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Amendment to Decision on Periodicity

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SUMMARY RECORD OF THE 349th MEETING

Held at Headquarters, New York,
on Thursday, 1 April 1982, at 10.30 a.m.

Chairman: Mr. MAVROMMATIS

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The meeting was called to order at 11.05 a.m.

CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 40 OF THE COVENANT (continued)

General comments under article 40 (4) of the Covenant and questions relating to consideration of supplementary reports

1. Mr. BOUZIRI, speaking as Chairman of the Working Group on general comments, said that articles 6, 7, 8 and 9, and perhaps article 10, still required further consideration. The question of periodicity, which the Working Group had considered, also required further study as a matter of urgency.

2. Sir Vincent EVANS said that the Committee had originally envisaged a continuous dialogue with each reporting State party, which would begin with consideration of the State's first report, followed by observations on that report by the Committee and questions to the representatives of the State concerned. It had been anticipated that oral replies would be supplemented by additional written information in the form of a supplementary report. The adoption of the Committee's decision on periodicity (CCPR/C/19) in 1981 appeared to have been interrupted to mean that the Committee would proceed on the basis of periodic reports with a strict periodicity of five years, the concomitant impression being that the Committee would not pursue the second round of the dialogue until at least five years after the due date of the first report. That had given a poor impression to reporting States and to all those interested in the effectiveness of the Committee's procedures, since, the implication was that the State party could avoid taking any action for five years.

3. The Committee's decision on periodicity must be changed to allow greater flexibility, in order to encourage States parties to submit supplementary reports as early as possible following consideration of their first report, so that the Committee could continue its dialogue as effectively as possible. There were various groups of States parties in respect of which the decision on periodicity had proved ineffective. In the case of States whose first report had been found inadequate, it was desirable for the second round of the dialogue to take place as early as possible. In cases where the first report had been fairly substantial but a supplementary report had been offered to the Committee for consideration, it was desirable that that report should be considered as soon as possible. There were also a few States which had delayed submission of their first report until the due date of the following report, a situation the Committee had had in mind in adopting the last paragraph of its decision on periodicity, by which it reserved its right to request a subsequent report whenever it deemed appropriate.

4. It would be undesirable for the Committee to be seen to be singling out certain reporting States by indicating that their reports were unsatisfactory. The decision on periodicity should be formulated in such a way as to encourage the co-operation of States and not merely to criticize them. In an endeavour to secure the submission of satisfactory reports without alienating States parties, he had drafted a proposed additional paragraph to the decision, reading as follows:

> "3. In cases where a State party submits a supplementary report following the examination of its initial report or of any subsequent periodic report and the

(Sir Vincent Evans)

supplementary report is examined at a meeting with representatives of the reporting State, the Committee will, if appropriate, defer the date for the submission of the State party's next periodic report."

5. It had been suggested in the Working Group that a deadline of one year should be imposed for the submission of supplementary reports. However, that would severely restrict the Committee's freedom of action, since some reports would have to be rejected. It was essential for the Committee to adopt a flexible approach.

6. Mr. GRAEFRATH said there was a possibility that the concept of periodicity would be destroyed if States were allowed to defer the due date of a periodic report by submitting a supplementary report. It was for the Committee, not States parties, to decide on periodicity. A time-limit for the submission of supplementary reports should be established. To provide some incentive for States parties, the date for submission of the next periodic report could be calculated from the date of submission of the supplementary report where the latter was particularly full. The Committee should avoid seeming to be critical of States parties, but it could not allow the concept of periodicity to be vitiated.

7. Mr. OPSAHL supported the proposal made by Sir Vincent Evans. States should be encouraged to submit supplementary reports, which should be considered as early as possible, since it was obviously better to encourage States than to single out some of them for criticism. The proposal went a long way towards meeting the criticism of Sir Vincent's original position that the supplementary report should be viewed as the State party's next report. The period of deferment would be in the hands of the Committee, so that there was less need for a fixed time-limit for the submission of supplementary reports.

8. Mr. BOUZIRI noted that the positions adopted by Sir Vincent Evans and Mr. Graefrath seemed to be converging. The new proposal submitted by Sir Vincent merited careful consideration, and it might enable the Committee to reach a decision in the near future. Further consideration should be deferred until the text of the proposal was available in all the working languages.

9. Mr. HANGA agreed that further consideration of the matter should be deferred until the text was available in all languages.

10. Mr. TOMUSCHAT said that he supported Sir Vincent's proposal and the view that States parties should be given encouragement, failing which they would not be co-operative. He agreed that the proposal should be distributed in all the working languages.

11. Mr. LALLAH welcomed the development in Sir Vincent's position, and said that his own position would be guided by the considerations set forth in paragraph 388 of the Committee's last report (A/36/40). It should be recalled that the five-year period was not immutable: perhaps shorter periods of four or three years would become feasible. More time was needed to consider the proposal.

12. The CHAIRMAN said that the Committee had made substantial progress towards solving the matter. Sir Vincent's proposals represented a compromise and displayed

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(The Chairman)

flexibility. It would be for the Committee to guard against any abuse by States parties wishing to extend the period between reports.

13. Mr. GRAEFRATH said he understood that the proposal made by Sir Vincent Evans was a compromise proposal. Nevertheless, there was a problem, in that the Committee would have to decide in every case whether and for how long to defer the date for the submission of the State party's next periodic report.

14. The CHAIRMAN observed that the proposed procedure would also involve a decision on whether it was necessary for the Committee to consider the supplementary report.

15. Sir Vincent EVANS said that, however the proposal was worded, it would involve a decision, express or implied, on the part of the Committee. The question under consideration was of great interest to persons and organizations that followed the work of the Committee closely and were concerned about the efficiency of its procedures. He stressed the urgent need to take a decision on the matter during the current session.

Application of article 4 of the Covenant

16. Mr. OPSAHL said that it was necessary to consider the general problem of derogation and notification under article 4 of the Covenant and its relation to the reporting system and the obligations of States parties under article 40. It was important to bear in mind that the functions of the Secretary-General under the Charter were different from his functions under the Covenant, particularly with regard to article 40. The Committee, in performance of its duties under article 40, could instruct the Secretariat to keep it informed about events relating to article 4. It had often been pointed out in various connexions that the Committee should be informed about public emergencies and how they affected the rights recognized in the Covenant. Paragraph 3 of general comment 5/13, contained in annex VII to the Committee's 1981 report (A/36/40), implied that the procedures of notification and reporting were equally important but did not explain how those two procedures should interact. That was part of the larger problem of parallel procedures in human rights questions within the United Nations system. Under article 40 (1) (b), the Committee had the power to request special reports and information about emergency situations affecting the implementation of the Covenant. He therefore wished to submit the following proposal for consideration by the Committee:

> "The Human Rights Committee, acting under article 40 of the International Covenant on Civil and Political Rights, requests the Secretary-General, whenever a notification under article 4 (3) has been made, immediately to act as follows:
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> (a) To transmit the notification forthwith to the members of the Human Rights Committee;
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> (b) To draw the attention of the State party concerned to general comment 5/13, and in particular to the comment regarding the content of the

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reporting obligations in this respect, and to inform it that the Committee will decide at its next ordinary or extraordinary session whether to request a special report under article 40 (1) (b) and that meanwhile the Committee will appreciate being kept currently informed about the development of the emergency in so far as its affects the implementation of the Covenant."

17. He stressed that general comment 5/13 was an important basis for that proposal. Unless that or a similar proposal was adopted, general comment 5/13 and possibly the Covenant itself would cease to be observed in such situations. Mor over, the Committee should draft further general comments regarding both the substance of and the procedure under article 4, in view of recent developments in various States parties and in the light of discussions going on in other United Nations bodies and related studies. If the Working Group was unable to submit any text for adoption during the current session of the Committee, it should endeavour to do so at the next session at the latest.

18. Mr. ERMACORA said that any emergency situation had important consequences for nations as a whole and for the safeguarding of human rights of individuals. Although it fell within the sovereign competence of States to declare an emergency situation and suspend certain rights, there were some human rights which could not be derogated from under the Covenant. International bodies could help to prevent cases of excès de pouvoir by responding quickly to such situations, reporting on developments and recommending action. Unfortunately, United Nations bodies had not acted as speedily as possible in such situations, as was evident, for example, in the case of the situation which had occurred in Chile in September 1973.

19. In dealing with emergency situations, the Committee had the task of consid ring communications and reports and the moral obligation of monitoring the observance of human rights. On the basis of article 4 of the Covenant, it was necessary to establish that the life of the nation had been threatened and that the existence of a public emergency had been officially proclaimed. States parties should indicate the concrete measures taken, what effect those measures had on the implementation of human rights and whether they had been taken to the extent strictly r quired by the exigencies of the situation. Furthermore, States parties should make a clear declaration that such measures were not inconsistent with their other international obligations, did not involve discrimination and did not constitute any derogation from those rights which, under the Covenant, could not be derogated from. The Committee had the right to request the Secretary-General to formally transmit to it any notifications of public emergencies by States parties. The Committee should also avail itself of information about the real situation during public emergencies, or at least of all information available in the Unit d Nations system. It should receive reports and recommendations of the Commission on Human Rights, the Sub-Commission on Prevention of Discrimination and Protection of Minorities and relevant information from the organs of the General Assembly. The Committe should then establish, if necessary, an intersessional working group to consid r the situation and the reports provided by those sources. Under article 40 of the Covenant, the Committee should request States parties to submit sp cial reports on emerg ncy situations, deal with such reports as speedily as possible and inform all other competent United Nations bodies about its findings.

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(Mr. Ermacora)

20. Those suggestions were in line with the framework of the Covenant and the existing rules of procedure of the Committee and would not constitute interference in the internal affairs of States. Most important, such a procedure would provide a quick response to emergency situations and prevent possible cases of excès de pouvoir by States parties. The Committee had ample material to consider in relation to emergency situations and would be negligent of its duty if it considered those problems only in the abstract. Mr. Opsahl's proposal should be considered either by the Working Group or in the Committee itself in order to establish as soon as possible general rules for dealing with emergency situations.

21. Mr. DIEYE said that he shared the views expressed by Mr. Ermacora with regard to article 4, and particularly the view that United Nations bodies had not acted promptly in the past in cases of public emergency and derogation from provisions of the Covenant. Nevertheless, it should be kept in mind that such situations were extremely delicate. It would be somewhat superficial and hasty to say that the Committee had not acted promptly and effectively in the past. Each situation should be responded to speedily, but in a manner appropriate to its particular circumstances.

22. He was not in favour of establishing ad hoc bodies to deal with emergency situations, because that would not be in keeping with either the letter or the spirit of the Covenant. However, the Committee was empowered under article 40 to request reports and information from States parties. The action it took should be exclusively within the terms of article 40, paragraph 1, of which was sufficiently flexible and general to allow the Committee to request reports from States parties whenever an emergency situation arose. The Committee should consider the report of States parties in such circumstances and take the measures it considered most appropriate.

23. With regard to Mr. Opsahl's proposal, he could not support the idea of setting up an intersessional group. However, the Secretary-General should transmit to the Comittee information submitted to him concerning derogations from the provisions of the Covenant, so that the Committee could also ask the State party for a report. In order to be able to act speedily, the Committee should impose a time-limit for th State party to comply with its request. State parties should understand that it was a question of co-operating with the Committee and not of responding to a list of accusations. In short, the Committee should give more thought to the methods to be used under article 40 to enable it to act promptly in emergency situations.

24. Mr. HANGA said that the Committee was not competent to interpret article 4 in abstracto. If it required elucidation of that article - which he found to be quite clear - it should request the States parties, which met every two years, to provide the necessary guidance. It had been suggested that the Committee should establish ad hoc bodies; however, it should be borne in mind that the Committee was a legal, not a political, organ with a specific mandate, which it should not xceed.

25. A possibility of interpreting article 4 of the Covenant in concreto occurred wh n the Committe considered reports submitted by States parties. At that time,

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it had an opportunity to judge whether a country's laws were in conformity with the Covenant. The Committee should continue to apply its decision on the periodicity of reports by States parties and to act within the confines of its limited mandate.

26. Mr. TARNOPOLSKY said that he favoured Mr. Opsahl's proposal, since the Committee could not discharge its responsibilities under the Covenant if it did not consider major changes in a country's constitution or laws which had a bearing on the protection of human rights. There was no reason why the Committee could not look into the situation in a State at a time other than when its periodic report fell due. For reasons of fairness, the Committee had endeavoured to adopt procedures that were applicable at all times to all States. However, under article 40 (1) (b), States parties had undertaken to submit reports whenever the Committee so requested. Thus, the Committee had the power to request a report at any stage. Clearly, if a State party submitted a report after the declaration of a public emergency, the Committee would consider it incomplete if it did not contain information on derogations from the provisions of the Covenant. If a situation of normality prevailed in a country and no major changes occurred in the situation with regard to fundamental human rights and freedoms, there would obviously be no need for the Committee to require more frequent reports from the State party concerned. However, if after the Committee had considered a periodic report major changes occurred rendering large parts of a report invalid, there was no reason why it should have to wait five years before receiving information on the situation. If the concern was to ensure equal treatment of all States, he submitted that it was unfair that a State which had declared a public emergency shortly before its periodic report was due should be called on to give a more thorough accounting than another which declared a public emergency shortly after its report had been considered by the Committee. States might even exploit that situation by lifting a stat of emergency just before their reports were due and declaring it again shortly after.

27. Und r article 4 (3), a State party which availed itself of the right of derogation was required to inform the other States parties immediately through the intermediary of the Secretary-General. The Committee was already informed at the beginning of its sessions of new ratifications of the Covenant, and there was no reason why it could not also be informed at that time of any notifications of derogation from the Covenant. However, some States parties failed to notify the Secr tary-General. In such cases, there was nothing in the Covenant to prevent the Committee, if it had information from any source concerning derogations, from exercising its authority under article 40 to request a special report.

28. Mr. TOMUSCHAT said that he essentially agreed with the views of previous speakers on Mr. Opsahl's proposal. He based his position on two premises: first, that the Human Rights Committee was responsible for monitoring the enjoyment of human rights under the Covenant, and, second, that the Committee should focus special attention on states of emergency, since human rights were particularly threatened in such situations. The Committee's decision on the periodicity of reporting was simply not sufficient to enable it to deal effectively with em rgency situations. He fully agreed with Mr. Tarnopolsky that the Committee should request reports under article 40 (1) (b) in emergency situations. The form which such reports should take was not prescribed in the Covenant and there was no reason why

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the Committee could not, in a highly critical situation, invite a representative of the State party concerned to appear before it to report orally on the situation.

29. In any event, the procedure for requesting such reports must be formalized and be applied to all States parties without exceptions, so as to preclude any suspicion that the Committee was subjecting a given State party to special scrutiny. He also agreed with Mr. Ermacora that the Committee should receive relevant documentation produced by United Nations bodies, particularly reports pr pared for the Commission on Human Rights which were of special relevance to article 4 of the Covenant.

30. Mr. Opsahl's proposal could not, unfortunately, solve the problem of States which failed to notify the Secretary-General of derogations under article 4. However, adoption of the proposal would be a first step towards dealing with the situation, and the Committee should consider further measures for dealing with States parties which failed to live up to their obligations under article 4 (3).

31. Mr. GRAEFRATH said that the Committee had been faced with emergency situations in many countries which were parties to the Covenant and the reaction of the States parties concerned had varied widely. In the case of Chile, where the violation of rights which were not permitted to be suspended was well documented, the Government had failed to furnish specific information requested by the Committee. Before the entry into force of the Covenant a state of emergency had been declared in Uruguay, but the Committee had not been informed of it until 1979. From 1977 onwards the Committee had tried to obtain an initial report from that country and it had only recently been submitted, five years late. Moreover, it merely repeated the information concerning the state of emergency provided in the notification given in 1979. While the Committee had become aware through individual communications of serious violations of human rights in Uruguay, it had never requested the State party to provide a report under article 40 (1) (b). In the case of Colombia, it had been difficult to obtain any information regarding even the existence of a state of emergency; eventually, in 1980, the Committee had been notified that a state of emergency had existed since 1976, but no information had been provided on how it affected the human rights situation in the country. The Committee had not requested a special report in that case. As to El Salvador, the Committee had not only refrained from requesting a special report but had even been reluctant to send a strong reminder that the initial report was overdue.

32. There was a state of emergency in the United Kingdom in relation to Northern Ir land affairs. The Committee had been informed of the situation in 1976; that information had been repeated in the initial report of the United Kingdom in 1977, and in 1978 the Committee had been told that the derogations applied to the whole of the United Kingdom and would not be withdrawn until the emergency giving rise to them had come to an end. In 1979, when members of the Committee had expressed conc rn at the continued derogations in the United Kingdom from articles 9, 10, 12, 17, 21 and 22 of the Covenant, they had been told that the public emergency in the United Kingdom threatened the life of the nation. Thus, despite the full co-operation of the United Kingdom Government, the Committee had never really discussed how far human rights had been affected by the state of emergency and it had never thought of asking the United Kingdom Government for a sp cial report.

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33. As to the difficult situation in Lebanon, the Committee had never been informed whether a formally proclaimed state of emergency existed and to what extent rights under the Covenant were affected by the continuing destabilizing and aggressive acts from abroad directed against that unfortunate country. In connexion with developments in Iran, the Committee had considered whether it should establish a procedure for requesting special reports under article 40 (1) (b) when considerable constitutional changes occurred in a country, but it had never taken a decision.

34. Thus, until the present, there had not been a single case in which the Committee had asked for a special report because of the existence of a state of emergency. He wondered what changes had occurred prompting members of the Committee to urge the establishment of such a procedure now. If the proposal was adopted, the Committee might lay itself open to criticism that it was biased and be faced with suspicion and reluctance to co-operate on the part of States parties.

35. It was essential to understand the legal situation of a State party that availed itself of the right to derogate from certain obligations under the Covenant because of a state of emergency and the legal situation of the Committee in such cases. It was not for the Committee to define what its mandate was; it had to act within the framework of the Covenant. In conformity with general international law, article 4 of the Covenant specifically provided for the possibility of a State party's derogating from obligations under the Covenant in time of national emergency. The effect was to make certain obligations temporarily inoperative. Accordingly, measures taken in such situations could not be characterized as wrongful, and that position had been supported in a report prepared for the International Law Commission on circumstances precluding wrongfulness (A/CN.4/318/Add.1, para. 8). Such emergency measures could not be considered violations of the Covenant because, in accordance with article 4, certain obligations were temporarily non-existent. It was necessary to make it clear that the Committee had nothing to do with propaganda campaigns denouncing the proclamation of a state of emergency in a given country as a violation of human rights. The proclamation of a state of emergency might well be the last resort to protect human rights, and that was precisely what was envisaged in article 4.

36. Under general international law, it was the sovereign right of a State to declare a state of emergency when it considered that it had no other means of protecting itself against a grave and imminent peril. While the aim of article 4 was to restrict the declaration of a state of emergency to situations threatening the life of the nation, paragraph 1 of the article clearly affirmed that the State had exclusive competence to determine whether such a situation existed, and there was nothing in article 4 to indicate or justify the assumption that States parties to the Covenant had transferred any competence in such matters to other States parties, let alone to the Human Rights Committee. Article 4 did not stipulate that information from a State derogating from the Covenant was to be transmitted on to other States parties or the Committee for approval. If that had been the intention, clear provision to that effect would have been included in the Covenant, together with a sophisticated procedure for such an extraordinary supervisory function.

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37. While article 4 (1) provided that emergency measures derogating from obligations under the Covenant should be limited to the extent strictly required by the exigencies of the situation, there was nothing in article 4 to justify the interpretation that States had accepted any third party scrutiny in that regard. Such an interpretation was, in fact, contrary to the right of peoples to self-determination. There was no Government in the world that would be prepared to sign a treaty giving anyone else the right to decide whether the life of the nation was threatened. Thus, when France, in acceeding to the Covenant, had declared that the words "to the extent strictly required by the exigencies of the situation" could not limit the power of the President of the Republic to take such measures as required by circumstances, it was not making a reservation but rather setting forth a correct interpretation of the situation envisaged in article 4 (1). Indeed, the very fact that States parties had agreed not to avail themselves of a state of emergency in all situations where that was possible under general international law, but only in those which threatened the life of the nation, made it abundantly clear that it fell to each State party to determine whether the life of the nation was threatened by a public emergency, and, if so, how far it was necessary to go in countering that emergency. By reason of their sovereignty and of their direct and continuous contact with the pressing needs of the moment, the national authorities alone were in principle - so long as violations of international peace and security were not involved - in a position to decide on the existence of an emergency and the nature and scope of derogations necessary. Even so, article 4 (2) specified those obligations which could not be suspended under a state of emergency, and that was in accordance with article 60, paragraph 5, of the Vienna Convention on the Law of Treaties.

38. When the Committee considered its functions in relation to article 4, it should not be forgotten that, under article 4 (3), a State party availing itself of the right of derogation was required to inform not the Committee but the other States parties and that only notification, and not a report, was required. Nothing in article 4 or article 40 gave the Committee the power to rule on the status of a derogation or the existence of a public danger justifying a derogation, or to decide whether measures taken by a State party were strictly required by the exigencies of the situation. The Committee's role under article 4 was limited to ascertaining whether other States parties had been immediately informed, what rights were affected by the emergency measures and whether there had been derogation from the provisions mentioned in article 4 (2), and determining what were the reasons by which the State had been actuated and when the derogations had been terminated. Any attempt by the Committee to go further and assess the legitimacy of the state of emergency or whether the measures taken had been strictly necessary would be outside its mandate.

39. Reference had been made to the procedures and provisions of the European Convention on Human Rights and to the practice of the European Commission and European Court of Human Rights. That was a special international instrument and there was no justification for transferring the jurisprudence relating to it to the activities of the Human Rights Committee. Moreover, the European Commission had no right to examine the conformity of a notice of derogation with article 15 of the European Convention. It seemed from article 15, paragraph 3, that the power of the

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Commission to examine the conformity of a notice of derogation depended on whether a petition against the State concerned had been submitted under either article 24 or article 25 of the Convention.

The meeting rose at 1.10 p.m.