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Eighty-seventh session

SUMMARY RECORD (PARTIAL)* OF THE 2372nd MEETING

Held at the Palais Wilson, Geneva,
on Wednesday, 12 July 2006, at 11.40 a.m.

Chairperson: Ms. CHANET

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* No summary record was prepared for the rest of the meeting.

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The discussion covered in the summary record began at 11.40 a.m.

ORGANIZATIONAL AND OTHER MATTERS (agenda item 3) (continued)

Meeting of the working group on reservations established by the fourth Inter-Committee Meeting and the seventeenth meeting of chairpersons of the human rights treaty bodies (HRI/MC/2006/5)

1. The CHAIRPERSON said that the position of the International Law Commission (ILC) on reservations to human rights treaties had evolved to some extent since the publication in 1997 of its preliminary conclusions on reservations to normative multilateral treaties including human rights treaties (Yearbook of the International Law Commission, 1997, vol. II), partly in response to the Committee's general comment No. 24, which had initially been viewed as a provocative document by some international public-law experts.

2. Sir Nigel RODLEY, speaking as Chairperson-Rapporteur of the meeting of the working group on reservations held on 8 and 9 June 2006, said that representatives of five treaty bodies had attended the meeting. Unfortunately no representative of the Committee on the Elimination of Racial Discrimination or the Committee on the Elimination of Discrimination against Women had been present. However, an overview of treaty practice had been provided in documents HRI/MC/2005/5 and Add.1, and a former Secretary of the Committee on the Elimination of Discrimination against Women had attended the meeting.

3. The working group had agreed that it would be unwise to seek confrontation by systematically declaring reservations incompatible with the object and purpose of the various treaties. It was preferable to adopt a persuasive approach during the review of a State party's report. In the context of individual complaints or inquiry procedures, however, it might be necessary to determine whether a reservation was valid for the purpose of adopting Views or drawing conclusions. He drew attention to paragraph 4 of the working group's report (HRI/MC/2006/5), which referred to the approach to reservations adopted in the Vienna Declaration and Programme of Action.

4. The meeting had endorsed the principle in its recommendation No. 5 that it was for the treaty bodies themselves to determine the legal implications of invalid reservations. In general comment No. 24, the Committee had taken the position that a State that had entered an invalid reservation would generally be considered a party to the treaty without benefit of the reservation. The juridical basis for that assertion had not been elaborated and the working group preferred to take the view that there was a rebuttable presumption that a State would prefer to remain a party without the benefit of a reservation than to be excluded (recommendation No. 7). In its recommendation No. 3, the working group took the view that although international human rights law did not require a special regime for reservations to treaties, the provisions of general international law relating to treaties and reservations must be interpreted and applied in a way that recognized the specificity of human rights treaties in terms of their goals and the fact that they involved not reciprocal but multilateral obligations. The erga omnes nature of human rights treaty obligations was thus implied in the working group's recommendation.

5. It was hoped that the recommendations would be conducive to a further evolution in the thinking of the ILC and its Special Rapporteur on reservations to treaties.

6. Mr. SOLARI YRIGOYEN noted that the Human Rights Committee was the only treaty body that had adopted a clear position on reservations to human rights treaties. In one of his reports, the Special Rapporteur of the ILC had implied that the silence of the other treaty bodies demonstrated that the Committee was isolated, but that argument had now been refuted.

7. He welcomed the reference in paragraph 4 to the Vienna Declaration and Programme of Action. He thought a reference should also have been made to a subsequent remark by the then United Nations Secretary-General in which he had interpreted the approach adopted in the Vienna Declaration and Programme of Action in a manner similar to that adopted in the Committee's general comment No. 24.

8. He requested more details about the contribution to the working group's meeting made by a member of the ILC secretariat (para. 14).

9. It was regrettable that the report contained no reference to an important report by the Special Rapporteur of the Third Committee of the General Assembly on reservations to human rights treaties.

10. He asked whether the position of the representative of the Committee against Torture in the working group had coincided with that adopted in general comment No. 24.

11. Mr. SHEARER said he was pleased to note that the dialogue with the ILC would continue, since the positions of the Committee and the Commission had seemed at their first meeting to be far apart. There now seemed to be a better prospect of narrowing the gap and achieving a uniform approach. The fact that some Governments, such as those of France, the United Kingdom and the United States, had also taken exception to general comment No. 24 underscored the importance of making the treaty bodies' position clear and of listening to other voices.

12. In the case of some individual complaints, the Committee had disregarded a State party's reservation where the State itself had failed to invoke it. He wondered whether an explicit invocation by a State party was necessary for a reservation to the Covenant to be taken into account in the context of an individual complaint.

13. Mr. AMOR said it was important to continue the dialogue with other treaty bodies so as to achieve a convergence of views and, if possible, consensus. It would then be easier to engage constructively with the ILC, whose reports were discussed by the Sixth Committee of the General Assembly.

14. Although he strongly supported general comment No. 24, he felt that some small amendments might be in order. He drew distinctions between validity, incompatibility and admissibility of reservations. The main issue for the Committee was that of validity and it was in that area that the best prospects lay for achieving a consensus with other treaty bodies and the support of the ILC and Sixth Committee. Validity depended on a treaty's object and purpose, the interpretation of which must be teleological rather than strictly exegetic or technical. A teleological approach gave those interpreting a treaty a margin of discretion, so that the interpretation could evolve in the light of circumstances.

15. Many human rights issues were extremely difficult to address. For instance, although very few reservations had been made to article 3 of the Covenant, some States parties had taken the opportunity when ratifying other treaties to undermine the scope of that article. It followed that reservations could be interpreted not solely in the light of the Covenant but also in the light of a State party's overall legal conduct. For instance, when treaty bodies accepted reservations that called in question the equality of men and women, their action had an impact on the Committee's work.

16. He cautioned against being carried away by the idea of universalization of human rights treaties at all costs. Universality should not be sought at the expense of human rights instruments.

17. Mr. ANDO said that the United States, on ratifying the Covenant, had made many reservations and interpretative declarations. One reservation excluded the operation of article 6, paragraph 5, because criminal jurisdiction lay with the various states, some of which imposed the death penalty on persons under 18 years of age. Many European States parties had raised objections to that reservation on the ground that it was incompatible with the object and purpose of the Covenant, a situation that had prompted the Committee to adopt general comment No. 24, which had in turn led to objections by a number of Governments. The basic issue was, in his view, who was competent to decide on validity. He therefore welcomed the working group's position that jurisdiction lay with the treaty bodies. The ILC position was that a human rights treaty must contain an explicit provision authorizing the monitoring body to decide on validity. Otherwise States parties retained their right of objection. He asked whether the working group had discussed that point.

18. Mr. LALLAH said that all the human rights treaties were the product of initiatives not just by Governments but also to a large extent by NGOs and the general public. The treaty bodies had a duty to keep faith with the international human rights community and should be wary of giving up what they perceived to be part of their mandate. They must continue to express their views forcefully vis-à-vis the ILC, which had begun to understand the purport of the treaty bodies' efforts. The Committee had played a commendable role in that regard.

19. He commended the emphasis in the report on the idea of flexibility and engaging constructively with States. With regard to severability, he pointed out that a number of States parties, such as Sweden, had reacted positively to the Committee's general comment. If the Committee was required to carry out conciliatory functions under article 41 in a dispute between States regarding a reservation, it could not simply refer the matter to the ILC.

20. With regard to recommendation No. 2, he stressed that it was not the right time to establish criteria for determining whether a declaration should be considered a reservation.

21. In his view, there should be more discussion of the reservations with which the Committee had been faced when considering individual complaints.

22. Mr. KÄLIN welcomed the emergence of a common approach to reservations among treaty bodies along the lines of the Committee's general comment and the narrowing of the gap between the Committee and the ILC.

23. Noting from paragraph 7 of the report that the Committee on the Rights of the Child had encouraged States parties, inter alia, to redraft their reservations, he asked whether the working group had discussed that point, since the Vienna Convention on the Law of Treaties made it clear that reservations must be entered at the time of ratification.

24. Referring to the second half of recommendation No. 7, he asked whether the working group took the view that the Committee would have to identify a State party's intention at the time of entry of a reservation, basing itself on the presumption that the State wished to remain a party. If the identification of the State's intention was based on an objective assessment, a rebuttable assumption could hardly be deemed to exist. The European Court of Human Rights took the view that if a reservation was invalid, the State remained a party to the treaty without the benefit of the reservation. He felt that it would be safer for the Committee to continue acting on general comment No. 24 when it examined individual complaints, in other words first assessing the validity of a reservation and in the case of an invalid reservation ruling on whether there had been a violation if the invalid reservation was disregarded. The Committee's finding in that regard was not binding and it was for States parties to draw their own conclusions.

25. Mr. O'FLAHERTY queried the use of the word "authorized" in recommendation No. 4 and suggested "permitted" as an alternative.

26. With regard to recommendation No. 6, he requested more information on the working group's discussion of the draft ILC methodological guidelines set out in the tenth report of the Special Rapporteur on reservations to treaties (A/CN.4/558/Add.1). He was somewhat concerned about some elements of the draft guidelines, in particular draft guideline 3.1.6 entitled "Determination of the object and purpose of the treaty", which seemed to be inadequately based on the logic of the interpretation provisions of articles 31 and 32 of the Vienna Convention, giving the travaux préparatoires the status of a primary interpretative tool for the determination of objective and purpose, and relegating references to subsequent practice by States parties to square brackets. State party practice was particularly important in the case of human rights treaties, since it had greatly elaborated on the content of treaty provisions over the years.

27. The CHAIRPERSON queried the use of the word prudence ("care" in the English version) in recommendation No. 2, since the responsibility of the treaty bodies was to assess in legal terms whether a declaration amounted to a reservation.

28. She suggested that the working group should take up Mr. Amor's point about the teleological interpretation of the object and purpose of treaties at its next session and the interrelationship between reservations entered by States parties to the various human rights treaties.

29. She shared Mr. Kälin's view on recommendation No. 7 and the idea of a rebuttable presumption. The Committee should not adopt a restrictive interpretation of its general comment No. 24.

30. Sir Nigel RODLEY said that the working group had not alluded to the United Nations Secretary-General's interpretation of the reference to reservations in the Vienna Declaration and Programme of Action, and had not been aware of the report on reservations to the Third Committee of the General Assembly.

31. The presentation by the member of the ILC secretariat had focused on the background to the Commission's work on reservations to treaties. There still seemed to be disagreement on the question of the severability of a reservation that had been declared invalid. The Special Rapporteur had apparently been more willing after his meeting with the Committee to examine the possibility of treaty bodies considering the legal consequences of an invalid reservation, including severability, provided that no absolute position was adopted on the matter. Some of the Special Rapporteur's ILC colleagues were reportedly unhappy with the shift in his position. It was therefore felt that the treaty bodies should seek to assist him in defending their position, and that accounted to some extent for the wording of recommendation No. 7. With regard to the question of a rebuttable presumption, his interpretation of the position taken by the European Court of Human Rights in the Belilos v. Switzerland case was that it could be assumed that a State party would opt for severability rather than other consequences, but that the burden of proof that that had not been its intention at the time of entering the reservation lay with the State. If he had misread the reasoning in that case, he would take steps to correct his mistake. He had no wish either to water down general comment No. 24. However, if the ILC adopted principles and guidelines that were antithetical to the general comment, it would be difficult to convince States parties to comply with the latter.

32. The representative of the Committee against Torture had not been opposed to general comment No. 24. He had argued, however, that if a treaty body were to find in its review of a State party report that a reservation was incompatible with the object and purpose of the treaty, it should immediately make a statement to that effect, a position which contrasted with that of the other treaty bodies.

33. The working group had not discussed whether an explicit invocation by a State party was necessary for a reservation to be taken into account in the context of individual complaints.

34. He agreed with Mr. Amor's perceptive comments. With regard to the issue of the existence or absence of reservations to different treaties on essentially the same issue, he wondered whether the implication was that the body monitoring a treaty to which no reservation existed should take into account a reservation to another treaty. He would be uncomfortable with that approach, especially if regional treaties were being taken into account. However, it was important for a body monitoring a treaty to which a reservation existed to be aware that the State party had ratified another treaty without reserving on the same point.

35. There had been consensus in the working group on the question of treaty bodies' power to determine the validity of reservations. In paragraph 10 of its preliminary conclusions on reservations to normative multilateral treaties, the ILC had focused on the options open to States, noting in paragraph 10 that in the event of inadmissibility of a reservation, it was the reserving State that had the responsibility for taking action and that such action could consist in the State's modifying its reservation so as to eliminate the inadmissibility, withdrawing its reservation or forgoing becoming a party to the treaty. That approach amounted to an outright rejection of the argument that the treaty bodies determined validity, and it had been the basis for the subsequent confrontation. The Special Rapporteur had now moved on from that stance and was having difficulties with other members of the Commission as a result.

36. Mr. Lallah's point that the Committee might find itself having to act as arbitrator under article 41 in a dispute between States parties with different views on reservations was a strong argument in support of the conclusion that a treaty body should be able to determine both the validity of the reservation and its legal consequences.

37. The working group had not discussed the idea of redrafting of reservations and he agreed with Mr. Kälin's point in that regard.

38. He also agreed with Mr. O'Flaherty's point that ILC draft guideline 3.1.6 attached undue importance to travaux préparatoires, which were intended to be an ancillary means of interpretation.

39. The CHAIRPERSON asked whether the working group had been referring in recommendation No. 7 to a particular case in which a treaty body had had to identify a State party's intention at the time of entering a reservation.

40. Sir Nigel RODLEY said that he had personally drafted the recommendation in the light of general comment No. 24 in order to strengthen the Special Rapporteur's hand. He was more than willing to engage in a discussion of its appropriateness.

The meeting rose at 1.05 p.m.