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# THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

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## INTRODUCTION

In Western and Western-influenced thinking the idea of granting an international remedy to alleged victims of human rights violations has been a leading one. Among those favoring an effective protection of those rights, such a concept has been regarded essential. However, political and legal difficulties have at times appeared unsurmountable, particularly at the global level.

Nevertheless, within the United Nations system, the Optional Protocol to the International Covenant on Civil and Political Rights is now formally in force.<sup>1</sup> The Protocol already has a world-wide membership, including twenty-four of the sixty-four States Parties to the Covenant.<sup>2</sup> The Protocol is

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1. The International Covenant on Civil and Political Rights and Optional Protocol to the International Covenant on Civil and Political Rights [hereinafter referred to as the Covenant and the Protocol] G.A. Res. 2200A, 21 U.N. GAOR, Supp. (No. 16) 49, 49-60, U.N. Doc. A/6316 (1966), were adopted by the General Assembly together with the International Covenant on Economic, Social and Cultural Rights on December 16, 1966. Both the Covenant and the Protocol entered into force March 23, 1976, in accordance with Articles 49 of the Covenant and 9 of the Protocol, respectively. 13 U.N. CHRON. (No. 1) 73 (1976).

2. As of October, 1980, according to information provided by the Secretariat of the United Nations. Only States Parties to the Covenant may ratify or accede to the Protocol. Protocol, *supra* note 1, at 59, art. 8. The present States Parties to the Protocol are: Barbados, Canada, Columbia, Costa Rica, Denmark, Dominican Republic, Ecuador, Finland, Iceland, Italy, Jamaica, Madagascar, Mauritius, Netherlands, Nica-

just beginning to function in practice. It is in some ways comparable to earlier regional mechanisms, but is still relatively unknown. Yet this global effort deserves attention and already offers a subject for practical study of procedures, competences, conditions, and developing practices.

The Protocol is a procedural measure for implementing the Covenant, and as such, is only open to States bound by the substantive obligations set forth in the Covenant. The essence of the Protocol is expressed in its Preamble:

to enable the Human Rights Committee . . . to receive and consider, as provided in the present Protocol, communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant.<sup>3</sup>

The Human Rights Committee consists of eighteen nationals of the States Parties to the Covenant elected by these States for terms of four years, and serving in their individual capacity.<sup>4</sup> The Committee started its work in 1977.

As a procedural measure, the Protocol does not stand alone, although it was written as a separate document. Apart from the national measures of implementation required of each State under the Covenant,<sup>5</sup> there are other international measures in the hands of the Committee. The Committee has three main functions; one is obligatory for States Parties, and two are optional:

1) to consider reports submitted by States Parties under Article 40 of the Covenant on the measures they have adopted

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ragua, Norway, Panama, Peru, Senegal, Suriname, Sweden, Uruguay, Venezuela, and Zaire.

3. Protocol, *supra* note 1, at 59, Preamble.

4. Covenant, *supra* note 1, at 56, arts. 28 & 32. The Committee was elected by secret ballot at the first meeting of the States Parties to the Covenant, held September 20, 1976 at the United Nations Headquarters. See Report of the Human Rights Committee, 32 U.N. GAOR, Supp. (No. 44) 1, U.N. Doc. A/32/44 (1977) [hereinafter referred to as Report I]. At the second meeting of September 18, 1978, nine members were elected to replace those whose terms of office were to expire on December 31, 1978. Five members were re-elected. See Report of the Human Rights Committee, 34 U.N. GAOR, Supp. (No. 40) 1, U.N. Doc. A/34/40 (1979) [hereinafter referred to as Report III]. See also Report of the Human Rights Committee, 33 U.N. GAOR, Supp. (No. 40) 1, U.N. Doc. A/33/40 (1978) [hereinafter referred to as Report II], and Report of the Human Rights Committee, 35 U.N. GAOR, Supp. (No. 40) 1, U.N. Doc. A/35/40 (1980) [hereinafter referred to as Report IV]. At the third meeting of the States Parties on September 12, 1980, nine members were elected to replace the other half of the original membership whose terms of office were to expire on December 31, 1980. Again, five members were re-elected. See U.N. Doc. CCPR/SP/SR.4 (1980).

5. Covenant, *supra* note 1, at 53, art. 2.

which give effect to the rights recognized in the Covenant and the progress made in the enjoyment of these rights (clearly the main activity in its practice to date);<sup>6</sup>

2) to consider communications from one State claiming that another State is not fulfilling its obligations, submitted under the optional Article 41 (a procedure which so far has not been applied);<sup>7</sup>

3) to consider communications from individuals under the Optional Protocol.<sup>8</sup>

The competence of the Committee in this respect is regulated by the provisions of Articles 1 through 5 in the Protocol. After having considered the communication, the Committee "shall forward its views to the State Party concerned and to the individual."<sup>9</sup> The annual report of the Committee shall contain a summary of its activities under the Protocol.<sup>10</sup>

At its second session in 1977, the Committee began consideration of the first communications which had arrived. By the end of the tenth session, on August 1, 1980, seventy-two communications had been placed before it for consideration. The Committee had adopted its final views regarding six communications.<sup>11</sup>

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6. A consideration of the reporting procedure falls outside the scope of this article. It should be mentioned, however, that until August 1, 1980, 41 States had submitted initial reports under Article 40; see Report IV, *supra* note 4, at 6-7. Of these reports, most have already been examined by the Committee in public meetings with representatives of States answering orally. Some States have also submitted additional information in writing, this "dialogue" continuing in order to enable the Committee to formulate such "general comments" under Article 40 as it may wish. See Report I, *supra* note 4, at 17-36, 67-68; Report II, *supra* note 4, at 8-97, 112-15; Report III, *supra* note 4, at 14-103, 117-18; Report IV, *supra* note 4, at 6-87, 103-04.

7. The following 13 States have made a declaration under Article 41 of the Covenant: Austria, Canada, Denmark, Finland, Federal Republic of Germany, Iceland, Italy, Netherlands, New Zealand, Norway, Sri Lanka, Sweden, and the United Kingdom of Great Britain and Northern Ireland. See Report IV, *supra* note 4, at 101. The procedure is therefore formally in force, and relevant rules have been adopted by the Committee in 1979. Report III, *supra* note 4, at 114.

8. The Committee so far has no other substantive functions than those referred to above, and activities inherent to or developing from them. An important accessory function follows from Article 45 of the Covenant, which provides that the Committee shall submit to the General Assembly, through the Economic and Social Council, an annual report on its activities. Covenant, *supra* note 1, at 58. See note 4 *supra*.

9. Protocol, *supra* note 1, at 59, art. 5(4).

10. Protocol, *supra* note 1, at 59, art. 6. The reports so far are the main source about the work of the Committee, particularly regarding communications under the Protocol, because the Committee examines these in closed meetings. *Id.* at art. 5(3).

11. See Report IV, *supra* note 4, at 93. For further details, see also text accompanying notes 242-60 *infra*.

## BACKGROUND

The history of the Protocol, closely linked to that of the Covenants,<sup>12</sup> began at the San Francisco Conference in 1945 with suggestions that the United Nations should establish an "International Bill of Rights."<sup>13</sup> The stages of that history moved from the United Nations Charter<sup>14</sup> via the Commission on Human Rights,<sup>15</sup> which decided in 1947 that the bill to be drafted should consist of a Declaration, a Convention (later called Covenant) and Measures of Implementation. Milestones were adopted by the General Assembly with the Universal Declaration on Human Rights December 10, 1948:<sup>16</sup> the decision by the Assembly in 1952 that there should be two Covenants, one on Civil and Political Rights, the other on Economic, Social and Cultural Rights, and that the provisions on measures of implementation should be contained in the texts of the two Covenants.<sup>17</sup> In 1954 the Commission's drafts were submitted to the Economic and Social Council and to the General Assembly.

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12. See, e.g., M. GANJI, *INTERNATIONAL PROTECTION OF HUMAN RIGHTS*, ch. VI (1962); A. H. ROBERTSON, *HUMAN RIGHTS IN THE WORLD* (1972); L. SOHN, *A Short History of United Nations Documents on Human Rights*, in 18TH REPORT OF THE COMMISSION TO STUDY THE ORGANIZATION OF PEACE 39-186 (1968); Schwelb, *Some aspects of the International Covenants on Human Rights of December 1966*, in *INTERNATIONAL PROTECTION OF HUMAN RIGHTS* 103 (1968) [hereinafter cited as Schwelb, *Some aspects*]; Schwelb, *Notes on the early legislative history of the Measures of Implementation of the Human Rights Covenants*, in *MELANGES OFFERTS A POLYS MODINOS* 270, 270-89 (1968) [hereinafter cited as Schwelb, *Notes*]; Schwelb, *Civil and Political Rights—the International Measures of Implementation*, 62 *AM. J. INT'L L.* 827, 827-68 (1968) [hereinafter cited as Schwelb, *Civil and Political Rights*]; Schwelb, *Entry into Force of the International Covenants on Human Rights and the Optional Protocol to the International Covenant on Civil and Political Rights*, 70 *AM. J. INT'L L.* 511, 511-19 (1976) [hereinafter cited as Schwelb, *Entry into Force*]; Schwelb, *The International Measures of Implementation of the International Covenant on Civil and Political Rights and of the Optional Protocol*, 12 *TEX. INT'L L.J.* 141, 141-86 (1977) [hereinafter cited as Schwelb, *International Measures*].

13. See, e.g., H. LAUTERPACHT, *AN INTERNATIONAL BILL OF THE RIGHTS OF MAN* (1945).

14. The Charter refers to, but does not define human rights. A proposal to incorporate the Bill in the Charter itself was put forward but not proceeded with at the San Francisco Conference. See A.H. ROBERTSON, *supra* note 12, at 25; Schwelb, *Some aspects*, *supra* note 12, at 104-05.

15. See Schwelb, *Some aspects*, *supra* note 12, at 104-05; M. GANJI, *supra* note 12, at 141-42.

16. G.A. Res. 217A, U.N. Doc. A/811 (1948).

17. G.A. Res. 543, 6 U.N. GAOR, Supp. (No. 20) 36, U.N. Doc. A/2119 (1952); G.A. Res. 547, 6 U.N. GAOR, Supp. (No. 20) 37, U.N. Doc. A/2119 (1952). See Schwelb, *Some aspects*, *supra* note 12, at 105-06; M. GANJI, *supra* note 12, at 168-72.

The 1954 Draft Covenant on Civil and Political Rights did not have any provision for an individual right of petition. During the years of deliberations in the Commission on Human Rights, several proposals to recognize the right to petition from individuals, groups and/or non-governmental organizations were made, but always rejected, usually by a small majority.<sup>18</sup> The major objection advanced was that this implementation procedure would interfere in the internal affairs of States.

The Third Committee of the General Assembly devoted its attention to the substantive provisions of the draft covenants for many years and did not concentrate on implementation measures until 1966.<sup>19</sup> At this session some delegations proposed inserting in the Covenant an optional article enabling the Human Rights Committee to receive petitions from individuals or groups of individuals.<sup>20</sup> However, it was decided to include the substance of the proposed article in a separate protocol. This made it possible for the General Assembly to achieve the unanimous adoption of the Covenant and to adopt the Protocol by a large majority although with many abstentions.<sup>21</sup>

Before this stage was reached, discussion of the merits in the Third Committee had shown considerable division of opinion and very narrow vote margins in choosing between the proposed optional article and the separate optional protocol. Third World countries tabled the main motions in the Committee. Lebanon proposed a separate protocol, while Nigeria requested a roll-call vote on this motion and voted against it. So did most Western States. The Eastern States, on the contrary, voted in favor, and Lebanon's proposal was adopted by a vote of forty-one to thirty-nine with sixteen abstentions.<sup>22</sup> Again Nigeria was active: having voted against the

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18. See Schwelb, *Notes, supra* note 12, at 274, 276-79; M. ГАНЛ, *supra* note 12, at 179.

19. See Schwelb, *Notes, supra* note 12, at 283-86; A.H. ROBERTSON, *supra* note 12, at 30-31.

20. See Schwelb, *Civil and Political Rights, supra* note 12, at 861; Schwelb, *International Measures, supra* note 12, at 178-79; A.H. ROBERTSON, *supra* note 12, at 31; L. SOHN, *supra* note 12, at 164-69.

21. See 21 U.N. GAOR (1496th plen. mtg.) 1, 6, U.N. Doc. A/PU/1496 (1966). The Covenant was adopted by 106 votes to none. The Protocol was adopted by 66 votes for, 2 against, and 38 abstentions.

22. Report of the Third Committee, 21 U.N. GAOR, I Annexes (Agenda Item

separation from the Covenant, it nevertheless submitted, at the very next meeting, the first draft of the Protocol.

We do not know exactly what occurred during the overnight drafting process. Originally, the proposed optional clause, Article 41 *bis*, in the Covenant,<sup>23</sup> apart from mentioning a few conditions of admissibility, said very little about the procedure or competence of the Committee. To some extent it was obviously inspired by the European Convention. When some elements were added that are presently a part of the Protocol, the changes must have been hurriedly made. This is a factor to take into account when interpreting these provisions.

However, the idea of a separate Protocol was not new. The General Assembly itself had mentioned the concept in 1951 as an alternative to provisions in the Covenant itself.<sup>24</sup> At the same time, the Council of Europe adopted the optional clause on individual petitions.

Although most of the delegations favoring the individual right of petition would have preferred the clause rather than the separate protocol, the merits of the choice were open to doubt. The forecast that the existence of a separate protocol "might even be more conducive to making the new institution operative than an optional clause in a treaty"<sup>25</sup> seems to have been accurate. A comparison with the optional clause on individual petition in the Racial Discrimination Convention, which has not entered into force for lack of acceptance despite many more ratifications of the Convention itself, and also with the fate of Article 41 of the Covenant, lends support to this view.

#### RELATIONS BETWEEN THE RELEVANT SOURCES

When discussing the legal aspects of the system under the Protocol, one must consider three main sources. Besides the Protocol itself, and the Covenant which the Protocol is to implement as one among other measures, the system is also governed by the Rules of Procedure of the Human Rights Com-

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62) 7, 51, U.N. Doc. A/6546 (1966).

23. *Id.* at 50-51, paras. 474-77.

24. *See, e.g.*, G.A. Res. 421 F, 5 U.N. GAOR, Supp. (No. 20) 43, U.N. Doc. A/1775 (1950).

25. *See* Schwelb, *International Measures*, *supra* note 12, at 179-80.

mittee. However, as in all living systems, the written law will be supplemented and even modified by precedent, *i.e.*, through practices and decisions in individual cases. Factors other than the texts of the three actual instruments are influential: the policies of those acting; their conceptions of the objectives of the system; and constraints such as inadequate resources and other indirect pressures. This is not, however, the place to discuss the juridical relevance of such factors or similar problems of method.

Returning to the three written instruments, the Protocol is of course the most important source for the consideration of communications. The substantive rights and freedoms stated in the Covenant are the basis for alleged violations submitted under the Protocol. In addition, some of the procedural and organizational provisions in the Covenant also apply to the Committee when it examines communications.<sup>26</sup> Thirdly, the Rules of Procedure are of major importance, especially Chapter XVII on the procedure for the consideration of communications received under the Protocol.<sup>27</sup>

In law, a crucial difference exists between the Covenant and Protocol on the one hand, and the Rules on the other. The former have created the Committee and its competence, and are at the same time limiting and binding on it; but the Rules are created by the Committee itself and their effects are thus, in principle, different. The Rules mainly affect parties, the Secretariat, the officers, and individual members. They are not binding on the Committee as such in the same way as the Covenant and Protocol.<sup>28</sup>

The Rules of Procedure are established by the Committee by virtue of the Covenant.<sup>29</sup> Moreover, the entire Covenant as

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26. See Covenant, *supra* note 1, at 57, art. 39(2)(a) (twelve members shall constitute a quorum) and *id.* art. 39(2)(b) (decisions by majority vote). These provisions are also reflected in the Rules; see, *e.g.*, Report I, *supra* note 4, rules 37 & 51. *But see* notes 200-01 and accompanying text *infra* (regarding "consensus" as a normal method of work of the Committee).

27. Report I, *supra* note 4, rules 78-94. A major and very valuable study to which various references will be made in the following, is Bossuyt, *Le Règlement intérieur du Comité des Droits de L'Homme*, 14 *REVUE BELGE DE DROIT INT'L* 104 (1978-79). See *id.* at 130-52 concerning chapter XVII of the Rules and relevant Articles of the Protocol.

28. Many Rules are subject to the clause "unless otherwise decided by the Committee." Report I, *supra* note 4, rule 46. See *id.* rule 65, concerning amendments "by a decision of the Committee" without formal requirements.

29. Article 39(2) grants the Committee this competence and contains some posi-



well as the Protocol must be considered as *lex superior* to the Rules of Procedure.<sup>30</sup> Using both positive and negative language, these two instruments limit the Committee's freedom of action when drafting its Rules of Procedure. If there is a contradiction between the Rules on the one hand and the Covenant or the Protocol on the other, the latter will prevail.

This is the point of departure. In practice, however, the question at issue will often be whether there exists a contradiction or not. Sometimes it may be obvious that the Protocol contains a lacuna, so that the Committee is free to solve the problem at its discretion. In other situations the Protocol must be so interpreted that it requires a certain solution. The difficulty is to distinguish between contradicting the Protocol, which is prohibited, and supplementing it, which is permitted.

A general answer to this question hardly exists. Some general comments may, however, be made. In principle, this is a question of interpretation of each provision concerned. The Protocol as well as the Rules must be construed in conformity with ordinary legal methods.

When interpreting the Protocol one should take into consideration the situation and manner in which it was drafted.<sup>31</sup> In fact, this instrument came into being within a few days and its provisions are not always clear and logical. In our opinion these factors are arguments in favor of a rather free interpretation of its provisions.

One important point is already settled in practice. The Committee has agreed that the order in which the Articles are presented in the Protocol should not be interpreted to reflect a chronological order of the procedures to be followed. The Protocol lays down the conditions for admissibility but does not establish the procedure to be followed in determining admissibility.<sup>32</sup>

The efficient functioning of the system provided for

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tive requirements as to the contents of these Rules.

30. The relations between the Covenant and the Protocol will not be dealt with here. Conflicts between these two instruments will hardly occur, but sometimes when the provisions of the Protocol depend on those of the Covenant, doubts may arise as to the exact position. Compare Covenant, *supra* note 1, at 53, art. 2, with Protocol, *supra* note 1, at 59, art. 1, regarding the question of territory. See text accompanying notes 143-47 *infra*.

31. See text accompanying notes 12-25 *supra*.

32. See Report I, *supra* note 4, at 11; see also text accompanying notes 75-190 *infra*.

under the Protocol should also be considered an important purpose when interpreting the relevant instruments. On points where it is silent, or obviously incomplete, the Protocol should not be seen to bar any pragmatic solution which may be laid down by the Committee in its Rules or in a decision, provided that basic principles are observed. Nor should the Protocol be automatically interpreted *a contrario*, e.g., when it says that the Committee "shall" do this or that,<sup>33</sup> or as not providing authority to solve practical problems unforeseen at the adoption of the Protocol. In particular, this pragmatic approach applies to procedural steps and conditions which may be necessary to adopt, since the Protocol generally has left such matters to the Committee.<sup>34</sup> The Protocol has, of course, implied or inherent limits, e.g., in the rights of States Parties, but a considerable space for supplementing the Protocol nevertheless seems to exist.

Such general guidelines as those suggested above may seem rather vague. Thus, the problem of "contradiction or supplement" ultimately must be solved *in concreto*. Some illustrations will be addressed in later portions of this article.<sup>35</sup> In discussion about interpretations and proposals within the Committee, widely differing approaches to the matters referred to may appear. There is a strict constructionist school, to which many declare themselves to belong and which few

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33. See, e.g., Protocol, *supra* note 1, at 59, art. 5(1). That the Committee has a duty to ("shall") take into account "all written information" submitted by the parties, does not exclude in our view that it also may consider information obtained orally, i.e., at hearings or fact-finding missions, at least when arranged with the consent of the party or parties concerned. On the other hand, it is not bound by any directive in the Protocol to do so, and unlike the European Convention Article 28(1)(a) the parties are not bound to cooperate if it decides to try. See European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 2889 U.N.T.S. 221 [hereinafter cited as European Convention]. The problem of such "inherent powers" in the procedure would, however, seem to deserve a further study.

34. See note 32 *supra*.

35. See, e.g., text accompanying notes 90-98 *infra*, concerning the questions of the interpretation of "views" in Article 5(4), of oral or written procedure, and of fact-finding missions. See text accompanying notes 187-89 & 192-93 *infra* concerning the extent of the reference as regards "unreasonable prolongation" in Article 5(2)(b), and the question of a time limit for the submission of communications after the exhaustion of domestic remedies. It should be noted that the problem of the limitation of the Committee's competence also occurs when it acts *in concerto*. In this situation not only the Covenant and the Protocol, but also the Rules may, in principle, limit the Committee's freedom of action. *But see* note 28 and accompanying text *supra*.

openly dare to oppose, rejecting suggestions about the Committee's functions as *ultra vires*.

Generally, unanimity prevails about the Covenant and Protocol as the Committee's constitution and basis of its work. This frail consensus is important as oil in the machinery of a body where so many interests and ideologies meet. A need seems to make itself felt, therefore, to conceal the "freer" interpretations and argue as if one keeps to the letter of the Protocol.

### A SUMMARY OF THE PROCEDURE UNDER THE PROTOCOL

Before taking up the legal questions arising under the Protocol, it will be useful to describe the communications procedure from a practical viewpoint and refer to the relevant Rules.

In the mass of communications arriving to the United Nations on human rights matters, those few which are or appear to be submitted for consideration by the Committee are registered "by the Secretary-General" and then transmitted to the Committee.<sup>36</sup> However, communications concerning a state which is not a Party to the Protocol are not transmitted to the Committee.<sup>37</sup> Before transmission, the Secretariat may, when necessary, solicit clarifications from the author if the information furnished appears insufficient,<sup>38</sup> or where it is unclear whether the author wants the communication considered by the Committee.<sup>39</sup> If it turns out that the author wants such a consideration, or if there are still doubts as to his wish, the communication will be transmitted to the Committee. The function ascribed to the Secretary-General under the Rules is therefore mainly of an administrative and technical nature. He has no "pre-screening competence" to reject a communica-

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36. Report I, *supra* note 4, rule 78(1). In practice, the Communications Unit in the Division of Human Rights, at the Geneva office, performs these tasks on behalf of the Secretary-General who, of course, is stationed in New York. The function of separating communications, distributing and channelling them to the appropriate bodies, is an important one. Unfortunately, delays are caused, in part because the Unit is seriously understaffed, but also inevitably, because of the administrative arrangements.

37. *Id.* rule 78(3). Communications concerning a state which is not a Party to the Protocol are not registered. See *id.* rules 79(1) & 78(3). This is in line with Article 1 *in fine* of the Protocol.

38. *Id.* rule 80.

39. *Id.* rule 78(2).

tion even if it is clearly inadmissible on formal or substantive grounds.<sup>40</sup>

In order to facilitate consideration by the Committee of the communications submitted to it, a Working Group usually meets prior to and during the sessions of the Committee.<sup>41</sup> When the Committee begins each session under the Protocol, it is presented with lists of communications with a brief summary of their contents,<sup>42</sup> fact sheets for each of them containing a more detailed description of the contents,<sup>43</sup> any additional written information submitted by the parties, and finally, the recommendations from the Working Group.<sup>44</sup> At each session there are communications brought to the attention of the Committee for the first time, as well as communications previously pending before the Committee.<sup>45</sup>

The Committee's considerations take place in closed meetings.<sup>46</sup> Unless the communication can clearly be rejected as "inadmissible" at once, the procedure must extend over more than one session and is divided into two main stages: 1) the *admissibility* of the communication, and, only if admissibility is found, 2) the *merits* of the communication.

It is probably implied in the Protocol, and is explicitly stated in the Rules, that the Committee must first decide whether a communication is admissible under the Protocol, *i.e.*, whether the Committee is competent to deal with the matter according to the positive and negative conditions laid down in the Protocol.<sup>47</sup> That the two stages should be clearly

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40. It is otherwise only if the communication concerns a state which is not a Party. See Bossuyt, *supra* note 27, at 130-33. Bossuyt criticizes rule 78(3) as in fact giving the Secretary-General the competence to take a decision on admissibility, this being the only exception from the general rule which leaves admissibility decisions exclusively to the Committee itself. The exception was included because it appeared clear and cannot apply in case of complications as those envisaged by Bossuyt (if it concerns several States, or a State having denounced the Protocol after the events complained of).

41. Report I, *supra* note 4, rule 89.

42. *Id.* rule 79.

43. *Id.* rule 81. These sheets are distributed for each case and are based on the submissions of the authors.

44. *Id.* rules 89, 94.

45. These points appear from the annotations to the provisional agenda of the Committee. See, *e.g.*, Prov. Agenda (9th Sess.) U.N. Doc. CCPR/C/11, Jan. 7, 1980, at 4.

46. Protocol, *supra* note 1, at 59, art. 5(3); Report I, *supra* note 4, rule 82.

47. See *id.* rule 87. These conditions are dealt with in the text accompanying notes 112-96 *infra*. This is also the system of the European Commission of Human

separated, not only in law, but also in time, seems to follow from the dictates both of legal logic, the competence to act being a precondition for acting, and of procedural economy. Yet it is not an unmixed blessing.

If the Committee decides that the communication is inadmissible,<sup>48</sup> that is the end. The decision is, in principle, final and no further steps are taken under the Protocol.<sup>49</sup> The Committee must, of course, communicate its decision to those concerned, and shall do so as soon as possible.<sup>50</sup> It always goes to the author of the communication, and the State Party concerned gets it if the communication has already been transmitted to it for additional written information or observations on admissibility.<sup>51</sup> One should note that transmission to the State Party at this stage is *not* obligatory and may be omitted where inadmissibility follows from the communication as submitted by the author. The decision then only has to be communicated to the author. In any event, the decisions declaring communications inadmissible may be referred to in the Committee's annual report. The question of giving further publicity to them has been raised but not settled.<sup>52</sup>

When a communication is declared admissible, the decision and the text of the relevant documents are submitted to the State concerned.<sup>53</sup> The author is informed of the decision.<sup>54</sup> It should be noted that the communication may not be declared admissible unless the State Party concerned has received the text of the communication and has been given an opportunity to furnish information or observations.<sup>55</sup> Although the admissibility decision does not prejudge the merits of the case, it may, procedurally, be seen as a decision against the State Party. Experience in similar organs has shown that States usually wish to contest admissibility rather than, or

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Rights; see, e.g., O'Boyle, *Practice and Procedure Under the European Convention*, 20 SANTA CLARA L. REV. 697 (1980).

48. A more detailed analysis of the various possible decisions is discussed in the text accompanying notes 196-219 *infra*.

49. The Committee may, subject to certain conditions, reconsider its decision. See *generally* text accompanying notes 217-19 *infra*.

50. Report I, *supra* note 4, rule 92(1).

51. *Id.* rule 91.

52. See text accompanying notes 252-53 *infra*.

53. Report I, *supra* note 4, rule 93.

54. *Id.* rule 92(1).

55. *Id.* rule 91(2).

before entering into, the merits. Thus, giving the State Party an opportunity to respond may be viewed as a safeguard and a reflection of the principle of hearing both parties.<sup>56</sup> Such a hearing is less necessary in cases declared inadmissible.

The consideration of the merits of an admissible case is briefly envisaged by Articles 4 and 5 of the Protocol. Within six months, the State shall submit written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.<sup>57</sup> This information is then communicated to the author who may submit additional written information or observations within a time limit decided by the Committee.<sup>58</sup> The Committee considers the communication in light of all written information made available to it by the author and the State concerned and then formulates its *views* on the merits of the case according to the provisions of Article 5 of the Protocol.<sup>59</sup> These views are communicated to the individual and the State. They may also be published and included in the annual report.<sup>60</sup>

The procedure outlined here was laid down by the Rules and has been applied in a number of cases since 1977. Since it is necessarily time-consuming, this procedure has not unequivocally confirmed its advantages. Because the Protocol itself does not distinguish between the two stages so clearly as the Rules of Procedure, and may even be read in a way that would obliterate the distinction, at least in part, the Rules are open to further discussion and possible improvement.

#### SOME QUESTIONS OF PRINCIPLE

A primary matter of principle is the *status of the Committee*, particularly when it is exercising its functions under the Protocol. As mentioned above,<sup>61</sup> the Committee is established by and derives its competence from the Covenant and the Protocol. Neither the Committee as a body, nor a member

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56. See text accompanying notes 76-82 *infra*.

57. Protocol, *supra* note 1, at 59, art. 4(2); see also Report I, *supra* note 4, rule 93(2). In practice, Article 4(2) has been interpreted to the effect that it applies only to the stage where the merits are considered, and not to the admissibility stage. However, the principle that both parties shall be heard before making a decision is also reflected at the initial stage. See notes 54 & 56 *supra*.

58. Report I, *supra* note 4, rule 93(3).

59. *Id.* rule 94(1). See Protocol, *supra* note 1, at 59, art. 5(4).

60. See text accompanying notes 109 & 242-50 *infra*.

61. See text accompanying note 28 *supra*.

individually, is responsible to any other institution. The only organ that, in a sense, is superior to the Committee is the meeting of the States Parties, at which the Committee members are elected.<sup>62</sup> Whether the meeting may exercise additional or inherent powers in its electoral capacity or assume other functions has not yet been explored. It does not seem to be intended that such a meeting should act as a representative of the collectivity of States Parties in matters of substance, *e.g.*, by issuing instructions binding the Committee. The Committee is not, in any event, a United Nations organ; it is an independent body established under an instrument distinct from the United Nations Charter.

On the other hand, the Committee is attached to the United Nations in various respects. The Secretary-General provides the necessary staff and facilities for the effective performance of the functions of the Committee,<sup>63</sup> and also has several administrative functions.<sup>64</sup> The members of the Committee receive emoluments from the United Nations sources with the approval of the General Assembly,<sup>65</sup> and the annual report of the Committee is submitted to the General Assembly.<sup>66</sup> This creates a dilemma: while the Committee is an independent body outside the United Nations hierarchy, it is dependent on resources made available by the General Assembly and the Secretariat.<sup>67</sup> When discussing some of the problems arising under the Protocol, this situation should be kept in mind.

One should also note the Committee's "geographical"

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62. See Covenant, *supra* note 1, at 56, arts. 30(4), 32(2) & 34(2).

63. *Id.* art. 36.

64. See *id.* at 56-58, arts. 30 (elections); 33, 34 (vacancies); 40 (submission and transmission of reports) and 48-53 (final provisions). See also Protocol, *supra* note 1, at 59-60 arts. 8-14.

65. Covenant, *supra* note 1, at 56, art. 35. This system differs from the one established under the Convention for the Elimination of All Forms of Racial Discrimination (CERD). See Int'l Convention on the Elimination of All Forms of Racial Discrimination, opened for signature Mar. 7, 1966, 660 U.N.T.S. 195.

66. See notes 4, 8, & 10, *supra*.

67. The Committee may wish to be heard, *e.g.*, about its needs as regards resources for the effective performance of its functions, or consult, as it has occasionally done, with the Legal Adviser of the U.N. Yet the Committee will probably jealously guard its own independence. Concern to preserve this independence was also a main reason why the Third Committee decided not to invite the Chairman of the Human Rights Committee to introduce its first annual report in 1977, despite a suggestion by the Committee itself. See Report I, *supra* note 4, at 44, para. 185.

scope of activity<sup>68</sup> where the view is sometimes expressed that the Committee is a "universal" institution. While this is not presently the case, the Covenant has universal aspirations. Only about two-fifths of the member states of the United Nations have ratified or acceded to the Covenant. On the other hand, many influential members have done so, and almost every region and political system existing in the world is represented among the States Parties as well as in the Committee. The Committee may therefore already be described generally as a global body. Yet the particular aspect of the system of implementation laid down in the Protocol, to which only twenty-four States have adhered, is at this moment much more narrowly applicable.

Further questions of principle arise when one asks what sort of implementation by the Committee is envisaged. There are two main attitudes represented both in the world and in the United Nations regarding implementation of human rights. Many States show a preference for the *promotion* of human rights, which implies action directed towards the future, *e.g.*, studies, research, and recommendations. The continuing process to define and develop the concept of human rights could be seen in this perspective. Others advocate the *protection* of human rights, *i.e.*, to ensure that they are observed — as established — through sanctions. The aim of this latter group traditionally has been to set up some type of judicial machinery. In particular, the protectionist interest has focused on the action taken by the institutions on individual petitions, such as those envisaged under the Protocol.

Having in mind these two schools of implementation, one could try to describe the task of the Committee under the Protocol. Is it a body for the promotion or the protection of human rights? The drafters of the relevant instruments have avoided this issue.<sup>69</sup> According to the neutral language of the Covenant, the Committee "shall carry out the functions hereinafter provided."<sup>70</sup> No further characterization of the tasks of the Committee is given, either in the Covenant or in the Pro-

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68. As to the concepts discussed here, see Vasak, *National, Regional, and Universal Institutions for the Promotion and Protection of Human Rights*, 1 REVUE DES DROITS DE L'HOMME 164, 165 (1968).

69. Since the text is silent, a pragmatic view should be taken. See text accompanying notes 220-41 & 259 *infra*.

70. Covenant, *supra* note 1, at 55, art. 28.



TOCOL itself.

The relations between "universalism" and "regionalism" in the international work for human rights have been discussed several times and from different perspectives. Evaluating the systems at different levels, a regional approach may be expected to increase the possibility of achieving common standards and efficient procedures of implementation. At the same time, it is often stressed that the contents of human rights in principle should be "universal." Although this aspect cannot be elaborated upon in this article, we think it is arguable that a division of functions between the global and regional level should emerge, the former concentrating on the promotion of human rights, the latter mainly dealing with protection.<sup>71</sup>

When several instruments, general or special, exist in the same field, the problem of *co-existence* arises, irrespective of geographical level. The convergencies and divergencies between the *substantive* rights protected, *e.g.*, both by the pre-existing European Convention and the Covenant, have been the subject of several studies, the method usually being that of comparison. In this context, however, some of the relations between the implementation *procedures* are of particular interest. This is the case when an individual submits a communication, not only under the Protocol, but also by virtue of some other instrument, such as the European Convention.<sup>72</sup>

Another dimension is the interaction between the various instruments.<sup>73</sup> Such interaction can be seen not only in the "legislative process" (*e.g.*, widening the scope of an existing instrument by drafting new substantive rights which are mentioned elsewhere, or improving the procedure with regard to other systems), but also when an instrument is applied by the competent organ (*e.g.*, other instruments may have an impact through *renvoi* or as means of interpretation). When examining the system under the Protocol, several examples of influence from other instruments can be found. The Rules of Procedure, for instance, are to a large extent inspired by those

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71. Some justification for such a view is advanced by Opsahl, *The Protection of Human Rights in the Council of Europe and in the United Nations*, 26 EUR. Y.B. 92, 115-17 (1980).

72. See text accompanying notes 176-89 *infra*.

73. Some aspects are dealt with in the Proceedings of the Colloquy about the European Convention on Human Rights in Relation to Other International Instruments for the Protection of Human Rights, Athens, September 21-22 (1978).

drawn up by the Committee on the Elimination of Racial Discrimination (CERD). Also, some of the rules provided for in regional systems have been of interest.<sup>74</sup> The experience and practice under the European Convention on Human Rights on similar points has been taken into consideration by the Committee acting under the Protocol, especially when establishing its procedures, and through contacts at the Secretariat level. On the other hand, the practice of the Committee has had an impact on the activities of other institutions.<sup>75</sup>

It is a well-established principle of procedure that both parties shall be heard before a decision is made (*audiatur et altera pars*), the aim being that all necessary information shall be available. This principle also applies to the proceedings under the Protocol.<sup>76</sup> When the Committee considered its Rules of Procedure, it agreed that it was under no obligation under the Protocol to transmit at the admissibility stage the text of the communication to the State concerned,<sup>77</sup> but it decided nevertheless that no communication shall be declared admissible unless the State has received the text of the communication and has been given the opportunity to furnish information or observations relevant to its admissibility.<sup>78</sup> There is no provision prescribing that the information and observations received from the State shall be transmitted to the author of the communication for additional comments,<sup>79</sup> but in practice this is normally done.

The communication shall be brought to the attention of the State Party concerned, "subject to the provisions of Article 3," which refers to inadmissible communications.<sup>80</sup> The Committee therefore has interpreted this duty as only applicable to the merits. In other words, the Protocol ex-

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74. See Bossuyt, *supra* note 27, at 108, 152-55.

75. *Id.* at 116, note 39, describing how the liberal attitude of the Committee regarding the distribution of documents has influenced the practice under CERD. The influence of the Committee will probably increase when the system of individual communication under CERD Article 14 enters into force.

76. See text accompanying notes 51-56 *supra*.

77. Report I, *supra* note 4, at 13.

78. *Id.* rule 91(2). On the other hand the Committee may declare a communication inadmissible without having transmitted it to the State concerned, since the State usually has no interest in being informed of such communication. See, e.g., *id.* rule 92(1). The Committee is, however, not excluded from transmitting such communications, if it so wishes.

79. This is criticized by Bossuyt, *supra* note 27, at 148.

80. Protocol, *supra* note 1, at 59, art. 4.

pressly provides for the principle that both parties have the right to be heard before the final views on the merits are adopted.<sup>81</sup>

Obviously a balance must be struck between the effective application of the principle *audiatur et altera pars*, on the one hand, and the need for the Committee to act as expeditiously as possible. The Protocol does not expressly provide for a second round from the author, and in any event the Committee must, sooner or later, bring the exchange between the parties to an end.<sup>82</sup> During the discussion of the Rules of Procedure, the Committee members differed on whether one should provide for other general time-limits and their eventual extent. It was finally decided not to lay down general time-limits,<sup>83</sup> but instead a flexible system was chosen. A time-limit is fixed in each case for the submission of observations on admissibility<sup>84</sup> and for the additional written information regarding the merits.<sup>85</sup> Later general decisions on the length of time-limits have nevertheless been applied.<sup>86</sup> In view of the long intervals between the Committee meetings, this solution may entail delays. Yet proposals to authorize the Secretary-General, on behalf of the Committee, to seek information or observations between sessions were rejected.<sup>87</sup> Therefore, the situation permits considerable time to pass from the moment when the communication is submitted until the Committee adopts its final views.<sup>88</sup> A crucial question arises: What action, if any, may be taken by the Committee to meet an

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81. This is repeated in rule 93(3), which also states that any explanations or statements submitted by the State shall be transmitted to the author who may submit additional written information; See Report I, *supra* note 4, rule 93(3). The latter provision leaves it to the author whether he wants to do so ("may"), but for the State, under rule 93(2), the mandatory term of the Protocol ("shall") is repeated. *Id.*

82. However, the only time-limit provided for in the Protocol is the six months rule in Article 4(2), within which the State must submit written explanations or statements.

83. Report I, *supra* note 4, at 13-14.

84. Report I, *supra* note 4, rule 91(1).

85. *Id.* rule 93(3).

86. See text accompanying note 202 *infra*.

87. Report I, *supra* note 4, at 14. The arguments were that "delegating" such (procedural) powers "might be construed as unconstitutional under the Protocol and it might be unacceptable to the Secretary-General." *Id.* para. 79. This is not entirely convincing to these authors.

88. In the two first cases, referred to in text accompanying notes 244-52 *infra*, the time taken was respectively, two and a half years, and two years and eight months.

individual's request during the interim?

The Protocol contains no express provision on this problem, but the Committee may, prior to forwarding its final views, inform the State concerned of its views whether *interim measures* may be desirable to avoid irreparable damage to the alleged victim.<sup>89</sup> This prudent formulation was chosen because several members considered Article 5(4) of the Protocol<sup>90</sup> as being a limitation of the competence of the Committee, not only regarding final views, but other "views" as well, such as recommendations on interim measures.<sup>91</sup> The present wording and the Committee discussions thereon leave the issue open to doubt as to whether the Committee may forward its views on interim measures not only after the communication has been declared admissible, but also at the initial stage.<sup>92</sup> If not, the purpose of avoiding damage to the victim would easily be defeated, in view of the time usually spent on the admissibility stage.

The Committee shall consider the communication in the light of all written information made available to it by the individual and by the State Party concerned.<sup>93</sup> It might seem to follow from this provision that all the proceedings concerning communications have to be in writing.<sup>94</sup> It is nevertheless in our view an open question whether the Committee may provide for oral proceedings in its Rules of Procedure.<sup>95</sup> The present Rules only mention written information and how it shall be obtained.<sup>96</sup> Yet the Rules are not very elaborate and draw no distinctions, for instance, between evidence and legal submissions. Experience may indicate that such issues ought to be further developed. One could argue that oral proceedings may, when required, at least be arranged with the consent of

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89. Report I, *supra* note 4, rule 86.

90. Article 5(4) of the Protocol provides: "The Committee shall forward its views to the State Party concerned and to the individual."

91. According to the draft, the Committee or its subsidiary body could at any time request a State Party to take interim measures to avoid irreparable damage to a victim of an alleged violation.

92. See Bossuyt, *supra* note 27, at 135.

93. Protocol, *supra* note 1, at 59, art. 5(1).

94. See Schwelb, *Civil and Political Rights*, *supra* note 12, at 867. By way of contrast, Article 41(1)(g) of the Covenant gives States Parties the right to make submissions orally and/or in writing.

95. See Covenant, *supra* note 1, at 56-57, art. 39.

96. Report I, *supra* note 4, rules 91(1), (2), 92(2), 93(2), (3). See also text accompanying note 33 *supra*.

the parties. Until present all proceedings have been in writing. The additional question of how to verify - by means of written procedure - the information submitted by the author when contested by the respondent State, will be of increasing importance in the future.<sup>97</sup> What is at stake is the whole fact-finding function, crucial to any inquiry aiming at objectivity.<sup>98</sup>

The Committee shall hold closed meetings when examining communications.<sup>99</sup> Meetings *in camera* are an exception from the main rule providing for public meetings.<sup>100</sup> The reason for this exception is partly "to protect States . . . from having all sorts of accusations, sometimes totally groundless, brought into the full glare of publicity, with the world press as an observer."<sup>101</sup> To some extent, this Rule could also serve the interests of the alleged victim and enables the Committee freely to discuss the matter.<sup>102</sup>

A problem distinct from the publicity of meetings is the issue of the publicity of *documents*.<sup>103</sup> Summary records of private meetings are distributed to the Committee members and the participants in the meeting. They may be made available to others upon decision of the Committee at such time and under such circumstances as the Committee may decide.<sup>104</sup> This principle of restricted distribution also applies to other official documents of the Committee and its subsidiary bodies relating to the Protocol (*e.g.*, reports and formal decisions). Such documents shall be distributed to all members of the Committee, to the States Parties concerned, and, if so decided by the Committee, to members of its subsidiary bodies

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97. The second case in which final views were adopted clearly illustrates the problem of establishing the facts when specific written allegations are refuted merely in general terms, and resulted in divided opinions in the Committee. See text accompanying notes 242-50 *infra*.

98. Both the Protocol and the Covenant are silent as to the possibility of fact-finding missions. Whether in the future this will be interpreted as a lacuna or a prohibition due to lack of competence remains to be seen.

99. Protocol, *supra* note 1, at 59, art. 5(3). This provision is repeated in Rule 82, which also prescribes that the Committee may decide to hold public meetings when considering general issues relating to communications. Report I, *supra* note 4, rule 22.

100. Report I, *supra* note 4, rule 33.

101. F. CASTBERG, THE EUROPEAN CONVENTION ON HUMAN RIGHTS 15 (1974). The expression explains the purpose of the similar rule regarding the European Commission.

102. With a system of oral procedure, this solution is less evident. A distinction may then be drawn between (public) hearings and deliberations (*in camera*).

103. See Bossuyt, *supra* note 27, at 112-19; Report I, *supra* note 4, at 8-10.

104. Report I, *supra* note 4, rule 36.

and others concerned.<sup>105</sup> This is an exception from the main rule of general distribution of Committee documents.<sup>106</sup> Information from a State Party is usually contained in documents of general distribution, unless the State requests otherwise.<sup>107</sup>

The Committee forwards its views to the State concerned and to the individual.<sup>108</sup> None of the instruments has any express provision regarding whether the Committee may make these views known to groups other than the parties. If not, it would be up to the parties to control publicity, and it might become very difficult for others to trace the information.<sup>109</sup> Therefore, the Committee has decided to publish it in the annual report in every instance since it for the first time concluded its considerations of a communication by adopting its final views.<sup>110</sup> The Committee has also decided to publish a press release on such occasions.

Public meetings and publication and distribution of documents are means to achieve *publicity* for the work of the Committee. Generally speaking, publicity is important for the purpose of informing and educating the public about human rights. With respect to the system under the Protocol one should also not overlook the function of publicity as a "sanction" mobilizing public opinion.<sup>111</sup>

#### ADMISSIBILITY: CONDITIONS

The first duty of the Committee under the Protocol is determining whether a communication is admissible.<sup>112</sup> This is not merely a simple check of formal requirements. The con-

105. *Id.* rule 64(2). Although it might seem that both Rule 36 and Rule 64(2) could be made use of as a basis for involving "others" in closed meetings—victims, authors, etc.—these general provisions of the availability of documents cannot be decisive as regards the functions of the Committee under the Protocol. In particular, Rule 64(3) is clearly unsuitable to documents relating to communications.

106. *Id.* rule 64(1).

107. *Id.* rule 64(3).

108. See Protocol *supra* note 1, at 59, art. 5(4). Report I, *supra* note 4, rule 94(2).

109. However Article 6 states that the annual report shall contain a summary of the activities under the Protocol. This provision has been interpreted to the effect that the final views in a case may be published in the report. Protocol, *supra* note 1, at 59, art. 6.

110. See Report III, *supra* note 4, at 124; Report IV, *supra* note 4, at 107, 111, 120-21, 127 & 130.

111. See text accompanying notes 254-55 *infra*.

112. See text accompanying notes 36-60 *supra*.

cept of admissibility as it is developing in practice covers many matters, sometimes very complicated and delicate. Other experience suggests that it may become the major obstacle where the overwhelming number of cases fail.<sup>113</sup> In any event, the concept raises many legal issues.

The unity of this concept<sup>114</sup> is perhaps somewhat theoretical or even artificial. The conditions of admissibility are found in the Protocol<sup>115</sup> and, in a restated form, in the Rules,<sup>116</sup> but the terms employed in these provisions vary.<sup>117</sup>

The conditions of admissibility are, to some extent, similar to those applied by the European Commission of Human Rights. The Protocol mentions fewer admissibility conditions. In its examination of individual applications, the Commission has established a certain hierarchical order in which the dif-

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113. See THE EUROPEAN COMMISSION, STOCK-TAKING ON THE EUROPEAN CONVENTION ON HUMAN RIGHTS 137 (1979). Of a total of 8072 individual cases (applications decided in the years 1955-1978), only 190, or about 2.3% were declared admissible, while the others were either inadmissible or struck off the list.

114. See, e.g., Report I, *supra* note 4, rule 87.

115. Protocol, *supra* note 1, arts. 1-3, 5(2).

116. Report I, *supra* note 4, rule 90.

117. Article 3 provides that the Committee "shall consider *inadmissible*" (emphasis added) a communication in certain circumstances, mentioning three separate grounds. The other provisions in the Protocol regulating the Committee's competence do not, however, use the terms admissible/inadmissible. According to Article 1, a State Party "recognizes the competence of the Committee to *receive and consider*," (emphasis added) subject to certain conditions, communications from individuals. "No communication shall be *received*" (emphasis added) if it concerns a state which is not a Party to the present Protocol. Article 2 again has a different formulation ("*may submit* a written communication") (emphasis added) as has Article 5(2) ("*shall not consider unless*") (emphasis added). It is therefore arguable that a distinction has to be drawn between grounds barring the receipt, the admissibility, and the consideration of a communication. On the other hand, the main legal effect of the existence of any of these grounds remains the same, in that the Committee will not embark upon a consideration of the merits. Seen in this perspective, not only Article 3, but also Articles 1, 2, and 5(2) contain conditions of admissibility. This has been the approach of the Committee. See Report I, *supra* note 4, rules 87, 89(1), and 90. The wording of the Protocol has thus not been taken literally as a basis for further distinctions, nor has it been regarded as containing a chronological order of the procedures to be followed. See text accompanying notes 28-35 *supra*. See also Bossuyt, *supra* note 27, at 140.

The Protocol might be understood as distinguishing between the legal effect of "inadmissibility" and "non-consideration" in one respect: Article 4 is placed between Article 3 (grounds of inadmissibility) and Article 5 (non-consideration). This could mean that the procedure in Article 4—submission to the state for observations—must be applied before the Committee ascertains whether the situations mentioned in Article 5(2) exist, whereas the Committee will take no such action when it has found that the conditions in Article 3 are not met. However, this interpretation has not been adopted by the Committee.

ferent grounds of inadmissibility are considered.<sup>118</sup> Moreover, it has developed extensive case-law on the interpretation and application of the various conditions of admissibility, with elaborately reasoned decisions, of which many are published.<sup>119</sup> Keeping in mind these general observations, we will turn to the specific grounds of inadmissibility.

There is no material available so far to show whether an order of precedence among the grounds for inadmissibility is developing in the practice of the Committee. As long as the Committee's decisions remain unpublished, one cannot say whether it will take an approach similar to the European Commission or merely select and refer to the simplest grounds, limiting the legal reasoning in support of its decision to that which may seem strictly necessary.<sup>120</sup> Its global, and thus much more heterogeneous, composition and lack of staff are factors suggesting a less perfectionist and legalistic approach to issues of admissibility. The first statistics available also indicate a drastically higher proportion of cases declared admissible.<sup>121</sup>

### *Anonymous communication*

According to the Protocol,<sup>122</sup> it is a condition of admissibility that the communication is not anonymous. So far, no communication has been considered anonymous. This rule will probably be rarely applied, since the normal condition for registering such a communication will not even be present.<sup>123</sup> Borderline cases may arise. If the communication is not signed by the author, but it nevertheless is possible to identify him by the information contained in it, the communication will probably not be considered anonymous.<sup>124</sup> The right ap-

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118. CASTBERG, *supra* note 101, at 65-66.

119. The European Commission has issued the bilingual series *Collection of Decisions*, vols. 1-46 (1960-1974), *Decisions and Reports* (1975-present). Many decisions are also reported in the series now called the *Yearbook on the European Convention on Human Rights*.

120. See text accompanying notes 197-219 *infra*.

121. See text accompanying notes 254-58 *infra*.

122. Protocol, *supra* note 1, at 59, art. 3; Report I, *supra* note 4, rule 90(1)(a).

123. At least this is the situation in the European Convention under Article 27(1)(a). European Convention, *supra* note 33, at 238. It is now an established practice of the European Commission not to register, as a formal application under Article 25, anonymous complaints. See CASTBERG, *supra* note 101, at 58.

124. Bossuyt, *supra* note 27, at 137. Practical difficulties arise, especially if



proach should be for the Secretariat to request clarification from the author.<sup>125</sup> If no further information is given, the communication should be transmitted to the Committee; but it is likely that the Committee, after having requested information without receiving any response, would discontinue its consideration of the communication without making a decision as to its admissibility.<sup>126</sup>

### *Abuse*

The Protocol<sup>127</sup> and the Rules<sup>128</sup> provide that a communication is inadmissible if it is considered an abuse of the right to submit a communication under the Protocol. So far, this ground of inadmissibility has not been applied by the Committee.

The European Commission has been hesitant to declare an application an abuse of the right to petition,<sup>129</sup> having recognized as a general principle that rules restricting its competence should be interpreted restrictively.<sup>130</sup> This should also be a point of departure for the Committee. The sole fact that an author is inspired by motives of publicity and political propaganda should not, therefore, cause the author's communication to be labelled an abuse. The clause should only be applied in cases involving communications that use false evidence in order to mislead the Committee or communications that are totally unsupported by the Covenant and flagrantly unreasonable. Whether one should admit a communication when it contains improper language is doubtful.<sup>131</sup>

This "abuse" clause in the Protocol may, however, be invoked to cover also other types of situations for which the

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there is no return address for requesting clarification, or if the author asks that his identity or sources of information should not be revealed to the Government.

125. Report I, *supra* note 4, rule 80(1)(a).

126. See text accompanying note 212 *infra*.

127. Protocol, *supra* note 1, at 59, art. 3.

128. Report I, *supra* note 4, rule 90(1)(c).

129. European Convention, *supra* note 33, at 238, art. 27(2).

130. See J.E.S. FAWCETT, *THE APPLICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 314 (1969); F.G. JACOBS, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 246, 255 (1975).

131. See Schwelb, *The Abuse of the Right of Petition*, 3 *REVUE DES DROITS DE L'HOMME* 313, 327-28 (1970). He criticizes a decision of the Commission, on Article 3 of the Protocol. He also expresses the hope that the Committee will not attach persuasive authority to this case when applying the Protocol.

Protocol does not have any separate provision. In particular, the Protocol has nothing similar to the European Convention which finds a petition inadmissible if it is "substantially the same as a matter that has already been examined by the Commission"<sup>132</sup> or is "manifestly ill-founded."<sup>133</sup> It may be argued that the Committee should use the "abuse" clause in order to cover such situations instead of developing grounds of inadmissibility not mentioned in the Protocol. The rule of abuse in the European Convention is applicable when the applicant repeatedly submits the same application. Yet the mere fact that the same matter is re-submitted to the Commission for consideration is presumably not sufficient to hold it abusive.<sup>134</sup> An interesting difference as regards the scope of the abuse clauses in the two instruments may thus develop. The practical need to dismiss manifestly ill-founded cases may create a temptation to lay down a broader notion of abuse.

### *Incompatibility*

The Protocol<sup>135</sup> and the Rules<sup>136</sup> condition admissibility on the communication not being "incompatible with the provisions of the Covenant," or rather, with the obligations of the State Party under the Covenant. These obligations are not only limited by the substantive provisions of the Covenant, but also in other respects, *e.g.*, as regards place and time. A similar rule in the European Convention<sup>137</sup> has been discussed regarding the exact meaning of the term "incompatible," and the relations between the notions "competence" and "compatibility." It is sufficient in this context to state that the Committee is not competent to consider the merits of the case if the communication is incompatible.

In the European context, a distinction is usually drawn between incompatibility *ratione temporis*, *ratione loci*, *ratione materiae* and *ratione personae*. These expressions have not been adopted by the Committee. We will nevertheless use them here for systematical purposes.

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132. European Convention, *supra* note 33, at 238, art. 27(1)(b).

133. *Id.* art. 27(2).

134. *Id.* art. 27(1)(b). This Article, which is normally applicable to this situation, makes it possible to take into account "relevant new information." *Id.*

135. Protocol, *supra* note 1, at 59, art. 3.

136. Report I, *supra* note 4, rule 90(1)(d).

137. European Convention, *supra* note 33, at 238, art. 27(2).

*Ratione temporis.* Several communications have been considered incompatible by the Committee because the events complained of took place prior to the entry into force of the Covenant and the Protocol for the State concerned. The Committee is only competent to consider an alleged violation which occurred on or after that date. This is in conformity with general principles of international law. A reference to such events may, however, be taken into consideration if the author claims that the violations have continued or have had effects on or after the decisive date. Events which took place prior to the entry into force may indeed be an essential element of the complaint resulting from alleged violations occurring after the date.<sup>138</sup>

As might be expected, this ground of inadmissibility has been frequently applied during the first years of the life of the Protocol. In several cases the Committee has decided to inform the State Party and the author of this legal situation before making an admissibility decision.<sup>139</sup> This approach has been considered appropriate, especially when the events complained of cover a time span both prior to and after the critical date.

The first case in which the Committee adopted its final views may serve as an illustration.<sup>140</sup> The author, a Uruguayan national, submitted a communication on behalf of herself, her husband, her stepfather, and her mother. With regard to herself, she alleged that she was detained in Uruguay from April 25 to May 3, 1975, subjected to psychological torture, and not brought before a judge. This part of the communication was declared inadmissible, as the Covenant and the Protocol entered into force for Uruguay March 23, 1976, and the violations had not continued or had effects after that date. On the other hand, the communication was considered admissible for the other victims. It was true that they, too, had been arrested before the entry into force of the Covenant, but their detention without trial continued after that date.

*Ratione materiae.* If the author alleges a violation of a right which is not mentioned in the Covenant, the communication will be declared inadmissible as incompatible with the

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138. Report II, *supra* note 4, at 99, para. 581.

139. Report I, *supra* note 4, at 37, para. 153.

140. Report III, *supra* note 4, at 124-29.

Covenant provisions. This will be the case, for example, if he claims that the domestic courts have infringed on his right to property or that he has been denied asylum, as these rights are not protected by the Covenant.<sup>141</sup> In this respect, the Committee may have to settle the scope of these rights, and must therefore lay down interpretations which are of interest beyond the case in question.<sup>142</sup> Even if the communication relates to a matter addressed by the Covenant, it must be declared incompatible if the State concerned has made a reservation concerning the matter in issue.

*Ratione loci.* If the alleged violation has taken place outside the territory of the respondent State, the communication will again be considered inadmissible because of incompatibility.<sup>143</sup> Within the European system, applications are not frequently declared incompatible *ratione loci*. The reason for this is that the European Convention applies to all individuals *within the jurisdiction* of the State Party;<sup>144</sup> therefore, the territorial aspect is usually not decisive. Because the Covenant explicitly mentions the "territory" of the State Party, the *ratione loci* ground of inadmissibility may be applied more often than under the European Convention.

It is true that the Protocol protects an individual subject to the jurisdiction of the State concerned, and does not specifically require him to be "within its territory."<sup>145</sup> It has been argued, however, that the scope of the procedural protection afforded by the Protocol cannot be wider than the substantive protection provided by the Covenant.<sup>146</sup> Under such a view even the Protocol must be interpreted with the territorial limitation of the Covenant.<sup>147</sup> This result is not always convinc-

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141. The substantive rights of individuals are set out in parts II and III of the Covenant. Covenant, *supra* note 1, at 53-56.

142. Others have indicated skepticism as to whether Article 1 of the Covenant ("All peoples have the right of self-determination") may be invoked under the Protocol. Covenant, *supra* note 1 at 53, art. 1. If the Committee should have to face that problem, a prerequisite must at any rate be that the requirements of Article 1 of the Protocol are met.

143. The important provision in this connection is Article 2 of the Covenant, under which each State Party undertakes to respect and ensure the rights recognized in the Covenant to all individuals *within its territory* and subject to its jurisdiction. Covenant, *supra* note 1 at 53, art. 2.

144. European Convention, *supra* note 33, at 224, art. 1.

145. Protocol, *supra* note 1, at 59, art. 1.

146. See Schwelb, *International Measures*, *supra* note 12, at 181.

147. Compare Protocol, *supra* note 1, at 59, art. 1, with Covenant, *supra* note 1,

ing. As an illustration, if a citizen's publications are seized or his passport annulled while he is abroad, he ought to be able to submit a communication invoking his freedom of expression or movement under the Covenant; and the *travaux préparatoires* to the Covenant suggest that the drafters in adopting the clause "within its territory" did not have such cases in mind.<sup>148</sup>

*Ratione personae.* Under the practice of the European Commission, an application may be declared incompatible with the provisions of the Convention *ratione personae*. This term covers two different problems: *against* whom and *by* whom may a complaint be lodged? Similar questions arise under the Protocol, although they are usually not explicitly considered in terms of its clause on "compatibility," but rather under its other provisions.

In answering the first question, against whom a communication may be brought, the point of departure is rather simple. The communication must contend a violation of the Covenant by a State Party to the Protocol.<sup>149</sup> Complaints concerning states which have not adhered to the Protocol are not even transmitted by the Secretariat to the Committee.<sup>150</sup> The Secretariat has been instructed to draw this to the attention of the author when it acknowledges the receipt of such communications.<sup>151</sup>

A more difficult aspect is the precise extent of the responsibility of the State Party for acts committed under its jurisdiction. Can it contest the admissibility of a communication on the ground that the alleged violation, if any, was committed by someone who did not act on its behalf? The Covenant provides that the State Party undertakes to respect and ensure the rights recognized in the Covenant.<sup>152</sup> This implies a double obligation for the State Party to implement the Covenant: first, it must refrain from infringements; second, some sort of positive action is required to make the rights effec-

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at 53, art. 2.

148. See Report IV, *supra* note 4, at 120, concerning a case which the Committee considered regarding renewal of a passport to a citizen staying abroad.

149. Protocol, *supra* note 1, at 59, art. 1; Report I, *supra* note 4, rule 90(1)(a), (b).

150. See text accompanying note 37 *supra*.

151. Protocol, *supra* note 1, at 59, art. 1; Report II, *supra* note 4, at 101, para. 590.

152. Covenant, *supra* note 1, at 53, art. 2(1).

tive.<sup>153</sup> The exact contents of this latter requirement are open to doubt, but the State will, to some extent, be responsible when rights are violated by individuals.<sup>154</sup>

The second question, by whom a communication may be submitted, is rather difficult to answer. Individuals claiming to be victims of a State's violation may submit a communication.<sup>155</sup> Thus, the system set up under the Protocol does not grant an *actio popularis*; the alleged violation must affect the person concerned. The point of departure, in the terms of the Protocol, is that he must be the *victim* of the alleged violation.

The notion of victim requires that the individual is personally affected. As in other systems,<sup>156</sup> the problem arises as to how closely and concretely this must be taken. The victim of torture is the one who has been tortured, but what about the person who speaks for justified fear of otherwise being tortured? Similarly, are only those individuals who are punished for having exercised their freedom of expression affected by, and victims of, censorship? Or are those remaining silent for fear of such punishment also victims? More generally, can an individual complain about the existence of a law or a practice claimed to be contrary to the Covenant, unless that law or practice has actually been applied to him? The problem seems to require a detailed analysis, particularly in light of the European practice,<sup>157</sup> and we cannot enter into it here.

In the view of the Committee, however, the term victim does not mean that in every case the individual affected must sign the communication himself. He may also act through a

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153. About this double obligation of implementation, see Opsahl, *Human Rights Today: International Obligations and National Implementation*, 23 SCANDINAVIAN STUDIES IN LAW 149 (1979).

154. For example, some States are said to use quasi-official liquidation groups, acting with the tacit consent of the authorities and having as their aim the oppression of political opponents. The discussion concerning the third-party effect of the European Convention has been rather subtle and this question is still controversial.

155. Protocol, *supra* note 1, at 59, art. 1.

156. Particularly the European one, where the victim in a similar way may submit a petition under the optional Article 25 of the Convention. See European Convention, *supra* note 33, at 236, 238, art. 25.

157. On the one hand it is established that the Strasbourg organs cannot rule *in abstracto* on the compatibility with the Convention of certain legal rules. On the other hand, Article 25 entitles individuals to contend that a law violates their rights by itself, in the absence of an individual measure of implementation, if they run the risk of being directly affected by it. See, e.g., "Marckx" case, European Court of Human Rights, ser. A, No. 13 (1979).

duly-appointed representative. The Committee has therefore introduced, in its Rules and its practice, the concept of the actual *author* of the communication in addition to the alleged victim. Also there may be other cases in which the author of the communication may be accepted as having the authority to act on behalf of the alleged victim.<sup>158</sup> Normally, the communication should be submitted by the individual himself or by his representative, but the Committee may accept for consideration a communication submitted on behalf of an alleged victim when it appears that he is unable to submit the communication himself.<sup>159</sup>

The problem remains as to when a person may act on behalf of an alleged victim.<sup>160</sup> In practice, the Committee has asked whether there is a sufficient link between the author and the victim. A close family connection has been considered sufficient. This was the position in the Uruguayan case, where the author submitted the communication on behalf of her husband, her stepfather, and her mother.<sup>161</sup> One may also think of other unrelated authors, for example, a friend who was a fellow inmate, and has escaped from the detention in which the victim is held incommunicado. The burden of proof for a sufficient link rests on the author. The Committee has declined to consider communications where the authors have failed to establish any link between themselves and the victim. Reliable knowledge about his position and inability to act for himself are not enough.

The term victim in the European Convention has been developed through considerable case law, under which only persons claiming to be victims themselves have standing. These victims may, of course, be represented by others, normally lawyers, guardians, or close relatives. In addition to the representative, the notion of an "indirect victim" has emerged in practice. Yet it is still a prerequisite for this indirect stand-

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158. Report II, *supra* note 4, at 99, para. 580.

159. Report I, *supra* note 4, rule 90(1)(b).

160. During the drafting of Rule 90, some members argued that a person submitting a communication on behalf of an alleged victim had to be "authorized" to do so. This proposal was rejected on two grounds. First, it was too restrictive, eliminating the possibility of submitting a communication on behalf of an alleged victim who was unable, for reasons beyond his control, to submit it himself or to authorize another person to act on his behalf. Second, the word could be construed as referring to criteria of domestic law. See Report I, *supra* note 4, at 12, para. 66.

161. See text accompanying note 140 *supra*.

ing that the matters complained of must have affected the rights of the petitioning person at least indirectly under the Convention.<sup>162</sup> One may think of the husband complaining that his wife was granted an abortion, and invoking Article 2 of the Convention as regards the right to life of the unborn child he fathered.

From the outset, the attitude adopted by the Committee has been more pragmatic. In comparison to the European Convention, persons may complain of violations, even if their rights have not been infringed upon, provided that a sufficient link to the victim is established. This is one of the reasons why the neutral term *author* has been introduced, covering not only the victim, but a representative and a person with whom there exists a sufficient link. On the other hand, under the European Convention, "any person, non-governmental organization or group of individuals"<sup>163</sup> may lodge an application claiming to be the victim,<sup>164</sup> while the Protocol only speaks of individuals.<sup>165</sup> This term must include not only one individual per communication, but also several individuals acting together in one communication, as long as each of them is claiming to be a victim.<sup>166</sup> For instance, if a group of women allege sex discrimination regarding the right to marry, it may not be necessary to examine the extent to which each of them is actually, and not only potentially, a victim. If she is a potential victim, the question may be whether the discrimination affects her personally to a degree which justifies her participation in the communication.

It is more doubtful whether a non-governmental organization may submit a communication. That it should not be able to do so, even if it is claiming to be a "victim" in its own right, seems to follow from the wording of the Protocol.<sup>167</sup> It would

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162. See Jacobs, *supra* note 130, at 229.

163. European Convention, *supra* note 33, at 236, art. 25(1).

164. *Id.* at 236, 238, art. 25.

165. Protocol, *supra* note 1, at 59, Preamble, arts. 1, 3.

166. See Schwelb, *International Measures*, *supra* note 12, at 182. *But see* Bossuyt, *supra* note 27, at 144. Bossuyt points out that the European Convention excludes organizations and groups but admits communications common to several persons; Bossuyt states that in the latter case the Committee must examine the admissibility for each of them taken individually. We think this is correct in principle, but it is too early to say how literally the Committee will apply this if it is clear that a number of those identified individuals who are submitting the common communication have the required standing.

167. As mentioned in the text accompanying notes 12-27 *supra*, many proposals



be unreasonable, however, always to deny these organizations standing under the Protocol, as they must clearly be protected by many of the substantive provisions of the Covenant. The Protocol should not be interpreted literally and narrowly in these matters, in view of the haste in which it was drawn up and the lack of any apparent discussion of the implications.

The main difficulty may be organizations as representatives, rather than as victims. Such a role may have appeared particularly unwelcome, at least to some governments, and may be seen as excluded by the text of the Covenant. There is reason to believe that the Committee, referring to the terms of Article 1 of the Protocol, will not allow the organizations to act as authors representing others. Thus, it will oblige the organizations wishing to take part in the development of the system to "hide" behind the name of a person duly authorized to act in each case.<sup>168</sup>

### *Exhaustion of Domestic Remedies*

The Protocol provides that the Committee shall not consider any communication from an individual unless it has ascertained that all available domestic remedies have been exhausted.<sup>169</sup> This condition is essential for the orderly operation of the Protocol and its acceptance by States Parties. It adopts, of course, a fundamental principle of general international law, where the observance of the domestic remedies rule is the normal condition for the exercise of any international remedy.<sup>170</sup> The rationale is based on the right and duty of the State to correct any wrong which may be shown before its internal fora, particularly courts and tribunals, thus re-

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were submitted during the deliberations in the Commission on Human Rights to recognize the right of petition to individuals, groups, or non-governmental organizations. Yet the proposals in the Third Committee only mentioned individuals and groups of individuals. The omission was hardly due to an oversight. The activity of non-governmental organizations in the human rights field is so prominent that their omission must be explained by at least deliberate caution, if not a wish directly to exclude them.

168. If the Committee so prefers, it may perhaps also exclude the organizations by relying on Article 4 of the Protocol, particularly the French text, which assumes that a communication must be presented "*en vertu du présent Protocole.*" See Protocol, *supra* note 1 at 59, art. 4; Bossuyt, *supra* note 27, at 141.

169. Protocol, *supra* note 1, at 59, arts. 2, 5(2)(b). See also Report I, *supra* note 4, rule 90(1)(f).

170. This principle has been developed, for example, in the practice of claims commissions, arbitral tribunals, and the International Court of Justice.

moving the cause of complaint. As long as the State has not had the chance to do so, the international organ is simply not competent. The primacy of domestic remedies and the subsidiary character of the international control machinery are thus two sides of the same coin.

It is already clear that this condition may come to play a very important role in the practice of the Committee, as it does in similar bodies. In traditional inter-State relations, where only the States have *locus standi* before the international organs, the domestic remedies requirement has not been so frequently applied as in systems allowing for international petitions by individuals themselves. As a result, the quickly developing case law within such systems will soon become the main source of precedents.<sup>171</sup>

It is against this common background that each system may develop its particularities and practices. In this respect, it is perhaps not very important that the texts of the relevant instruments differ slightly. For example, the Protocol expressly refers to "available" remedies; the European Convention to "generally recognised rules of international law." The intention is broadly the same. Therefore, the principle developed by the European Commission that only effective and sufficient remedies are relevant will no doubt also be applied by the Committee. The type of remedy is, on the other hand, irrelevant, especially whether it is a judicial or an administrative one. Probably, the Committee will, like the European Commission, only consider ordinary remedies available in the domestic procedures, such as judicial appeals to the highest tribunals or administrative complaints to the top of the government hierarchy, but not extraordinary remedies, such as requests for a retrial or for pardon by the Head of State or complaints to an Ombudsman only entitled to state advisory opinions.

In European case law, ignorance of the remedy, high costs, contrary advice from counsel, and the lack of any prospect of success do not absolve the individual of the exhaustion

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171. The Committee has considered that this condition of admissibility should be interpreted and applied in accordance with the generally accepted principles concerning the matter in the field of human rights. This implies that the practice of similar bodies, particularly under Article 26 of the European Convention, will be of considerable interest. See European Convention, *supra* note 33, at 238, art. 26; See also O'Boyle, *supra* note 47, at 712-15.

requirement. On the other hand, the term "available" in the Protocol may be used to soften some of the harsher effects of the strict application of non-exhaustion as a ground for inadmissibility. If remedies are only available in law and not in actuality, they may be disregarded or considered ineffective. Examples include the ignorance of the alleged victim being detained incommunicado, or costs of litigation making the exercise of the remedy impossible or theoretical.

In view of the variety of legal systems coming under this rule, the Protocol will most certainly not be seen as referring only to domestic remedies that directly apply the Covenant provisions. In fact, few States Parties seem to have authorized domestic organs to do so, and one cannot draw the conclusion that any other remedy is ineffective for this reason alone. The rule should be that the remedy must be one whereby corresponding principles of domestic law are applicable, such as to offer in substance the same protection. If no such remedy, principle, or law exists, there is nothing to exhaust. Such a situation would in itself mean that the State was in breach of Article 2 of the Covenant.<sup>173</sup>

If the State Party concerned disputes the contention of the communication that all available domestic remedies have been exhausted, the Committee has required the State Party to give details of the effective remedies available to the alleged victim in the particular circumstances of the case. A general description of the rights available to accused persons under law and the domestic remedies designed to protect and safeguard these rights have been deemed insufficient.<sup>174</sup> One should also note that according to the express wording of the Protocol, the domestic remedies clause does not prevent the Committee from taking a case under consideration if the application of the remedies is unreasonably prolonged.<sup>175</sup> In this situation one might say that exactly because of such delay, domestic remedies are not effective.<sup>176</sup>

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172. Article 2 requires that the Covenant shall be implemented in domestic law and an effective remedy granted. Covenant, *supra* note 1, at 53, art. 2(2), (3)(a).

173. Report II, *supra* note 4, at 101, para. 586. See Report III, *supra* note 4, at 124-29; Report IV, *supra* note 4, at 91, para. 397; See, e.g., *id.* at 108-09.

174. See text accompanying notes 187-89 *infra*.

175. The European Convention states that an application may only be brought before the Commission within a period of six months from the date on which the final decision in the case was taken. European Convention, *supra* note 33, at 238, art. 26. The Protocol contains no such rule. See text accompanying notes 192-93 *infra*.

Non-exhaustion is only a temporary obstacle to admissibility when remedies are being, or still may be, pursued. Yet if it is too late to exercise the remedy under domestic law, for example when the time-limit for an appeal has expired, this obstacle becomes a definitive one.

### *International Remedies*

Further, the Committee shall not consider a communication if the same matter is being examined under another procedure of international investigation or settlement.<sup>176</sup> Several authors have discussed this principle when considering the co-existence of different procedures.<sup>177</sup> It is obviously intended to prevent simultaneous, duplicating procedures. The purpose of this "international remedies" rule is therefore quite different from that of the "domestic remedies" rule. In comparison, the former is applicable only when the international remedy is used and not when it is omitted; its effect then becomes the opposite of failing to pursue domestic remedies. The use of another international remedy is an obstacle to, not a precondition for, the competence of the Committee.<sup>178</sup>

This obstacle is, at the outset, a temporary one. Accordingly, the Committee has decided that it is not precluded from considering a communication if the matter has been withdrawn from, or is no longer being examined under, another procedure at the time the Committee reaches a decision as to admissibility.<sup>179</sup> In order to apply the rule, and possibly to find that it is no longer applicable, the Committee needs to know about the development of other international applications. To ascertain these points *ex officio* poses a practical problem. It is not enough to rely on the author, or, for that matter, the State Party; moreover, neither is necessarily fully informed. It may happen that the same matter is submitted by another person (e.g., a relative), or that the situation has

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176. See Protocol, *supra* note 1, at 59, art. 5(2)(a); Report I, *supra* note 4, rule 90(1)(e).

177. See, e.g., Mikaelsen, 91 TIDSSKRIFT FOR RETTSSVITENSKAP 692 (1978).

178. The rule does not limit the right of the individual to choose between the different petition systems. But when he has opted for one procedure, Article 5(2)(a) prevents him from mobilizing other procedures of international investigation or settlement, i.e., the principle of adjournment *pendente lite*. Protocol, *supra* note 1 at 59, art. 5(2)(a).

179. Report II, *supra* note 4, at 100, para. 583.

not been brought to the attention of the State Party.

Information directly from other international petitioning systems may be necessary to avoid the Committee's examination of a matter already under consideration. The Committee has accordingly requested the Secretariat to engage in such exchange of information as may be necessary to enable the Committee to ascertain whether this examination obstacle exists. In practice, the Inter-American and European organs have already been engaged to that effect.<sup>180</sup>

During its deliberations, the Committee has discovered a difference between the Chinese, English, French, and Russian text, on the one hand, and the Spanish version, on the other. The meaning of the Spanish text is that the Committee shall not consider a communication unless it has ascertained that the same matter "has not been" examined, whereas the other languages focus the decision on whether the same matter "is being" examined. As this discrepancy stems from an editorial oversight in the preparation of the final version of the Spanish text, the Committee has decided to base its practice under Article 5(2) on the Chinese, English, French, and Russian language versions.<sup>181</sup>

This interpretation implies that the provision does not set forth the principle of *non bis in idem*. When the examination of a complaint under another procedure of international investigation or settlement is terminated, the Committee is at liberty to consider the same matter. The situation is different under the European system. It has been argued that one should avoid the possibility of an individual "appeal" from the European organs to the Human Rights Committee, and some countries have tabled reservations to this effect.<sup>182</sup>

The Committee is only prevented from considering the matter if it is being examined under another procedure of *in-*

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180. *Id.* para. 585.

181. *Id.* para. 584.

182. Article 5(2)(a) only contains a restricted limitation of the Committee's competence. This aspect becomes even more apparent when taking into account that the principle of adjournment *pendente lite* may be considered as a "relative" principle in this context. See text accompanying notes 187-89 *infra*.

The Committee of Ministers in the Council of Europe, by a resolution in May, 1970, recommended that member States when ratifying the Protocol should make such reservations, which Denmark, Norway, and Sweden have done. See, e.g., Mikaelson, *supra* note 177, at 705. Their example has later been followed by Iceland, Italy, and the Netherlands.

*ternational* investigation or settlement. The Committee has interpreted this to relate solely to procedures implemented by inter-State or intergovernmental organizations on the basis of inter-State or intergovernmental agreements or arrangements. Procedures established by non-governmental organizations (e.g., the procedure of the Inter-Parliamentary Council of the Inter-Parliamentary Union) cannot bar the Committee from considering communications submitted to it under the Protocol.<sup>183</sup>

Finally, the expression "the same matter" raises questions of interpretation, some of them difficult. The phrase clearly refers to an individual complaint submitted under another international procedure. The Committee has determined that the procedure set up under ECOSOC resolution 1503<sup>184</sup> does not fall within the scope of Article 5(2)(a). The question at issue under that system is whether there exists a situation which reveals a consistent pattern of gross human rights violations. Such a situation cannot be considered "the same matter" as an individual complaint.<sup>185</sup> The 1503 procedure affects large numbers, perhaps the whole population of a given country. To examine such a situation is a task very different from that raised by communications from alleged victims. Thus the Committee could not consider itself prevented by that procedure. Otherwise, the alleged victims would be denied the individual remedy which is the object of the Protocol. On the other hand, even though the other complaint is based on another instrument, (e.g., European or American Conventions), this clearly does not make it a different matter. Otherwise, the clause would have no meaning, because only the Committee and its procedure exist internationally to apply the Covenant to individual complaints. Yet the problem of the identity of the "matter" arises if the applicable provisions are not legally similar. If new or different factual aspects are invoked, this may again be a different matter, although the same alleged victim and events are involved.

The question of "same matter" may become even more complex when reservations exclude the competence of the

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183. Report II, *supra* note 4, at 99-100, para. 582.

184. 48 U.N. ESCOR, Supp. (No. 1A) 8, U.N. Doc. E/4832/Add.1 (1970). See Tardu, *The United Nations Response to Gross Violations of Human Rights: The 1503 Procedure*, 20 SANTA CLARA L. REV. 559 (1980).

185. Report II, *supra* note 4, at 99-100, para. 582.

Committee once the issue has been examined under another procedure. For instance, does the reservation apply even if the matter was then declared inadmissible, so that its merits were not considered? A full discussion of this question would have to consider, in particular, the various grounds of inadmissibility. They do not all seem to lead to the same answer. Since our space is limited and the practice of the Committee has not yet developed, these indications will have to suffice here.<sup>186</sup>

*Exception: Unreasonable Prolongation*

Even if the *domestic* remedies are not exhausted, it is clear that the Committee is not totally precluded from considering the communication: "This shall not be the rule where the application of the remedies is unreasonably prolonged."<sup>187</sup> Such delay could already have occurred when the communication is submitted. It is then immediately admissible on this point. If the delay only appears after a decision of inadmissibility for non-exhaustion, this new fact alone should then lead to a review of that decision.

During the drafting of the Rules of Procedure the question arose whether the Committee may consider the communication when the application of other *international* remedies is unreasonably prolonged. The question may also be formulated in this way: Does the sentence introduced by the word "this" in the English text refer not only back to subparagraph (b), domestic remedies, but even to subparagraph (a), other international procedures?<sup>188</sup>

Various arguments were advanced and the U.N. Legal Counsel was consulted about these two possible interpretations. The intention of the authors of the Protocol, as expressed in the *travaux préparatoires*, was one of the argu-

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186. See Mikaelson, *supra* note 177, at 706 for an interpretation of these reservations.

187. Protocol, *supra* note 1, at 59, art. 5(2).

188. A typesetting discrepancy between the original versions in the various official languages complicates the question. In the original English text, the sentence appears in the same sub-paragraph as the text of the domestic remedies clause, i.e. as part of (b). This is an argument in favor of the view that the prolongation clause only applies in regard to domestic remedies. In the French and Spanish texts, however, the sentence is placed on a new line, forming a separate sub-paragraph which seems to imply that the Committee may consider a communication also when the unreasonable prolongation occurs at the international level. See Bossuyt, *supra* note 27, at 145-47; Report I, *supra* note 4, at 12-13, paras. 68-73.

ments advanced in favor of the latter interpretation. Conversely, the wish to avoid competition with other international bodies and not to pass judgments on their procedures supported the former, more restricted, understanding. The Committee finally decided to bypass the problem by formulating a provision as follows: "The Committee shall consider a communication, which is otherwise admissible, whenever the circumstances referred to in article 5(2) of the Protocol apply."<sup>189</sup> This Rule, unfortunately, forgets to refer explicitly to the last sentence of Article 5(2). It therefore may look rather mysterious or even contradictory to the uninitiated. Yet the intention was clearly to leave the scope of the prolongation clause still open to discussion.

#### *Other Conditions of Admissibility?*

All the conditions of admissibility explicitly set forth in the Protocol have now been commented upon. But is this list exhaustive? The general problem considered above should be kept in mind: Where does one draw the line between supplementing the Protocol and departing from it? Since the Committee agreed from the beginning that the Protocol only establishes the conditions, not the procedure, of admissibility,<sup>190</sup> one cannot exclude a grey area where Rules and practice may add or develop what may be called "procedural conditions" based upon practical needs and common sense. Some illustrations will have to suffice.

We have noted that the Protocol contains no provision laying down as a ground of inadmissibility that the same matter already has been examined by the Committee. So far, no such rule has developed in practice, and it may be argued that the Committee should prefer to use the abuse clause.<sup>191</sup>

Further, there is no time-limit in the Protocol for the admission of communications, such as in the European Convention.<sup>192</sup> This matter was brought up when the Committee considered its Rules of Procedure. The Secretariat draft on which

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189. Report I, *supra* note 4, at 64, rule 90(2).

190. Report I, *supra* note 4, at 11, para. 59 states: "This task was expressly left for the Committee."

191. See text accompanying note 132 *supra*. Taking into account previous comments on the abuse clause, it is likely that this provision may be used rather frequently as compared with the similar rule in the European Convention.

192. See European Convention, *supra* note 33, at 238, art. 26.



the Committee based its discussions contained a rule providing that the Committee should normally not give consideration to claims received more than twenty-four months after the exhaustion of all domestic remedies. This gave rise to a debate as to whether this Rule was in conformity with the spirit and the letter of the Protocol.<sup>193</sup> Some members argued that this provision was a matter of substance and that it would be contrary to the Protocol to introduce such a rule. It was also pointed out that the Rules of Procedure were not likely to be known to the public in the various countries. Other members contended that the establishment of a time-limit for the admission of complaints was a generally accepted principle or practice of domestic and international law. They argued further that it was important to protect the Committee from difficult situations brought on by examining communications based on events in a distant past.

The Committee preferred to postpone a final decision. The draft rule was deleted, with the understanding that the Committee might revert to the matter if experience justified the consideration of such a provision. It was therefore unnecessary to decide whether the Committee *may* adopt a time-limit, and it will now be possible to gain experience as to whether such a rule *should* be introduced. There is no urgency about this matter during the first few years of the system, where the limitation of the Committee's competence *ratione temporis* takes care of any older complaints. This situation will change over time, however, the Protocol having been in force since 1976 for a number of States. The clause against abuse could also be used to prevent unreasonably late communications.

The European Commission shall not deal with a petition which is "manifestly ill-founded."<sup>194</sup> This ground of inadmissibility, which literally means prejudging the merits or joining the two stages, has been used in numerous hopeless European cases and sometimes in difficult matters, even after thorough proceedings. The Protocol has adopted no such provision. Once more, *in extremis* cases may be declared inadmissible as an abuse of the right to submit communications.<sup>195</sup> If not,

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193. See Bossuyt, *supra* note 27, at 147-48.

194. European Convention, *supra* note 33, at 238, art. 27(2).

195. Protocol, *supra* note 1, at 59, art. 3.

does this mean that the Committee will have to consider the merits of the case and then conclude that there has been no violation of the Covenant? Such a duty may entail a considerable work-load for the Committee and its Secretariat, not to mention delays involved in the extra procedural steps required once the matter enters the stage of the merits.

There is reason to believe that the Committee may seek to avoid this result. Where obviously unfounded or untrue allegations are made, without any attempt at substantiation, or where the rights of the Covenant are invoked on facts which clearly do not warrant review, the Committee may conclude that the matter does not merit further consideration or does not raise any issue under the Covenant. Such conclusions would, however, not correspond directly to any provision of the Protocol. In order to forestall the objection that the Committee cannot lay down further conditions of admissibility than those mentioned in the Protocol, we are of the opinion that in such cases the Committee could well consider and describe a communication as "incompatible with the provisions of the Covenant" within the meaning of Article 3 of the Protocol.<sup>196</sup>

#### DECISIONS AT THE STAGE OF ADMISSIBILITY

The procedure and conditions of admissibility<sup>197</sup> require a number of decisions. Some of these are only procedural and are largely left to the Committee's own Rules and practices. Others are taken in exercise of the Committee's powers to determine substantive issues arising at the admissibility stage. Although these issues do not relate to the merits of the claim that human rights have been violated, decisions on admissibility may involve substantive interpretations of the Covenant. This is particularly the case regarding one of the conditions of admissibility, the compatibility of the communication with the provisions of the Covenant.<sup>198</sup> In further discussing the kinds of decisions, the power to make them, and their effect, it may be convenient to distinguish between decisions during the admissibility stage and decisions ending that stage.

We should first consider the manner in which all these

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196. See text accompanying notes 141-42 *supra*.

197. See text accompanying notes 36-60 & 112-96 *supra*.

198. Protocol, *supra* note 1, at 59, art. 3.

decisions are reached. Under the Covenant, all decisions of the Committee are to be made "by a majority vote of the members present."<sup>199</sup> This provision is mandatory for the Rules of Procedure. From the outset, however, it was strongly argued within the Committee, mainly by the members coming from the U.S.S.R. and other socialist countries, that the Committee ought, in principle, to seek consensus rather than proceed with formal voting. It was proposed that this consensus viewpoint be expressed in the Rules. This proposal was opposed both on principle and out of fear that it might have unfortunate consequences. Long and difficult deliberations followed, partly in informal consultations.<sup>200</sup> As a compromise solution, it was agreed to state in the annual report that Committee members generally had expressed the view that the "method of work" of the Committee "normally should allow for attempts to reach decisions by consensus before voting," provided, *inter alia*, that the Covenant was "observed."<sup>201</sup>

The result has been that no formal vote has ever been taken, not even in order to confirm the consensus (or unanimity) by which decisions normally are made within the Committee and stated by the Chairman. In other words, the practice of the Committee immediately became that of reaching decisions by consensus instead of voting, and not only before voting as agreed in the compromise. This difference is perhaps mainly formal, and the Committee has adopted its practice with open eyes, so far without much difficulty.

Such has also been the case in the Committee's work on communications under the Protocol. Moreover, it may be seen from what the Committee has published that decisions under the Protocol appear as made by the Committee as an entity. Neither the decisions nor the summary records indicate which members were present or took part in the decisions. It is only in adopting views of the merits that individual opinions by named members may break the anonymity, which, up to that point, characterizes the Committee's decisions.

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199. Covenant, *supra* note 1, at 57, art. 39(2)(b).

200. See Bossuyt, *supra* note 27, at 119-25.

201. Report I, *supra* note 4, at 8, para. 32. It was further agreed to draw attention to this point, which in itself was an example of consensus at work, in a footnote to rule 51. *Id.* rule 51 note (a).

*Decisions During the Procedure*

During the admissibility procedure, decisions are made under the relevant Rules, for instance, about whether to request clarifications or further information from the author, or whether to transmit the communication to the State Party for reply. Illustrations of such decisions are summarized in the annual reports.<sup>202</sup> Some of them, such as those involving general points of interpretation or the length of time-limits for submission of information, observations, or comments, have been made generally applicable, without having been made part of the Rules.

Obviously, it is an administrative task to prepare the cases for the Committee. Yet directing the procedure is a different matter which requires a policy. For example, whether transmission to a State Party is required may involve delicate assessments, and there has been no willingness to delegate such decisions to the Secretariat. So far, the result has been that such decisions can only be made when the Committee is in session. It is true that the Rules authorize a Working Group to decide whether to make the necessary requests to the parties and fix time-limits on the Committee's behalf.<sup>203</sup> This simplifies the procedure<sup>204</sup> but has not yet significantly expedited the process. So far, no Working Group has met between the sessions, meeting only immediately before and during them due to budgetary constraints.

Although the Secretariat has been given certain functions under the Rules<sup>205</sup> and serves as the channel of communications with the authors and the States Parties concerned,<sup>206</sup> the Secretariat is naturally reluctant towards suggestions to increase its decision-making role. On occasion, the Secretariat has referred to the generally recognized need for distinguishing clearly between its own administrative functions and the juridical competence of the Committee, particularly regarding

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202. *Id.* at 37-38, paras. 150-54; Report II, *supra* note 4, at 98; Report III, *supra* note 4, at 104; Report IV, *supra* note 4, at 89.

203. Report I, *supra* note 4, rule 91.

204. Report II, *supra* note 4, at 101, para. 588. Such decisions "henceforth" (after agreement at the fourth session) do not require approval by the Committee.

205. See Report I, *supra* note 4, rules 78-81.

206. The Secretariat has also been authorized to assist individuals by drawing up and making use of guidelines and a model form of communications. Report II, *supra* note 4, at 102, para. 591.

the pre-screening of communications.<sup>207</sup>

During the procedure, two or more communications may be merged for joint consideration by a separate decision.<sup>208</sup> The Rules also provide for decisions, or expressions of the Committee's view as to the desirability of interim measures.<sup>209</sup>

### *Decisions Ending the Procedure*

Decisions ending the Committee's consideration of admissibility normally conclude by declaring the communication either admissible or inadmissible. Two decisions in the latter category were already adopted at the earliest opportunity.<sup>210</sup> It follows from this fact that no further procedural steps were found necessary. Since only summaries and general decisions on points of admissibility have been published, the reasoning in these and other case decisions on admissibility is not open to comment. It appears from the first case of published "views", however, that communications may also be declared partly inadmissible, partly admissible.<sup>211</sup>

However, these are not exhaustive alternatives. Other categories of decisions ending or suspending the consideration of communications have appeared, though such categories are foreseen neither in the Protocol nor in the Rules. In the European system, the category of "striking an application off the list" has developed in a similar fashion. This happens in particular, but not unforeseeable, situations arising primarily when the contact with the author has been lost. This may result from difficulties in communication or lack of interest on the author's part. In such cases, the Committee may be unable to, or may not wish to, decide on the admissibility or inadmissibility of the communication, but may prefer to discontinue or suspend its consideration. This procedural decision temporarily ends the Committee's activity without preventing, as a decision of inadmissibility would, a later consideration.<sup>212</sup>

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207. See, e.g., text accompanying notes 36-40 *supra*; see also Bossuyt, *supra* note 27, at 130.

208. Report III, *supra* note 4, at 107-08, para. 454 refers to examples concerning Canada and Uruguay.

209. Report I, *supra* note 4, rule 86.

210. Report I, *supra* note 4, at 37, para. 149. See Report III, *supra* note 4, at 106, para. 448 on the practice when the inadmissibility is clear from the communication itself.

211. Report III, *supra* note 4, at 126.

212. See *id.* at 106-08, paras. 449, 454 where reference is made to a number of

A particular situation arises if the author of the communication states that he wishes the communication withdrawn. This is obviously no reason in itself to declare the communication inadmissible, but is, in most cases, sufficient to discontinue it. However, a proposal to make provisions for this situation in the Rules of Procedure was not adopted, as members did not agree on the precise conditions and suggested that more experience should be gained.<sup>213</sup> Difficulties may be seen on two points. First, is the withdrawal really voluntary? Second, could a communication be of such general interest that once it is introduced in accordance with the Protocol, consideration ought to continue despite the later position taken by the author? It may not be in the interest of human rights to allow the government to "pay him off" in return for his withdrawal of the communication. On the other hand, an unofficial settlement on the basis of respect of human rights should not be obstructed by the Committee.

Finally, it would seem open to the Committee to join a point concerning admissibility to the merits, without deciding the matter at this stage. One example would be its reviewing the effectiveness of domestic remedies. While the effect of this joinder is that the communication is technically declared admissible so that the stage of the merits is entered, the question of admissibility is nevertheless reserved.<sup>214</sup>

Furthermore, the Committee must be able to make partial decisions on admissibility, dividing this stage so that the admissibility of one complaint or the presence of one or more conditions is decided earlier than other issues of admissibility. This is a well-known practice in similar bodies.<sup>215</sup> Reasons of procedural economy may suggest such a solution. Yet this development may make the case files appear complicated and delay the final decision. Therefore, partial decisions should not become a normal practice.

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discontinued communications in respect of various countries, and one suspended communication.

213. See Bossuyt, *supra* note 27, at 135.

214. This possibility is closely related to, but technically different from the situation envisaged in rule 93(4) that the Committee "may review its decision that the communication is admissible" in the light of what it is told at the stage of the merits. See text accompanying notes 216-19 *infra*.

215. Partial and later final decisions on admissibility are often published by the European Commission of Human Rights in its series referred to above. See note 121 *supra*.

*Effect of Decisions*

The main effect of the procedural decisions, depending on their contents, is normally to govern the steps leading to decisions on admissibility. If the former decisions are not observed, for instance, or if a party does not meet a time-limit, it may lead to discontinuing or suspending the proceedings. If the State Party does not react, or is late, it may result in a decision declaring the case admissible. The effect of a decision on admissibility is either to dispose of the communication definitely, if inadmissible, or, in the admissible cases, to open the consideration of the merits of the case.<sup>216</sup>

Although it is not expressly stated in the Protocol, decisions on admissibility may be regarded as binding in law on the parties. They have no right of appeal to any other body or to claim reconsideration of this decision by the Committee. The Committee clearly has no duty to grant a request to re-examine a communication once declared inadmissible, nor has it any duty to review the admissibility decision at the stage of the merits.

This is a point of departure, yet it is subject to certain major qualifications. In the first place, the Committee has made it clear that it "may," during the stage of the merits, review its decision of admissibility.<sup>217</sup> This explicit statement does not entail any duty for it to do so, and may be explained by the wish to keep open the possibility of reconsideration of difficult matters, such as whether a remedy that has not been exhausted and that has not been shown to be an effective one, nevertheless should have been considered relevant, based upon information and arguments obtained during the merits.

Secondly, temporary obstacles to admissibility, such as non-exhaustion or simultaneous examination elsewhere,<sup>218</sup> may have been removed. This new fact certainly justifies a new communication. However, no published practice has yet clarified whether, in the alternative, the same communication may be re-introduced or restored to the list and the original admissibility decision reviewed formally. Since the decision

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216. See text accompanying notes 220-41 *infra*.

217. The Committee amended rule 93 in 1978 by adding this provision as paragraph 4. Report II, *supra* note 4, at 120.

218. Protocol, *supra* note 1, at 59, art. 5(2). Rule 92(2) allows a review of decisions of inadmissibility upon request in such cases. Report I, *supra* note 4, rule 92(2).

was correct when it was made, the seemingly better course would be to register and treat the matter as a fresh communication.

Besides its effect on the parties and the procedure in the particular case, the decision may also serve as a precedent. For others to rely on it as such is, however, difficult, unless decisions are published or reasoning is disclosed in the annual report so that guidance for future cases is provided. Earlier decisions will most certainly be raised as precedents within the Committee in deliberations in later, similar cases, even though elaborate reasoning is not published. If or when published, these decisions may also serve the interests of others, such as future authors, lawyers, governments, and scholars interested in studying the case law of the Committee. We have made reference to the rather selective information about decisions on the admissibility stage published so far. More public reporting of such decisions should be regarded as desirable.<sup>219</sup>

#### MERITS (ARTICLE 4 AND ARTICLE 5(1)) OF THE PROTOCOL

The Protocol provisions governing admissibility need a great deal of elaboration in order to be interpreted and applied. We can only hope that our readers will not think we have overdone that task. Yet these provisions are relatively abundant compared to what follows. What the Protocol says specifically about the consideration of the merits is, indeed, laconic. The key word regarding an admissible communication is that the Committee shall "consider" it.<sup>220</sup>

The Protocol further provides for the self-evident duty of the Committee to bring the communication to the attention of the State Party concerned.<sup>221</sup> The more crucial duty of the State Party is to submit to the Committee, within six months, "written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State."<sup>222</sup> Then follows the quite generally expressed duty of

219. See text accompanying notes 251-53 *infra*.

220. This verb appears both in the Preamble and in Articles 1 and 5(1). Article 2 uses the noun, "consideration." Articles 4 and 5(1) are the main provisions on the Committee's functions on the merits.

221. Protocol, *supra* note 1, at 59, art. 4(1). Under Rule 91(2) this is done before it is declared admissible, but rule 93(1) completes the picture: The decision and (other) relevant documents shall also be submitted to the State Party.

222. *Id.* art. 4(2).



the Committee to "consider communications received under the present Protocol in the light of all written information made available to the individual and by the State Party concerned."<sup>223</sup> We have already discussed as a question of principle<sup>224</sup> how far this latter provision defines and limits the nature and kind of Committee action at this stage. Consideration by the Committee is not subject to any other specific description or prescription, except conditions of admissibility<sup>225</sup> and the general obligation to "hold closed meetings when examining communications under the present Protocol."<sup>226</sup> Yet the consideration clearly has to be brought to some conclusion, called the Committee's "views."<sup>227</sup>

The main subject matter of the examination on the merits is, of course, whether any provision of the Covenant has been violated in respect of an alleged victim. Thus, the Covenant is the general frame of reference for the Committee's consideration. Having declared a communication admissible, the Committee may have implied that if the allegations are true, provisions of the Covenant have been violated. Strictly speaking, no more has been decided than that the Covenant may be applicable to such allegations; otherwise the communication should have been declared incompatible and thus inadmissible. Already such a finding may involve a determination of legal issues of the interpretation of Covenant provisions.<sup>228</sup> However, the answer on the merits may not only depend on whether the facts alleged are true. It may also depend on whether the interpretation and application of a Covenant provision argued by the author of the communication will be retained by the Committee. If the proffered interpretation is in dispute, it is not to be prejudged. In this respect, the admissibility decision will have to define the frame of reference of the Committee more particularly in each individual case. Questions of fact as well as questions of law may thus belong to the stage of the merits.

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223. *Id.* art. 5(1).

224. See text accompanying notes 93-98 *supra*.

225. See Protocol, *supra* note 1, at 59, art. 5(2).

226. *Id.* art. 5(3).

227. The Protocol provides: "The Committee shall forward its views to the State Party concerned and to the individual." *Id.* art. 5(4).

228. In addition, the decision may, in that event, deal with issues of interpretation of reservations made by the State Party concerned.

We should emphasize that the function of the Committee under the Protocol could not be seen as a judicial one. The task of the Committee is not that of a court, neither in subject matter nor in form. Whatever its views,<sup>229</sup> the Committee obviously cannot make any judgment binding in law on the parties nor hold public hearings.<sup>230</sup> There are also other differences from the judicial functions.<sup>231</sup> Although international proceedings necessarily differ from those of domestic courts or tribunals, those differences are too important to be ignored.

What, then, is the task of the Committee at the stage of the merits, and how shall it be carried out? These are the main problems to which the Protocol gives very little guidance. One school of thought, Western or Western-influenced, might prefer to describe the task as "quasi-judicial."<sup>232</sup> The decisions on admissibility represent a binding application of the law of the Covenant and Protocol as far as they go. Rendering an opinion on the main subject matter, such as whether an alleged victim has suffered a violation of any of his civil and political rights, necessarily involves a determination which should be carried out under judicial considerations. Thus, the context and purpose, if not the text, of the Protocol supports the "quasi-judicial" conception of the Committee's function.

The fact is, however, that this conception has not been reflected in any provision of the Protocol and only practice can develop it. In a Committee which normally proceeds by consensus, and where a majority of its members (twelve of eighteen) come from countries that are not party to the Protocol, such a development cannot be taken for granted.

The Committee was faced with these issues for the first time when considering its Rules of Procedure. The Committee anticipated that there would be a need to allow the author of the communication to comment on the submissions of the State Party.<sup>233</sup> It also provided for recommendations by the

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229. Protocol, *supra* note 1, at 59, art. 5(4).

230. *Id.* art. 5(3)..

231. See, e.g., Covenant, *supra* note 1, at 54-55, art. 14, which sets out the typical prescriptions for these functions in domestic law.

232. A prominent exponent of this school is Robertson, *The Implementation System: International Measures*, in *THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, A GUIDE TO INTERPRETATION* (Henkin ed. to be published).

233. Report I, *supra* note 4, rule 93(3).

Working Group.<sup>234</sup> Finally, it introduced the right of any member to have a summary of his individual opinion appended to the views of the Committee.<sup>235</sup> Otherwise, the Rules merely restated the few Protocol provisions referred to above, which leave numerous questions unanswered.

Such questions relate to the respective roles of the Committee and both parties, as well as their procedural rights and duties. These questions include: What shall happen during the six month period envisaged before the State Party submits the reply required under Article 4(2) of the Protocol? What if any steps can the Committee take to guide the parties and elicit the matter during the procedure on the merits? Can it arrange for any kind of fact-finding? Or must the Committee passively await the State Party's reply? Is it limited to channeling the State Party's information to the author? Or can it act in other ways?

After a reply has arrived, Rule 93(3) applies, fulfilling the inherent duty to allow comments from the other side. Yet this process should not continue indefinitely. As an alternative to its passive role in allowing an exchange between the parties in contradictory proceedings, one might conceive of the Committee exercising an investigatory function.

At first sight, it looks as if the six months rule<sup>236</sup> lays down the maximum period allowed to reach a result; but at the same time, neither the Protocol nor the Rules provide for any activity by the other party or the Committee during this period. The practical effect is to make six months a minimum period for consideration on the merits. Any steps taken by the author to substantiate a contested claim, by way of a memorial, offers of evidence, or legal submissions, apparently must follow rather than precede the State Party's submissions.<sup>237</sup> The Protocol may assume that the author has completely made out his case prior to the admissibility decision. We believe that this would be much too optimistic.

It would be far-fetched to deduce from the provisions of the Protocol a duty for the Committee to be entirely passive,<sup>238</sup> and yet allow the parties to go on submitting more ma-

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234. *Id.* rule 94(1).

235. *Id.* rule 94(3).

236. Protocol, *supra* note 1, at 59, art. 4(2).

237. Report I, *supra* note 4, rule 93(3).

238. Article 5(1) lays down the duty of the Committee to consider *all* the writ-

terial as long as they wish. In the first place, the procedure requires submissions "clarifying the matter," which we take to mean the facts and laws relating to the claim of the author. Another, equally important dimension is suggested by the second limb of the State Party's duty, in the clumsy expression of the Protocol on this point: The State Party's "explanations or statements" shall also clarify "the remedy, if any, that may have been taken by that State."<sup>239</sup> This has, of course, nothing directly to do with the remedies which already must have been taken and exhausted by the individual, in order to have the Committee consider the communication. It rather suggests that a State which has been faced with an admissible claim, and perhaps has conceded some justification for it, may already have taken action to resolve it by way of remedying the situation.

This opens an important perspective. Clearly the Protocol here envisages a kind of *settlement* during the six month period, resulting from the action taken by the State Party in order to answer the admissible case. For such a settlement to be achieved, the State must normally act at the domestic level, not only to investigate, but to remedy the matter. The silence of the Protocol should not, however, be interpreted to mean that the Committee could not have a conciliatory or mediating function in order to achieve such a solution in respect for human rights. Yet the six month provision is, in practice, likely to be considered by States Parties as a breathing space during which they only need to react internationally by submitting a reply on the merits before the time limit expires.<sup>240</sup>

In our view it would be preferable, and not contrary to the Protocol, for the Committee to show some initiative at the stage of the merits. This can be accomplished at the outset by securing a basis for its deliberations by requesting memorials from both sides, and concretely suggesting the enquiries indicated by the submission of evidence and pleadings. Moreover,

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ten information submitted by the parties. Protocol, *supra* note 1, at 59.

239. *Id.* art. 4(2).

240. This seems to be confirmed by the first published cases of the Committee. The attitude taken by the Government of the State Party was, if not wholly uncooperative in terms, very slow. Uruguay did not really enter into the substance of the cases except for giving, in the one case, some data partly confirming the allegations, partly offering only denials of a general character. See text accompanying notes 242-50 *infra*.

it should not be seen as incompatible with Committee functions to suggest, formally or informally, that it is at the disposal of the parties in order to reach a friendly settlement.<sup>241</sup> However, the Committee cannot normally expect the State Party to react before the six month period has expired. Since there is no maximum time-limit for the length of proceedings before the Committee, the need for an active role on the part of the Committee at the stage of the merits is obvious.

### VIEWS

Up to this point, we have assumed that the views which the Committee shall forward to the parties are not intended to be binding.<sup>242</sup> The Committee must formulate its views and may for that purpose obtain recommendations from a Working Group.<sup>243</sup> This was first done in two Uruguay cases of August and October 1979. After examining the communications and adopting its views in closed meetings as required by the Protocol, the Committee in both cases decided, without any express authority, to publish the views in their entirety. This created bold and important precedents, to be followed by several cases in 1980.<sup>244</sup>

Generally speaking, it makes little difference in law whether the views are formally binding or not, unless there

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241. See the express clause in the European Convention, *supra* note 33, at 240, art. 28(b).

242. Protocol, *supra* note 1, at 59, art. 5(4).

243. Report II, *supra* note 4, rule 94(1).

244. The first case was submitted by Moriana Hernández Valentini de Bazzano on her own behalf, as well as on behalf of her husband, Luis María Bazzano Ambrosini, her stepfather, José Luis Massera, and her mother, Martha Valentini de Massera. The second case was submitted by Eduardo Dante Santullo Valcada on his own behalf. In the former case, violations were found in connection with the detention of the husband, stepfather and mother, with respect to Articles 7 and 10 (partly because of conditions seriously detrimental to health, partly torture, partly detention incommunicado or with denial of visits by family), Articles 9 and 14 (lack of legal guarantees during detention, lack of fair trial), and Article 25 (stepfather's political rights unreasonably restricted). Report III, *supra* note 4, at 124. In the latter case, violations were found in respect of Article 9(4) (denied effective remedy to challenge arrest and detention) and Article 2 (lack of protection against ill-treatment), whereas the position as regards Article 7 (ill-treatment), divided the Committee. Report IV, *supra* note 4, at 107. For the cases reported so far in 1980, all also concerning Uruguay, see *id.* at 111, 120-21, 127, & 132. Violations of the Covenant were found in all but one, where the matter complained of had been remedied and the Committee therefore decided to discontinue consideration of the communication. *Id.* at 120. See also text accompanying note 250 *infra*.

are available means of enforcement. Psychologically, States Parties might have been more reluctant to accept the Protocol if they were bound under its terms to observe a decision of the Committee. Nevertheless, while skeptics may perhaps dismiss the whole procedure as empty or inefficient, those in favor of the system may argue that the position and composition of the Committee will give strong moral authority to these views. In any event the Committee is the only organ established and authorized to examine individual issues under the Covenant. There would not be much sense in ratifying the Protocol if the State Party was not generally inclined to follow the opinion of the Committee, even when it goes against that State. If the Committee succeeds in establishing an image of being conscientious and fair, one should normally expect that its views will be followed in practice.

Unfortunately, conditions are far from normal everywhere. This is illustrated by the series of violations found in Uruguay, to which the views in the earliest cases were addressed. At the time of this writing, it is too early to say what impact the Committee's action under the Protocol will have in those cases, or similar ones relating to the same general conditions.

Thus the first precedents might have occurred under more favorable auspices. Yet those cases illustrate how the Committee conceives its task under the Protocol. As might be expected, it will first seek to establish the facts on which it will base its views, and then apply the provisions of the Covenant to those facts. The views adopted in the two first cases broadly follow the same pattern. The published views are rather brief, respectively six and four typed pages in all. First the original communications and the procedure leading to the decision admitting it are summarized, followed by a summary of the submissions of the parties on the merits insofar as they existed. However, in both these cases the response of the State Party was found insufficient in substance and it was noted that the six month time limit had not been observed. As a result, the Committee decided "to base its views on the following facts which have not been contradicted by the State Party,"<sup>245</sup> or "which have either been essentially confirmed by the State Party or are unrepudiated or uncontested except for

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245. Report III, *supra* note 4, at 127.

denials of a general character offering no particular information or explanations."<sup>246</sup>

Having then set out the facts largely as stated in the authors' allegations, the Committee, "acting under article 5(4)," stated that it "is of the view that these facts . . . disclose violations of the Covenant."<sup>247</sup> Accordingly, the Committee then was "of the view that the State party is under an obligation to take immediate steps to ensure strict observance of the Covenant and provide effective remedies" to the victims.<sup>248</sup> In the second case, where arbitrary detention was the primary violation established, these steps included "compensation in accordance with article 9(5) of the Covenant."<sup>249</sup> The specific provision referred to here does not exclude other remedies, but since neither the Protocol nor the Covenant prescribe what kind of measures are required in the various situations of violations, the Committee apparently felt that it could not be more precise.

Some points of general interest should be noted. First, fact-finding is difficult without the full cooperation of the parties. In these cases, it appears to have mainly been based, for lack of further evidence, on allegations made, without reference to possible corroboration or any standard of proof.

Second, once the decision to take the allegation as the basis for the decision had been made, the application of the Covenant does not seem to have caused much difficulty. In any event this is not broadly explained. The interpretations on which it appears to depend are not made explicit and could perhaps be regarded as largely self-explanatory. Nevertheless, the interested expert could no doubt find significant points or omissions, and perhaps assumptions which might deserve more elaboration.

Third, the Committee in both cases went beyond the finding of a violation, and explicitly made a statement of the duty to take steps to ensure observance and provide remedies, as part of its views.

Fourth, in the second case, use was made for the first time by a member, joined by no less than five others, of the

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246. Report IV, *supra* note 4, at 109.

247. Report III, *supra* note 4, at 128-29; Report IV, *supra* note 4, at 110.

248. Report III, *supra* note 4, at 129.

249. Report IV, *supra* note 4, at 110.

right to append an individual opinion.<sup>250</sup> They went further than the Committee as such, finding also a breach of Article 7 with its prohibition of ill-treatment. The Committee had only said that denials of a general character were not enough and that it could not hold that there had been no violation of that provision. Yet the Committee also noted significantly that the State Party in this respect had failed to show that it had ensured, to the person concerned, the protection required by Article 2 of the Covenant. This finding seems to make a lack of protection a separate breach of the Covenant, but at the same time refrains, for lack of proof, from concluding positively that ill-treatment had occurred. This way out of a dilemma created by specific allegations against only general denials did not satisfy the six members who concluded, on the same facts, that the violation of ill-treatment had been established.

The further cases so far published in 1980 all concern Uruguay.<sup>251</sup> They follow broadly the same pattern, the Committee expressing the view that the violations had occurred largely as alleged, and illustrating similar difficulties of the inquiry.

Whatever the impact of these views will be in the context of the particular cases, some early lessons may perhaps be drawn from them. The Committee must establish the facts. This may often become difficult, not only as shown in the Uruguay cases, but in other ways, even if the State Party concerned cooperates as effectively as possible. Since the Committee probably will not accede to giving opinions on, or response to, assumed or hypothetical facts, the need for developing methods of independent fact-finding is urgent. Yet it is not easy at this stage to say how the Committee can meet this need in practice.

If the Committee wishes to contribute to the development of the law of the Covenant through giving reasoned interpretations of its provisions on doubtful points, it could probably best do so when stating its views under the Protocol. In order to accomplish this interpretive function, the Committee must

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250. See Report I, *supra* note 4, rule 93(3). The individual opinion of Mr. Tarnopolsky was joined by MM. Bouziri, Diéye, Graefrath, Janca, and Sadi. Report IV, *supra* note 4, at 110. It has been suggested that a careful use of the device of individual opinions may strengthen the quasi-judicial character of the Committee's task, Bossuyt, *supra* note 27, at 152, See also Robertson, *supra* note 232.

251. See note 243 *supra*.



state more elaborate reasons than in the earliest cases published.

Finally, although the views in most cases will probably focus on the question of alleged violations of the Covenant, their function is not necessarily limited to this "quasi-judicial" aspect. The reported cases went one step further in suggesting steps and remedies. This expansion suggests another possibility worthy of the Committee's views: a settlement of the complaint, making it perhaps unnecessary and undesirable to take a stand on the matter of a violation.<sup>252</sup> If such possible endorsement by the Committee of a solution without prejudice to the claim about violation could serve as an incentive to the parties, in particular the State, to achieve a friendly settlement on the basis of respect for human rights, or if the views could also include constructive recommendations for a similar solution, the views of the Committee might perhaps influence matters more effectively than by mere condemnations. Until more experience is gained, however, it is probably wise to refrain from further speculation regarding the future province and function of the views of the Committee.

#### FOLLOW-UP?

After the adoption of the Committee's views, there is not, under either the Covenant or the Protocol, any procedure leading to binding decisions by other organs. Here the simple system under the Protocol differs sharply from its regional counterparts, in particular the European and American systems. Nor is the activity of the Committee under the Protocol subject to any kind of control or review by other bodies, or backed by any machinery of enforcement. We have noted its independent status in not being a United Nations' organ. Depending on the Committee's approach, this position may be seen as a source of considerable weakness as well as a source of strength in some respects.

Nevertheless, the link to the General Assembly of the United Nations, via the Economic and Social Council, particularly the submission of an annual report, in fact offers a possi-

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252. See, e.g., Report IV, *supra* note 4, at 120, and notes 148 & 243 *infra* regarding the published case where the Committee in the end discontinued its consideration.

bility for discussions within these political organs. According to the line adopted by the Third Committee of the Assembly, the Human Rights Committee is not going to be represented as such there. Yet its practice may be the subject of comments.<sup>253</sup> If such discussions should take place, it is also possible that resolutions may be adopted on the Committee's activity under the Protocol. That, however, would be without legal effect and could also be unfortunate in view of the Committee's independence. The Assembly no doubt is a most representative body in many ways, but not as regards questions of policy relating to the Protocol. Here the views of the States Parties concerned, having accepted this instrument, are more relevant. Yet they have no forum of their own.

The system is, however, not served by being ignored. Instead of enforcement, the publicity of action under the Protocol may contribute to making it effective. It is true that the confidentiality of the proceedings may also contribute, in some ways, to the achievement of desirable results. We will not enter into a full discussion here.

The importance of publishing Committee materials is worth noting. In particular, the annual reports may already have an impact far beyond the United Nations' organs which is their primary destination. Besides governments, both non-governmental organizations and scholars, to mention only two of the interested groups, may make use of these materials and press releases.

The reporting and publication of Committee materials so far has been incomplete. Nothing seems to prevent the publication of its decisions on admissibility as well as views on the merits. Once the step was taken to publish the latter, and even to give all names and other details of persons and facts involved, it seems clear that the admissibility decisions should have been similarly available to the general public. One might, however, consider preserving the anonymity of authors and alleged victims while publishing the substance of these decisions. A selection of those having a precedential interest

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253. In the autumn of 1979 Uruguay, raising various objections against the Committee having adopted its views in the first case, was taking the matter to the General Assembly. The Government's letter was distributed as an official document in the Third Committee. See U.N. Doc. A/C.3/34/3. Panama then submitted a reply emanating from the author of the communication. See U.N. Doc. A/C.3/34/6. It appears, however, that no further action was taken during the General Assembly.

might be sufficient.

Mainly for administrative and financial reasons, all suggestions for this kind of follow-up of the Committee's work have yielded few results. The problem is equally urgent as regards the other main function of the Committee, its consideration of State reports under the Covenant,<sup>254</sup> and cannot be pursued here.<sup>255</sup>

### EXPERIENCES

Many matters arising in the practice of the Protocol during the first four years have been referred to above. It remains to give a brief general picture.

Of its two daily meetings during its second to its tenth sessions, the Committee has devoted seventy closed meetings to its consideration of communications.<sup>256</sup> It has been assisted by the Communications Unit of the Division of Human Rights in the Secretariat of the United Nations. The seventy-two communications registered and placed before the Committee until the end of the tenth session, August 1980, related to Canada (seventeen), Columbia (four), Denmark (four), Finland (three), Iceland (one), Italy (one), Madagascar (one), Mauritius (one), Norway (two), Sweden (one), Uruguay (thirty-six), and Zaire (one). Of these seventy-two cases, thirty-three had been disposed of: six by the adoption of views, and the remainder had been declared inadmissible, discontinued, or suspended. Of the thirty-nine remaining communications, twenty-seven had been declared admissible and twelve were pending decision as to admissibility.<sup>257</sup>

In other words, a broad range of States Parties were represented. Yet apart from the two countries with relatively significant numbers, communications have arrived quite sporadically. This scarcity does not permit the material to be

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254. Covenant, *supra* note 1, at 57, art. 40.

255. Since the beginning of its work, members of the Committee have at times called for the publication of a Yearbook including *inter alia* State reports, summary records of public meetings of the Committee and other documents of general distribution, and have also proposed publication of decisions and views under the Protocol. An alternative is to expand the annual report and include such material in annexes, or publish Official Records of the Committee in special series. See, e.g., Report IV, *supra* note 4, at 4-5.

256. The figure is compiled from the numbering of the summary records of the Committee's public and closed meetings.

257. Report IV, *supra* note 4, at 93.

considered as representative for what may be expected in the future.

The next striking fact is the high proportion declared admissible. The large majority of these, however, concerned Uruguay, where the circumstances are exceptional.<sup>258</sup> Nevertheless, four concerning Canada, two relating to Finland, and one each concerning Columbia, Mauritius, Sweden, and Zaire were also declared admissible and were pending on their merits.<sup>259</sup> This markedly differs from the statistics of the European Commission on Human Rights, where during twenty-four years only about two percent were admissible.<sup>260</sup> It seems already that the Committee under the Protocol is less strict in practice than the European organ, although the difference is caused in part by the nature of the many Uruguay cases.

The number of cases coming from other countries is still quite small. If one had expected a flood from the beginning it has not so far materialized. The main reason for this absence must be that the Protocol is not well known. Yet the Committee would hardly be able to cope with many more petitions. It is difficult to believe, in particular for anyone familiar with the work of the European Commission of Human Rights, that the United Nations seriously expects a part-time body like the Committee to manage such a task as that under the Protocol without a permanent secretariat of specialists who have no other functions. Otherwise only superficial procedure and decisions will become possible as the number of cases grows.

### CONCLUDING REMARKS

In working with the practical details of a system, the wider perspectives are easily lost. How important is it, really, that the Protocol exists and that it is beginning to function?

In principle it is revolutionary. In practice so far, it has had only limited, nearly negligible effects. The Covenant is a great document. Yet the Committee is a very modest entity for its implementation, and the Protocol does not give it much

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258. The views in the published cases concerning Uruguay were to the effect that serious violations had occurred. Many more cases concerning that country are pending on the merits. Uruguay had ratified the Protocol long before it entered into force, and also before the internal developments which have caused so many complaints.

259. Report IV, *supra* note 4, at 93.

260. See note 113 *supra*.

additional power. Despite all polite official comments about its importance, which reflect the overwhelmingly persuasive strength of the ideas of the Covenant rather than the realities which the Committee is facing, the Committee lacks support, publicity, and resources. Public opinion is hardly aware of it. The Protocol will only become effective if the Committee does. Both depend on being used, and being given means to work with, including assistance by a permanent Secretariat as suggested above.

The picture does have brighter aspects. In its practice so far, the fact that the Committee's composition is of a majority of members from countries not parties to the Protocol, does not in itself seem to have significantly limited the Committee's ability to deal with communications, as it may have been feared by some. In important work on Protocol matters, both the drafting of relevant Rules and the making of recommendations in individual cases from the Working Group, members from these other countries have made very valuable and decisive contributions.<sup>261</sup> An attitude of pragmatic flexibility has characterized the Committee as a whole. Members have arrived with different experiences and attitudes. Yet they are now making common experiences, and to some extent forming common attitudes.

Normally States accepting the Protocol should welcome the development of a more meaningful role for the Committee, instead of it becoming "harmless" or falling victim to obstructive tactics. The fact that only few countries have accepted it, usually the ones with a record which gives them relatively little to fear from individual complaints, is sometimes mentioned as a reason to be cautious. The countries with the most real problems are, however, likely to remain outside the

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261. Bossuyt, *supra* note 27, *passim*. Bossuyt mentions many examples from the discussions of the Rules and notes that members from socialist states have not been particularly restrictive. He also mentions some illustrations of their attitude. *Id.* at 155. It may be added that all these members have in turn served on the Committee's various Working Groups on communications under the Protocol, those from the German Democratic Republic and Rumania as Chairmen/Rapporteurs. The former, however, writes in a recent article that the efficiency of the communications procedure so far has not been confirmed, while the reporting procedure, *see, e.g., supra* note 6, has proved useful. *See Graefrath, Trends Emerging in the Practice of the Human Rights Committee*, G.D.R. COMMITTEE FOR HUMAN RIGHTS BULLETIN 3, 22-23 (1980). Sharing this viewpoint, we think that both kinds of procedures should be much further developed.

reach of the Protocol in the all-foreseeable future. The Committee should not look to them, or to what is acceptable to them, when establishing its own patterns and standards.

This is not, however, to suggest that it should primarily pose as a tribunal passing strict judgment on States Parties. It should rather try to assist them and allow the Protocol, imperfectly designed as an instrument of protection, to become at the same time an instrument of promotion of civil and political rights.

For this purpose, an open mind is necessary, not too traditional or legalistic. The procedures under the Protocol can no doubt be developed and improved. But the measure of its success should be the degree to which the Committee is able to convince and influence States, rather than condemn or expose them.

