HUMAN RIGHTS TODAY: INTERNATIONAL OBLIGATIONS AND NATIONAL IMPLEMENTATION

BY

TORKEL OPSAHL

Professor of Law,
University of Oslo

1. A NEW DIMENSION OF INTERNATIONAL LAW, SEEN FROM THE SCANDINAVIAN ANGLE

Various human rights instruments, to which more and more states are adhering, are actually giving international law a new dimension in important areas of the world. The basis may be regional, as in the Council of Europe, or global, through the United Nations.

This revolutionary development dates back to the United Nations Charter of 1945 and the Universal Declaration of Human Rights in 1948 and thus began about a generation ago. The new dimension means in essence the internationalization of relations between society and the individual. This is particularly striking when the individual is granted the right of petition to international organs. Even though international controversies have to a large extent paralysed this development and still hamper it, its direction is clear.

A milestone was reached on March 23, 1976, when the International Covenant on Civil and Political Rights (CCPR), adopted by the General Assembly of the United Nations in December 1966, formally entered into force for the 35 States Parties which had by then ratified it. At the same time the Optional Protocol to the Covenant, granting individuals the right to submit communications concerning alleged violations, became operative for the 12 States Parties which had accepted it. By November 3, 1978, the numbers had risen to 52 and 20.[1] Denmark, Finland, Norway and Sweden are bound both by the Covenant and by the Protocol.

This paper, completed in January 1979, is based on a report (in Norwegian) originally prepared in February 1978 and presented to the 28th Congress of Nordic Lawyers, Copenhagen, August 23–25, 1978. Certain new data, some points made in the discussion at the Congress, and a few further observations have been added. The paper is nevertheless still addressed to the legal community at large rather than to the specialists in the field. It is hoped, however, that in focusing on the typical attitudes of Nordic Governments to the matter, and in drawing on the author's experience as a member both of the European Commission of Human Rights and of the Human Rights Committee established under the International Covenant on Civil and Political Rights, the paper may also serve as a contribution to the discussion of certain issues of policy.

[1] Report of the Human Rights Committee, General Assembly, Official Records: Thirty-Third Session, Supplement no. 40 (A/33/40), Annex I, pp. 108 ff. Thus, it is now binding on 11 states traditionally considered as belonging to Western Europe (the four Nordic countries, Austria, Cyprus, the Federal Republic of Germany, Italy, Portugal, Spain, and the United

Much earlier, in 1953, the Convention on the Protection of Human Rights and Fundamental Freedoms, adopted in 1950 by the Council of Europe (ECHR), had entered into force. Of the Council's 21 member states, 19 are now bound by the Convention, Portugal being the latest to adhere, while the remaining new members, Spain and Liechtenstein, are expected to do so very soon. The optional clause on the right of individual petition has been accepted by 14 High Contracting Parties,[2] among them Denmark, Iceland, Norway and Sweden.

In a Scandinavian perspective the new situation means that the right of individuals to submit international complaints now applies to all five "Nordic" states, either under the European Convention or under the Protocol to the U.N. Covenant. The rights protected under both systems are roughly the same as to subject matter. And for Denmark, Norway and Sweden both sets of obligations apply side by side. Thus the individual may choose his avenue of complaint. But both instruments have rules barring parallel procedures, and the three states have made reservations to the Protocol in order to prevent a subsequent review of European cases under the U.N. procedure.[3]

The protection extends not only to citizens of the state concerned, but also to everyone subject to its jurisdiction. The U.N. Covenant, in addition, makes it an explicit condition that the person in question shall be "within its [the state's] territory", CCPR art. 2. Subject to this provision the human rights of aliens as well as nationals are protected. And otherwise it is not necessarily determinative where a person is staying at the moment, for

Kingdom), 14 American states (Canada and 13 Caribbean and Latin-American nations), 11 socialist states (*inter alia* the Soviet Union and Yugoslavia), besides 9 African and 7 Arab and Asian states (*inter alia* Iran)—altogether 52 states. Nearly two thirds of these must be classed as developing countries. The Covenant establishes in Part IV the new Human Rights Committee, with 18 members. This must not be confused with the old Commission on Human Rights. The Committee has been functioning since 1977. Its competence to consider communications from individuals has been recognized by Barbados, Canada, Colombia, Costa Rica, Denmark, the Dominican Republic, Ecuador, Finland, Jamaica, Madagascar, Mauritius, Norway, Panama, Senegal, Surinam, Sweden, Uruguay, Venezuela and Zaire.

[2] The Convention for the Protection of Human Rights and Fundamental Freedoms, adopted by the Council of Europe, is thus now (January 1979) binding on *Austria, Belgium,* Cyprus, *Denmark,* France, the *Fed. Rep. of Germany,* Greece, *Iceland, Ireland, Italy, Luxembourg,* Malta, the *Netherlands, Norway, Portugal* (ratified November 9, 1978), *Sweden, Switzerland,* Turkey and the *United Kingdom.* The states which are italicized have accepted the individual right of petition under art. 25. The Convention, which has several additional Protocols, established the European Commission and the Court of Human Rights.

[3] The coexistence of the two systems has been the subject of various reports and studies, *inter alia* a report from the Committee of Experts on Human Rights to the Committee of Ministers, H(70)7 of September 1970. It was most recently studied by the Council of Europe Colloquy on Human Rights, Athens, September 21–22, 1978, the proceedings of which will be published separately. A special committee is at present examining whether any of the provisions of the Covenant should be included in the Convention. See also an article by the Danish author Laurids Mikaelsen in *TfR* 1978, p. 692, with references.

instance when the question arises whether a denial of entry may infringe some human rights provision.

The importance in principle of this internationalization of the obligations of the state towards individuals is obvious. Its practical effect is more difficult to assess. The point of departure for the observations made in this paper is the following basic thesis:

The national implementation should always be regarded as the alpha and omega of the protection of human rights. Although this thesis has some important implications, it needs no detailed explanation: it simply means that rights stated on paper in international instruments may be worthless unless they are effectively implemented by organs operating in the actual environment of the individuals concerned, and not at a great distance from them.[4] Thus, to the basic thesis there is connected another: The main function of international organs in this area is to contribute to the necessary interaction between the international obligations and the national implementation. It is not sufficient that the international obligations shall formally have entered into force. Many treaties have done this, without visible effects. In order for them really to come to life, more is needed. International organs to review the national implementation of the international obligations are a necessary—if not a sufficient—aspect of the obligations. The *international supervision* of the national implementation therefore naturally belongs to our subject. One of the obligations is precisely to submit to this control.

It is well known that in human rights as in other matters many states, above all the socialist ones in Eastern Europe, have made a strong point of their sovereignty and the principle of non-intervention in their own affairs. This was in evidence at the Belgrade Conference 1977–78 on the follow-up of the Helsinki Act of 1975 on security and cooperation, and has often been underlined in East–West relations. The fact that at the same time the states in question have been willing to submit to a certain control by the new Human Rights Committee established under the Covenant (below, section 6) ought to attract more attention than it has done so far. This is not to say that their position is necessarily an inconsistent one.

[4] Even as a matter of interpretation of the existing international systems, this national dimension must be regarded as primary to any international control, both in time and in the exercise of such discretion as may be allowed. The "margin of appreciation" of national courts and authorities has become a convenient catchword, not always convincing but often invoked, and has in principle been accepted by the European Court of Human Rights, see notably the Handyside case, judgment of December 7, 1976, Series A no. 24, para. 48, p. 22.

2. BREAD AND FREEDOM

Before going further we should point out another main line of development from the same point of departure, i.e. the Universal Declaration of 1948. This document speaks of economic, social and cultural rights as well as the civil and political ones which traditionally have received most attention in the Western world. The truth which has now irresistibly forced itself upon us is that both groups of rights are equally important and are in fact closely connected. The reason why in 1966 the United Nations adopted a separate International Covenant on Economic, Social and Cultural Rights (CESCR),[5] which entered into force on January 3, 1976, is that from the legal point of view the latter rights cannot be implemented in the same way or by the same means. This Covenant recognizes as rights freedom from hunger (CESCR art. 11) and, e.g., the right to work (arts. 6 and 7), to an adequate standard of living (art. 11), to health (art. 12) and to education (art. 13).

Nevertheless, Western leaders today accept the thesis which the majority of new and poor states in the United Nations together with the socialist states have supported for a long time. The human rights policy for the United States which has been launched under President Carter has the following elements: "The right to be free from governmental violations of the integrity of the person; the right to fulfill one's vital needs such as food, shelter, health care, and education; and civil and political rights."[6]

When President Carter signed the two United Nations Covenants in October 1977 he said: "The Covenant on Civil and Political Rights concerns what Governments must not do to their people and the Covenant on Economic, Social and Cultural Rights what Governments must do for their people."[7]

In December 1977 the General Assembly of the United Nations adopted a resolution advanced by the Third World proclaiming new priorities in the work for human rights. According to the resolution this work should aim at achieving the equality and self-determination of peoples and a new economic world order. The adoption has been interpreted as giving priority to "collective" rather than "individual" human rights.[8]

[5] The International Covenant on Economic, Social and Cultural Rights has been ratified by the states referred to in note 1 above and a few others (notably Australia and the Philippines). It does not establish any new organs. The reports from the states on the implementation of this Covenant are submitted to the Economic and Social Council.

[6] Deputy Secretary of State, Warren Christopher, *The Diplomacy of Human Rights: The First Year,* The United States Information Service, released February 13, 1978.

[7] Quoted from Margo Picken, "Rights and Freedoms. The International Covenants", *Matchbox,* Amnesty International USA, Fall 1977, p. 6.

[8] General Assembly res. 32/130, as interpreted *inter alia* in *Le Monde,* December 9, 1977.

Some observers see this development as a danger to the traditional human rights. The Foreign Minister of Norway, however, in his speech to the Consultative Assembly of the Council of Europe in Strasbourg on January 27, 1978, stressed that the work for a new economic world order had become an important and integral part of the work for human rights. As he had said in the United Nations in the autumn of 1977, we could not accept the need for economic and social development as an excuse for torture, arbitrary arrest and political oppression, but on the other hand it was not proper to concentrate on the traditional human rights to the exclusion of all else. In relation to the developing countries, he said, we must reach a synthesis: Bread and freedom. In this connection he appealed to the Council of Europe to revise its own system of protection in the light of a "dynamic" concept of human rights.[9]

There are certainly those who will maintain that there is a danger of confusing the conceptions here. But the answer must be that in that case it is necessary to revise the conceptions concerned. It is sometimes quite embarrassing to notice how the work for human rights in our part of the world is dominated by juridical niceties, rather than by actual needs and sufferings, which should be the main concern wherever they exist.[1]

International obligations imply not only international supervision but also international assistance as regards the national implementation. This is expressly stated in CESCR art. 2. But the yardstick for the implementation of economic, social and cultural rights cannot be sought in conventions or constitutional texts. Statistics and budgets (though even these do not necessarily reflect reality) afford better material.[2]

It is sometimes said that when there is a gap between norm and reality as regards economic, social and cultural rights, it is usually the resources of the state rather than its willingness which are missing.[3] We must be grate-

[9] *UD-Informasjon* (Information from the Ministry of Foreign Affairs, Oslo) no. 6/78, pp. 7–8; see also on the same subject his remarks in "Further Human Rights", *FORUM Council of Europe*, 1–2/78 pp. 14–15.

[1] Certain difficulties connected with this approach were described by Professor Thor Vilhjalmsson, a judge at the European Court of Human Rights (Copenhagen Congress, August 24, 1978), who pointed to the risk of neglecting civil and political rights, and criticized the extension and use of the concept of human rights for the promotion of generally accepted political ideas, when only the label was new.

[2] See, for instance, Manouchehr Ganji, *The Realization of Economic, Social and Cultural Rights: Problems, Policies, Progress*, United Nations, New York 1975 (E/CN.4/1108/Rev. 1, E/CN.4/1131/Rev. 1), a special report for the Commission on Human Rights; Anders Helge Wirak, "On Indications on Human Rights" (in Norwegian), Paper no. 49 from the Chair in Conflict and Peace Research, University of Oslo, 1977.

[3] Hans Danelius, *Mänskliga rättigheter* (Stockholm 1975, in Swedish), p. 145, makes this point, and considers that there is thus a profound difference of principle between the two categories of rights. At the Copenhagen Congress a similar view was put forward by Mr Voitto Saario, who rightly emphasized, however, that the two categories are compatible and

ful for the fortunate position of the Nordic countries in both respects. But apart from the responsibility which this position carries with it in relation to the rest of the world, we should not allow ourselves to be complacent because of the relatively high levels which have been reached in economic, social and cultural matters. Not that continued growth or increased standards of living should be the primary goals. But the problems which are caused by social change, and in particular the unemployment resulting from the development of and fluctuations in the economy, demonstrate that the national implementation of economic, social and cultural rights is not acknowledged or lastingly achieved anywhere.

Nevertheless it is not easy to change an old habit. For lawyers in particular, the difference between economic, social and cultural rights, on the one hand, and civil and political rights, on the other, is still noticeable. As regards the first group, the main obligation is one of progressive implementation. But in the case of civil and political rights no similar "period of transition" from their entry into force is recognized.[4]

In what follows we shall refer mainly to civil and political rights. Here the relation between international obligations and national implementation depends on whether the national *law* and the national *remedies*, both taken in a wide sense, meet the requirements of the conventions.

3. POINTS AT ISSUE

The relation of national law and remedies to international obligations, has for a long time been the subject of extensive debate and writing by and for experts. At the Scandinavian level it was taken up *inter alia* at a conference held at Åbo, Finland, in 1974, resulting in a valuable publication, *The Protection of Human Rights in the Nordic Countries*.[5]

For the majority of the legal community the subject still seems to be somewhat distant. But it is coming closer.

that the political right of participation in the conduct of public affairs is particularly important.

[4] It is possible that the wording of CCPR art. 2 allows or suggests a minor reservation on this point, cf. statements by the Norwegian Ministry of Justice in *Odelstingsproposisjon* no. 10 (1970–71), pp. 11–12. It was even at first read by some as being based on the principle of "progressive realization", e.g. by A. H. Robertson in *British Year Book of International Law* 1968–69, p. 26, and, less explicitly, by the same author, *Human Rights in the World* (1972), p. 83, compare p. 34 where his position is modified.

[5] The Conference was held by the Henrik Gabriel Porthan Institute, and the work was published in the *Human Rights Journal/Revue des droits de l'homme* vol. VIII, 1, 1975, and as a separate volume by the Institute, cited below as the *Åbo Conference*.

Anyone who seeks to examine the interaction between international obligations and national implementation will face far-reaching issues.

The relation between *treaty* and *legislation* has received much attention in constitutional and international legal writing. Important aspects of it are mainly matters of legal method within the respective systems. Although the theoretical discussion, e.g. about monism or dualism, may at times seem somewhat sterile, it is of undoubted interest in the area of human rights. The same may be said about the more practical discussion on the various legislative techniques for the implementation of law-making conventions.[6] Since we must abstain here from taking these issues up in their full breadth, some comfort may be found in the fact that as early as 1965 Max Sørensen was able to say on a similar occasion that nothing new had been said in the last 20 years in the discussion about the relation between treaty and law in the doctrine of international law.[7]

An equally extensive, or even greater, task would be to examine the substance and protection of each of the various human rights at the international and national level in order to form a view whether there is real conformity. The national implementation does not depend, positively or negatively, on the reading of formal texts. Different legal traditions and legislative techniques mean that the same position may be reached in very different ways. The international obligations express propositions which are taken as self-evident in many national systems. The protection may then be more indirect, for instance through the penal code, or result from unwritten principles, for instance the "principle of legality", while the main proposition in its more general form is not expressed anywhere.

It is not possible in a brief study to develop these large issues, or even enter into the various rights at all.

In individual cases, moreover, the question is not so much whether the right is expressly stated in national legislation as what are the remedies through which it is protected at the national level, and how effective these

[6] The subject has been examined in important public reports in several Nordic countries, see *inter alia* for Norway *NOU* (*Norges offentlige utredninger*) 1972: 16 "Gjennomføring av lovkonvensjoner i norsk rett" (in Norwegian), for Denmark *Betænkning* (no. 682) of May 1973, "Kundgørelse og opfyldelse af traktater" (in Danish) and for Sweden *SOU* (*Statens offentliga utredningar*) 1974: 100, "Internationella överenskommelser och svensk rätt" (in Swedish).

[7] Max Sørensen, "Obligations of a State Party to a Treaty As Regards Its Municipal Law", *Human Rights in National and International Law* (ed. A. H. Robertson, proceedings from a conference in Vienna 1965) Manchester 1968, p. 11. Despite this comment, his own analysis and the following discussion showed that the subject could still reveal new and interesting points. See also a recent study by Andrew Drzemczewski, "The Domestic Status of the European Convention on Human Rights: New Dimensions", in *Legal Issues of European Integration* 1977/1 (Amsterdam), discussing, *inter alia*, the obligations assumed and giving an overview, country by country, of issues which correspond to sections 4 and 5 below. It has not been possible to take this and other literature fully into account in this paper.

in fact are. Thus not only the action of the legislature, but also that of the *tribunals* and the *administration,* is highly relevant for an effective national implementation.[8]

In these few pages we shall deal mainly with the following points:

First, what really is the nature and content of the duty of the state as regards national implementation under the existing systems?

Secondly, how is this implementation obligation—and here with particular reference to the Nordic countries—actually observed in relation to these systems?

Thirdly, how does the international supervision work in practice?

Last but not least, looking to the future, what attitude should be taken up and what further measures should be considered?

4. THE CONTENT OF THE INTERNATIONAL OBLIGATION IN PRINCIPLE

The essence of the international obligation of the state as regards civil and political rights is to *secure* the rights concerned to everyone; ECHR art. 1 uses only the word "secure", while CCPR art. 2 significantly says both "respect and ensure". We are here concerned with the right to life, the right to protection against torture and ill-treatment, slavery and forced labour, the right to personal liberty, with restrictions regarding resort to arrest and detention, guarantees for fair hearing and the use of punishment, respect for private and family life, home and correspondence, freedom of thought, conscience and religion, freedom of expression, assembly and association, just to mention the most important subjects covered by the European Convention (ECHR arts. 2–12). The European system also provides a very limited protection for property, and refers to the rights to education, free elections and certain other matters dealt with in its Additional Protocols (no. 1 arts. 1–3 and no. 4 arts. 1–4). Most of this, but not all, is also covered by the Covenant, which however protects some further rights, *inter alia* the right of aliens to protection against arbitrary expulsion, protection for children, the right of access to public service and participation in public life, the right to equality before the law, as well as the right of minorities to their own culture, religion and language (CCPR arts. 6–27).

[8] At the Copenhagen Congress the Chief Justice of the Supreme Court of Norway, Mr Rolv Ryssdal, who is also a judge at the European Court of Human Rights, called the particular attention of Scandinavian lawyers to the implementational role of national judicial and administrative organs as regards international human rights.

A closer look shows that these new international obligations can only be said to be international law in their form, and that in their substance they concern typical national law. They have dominating features of criminal law and procedure besides elements of administrative and constitutional law. It is more important in practice to know these areas than to be trained in international law.

Most of the rights are far from completely defined. They are often expressed in wide and flexible terms. But as a rule states have taken precautions to prevent their obligations from becoming too far-reaching. First, there is the explicit reference to the possibility that national rules of law may make "necessary" exceptions or limitations for certain purposes. This implies that such reservations cannot be made without a basis in national rules, or for other purposes. (See for instance ECHR arts. 8(2), 9(2), 10(2), 11(2) and 18.) Secondly, there exist certain general clauses. In particular, the protection may to a certain extent be derogated from or suspended during wartime or other national emergency (ECHR art. 15 and CCPR art. 4). Another general clause prohibits discrimination in the enjoyment of rights (ECHR art. 14 and CCPR art. 2(1)).

One general clause which may be said to be of particular interest from the point of view of principle, and which has a bearing on the implementation obligation of the state, is that stating that anyone whose rights under the conventions have been violated is entitled to an *effective national remedy* (ECHR art. 13 and CCPR art. 2(3)). Under the European system, however, this clause has for a long time had a strange fate—a literal interpretation, possibly misconceived, having deprived it of nearly all substance. Recently, however, voices have been heard both within and outside the organs of Strasbourg in favour of giving it its logical place as an important principle covering national implementation. We shall return to this point a little later.

It may be stated as a main principle that the duty of implementation has the effect of requiring the existence of national legislation in so far as limitations or exceptions to human rights are to be made, while on the other hand there is no requirement of such legislation for the implementation of the rights themselves. This may seem strange at first sight, but it is now firmly established in practice. The discussion about the obligations of parties to the European Convention in this respect demonstrates the point.

This discussion has reference to ECHR art. 1, which by its term "shall secure" establishes the duty of national implementation without saying directly how it is to be carried out. In this respect CCPR art. 2 is more explicit. Above all its significant expression "respect and ensure" may be said to confirm what I will call the *double* duty of implementation. In the

discussion of the European system among experts there has been persistent disagreement and a general lack of clarity. It is fairly safe to take as a point of departure that the Convention does not contain any duty to transform its own provisions as such into national legislation or incorporate them in existing legislation. On the other hand, the rights of an individual under the Convention must not be violated even if to do so would not be contrary to national law. No state may invoke its own constitution or legislation as an excuse for not carrying out its international obligations. Between these two unquestionable propositions lies the disagreement: *Are human rights implemented if only they are not violated (i.e. are "respected"), or is there more in the demand that they shall be "secured"?*

The more "European" or "supranational" interpretations have understood the duty of implementation to mean that the state must provide for the rights to become immediately binding as part of domestic law. In practice these interpretations conflicted with the attitude taken by a group of states, including the Nordic countries, where this form of execution of treaties has not been the rule, is not envisaged by the constitutions and was also not resorted to in this case, notwithstanding any real arguments which could be made in favour of such an immediate or "self-executing" effect of human rights. The details of this discussion cannot be gone into here. It will have to suffice to stress that the ability and the willingness of the state to execute such international obligations do not in the first place depend on the status of the conventions in domestic law. Those states which have denied such a direct status have often argued that in any event national law offered substantially the same protection. And some of them have accepted the maximum of existing international control. By contrast, as regards those states which pride themselves on having made their international obligations part of the law of the land, it may in many cases be said that their unwillingness to subject themselves effectively to international supervision is disturbing.

In practice this matter has not been completely settled. But recently, in the first judgment by the European Court of Human Rights in an interstate case, in the important matter of Ireland against the United Kingdom, it was observed that "the Irish Government's argument prompts the Court to clarify the nature of the engagements placed under its supervision".[9]

The Court confirmed that the Convention comprises more than "mere reciprocal engagements" between states. And it stated, *inter alia,* that according to the *travaux préparatoires* the purpose was to make it clear that the

[9] European Court of Human Rights, case of *Ireland* v. *the United Kingdom,* judgment of January 18, 1978, Series A no. 25, para. 239 (pp. 90–91), from which the following quotations are also taken.

rights were to be "directly secured". "That intention finds a particularly faithful reflection in those instances where the Convention has been incorporated into domestic law", the Court said with reference to earlier decisions. And the Convention does not only oblige the higher state authorities, for their part, to respect the rights. It also means that these authorities, in order to secure the rights, must "prevent or remedy any breach at subordinate levels".

The problem in the case in question was especially whether a law could be challenged *in abstracto* under the Convention. The answer, according to the Court, followed less from art. 1 than from art. 24, which enables a state to act against "any alleged breach" of the provisions of the Convention. And it is here that the Court has tried to draw up a directive for the controversial area. The opinion of the Court runs as follows:

> Such a "breach" results from the mere existence of a law which introduces, directs or authorises measures incompatible with the rights and freedoms safeguarded; this is confirmed unequivocally by the *travaux préparatoires* (document H (61) 4, pp. 384, 502, 703 and 706).
>
> Nevertheless, the institutions established by the Convention may find a breach of this kind only if the law challenged pursuant to Article 24 is couched in terms sufficiently clear and precise to make the breach immediately apparent; otherwise, the decision of the Convention institutions must be arrived at by reference to the manner in which the respondent State interprets and applies *in concreto* the impugned text or texts.
>
> The absence of a law expressly prohibiting this or that violation does not suffice to establish a breach since such a prohibition does not represent the sole method of securing the enjoyment of the rights and freedoms guaranteed.

In other words, the Court has confirmed that the rights may be secured in other ways than by explicit prohibitions against their breach. And a law which does not conform to the Convention may only be said to be as such in breach of it when this is clearly and precisely demonstrated by its terms. Otherwise only its application to individual cases may decide the question of a breach.

As regards the nature and scope of the duty of implementation, it is true that various questions are still unanswered. For instance, may an *individual* in any case be considered a "victim"[1] before the law which is contrary to the Convention has been applied to him? This question is left open by the Court. It is reasonable to presume that if the conflict is manifest, one

[1] This is a condition for the exercise of the individual right of petition under ECHR art. 25 and has given rise to a varied and developing body of case law in the Commission's decisions on admissibility (below, note 7 at p. 168).

cannot require the individual to allow himself to be punished before he asks to have his human rights implemented. But this is above all a question of the competence of the international organs. The general compatibility of the law with the international obligations may be examined under a reporting system as an alternative to the complaints procedures (below, section 6).

The duty of implementation is therefore conditional as regards the content of national *laws*. As regards national *remedies*, too, this duty is perhaps not unambiguous. Reference was made above to ECHR art. 13, which for a long time was given a narrow interpretation in the practice of the Commission: the attitude was that the remedy only had to be granted to those whose rights *had been* violated, not to those who merely *claimed* this to be the case. In this way the whole point seemed to be lost. It would seem more reasonable to say that since it was not necessary expressly to secure the rights themselves, it was at least necessary to secure the remedies to anyone wishing to have his rights *examined*. And in CCPR art. 2, which is more detailed and precise and appears to pose stricter requirements than does ECHR art. 13, there seems to be a basis for such an understanding.

The frustrating interpretation of art. 13, however, now probably belongs to history. When recently the European Court of Human Rights was faced with this question in the *Klass* case, it took a very firm position, rejecting in fact the many decisions of the Commission which had given art. 13 the narrow meaning. Contrary to the literal reading, the Court held what logic seemed to dictate, namely that "Article 13 must be interpreted as guaranteeing an 'effective remedy before a national authority' to everyone who *claims* that his rights and freedoms under the convention have been violated" (my italics).[2]

5. THE NATIONAL IMPLEMENTATION, PARTICULARLY IN SCANDINAVIA

The constitutional protection of the individual has long traditions in many countries. Already, in connection with the upheavals in the latter part of the 18th century, in particular in America and France, constitutionalization of the basic rights of the citizens became one of the self-evident political claims of the period. The written constitutions of the Nordic countries have also guaranteed them in various ways. Both in the old

[2] European Court of Human Rights, case of Klass and others, judgment of September 6, 1978, para. 64 (mimeographed version p. 23).

monarchies, Denmark, Norway and Sweden, where the constitutions of the 19th century were based on the separation of powers, and in the younger, democratic republics of the 20th century, Finland and Iceland, these constitutions were nevertheless at the outset typically bourgeois ones; primarily they secured civil rights, but gradually they also extended the citizens' political rights, which at first were very limited.

Where civil rights are recognized, we say today that the state is based on the rule of law, while the structure which follows from the exercise of political rights is democracy. Economic, social and cultural claims, achieved at a later stage, have created the welfare state. The historic role of the Nordic countries has been to show that in favourable circumstances the last-mentioned societal form is compatible with the rule of law and democracy.

The three concepts rule of law, democracy and the welfare state relate to societal forms which secure the needs and rights of individuals in different dimensions. There is no necessary contradiction between collective and individual interests relating to any of these concepts. But none of them has been developed without resistance and "class struggle" in a wide sense.

In the more recent development of the relation between states and the individuals, constitutional provisions appear to have played only a modest role. Sweden is alone among the Nordic countries in having carried out a complete revision of the constitutional protection of individual rights. The rule of law and democracy have generally been achieved while only cautious adjustments of the older, bourgeois constitutions have been made. The welfare state has been created through legislation and also, it should not be forgotten, through budgetary provisions. As it is common among lawyers not to penetrate very far behind the norms and institutions themselves, I do not propose here to embark on an analysis of the real forces which have been at work in this process.

This is the background against which the question of implementation of the new international obligations has been handled in our countries. It is striking how the governments have approached the treaties in a similar way, expressing the view that there was no general need for national measures of implementation. A statement by the Icelandic Minister of Justice in the Althing in 1953 may be considered typical: "As to the rights mentioned here, it can be stated in brief that in all points of any importance they are already expressly granted to the citizens by Icelandic law, partially in the Constitution itself—or they are such fundamental rights that they are considered to be embodied in the main rules of Icelandic law, even though that is not expressly stated." Later the same minister said: "For us in Iceland there are few new points in this, as the substantive rules

on the legal protection of the individuals are on the whole already to be found in Icelandic law."[3]

The Minister's statement was concerned with the European Convention. It is well known that Norway, for instance, had in this connection made a reservation concerning the freedom of religion, later withdrawn as the "Jesuit Clause" of the Constitution had been amended. But otherwise few, if any, national measures of implementation were considered necessary at the time of ratification. The same seems to have been the case in the other Scandinavian countries.

Before the ratification of the UN Covenants, consultation among the Nordic countries took place, as so often before.[4]

The Danish Government recently reported that it had, "before ratifying the Covenants, made an in-depth study of each individual Article in comparison with similar provisions in Danish law". Apart from certain legislative amendments and a few reservations, it was found that the law in Denmark was in harmony with the CCPR, a view which was supported by the fact that already in 1953 Denmark was able to ratify the European Convention without reservations.[5] Similar provisions were in force in Denmark, it was stated, by virtue of the Constitution, of express statutory provisions, and of general principles of Danish law. Therefore, "in accordance with ordinary practice, a general incorporation by statute of the Covenant was regarded as unnecessary".[6] The corresponding national provisions are also influenced by the rule of *interpretation* which says that the national authorities shall prefer the answer which "will best comply with existing treaty obligations". The rule of *presumption* is also invoked by the Government, relying particularly on the memorandum from the Ministry of Justice on the constitutional problems relating to Denmark's entry into the European Communities in 1972, which presumes that the Danish courts will avoid a literal interpretation of Danish law, and "prefer a more *ad hoc* application of a law" if Denmark would otherwise be responsible for "an unintentional violation of a treaty".

One aspect particularly worth noting, according to the Danish Government, is that administrative authorities which exercise discretionary pow-

[3] Quoted by Thor Vilhjalmsson, "The Protection of Human Rights in Iceland", *Åbo Conference*, p. 222.

[4] *Odelstingsproposisjon* (Norway) no. 10 (1970–71) p. 4.

[5] See the report of Denmark (additional information) under art. 40 of the Covenant, Doc. CCPR/C/1/Add. 19, p. 2. On the reporting system see further below (section 6, with references).

[6] This and the following points and quotations are from the initial report of Denmark under art. 40 of the Covenant, Doc. CCPR/C/1/Add. 4, pp. 2ff., see also identical passages by Niels Eilschou Holm, "The Protection of Civil and Political Rights in Denmark", *Åbo Conference*, pp. 167ff.

ers are under a legal obligation to do this in such a way that the administrative acts "conform to validly contracted international obligations", that is, even assuming that they are not incorporated in domestic law.

The other Scandinavian countries have made similar statements. Finland, for instance, observed that after careful scrutiny most of the rights and the freedoms of the Covenant "were considered to be sufficiently guaranteed by the Constitution or by ordinary legislation".[7] Norway drew attention to the catchword "dualism" in describing the relationship between Norwegian municipal law and international law, but pointed out that besides the "principle of transformation" which is part of this doctrine, Norway had in many instances, including the Covenant, employed a mechanism referred to as "the ascertainment of normative harmony" ("passive transformation"). No special act of transformation was then required, as the law was already in conformity with the treaty. In this connection not only written laws, but also unwritten principles which are of particular significance in the field of human rights, were described. Thus, the principles of "legality" and of "equal treatment under the law" were particularly relevant.[8] Sweden reported that except for three points where reservations were made, Swedish law was, according to the Government and the Parliament (Riksdagen), "in full accord with the obligations which were to be assumed by Sweden under the Covenant".[9]

Nevertheless Sweden has in fact, since its ratification of this treaty in 1971, not only once but twice revised the whole area through the two great constitutional reforms which entered into force on January 1, 1975, and January 1, 1977, respectively.[1] The provisions are now contained in particular in the new ch. 2 of the Swedish Instrument of Government. The principle of legality, which in the other Nordic countries is unwritten, has now been expressed in the Swedish Instrument of Government, ch. 8, sec. 3. This principle is the cornerstone of the argument that transformation of human rights is not as a rule necessary: It serves as a prohibition against interferences unless these take place through or are authorized by a legislative act.

With this striking exception of Sweden,[2] where thorough comparative

[7] See the initial report of Finland. Doc. CCPR/C/Add. 10, p. 1, which otherwise mainly explains Finland's various reservations to the Covenant.

[8] The initial report of Norway, Doc. CCPR/C/1/Add. 5, pp. 2–3, which also refers to certain reservations made to the Covenant.

[9] The initial report of Sweden, Doc. CCPR/C/1/Add. 9, p. 2.

[1] The initial report of Sweden, Doc. CCPR/C/1/Add. 9, p. 32, which also describes further work in progress in this area.

[2] Also in Finland there have been recent official *inquiries* into the need for constitutional reforms generally, including relevant studies of human rights. Because of political disagreement on various important points no major changes have as yet taken place, see *Statsför-*

and international studies were the basis for the formulation of new constitutional provisions,[3] it has to be said that the Nordic countries have not felt what was called above the double duty of implementation to be a strong incentive to action. It is, of course, true that it is not the words which really matter. The fact that the term "human rights" does not exist in the national legal vocabulary (as is the case, for instance, in Norway, where one can say with almost complete certainty that the term is not used in any act of parliament or any other official provision) is no reason for anxiety in itself. But the confidence in the principle of legality and other unwritten fundamentals is, after all, in my opinion not entirely satisfactory as a substitute for explicit guarantees. Only sporadic measures have been taken in this respect. The Norwegian Government has admitted: "It will often be impossible to demonstrate as a matter of 'visual' fact that these obligations are fulfilled."[4]

It is naturally of paramount importance that human rights shall not be violated. Unfortunately, what the national laws say is often of little importance in this respect. Comparative studies may show that constitutional texts and the number of ratified conventions are indicators which may in fact be in inverse proportion to the real protection.[5] The level of real protection then has to be measured by such evidence as there is of violations. Although no society or state is perfect, it is reasonable to say that the Nordic countries have a good record and reputation in this regard.

This probably helps to explain why Scandinavian governments generally appear to consider that special measures of implementation of the international obligations are superfluous, except for the reservations or amendments made where national law was clearly incompatible with those obligations. Their basic attitude seems to have been that the duty of implementation has been observed when human rights are *respected in fact.* Neither new enactments nor new remedies have been introduced for the sole and separate purpose of affirming or *ensuring in law* the rights to be implemented.

fattningskommitténs delbetänkande 1974 (*Kommittébetänkande* 1974:27), and on the follow-up, Hidén and Saraviita, *Statsförfattningsrätten i huvuddrag* (1978), pp. 239–41.

[3] The effect of this new constitutional catalogue of human rights is perhaps not entirely settled. Are they mainly directives for the legislator or also immediately enforceable by courts and administrative organs? Comments by Gustaf Petrén at the Copenhagen Congress, underlining the first function and the failure to provide generally for judicial enforcement, were supplemented by Holmberg, stating that they were generally applicable by the courts except when otherwise provided. The problem of constitutional review by courts and administrative authorities is to be the subject of further study, Doc. CCPR/C/1/Add. 9, p. 32.

[4] The initial report of Norway, Doc. CCPR/C/1/Add. 5, p. 2.

[5] Wirak (above, note 2 at p. 155) has sought to show this by data collected by Amnesty International about the human rights situation in a number of countries as compared with the official norms contained in the constitutions and conventions ratified by the states concerned.

This attitude is understandable in countries which historically have been, or may consider themselves to be ahead of others, and even be models for the internationalization of human rights. It is as if they are saying: "We do not need to import these rights: rather it is we who have exported them." A famous example of such export of legal thought is *habeas corpus* from England, which without any doubt was the model for the rule in ECHR art. 5(4). It is, however, worth noting that the Court in Strasbourg has now found that this model, although it has been in existence for hundreds of years, does not in all cases satisfy the requirements which the European Convention today must be said to contain as regards judicial control.[6]

With due respect for the traditional view, it seems to me that the double duty of implementation, viz. not only to "respect"—which seems to be understood merely as "not to violate or disagree with"—but also to "ensure" the rights concerned, should be understood as further meaning "explicitly to endorse and protect" these rights at the national level, too. As regards this second aspect the duty needs in my opinion to be taken more seriously than our Nordic examples show; this should be done either by adopting explicit legislation on the substance or, at least, by securing that the remedies offered are adequate and effective.

6. INTERNATIONAL SUPERVISION OF THE NATIONAL IMPLEMENTATION

The following observations are based in particular on personal experience from the work of the European Commission of Human Rights and the new Human Rights Committee which was established in 1976 under the Covenant on Civil and Political Rights. The Committee took up its work in 1977 and toward the end of 1978 it submitted its second annual report to the General Assembly of the United Nations.

Under the European system the international supervision is mainly based on a *complaints procedure*. Decisions finally reached here are binding. The individual right of petition to the European Commission (art. 25) has up to the beginning of 1979 been exercised in about 8 500 cases, and an even greater number of initiated cases have been dropped at the preparatory stage by the individuals themselves without having been registered as applications. Most applications (*c.* 98 %) are declared inadmissible, by a strict use of the formal and substantial conditions for examining their

[6] *Ireland* v. *the United Kingdom*, judgment cited above (note 9 at p. 160), para. 200, p. 77.

merits (arts. 26 and 27). The right of states to complain (art. 24) is seldom exercised, but it has been used in exceptionally serious cases. In both categories of applications the purpose of the supervision is to obtain a friendly settlement through the Commission (art. 30) or a binding decision by the Court or the Committee of Ministers (art. 32) following a report by the Commission (art. 31) as to whether human rights have been violated.[7] Relatively few cases have concerned Denmark, Iceland, Norway or Sweden, but some of them have been of general interest, even if so far nobody has succeeded in obtaining a decision that any of these countries has violated the Convention.[8]

In this way the second aspect of the duty of implementation, the scope of the obligation to secure human rights, not only to refrain from violating them, has been left in the background of the European system. With the exception of a few cases referred to above (section 4), the complaints procedure does not normally focus on this aspect. It is true that ECHR art. 57 obliges the state to "furnish an explanation of the manner in which its internal law ensures the effective implementation of any of the provisions of this Convention", when the Secretary-General of the Council of Europe so requests. But for various reasons, partly political and structural, the Secretary-General has not made much use of this possibility.

As mentioned above, under the system of the Covenant, too, states have the option of submitting to a procedure dealing with complaints on the basis of communications from individuals, but this procedure will only result in an expression of "views" on the matter by the Human Rights Committee.[9] Like the reports of the European Commission, these views

[7] The best survey of the practical aspects of the use of the right of individual petition is given in "Stock-taking on the European Convention on Human Rights, a periodic note on the concrete results achieved under the Convention" (DH(77)3), issued by the Secretary to the European Commission of Human Rights, including *inter alia* statistical material. Many of the Commission's decisions on admissibility and reports on the merits of cases and all of the Court's decisions and judgments are published in separate series. Much of these and other materials also appear in the *European Yearbook of Human Rights*. Final decisions under the Convention are taken by the Committee of Ministers in cases which do not end in the Court, and these, too, are often published. However, the proceedings in the Commission and the Committee of Ministers take place *in camera*, while those of the Court are public.

[8] To illustrate, without detailed references, the kind of matters which have been brought before the Commission relating to Nordic countries, mention may be made from Denmark of certain questions of criminal procedure (*inter alia* in the Schouw Nielsen case of 1959), the right of parents to resist on religious grounds sexual education of their children (judgment of the Court in the Kjeldsen case in 1976) as well as various matters relating to family life; from Iceland the progressive taxation of capital (in the Gudmundsson case of 1960), as well as the prohibition against keeping dogs in Reykjavik; from Norway the legislation on obligatory public service for dentists (in the Iversen case of 1963) as well as various cases on criminal procedure; from Sweden *inter alia* questions of religious instruction, as well as conflicts between the authorities and certain trade unions (judgments in the Swedish Engine Drivers Union case and the Schmidt–Dahlström case, also in 1976) and the protection of property against long-term city planning permitting but postponing expropriation.

[9] Optional Protocol to the CCPR, art. 5(4), cf. Rules 78 to 94 of the Rules of Procedure of

are not binding on the parties, and in the Covenant system there is, unlike the European system, no further machinery authorized to make binding decisions.[1]

Supporters of international supervision may have been disappointed, but not surprised, that in this respect the Covenant system appears to be considerably weaker than the European system. The question of other means of supervision has not received the same attention. It is important therefore to note that the Covenant on Civil and Political Rights also provides for obligatory supervision through a *reporting system* which has not existed under the ECHR. It is the duty under CCPR art. 40 of all States Parties to account for their national implementation of the Covenant. The accounting system is based on initial reports within one year from the entry into force of the Covenant for the State Party concerned, and additional reports whenever the Committee so requests. These reports are studied by the Committee, which in its Rules of Procedure has confirmed that it considers itself authorized to determine whether or not the obligations under the Covenant have been discharged, and may "in accordance with Article 40, paragraph 4, of the Covenant, make such general comments as it may consider appropriate".[2] It may safely be predicted that the scope of these functions will create doubts and lead to disputes.

Nevertheless experience has already shown that the reporting system, and in particular the study of the reports by the Committee, brings into prominence much more easily than the pure complaints procedure the second aspect of the duty of implementation.

Within the United Nations such a reporting system—which had earlier been brought into use quite effectively and extensively by the International Labour Organization in particular—has been tried out in connection with the International Convention on the Elimination of All Forms of Racial Discrimination of 1966. The corresponding Committee on the Elimination of Racial Discrimination, CERD, has gone quite far in what it requires of States Parties without breaking the "dialogue" with them. Generally speaking, eperience from international cooperation tends to show that this

the Human Rights Committee, as amended, see Reports of the Human Rights Committee, General Assembly, Official Records: Thirty-Second Session (1977), Supplement no. 44 (A/32/44) Annex II, and Thirty-Third Session (1978), Supplement no. 40 (A/33/40) Annex V.

[1] A procedure laid down in CCPR art. 41, which is optional and not yet in force (having up to November 3, 1978, been accepted by eight of the required 10 States Parties) provides for the consideration of complaints by one State Party against another. If the good offices of the Human Rights Committee do not lead to a solution, an *ad hoc* Conciliation Commission may be appointed under art. 42 if the States Parties want this latter procedure, and it is also up to them to accept its possible results.

[2] Rule 70(3), see the 1977 Report (A/32/44) referred to above (note 9 at p. 168), Annex II, at p. 60.

apparently "innocent" means of implementation has possibilities which should not be underestimated.[3]

The report of Finland was one of the first to be studied by the Human Rights Committee, whose members put their questions to the representative of the Government during meetings in Geneva in August 1977.[4] The reports of Denmark and Sweden were examined in a similar way in January 1978. Having been tabled, the report of Norway was examined in July 1978 in New York. Altogether 21 states, including, e.g., the Soviet Union, United Kingdom, both Germanies and Iran, to mention only some, were initially examined under this procedure during 1977 and 1978.[5]

No particular guidelines existed when the first states, including the Nordic ones, submitted their initial reports. The Human Rights Committee has since adopted "general guidelines regarding the form and contents of reports from States parties under article 40 of the Covenant".[6] It appears that the Committee does not want only to receive the texts of laws or general explanations showing how the legal position is in conformity with the Covenant. It also requires information enabling it to carry out a quite thorough scrutiny of national practices and situations of fact. There are some terms and indications in the Covenant art. 40 on which it may rely for support in this respect. And the Committee is expected to continue to request new reports from the States Parties at regular intervals.

The Human Rights Committee, of course, works in the difficult environment of widely differing national and regional systems existing in all parts of the world. The method adopted by it has therefore been pragmatic. Nevertheless it has not been superficial. Instead of wasting time on trying to achieve agreement within the Committee on what information to request or what questions to ask, its individual members have exercised their right, established through the Rules of Procedure, to question the representatives of governments, and these have generally cooperated in trying to answer even very detailed and searching questions. In this way the shortcomings of national reports are sometimes politely but mercilessly exposed in public sessions. The public, and more gradually and indirectly world opinion, may take note of the answers and explanations offered by

[3] This has been demonstrated in particular by Thomas Buergenthal, "Implementing the UN Racial Convention", *Texas International Law Journal* 1977, vol. 12, pp. 187 ff.

[4] See the 1977 Report (A/32/44) referred to above (note 9 at p. 168), at pp. 26–28, where the questions to and answers from the representative (President of the Court of Appeal, Mr Voitto Saario) are summarized.

[5] Questions to and answers from the representatives are summarized in the Reports, see for Sweden, Denmark and Norway the 1978 Report (A/33/40) referred to above (note 9 at p. 168), at pp. 12–16, 16–19, and 38–42 respectively.

[6] The 1977 Report (A/32/44), Annex IV at p. 69.

the governments. The state reports themselves are, like the summary records of the meetings and the annual reports of the Human Rights Committee, documents of general distribution. They are gradually catching the interest of the press and the public, and in particular of other governments and of scholars, as well as of institutions and organizations interested in human rights today. Some non-governmental organizations early saw this new opportunity for a serious international supervision and, although having no formal status in the procedure, have followed it very closely from the beginning.[7] The approach and style of the members of the Committee has generally been matter-of-fact and balanced, and the progress thereby achieved in the examination of state reports as a monitoring device should be an interesting subject for study.

Many states have already made statements in respect of sensitive points in their legal system and practices, in some cases amounting to promises of change. Usually they have made good use of the opportunity to explain their systems and defend them against criticisms implied in polite questions.

It is probably also fair to say that—somewhat to their own surprise—the representatives of the Scandinavian governments have been subjected to intensive questioning to no less an extent than others. This does not mean that serious suggestions of a lack of respect for human rights in these countries have been made, the questioning being limited to the area of civil and political rights under the terms of the Covenant. But it stems to a considerable extent from the fact described above, namely the passive attitude taken by these governments as regards the obligation to "ensure" the rights and freedoms concerned. As long as the protection is based on implied rights and general principles, and considering that it is not always possible to demonstrate that it exists, searching questions and requests for more facts have to be expected.

Comparing this with the European experience, it is worth noting that organs which only deal with complaints about alleged violations in individual cases will not always be faced with the most important questions of principle. Under the reporting system, on the other hand, the international organ, and even its individual members according to the practice now established, have the possibility of taking up matters of this kind by themselves. Whether or not the result of such an inquiry is a binding decision is probably not very important so long as no international means of coercion are applicable in any event.

[7] As an important example see the commentaries on the Committee's sessions appearing in the *Review of the International Commission of Jurists,* no. 19 (December 1977), p. 19, no. 20 (June 1978), p. 24, and no. 21 (December 1978), p. 16.

The example of the United Kingdom may illustrate the difference. In the course of a decade, from the acceptance of the individual right of petition under the European Convention by the United Kingdom up to 1977, the Commission of Human Rights in Strasbourg had dealt with hundreds of individual applications constituting a varied and interesting body of case law concerning the application of the Convention in the United Kingdom, besides a few judgments by the Court of Human Rights. The intensity of the use of this procedure was certainly felt by the United Kingdom Government, which generally accepted a thorough investigation of facts and contributed detailed legal submissions whenever required. Nevertheless, already at the first examination of the report from the United Kingdom to the Human Rights Committee, which took place in Geneva in January 1978, a very large number of entirely new questions were raised. Many of them were questions which had never been, and probably could not have been, raised in connection with any individual allegation of a violation.[8]

For the interpretation and application of human rights instruments the practice of and opinions expressed by the relevant organs have undoubtedly a law-making effect. The substance of the human rights concerned was far from being completed by the adoption of the Convention or the Covenant. This is not the place to describe or analyse the ongoing process of law-making by the law-applying organs. For the present purpose it must suffice to underline its fundamental importance at least within the European system.

In this respect a comparison of the two systems of supervision may reveal that they have different advantages. This may be illustrated by an example.

A question of principle which long remained unsettled under the European Convention was at last decided by the Court in 1975. This was that the right to a fair hearing by an impartial and independent tribunal (ECHR art. 6) includes not only certain procedural guarantees, but also a guarantee of access to the courts of the land.[9] It had taken nearly twenty years before this fundamental issue was squarely faced in an individual case in such a way that it had to be clarified, at least provisionally, by a judgment. By contrast, the analogous problem which must arise under CCPR art. 14, which has similar language and the same origin, namely the Universal Declaration of 1948, could be raised in the Human Rights

[8] Questions and answers are summarized in the 1978 Report (A/33/40) at pp. 31–38.

[9] European Court of Human Rights, Series A, vol. 18, Golder case, judgment of February 21, 1975, particularly at p. 18.

Committee on the very first occasion.[1] It will then be up to the Committee whether it will express an opinion as to the right interpretation.

This is not to say, contrary to the commonly held opinion, that the total effect of the supervision system is better under the United Nations Covenant than under the Council of Europe Convention. But it does suggest that had a similar reporting system operated under the European Convention, it might have proved to have important advantages as a supplement to the complaints procedure.

It is often said that the international supervision under the United Nations system is much weaker than that of the European Convention. But if it is agreed that the success of an international organ is better measured by its record of influencing states and governments than by its energy in condemning them, the development of the reporting system offers some hope. Whether this hope can be realized is likely to depend on internal and external peace. What has been said is particularly relevant as regards countries without an articulate and lawful domestic opposition. This seems to be the situation of many of the States Parties to the Covenant, in contrast to the parties to the European Convention.

7. NATIONAL IMPLEMENTATION IN SCANDINAVIA IN THE FUTURE

Against the background of all the appeals for international solidarity for human rights that are being put forward in these times, it is natural also to ask what the Scandinavian countries ought to do in the future in this respect. In a pioneering Report[2] the Norwegian Government in 1977 brought up for discussion in Parliament the question of what the country might do for the international protection of human rights. This raises delicate points of solidarity and action on the international level.

The question how to secure the continued implementation in Norway was, however, expressly left out from this discussion. While preserving the global perspective, some remarks on this point may not be out of order.

What has been said above is very incomplete in many respects. The concept and substance of human rights, and the main tensions affecting their implementation in the world of today—phenomena which the Nordic

[1] The question was at least implicitly raised, as may be seen from the Summary Record, CCPR/C/SR. 69 paras. 9 and 24.

[2] *Stortingsmelding* no. 93 for 1966–67. The report was based on an independent study by Asbjørn Eide, PRIO (Peace Research Institute, Oslo) issued in *NOU* 1977:23. Both documents have later also been published in English.

countries mainly witness at a rather safe distance—have hardly been discussed. But one impression seems to be generally valid: Everywhere in the world one meets the same problem of *securing* both rights and remedies. Protection of human rights is not only a question of revealing violations and reacting against them.

In the light of this, it is necessary, in Scandinavia just as much as elsewhere, to take up the crucial issues concerning the national implementation of our international obligations. The fact that human rights are becoming international law (section 1 above), welcome as it is, requires to be followed up, nationally as well as internationally. For the real implementation of these rights, it is necessary that the norms which have been developed at the international level shall be received where they really belong, and that is in the various branches of national law. Such a reception of norms requires that other specialists in law than international lawyers, e.g. proceduralists, family lawyers, legal aid societies, etc., shall take them up. This process seems to be very slow.

This has to do with the character of these norms themselves. The grand design of the United Nations programme had three stages: definition, obligation and implementation. Some thought that the first stage was achieved already by the Declaration of 1948. But the translation into obligations through the elaboration of the Covenants required new definitions, in part more precise, but also—from the point of view of the individual—more limited, surrounded by exception clauses.

The practical experience of international supervision at the stage of implementation clearly shows, in my opinion, that the *process of definition is still not completed.* The supervisory organs have, as suggested above, a law-making function. Many examples from the practice of the European organs show that the basic concepts of the rights still require further elaboration. For example, it was only as recently as January 1978 that anything like a definition of "torture" was given, in a judgment which has been referred to above.[3] This evolution of basic concepts has rightly been compared to the development of constitutional provisions in the case law of national organs.[4] In fact, the international protection of human rights —by conventions—is gradually replacing the constitutional protection,

[3] *Ireland* v. *the United Kingdom*, referred to above (note 9 at p. 160), paras. 165–8. The Court found on this basis that treatment classified by the Commission as torture was to be considered as "inhuman and degrading" but not as torture, although it still was in breach of the Convention. The process of definition is continuing: the judgment referred *inter alia* to a Declaration by the UN General Assembly of December 1975, which is being followed up *inter alia* in a Swedish Government draft of 1978 for a separate convention against torture.

[4] Max Sørensen in a report to the *Fourth International Colloquy on the European Convention on Human Rights*, Rome 1975, in particular at p. 5.

both in the Nordic countries and others with which a comparison is possible. And in the case of the United Kingdom, where no modern Bill of Rights or any constitutional review of legislation exists, the international system has in fact come to play a similar role.[5]

This process of continuous definition of human rights by international supervisory organs is probably best understood as a great attempt to bring about a *harmonization of the national legal systems*. One may just as well save the big words about "inalienable" freedoms or "fundamental" human rights. The substance and trend of this harmonization depend very much on the possibility of harmonizing contemporary ideas about legislative policy in the various countries.

It is not in itself surprising that the stage of implementation should be inseparable from the further development and harmonization of the norms formulated in the declarations (definitions) and binding instruments (obligations). All application of law teaches the same lesson.

In order to further this continued process, there is, as suggested above, a need for the "soft" line which prefers to convince rather than condemn those parties who are lagging behind.

Countries which aspire to lead in this development should consider that what they do themselves is important not only for their own peoples but also for the way other states meet the same problems. Possibly the presumed existence of general principles is a plausible excuse for not taking explicit and particular measures in various respects, such as, e.g., creating control mechanisms against ill-treatment of persons deprived of their liberty in prisons or hospitals, but the failure to take action may constitute a bad example. In the majority of countries conditions are very different, and our attitudes, especially when a problem is neglected because it is not thought to be acute, may easily be invoked by regimes in countries where the needs are very different.

In several of the Scandinavian countries, the question of revising the written constitutions so as to bring them up to date as regards human rights has been studied or at least raised, but only Sweden has taken action on the matter. Without entering into that discussion here, it is worth noting that in many other countries this is one of the most prominent means of national implementation of human rights even today.

Even if Nordic countries should still intend to remain passive rather than to revise their constitutions or even to legislate about the rights themselves, they could at least contribute something to the international

[5] A United Kingdom official, who must here be anonymous, in 1977 privately described the European Commission of Human Rights as playing in fact the role of "the Constitutional Court of the United Kingdom".

effort—and save themselves some troubles and avoid possibly unwarranted suspicions—by adopting certain other measures at the domestic level. They could, for instance, expressly authorize national organs—if no other, the ordinary courts—to apply the international obligations directly. At present this power is very questionable, and indeed is not clearly established in practice in any Nordic country, despite recommendations in legal writing and certain suave but non-committal statements by persons in important positions.[6] National *remedies* are incomplete as long as no organ is expressly authorized to apply the international human rights provisions directly at the national level. This is in fact the case both in Norway and in other Nordic countries. One may be convinced that human rights are respected in fact, but in this way they are still not secured in law.

It is probably not a very good idea to introduce new remedies or new organs authorized to apply the human rights provisions directly. Instead, a simple and modest, but useful reform might be to extend the mandate of the *Ombudsman*, a significant Scandinavian contribution to the world at large. It is true that recourse to the Ombudsman is not among the domestic remedies which *must* be exhausted in order to commence international proceedings (ECHR art. 26, CCPR Optional Protocol arts. 2 and 5). But if the Ombudsman was generally authorized to express his opinion whenever international human rights were invoked, without necessarily making binding decisions, this in practice would probably—even in relation to the duty of implementation under ECHR art. 13 and CCPR art. 2(3)—be just as effective a remedy as any other.

[6] Various speakers at the Copenhagen Congress touched on this matter. Professor Carsten Smith expressed views in line with those published by him in 12 *Sc.St.L.*, pp. 151 ff. (1968). As far as Norway is concerned, Mr Stein Rognlien, Director General, Department of Legislation, Ministry of Justice, as well as Mr Ryssdal (above, note 8 at p. 158) gave assurances that, in their opinion, the courts could already apply the international human rights instruments. The present writer can only observe that neither the Parliament, nor the Government of the Supreme Court—unlike some professors of law and high officials speaking in their personal capacity—have made this entirely clear, and have never acted accordingly. Perhaps a suitable occasion has not yet arisen.