United Nations CCPR/C/SR.2815

International Covenant on Civil and Political Rights

Distr.: General
26 July 2011

Original: English

Human Rights Committee
102nd session

Summary record of the 2815th meeting*
Held at the Palais Wilson, Geneva, on Tuesday, 19 July 2011, at 10 a.m.

Chairperson: Ms. Majodina

Contents

* No summary records were issued for the 2813th and 2814th meetings.

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

General comments of the Committee

Draft general comment No. 34 (CCPR/C/GC/34/CRP.6)

1. **Mr. O'Flaherty**, Rapporteur for the general comment, drew attention to a break in the numbering of the paragraphs. The Committee had completed its discussion of the first 24 paragraphs and reduced them to 22, but the original numbering had been retained from paragraph 25 onwards to avoid confusion.

2. He had received about 75 submissions with some 350 textual suggestions from States parties and NGOs. The United States had submitted its proposals only a few days previously. As there was a great deal of repetition and many comments were vague, he had succeeded in distilling the content to a manageable number of recommendations. He would draw attention both to those that he found convincing and to those with which he disagreed.

Paragraph 25

3. **Mr. O'Flaherty** said that many States parties with common-law traditions and NGOs operating in common-law countries had suggested removing the square brackets around the phrase "and, where appropriate, case law". Some stakeholders had also proposed amending "case law" to read "jurisprudence". The United States suggested deleting the whole of the second sentence, since the meaning of the word "law" was clear in any given jurisdiction.

4. **Mr. Lallah** expressed support for that suggestion.

5. *It was so agreed.*

6. **Mr. O'Flaherty** said that the term "customary law" in the last sentence referred to regimes of traditional law that were applied alongside constitutional law in many jurisdictions. However, many stakeholders thought that it referred to customary international law.

7. **Mr. Fathalla** observed that footnote 53 referred to general comment No. 32 (CCPR/C/GC/32), which dealt with traditional law.

8. **Mr. O'Flaherty** suggested amending "enshrined in customary law" to read "enshrined in traditional religious or other such customary law".

9. *It was so agreed.*

10. **Mr. Lallah**, referring to the third sentence, said that a judgement by the Mauritian Supreme Court had led to the enactment of legislation concerning contempt of court cases with a view to ensuring, inter alia, that the penalties imposed were not unduly heavy.

11. **Sir Nigel Rodley** said that "the law of parliamentary privilege and the law of contempt of court" were traditional kinds of law associated with the structure of a country's Government and legal system that sometimes resulted in infringements of freedom of expression. It was appropriate to draw attention to them precisely because of their function as inhibitors of freedom of expression.

12. **Mr. Thelin** proposed replacing "the law" with "laws" so that the sentence would read: "It may include laws of parliamentary privilege and laws of contempt of court".

13. **Mr. Lallah** expressed support for that proposal. As sanctions for contempt of court might even include imprisonment, a legal enactment was essential to ensure that people were aware of the risks they incurred if they committed such an offence.

14. **Mr. O'Flaherty** agreed that it was important to recognize the right to self-defence of anybody accused of contempt of court and to make it abundantly clear that legal enactments must comply with the provisions of article 19. He therefore proposed inserting the following phrase at the beginning of the third sentence: "Taking account of the provisions of article 19, paragraph 3".

15. **Sir Nigel Rodley** said that the current wording of the sentence might be taken to imply that such laws were being exempted from the normal rules. He therefore welcomed the wording suggested by the Rapporteur.

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

Paragraph 26

17. **Mr. O'Flaherty** said that some commentators had proposed amending the phrase "and it must be made public" at the end of the first sentence to read "and it must be made accessible to the public".

18. *It was so agreed.*

19. **Mr. O'Flaherty** said that an NGO had proposed adding the following sentence at the end of the paragraph: "Laws must provide sufficient guidance to those charged with their execution to enable them to ascertain what sorts of expression are properly restricted and what sorts of expression are not".

20. *It was so agreed.*

21. *Paragraph 26, as amended, was adopted.*

Paragraph 27

22. **Mr. Flinterman** proposed the following amended version of the first sentence: "Laws restricting the rights enumerated in article 19, paragraph 2, must not only comply with the strict requirements of article 19, paragraph 3, but must also be compatible with the provisions, aims and objectives of the Covenant".

23. **Mr. Neuman** suggested including a specific reference to laws concerning contempt of court.

24. **Sir Nigel Rodley**, concurring with Mr. Neuman, proposed amending the opening of Mr. Flinterman's amendment to read: "Laws, including all those identified in paragraph 25, which restrict the rights ...".

25. **Mr. O'Flaherty** agreed with Sir Nigel's point but suggested amending his proposal to read: "Laws, including all laws as identified in paragraph 25 above, which restrict Covenant rights ...".

26. *It was so agreed.*

27. **Mr. Bouzid** proposed replacing "may not" with "must not" in the second and third sentences.

28. *It was so agreed.*

29. *Paragraph 27, as amended, was adopted.*

Paragraph 28

30. *Paragraph 28 was adopted.*

Paragraph 29

31. **Mr. O'Flaherty** said that a number of organizations wished to delete the word "international" before "human rights law" in the second sentence because domestic human rights law might otherwise be excluded.

32. **Mr. Neuman** said that the sentence was in any case somewhat ambiguous, since it implied that the rights of others mentioned in the first sentence referred only to human rights and not to other rights.

33. **Sir Nigel Rodley** said that he would prefer to keep the sentence as it stood. The word "includes" did not imply that any rights were excluded. The Committee should be careful about endorsing rights under domestic law which might in some cases go further than international human rights law.

34. **Mr. Salvioli** said that he was also opposed to any amendment of the sentence. The paragraph referred to legitimate grounds for restriction of the right to freedom of expression. Any broadening of its scope might defeat the purpose of the general comment.

35. **Mr. Iwasawa** said that he had been in favour of replacing the phrase "includes but is not limited to" with "includes" wherever it occurred in the general comment. It was clear, in his view, that although the second sentence referred explicitly to Covenant rights and international human rights law, it did not rule out human rights under domestic law or other rights. He was therefore in favour of retaining the sentence as it stood.

36. **Mr. Lallah** concurred with the previous speakers. He pointed out that States parties were entitled, pursuant to article 5 of the Covenant, to grant additional rights that were not included in the Covenant.

37. **Ms. Chanet** and **Mr. O'Flaherty** said that they were also opposed to any amendment.

38. **Mr. O'Flaherty**, referring to the last two sentences of the paragraph, said that a number of stakeholders had cautioned against defining "others" in a manner that might create a group entitlement which could be invoked in support of the rights of an ideology. To address that concern, he suggested that the word "individual" should be inserted before "members" in the last sentence.

39. *It was so agreed.*

40. **Mr. O'Flaherty** said that another suggestion had been to insert an additional sentence at the end of the paragraph, which would read "The term 'others' does not include public entities, who are instead addressed under the second legitimate ground for restriction, public order (*ordre public*)".

41. **Mr. Fathalla**, supported by **Mr. Thelin**, proposed that, instead of adding that new sentence, in the penultimate sentence the word "may" should be deleted in order to avoid any confusion about the meaning of the term "others". The sentence would therefore begin "The term 'others' relates to".

42. **Mr. Neuman** noted that it was sometimes necessary to restrict certain rights for purposes such as protecting public buildings from destruction. He asked whether the Committee's view was that such a restriction would not be covered by protection of the rights of others because a municipality or the State was not to be regarded as an "other" that had rights. Rather, restrictions would be on the ground of "*ordre public*".

43. **Mr. Thelin** said that he understood the paragraph, with the deletion of the word "may" in the penultimate sentence, to refer to restriction on the grounds of respect for the rights or reputations of others. Rights could be restricted to protect public buildings on the grounds of "*ordre public*".

44. **Ms. Chanet** said that, in French, the term "*les droits d'autrui*" always referred to other people's rights. She noted that in that paragraph and in others the English term "the rights of others" might well be interpreted to include other entities as well as persons. It might be useful to know whether the Spanish term posed a similar problem.

45. **Mr. Rivas Posada** said that the term "*los demás*" in Spanish was perfectly clear and was widely used in legal texts.

46. **Mr. Iwasawa** proposed that, in the third sentence, the word "under" before "article 17 rights" should be deleted.

47. *Paragraph 29, as amended, was adopted.*

Paragraph 30

48. *Paragraph 30 was adopted.*

Paragraph 31

49. **Mr. O'Flaherty** said that the second sentence had generated much interest from stakeholders. The problem had arisen because the reference to the Committee's jurisprudence, while perfectly accurate in itself, gave the misleading impression that it summarized the Committee's entire message. Several States parties had noted that there might well be occasions on which national security outweighed legitimate public interest. The concern had also been expressed that, given its focus on prosecution, the sentence overlooked the issue of repression of expression, which was an equally important dimension of restraint. Stakeholders had also asked why the paragraph focused on treason laws.

50. He supported the proposal of one organization to amend the second sentence to read: "It is not compatible with paragraph 3, for instance, to invoke such laws to suppress or withhold from the public information of legitimate public interest that does not harm national security, or to prosecute journalists, researchers, environmental activists, human rights defenders or others for having disseminated such information". Several NGOs had also requested that the Committee formulate a definition of national security, which he thought inappropriate.

51. **Mr. Neuman** said that, if the terms used in the paragraph, such as "national security", "official secrets", "sedition laws" and "State secrets", were defined in a limited way, the paragraph appeared to make sense as an explanation of freedom of expression. However, broad interpretation of those concepts could overprotect freedom of expression. He was concerned that, in the proposed second sentence, identifying national security as the sole justification for limiting the dissemination of the information was too narrow.

52. Likewise, turning to the third sentence, he observed that information of a commercial or banking nature was often legitimately kept secret under one kind of official secrets law but not of the national security type. The paragraph, if interpreted within the limited focus of treason and national security, expressed the message the Committee was aiming to convey. However, it was unclear whether the wording made that clear – in the current draft and in the proposed second sentence.

53. **Ms. Chanet** agreed, adding that there would be a vast array of interpretations of the term "state secret" among the States parties. The current wording of the paragraph would not convey the Committee's message to them all.

54. **Mr. O'Flaherty** said that the terms "treason laws", "official secrets" and "sedition laws" had been used in the paragraph because States parties had cited them when describing their own legislation that restricted expression, which they said was necessary to

protect national security. The legislation in question was given different names by different States parties, but those three terms had been widely used and were relevant to many States.

55. The third sentence of the paragraph had been discussed at length during the first reading of the draft general comment. There had been general consensus that the concern Mr. Neuman had expressed had been captured in the somewhat soft language of the phrase "Nor is it generally appropriate", which itself clearly indicated that there might well be exceptional cases in which it was appropriate to limit speech of that kind. Indeed, the feedback from the United States had indicated that it agreed with that sentiment, since it was not an absolute prohibition.

56. **Mr. Thelin** said that it was extremely difficult to find a widely acceptable definition of the concepts included in the paragraph, such as national security. He would support replacing the second sentence with the new one that had been proposed and leaving the rest of the paragraph unchanged.

57. **Mr. Neuman** suggested that, in the first sentence, the phrase "such as official secrets and sedition laws" should be replaced with "whether described as official secrets or sedition laws" in order to make it clear that the sentence referred to official secrets in the national security context only. In the third sentence, the word "such" should be inserted before the phrase "a state secrets law".

58. **Mr. O'Flaherty** supported those suggestions with some minor amendments. Since many names were used to refer to official secrets laws, he proposed that the phrase in the first sentence should read "whether described as official secrets, sedition laws or otherwise". In the third sentence, he proposed amending Mr. Neuman's suggestion to read simply "the remit of such laws", since the sentence referred to the whole panoply of laws addressed in the first and second sentences.

59. **Mr. Flinterman** proposed that the end of the first sentence should be amended to read "in a manner that conforms to the strict requirements of paragraph 3".

60. *Paragraph 31, as amended, was adopted.*

Paragraph 32

61. **Mr. O'Flaherty** said that the Government of Japan had requested that, in the last sentence, the word "must" should be replaced by "should".

62. **Mr. Thelin** opposed that proposal, particularly as the word "must" had been used in several previous paragraphs.

63. **Mr. O'Flaherty** said that one NGO had requested that the Committee provide additional examples of what might legitimately be limited on the grounds of public order, and another had asked for a clarification of the distinction between public order and "*ordre public*".

64. **Mr. Lallah** said that, since the Committee had not examined specific cases concerning limitations on freedom of expression on the grounds of maintaining public order, it would be dangerous to provide any kind of definition, since it would have no basis in the Committee's jurisdiction.

The meeting was suspended at 11.10 a.m. and resumed at 11.30 a.m.

65. **Sir Nigel Rodley**, amending a proposal by **Ms. Chanet**, suggested the following wording, to be added as a new sentence at the end of the paragraph: "Such proceedings should not be used in any way to restrict the legitimate exercise of defence rights".

66. *Paragraph 32, as amended, was adopted.*

Paragraph 33

67. **Mr. O'Flaherty** suggested that the phrase "public morals" should be replaced by "morals". Members had expressed concern that the paragraph was too permissive and might be used to restrict freedom of expression unjustifiably. It should be made clear that restrictions intended to protect morals must be applied in a non-discriminatory way. The French NGO, the National Consultative Commission on Human Rights, had suggested a new sentence, to be added at the end of the paragraph, along the following lines:

> "Public morals should be interpreted in light of the universality of human rights, without reference to specific local conditions. Public morals is an element of public order, which itself includes the need to respect human rights."

68. **Ms. Motoc** said that the phrase "there is no universally applicable common model" could be deleted from the first sentence since the same assertion appeared in the second sentence. However, it was important not to weaken the wording: human rights standards were universal, so it must be ensured that they were universally protected in one way or another.

69. **Ms. Chanet** said that the wording suggested by the National Consultative Commission was expressed in a more positive way than the original version. She suggested that the first sentence should be deleted and a reference added to the need to observe basic moral principles and recognize the values enshrined in the Covenant.

70. **Sir Nigel Rodley** noted that the amendment suggested by the National Consultative Commission referred to "public morals", which it considered to be an element of public order. He wondered whether the word "public" should be retained.

71. **Mr. Iwasawa**, supported by **Ms. Chanet**, noted that, in the French version of article 19 (3) (b) of the Covenant, the adjective "*publiques*" applied to both "health" and "morals".

72. **Mr. Rivas Posada** said that the same was true for the Spanish version. The term "morals" alone implied the moral values of the individual, which might be derived from religious beliefs, for example.

73. **Mr. O'Flaherty** suggested that, in the light of those remarks, the term "public morals" should be retained. He suggested that he should prepare a new draft of the paragraph for consideration the following day.

74. *It was so agreed*.

Paragraph 34

75. **Mr. O'Flaherty** observed that the general comment should also cover restrictions which were excessively broad. An NGO had suggested the following sentence, to be added at the end of the paragraph: "Restrictions are impermissible where they are over-broad, meaning that they prohibit not only unprotected expression but substantial amounts of permissible expression as well".

76. **Mr. Neuman** said that the United States legislation governing freedom of speech referred to restrictions which were over-broad in relation to the legitimate scope of application. In other words, it did not consider the absolute number of cases in which the restriction was unjustifiably applied, but rather the ratio between that number and the number of cases in which the restriction was justifiable. The Committee might wish to employ a phrase such as "permissible expression in an amount which is substantial in relation to the restriction's scope".

77. **Mr. O'Flaherty** suggested the addition of the phrase "taking account of the purpose of the limitation" at the end of the new sentence he had read out.

78. **Mr. Salvioli** said that the general comment should make it very clear that restrictions should be applied only to the extent necessary and that they should never become the norm.

79. **Mr. Iwasawa** asked whether the discussion of over-broad restrictions properly belonged in paragraph 34, which dealt with the concept of the necessity of the restriction, or in paragraph 26, which dealt with the need for precision.

80. **Mr. O'Flaherty** said that, while the discussion might be included in either paragraph, he considered that paragraph 34 was more appropriate.

81. **Ms. Chanet** noted that, as yet, the general comment contained no recommendations governing the duration of the restriction. The concept of necessity implied that the restriction was urgently required, but it was also important to ensure that it was not imposed for an unjustifiably long period.

82. **The Chairperson** suggested that Mr. O'Flaherty should prepare a new version of the paragraph, taking into account members' comments.

83. *It was so agreed*.

84. **Mr. Lallah**, referring to the proposed amendment by Mr. Neuman, said it was not clear what was meant by "substantial" or what constituted the "legitimate scope of application". The language needed to be made more specific, for example, by referring to the Covenant.

85. **Sir Nigel Rodley** said he wondered whether Mr. Neuman's amendment was necessary as it seemed that paragraph 35 already addressed the matter of proportionality in a way that covered the intent of that amendment.

86. **Mr. O'Flaherty** suggested keeping a simplified version of the proposed text under paragraph 34 as a reminder: "Restrictions are impermissible where they are over-broad".

87. **Mr. Neuman** said that, in the light of the Committee's comments, he withdrew his proposal.

88. **Mr. Flinterman** said that he could not endorse Mr. O'Flaherty's proposed amendment because it introduced a new concept, that of impermissibility.

89. **Sir Nigel Rodley** suggested moving that amendment to the beginning of paragraph 35.

90. *It was so agreed*.

Paragraph 35

91. **Mr. O'Flaherty** proposed amending the new first sentence to read: "Restrictions must not be over-broad". He also suggested the addition of the following phrase at the end of the second sentence: "as well as the means of its dissemination".

92. **Mr. Neuman** recalled that the question that had arisen in relation to paragraph 35 during the Committee's first reading in March 2011 was whether to add to that paragraph any text that would address commercial advertising or the right of access to information, or whether to leave that open in the general statement of proportionality, which must also take account of the form of expression at issue. One way to address the matter would be to add the following sentence at the end of the paragraph: "This high value requires more stringent justification for limitations on political debate than for limitation of other aspects of freedom of expression, such as the right to advertise commercial products or the right of access to information held by Government."

93. **Mr. Thelin** said that although he was sympathetic to Mr. Neuman's proposal, he preferred leaving the text of paragraph 35 as it stood, as amended by Mr. O'Flaherty.

94. **Mr. Salvioli** said that, in principle, he did not disagree with the proposal by Mr. Neuman but had reservations about addressing the two examples — commercial advertising and access to information — on the same footing. He feared that keeping both examples undermined the importance of the right of access to information, which was crucial in any democratic society as a means of fighting corruption and monitoring the actions of the Government.

95. **Mr. O'Flaherty** recalled that, during the Committee's first reading, members had expressed differing views on the nature and extent of the right of access to information, and the language reached following that discussion reflected safe common ground. As the proposed new language would reopen the debate on the matter and disrupt the consensus reached in March, he suggested keeping the sentence, with mention of only one indicative illustration: that relating to commercial speech.

96. **Ms. Keller** said that while sympathetic to Mr. Neuman's proposed new sentence, she would prefer not adding it at the end of the paragraph. The underlying assumption on which the proposal was based was the need for a clear distinction between commercial expression and other types of expression; in many cases there was no clear distinction.

97. **Mr. O'Flaherty** considered that in the interest of maintaining the consensus reached at first reading, the sentence proposed by Mr. Neuman should not be included.

98. **Mr. Iwasawa** said that the Committee's discussion on the principle of proportionality reflected the different approaches to the issue in different parts of the world. In a spirit of compromise, therefore, he proposed that the Committee should retain Mr. Neuman's sentence, even though it might not fully reflect all approaches to proportionality.

99. **Sir Nigel Rodley** said that he would welcome the inclusion of that sentence with just one exemplary reference – to commercial advertising. If the sentence were not included, however, it would still be clear from the existing text that the Committee placed a higher value on public debate in a democratic society than it did on commercial advertising. Most forms of commercial advertising were extremely distinguishable, and it would be difficult to interpret paragraph 35 as affording the same protection to commercial advertising as it did to public debate in a democratic society.

100. **Mr. Neuman** said that, in the light of the Committee's discussion, he withdrew his proposal. He nevertheless noted a degree of dissatisfaction with the Committee's decision to address such a highly complex matter through a simple reference to proportionality. Some of the complexities would have to be dealt with in the future.

101. **Mr. Lallah** said that he would have been more comfortable if the Committee had had specific experience in dealing with relevant cases or concluding observations.

102. *Paragraph 35, as amended by Mr. O'Flaherty, was adopted*.

Paragraph 36

103. **Mr. O'Flaherty** said that Japan had proposed replacing "must" with "should".

104. **Mr. Salvioli** suggested adding the words "and proportionality" after the word "necessity", as the concept of proportionality was very important, particularly to entities working to promote freedom of expression in Latin American countries. He was from a region where, on numerous occasions, many reasons were given for limiting freedom of expression. While those reasons might be valid in certain cases, the measures taken were often totally disproportionate.

105. **Mr. O'Flaherty** said that the text as it stood did not jeopardize the principle of proportionality. He nevertheless took Mr. Salvioli's point and endorsed his suggestion.

106. *Paragraph 36, as amended, was adopted.*

Paragraph 37

107. **Mr. O'Flaherty** said that one State party, Norway, had objected to the Committee's view concerning the "margin of appreciation". He nevertheless believed that the paragraph was a faithful reflection of the Committee's discussion and should not be changed.

108. **Ms. Keller** said that she could endorse the Rapporteur's text, in principle, but to prevent States from using the "margin of appreciation" as an excuse, she suggested adding the word "simple" before "reference" in the second sentence.

109. **Mr. Thelin** said that he did not wish to see the Committee change its position on the matter and suggested adding the word "any" before "reference" instead of "simple".

110. **Mr. O'Flaherty**, supported by Sir Nigel Rodley, agreed that the Committee should not modify its position; the text should be left as it was, without any changes.

111. *Paragraph 37 was adopted.*

The meeting rose at 12.55 p.m.