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HUMAN RIGHTS COMMITTEE

Ninetieth session

SUMMARY RECORD OF THE 2468th MEETING

Held at the Palais Wilson, Geneva,
on Wednesday, 18 July 2007, at 3 p.m.

Chairperson: Mr. RIVAS POSADA

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The meeting was called to order at 3.15 p.m.

GENERAL COMMENTS OF THE COMMITTEE (agenda item 8) (continued)

Draft general comment No. 32 on article 14 of the Covenant (continued)
(CCPR/C/GC/32/CRP.1/Rev.5)

1. The CHAIRPERSON invited the members of the Committee to resume consideration of the draft general comment on article 14 of the Covenant.

2. Mr. KÄLIN (Rapporteur on general comment No. 32) recalled that the Committee had already considered all the paragraphs of the draft general comment on first reading, but said that changes had been proposed since then for some of the paragraphs and others had not yet been adopted. He suggested examining only those paragraphs, beginning with paragraph 5.

A. Paragraph 5

3. Ms. WEDGWOOD asked for clarification on the meaning of the fourth sentence (English text), which stated that "as article 7 is also non-derogable in its entirety, no evidence obtained through a violation of this provision may be admitted in any proceedings covered by article 14, including during a state of emergency, except if a statement obtained under torture is used as evidence against a person accused of torture". To start with, she was strongly against admitting evidence obtained through a violation of any of the provisions of article 7 of the Covenant. She wondered whether it was legitimate to consider that the fact that a statement had been obtained under torture automatically made all further statements inadmissible (the principle of the "fruit of the poisonous tree"). It would perhaps be going too far to rule out the admissibility of all evidence, both incriminating and exonerating, gathered with the help of a statement obtained under torture.

4. Mr. LALLAH and Ms. MAJODINA asked for an explanation of the last part of the fourth sentence ("except if a statement obtained under torture is used as evidence against a person accused of torture").

5. Sir Nigel RODLEY, responding to Ms. Wedgwood's remark, which evidently concerned cases in which a statement obtained under torture might prove to be important for the defence of the torture victim, said that the Committee might specify that no evidence obtained through a violation of article 7 "may be admitted against any person in any proceedings".

6. The second part of the fourth sentence (fifth sentence in the French and Spanish texts) was based on article 15 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. He had been a member of the working group of the Commission on Human Rights that had been active in drafting article 15, which provided that no statement obtained under torture could be invoked as evidence in any proceedings "except against a person accused of torture as evidence that the statement was made". That exception had been introduced at the suggestion of the Secretary-General of the International Commission of Jurists, who had wanted to ensure that a statement obtained under torture, including a false statement, could be

used as evidence of torture. The working group had shared that concern and had proposed the insertion of the above-mentioned exception. The working group of the Human Rights Committee that had elaborated the draft general comment on article 14 had drawn on article 15 of the Convention and had sought to reaffirm that a statement or confession obtained under torture could be admissible in proceedings involving the perpetrator of the act of torture.

7. Ms. WEDGWOOD noted that the Convention against Torture provided that any statement obtained under torture was inadmissible, but did not say anything about statements obtained through other treatment prohibited by article 7 of the Covenant. In the proposed wording of paragraph 5 of the draft general comment, the Committee rightly reaffirmed the exclusion of any evidence obtained through a violation of article 7, in other words through torture or cruel, inhuman or degrading treatment; logically, the exception set out in the last part of the sentence on article 7 should be extended to statements obtained through cruel, inhuman or degrading treatment.

8. Mr. BHAGWATI wondered whether there was any point in providing for the case in which a statement obtained under torture might be used against a person accused of torture, the act of torture itself being sufficient evidence.

9. The CHAIRPERSON noted that, generally speaking, the terms used in the English, French and Spanish versions of the text did not imply that the evidence was necessarily a statement, because there were also other forms of evidence.

10. Mr. KÄLIN (Rapporteur on general comment No. 32) recalled that, at an earlier meeting, the Committee had already raised the question of whether it should adopt the wording of article 15 of the Convention against Torture and had decided that the last part of the article ("except against a person accused of torture as evidence that the statement was made") might be misleading, which was why paragraph 5 of the draft general comment was worded somewhat differently. However, the Committee might ultimately decide that it was preferable for the end of the sentence on article 7 to use the formulation in article 15 of the Convention ("as evidence that the statement was made"). In any event, that exception was very important, because in a trial, statements obtained under torture were sometimes the only evidence of torture, and the Committee should reaffirm the fundamental principle embodied in the Convention.

11. The question of the admissibility of evidence based on statements made under torture was complex and particularly broad, and the Committee might do well to refer to the authoritative text in the area, the Convention against Torture, and more specifically its article 15, which concerned statements invoked as evidence. It should also draw on its General Comment No. 20 on article 7, in which it was stated (para. 12) that the law must prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment. For the sake of clarity, the Committee might perhaps adopt that wording, which would also avoid protracted discussions on the principle of the "fruit of the poisonous tree".

12. On the question whether reference should also be made to cruel, inhuman or degrading treatment, he suggested that there again, the wording in paragraph 12 of the Committee's General Comment No. 20 should be used ("obtained through torture or other prohibited treatment"). The Committee should also decide whether a statement or confession obtained under torture could be used to exonerate the accused in a trial. He did not think so: not only were statements and confessions obtained in that manner contrary to law and immoral, but they were

also very unreliable, because it was well known that, under torture, people could say anything. In his view, there was no basis for the claim that exonerating evidence obtained through torture could be admissible. For all those reasons, he urged the Committee to decide not to introduce the words suggested by Sir Nigel Rodley ("against any person") and to confine itself to the formulation in the Convention against Torture.

13. Mr. SHEARER agreed with Mr. Kälin. To make matters clearer, he suggested specifying that the exception concerned statements or confessions obtained under torture which were used as evidence of the act of torture itself. A footnote should also be inserted to refer to article 15 of the Convention against Torture, whose wording, although slightly different from that proposed for paragraph 5, was by no means contradictory with it.

14. Mr. LALLAH said he was satisfied with the explanations given and the drafting changes proposed by Mr. Kälin. With regard to the matter raised by Ms. Wedgwood, he saw no point in continuing the discussion in the absence of Committee jurisprudence on the question and also bearing in mind the enormous complexity of the issue.

15. Sir Nigel RODLEY welcomed Mr. Shearer's suggestion and proposed extending the exception to statements and confessions obtained through any treatment covered in article 7 of the Covenant. It would also be appropriate, in the context of a general comment on article 14, to draw on the wording of General Comment No. 20 and to say, in the first part of the sentence on article 7, that no statement, confession or, in general, other evidence obtained through a violation of that provision could be admitted in any proceedings covered by article 14.

16. Ms. WEDGWOOD subscribed to the idea of extending the prohibition of statements or confessions obtained through torture to include cruel, inhuman or degrading treatment. However, the Committee should bear in mind that the Convention against Torture did not enshrine the principle of the "fruit of the poisonous tree", even with regard to the sole acts of torture, and it should be fully aware that, in accepting the formulation proposed for paragraph 5 of the draft general comment, it was introducing that principle, and not only for torture but also for cruel, inhuman or degrading treatment. In the real world, police investigations were not always conducted under irreproachable conditions, and the Committee should be careful not to prescribe absolute inadmissibility of evidence stemming from statements or confessions obtained through "mere" ill-treatment, for example, especially since in any case such evidence would have been obtained by other means.

17. The CHAIRPERSON drew the Committee's attention to the fact that if it decided to adhere as closely as possible to the wording in article 15 of the Convention and paragraph 12 of General Comment No. 20, it would limit itself to only one type of evidence; he noted that statements and confessions were not the only evidence used for establishing the facts.

18. Mr. KÄLIN (Rapporteur on general comment No. 32) said that the Committee might in fact decide not to speak of treatment other than torture in the first part of the sentence in paragraph 5 on article 7 for the reason given by Ms. Wedgwood. As to the last part of the sentence, one solution might be to make provision for an exception in the case of a statement or confession obtained through a violation of article 7 which could be used as evidence with regard to a person accused of an act of torture or any other treatment prohibited under the provision.

19. Sir Nigel RODLEY said he gathered that the Rapporteur would have preferred to insert words more precise than "in general".

20. Mr. KÄLIN (Rapporteur on general comment No. 32) said that although evidence obtained through torture other than a statement or a confession must be regarded as inadmissible, there could be exceptions. He well understood Ms. Wedgwood's objection in the context of the common law system, but stressed that in the continental European tradition, the criterion of the "fruit of the poisonous tree" concerned the question of whether or not it was possible to obtain the same evidence by legal means. Moreover, that tradition still did not always automatically rule out that type of evidence. He agreed with the thrust of Sir Nigel Rodley's proposal but was not convinced that the insertion of the words "in general" would suffice to address the question; on the contrary, it would only complicate matters. Perhaps Sir Nigel Rodley could make his proposal more specific, bearing in mind that there might be exceptions.

21. Sir Nigel RODLEY said that for the moment, he did not want to propose too specific a formulation, because he was not familiar with all the peculiarities of the various judicial systems. He was all too aware that, if criminals were to be convicted, the police must gather evidence and that they sometimes made use of illegal means to do so, but the whole point of excluding some evidence was precisely to discourage them from such acts. He did not think that it would be going to far to introduce in paragraph 5 elements of the rule of inadmissibility of the "fruit of the poisonous tree". To make the text more flexible, it might be preferable to insert the words "in principle" instead of "in general".

22. Ms. WEDGWOOD said that in some countries, it was difficult at times to know what the police had done, because they did not record interrogations on videocassettes, and thus it was impossible to be sure that a person who claimed to have been beaten was telling the truth. However, if statements which raised doubts were discounted, it might have such serious consequences that there might be a temptation not to discount anything. The doctrine relating to evidence gathered elsewhere, for example through witnesses, also existed in common law. She referred, with regard to the exclusion rule, to evidence obtained when the police had acted in a manner almost in conformity with the Constitution ("attenuated evidence"), for which it might be possible to push the balance in the other direction, and concluded that it would be preferable for the Committee to include those aspects as exceptions instead of debating the difference between "in general" and "in principle". She also noted that the words "through a violation" in the English version should perhaps be replaced by "in violation"; that way, everyone could interpret it as they saw fit.

23. Mr. LALLAH said that evidence should be linked to the confession or the statement, and that perhaps an adjective was missing which would make it possible to establish that link, without which the meaning of the sentence was too general and vague. The Rapporteur should seek a solution, because the scope of the words "no […] other evidence" gave cause for concern.

24. Sir Nigel RODLEY recalled that he had in fact proposed the insertion of a number of words, without specifying which ones. He therefore suggested that the phrase in question should read: "no statements or confessions or, in principle, other evidence obtained in violation". However, it would be preferable to postpone consideration of the sentence for the time being.

25. Mr. KÄLIN (Rapporteur on general comment No. 32) agreed that a period of reflection was necessary, and he read out the sentence as currently worded: "Similarly, as article 7 is also

non-derogable in its entirety, no statements or confessions or, in principle, other evidence obtained in violation of this provision may be invoked as evidence in any proceedings covered by article 14, including during a state of emergency, except if a statement or confession obtained in violation of article 7 is used as evidence that torture or other treatment prohibited by this provision occurred". In the English version, the current paragraph 6 would become paragraph 5, and paragraph 5, as amended, would become the new paragraph 6. In the French version, the first sentence of the current paragraph 5 would become the new paragraph 5, the rest of paragraph 5 would become the new paragraph 6, and the current paragraph 6 would be deleted.

Paragraphs 8, 9 and 10

26. With regard to paragraph 8, the right to equality before courts and tribunals was a fundamental concept which should be read together with the second sentence of article 14, paragraph 1. Ms. Wedgwood had referred to the independence of the judiciary as opposed to their actual independence, but he did not think that it was appropriate to address the question, which concerned administrative judges, in paragraph 8. He suggested deleting the phrase "of competence, impartiality, independence, and of fairness", because there was no need to enunciate those principles. The phrase would then read: "The right to equality before courts and tribunals, in general terms, guarantees, in addition to the principles mentioned in the second sentence of article 14, paragraph 1…".

27. On paragraph 9, Ms. Wedgwood had argued that the phrase "or subject to the jurisdiction of the State Party" went too far, because it covered, for example, the case in which the State turned down a person's request for a visa, who thus was subject to the State's jurisdiction but did not have access to the courts. Although her remark was correct, it did not warrant the deletion of the phrase. It would be sufficient to state in the first sentence that access to the courts was a right applicable in cases regarding the determination of criminal charges or of rights and obligations in a suit at law.

28. Mr. Amor had suggested adding the phrase "or whatever their condition" after "regardless of nationality or statelessness". He saw no reason not to, but asked why the proposal should apply solely to stateless persons and not to the other persons referred to in the sentence. Mr. Amor had also proposed inserting, in the next sentence, the words "de jure or de facto" after "are systematically frustrated". That was a valid point, and he endorsed the insertion.

29. Mr. AMOR said that he was not singling out stateless persons and that in reality he had proposed the following wording: "The right of access … must also be available to all individuals, regardless of nationality or statelessness, or whatever their condition, such as asylum seekers…".

30. Sir Nigel RODLEY said he did not understand Ms. Wedgwood's proposal on the right of access to the courts and sought clarification from the Rapporteur.

31. Mr. KÄLIN (Rapporteur on general comment No. 32) said that initially he had not grasped the point of Mr. Amor's proposal, which in fact seemed excellent. Replying to Sir Nigel Rodley, he stressed the need to differentiate between the right of access to the courts, which was granted only in cases regarding the determination of criminal charges against individuals or of their rights and obligations in a suit at law, and the right to equality before the courts. In its current wording, the paragraph was misleading, as he had just become aware thanks to Ms. Wedgwood's

remark. It would perhaps be useful to specify that article 14 encompassed access to the courts in cases regarding the determination of criminal charges against individuals or of their rights and obligations in a suit at law and then to add that access must be real for everyone.

32. Sir Nigel RODLEY, thanking the Rapporteur for his proposal, which settled the problem, said that the word "condition" in the French version should be translated as "status" in the English version.

33. Mr. AMOR said that the French word "condition" was not synonymous with "status", because the condition implied, but went beyond, status. The word "condition" should thus be retained in the French version.

34. Mr. LALLAH asked whether the words "suit at law" would be translated as in the Covenant.

35. The CHAIRPERSON said that the wording of the Spanish and French versions of the Covenant would be used so as to avoid any problem. He also pointed out that the word "very" in the first sentence was unnecessary and that it was sufficient to state the following: "Equality before courts encompasses the right of access to the courts.".

36. Mr. KÄLIN (Rapporteur on general comment No. 32) noted that in the last sentence of paragraph 10, Ms. Wedgwood proposed to restrict the principle of legal assistance to cases in which a person "seeks constitutional review of irregularities in a criminal trial" by adding the words "which cannot be the subject of a direct appeal". Thus, it would not be applicable in situations in which it was possible to petition for a constitutional review and lodge an appeal with the Supreme Court or the Constitutional Court.

37. Ms. WEDGWOOD said that she was merely trying to preserve the "creative ambiguity" of paragraph 10, in which the Committee encouraged States to provide free legal aid and in some cases required them to do so. Her idea was to limit the scope of the words "for instance". By direct appeal, she did not only mean the first court of appeal. In the United States and common law countries, the question arose as to the point at which the appeals process must be limited.

38. The CHAIRPERSON said that in Latin America, for example, appeals referred only to decisions by the court of first instance. Beyond that, it was no longer called an appeal, but a revision of judgment, amparo etc. Ms. Wedgwood's proposal might cause confusion and create new difficulties, given the differences between the two systems.

39. Ms. MOTOC asked at what stage of the criminal proceedings legal assistance must be guaranteed and whether it must be obligatory as soon as the proceedings were instituted in an accusatorial system, where the prosecutor intervened before the actual trial. That was not the case in many States, and it created problems for persons placed in pre-trial detention.

40. The CHAIRPERSON asked the Rapporteur to explain the general idea behind paragraph 10; that would help to clarify the situation and to choose between the various proposals.

41. Mr. KÄLIN (Rapporteur on general comment No. 32) said that he was puzzled by Ms. Wedgwood's proposal, although he saw very well what she was trying to say. Before reaching the stage of a constitutional appeal, it was first necessary to exhaust ordinary remedies, and legal

assistance was needed at all levels. A constitutional appeal could be formulated in some criminal cases, but it was up to the court of last instance to take a final decision. Thus, he could not imagine any situation in which it would not be justified to grant such financial assistance. The current formulation was already rather precise, in addition to being in line with the Committee's jurisprudence.

42. Ms. WEDGWOOD said that when a person lodged an appeal in a common law court which was empowered to rule on questions of law and constitutional questions (and sometimes confused them in order to avoid the latter), lawyers could decide which questions they wanted to ask, in other words which they deemed most suitable – too rapid proceedings, confessions obtained under torture etc. The case of collateral attacks in general, i.e. a challenge sometimes lodged years after the completion of the appeals procedure in the Supreme Court, was worrisome because it tended to prolong the proceedings. Irrespective of the Committee's position on the death penalty, it was important to decide whether the Covenant required States to provide free legal aid for collateral attacks as well. That was a very controversial issue for two reasons: first, a person could lodge as many indirect attacks as he or she wished, on as many points as wished, and could thus raise questions which could have been brought up much earlier, during the first direct appeal; and second, the words "constitutional review" would also necessarily cover collateral attacks, because in the common law system, questions raised in most criminal proceedings were of a constitutional nature. Perhaps the insertion of the word "direct" or the phrase "in due time" would help limit the scope of the phrase to direct appeals and exclude collateral attacks.

43. Sir Nigel RODLEY said that under the British common law system, the word "appeal" was used for all procedures of review by a higher court of a decision handed down by a lower court. It was not the Committee's role to say in what circumstances an appeal was or was not legitimate: either the appeal existed, or it did not. From that point of view, the insertion of the word "available" (when the appeal existed) before "constitutional review" might be an acceptable solution.

44. The CHAIRPERSON endorsed Sir Nigel Rodley's proposal, which had the advantage of leaving sufficient latitude for interpretation to take account of differences between existing legal systems without entering into the details of their respective features.

45. Ms. WEDGWOOD thought that the granting of legal assistance should be obligatory only in the context of criminal proceedings, including in the case of constitutional review. To extend that obligation to other procedures would go beyond the Committee's existing jurisprudence and would create a precedent; that was not the role of a general comment, which was to interpret and analyze existing jurisprudence. Moreover, in a country such as the United States, where abusive use was often made of collateral attacks (separate procedures instituted to challenge one aspect of an older case), it would be unrealistic in such instances to require that legal assistance be granted by the State for all those procedures.

46. Mr. KÄLIN (Rapporteur on general comment No. 32) said he endorsed the change proposed by Sir Nigel Rodley, because the function of constitutional review or appeal did in fact differ from one legal system to another. However, regardless of the system, the Committee could not allow a person to be deprived of the right to make use of an existing appeal for the sole reason that he or she did not have the financial means to do so, especially if it was a question of

avoiding the death sentence. The Committee based itself in that regard on article 14, paragraph 1, and article 2, paragraph 3.

47. The CHAIRPERSON, noting that a consensus seemed to have emerged on paragraph 10, as amended by Sir Nigel Rodley, said that there was no need to dwell any longer on the distinctive features of various legal systems.

48. Paragraph 10, as amended orally, was adopted.

Paragraphs 11 and 12

49. Paragraphs 11 and 12 were adopted.

Paragraph 13

50. Sir Nigel RODLEY proposed that the following words should be inserted at the end of the second sentence: “not entailing actual disadvantage or other unfairness to the defendant”. As the Committee’s decision in that regard depended on the position which it would eventually adopt in a case which it had not yet considered in plenary, he suggested that his proposal should be placed in square brackets with a view to returning to it later.

51. It was so decided.

Paragraphs 14 and 15

52. Paragraphs 14 and 15 were adopted.

Paragraph 16

53. Mr. KÄLIN (Rapporteur on general comment No. 32) submitted two proposed changes to the Committee from Ms. Wedgwood. The first, which he endorsed, was to delete the words “The concept is large” and to replace the word “It” in the following sentence by “The concept”. The second proposal had to do with arbitration procedures. As he understood it, the point was whether arbitration courts came under article 14 or not. Depending on the legal system considered, either the arbitration courts were ordinary courts and thus were bound by article 14, or they were not, in which case article 14 came into play only if their decisions could be the subject of an appeal before an ordinary court. He was not convinced that the question should be addressed in the draft general comment on article 14, or at any rate in paragraph 16.

54. Mr. AMOR said that in many countries, the arbitration procedure was more a matter for private law than for public law, and the guarantees under article 14 of the Covenant did not apply until the arbitration decision was submitted to the jurisdictions of the State for enforcement. Accordingly, he did not see any reason to evoke the arbitration procedure in a draft general comment on article 14.

55. The CHAIRPERSON said that he agreed with Mr. Amor, since it would be impossible to arrive at a position on that point which was acceptable to all the members of the Committee in view of the differences in the functioning of arbitration from one legal system to another.

56. Ms. WEDGWOOD said that her intention was not to include arbitration procedures in the scope of article 14, but to exclude others. Defining a suit at law as being dependent on the nature of the right in question and not on the status of the body called upon to rule on that law would implicitly extend article 14 to arbitration procedures, the nature of the right in question in a procedure of public law or in a private arbitration often being the same. Consequently, the formulation should be modified by adding a simple word to expressly exclude arbitration procedures from the scope of article 14.

57. Mr. BHAGWATI said that he too was against extending the scope of article 14 to arbitration procedures.

58. Mr. KÄLIN (Rapporteur on general comment No. 32) said that it would be useful to recall that the cases covered by article 14 were those which made it possible to institute legal proceedings in the courts, the determining factor being the nature of the right in question. In other words, a Government must not be able to require an individual to submit a suit concerning a contract in private law to arbitration rather than a court. Paragraph 16 provided that in the event of a suit at law, regardless of whether the concept was defined in the domestic legal system as being a matter for private, administrative or other law, claimants must be able to plead their case in court without the Government being able to prevent them. Perhaps the question of arbitration courts should be addressed in paragraph 18, on the definition of the notion of "tribunal".

59. Mr. SHEARER, in response to Ms. Wedgwood's concern, suggested inserting an adjective to specify that the procedures covered by the notion of "suit at law" were judicial procedures, which by definition excluded arbitration procedures.

60. Mr. KÄLIN (Rapporteur on general comment No. 32) and Ms. WEDGWOOD endorsed Mr. Shearer's proposal.

61. Sir Nigel RODLEY said that in English, the words "suit at law" referred to questions of private law, and he sought confirmation from the member of the Committee familiar with the French and Spanish legal systems that the words "de caractère civil" and "de carácter civil" covered other notions in addition to those that came under private law. If that was the case, he was prepared to accept paragraph 16 and to review his position concerning a number of communications.

62. The CHAIRPERSON doubted that it was possible to take a categorical stance on the scope of "suit of law" and its equivalents in French and Spanish, since that was a source of constant discussion and controversy in the Committee, which on several occasions had applied article 14 in cases that did not, strictly speaking, come under the notion of a suit at law. It was probably inevitable that the question would continue to be debated both in the Committee and in other international bodies.

63. Mr. AMOR pointed out that the differences between domestic legal systems went well beyond mere words. For example, in Tunisia, obligations in a suit at law concerned all obligations other than criminal, which thus included obligations binding individuals with regard to each other but also obligations binding individuals vis-à-vis the administration. There was no reason to give priority to one notion or language over another. On the contrary, the diversity of legal systems was a source of mutual enrichment which must be put to good use.

64. Mr. KÄLIN (Rapporteur on general comment No. 32) said that in his view, the French expression "droits et obligations de caractère civil" included rights and obligations that went beyond those that came under private law. The difference in scope between the English expression "suit at law" and the French expression "de caractère civil" was due to the fact that the continental legal system contained a concept that did not exist in the common law system in force in the United Kingdom, namely the administrative contract, which bound individuals vis-à-vis the administration and vice versa. Having had to render a decision on identical cases which courts in a common law country had ruled on in the context of a suit of law but which courts in a country of European continental law had treated as falling within administrative law, the European Court of Human Rights had ultimately concluded that, if the right or obligation was of a contractual nature, it did not matter whether it came under private law or administrative law in the domestic legal system. The definition of the notion of "suit at law" enunciated in paragraph 16 was based on abundant Committee jurisprudence, was fully in conformity with the jurisprudence of the European Court of Human Rights in the area, and offered a compromise between the position of partisans of as broad as possible an application of article 14 and the viewpoint of advocates of a strict application.

65. Mr. LALLAH said that the recourse by the Committee to the concept of the nature of the right did not date back to the Perterer case, in which the Committee's decision (namely, that even in a procedure which might be a matter for administrative law, access to judicial procedures must be guaranteed) had aimed to prevent that, in some systems, a particular right was dealt with under administrative law rather than civil law. The Committee could not allow appeals to be circumvented when violations of rights were concerned. Administrative law bodies were competent with regard to specific violations of an individual's rights in the area of regional planning, but their decisions could be reviewed by the courts. The system of judicial review had been conceived in accordance with that principle. Bearing in mind the Committee's jurisprudence on the question, he accepted the interpretation in paragraph 16 as a compromise solution to be discussed case by case.

66. Sir Nigel RODLEY said that, having received confirmation that the scope of the concept of "caractère civil" went beyond the scope of private law, he was prepared to endorse paragraph 16.

67. Mr. IWASAWA pointed out that in the Japanese version of the Covenant, the English concept of "suit at law" had been interpreted as being a broad notion, and not limited to questions of private law as indicated by Sir Nigel Rodley.

68. The CHAIRPERSON, taking note of the deletion suggested by Ms. Wedgwood and the proposal by Mr. Shearer, said he took it that there was a consensus among the members of the Committee on paragraph 16.

69. Paragraph 16 was adopted, subject to later drafting changes.

Paragraph 17

70. Paragraph 17 was adopted.

Paragraph 18

71. Mr. KÄLIN (Rapporteur on general comment No. 32) said that, needless to say, the question which arose – whether an administrative decision could be appealed in court in keeping with the criteria in the definition enunciated in paragraph 18 – only concerned the determination of rights and obligations in a suit at law; in other cases, article 14 was irrelevant. The jurisprudence stemming from the Perterer case did not enlarge the notion of "suit at law"; it simply established that when a case did not concern the determination of rights or obligations in a suit at law but was judged by a tribunal within the meaning of article 14, the guarantees enunciated in that article must be respected. In the Perterer case, the Committee had established that it had not been a procedure in the sense of a suit at law, but as the State party had recognized that the body which had decided on appeal to apply disciplinary measures against Mr. Perterer had been a court within the meaning of article 14, the Committee had concluded that the guarantees under article 14 must be respected. Accordingly, he saw no reason to modify the text of paragraph 18.

72. Ms. WEDGWOOD stressed that, in a common law system, the administrative courts were theoretically part of the executive branch, even if they were given effective independence. Any decision rendered by such courts on rights and obligations in a suit at law would thus be contrary to the Covenant, since paragraph 18 provided that decisions of that nature must be rendered by a court that was "independent of the executive and legislative branches of government". That was tantamount to excluding virtually all administrative decisions in the United States, for example.

73. She also wondered what the relation was between the nature of the rights and the nature of the tribunal. Mr. Kälin appeared to be saying that it was only possible to speak of the determination of rights and obligations in a suit of law if the court was, in a sense, public, but as had been seen in paragraph 16, the suit at law depended on the nature of the right in question, and not on the nature of the court.

74. Mr. AMOR said that, on the contrary, administrative courts had long been separate from the executive branch. In France, the system of justice "chosen" by the executive branch, although exercised by the courts, had disappeared with the Cadot decision of 1889, and all countries whose system was based on the French model had delegated to the administrative courts the power to take decisions in complete independence. There was perhaps jurisdictional unity in the United States, but elsewhere dual systems of jurisdiction prevailed – an administrative system and a judicial system – and they differed considerably.

75. Ms. PALM said that administrative judges were independent in many countries, and not just in those based on the French model. In Sweden, for example, the three levels of administrative jurisdiction were real courts and were totally independent. That said, account should be taken of the fact that other countries might have different systems.

76. Mr. BHAGWATI said that India also had a large number of administrative courts which dealt with the rights of individuals in various areas in complete independence.

77. Sir Nigel RODLEY said that, nevertheless, it had to be said that some countries might have bodies which were called administrative courts but were not independent of the executive branch. He therefore suggested inserting the word "effectively" before "independent".

78. Mr. LALLAH welcomed that attempt at a compromise but doubted that it would settle the problem, because a court that was not "effectively" independent could circumvent all the provisions of the Covenant.

79. After an exchange of views in which Ms. PALM, Ms. WEDGWOOD, Mr. AMOR, Mr. BHAGWATI and Sir Nigel RODLEY took part, it was decided not to adopt the proposal.

80. Sir Nigel RODLEY said that in any event, the second part of the sentence, where it was stated that the body "enjoys in the specific case judicial independence in deciding legal matters in proceedings that are judicial in nature", allowed for Ms. Wedgwood's concerns.

81. Mr. KÄLIN (Rapporteur on general comment No. 32) said that that was precisely why he had added the clarification. The notion of "administrative court" varied from one country to another. In French law, it was very clear and designated a real court within the meaning of article 14, whereas the Germanic system, for example, had hybrid bodies which were linked to a certain extent to the administration, although they did not have to follow its instructions.

82. As to the relation between the nature of the rights and the nature of the tribunal, the latter depended on the former. The nature of the right determined whether a suit at law was concerned; if it was, the decision must be rendered by a court within the meaning of article 14. In some countries, however, there would first be an administrative procedure and then a sort of internal appeal within the administrative system, for instance in Switzerland's Appeals Commission, which was not a court. After that stage, the case must be examined by a court. In Switzerland, it would be an administrative court, which had the same role as in French law.

83. In order to reassure States parties that were worried that they would be under an obligation to bring every administrative case directly before a tribunal (which was not what was stated in article 14, which merely called for an independent tribunal without specifying at what stage), he proposed modifying the fourth sentence of paragraph 18 to read: "Similarly, whenever rights and obligations in a suit at law are determined, this must be done at least at one stage of the proceedings by a tribunal within the meaning of this sentence."

84. Lastly, for consistency's sake, the word "court" should be replaced by "tribunal" in the fifth sentence.

85. The CHAIRPERSON proposed that paragraph 18, with the changes proposed by the Rapporteur, be adopted.

86. It was so decided.

Paragraph 19

87. Mr. KÄLIN (Rapporteur on general comment No. 32) recalled that the paragraph had been adopted at the session in New York. In the second sentence, which explained what the guarantee of independence of the courts covered, Ms. Wedgwood had proposed deleting the references to promotion and transfer. That no longer seemed relevant, because her suggestion had concerned administrative judges in the United States, and not courts within the meaning of article 14.

88. Paragraph 19 was adopted.

Paragraphs 20 and 21

89. Mr. KÄLIN (Rapporteur on general comment No. 32) said that the wording of those paragraphs had also been debated and adopted at the session in New York and did not call for any comments.

90. Paragraphs 20 and 21 were adopted.

Paragraph 22

91. Mr. KÄLIN (Rapporteur on general comment No. 32) explained that he had sought to reformulate the paragraph taking into account the debates in the Committee on the Madani case.

92. Mr. AMOR pointed out that the paragraph concerned military and special courts, but only addressed the former in the subsequent text. Moreover, the Committee had just seen that it was not the nature of the court that was important but the guarantees under article 14. Military or special courts were not prohibited by the Covenant, provided they respected its guarantees, something which all courts, ordinary and special, were required to do.

93. It was not for the Committee to approve or reject a given category of court or to tell States what jurisdictions must hear which cases. That was why he had disagreed with the Committee's position on the Madani case. There was a big difference between a power of interpretation and a creative or normative power, and if that difference was disregarded, the basis for the Committee's concluding observations would become meaningless. In discharging its mandate as the guardian of the Covenant, the Committee should be careful not to exceed its interpreting role.

94. He proposed that the fourth sentence should be modified to read:

> "It is incumbent on a State party that tries civilians before military courts or special courts to ensure strict compliance with all the provisions under article 14. No limitation of the guarantees under article 14 can be allowed. The requirement of a fair trial cannot be circumvented or attenuated because of the military or special character of the court concerned".

95. Mr. KHALIL agreed that what mattered was not the nature of the court but compliance with the guarantees enunciated in article 14. States must demonstrate that the court which they had chosen to hear a case respected those guarantees.

96. The CHAIRPERSON asked Mr. Amor to circulate his proposal among the members of the Committee in writing before resumption of the debate at the next meeting.

The meeting rose at 6.05 p.m.
