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COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION

Seventy-third session

SUMMARY RECORD OF THE 1885th MEETING

Held at the Palais Wilson, Geneva,
on Tuesday, 5 August 2008, at 10 a.m.

Chairperson: Ms. DAH

CONTENTS

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

ORGANIZATIONAL AND OTHER MATTERS (agenda item 2)

Thematic discussion on special measures (*continued*)

1. The CHAIRPERSON invited the Committee members and the representatives of States and non-governmental organizations present in the room to continue the discussion begun at the previous meeting on special measures, with a view to the future elaboration of a general recommendation of the Committee concerning article 2, paragraph 2, of the Convention.

2. Mr. AVTONOMOV concurred with the view expressed the previous day by the representative of the Committee on the Elimination of Discrimination against Women, Ms. Schöpp-Schilling, to the effect that the Committee should confine itself to the terms included in the Convention, namely, "special measures", and refrain from using synonyms such as "affirmative action", as they were closely linked to the realities of the States where such concepts had been coined but did not necessarily have a clear meaning for other States. Furthermore, the term "special measures" possessed the advantage of appearing both in the International Convention on the Elimination of All Forms of Racial Discrimination and in the Convention on the Elimination of All Forms of Discrimination against Women.

3. Given that special measures varied considerably from one State to another according to the specific situation and problems in each one of them, the Committee had the responsibility of determining on a case-by-case basis whether the measures adopted truly gave effect to the provisions of article 2, paragraph 2, of the Convention. In addition, the Committee should state in its future general recommendation that the measures adopted for indigenous or ethnic minorities or other vulnerable groups such as migrants did not necessarily constitute special measures and that States could take temporary special measures to improve the situation of such persons parallel to the permanent measures of protection in force.

4. Although special measures were in principle of limited duration, it could prove necessary for such measures to be applied for several decades, until such time as a balance had been restored between the different components of society. It was therefore important to keep close track of the situation in order to determine whether special measures should be maintained or had fulfilled their purpose and could accordingly be repealed.

5. In view of the large and growing number of international human rights instruments, the Committee should endeavour to bring its terminology into line with that of other treaty bodies and concerned organizations, notably the International Labour Organization (ILO), whose Convention No. 111 on Discrimination (Employment and Occupation) and Convention No. 169 on Indigenous and Tribal Peoples were frequently cited by the Committee during consideration of the periodic reports of States parties. A proliferation of terms could create confusion and needlessly complicate the task of States at the time of implementing the provisions of instruments to which they were parties. Lastly, it would be useful for the Committee to think about compiling a standard list of special measures, which would indicate their possible variety and duration.

6. Mr. de GOUTTES, welcoming the number and range of the statements made by the participants present during the first part of the thematic discussion, said that

five main points had emerged and should be noted for the purposes of the future general recommendation of the Committee. First, most of the participants had stressed the need to harmonize the terminology of the treaty bodies; that was in line with the recommendations made at the seventh inter-committee meeting of international human rights treaty bodies and the twentieth meeting of chairpersons of international human rights treaty bodies, held in June 2008. The Committee could therefore, as suggested by the representative of the Committee on the Elimination of Discrimination against Women, keep the expression "temporary special measures", even though the temporary character of such measures was already implied in the relevant provisions of the Convention (article 1, para. 4, and article 2, para. 2), and drop such terms as "affirmative action" and "reverse discrimination".

7. Secondly, the Committee should give a definition of the particular characteristics of special measures and the related conditions. It could specify, on the basis of the provisions of the Convention, that special measures must be necessary, appropriate and proportional (in other words, warranted by the circumstances), temporary and mandatory, bearing in mind that article 2, paragraph 2, stipulated that States parties "shall take", and not "may take", special measures when the circumstances so warranted. The Committee could recall in its future general recommendation that the compliance of those measures with the provisions of the Convention should be monitored by national courts, regional courts (including the European Court of Human Rights), where appropriate, and the treaty monitoring bodies, in particular the Committee on the Elimination of Racial Discrimination and the Committee on the Elimination of Discrimination against Women.

8. Thirdly, the Committee should address in its draft general recommendation the question of the distinction between special measures and the positive obligations of States, on the one hand, and temporary special measures and basic rights, which were permanent in character, on the other. The latter category encompassed rights that must be extended to indigenous persons, including civil and political rights and social, economic and cultural rights, in particular the land rights of those minorities. The assertion of those basic rights could, where appropriate, go hand in hand with temporary special measures, if the latter served more effectively to promote respect for those rights. He also recalled that, in its General Recommendation No. 25 on temporary special measures, the Committee on the Elimination of Discrimination against Women had stressed that, owing to their biological differences, women could not be treated in the same way as men and that, consequently, some special measures were permanent, at least until such time as scientific and technological knowledge would warrant a review (HRI/GEN/1/Rev.8, par. 16).

9. Fourthly, the Committee should deal in its general recommendation with the question of the content of special measures. It should define therein the different forms that might be assumed by special measures – directives, legislative or regulatory provisions, assistance or solidarity programmes, allocation of resources, preferential treatment, and quota policies designed to promote access by disadvantaged groups, in particular, to education, employment, housing and political life. The Committee should specify that such measures could or must be taken not only in the public sector but also in the private sector.

10. Fifthly, the Committee might take into account in its draft general recommendation the question of limits to special measures. Those measures should

not in any case violate the basic principle of non-discrimination, which did not admit exception. In his final report on the concept and practice of affirmative action (E/CN.4/Sub.2/2002/21), the Sub-Commission expert responsible for preparing that document, Mr. Bossuyt, had emphasized that special measures were not an exception to the principle of non-discrimination, that the prohibition of discrimination also applied to measures qualified by national authorities as measures of affirmative action and that an injustice could not be repaired by another injustice (paras. 108 and 109). There should therefore be external oversight in order to be sure that the proposed special measure was fully justified. As indeed had been recalled by the ILO representative, Mr. Oelz, some special measures could have perverse effects and produce discrimination, as had been the case in some countries where reservations had been created for indigenous communities.

11. Mr. MURILLO MARTINEZ said that the fact that a woman and an Afro-American, in the persons of Mrs. Clinton and Mr. Obama, were competing for the Democratic Party's nomination for the United States presidential election should be highlighted; it was a source of pride to the people of that country but was none the less the exception that confirmed the rule. The discrimination suffered by women and other disadvantaged groups, in the United States as elsewhere, was the result of the implementation for a period of decades of national measures limiting their rights. Reference could be made, for example, to Colombia, where women had not had the right to manage their own property until 1928, to receive a university education until 1933 or to vote until 1954. However, that country was altogether representative of Latin American countries as a whole, which in the past had laid down laws placing women in a situation of inferiority.

12. Similarly, laws in the various Latin American countries, which had formerly determined the market value of slaves according to their age or gender, clearly explained the correlation in those countries between racism and poverty and the fact that persons of African descent were underrepresented in the parliamentary bodies of those countries (they formed 23 per cent of the total population of Latin America but accounted for only 2 per cent of parliamentarians in all Latin American countries).

13. Women and disadvantaged groups thus suffered from similar forms of discrimination rooted in a past when they had been regarded as inferior. There should therefore be no distinction between them with regard to the affirmative action from which they should benefit.

14. Affirmative action had been criticized on many scores. It had been said to violate the right to equality by placing beneficiaries in a position of inferiority; to establish a nanny State; and to contribute to the perpetuation of stereotypes, through disability for example. As for quotas, they were accused of exacerbating discriminatory attitudes, their detractors considering that the beneficiaries did not deserve their posts, to which they had been appointed at the expense of other people; and according to them, only the motivation of candidates, their competence and professional experience should have been taken into account.

15. Notwithstanding such assertions, however, affirmative action, particularly quotas, actually helped to correct the inequalities from which some disadvantaged population groups suffered, by allowing them in particular to participate in decision-making processes, to take part in public life and to be better represented in Parliament, as well as by improving their image in society. Quotas, notably in the

civil service, did not mean giving preferential treatment to an undeserving person, as those selected were as qualified as other applicants for the post applied for; however, they were given preference because they belonged to a disadvantaged group.

16. Affirmative action did not spring from a paternalistic attitude and was not designed to take the place of anti-discrimination laws or standards governing the rights of indigenous peoples, for example. Moreover, they were essentially temporary and must be discontinued as soon as the inequalities which they were intended to correct no longer existed.

17. In preparing its general recommendation on the question of special measures, the Committee should list the objective circumstances requiring affirmative action or quotas, by which States could be guided. Referring to the jurisprudence of the Constitutional Court of Colombia which allowed exceptions to the principle of equality enshrined in the 1991 Constitution, he listed criteria that might be adopted to justify the use of temporary measures. First, the de facto situation of the persons concerned should be evident; secondly, the proposed preferential treatment should have a clearly specified goal; thirdly, that goal should be reasonable, in other words compatible with constitutional values and principles; fourthly, the goal pursued and the treatment granted to beneficiaries should be tailored to the particular situation of those beneficiaries; fifthly, the measures should not be disproportional in relation to the situation they were designed to correct or to their ultimate purpose.

18. He emphasized that the criteria used for the adoption of special measures should be defined in accordance with each country's socio-economic and sociological realities. Lastly, the many invisible factors affecting the development of children – the families in which they were born, the schools they attended, their socio-economic background – must be taken into account before deciding whether or not it was legitimate to take a measure designed to correct a situation considered to be discriminatory.

19. Mr. LAHIRI said that the Convention was predicated on the principle that the members of dominant groups and those of minority groups were equally competent and that consequently unequal access to the job market reflected the existence of discriminatory practices, which it was incumbent upon States to correct when they became persistent. Affirmative action was essentially temporary and should be discontinued upon the achievement of the goals it was intended to serve. However, the fact that it was temporary did not mean that it was of short duration as the consequences of discrimination could not be corrected in a few decades.

20. He referred to the experience of India, which was unique in that the dominant groups and the groups suffering from exploitation and discrimination were of the same race and of the same ethnic origin. India had taken affirmative action even before becoming independent and therefore offered an interesting testing ground. Its Constitution provided for several measures to correct the inequalities suffered in particular by scheduled castes and tribes. Affirmative action in their regard was based on a quota system which, in the civil service, gave preference to the recruitment of members of those castes (up to 49.5 per cent). That system should soon be extended to the private job market; employers who did not apply the new standards would be liable to heavy penalties.

21. Sixty years of affirmative action had undoubtedly improved the socio-economic situation of those castes and tribes, particularly from the point of view of literacy and primary schooling. A UNDP report on poverty and socially disadvantaged groups in India had shown, however, that the human development index of those castes in 2007 had been 25 per cent lower than the rest of the population.

22. Other affirmative action measures had enabled "other backward castes" gradually to enter public life, thus propelling castes into the political arena. In 1995, a Dalit woman had thus become Prime Minister of the biggest State in India.

23. There were many lessons to be drawn from the Indian experience. It was clear, in particular, that affirmative action truly produced results, but that it was sometimes preferable and effective to dare to take on the dominant class; that temporary placing one group at a disadvantage in relation to another might be a price to be paid to eliminate racial discrimination; and, lastly, that consultation and consensus were not always the best method, that sometimes opposition and controversy opened the way to more rapid advances. Those observations could be useful to many European States that were having difficulty in correcting the inequalities suffered by Roma and Sinti and in combating the xenophobia directed against non-white immigrant groups.

24. He agreed that affirmative action usually benefited the least disadvantaged of the target groups, thus exacerbating inequalities within the beneficiary groups. For that reason, experts proposed that other criteria be taken into account, particularly socio-economic ones, to determine who should benefit from equal access programmes and those who, having regard to the income or their socio-economic situation, should stand aside in favour of those in greatest need.

25. In its general recommendation, the Committee could remind States parties of their obligation under the Convention to take affirmative action to combat deep-seated, structural discrimination. States parties should be asked to explain why they had not adopted temporary special measures when circumstances so permitted and to provide in their reports statistical data disaggregated by racial group in order for the Committee to evaluate needs for special measures and their effectiveness. The Committee could recommend that States parties include in their Constitution or national legislation provisions allowing and facilitating the adoption of temporary special measures. Affirmative action should be adopted in accordance with the situation of each State party; no radical measure should be dismissed out of hand so long as it did not itself entail discrimination.

26. Mr. CALI TZAY said that, in its general recommendation, the Committee should emphasize that temporary special measures or affirmative action should benefit the population at large and not any specific group. They should also help to develop a conception of the State that reflected the reality of the nation and to guarantee equality and fairness for all. It should be stressed that States parties must define beforehand those who were to be the main beneficiaries of special measures. States parties should also be cautioned against the adoption of special measures that might have effects contrary to those sought, like for example intercultural bilingual education measures, adopted in Latin America, which had compelled indigenous pupils to learn the national language, while Spanish-speaking pupils were not required to learn indigenous languages.

27. Mr. KEMAL said that the objective of special measures should be to remedy the long-standing or recent imbalances existing in society. Contrary to what might be thought by States parties, temporary measures helped to strengthen the nation and enhance social cohesion by ensuring that a particular group did not feel disadvantaged and marginalized. He noted that the Committee systematically addressed the question of affirmative or corrective action when considering periodic reports in the presence of States parties. The problems that might now arise were, for that reason, more ones of form (harmonization of concepts and terminology) than of substance. The Committee should, for example, determine whether it wished to use the concept of affirmative action or temporary special measures.

28. Mr. PROSPER said that the participants in the thematic discussion were in agreement as to the indispensable nature of special measures. There would always be inequalities and imbalances within nations, irrespective of whether or not discriminatory practices existed, but the purpose of special measures should be to offer everyone the same opportunities and to promote diversity. The main question was to know when special measures should be introduced and what types of measure should be adopted by States parties. The Committee should look more deeply into those questions so as to be able to address them in its general recommendation.

29. Mr. LINDGREN ALVES said that special measures, whether temporary or permanent, should serve the sole purpose of remedying situations of structural discrimination based on race. The Committee should not be concerned about how States parties adopted such measures, as the only criterion to be taken into account was that of race. Accordingly, the Committee should emphasize in its general recommendation that States parties shall provide statistical data, disaggregated by race in particular, with regard inter alia to education and employment.

30. Mr. PETER pointed out that institutions like the African Union or countries like India and South Africa had already given far more thought to the subject of affirmative action than the Committee. Consequently, in its general recommendation, the Committee should take care not to appear to be lagging too far behind on the question, particularly in relation to States parties that had long been engaged in affirmative action. The concept of affirmative action was no longer controversial and there was widespread agreement on the effectiveness of such measures in remedying situations of racial discrimination. In any event, the Committee should lay down very clear rules in its general recommendation and remove all ambiguity, particularly as to meaning.

31. Mr. ABRAMSON (International Peace Bureau) said that he was very impressed with the far-reaching comments of the speakers on the question of special measures. Considering that that many of them had concerned the terminology to be used, he noted that article 1 of the Convention did not qualify the special measures as "temporary" but stated merely that those measures "shall not be continued after the objectives for which they were taken have been achieved". Moreover, as some States parties had kept special measures in force for 50 years, if not more, it was euphemistic to describe them as temporary.

32. Furthermore, the Committee should consider whether the proposed draft general recommendation should provide for exceptions to special measures. Although the Convention did not provide for exceptions to the obligation of non-discrimination, it did however allow States parties to enter reservations to certain

articles. There were some practical problems as some States were convinced of the need to maintain discriminatory measures that they considered to be positive, even though they had not entered any reservations to the Convention.

33. M. THORNBERRY, summing up the comments made during the thematic discussion on special measures, took it that the Committee members approved the principle of the elaboration of the draft general recommendation concerning special measures, which would be considered at the following session of the Committee, in February 2009.

34. On substance, there were several points of agreement among Committee members. First, all appeared to be in favour of a degree of flexibility in terminology and to consider that the definition of the term "special measures" should so far as possible be in conformity with that set forth in article 1 of the Convention. Secondly, it also appeared that the draft general recommendation should not qualify special measures as "temporary", given that they could remain in force for as long as was needed to ensure the advancement of certain racial or ethnic groups. In addition, the speakers seemed on the whole to be convinced of the need to define limits to special measures and to state clearly that such measures should not be an exception to the principle of non-discrimination, which remained non-derogable, that they were admissible only if they did not violate that higher principle and that they should not have effect of creating separate rights for different racial groups.

35. It had also become clear that the draft general recommendation should give some latitude to States in determining the nature and duration of the special measures they were intending to adopt. Furthermore, even though some Committee members deemed it useful to analyze article 1, paragraph 4, of the Convention from a historical perspective, the majority seemed to prefer to interpret the principle of special measures in a more contemporary light.

36. At the terminological level, the speakers considered that the draft general recommendation should define special measures while certainly taking into account the experience of States in that regard, but also on the basis of relevant international standards. Moreover, the work of the open-ended working group to prepare the draft general recommendation on special measures should be continued, with a view to arriving at a suitable formulation of the general effects of special measures. The working group should also look into the question whether the draft should offer examples of best practices in that area.

The meeting rose at 12.05 p.m.