



## International Covenant on Civil and Political Rights

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### Human Rights Committee 100th session

#### Summary record (partial)\* of the 2770th meeting\*\*

Held at the Palais Wilson, Geneva, on Thursday, 28 October 2010, at 3 p.m.

*Chairperson:* Mr. Iwasawa

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- \* No summary record was prepared for the rest of the meeting.
  - \*\* No summary records were issued for the 2766th to 2769th meetings.

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*The meeting was called to order at 3.20 p.m.*

### **Organizational and other matters**

#### *Proposal on undue delay in the submission of communications*

1. **The Chairperson** said that the Committee had recently received a considerable number of communications that had been submitted several years after the exhaustion of domestic remedies. Although articles 2, 3 and 5 of the first Optional Protocol to the Covenant laid down conditions for the admissibility of a communication, there was no explicit provision governing delays in submission. Other treaties contained such provisions, for instance the International Convention on the Elimination of All Forms of Racial Discrimination imposed a six-month time limit and the recently adopted Optional Protocol to the Covenant on Economic, Social and Cultural Rights imposed a one-year limit.

2. The Committee had applied article 3 of the first Optional Protocol concerning abuse of the right of submission to communications submitted with undue delay and had found them inadmissible. As there was no evidence in the drafting history (*travaux préparatoires*) of the Optional Protocol of an intention to permit consideration of communications submitted with undue delay, the Committee was fully entitled to find them inadmissible. However, in view of the large number of such cases currently before the Committee, it was felt that the rules of procedure (CCPR/C/3/Rev.8) should be amended to ensure transparency and legal certainty and to give complainants and States parties a clearer idea of what to expect.

3. Rule 96 (c) dealt with abuse of the right of submission but made no reference to delays. Proposals for amendment had been submitted by a former Committee member, Mr. Shearer, and by Sir Nigel Rodley, Mr. Amor, Mr. Thelin, Mr. Salvioli and Mr. Rivas Posada. In the light of the discussion at the previous session, he had drafted his own proposed amendment in consultation with Committee members who had submitted proposals and with the other members present at the current session. It was based on the Committee's jurisprudence and codified its customary practice.

4. He read out the following proposed text for rule 96 (c):

“That the communication does not constitute an abuse of the right of submission. An abuse of the right of submission is not, in principle, a basis of a decision of inadmissibility on grounds of delay in submission. However, a communication is deemed to constitute an abuse of the right of submission when it is submitted after five years from the exhaustion of domestic remedies by the author of the communication or, where applicable, after three years from the conclusion of another procedure of international investigation or settlement, unless there are special circumstances justifying the delay.”

He invited members of the Committee to comment on the proposed text.

5. **Mr. O'Flaherty** said that the proposed amendment provided a helpful basis for the discussion. Speaking also on behalf of Ms. Keller and Ms. Majodina, he proposed inserting at the end of draft subparagraph (c) a list of the factors that would be taken into account in determining whether exceptional circumstances existed. A draft submitted by Sir Nigel Rodley the previous year contained five subparagraphs listing such factors.

6. In response to a question from **Mr. Rivas Posada**, the **Chairperson** said that he expected the discussion to focus on his proposal, since it had been agreed at the previous session that a compromise text should be drafted in the light of the other proposals.

7. **Mr. Amor** said that, although he had strong reservations regarding the Chairperson's proposal and was still convinced that special circumstances should be

considered on a case-by-case basis, he did not rule out the possibility of supporting the text provided that some amendments were introduced. He emphasized that the rule would be applicable in practice only if it secured a consensus in the Committee. Otherwise it was likely to prove divisive. If members were unwilling to compromise and a consensus was unattainable, the status quo, however unsatisfactory, should be maintained.

8. **Sir Nigel Rodley** said that it was important to reach a consensus on the issue since the current situation was untenable. The practice of adopting inconsistent decisions on a case-by-case basis reflected badly on the Committee and was confusing for those who wished to take advantage of the procedure under the Optional Protocol.

9. The proposed draft codified the Committee's procedure but reduced the time threshold used to define an abuse of the right of submission from over seven years to just five. Although he found the shorter time limit difficult to accept, he was prepared to compromise, if necessary, in order to reach a consensus. The Chairperson's proposal should serve as the basis for the Committee's discussion. Amendments could be proposed, but if members were unwilling to compromise for the greater good, the issue should be set aside, which would be unfortunate.

10. **Mr. Fathalla** said that the Chairperson had faithfully followed the procedure agreed at the previous session, namely the drafting of a compromise text based on consultations with the Committee members who had submitted proposals. Any text that amended the Committee's rules of procedure should be adopted by consensus in order to avoid subsequent confusion. Consensus did not imply that all members wholeheartedly approved the text; it simply meant that they were prepared to go along with it.

11. **Mr. Thelin** said that he endorsed Mr. Fathalla's definition of consensus. While he was not entirely happy with the Chairperson's proposal, particularly with the addition proposed by Mr. O'Flaherty, Ms. Keller and Ms. Majodina, he and Mr. Salvioli had decided to withdraw their proposal as a contribution to the process of reaching a consensus. He encouraged other members to follow their example.

12. **Ms. Chanet** said that she would not oppose a consensus. However, she wondered whether a text that was approved by the present quorum was entirely acceptable, since the Committee's membership would change at the next session. Members' positions on the issue had so far been extremely divided and those who had submitted proposals were now being asked to withdraw them in the interests of reaching a consensus. She wished to know, for instance, whether Sir Nigel Rodley was prepared to withdraw his proposal and whether Mr. O'Flaherty, Ms. Keller and Ms. Majodina were prepared to adopt the Chairperson's proposal without inserting the additional subparagraphs from Sir Nigel's text.

13. **Mr. Fathalla** said that there was a difference between unanimity and consensus. The Chairperson's proposal would certainly not be adopted unanimously.

14. Very few new members would be joining the Committee at the next session. As newcomers, they would need several sessions to form a strong opinion on the issue under discussion, so that a further year or two would be wasted.

15. Citing common United Nations practice, he said that there was no need to withdraw the previous proposals. The text finally adopted was the only one that remained valid.

16. **Mr. Rivas Posada** said that if the Committee agreed to discuss only one proposal with possible amendments, the implication was that it had set aside the previous proposals. The authors of those proposals were not required to withdraw them, despite the initiative to that effect taken by Mr. Thelin and Mr. Salvioli. The previous proposals were based on a variety of arguments that had not been properly discussed and the authors should be given the opportunity to defend them.

17. **Sir Nigel Rodley** said that he agreed with Mr. Rivas Posada. He had drafted his proposal at the request of a former Bureau of the Committee, but now agreed that the Chairperson's proposal should serve as the basis for discussion. Nobody had the right to demand that he take any further action.

18. Everyone present would be a member of the Committee during the next biennium. There would only be three new members and he supported Mr. Fathalla's comment in that regard.

19. **Ms. Chanet** said that in the French version of the Chairperson's proposal there was an implicit contradiction between the first and third sentences. That could be corrected if the words "*est réputée*" were replaced by "*peut*" or if the first sentence was deleted.

20. **Sir Nigel Rodley** proposed that the word "*réputée*" should be replaced by "*présumée*".

21. **Mr. Amor** said that there did not seem to be sufficient justification for retaining the second sentence as it appeared to be incompatible with article 3 of the first Optional Protocol, which stated that the Committee was required to consider inadmissible any communication under the Protocol that it considered to be an abuse of the right of submission of such communications. He therefore suggested its deletion.

22. **The Chairperson** suggested that, because the second sentence reflected a compromise between the differing views of Committee members, it should be retained.

23. **Mr. Amor** said that, if the Committee wished to accept the Chairperson's proposal as a compromise, he would not raise any further objection. On the other hand, if it agreed that the text could be further amended through additions or clarifications, then he would maintain his view that the second sentence should be deleted.

24. **The Chairperson** said that the next question was whether the Committee should adopt Mr. O'Flaherty's suggestion to add to the text the list of factors, based on Sir Nigel's proposal, that the Committee should take into account in determining whether special circumstances justified a delay in submission of a communication. In his own view, the addition of those factors would make subparagraph (c) too long. He was therefore reluctant to incorporate them.

25. **Mr. O'Flaherty** said that, while he could understand the Chairperson's concern at the length of rule 96 (c), it was nevertheless important for the last sentence explicitly to indicate what lay behind the Committee's provision for special circumstances. Moreover, as amended by the Chairperson's proposal, the rule suggested that the burden lay on the complainant to fully justify the delay, whereas it ought to be up to the Committee, when making its determination as to whether a communication constituted an abuse of the right of submission, to identify the issues in a particular State party to which such a delay might be attributable. While the list could certainly stand being abbreviated, that should not be done without taking those points into account.

26. **Mr. Fathalla** said that the current wording of the second sentence of the Chairperson's proposal seemed to suggest that the Committee sometimes tolerated abuse of the right of submission.

27. **The Chairperson** said that the second and third sentences must be read together.

28. **Mr. Rivas Posada** asked whether the list of factors in Sir Nigel's proposed amendment was intended to be exhaustive or non-exhaustive. If it was intended to be an exhaustive list of special circumstances, then it seemed illogical, in subparagraph (e) of that proposal, to imply that the Committee was open to any other convincing explanation that might be given by the author for an excessive delay.

29. **Mr. Thelin** said that the Committee was attempting to codify its existing jurisprudence in order to create more legal certainty. Some of the confusion created by the wording of the second sentence of the Chairperson's proposal could be eliminated if the words "*ratione temporis*" were inserted after "inadmissibility". Their insertion would also address the problem of the conflict of that sentence with article 3 of the first Optional Protocol.

30. He had understood the list contained in Sir Nigel's proposal to be an indicative, not exhaustive list. However, there was a problem with incorporating subparagraph (c) of Sir Nigel's list, since it introduced a time limit of its own and would contradict the text proposed by the Chairperson.

31. He would encourage the proponents of Sir Nigel's list to shorten it while ensuring that it captured the essence of the five proposed points.

32. **The Chairperson** agreed with the suggestion to insert the words "*ratione temporis*", which had been used by Sir Nigel in his proposal.

33. **Sir Nigel Rodley** said that the wording of the Chairperson's proposal reflected a careful compromise and balance that would be undermined by the deletion of the second sentence.

34. **Mr. Amor** said that he was opposed to the wording of the Chairperson's proposal, particularly that of the second sentence. However, he would be willing to endorse it provided that the last sentence was maintained and that a spirit of compromise prevailed in the consideration of the text in general. He recalled that consensus was not the same as unanimity; rather, it was the absence of objection.

35. **Ms. Chanet** said that, in accepting the Chairperson's proposal as the basis for discussion, she had made concessions on a number of issues. Nevertheless, that proposal should not be changed beyond recognition. In her view, the Committee's attempts to reach consensus should be based on the Chairperson's proposal with the amendments proposed by Mr. O'Flaherty.

36. As she was the Committee's Special Rapporteur on new communications and interim measures, she pointed out that, if a consensus was reached on amending rule 96 (c), it would also be necessary to discuss the transition period before the amendment would enter into force.

37. **Mr. Thelin** said that one way out of the impasse might be to cite in a footnote particular cases that exemplified the special circumstances described in Sir Nigel's list. Such an approach would serve two purposes: it would make the text of rule 96 (c) much shorter and would safeguard the essence of the Committee's jurisprudence.

38. **The Chairperson** suggested that the additional text proposed for inclusion at the end of rule 96 (c) could form part of a separate understanding of the rule, rather than be incorporated in the rule itself.

39. **Mr. O'Flaherty** proposed that the entire content of the text he had proposed could be reduced to a single sentence: "Such special circumstances may include, but are not limited to, situations in which the author had no legal representation at the time of exhaustion of domestic remedies; circumstances in which the State party had impeded knowledge of or access to the Committee; or other situations with regard to which the author makes a convincing explanation for excessive delay." Such a sentence would also eliminate the need for a footnote.

40. **Ms. Majodina** said that she supported the text proposed by Mr. O'Flaherty, but was also of the view that it should be included as part of a footnote that covered the Committee's case law.

41. **The Chairperson** suggested that the factors proposed by Mr. O’Flaherty on the basis of Sir Nigel’s proposal should be formulated in a separate paper or understanding rather than included as part of the rule, even in a footnote.
42. **Mr. O’Flaherty** said that the Committee’s acceptance of the Chairperson’s proposal as the basis for its discussion did not imply its acceptance of the totality of his proposal.
43. **The Chairperson** said that he was not excluding any amendment, but was expressing his wish to see Mr. O’Flaherty’s proposal included either in a footnote or as a separate understanding rather than as part of the text.
44. **Mr. O’Flaherty** said he was proposing an amendment to the text, not a separate paper.
45. **Mr. Amor** said that he was not in favour of spelling out the special circumstances referred to in the Chairperson’s proposal. Such circumstances could not be specified in advance; they could only be determined following the Committee’s evaluation of a particular case. Specifying them in advance could create a host of problems, and so he was opposed to their inclusion, even in a footnote.
46. **Mr. Fathalla** said that the aim of the meeting was to define the abuse of the right of submission and the Chairperson’s proposed compromise text had largely achieved that aim. He agreed with the proposed addition of “*ratione temporis*” and the preparation of a separate list of examples of special circumstances, which could be included in the official record of the meeting.
47. **Mr. Lallah** proposed that in the third sentence “is deemed to”, which implied a legal obligation, should be replaced by “may”, which was merely indicative, in order to conserve the discretionary power of the Committee to decide whether a delay was fatal in determining admissibility. The Committee needed to address the handling of the issue of the interim period between the adoption of the amendment and the time when States parties became aware of the new rule. The fact that delayed communications would be brought to the attention of the Special Rapporteur or the working group was a problem because it enlarged the mandate of the working group to decide upon the admissibility of communications. He supported the proposed amendment because in practice it did not fetter the Committee’s powers under the Optional Protocol.
48. **Mr. Rivas Posada** said that the possible retroactive application of the new rule posed a problem; the time frame and procedures for its implementation needed to be defined at the time of its adoption. Transitional measures would be needed to end the Committee’s often arbitrary handling of cases, which stemmed from a lack of precision regarding what constituted reasons for excessive delay.
49. **Mr. O’Flaherty** said that he withdrew the alternative text he had proposed a few moments earlier and proposed a slight change to the Chairperson’s compromise text instead. He suggested that the last sentence should end with “unless the Committee determines that, taking into account all the circumstances of the communication, the delay may be justified”.
50. In response to Ms. Chanet’s question about when the new rule would begin to apply, **the Chairperson** said that it would not apply to pending communications and that a transition period was needed in order to publicize it.
51. **Mr. Amor** said that Mr O’Flaherty’s formula was a step forward, but he would remove the word “special” in reference to circumstances.
52. **Mr. Fathallah** said that he also supported Mr. O’Flaherty’s latest proposal with Mr. Amor’s suggested amendment. The arrangements during the transition period should be

agreed on and notified to the States parties in the covering letter sent with the text of the new rule, but not stipulated in the rules of procedure.

53. **Ms. Chanet** said that the Committee needed to agree on the text in all the languages. The suggested change to “may” could be translated as “*peut*” in French, but would “the circumstances” be translated as “*des circonstances*” or “*les circonstances*”?

54. **Ms. Majodina** agreed with Mr. O’ Flaherty’s proposal for the last sentence, but had misgivings about the removal of the word “special”.

55. **The Chairperson**, summing up the discussion on the compromise text he had proposed, asked the Committee to endorse the proposed insertion of “*ratione temporis*” after “admissibility” and the change from “is deemed to” to “may” in the third sentence. He made a new proposal for the final part of the last sentence to read: “unless there are reasons justifying the delay, taking into account all the circumstances of the communication”.

56. **Mr. Lallah**, supported by **Mr. O’Flaherty**, endorsed the Chairperson’s latest proposal.

57. **Mr. Amor** said that he would prefer “unless the circumstances of the case ...”, but in the interests of consensus he would endorse the Chairperson’s proposal.

58. **Mr. Rivas Posada** asked the secretariat, in the light of Ms. Chanet’s concerns and the poor Spanish translation of the Chairperson’s compromise proposal, to take extra care to ensure the accuracy of the translations of the amendments made.

59. *Rule 96 (c), as amended, was adopted.*

*The meeting was suspended at 5 p.m. and resumed at 5.15 p.m.*

60. **The Chairperson** invited the Committee to decide when the amendment to rule 96 (c) should enter into force, and whether there should be a transition period.

61. **Mr. Fathalla** said that a footnote reading “this amendment will apply to complaints submitted to the secretariat from [date]” should be appended to the new rule, which would state the date of its entry into force.

62. **Sir Nigel Rodley** suggested that the footnote should read “this rule in its amended form will apply to communications received after [date]”, which would make it clear that there was no retroactive application of the amendment and would remove the need for a transition period. The word “received” should be used rather than “submitted” since receipt by the United Nations was objectively verifiable, whereas submission by a complainant was not.

63. **Ms. Chanet** pointed out that all communications must therefore be date-stamped on the day of their receipt by the secretariat.

64. **The Chairperson** said that, in the absence of any objections, he took it that the footnote, as proposed by Sir Nigel Rodley, was adopted.

65. *It was so decided.*

66. **Mr. Thelin** suggested that the date of entry into force ought to be one year after the adoption of the amendment. Since changing a procedure in the middle of a year could be problematic, he proposed that rather than October 2011 (one year from the adoption of the amendment) the date of entry into force should be set at 1 January 2012.

67. *It was so decided.*

68. **The Chairperson** said that the Committee must decide how to publicize the amendment to rule 96 (c).

69. **Mr. Fathalla** said that States parties to the Optional Protocol should be informed by a note verbale from the secretariat or the Chairperson.

70. *It was so decided.*

71. **Mr. Lallah** pointed out that the amendment must be publicized more broadly than simply among States parties. Lawyers, in particular, should be informed.

72. **Mr. O'Flaherty** suggested announcing the amendment on the Committee's page on the Internet site of the Office of the United Nations High Commissioner for Human Rights (OHCHR). The note verbale could include a request for States parties to inform their national bar associations. The secretariat should be asked to inform all OHCHR field offices of the change. The Chairperson could announce the amendment in his opening remarks at the meeting commemorating the 100th session of the Human Rights Committee, which would take place the following day.

73. **Ms. Chanet** said that NGOs and potential complainants must also be informed. Consideration should be given to how to inform remote communities who might not have access to the Internet.

74. She pointed out that the commemorative meeting was not a meeting of States parties and was not an appropriate occasion to announce a change in the Committee's rules of procedure. Such an announcement would risk sparking a debate that would be inappropriate at that meeting.

75. **Mr. Lallah** expressed concern about announcing the amendment at the commemorative meeting since the States parties would not yet have received the note verbale.

76. **Mr. Thelin** said that the NGO Coordinator in Geneva must be informed and could inform the NGO community.

77. **Mr. Fathalla**, supported by **Mr. O'Flaherty** and **Sir Nigel Rodley**, said that since all States parties had been invited to the commemorative meeting, the amendment to the rules of procedure could be announced and the Chairperson could inform them that a note verbale would be sent to them shortly. All possible means should be used to publicize the amendment.

*The discussion covered in the summary record ended at 5.50 p.m.*