LEGAL AID BEFORE HUMAN RIGHTS TREATY MONITORING BODIES

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I. INTRODUCTION

THE right of individuals to have recourse to international human rights bodies has been regarded as one of the most significant developments in securing respect for and the promotion of universal fundamental rights and freedoms.[1] First, it ensures that individuals subjected to human rights violations have an alternative forum should the domestic judicial forums not be persuaded of the existence of rights violations, for whatever reason. Secondly, the availability of an individual's right of recourse affirms the fact that the individual is an actor cognisable by international law, and is not dependent on the intervention of other States for the safeguarding of his or her rights.[2] This is particularly important, as many States are slow to engage complaint mechanisms against another State for fear of reprisal (be it in the form of economic or political sanctions, or the instigation of a complaint under the same mechanism by the other state),

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1. See M. E. Tardu, "Conclusions: Petition Systems and the Future Shock", in M. E. Tardu, *Human Rights: The International Petition Systems* (part issued May 1979), p.1. The absence of an individual complaint mechanism has been for many years a major deficiency in the implementation of the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW"): see e.g. S. Cartwright, "Rights and Remedies: The Drafting of an Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women" (1998) 9 *Otago L Rev* 239.

2. See A. Cassese, *International Law in a Divided World* (1986), pp.99–103 and P. van Dijk & G. J. H. van Hoof, *Theory and Practice of the European Convention on Human Rights* (2nd edn, 1990), p.38. The complainant is, of course, dependent on State acceptance of the communication jurisdiction.

lack of interest, or otherwise.[3] Thirdly, the existence of such *fora*, and the right of individual complaint from a variety of countries, are useful in developing a common universal standard of human rights observance.[4] The combined result of these is that implementation of the goals set out in the international human rights instruments is facilitated because the means for their enforcement are not dependent upon international politics but rather are put in the hands of the rights holders. In turn, such machinery should improve State compliance.[5]

However, like all tribunals, an individual's recourse to an international human rights body can often amount to no more than a paper right due to one significant hindrance—money, or rather the lack of it. In this article I consider the extent to which the international mechanisms deal with this practical matter,[6] and in particular consider issues related to legal aid for

3. Inter-State complaints have made up a tiny percentage of the work of the European Convention organs. No inter-State complaints have been submitted under the International Covenant. By 1994 the African Commission on Human and Peoples' Rights had received over 140 individual complaints but not one inter-State complaint: H. B. Salem, "The African System for the Protection of Human and Peoples' Rights" (1994) 8:3 Interights Bulletin 55, at p. 57. As Avery, "The Human Rights Committee after Six Years" cited by T. Opsahl, "The Human Rights Committee", in P. Alston (Ed.) *The United Nations and Human Rights: A Critical Appraisal* (1992) at p.420 states: "There is something almost naive about a system that assumes that a government will gratuitously come to the help of foreigners at the risk of compromising its relationships with other States." For similar comments see also Cassese, *op cit., supra* n.2, p.304, van Dijk & van Hoof, *op cit., supra* n.2, p.36, J. P. Humphrey, "The International Law on Human Rights in the Middle Twentieth Century", in M. Bos (Ed.), *The Present State of International Law and Other Essays* (1973), p.86, T. Meron, *Human Rights Law-Making in the United Nations* (1986), pp.81–82, M. Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (Kehl-am-Rhein: N. P. Engel, 1993), pp.584–585.

4. A. Drzemczewski, *European Human Rights Convention in Domestic Law: A Comparative Survey* (1983), p.10 and N. Singh, *Enforcement of Human Rights in Peace and War and the Future of Humanity* (1986), p.53.

5. Speaking of the individual petition under the European Convention, Singh, *op cit., supra* n.4, p.48 observes that "Without this right the Convention would lose most of its efficacy", while M. Bossuyt, "International Human Rights Systems: Strengths and Weaknesses", in K. E. Mahoney and P. Mahoney (Eds), *Human Rights in the Twenty-First Century: A Global Challenge* (1993) (hereafter Bossuyt Strengths and Weaknesses), p.49 states that the individual petition system is "the cornerstone of any efficient system of international protection of human rights".

6. The issue has not attracted significant academic interest. Even the majesterial project on access to justice under the general editorship of Professor Mauro Cappelletti *Access to Justice* (1978) does not appear to cover it. For a detailed study of the legal aid scheme operated by the European Court of Justice, see T. Kennedy, "Paying the Piper: Legal Aid in Proceedings before the Court of Justice" (1988) 25 C.M.L.R. 559.

proceedings under the European Convention and International Covenant systems.[7] Issues considered are: What efforts are made by international organisations to facilitate access to international human rights bodies through the provision of legal aid? Do domestic legal aid schemes facilitate such access? What, if any, obligations do the international human rights treaties themselves create in relation to the provision of free legal aid for proceedings before international bodies? Finally, consideration is given to the implications which the provision of legal aid would have for the international tribunals and for the integration of international and domestic human rights norms and systems.

II. LEGAL AID BEFORE THE STRASBOURG COURT AND THE HRC: CURRENT PRACTICE

A. European Convention[8]

1. The system

As readers will be well aware, the European Convention system has just completed a transitional phase, since the entry into force of Protocol Number 11 on 1 November 1998.

7. A number of other human rights instruments provide a jurisdiction under which individuals may submit complaints of rights violations against states parties which have accepted that jurisdiction. For example, the Inter-American Convention on Human Rights (1969, entered into force 1978) provides such a complaint mechanism to the Inter-American Commission of Human Rights and the Inter-American Court of Human Rights (see Arts.44 and 62). The African Charter on Human and Peoples' Rights (1981, entered into force 1986) contemplates the possibility of an individual complaint mechanism to the African Commission on Human and Peoples' Rights (see Arts.55 *et seq.*). Under Art.14 of the Convention on the Elimination of All Forms of Racial Discrimination, the eponymous Committee (CERD) and under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Committee against Torture (CAT) may accept complaints from individuals where a state party has accepted the Committee(s)'s jurisdiction in such matters. The Convention on the Elimination of All Forms of Discrimination Against Women does not provide for an individual complaint procedure, although an Optional Protocol which would allow for the right of private petition was opened for signature on 10 December 1999: see generally A. Byrnes, "Slow and Steady Wins the Race? The Development of an Optional Protocol to the Women's Convention" (1997) 91 Proceedings A.S.I.L. 383 and Cartwright *supra* n.1.

Apparently, there are no provisions for legal aid in the inter-American system. Arrangements for legal aid, if any, are left to the members states of the OAS or states parties to the IACHR. Significantly, much of the work done for complainants from the United States of America has been undertaken by lawyers working for non-governmental organisations or by private lawyers working *pro bono*. In many of the poorer member states, individuals and groups pursue claims without the input of a lawyer. Many of these claims are fact driven and do not require precise legal analysis, and so, according to Scott Davidson, author of *The Inter-American Court of Human Rights* (1992), applicants do not necessarily suffer greatly from the lack of legal assistance. I am very grateful to Scott for supplying me with this information.

8. Convention on Human Rights and Fundamental Freedoms (1950) 87 U.N.T.S. 103.

Under Protocol Number 11, the Commission has been effectively eliminated from the Convention system. Complaints are now directly made to the Court of Human Rights, which determines admissibility, the facts, and issues decisions on the merits if a friendly settlement cannot be reached. The Court is established on a full-time basis and all applicants have direct access to it.

Decisions of the Court are binding as regards the interpretation of the Convention, and have binding effect on the State concerned in international law (new Article 46). Use of the Convention system is free; unlike many national judicial systems, no court fees are levied against persons making use of the Strasbourg procedure.

2. *The Convention Legal Aid Scheme*

While originally there was no provision for it, amendments to the Commission's and the Court's rules provided for legal aid.[9] The scheme was introduced according to Gomien, Harris and Zwaak, because "it became clear that the lack of free legal aid to persons wishing to pursue a matter in Strasbourg, but having insufficient means to pay the expenses incurred in proceedings before the European organs, could seriously undermine the integrity of the Convention".[10] Whether the scheme actually achieves this goal is doubtful. The sums payable are minimal and the eligibility rules are quite restrictive.

Under the Court scheme, legal aid is means tested[11] and is only made available where it is considered essential for the proper discharge of the Court's duties. Legal aid is not available in relation to the preliminary

9. L. J. Clements, *European Human Rights: Taking a Case under the Convention* (1994), pp. 94–99 contains a useful summary of the (old) scheme provided in relation to proceedings before the Convention organs, including as Apps.8 and 9 the Commission and Court rules on legal aid.

10. D. Gomien, D. Harris & L. Zwaak, *Law and Practice of the European Convention on Human Rights and the European Social Charter* (Council of Europe Publishing, 1996), p.52. Interestingly, in the documentation related to the establishment of the Commission scheme, it is clear that the concerns expressed were not solely related to securing individual access to the Strasbourg organs. In a memorandum accompanying a letter addressed by the President of the Commission (Sir Humphrey Waldock) to the Secretary-General of the Council of Europe dated 24 Mar. 1961 (to be found in CM(63)91, App.1.2) it was stated that legal aid "is essential not only from the point of view of fairness to the individual but also from the point of view of the effective discharge of the Commission's responsibilities under the Convention. For the Commission will be in a much better position to give a correct decision, if both sides of the case have been adequately presented to it by the parties." See also the extract from a Supplementary Memorandum of the Commission dated 22 Mar. 1962, entitled "On the Question of Granting Free Legal Aid" in COM(63)91, App.1.4.

11. The means test is not governed by the rules of domestic means-tested legal aid schemes. Hence, it can be the case that the Convention organs will allow an applicant legal aid, where that person would not qualify under national schemes. However, national authorities which are involved in the process as an applicant must first approach the relevant national authority for a declaration of lack of means, and the particular High Contracting Party will be asked for its views on the application for legal assistance.

stages of the complaint process: it only becomes available from the point at which the relevant government has submitted written observations on admissibility (or the time limit for the submission of such observations has expired) or once admissibility has been declared. Legal aid is available for the costs of a lawyer or professor of law (or a professionally qualified person of similar status) and can, where appropriate, cover more than one lawyer. A fixed sum is given to defray miscellaneous expenses such as telephone, postage, and translations. In addition, where representation before the Court is required, travel expenses and a daily allowance are allowed.

The European scheme operates on a per item basis, not on a unit of time basis. Legal aid funds come out of the Council of Europe's budget. The rates paid under the Commission and Court rules were as at 1 July 1999:[12]

Item payments (average)[13]

Preparation of case	FF 2,000
Written pleadings	FF 1,800
Supplementary observations	FF 1,000
Friendly settlement	FF 1,000
Appearance at hearing	FF 1,800
Out of pocket expenses (max)	FF 400

Daily allowances

Daily allowance (lawyer)	FF 996

In addition, special items such as translations can be reimbursed with prior approval of the Registrar in charge, and travelling costs incurred in connection with appearance at a hearing or with friendly settlement negotiations will be allowed.

3. *Domestic legal aid for Strasbourg complainants*

A number of states parties make legal aid available to persons taking complaints to Strasbourg. In the Netherlands, the Legal Aid Act (*Wet op de Rechtsbijstand*) allows legal aid for international human rights

12. The expenses are reimbursed in French Francs. As at the date of writing the French Franc had a value of approximately three and a half francs to one Euro and US dollar respectively. Thanks to Erik Fribergh of the European Commission for providing me with this information.

13. The legal aid rate guidelines distinguish between average amounts and maximum amounts. The average rates are to be offered "in all cases except where the Registrar in charge decides, having regard to special circumstances, that it is justified to offer less (no minimum fixed) or more (up to the maximum amounts)." No offer of legal aid is to be made in cases "which concern exclusively length of procedure." In cases which involve following clearly established case law the Registrar has a discretion whether or not to offer legal aid. The maximums are in order of listing in the text, FFr 3,000, 2,000, 1,200, 1,200, 2,000 and 500.

complaints, provided that the instant body does not itself offer the possibility of legal aid provision (section 12(2)(f)). Obviously, this exclusionary clause could have meant that Strasbourg litigation has fallen outside of the Act, due to the schemes operated by the Commission and Court. However, practice indicates that since Strasbourg legal aid only applies after admissibility, legal aid can be claimed from the Dutch authorities for pre-admissibility work. Moreover, where there is doubt as to whether legal aid will be granted from Strasbourg, preliminary legal aid can be granted by the Dutch legal aid authorities.[14]

Norway would appear to be another jurisdiction which provides legal aid for Strasbourg complainants.[15] While the Free Legal Aid Act[16] makes no explicit reference to aid for international human rights proceedings, section 4 of the Act provides that when special reasons so require legal aid may be granted before a foreign court or administrative authority. During the drafting of the Act it was specifically contemplated that this section could embrace proceedings before the Commission[17] and subsequently the Ministry of Justice accepted that section 4 also permitted the granting of legal aid in proceedings before the Court on a case-by-case basis.[18] Further provisions of the Act delineate the conditions which must be met before legal aid is generally available (conditions which are monetary and related to the need for legal assistance); hence there is no automatic right to legal aid for Strasbourg proceedings. Nonetheless, in all four cases against Norway which had come before the Court by mid-1997 legal aid was granted by the Norwegian authorities.[19]

However, it would appear that the majority of States do not provide for Strasbourg litigation under their domestic legal aid schemes (whether criminal or civil). Belgium, the Czech Republic,[20] France,[21] Germany,[22]

14. Sincere thanks are due to Ineke Boerefijn at the Netherlands Institute of Human Rights, Utrecht for a comprehensive response to queries related to the Dutch legal aid scheme. In turn assistance was given by the Dutch Ministry of Justice (Department of Legal Aid) and the Amsterdam Council of Legal Aid.

15. I am very grateful to Judge Erik Møse of the Borgarting Court of Appeals, Oslo for a very full and thorough response to my queries on the Norwegian system.

16. Act 35 of 13 Jun. 1980 as amended.

17. *Norges offentlige utredninger* 1976: 38, p.93 and *Odelstingsproposisjon* No.35 (1979–80) pp.93–94.

18. See Ministry of Justice circular G–73/96, p.111.

19. In the three cases where violations were found and the Court had to address itself to Art.50 claims for just satisfaction the judgment explicitly notes that legal aid had been paid by the Norwegian authorities: see *E.* v. *Norway* (1990) 17 E.H.R.R. 30, 58 para.68, *Botten* v. *Norway* (50/1994/497/579, judgment of 19 Feb. 1996) para.55 and *Johansen* v. *Norway* (1997) 23 E.H.R.R. 33, 96 para.93. In the one case where no violation was found, *Eriksen* v. *Norway* (102/1995/608/696, judgment of 27 May 1997), I understand through Judge Møse that legal aid was granted by the Norwegian authorities.

20. Thanks to Dr Dalibor Jilek of Masarykory University, Brno for assistance on the Czech position on this point.

21. See *Loi No.91–647 relative à l'aide juridique*, Arts.10 and 15.

22. My thanks to Professor Jochen A. Frowein for information on this point.

Ireland,[23] Italy, Sweden,[24] and the United Kingdom[25] do not so provide. Denmark also does not provide legal aid for international human rights proceedings,[26] though the unavailability of legal aid for Strasbourg proceedings was the subject of critical observation in a 1987 white paper report on the Danish legal aid system.[27] No steps have yet been taken to remedy the situation. Similarly, in Sweden there have apparently been proposals that Strasbourg complainants receive legal aid but these have been rejected on the basis that Strasbourg complaints involve non-national procedure.[28] In other countries the matter is not addressed by the specific legal texts dealing with the national legal aid scheme, and there has been no litigation on the point.[29]

4. *Comment*

Bearing in mind the considerable work involved in the preparation of cases, the drafting of written submissions, the preparation of memorials, administrative obligations in relation to compliance with procedural requirements, and so on, the Convention legal aid scheme provides derisory remuneration.[30] The Court itself recognised in *LeCompte, Van Leuven & De Meyere* v. *Belgium* that "no more than reduced fees" are payable under the Convention scheme.[31] A lawyer approached by a person unable to pay normal fee levels would need to be very motivated by the justice of the case, by the cause of human rights, or by the novelty or prestige of going to Strasbourg, or else convinced of the correctness of

23. *Civil Legal Aid Act 1995*.

24. My thanks to the Raoul Wallenberg Institute of Human Rights and Humanitarian Law, Lund for assistance on the Swedish position.

25. See Clements, *op cit., supra* n.9, p.93.

26. *Betænkning 1113/1987 om advokatretshjælp, fri proces, retshjælpsforsikring*, pp.97–99. The committee in charge of the report noted and appears to concur in the opinion of the Ministry of Justice that there was no legal basis on which legal aid could be made available for international tribunal litigation.

27. *Ibid.* See also P. Lorenzen, L. A. Rehof & T. Trier, *Den Europæiske Menneskeretskonvention med kommentarer* (Jurist- og Økonomforbundets Forlag, 1994), p.348, who are critical of the lack of funding for Convention cases. I am extremely grateful to the Danish Centre for Human Rights, Copenhagen, in particular Jens Vedsted-Hansen, for explaining the Danish position on the issue to me.

28. *Op cit., supra* n.24.

29. Portugal would appear to be one example: correspondence between the author and José Manuel Santos Pais of the Procuradora Geral da República, Lisbon.

30. Others have commented that the Convention scheme is "not generous" (N. Sansonetis, "Costs and Expenses", in R. Macdonald, F. Matscher & H. Petzold (Eds), *The European System for the Protection of Human Rights* (1993), p.762) provides "meagre, if not derisory" fees (D. Harris, M. O'Boyle & C. Warbrick, *Law of the European Convention on Human Rights* (1995), p.665) which amount to "little more than a nominal payment" (Clements, *op cit., supra* n.9, p.97). The limited nature of the Strasbourg scheme was noted in a Danish report on legal aid: see Betænkning 1113/1987, *op cit., supra* n.26, p.98 and 99.

31. (1982) 5 E.H.R.R. 183 (Art.50), para.23.

his/her client's view that the Convention had been violated,[32] to undertake litigation before the Convention organs.

This situation has prompted the Court to make various observations. On the one hand the Court has called on lawyers representing indigent applicants to be modest in their charges so that access to Strasbourg is a meaningful right, open to as many as possible.[33] On the other hand, in *Luedicke, Belkacem & Koç* v. *FRG (No.2)*, the Court noted "the dangers accompanying too modest a remuneration of lawyers, in particular the risk that they may hesitate to act for certain applicants" and observed that:[34]

> ... this is a problem lying within the competence of the organs of the Council of Europe. Under Article 58 of the Convention, it is for the Council to provide the Commission with funds to cover its expenses which *should include such amounts as may be necessary for the payment of adequate fees to lawyers acting under the [Convention] legal aid scheme.* (emphasis added)

Interestingly, in Resolution (78)8 "On Legal Aid and Advice"[35] the Committee of Ministers of the Council of Europe compiled a set of principles to govern access to justice and the role of legal aid therein. The first principle reads:

> No one should be prevented by economic obstacles from pursuing or defending his right before *any court* determining civil, commercial, administrative, social or fiscal matters. To this end, all persons should have a right to necessary legal aid in court proceedings. (emphasis added)

32. Where an applicant is successful in establishing a violation of the Convention before the Court of Human Rights, he or she can claim the full legal costs actually and reasonably billed by his or her lawyer against the State concerned (invoking the Court's "just satisfaction" jurisdiction under Art.50 of the Convention). If the applicant has received any legal aid assistance from the Convention organs that sum will be deducted from the sums billed and the State will be ordered to reimburse the difference. One might query why the losing State is not required to reimburse the Council of Europe the sums for the legal aid given to the successful applicant under the Strasbourg schemes. It seems somewhat of a windfall for the losing State to avoid paying legal costs which it would have had to pay in full, if the successful applicant had not been legally aided. Any alteration in current practice might require a change to the Court rules. Interestingly, under its legal aid scheme, the European Court of Justice can clawback legal aid: see Kennedy *op cit.*, *supra* n.6, pp.575–578.

33. In *Young, James & Webster* v. *United Kingdom* (1982) 5 E.H.R.R. 201 (Art.50) the Court observed (at para.15) that: "high costs of litigation may themselves constitute a serious impediment to the effective protection of human rights. It would be wrong for the Court to give encouragement to such a situation in its decisions awarding costs under Art.50. It is important that applicants should not encounter undue difficulties in bringing complaints under the Convention and the Court considers that it may expect that lawyers in contracting States will co-operate to this end in the fixing of their fees."

34. Both quotations to be found at (1980) 2 E.H.R.R. 433, para.15.

35. Adopted by the Committee of Ministers on 2 Mar. 1978 at the 284th meeting of the Ministers' Deputies.

Principle 5, paragraph 2 states that a person appointed to assist "should be *adequately remunerated* for the work he does on behalf of the assisted person (emphasis added)".[36] Surely it is a great irony that the acknowledged inadequacy of the payments made to lawyers under the Convention legal aid scheme means that arguably the Court and Commission have been violating principles advanced by an organ of the Council of Europe itself?[37]

It has been suggested to me that the situation is ameliorated by the fact that lists of lawyers willing to take cases under the Convention *pro bono* are held by the Strasbourg authorities and made available to indigent applicants. Thus, it is said, *in practice* few potential litigants are deprived of the opportunity to utilise the Strasbourg system, because even if their original domestic lawyer is unprepared to accept the low Strasbourg fees, a replacement can be found. However, even if true in the past, this does result in applicants being unable to appoint preferred counsel and results in a restricted field of choice. Moreover, surely there is an element of dignity lost? As the International Movement ATD Fourth World observed in its study for the Council of Europe, *Towards Justice Accessible to All: Legal Aid Machinery and Certain Local Initiatives as seen by Families Affected by Severe Poverty*:[38]

> When fees become a major issue, the poor are the first to suffer. Not only do they feel that they are getting cut-price defence, they also know that they are second-class clients.

36. Clause X of the Report of Committee IV, International Congress of Jurists, New Delhi, 1959 expressed this point very well:

> Equal access to law for the rich and poor alike is essential to the maintenance of the rule of law. It is, therefore, essential to provide adequate legal advice and representation to all those, threatened as to their life, liberty, property or reputation who are not able to pay for it. This may be carried out in different ways and is on the whole more comprehensively observed in regard to criminal as opposed to civil cases. It is necessary, however, to assert the full implications of the principle, in particular in so far as "*adequate*" *means legal advice or representation by lawyers of the requisite standing and experience. This is a question which cannot be altogether dissociated from the question of adequate remuneration for the services rendered.* The primary obligation rests on the legal profession to sponsor and use its best effort to ensure that adequate legal advice and representation are provided. An obligation also rests upon the State and the community to assist the legal profession in carrying out this responsibility. (emphasis added.)

Appendixed to the Law of Lagos, a resolution passed at a Rule of Law conference organised by the International Commission of Jurists, 7 Jan. 1961, reproduced in M. Hamalengwa *et al*, *The International Law of Human Rights in Africa: Basic Documents and Annotated Bibliography* (1988), p.46.

37. It should be noted that the Resolution only calls on member states to *progressively* work towards the realisation of its principles.

38. (Strasbourg: Council of Europe, 1992) H(92)2, p.19, para.51. This comment was made after it had been noted that a number of domestic legal aid schemes fix payments at rates unrelated to the actual costs which counsel may incur.

The small number of member states which provide legal aid from their domestic schemes means that the vast majority of indigent Convention citizens are reliant on the Convention legal aid scheme, thereby imperilling effective access to justice.

Moreover, the fact that so few States accord aid for Strasbourg proceedings indicates how few see the Convention system as an integrated part of their legal system. For the majority of States, even if the *legal* effects of Strasbourg decisions are accorded great weight domestically, the Strasbourg system is still seen as something outside the domestic legal system, something foreign. This "apartness" detracts from the goal of integrating the Convention into national systems.

B. International Covenant

1. The system

The (first) Optional Protocol to the International Covenant on Civil and Political Rights[39] provides that individuals may submit complaints (referred to in the Protocol as "communications") of rights violations against ratifying States to, and obtain the views thereon of, the Human Rights Committee ("HRC"). As its name suggests, accession to the Protocol is not a mandatory requirement under the Covenant. The procedure is only available to those who have exhausted available domestic remedies. Just like the European system, no costs are levied against a person who makes use of the complaint mechanism; it is free. The Committee first establishes whether the complaint is admissible. Once admissibility is established the Committee calls on the complainant and the respondent state to make submissions on the merits. The Committee then issues its "views" as to whether a violation has occurred. There are no oral hearings; all work under the Optional Protocol is done on the papers.

Where a violation is found the HRC calls upon the State Party to provide an enforceable and effective domestic remedy. However, the Committee's views are non-binding, and the Protocol provides no enforcement mechanism to give effect to the views of the HRC. Interestingly, however, the Committee has recently established the position of Special Rapporteur to follow up views issued by it and ensure

39. (1966) 999 U.N.T.S. 302. For comments on the complaints procedure before the HRC see e.g. A. de Zayas, J. T. Möller & T. Opsahl, "Application of the International Covenant on Civil and Political Rights under the Optional Protocol by the Human Rights Committee" (1985) 28 G.Y.I.L. 9, P. R. Ghandhi, "The Human Rights Committee and the Right of Individual Communication" (1986) 57 B.Y.I.L. 201, D. McGoldrick, *The Human Rights Committee* (1991) and M. Schmidt, "Individual Human Rights Complaints Procedures Based on United Nations Treaties and the Need for Reform" (1992) 41 I.C.L.Q. 645.

that states parties have indeed undertaken measures which remedy violations found by the Committee.

2. *No HRC Legal Aid Scheme*

Unlike the situation under the European Convention system, no provision for legal aid is stipulated in the Protocol, nor do the Rules of the HRC contemplate such aid. According to Dominick McGoldrick, author of one of the leading treatises on the HRC, this scenario is unlikely to change.[40]

3. *Domestic legal aid for HRC proceedings*

The lack of a legal aid system under the Covenant system means that whether a complainant receives legal aid depends on national legal aid regimes. Some jurisdictions do provide such support. The Dutch scheme described above also applies to communications before the HRC[41] and the Norwegian scheme may also so apply.[42] Apparently, the Finnish authorities are contemplating making legal aid available for HRC complaints in the context of a revamp of legal aid legislation.[43] In Western Australia legal aid guidelines indicated until recently that HRC complaints could be considered for legal aid. Finally, in New Zealand while the High Court held in 1996 that communications to the HRC qualified for legal aid consideration under the domestic Legal Services Act 1991,[44] that decision was overturned by the Court of Appeal[45] and the Judicial Committee of the Privy Council has affirmed the latter's judgment.[46] However, it is the policy of the New Zealand Labour Party, the main partner in the recently formed coalition government, that legal aid be made available for communications to the HRC.

These, and a few possible other cases apart, it seems fair to acknowledge, as McGoldrick did in his extensive study of the Covenant scheme,

40. See McGoldrick, *op cit.*, *supra* n.39, p.134.

41. See *supra* n.14.

42. See *supra* n.15.

43. See the affidavit of D. J. MacKay (Director, Legal Division, Ministry of Foreign Affairs, Wellington, New Zealand) (hereafter "MacKay affidavit") made in preparation for the Court of Appeal hearing in *Tangiora* v. *Wellington District Legal Services Board*. This affidavit sets out the responses received by the Ministry from a number of foreign governments which are parties to the Optional Protocol in relation to questions concerning the availability in those States of legal aid for communications to the HRC.

44. (1996) 3 HRNZ 267 (HC).

45. (1997) 4 HRNZ 136 (CA).

46. Privy Council App No 8 of 1999, 4 October 1999 ("*Tangiora (PC)*"). The High Court decision was criticised by B. Robertson, "The Human Rights Committee as a 'Judicial Authority'" (1997) 3 HRLP 5 and Editorial, "Courts or Committees?" [1996] N.Z.L.J. 433.

that "in most cases" legal aid for HRC communications "will be very unlikely."[47]

III. LEGAL AID BEFORE THE STRASBOURG COURT AND THE HRC: A FAIR HEARING REQUIREMENT?

A. General Observations

The question arises whether the current practice with respect to legal aid before international human rights tribunals violates obligations under the relevant human rights instruments. Do the Convention and the Covenant create obligations on the states parties or on the international institutions themselves to provide legal aid for international human rights proceedings? In terms of general principle arguments in favour are strong, but any argument based on the relevant texts faces significant hurdles. Indeed, in its decision on admissibility in the recent *Toala v. New Zealand*,[48] the HRC held that New Zealand was not in breach of Covenant obligations in failing to provide legal aid for HRC communications, as the relevant article (Article 14) related only to domestic proceedings.

B. The Argument from Principle

Preparation of submissions for proceedings before the international human rights bodies often involves specialised legal work. It can be very time consuming. Appropriate advice can be—though will not always necessarily be—expensive.[49] Many complainants will be indigent and utterly unable to pay for costs at a domestic level never mind the international. Moreover, even for non-indigent complainants the costs of preparing a communication will doubtless prove unduly burdensome since in most cases they will have been put through the cost of expensive domestic proceedings in order to exhaust domestic remedies (a requirement laid down in new Article 35.1 of the Convention and Article 5.2(b) of the Protocol). It is unlikely therefore that even well-to-do complainants will have the requisite funds to launch international proceedings which at the end of the day, even if successful, will not necessarily have binding domestic effects. Moreover, there is a limit to the amount of

47. See McGoldrick, *op cit.*, *supra* n.39, p.134. In Gomien *et al. op cit.*, *supra* n.10, p.52 it is noted that "domestic legal aid systems in most Council of Europe countries do not cover costs of pursuing international legal actions". For example, Denmark does not provide assistance for complainants to the HRC: see the same sources cited *supra* nn.26–27. In addition, according to the MacKay affidavit, *supra* n.43, no legal aid is available from Austria, Belgium, Canada, Chile, France, Germany, Ireland, Italy, Korea (South), the Philippines or Sweden.

48. Comm. No. 675/1995 (10 July 1998, decision on admissibility) at para. 6.2

49. In the *Tangiora* case, *op cit.*, *supra* n.46 the plaintiffs' application to the defendant legal aid board sought an amount of NZ$89,960 (approx. US$50,000).

personnel and money which human rights NGOs can devote to supporting individual complaints. The result? Rights of recourse to international human rights bodies become illusory for many victims, and the Convention and the Protocol remain little more than paper guarantees against State violation of rights.

Such a result offends the principle of effectiveness. This principle is "designed to ensure that full measure is given to human rights guarantees. It leads to interpretations which secure the effective exercise and effective enjoyment of these rights."[50] The principle of effectiveness, at least in the field of international human rights law, has undoubtedly acquired the status of a general principle of international law.[51]

In ensuring the effective enjoyment of the right of access to justice and the observance of the right to a fair hearing, legal aid is of great importance. Without legal aid many litigants will be unable to afford the services of a lawyer to represent their interests. While the lack of a lawyer's services need not be detrimental in every case, in many it will ensure that no proceedings are ever commenced; in others that (even if they are started) time limits, procedural requirements, and the like will not be met; and, even when those are complied with that evidence and arguments will not be placed before the tribunal in a convincing or logical manner.[52] This has been the experience at the domestic level[53] and there appears to be no good reason to expect it to be any different at the international level. Indeed, given potential language problems and unfamiliarity with something "foreign", difficulties associated with the absence of legal services at the domestic level are likely to be more accentuated at the international.

Moreover, the principle of "equality of arms" is of importance. That principle requires that neither party to litigation should enjoy an improper advantage over the other.[54] The lack of legal aid not only renders use of an international complaint mechanism more unlikely, but also likely results in a serious imbalance or mis-match between the level of skills and research resources available to both sides. On the one side,

50. A. Shaw & A. S. Butler, "The New Zealand Bill of Rights comes Alive (I)" [1991] N.Z.L.J. 400, p.402 citing to authority.

51. See views adopted by the HRC in (1982) A/37/40, p.94; (1980) A/35/40, p.119. See also J. G. Merrills, *The Development of International Law by the European Court of Human Rights* (1988), Chap.5 entitled "The Effectiveness Principle" and B. G. Ramcharan, *The Concept and Present Status of the International Protection of Human Rights* (1989), p.37. For a discussion of the principle of effectiveness in relation to the work of the International Court of Justice and its importance in that Court's work, see H. Lauterpacht, *The Development of International Law by the International Court* (1958), Chaps.14–19.

52. See e.g. *Maxwell* v. *UK* (1994) 19 E.H.R.R. 97, paras.41 and 45, *Boner* v. *UK* (1994) 19 E.H.R.R. 246, *Granger* v. *UK* (1990) 12 E.H.R.R. 469.

53. See e.g. *The State (Healy)* v. *Donoghue* [1976] I.R. 325, 350 (Ir.S.C.) and *Powell* v. *Alabama*, 287 US 455 (1938) (USSC).

54. See e.g. Gomien *et al.*, *op cit.*, *supra* n.10, p.172.

the Government has available to it the substantial resources of the state treasury to protect its international reputation. In addition, in the case of many governments (though far from all), full-time, specialist staff will be available to handle the government's defence.[55] On the other, the unfunded complainant may well be unable to afford the preparation of empirical evidence, the obtaining of costly opinions and fully researched submissions, with the result that the presentation of his or her case could be severely disadvantaged.[56]

C. *Legal Aid and the Fair Hearing Requirement of Article 6 ECHR and Article 14 ICCPR*

1. *Legal aid as a fair hearing requirement*

Moving to the specific legal texts, the first obstacle is that neither the ECHR nor the ICCPR specifically guarantees a system of civil or criminal legal aid.

Certainly, Article 6.3(c)[57] of the Convention and Article 14.3(d) of the Covenant require States to *make available*, without cost, legal *representation* where a criminal defendant has insufficient means to pay and the interests of justice require legal representation. However, this can be achieved by assigning counsel (who may or may not receive a fee depending upon the system) to a defendant and does not necessitate legal aid as such.[58]

This system may well create difficulties in so far as international human rights proceedings are concerned. The right to free legal assistance is a right to *effective* assistance.[59] This means that the lawyer must be

55. Certainly this would seem to be anecdotally true of the Convention system. A random check of European Convention cases in the author's research file indicated that the number of government counsel and/or advisers appearing before the Strasbourg Court regularly and significantly outnumbered those appearing for the complainant: see e.g. *Miailhe* v. *France* (1993) 16 EHRR 332 (5–2 counsel); *Murray* v. *UK* (1996) 22 EHRR 29 (3–2 counsel; 3–1 advisers); *Malige* v. *France* (1998) 28 EHRR 578 (5–1 counsel).

56. See to similar effect, S. Davidson, "Individual Communications to the United Nations Human Rights Committee: A New Zealand Perspective" [1997] N.Z.L.Rev. 373, at p.390.

57. For a detailed discussion of Art.6.3(c) see S. Stavros, *The Guarantees for Accused Persons Under Art.6 of the European Convention on Human Rights* (1993), pp.201–221.

58. For the rules operative in Council of Europe member states, see the useful report *Implementation of the Right to a Fair Trial Guaranteed by Art.6.1 of the European Convention on Human Rights and of the Provisions Included in Art.6.3 in Particular Procedures* (Strasbourg: Council of Europe, 1993) H/SG(93)1 *passim*. The HRC recently reaffirmed the fact that Art.14.3(d) "does not entitle an accused to choose counsel provided free of charge": *Werenbeck* v. *Australia* Comm.579/1994, para.9.4 (27 Mar. 1997).

59. In relation to Art.6 of the Convention, see e.g. *Artico* v. *Italy* (1980) 3 E.H.R.R. 1 (ECtHR), *Biondo* v. *Italy* App. No.8821/79 64 D.R. 5 (1983) and *Imbroscia* v. *Switzerland* (1993) 17 E.H.R.R. 441, para.38 (ECtHR) (no violation found). See also Stavros, *op cit.*, *supra* n.52, pp.214–219. In relation to Art.14.3(d) of the Covenant see e.g. *Collins* v. *Jamaica* Comm. No. 356/1989, para. 8.2 (25 Mar. 1993) and *Chaplin* v. *Jamaica* Comm. No. 596/1994, para. 8.3 (2 Nov. 1995).

competent to deal with the applicant's case in terms of qualifications as well as in fact. As emphasised above, international human rights law is quite specialised work. There are not large numbers of lawyers qualified in it, and sufficiently well-versed in its methods to be in a position to represent an accused before, and submit quality written submissions to, an international tribunal. Any assignment system must accommodate these special features to ensure that the free assistance rights are properly observed.[60]

Notwithstanding the absence of a specific legal aid guarantee, recourse can be (and has been) had to the general right to a fair trial in relation to proceedings which determine criminal charges and civil rights and obligations (Article 6(1) of the Convention and Article 14.1 of the Covenant). Thus, the European Court of Human Rights in *Airey* v. *Ireland* observed that since the Convention "is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective"[61] the right to a fair trial must mean in particular circumstances that an applicant should be granted free legal assistance to undertake civil proceedings.[62]

It has to be noted that the Court emphasised in *Airey* that it was not laying down a requirement that a comprehensive legal aid scheme be introduced. This position has been repeatedly affirmed by the Court. Each case has to be assessed on its merits and by reference to the twin requirements of necessity and indigence. Accordingly, in determining the scope of the legal aid requirement under Article 6 in relation to proceedings before the Strasbourg organs these indicia will need to be proven.

60. Readers may be interested to note that the Statute of the International Criminal Tribunal for the Former Yugoslavia provides the right of an accused to choose his own counsel where (s)he can afford it or to have defence counsel appointed free of charge by the Tribunal itself: Art.21(4)(d). However, according to Antonio Cassese, "The International Criminal Tribunal for the Former Yugoslavia and Human Rights" [1997] E.H.R.L.R. 329, pp.338–339 the Tribunal in practice allows a defendant to select counsel who will then be paid by the Tribunal registry.

61. *Artico, op cit., supra* n.54, para.33 (ECtHR).

62. *Airey* v. *Ireland* (1979) 2 E.H.R.R. 305 (ECtHR). The Court observed (at para.25 (citations omitted)):

> ... hindrance in fact can contravene the Convention just like a legal impediment. Furthermore, fulfilment of a duty under the Convention on occasion necessitates some positive action on the part of the State; in such circumstances, the State cannot simply remain passive, and "there is ... no room to distinguish between acts and omissions". The obligation to secure the effective right of access to the courts falls into this category of duty.

In *Airey*, it was found that the instant proceedings involved: (a) procedural complexity; (b) the need to present expert evidence; (c) considerable emotional strain; and (d) imbalance in that the other party had secured the services of a lawyer (from private funds) such that personal representation was an inadequate realisation of the Art.6(1) right.

The position under the Covenant in relation to legal aid in civil matters is less clear. In its General Comment No.13 on Article 14, the HRC noted the "complex nature" of the article and observed that "different aspects of its provisions will need specific comments".[63] The HRC made no suggestion that legal aid in civil cases was an aspect of a fair trial.[64]

2. *Is the scope of Article 6 ECHR or Article 14 ICCPR confined to domestic proceedings?*

Moving on, if we assume the availability, on a case by case basis, of legal aid under Articles 6 and 14, the next important threshold question is whether the scope of Article 6 or Article 14 is confined to domestic proceedings? Nothing in the wording of the relevant articles purports to limit the fair trial rights to proceedings which occur before national tribunals. It might be argued however that such a limitation is inherent in the obligations which were assumed by states parties, as the only tribunals over which they have control are domestic tribunals. Hence states parties can only be held responsible in relation to proceedings before such tribunals. After all Article 1 of the Convention provides that the contracting parties "shall secure to everyone *within their jurisdiction* the rights and freedoms" protected by the Convention, while Article 2 of the Covenant commits each state party to respecting and ensuring "to all individuals within the territory and *subject to its jurisdiction* the rights recognised in the present Covenant".

However, the point of principle is that while states parties have no control as such over proceedings before international tribunals nonetheless the ability to take proceedings to such tribunals is one which has been deliberately made available by states parties. The states parties have therefore essentially conferred a right on citizens to avail of a dispute resolution mechanism in relation to affairs *within their jurisdiction*. Whether the mechanism works may well depend upon the availability of legal aid. In turn, whether legal aid is available from domestic systems is a

63. Adopted on 12 Apr. 1984 at the 21st session of the HRC, para.1.

64. In relation to Art.14.3(d) the HRC merely noted the lack of supply of information on this matter. The jurisprudence of the HRC on legal aid has arisen entirely in the criminal field. From the cases it seems that whether legal aid should be made available depends on the seriousness of the charge and the potential punishment. See the cases cited by Nowak, *op cit.*, *supra* n.3, p.260, n.140. As regards civil legal aid some tangential support may be gained from the HRC's views on *Morael* v. *France* Comm. No.207/1986 (28 July 1989). *Morael* involved a bankruptcy hearing. The HRC held that a very important condition for the observance of Art.14's fair hearing requirement was respect for the principle of equality of arms. While the HRC found there to be no violation in the instant case, and did not have to deal with any claim concerned with the provision of legal aid, its holding in a *civil setting* that equality of arms must be observed provides some hope that legal aid will be seen as appropriate in civil cases. This should be even more so where the opposing party is the State itself.

matter falling easily within domestic control.[65] Hence, at the level of principle, the argument from control fails to convince.

Turning to case law of the HRC first, a recent decision has severely limited any potential arguments under Article 14. In *Tola et al v. New Zealand*, the main complaint made was that New Zealand has unlawfully deprived persons born in Western Samoa of their New Zealand citizenship. However, complaint was also made that the state party violated Article 14.3(d) of the Covenant (legal aid in criminal cases) by failing to provide legal aid to those persons making communications to the HRC. In its decision on admissibility given in July 1998, the HRC declared this latter complaint inadmissible. The Committee stated:[66]

> [T]he Committee notes that Article 14 refers to domestic procedures only and there is no separate provision in the Covenant or the Optional Protocol dealing with the obligation to provide legal aid to complainants under the Optional Protocol.

On the face of it this would appear to eliminate any possibility of raising an argument that national authorities have an obligation to provide legal aid for HRC communications. However, it must be at least arguable that in those jurisdictions where the views of the HRC are regarded as forming part of the legal system, a HRC communication is a "domestic procedure" in respect of which the legal aid obligation arises.

Convention jurisprudence is not so clear. It certainly admits the possibility of states parties being held liable for the violation of human rights by international organisations and/or by the states parties themselves when giving effect to legislative, executive or judicial acts of

65. This type of argument was invoked by Gallen J of the High Court in *Tangiora, op cit., supra* n.46, pp.278 and 283 to justify his ruling that legal aid be granted for complaints under the Protocol. This element of control is of importance. An undiscriminating application of state responsibility for violation of Art.6 before international tribunals could result in states parties being held responsible for delays in Strasbourg proceedings over which they have little effective control, and which they could do little to alter. Only collective action would bring about the changes sought. On the other hand, the doctrine of residual responsibility is designed to ensure that transfer of powers from national to international authorities does not result in the bypassing of human rights norms.

66. Above note 65 at para.6.2.

international organisations.[67] The Commission has stated that "a transfer of powers [to international organisations] does not necessarily exclude a State's responsibility under the Convention with regard to the exercise of the transferred powers".[68]

The same line was taken by the Court of Human Rights in its recent judgment in *Waite* v. *Germany*.[69]

This is an especially important point in respect of those States where decisions of the Court allow for the reopening of domestic judicial or administrative proceedings: to the extent that such States have permitted an international court to determine matters (related to criminal charges and/or civil rights and obligations) arising within their individual jurisdictions, and conferred binding effect on the Court's decision, the obligation to respect Article 6 must be obligations enforceable against the State concerned.[70]

That said, it must also be noted that the Commission stated in *M & Co* that "the transfer of powers to an international organisation is not incompatible with the Convention provided that within that organisation fundamental rights will receive an equivalent protection".[71] In *Waite*, the Court applied the same principle. Doubtless it will be argued that to the extent that the Convention system provides a legal aid system this test is satisfied. Again, however, the derisory nature of the Convention scheme must be kept to the forefront: in line with Convention jurisprudence the provision of any legal aid scheme is not enough—it must be adequate to ensure effectiveness.

67. As the Commission explained in one of its early decisions, "if a State contracts treaty obligations and subsequently concludes another international agreement which disables it from performing its obligations under the first treaty it will be answerable for any resulting breach of its obligations under the earlier treaty": see *M & Co.* v. *FRG* App. No.13258/87 (unsuccessful attack on acts of German Federal Justice Ministry which issued a writ of execution of a judgment of the European Court of Justice) citing to App. No.235/56 (1958) 2 Y.B. 256, 300. See also *Heinz* v. *Contracting States also Parties to the European Patent Convention* App. No.21090/92, (acts of the European Patent Office unsuccessfully challenged). See e.g. A. Clapham, "A Human Rights Policy for the European Community" (1990) 10 Y.E.L. 309, at pp.332–335, Harris, *et al.*, *op cit.*, *supra* n.29, pp.27–28, and J. P. Jacqué, "The Convention and the European Communities" in Macdonald, *et al.*, *op cit.*, *supra* n.30, pp.896–901.

68. *M & Co. op cit.*, *supra* n.67, p.145.

69. (1999) 6 B.H.R.C. 499, para.67 (employment matters concerning European Space Agency).

70. Note that the Commission held that the Supreme Restitution Court which sat in Germany fell outside the scope of Art.1 on the ground that it was an international tribunal over which Germany had no legislative or supervisory powers: App No.2095/63 *X* v. *Sweden, FRG & Other States* (1965) Ybk VIII 272, 282 (ECHR) and see also App No.235/56 *X* v. *FRG* (1958/9) Ybk II 256, p.304 (ECHR).

71. *Ibid.*, p.145.

3. Are international human rights proceedings "determinations"?

Even if it is assumed that (1) legal aid is a right guaranteed by the Convention and the Covenant, and (2) the domestic proceeding limitation does not apply (in the case of the HRC) or is not adopted (in the case of the Strasbourg Court), it has to be established that complaints before the Strasbourg Court and the Human Rights Committee result in "determinations" in relation to "criminal charges" or "civil rights or obligations", as required by Articles 6 and 14 respectively.

The case law of the Court of Human Rights indicates that for Article 6 to be applicable, the proceedings must result in an *enforceable* decision.[72] Moreover, the instant proceedings must be *decisive* in relation to the determination of a criminal charge or civil rights and obligations.[73] Presumably, similar factors will operate in relation to Article 14.

(a) Judgments of the European Court: determinations for the purposes of Article 6 ECHR? Do decisions of the European Court of Human Rights meet these criteria? In a number of member states decisions of the Court of Human Rights have effective binding effect at the domestic level. For example, in relation to criminal convictions, legislation in Luxembourg, Malta, Norway and Switzerland permits successful applicants to reopen verdicts reached in domestic courts, which have been the subject of a successful complaint to Strasbourg.[74] As regards civil cases, it would appear that in Malta, Norway and Switzerland a decision of the Strasbourg Court can provide a sufficient basis on which to review a judgment of a domestic court.[75] In these jurisdictions, it seems indisputable that Article 6 is potentially triggered, because the Court of Human Rights clearly has the power to make determinations as to the civil rights

72. *Delcourt* v. *Belgium* (1970) 1 E.H.R.R. 355 (ECtHR) para.25.

73. Accordingly, a governmental inquiry, without any civil or criminal sanctioning powers (apart from powers to compel co-operation) does not fall within Art.6: *Fayed* v. *UK* (1994) 18 E.H.R.R. 393 (ECtHR), para.61. On the other hand, it has been held that an application to a Constitutional Court alleging a constitutional violation does involve a determination for the purposes of Art.6 to the extent that the outcome of such proceedings are decisive for an underlying trial related to the determination of civil rights and obligations or criminal charges: see e.g. *Ruiz-Mateos* v. *Spain* (1993) 16 E.H.R.R. 505 (ECtHR), para.59.

74. See Committee of Experts, *The European Convention on Human Rights: Institution of Review Proceedings at the National Level to Facilitate Compliance with Strasbourg Decisions* reproduced in (1992) 13 H.R.L.J. 71, pp.73–74. See also J. Polakiewicz & V. Jacob-Foltzer, "The European Human Rights Convention in Domestic Law: The Impact of Strasbourg Case Law in States where Direct Effect is given to the Convention" (1991) 12 H.R.L.J. 65, *passim*. In relation to Switzerland, see the *Loi fédérale sur la procédure pénale* Art.229(4) and the *Loi fédérale sur le droit pénal administratif* Art.89. In Austria, legislation was introduced to allow for the review of proceedings affected by the Court's decision in the *Unterpertinger* case.

75. Committee of Experts, *op cit.*, *supra* n.62, p.76. In relation to Switzerland, see the *Loi fédérale d'organisation judiciarie*, Art.139a (inserted by the *Loi fédérale* of 4 Oct. 1991, Chap.1).

and obligations of applicants as well as to criminal charges which applicants may be facing, which are binding domestically and are decisive on aspects of the underlying proceedings.[76]

In most countries, however, this is not the case. While, according to new Article 46 of the Convention, states parties must abide decisions of the Court in the instant case,[77] the Court accepts that it has no power to overrule a domestic law or to overturn a decision of a domestic court which is adjudged contrary to the Convention.[78] How the member state implements the Court's decision is a matter for its domestic law. Nonetheless, State practice demonstrates that a judgment of the Court will be given effect to in most cases. Accordingly, a decision of the Court can ensure that a new administrative regime becomes applicable to the applicant's situation (and indeed it will often be the case that even where an administrative act has been upheld by an (administrative) court decision, the administration will nonetheless reverse the initial act and modify its practice in accordance with the Court of Human Rights' judgment),[79] that legislative amendments are made which meet the concerns of the applicant, and that criminal verdicts are re-opened at the request of the prosecuting authorities. All of this goes to show that Court judgments are *in practice*[80] decisive determinations (in so far as human rights issues are raised).[81]

(b) Views of the HRC: determinations for the purposes of Article 14 ICCPR? Even putting aside *Toala*, a number of factors make any argument based on Article 14 of the Covenant difficult.

76. The Court of Human Rights has held that Art.6.1 is triggered by appeal hearings (*Delcourt, op cit., supra* n.72) and by proceedings before a constitutional court which are decisive for the outcome of the underlying trial (see cases cited *op cit., supra* n.73). On either of these lines of authority Art.6.1 must be regarded as being triggered in relation to proceedings before the Court of Human Rights in respect of the States referred to in this paragraph.

77. Decisions of the Inter-American Court of Human Rights are also binding: see Art.68(1) of the Inter-American Convention.

78. See e.g. *Belilos* v. *Switzerland* (1988) 10 E.H.R.R. 466 (ECtHR), paras.78 and 76 respectively. See also J. A. Frowein, *Der Europäische Grundrechtsschutz und die Nationale Gerichtsbarkeit* (Walter de Gruyter, 1983), p.24 and J. Velu, *Les Effets Directs des Instruments Internationaux en matière de Droits de l'Homme* (Swinnen, 1981), p.141.

79. G. Ress, "The European Convention on Human Rights and States Parties: The Legal Effect of the Judgments of the European Court of Human Rights on the Internal Law and before Domestic Courts of the Contracting States", in I. Maier (Ed.), *Protection of Human Rights in Europe: Limits and Effects* (C. F. Müller Juristischer Verlag, 1982), pp.221–222.

80. Against this argument from practice, however, it can be countered that decisions of ombudsmen, mediators and so on are also often in practice decisive for the determination of entitlements, including civil rights and obligations as understood by the Convention organs, yet this does not suffice to bring them within the ambit of Art.6.

81. For a review of the implementation of the Court decisions in states parties see Polakiewicz & Jacob-Foltzer, *op cit., supra* n.74.

First, the Committee's views do not have any binding effect, even in international law.[82] The Protocol, unlike the Convention, does not assert such an effect.

As regards state practice and the practice of the HRC, while the response of some states parties to requests to supply information as to compliance was, in the initial years of the HRC, lamentable, such has been the change that Professor Manfred Nowak confidently submits that the experience of the first sixteen years of HRC case law shows that most states make an effort to grant domestic effect to HRC decisions.[83] Moreover, while the Protocol does not provide for any enforcement mechanism, the establishment at its 39th Session in 1990 of the position of Special Rapporteur for the Follow-Up on Views[84] shows that for the HRC its "views" come with an expectation of compliance.[85]

Secondly, and following on from the above, there has been substantial controversy as to whether the HRC can even be regarded as making authoritative interpretations and applications of the Covenant. Many early commentators argued that the Committee had no such authority—the Protocol only allowed it to adopt views, not to make determinations, and the Protocol did not even mention a capacity to make recommendations as to how violations might be remedied. However, the more modern view is that the Committee's views are authoritative determinations and applications of the provisions of the Covenant.[86]

82. See M. O'Flaherty & L. Heffernan, *International Covenant on Civil and Political Rights: International Human Rights Law in Ireland* (Brehon Publishing, 1995), p.105, citing to C. Tomuschat, "Evolving Procedural Rules: The United Nations Human Rights Committee's First Two Years of Dealing with Individual Communications" (1980) 1 H.R.L.J. 249, p.255. See also Nowak, *op cit.*, *supra* n.3, p.710 and *Tangiora (PC) supra* n.46.

83. Nowak, *op cit.*, *supra* n.3, p.710. Sian Lewis-Anthony, "Treaty-based Procedures for Making Human Rights Complaints Within the UN System", in H. Hannum (Ed.), *Guide to International Human Rights Practice* (2nd edn) (1992) takes the contrary view that in the majority of cases, states parties do not take heed of the views adopted by the HRC.

84. See generally Schmidt *op cit.*, *supra* n.39. The measures adopted to give effect to the role of the Special Rapporteur are reproduced in Nowak, *op cit.*, *supra* n.3, pp.881–882 (A/45/40, Vol.II, at p.205).

85. Moreover, in a number of jurisdictions the judicial authorities treat the HRC's views with considerable respect, in a manner suggesting that they regard the HRC as the authority on the interpretation of the Covenant. The Netherlands and New Zealand are examples.

86. See e.g. Davidson, *op cit.*, *supra* n.56, at p.353; R. Higgins, "The Relationship between International and Regional Human Rights Norms and Domestic Law" [1992] Comm.L.B. 1268, at p.1270; Nowak, *op cit.*, *supra* n.3, at p.vviv; and F. Pocar, "The Legal Value of the Human Rights Committee's Views" (1991–1992) 7 C.H.R.Y.B. 119. See also *Tangiora (PC) supra* n.46 where the Privy Council appeased to incline to the view that the HRC does make definitive determinations on compatibility with the Covenant.

Thirdly, there is a substantial controversy as to whether the Committee can be regarded as a *judicial* body.[87] This controversy arises for a number of reasons. First, the HRC is precluded from holding oral hearings by the Protocol (Article 5.1). The absence of oral presentation and confrontation on evidential matters must detract from the arguments of those who claim the HRC is a tribunal or court, it has been submitted.[88] But then again, lack of oral hearings is not so unusual internationally, and anyway the HRC does attempt to provide opportunity to both parties to provide sufficient material so as to prove the factual basis of their claims, and to comment on the material provided by the other side. Further, reasons are normally presented for the HRC's preference of one factual claim over another, which demonstrates the HRC's determination to consider and evaluate evidence like ordinary tribunals.

Next, the Committee has functions other than hearing individual complaints, such as the consideration of periodic reports submitted by states parties. Currently, consideration of state party reports[89] occupies the bulk of the Committee's time. For some, to the extent that such work predominates, and because of the supervisory/advisory nature of that work, the Committee can be seen merely as an international mediator, not as an arbiter in the judicial sense.[90]

87. In *Grant* v. *South-West Trains* (C-249/96, 17 Feb. 1998) [1998] 1 C.M.L.R. 993, at para. 46, the European Court of Justice stated that the HRC "is not a judicial institution". The majority of Court of Appeal in *Tangiora (CA)* (Thomas J. agreed with the majority on other grounds and expressed no firm opinion on this point) held that the HRC did not have the attributes of a judicial body, though the Privy Council on appeal was much more circumspect, conceding that the HRC could be a judicial body: *Tangiora (PC) supra* n.46. See also the report prepared by Professor Anne Bayefsky for the *67th International Law Association Conference*, Helsinki 1996 (London: ILA, 1996) 337ff which is quite critical of a number of aspects of the HRC's functioning in relation to its communications work, in particular calling for oral hearings, more detailed reasoning and so on. See also the report prepared by Professor Anne Bayefsky for the *67th International Law Association Conference*, Helsinki 1996 (London: ILA, 1996), 337 *et seq.* which is quite critical of a number of aspects of the HRC's functioning in relation to its communications work, in particular calling for oral hearings, more detailed reasoning and so on.

88. See the arguments of defendant counsel in the High Court in *Tangiora op cit.*, *supra* n.46, pp.281–282.

89. These reports detail (or at least are meant to detail) the state party's compliance with the Covenant and the development of human rights protection mechanisms. While there can be a certain level of confrontation involved in such hearings (facilitated by the comments of domestic or international NGOs on the state party's report) they lack the adversarial and issue-specific elements characteristic of judicial proceedings. Moreover, the comments made by the Committee on state party reports tend to be quite general in nature and lacking the attention to detail characteristic of judicial proceedings. In addition, the suggestions made by Committee members in reaction to state reports generally call for progressive change in domestic legislation and practice so as to ensure compliance with the Covenant. Moreover, they often tend to be uneven as between countries.

90. See the High Court judgment in *Tangiora*, *op cit.*, *supra* n.46, p.282.

Indeed, as between members of the HRC itself, there has been significant controversy as to its proper classification.[91] Some members of the Committee clearly accept that it has judicial qualities and capacities: Professor Dame Rosalyn Higgins QC has referred to the HRC as "sit[ting] in a quasi-judicial capacity" when considering communications lodged under the Protocol while Mr Uribe-Vargas described the HRC's work as being of a "judicial nature".[92] Professor Opsahl has observed in relation to its communication work that the HRC has "applied basic principles of a judicial, or quasi-judicial nature concerning, for instance contradictory proceedings, assessment of evidence, and reasoning in support of its results".[93] Others have demurred. Mr Graefrath disagreed with the view "that the work of the Committee could be compared to that of a court. ... Unlike a court the Committee was not required to make judgments, but simply to consider and comment on reports and to act as a conciliatory body in dealing with complaints and communications."[94]

From the modern literature emerges the view that the HRC is not a court or a tribunal in the classical sense. Nonetheless it is recognised that the HRC has "striven to be seen to be acting in a way as nearly as possible to that in which a court of law acts".[95] Moreover, in the author's view, the existence of other functions does not render the HRC a non-judicial body in its communications jurisdiction. If this were the case some notable courts would have to cease to be so regarded, due to advisory and nonjudicial functions which they exercise.[96] In addition, as Siân Lewis-Anthony points out, "the Committee has established an informal doctrine of precedent and tends to follow its earlier decisions".[97] In this respect it acts like a judicial body. However, there is still quite some uncertainty as to the status of the HRC's views, and whether they are binding.

91. A collection of the opinions of various members of the HRC is gathered in McGoldrick, *op cit.*, *supra* n.39, p.54. See too Opsahl, *op cit.*, *supra* n.3, p.396.

92. See R. Higgins, "Ten Years on the United Nations Human Rights Committee: Some Thoughts upon Parting" [1996] E.H.R.L.R. 570, at p.570 and Yearbook of the Human Rights Committee 1977/78, vol.1, UN Doc.CCPR/1, at p.20 (6th Meeting) para.73 respectively. See also Ghandhi, *op cit.*, *supra* n.39, p.205.

93. Opsahl, *op cit.*, *supra* n.3, pp.426–427. See also M. Schmidt, "Does the United Nations Human Rights Program Make a Difference?" (1997) 91 Proceedings A.S.I.L. 461, at pp.463 and 464 referring to the HRC as a "quasi-judicial" international human rights organ.

94. Yearbook of the Human Rights Committee 1977/78, vol.1, at p.21, UN Doc.CCPR/1, (7th meeting) para.1.

95. Ghandhi, *op cit.*, *supra* n.39, p.249. See also the same author's reference to the HRC's "quasi-judicial attitude" *ibid.*, p.205.

96. For example, the Supreme Court of Canada is required to give advisory opinions when requested to do so by the Governor-General of Canada. While formally these opinions are non-binding, practice is to follow them, and they are cited as precedents in the normal way. See P. Hogg, *Constitutional Law of Canada*, 3rd edn, (1992), chap.8.6. The Privy Council, formally, does not render binding judgments merely tendering its advice to Her Majesty: is it therefore not a court?

97. See Lewis-Anthony, *op cit.*, *supra* n.83, p.42.

Balancing all of these considerations, it is difficult to regard views of the HRC as falling within the strict wording of a determination for the purposes of Article 14. And in light of the severe limiting effects of *Toala*, an argument in favour of domestic legal aid for HRC communications based on Article 14 of the Covenant is tenuous at best.

4. Are the Convention organs and the HRC themselves bound by Articles ECHR and 14 ICCPR?

Both Article 6 and Article 14 can only be invoked against parties to the Convention and the Covenant respectively.[98] The organs established by those international instruments are not themselves parties to the instruments and hence are not bound to comply with the substantive rights obligations set out therein. Thus, a claim before the Convention organs or the HRC that they themselves violate a complainant's right to a fair trial by providing no, or an inadequate, legal aid scheme would seem to be doomed to failure.

That said, the arguments advanced above must surely affect the way in which both the Convention organs and the HRC set about moulding their rules and procedures. Surely it would be inconsistent for the Strasbourg Court and the HRC to insist on the observance of such standards by the national authorities in relation to domestic proceedings without endeavouring themselves to observe similar standards. Thus, even in the absence of a legal requirement, there is surely a strong argument to be made from "good practice". At the least, the Convention organs and the HRC must make best efforts to secure a legal aid scheme which comports in its essentials with the requirements of Articles 6 and 14 respectively, whether the source of funding be international or domestic.

IV. DOMESTIC LEGAL AID FOR INTERNATIONAL PROCEEDINGS: POLICY CONSIDERATIONS

LET us leave aside the arguments based on legal texts and principles themselves, and consider a number of policy considerations some of which support, some of which militate against, the notion of *domestic* support for international proceedings. These may prove helpful to groups attempting to convince national authorities—at a policy level—of the need to provide legal aid for international human rights proceedings and can be deployed in proceedings aimed at forcing national authorities to assume their obligations under Article 6 and/or Article 14 (if these exist).

98. It is clear that the Convention cannot apply directly to institutions which are not parties to the Convention. Thus, the EU institutions are not directly caught by the Convention: see e.g. App. No.8030/77 *CFDT* v. *European Communities* (1978) 13 D.&R. 231 (ECHR), App. No.13539/88 *D.* v. *European Communities* (1989) (ECHR), and *M. & Co., op cit., supra* n.67, p.144.

We have already discussed the importance of legal aid in the context of international human rights proceedings. That ground need not be revisited. Suffice it to say that effective access to justice, an important goal of any legal system, is a compelling policy factor on its own favouring domestic support for international proceedings.

The first policy consideration is informed by the constant complaint of international human rights lawyers that the awareness of international mechanisms among domestic practitioners is not high.[99] The cause of this unawareness may well be that communications work is not perceived to be remunerative.[100] If availability of legal aid helps domestic lawyers to re-examine this perspective (because fees will be available from international complaints work), then it will be for the good,[101] for not only will law firms be interested in taking on such cases, but also law students will be encouraged by those firms to study courses on international human rights law. In turn, through increased awareness of, and contact with, the norms contained in the Convention and the Covenant, their aim of securing rights and freedoms to individuals within states parties will hopefully be greatly advanced. Thus, to the extent that legal aid for international human rights proceedings is integrated into the national legal aid scheme, the generation of knowledge among national practitioners as to the existence and accessibility of international human rights tribunals will be greatly enhanced.

Thirdly, such a scheme would provide bottom-up support for the international tribunals, by stimulating a ready flow of communications work, ensuring the tribunals are used and a jurisprudence can emerge. In

99. See e.g. A. Bayefsky, "Remarks" (1997) Proceedings A.S.I.L. 466, p.469, n.13 ("widespread ignorance") McGoldrick, *op cit.*, *supra* n.39, p.500 and Opsahl, *op cit.*, *supra* n.3, p.437. In the New Zealand context, see e.g. J. Elkind, "The Optional Protocol and the Covenant on Civil and Political Rights" [1991] N.Z.L.J. 409.

100. Such a perspective does not mean that lawyers are greedy, but they cannot run a practice without income. In Tardu, *op cit.*, *supra* n.1, Pt.III, s.X, entitled "Access of the Individual to the International Petition System" (issued in May 1979) at p.27 it is recognised that:

> The truth is that the only effective representation is that afforded by a lawyer. Few practising attorneys, however, are attracted towards human rights lawyering, and still fewer towards acting before international bodies. These occupations cannot exactly be called lucrative pursuits: victims of human rights violations are either born poor or have become so through confiscation of property, fines and other forms of persecution. The political risk involved in representing them is another deterrent.
>
> The establishment of an adequate system of legal aid would contribute to the solution of these problems. Ultimately, this might best be achieved through a legal aid agency of the international community, to be funded through voluntary contributions from governments, national bar associations and other groups concerned.

101. I note that Davidson, *op cit.*, *supra* n.51, p.389 suggests that the informal nature of the HRC process indicates that "it was not envisaged that the process would have been colonised by lawyers". Legal aid would result in the capture of the process by the legal profession. Davidson is realistic enough to recognise however that legal aid or not "there is a certain inevitability" of capture "where law and legal interpretation are concerned".

turn, the availability of meaningful legal aid will make the international options more viable and appealing. Over time and through usage the Strasbourg Court and the HRC will become an increasingly prominent feature of the domestic legal landscape. Moreover, as an "appeal" to Strasbourg, Geneva, or New York becomes more common, domestic courts will inevitably learn that it is often easier to mould domestic law to the requirements of international norms, rather than be exposed to the indignity of international condemnation. In this way the differentiation between domestic and international systems of human rights protection will become blurred and an integration of international and domestic law will take place over a gradual period of time.

Fourthly, domestic support for international proceedings reaffirms the principle that responsibility for observance of international human rights commitments is an obligation which lies primarily with the states parties. By sustaining access to the international tribunals, the states parties affirm their commitment to ensuring that the system works and is accessible.

A further three issues related to the current Strasbourg scheme need articulation. First, all legally aided lawyers receive the same remuneration and allowances regardless of the rates enjoyed domestically—for lawyers coming from the high fee earning countries Strasbourg significantly undercompensates, while for those from low fee countries it overcompensates. Domestic provision of legal aid would hopefully eliminate the real-rate-of-return disparities caused by the centralised system, with their attendant disincentives/incentives. Secondly, placing the responsibility on the states parties to provide legal aid avoids the current unfair situation in which a number of states parties pay twice over for legal aid. The Netherlands for example pays for its nationals to go to Strasbourg, yet its contributions to the Council of Europe go to ensuring that the nationals of other States which do not provide such legal aid receive aid from the Strasbourg coffers. Thirdly, a decentralised, domestic-based system of legal aid for Strasbourg proceedings would ensure that the administrative burden on that tribunal would be lessened.

Admitting these policy advantages, placing the responsibility for providing legal aid on domestic systems is not meant to result in reduced effective access to international tribunals, rather more. Therefore, it is important to emphasise that there would need to be supervision of domestic implementation, designed to check that the right to legal aid is actually enjoyed. In the interim, it may well be necessary to maintain parallel systems of legal aid, so that in the case of non-complying States, the unavailability of legal aid at the domestic level does not leave the complainant without the necessary means.

Of course, making available domestic legal aid for international human rights proceedings inevitably confers a heightened status on the decisions

of the relevant adjudicative body. This likely effect will doubtless, in turn, force national governments to think hard about whether the particular body for which legal aid is made available is truly deserving of that status. In the case of the European Court of Human Rights that is unlikely to be a problem—that court has earned a substantial reputation and enjoys considerable respect. As noted when considering the arguments on Article 14 of the Covenant, the same cannot yet be said of the HRC. In light of its uncertain status as a judicial body, the nature of its processes, the legal bindingness of its views and so on, it can be anticipated that a number of national authorities will think deeply before making a policy decision to afford legal aid for HRC communications.

In addition, any move towards domestic support for international proceedings by a substantial number of States parties could have significant implications for the international monitoring bodies themselves, which must be put in the policy melting pot. These are considered in the next section.

V. IMPLICATIONS FOR THE INTERNATIONAL TRIBUNALS

A. Implications for the HRC

An overarching concern for international politicians and the HRC itself is that the ready availability of legal aid will doubtless make the HRC more accessible. Is this desirable?

As to the former group, there will be those who would prefer a toothless, rarely used HRC which could be pointed to as an affirmation of the seriousness with which the international community takes human rights norms on Human Rights Days, at human rights conferences, and such like, yet which in reality has little effect because its functioning is underfunded and its jurisdiction underutilised. Indeed, as practitioners in the field well know "cynicism" is a word often met in the field of international human rights.[102] For others, greater use of the HRC will be welcomed as another source of pressure in the fight to give meaning to human rights protection at the international level. For others still, the expansion of recourse to the HRC which legal aid would surely usher in would be disconcerting. Many commentators have noted "the political character of the global human rights system".[103] Many States are quite happy for this political character to remain. Readier access to the HRC would be perceived as a threat to international politics: because it would permit condemnation of human rights violations by an independent panel of experts not so amenable to political persuasion, the need for political action in, and political control over, such matters would be diminished.

102. See e.g. Meron, *op cit., supra* n.3, at p.49.
103. O. Schachter, *International Law in Theory and Practice* (1991) p.330.

As for the HRC, an immediate question which arises is its capability to cope with a significant increase in communications.[104] Already it has been noted that the HRC operates under significant economic constraints which hinder its functioning.[105] In addition, the members of the HRC are part-timers, who meet three times a year for a number of weeks. Accordingly, they have limited available hours for their HRC work.[106] A considerable increase in communications work might well require the HRC to reassess its work allocation devoting considerably more time to communications rather than examination of state reports (which currently consumes the lion's share of time).[107] Is this wise?[108]

Next, even if a HRC legal aid scheme (as opposed to domestic schemes) might be attractive in principle, one could imagine that the HRC might not be enthusiastic about having its own legal aid scheme for practical reasons. First, administration of such a scheme would involve expansion of administration/secretariat and perhaps a diversion of very limited resources away from other aspects of the HRC's work. Secondly, there would be difficulties in calculating an appropriate fee basis structure. The states parties to the Protocol are so diverse in terms of wealth, that what would be reasonable remuneration for a lawyer from one country would not suffice from a country where costs, services, and the cost of living are higher. Moreover, if the HRC granted legal aid to a lawyer of choice, how would it determine whether the fees charged were appropriate within the legal profession of the particular jurisdiction from which the lawyer comes?

Even if a HRC scheme is not feasible, the HRC should as a minimum closely examine reports filed by states parties (which have ratified the

104. As regards the practical challenges which face most of the United Nations-related human rights treaty monitoring bodies see the document, *Effective Functioning of Bodies Established Pursuant to United Nations Human Rights Instruments* E/CN.4/1997/74 (27 Mar. 1997) prepared for the Commission on Human Rights' 53rd session.

105. Lack of resources for the HRC is discussed by Opsahl, *op cit.*, *supra* n.3, pp.434–435 and 440–441. See also Bossuyt, *op cit.*, *supra* n.5, p.51 who notes that, "Another main weakness of the international human rights system is lack of funding. No system for the protection of human rights can function without a minimum of resources."

106. Ghandhi, *op cit.*, *supra* n.39, p.248 noted that "a very heavy and rapidly increasing workload that is being thrust upon the Committee".

107. O'Flaherty & Heffernan, *op cit.*, *supra* n.82, p.111 note the "supplementary role" of the petition procedure to state reports in the Covenant system. Bayefsky, *op cit.*, *supra* n.87, pp.346 and 355 has called upon the HRC to spend a greater amount of time on individual communications in preference to its state report work.

108. Certainly, Opsahl, *op cit.*, *supra* n.3, p.440, has argued that the HRC should not devote a huge amount of time to its communications jurisdiction; it "should not be more than a secondary aim". It would be better, in his view, for the HRC to concentrate on supervisory and co-ordination roles, leaving complaints to regional procedures such as the European Convention and Inter-American Convention systems. They offer "several advantages in the areas of logistics, local trust, and homogeneity". See also Meron, *op cit.*, *supra* n.3, p.123 who describes the HRC's state report work as its central function, because it is the procedure which is binding on all states parties to the Covenant.

Optional Protocol) on the issue of funding for international complaints under domestic legal aid schemes. In principle, there seems to be no good reason why such legal actions should not be covered by domestic schemes.

B. Implications for the Convention Organs

The implications for the Convention organs are unlikely to be as pronounced, for a number of reasons. The Convention organs have already been operating a legal aid scheme for over 30 years. The difficulties associated with the establishment of new procedures to administer a legal aid scheme therefore do not arise. Moreover, any growth in recourse to the Convention organs due to a revamped Convention legal aid scheme or the provision of legal aid from domestic schemes is likely to be manageable within the current context of the Convention scheme. In addition, the greater homogeneity of Council of Europe members means that disparities in lawyers fees are not as great; the smaller number of members also makes comparison of fees more feasible.

Nonetheless, availability of a more reasonable level of legal aid support, whether from a revamped Strasbourg scheme or through domestic provision, should make Strasbourg an even more attractive option for litigants and their lawyers, ensuring that usage remains high. The revamp of the Strasbourg complaints scheme effected through Protocol 11 is designed to address the serious problems of delay in dealing with complaints. Will it really be able to cope with a significant increase in litigation subsidised by the Council of Europe or by domestic legal aid schemes?

VI. CONCLUSIONS

CURRENT practice in relation to the provision of legal aid to complainants before international human rights bodies is not encouraging. While the Strasbourg organs do provide such aid to complainants, the sums payable are minimal and arguably violate guidelines recommended by the Council of Europe's Committee of Ministers. The HRC has no legal aid scheme. Domestic support for international proceedings is also infrequent. Only a handful of states parties provide assistance to those within their jurisdictions who wish to have recourse to the international tribunals.

I have considered whether the lack of domestic legal aid support for international human rights tribunals may be a substantive violation of the parent instruments. The arguments are complex. They are strongest in relation to the European Court, particularly in relation to those States which give domestic effect to decisions of that Court. They are weakest in relation to the HRC. Indeed, in its recent *Toala* decision, the HRC held

that Article 14 of the Covenant does not apply to international proceedings. The same arguments cannot be advanced against the tribunals themselves as they are not parties to the instruments. However, principles of "good practice" should inform their stance on this issue.

A number of policy considerations support domestic legal aid for international proceedings. These range from knowledge-generation to integration of international and domestic human rights norms, from reinforcing primary State responsibility for fulfillment of human rights obligations to administrative concerns, from decentralisation to fairness. However, there would be serious implications for the international institutions concerned if there were to be greater accessibility. To the extent that legal aid makes recourse to the tribunals readier, there will be resource and time concerns, as well as a need (particularly in the case of the HRC) to make difficult choices in terms of work-prioritisation.

Legal aid for international human rights proceedings is an important, practical issue. It goes to the heart of the efficacy of international complaint mechanisms, as seen from the perspective of the victim. It calls for analysis which appreciates the underlying rationale for legal aid, its grounding in human rights law, and the demands which its actualisation in international proceedings make on international and domestic institutions. Resolution of the legal issues is not easy, though a number of the policy options are clear. Hopefully, this paper will have contributed to an understanding of the problems and options and may serve to initiate a keen debate on what has essentially been a neglected issue.