Summary

This lesson gives an overview of some of the United Nations treaty based human rights protection mechanisms.

The lesson aims to enable individuals and groups to make use of the UN complaint procedures and to that effect provides examples of cases submitted to certain UN mechanisms.
THEME: Filing a Complaint with the United Nations Treaty Based Human Rights Protection Mechanisms

THE ISSUE

Anyone may bring a human rights problem to the attention of the United Nations and thousands of people around the world do so every year. This lesson explains in detail the procedures open to individuals and groups who want the United Nations to take action on a human rights situation of concern to them. (For a general overview of United Nations Charter based Bodies and Procedures, see Lesson Series 19).

THE LESSONS:

There are two lessons in this series.

Lesson 1: this lesson gives an overview of the complaint mechanisms before the United Nations treaty based human rights bodies.

Lesson 2: this lesson consists of a case example, highlighting various aspects of the International Covenant on Civil and Political Rights complaint procedure in practice. Additionally, an excerpt of a complaint submitted before the Human Rights Committee, and an excerpt of an interim order made by the same committee is also given for illustrative purposes.
Lesson 1

A. Introduction

This lesson examines complaints that are brought directly under international human rights treaties and the special complaints mechanisms & procedures set up under the treaties.

Since the early 1970s international complaint mechanisms have developed apace, and you can now bring claims to the United Nations concerning violations of your rights under four of the ‘core’ human rights treaties:

1. The International Covenant on Civil and Political Rights which covers abuses of civil and political rights;
2. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which covers abuses involving torture and cruel treatment;
3. The International Convention on the Elimination of All Forms of Racial Discrimination, which covers abuses of racial discrimination; and

Each of these treaties establishes a quasi-judicial committee to examine complaints. The complaint mechanisms are designed to be uncomplicated and accessible to the layperson. You do not need to be a lawyer or even familiar with legal and technical terms to bring a complaint before the bodies concerned. On the contrary, the system is intended to be as straightforward as possible.

The human rights protection mechanisms discussed in this lesson are by no means the only UN mechanisms available to individuals. The UN system also includes charter based human rights protection mechanisms (i.e. mechanisms based on the UN Charter) such as the Commission on Human Rights, the Commission on the Status of Women and the UN Special Rapporteurs. These charter based mechanisms are not addressed in this lesson series, which focuses on treaty based protection mechanisms.
B. Complaints under the international human rights treaties

Overview

A human rights treaty is a formal document negotiated by States that imposes binding obligations to protect and promote rights and freedoms on States parties that officially accept it (commonly through ‘ratification’). The full texts of the treaties are accessible on the web site of the Office of the United Nations High Commissioner for Human Rights (OHCHR) at the following address: http://www.unhchr.ch/html/intlinst.htm

Under the treaties anyone may submit a complaint alleging a violation of treaty rights to the ‘treaty bodies’ (committees) for quasi-judicial adjudication. These committees are composed of independent experts elected by State parties to the relevant treaty. They are responsible for monitoring the implementation of the rights set forth in the treaties by State parties, and with deciding complaints brought against those States. While there are some procedural variations between the four committees, their design and operation are very similar.

Who can be the subject of a complaint?

A complaint under one of the four treaties can be made only against a State that satisfies two conditions. First, the State must be a party to the treaty in question, having ratified or otherwise accepted it. (You may refer to the Office of the High Commissioner for Human Rights’ Treaty body database, to view ratifications and reservations). Second, the State party must have recognized the competence of the committee established under the relevant treaty to consider complaints from individuals. A State recognizes the Committee’s competence by becoming a party to a separate treaty or under a specific article of a Convention. (To check whether or not a state has done so, access the OHCHR treaty body database mentioned above, choose a relevant State by clicking on Ratifications and reservations and then click on Declarations on procedural articles.)

Who can make a complaint?

Anyone claiming that his or her rights under the relevant treaty have been violated can submit a complaint with a committee against a State party that satisfies these two conditions. It is not necessary to have a lawyer prepare your case, though legal advice usually improves the quality of the submissions. You may also bring a claim on behalf of another person on condition that you obtain his or her written consent. In certain cases, you may bring a case without such consent, for example, on behalf of persons unable to give formal consent, such as children, or where a person is in prison without access to the outside world.
What information do you need to provide in your complaint?

A complaint to a committee, also called a ‘communication’ or a ‘petition’, need not take any particular form, though should be in writing, in one of the secretariat’s languages, and signed. It should also supply the following necessary particulars:

- Your name, nationality and date of birth;
- Specify the State party against which your complaint is directed;
- If you are bringing the claim on behalf of another person, you should provide proof of their consent, or state clearly why such consent cannot be provided;
- The details of all the facts, in chronological order, on which your claim is based;
- The remedies you have sought from your country’s local courts and authorities, the dates and outcome of the proceedings. You should also state whether you have submitted your case to another means of international investigation or settlement;
- A statement about why you consider that the facts you have outlined constitute a violation of the treaty in question. It is helpful, though not strictly necessary, for you to identify the articles of the treaty that have allegedly been violated;
- Lastly, you should provide all documents of relevance to your claims and arguments, especially administrative or judicial decisions on your claim by national authorities (local courts or federal authorities).

If your complaint lacks essential information, you will be contacted by the secretariat with a request for the additional details.

When can you make a complaint under the human rights treaties?

In general, there is no formal time limit after the date of the alleged violation for filing a complaint under the relevant treaties. It is usually appropriate, however, to submit your complaint as soon as possible after you have exhausted domestic remedies.

The procedure

If your complaint contains the essential elements outlined above, your case will be registered, that is to say formally listed as a case for consideration by the relevant committee. You will receive notice of registration.

At that point, the case is sent to the State party concerned to give it an opportunity to comment. The State is requested to submit its observations within a set time frame. The time within which the State is required to respond to your complaint varies between procedures and is specified in the sections dealing with individual
committees below. It is important to understand that this part of the process is about establishing whether or not your case is admissible and if it has merits. If the committee accepts your case and its merits, the committee can then make a final decision.

Once the State replies to your submission, you are offered an opportunity to comment. Again, the time frames vary somewhat between procedures. At that point, the case is ready for a decision by the relevant committee. If the State party fails to respond to your complaint, you are not disadvantaged. Reminders are sent to the State party and if there is still no response, the committee takes a decision on your case on the basis of your original complaint.

Special circumstances of urgency or sensitivity

Each committee has the facility to take urgent action where irreparable harm would otherwise be suffered before the case is examined in the usual course. The common feature is that the committee in question may, at any stage before the case is considered, issue a request to the State party for what are known as “interim measures” to prevent any irreparable harm to the victim. Typically, such requests are issued to prevent actions that cannot later be undone, for example implementing a death sentence or the deportation of an individual facing the risk of ill treatment and/or torture.

If you wish the committee to consider a request for interim measures, it is advisable to state this explicitly in your complaint, with reasons for why you consider such action to be necessary.

If there are particularly sensitive matters of a private or personal nature that emerge in the complaint, you may request that the committee suppress identifying elements in its final decision so that your identity does not become public.

The admissibility of your case

Before the committee to which you have brought your case can consider its merits or substance, it must be satisfied that the claim meets the formal requirements of admissibility. When examining admissibility, the committee may consider one or several of the following factors:

- That you (or the person on whose behalf you are bringing the complaint) are a victim of the alleged violation.
- If you are acting on behalf of another person, that you have obtained sufficient authorization or you are otherwise justified in doing so.
- That the alleged violation relates to a right actually protected by the treaty.
- That your complaint of violation of a treaty is sufficiently substantiated.
• That your complaint relates to events that occurred after the entry into force of the complaint mechanism for your State (exceptions to this rule may apply).
• That you have exhausted all available domestic remedies (exemptions from this rule may be allowed, for example, where the exhaustion of remedies would be unreasonably prolonged, or would plainly be ineffective - you should, however, give detailed reasons why the general rule should not apply).
• That your complaint is not an abuse of the complaints process.
• That your complaint is not being examined under another international mechanism of investigation or settlement - the aim being to avoid unnecessary duplication at the international level.
• That your complaint is not precluded by a reservation which the State party to the treaty has made, for example limiting a committee’s competence to examine certain communications.

If you think there is a risk that your claim may be considered inadmissible on one of these grounds, it is helpful to present your counter-arguments in the initial complaint.

The merits of your case

Once a committee decides your case is admissible, it proceeds to consider the merits of your complaint, stating its reasons for concluding that a violation has or has not occurred under the various articles it considers applicable. A number of States have also entered substantive reservations that may limit the scope of the human rights obligations they assume under the treaties. In most cases, a committee will decline to consider complaints falling within areas covered by a reservation, though in exceptional circumstances it may find a reservation impermissible and consider the case despite the purported reservation. (Reservations or declarations entered may be viewed in the Treaty Body database on the OHCHR web site).

The Committees’ consideration of your case

The committees consider each case in closed session. Although some have provisions for oral proceedings in their rules of procedure, the practice has been to consider complaints on the basis of the written information supplied by the complainant and the State party. The committees do not go beyond the information provided by the parties to seek independent verification of the facts, nor do they consider briefs provided by third parties.

Once the committee makes a decision on your case, it will notify you and the State party simultaneously. The text of any final decision on the merits of your case or of a decision of inadmissibility will be posted on the OHCHR’s web site at the following address: http://www.unhchr.ch/html/menu2/8/jurispr.htm
What happens once a committee decides your case?

It should be noted at the outset that there is no appeal against committee decisions and that, as a rule, the decisions are final. What happens to your case subsequently depends on the nature of the decision taken. The committee may decide:

- That you have been the victim of a violation by the State party of your rights under the treaty and issue recommendations. The committee will invite the State party to supply information within three months on the steps it has taken to give effect to the committee’s findings.
- That there has been no violation of the treaty in your case or that your complaint is inadmissible. Here the process is complete once the decision is sent to you and the State party.
- That your case is admissible, either in general or with reference to specific claims or articles. In this case the State party is requested to make submissions on the merits within a specific time frame. You will then have a period for comment on the submissions, following which the case is usually ready for consideration by the committee.

Having understood what constitutes a human rights treaty and its corresponding complaint mechanisms, we may now look at specific international treaty procedures.

1. Procedure under the Optional Protocol to the International Covenant on Civil and Political Rights

Introduction

In respect of violations of rights under the International Covenant on Civil and Political Rights (the Covenant), you can find the complaints mechanism in the Optional Protocol to the Covenant. Under this, the Human Rights Committee (the Committee) has been established to receive and decide on complaints, which it does so at three sittings per year. Before the Committee can hear your complaint however, it must establish that the State party against which your complaint is directed has formally recognized the existence of the Committee. This recognition is indicated in the Optional Protocol.

The complaint procedure

You may submit a complaint of a violation of the Covenant to the Committee, or if you are representing another individual or individuals, on their behalf.

After you have submitted your complaint, it will be referred to the Committee’s Special Rapporteur on New Communications who will decide whether or not your complaint will be registered. Following registration, the
Committee sends the complaint to the State party concerned, which has six months to comment on the admissibility and the merits of your complaint. Upon receipt of these, the Committee will send them to you for your comments. You will have two months to reply to the State party’s comments.

It is worth noting a few things about this procedure. First, the Committee may vary this process to quicken things; second, the Committee may depart from the general rules on admissibility outlined above, and consider acts or events preceding the entry into force of the Optional Protocol for the State party concerned. It may also consider complaints submitted to or under review of another international mechanism of investigation or settlement, including complaints submitted to the Special Rapporteur of the Commission on Human Rights or under the ‘1503 procedure’.

If you are concerned that the State party may take some action against you that may harm you or the victim who you are representing, you may also include in your complaint a request to the Committee to issue interim orders to prevent the State party from doing so.

**The Committee’s decision**

If, after considering the merits of your case, the Committee decides that you, or the individual(s) you represent, are a victim(s) of a violation of the Covenant it may:

- Recommend remedial action be taken by the State (e.g. release from detention, further and proper investigations, payment of compensation); and
- Invite the State party to supply information within a fixed period on the steps it has taken to give effect to the committee’s recommendations.

Where there is no follow up with the recommendations, the Committee’s Special Rapporteur on Follow-up will monitor the State party for implementation of the recommendations. Also, the extent to which the State party has taken steps to implement the recommendations is reported in the Committee’s Annual Report.

**How long will my case take?**

Typically, cases will be resolved within one and three years of registration of the complaint.

**Where can I find a copy of the Covenant, Optional Protocol, and the Committee’s Rules of Procedure?**

To view the Covenant, click onto this link:

To view the Optional Protocol, click onto this link:
To view the Committee’s Rules of Procedure: These are available in PDF format and may be found by doing a search for “Rules of Procedure” on the UNHCHR website or by clicking here:

How to direct complaints to the treaty bodies

For complaints to the Human Rights Committee, direct your correspondence and inquiries to:
Petitions Team
Office of the High Commissioner for Human Rights
United Nations Office at Geneva
1211 Geneva 10 Switzerland
Fax: +41 22 9179022 (particularly for urgent matters)
Email: tb-petitions.hchr@unog.ch

2. Procedure under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment

Introduction

Regarding violations of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment (the Convention), the complaints mechanism can be found in the Convention. Under the Convention, the Committee against Torture (the Committee) has been established to receive and decide on complaints, which it does so two times per year. For the Committee to hear complaints made against a State party, the State party concerned must have formally recognized the existence of the Committee. This recognition is indicated in the Convention.

The complaint procedure

You may submit a complaint to the Committee, or if you are representing another individual or individuals, on their behalf.

After your complaint is registered it will be sent to the State party concerned which will have six months to comment on the admissibility and merits of the complaint. Upon receipt of the State party’s comments, the Committee will then send a copy to you for your comment, and you will have six weeks in which to reply. It is worth noting a few things about the procedure. First, the Committee may vary the procedure to quicken things up; second, the Committee may reject a complaint if: (i) it is pending a decision or has already been decided by
another international mechanism; or (ii) some time has elapsed since it was decided by the national authorities in the State concerned and your submitting it to the Committee.

If you are concerned that the State party may take some action against you or the victim which would effectively damage your case, you may apply to the Committee for interim orders to prevent such action being taken.

**The Committee’s decision**

If the Committee decides that your case is admissible and that it has merits, that is that a state action or proposed action has violated or would violate its obligations under the Convention, the Committee may make recommendations to the State party on how it can remedy those violations. The Committee may also invite the State party to supply information within a fixed period, usually 90 days, on the steps it has taken to give effect to the committee’s recommendations.

Where there has been a failure to follow up, the Committee’s Rapporteur for Follow-up will monitor the State party for implementation of the recommendations.

**How long will my case take?**

Typically, cases will be resolved within one to two years of registration of the complaint.

**Where can I find a copy of the Convention, the Optional Protocol, and the Committee’s Rules of Procedure?**


To view the Committee’s Rules of Procedure: These are available in PDF format and may be found by doing a search for “Rules of Procedure” on the UNHCHR website or by clicking here: [http://www.unhchr.ch/huridoca/huridoca.nsf/FramePage/HCHR+En?OpenDocument](http://www.unhchr.ch/huridoca/huridoca.nsf/FramePage/HCHR+En?OpenDocument)

**How to direct complaints to the treaty bodies**

For complaints to the Committee against Torture, direct your correspondence and inquiries to:

Petitions Team
3. Procedure under the International Convention on the Elimination of All Forms of Racial Discrimination

Introduction
For complaints submitted under the International Convention on the Elimination of All Forms of Racial Discrimination (the Convention) the complaints mechanism is contained in the Convention itself. Under the Convention, the Committee on the Elimination of Racial Discrimination (the Committee) has been established to receive and decide on complaints, which it does so two times per year.

The complaint procedure
You may submit a complaint to the Committee, or if you are representing another individual or individuals, on their behalf. After your complaint is registered, the Committee will send a copy to the State party, who will have three months to comment on the admissibility of the complaint, and if none, then on the merits of the complaint. If the State party argues that your case is inadmissible, you will be sent a copy of its comments and will have six weeks in which to comment on these. The Committee will then meet to decide the issue of admissibility. If the State party has no objection to admissibility, it will have another three months to comment on the merits of the complaint. The Committee will then send you a copy of the State party’s comments on the merits and you will then have six weeks in which to reply. The Committee will then meet to make its final decision.

In a departure from the general rules applicable to the treaty committees, the Committee will still review and decide on a case even though it has been decided by another international mechanism or is pending a decision before one. However, the Committee will only hear cases that are submitted within six months following a violation.

If you are concerned that the State party may take some action against you that may harm you, or the victim who you are representing, you may also include in your complaint a request to the Committee to issue interim orders to prevent the State party from taking such action.
The Committee’s decision

Where the Committee finds that a state action or proposed action has violated or would violate a State party’s obligation under the Convention, it may make recommendations to the State party and invite it to report within a certain period on the steps it has taken to implement those recommendations. Unlike the other treaty committees, the Committee may also make general or specific recommendations even if the State party is found not to be in violation of the Convention and may also issue general or specific recommendations to all State parties to the Convention.

How long will my case take?

Typically, cases will be resolved within one year of registration of the complaint.

Where can I find a copy of the Convention, and the Committee’s Rules of Procedure?

To view the Convention, click onto this link:
To view the Committee’s Rules of Procedure: These are available in PDF format and may be found by doing a search for “Rules of Procedure” on the UNHCHR website or by clicking here:

How to direct complaints to the treaty bodies

For complaints to the Committee on the Elimination of Racial Discrimination, direct your correspondence and inquiries to:
Petitions Team
Office of the High Commissioner for Human Rights
United Nations Office at Geneva
1211 Geneva 10 Switzerland
Fax: +41 22 9179022 (particularly for urgent matters)
Email: tb-petitions.hchr@unog.ch
4. Procedure under the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women

Introduction

The complaints mechanism to the Convention on the Elimination of All Forms of Discrimination against Women (the Convention) is contained in the Optional Protocol to the Convention. Under this, the Committee on the Elimination of All Forms of Discrimination against Women (the Committee) has been established to receive and decide on complaints, which it does so two times per year.

The complaint procedure

You may submit a complaint to the Committee, or if you are representing another individual or individuals, on their behalf. After the registration of your complaint, the Committee will send a copy to the State party concerned which will have six months to comment on the admissibility and merits of the complaint. The Committee will then send you a copy of the State party’s comments and you will be directed on when you are to submit your counterarguments. Thereafter, the case will be ready for a decision of the Committee. It is important to note that the Committee may vary the procedure and accelerate it. In a departure from the general rule, the Committee may seek documentation from the UN or other bodies that may assist it in deciding the case. In this regard, both State party and complainant will be given an opportunity to comment on such documentation within a fixed period. Also, the Committee may reject a complaint if it is pending before, or has been decided by, another international mechanism of investigation or settlement.

If you are concerned that the State party may take some action against you that may harm you, or the victim who you are representing, you may also include in your complaint a request to the Committee to issue interim orders to prevent the State party from taking such action.

The Committee’s decision

Where the Committee issues a decision and makes recommendations against a State party, the State party will have six months within which to submit a detailed report on the steps it has taken to implement the Committee’s recommendation.

Where can I find a copy of the Convention, the Optional Protocol, and the Committee’s Rules of Procedure?

To view the Convention, click onto this link: http://www.unhchr.ch/html/menu3/b/e1cedaw.htm
To view the Optional Protocol, click onto this link:
To view the Committee’s Rules of Procedure: These are available in PDF form and may be found by doing a search for “Rules of Procedure” on the UNHCHR website or by clicking here:

How to direct complaints to the treaty bodies

For complaints to the Committee on the Elimination of Discrimination against Women, direct your correspondence and inquiries to:
Committee on the Elimination of Discrimination against Women
c/o Division for the Advancement of Women, Department of Economic and Social Affairs
United Nations Secretariat
2 United Nations Plaza
DC-2/12th Floor
New York, NY 10017
United States of America
Fax: +1-212-963-3463

C. Questions for discussion

1. When submitting a complaint before a UN committee, it is important to consider the relevant treaty or convention under which you are claiming an abuse of your rights. Given the outline above, what other UN documents affecting the submission of complaints would you need to consider before submitting a complaint? What impact could a State party’s declarations or reservations have on the submission of your complaint?

2. What potential problems or threats to a complainant or his/her case could possibly arise which you should be prepared to deal with?
Lesson 2

Now that we have had an overview of the various complaint mechanisms, it would be useful to examine practical cases. This lesson is split into three sections, each section providing a case study relating to the various procedures:

- A complaint submitted to the Human Rights Committee of the International Covenant on Civil and Political Rights;
- Interim measures issued by the same committee while the case decision is pending; and
- An example of the procedure of the Human Rights Committee in another case: case admissibility, merits and the final decision of the Committee.

A. Michael Anthony Fernando’s complaint submitted to the UN Human Rights Committee of the International Covenant on Civil and Political Rights

Below is an excerpt from a complaint submitted before the Human Rights Committee, by Michael Anthony Fernando (for more information on his case, see Lesson Series 30: The Case of Michael Anthony Fernando: Effective Campaigning and Judicial Accountability). This illustrates what a complaint may look like and what information it should contain, such as the author’s identity, the facts of the violation, the State party concerned, articles of a convention violated, all of which a committee hearing a complaint will require.
Case of Michael Anthony Fernando: Communication to UN Human Rights Committee

I. INFORMATION CONCERNING THE AUTHOR OF THE COMMUNICATION

1.1 The author of this application is Anthony Michael Emmanuel Fernando, a Sri Lankan national, and an English teacher by profession. The Applicant was born on 1st September, 1954 in Colombo, Sri Lanka, and is ordinarily a resident at No. 187/70A, Jaya Samagi Mawatha, Hospital Road, Dehiwela, Sri Lanka.

The author is represented by:
1. Kishali Pinto-Jayawardene of No 12B Sarasavi Gardens, Nawala Road, Sri Lanka; and
2. Suranjith Hewamanne of No 530/7 Havelock Road, Colombo 6, Sri Lanka,

who, as counsel, are assisted by the Asian Human Rights Commission of Unit D, 7/F Mongkok Commercial Centre, 16-16B, Argyle Street, Kowloon, Hong Kong...

(A letter of authorization from the Applicant appointing the above attorneys-at-law as his legal counsel is attached as Annex A).

1.3 The Applicant is currently held in Welikada Prison, Borella, Sri Lanka, where he is serving one year’s imprisonment in connection with his conviction for contempt of court by the Supreme Court of Sri Lanka on 6 February 2003.

II. STATE CONCERNED

2.1 The State Party to the International Covenant on Civil and Political Rights (‘the Covenant’ or ‘ICCPR’) and the First Optional Protocol against which this communication is directed is the Democratic Socialist Republic of Sri Lanka.

III. ALLEGED BREACHES OF THE ICCPR

3.1 It is submitted that this case, which arises in relation to a conviction for contempt of court by
the Sri Lankan Supreme Court in Case S.C. F/R No. 55/03 (Fernando v. AG of Sri Lanka and others)… involves breaches of Article 9, Article 14 and Article 19 of the Covenant relating to the Applicant’s trial, conviction and sentence, and Articles 7 and 10 of the Covenant, relating to the circumstances and conditions of his subsequent detention.

3.2 More specifically, the Applicant’s claim relates to:

a) The criminal process involving the Applicant in Fernando v. A.G. of Sri Lanka and others S.C. F/R No. 55/03. This culminated in the Supreme Court’s conviction of the Applicant of contempt of court on 6 February 2003 and its decision to impose a sentence of one year’s ‘rigorous imprisonment’ for contempt. This verdict was reached in the absence of any hearing prior to the conviction, without any specific charge being against the Applicant and without affording the Applicant any opportunity to seek access to counsel, and was not subjected to any further appeal hearing. It is submitted that this process has been seriously flawed and... in breach of his rights under Article 14 of the Covenant.

b) The use of contempt proceedings in response to the applicant’s attempt to bring an action in good faith by filing fundamental rights petitions (under the Constitution of Sri Lanka) and the consequent breach of his rights under Article 19 of the Covenant.

c) The conditions of imprisonment and alleged ill-treatment of the Applicant while in prison following his detention, in breach of Articles 7 and 10 of the Covenant.

These grounds are further elaborated below...

3.3 Summary of Facts: The Author makes the following submissions in relation to S.C. F/R No. 55/03:

3.3.1 The Applicant filed a workman’s compensation claim before the Deputy Commissioner of Workmen’s Compensation. Following rejection of this claim, he made further complaints to various other authorities, and ultimately filed two separate constitutional petitions before the Supreme
Court of Sri Lanka, alleging breach of his fundamental rights guaranteed under the Constitution of Sri Lanka. The Supreme Court consolidated these two petitions for hearing.

3.3.2 The Applicant then filed a further petition on 30.1.2003 alleging that the consolidation of these two petitions... had affected his right to be heard in a just and fair manner and had violated his constitutional rights to fair trial. This petition implicated, among others, the Chief Justice of Sri Lanka and two other sitting judges of the Supreme Court...

3.3.5 The law governing the Supreme Court of Sri Lanka’s powers to punish individuals for contempt of court is set out in Article 105 (3) of the Constitution of Sri Lanka 1973 (‘the Constitution’), which provides as follows:

The Supreme Court of the Republic of Sri Lanka and the Court of Appeal of the Republic of Sri Lanka shall each be a superior court of record and shall have all the powers of such court including the power to punish for contempt of itself, whether committed in the court itself or elsewhere, with imprisonment or fine or both as the court may deem fit...

3.4 Fair Hearing: It is submitted that the judicial process culminating in the Applicant’s conviction for contempt and his imprisonment immediately thereafter breaches his right to fair hearing, as guaranteed by Article 14 of the Covenant, and in particular of Article 14(1), 14(2), and 14(3) a), b), c) and e), as follows:

a) Firstly, the Applicant was denied a genuine hearing on the contempt matter and no inquiry was held into this matter (as evident in Annex C and D); consequently, the finding of guilt and sentencing were not supported by trial or inquiry. Yet in Re Pollard, the Judicial Committee stated that ‘no person should be punished for contempt of Court, which is a criminal offence, unless the specific offence charged against him be distinctly stated, and an opportunity of answering it be given to him.’

b) Secondly, no opportunity was given for the preparation and presentation of a defense and, therefore, the Judges had no opportunity to take into consideration any defense when they
decided that the Applicant was guilty of criminal contempt. As there was no hearing on mitigation of sentence, the judges had no opportunity to address issues relating to mitigation...

c) Thirdly, it is doubtful whether there is proof as to whether the Applicant has committed contempt in the first place...

d) Fourthly, the judges had not come to the finding that Mr. Fernando was acting with the intention of disturbing the court (see Annex C and D). A deliberate intention to commit contempt of court has not been established.

e) Fifthly, the Applicant was denied a fair hearing by an ‘impartial’ tribunal (Article 14(1))...

f) Sixthly, the hearing in respect of the contempt matter was held summarily, with the applicant being given no opportunity either of being informed in detail of the nature and cause of the charge against him, or having adequate time and facilities for the preparation of his defence or to communicate with counsel (Article 14(3) (a), (b), (d))...

g) Seventhly, the Applicant was convicted, sentenced and imprisoned without being given any opportunity to appeal against his conviction or sentence (Article 14(5))...

h) Eighthly, the sentence of one year’s imprisonment is grossly disproportionate to the offence which the Applicant was found to have committed...

i) In considering the issue of fair trial, it is also a relevant consideration that there had been much international and national concern expressed regarding the judicial conduct of Chief Justice Sarath Nanda Silva who was the presiding judge in this case...

3.5. **Arbitrary Detention**: It is submitted that the imprisonment of the applicant without a fair trial amounts to arbitrary detention and is in breach of Article 9 of the Convention...
3.6 **Freedom of Expression**: It is further submitted that the use of powers of criminal contempt in relation to the Applicant's submission of fundamental rights petitions before the Court is wholly disproportionate, thereby violating his right to freedom of expression as guaranteed by Article 19 of the Covenant…

3.7 **Torture and Ill-Treatment**: It is submitted that the conditions of detention inflicted on the Applicant clearly represent a form of torture and/or cruel, inhuman and degrading treatment and constitute a breach of Sri Lanka's obligations under Article 7 and Article 10 of the ICCPR…

e) On 10th February 2003, the Applicant experienced severe pain all over his body but was not given medical attention. His condition was so critical that his Father who visited him brought a priest to give the final sacrament given only to persons who are about to die.

f) The Applicant states that on his discharge from the Hospital on 10 February 2003, and his removal to the prison, he was assaulted several times, specifically between 2 and 5 p.m., when he was beaten by prison guards outside the prison on the road. He was then pushed into a police van where he was kicked repeatedly on the back causing damage to his spinal cord. On his arrival in prison, the Applicant was taken on a stretcher and left to lie near a putrid toilet. He was then stripped naked and left to lie near the toilet for a further 24 hours. Following this sequence of events, the Applicant began to urinate blood and was returned to the hospital in a van. As of 11 February 2003, he has been unable to rise from his bed…

**IV. EXHAUSTION OF DOMESTIC REMEDIES**

4.1 It is submitted that the Applicant has exhausted every possible domestic course of action which might constitute a remedy. Under Sri Lankan law there is no provision for any appeal against a judgment of the Supreme Court regarding contempt of court or any other matter. As an exceptional measure, a petition seeking review of a judgment of the Supreme Court may be filed. However such a review petition would usually be heard before the same judges who considered the original petition in the matter.
4.2 In the instant matter, such a review petition was submitted on behalf of the Applicant, and was heard on 2 June 2003 in the Supreme Court by the same panel of three judges which had convicted him for contempt, almost four months after his initial imprisonment...

4.4 Moreover, as regards constitutional remedies, it may be noted that the Sri Lankan Constitution (Article 126(1)) only permits judicial review of ‘executive or administrative’ as opposed to ‘judicial’ action. The apex courts in Sri Lanka have also held that judicial review of judicial action is not permissible...

V. LIMITATION

5.1 This application is admissible ratione temporis. The Supreme Court of Sri Lanka’s final order on 6 February 2003 convicting the Applicant for contempt of court and sentencing him to a year’s imprisonment, and its subsequent order of 2 June 2003 dismissing the review petition filed on behalf of the Applicant, were both passed after the First Optional Protocol came into force for the State Party.

VI. OTHER INTERNATIONAL PROCEDURES

6.1 This matter has not been submitted for examination to any other procedure of international investigation or settlement.

VII. INTERIM MEASURES

7.1 The Applicant requests in this communication that the Committee consider recommending the adoption of interim measures by the State Party pursuant to Rule 86 of the Rules of Procedure. In the past, the Committee has recommended the adoption of interim measures in situations where it is desirable to avoid ‘irreparable damage’ to the Applicant...

7.5 The Committee is accordingly requested to consider recommending that the State Party adopt interim measures, pursuant to Rule 86 of the Rules of Procedure of the Human Rights
VIII. CONCLUSION

8.1 It is submitted that the Applicant has suffered a violation of his rights as guaranteed by Articles 9, 14, 19, 7 and 10 and Article 2(3) of the Covenant respectively.

8.2 It is further submitted that given the Applicant’s frail state of health and already substantial period of imprisonment— during which he suffered deterioration of his mental health due to imprisonment and degrading treatment— early release from prison would be the most appropriate remedy. The Committee has earlier found release to be the most effective remedy in several cases of breach of the right to fair trial under Article 14.

8.3 Finally, it is submitted that, as a victim of unlawful detention and a miscarriage of justice, the Applicant should be entitled to compensation under Article 14(6) of the Covenant.

IX. RELIEF SOUGHT

9.1 Accordingly, the author hereby requests the Committee:

a) To declare a breach of the Applicant’s rights under the Covenant, specifically under Articles 9 and 14, Article 19, Article 10 and Article 7, read with Article 2(3) of the Covenant;

b) To declare that the application of Article 105 (3) of the Sri Lankan Constitution 1973 is incompatible with the Applicant’s rights to fair trial, freedom of expression and an effective remedy, under Articles 14 and 19, read with Article 2(3) of the Covenant respectively;

c) To recommend that the State Party consider taking necessary steps to adopt legislative and other measures necessary to give effect to Articles 9, 14, 19, 7 and 10, as well as Article 2(3) of the Covenant, including framing legislation to regulate the Supreme Court’s powers of
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contempt;
d) To recommend that the State Party commute the Applicant’s sentence and order his immediate release from prison; and

e) To recommend that the State Party award compensation to the Applicant, pursuant to Article 14(6) of the Covenant, for disproportionate punishment in respect of his conviction in Case SC.FR NO. 55/03 (Fernando v. AG of Sri Lanka and others) and for the miscarriage of justice suffered as a result of his arbitrary and continued incarceration.

Signed by Author
Dated: 10 June 2003

ANNEX
LIST OF DOCUMENTS

A. Letter of Authorization of Counsel
B. Petition before the Supreme Court Enforcing Fundamental Rights
B1. Motion Relevant to Same
C. Journal Entry of Supreme Court, dated 6 February 2003
D. Later Order of Supreme Court
D2. Article in Sri Lankan newspaper dated 23 February 2003
E. Press Release of UN Special Rapporteur on the Independence of the Judiciary and the Legal Profession, dated 17 February 2003
G. ‘Torture Petition’
G1. Connected Affidavit
G2. Medical Reports
H. ‘Review Petition’
B. An excerpt of interim measures issued by the Human Rights Committee

The interim order below was issued in Michael Anthony Fernando’s case, while his complaint was being considered by the Human Rights Committee.

Reference: G/SO215/51 SRI (7)
KF 1189/2003

9 January 2004

... [C]onsidering the urgency of this matter, the Special Rapporteur [on New Communications] has reviewed your request for interim measures of protection. The Special Rapporteur noted that the request relates to various alleged death threats against the author and his family, by reason of the author’s communication to the Human Rights Committee.

Pursuant to Rule 86 of the Committee’s rules of procedure, and while the communication is under consideration by the Committee, the Special Rapporteur requested the State party:

To adopt all necessary measures to protect the life, safety and personal integrity of the author and his family members, so as to avoid irreparable damage to them and;

To inform the Committee on the measures taken by the State party in compliance with the decision within 30 days from the date of this Note Verbale, that is no later than 9 February 2004.

C. An example of the procedure and decision of the Human Rights Committee in the Sarma vs. Sri Lanka case

a. Summary of facts

This came to the Committee’s attention in early 2000 when the complainant (the author) submitted a complaint alleging that the State of Sri Lanka had violated the International Covenant on Civil and Political Rights (the Covenant) when the author’s son was abducted by members of the Army which resulted in the son’s subsequent disappearance. (Further details about this case can be found in Sri Lanka Legal Reforms and Human Rights,
On the morning of 23 June 1990, the author, his son and three other persons were removed from the author’s house by members of the army during a “cordon and search operation”. Their removal was witnessed by other family members, and while in detention, they were handed over to other members of the army, including one Corporal Sarath, and detained at a number of army camps. The author’s son was apparently suspected of being a member of the Liberation Tigers of Tamil Eelam (the LTTE) and was allegedly beaten and tortured on a number of occasions. The day following their detention, all detainees were released, except the author’s son. He remained indefinitely detained and his whereabouts, let alone his existence, remains in doubt.

In May 1991, almost one year following the son’s detention, the author was informed by army personnel that his son was dead. However, in October 1991, in a chance occurrence, the author claimed that he saw his son sitting inside a military vehicle. On this occasion, the author claimed that his son acknowledged his father but because of the circumstances, the author could not speak with his son. The author did not see his son again following this incident. It was after this that the author sought his son’s release through various means, including petitioning the Prime Minister three times in 1993, 1995 and in 1999; and giving evidence before a “Presidential Commission of Inquiry”. Despite these efforts, they yielded no results and the author was no closer to knowing the fate of his son. It was then that the author took his complaint to the Committee.

b. The complaint

As stated above, not only was the son a victim of abduction, alleged torture, and subsequently “disappearance”, but so too was the father and his family a victim as a result of the abduction that took place in June 1990. In this regard, the father appeared as both representative for his son, and family, and as a victim himself and as highlighted in Lesson 1 is permissible and serves as one of the points to be considered for admissibility of a complaint.

In his complaint, the author submitted that the events that took place and the son’s subsequent treatment and disappearance constituted violations of the Covenant. The author argued that the facts showed that the Sri Lankan Army was responsible for these violations, and being an organ of the State, the state of Sri Lanka was also responsible for his son’s abduction and subsequent disappearance. And because Sri Lanka was a State party to the Covenant, it had violated Articles 6, 7, 9 and 10 of the Covenant:

Article 6: Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

Article 7: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.
Article 9: Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention.

Article 10: All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

c. The procedure adopted by the committee

Having submitted his complaint to the Committee and following its registration, the Committee determined the mechanism to be adopted for dealing with the complaint. Departing from the general procedure outlined in Lesson 1, the Committee proceeded to have the case decided in two stages. First, dealing with its admissibility, followed by a second, dealing with its merits in which the Committee made its final decision on the complaint. For the complete decision, see Sri Lanka Legal Reforms and Human Rights, Vol.1, No.3, October 2003.

The admissibility of the case

Following the registration of the complaint, the Committee sent a copy to the State party to comment on its admissibility and was given a fixed period of time for this. Subsequently, on 26 February 2001, the State party submitted a number of objections arguing that:

• The alleged involuntary removal of the author’s son, and his subsequent disappearance, occurred before the entry into force of the Optional Protocol for Sri Lanka;
• The complainant had not exhausted all available domestic remedies (which were set out); and
• Regarding those remedies, the complainant had failed to demonstrate that they would be ineffective, or would unreasonably prolong the conclusion of his case.

Essentially, the State party was objecting to admissibility on the grounds which had been set out in the Committee’s Rules of Procedure and needed only to show that any one of these grounds would apply for the case to be inadmissible.

Having received these objections, the Committee then sent them to the author to give him an opportunity to reply, within a fixed period of time, before the Committee met to consider the arguments and give its decision on admissibility. In his reply, which he submitted on 25 May 2001, the author essentially stated that:

He and his family were suffering from a continuing violation of Article 7 of the Covenant as he had no information about his son’s location, and that this treatment was a form of psychological torture aggravated by the contradictory replies from the authorities. In effect, the violation was of a continuing nature and carried on after the Optional Protocol came into effect for Sri Lanka.
He had gone to various efforts to find out the location of his son, which included sending or filing requests with numerous Sri Lankan authorities, including the police, the army, the national human rights commission, several ministries, the president of Sri Lanka and the Presidential Commission of Inquiry.

The other available domestic remedies, including the remedy of habeus corpus, were unhelpful or ineffective and futile to pursue (which he then substantiated).

Having received the parties’ arguments, the Committee, at its next sitting, met and decided on the issue of admissibility of the case.

It is interesting to note that, even where the parties did not address certain issues of admissibility, the Committee itself had to check that the same matter was neither pending before, nor had been examined under another procedure of international investigation or settlement – a matter which the complainant must also address in its complaint. Noting that the complaint raised issues under Article 7 of the Covenant with regard to the author and his family and under Articles 6 and 10 of the Covenant with regard to the author’s son, the Committee then reviewed the parties’ arguments and made the following conclusions in support of the complaint being admissible:

though the alleged detention and subsequent disappearance took place before the entry into force of the Optional Protocol for the State party, “…the alleged violations of the Covenant, if confirmed on the merits, may have occurred or continued after the entry into force of the Optional Protocol.” On this basis, the complaint was admissible.

& 3. “…[on] the question of exhaustion of domestic remedies…in the circumstances of the case, the author had used the remedies that were reasonably available and effective in Sri Lanka.” In essence, the author had satisfied all available domestic remedies.

Following the conclusion of this stage, the Committee then requested the parties to comment on the merits of the case.

The merits of the case

Following the parties’ submission of their arguments on the merits, the Committee at its next sitting, met to consider the matter and give its final decision. For the purposes of brevity, here we will refer only on the author’s counterarguments on the merits of the case and what the Committee decided on those.

On 2 August 2002, the author submitted his counterarguments which in essence stated that:
• around the time the author’s son disappeared, disappearances were systemic. To support this, the author referred to the “Final Report of the Commission of Inquiry into Involuntary Removal or Disappearance of Persons in the Northern and Eastern Provinces” which officially recognized that disappearances were common in parts of Sri Lanka around 1989 and 1990;
• the State party, in its objections on the merits, essentially confirmed that the complainant’s son was abducted on 23 June 1990 by Corporal Sarath, who was a member of the Army personnel, even though the State claimed it was not done with its sanction;
• the State party was responsible for the alleged disappearance of the author’s son because Corporal Sarath was a member of the Army personnel and acting under orders of an officer to conduct a “cordon and search operation” in that area during the period in question;
• whether or not Corporal Sarath was acting beyond his authority when he abducted the author’s son was immaterial, because “… [where] the violation of Covenant rights is carried out by a soldier or other official who uses his or her position of authority to execute a wrongful act, the violation is imputable to the State, even where the soldier or the other official is acting beyond his authority.”; and
• enforced disappearances represent a clear breach of various provisions of the Covenant, including Article 7, and in respect of the alleged disappearance, responsibility could be imputed to the State party on account that the Sri Lankan Army is an organ of the state.

C. The Committee’s decision

The Committee having met to consider the merits of the case and give its final decision, made a number of conclusions, notably:

On the disappearance of the son and responsibility of the State

“… the Committee notes that the State party has not denied that the author’s son was abducted by an officer of the Sri Lankan Army on 23rd June 1990 and has remained unaccounted for since then. The Committee considers that, for purposes of establishing State responsibility, it is irrelevant in the present case that the officer to whom the disappearance is attributed acted ultra vires or that superior officers were unaware of the actions taken by that officer. The Committee therefore concludes that, in the circumstances, the State party is responsible for the disappearance of the author’s son.”
On the disappearance violating the Covenant

“...The facts of the present case clearly illustrate the applicability of article 9 of the Covenant concerning liberty and security of the person. The State party has itself acknowledged that the arrest of the author’s son was illegal and a prohibited activity. Not only was there no legal basis for his arrest, there evidently was none for the continuing detention. Such a gross violation of article 9 can never be justified. Clearly, in the present case, in the Committee’s opinion, the facts before it reveal a violation of article 9 in its entirety.”

On the violation of the rights of the author and his family under the Covenant

In considering not only the effect of the disappearance on the author’s son, but also the ongoing anguish and stress caused to the author’s family because of the continuing uncertainty of the son’s fate and location, the Committee concluded that the author and his family were also victims of a violation of article 7 of the Covenant. It stated:

“...The Human Rights Committee... is of the view that the facts before it disclose a violation of articles 7 and 9 of the International Covenant on Civil and Political Rights with regard to the author’s son and article 7 of the International Covenant on Civil and Political Rights with regard to the author and his wife.”

Having formed the view that the State party was in violation of the Covenant and noting the State party’s obligations, under Article 2, to provide an effective remedy to persons whose rights or freedoms had been violated under the Covenant, the Committee then gave its views (recommendations) on how the complaint should be resolved:

“...the State party is... to provide the author and his family with an effective remedy, including a thorough and effective investigation into the disappearance and fate of the author’s son, his immediate release if he is still alive, adequate information resulting from its investigation, and adequate compensation for the violations suffered by the author’s son, the author and his family.”

Compliance with the recommendations

Finally, the Committee invited the State party to report on the measures it would take to implement the Committee’s views.

“...pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within ninety days, information about the measures taken to give effect to the Committee’s Views.”
D. Questions for discussion

1. Using the example of the complaint submitted for Anthony Fernando above, and bearing in mind that it was drafted with the support of legal advisors, identify what points in a complaint would require further substantiation by referring to witness’ evidence. Consider which points may require reference to legal arguments, for example the treaty concerned, case law or official reports and discuss how you would go about collecting further evidence.

2. What circumstances could possibly be a reason for a committee ordering interim measures?