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Summary record of the 3113th meeting
Held at the Palais Wilson, Geneva, on Friday, 17 October 2014, at 10 a.m.

Chairperson: Sir Nigel Rodley

Contents

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The meeting was called to order at 10.05 a.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 (continued) (CCPR/C/GC/R.35/Rev.4)

1. **The Chairperson** recalled that, at the previous meeting, Ms. Majodina had asked to return to paragraph 57, which had already been adopted.

2. **Ms. Majodina** said that she was not questioning the wording adopted by the Committee members, but wished to stress that, in her opinion, sending individuals to countries where there was a real risk that they would be held in prolonged arbitrary detention, and thus subjected to physical or psychological ill-treatment, amounted to — rather than "may amount to" — a violation of article 7 of the Covenant.

3. **The Chairperson** said he took it that paragraph 57, as adopted, remained unchanged.

Paragraph 58

4. **Mr. Neuman** (Rapporteur for the general comment) said that the paragraph, which addressed the links between articles 7 and 9 of the Covenant, had given rise to many comments. Some non-governmental organizations (NGOs) had urged the Committee to replace the word "should" with "must", but given that the paragraph largely quoted paragraph 11 of the Committee's general comment No. 20 on article 7 of the Covenant, which used the modal "should", he did not think it useful to endorse that proposal. However, in order to cover a number of specific situations whose inclusion had been requested by various sources, he proposed inserting after the first sentence the following additional sentence: "The following examples are non-exhaustive".

5. Some States parties, including Japan, Switzerland and the United Kingdom, had submitted comments on the keeping of official registers in places of detention. He had not found it appropriate to retain the amendment proposed by Japan because it was too vague or the proposal of the United Kingdom to include a reference to the provisions on incommunicado detention contained in the International Convention for the Protection of All Persons from Enforced Disappearance because it would have considerably lengthened the paragraph. He had not thought it useful to indicate that there were exceptions to the obligation to hold detainees in official facilities, as suggested by the United Kingdom, because it was obvious that, in certain emergency situations, a State party that temporarily relocated detainees to an unofficial facility to keep them safe was not in violation of article 9 of the Covenant. However, the Committee might wish to take into account the comment of Switzerland that obliging States parties to keep an official register might cause problems in federal States, and to add the following footnote: "In federal States, central registers for each political unit may be appropriate".

6. Austria had suggested indicating in another paragraph of the draft that leaflets issued in several languages should be distributed to detainees to fully inform them of their rights. Since that addition would fit better in the paragraph currently under discussion, he proposed inserting in the penultimate sentence, after the phrase "in a language they understand", the following words: "…; providing information leaflets in the appropriate language, including in Braille, may often assist the detainee in retaining the information".

7. Several NGOs had proposed that States parties should be invited to ratify the Convention against Torture but, since it was not the Committee's practice to recommend accession to an international instrument in its general comments, he had not retained the proposal. An NGO coalition had invited the Committee to indicate in the draft that States must guarantee that detainees had access to their country's consular services. The

Committee did not have any jurisprudence in that area but, based on principle 16, paragraph 2, of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, it might wish to insert between the last two sentences of the paragraph another sentence that read: "Detained foreign nationals should be informed of their right to communicate with their consular authorities or, in the case of asylum seekers, with the Office of the United Nations High Commissioner for Refugees".

8. **Mr. Salvioli** said that he supported all of Mr. Neuman's proposals.

9. **Ms. Chanet**, referring to the comment by Switzerland, said that the obligation of States amounted to ensuring that all places of detention kept a register of detainees and that the information it contained was accessible. The Committee did not need to broach the issue of whether detainee registers should be national, federal or cantonal.

10. **The Chairperson** said he did not agree that the State's obligation could be reduced to keeping registers in all places of detention. When individuals were the victims of arbitrary detention, their relatives could not be expected to guess which facility's register they had to consult in order to trace their next of kin. The relevant information should be centralized at a higher level.

11. **Mr. Neuman** said that, in its concluding observations, the Committee had recommended to three States parties that they set up a central register. However, it had not yet had occasion to issue a similar recommendation to a federal State; hence the suggestion to add an explanatory footnote.

12. **Ms. Chanet** said that the reference to a central register should appear in the body of the text rather than in a footnote.

13. Following an exchange of views with **Mr. Neuman**, **the Chairperson** proposed inserting in the third sentence the adjective "centralized" before the term "official register". Given that the word could be interpreted flexibly in the case of a federal State, the footnote was no longer necessary.

14. *The proposal was adopted.*

15. **The Chairperson** said he took it that the Committee members wished to adopt all of Mr. Neuman's other proposed amendments as they had been presented and that, if there was no objection, he would consider the paragraph, as orally amended, to be adopted.

16. *It was so decided.*

Paragraph 59

17. **Mr. Neuman** said that the paragraph covered the links between articles 9 and 10 of the Covenant. An NGO had urged the Committee to describe in detail the situations that came under article 9 of the Covenant. Given that the issue was addressed thoroughly in other paragraphs of the draft, especially paragraphs 18 and 21, he proposed simply adding a reference to those paragraphs in footnote 210.

18. *Paragraph 59, as amended, was adopted.*

Paragraph 60

19. **Mr. Neuman** said that the paragraph covered the relationship between articles 9 and 12 of the Covenant. Since a confidential source had expressed concerns about the clarity of the beginning of the third sentence, he proposed replacing "[T]emporary detention, including involuntary transportation" with "Detention in the course of transporting a migrant involuntarily".

20. *The proposal was adopted.*

21. **Mr. Ben Achour**, supported by **Mr. Shany** and **Ms. Chanet**, proposed deleting the second part of the last sentence from "but does not directly address the substance of migration or extradition policies …" onwards, which he considered superfluous.

22. *Paragraph 60, as amended, was adopted.*

Paragraph 61

23. **Mr. Neuman** said that the purpose of the paragraph was to explain the links between articles 9 and 14 of the Covenant. Switzerland had suggested describing the principles contained in the paragraph in fuller detail, but he did not think it necessary.

24. **Mr. Seetulsingh**, supported by **Mr. Ben Achour**, **Ms. Chanet** and **Mr. Fathalla**, considered that the phrase "both formalized and informal government action" was not clear enough and proposed deleting the third sentence of the paragraph.

25. *The proposal was adopted.*

26. **Mr. Shany** said he was not sure that he understood the meaning of the term "article 14 proceedings" in the last sentence.

27. **The Chairperson** proposed that, for clarity, the term should be replaced with "procedures falling under the scope of article 14".

28. *The proposal was adopted.*

29. *Paragraph 61, as amended, was adopted.*

Paragraph 61 bis

30. **Mr. Neuman** recalled that that new paragraph (document without a symbol, distributed in the meeting room in English), which addressed the deprivation of liberty of children, had been drafted following a request made at the Committee's previous session. In the light of the Committee's sparse jurisprudence on the matter, the footnotes mainly referenced external sources. The footnotes in square brackets were intended for the Committee members only. The proposed draft read:

> "Article 24, paragraph 1, of the Covenant entitles every child 'to such measures of protection as are required by his status as a minor on the part of his family, society and the State'. That article entails the adoption of special measures to protect the personal liberty and security of every child, in addition to the measures generally required by article 9 for everyone.[1] A child may be deprived of liberty only as a last resort and for the shortest appropriate period of time.[2] The Committee recognizes, however, that sometimes children are protected by the possibility of a justified restriction of one of their rights under the Covenant.[3] Placement of a child in institutional care, even when necessary for the child's care and protection, amounts to a deprivation of liberty within the meaning of article 9.[4] In addition to the other

[1] See general comment No. 17, para. 1; general comment No. 32, paras. 42–44.

[2] See concluding observations regarding Albania, 2013, para. 15; the Czech Republic, 2013, para. 17; Moldova, 2010, para. 20; Convention on the Rights of the Child, art. 37 (b).

[3] General comment No. 17, para. 2. ["In other instances, children are protected by the possibility of the restriction — provided that such restriction is warranted — of a right recognized by the Covenant, such as the right to publicize a judgement in a suit at law or a criminal case, from which an exception may be made when the interest of the minor so requires."]

[4] See Committee on the Rights of the Child, general comment No. 10, para. 11; United Nations Rules for the Protection of Juveniles Deprived of their Liberty (1990), para. 11 (b). In contrast, normal supervision of children by parents or family may involve a degree of control over movement, especially of younger children, that would be inappropriate for adults, but that does not constitute a

requirements applicable to each category of deprivation of liberty, the best interests of the child must be a primary consideration in every decision to initiate or continue the deprivation.[5] The decision must be subject to the periodic review of its continuing necessity and appropriateness.[6] The child has a right to be heard, directly or through a representative, in relation to any decision regarding a deprivation of liberty, and the procedures employed should be child-appropriate.[7] The right to release from unlawful detention may result in return to the child's family or placement in an alternative form of care that accords with the child's best interests, rather than simple release into the child's own custody.[[8]]"

31. **Mr. Flinterman** said he was not sure that he fully understood the meaning of the fourth sentence of the paragraph, which stated that some restrictions on Covenant rights might be acceptable. in addition, the principle of the best interests of the child was, in his view, not given sufficient emphasis and should be mentioned earlier in the paragraph.

32. **Ms. Seibert-Fohr** and **Mr. Shany** agreed that the fourth sentence was problematic and proposed deleting it.

33. **Mr. Seetulsingh** said that he understood the idea behind the fourth sentence, but it should be spelled out in greater detail for the sake of clarity.

34. **Mr. Fathalla** said that the term "representative" in the penultimate sentence was not precise enough and should be qualified by the adjective "legal".

35. **Mr. Iwasawa** asked whether it was useful to cite the example of school attendance in footnote 4.

36. **Mr. Neuman** said that drafting the new paragraph had been complicated. The draft general comment was already fully written and set forth a large number of principles that were valid for adults but not always for minors. The fact was that an illegally detained 6-year-old could not simply be released onto the streets following a habeas corpus procedure and that, in some cases, restricting children's liberty could serve to protect them. Therefore, the issue of deprivation of liberty must be revisited and he thought it necessary to give a few specific examples, such as compulsory enrolment. Given that the Committee wished to broach the issue in its general comment, it was important to do so as exhaustively and precisely as possible.

37. **Ms. Chanet** said that the detention of children was a genuine problem in some countries and that the issue warranted the Committee's attention. The proposed text was satisfactory, even if it seemed too detailed, because it was necessary to cite a few important cases.

38. **Mr. Neuman** said that the principle contained in the third sentence, which stated that a child might be deprived of liberty only as a last resort and for the shortest appropriate period of time, reflected the wording of the Convention on the Rights of the Child.

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deprivation of liberty; neither do the ordinary requirements of daily school attendance constitute a deprivation of liberty.

[5] Communication No. 1069/2002, *Bakhtiyari v. Australia*, para. 9.7; see Convention on the Rights of the Child, art. 3 (1).

[6] See paragraph 12 above; Convention on the Rights of the Child, arts. 37 (d) and 25.

[7] See general comment No. 32, paras. 42–44; Committee on the Rights of the Child, general comment No. 12, paras. 32–37.

[8] [Compare UNHCR Detention Guidelines, para. 54 ("Where possible [unaccompanied or separated children] should be released into the care of family members who already have residency within the asylum country. Where this is not possible, alternative care arrangements, such as foster placement or residential homes, should be made by the competent childcare authorities, ensuring that the child receives appropriate supervision. […]")]

Depending on the country and the circumstances, the criteria of last resort and the shortest appropriate period could be interpreted more or less strictly and might not necessarily guarantee absolute protection against situations that were harmful to children; however, in that sentence the Committee was merely referring to an internationally recognized standard. It seemed that the fourth sentence ("The Committee recognizes, however, that sometimes children are protected by the possibility of a justified restriction of one of their rights under the Covenant") had been misunderstood by some Committee members. It was not at all meant as an exception to the principle contained in the previous sentence; rather, its purpose was to reflect the fact that sometimes it might be in their best interest to deprive children of their liberty, for example by placing them in an institution because they had nowhere else to go. Lastly, regarding footnote 4, he said that the sentence Mr. Iwasawa considered superfluous had been included in the footnote because a State had requested that it should be explicitly affirmed that the Committee did not consider the ordinary rules on school attendance to constitute a form of deprivation of liberty.

39. **The Chairperson**, returning to an observation made by Mr. Fathalla regarding the use of the term "representative" in the penultimate sentence, proposed using instead the words "legal or appropriate assistance", as contained in article 40 of the Convention on the Rights of the Child.

40. *The proposal was adopted.*

41. **Mr. Flinterman** proposed moving the sixth sentence ("In addition to the other requirements applicable to each category of deprivation of liberty …") so that it immediately followed the third sentence ("A child may be deprived of liberty only as a last resort …").

42. **Mr. Shany** said that if the order of the sentences was thus changed, specifying "each category of deprivation of liberty" in the current sixth sentence would no longer make sense because it referred to the institutionalization mentioned in the fifth sentence. Perhaps the beginning of the sentence ("In addition to the other requirements applicable to each category of deprivation of liberty …") should be deleted so that it began directly with "The best interests of the child must be a primary consideration …".

43. **Mr. Neuman** said that the clause Mr. Shany suggested deleting was meant to recall the fact that children's rights under the Covenant were not limited to the rights enshrined in article 24. As to the fourth sentence, the underlying idea was that deprivation of liberty was sometimes the only way of protecting the best interests of the child. If there was no objection to the content, the sentence could be reworded along those lines.

44. **Ms. Seibert-Fohr** proposed recasting the fourth sentence as suggested by Mr. Neuman to read: "Sometimes a child's deprivation of liberty may be in the best interest of the child".

45. *The proposal was adopted.*

46. **Mr. Fathalla** proposed deleting, in the fifth sentence, the words "even when necessary for the child's care and protection".

47. *The proposal was adopted.*

48. **The Chairperson** said he took it that the Committee had reached consensus on the paragraph — as rearranged according to Mr. Flinterman's suggestion and amended by Ms. Seibert-Fohr, Mr. Fathalla and himself — and proposed that Mr. Neuman should be left to make the necessary editorial changes resulting from the rearrangement.

49. *Paragraph 61 bis, as amended, was adopted, subject to the necessary editorial changes.*

Paragraph 62

50. **Mr. Neuman** said that the paragraph repeated the Committee's position regarding the extraterritorial scope of the Covenant, as set forth in its general comment No. 31. Following an observation by Switzerland, the only amendment he would propose was to add, in the penultimate sentence, the words "inter alia" before "prolonged incommunicado detention".

51. *Paragraph 62, as amended, was adopted.*

Paragraph 63

52. **Mr. Neuman** said that Mr. Kälin had proposed amending the beginning of the first sentence to read: "Subject to derogations compatible with article 4, article 9 continues to apply in situations of armed conflict …." He had also proposed placing paragraph 63 immediately after paragraph 64. He (Mr. Neuman) did not object to the suggested rewording, but disagreed with moving paragraph 63 because it would break the logical flow linking paragraph 65 to paragraph 64.

53. **The Chairperson**, said it was regrettable that Mr. Kälin could not explain his proposal in person but asked whether the idea behind it was that, in the context of an armed conflict, a State must formally derogate from the Covenant in order to carry out a detention that would otherwise violate article 9.

54. **Mr. Neuman** said he understood the wording proposed by Mr. Kälin to mean that article 9 applied in situations of armed conflict and that derogations were in fact possible provided that they were compatible with article 4. The purpose of Mr. Kälin's proposal was to align paragraph 63 with the wording of paragraph 15, which the Committee had provisionally adopted at its previous session and whose last sentence stated: "security detention authorized and regulated by and complying with international humanitarian law in principle is not arbitrary".

55. **Ms. Chanet** said that it was not for the Committee to speculate on the meaning of Mr. Kälin's proposal and that it would have to ask him for clarification directly. The link between article 4 and international humanitarian law should be spelled out more clearly while taking care not to contradict the Committee's position set forth in general comment No. 29 on article 4.

56. **Mr. Shany** said that he preferred the current wording to Mr. Kälin's proposal, which implied that, once a provision had been derogated from, the State was no longer obliged to uphold the safeguards contained in article 9.

57. **Mr. Salvioli** said that care should be taken not to weaken the scope of the safeguards established under the Covenant by interpreting them in the light of other instruments. It would be desirable, in order to give the paragraph greater weight, to add a reference to article 5 of the Covenant, recalling that nothing in the Covenant might be interpreted as implying for a State any right to engage in any activity or perform any act aimed at the destruction of the rights and freedoms recognized in the Covenant or at their limitation to a greater extent than is provided for in the Covenant.

58. **Mr. Neuman** said that if the Committee had not reached consensus on Mr. Kälin's proposal, it might be simpler to leave the paragraph as it was worded in the draft.

59. **The Chairperson** recalled that the previous general comment (No. 8) on article 9 had not explicitly stated that international humanitarian law did not in any way interfere with the applicability of the Covenant in situations of internal armed conflict and that, as a result, it had been highly criticized for implying that security detention could be implemented in situations of internal conflict without need to derogate from the Covenant.

He therefore remained convinced of the importance of explicitly mentioning that obligation to derogate in the new draft general comment on article 9. To that end, he suggested adding the following sentence to paragraph 63 or any other paragraph the Committee might deem more appropriate: "Furthermore, no measures of security detention (see paragraph 15) effected on its own territory, in respect of activities occurring or threatened within its territory, may be resorted to in the absence of a derogation pursuant to article 4". He had deliberately avoided using the term "internal armed conflict" because they were not a term of art and the term "non-international armed conflict" because that notion included transnational terrorist acts and the Committee should not give the impression that it considered the implementation of detention measures to prevent such acts as systematically requiring a derogation under article 4. Given the late hour, he invited the Committee members to reflect on his proposal and resume the discussion on paragraph 63 at the next meeting devoted to consideration of the draft general comment.

The meeting rose at 1 p.m.