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Human Rights Committee
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Summary record of the 2720th meeting
Held at the Palais Wilson, Geneva, on Thursday, 15 July 2010, at 11 a.m.

Chairperson: Mr. Iwasawa

Contents

The meeting was called to order at 11.10 a.m.

Organizational and other matters

International Law Commission guidelines on reservations to treaties (A/64/10, A/CN.4/624/Add.1)

1. **The Chairperson** recalled that the International Law Commission (ILC) had been working on the issue of reservations to treaties since 1995, under the guidance of its Special Rapporteur, Mr. Alain Pellet. The Commission planned to complete that work by 2011, when Mr. Pellet's term of office would expire. The ILC would complete the first reading of a set of guidelines in 2010, after which it would welcome comments from interested parties before adopting the guidelines in 2011. At its previous session, the Committee had considered guidelines 3.2 to 3.2.5, which pertained to the validity of reservations and were therefore particularly relevant to treaty bodies. He reviewed guidelines 3.2 to 3.2.5, recalling that, at the previous session, several Committee members had voiced concern about guideline 3.2.2, particularly the use of the term "where appropriate", which they had considered somewhat unclear.

2. The Commission had adopted the guidelines together with their accompanying commentaries in 2009 and they were reproduced in the report of the International Law Commission to the General Assembly (A/64/10). Nonetheless, at the Committee's request, he had met with the Director of the Codification Division of the Office of Legal Affairs at United Nations Headquarters to exchange views on the guidelines. While it was unlikely, the Director had suggested that it might be possible to amend guidelines 3.2 to 3.2.5.

3. In 2010, the ILC would address the question of the effects of reservations, particularly invalid reservations, which it would examine in the very near future. In fact, only the previous day the Special Rapporteur had introduced that topic to the ILC, as set out in the fifteenth report on reservations to treaties (A/CN.4/624/Add.1 and 2). The drafting committees of the ILC would adopt guidelines based on the proposals by the Special Rapporteur, beginning their work on 20 July. The Committee should therefore act quickly if it wished to suggest any amendments. He drew attention to paragraphs 464 and 481 of document A/CN.4/624/Add.1.

4. Expressing his personal opinion, he said that the proposed new guideline 4.5.3 (A/CN.4/624/Add.1, para. 481) appeared to be based on recommendation No. 7 of the working group on reservations. He hoped that the ILC drafting committee would also give due consideration to that recommendation.

5. Turning to the guidelines that had already been adopted (A/64/10), he had concerns about the first sentence of guideline 3.2.2, particularly the use of the term "where appropriate". Paragraph (4) of the commentary on that guideline indicated that the term had been used to emphasize the purely recommendatory nature of the guideline. Nonetheless, it could be argued that the meaning of the sentence was that if a treaty did *not* contain a clause specifying the nature and the limits of the competence of treaty monitoring bodies to assess the permissibility of reservations, they had no competence to do so. That point could possibly be clarified in the commentary. Furthermore, the second sentence of the guideline could be interpreted as an invitation to States to restrict the competence of the existing treaty monitoring bodies to assess the permissibility of reservations.

6. **Ms. Motoc** said that there remained one fundamental difference of opinion between the treaty monitoring bodies and the ILC. The latter did not consider reservations to treaties to be incompatible with the scope of the treaties. The treaty bodies held the opposing view, as articulated in the Committee's general comment No. 24 on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant. While the ILC had accepted that

treaty monitoring bodies and States parties could engage in dialogue on the issue of reservations, the common thread running through the ILC documents before the Committee was that the States parties had the last word in that dialogue. The Committee, in contrast, held that it had the last word. The Committee should spare no effort in defending that position.

7. **Mr. Salvioli** said that the ILC report on reservations to treaties (A/CN.4/624/Add.1) appeared to reflect relatively faithfully the jurisprudence of the European Court of Human Rights and the Inter-American Court of Human Rights on critical issues relating to the drafting of reservations by States and limitations on clauses accepting the competence of those Courts. The current report therefore adopted a more nuanced approach to human rights than previous ILC reports in that it drew a distinction between classical international law treaties and specific human rights treaties. He welcomed the setting-up of the working group on reservations as it had facilitated dialogue between the ILC and other interested parties; he trusted that dialogue would continue.

8. He remained concerned about guideline 3.2.2, particularly the second sentence, which seemed to indicate that, for example, a meeting of the States parties to the Covenant could agree to restrict the Committee's competence regarding the interpretation of States parties' reservations. He therefore suggested that all the existing treaty bodies should take a firm stance against that sentence, perhaps joining with regional human rights protection bodies to propose its deletion. They should urge the ILC to state clearly that human rights treaty bodies had the right to interpret all aspects of reservations, including their validity, inter alia, because reservations were technically an integral part of the treaty.

9. **Mr. O'Flaherty** said that, while the reports of the ILC reflected the considered views of the Committee relatively well, he also remained concerned about guideline 3.2.2. He agreed that the use of the term "where appropriate" was open to misunderstanding. The sentence would be much improved if the words "States or international organizations should specify, where appropriate, the nature and limits" were amended to read "States or international organizations may specify the nature and limits".

10. He remained concerned about the second sentence, which constituted an invitation to the curtailment of existing monitoring bodies' well-established functions. It also raised the issue of the extent to which the measures proposed might purport to have retrospective effect. For instance, he questioned whether it would be legitimate for States parties to the Covenant to adopt measures and indicate that those measures would also apply to all actions the Committee had taken in the past. Any attempt to give the clause retrospective effect would be reprehensible as it would undermine legal certainty and the principle of effectiveness for the Committee. Moreover, it was difficult to see how the guideline could be put into effect without amending a treaty. It was generally accepted that amending human rights treaties was best avoided as it entailed many risks and concerns.

11. **Mr. Pérez Sánchez-Cerro** said it would be difficult for the Committee to conduct an in-depth analysis of the work done by the ILC on the topic, especially without knowing the background to the Commission's debates. The Committee should perhaps be looking to its own future and that of the other treaty bodies. The burden of reporting by States parties and dealing with complaints had become too heavy. The Committee could consider increasing its membership from 18 to 27 and constituting two chambers to deal with the backlog of work. The monitoring bodies set up under human rights treaties should be open to change.

12. **Ms. Chanet** said the treaty bodies were free to take a stand on the validity of reservations to their competence. There was no real risk that the Commission's draft guideline 3.2.2 would change existing treaties. To limit the competence of the Committee it would be necessary to amend the Covenant itself. Rather, the risk posed by the

Commission's proposals would be to future accessions to the Covenant, and especially to its Optional Protocol, which some States parties had not yet accepted. Those States might be seeking to impose their wishes, using the ILC as an intermediary. She recalled that the reservation put forward by Germany would have limited the competence of the Committee to certain areas. That could be the effect of the words "where appropriate" in draft guideline 3.2.2, words which should be deleted. The last sentence of that draft guideline could then be adapted to say that reservations would be valid at the point when States created a monitoring body or acceded to a treaty.

13. **Mr. Amor** said that, in his opinion, draft guideline 3.2.1 was on the whole satisfactory but warranted careful consideration. Without seeking to interfere with the work of the ILC, by expressing its views the Committee could enable the Commission to re-examine and perhaps improve on its draft. In draft guideline 3.2.1, the word "may" in the first paragraph ("may … assess the permissibility of reservations formulated by a State or an international organization") was not consistent with the commentary to that guideline, which stated in paragraph (4) that the treaty monitoring bodies were "inevitably competent" to make that assessment. The first paragraph could be amended to begin "A treaty monitoring body is entitled … to assess the permissibility of reservations".

14. Draft guideline 3.2.2 was acceptable, and the commentary to it was useful. However, the provision that States and international organizations should specify, where appropriate, the nature and limits of the competence of monitoring bodies could create ambiguity. How was the permissibility of those specifications to be judged? He suggested adding the sentence "those specifications shall be considered by the bodies themselves". That would avoid an undesirable clash with the founding principles of the treaty bodies.

15. **Mr. Thelin** said the Committee should stand by the principles laid down in its own general comment No. 24. It should not refrain from putting its views to the ILC, even at the present stage when the draft guidelines had already been adopted on first reading. He thought the wording of draft guideline 3.2.1 was acceptable, since it was clear from paragraph (9) of the commentary to draft guideline 3.2 that bodies monitoring the application of a treaty did have competence to assess the permissibility of a reservation to the treaty. The only change he would suggest to draft guideline 3.2.1 would be to replace the word "may" by "can".

16. Draft guideline 3.2.2 was a different matter entirely, its meaning being open to doubt. He would suggest substituting the word "could" for "should". The last sentence could have unfortunate consequences for the existing treaty bodies and should be deleted.

17. **Mr. Rivas Posada** said the concern expressed by other members of the Committee was justified. It was difficult to foresee the impact of the draft guidelines on the treaty bodies, and they should take a stand on the text, which in any case had not yet taken final shape. The limitation on the competence of treaty bodies, as defined in draft guideline 3.2.2, appeared to be discretionary and could result in imprecision. It was difficult to see how it would be applied in practice. The underlying principle of the draft seemed to be that the nature of the limits on the competence of treaty bodies to assess the permissibility of reservations should be made clear at the outset, when the bodies were set up. He agreed with the criticisms already voiced of the last sentence of the draft guideline, which would create uncertainty in a number of ways, not only as to its possible retroactive effect.

18. **Mr. El-Haiba** said that much positive work had been done by the ILC on the topic of reservations to treaties, and the specific nature of the human rights instruments was now better understood as a result. At the joint meetings of the human rights treaty bodies and their chairpersons, attention should be drawn to the jurisprudence of the Human Rights Committee and to the special role of the monitoring bodies in assessing the validity of reservations to human rights treaties. The peremptory character of certain human rights

norms must be protected. Like Ms. Chanet, he thought the last sentence of draft guideline 3.2.2 should be deleted because it carried an inherent risk that its effect would be retroactive.

19. **Ms. Keller** said she shared that concern. Was it yet agreed how and when the Committee would express its concerns to the ILC?

20. **Ms. Chanet** sought clarification of the approach to be taken. Would the Committee communicate its position jointly with the other treaty bodies, notwithstanding the differences in their methods of work? Would it seek to amend the text of the draft guidelines or to make an interpretative declaration on the text? At its previous session in New York, the Committee had not dealt with the permissibility of reservations. She suggested adding, after the word "may" in draft guideline 3.2.1, the phrase "where appropriate".

21. **The Chairperson** said that he had discussed the Committee's concerns regarding the draft guidelines with the Director of the Codification Division of the Office of Legal Affairs at the Committee's ninety-eighth session in New York in March 2010. As the ILC was about to finalize its first reading, he had stated that he was contemplating the possibility of writing a letter to the Commission in his capacity as Chairperson of the Committee. However, he had since decided that it might speed things up if he spoke to the Special Rapporteur himself and he had done so the previous day, requesting a meeting at which he could convey the Committee's concerns in oral or written form, depending on the Committee's preference. As the Commission would shortly complete its first reading, it might be difficult to persuade it to agree to major amendments, but minor adjustments might be acceptable. Alternatively, amendments such as the deletion of the second sentence of draft guideline 3.2.2 might be adopted at the Commission's second reading in 2011.

22. The Meeting of Chairpersons of the Human Rights Treaty Bodies had not established a new working group on reservations. The matter had not even been placed on the agenda although he had suggested that it be included. He had nonetheless emphasized its importance and the need to develop a joint position as soon as possible. The matter could perhaps be discussed at the Inter-Committee Meeting scheduled for September 2010 and, if it was not too late, at the next Meeting of Chairpersons in June 2011.

23. **Ms. Motoc** said that Mr. Pellet's views did not necessarily reflect those of other members of the Commission. The final decision at the second reading would be taken by the Commission as a whole. She was therefore sceptical about the effectiveness of a letter to Mr. Pellet and would prefer a meeting between several members of the two bodies. That kind of interaction had in the past persuaded the Special Rapporteur to change his views on certain questions.

24. **Mr. Thelin** said that he would prefer the Committee to maintain a modicum of formality in expressing its views regarding possible amendments to the Commission. The Chairperson should convey its opinion in writing to the Chairman of the Commission, with a copy for the Special Rapporteur. He would then be free to engage in further oral discussions as and when necessary.

25. **Mr. Amor** said that while he agreed that the Committee should adopt a formal stance, he also supported the idea of maintaining direct contact with Mr. Pellet.

26. **The Chairperson** emphasized that Mr. Pellet had so far taken great pains to reflect the treaty bodies' concerns.

27. **Ms. Keller** said she trusted that the Chairperson would state the grounds for the Committee's concerns regarding draft guideline 3.2.2, such as the need for legal certainty.

28. **Mr. O'Flaherty** noted that draft guideline 3.2.5 referred only to dispute settlement bodies. However, as the Committee's orders concerning interim measures were binding on States parties, according to general comment No. 33, the authority accorded to dispute settlement bodies in draft guideline 3.2.5 might usefully be extended to the treaty monitoring bodies when they engaged in such legally binding activities.

29. **Mr. Thelin** said that he had reservations about the desirability of raising such an issue since it might give undue cause for alarm.

30. **The Chairperson** said he took it that the Committee agreed that draft guideline 3.2.2 gave rise to concerns: many members were sceptical about the words "where appropriate" and a number of members had suggested deleting the last sentence.

31. *It was so agreed.*

Draft revised guidelines for State party reports (CCPR/C/2009/1/CRP.3)

32. **The Chairperson** noted that the Committee had already adopted paragraphs 1 to 57, except for three pending issues that would be discussed in due course.

33. **Ms. Keller**, Rapporteur on the draft revised guidelines, pointed out that the draft guidelines were intended for States parties submitting initial reports and for States which wished to submit a traditional report or from which the Committee had requested a traditional report.

34. **Mr. Thelin** proposed deleting the adjective "detailed" throughout the text when referring to the information required from States parties.

Paragraph 58

35. *Paragraph 58 was adopted.*

Paragraph 59

36. **The Chairperson** said that he disliked "s/he" and "his/her" and would prefer some alternative way of conveying the idea.

37. **Ms. Motoc**, **Mr. Salvioli** and **Ms. Keller** expressed support for the use of gender-neutral language.

38. *Paragraph 59 was adopted.*

Paragraph 60

39. **Ms. Chanet** proposed amending the paragraph to read: "Indicate whether a central register exists mentioning all places of detention and the names of persons detained, as well as the procedures for ensuring that the register is readily available and accessible to all persons concerned".

40. *Paragraph 60, as amended, was adopted.*

Paragraph 61

41. **Mr. Thelin**, supported by **Ms. Chanet**, proposed deleting the word "detailed".

42. *Paragraph 61, as amended, was adopted.*

The meeting rose at 12.50 p.m.