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HUMAN RIGHTS COMMITTEE

Second Session

SUMMARY RECORD OF THE 33rd MEETING

held at the Palais des Nations, Geneva,
on Monday, 22 August 1977, at 10.50 a.m.

Chairman: Mr. MAVROMMATIS

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1. Mr. VARGA (Hungary), speaking at the invitation of the Chairman, said that most of the questions put by Committee members had already been answered. Some questions of a more particular nature would be the subject of written replies from his Government, accompanied by the text of the Hungarian legislative and constitutional provisions relating to the Covenant.

2. The Hungarian Constitution (chapter VII, articles 54-70) dealt with the basic rights and duties of citizens, and ensured, in particular, equality between men and women, freedom of religion, freedom of the press and equality before the law, without distinction as to sex, race or religion. The Penal Code (title II, sections 261-270) dealt with crimes against freedom and human dignity. All the relevant texts (the Constitution, the Penal Code and the Code of Criminal Procedure) would be sent to the Committee. He thanked Committee members for their comments on the initial report of his country, which would assist his Government in drawing up its next report.

3. The CHAIRMAN thanked the representative of Hungary; the Committee had noted that the Constitution, the Penal Code and the Code of Criminal Procedure of Hungary would be communicated to it by the Hungarian Government, and that the questions put by Committee members would be transmitted to the Hungarian authorities, which would supply the Committee with additional information.

ADOPTION OF FURTHER RULES OF PROCEDURE OF THE COMMITTEE IN ACCORDANCE WITH ARTICLE 39 OF THE COVENANT (agenda item 2) (CCPR/C/WG.1/CRP.1) (continued)

Rule 92, paragraph 2 (former rule 93)

4. The CHAIRMAN recalled that, at its 24th meeting, the Committee had considered a text for rule 92 of the rules of procedure which had been circulated in an unofficial document dated 15 August 1977. He read out the final version of paragraph 2 of the rule concerned, which was slightly different from the text given in that document: "A 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 as provided in paragraph 1 of this rule."

5. The final version of rule 92, paragraph 2, was adopted.

Rule 93 (former rule 94)

6. The CHAIRMAN read out a new text proposed for paragraph 3 of rule 94 (which would become paragraph 2 of rule 93): "If the Committee declares a communication inadmissible under article 5 (2) of the Protocol, this decision may be reviewed at a later date by the Committee upon a written request by or on behalf of the individual concerned containing information to the effect that the reasons for inadmissibility referred to in paragraph 1 (e) or (f) of rule 92 no longer apply."

7. In the proposed text, the reference should be to paragraph 1(e) or (f) of rule 91, and not rule 92, because the rules in the text originally submitted by the Working Party had been renumbered.

8. Mr. GRAEFRATH observed that the provision under consideration laid down a special rule for cases in which the reasons for inadmissibility referred to in paragraphs 1(e) and (f) of rule 91 no longer applied. That rule was doubtless derived from the Protocol itself (article 5, paragraph 2), but if reasons for inadmissibility other than those specified in paragraphs 1(e) and (f) no longer applied, could the individual renew his request or would the Committee apply a different rule? To follow the latter course appeared dangerous.

9. Mr. OPSAHL said he did not believe that the problem mentioned by Mr. Graefrath was serious. The special conditions relating to admissibility which were under consideration were associated with temporary obstacles. If, in the case of other conditions of admissibility, the condition was met after a communication had been declared inadmissible, the best and simplest course would be for the person concerned to submit a new communication rather than to ask for reconsideration of the initial communication.

10. Mr. TOMUSCHAT said that, in his opinion, a reference to paragraph 2 of rule 91 should also be included, as it was necessary for the Committee to be able to take up a case when the application of domestic remedies was unreasonably prolonged. He thought that the existing provisions of rule 93, paragraph 2, were not sufficient for that purpose.

11. Sir Vincent EVANS said he had the impression that Mr. Tomuschat was referring to the original text of rule 94, paragraph 3. The objection was not valid for the suggested new wording: the reference to paragraphs 1(e) and (f) was sufficient, because paragraph 2 of rule 91 referred only to cases in which the communication could be declared admissible, which meant that a communication could never be declared inadmissible under paragraph 2. Although, therefore, a reference to paragraph 2 of rule 91 could conceivably be included in the text of paragraph 2 of rule 93, it was unnecessary and he preferred to leave it out.

12. Mr. ESPERSEN said, in reply to the objection raised by Mr. Graefrath, that in practice he did not see how the situation envisaged - namely, that the reasons for inadmissibility should cease to exist - could arise in the case of the conditions other than those stipulated in paragraphs 1(e) and (f), except perhaps for the requirement laid down in paragraph 1(a) insofar as the person concerned might subsequently sign an authorization or indicate in some other manner that the communication emanated from him. That being so, he wondered whether the inclusion of a reference to paragraph 1(a) of rule 91 would satisfy Mr. Graefrath.

13. Mr. OPSAHL said he thought that the Committee should avoid laying down rules which would explicitly encourage requests for the reconsideration of decisions relating to the admissibility of a communication, other than in cases of absolute necessity. Since neither the Protocol nor the rules of procedure provided in principle - as would have been desirable - that a communication could not be

resubmitted if it contained no new substantive element, it could happen that the Committee would receive requests for reconsideration which it would reject as an abuse of the right to submit communications. To repeat, however, such requests should not be encouraged.

14. Mr. LALLAH said he regarded that as a practical problem rather than a problem of substance: if the Committee had deemed a communication inadmissible for particular reasons, but those reasons had ceased to apply, the author could always submit a further claim. However, it was essential to insist that a new claim be lodged, as that was the only way to make sure that the author of the communication still intended to exercise his rights. He therefore thought it necessary to retain the rule under discussion as it stood, or redrafted to take account of Mr. Graefrath's comments.

15. Mr. GRAEFRATH said he did not wish to complicate matters; he was satisfied with the knowledge that the Committee did not regard the proposed rule as precluding the author of the communication from resubmitting his claim if reasons for inadmissibility other than those specified in paragraphs 1(e) and (f) of rule 91 no longer applied. He would be willing to accept the wording proposed by Sir Vincent Evans subject to that interpretation.

16. The CHAIRMAN said he thought that the text proposed by Sir Vincent Evans clarified the provisions of article 5, paragraph 2, of the Protocol.

17. Mr. TOMUSCHAT suggested that the following sentence should be added at the end of the text proposed by Sir Vincent Evans: "All other communications come under the provisions of rule 91, paragraph 2". As the Committee had not yet adopted paragraph 2 of rule 91, that suggestion could only be adopted provisionally.

18. The question whether the Committee should go back on a previous decision regarding a communication already submitted, or decide on the admissibility of a new communication, would only really be important if time-limits had been laid down beyond which a communication was no longer admissible. As such was not the case, the Committee should not concern itself unduly with that question.

19. The CHAIRMAN proposed that the Committee should adopt Mr. Tomuschat's suggestion provisionally, on the understanding that it would revert to it when a final text had been adopted for paragraph 2 of rule 91. Subject to that reservation, the new rule 93 (formerly rule 94) would therefore be made up in the following manner: paragraph 1 would be paragraph 2 of former rule 94; paragraph 2 would be the text submitted by Sir Vincent Evans, together with the addition suggested by Mr. Tomuschat.

20. It was so decided.

Rule 91, paragraph 2 (former rule 92)

21. Mr. TARNOPOLSKY recalled that when rule 91, paragraph 2 had been considered, members of the Committee had been divided as to whether the last part of the sentence, starting with the words "provided it considers", applied both to claims pending "before another international organ of investigation or settlement" and to claims pending "before national organs". He entirely agreed with the opinion expressed by Mr. Movchan when that provision had been drafted: it was difficult to see how the Committee could judge that proceedings before another international organ were "unreasonably prolonged"; the words "before another international organ of investigation or settlement or" should be deleted.

22. The CHAIRMAN recalled that the Legal Counsel had been consulted on that point.

23. Mr. MAZAUD (Assistant Director, Division of Human Rights) said that the Secretariat had been asked to inquire of the Legal Counsel what had been the place in the original text of the Protocol, or in the certified true copies, of the sentence: "This shall not be the rule where the application of the remedies is unreasonably prolonged": had it constituted a separate paragraph or been the continuation of article 5, paragraph 1(b)? He read out the reply received from the Legal Counsel by telegram:

"A. In original Optional Protocol, sentence you quote appears on a separate line in French and Spanish, and also in Chinese and Russian, although in case of latter two languages, typographical layout necessitates a new line anyway. In English text word 'this' appears on same line as provision (b). Certified true copies dated 29 March 1967 are photocopies of original.

"B. We consider English text of original to contain typographical error on following grounds:

1. Main reason is specific clarification given by sponsors before Third Committee regarding A/C.3/L.1411/Rev.2 [the document containing the text proposed by the authors of the Protocol]. In the absence of objections, sponsors' interpretation can be deemed to be that of Committee.

2. Accessorily, original English text submitted by sponsors, which in mimeographed form, has sentence in question on separate line, carried some authoritativeness as to sponsors' intention, if not as to intention of other members that did not use English as working language.

3. The sentence under consideration is the second of the two sentences of paragraph 2, which are clearly separated by a period. That sentence should therefore be read in conjunction with the whole of the preceding sentence rather than with a part of the latter. In our view that consideration overrides conclusions that might be adduced from English typographical layout of paragraph 2 in original and in certified true copy."

24. Mr. OPSAHL said he found himself facing a dilemma: his original interpretation was confirmed by the telegram which had just been read out, while he had been convinced by the arguments of Mr. Movchan and Mr. Tarnopolsky to the effect that it was not for the Committee to judge whether the application of remedies by other international organs was unreasonably prolonged. Consequently, if the Committee received a communication invoking such delays, it should consider it with the greatest caution.

25. Sir Vincent EVANS said he thought the reasoning of the Legal Counsel was entirely convincing and was, moreover, consistent with the approach followed during the preparatory work. The initial text had been ambiguous, and the sponsors of the draft had given explanations to the Third Committee of the General Assembly which went along the lines of the telegram. That the English expression "remedies" had been retained at the time was because it had been considered flexible enough to cover the situations referred to in paragraphs 2(a) and (b) of article 5. He was therefore of the opinion that the provisions of rule 91, paragraph 2, should be retained as they stood.

26. Mr. LALLAH said that he had been surprised by the distinction drawn between international and national organs of investigation or settlement and had noted that his opinion was shared by other members of the Committee. If only because of the exceptional qualities of some national judges especially those at the higher levels of the judiciary, he hoped that the Committee would not draw any distinction of that kind when it considered specific cases.

27. Mr. MOVCHAN said that the Legal Counsel had replied in a manner which reflected the concern for impartiality of United Nations officials. The Legal Counsel's interpretation, based on semantic and historical considerations, should obviously be taken into account, but that did not mean that other interpretations, which might give more weight to ethics, psychology or the law and be based on the practice of international bodies, should be dismissed. He wondered how the Committee would react if another international body accused it of tardiness in considering matters referred to in article 5 of the Protocol, although such an opinion would be justified since, at the present session, the Committee had examined only six reports out of 10.

28. Judges practising in the highest courts of their countries could hardly be compared to the experts of the Committee, who had a precise task, i.e. to consider the reports. When another organ was dealing with a case which was the subject of a communication, as envisaged in article 5, the Committee had no grounds for placing itself above an established international procedure. He therefore considered that the words "before another international organ of investigation or settlement or" should be deleted. That question should have been raised not with the Legal Counsel but with the States parties themselves.

29. Mr. PRADO VALLEJO said that there were several possible interpretations of that point and that the Committee should not opt for any particular one of them. A provision of a general nature, not mentioning any specific organ, would be preferable. It might perhaps be advisable to say, for instance, "even if [the communication] is not being examined under other procedures".

30. Mr. ESPERSEN said he also thought that it would be difficult to decide on the correct interpretation before specific cases had been examined and that undue haste should be avoided. Moreover, as Mr. Movchan had said, it would certainly be awkward if other international bodies were to take the view that the Committee was lagging in its consideration of communications. One possible solution would be simply to refer to the Protocol in the following terms: "The Committee may decide to consider the claim contained in the communication if the circumstances referred to in the last sentence of article 5, paragraph 2, of the Protocol apply."

31. Mr. TOMUSCHAT said that, to the extent that an error had been noted in the English text, the conclusion would perhaps be that the French and Spanish texts better reflected the intentions of the authors. Moreover, it was permissible to think that those who had drafted the Covenant had based themselves on the provision on domestic remedies contained in article 14, paragraph 7 (a), of the International Convention on the Elimination of All Forms of Racial Discrimination.

32. The CHAIRMAN expressed the opinion that the Committee should not try to arrive at a definitive interpretation: it might perhaps adopt a text worded in the manner proposed by Mr. Espersen - he himself had had something similar in mind - and revert to the matter subsequently in the light of the experience gained in considering specific cases.

33. Mr. OPSAHL and Sir Vincent EVANS also supported Mr. Espersen's suggestion.

34. Mr. GRAEFRATH said that he also could accept Mr. Espersen's draft but would suggest the deletion of the words "the claim contained in" at the beginning of the paragraph, so that the phrase would simply read "to consider the communication".

35. Mr. TOMUSCHAT said he would prefer to say "the Committee shall decide" rather than "the Committee may decide" because, if the application of remedies was unreasonably prolonged, the Committee could not refrain from taking up the communication.

36. Mr. LALLAH said that Mr. Tomuschat's objection might be met by keeping the word "may" but by replacing the word "if" by the word "whenever".

37. Sir Vincent EVANS remarked that the Committee should be allowed a certain discretion and should not be bound by any strict rule.

38. Mr. ESPERSEN said he also was of the opinion that, if the Committee found that the application of remedies had been unreasonably prolonged, it would be under an obligation to consider the communication. To take account of that concept, he proposed the following reworded text: "The Committee shall decide to consider a communication, whenever it finds [or 'concludes' or 'decides'] that the circumstances referred to in the last sentence of article 5, paragraph 2, apply."

39. Mr. MOVCHAN said that he would prefer a reference to a paragraph rather than to a sentence. He proposed the following wording: "The Committee shall [may] decide to consider a communication if it decides that the application of remedies mentioned in article 5, paragraph 2, of the Protocol is unreasonably prolonged."

40. Mr. OPSAHL said he could conceive of cases in which remedies would be ineffective - for instance, because the courts were not independent; consequently, provision should be made for exceptions to the rule regarding the exhaustion of other remedies. The provision of rule 91, paragraph 2, should not be of a mandatory nature, depriving the Committee of any discretion to weigh up the circumstances which might justify an exception to the rule. In any event, the Committee should show itself aware of the requirements in that connexion, even if they were not expressly reflected in the text.

41. Mr. BEN-FADHEL said that he could accept the wording proposed by Mr. Movchan, but he would prefer the words "if it [the Committee] decides" to be replaced by "if it is persuaded" or "if it is convinced".

42. Mr. KOULISHEV said he would prefer a more concise wording, along the following lines: "... if it [the Committee] decides that the exception provided for in article 5, paragraph 2, is not applicable".

43. Sir Vincent EVANS said he was not convinced of the advisability of using the expression "shall decide" at the beginning of the sentence, since the Committee might have to take another negative decision about the communication for reasons other than the fact that the application of remedies was unreasonably prolonged. To provide for that eventuality, it was preferable to keep the words "may decide".

44. Mr. HANGA observed that the Committee should make certain that the application of remedies was unreasonably prolonged. The need for the Committee to do so should be emphasized by incorporating at the beginning of paragraph 2 a phrase such as: "the Committee, should it find that the application of remedies is unreasonably prolonged, shall decide ...".

45. The CHAIRMAN said that it was necessary to establish a balance between the discretion allowed the Committee and the limits within which it should exercise that discretion. For that reason, he thought that it would be better to keep to the original text, retaining the word "may" but replacing the expression "provided it considers" by "whenever it considers".

46. Mr. ESPERSEN said that in his opinion the expression "whenever it considers" was too sweeping; he would prefer to add the phrase "and no other reason for inadmissibility exists" at the end of his proposed wording for paragraph 2.

47. Mr. TOMUSCHAT proposed the following wording: "Whenever the Committee finds that the application of remedies as referred to in article 5, paragraph 2, of the Protocol is unreasonably prolonged, a communication may not be declared inadmissible because such remedies have not been exhausted."

48. Mr. PRADO VALLEJO said that the five proposals which had been submitted were all acceptable, as they were identical in substance and differed only in form. It would perhaps be advisable to wait until those various proposals were available in written form before taking a decision, as it should be possible to resolve fairly rapidly what were problems of a purely drafting nature.

49. Mr. GRAEFRATH said he agreed with Mr. Prado Vallejo except for the fact that Mr. Tomuschat's proposal differed from that of Mr. Espersen, as amended by Mr. Movchan. Mr. Tomuschat's text prejudged the question of domestic remedies and entailed an interpretation of the rule which was not within the competence of the Committee. Consequently, he would support the text proposed by Mr. Espersen, as amended by Mr. Movchan.

50. The CHAIRMAN pointed out that Mr. Tomuschat's wording had a more restricted meaning than the initial text.

51. Mr. LALLAH said that, in order to satisfy all the members of the Committee, he would propose a compromise wording which was close to that adopted in the Protocol and which would read: "The Committee shall consider a communication which is otherwise admissible whenever the circumstances referred to in the last sentence of article 5, paragraph 2, of the Optional Protocol apply."

52. The text of rule 91, paragraph 2, proposed by Mr. Lallah was adopted.

Rule 93, paragraph 2 (former rule 94)

53. The CHAIRMAN recalled that Mr. Tomuschat had suggested that a reference to rule 91, paragraph 2, should be included in rule 93, paragraph 2. He asked whether, in the light of the text just adopted, the Committee would confirm its acceptance of that suggestion.

54. Mr. GRAEFRATH said that in his opinion the Committee now had a clear mandate and that it was not necessary to insert that reference. However, that was a point for Mr. Tomuschat to decide.

55. Mr. OPSAHL considered that the situation envisaged in rule 93, paragraph 2, was different from that referred to in the new text of rule 91, paragraph 2: the former provision concerned a decision on inadmissibility which might be reconsidered if circumstances changed, whereas that was not the case envisaged in rule 91, paragraph 2, in connexion with paragraphs 1 (e) and 1 (f) of the same rule. He would clarify his point by quoting as an example the case of an individual whose communication was declared inadmissible in 1977 because the application of domestic remedies was about to be completed; should that individual approach the Committee in 1990 on the grounds that the application of those remedies had still not been completed, that would constitute new circumstances which would justify the Committee's reconsidering the admissibility of the claim.

56. The CHAIRMAN pointed out that such a case was covered by the new text adopted on Mr. Lallah's proposal and that it was not necessary to reopen the file of the individual in question.

57. Mr. ESPERSEN emphasized that the Committee was not bound by rules as strict as those applicable to courts in matters of time-limits and procedure. What was important was that individuals should be able to appeal to it whenever a new circumstance occurred. A communication declared inadmissible under rule 91, paragraphs 1 (a), (b), (c) or (d) could be reconsidered by the Committee if the

individual proved that the grounds on which the decison had been made no longer applied: it would not be necessary for that person to submit a new application. In the light of those considerations, it did not seem necessary to include a reference to rule 91, paragraph 2.

58. Mr. LALLAH said that rule 93, paragraph 2, introduced a slight difference in that it concerned the review of an earlier decision of the Committee. Accordingly, it would be advisable to add, at the end of that paragraph, a phrase similar to that which had been adopted for rule 91, paragraph 2. Such a phrase would read: "or that the circumstances referred to in the last sentence of article 5, paragraph 2, of the Protocol apply".

59. The CHAIRMAN said that in his opinion that would be tautological, since the Committee had to apply the provisions of rule 91, paragraph 2, before it could declare a communication inadmissible under paragraphs 1 (e) and 1 (f) of that rule.

60. Mr. TOMUSCHAT said he did not agree with that interpretation, which would mean having to wait indefinitely before declaring a communication inadmissible under rule 91, paragraphs 1 (e) and 1 (f). The only way of ensuring that the Committee could reverse a decision on inadmissibility in the light of new circumstances - a reversal not provided for under rule 91, paragraph 2 - would be to adopt the phrase proposed by Mr. Lallah.

61. Mr. OPSAHL said he agreed with Mr. Tomuschat and supported Mr. Lallah's proposal.

62. Sir Vincent EVANS said that in his opinion the amendment proposed by Mr. Lallah was superfluous, since the last part of rule 93, paragraph 2, presupposed the existence of new circumstances likely to modify the Committee's decision.

63. Mr. TOMUSCHAT pointed out that excessive delay in the application of remedies could not in itself be likened to a change in circumstances and that, consequently, it was not possible to put in the same category the situations referred to respectively in rule 91, paragraph 2, in relation to paragraphs 1 (e) and 1 (f) of that rule, and in rule 93, paragraph 2. Perhaps the simplest thing to do would be to delete any reference to that provision, which was not very clear in any case.

64. Mr. MOVCHAN proposed that, in order to accommodate the different views expressed, the end of the sentence should be amended to read: "... to the effect that the reasons for inadmissibility referred to in the provisions of article 5, paragraph 2, of the Protocol no longer apply". That wording would cover all the situations referred to in paragraphs 1 (e) and 1 (f) and paragraph 2 of rule 91.

65. Mr. LALLAH and Mr. OPSAHL supported that proposal, which they believed would overcome all difficulties.

66. Sir Vincent EVANS said that he also found Mr. Movchan's draft acceptable, but would suggest that the words "of the Protocol" should be deleted.

67. Mr. TOMUSCHAT said that he, too, could accept the reworded text proposed by Mr. Movchan. However, for reasons of style, he suggested that the word "declares" at the beginning of the paragraph should be replaced by "has declared".

68. Rule 93, paragraph 2, as amended by Mr. Movchan, Sir Vincent Evans and Mr. Tomuschat, was adopted.

The meeting rose at 1 p.m.