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Summary record of the 3014th meeting
Held at the Palais Wilson, Geneva, on Thursday, 17 October 2013, at 3 p.m.

Chairperson: Sir Nigel Rodley

Contents

The meeting was called to order at 3.05 p.m.

Organizational and other matters, including the adoption of the report of the pre-sessional working group on individual communications

Draft general comment No. 35 on article 9 (CCPR/C/GC/R.35/Rev.1)

1. **The Chairperson** invited the Committee members to resume their first reading of draft general comment No. 35 on article 9, begun at the 108th session. He said that the Committee had reached paragraph 31, but the recasting of certain sections had been left to the Rapporteur, Mr. Neuman. The revised text had been handed out to members with the symbol CCPR/C/GC/R.35/Rev.1. He invited Mr. Neuman to present his proposed changes.

Paragraph 13

2. **Mr. Neuman** (Rapporteur for the general comment) said that he had changed the last sentence of the paragraph to reflect the discussions of the previous session but had not made a decision on the matter that had been left pending regarding which word, between "review" and "re-examination", was the most appropriate.

3. **Ms. Chanet** said that the word did not really matter as long as it unequivocally conveyed that detention should be justified and reviewed periodically. However, she would delete the words "aside from fixed-term sentences" at the beginning of the last sentence because they might be interpreted to mean that detention could not be arbitrary if its duration was determined by a court; whereas what the Committee wished to say was that a 10-year prison sentence, for example, could not be deemed arbitrary simply on the grounds that it was not re-examined every year.

4. **Mr. Kälin** proposed specifying that in a footnote in order to avoid any misinterpretation.

5. **The Chairperson** suggested the following formulation: "Aside from fixed-term sentences imposed by judicial decision following a guilty verdict ...".

6. **Mr. Neuman** proposed submitting a sentence recast on that basis during the second reading.

7. *It was so decided.*

Paragraph 14

8. **Mr. Neuman** said that to complete the definition of the term "arrest", he had inserted, at Mr. Kälin's suggestion, the words "by actual taking into custody" in the first sentence and had added at the end of the paragraph the sentence "When an additional deprivation of liberty is imposed on a person already in custody, the initiation of that deprivation of liberty also amounts to an arrest", to specify that the guarantees provided for under article 9, paragraph 2, also applied when a detainee received another custodial sentence.

9. **The Chairperson** said that the insertion in the first sentence could be interpreted in a restrictive manner when the point was in fact to provide a generic definition of arrest.

10. **Mr. Kälin** explained that his intention had been to clearly state that it was the act of seizing and detaining a person that was referred to and not, for example, the issuance of an arrest warrant.

11. **Ms. Chanet** said that the word "apprehension" would be the most suitable because it had both a legal and a physical dimension.

12. **Mr. Neuman** agreed with the suggestion. Thus the first sentence would read: "The term 'arrest' refers to the apprehension of a person leading to deprivation of liberty ...".

13. *It was so decided.*

14. **Mr. Shany** asked what situations the last sentence was meant to cover.

15. **Mr. Neuman** replied that the notion of additional deprivation of liberty introduced in that sentence was meant to cover not only cases where further charges were laid against a person already held on charges or serving their sentence, but also cases where additional restrictions were imposed, such as solitary confinement. Solitary confinement could be mentioned by way of example.

16. **The Chairperson** said that he failed to see how placement in solitary confinement could be considered a new arrest under article 9, paragraph 2.

17. **Mr. Neuman** recalled that, in paragraph 5 of the draft general comment, solitary confinement was explicitly cited as a restriction constituting deprivation of liberty.

18. **Mr. Kälin** acknowledged that the link between the concepts of arrest and solitary confinement was unclear, but believed that excluding solitary confinement from the scope of article 9, paragraph 2, would imply that a detainee could be placed there at any given time without the need to justify the measure or give the person any reasons, which was obviously not the Committee's position. It might be best to specify, by giving examples and using the terms of paragraph 5, that in addition to arrest in the strict sense of the word, article 9, paragraph 2, also applied to cases where restrictions were imposed on a person already in detention.

19. **The Chairperson** suggested that the Rapporteur should revise the last sentence on that basis and submit the amended version of the paragraph for the Committee's consideration at the second reading.

20. *It was so decided.*

Paragraph 17

21. **Mr. Neuman** said that the two new points on which the Committee was invited to comment were the insertion in the first sentence of the words "for the legitimate exercise of certain rights as guaranteed by the Covenant" and the recast last sentence, which, inspired by the phrasing of the European Court of Human Rights, read: "Imprisonment after a manifestly unfair trial is arbitrary, but not every violation of the specific procedural guarantees for criminal defendants in article 14 results in arbitrary detention."

22. **Mr. Kälin** asked whether it might not be better, in the first sentence, to speak of "the legitimate exercise of rights as guaranteed by the Covenant" as opposed to "*certain* rights", in order to avoid giving the impression that arresting a person for exercising other rights might not be arbitrary.

23. *Paragraph 17, as amended, was adopted with an editorial change in the Spanish version.*

Paragraph 18

24. **Mr. Neuman** recalled that, at its previous session, the Committee had asked him to add a sentence clearly explaining what was permissible regarding the deprivation of liberty of migrant children and also to use the term "minors" instead. He therefore proposed the following: "Minors may be deprived of liberty only as a measure of last resort and for the shortest appropriate period of time, taking into account their best interests as a primary consideration with regard to the duration and conditions of detention."

25. **Mr. Flinterman** said that the Committee on the Rights of the Child, at its day of general discussion in 2012 on the issue of children's rights and international migration, had stated that detaining a child on the basis of their or their parents' migration status was a violation and was always contrary to the child's best interest. Yet the suggested sentence opened up the possibility of depriving migrant children of their liberty. Therefore, it would perhaps be better to stick as closely as possible to the statement of the Committee on the Rights of the Child.

26. **Mr. Neuman** said that the Committee had never objected to asylum seekers who had illegally entered the territory of a State party being detained for a brief initial period in order to determine their nationality and establish their identity, even if they were children. In fact, one of the cases cited in the footnote concerned an unaccompanied minor who, after running away from the open facility in which he was housed, had been placed in a closed centre while his case was considered. The State party had justified the detention by the fact that the person could not be expelled if he ran away again, and the Committee had ruled that no violation had occurred. If the Committee wanted to review its position and state that a child could not under any circumstances be placed in a detention centre for any period of time, then further discussion was needed.

27. **Mr. Flinterman** agreed that it was important to reflect the Committee's own jurisprudence first and foremost. However, it would be useful to keep the term "child" because the Committee had always referred to the best interests of the "child" rather than of the "minor".

28. *The proposal was approved.*

29. *Paragraph 18 was adopted with the Rapporteur's proposal, as amended by Mr. Flinterman, and an editorial change in the Spanish version.*

Paragraph 22

30. **Mr. Neuman** said that the last sentence of the paragraph had been amended to state, on the one hand, that it was illegal to deny the release of a person to whom amnesty laws applied and, on the other, to specify that the judicial decisions referred to those that were legally effective.

31. **Mr. Shany** said he thought that "legally valid" was more suitable than "legally effective", especially since the phrase could be positioned so as to apply to both judicial decisions and amnesties.

32. **The Chairperson** said that there did not appear to be an English equivalent of the French "exécutoire". He suggested inserting "exécutoire" in parentheses in the English version.

33. **Mr. Kälin** said he thought that the phrase "legally valid" was inappropriate because a decision could be perfectly valid yet not be executable because it was subject to appeal. Furthermore, he was not sure that it was possible to speak of violating an amnesty.

34. **Ms. Chanet** confirmed that validity could not apply to amnesty. An amnesty was always valid as it was always looked at from the perspective of national law.

35. **The Chairperson** suggested the phrase "legally operative" as an equivalent for "exécutoire" and recalled that the goal was to avoid situations where individuals were kept in detention once the justice system had ordered their release.

36. **Mr. Neuman** proposed recasting the sentence to read: "Continued detention despite an operative (*exécutoire*) judicial order of release or a valid amnesty is also unlawful."

37. *Paragraph 22, as amended, was adopted.*

Paragraph 24

38. **Mr. Neuman** explained that the first sentence in square brackets had been slightly modified on the basis of the Committee's general comment No. 8. The second sentence in square brackets was new and read: "If a person already detained on one criminal charge is also ordered to face an unrelated criminal charge, prompt information must be provided regarding the unrelated charge."

39. *Paragraph 24, as amended, was adopted.*

40. **The Chairperson** said that that concluded their consideration of paragraphs 1 to 31.

The meeting was suspended at 4.40 p.m. and resumed at 4.55 p.m.

41. **The Chairperson** invited the Committee members to proceed with the first reading of paragraphs 32 onwards.

Paragraph 32

42. **Mr. Neuman** explained that the sentence in square brackets was meant to streamline the Committee's practice regarding individuals who were detained on suspicion of a criminal offence but had not been charged, and who waited in vain for the launch of criminal proceedings. Since such cases were not being treated as criminal cases they constituted arbitrary detention, in violation of article 9, paragraph 3.

43. **Mr. Kälin**, supported by **Mr. Ben Achour**, **Ms. Majodina** and **Mr. Rodríguez-Rescia**, said that it was not helpful to retain that sentence as it detracted from the clarity of the text.

44. **Mr. Neuman** said that the sentence could provide useful guidance, considering the communications where the Committee had found a violation of article 9, paragraph 3, even though that article was not strictly applicable because they were not criminal cases.

45. **The Chairperson**, supported by **Ms. Chanet**, recalled that those communications concerned cases where the State party had not specified that the detentions being challenged were based on grounds other than a criminal offence; for example, it had not stated that the detainees were in administrative detention. The Committee had therefore assumed that the detainees were suspected of a criminal offence and that the State party intended to launch criminal proceedings. The Committee was not entitled to assume that the regime being applied was administrative detention, which would then have required the application of article 9, paragraph 1. It did not seem necessary to make too much of that point, as it would not do to appear to be encouraging detention on vague grounds. There was nothing in the Covenant on which to base the legitimacy of a regime halfway between detention on suspicion of a criminal offence and pure administrative detention. The Committee should avoid suggesting that there might be a third type of regime constituting a new category.

46. **Mr. Shany** suggested replacing the sentence in square brackets by an addition to footnote 78, referring to *Titiahonjo v. Cameroon* and explaining that, where a person was detained for a criminal offence but had not been charged with a specific offence under a specific provision of the Criminal Code and awaited in vain for criminal proceedings to begin, the guarantees under article 9, paragraph 3, were equally applicable.

47. *The proposal was accepted.*

48. *Paragraph 32 was adopted, subject to that amendment and an editorial change to the first sentence of footnote 78 in the French version.*

Paragraph 33

49. **Mr. Neuman** said that the aim of the paragraph was to specify the primary obligation set out in article 9, paragraph 3, and at what point that provision applied, and to recall that judicial supervision should, as a rule, be conducted by judges rather than prosecutors.

50. **Mr. Kälin** proposed mentioning, in footnote 83 to paragraph 33, cases where the prosecutor had ordered the arrest of a person suspected of an offence and then decided to keep them in detention, as well as cases where the prosecutor had also acted as judge. *Kulomin v. Hungary* could be the example chosen for the latter scenario.

51. *The proposal was accepted.*

52. **Mr. Bouzid** said he thought that the last sentence of the paragraph, regarding public prosecutor objectivity, was too general: many legal systems granted considerable independence to prosecutors.

53. **Ms. Chanet** stressed that it was not a matter of prosecutors' personal objectivity but of institutional objectivity. According to the established case law of the Committee and the European Court of Human Rights, there was a conflict between the prosecuting authority and the authority required to exercise judicial power within the meaning of the Covenant. Only a judge could exercise that function. The prosecuting authority could not at the same time be the authority that weighed the facts and circumstances of a case.

54. **Mr. Rodríguez-Rescia** proposed deleting the word "generally" from that sentence, since it implied that there could be independent prosecutors, when in fact the point was to emphasize that public prosecutors could not perform judicial functions.

55. **Ms. Seibert-Fohr** said that the Committee should not be so categorical: there could be systems where judicial functions were performed by prosecutors whose independence was guaranteed.

56. **Mr. Ben Achour** proposed specifying that the public prosecutor, as prosecuting authority, could not be considered an authority empowered to perform judicial functions.

57. **The Chairperson** said that it would be best to follow the Committee's well-established case law, which stipulated that the judicial supervision of detention could not be carried out by the prosecuting authorities. He asked the Committee to support the text proposed by the Rapporteur for the time being.

58. *It was so decided.*

59. *Paragraph 33 was provisionally adopted without amendment.*

The meeting rose at 6 p.m.