Supplement No. 40 (A/36/40) (1981).
37th Session, Supplement No. 40 (A/37/40) (1982).
38th Session, Supplement No. 40 (A/38/40) (1983).
39th Session, Supplement No. 40 (A/39/40) (1984).
40th Session, Supplement No. 40 (A/40/40) (1985).
41st Session, Supplement No. 40 (A/41/40) (1986).

Also available is a volume which contains selected views and decisions issued between 1979 and 1982 on individual complaints under the Optional Protocol:

United Nations, Human Rights Committee: Selected decisions under the Optional Protocol (Second to sixteenth sessions), UN Doc CCPR/C/OP/1 (1985). This volume contains a useful subject index and an index by articles of the Covenant.

The summary records of the Committee's meetings are available in UN documents with the prefix CCPR/C/SR, followed by the number of the particular meeting.

For a more detailed examination of the Committee's procedures, one should consult:

- "Rules of procedure of the Committee", UN Doc. CCPR/C/3/Rev.1 (5 December 1979).
- "General guidelines regarding the form and contents of reports from States Parties under Article 40 of the Covenant", UN Doc. CCPR/C/5 (28 September 1978).
- "Guidelines regarding the form and contents of reports from States Parties under Article 40, Paragraph 1(b) of the Covenant", UN Doc. CCPR/C/20 (19 August 1981).
- "Decision on Periodicity" UN Doc. CCPR/C/19/Rev.1 (26 August 1982).

B. General sources on the work of the Committee

An extensive listing of books and articles is provided below. For the reader wishing to consult only one or two sources, the following two articles provide informative overviews of the subjects indicated:

(i) State Party reports:

Fischer, Dana D. "Reporting under the Covenant on Civil and Political Rights: The first five years of the Human Rights Committee", 76 The American Journal of International Law (January 1982): 142-153.

(ii) Communications from individuals:

Möse, Erik and Opsahl, Torkel. "The Optional Protocol to the International Covenant on Civil and Political Rights", 21 Santa Clara Law Review (1981): 271-331.

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Bossuyt, Marc J. "Le règlement intérieur du Comité des droits de l'homme", 14 Revue belge de droit international (1978-79): 104-156.

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Decaux, Emmanuel. "La mise en vigueur du Pacte international relatif aux droits civils et politiques", 84 Revue générale de droit international public (1980): 487-534.

Dimitrijevic, Vojin. "Activity of the Human Rights Committee", 34 Review of International Affairs (Belgrade)(1983): 24-27.

Fischer, Dana D. "Reporting under the Covenant on Civil and Political Rights: The first five years of the Human Rights Committee", 76 The American Journal of International Law (January 1982): 142-153.

Graefrath, Bernhard. "Trends emerging in the practice of the Human Rights Committee", 3 GDR Committee for Human Rights Bulletin (1980): 3-32.

Hartman, Joan F. "Derogation from human rights treaties in public emergencies - A critique of implementation by the European Commission and Court of Human Rights and the Human Rights Committee of the United Nations", 22 Harvard International Law Journal (1981): 1-52.

"Human Rights: Rights of relatives of victims - views of the Human Rights Committee in the Quinteros communication", 25 Harvard International Law Journal (Spring 1984): 470-477.

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APPENDIX 7

GUIDELINES

1. **Concerning conditions for submission of communications**

Those who intend to submit communications to the Human Rights Committee for consideration under the Optional Protocol to the International Covenant on Civil and Political Rights, should note the following conditions based on articles 1, 2, 3 and 5(2) of the Optional Protocol and the relevant rules of procedure of the Committee:

(a) **The communication must concern a violation of one or more of the rights set forth in the International Covenant on Civil and Political Rights;**

(b) as a rule the communication should be submitted either (i) by the victim himself, or (ii) his representative (i.e. someone assigned by the victim to act on his behalf);

however, the Committee may also accept to consider communications submitted by others when it appears that the victim is unable to do so himself or unable to assign someone to act on his behalf;

(c) the State against which the communication is directed must be a party to the Optional Protocol (see page 3);

(d) the communication should concern an individual or individuals subject to the jurisdiction of the State against which the communication is directed;

(e) the alleged violation of human rights must have occurred on or after the date of the entry into force of the Protocol for the State concerned (see page 3), unless the alleged violation - although occurring before that date - continues or has effects which themselves constitute a violation after that date;

(f) all available domestic remedies must have been exhausted, unless the application of the remedies is unreasonably prolonged;

(g) the communication cannot be considered by the Committee, if the same matter is being examined under another international procedure (e.g. the Inter-American Commission on Human Rights or the European Commission of Human Rights).

2. **Concerning contents of communications**

All communications should be addressed to the Human Rights Committee, c/o Division of Human Rights, United Nations Office at Geneva, Switzerland. They should clearly state the following :

(a) the name, address, age, occupation and nationality of the alleged victim or victims;

(aa) if the author is the alleged victim's representative he should state so clearly, explain in what capacity he is acting (e.g. as the victim's lawyer, a family member, a friend etc.) and give his own name, address and occupation;

(bb) if the author of the communication is neither the alleged victim nor his representative, he should clearly indicate why he is acting on behalf of the alleged victim, i.e. give detailed information on the grounds and circumstances justifying his acting on behalf of the alleged victim, in particular the author's reasons for believing that the victim is unable to submit a communication himself and the reasons for believing that the victim would approve the author's acting on his behalf;

(b) the name of the State party against which the communication is directed;

(c) a detailed description of the facts of the alleged violation or violations (including all relevant dates);

(d) the provision or provisions of the International Covenant on Civil and Political Rights allegedly violated;

(e) steps taken by the victim or on his behalf to exhaust domestic remedies (if possible, include copies of relevant judicial or administrative decisions);

(f) whether steps have been taken to have the same matter examined under another procedure of international investigation or settlement, and, if so, when and with what results.

MODEL COMMUNICATION

Communication to:

The Human Rights Committee
c/o Centre for Human Rights
United Nations Office
Geneva (Switzerland)

Date: ____________

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

I. INFORMATION CONCERNING THE AUTHOR OF THE COMMUNICATION:

Name .... First Name(s) ....

Nationality .... Profession ....

Date and place of birth ....

Present address ....

....

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

....

Submitting the communication as:

(a) victim of the violation or violations set forth below [ ] */

(b) representative of the alleged victim(s) [ ]

(c) other [ ]

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

....

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

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

....

....

....

....

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

....

....

....

....

....

*/ Mark the appropriate box or boxes

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

....

....

....

....

....

II. INFORMATION CONCERNING THE ALLEGED VICTIM(S) (if other than author) */

Name .... First Name(s) ....

Nationality .... Profession ....

Date and place of birth ....

Present address or whereabouts ....

....

Name .... First Name(s) ....

Nationality .... Profession ....

Date and place of birth ....

Present address or whereabouts ....

....

Name .... First Name(s) ....

Nationality .... Profession ....

Date and place of birth ....

Present address or whereabouts ....

....

Name .... First Name(s) ....

Nationality .... Profession ....

Date and place of birth ....

Present address or whereabouts ....

....

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

III. State concerned/Articles violated/Domestic remedies/Other international procedures

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

....

Articles of the International Covenant on Civil and Political Rights allegedly violated:

....

....

....

....

....

Steps taken by or on behalf of the alleged victim(s) to exhaust domestic remedies (recourse to the courts or other public authorities, when and with what results - if possible, enclose copies of all relevant judicial or administrative decisions)

....

....

....

....

....

....

....

If domestic remedies have not been exhausted, explain why: ....

....

....

....

....

....

....

....

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

....

....

....

....

....

IV. FACTS OF THE CLAIM

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

....

Author's signature: ____________

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

II. B규약의 이행보장구조

시민적 · 정치적 권리를 보호하기 위한 B규약은 그 이행을 담보하기 위하여 다음의 방법을 마련하고 있다. 첫째는 당사국에게 보고서를 제출케 하여 동당사국의 B규약 준수여부를 감독하는 것이다. 둘째는 규약의 인권이사회가 당사국이 규약을 위반한다는 다른 당사국의 제소를 받아 이를 해결하는 것이고 끝으로 규약상의 권리를 침해당한 개인에게 인권이사회에 개인청원을 하여 구제받을 수 있게 하는 것이다.

세번째 방식이 인권 및 기본적 자유의 보호방식에 있어서 가장 발달한 방식임은 물론이지만 앞의 두 방식 역시 운용여하에 따라 인권의 보호에 있어서 상당한 작용을 할 수 있다. 특히 둘째 셋째 방식은 선택규정화 되어 있으므로 첫번째 방식은 최소한의 이행보장조치로 이해된다.

규약은 그 이행을 확보하기 위한 기관으로 자체에 인권이사회를 설치하였다. 아래에서는 동위원회의 구성, 권한 등을 검토하고 위에 언급한 세가지 이행방법을 보기로 한다.

가. 인권이사회

B규약 제28조는 인권이사회(Human Rights Committee)의 설치를 규정한다. 인권이사회의 임무는 당사국이 B규약상 보호되는 권리의 준수 및 이행여부를 감시한다.

1. 사적 배경

1976년 3월 23일 B규약이 발효한 후 인권이사회 위원의 선출은 같은 해에 이루어졌고 1978년 최초의 이사회 회기가 있었다. 제37조 제3항에 의하면 이사회는 UN본부 또는 제네바 국제연합사무국에서 회합한다. 정부의 특별한 요청이 있는 경우 이사회는 기타의 지역에서도 회합할 수 있다.

2. 인권이사회의 구조

인권이사회는 엄격히 볼 때 UN의 기관으로서의 자격은 갖지 못한다. B규약의 당사국이 UN의 가입국과 일치하지 않기 때문이다. 그러나 위원회와 UN간에는 긴밀한 관계가 있다. 규약은 UN에 의하여 마련된 것이고 세계인권선언의 목적을 실현하기 위한 문서라는 점에서 UN과의 관련성은 긴밀하다. 인권이사회 조직은 UN사무총장과 연결되어 있다. 인권이사회는 국제연합총회에 그 활동에 관한 연례보고서를 제출할 의무가 있다.

인권이사회 위원은 B규약 당사국 국민으로서 "인격이 고결

하고 인권의 분야에서 인정된 능력을 갖춘 자"[1]중에서 선출된다. 각 당사국은 자국적을 갖는 2명의 후보까지 추천할 수 있으나[2] 이사회는 동일 국적의 위원이 둘 이상이 될 수 없다.[3] 위원의 구성에 있어서 국제사법재판소(ICJ)의 경우처럼 규약은 "지리적으로 형평하게 배분되며 또 다른 문명형태와 주요 법체계가 대표될 수 있도록" 이를 고려하도록 규정한다.[4]

인권이사회 위원은 본국의 외교적 대표가 아니고 "개인적 자격에서 활동하여야 한다"[5] 위원이 독립된 전문가로서 그 임무를 수행할 것을 바라는 규약의 입장은 "모든 위원은 임무를 수행하기 전에 그 임무를 공평하게, 양심에 따라서 수행할 것이라는 엄숙한 선언을 행하여야 한다"[6]고 하는 조항에서 분명히 드러난다. 그러나 일부 기간중 위원회의 위원중에 정부의 각료직을 보유한 경우가 있는데 이러한 경우 개인자격으로서 그 임무를 수행해야 하는 위원의 지위와 충돌가능성의 문제가 제기된다. 그밖에도 당사국이 추천하는 위원이 당해 정부와 긴밀한 관련을 갖는 경우도 그 활동의 공평성은 기대하기 어려울 수도 있다. 그러나 규약 자체는 부적절한 후보가 선출됐을

1) 제28조 제2항.
2) 제29조 제2항.
3) 제31조 제1항.
4) 제31조 제2항.
5) 제28조 제3항.
6) 제38조.

때 이를 다루는 절차는 규정하지 않는다.

총 18명으로 구성되는 위원은 4년의 임기로 선출되고 이중 최초 9인의 임기는 2년으로 하여 위원회는 인적인 연속성이 유지되도록 하는 구조를 갖고 있다. 실제에 있어서 위원회는 법학교수, 외교관, 판사 및 변호사 등으로 구성되고 있으며 1983년에 최초로 여자 위원이 등장하기도 하였다.

인권이사회 위원이 향유하는 특권 및 면제에 대하여 B규약은 "국제연합의 특권 및 면제에 관한 협약"(Convention on the Privileges and Immunities of thhe United Nations) 제22조 권리를 언급하고 있다.[7] 따라서 위원은 임무수행중 행한 행위나 발언 등에 관해 면책특권을 향유하고 그 서류 및 문서의 불가침성을 보장받는다. 이외에도 위원은 그 임무의 효과적인 수행을 위하여 필요한 직원과 편의를 UN사무총장으로부터 제공받고[8] 그 책임의 중요성을 고려하여 UN으로부터 보수를 받는다.[9]

3. 인권이사회의 기능

인권이사회의 기능은 규약에 정한 기능에 한정된다. UN에 의하여 창설된 인권위원회(Commission on Human Rights)와

7) 제43조.
8) 제36조.
9) 제35조.

는 달리 인권이사회는 인권영역에 있어서 활동이 제한된다.

규약에 의하여 당사국은 규약의 이행과 관련한 보고서를 제출하고 인권이사회는 이 보고서를 연구하고 "[이사회의] 보고와 적당하다고 생각되는 일반적 의견"을 당사국에 전달한다.[10]

인권이사회는 규약 제41조에 의하여 국가간 분쟁을 해결하고 또한 B규약 선택의정서에 의한 개인청원을 심리하는 권한을 갖는다.

4. 인권이사회의 의사결정과정

규약 제39조에 의하여 인권이사회는 뉴욕에서의 첫 회기때 자체의 잠정절차규칙(Provisional Rules of Procedure)을 작성하였다. 이 규칙은 두 차례 개정되었다.[11]

인권이사회의 결정은 12인의 위원을 정족수로 하고 출석위원의 과반수의 투표에 의하여 이루어진다.[12] 이러한 결정방식은 인권이사회의 절차규칙 제51조에서도 동일하게 규정되어 있으나 동조에 대한 주석에서 "인권이사회 위원들은 규약과 절차규칙이 준수되고 합의에 의한 결정의 시도가 이사회의 업무를 부당하게 지연하지 않는 한, 표결에 앞서 합의(consensus)에 의

10) 제40조 제4항.
11) 현재의 것은 UN Doc. CCPR/C/3/Rev. 1.
12) 제39조 제2항.

한 결정에 이르는 방식을 허용해야 할 것이라는 견해를 표명하였다". 이 주석은 이사회 자체의 결정은 아니고 위원들의 일반적 견해를 반영한 것이다. 따라서 공식적인 표결절차는 결코 차단되어 있지 않다. 그렇지만 표결을 최종적인 수단으로 의도했던 최초의 의도는 존중되었기 때문에 현재까지 어떤 공식적 표결행위는 없었다.[13]

인권이사회는 작업의 편의를 위하여 개인청원에 있어서는 5인으로 구성되는 작업반이 이사회에 의하여 채택될 견해의 문안을 작성하도록 하고 있다. 인권이사회는 당사국의 보고서를 심의하느냐 또는 개인청원을 심의하느냐에 따라 그 기능이 달라지지 않으므로 B규약 선택의정서의 운용에 있어서의 의사결정에 관한 해석은 당사국의 보고와 관련한 의사결정과정에도 그대로 적용될 수 있고 그 반대의 경우도 마찬가지라 할 수 있다.

나. 보고제도

1. 보고제도 일반

일반적으로 보고제도는 국가에 보고제출의 의무는 부과하

13) Christian Tomuschat, International Covenant on Civil and Political Rights, Human Rights Committee, in: R. Bernhardt (ed.), Encyclopedia of Public International Law, Instalment 8 (1985), p. 329참조.

나 위반사항에 대하여 이를 구제해야 한다는 의무는 부과하지 않으므로 국가의 행동을 잠재적으로 제한할 수 있는 수단으로서 보고제도(reporting system)는 가장 약한 이행방법이라 할 수 있다.[14] 보고제도가 이행방법에 있어서 약하다는 것은 보고를 심사하는 기관이 독립적인 사실조사능력이 없다는 점이다.

그럼에도 불구하고 인권준수여부에 관한 보고서를 접수·심사하는 몇몇 기관의 관행은 보고제도가 국가간 이의제기절차나 개인청원절차 이상으로 각국에 상당한 영향력을 미칠 수 있다는 점을 시사하고 있다. 이것은 국가간 이의제기절차나 개인청원절차에 있어서 조사기관의 권한이 거의 이용되지 않기도 하고 또한 무시된다는 측면이 반영되고 있다.

현재 A, B 규약 외에도 인권관련조약으로서 "모든 형태의 인종차별철폐에 관한 국제협약"(International Convention on the Elimination of All Forms of Racial Discrimination),[15] "어파트

14) 보고제도중 가장 발달한 ILO의 보고제도는 일반적 보고제도와는 질적으로 다르다.

15) 이 협약은 1963년 11월 20일 UN총회에서 결의 1904(XVIII)로 만장일치로 채택되었던 Declaration on the Elimination of All Forms of Racial Discrimination이 그 모태가 되었다. 협약은 1965년 12월 21일 UN총회 결의 2106(XX)으로 채택되었다. 협약 제9조에 의하면 당사국은 UN사무총장에게 협약규정의 이행을 위하여 채택한 입법적·사법적 및 행정적 조치 등에 관한 보고를 제출해야 하며, 협약에 의하여 설치된 인종차별철폐위원회(Committee on the Elimination of Racial Discrimination)는 이

헤이드범죄의 억제와 처벌에 관한 국제협약"(International Convention on the Suppression and Punishment of the Crime of Apartheid)[16]은 이행의 담보수단으로 보고제도를 규정하고 있다.

당사국의 조약 이행여부를 평가하는 수단으로서의 보고제도 자체는 인권보호를 증진시킴에 있어서 그 자체로는 효과적인 이행수단은 되지 못하나, 보고심리를 통하여 당사국의 이행여부를 공개적으로 비판·평가하게 됨으로써 인권보호를 증진시킬 수 있는 한 방법이 되고 있다.

2. 보고제도와 NGOs의 참여

앞에 언급한 인권관계조약에는 보고제도에 있어서 NGOs (non-governmental organizations, 비정부조직)[17]의 참여를 허용하는 규정이 없으나 NGOs는 당사국이 제출하는 보고에 대하여 조약상의 권한있는 기관이 심리를 하고 평가를 함에 있어서

를 심리하고 일반적 성격의 권고를 할 수 있다.

16) 1973년 11월 30일 UN총회 결의 3068(XXVIII)로 채택되었다. 협약은 UN인권위원회(Commission on Human Rights) 위원 3인으로 구성되는 "3인그룹"(Group of Three)의 심리를 위하여 당사국이 협약에 따라 채택된 입법적·사법적 및 행정적 조치 등에 관해 보고하도록 한다(제7조).

17) NGOs의 상세에 대하여는 본고 제1장 다. 6. "인권보호와 NGOs의 역할" 참조.

중요한 역할을 한다.

인종차별철폐협약의 인종차별철폐위원회나 B규약의 인권이사회는 당사국이 제출하는 보고서 심리기관으로서 독립적인 사실조사권한(independent fact-finding capacity)이 없기 때문에 NGOs가 제출하는 정보는 보고의 분석에 있어서 상당한 기여를 한다. NGOs의 관계 전문가들이 수집·작성한 정보는 당사국 제출의 보고가 미흡하거나 부정확한 경우에는 "대응 보고서"(counter-report)의 성격을 갖기도 한다.

B규약 인권이사회의 경우 이사회에서 처리하게 되는 방대한 자료로 인하여 이사회는 당사국에서 접수된 정보를 사전에 평가하기 위하여 NGOs의 참여를 환영하고 있다. NGOs가 가장 유용하게 관여하는 방법은 보고심사중에 있는 특정 국가의 사실상황과 법적상황을 상세히 취급하는 것이다. 물론 NGOs가 공식적으로 심의에 참석하는 것은 아니지만 심사를 하게되는 위원회의 준비작업에 상당한 영향을 주게된다.

실제 인권이사회의 보고심의에 있어서 위원들은 NGOs가 제공하는 정보에 의존하여 당사국이 제출한 보고서에 언급되지 않은 사실상황 및 법적 상황에 대하여 심도있는 질문을 하고 구체적인 답변을 요구하고 있다.

3. B규약의 보고절차

규약안 작성시에 보고제도는 그렇게 중요한 절차로 생각하

지 않았다. 그러나 국가간 분쟁해결절차가 선택규정으로 되면서 규약당사국의 보고와 이에 대한 인권이사회의 심사는 규약의 실시수단으로 매우 중요한 지위를 차지하게 되었다.

규약 제40조는 본규약이 관계당사국에 대하여 효력이 발생한 날로부터 1년 이내에 그후는 인권이사회의 요청이 있으면 보고를 제출하도록 되어 있다. 보고는 규약에 인정된 권리를 실현하기 위하여 취한 조치 및 이러한 권리의 향유를 위하여 이루어진 진전사항(progress)을 그 내용으로 하며[18] 규약의 실시에 영향을 미치는 요소나 장애가 있다면 이를 지적해야 한다.[19]

보고서는 UN사무총장을 경유하여 인권이사회에 그 심의(consideration)를 위하여 송부된다. 이 보고서는 관계당사국 대표가 출석한 가운데 인권이사회에 의하여 심의된다. 인권이사회는 초창기부터 인종차별철폐위원회 관행을 본받아 보고국가의 대표가 인권이사회에 참석하여 위원들의 질문에 답변하도록 하는 방식을 채택하였다. 답변은 즉석에서 할 수도 있고

18) 제40조 제1항.

19) 제40조 제2항. 인권이사회는 보고내용에는 당사국의 규약의 의무이행과 관련한 관계법률 뿐 아니라 실제의 관행, 법원의 판결, 규약에서 인정되는 권리의 향유와 실제 이행의 정도를 시사해주는 관련 사실 및 규약상의 의무이행에 있어서의 난관과 그 요소들까지 포함해야 한다는 견해를 밝히고 있다. CCPR/C/21/Rev.1, general comments 2 para. 3 참조.

차후의 추가보고서(supplementary report)를 통하여 해명할 수도 있다. 추가보고서의 검토시에는 최초보고서의 심의시에 사용되는 것과는 다른 방법이 이용된다. 이때에는 위원들이 토픽별로 질문을 하고 국가의 대표가 이에 답변을 하도록 함으로써 자연스럽게 특정 관심사항에 중점을 두게 된다. 여기서는 최초 심의시에 만족스런 답변을 얻지 못한 부분에 대해 재차 질문을 하고 답변을 듣기 때문에 일종의 교호심문(cross-examination)의 성격을 갖는다. 그리고 이러한 질문과 답변은 공개기록으로 남기 때문에 보고국가의 노력 여하가 극명하게 나타난다.

인권이사회의 심의에 있어서 위원들이 관계 당사국이 제공한 정보 이외의 정보를 이용할 수 있느냐의 문제는 많은 논란을 야기시켰다. 한 가지 확실한 정보원은 UN의 전문기관이다. 규약 제40조 제3항은 UN 사무총장은 인권이사회와 협의를 거쳐 "관계 전문기관에 그 권한의 범위에 속하는 보고부분의 사본을 송부할 수 있다"고 규정한다. 또한 잠정절차규칙[20]에도 전문기관과의 협력규정이 들어있다. 제8차 회기에서 인권이사회는 전문기관들이 관계조약문서 등의 운용에서 얻어진 정보는 정규적인 기초에서 위원들이 입수할 수 있도록 하고 그러한 정보는 회기중 위원들의 요청이 있을 때 입수할 수 있도록 해야 할 것이라 결정했다.[21]

20) UN Doc. CCPR/C/3/Rev. 1 (1979).

21) Report of the Human Rights Committee, 35 UN GAOR, Supp.

인권이사회가 보고서를 검토한 후에 이사회는 제40조 제4항에 따라 자신의 "보고"(reports)와 적당하다고 생각되는 "일반적 의견"(general comments)을 당사국에 전달한다. 이 조항의 해석은 양극화되었다. 즉 제40조 제4항은 이사회가 당사국이 제출한 각각의 보고서에 대해 보고서를 작성하라는 취지의 조항이라는 견해가 있다. 이 견해에 의하면 당사국이 보고서를 제출하는 의미는 동국이 규약에 인정된 권리의 실제 보장여부를 확인하기 위한 것이다. 이사회의 보고서는 제45조에 규정된 연례정기보고서(annual report)와 다르지 않다는 것이 그 반대의 견해이다. 이 해석에 의하면 이사회는 당사국의 규약준수여부를 평가·판단하도록 요구되지도 않으며 이것이 허용되지도 않는다는 것이다.[22]

한편 이사회가 제출할 수 있는 "일반적 의견"과 "권고"의 성격에 대한 해석도 상이하다. 즉 이사회는 그 성격이 일반적인 것이고 특정 사안과 관련되지 않는다면 특정 국가를 상대로 "의견"을 제시할 수 있다는 해석이 있는 반면, "일반적 의견"으로는 특정국가에 대해 권고할 수 없다는 해석이 있다.[23]

(No.40), UN Doc. A/35/40 (1980), note 8 at 94-95.

22) Dana D. Fischer, International Reporting Procedures, in Guide to International Human Rights Practice, ed., by Hurst Hannum (1984), p.171 참조.

23) UN Docs. CCPR/C/SR. 48, 49, 55, 73 (1978) 참조.

인권이사회의 제11차 정기회기에서 보고의 검토(study)에 대하여 중요한 합의가 있었다. 즉 국가를 특정하지 않은 "일반적 의견"의 채택이 가능하게 되었다.[24]

인권이사회는 검토절차의 만전을 기하기 위하여 1980년 10월 30일 제40조의 의무에 관한 성명서에서 추후의 정기보고서를 심사할 때는 보고국가의 대표와 회합하기 전에, "보고국가와의 논의에 유용할 것으로 보이는 사항을 확인하기 위하여" 3인으로 구성되는 실무작업반을 구성하기로 결정하였다.[25]

규약 제40조 제1항 b에 의거 이사회는 최초보고서가 심의된 날로부터 매 5년마다 정기보고서를 제출하도록 결정하였다. 그러나 이 결정은 이사회가 적절하다고 판단하는 경우에 언제라도 추가보고서의 제출을 요청할 수 있는 이사회의 권한에 영향을 미치지 않는다.[26] 정기보고서는 이사회의 질의에 대하여 과거에 답변하지 않은 사항이나 충분치 않았던 답변에 대한 추

24) 실제에 있어서 인권이사회의 일반적 의견(general comments)은 규약의 실체규정의 준수와 관련한 사항에 대하여 국가를 특정하지 않고 규약의 목적에 적합하게 운용하도록 권고하는 내용을 담고 있으며 규약의 해석에 관한 의견도 포함되고 있어 규약의 통일적 해석·적용에 있어서 상당한 지침으로서의 역할을 한다.

25) C. Tomuschat, *op.cit.*, p.330.

26) Report of the Human Rights Committee, 36 UN GAOR, Supp. (No.40) Annex IV, UN Doc. A/36/40 (1981).

가적인 정보를 포함하여 특히 이사회가 의문을 가졌던 문제라든가, 규약과 관련된 국내법 및 관행의 변화, 규약의 시행에 영향을 미치는 요소와 난점 등을 지적하는 것이어야 한다.[27]

인권이사회는 각국의 최초보고서와 추가보고서를 검토한 경험을 바탕으로 당사국의 규약이행의 지원에 필요하다고 생각하는 "일반적 의견"을 작성했다. 최초로 나온 의견은 당사국의 보고관행의 절차적 측면을 지적하는 것이었다. 예컨대 제40조 제1항에 규정된 시한내의 보고서 제출, 이사회 가이드라인에 따른 보고서의 완벽성, 규약의 이행에 영향을 미치는 요소와 난점에 대한 지적, 개인이 규약에 규정된 권리를 알 수 있도록 하는 방법 및 당사국의 행정·사법기관이 규약상의 국가의 의무를 잘 인식할 수 있도록 하는 방법 등에 관한 것이었다.[28]

보고제도는 규약의 이행방식으로서 부과되는 가장 약한 방법임에도 불구하고 그 실시에 관해 여전히 해석의 차이가 존재한다. 이러한 보고제도의 약점을 극복하는 방법으로 A.H. Robertson은 다음의 다섯 가지를 들고 있다. 첫째 각국정부의 협력이 절대적으로 필요하며, 둘째 정부 이외의 다른 책임있는 권원으로부터 더욱 깊은 정보를 얻는 방법이 강구되어야 하고, 셋째 인권이사회 위원의 완전한 독립성이 실현되어야 하고, 넷

27) *Ibid.*, at Annex V.

28) *Ibid.*, at Annex VII.

째 인권이사회가 관계국가에 대하여 일반적 의견이 아닌 적당한 권고를 할 수 있는 권한이 있어야 하며, 다섯째 보고국가의 법과 실제에 있어서 변화가 있어야 한다.[29]

이러한 개선이 필요하기는 하지만, 현재의 체제에서 보고제도의 일부 약점을 커버할 수 있는 방법도 있다. 즉 규약 제45조는 "인권이사회는 그 활동에 관한 연례보고를 ECOSOC을 통하여 UN총회에 제출하여야 한다"고 규정하고 있다. 따라서 이 조항을 활용함으로써 보고제도의 약점을 일부 보완할 수 있을 것이다.

다. 국가통보제도(inter-state communication)

다른 조약과 마찬가지로 B규약도 당사국간에 권리와 의무가 발생하는 조약이다. B규약은 그 이행을 담보하기 위한 기관으로 인권이사회를 두었고 이사회는 다른 당사국의 규약 위반사실을 문제삼는 당사국의 이의신청을 접수하고 이를 심리(consideration)하는 권한을 갖는다.[30]

29) A.H. Robertson, The Implementation System: International Measures, The International Bill of Rights (New York: Columbia Univ. Press, 1981) ed by Louis Henkin. pp. 343-351.

30) 일반 국제법원칙에 의하면 국가는 자신이 직접적 피해자이거나 그렇지 않으면 자국민이 입은 손해를 국가 자신의 손해로 간주하여 그 침해국을 상대로 국제청구를 제기할 수 있을 뿐이다.

규약은 국가통보제도의 실시를 3단계로 나눈다. 제41조 및 제42조에 의하면 당사국간 규약위반 사실에 대한 분쟁은 먼저 관계당사국간의 양자협상에 의하여 해결하도록 하고, 둘째 이것이 실패할 경우 당사국이 인권이사회에 부탁하면 인권이사회는 사실을 확정하며 우호적인 해결을 위하여 주선(good offices)을 하고, 셋째 주선이 실패할 경우 인권이사회는 특별조정위원회를 구성하여 조정을 행하도록 하고 있다.

규약의 국가통보제도는 규약을 비준한 모든 당사국에게 적용되지 않는다. 규약은 국가통보제도를 선택규정(optional provision)으로 만들었다. 규약 제41조 제1항 전단에서 "이 규약의 당사국은 다른 당사국이 이 규약상의 의무를 시행하지 않는다고 주장하는 다른 당사국의 통고를 접수하고 심리하는 인권이사회의 권한을 승인할 것을 이 조에 의하여 어느 때라도 선언할 수 있다"고 규정되어 있다. 보고제도에 비하여 한 차원 높은 규약의 실시수단인 국가통보제도가 적용되기 위하여는 원고국 및 응소국 모두 제41조 제1항에 의한 인권이사회권한수락선언을 한 국가여야 한다.[31]

따라서 규약이 다른 당사국이 규약규정을 준수하지 않는 행위를 공적으로 문제삼을 수 있도록 하는 제도는 국제법에 있어서 진전이라 할 수 있을 것이다.

31) 유럽인권협약은 B규약의 국가통보제도에 비하여 진일보한 국가제소제도(inter-state application)를 의무규정으로 두고 있다. 즉 어느 당사국도 다른 당사국의 협약위반문제를 유럽인권위원회

1. 당사국간 해결

제41조 제1항 a에 의하면 규약의 당사국은 다른 당사국이 규약의 규정을 이행하지 않는다고 생각될 때는 문서에 의한 통보(written communication)에 의하여 그 당사국의 주의(attention)를 환기할 수 있다.

통보를 접수한 국가는 이를 접수한 후 3월 이내에 문제를 명확하게 하는 설명서(explanation) 또는 성명서(statement)를 통보를 보낸 국가에 송부하여야 한다. 이러한 서류는 가능하고 적당한 범위에서 문제에 대하여 이미 조치하였거나, 현재 조치중에 있거나 또는 이용가능한 국내적 절차와 구제수단을 포함하여야 한다.

규약이 국가통보를 특별한 형식에 구애됨이 없이 그리고 인권이사회가 개입하지 않고 당사국간에 우선적으로 해결하도록 한 것은 국제법상 가장 전통적인 분쟁해결방식인 교섭(negotiation)을 염두에 둔 것이다. 교섭은 분쟁해결의 일방식으로 당사국간에 제3자의 도움없이 접촉하는 것이다. 규약은 문서에 의하여 규약위반사실을 통보하고 통보를 받은 국가도 문서로서 그 주장사실에 대해 설명을 하도록 하는 형식적인 요건만 규정할 뿐 전통적인 의미의 외교적인 "교섭"과 별다를 것이 없다. 제3자가 바로 개입하는 방식을 지양한 것은 인권문제를 우선 전통적인 국제법의 틀 속에서 해결하려 하는 보수적

에 회부시킬 수 있다(제24조).

입장을 반영한 것으로 볼 수 있다.

2. 인권이사회의 주선(good offices)

제41조 제1항 b에 의하면 통보를 접수한 국가가 최초의 통보를 접수한 후 6월 이내에 그 문제가 관계당사국간에 만족하도록 조정되지 못할 때에는 어떠한 국가도 위원회와 상대국에 통고하여 이 문제를 인권이사회에 부탁할 권리를 갖는다.

인권이사회에 부탁된 문제는 곧바로 심리되지 않는다. 인권이사회는 "국제법상 일반적으로 승인된 원칙에 따라서"(in conformity with the generally recognized principles of international law) 이 문제에 대하여 "일체의 이용가능한 국내적 구제수단"(all available domestic remedies)이 원용되고 완료(invoked and exhausted)된 것을 확인한 후에 이 문제를 심리한다.[32]

규약은 관습국제법상 확립된 국제법원칙인 국내적구제완료원칙을 명문화하여 규약위반으로 인한 인권침해가 문제가 되고 있는 나라에서 그 침해를 구제할 수 있는 방법이 있고 그러한 구제가 가능하다면 그러한 구제를 이용하도록 하는 것이다.

32) 제41조 제1항 c. 후단에서는 이 [국내적 구제완료] 원칙은 구제수단의 적용이 부당하게 지연될 때는 적용되지 않는다고 하여 전통적인 국제법원칙인 "국내적구제완료원칙"의 예외도 함께 규정하고 있다.

구제의 방법이 없다는 것이 확인된 후에야 인권이사회가 이 문제를 다룬다는 것이다.

인권이사회가 국가통보를 심의하는 경우 관계당사국에 서면 또는 구두의 정보와 의견을 요구하고[33] 관계당사국은 각 대표를 출석시켜 서면 또는 구두로 의견을 제출한다. 이 단계에서 관계 당사국(통보를 접수한 국가)은 "통보의 허용성(admissibility)" 문제를 제기할 수 있다. 즉 위원회의 통보심사는 전술한 국내적구제완료원칙에 따라 문제된 사안이 일체의 국내적 구제를 완료한 것을 전제로 이루어질 수 있기 때문이다. 물론 관계당사국이 통보의 허용성 문제를 제기하지 않은 경우에는 국내적구제완료원칙의 적용을 포기한 것으로 간주할 수 있다.

그 이후 인권이사회는 통보를 접수한 날로부터 12월 이내에 인권존중의 기초에서 사건의 우호적 해결(friendly solution)을 위하여 주선(good offices)[34]을 하게 되는데[35] 이것이 달성

33) 제41조 제1항 f. 절차규칙 제77조의 B.
34) 주선은 분쟁의 평화적 해결을 위하여 제3자가 분쟁당사국간의 교섭에 편의를 제공하는 것이다. 그러므로 사무적인 편의의 제공을 넘어서 직접 분쟁당사국간의 교섭에 참여하거나 해결책을 제시하지는 못한다. 일반적으로 주선은 분쟁당사국의 동의를 얻어서만 이루어지나 B규약에 있어서 인권이사회의 주선은 일방당사국의 요청으로 가능하다. 이것은 통고를 수리한 국가가 인권이사회권한수락선언을 이미 행했기에 별도의 동의가 필요없다.

되지 않을 경우 이사회는 사실의 간단한 기술만을 포함한 보고서(a report which is to be confined to a brief statement of the facts) 및 관계당사국의 의견기록을, 사건이 우호적으로 해결된 경우에 이사회는 도달한 해결의 간단한 기술만을 포함하는 보고서를 통보를 접수한 날로 부터 12월 이내에 관계당사국에 제출해야 한다.[36]

따라서 국가통보에 있어서 이사회의 기능은 실질적으로 사실을 확정하고 주선을 하며 이것이 수락될 경우 이를 실행하는 것이다.

3. 특별조정위원회의 조정(conciliation)

제41조에 따라서 인권이사회에 부탁된 문제가 만족스럽게 해결되지 못한 경우 인권이사회는 관계당사국의 사전의 동의(prior consent)를 얻어 "특별조정위원회"(ad hoc Conciliation Commission)를 설치할 수 있다. 특별조정위원회는 규약의 존중을 기초로 하여 문제의 우의적 해결(amicable solution)을 위하여 당사국에 대하여 조정을 행한다.[37]

35) 제41조 제1항 e.
36) 제41조 제1항 h.
37) 제42조 제1항 a.

특별조정위원회는 당사국이 동의하는 5인의 위원으로 구성된다. 당사국이 위원의 전부 또는 일부에 관하여 3월 이내에 합의에 도달하지 못한 경우에는 합의를 얻을 수 없었던 위원은 인권이사회의 위원중에서 비밀투표에 의하여 3분의 2의 다수결로서 선출된다.[38]

특별조정위원회의 위원은 개인의 자격(personal capacity)으로 그 임무를 수행한다. 그 위원은 분쟁관련 당사국의 국민이거나, 규약당사국이 아닌 국가의 국민이거나 또는 제41조에 의한 선언을 행하지 않은 국가의 국민이어서는 안된다.[39] 위원은 UN의 특권 및 면제에 관한 조약의 관계규정에 따라서 UN을 위한 임무에 관한 전문가의 편의, 특권 및 면제를 향유할 권리를 갖는다.[40]

특별조정위원회는 그 의장을 선출하고 독자적인 절차규칙을 채택한다.[41] 특별조정위원회는 인권이사회가 입수하고 정리한 정보를 이용할 수 있고, 관계당사국에 다른 모든 관련정보의 제공을 요구할 수 있다.[42]

특별조정위원회는 문제를 충분히 심의한 경우에는 당해 문제를 수리한 날로부터 12월 이내에 인권이사회 위원장에게 보

38) 제42조 제1항 b.
39) 제42조 제2항.
40) 제43조.
41) 제42조 제3항.
42) 제42조 제6항.

고서를 제출해야 한다. 위원장은 이 보고서를 관계당사국에 송부한다.

심의사안에 대하여 특별조정위원회가 인권이사회 위원장에게 제출하게 되는 보고는 다음 세 종류로 구분된다.

첫째, 특별조정위원회가 12월 이내에 문제의 심의를 종료할 수 없는 경우에는 심의현황의 간단한 설명에 국한한 보고를 제출한다.[43]

둘째, 규약에 인정된 인권존중을 기초로 하여 문제의 우호적인 해결에 도달한 경우에는, 특별조정위원회는 사실 및 도달한 해결의 간단한 설명에 국한한 보고를 제출한다.

셋째, 우호적 해결에 도달하지 못한 경우에는, 특별조정위원회는 관계당사국간에 쟁점이 되고 있는 모든 사실문제에 대한 인정(findings) 및 문제의 우호적 해결의 가능성에 관한 의견(views)을 제시하는 보고를 제출한다. 이 경우 관계당사국은 보고를 접수한 날로부터 3월 이내에 인권이사회 위원장에 대하여 특별조정위원회의 보고내용의 수락여부를 통고한다. 관계당사국이 이를 수락하지 않는다면 인권규약내의 해결절차는 일체 종결된다.

43) 제42조 제7항.

4. 다른 분쟁해결절차

규약은 다른 국제협정에 의한 분쟁해결절차의 이용가능성도 열어 두고 있다. 즉 제44조는 "규약의 실시에 관한 규정의 적용은 UN과 그 전문기관의 설립문서와 조약에 기하여 인권분야에 규정된 절차의 적용을 방해하는 것이 아니며, 또 이 규정은 규약의 당사국이 당해 당사국에 효력을 갖는 일반적인 또는 특별한 국제협정에 따라서 분쟁의 해결을 위하여 다른 절차를 이용할 것을 방해하는 것은 아니다"고 규정한다.[44]

이 규정의 취지는 인권규약의 적용·해석에서 발생하는 분쟁이 다른 국제절차에 의하여도 해결될 수 있도록 하여 당사국간에 분쟁해결수단의 선택의 폭을 넓힘으로써 분쟁해결 가능성을 제고시키기 위한 것이다. 이 규정은 인권문제의 규약구조내에서의 처리의 한계를 스스로 인정하는 한편, 인권분야에 있어서 세계적 합의의 현상황을 보여주고 있다.

라. 개인청원제도(individual petition)

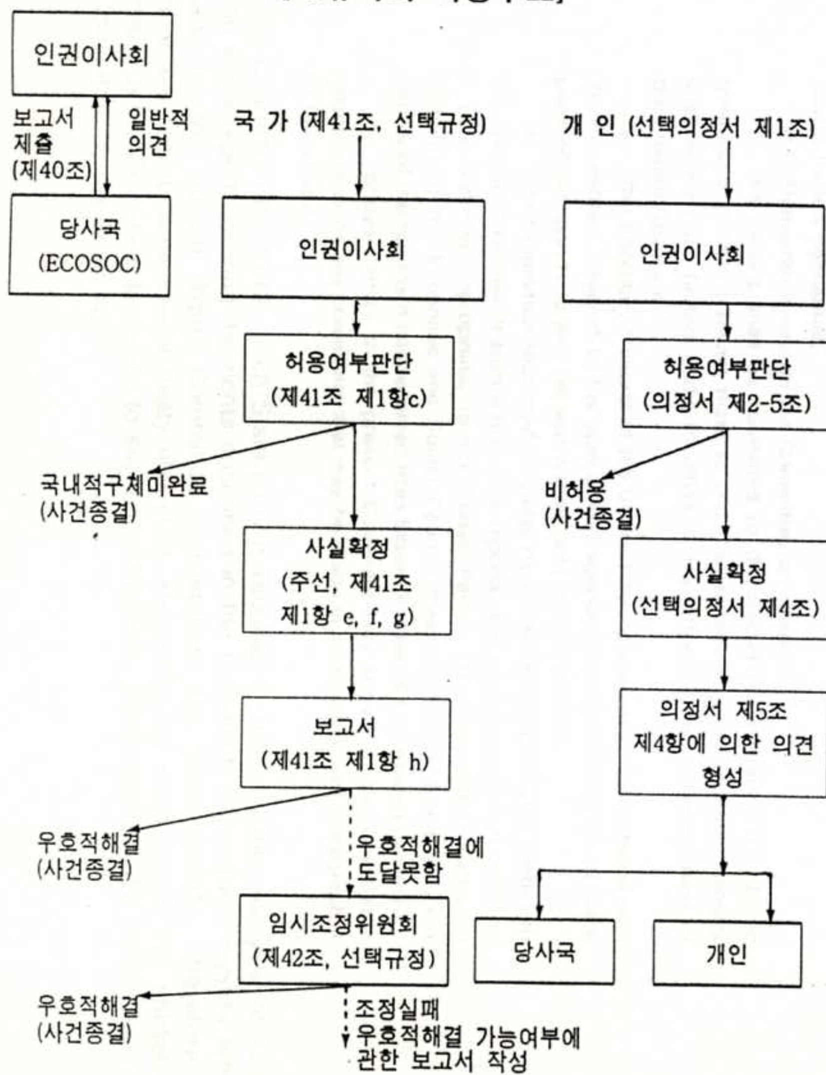
인권의 국제적보호체계의 효율성의 진정한 테스트는 개인의 권리가 침해당했을 때 국제적 구제의 보호수단이 제공되느냐 하는 것이다.[45] 전통국제법은 국가사이의 관계를 규율하며 개인은 국제법상 어떠한 지위도 차지하지 못한다. 국제법의 관심은 그 국민이 속하는 국가에 의한 보호에 국한되었으며 개인은 국제법정에서 소송적격(*locus standi*)을 갖지 못한다. 그러나 20세기 후반기에 접어들면서 이러한 전통적 태도도 변화를 맞고 있다.

UN인권위원회의 B규약의 초안작성과정에서도 전통적인 견해가 우세하여 인권이사회에 대한 개인의 청원권은 부인됐었다.[46] 그러나 후에 개인청원권을 인정하는 방향으로 나갔고 다만 이것을 규약 자체에서 선택규정으로 만들 것인지 그렇지 않으면 분리된 의정서 형식으로 할 것인지를 논의했는 바 현재처럼 선택의정서에서 규정하게 되었다.[47]

규약의 당사국으로서 선택의정서의 당사국으로 된 국가는 "그 관할하에 있는 개인의 규약에 정한 어떠한 권리가 그 당사국에 의하여 침해되었다고 주장하는 통보를 위원회가 수리하고 심의할 권한을 갖는 것을 인정한다". 이에 따라서 선택의정서에 가입한 국가를 상대로 동국에 의하여 규약상 권리를 침해당한 개인은 인권이사회에 개인청원을 하여 이를 구제받을 수 있다.[48)]

44) 이와는 달리 유럽인권협약은 다른 분쟁해결방식에 의한 해결을 일체 인정하지 않는다. 동협약 제62조에 의하면 당사국은 협약의 해석 또는 적용에서 생기는 분쟁에 대하여 당사국간에 효력을 갖는 조약 등을 이용할 수 없다.

45) A. H. Robertson, *op.cit.*, p.357.
46) UN Doc. E/CN. 4/SR. 178, at 3-4.
47) UN Doc. A/6546, para. 485.
48) 개인청원에 관한 상세한 논의는 본고 III 장 참조.



THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

By Fausto Pocar

The International Covenant on Civil and Political Rights (hereinafter, the "Covenant", or "ICCPR") was adopted by the General Assembly of the United Nations with resolution 2200 A (XXI) of 16 December 1966. It entered into force on 23 March 1976, in accordance with article 49. As of October 1990, the Covenant had been ratified or acceded to by 92 States.

A. THE REPORTING PROCESS

(a) The Covenant and its reporting requirements

Under article 2(1) of the Covenant, each State party undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized, and specifically listed and dealt with, in Part III of the Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status. The Covenant itself addresses the implementation of this fundamental international treaty obligation of States parties in the subsequent paragraphs of article 2. It points out that each State party has to take the necessary steps, in accordance with its constitutional processes and the provisions of the Covenant, to adopt legislative and other measures required to give effect to the rights recognized in the Covenant. Such measures shall in any case include effective remedies for victims of violations of their rights and freedoms, possibly in a judicial form and enforceable by competent authorities when granted.

In connection with this provision, and parallel to it, the Covenant requires States parties to submit reports on the measures adopted by them on the progress made in the enjoyment of the rights defined in the Covenant, and on any factors and difficulties that may affect the implementation of the Covenant. This obligation is set forth in article 40, which also describes the main characteristics of the monitoring system based on reporting.

-Text of article 40

> **1. The States Parties to the present Covenant undertake to submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights:**
>
> **(a) Within one year of the entry into force of the present Covenant for the States Parties concerned;**
>
> **(b) Thereafter whenever the Committee so requests.**
>
> **2. All reports shall be submitted to the Secretary-General of the United Nations, who shall transmit them to the Committee for consideration. Reports shall indicate the factors and difficulties, if any, affecting the implementation of the present Covenant.**
>
> **3. The Secretary-General of the United Nations may, after consultation with the Committee, transmit to the specialized agencies concerned copies of such parts of the reports as may fall within their field of competence.**
>
> **4. The Committee shall study the reports submitted by the States Parties to the present Covenant. It shall transmit its reports, and such general comments as it may consider appropriate, to the States Parties. The Committee may also transmit to the Economic and Social Council these comments along with the copies of the reports it has received from States Parties to the present Covenant.**
>
> **5. States Parties to the present Covenant may submit to the Committee observations on any comments that may be made in accordance with paragraph 4 of this article.**

According to article 40(1) to (3), each State party is required to submit within one year of its entry into force an initial report covering the rights enshrined in the Covenant. Subsequent reports are due upon request by the Human Rights Committee (hereinafter, the "Committee"). Therefore, the submission of any report constitutes a treaty obligation. Regarding the initial report, this obligation is explicitly stated in the Covenant; in regard to subsequent reports, it derives from the powers conferred upon the Committee by the Covenant.

In exercising its powers, the Committee has decided in principle to establish a specific periodicity for the submission of States reports. Based on a decision adopted by the Committee in 1981 and amended in 1982 (United Nations document CCPR/C/19/Rev.1), States parties which have submitted their initial reports before July 1981 are requested to submit subsequent reports every five years after the consideration of their initial reports. Other States parties are required to submit subsequent reports to the Committee every five years from the date when the initial report was due. This decision is without prejudice to the power of the Committee to request a subsequent report whenever it deems appropriate. The date for the submission of a State party's next periodic report may be deferred in cases where a State party, following the examination of its report and at the request of the Committee, submits additional information, and provided that such additional information is considered at a meeting with representatives of the reporting State.

As to the substance of the reporting obligation undertaken by States parties, article 40 gives only general indications. It refers to measures adopted to give effect to the protected rights, to progress made in their enjoyment, and to any factors or difficulties affecting the implementation of the Covenant.

(b) Guidelines for reporting under the Covenant

The Committee has prepared general guidelines regarding the form and contents of reports. These guidelines are intended to provide guidance to States parties in their reporting activities and to avoid general and incomplete presentations. They are further designed to ensure that reports are presented in a uniform manner and that they offer a complete picture of the situation in each State regarding the implementation of the rights contained in the Covenant. This formal structure provides a uniform character to the reports, and enables the Committee to perform its supervisory duties in its consideration of reports, and at the same time offers an opportunity to other States parties fully to appreciate how the obligations under the Covenant are carried out by each State party.

The Committee has issued separate general guidelines for initial and for subsequent reports. They follow the same structural pattern, but differ to a certain extent in the emphasis they place on reporting under the individual provisions of the Covenant.

According to a decision taken by the Committee in 1977 (document CCPR/C/5), the initial report should observe the following guidelines.

-Text of the general guidelines for initial reports

Part one: general. This part should describe briefly the general legal framework within which civil and political rights are protected in the reporting State. In particular it should indicate:

(i) Whether any of the rights referred to in the Covenant are protected either in the Constitution or by a separate "Bill of Rights", and if so, what provisions are made in the Constitution or in the Bill of Rights for derogations and in what circumstances;

(ii) Whether the provisions of the Covenant can be invoked before and directly enforced by the courts, other tribunals or administrative authorities or whether they have to be transformed into internal laws or administrative regulations to be enforced by the authorities concerned;

(iii) What judicial, administrative or other competent authorities have jurisdiction affecting human rights;

(iv) What remedies are available to an individual who claims that any of his rights have been violated;

(v) What other measures have been taken to ensure the implementation of the provisions of the Covenant.

Part two: information in relation to each of the articles in parts I, II and III of the Covenant. This part should describe in relation to the provisions of each article:

(i) The legislative, administrative or other measures in force in regard to each right;

(ii) Any restrictions or limitations even of a temporary nature imposed by law or practice or any other manner on the enjoyment of the right;

(iii) Any other factors or difficulties affecting the enjoyment of the right by persons within the jurisdiction of the State;

(iv) Any other information on the progress made in the enjoyment of the right.

The report should be accompanied by copies of the principal legislative and other texts referred to in the report. These will be made available to members of the Committee. It should be noted, however, that, for reasons of expense, they will not normally be reproduced for general distribution with the report except to the extent that the reporting State specifically so requests. It is desirable therefore that, when a text is not actually quoted in or annexed to the report itself, the report should contain sufficient information to be understood without reference to it.

States reports should always follow the format recommended by the Committee.

The first part should be of a general nature and provide background information on the context within which civil and political rights are ensured in the reporting State. To this end, the status of the Covenant in the domestic legal order needs to be clarified. The Committee seeks information on how the Covenant becomes part of the national legislation, namely either by means of corresponding provisions in the Constitution or a separate Bill of Rights and in internal laws, or through its direct applicability, granting rights to individuals that can be invoked directly before and enforced by State courts and other authorities. Moreover, specific information should be provided on the remedies available in domestic law to individuals claiming a violation of their rights as contained in the Covenant. Finally, this part of the report should describe any other step taken by the State's authorities to implement the Covenant and the role of national institutions in supervising and implementing the protected rights. (Part one of the guidelines is now common to the reporting guidelines prepared for all United Nations human rights treaty bodies. For the text of the consolidated guidelines for the initial part of the reports of States parties see the annex at the end of part one of the Manual.)

The second part of the report should then be devoted, on an article-by-article basis, to the description of measures taken to realize each specific right set forth in the Covenant. In this respect, a detailed description should be made of any restrictions affecting the enjoyment of each protected right, as well as any other difficulty encountered by the State in implementing them. In order to get a complete and comprehensive picture of the actual level of implementation reached by the State party, the information provided to the Committee should refer not only to measures adopted in the legislative field, but also to the judicial and administrative practice, and even, as the case may be, to activities of bodies other than State organs, as far as they are relevant to the enjoyment of any specific right. Since the State party is under an obligation both to respect and to ensure the rights under the Covenant, negative as well as positive measures taken by the authorities are relevant, and, as far as applicable, should be dealt with under each article. For the Committee, it is important to obtain a clear understanding of the legal and the *de facto* situation in the reporting State.

The Committee recently also decided to adopt certain measures to follow up on its views on communications under the Optional Protocol to the Covenant. At its thirty-ninth session in 1990, the Committee amended its guidelines for the submission of initial and periodic reports by adding a new paragraph, which reads as follows:

"When a State party to the Covenant is also a party to the Optional Protocol, and if in the period under review in the Report the Committee has issued Views finding that the State party has violated provisions of the Covenant, the Report should include a section explaining what action has been taken relating to the communication concerned. In particular, the State party should indicate what remedy it has afforded the author of the communication whose rights the Committee found to have been violated."

Accordingly, States parties to whom the provision of this new paragraph of the guidelines applies, are expected to include the appropriate information in their reports to the Committee.

For details on periodic reporting, see section C) below.

The Committee has adopted a number of **general comments** in accordance with article 40(4) of the Covenant. These general comments reflect the experience gained by the Committee in the consideration of reports. At the same time, they are intended to assist States parties in fulfilling their reporting obligations. Therefore, States parties should pay particular attention to these general comments when preparing reports. (For more details on general comments, see below.)