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Summary record of the 3112th meeting*
Held at the Palais Wilson, Geneva, on Thursday, 16 October 2014, at 3 p.m.

Chairperson: Sir Nigel Rodley

Contents

* No summary records were prepared for the 3110th and 3111th meetings.

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The meeting was called to order at 3.15 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 (continued) (CCPR/C/GC/R.35/Rev.4)

Paragraph 45

1. **The Chairperson** reminded the Committee that, at the previous meeting, at which it had resumed its second reading of the general comment, it had not reached any conclusion on how to deal with the phrase "tribunal outside the judiciary" in the second sentence of paragraph 45.

2. **Mr. Neuman** (Rapporteur for the general comment) said that concern had been expressed that the phrase was understandable in some legal systems, but not in others. He therefore proposed to replace it with "specialized tribunal". One member had suggested that a reference should be added in the footnotes to Committee precedents in cases concerning challenges, under article 9, paragraph 4, to the decisions of refugee appeal boards. It was, however, impossible to cite any such examples, because no cases of that kind had been brought before the Committee.

3. *Paragraph 45, as amended, was adopted.*

Paragraph 46

4. **Mr. Neuman** said that paragraph 46 concerned the initiation of proceedings. Two comments had been received from States. The Government of Australia seemed to confuse the issue of access to counsel with that of the assistance of counsel at government expense. For that reason, it was not pertinent. The Government of Ireland had merely drawn the Committee's attention to its Supreme Court's decision regarding the non-admissibility of evidence received in the absence of counsel. The Government of Switzerland wished for the insertion of the word "legal" before "counsel" and had also suggested the addition of the phrase "of choice" after the word "counsel". As neither of those additions appeared to be necessary, he recommended the adoption of the paragraph as it stood.

5. **Mr. Ben Achour** said that, in the French version, the use of the word "*réexamen*" might give rise to the incorrect impression that it referred to a right of appeal to a higher authority.

6. **The Chairperson** asked the secretariat to find a more suitable translation in French of the term "review".

7. *Paragraph 46 was adopted, subject to that amendment of the French text.*

Paragraph 47

8. **Mr. Neuman** said that paragraph 47 concerned the right to a court decision without delay. He was sympathetic to an oral comment made by an NGO to the effect that the reference in the penultimate sentence to "detention on mental health grounds" might give too much prominence to and might encourage detention on those grounds. He therefore suggested deleting that sentence.

9. **Ms. Chanet** said that the third sentence was ambiguous, since it gave the impression that a State would have discretion to decide when to assess whether a decision had been reached without delay, whereas a State must have a legal time limit of a few days for conducting such an assessment.

10. **Mr. Neuman** said that, as the paragraph repeatedly made the same point, the third sentence could also be deleted.

11. *Paragraph 47 was amended with the two deletions proposed by the Rapporteur.*

Paragraph 48

12. **Mr. Neuman** said that paragraph 48 addressed issues related to appeal. Amnesty International believed that decisions upholding the lawfulness of detention should be subject to appeal. The Covenant required the possibility of an appeal in the event of a criminal conviction. The right to have a determination as to the lawfulness of detention was the right to have a decision taken by one court and not by two courts. The European Court of Human Rights had found that there was no obligation to provide for an appeal against a court decision upholding the lawfulness of detention.

13. **Mr. Ben Achour** said that the second sentence of the French language version of paragraph 48 was so ambiguous as to be meaningless.

14. **The Chairperson** noted that, unlike the French text, there was no reference to "each proceeding" in the English text. It spoke only of "the proceeding", in other words the proceeding in question.

15. **Ms. Chanet** said that the problem stemmed from the phrase "may reflect the changing nature of the proceeding", whereas it was the number of appeals entered that influenced the length of the procedure. It was therefore necessary to find language which conveyed the idea that, if the right to appeal existed, the notion of delay was conditioned by the time limit applying to the exercise of that right.

16. **Mr. Seetulsingh** said that, since the right of appeal against detention existed in most legal systems, the second sentence should indicate that the adjudication of an appeal should take place as expeditiously as possible.

17. **Mr. Neuman** said that, since there was a variety of situations in which an appeal against detention could be entered, the establishment of a specific time limit for all appeals would be inappropriate. While the Committee was concerned about the expeditiousness of any appeal challenging the lawfulness of detention after a lower court ruling, the nature of the proceedings, in other words whether or not the court of first instance had found detention to be lawful, was a factor which had to be borne in mind in that context.

18. **Ms. Chanet** said that, as it stood, the very complicated last sentence did not reflect the simple notion that there should be no excessive delay in conducting an appeal.

19. **The Chairperson** said that he was not shocked by the idea that the nature or level of proceedings and whether they raised issues of law or of fact had an effect on what might be considered a reasonable delay. He suggested that the sentence might read either "if a State party provides for appeal or further instances, excessive delay must be avoided", or "if a State party provides for appeal or further instances, the standard of delay may reflect the changing nature of the proceeding, but in any event must not be excessive".

20. **Mr. Neuman**, **Mr. Shany**, **Mr. Iwasawa** and **Mr. Flinterman** preferred the longer version of the amendment suggested by the Chairperson.

21. **Ms. Chanet** said that the reference solely to the case of *J.S. v. New Zealand* in the footnote gave the impression that the notion of delay in appeal proceedings depended on the nature of proceedings and that different time limits could apply depending on whether the appellant was mentally ill, or was in administrative or criminal detention. Such discrimination was inadmissible, and that wording left the door wide open to abuse.

22. **Mr. Seetulsingh** said that the term "standard of delay" was misleading, since it suggested that the Committee was establishing a variety of standards. He therefore proposed the deletion of "standard of".

23. **Mr. Neuman** agreed to the deletion of those words.

24. *Paragraph 48 was adopted with the longer version of the amendment suggested by the Chairperson.*

Paragraph 49

25. **Mr. Neuman** said that article 9, paragraph 5, concerned the right to compensation for unlawful arrest or detention, which was a specific right, but not the only right, which could be claimed by persons who had been unlawfully or arbitrarily arrested or detained. It existed alongside the right deriving from article 9, paragraph 4, to be released from unlawful detention and alongside the rights established by article 2, paragraph 3. Article 9, paragraph 5, did not in any way limit the rights embodied in article 2, paragraph 3. It simply guaranteed that one of the remedies was compensation. At the time of its adoption, it had been impossible to foresee how the interpretation of article 2, paragraph 3, would develop. Other remedies did not come within the ambit of article 9, paragraph 5. The Government of the United States of America had made the point that there was no right to compensation in the context of armed conflict. He proposed that the phrase "for a victim of unlawful or arbitrary arrest or detention" should be added after the phrase "in a particular situation" in the third sentence of paragraph 49, in order to make it clear that article 9, paragraph 5, did not in any way obstruct article 2, paragraph 3.

26. **Mr. Salvioli** drew attention to an apparent disparity in the translation of the term "compensation" in the French and Spanish versions of that article 9 of the Covenant.

27. **Ms. Chanet**, supported by the Chairperson, said that any reference to the word "arbitrary" should be avoided, as article 9, paragraph 5, of the Covenant spoke only of unlawful arrest or detention.

28. **Ms. Seibert-Fohr** said that the decision on whether to include the word "arbitrary" hinged on the Committee's interpretation of the word "unlawful" in the context of article 9, paragraph 5. Under the Covenant, the word "unlawful" appeared to have a broad meaning that encompassed arrest or detention of an arbitrary nature.

29. **The Chairperson** said that, as compensation for arbitrary arrest or detention was already covered in article 2, paragraph 3, it was highly unlikely that the special provision in article 9, paragraph 5, was intended to apply to any violation of article 9. In its general comment No. 31, the Committee had made it clear that it considered compensation to be the default form of reparation for all violations of the Covenant.

30. **Mr. Flinterman** suggested that the second sentence of paragraph 51, which addressed the scope of article 9, paragraph 5, should be brought forward in the interest of clarity.

31. **Mr. Neuman** said that, in its case law, the Committee had stated that all violations of the Covenant triggered the provisions laid down in article 9, paragraphs 4 and 5. He would therefore prefer to leave paragraph 49 unchanged, except for the amendment to the third sentence that he had proposed earlier. For the same reason, it was unnecessary to alter the titles of subsections V and VI, which, in addition to performing an important organizational role, served to educate States parties and civil society as to the Committee's understanding of the content of the provisions under article 9, as opposed to their literal wording.

32. **The Chairperson** said that he took it that the Committee wished to adopt the paragraph as amended by Mr. Neuman, which would entail adding the words "for a victim of unlawful or arbitrary arrest or detention" after "particular situation" in the third sentence.

33. *Paragraph 49, as amended, was adopted.*

Paragraph 50

34. **Ms. Seibert-Fohr** said that, in light of the Committee's recent findings in the case of *Horvath v. Australia*, in which the victim's right to an effective remedy had been compromised by State officials' inability to pay compensation, paragraph 50 should be amended to place greater emphasis on the requirement for remedies to operate effectively.

35. **Mr. Neuman** suggested placing the fourth sentence, which highlighted that requirement, before the second sentence, which would be redrafted to read: "Paragraph 5 does not specify the precise form of procedure, which may include remedies against the State itself, or against individual state officials responsible for the violation, so long as they are effective." A footnote cross reference to the case in question could be included at the end of the sentence.

36. **Mr. Shany** recalled that, as the case fell under article 2, paragraph 3, of the Covenant, it should be cited only by way of analogy.

37. *Paragraph 50, as amended, was adopted.*

The meeting was suspended at 4.35 p.m. and resumed at 5 p.m.

Paragraph 51

38. *Paragraph 51 was adopted.*

Paragraph 52

39. **Mr. Vardzelashvili** suggested that, in the second sentence, reference might also be made to freedom of assembly, which featured prominently in the Committee's case law.

40. **Mr. Neuman** said that specific reference had been made to freedom of expression, as it was the subject of the cases cited in the relevant footnote. The freedoms of assembly and association were covered by the use of "such as".

41. *Paragraph 52 was adopted.*

Paragraph 53

42. **Mr. Neuman** said that the paragraph marked the beginning of the final subsection, on the relationship of article 9 with other articles of the Covenant. At first reading, the Committee had decided to retain paragraphs on reprisals, articles 6, 7, 10, 12 and 14, extraterritoriality, derogation and, finally, reservations to article 9. In follow-up to recommendations made during the previous session, a new paragraph on article 24 had been drafted and circulated among Committee members. He recalled that, once the Committee had discussed the paragraphs on derogation, it would need to revisit paragraph 15 of the draft general comment, which had been adopted provisionally at the previous session. Paragraph 53 was introductory and should be adopted as it stood.

43. *Paragraph 53 was adopted.*

Paragraph 54

44. **Mr. Neuman** said that a concern regarding the second sentence had been raised by Mr. Kälin, who had pointed out that, although threats to personal liberty were violations of

the right to security of person under the Covenant, they did not, in themselves, amount to a violation of article 9, paragraph 1. The issue could be resolved by replacing the words "threats to personal liberty" with "arrest", on the understanding that, by keeping the words "for example", the Committee did not exclude other possible violations.

45. **Mr. Iwasawa**, noting that violations could be committed by anyone, said that the second sentence should be amended to specify that physical intimidation or arrest amounted to a violation of article 9, paragraph 1, only when perpetrated or condoned by State party authorities or their representatives.

46. **Ms. Chanet** said that the second sentence failed to take into account all the Committee's functions. It would be more appropriate to list the functions exhaustively or give just one example.

47. **The Chairperson** suggested recasting the second clause of the second sentence to read: "in retaliation for cooperating with the Committee in any of its functions".

48. **Mr. Neuman** suggested that the Committee could accommodate Ms. Chanet's concern by replacing the words "submitting communications to" by the words "cooperating or communicating with" and expanding the footnote.

49. **Mr. Ben Achour** suggested, on the contrary, listing the Committee's functions, so that the phrase "or the preparation of general comments" would be inserted after the phrase "in connection with a State party's reports".

50. **The Chairperson** said that the difficulty with listing the Committee's functions was that follow-up activities, for example, might not be covered by the words "cooperating" and "communicating". It might be preferable to be non-illustrative and to refer to the Committee's functions in general terms.

51. **Mr. Shany** said that there should be an indication that the paragraph related specifically to physical intimidation by State officials.

52. **Mr. Seetulsingh** suggested that the reference to the Committee in the second sentence could be expanded to cover all United Nations human rights treaty bodies.

53. **The Chairperson** asked, with reference to the title of section VII, what other articles of the Covenant were involved in paragraph 54.

54. **Mr. Neuman** said that the Committee received and acted on information that related to other articles under the Covenant. He added that he agreed with the substance of Mr. Iwasawa's suggestion, supported by Mr. Shany: if the paragraph ended with the phrase "amount to a violation of article 9, paragraph 1", the first part of the sentence ought to contain a reference to State officials. He therefore suggested that the second sentence should be amended to read: "For example, physical intimidation by State officials or arrest in retaliation for cooperating or communicating with the Committee amount to a violation of article 9, paragraph 1." He pointed out, in that connection, that the words "for example" showed that the Committee was not limiting the scope of unauthorized forms of reprisals.

55. **The Chairperson** said that, in most countries, intimidation was not carried out directly by the State but with its tacit acquiescence or indirect instigation by State officials. The Committee must be careful not to send the wrong signal.

56. **Ms. Chanet** said that the sentence should indeed not refer only to State officials; intimidation could also be carried out by other groups. It was the obligation of the State to ensure that extremist groups were kept under control.

57. **Mr. Seetulsingh** suggested that the paragraph would be clearer if the full stop after the first reference to the Committee was replaced by a comma and the paragraph ended with the phrase "a State party's reports".

58. **Mr. Vardzelashvili**, supported by **Mr. Shany**, suggested that the second sentence should contain the phrase "failure to protect", which would balance the obligation set out in the first sentence for a State to protect individuals from the actions of State officials and others.

59. **Mr. Iwasawa** concurred. He suggested that the first and second sentences of the paragraph should be combined, so that the words "for example, physical intimidation" would be replaced by the words "such as intimidation or arrest".

60. **Mr. Neuman** suggested that the Committee should adopt the wording proposed by Mr. Iwasawa.

61. *Paragraph 54, as orally amended, was adopted.*

Paragraph 55

62. **Mr. Neuman** said that paragraph 55 dealt with the relationship between the right to personal security and the right to life. No comments had been received.

63. **Ms. Chanet** said that no general comment on article 9 would be complete without a reference to enforced disappearance under article 6. Paragraph 55 would be an appropriate place to insert such a reference. The words "in particular enforced disappearance", "notamment les disparutions forces" in the French version, should be inserted after the words "personal security" in the last sentence, in order to reinforce the message that enforced disappearance was covered by the draft general comment.

64. **Mr. Neuman** pointed out that paragraph 17 of the draft general comment already contained a reference to enforced disappearance. He was not, however, opposed to a reference in paragraph 55.

65. *Paragraph 55, as amended, was adopted.*

Paragraph 56

66. **Mr. Neuman** said that paragraph 56 was the first of three paragraphs dealing with the relationship between articles 9 and 7. One group of NGOs had suggested that the Committee should refer explicitly to forms of detention that might cause irreparable harm, such as solitary confinement, life imprisonment without parole, the "death row" phenomenon or indefinite detention without charge, as well as the detention of vulnerable individuals, including survivors of torture. In his view, it would be preferable not to spell out every form of detention. Mr. Kälin had suggested, indeed, that some detail should be removed from the second sentence, which would thus read: "… and may also amount to a violation of article 7".

67. **The Chairperson** said that he supported Mr. Kälin's proposal. Unlike other treaty bodies, the Committee did not draw a distinction between torture and other forms of ill-treatment, because it viewed such treatment from the perspective of its purpose.

68. **Mr. Salvioli** said that the phrase "may also amount to" should be replaced by a more emphatic form of words, such as "amounts to".

69. **The Chairperson** said that the word "may" was constantly used by the Human Rights Council and, in the past, the Commission on Human Rights. He was not, however, opposed to strengthening the language.

70. **Mr. Shany** said that the phrase "may also amount to" could be replaced by the phrase "would generally be regarded as".

71. *It was so agreed.*

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

Paragraph 57

73. **Mr. Neuman** said that the paragraph related to article 7 of the Covenant on refoulement. The Committee had always left open the question of whether a refoulement claim could be made under article 9, which was too broad to allow for an automatic rule that any violation of the article should prevent expulsion. In paragraph 57, the Committee continued to avoid setting out a definitive view, but the text did not block any future decision on adopting some other approach to the issue.

74. Some commentators thought that the Committee should have been more specific, while a number of States thought that paragraph 57 went too far. One such State was the United States of America, which disagreed with the paragraph because it denied that there were non-return obligations under article 7 in the first place. Australia disagreed with the paragraph on the grounds that arbitrary detention did not necessarily involve irreparable harm or necessarily violate article 7. Mr. Kälin considered that the paragraph might be too broad and had suggested the deletion of the phrase "such as prolonged arbitrary detention", but, in his own view, the words "may amount" made the sentence fairly non-committal. Switzerland had tentatively suggested adding a reference to the principle of non-refoulement, while a confidential source had suggested including a reference to article 33 of the 1951 Convention on the Status of Refugees (Refugee Convention). However, general comment No. 31 did not use the term "principle of non-refoulement" and the Committee should follow the same course, because the scope of the principle under refugee law was different from the scope of the prohibition under the Covenant. The Refugee Convention contained some exceptions that did not apply under the Covenant, so a reference to the Convention could cause confusion as to the content of the obligation. Canada had commented that the language used with reference to whether or not a risk of violence existed did not make it clear that the violence must be relevant to the individual. It therefore suggested that the Committee should use the wording that appeared in general comment No. 31, namely that there were "substantial grounds for believing" that there was a risk. Amnesty International had made a similar suggestion. He therefore suggested that the word "where" should be followed by the phrase "there are substantial reasons for believing that the individual faces"; the word "exists" should be deleted.

75. **The Chairperson** said that the new phrase made explicit what had been implicit. He was not in favour of adding further examples of forms of detention.

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

77. **Ms. Majodina** added the opinion that the word "may" in paragraph 57 should be replaced with more emphatic language, as had been done in paragraph 56 and as the Committee had done in general comment No. 31, paragraph 12.

78. **The Chairperson** said that not every form of prolonged arbitrary detention was a violation of article 7. The Committee, would, however, return to Ms. Majodina's point at the next meeting.

The meeting rose at 6 p.m.