



## International Covenant on Civil and Political Rights

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### Human Rights Committee

#### 109th session

#### Summary record of the first part (public)\* of the 3033rd meeting\*\*

Held at the Palais Wilson, Geneva, on Thursday, 31 October 2013, at 10 a.m.

*Chairperson:* Sir Nigel Rodley

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- \* No summary record was prepared for the second part (closed) of the meeting.
  - \*\* No summary record was issued for the 3032nd meeting.

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

**Organizational and other matters**

*Draft general comment No. 35 on article 9 of the Covenant (continued)*  
(CCPR/C/GC/R.35/Rev.1)

*Paragraph 43 bis*

1. **The Chairperson** invited the Committee to resume its first reading of draft general comment No. 35, beginning with paragraphs 43 bis, 45, 48, 56 and 57, which the Rapporteur had redrafted in the light of members' comments (document without a symbol circulated in the meeting room).
2. **Mr. Neuman** (Rapporteur for general comment No. 35) said that paragraph 43 bis had been redrafted to read: "The right to bring proceedings applies in principle from the moment of arrest, and any substantial waiting period before a detainee can bring a first challenge to detention is impermissible. The detainee has a right to appear in person before the court, where such presence serves the inquiry into the lawfulness of detention, including when questions regarding ill-treatment of the detainee arise." It was not stating that, in every proceeding brought under article 9, paragraph 4, there was an automatic requirement for the detainee to be transported to the court. The European Court of Human Rights treated the issue raised in paragraph 43 bis as one of equality of arms. The Committee, on the other hand, also considered the right to take proceedings before the court as a means of protection against ill-treatment in custody. With that in mind, a footnote had been added referring to general comment No. 29 on states of emergency, in which the Committee had discussed the non-derogability of the right expressed in paragraph 43 bis.
3. **Mr. Shany** said that the paragraph should make it clear that appearing before the court was the rule and not appearing was the exception.
4. **The Chairperson**, supported by **Mr. Vardzelashvili** and **Mr. Shany**, suggested redrafting the second sentence to read: "In general, the detainee has a right to appear in person before the court, especially where such presence serves the inquiry into the lawfulness of detention, including when questions regarding ill-treatment of the detainee arise."
5. **Mr. Neuman** said that, if the purpose of the rule was to ensure that the detainee had not been mistreated, rather than to determine the lawfulness of detention, it should be clearly stated in the paragraph.
6. **Mr. Fathalla** said that the rule should be further emphasized and suggested redrafting the second sentence to read: "As a rule, the detainee has to appear in person before the court. Such presence may serve the inquiry into the lawfulness of detention, including when questions regarding ill-treatment of the detainee arise."
7. **Mr. Bouzid** suggested replacing "a right" with "the right".
8. **Mr. Neuman** said that he would be happy to accept the Chairperson's suggestion, which followed the same lines as that made by Mr. Fathalla. He also welcomed Mr. Bouzid's suggestion.
9. **Mr. Bouzid** asked Mr. Neuman to clarify whether a detainee who chose not to exercise his or her right to appear could be ordered to do so by the court.
10. **The Chairperson** said that, as it was a right rather than an obligation, appearance before the court was not compulsory under article 9, paragraph 4. Individuals who were fearful about appearing before court would have representatives acting on their behalf.

11. **Mr. Neuman** said that the issue raised by Mr. Bouzid was not addressed in the paragraph. It was important to express that it was not entirely at the court's discretion whether or not a detainee appeared before it, and that the detainee had a right that the court had to recognize.
12. **Mr. Bouzid** said that the issue was addressed in the sentence that had been removed from the paragraph.
13. **Mr. Fathalla** said that, because courts could order detainees to be brought before them, his suggested redrafting left out the phrase "has a right".
14. **Mr. Shany** agreed with Mr. Bouzid and suggested restoring the first clause of the sentence that had been deleted, placing it at the end of the paragraph.
15. **Mr. Neuman** said that the sentence had been deleted in order to frame appearance before the court as a right of the detainee rather than a power of the court, in case the latter made an improper exercise of that power. He asked whether the Committee wanted the paragraph to address the right of the detainee, the power of the court, or both.
16. **The Chairperson**, supported by **Mr. Bouzid**, said that the paragraph should mention both.
17. **Mr. Neuman** said that he would be willing to restore the first clause of the deleted sentence. It would, however, be better to keep the original order, as changing it might give the impression that courts only had the power to enter an order when detainees chose to exercise their right.
18. **Mr. Shany**, supported by **Mr. Fathalla** and **Mr. Iwasawa**, said that the right of the detainee should be mentioned first, as the court's power only needed to be underscored for cases in which the detainee's right was not exercised.
19. **Mr. Neuman** said that he would redraft the paragraph in the light of members' comments, making the stylistic changes necessary to avoid misunderstandings.
20. *It was so decided.*

#### *Paragraph 45*

21. **Mr. Neuman** said that, in the second sentence, the word "administrative" had been deleted. Following a suggestion from Mr. Shany, the third sentence had been redrafted to read: "The Committee recommends that the Covenant be made applicable in such proceedings, but other legal structures may also be adopted in order to give effect to the rights recognized in article 9." The rest of the paragraph remained unchanged.
22. *Paragraph 45, as amended, was adopted.*

#### *Paragraph 48*

23. **Mr. Neuman** said that paragraph 48 had been redrafted to read: "Persons deprived of liberty are entitled not merely to take proceedings, but to receive a decision, and without delay. The refusal by a competent court to take a decision on a petition for the release of a detained person violates paragraph 4. The question of whether a decision has been reached without delay must be assessed on a case-by-case basis. As a matter of principle, the adjudication of the case should take place as expeditiously as possible. Delays attributable to the petitioner do not count as judicial delay. The Committee has recommended that detention on mental health grounds be judicially reviewed within a few days." The phrase "as expeditiously as possible" had been taken from case No. 291/1988 (*Torres v. Finland*), as suggested by Mr. Kälin. There was little by way of precedent to indicate the time beyond which a delay became excessive.

24. **Mr. Kälin** said that, since the fourth sentence dealt with a legal requirement, the phrase “As a matter of principle” should be deleted.

25. **Mr. Shany** said that the last sentence could be used to illustrate the rule to which the fourth sentence referred. He suggested placing it immediately after the fourth sentence and redrafting it to read: “For example, the Committee has recommended that detention on mental health grounds be judicially reviewed within a few days.”

26. **Mr. Flinterman** asked Mr. Neuman to clarify why the word “competent”, which seemed superfluous, had been added to the second sentence.

27. **Mr. Neuman** said that he would be happy to accept the suggestions made by Mr. Kälin and Mr. Shany. The word “competent” had been included on the advice of Mr. Kälin, who had pointed out that, aside from a court being incompetent, nothing could justify a refusal.

28. **Mr. Kälin**, supported by **Ms. Seibert-Fohr**, said that, in case No. 712/1996 (*Smirnova v. Russia*), which underpinned the second sentence, the court had refused to consider a petition on the grounds that it was incompetent. Such an action could not be deemed a violation of paragraph 4. The word “competent” should, therefore, be kept, even if the footnote cross reference to the case in question was not.

29. *Paragraph 48, as amended, was adopted.*

#### *Paragraph 56*

30. **Mr. Neuman**, introducing paragraph 56, said that, on the basis of the suggestions received, the second and third sentences of the paragraph had been redrafted to read: “Some forms of conduct amount independently to a violation of article 9 and another article, such as delays in bringing a detained criminal defendant to trial, which may violate both paragraph 3 of article 9 and paragraph 3 (c) of article 14. At times, the content of article 9, paragraph 1, is informed by the content of other articles; for example, detention may be arbitrary by virtue of the fact that it represents punishment for freedom of expression, in violation of article 19.” A footnote had then been added referring to paragraph 17, which discussed other forms of violation that led to arbitrary detention.

31. **The Chairperson** said that the paragraph accurately reflected the Committee’s intentions in that regard and he took it that the Committee wished to adopt it as amended.

32. *It was so decided.*

33. *Paragraph 56, as amended, was adopted.*

#### *Paragraph 57*

34. **Mr. Neuman** said that the new language proposed for paragraph 57 was: “The rights to liberty of person and security of person under article 9, paragraph 1, provide additional emphasis upon the obligations inherent in article 1 of the Optional Protocol and article 40 of the Covenant for States parties to refrain from reprisals against individuals in retaliation for submitting communications or for providing information to the Committee in connection with a State party’s reports, and to protect individuals against such reprisals by others.”

35. **Mr. Bouzid** suggested that the paragraph should refer to associations as well as to individuals.

36. **Mr. Flinterman** said that he would like the specific examples of reprisals that had been included in previous versions, namely physical intimidation and threats to personal liberty, to be retained.

37. **Mr. Kälin**, agreeing with Mr. Flinterman and following on from a suggestion by the Chairperson not to limit the scope of cooperation with the Committee, proposed rewording the paragraph to state: “Article 9 also reinforces the obligations of States parties under the Covenant and under the Optional Protocol to protect individuals against reprisals for having cooperated or communicated with the Committee. Physical intimidation or threats to personal liberty, for instance in retaliation for submitting communications or for providing information to the Committee in connection with a State party’s reports, amount to a violation of article 9 of the Covenant.”

38. **Mr. Neuman** pointed out that Mr. Bouzid’s request for including a reference to associations would then not be satisfied.

39. **Mr. Bouzid** said that, given the paragraph’s focus on threats to personal security and deprivation of liberty, it would not be appropriate to include associations anyway.

40. **Ms. Majodina** said that she was concerned that the reference to the rights to liberty of person and security of person, which had been present in the language proposed by the Rapporteur, was no longer present.

41. **Mr. Neuman** suggested inserting “, paragraph 1,” after “article 9” in the last sentence to narrow the scope to those two rights.

42. **The Chairperson** said that he took it the Committee agreed to the proposed changes.

43. *It was so decided.*

44. *Paragraph 57, as amended, was adopted.*

#### *Paragraph 58*

45. **Mr. Neuman** said that since it had been said that part VII of the draft general comment was too detailed and long, the Committee might wish to delete paragraph 58.

46. **Mr. Kälin** said that, if the Committee wished to keep the paragraph, it might consider removing “Some” from the last sentence and rephrasing it to start with “Extreme forms of arbitrary detention that are themselves life-threatening violate” since that would capture the specific relationship between articles 9 and 6.

47. **Ms. Seibert-Fohr** proposed deleting the paragraph for the sake of brevity and because it did not have particular relevance to article 9. Moreover, if the Committee was going to comment on the overlaps with article 6, it might need to comment on the overlaps with all the other articles as well.

48. **The Chairperson** said that one reason for highlighting possible overlaps was to clearly establish that what was said in the general comment on article 9 was without prejudice to what might be applicable under other articles. A serious threat to life, for example, could constitute a violation under both articles 9 and 6.

49. **Mr. Shany** said that the second sentence should be retained because it helped define the scope of article 9 by delineating the differences between it and article 6.

50. **Ms. Majodina** said she would also like the paragraph to be retained. The purpose of the general comment was to provide guidance and that guidance should be as clear as possible given the varied readership it would have.

51. **Mr. Kälin** said that the notion of overlap caused him concern. His interpretation was that article 6 was *lex specialis*, and the current wording implied that, in the future, the Committee would have to find a violation of article 9 when it found a violation of article 6.

52. **The Chairperson** said that he was not sure that would be the case. The Committee had little case law on the subject since complaints were usually filed under one article or another. There did seem to be consensus, however, on the need to comment on the relationship between article 6 and article 9, paragraph 1, in relation to the right to liberty and security of person and hence to retain paragraph 58.

53. **Mr. Neuman** suggested considering the wording of the paragraph sentence by sentence.

54. **Mr. Ben Achour** proposed, as a matter of style, starting each paragraph in part VII, including paragraph 58, with a reference to the relevant wording of article 9 before turning to its relationship with another article.

55. **Mr. Neuman** explained that the structuring of part VII had been modelled on the corresponding section of general comment No. 32 and reflected the theory that it was more helpful to the reader to signal the article that was being brought into the discussion at the outset of each paragraph, but either approach could be used.

56. In reply to a suggestion made by **Mr. Shany** to underscore that not all violations of article 6 were ipso facto violations of article 9, **the Chairperson** proposed changing “overlaps” to “may overlap” in the first sentence.

57. **Mr. Neuman** proposed removing “guaranteed by article 6 of the Covenant” from the wording put forward by Mr. Kälin for the last sentence, which would then end with “protection of life”, given that the point was now made in the first sentence.

58. **The Chairperson** suggested that the decision on which stylistic approach to apply for opening the paragraph could be decided at the second reading. In the meantime, he took it that the Committee did not wish to change the wording of the second sentence and wished to adopt the paragraph as discussed.

59. *It was so agreed.*

60. *Paragraph 58, as amended and subject to further stylistic modifications, was adopted.*

*The public part of the meeting rose at 12.05 p.m.*