

TREATY BODY MONITOR

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COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION 74TH SESSION THEMATIC DISCUSSION ON SPECIAL MEASURES 20 FEBRUARY 2009

The Committee on the Elimination of Racial Discrimination ('the Committee') met on 20 February to discuss for the second time the possibility of drafting a General Recommendation on the issue of special measures, as provided in Articles 1(4) and 2(2) of the *International Convention on the Elimination of All Forms of Racial Discrimination* ('the Convention'). While there was very little discussion on the elements paper presented by Committee members Mr Thornberry and Mr Sicilianos,¹ there was agreement among members that Mr Thornberry and Mr Sicilianos should begin the first stages of a draft General Recommendation. It was hoped that something could be produced by the end of the present session for members to consider in more detail at next session in August 2009.

Presentation by Mr Thornberry

Committee members had before them the summary record of the previous discussion on special measures and a new 'maximalist' elements paper drafted by Mr Thornberry and Mr Sicilianos, which outlined all relevant conceptual and operative components to be considered in drafting a General Recommendation. Mr Thornberry noted that the first question was whether a General Recommendation was needed at all, although in his view it appeared that it was. He urged that members consider very closely the object and purpose of such a Recommendation. He placed particular stress on CEDAW's General Comment No. 25 on temporary special measures as a relevant new Comment that could serve as guidance, as well as other UN work such as Marc Bossuyt's study on affirmative action.² He also stated that length and style needed to be determined.³

Moving to substance, Mr Thornberry noted that the Committee would have to clarify its understanding of *de jure* and *de facto* equality and non-discrimination beyond what the *travaux préparatoires* of the Convention can provide, and that this and other questions could be addressed in the introduction. He added that the introduction may include a justification of the need for 'temporary' special measures (as addressed by CEDAW) and an incorporation of other commonly used terms such as 'affirmative action' (while taking note of what he saw as the 'apparent contradiction in the term positive discrimination'). The Recommendation could then move to a precise analysis of Articles 1(4) and 2(2).

Mr Thornberry also raised the need to consider whether there may be a margin of appreciation for States, recognition of 'needs based' special measures (drawing from the examination of the United States before

¹ This paper is for internal circulation only among Committee members.

² Working paper prepared by Mr. Marc Bossuyt on the concept of affirmative action, E/CN.4/Sub.2/1998/5.

³ Mr Thornberry noted that CERD General Recommendations 25, 27, 29, 31 tended to be quite and proscriptive.

See <http://www2.ohchr.org/english/bodies/cerd/comments.htm>

CERD), and the question of State resources (as raised in the recent examination of Pakistan). He also touched upon a number of operational aspects, including how to measure the role of States, how to include the participation of groups in designing special measures, how to collect data, and how this would be reflected in the reports of States Parties. He suggested that the text could also include the role of CERD and may draw on models of national best practice.

He concluded with the hope that Committee members could appraise the current paper, discuss structure and content, and arrive at lines of possible consensus on whether there should be a General Recommendation. He asked that members bear in mind that the Committee on Economic, Social and Cultural Rights is also drafting a General Comment on non-discrimination and that it would be important to speak with the same voice.

General discussion

It appeared that the majority of Committee members had not read the elements paper before them. Instead, most members made general comments about the need for a General Recommendation and broadly described what it might contain.

Mr de Gouttes opened the discussion by urging that the Recommendation first cover the conceptual nature of special measures and then make an operational contribution, which should include the need for special measures to be proportionate and temporary. All agreed on the temporary nature of special measures, while Mr Cali Tzay stressed that this should be distinguished from permanent measures taken to protect the rights of indigenous peoples. Mr Thornberry echoed the need for this clarification, while adding that indigenous peoples could also be entitled to temporary special measures.

Mr Diaconu stated that the Recommendation needed to address the role of the Committee regarding special measures, and that this could include its role in relation to follow-up. Mr Ewamson added that the Committee should be looking to help countries so that none are left behind.

Mr Kemal, Lahiri and Lindgren all stressed that any Recommendations should be short and direct, with the former claiming that the present document was 'too theoretical'. This was one point that Mr Thornberry could not accept, stating that the paper was a compilation of practical elements that required consideration, but he agreed that he has left open the possibility for a much shorter document. Mr Peter added that he was uncomfortable to go into content without a working draft.

Only Mr Amir raised questions as to why such a General Recommendation was now necessary after 40 years. It was therefore repeated that States have misunderstood the meaning of their obligations under Articles 1(4) and 2(2), that much has happened in 40 years and that discussions on the need for a General Recommendation have existed for some time, and that the Committee itself could also benefit from clarifying its understanding. It was also suggested by Mr Thornberry that as the other 'discrimination Committee', CEDAW, has drafted a General Comment on special measures, perhaps CERD should now do so as well.

While supporting the need for work in this area, Mr de Gouttes queried whether a draft study may have been less ambitious and more appropriate, as he was unclear whether any 'recommendation' was being made by the Committee. This generated some debate in relation to CERD's specific use of the term 'General Recommendation', where other Committees use 'General Comment', and the ongoing process of harmonisation of the working methods of treaty bodies. However, while no members expressed particular objection to changing the term to 'General Comments', support was expressed by Mr Diaconu, Mr Sicilianos and others for such a Comment/Recommendation to be part of the existing series of CERD General Recommendations. Mr de Gouttes appeared content to accept the general trend in this regard.

While it was proposed by Mr Kemal and Peter that the secretariat could prepare a first draft, Mr Thornberry rightly pointed out that this was the task of the Committee itself. Instead, he proposed as a next step that he

and Mr Sicilianos would attempt to draft either the beginnings of a preambular part or some operational elements, depending also on contributions from other members, and that something may be ready for circulation at the end of the current session if time permitted.

The Chairperson, Ms Dah, closed the meeting by summarising that the Committee had reached a decision to draft a General Recommendation (or whatever equivalent it may be called) and that all the elements for consideration exist in the draft elements paper before them. It was also agreed that the Recommendation would be concise and have little theory. She concluded that the Committee may have time to discuss a sketch of a draft at this session, depending on how Mr Thornberry and Mr Sicilianos progress on the matter and how the rest of the session proceeds.

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