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Summary record of the 3024th meeting
Held at the Palais Wilson, Geneva, on Thursday, 24 October 2013, at 3 p.m.

Chairperson: Sir Nigel Rodley

Contents

The meeting was called to order at 3 p.m.

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

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

1. **The Chairperson** invited the Committee members to consider the amended wording of paragraphs 14, 35 and 37 (document without a symbol, in English only), prepared by the Rapporteur on the basis of the proposals made at previous meetings.

Paragraph 14

2. *Paragraph 14, as amended by the Rapporteur, was adopted.*

Paragraph 35

3. **Mr. Neuman** (Rapporteur for general comment No. 35) said that the last sentence, which read "In the hearing that ensues, and in subsequent hearings at which the judge assesses the legality or necessity of the detention, the individual should be entitled to legal assistance by counsel of choice" had been added at Mr. Shany's suggestion to reflect the idea that it was indeed desirable that the detainee should be assisted by a lawyer of his or her own choosing, but that the most important was that the hearing should be held within 48 hours, even if the detainee's counsel of choice was not available.

4. **Ms. Chanet** said that would mean the detainee might appear alone before the judge if his or her counsel of choice could not be present at the hearing, whereas it was essential for the detainee to be assisted by counsel, even if it was not his or her counsel of choice.

5. **The Chairperson** agreed and suggested that the Rapporteur should reword the end of the sentence to say that the individual was entitled to legal counsel, who should in principle be counsel of choice.

6. *It was so decided.*

Paragraph 37

7. *Paragraph 37, as amended by the Rapporteur, was adopted.*

8. **The Chairperson** invited the Committee members to resume their consideration of the draft general comment paragraph by paragraph.

Paragraph 39

9. **Mr. Kälin** said that, by stating that "Pretrial detention should not be mandatory for all defendants charged with a particular crime, without regard to individual circumstances" the Committee would be falsely implying that pretrial detention was incompatible with article 9, paragraph 3, only when it was applied systematically, whereas it was the widespread use of the measure that posed a problem.

10. **The Chairperson** said that the idea expressed in the paragraph was that pretrial detention could not be justified solely by the nature of the offence.

11. **Ms. Chanet** said that interpreting article 9, paragraph 3, to mean that pretrial detention should not be mandatory, rather than saying that it should not be the rule, constituted a dangerous shift in meaning.

12. **The Chairperson** said the Committee should nevertheless clearly indicate to States that systematic placement in pretrial detention for certain offences was incompatible with article 9.

13. **Mr. Neuman** pointed out that in its concluding observations on the third periodic report of Argentina (A/56/40) the Committee had said: "there should not be any offences for which pretrial detention is obligatory".

14. **The Chairperson** said that it would be more logical to place the statement that pretrial detention should not be a widespread practice before the sentence explaining that the measure must be based on an individualized determination.

15. *It was so decided.*

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

Paragraph 40

17. **Mr. Neuman** said that the paragraph, which dealt only with the information that States parties were requested to include in their reports, would be deleted.

Paragraph 41

18. **Mr. Neuman** said that it was important to point out the connections between article 9, paragraph 4, and the principle of habeas corpus, as the Committee had done in the *Gavrilin v. Belarus* case, cited in a footnote. The "prior determination" referred to in the second sentence of the paragraph could be of a judicial or administrative nature.

19. **Ms. Chanet** said that, as she understood it, anyone could file a habeas corpus petition on behalf of a detainee, which was not provided for in the Covenant. By implying that such a procedure was the same as what was provided for in the Covenant, the Committee might open the door to the filing of petitions by persons who had no connection with the individual.

20. **Mr. Neuman** said that an appropriate connection must still be demonstrated between the individual and the person who wished to represent him or her. In practice, an action for writ of habeas corpus was never authorized if the detainee or the detainee's counsel or family was opposed to it. The procedure was therefore just as restrictive as the Covenant in that regard. If clarification was needed, it should be provided in paragraph 47, which dealt with the possibility of a third party taking proceedings.

21. *Paragraph 41 was adopted, with an editorial change in the Spanish version.*

Paragraph 42

22. Following a discussion in which **the Chairperson**, **Mr. Fathalla**, **Mr. Kälin**, **Mr. Rodríguez-Rescia** and **Mr. Neuman** took part, it was decided that Mr. Neuman, acting in his capacity as Rapporteur, would redraft the paragraph so as to indicate that the right to take proceedings for release before a court applied to all measures of deprivation of liberty effected by official action or issued under colour of law, except for cases of kidnapping carried out by individuals.

23. *Paragraph 42 was adopted, subject to the editorial changes to be made in accordance with the decision taken.*

Paragraph 43

24. **Mr. Kälin** proposed including in the body of the paragraph the text of footnote 129, which stated that continued detention after a release order amounted to a violation of article 9, paragraph 1.

25. *It was so decided.*

26. **Mr. Neuman** said that the word "Operative" should be added before "Judicial orders" in the last sentence, in line with the decision taken with regard to paragraph 22.

27. **Mr. Flinterman** suggested also saying that the orders must be complied with "immediately".

28. **Mr. Bouzid** and **Ms. Chanet** said the Committee should specify that the orders must be effectively and immediately enforceable, meaning, for example, that they must not be subject to an appeal with suspensive effect.

The meeting was suspended at 4.40 p.m. and resumed at 5 p.m.

29. **Mr. Shany** said that the concept of immediacy was too strict and did not necessarily correspond to actual practice with regard to the release of detainees, since the procedure might require that the detainee first be brought to a detention centre to complete the necessary formalities.

30. **The Chairperson** said that following the usual release procedures would not constitute a violation of the principle of immediacy, as the general comment was not a statute.

31. **Mr. Neuman** proposed redrafting the last sentence of paragraph 43 to state that, once a judicial order of release issued in accordance with paragraph 4 became enforceable, it must be executed immediately.

32. *It was so decided.*

33. **Mr. Kälin** said that the standards relating to the review of detention should be clearly specified.

34. **Mr. Neuman** said that, given the complexity of the subject, it would probably require a separate paragraph.

35. *Paragraph 43, as amended, was adopted.*

Paragraph 44

36. **Mr. Neuman** said that the paragraph explained how the entitlement to review was affected by a change in circumstances over time.

37. **The Chairperson** said he feared that by describing as impermissible any "substantial" waiting periods before a detainee could bring a first challenge to detention, the Committee would be implying that there might nevertheless be a considerable waiting period, whereas the Committee had always considered that any waiting period before being allowed to bring a first challenge was unacceptable.

38. **Mr. Neuman** gave the example of an individual who had been arrested and who asked to challenge his or her detention while being taken to the police station. In that situation, the police would not be required to make a detour via the courthouse, and there would be a brief period during which the individual, for practical reasons, would not be able to challenge the detention.

39. **Mr. Shany** said that, while the first appearance before a judge, as referred to in article 9, paragraph 3, must be immediate so that the legality of the detention could be

reviewed, he could imagine circumstances in which there would be a short waiting period before the detainee was brought before a judge a second time pursuant to paragraph 4.

40. **Ms. Chanet** said that the last sentence did not belong in the paragraph because it dealt with bringing a first challenge to detention, while the rest of the paragraph dealt with the possibility taking proceedings again if the circumstances had changed.

41. **Mr. Neuman** explained that he had intended to highlight the difference between bringing a first challenge and taking proceedings again after a change in circumstances.

42. **Mr. Shany** suggested that the Rapporteur might wish to examine the relationship between article 9, paragraph 3 and article 9, paragraph 4, to ensure that it would not lead to confusion if the Committee established two different standards for the two paragraphs.

43. **Mr. Neuman** agreed to examine the matter and to propose new wording for the last sentence of the paragraph.

44. *It was so decided.*

Paragraph 45

45. **Mr. Neuman** said the paragraph explained that "unlawful" detention included both detention that violated domestic law and detention that was incompatible with the requirements of article 9, paragraph 1, or with any other relevant provision of the Covenant.

46. **Mr. Kälin** asked whether the Committee, by recommending in the third sentence that the Covenant should be made directly applicable in such proceedings, was suggesting that dualist countries should exceptionally follow the monist doctrine with regard to article 9.

47. **Mr. Fathalla** asked why the second sentence referred to "administrative detention" when article 9 referred only to detention.

48. **The Chairperson**, referring to the point raised by Mr. Kälin, drew attention to his individual opinion in *C. v. Australia* (communication No. 900/1999). It was a circular argument to say that detention that was arbitrary under article 9, paragraph 1, was necessarily unlawful under article 9, paragraph 4, and that the absence of a remedy was a violation of both paragraph 1 and paragraph 4.

49. **Mr. Neuman**, replying to Mr. Fathalla, said that the paragraph should indeed refer to "detention" in general. Replying to Mr. Kälin, he explained that the Committee would appreciate it if dualist countries adopted a law stipulating that any detention in violation of the Covenant should be addressed by the appropriate remedy.

50. **Mr. Iwasawa** said that it might be preferable to delete the reference to other frameworks that might produce an equivalent effect.

51. **Mr. Neuman** said that, on the contrary, the reference should be retained because the next sentence provided an example of such frameworks.

52. **Mr. Shany** suggested redrafting the phrase by drawing on the wording of article 2, paragraph 2, of the Covenant, which set out the obligation to give effect to the rights recognized in the Covenant.

53. **Mr. Neuman** offered to submit a new formulation that took into account the various comments made.

54. *It was so decided.*

Paragraph 46

55. **Ms. Chanet** said that the Committee should clarify what was meant by the "procedural adequacy" required of the "court" competent to hear the proceedings. It should describe exactly the procedure that must be followed to implement the remedy.

56. **Mr. Kälin** said that it would also be useful to clarify the meaning of "a court" by referring in a footnote to the definition provided in paragraph 18 of general comment No. 13.

57. **Ms. Seibert-Fohr** agreed that the procedure should be further described. The European Court of Human Rights, for example, did so in great detail, referring in particular to equality of arms, the hearing, the presence or absence of a lawyer and access to case files.

58. **The Chairperson** said that he failed to see how there could be a court that was not within the judiciary. The example provided in the footnote was that of a parole board, which did not issue judicial decisions.

59. **Mr. Neuman** said that in the case in question the Committee had taken the view that a parole board met the requirements set out in article 9, paragraph 4. The International Commission of Jurists had suggested that the Committee should state that, on an exceptional basis, there could be cases in which proceedings heard by a body other than a court could suffice. It must be borne in mind that article 9 was not subject to derogation and that paragraph 4 of the article applied even in situations where the courts were not functioning because the country had been plunged into chaos.

60. **The Chairperson** invited the Committee members to continue their discussion of the paragraph at the next meeting devoted to consideration of draft general comment No. 35.

The meeting rose at 6 p.m.