INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

CCPR

Distr.
GENERAL

CCPR/C/SR.139
2 May 1979
ENGLISH
ORIGINAL: SPANISH

HUMAN RIGHTS COMMITTEE

Sixth session

SUMMARY RECORD OF THE 139th MEETING

Held at Headquarters, New York,
on Thursday, 19 April 1979, at 10.30 a.m.

Chairman: Sir Vincent EVANS

CONTENTS

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

ADOPTION OF FURTHER RULES OF PROCEDURE OF THE COMMITTEE IN ACCORDANCE WITH ARTICLE 39 OF THE COVENANT (continued)

1. The CHAIRMAN suggested that the Committee should consider the proposals made by the Working Group on the rules of procedure relating to article 41 of the Covenant, contained in an unofficial working paper, and explained that in preparing that document the Working Group had tried to take into consideration the suggestions and comments made by members of the Committee; not all ideas were reflected in the proposals because different points of view had been expressed. The Working Group's main objective had been to retain the flexibility necessary to develop an efficient procedure, taking into account the time-limit established in article 41 for putting the machinery into effect, for deciding on the Committee's competence, for using its good offices and for preparing and adopting the relevant report.

2. The suggested procedure could be compared with that established for considering communications received in accordance with the Optional Protocol as it appeared in document CCPR/C/3.

3. The procedure envisaged in article 41 of the Covenant created certain complications. First, paragraph 1 specified that "Communications ... may be received and considered only if submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the Committee". Paragraph 2 of article 41, however, stipulated that "A declaration may be withdrawn at any time by notification to the Secretary-General", but went on to say that "Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article".

4. As far as the declarations were concerned, the Committee would have to take into account the precise wording used in each particular case. In the declaration made by New Zealand, for example, appearing in document CCPR/C/2/Add.2, the Government declared that it recognized the competence of the Committee to "receive and consider communications from another State Party which has similarly declared under article 41 its recognition of the Committee's competence in respect to itself except where the declaration by such a State Party was made less than 12 months prior to the submission by it of a complaint relating to New Zealand".

5. Article 41, paragraph 1, stated that "Communications received under this article shall be dealt with in accordance with the following procedure", and went on to indicate the various steps to be taken following receipt of the communications referred to in subparagraphs (a) and (b).

6. Another point to be remembered was that the Committee could not take up the matter until six months after the date on which the receiving State had received the initial communication and either State had then referred the matter to the Committee by means of the requisite notice. Consequently, the Committee could begin to act only after receiving notice, although that did not necessarily mean that receipt of the communication could not precede the notice. On that question,

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(The Chairman)

which was one of substance, the members of the Working Group had had differing opinions, as the wording in brackets at the end of rule 72, paragraph 2, of the proposals indicated.

6a. Rule 72, paragraph 1, of the proposals corresponded to rule 78, paragraph 1, of the rules of procedure, relating to the consideration of communications received under the Optional Protocol, which appeared in document CCPR/C/3.

7. Rule 72, paragraph 2, dealt with declarations by the States parties concerned: communications would not be received unless declarations by both States parties were in force and were applicable to the communication.

8. In rule 73 of the proposals, which was based on rule 79, of the rules of procedure, relating to the consideration of communications received under the Optional Protocol, it was provided that the Secretary-General should maintain a permanent register of all communications received by the Committee under article 41 of the Covenant. Rule 79 also provided for the circulation of lists of communications to Committee members, but that provision had been considered unnecessary in the present case since it was improbable that a large number of communications would be received under article 41 of the Covenant.

9. Rule 74, paragraph 1, of the proposals dealt with the procedure laid down in article 41, paragraph 1 (b), of the Covenant, and paragraph 2 specified the information which should be contained in or accompany the notice.

10. With regard to rule 74, paragraph 3, of the proposals, he observed that, since a period of one year was allowed for carrying out the procedure established in article 41 of the Covenant, it was essential that the information should be as comprehensive as possible; the Secretary-General could provide assistance in that connexion in order to save time before the Committee met.

11. Once notice had been given to the Committee, the next step would be to notify Committee members. Rule 75 of the proposals, which dealt with that question, contained two elements: first, the Secretary-General would inform members of the Committee without delay of any notice given under rule 74, and, second, he would transmit to them as soon as possible copies of the notice and relevant information or a summary thereof. In other words, it was made plain that the members of the Committee should be informed of the notice even before a copy of the notice and the information or summary were available for circulation. The decision whether to summarize the relevant information would be left to the Secretary-General.

12. With regard to the procedure for considering communications, the Working Group had tried to keep as close as possible to the wording of article 41 of the Covenant. Rule 76, paragraph 1, of the proposals derived from article 41, paragraph 1 (d). On the other hand, rule 76, paragraph 2, contained elements of the procedure for considering communications received under the Optional Protocol. It had been thought appropriate to include such a provision so that the information media could make use of authorized information, supplied by the Committee after consultations with the States parties concerned.

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(The Chairman)

13. Rule 77 A of the proposals dealt with the competence of the Committee and was based on article 41, paragraph 1 (c), of the Covenant. It used the phrase "in accordance with the provisions of the Covenant" instead of "in accordance with the provisions of article 41", since there was at least one element affecting the Committee's competence which was not contained in the provisions of article 41: the question of whether claims were related to any other obligation contracted by virtue of the Covenant. During the Committee's discussions it had been suggested that when that rule was drafted the idea that the Committee would consider the question of competence only if a State called the matter into question could be taken as a starting-point. He felt that the wording proposed by the Working Group might be better because of the express provision appearing in article 41, paragraph 1 (c), and because the Committee should be in a position to consider the question of competence proprio motu if, in a given case, serious doubts emerged. In that connexion he recalled the dispute between the United Kingdom and Iceland over fisheries, with respect to which the International Court of Justice had had to decide, despite Iceland's refusal to take part in the proceedings, whether it was competent to rule on the case. However, as a general rule the question of competence should not arise.

14. For those reasons, rule 77 B of the proposals began with the word "Unless" rather than "If", which would imply that a decision would be necessary in all cases.

15. The first sentence of rule 77 C derived in part from article 41, paragraph 1 (f), of the Covenant. It had been thought useful to include the word "observations" because rule 77 C would also apply to consideration of the Committee's competence, which would require not merely information but also the observations of the States concerned.

16. Rule 77 D, paragraph 1, was a reflection of article 41, paragraph 1 (g), of the Covenant. If States were to be able to exercise their right to be represented, they must of course know when the matter was to be considered; that question was dealt with in paragraph 2. Paragraph 3 of the rule was needed so that an orderly procedure could be followed with respect to oral and written submissions.

17. Rule 77 E of the proposals dealt with the submission of the Committee's report in accordance with article 41, paragraph 1 (h), of the Covenant. Paragraph 2 introduced an exception to the provision set out in rule 77 D, paragraph 1, because the Committee obviously should have the opportunity to consider the contents of the report of a State party without representatives of that State being present.

18. Rule 77 F of the proposals was concerned with the case in which the Committee could not reach a solution in accordance with article 41 of the Covenant and the parties agreed to apply the procedure prescribed in article 42. Since that provision described the procedure very fully, it was not necessary for the rules of procedure to be very detailed in that regard.

19. The proposals of the Working Group contained several apparent omissions. For example, there was no provision concerning the establishment of subsidiary bodies or working groups; it had seemed unnecessary, since at the current stage it could

(The Chairman)

not be foreseen what powers would have to be given to such subsidiary bodies as might be established in connexion with the examination of communications received under article 41 of the Covenant; besides, the matter was dealt with in article 62 of the provisional rules of procedure.

20. There had been two conflicting views within the Working Group on the words appearing in brackets at the end of rule 72, paragraph 2, of the proposals. In his view, the inclusion of those words would be incompatible with the procedure laid down in article 41 of the Covenant. The Committee could not take up the matter before receiving the notice referred to in article 41, paragraph 1 (b); nevertheless, it could be inferred from the text of that provision that the initial stage, during which the parties concerned tried to reach agreement without the Committee intervening, should take place after the communications had been received. It was important that the relevant provisions of the Committee's rules of procedure should be drafted so that it would be possible to receive communications before receipt of the notice referred to in article 41, paragraph 1 (b), of the Covenant. If the Committee could not receive the communication before it received such notice, it would not be competent to consider any communication received after a State party withdrew its declaration recognizing the Committee's competence, and a State party could withdraw its declaration six months from the date on which it received the first communication, before the Committee had been given notice. That would be a serious flaw in the Committee's procedure. It would be helpful, for the purposes of the Committee's work, if it were not made easy to withdraw a declaration before the Committee could make its good offices available. Moreover, there was a practical reason for not including the words within brackets; considering the time it would take to deal with a matter, including the preparation by the Secretariat of documents for use by the Committee, it would be desirable for the Committee or the Secretary-General to be made aware at the earliest possible time of the possibility that a matter might be submitted under article 41, paragraph 1 (b), of the Covenant.

21. Mr. LALLAH said he understood that the Working Group had had two main considerations in mind, namely the brevity of the twelve-month period and the desirability of preserving the unity of the procedure. Perhaps, then, the subtitles A (Submission of communications) and B (Examination of communications) should be deleted from the proposals, since in reality the process of examination would already have begun at the stage of submission of the communications.

22. With regard to the words in brackets in rule 72, paragraph 2, he felt that the rules of procedure should include provisions assuring States parties that the Committee would consider all the legal consequences of article 41 of the Covenant in dealing with a matter. For that reason, he would favour eliminating the brackets and transposing the text of rule 77 A of the proposals to the end of rule 72, paragraph 2, which could read: "A communication shall not be considered by the Committee unless: (a) the States parties concerned have made declarations under article 41, paragraph 1, of the Covenant which are in force and applicable to the communication; (b) the time-limit prescribed in paragraph 1 (b) has expired, and (c) the Committee has satisfied itself that it is competent to consider the matter in accordance with the provisions of the Covenant".

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(Mr. Lallah)

23. He was proposing that the word "considered" should be used in the first line of paragraph 2 in place of "received" in order to resolve a difficulty which stemmed from article 41 of the Covenant itself, the first paragraph of which read "Communications ... may be received and considered" and added that "no communication shall be received by the Committee if it concerns a State party which has not made such a declaration". The problem was that it could not be determined whether a State was or was not a party unless the communication had been received; it would be illogical not to receive the communication in certain cases, since the Committee should be concerned precisely with the question of receivability.

24. Although the Chairman had pointed out the difference between a communication and a notice, perhaps it would be appropriate to consider the communication itself as a notice; rule 74 would have to be amended slightly so that it would read "A communication by a State party under article 41 of the Covenant shall contain all the information necessary to enable the Committee to deal with the matter, including information regarding:", followed by subparagraphs 2 (b) to (g) of rule 74 of the proposals. The order of the rules could also be changed so that rule 74 would come first, followed by rules 73, 72, 77 C and 76. If subtitles A and B were eliminated, rule 77 A were incorporated into rule 72, paragraph 2, and rule 74 were slightly modified, the procedure would have greater unity.

25. The CHAIRMAN said he did not believe it would be possible to amend rule 74 of the proposals in the way Mr. Lallah suggested because article 41 of the Covenant drew a very clear distinction between the initial written communication and the notice addressed to the Committee six months later.

26. Mr. MOVCHAN said that, although the drafting of the Covenant and the establishment of the Committee were in keeping with the purposes and principles of the United Nations and the Committee worked closely with the United Nations Secretariat, it was important to bear in mind that the Committee was not a United Nations body and that it had not been established by the United Nations, but by the States parties to the Covenant. From the provisions of articles 36, 37, 40 and 41 of the Covenant concerning the function of the Secretary-General, it could be seen that that function was limited to providing the necessary services, convening the initial meeting of the Committee, transmitting copies of the Committee's reports to the specialized agencies concerned, and acting as a depositary for declarations made by States. He felt that the function assigned to the Secretary-General in the rules contained in the proposals were not in conformity with the provisions of the Covenant, to which the Committee must adhere. It would therefore be preferable to replace the words "The Secretary-General" in rule 72, paragraph 1, of the proposals by the words "the secretariat of the Committee". It would even be possible to omit that paragraph entirely and start the rule with the present paragraph 2. In that connexion, he agreed with Mr. Lallah and felt that rule 72 should combine three elements of the utmost importance for the work of the Committee: the requirements for declarations under article 41 (1), the six-month time-limit prescribed in paragraph 1 (b) and the Committee's competence to consider the question.

(Mr. Movchan)

27. He drew the attention of the members of the Committee to the fact that, according to article 41, paragraph 1 (b), of the Covenant, "If the matter is not adjusted to the satisfaction of both States parties concerned ..." "either State shall have the right to refer the matter to the Committee". Since it was a question of a right and not an obligation, the Committee might not receive notice, which would mean that it would be unable to consider the question. The provision under rule 77 A of the proposals was therefore not an optional but an obligatory factor, and must be included in the factors that determined when the Committee should consider a question.

28. The first requirement for codification was to set forth in detail the contents of a rule and avoid vague, general formulations, so as not to give rise to differing interpretations. Moreover, he fully shared the view expressed by the Chairman that the Committee should satisfy itself of its competence not only under article 41 of the Covenant but also under other articles.

29. As far as rule 74, paragraph 3, of the proposals was concerned, article 41, paragraph 1 (f), of the Covenant established very clearly that it was not the Secretary-General but the Committee that was to call upon the States parties concerned to supply any relevant information. It might be necessary to examine the function of the Secretary-General in connexion with the communications received under article 41.

30. Mr. OPSAHL observed that the terms used in the drafting of the Covenant were unfortunately not always very clear; perhaps that was due to the fact that those who had drafted it had not had to take into consideration all the aspects of the Committee's work. With regard to the word "communication", which appeared to be giving rise to disagreement in the Committee, he felt that it had been chosen as a neutral term and could not be considered out of context, since the communication actually constituted a claim that a State was not fulfilling its obligations, and it was therefore not merely a formal document, but the substantive question that the Committee had to consider under article 41 of the Covenant. As a starting point, the Committee should therefore take the view that the communication was a claim on which it must base its consideration. With regard to the sequence in which it was to consider the matter, the Committee must be free to adopt a rational procedure, but it must try to make very plain the meaning of terms such as receive, consider, communication or notice, and use them consistently.

31. The only controversial substantive aspect that the Committee must clarify in its rules of procedure related to the interpretation of the word "transmitted" in article 41 (2), since a State could withdraw its declaration, with the result that the Committee could not consider a communication transmitted subsequently to that withdrawal.

32. Moreover, he would prefer to delete the phrase in square brackets in rule 72, paragraph 2, of the proposals, since, as the Chairman had said, it was psychologically important for the rules not to give the impression that a State that had been informed of the content of a claim submitted in a written

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(Mr. Opsahl)

communication could promptly cease to recognize the Committee's competence to consider that claim. The requirement that an additional period of six months should elapse after a Government's attention had been brought to the content of a communication therefore should not prevent the Committee from considering the communication. Furthermore, as other speakers had pointed out, such a case would probably not arise very often and the Committee should not waste time in adopting its rules of procedure.

33. Mr. HANGA said that unlike the notice, for which provision was made only in article 41, paragraph 1 (b), the communication seemed to be far more important in the spirit of the Covenant, since it had to detail all the main elements of the claim. He therefore wondered whether the details listed in rule 74, paragraph 2, of the proposals should not be included in the communication rather than in the notice. As far as subparagraphs (c) and (d) of the same paragraph were concerned, he wondered whether it was not superfluous to mention the object of the claim, since it actually constituted one of its elements.

34. Concerning rule 74, paragraph 3, and rule 75 of the proposals, regarding the Secretary-General's function, he shared the view that it was the Committee which should ask the State party for clarification and inform its members of all notices given under rule 74.

35. As for the logical order in which the rules of procedure should be arranged, he thought that the present rule 77 should come before rule 76, which dealt with the consideration of communications, since rule 77 pertained to questions that should be resolved before proceeding to consider a matter.

36. Paragraph 2 of rule 76 of the proposals foresaw the possibility that the Committee, through the Secretary-General, might issue communiqués. The Chairman, however, had said that the rule was not based on any provision of the Covenant or of the Optional Protocol, but that it derived from the spirit of the Covenant and, in his judgement, to adopt such a provision would be to go beyond the provisions of the Covenant, which the Committee should scrupulously respect.

37. Mr. GRAEFRATH said he thought that the phrase in square brackets at the end of paragraph 2 of rule 72 of the proposals raised a basic question. According to the procedure prescribed in article 41 of the Covenant, there were two stages: the first was the communication sent by one State party to another State party. The State parties concerned then went on to try to reach an amicable adjustment. The Covenant made absolutely no provision for the Committee's participation in that stage, since if an adjustment was agreed upon, there would be no reason for it to become involved in the case or take note of it. If, however, the matter was not adjusted to the satisfaction of both State parties within six months after the receipt by the receiving State of the initial communication, either State would have the right to refer the matter to the Committee. Even though if a State party wanted the Committee to participate from the outset, nobody could stop it, the Committee should not put itself in a position which would compel it to participate unless it was requested to do so by the State party concerned. He therefore proposed that the phrase in square brackets should be included in the text of paragraph 2 of rule 72 of the proposals.

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(Mr. Graefrath)

38. Rule 77 A of the proposals should be deleted, since the Committee did not have to follow a specific procedure in deciding the admissibility or inadmissibility of a matter; the provisions of rule 77 B were sufficient. However, he would not press that point and would abide by the Committee's decision.

39. Mr. Movchan's comments on the Secretary-General's role were very much to the point, and he suggested that the rules of procedure should refer only to the "Secretariat".

40. Mr. MAZAUD (Representative of the Secretary-General), referring to the distinction which two members of the Committee had made between the Secretariat and the Secretary-General, recalled that, according to Article 97 of the United Nations Charter, the Secretary-General was a member of the Secretariat. Article 36 of the Covenant stipulated that the Secretary-General should provide the necessary staff and facilities for the effective performance of the functions of the Committee, and rule 23 of the rules of procedure established that "the secretariat of the Committee and of such subsidiary bodies as may be established by the Committee ... shall be provided by the Secretary-General". The "secretariat of the Committee" was thus an integral part of the Secretariat of the United Nations. It should also be pointed out that, although the provisional rules of procedure which the Committee had thus far adopted mentioned the secretariat with respect to technical functions, they referred specifically to the Secretary-General with respect to substantive questions. In any case, it was up to the Committee to determine the precise scope and modalities of the functions entrusted to the Secretary-General under the Covenant.

41. Mr. BOUZIRI noted that rule 75 provided that summaries were to be prepared of the information which the Secretary-General was to transmit to the Committee together with the notice given by a State party, and that judging from his experience in the matter, it was a dangerous procedure in that a summary might very well omit very important questions even when those preparing it were experts on the subject.

42. He would prefer the deletion of the phrase in square brackets in paragraph 2 of rule 72 of the proposals for the reasons given by the Chairman, and the replacement of the word "received" by the word "considered", as Mr. Lallah had proposed.

43. The problem relating to paragraph 3 of rule 74 of the proposals might be avoided by the formulation "The Committee, through the Secretary-General, ...".

44. Mr. TARNOPOLSKY observed that paragraph 1 of rule 72 of the proposals was similar to paragraph 1 of rule 78 of the Committee's rules of procedure. As the representative of the Secretary-General had indicated, the reference to the Secretary-General was perfectly legitimate according to article 36 of the Covenant.

45. He agreed that paragraph 2 of rule 72 of the proposals should indicate that no communication would be accepted unless both States parties concerned had made the declarations prescribed in article 41 (1) of the Covenant and the time-limit

(Mr. Tarnopolsky)

prescribed in paragraph 1 (b) had expired. On the other hand, he did not agree with Mr. Lallah's proposal that the present rule 77 A of the proposals should be included in rule 72, paragraph 2, since at that stage it was up to the Committee to determine if it should accept a communication and not if domestic remedies had been exhausted. For the same reason he opposed substituting the word "considered" for the word "received" in that paragraph. Besides, "received" was the word used in article 41 (1) of the Covenant.

46. He agreed with Mr. Lallah on rule 74 of the proposals. The notice referred to in that rule should be as explicit as possible. It should also be stipulated that the State party giving notice should also give notice to the other State party concerned in order to expedite the transaction in view of the short time at the Committee's disposal for submitting a report. Moreover, the clarification mentioned in paragraph 3 of rule 74 of the proposals should be requested not only from the State party giving notice but also from the other State party concerned.

47. Mr. MOVCHAN stated, with respect to paragraph 3 of rule 74 of the proposals, according to which "the Secretary-General, when necessary, may request clarification regarding any of the matters referred to in paragraph 2 of this rule from the State party which has given notice", that in his opinion the Secretary-General would under no circumstances accept that wording because it was not in accordance with the spirit of the Charter nor with the impartiality inherent in his office. Moreover, pursuant to subparagraph (f) of paragraph 1 of article 41 of the Covenant, it was up to the Committee and not to the Secretary-General to call upon the States parties concerned to supply any relevant information.

48. Mr. KOULISHEV proposed that the draft of paragraph 3 of rule 74 should be amended to read "When necessary, the Committee, through the Secretary-General, ...".

The meeting rose at 1.10 p.m.