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Chairperson: Sir Nigel Rodley

Contents

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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.3)

1. **Mr. Neuman** (Rapporteur for general comment No. 35), introducing the second reading of the draft general comment, said that, following the first reading, the Committee had invited comments from States parties and other bodies, as a result of which there had been 9 comments from States parties and over 15 from NGOs, as well as some from sources from within the United Nations. The comments had generally been useful, although some showed a lack of understanding of the draft general comment, which could in itself be useful. Some of those commenting had wanted more depth on other articles of the Covenant. However, the Committee was restricted to 10,700 words, including the footnotes, and the text currently contained 12,000 words, so he would need to make cuts. Some footnotes that had made a particular point — mostly citations from previous general comments — had served their purpose and could be deleted. He suggested that he should retain citations containing quotations or other indications of their content.

2. With regard to the section entitled "General remarks", he said that Belarus objected to the whole process because the text was not available in Russian and had urged Committee to start all over again in a more inclusive manner. He had some sympathy with that view, but the Committee had to work within external constraints. Some States had objected that the draft general comment was not binding, while others said that the Committee should not cite its own views as authoritative; only a limited set of sources should be drawn on beyond the text of the Covenant itself. Nor should the Committee make categorical statements about the duties of States parties. The draft general comment, was, however, written in the customary way and did not purport to be legally binding. It was simply the way in which the Committee expressed its accumulated expertise on the application of the Covenant. Austria had said that the Committee should consider regional case law, to which his answer was that he had considered it, even if he gave no citations. Belarus had said that the Committee should take civil law into account, not just common law, but he noted that the majority of members of the Committee came from civil law systems and civil law had indeed been taken into account. A comment by the United Kingdom seemed to relate to an earlier draft of the general comment. One NGO had said that there should be a separate title for each section. The suggestion was understandable, but it would use up too much time and space.

3. **Mr. Iwasawa** commended the Rapporteur's work and hoped that the draft general comment could be finalized soon. He drew attention to the distinction between the words "should" and "must": the latter was warranted when an action was required by law, but in its concluding observations the Committee regularly used the word "should", even when it believed that an action was required by law. Secondly, the phrase "General remarks" sounded too conversational to his ears and he wondered whether it might not be better to replace the word "remarks" by the word "part". Lastly, he thought that paragraph 67 should be appended to the end of the general part.

4. **The Chairperson** noted that the United States of America had said that the Committee's views were "neither primary nor authoritative sources of law" and should not be cited as such. In that connection, he drew attention to the case of *Ahmadou Sadio Diallo* (*Republic of Guinea v. Democratic Republic of the Congo*), in which the International Court of Justice had said that great weight should be attached to the interpretation adopted by the independent body established specifically to supervise the application of the Covenant. Australia, meanwhile, had said that whether or not the examples given amounted to violations of the Covenant would depend on the facts and circumstances in each

individual case. A constant difficulty faced by the Committee in dealing with Australia, however, was that it tended to apply blanket measures without taking account of individual cases.

5. **Mr. Neuman** said that he had taken the term “General remarks” from earlier general comments, but he could look at other possibilities.

Paragraphs 1 and 2

6. *Paragraphs 1 and 2 were adopted.*

Paragraph 3

7. **Mr. Neuman** said that there had been two suggestions for possible additions to the list of the categories of person that some States might view as not protected, those being lesbian, gay, bisexual and transgender (LGBT) persons and stateless persons. He found those suggestions acceptable.

8. **The Chairperson** said that another suggestion had been to include migrant workers in the list.

9. **Mr. Shany** said that he had no objection to any of the suggestions, but any list ran the risk of antagonizing any group that was omitted. He therefore suggested replacing the list with the phrase “every human being”.

10. **The Chairperson** said that the Committee had discussed the matter at length on first reading. If there had been a large number of suggestions for additions to the list, he would have considered reopening the discussion, but there had not.

11. **Mr. Bouzid** endorsed the suggestion that migrant workers should be added as a separate category.

12. **Mr. Seetulsingh** said that indigenous peoples might feel aggrieved at being left off the list.

13. **The Chairperson** said that no representatives of indigenous peoples had objected and, in any case, the Covenant clearly covered them.

14. **Ms. Chanet** said that, most importantly, the impression should not be given that the list was exhaustive.

15. **Mr. Neuman** said that he had no objection to adding migrant workers to the list. Originally, the text had referred to aliens, refugees and asylum seekers. There was no need to add a reference to indigenous peoples, because the list was of people who faced denial of their rights.

16. **The Chairperson** suggested that, since the document was of some legal significance, the phrase “among others” should be replaced by the more formal-sounding “inter alia”.

17. *Paragraph 3, as amended, was adopted.*

Paragraph 4

18. *Paragraph 4 was adopted.*

Paragraph 5

19. **Mr. Neuman** said that paragraph 5 had attracted several comments from States. Australia had suggested that the Committee should provide a definition of the phrase “deprivation of liberty”, while Belarus wanted the Committee to avoid defining it.

Although it had not provided a definition, the general comment did differentiate liberty from freedom of movement and provided examples, which were not meant to be exhaustive. The problem with definitions was that one abstract term was defined in terms of another and no problems were solved. The Committee's approach was the right one. The United States suggested that the Committee should use the paragraph to reject its traditional interpretation of the extraterritorial applicability of the Covenant. It was also concerned about the Committee's characterization of solitary confinement and restraining devices, and also the detention of children for "educational purposes", as deprivation of liberty. Austria had objected that confinement to a restricted area of an airport did not necessarily amount to deprivation of liberty, but, in his view, the Committee's decision was correct: confinement to a restricted area was a deprivation of liberty. One NGO wanted to use the language of the European Court of Human Rights to distinguish between liberty of person and freedom of movement. The Committee had discussed the matter previously and rejected the distinction, out of a concern that it could be used inappropriately to narrow the meaning of deprivation of liberty. A confidential source had suggested that detention for immigration-related purposes should be mentioned and, in that case, he would suggest that the example could be added to the existing footnote. Other examples had been suggested, to which he had no objection in principle, but the Committee should not unnecessarily multiply the number of words used.

20. **The Chairperson** said, with regard to the challenge by the United States to the extraterritorial application of the Covenant, that the Committee would surely prefer to take its lead from the International Court of Justice, which had confirmed in the case concerning "*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*" that the Covenant did apply extraterritorially.

21. **Mr. Kälin** said that the relationship between articles 9 and 12 of the Covenant should be clarified, but such a clarification belonged in paragraph 60.

22. **The Chairperson** said he took it that the only amendment was to add a reference to the detention of immigrants in a footnote.

23. *Paragraph 5, as amended, was adopted.*

Paragraph 6

24. **Mr. Neuman** said that two NGOs had made opposing comments. The existing text need not be changed.

25. *Paragraph 6 was adopted.*

Paragraph 7

26. **Mr. Neuman** said that the United States had rejected the Committee's traditional understanding of security of person and wished it to limit the notion to the security of persons who were in custody. He was not persuaded that that was the right course. Australia seemed to be unaware that the Committee had previously used article 9 in connection with domestic violence and therefore suggested that it should use material from the Committee on the Elimination of Discrimination against Women and the Committee on the Rights of the Child to ensure consistency. The Human Rights Committee had adequately addressed the issue and did not need to refer to other human rights treaty bodies. The United Kingdom focused on footnote 15 to disagree with the Committee's usual understanding of the extraterritorial applicability of the Covenant. A confidential source had suggested the replacement of the phrase "sexual minorities" by the phrase "sexual orientation and gender identity". Although he did not believe that only one form of jargon could express a given idea, he was willing to endorse the suggestion and reword the paragraph accordingly. Various NGOs had suggested additions, but the paragraph had originally been drafted as a

compromise following a long discussion that had left room for further developments relating to the phrase "security of person". In his view, the Committee was not ready to spell the concept out in greater detail. Some comments had viewed the reference to patterns of violence as being too restrictive. That had not been his intention, but the addition of the words "for example" might clarify the paragraph. He had no objection to adding persons with disabilities to the list of persons subject to patterns of violence.

27. **Mr. Kälin** suggested that paragraph 7 should be moved to the end of part I, after paragraph 9, in order to make a more logical progression. He also suggested that the phrase "or other third parties" should be added at the end of the third sentence, following the words "private actors". Threats to life could come from troops or the authorities of another State, for example.

28. **Mr. Rodríguez-Rescia** said that he was inclined to support the suggestion by Amnesty International that the paragraph should specifically mention the excessive use of force even when a person was not deprived of his or her liberty, as in the case of demonstrators.

29. **Ms. Majodina** endorsed that view. The paragraph could also specify that States parties should prevent and remedy violations of the right to security of person.

30. **Mr. Zlătescu** noted that the phrase "violence and abuse" was used in relation to the treatment of children but only the word "violence" appeared in relation to women or sexual minorities.

31. **Mr. Neuman** said that he had no serious objection to moving paragraph 7 to the end of part I. As for the addition of "or other third parties", foreign governments were also governmental; he could, however, accept the amendments. With regard to Mr. Rodríguez-Rescia's point, the paragraph already used the phrase "unjustifiable use of force in law enforcement", though without singling out particular categories. Moreover, using the draft general comment to expand a discussion of the scope of articles 19 and 21 of the Covenant was not the best use of the word limit. As for the phrase "violence and abuse", he would prefer to delete the words "and abuse" in referring to the treatment of children.

32. **Mr. Kälin** said the wording "either governmental or private actors" did not make it clear that foreign Governments were included. He therefore proposed the wording "from any governmental or private actor".

33. *The proposal was accepted.*

34. *Paragraph 7, as amended, was adopted.*

Paragraph 8

35. **Mr. Neuman** said that the United States objected to applying liberty of person to the actions of private parties. Australia had proposed alternative wording, but he did not consider it an improvement on the current text. Mads Andenæs of the Working Group on Arbitrary Detention had suggested expanding the discussion of the duty of States with regard to actions of other States operating in their territory. Further consideration could be given to that point if the Committee so wished.

36. **Mr. Fathalla** said that he supported the proposal to refer to the "duty to take appropriate measures to protect", as the current wording was too general.

37. **Ms. Chanet** said that it was necessary to specify what was understood by the "activities of another State within their territory". It should be clear that kidnapping was the main concern. As currently worded, it might be interpreted to include the foreign funding of NGOs, which was being restricted in a number of countries at present. She suggested referring to activities that might impair or threaten liberty of person.

38. **The Chairperson** agreed that, although that was probably intended to be implicit, the words “that might impair personal liberty” could be added.

39. **Mr. Neuman** said that he had not initially been in favour of the Australian proposal because “appropriate measures” appeared in the second sentence, thus quickly clarifying the nature of the duty mentioned in the first. It could, however, be repeated in the first sentence if the Committee wished to make it clear that the duty to protect was not an absolute duty. Given that the reference in the last sentence was to detention by another State acting within the territory of the State, the ambiguity might be resolved by simply referring to “detention” rather than “activities”. He was concerned that the phrasing proposed by Ms. Chanet could actually be interpreted to mean the very thing she wished to avoid – the prevention of foreign funding of NGOs.

40. **Mr. Shany** agreed with Mr. Fathalla. Noting that the words “appropriate measures” were used in the second sentence but not the third, he suggested introducing them in the first sentence as a chapeau and using the same formulation in the second sentence as in the third. As to the last sentence, he wondered whether replacing “activities” with “infringements” might be possible.

41. **Mr. Zlătescu**, referring to the second sentence, asked whether, in addition to abduction or detention, reference should not also be made to “ill-treatment”.

42. **The Chairperson** said that such a reference would not be appropriate in paragraph 8, which dealt exclusively with detention. The point could be borne in mind when it came to discussing the interrelationship between articles 7 and 9.

43. **Mr. Seetulsingh**, referring to the last sentence, asked why the reference was to States parties “doing their utmost” to take appropriate measures.

44. **Mr. Neuman** said he supported Mr. Shany’s proposal concerning “appropriate measures”. In the last sentence, if the word “infringements” were accepted, it should be followed with “by the action of another State”. Those actions included situations in which the troops of another State had invaded or were occupying portions of its territory. The words “do their utmost” had been added by the Committee to stress the strong efforts the State should be making in those situations, although recognizing that it might not be able to prevent deprivations.

45. The Chairperson said that, in his view, the term “infringements” was rather too elastic.

46. Mr. Neuman proposed the wording “protect individuals against deprivation of personal liberty by the action of another State within their territory.”

47. *Paragraph 8, as amended, was adopted.*

Paragraph 9

48. **Mr. Neuman** said that he agreed with the suggestion by Australia to refer to “effective” rather than “adequate” remedies in the final sentence. However, he did not agree with Australia that paragraph 9 should employ concepts of attribution from the law of State responsibility. The United States had raised the same objection to the duty to regulate private actors. One NGO believed there was a need to be more explicit about privately run prisons, but in his view it was clear that they were being referred to in that paragraph. He did not support suggestions to include privately managed immigration detention and expand on the subject of privatization.

49. **Ms. Seibert-Fohr** said that it was clear from article 5 of the International Law Commission’s draft articles on Responsibility of States for Internationally Wrongful Acts

that if a State authorized an entity to exercise governmental authority, there was State responsibility. She therefore did not see any contradiction in paragraph 9.

50. **Mr. Kälin** said that, in his view, Australia had made a valid point. Two situations covered in the draft articles on State responsibility were of relevance. Article 5 dealt with the conduct of persons or entities exercising elements of governmental authority, such as prisons not run by a State authority but by a private company on behalf of the State. Article 8 addressed conduct directed or controlled by a State, such as a law regulating private security companies and allowing them to lock up their staff as a disciplinary sanction. No distinction was made between those two situations in the current draft. Therefore, for the sake of clarity, he proposed redrafting the first sentence to read: "When private individuals or entities are empowered or authorized". "Empowered" would address the content of article 5 of the draft articles, while "authorized" would cover article 8. The second part of that sentence should read "the State party remains responsible for adherence and ensuring adherence ...".

51. *Paragraph 9, as amended, was adopted.*

The meeting was suspended at 11.30 a.m. and resumed at 11.45 a.m.

52. **Mr. Neuman** said that, as the title of part I was the same as that used in general comments Nos. 32 and 34, Mr. Iwasawa had agreed that, although perhaps not ideal, it created a certain precedent and so would continue to be used.

Paragraph 10

53. **Mr. Neuman** said that there had been no comments concerning paragraph 10.

54. *Paragraph 10 was adopted.*

Paragraph 11

55. **Mr. Neuman** said that he supported the proposal by the Danish Institute for Human Rights to add, in the first sentence, "unlawful deprivation of liberty, i.e." before "deprivation of liberty that is not on such grounds …". The same NGO, Switzerland and another source recommended spelling out more clearly the difference between unlawful and arbitrary detention. Amnesty International had recommended leaving more room for future developments. Detention that was based on a mistaken interpretation of domestic law could be unlawful without being arbitrary if the mistake was not too gross. Article 9, paragraph 4, was intended to give domestic courts the opportunity to correct legal errors made in good faith and not just the gross errors that would render detention arbitrary. Another source would like the Committee to discuss maximum periods of detention, but that paragraph would not be the appropriate place; it would be a mistake to demand maximum periods of detention for all categories of detention.

56. **Mr. Kälin** said that some of the comments might have been prompted by a lack of clarity concerning the term "unlawful", given that it could mean either not in accordance with the law in general, including international law, or in violation of domestic law. In the second sentence, "unlawful" was being used in the latter sense. Perhaps it would be clearer to say that "arrests or detentions may be in violation of domestic law but not arbitrary".

57. **Mr. Shany** said that he would be reluctant to state that the domestic law was always the relevant framework for assessing legality of detention. For example, when international forces exercised powers of detention during peacekeeping missions, it could be argued that the Security Council or other mandate that provided them with those powers was the relevant framework.

58. **Mr. Kälin** proposed the formulation: “arrests or detention may be in violation of the law authorizing such actions but not arbitrary”.

59. **Ms. Seibert-Fohr** said that such a formulation suggested a much narrower interpretation of “unlawful” than was the Committee’s usual understanding.

60. **Mr. Kälin** proposed the wording: “may be in violation of the law applicable to ...”.

61. **Mr. Neuman** suggested the wording “may be in violation of the applicable law”.

62. *Paragraph 11, as amended by the Rapporteur, was adopted.*

Paragraph 12

63. **Mr. Neuman** said that Belarus had commented that lawful detention could never be arbitrary. However, the *travaux* of the Covenant clearly supported the Committee’s view on that point. The United States had said that necessity and proportionality should not be elements of what was arbitrary and objected to the requirement of periodic review. The United Kingdom had requested clarification of the Committee’s reference to “inappropriateness” and how the notion of fixed terms of imprisonment applied to whole-life tariffs. It was for the Committee to decide whether the paragraph was ambiguous on that point. Switzerland had expressed the view that periodic review could be either ex officio or by application, which was what the Committee intended. Amnesty International believed the paragraph did not specify sufficiently clearly that periodic review applied outside a criminal context. Perhaps the paragraph could be recast to make that clearer, referring to “any form of detention”. Mads Andenæs and Lawrence Hill-Cawthorne recommended adding language about the clarity of grounds for detention, which was discussed in paragraph 22. Another source recommended referring to discriminatory detention on grounds of sexual orientation and gender identity, but that was not the appropriate paragraph in which to do so. There was another proposal to require independent administrative or judicial review prior to detention, which was not appropriate in a general paragraph.

64. His only proposal in relation to paragraph 12 was that, in the final sentence, the words “in detention” should be replaced with “in any form of detention”.

65. The Chairperson said that the Committee would, at some point, need to address the acceptability or otherwise of whole-life sentences.

66. *Paragraph 12, as amended, was adopted.*

Paragraph 13

67. **Mr. Neuman** said that, despite requests from certain States parties to limit the scope of the term “arrest” to criminal arrests, the original wording should stand. He pointed out that, in article 9, paragraph 2, of the Covenant, notice of reasons applied to all forms of detention, while notice of charges was relevant only when there were criminal charges.

68. **The Chairperson** said that it had long been accepted, both in the practice of the Committee and in the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, that the notion of arrest had to be understood to have a broader meaning, as reflected in paragraph 13.

69. *Paragraph 13 was adopted.*

Paragraph 14

70. **Mr. Neuman** said that, although the United States had expressed uncertainty as to the meaning of the fifth sentence, the paragraph should be adopted as it stood, on the understanding that explanatory footnote 45 would be retained.

71. *Paragraph 14 was adopted.*

Paragraph 15

72. **Mr. Neuman**, summarizing some of the many comments that had been received, said that Australia wished to delete the paragraph and all discussion of international humanitarian law in the draft general comment, while Switzerland believed that the matter would be better addressed in a separate paragraph in part VII. The United States had suggested deleting the word "international" before "armed conflict" on the grounds that international humanitarian law was the *lex specialis* in both international and non-international armed conflicts. It also stated that elements of the paragraph were incorrect, that article 9, paragraph 4, of the Covenant was not applicable in all cases, that the notions of imperative threat and increasing burden of proof were unjustified, that the words "absolutely necessary" should be replaced with "necessary" or "reasonably necessary", and that it had not been made explicit that the reference to guarantees did not apply to article 9, paragraph 3, of the Covenant. Some NGOs, meanwhile, had maintained that the paragraph was not protective enough, and that security detention was only ever permissible by derogation, which was not always an option.

73. It was important to bear in mind the relationship between paragraph 15 and a number of paragraphs in part VII. Adoption of the paragraph should be provisional, allowing the Committee to revisit it in the light of subsequent discussions on the interrelated paragraphs that followed. While he was uncomfortable with the content of the paragraph, he would prefer to express the will of the Committee rather than contribute further to shaping it.

74. **The Chairperson** said that the discordant comments from sources were indicative of the difficult position in which the Committee found itself. It would be easy to restrict the application of paragraph 15 to internal armed conflict, given that detention in international armed conflict was dealt with by the Third and Fourth Geneva Conventions. Nevertheless, he recalled that general comment No. 35 was designed to replace general comment No. 8, and that, should the Committee avoid the problematic issue of transnational armed conflict, which the Supreme Court of the United States had equated to non-international armed conflict in its ruling on the case of *Hamdan v. Rumsfeld*, it would not be discharging its responsibilities fully.

75. **Mr. Rodríguez-Rescia** said that he had misgivings over whether the Committee should allow administrative detention on security grounds. If it did, it should ensure that the protection against arbitrary deprivation of liberty provided for in paragraph 15 was at least commensurate with that embodied in article 9 of the Covenant.

76. **Mr. Shany**, supported by **Ms. Chanet**, said that, while paragraph 15 should be retained, the Committee should review the sharp distinction that it had made between international and non-international armed conflict. Transnational armed conflict, though viewed as a form of non-international armed conflict, bore many resemblances to international armed conflict. Consequently, the Committee should either amend the paragraph to reflect the applicability of international humanitarian law to non-international armed conflict, or differentiate between the various types of non-international armed conflict and the standards applicable in each case.

77. In view of the progress being achieved in the formulation of standards applicable to non-international armed conflict, the Committee should leave the door open for future developments to inform the interpretation of article 9, paragraph 1, of the Covenant.

78. **Mr. Salvioli** said that the Committee should guard against ambiguity, which some States parties exploited to serve their intentions, by basing paragraph 15 on the very clear provisions laid down in the Covenant. Any mention of the exceptional circumstances under which lawful derogating measures could be taken should thus take article 4 of the Covenant as its point of departure.

79. **Mr. Kälin** proposed deleting the second sentence and adding a sentence at the end of the paragraph to the effect that article 9, subject to derogation, remained applicable in situations of armed conflict, and that security detention that was permissible under international humanitarian law did not amount to arbitrary detention. In that way, the Committee would avoid taking a stance on the content of international humanitarian law, which was outside its mandate, and make it clear that the Covenant was applicable in cases where *lex specialis* was not.

80. **The Chairperson** said that, to avoid misinterpretation, the words "permissible under" should be replaced with "provided for and regulated by".

81. **Mr. Shany** said that "authorized by" might also be used instead of "permissible under". He agreed that the second sentence should be deleted, and pointed out that the third sentence would have to be amended accordingly.

82. **Ms. Chanet** said that the word "derogation" should not feature in a general comment on article 9.

83. **The Chairperson** said that the important doctrinal issue of derogations, which would be studied in part VII of the text, left the Committee with a dilemma. On the one hand, there had, until recently, been calls for it to consider administrative detention as inherently arbitrary unless subject to measures required by a state of emergency, with article 4 of the Covenant stipulating that there had to be a threat to "the life of the nation" and that States parties had to provide notification of derogation. On the other hand, in the context of multilateral enforcement actions authorized by the Security Council, the Committee could not oppose the authorization of administrative detention under certain circumstances, nor could it insist that States parties issue a notification of derogation in order to render the action lawful, and yet the Covenant had extraterritorial applicability.

84. **Mr. Shany**, referring to the fourth sentence, sought clarification on the meaning of the word "increases", which might imply that States parties had to supply more evidence the longer an individual remained in detention.

85. **The Chairperson** said that the intention was not to put an impossible burden on States parties at the outset of detention. The word "increases" referred to the raising of the standard or threshold of proof the longer detention continued. He would be happy for the Committee to consider alternative drafting.

86. **Mr. Neuman**, referring to Mr. Kälin's proposal to incorporate a new sentence in the paragraph, wished to know what the sentence would apply to. His own view was that article 9 should also apply in the context of armed conflict, but there were still question marks over what the requirements of the article should be in a variety of situations, both infraterritorial and extraterritorial.

87. **The Chairperson** said the general feeling among members appeared to be that the existence of armed conflict should not automatically preclude the application of article 9. He invited Ms. Chanet, Mr. Kälin and Mr. Shany to draft a provisional text on that basis.

The Committee could continue to use language borrowed from international humanitarian law and might consider referring to the criteria established in article 4 of the Covenant.

88. **Ms. Chanet** said that the Committee should be wary of taking a step backwards in relation to its general comment No. 8. Its approach to the issue of the burden of proof on States parties should be grounded in its own perspective vis-a-vis article 9 of the Covenant, without complicating matters by mentioning other international laws.

The meeting rose at 1 p.m.