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Application of the International Covenant on Civil and Political Rights under the Optional Protocol by the Human Rights Committee

by Alfred de Zayas / Jakob Th. Möller / Torkel Opsahl*

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* This article draws on material published in the annual reports of the Human Rights Committee. Further thoughts expressed and observations made are those of the authors in their purely personal capacities.

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I. Introduction

The International Covenant on Civil and Political Rights and the Optional Protocol thereto were adopted by the General Assembly on 16 December 1966 and entered into force on 23 March 1976, after 35 States parties had ratified or acceded to the Covenant and twelve of these States had ratified or acceded to the Optional Protocol. In accordance with Article 28 of the Covenant, the States parties established the Human Rights Committee on 20 September 1976, electing 18 independent experts as members, whose terms of office began on 1 January 1977. The Committee's first session was held in New York from 21 March to 1 April 1977. As of the writing of this article, the Committee, which meets three times a year, has just completed its twenty-eighth session (7 to 25 July 1986).

Among the responsibilities of the Committee are (1) the consideration of reports submitted by States parties under Article 40 of the Covenant, (2) the preparation of general comments under Article (Art.) 40 (4) of the Covenant, *i. e.* elucidating the content of the articles of the Covenant so as to assist States parties in fulfilling their reporting obligations, and (3) examining communications from individuals alleging violations of any of the rights set forth in the Covenant, as provided for in the Optional Protocol thereto.

This article focuses primarily on the Committee's consideration of communications under the Optional Protocol and aims at explaining, on the procedural level, the criteria of admissibility as laid down in the Optional Protocol and restated in the Committee's provisional rules of procedure, and at illustrating, on the substantive level, the Committee's findings on the merits of communi-

cations submitted under the Optional Protocol. Enough data are now available to allow an initial assessment of the Committee's "case law" since 1977, which shall be supplemented by relevant parts of the Committee's general comments mentioned above. (Thus far the Committee has adopted general comments relating *i. a.* to Articles 1, 2, 3, 4, 6, 7, 9, 10, 13, 14, 19 and 20.) The structure of this article is accordingly simple. A general description of the Committee's work is followed by a section on admissibility criteria such as the standing of authors, the exhaustion of domestic remedies and the competence of the Committee *vis-à-vis* national law and decisions. The main part of the article consists of a survey of the Committee's pronouncements on many of the articles of the Covenant, as formulated in the Committee's views and other decisions under the Optional Protocol. Observations on the issue of derogation by States parties from some provisions of the Covenant are then followed by brief concluding remarks.

At this point it should be indicated that the Committee is neither a court nor a body with a quasi-judicial mandate like the two organs created under the European Convention on Human Rights (the European Court of Human Rights and the European Commission of Human Rights). Nevertheless, the Committee does perform functions similar to those of the European Commission of Human Rights when the latter considers applications from individuals: The Committee also decides on the admissibility of communications; those cases declared admissible are then examined on the merits, the facts are established and the Committee states its opinion as to whether or not there have been violations of the Covenant. Its decisions on the merits are, in principle, like the reports of the European Commission, non-binding recommendations, and are referred to as "views under Article 5 (4) of the Optional Protocol". The two systems differ, however, in that the Optional Protocol has no express provisions for friendly settlement between the parties, and more importantly, in that the Committee does not make binding decisions (as the European Court).¹ Although the system under the Optional Protocol is simple, it can and does yield results by persuasion of State parties. The Committee applies the provisions of the Covenant and Optional Protocol in a judicial spirit.

The Preamble of the Optional Protocol states its purpose as follows:

to enable the Human Rights Committee . . . to receive and consider, as provided in the present Protocol, communications from individuals claiming to be victims of any of the rights set forth in the Covenant.

¹ When the Court's optional jurisdiction is not resorted to, the binding decision under the European Convention has to be taken by the Committee of Ministers of the Council of Europe.

Only States parties to the Covenant (at present 85) may ratify or accede to the Protocol (Art. 8); thus far 38 States have done so.² No communication can be received by the Committee if it concerns a State party to the Covenant which is not also a party to the Optional Protocol (Art. 1 *in fine*). So far, communications have been received with respect to 22 States parties. The fact that no communications have been received in respect of 16 States parties may be partly attributable to lack of knowledge of the system. Communications are addressed to the Human Rights Committee in care of the Centre for Human Rights, United Nations Office at Geneva.

This article seeks to review the “holdings” and “*obiter dicta*” of the Committee in a number of leading cases, most of which have already been made public in the annual reports of the Human Rights Committee to the General Assembly under Article 45 of the Covenant.³ A volume containing 67 “Selected Decisions under the Optional Protocol” including the text of some of the decisions referred to below and covering the Committee’s jurisprudence through its sixteenth session, was published 1985 in an English version.⁴ Spanish and French versions are forthcoming. Volume 2 covering the Committee’s seventeenth through twenty-eighth session is in preparation.

1. Procedure on Admissibility and Merits

Consideration of communications under the Optional Protocol takes place in closed meetings (Art. 5 [3] of the Optional Protocol). All documents pertaining to the work of the Committee under the Optional Protocol (submissions from the parties and other working documents of the Committee) are confidential.

² These States are Argentina, Barbados, Bolivia, Cameroon, Canada, the Central African Republic, Colombia, Congo, Costa Rica, Denmark, the Dominican Republic, Ecuador, Finland, France, Iceland, Italy, Jamaica, Luxembourg, Madagascar, Mauritius, the Netherlands, Nicaragua, Niger, Norway, Panama, Peru, Portugal, Saint Vincent and the Grenadines, San Marino, Senegal, Spain, Suriname, Sweden, Trinidad and Tobago, Uruguay, Venezuela, Zaire and Zambia.

³ See Official Records of the General Assembly, Thirty-fourth Session, Supplement No. 40 (A/34/40 hereafter referred to as HRC 1979 report; Thirty-fifth Session, Supplement No. 40 (A/35/40) hereafter referred to as HRC 1980 report; Thirty-sixth Session, Supplement No. 40 (A/36/40) hereafter referred to as HRC 1981 report; Thirty-seventh Session, Supplement No. 40 (A/37/40) hereafter referred to as HRC 1982 report; Thirty-eighth Session, Supplement No. 40 (A/38/40) hereafter referred to as HRC 1983 report; Thirty-ninth Session, Supplement No. 40 (A/39/40) hereafter referred to as HRC 1984 report; Fortieth Session, Supplement No. 40 (A/40/40) hereafter referred to as HRC 1985 report; Forty-first Session, Supplement No. 40 (A/41/40) hereafter referred to as HRC 1986 report. The HRC 1984 report for the first time gave a summary of the Committee’s jurisprudence. This article follows a similar pattern but contains considerably more detail, including excerpts from decisions which have been made public since the adoption of that report.

⁴ Human Rights Committee, Selected Decisions under the Optional Protocol, CCPR/C/OP/1 (hereinafter cited as HRC Selected Decisions), New York, 1985.

a) Admissibility

Once a communication has been registered, the Committee must decide whether it is admissible under the Optional Protocol. The requirements for admissibility, which are contained in Articles 1, 2, 3 and 5 (2) of the Optional Protocol, are listed in Rule 90 of the Committee's provisional rules of procedure, pursuant to which the Committee shall ascertain:

- (a) That the communication is not anonymous and that it emanates from an individual, or individuals, subject to the jurisdiction of a State party to the Protocol;
- (b) That the individual claims to be a victim of a violation by that State party of any of the rights set forth in the Covenant. Normally, the communication should be submitted by the individual himself or by his representative; the Committee may, however, accept to consider a communication submitted on behalf of an alleged victim when it appears that he is unable to submit the communication himself;
- (c) That the communication does not constitute an abuse of the right of submission under the Protocol;
- (d) That the communication is not incompatible with the provisions of the Covenant;
- (e) That the same matter is not being examined under another procedure of international investigation or settlement;
- (f) That the individual has exhausted all available domestic remedies.

Unlike in the procedure before the European Commission (Article 26 of the European Convention), there is *no* requirement under the Optional Protocol that the author submit his communication to the HRC within six months from the exhaustion of domestic remedies in the State concerned.

Under Rule 91 (1) the Committee or its Working Group on Communications⁵ may request the State party concerned or the author of the communication to submit, within a time-limit which is indicated in each such decision (normally six weeks or two months), additional written information or observations relevant to the question of admissibility of the communication. Such a request does not imply that any decision has been taken on the question of admissibility (Rule 91 [3]). If the case is referred to the State party at this stage, any reply received from it is transmitted to the author to give him an opportunity to comment thereon. If the case is only referred back to the author for clarifications under Rule 91 and is subsequently declared inadmissible, no

⁵ Rule 91 simply refers to "a Working Group" having this competence. The Committee has in practice institutionalized this Working Group, which is generally referred to as the Working Group on Communications.