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on civil and  
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HUMAN RIGHTS COMMITTEE

Ninety-third session

SUMMARY RECORD (PARTIAL)\* OF THE 2554th MEETING

Held at the Palais Wilson, Geneva,  
on Wednesday, 16 July 2008, at 10 a.m.

Chairperson: Mr. RIVAS POSADA

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\* No summary record was prepared for the rest of the meeting.

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The meeting was called to order at 10.10 a.m.

## GENERAL COMMENTS OF THE COMMITTEE

Draft general comment on the obligations of States parties under the Optional Protocol to the Covenant (CCPR/C/GC/33/CRP.2)

1. The CHAIRPERSON invited members to resume consideration of the draft general comment (CCPR/C/GC/33/CRP.2).

### Paragraphs 1 to 18

2. Mr. SHEARER, Rapporteur on the draft general comment, recalled that there had been a useful debate on the first 18 paragraphs of the draft general comment at the previous session. He had revised the text to reflect the suggestions on which there had been general agreement. Some members had argued that Committee procedures should be set out in greater detail. The Committee had subsequently agreed that the draft should focus on the obligations of States parties rather than procedure. He concurred with one member who had stated that the draft should be practical and avoid appearing professorial. The criticism might have been prompted by the extensive use of footnotes, which had been included to inform members of the sources of the ideas put forward. Following discussion of the draft, the Committee could decide how many footnotes, if any, should be retained. However, they were useful for the purpose of discussion.

3. He highlighted the revisions made to the previous text. The former paragraph 20 had been moved to paragraph 12 and an entirely new paragraph 20, which emphasized the consistent wording adopted by the Committee in issuing its views, had been inserted. The last sentence of paragraph 2 stated that a majority, rather than a specific percentage, of States parties had also become parties to the Optional Protocol. Paragraphs 3, 4 and 5 had been revised to emphasize the obligations of States parties under the Optional Protocol rather than procedures. He drew particular attention to the new paragraphs 10 bis and 10 ter, which would subsequently be renumbered. Paragraph 12 had been revised in the light of comments by members. The word “fully” had been added to the clause “the function of the Human Rights Committee under [the Optional Protocol] is not fully that of a judicial body”. The two subsequent sentences had also been added. Paragraph 13 contained the correct Spanish term for the Committee’s views: “dictámenes”. The first sentence of paragraph 15 contained significant changes in wording which went to the heart of the Committee’s work. In particular, it stated that the views of the Committee under the Optional Protocol represented “an authoritative determination of a body established under the Covenant as an authentic interpreter of that instrument”. The wording drew on the work of Derek Bowett on international institutions, among others.

4. Mr. LALLAH said that he had no particular problems with the changes made to the draft as they reflected the discussion at the previous session. He wished to clarify, however, what he had meant by the need to avoid taking a professorial approach. The frequent references in the text to scholarly works suggested that the Committee was taking an academic approach. The Committee should rely on its own work when it adopted general comments. As his own

approach tended to be that of a judge, he relied on past decisions of the courts rather than academic work. His reference to professorial work was not intended to be pejorative but rather to underscore a difference in approach. Indeed, the difference in the two approaches was encapsulated in the new paragraph 15.

5. Sir Nigel RODLEY, referring to the point raised by Mr. Lallah, said that he was comfortable with the language in paragraph 15 as it avoided the problem of the Committee seeming to be too self-congratulatory. Nevertheless, Mr. Lallah might be right in saying that the Committee should simply assert its views, which would involve making some fine adjustments to the wording of the paragraph.

6. Mr. AMOR said the assertion in paragraph 10 that a State did itself a disservice by failing to respond or responding inadequately to a communication seemed paternalistic and should be reworded. He suggested deleting the words “from all the circumstances” from the last sentence of that paragraph. Paragraphs 10 bis and ter raised fundamental issues which would require further discussion. Paragraph 15 could be clarified and strengthened by adding that, once a Committee expressed a view on a violation of the Covenant, that view would have the same authority as a matter that had been adjudicated by a competent court.

7. Ms. CHANET said that while she understood Mr. Lallah’s concern to refer to the Committee’s jurisprudence in documents such as the general comment on article 14 of the Covenant, the current situation was different. The Committee must rely on doctrine in the present draft general comment, which was what Mr. Shearer had done in a very comprehensive fashion. She concurred with Mr. Amor on the need to strengthen the notion of the authority of the Committee’s views. Furthermore, the present draft referred not only to academic work but also to the views of the Committee relevant to the Optional Protocol. It also referred later in the text to the decisions of national courts, which she found of particular interest.

8. Ms. WEDGWOOD said that the last sentence of paragraph 3 did not specify which States parties were referred to. There were States parties which were immediately bound by the Optional Protocol and obligations under the Covenant which extended to all States parties, regardless of whether they were parties to the Optional Protocol. She therefore suggested adding a specific reference to States parties which took part in the communications procedure. She also suggested rewording paragraph 5, as persons who addressed a communication to the Committee might still be punished, although not for transmitting a communication. Clarification of paragraphs 10 bis and ter was also needed to avoid giving the impression that States parties were obliged to act as law clerks in order to answer questions for the Committee if they allowed a complaint to go forward. Such an approach would only make the Committee’s work more cumbersome. She therefore suggested adding the words “if the State party chooses to rely on that circumstance” to the last sentence of paragraph 10 bis. As “judicial” was a very broad term, the use of “judicial body” in paragraph 12 should be avoided. In some respects, the Committee did not follow strict judicial methods of operation. Turning to paragraph 15, she enquired whether the reference to the Committee as “the authentic interpreter” of the Optional Protocol had been intended to convey an exclusive claim, because many States parties had not acceded to the Optional Protocol.

9. Because the general comment would be relied on by domestic judges, there was a need for the Committee to indicate that some States parties took dissenting views. Paragraph 18 made the exaggerated claim that the great majority of States parties to the Optional Protocol had agreed to follow the Committee's views in practice. For the sake of transparency, the paragraph should be revised to reflect the fact that not all States did so.

10. Mr. O'FLAHERTY proposed that in paragraph 5 the words "A clear consequence ... is that" should be deleted. In paragraphs 6, 10 bis and 10 ter, the term "obligations" should be removed and wording should be found to the effect that the onus fell on States parties to take certain measures. He suggested that paragraph 11 should be deleted, since it did not add any substance. The first sentence of paragraph 12 should also be deleted to avoid introducing the problematic notion of the fully or partly judicial nature of the body. The final sentence of paragraph 12 should be amended to ensure that it referred clearly to the Committee's work specifically relating to individual communications. The last sentence should make it clear that the work of the Committee in relation to individual communications was referred to. He shared Ms. Wedgwood's concerns about paragraph 18 and would therefore prefer to delete that paragraph.

11. Mr. SÁNCHEZ CERRO said paragraph 5 should be amended to indicate that States parties were obliged not to punish any person pending a decision by the Committee on his or her communication. In paragraph 7, the term "author" should be replaced by "actor" and the term "petition" was more appropriate than "communication". Care should be taken when considering references to article 5 of the Optional Protocol, since the Spanish version of that article differed quite considerably from the English and French versions in letter and in spirit.

12. Mr. IWASAWA said that despite the great deal of jurisprudence accumulated by the Committee on many aspects of communications, the present general comment was entitled "Obligations of States parties"; it would therefore be wise to delete references to procedural matters. He agreed with Ms. Wedgwood's point on the difference in membership between the Covenant and the Optional Protocol and said that care must be taken to distinguish between the two. In paragraph 15, he would prefer "authentic" to be replaced by "authoritative".

13. Ms. MAJODINA said she thought it would be prudent to attach a footnote to paragraph 4 explaining the Committee's definition of the term "individuals" in order to ensure clarity for the reader. On paragraph 5 she said that the Committee had considered communications whose authors had been severely hindered by the State party concerned in their attempts to access the Committee. She requested that stronger language should be used to emphasize that particular problem, which occurred regularly in certain parts of the world.

14. Ms. CHANET pointed out the draft general comment pertained only to States parties to the Optional Protocol and there should therefore be no confusion with States that were only parties to the Covenant. She agreed with Ms. Majodina on paragraph 5 regarding the need to emphasize States parties' obligation not to hinder access to the Committee. Responding to Mr. Sánchez Cerro, she said that the punishment of persons who had addressed a communication to the Committee did not raise the question of interim measures, but rather action to prevent such punishment. A case in point was Chisekedi v. Zaire, in which the author's property had been searched and all Committee-related documents seized and declared subversive. That case could be mentioned explicitly, to substantiate that point and avoid any misinterpretation.

15. The use of the term “obligation” in paragraph 10 bis was inappropriate, since the Optional Protocol did not contain an obligation for States to invoke the fact that a communication related to a matter that had arisen before the Protocol’s entry into force. The paragraph should be redrafted to the effect that States should invoke that circumstance, and if they failed to do so the circumstance would not be taken into account by the Committee.

16. In paragraph 6, the obligation to inform authors who were deemed not to have exhausted all domestic remedies was not an obligation for States parties, but rather for the Committee. The paragraph should be amended accordingly. The State party should inform the Committee what domestic remedies were available.

17. On the question whether the majority of States accepted the Committee’s decisions, Mr. Shearer, in his capacity as Rapporteur for the Follow-up of Views, could find out exactly how many States had accepted and implemented the Committee’s decisions, and amend paragraph 18 if necessary.

18. Ms. MOTOC agreed with Ms. Majodina and Ms. Chanet on the need to emphasize States parties’ obligation not to restrict the right of individuals to address communications to the Committee. She felt the reference to the “quasi-judicial” character of the Committee in paragraph 12 should be retained. She requested clarification on the understanding of the terms “authoritative” and “authentic” used in paragraph 15.

19. Mr. JOHNSON LÓPEZ agreed with Mr. Sánchez Cerro that the term “author” should be replaced by “actor” and that “communication” be replaced by “petition” or “complaint”.

20. Mr. O’FLAHERTY said he agreed with Ms. MOTOC about paragraph 12 but had asked to delete the first sentence, not the entire paragraph, as the last two sentences were sufficient.

21. Mr. LALLAH, referring to the comments of Mr. Sanchez-Cerro and Mr. Johnson López on the use of the words “communication” and “author”, proposed that the terms used in the Optional Protocol should be retained. With reference to Ms. Chanet’s comment concerning use of the word “punish” in paragraph 5, he proposed “take retaliatory measures” as an alternative.

22. As to Mr. O’Flaherty’s suggestion concerning paragraph 12, he noted that although the Committee was not a court, its conclusions in determining a matter under the Optional Protocol allowed no appeal.

23. Ms. MOTOC explained that she agreed with Mr. O’Flaherty that the first sentence of paragraph 12 was redundant. The points raised by Mr. Sánchez Cerro and Mr. Johnson López could be answered by referring to the terminology used in the Spanish version of the Optional Protocol.

24. The CHAIRPERSON asked the Rapporteur to clarify whether he proposed to delete the first sentence of paragraph 6 and, in addition, whether the words in brackets in paragraph 10 ter should be between commas instead.

25. Mr. SHEARER said he had not suggested deleting paragraph 6 but had proposed reworking it to make it clear that the onus was on the State party. There was a need to describe the basic procedure under the Optional Protocol in order to give the reader sufficient context. Commas would indeed be preferable to brackets in paragraph 10 ter.

26. He had noticed some obvious errors in translation, which would be resolved.

27. With respect to paragraph 5, a better word than “punish” could certainly be found. The fact that in certain countries it was reportedly considered unpatriotic to approach the Committee should be mentioned.

28. The discrepancy between the different language versions had been acknowledged but was beyond the scope of the present discussion. The term “author” did not appear in the Optional Protocol, which referred to “individuals”. The use of the word “author” to describe a person coming before the Committee with a complaint was well established.

29. The phrase “the authentic interpreter” had attracted comment from members. His use of the definite article had sought to emphasize the primacy of the Committee; that idea needed to be expressed, as it reinforced the Committee’s conclusions and the respect of parties for the cases before it. While it was necessary to stop short of claiming that the Committee’s decisions were binding, it was important to emphasize that they were not merely recommendations.

30. The duty to respect the Committee’s views applied only to the State party involved in the case; those views should have persuasive effect and should not be watered down.

31. Mr. AMOR proposed that the Committee should review in greater detail the notion of authority. In addition, he emphasized his reservations regarding paragraphs 10 bis and ter, which, as they stood, were not sufficiently substantiated.

32. Sir Nigel RODLEY pointed out that the term “author” of a communication had originally been used in Economic and Social Council resolution 1503 (XLVIII) on procedure for dealing with communications relating to violations of human rights. The communications unit established had at that time used the term “author” and had continued to use it subsequently when dealing with communications under the Optional Protocol.

33. Mr. SÁNCHEZ CERRO pointed out that in the Spanish text of article 5 of the Optional Protocol the past tense was used, which could have a bearing on admissibility. He asked when the Committee would address that issue.

34. Ms. WEDGWOOD noted that countries such as Australia and Canada, which were usually eager to comply with their obligations under international treaties, had openly disagreed with the Committee’s views under the Optional Protocol, which indicated that they did not regard them as authoritative.

The meeting was suspended at 11.45 a.m. and resumed at 12.20 p.m.

Paragraph 19

35. The CHAIRPERSON invited comments on paragraph 19.
36. Mr. AMOR considered that the invocation of moral authority in the paragraph weakened the reasoning of the Committee and proposed that the paragraph should be deleted.
37. Ms. CHANET, Mr. O'FLAHERTY and Mr. BHAGWATI agreed.
38. Ms. WEDGWOOD said that, in her view, the invocation of moral authority was valid and the idea could be retained, although perhaps not standing alone.
39. The CHAIRPERSON confirmed that the Rapporteur would take account of the majority preference to delete the paragraph but would consider reworking the idea for inclusion in another paragraph.

Paragraph 20

40. Mr. SHEARER pointed out that paragraph 20, which set out the standard formula used in nearly all communications in cases where a violation was found, had been added to the draft considered at the previous session.
41. Mr. AMOR, referring to the penultimate sentence, pointed out that the deadline for receiving information from States parties about measures taken to give effect to the Committee's views had been extended from 90 to 180 days.
42. Sir Nigel RODLEY proposed omitting the last two sentences, since the really important points were made in the first two sentences of the quotation.
43. Mr. LALLAH noted that the paragraph referred only to cases in which a violation had been found. There were also many cases in which no violation was found or a communication was deemed inadmissible. The implication that violations were found in all cases sent the wrong message.
44. Ms. MAJODINA, referring to the statement that the State party had undertaken to ensure the rights recognized in the Covenant "to all individuals within its territory or subject to its jurisdiction", drew attention to the fact that article 1 of the Optional Protocol referred only to individuals "subject to its jurisdiction".
45. Mr. SHEARER said that he was aware of the inconsistency; he had quoted the Committee's long-standing wording in cases where a violation had been found. He nevertheless agreed that the question ought to be discussed at some point.
46. He agreed to delete the last two sentences, which would solve the problem of the incorrect deadline.
47. A reference to cases that were declared inadmissible or where no violation was found could perhaps be inserted elsewhere, but the emphasis in paragraph 20 was on the legal quality of the Committee's views and its consistent jurisprudence.

48. Mr. LALLAH proposed in that case replacing “consistent wording” by “consistent analysis”.

49. Sir Nigel RODLEY said that he would be reluctant to use the word “analysis” because the Committee had sometimes been criticized by legal commentators for its lack of analysis.

50. He was in favour of making it clear that the Committee took a juridical view of the outcome of its views in cases where a violation was found. No consistent wording existed for other cases.

51. Mr. LALLAH proposed replacing the words “legal quality” by “legal character”.

52. Mr. SHEARER agreed to that proposal.

#### Paragraph 21

53. Ms. CHANET said she did not agree that the Committee’s follow-up procedures illustrated its quasi-judicial character. No follow-up was required in the case of judicial procedures. She was also opposed to the statement that the Committee had no direct means of enforcing its views. She therefore proposed replacing the first two sentences by the following: “On the basis of these views, the Committee has decided, pursuant to its rules of procedure, to appoint a Special Rapporteur for the Follow-up of Views.”

54. Mr. AMOR expressed support for Ms. Chanet’s proposal. However, he offered as alternative wording: “Another aspect of the Committee’s work illustrates its legal character even more clearly. The rules of procedure, taking due account of the scope of the Optional Protocol, have established the functions of a Special Rapporteur for the Follow-up of Views.”

55. Mr. O’FLAHERTY said that he broadly agreed with the points made by the two previous speakers. In his view, the Committee’s quasi-judicial character had already been established. There was no need to belabour the point.

56. The reference to follow-up mechanisms introduced a procedural discussion, which was, in his view, quite acceptable. However, he proposed moving the comment on the same subject in paragraph 24 to paragraph 21.

57. Mr. LALLAH expressed support for Mr. Amor’s proposed first sentence, which ensured a smooth transition from paragraph 20.

58. Mr. SHEARER said that he would delete the first two sentences and replace them by wording along the lines proposed by Ms. Chanet and Mr. Amor.

59. Mr. Khalil had drawn his attention to the need to replace the reference to “communications” by the Special Rapporteur in the third sentence by some other word such as “representations” in order to avoid confusion.

60. He also agreed to move some of the material from paragraph 24 to paragraph 21.



61. Lastly, he felt that a distinction should be made between States parties that failed to give effect to the Committee's views while remaining silent and those that contested its views and claimed that they were non-binding. He submitted that silence could be regarded as acquiescence in the fact that they were binding and justified the statement in the last sentence of the paragraph that the follow-up procedure had led to acceptance and implementation of the Committee's views.

#### Paragraph 22

62. Mr. AMOR pointed out that the Committee's views were published on a large number of websites and not just on that of the Office of the High Commissioner for Human Rights. He proposed the following alternative wording for the paragraph: "It should be emphasized that failure by a State party to implement the views of the Committee constitutes a breach of the obligations which it has assumed. This breach becomes a matter of public record, particularly through the Committee's annual reports to the General Assembly."

63. Mr. O'FLAHERTY agreed with Mr. Amor. A distinction should be made between the formal act of publication and the places in which the published material could be found.

64. He proposed deleting the last sentence regarding potential criticism of a State party, which was speculative and went beyond the realm of legal analysis.

65. Mr. SHEARER said that he would reflect the points made by both speakers in the next version of the draft.

#### Paragraph 23

66. Mr. SÁNCHEZ CERRO proposed making it clear in the last sentence that a State party's rejection of the Committee's views was contrary to procedural due process and constituted a breach of its obligations, since the State had recognized the Committee's competence in article 1 of the Optional Protocol.

67. Mr. AMOR proposed incorporating the substance of the last sentence in the first sentence, which would then read: "Some States parties, to which the views of the Committee have been transmitted in relation to communications concerning them, have failed to take those views into consideration, in whole or in part, notwithstanding the obligations they have assumed."

68. Mr. O'FLAHERTY proposed omitting the reference to some States parties. It would be preferable simply to state the rule, namely that it was not permissible for a State party to attempt to reopen a matter that it had not previously argued, since that was contrary to procedural due process and constituted a breach of its obligations. The same approach should be adopted in paragraph 24. In his view, references to uncooperative States weakened the Committee's argument and diminished its standing. It should simply exercise its authority and state the rule.

The meeting rose at 1 p.m.