THE PROCEDURE OF ADOPTING THE DECISIONS OF THE HUMAN RIGHTS COMMITTEE RELATING TO COMMUNICATIONS UNDER THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

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One of the most important functions of the Human Rights Committee, established under the International Covenant on Civil and Political Rights (henceforth: the Committee), which was adopted on 16 December 1966 and entered into force on 23 March 1976, was determined by the Optional Protocol to the same Covenant (same dates of adoption and entry into force).

The Optional Protocol provides for the competence of the Committee to consider communications from private individuals claiming to be victims of violations of the rights and freedoms recognised in the Covenant by a State party to the Optional Protocol. In recent years this function of the Committee has become more and more important, which can be judged by the increasing number of ratifications of or adhesions to the Optional Protocol, the almost exponential growth of the number of communications (complaints) received and registered, and consequently, by the amount of time the Committee has had to devote to the consideration of the communications, which is visible from the data provided in regular annual reports of the Committee to the UN Economic and Social Council and General Assembly.[1]

The procedure for the examination of communications submitted under the Optional Protocol is governed by the general provisions on decision making in the Committee contained in Art. 39, para. 2 of the Covenant, by special rules regarding that matter in the Optional Protocol, and by the Committee's Rules of Procedure, which it is empowered to establish itself, according to the same Article of the Covenant.[2]

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[1] These reports are published as GAOR, Suppl. No. 40.

[2] The latest version of the Rules of Procedure is contained in UN Doc. CCPR/C/3/Rev. 3 of 24 May 1994.

The formal norms, from which the Committee cannot depart when adopting its Rules of Procedure, are the following. For all the decisions of the Committee a quorum of twelve members must be present, which is significantly above the simple majority of the members of the Committee, who are eighteen. Decisions of the Committee are made by a majority vote of the members present.[3]

More specifically, Art. 5,3 of the Optional Protocol stipulates that communications shall be examined in closed sessions.[4] In the practice of the Committee, this means that only the members of this body and the necessary personnel from the United Nations Secretariat can be present during the deliberations, and that the summary records of such meetings are not generally distributed. However, from the very beginning, when in 1979, the Committee adopted its first views on a communication, it was decided that the views should be made public generally, and that they should appear as annexes to the annual reports of the Committee. Some authors[5] seem to consider this as a departure from the text of Art. 5 paras 3 and 4 of the Protocol, which has the following wording:

3. The Committee shall hold closed meetings when examining communications under the present Protocol.
4. The Committee shall forward its views to the State Party concerned and to the individual.

It is the opinion of the undersigned that the Committee was right in adopting such a course. Irrespective of the possible divergent views of some drafters of the Protocol, its "ordinary" meaning is sufficiently clear. Art. 5 para. 3 refers expressly only to meetings and not to the results thereof. Furthermore, para. 4 mandates the transmission of the views to the State Party and the author of the communication, without imposing on them the duty to maintain their confidentiality. Accordingly, the State and the individual concerned are free to let the views be generally known.

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[3] Although this problem has not arisen in practice, the wording of Art. 39,2,b of the Covenant ("majority vote of the members present") shall be interpreted so that possible abstentions are not counted in the sense of the expression "present and voting"; the majority must consist only of positive votes exceeding the half of the members present. In the case of the minimum quorum, this majority would be seven.

[4] The reader will understand that any member of the Committee is thus limited in reporting to the general public many details and impressions concerning his or her experience in the examination of the communications.

[5] E.g. B. Graefrath, *Menschenrechte und internationale Kooperation, Berlin*: Akademie-Verlag, 1988, p. 162. To be more precise, Graefrath considers this conduct of the Committee to be different from the attitudes of the drafters of the Protocol ("Abweichung von der Auffassung der Autoren des Protokolls ..."

In deciding to publish the views as official documents, the Committee was guided by the wish to have them presented in their entirety, so as to prevent the interested parties from making public only those parts of the decision that suit their interests and are favourable to them. The established practice is to publish the views in full, whereas in the published decision on admissibility of the communication the authors of communications are referred to only by their initials. In addition to the distribution of decisions as separate documents and in the annual reports, volumes and selected decisions of the Committee were issued by the United Nations.[6] This the Committee has done irrespective of the rather confusing Rule 64,2 of its Rules of Procedure:

> All reports, formal decisions and other official documents of the Committee and its subsidiary bodies relating to ... the Protocol shall be distributed by the Secretariat to all members of the Committee, to the States parties concerned and, as may be decided by the Committee, to members of its subsidiary bodies and to others concerned.[7]

The Protocol also determines, in its articles 2,4 and 5, that the procedure before the Committee should be in written form. Although at some times the representatives of some States and some members of the Committee have considered the possibility of holding oral hearings, examining witnesses, etc. this has been considered to be clearly in contradiction with the aforementioned provisions of the Protocol and has not met with the approval of the Committee. In addition to legal reasons, it has been felt that the introduction of oral procedures would have serious disadvantages in increasing the costs both to the United Nations and the parties. An important advantage of the procedure based on the Optional Protocol is that it is relatively easily accessible to many individuals and that it is not expensive.[8] If the United Nations would not have the means to cover the costs of representatives of the applicants and the States

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[6] See: Human Rights Committee, Selected Decisions under the Optional Protocol, New York: United Nations, 1985. International Covenant on Civil and Political Rights, Selected Decisions of the Human Rights Committee under the Optional Protocol, Vol. 2, New York: United Nations, 1990.

[7] See the interesting comment of Nowak, who believes that the Committee in adopting Rule 64,2 had departed from the principles set out by the Optional Protocol, but then in practice ignored its own decision. M. Nowak, *UNO-Pakt über bürgerliche und politische Rechte und Fakultativprotokoll, CCPR-Kommentar*, Kehl - Strasbourg - Arlington: N.P. Engel, 1989, p. 754.

[8] *Cf. Protecting Human Rights: International Procedures and how to Use Them*, London: Amnesty International (AI Index IOR 03/02/87), 1987, p. 6.

Parties and the possible witnesses (and this is certainly now the case), those with lesser means would be put in an inferior situation.

On the basis of the general provisions, set out in the Covenant and the Optional Protocol, more detailed procedural rules have been established by the Committee in its Rules of Procedure. They delegate some rights to the UN Secretariat, which under the Covenant provides the necessary administrative support to the Committee. Thus, under Rule 78, the Secretary-General may even exercise some discretion in cases when from the text of the communication it is not clear whether it is directed to the Committee under the Optional Protocol. The Administration is in such cases free to judge whether the communication "appears" to be submitted for consideration by the Committee and to bring it to its attention. Of course, the final decision rests with the Committee, but this means that the Secretariat may choose not to bring the communication to the attention of the Committee in instances where in its opinion the communication is not intended to be presented to the Committee under the Optional Protocol. Naturally, the Secretariat is bound to clarify with the author his or her wishes and in case of doubt to bring the communication to the attention of the Committee. Rule 80 enables the Secretary-General to request the authors to provide additional information, relevant for the admissibility of the communication; it is important to note that the Secretariat is free to indicate appropriate time limits for replies, in order to avoid undue delays.

The Committee may decide on communications without the participation of some of its members. Under Rule 84 participation is barred to those members that have any personal interest in the case or have taken part in any capacity in the making of any decision relating to the matter covered by the communication. However, members may abstain from participation, if they feel that they should do so "for any reason", by simply informing the Chairman (Rule 85). In practice, some members have used this opportunity not to participate in decisions on communications against countries of which they happen to be nationals. As independent experts, elected in their personal capacity, they are not expected to do so, since this would imply doubts as to their integrity and impartiality, but they have nevertheless chosen to act in such a manner. In fact, their abstention has not been total - it has only amounted to not taking part in the vote. As to the debate, they have found a good measure between excessive efforts to influence the decision and the need to satisfy the natural desire of other members to profit by their expertise on questions of the municipal law of their States. It can be stated with assurance that in the practice of the Committee there have been no difficulties regarding this subject.

In order to cope with the increasing workload the Committee has adapted its Rules of Procedure so as to decrease the number of decisions taken at plenary meetings. Some functions relating to the procedure on communications on the Optional Protocol can be performed by special rapporteurs or by a working group of the Committee.

Special rapporteurs can act in two capacities. Initially, the Committee had appointed special rapporteurs for cases of great complexity, for which it was believed that special research was necessary, either because this was the immediate impression of the Committee, or because it was felt, after the debate, that the Committee was unable to reach a decision.[9] This function is covered by Rule 89, 3 of the Rules of Procedure.

However, the Rules of Procedure were amended in 1989 to provide for a colloquially called "special rapporteur for new communications", who is not assigned a particular case, but has the power to receive communications between the sessions of the Committee and to request the State Party concerned or the author of the communication to submit additional information or observations relevant to the admissibility of the communication (Rule 91, 1). This has been done in order to expedite the proceedings (the Committee meets only three times a year), so that the special rapporteur has also the power to indicate appropriate time-limits for replies. It is quite evident, and this was expressly stated in Rule 91, 3, that the action of the special rapporteur belongs to the so-called "pre-admissibility" stage of the procedure - it does not prejudge in any way the final decision on admissibility.

The Committee has always prepared its decisions on matters relating to communications with the assistance of a working group, composed of some of its members who meet before each session of the Committee. As a rule, relevant material (including a rough draft) is prepared by the Secretariat and presented to the working group, which produces a draft decision to be submitted to the Committee. This applies to all decisions, both on admissibility and the merits. Rule 89 determines that the group should have no more than five members.

In the past, working groups on communications (the Committee can establish working groups for other matters within its jurisdiction) have as a rule consisted of three members. This is not the case anymore, because the amended Rule 87, 2 delegates to the working group the right to act on behalf of the Committee in declaring a communication admissible. When making such an important decision, the group must be composed of five

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[9] This was certainly influenced by the desire to decide by consensus, which will be addressed below.

members, and they must be unanimous. This was again done in order to reduce delays and it was believed that with due safeguard (the unanimity of a large working group) no great harm could be done, not only because a decision on admissibility does not touch on the merits, but also because it is reviewable under Rule 93, 4, when the matter comes to the full Committee to decide on the merits. It can be argued that a decision on admissibility, which can be changed only in connection with the discussion on the merits, may place additional burdens on the State Party concerned, which has to take pains to furnish explanations regarding the substance of the case, but the Committee has been guided by the interests of the possible victims, for whom a decision on inadmissibility is generally of a definite nature. Of course, if the working group does not reach unanimity, it has to refer the question to the Committee for ultimate decision. The principle remains valid that a decision on admissibility cannot be taken unless the State Party concerned has received the text of the communication and has been given the opportunity to furnish necessary information and observations (Rule 91).

Before deciding on admissibility the Committee has on numerous occasions appealed to the State Party to take interim measures in order to avoid irreparable damage to the victim of the alleged violation. A typical example is when the person submitting a communication has been sentenced to death and is awaiting execution. The applicants have claimed that the sentence to death had been imposed in violation of the provisions of the Covenant, but, on the other hand, it has appeared that the authorities of the State have considered it to be final so that the execution had been possible. The death of an individual resulting from official action that may be found to be in violation of the Covenant is certainly the supreme example of "irreparable damage". In view of the lengthy procedure before the Committee, even at "pre-admissibility" stage (the need for additional information etc.) the Committee has found it necessary to appeal for the stay of execution until it would be able to decide on the merits of the case. For that purpose it has referred to Rule 86 of the Rules of Procedure[10], interpreting it somewhat extensively. Not only did it empower its working group to issue the appeal, but, according to the literal sense of that Rule, interim measures seem to be warranted only *after* a communication has been declared admissible:

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[10] See e.g. the views of the Committee on communications nos. 210/1986 and 225/1987 (Pratt and Morgan v. Jamaica) of 6 April 1989 (violations found). Report of the Human Rights Committee, GAOR, 44th Sess., Suppl. 40 (1989), p. 224.

The Committee may, prior to forwarding its final views on the communication to the State party concerned, inform that State of its views whether interim measures may be desirable to avoid irreparable damage to the victim of the alleged violation. In doing so, the Committee shall inform the State party concerned that such expression of its views on interim measures does not imply a determination on the merits of the communication.[11]

However, there is some justification for this attitude of the Committee because the interim measures are not expressly ruled out at the pre-admissibility stage and, in view of systematic interpretation of the Rules of Procedure, Rule 86 is not under the heading "Procedure to determine admissibility", but in the chapter relating to "General provisions regarding the consideration of communications by the Committee and its subsidiary bodies".

The Committee has gone even further and asked for interim measures even after declaring communications inadmissible. This has been done in cases where the reason for inadmissibility was the non-exhaustion of domestic remedies (Art. 5, para 2 (b) of the Optional Protocol). In such instances the Committee has referred to Rule 92, 2 of its Rules of Procedure, which establishes that decisions on admissibility may be reviewed and to the "spirit and purpose" of Rule 86, because the non-exhaustion of local remedies was understood to be a formal barrier which the author of the communication could eventually overcome and turn again to the Committee, which would be pointless if irreversible action would be taken by the government in the meanwhile.[12]

The most important practical departure from the general rules on decision making in the Committee results from a decision of the Committee, at its first session, which was inconspicuously reflected in a footnote to Rule 51 of the Rules of Procedure:

1. The members of the Committee generally expressed the view that its method of work normally should allow for attempts to reach decisions by consensus before voting, provided that the Covenant and the rules of procedure were observed and that such attempts did not unduly delay the work of the Committee.

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[11] Italics supplied.

[12] See e.g. the decision on admissibility on the communication No. 231/1987 (A. S. v. Jamaica) of 21 July 1989. *Report of the Human Rights Committee*, GAOR, 44th Sess., Suppl. 40 (1989), p. 276.

2. Bearing in mind paragraph 1 above, the Chairman at any meeting may, and at the request of any member shall, put the proposal to a vote.

As a result of this decision the Committee has never voted on any matter and no member has so far insisted on a decision being put to a vote. The introduction of consensus as a principle of decision making was principally due to the insistence of Anatolii Movchan, the then member of the Committee from the USSR. His reasons, and the motives of the members supporting him, were not so much related to decisions on the communications under the Optional Protocol, but on other matters, where at that time the danger of a "politicisation" of the Committee was perceived and where not only members from the so-called socialist countries, but also from other regions, felt that they could be outvoted to the detriment of fruitful international cooperation in the field of human rights.[13]

At that time, this was certainly a wise decision. Efforts to reach consensus relating to the exercise of many competencies of the Committee, including especially its general comments, together with the spirit of understanding and cooperation of the first group of personalities elected to be members of the Committee, have certainly contributed to the regulation of the Committee as a body that has not been torn by political and ideological divisions and has refused to be involved in any kind of manoeuvring, where human rights would serve as tactical weapons for ends unrelated to the improvement of the human condition and dignity.[14]

Naturally, insistence on consensus has had its shortcomings, which are inherent to this kind of decision making. Let us mention only some of them. In many instances, more time than necessary is needed to reach a decision. An insignificant minority, or even an individual, can prevent effective decision making. The most important drawback is that some decisions, in order to accommodate very divergent views, are watered down, phrased in ambiguous language or reduced to the lowest common denominator. Some general comments have been criticised for showing

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[13] See Graefrath, op. cit., p. 131 f; A. P. Movchan, Prava cheloveka i mezhdunarodnye otnoshenia, Moscow: Nauka, 1982, p. 116f.

[14] Cf. V. Dimitrijevic, The Roles of the Human Rights Committee, Vorträge, Reden und Berichte aus dem Europa-Institut, Nr. 37, Saarbrücken: Europa-Institut der Universität des Saarlandes, 1985, p. 17.

such characteristics, but it should be immediately added that other critics found other comments adopted by consensus to be too daring.[15]

Another disadvantage may be construed as some kind of restriction of the freedom of opinion and expression of individual members of the Committee: in order not to "spoil" the consensus and not to prevent the taking of a decision altogether, a minority or an individual dissenter have had to pretend that they are for it, in spite of their deeply held convictions.[16]

If we concentrate on the application of the rule of consensus to decisions on communications submitted under the Optional Protocol, the first impression is possible that in that respect insistence on consensus has not been necessary for several reasons.

The political anxieties should not have been valid in this realm, for, until 1988, when Hungary acceded to the Optional Protocol, no "socialist" country had been exposed to the risk of being demeaned in the Committee by a "bourgeois" majority. In a quite different vein, the solution could be regarded as impractical in a procedure which is quasi-judicial; in most countries the courts, although composed of judges from the same country and similar professional and cultural backgrounds, pass by majority judgments that have much stronger effects than the unbinding views of the Human Rights Committee. Furthermore, experience has shown that the questions debated in the course of the proceedings under the Optional Protocol tend to be purely legal, and that the varying attitudes and opinions of the members of the Committee cannot be explained by their ideological beliefs or political convictions.

For example, one of the most difficult questions that the Committee has had to face in deciding on admissibility is whether the domestic remedies have been exhausted. In that context, problems arise that are primarily related to the interpretation of domestic law (what is in fact a "remedy" and whether it is "available"), but there are also judgments on facts, related to the condition that the application of the remedy not be unreasonably prolonged (Art. 5,2,b of the Optional Protocol) and that the

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[15] This applies especially to General Comment 14 (23) relating to Article 6 of the Covenant, where the Committee stated that the production, testing, possession, deployment and use of nuclear weapons represented a menace to the right to life and that they should be recognised as crimes against humanity (UN Doc. CCPR/C/21/Rev. I). In this case the critics were joined by at least one member of the Committee, Felix Emacora, who openly expressed his belief that the Comment had been contrary to international law and that, had it been put to a vote, he would have voted against it. See Nowak, op. cit., p. 581; Dimitrijevic, op. cit., pp. 6, 21.

[16] See M. J. Bossuyt, Le réglement interieur du Comité des Droits de l'Homme, *Revue belge de Droit International*, Vol. 14 (1978 - 1979), p. 119 f.

remedy is "effective" (Art. 2,3,a of the Covenant). These are matters where reasonable people may differ in their opinions, but it is very hard to attribute such differences to political opinions, except possibly in relation to the possible meaning of "effectiveness". Even in that matter, when dealing with a number of very similar communications complaining against the military regime in Uruguay, the Committee found no difficult in agreeing that in the situation prevailing at that time in that country, the remedies to which the State party had referred were not in fact effective.[17]

Without divulging too much the goings-on at the closed meetings of the Committee the undersigned is convinced that a casual visitor listening to the debate on a communication in a room where the name plates before the members of the Committee were removed would not be able to ascertain the countries of members' origin. In order not to rely only on impressions, one could usefully look at the signatories of individual opinions, published together with the decisions of the Committee. They tend to show differing "alliances" of members, but there is nothing to indicate that they act on the impulse of some kind of ideological or political propinquity. Let us give only two examples. The views of the Committee on communication No. R.2/9 of the 26 October 1979 were accompanied by an individual opinion signed by members from Canada, Tunisia, Senegal, the German Democratic Republic, Yugoslavia, and Jordan.[18] In a more recent case (views on communication No. 203/1986 of 4 November 1988) individual views were submitted by members from Sri Lanka, Yugoslavia, Mauritius, and Sweden.[19] Following the now largely artificial United Nations division of countries into "regions", this group of "dissenters" was from Asia, East Europe, Africa and the "West". It should not be forgotten that the "majorities" in such cases were also as heterogeneous.

The reader will justifiably ask how the practice of individual or dissenting opinions can be reconciled with reaching decisions by consensus. The possibility formally exists for "individual" opinions in Rules 92,3 (decisions on inadmissibility) 94,3 (views) of the Rules of Procedure. These provisions were originally intended to be used in connection with Rule 51, which provides for a decision by majority vote. In practice, the

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[17] See e.g. the views of the Committee on communication No. R.2/0 (Alice Altesor and Victor Hugo Altesor v. Uruguay) of 29 March 1982, Report of the Human Rights Committee, GAOR, 37th Sess., Suppl. No. 40 (1982), p. 123. See Nowak, op. cit., p. 753.

[18] *Report of the Human Rights Committee*, GAOR, 35th Sess., Suppl. No. 40 (1980), p. 110.

[19] *Report of the Human Rights Committee*, GAOR, 44th Sess, Suppl. No. 40 (1989), p. 206 - 209.

Committee has respected the aforementioned footnote to Rule 51, suggesting consensus, so that an individual opinion in the sense of the general understanding of consensus in international organisations could only amount to some kind of reservation, where the party or the member expresses support for the essence of the decision, but would like to indicate separate reasons for this or a different understanding of the decision.

To be sure, many individual opinions of the members of the Committee have been of that nature and they could be justly called "individual". However, some of them have been "dissenting" opinions in the true sense of the word and this is how the Committee has tended to overcome the self-imposed difficulties related to consensus. In other words, in spite of some voices that favoured, for the sake of expedience and clearer decisions, the return to voting at least as regards decisions on communications, the Committee has been hesitant to depart from established practices, but has encouraged members who find themselves in isolation or small minorities not to prevent the decision from being taken without the vote, in exchange for the opportunity to explain their views in full, and not only a summary of them, as stated in the rules that were referred to in the preceding paragraph.[20]

The present settlement amounts to a vote, with some important qualifications. First, all efforts are made to reach consensus, which implies important amendments to draft decisions. Only when it becomes obvious that a small minority cannot accept the decision, there is a feeling, usually expressed by members belonging to such a minority themselves, that they should not obstruct the work of the Committee by further insisting on their views. The procedure is very flexible because it remains unclear what is a "small" minority. The decision certainly cannot come from a divided Committee, with a slight margin in favour, which would be possible if the Committee were to vote in accordance with the provisions of the Covenant and the Rules of Procedure, but this is the only statement which could be made with certainty. The highest number of dissenting voices so far has been five. In such a case, is it really fair to pretend that the decision has been reached by consensus?[21]

This kind of "disguised voting" appears to work satisfactorily and to protect the authority of the Committee's views, which are, strictly

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[20] See examples quoted in A. de Zayas - J. Th. Möller - T. Opsahl, Application of the International Covenant on Civil and Political Rights under the Optional Protocol by the Human Rights Committee German Yearbook of International Law, Vol. 28 (1985), p. 16.

[21] Thus Nowak, op. cit., pp. 581, 758.

speaking, not legally binding on States parties[22] and therefore depend not only on the persuasiveness of the arguments but also on the unity of the members of the Committee. One could therefore not expect that the Committee would revert to voting in the near future, although some of the original circumstances in favour of the consensus have changed.

It should be added, however, that "not legally binding" does not mean that the views of the Committee have no legal effects, Admittedly, they are not titles that can be immediately executed within states, but they amount to the statement of the competent supervising body that the state party has not fulfilled its obligations under the Covenant. This has been reflected in the uniform final paragraphs of the views adopted by the Committee since 1994:

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

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[22] See e.g. the views on communication No. 434/1990 (Lal Seerattan v. Trinidad and Tobago) of 26 October 1995 - CCPR/C/55/D/434/1990, para. 10.