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HUMAN RIGHTS COMMITTEE

Ninety-fourth session

SUMMARY RECORD OF THE 2587th MEETING

Held at the Palais Wilson, Geneva, on
Friday, 24 October 2008, at 10 a.m.

Chairperson: Mr. RIVAS POSADA

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The meeting was called to order at 10.05 a.m.

GENERAL COMMENTS OF THE COMMITTEE

Draft general comment 33 on the obligations of States parties under the Optional Protocol to the Covenant (CCPR/C/GC/33/CRP.4)

1. The CHAIRPERSON invited Mr. Shearer to introduce the latest version of the draft general comment (CCPR/C/GC/33/CRP.4) submitted to the Committee for its consideration.

2. Mr. SHEARER, Rapporteur for the draft general comment, noted that the draft general comment sought to specify the nature of the obligations of States parties under the Optional Protocol to the Covenant, in particular with regard to the views adopted by the Committee following the consideration of individual communications. He thanked Ms. Wedgwood, who had taken upon herself to revise the draft bearing in mind the comments received since the previous session. In order to ensure that the text could be translated into the working languages of the Committee within the time required, only those comments received before the deadline set for their submission, namely, 3 October 2008, could be taken into consideration. As at that date the secretariat had received comments from Mr. Waleed Sadi, a former member of the Human Rights Committee, from six non-governmental organizations, namely, Amnesty International, the Civil and Political Rights Programme of the Law and Society Trust in Sri Lanka, the Human Rights Law Resource Centre in Australia, the International Commission of Jurists, the Asian Human Rights Commission and the World Organization against Torture, and from 13 States parties, namely, Australia, Canada, Ecuador, Germany, France, Japan, Mauritius, Mexico, New Zealand, Norway, Russian Federation, Sweden and Turkey. Six other States parties had sent in comments after the deadline set, namely, Finland, Poland, Romania, Switzerland, the United Kingdom and the United States, and their comments could not, therefore, be reflected in the draft under consideration. They had, however, been distributed to members of the Committee so that they could be taken into account during the discussion.

3. Generally speaking, the non-governmental organizations (NGOs) were favourable to the position presented in the draft general comment. Some of them would have wished that the procedure that applied under the Optional Protocol be presented in greater detail, so that the General Comment might serve as a complete guide to the obligations of States parties under the Optional Protocol. The draft had not, however, been amended to achieve that purpose, as the Committee had decided during the first reading that it would not enter into procedural considerations, in order rather to stress the weight that its views should be given. It was, however, not excluded that the Committee might deal with the procedural aspects in detail in a separate general comment.

4. States parties had proposed certain amendments to the form of the text, which had been incorporated if they improved the text. With regard to the substance, the States parties were virtually all opposed to anything that tended, in their view, to attribute binding force to the Committee's views. The draft had, therefore, been revised to present the Committee's position more clearly, which was in between the view that the Committee's views were mere recommendations that the States parties were free to accept or reject, and the view that the Committee's findings of a binding nature similar to legal obligations.

5. Ms. CHANET expressed surprise that NGOs were not listed among the authors whose comments had been taken into consideration.

6. Mr. LALLAH said that, by not listing the organizations that had submitted comments, the impression was given that only the views of States had been taken into consideration. It was important to recognize all contributions, without exception.

7. Mr. SHEARER, Rapporteur for the draft general comment, replied that the revision of the text was based essentially on the comments of States, as they had dealt with the substance, which was why only States had been cited in the list of those whose contributions had been taken into consideration. In any case, the draft under consideration was a working document, and the references in question would not appear in the final document, which must remain a document of the Committee and not appear to be a compilation of the views of various groups. When the final text was adopted, a letter would have to be sent to all the parties that had submitted comments to thank them for their contributions.

8. The CHAIRPERSON invited members of the Committee to consider the draft paragraph by paragraph.

9. Mr. SHEARER, Rapporteur for the draft general comment, noted that paragraphs 5, 11, 19, 24, 26 and 30 had been deleted during earlier readings and that the earlier numbering of the paragraphs had been kept for ease of reference.

Paragraph 1

10. *Paragraph 1 was adopted without amendment.*

Paragraph 2

11. Mr. O'FLAHERTY proposed deleting the words "consequently to be regarded as", so that the first line would read "Although the Optional Protocol is organically related to the Covenant ...".

12. Mr. IWASAWA said that the proposal of an NGO to use the wording found in the Vienna Convention on the Law of Treaties seemed worth adopting, and he suggested, therefore, that the words "by a separate act of ratification or accession" be replaced by the words "by an expression of its consent to be bound by it", which followed the usage of the Convention.

13. *Paragraph 2, as amended, was adopted.*

Paragraph 3

14. Ms. CHANET said that, in the last sentence of the French text, the verb "énonce" should be replaced by "établit".

15. *Paragraph 3, as amended in French, was adopted.*

Paragraph 4

16. Mr. O'FLAHERTY said that, in as much as the obligation on States parties not to hinder access to the Committee, which was mentioned in the second sentence, was not explicitly stated in article 1 of the Optional Protocol, it would be preferable to start the second sentence with wording such as "It follows that ...".

17. *Paragraph 4, as amended, was adopted.*

Paragraph 6

18. Mr. O'FLAHERTY noted that paragraph 6, like paragraph 10*bis*, set out an obligation without indicating the consequences of non-compliance with it. That was perhaps prudent, but it should at least be stated that, in the absence of the information required, the Committee might draw any conclusions that it deemed appropriate.

19. Ms. CHANET felt, on the contrary, that such a mention would not be useful, in as much as the Committee had decided not to deal with rules of procedure in the draft general comment under consideration. On the other hand, the obligation should be strengthened in the French text by saying that the State "*doit préciser*", rather than "*devrait préciser*", as the obligation to specify which remedies had not been exhausted was in its own interest.

20. Sir Nigel RODLEY said that it would be preferable to use more nuanced wording and say, for example, "The Committee looks to the State party, if it feels that the condition has not been met, to specify in its response regarding a communication ...".

21. Mr. SHEARER, Rapporteur for the draft general comment, said that it would indeed be best not to insist on the obligation and any possible consequences of failure to comply, as the expression "is under an obligation to" had been deleted from the earlier draft precisely because States parties had found it too binding.

22. The CHAIRPERSON pointed out that the Committee should remember, in considering the paragraph, like those following, that it had decided not to deal with procedural issues in the General Comment under consideration.

23. *Paragraph 6, as amended, was adopted.*

Paragraph 7

24. After an exchange of views involving Sir Nigel RODLEY, Mr. O'FLAHERTY, Mr. LALLAH and himself, the CHAIRPERSON said that the English text would be amended to read, like the French text, "The Committee uses the term ..." rather than "The Committee favours the use of the term ...". The Committee would thus not commit itself with regard to usage in the terminology, which should be harmonized.

25. *Paragraph 7, as amended, was adopted.*

Paragraph 8

26. Sir Nigel RODLEY wondered whether the word "views" should be spelled with an initial upper case or a lower case letter. The Committee should, in any case, decide and stick by its choice.

27 Mr. SHEARER, Rapporteur for the draft general comment, explained that he had decided to use a lower case letter because that was the way that the term was found in the Optional Protocol and, in addition, that gave the word a more neutral character. In the second sentence, he proposed replacing the expression "being regarded as admissible" with the expression "being found admissible", as an NGO had suggested.

28. *Paragraph 8, as amended, was adopted.*

Paragraph 9

29. Ms. CHANET proposed specifying in the last sentence that the Rules of Procedure provided for consideration of the possibility of examining the admissibility and the merits in "exceptional cases", not in "certain cases", thus remaining closer to the text of the Rules.

30. *Paragraph 9, as amended, was adopted.*

Paragraph 10

31. Mr. O'FLAHERTY proposed moving paragraph 10 to have it follow paragraph 10*bis*, which would then become 9*bis*. There would then be two paragraphs on the obligations of the State party, followed by paragraph 10 on the consequences of the State party's failure to fulfil its obligations.

32. *The proposal was accepted.*

33. Ms. MAJODINA felt that the first sentence should be maintained; the Committee's intent was to show that it expected State parties to fulfil their obligations and that some States indeed did not respect their obligations.

34. Ms. CHANET supported that comment. There was in the draft a certain tendency systematically to avoid the word "obligation". In the present case the word could be used with confidence, as the obligation in question was stipulated in article 4 of the Optional Protocol. On the other hand, the expression "responding inadequately" in the second sentence left too much margin for discretion. States needed to know exactly what was expected of them, as the consequences of a response other than the expected one were weighty, since the Committee would then give credence to the allegations made by the author of the communication.

35. Sir Nigel RODLEY supported the idea of maintaining the first sentence, provided that it was moved, because the expression "this obligation" had no referent in the preceding sentence, which was the final sentence of paragraph 9. He proposed simply moving the first sentence of paragraph 10 and putting it before the final sentence of paragraph 9, whose first two sentences dealt precisely with the State party's obligation to respond with regard to communications.

36. Mr. IWASAWA also supported the idea of moving the sentence, which was even more necessary since it had been proposed to insert paragraph 10*bis* between paragraphs 9 and 10.

37. Mr. SHEARER, Rapporteur for the draft general comment, supported the suggestions that had been made. The expression "responding inadequately" could be replaced by "responding incompletely".

38. Ms. CHANET said that it would also be possible to combine the two adjectives. Furthermore, the adjective "first" in the first sentence of paragraph 9 should be deleted, as there was no second obligation.

39. Sir Nigel RODLEY proposed explaining in a footnote what the Committee meant by an inadequate or incomplete response; for example, the fact that a State party had not provided evidence for its affirmations with regard to the facts or had not explained how its judicial procedures were consistent with the provisions of the Covenant.

40. The CHAIRPERSON invited the Rapporteur for the draft general comment to redraft the paragraph in such a way as to take into account the proposals made by members of the Committee and to resubmit it at a later stage.

41. *It was so decided.*

Paragraph 10*bis*

42. Ms. CHANET said that the paragraph under consideration provided another instance where it was in the State party's interest to comply with the obligation in question. She proposed rewriting the French text of the final sentence to read: "… *l'État partie devrait invoquer cette circonstance explicitement, et, s'il l'invoque, faire connaître son avis sur ce qui pourrait constituer 'des effets continus' d'une violation commise dans le passé*".

43. *Paragraph* 10*bis, as amended in French, was adopted.*

Paragraph 12

44. Sir Nigel RODLEY proposed amending the first sentence to read: "The function of the Committee … is not, as such, that of a judicial body". The expression "has been described as not" was not useful. The reference to the "judicial spirit" must definitely be maintained in the second sentence, as it was in just that spirit that the Committee worked in reaching its decisions.

45. Mr. LALLAH agreed that the reference to the "judicial spirit" should be kept.

46. Mr. O'FLAHERTY said that it would be more positive for the Committee to begin by stating what it was, rather than what it was not. That would only require inverting the two sentences and stating that the views that the Committee adopted showed several important features of judicial decisions, even though its function was not, as such, that of a judicial body.

47. Ms. CHANET said that the paragraph was not well placed in the middle of the text. In view of the importance of the matter, the nature of the Committee should be dealt with in the form of a demonstration. A discussion of the obligations of the States parties and the manner in which the Committee operated then led to the conclusion, which demonstrated the legal nature of the Committee. Looking at the substance of the text, she said that the characteristics that were listed by way of example were not particular to legal decisions: the painstaking consideration of facts was not a function that belonged exclusively to legal bodies, and some legal bodies, such as the European Court of Human Rights, did not bar their members from participating in the consideration of cases concerning their State party. It would require further thought to establish the real essence of decisions of a quasi-judicial nature.

48. Sir Nigel RODLEY agreed that it would be preferable to place the paragraph in another part of the General Comment. He supported the approach suggested by Mr. O'Flaherty but proposed the following wording in order to give more weight to the affirmation: "While the function of the Human Rights Committee ... is not, as such, that of a judicial body, the views issued by the Committee ... exhibit some important characteristics of a judicial decision and are arrived at in a judicial spirit."

49. The CHAIRPERSON said that he took it that the Committee wished to postpone its consideration of paragraph 12 and the choice of its place in the text.

50. *It was so decided.*

Paragraphs 13 and 14

51. Mr. IWASAWA pointed out that, contrary to what was stated in the English text of paragraph 13, the term used in Spanish in the Optional Protocol to describe the decisions of the Committee was not "*determinas*", but "*observaciones*".

52. Mr. O'FLAHERTY said that the wording of paragraphs 13 and 14 gave the impression that the Committee was defending itself against potential challenges to the value of its decisions. The two paragraphs could be merged and redrafted to show more assurance and authority.

53. Mr. LALLAH said that it would be better to begin paragraph 13 with the wording from the Optional Protocol, namely, that the Committee "shall consider communications received under the (…) Protocol in the light of all written information available to it" and that it "shall forward its views to the State party concerned", and then continue with the ideas expressed in the existing paragraphs 13 and 14. There was no way to express what the Committee was with greater assurance.

54. Sir Nigel RODLEY agreed with Mr. Lallah's proposal. Furthermore, he did not think it useful to keep the second sentence of paragraph 13. With reference to paragraph 14, several States parties had, in their comments, used expressions such as the "the character of advisory opinions or recommendations", and the Committee needed therefore to take note of that fact and respond. That was what the paragraph sought to do. However, another wording would be preferable.

55. Ms. CHANET supported Mr. O'Flaherty and Mr. Lallah. In her view there was no need to build an argument but rather to reaffirm what was stated in the Protocol. First of all, because for some States the views of the Committee did not even have the status of advisory opinions or recommendations, and secondly, because the reasons why the Committee's views were neither advisory opinions nor recommendations could not all be presented in the General Comment. The Committee should confine itself to citing the powers granted to it under the Optional Protocol and stating that its views were the expression of its position with regard to the implementation or non-implementation by States parties of the provisions of the Covenant and included proposed measures to remedy the violations found.

56. Mr. LALLAH said that, if the Committee decided not to responded to the perceptions that third parties might have of it but chose rather to reaffirm what it was under the Protocol, paragraph 12 as currently drafted served no purpose.

57. After an exchange of views involving Mr. SHEARER, Sir Nigel RODLEY, Ms. CHANET and himself, the CHAIRPERSON said that Ms. Chanet would draft and submit to the Rapporteur for the draft general comment a proposal for a text merging paragraphs 13 and 14.

Paragraph 15

58. Sir Nigel RODLEY noted that in the final sentence the word "respect" appeared twice with different meanings. It would be preferable to delete the first phrase, "Respect for the obligations ... extends also to the respect ...", and to state simply: "Respect is due …". In the first sentence, he proposed replacing the words "the [an] authentic interpreter of that instrument" with the wording proposed by a State party, namely, "the body established under the Covenant itself charged with interpreting that instrument".

59. Ms. MAJODINA noted that the expression "the [an] authentic interpreter" had raised strong reactions from certain States, which went as far as to say that the Committee was not the authentic interpreter of the Covenant. To withdraw that expression would amount to retreating in the face of those attacks. She therefore preferred maintaining the expression with the wording "the authentic interpreter".

60. Mr. O'FLAHERTY noted that one could not speak of "an authentic interpreter", as that would imply that there were others. It was also not possible to say that the Committee was "the authentic interpreter". The wording proposed by a State party and cited by Sir Nigel Rodley seemed to be a good solution.

61. Mr. LALLAH proposed to delete the words "In the first place" at the beginning of the first sentence of the paragraph, use the expression proposed by the State party cited by Sir Nigel Rodley, move the term "authoritative" to the end of the sentence to read "whose interpretation is authoritative", and delete the phrase "when a violation is found following a careful consideration of the communication", because the finding was authoritative, whether or not the Committee had found a violation.

62. Ms. MOTOC and Mr. IWASAWA said that they were also in favour of the wording proposed by Sir Nigel Rodley, given that the Committee was not an authentic interpreter in the sense of the Vienna Convention.

63. The CHAIRPERSON requested the Rapporteur for the draft general comment to draft a new version of the paragraph bearing in mind the proposals made by members of the Committee.

Paragraph 16

64. Ms. CHANET said that the last sentence of the paragraph was not satisfactory; in particular the terms "*très sérieusement*" in French and "solemnly" in English were not appropriate, but it was not easy to find a wording that expressed precisely what a State party should do when the Committee found a violation.

65. Mr. O'FLAHERTY said that the paragraph should, in fact, not have been amended. Article 2, paragraph 3 of the Covenant did not state that the views of the Committee were legally binding. It stated simply that legal implications flowed from the nature of the provisions of the Protocol. He wished to maintain the earlier wording: "A finding of a violation by the Committee engages the legal obligation of the State party to reconsider the matter." The adverb "solemnly" meant nothing in law. The Committee must be firm on that point.

66. Mr. LALLAH shared that view. He proposed replacing the expression "legal obligation" by the expression "treaty obligation".

67. Sir Nigel RODLEY said that Mr. Lallah's proposal helped avoid the implications of the adjective "legal", which had raised objections, but the proposed expression was not used in the Covenant. Perhaps there was no need to qualify the word "obligation" with an adjective.

68. Ms. CHANET proposed returning to the wording used by the Committee at the end of its views when it had found a violation of the Covenant, namely, "By becoming a party to the Optional Protocol the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its

jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established."

69. The CHAIRPERSON noted that that wording had already been used in paragraph 20.

70. Mr. SHEARER, Rapporteur for the draft general comment, explained that, indeed, the same idea came up in paragraph 20 but that the point was sufficiently important that he had deemed it valuable to repeat it. A former member of the Committee, Mr. Louis Henkin, had the habit of saying that the real basis for the obligation of a State party to follow up on the Committee's views lay in article 2, paragraph 3 of the Covenant. For that reason he had stated the point succinctly in paragraph 16, and then exhaustively in paragraph 20 by using the wording that the Committee used when it found a violation of the Covenant. That having been said, he remained open to any suggestions.

71. Sir Nigel RODLEY did not see the two statements of the problem as duplications. Paragraph 20 dealt with the State party's obligation to ensure that the author had an effective remedy, which involved the legal character of the consequences of a violation, and paragraph 16 dealt with the legal character of the Committee's views.

72. Ms. CHANET said that she was aware of the difference between paragraph 16 and paragraph 20, but was concerned that one risked weakening the other. The affirmation in paragraph 20 that the State party was required to ensure to the author an effective remedy was much stronger than the statement in paragraph 16 that, under that same article 3, the finding of a violation by the Committee must be taken very seriously by the State party. States would not be able to understand such inconsistency. The Committee had to have the courage to state in paragraph 16 what was said in paragraph 20.

73. Sir Nigel RODLEY insisted that the two paragraphs dealt with different matters: paragraph 16 dealt with the consequences of the Committee's views and paragraph 20 with the consequences of a violation by a State party. Paragraph 16 had to do with the nature of the Committee's views and paragraph 20 with the nature of the legal obligation that derived from a violation of the Covenant. The wording of the two paragraphs was therefore not the same.

74. The CHAIRPERSON said that the drafting of one paragraph or the other, even both, should be changed to avoid any confusion.

75. Mr. SHEARER, Rapporteur for the draft general comment, said that, for the reasons already mentioned, the text should avoid expressions such as "must be given very serious consideration by the State party ... ", as well as the adjective "legal", for the reasons mentioned by Sir Nigel Rodley. He proposed replacing the second sentence of paragraph 16 with the following sentence: «If the Committee considers that a remedy is due, that implies for the State party an obligation to reconsider the matter."

76. Ms. MAJODINA suggested, in order to achieve greater clarity, to bring paragraphs 16 and 20 next to each other, and to put paragraphs 17 and 18 after paragraph 20. She supported the deletion of the adjective "legal" and the words "given very serious consideration".

77. Sir Nigel RODLEY said that he saw no problem with Mr. Shearer's suggestion but was concerned that the words "the obligation to reconsider" proposed by Mr. Shearer might be too weak and proposed changing them to "the obligation to give the matter very serious consideration".

78. Mr. LALLAH was of the view that one should not tone down the State party's obligation. Under the Optional Protocol, the Committee must suggest a remedy; article 4, paragraph 2 referred to "the remedy ... taken by the State party". The State party was, therefore, not required merely to reconsider the matter but to follow up on the Committee's views.

79. Ms. CHANET felt that it would be better not to describe the State party's obligation, which risked weakening it, and she supported Ms. Majodina's proposal to keep only the first sentence of paragraph 16 and to insert it just after paragraph 20.

80. Sir Nigel RODLEY, supported by the CHAIRPERSON, saw no problem with deleting the second sentence of paragraph 16; however, to merge the first sentence of the paragraph with paragraph 20 would focus attention on the State party's obligation in the event of a violation and ignore the State party's obligation with regard to the Committee's views.

81. Mr. SHEARER, Rapporteur for the draft general comment, proposed that the second sentence of paragraph 16 should have the following wording: "If the Committee finds that a remedy is due, that engages the obligation of the State party to implement its commitment to offer a remedy in the light of that finding."

82. The CHAIRPERSON asked whether that proposal assumed that paragraphs 16 and 20 would remain separate or merged.

83. Mr. SHEARER, Rapporteur for the draft general comment, replied that he would prefer that they remained separate because, as Sir Nigel Rodley had pointed out, they dealt with two related but different matters.

84. Mr. LALLAH wished to revisit what Sir Nigel Rodley had said with regard to the follow-up to the Committee's views that States parties must undertake. With regard to the commitments undertaken by States parties under the Covenant and the Optional Protocol, there was often some confusion in that the legal character of the Committee's decisions was sometimes confused with the quality of enforceability, which those decisions did not have. The Committee's decisions were not enforceable, but they engendered a legal obligation for States parties to implement them by following up on the Committee's views. That legal obligation should not be diminished by a wording such as "reconsider the matter".

85. Sir Nigel RODLEY found it problematic to state that the State party had a legal obligation to offer a remedy as a follow-up to the Committee's views. The State had an obligation to offer a remedy if a violation had been found. That also presupposed that the Committee had been right in finding a violation, an issue raised by many States parties. Actually, the problem was that the second sentence of paragraph 16 was not in the right place. The idea it conveyed could be rephrased with greater emphasis and inserted in paragraph 15, or between paragraphs 15 and 16.

86. Ms. MAJODINA explained that her suggestion had not necessarily been to merge paragraphs 16 and 20 but to have one follow the other, which would be easier if the second sentence of paragraph 16 were deleted.

87. Ms. CHANET said that the reason why she favoured merging paragraphs 16 and 20 or having one follow the other was precisely that she could not accept the second sentence of paragraph 16, whether it was in paragraph 16 or elsewhere.

88. The CHAIRPERSON said that he took it that a consensus had emerged favouring the deletion of the second sentence of paragraph 16. As time was running low, he proposed that the discussion be adjourned for the time being and suggested that Mr. Shearer, Sir Nigel Rodley and Ms. Chanet work together before the next meeting on the wording of and appropriate place for paragraphs 16 and 20.

89. *It was so decided.*

The meeting rose at 1 p.m..