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HUMAN RIGHTS COMMITTEE

Eighty-seventh session

SUMMARY RECORD OF THE 2386th MEETING

Held at the Palais Wilson, Geneva,
on Friday, 21 July 2006, at 10 a.m.

Chairperson: Ms. CHANET

later: Ms. PALM
(Vice-Chairperson)

later: Ms. CHANET
(Chairperson)

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The meeting was called to order at 10.05 a.m.

GENERAL COMMENTS OF THE COMMITTEE (agenda item 8) (continued)
(CCPR/C/GC/32/CRP.1/Rev.1)

1. Mr. KÄLIN, speaking as rapporteur on draft general comment No. 32 concerning article 14 of the Covenant, said that the Committee had so far adopted at first reading paragraphs 1 to 27 of the text relating to article 14, paragraphs 1 and 2. However, there had not been a consensus on the wording he had proposed for paragraph 21 to the effect that trials by faceless judges were as such incompatible with article 14. Several members had taken the view that it was the combination of facelessness with other elements that rendered a trial unfair. He had redrafted the paragraph in an attempt to reflect that approach.
2. Draft paragraphs 28 to 38 dealt with article 14, paragraph 3, which listed the rights of persons against whom criminal charges had been brought. If the Committee adopted those paragraphs at first reading at the current session, he would submit a draft text on the remainder of article 14 and its relationship with other articles of the Covenant at the Committee's next session.
3. There was a great deal of jurisprudence on article 14, paragraph 3, which could not all be reflected in a general comment. The Committee had been consistent in terms of principles but their application varied from case to case, for instance in terms of assessing what kind of delay was "undue" and whether there had been sufficient time in certain circumstances to prepare a defence. The draft text therefore restated basic principles and relevant precedents were mentioned in the footnotes.

Paragraph 21

4. Mr. RIVAS POSADA commended the enumeration of the irregularities associated with proceedings involving faceless judges and the citation of relevant cases in the footnotes. He wondered, however, why the list did not include the anonymity of the judges, which prevented the accused from identifying and challenging them.
5. Mr. KÄLIN said the draft could either state that a shortcoming of faceless judges was their anonymity or, alternatively, define faceless judges as anonymous judges. At the current session the Committee had concluded, in a case involving a trial in absentia, that it was equivalent to a case of faceless judges because the absentee had not been informed of the composition of the court. He had decided to include anonymity in the definition, stating in the first sentence that some countries had resorted to special tribunals of faceless judges composed of anonymous judges.
6. Mr. AMOR said that he had stressed the importance of highlighting the anonymity aspect during the Committee's previous discussion of the paragraph. He suggested adding at the end of the first sentence, after the words "anonymous judges", the phrase "whose identity and status are not verified by a competent authority".
7. Sir Nigel RODLEY proposed instead that the beginning of the second sentence be amended to read: "Such courts, apart from the fact that the judges cannot be challenged, suffer from additional serious irregularities ...".

8. He also proposed reflecting the Committee's Views adopted the previous day in the Becerra v. Colombia case by adding the words "or even the accused or his or her representative" between "exclusion of the public" and "from the proceedings" later in the sentence.
9. The CHAIRPERSON said that she preferred Sir Nigel Rodley's proposal for dealing with the point raised by Mr. Rivas Posada.
10. She suggested deleting the word "severe" before "restrictions or denial of the defendant's right to communicate with his lawyer".
11. Mr. SHEARER said he thought Mr. Kälin's original version of the first two sentences was preferable because it did not rule out the possibility that faceless judges might be justified in extreme circumstances, for instance in countries where judges would be exposing themselves and their families to reprisals if their identities became known. The important point to make was that facelessness was frequently accompanied by other circumstances that made it unacceptable.
12. The CHAIRPERSON drew attention to the final sentence, which stated that tribunals of faceless judges, "particularly in circumstances such as these", in other words cases involving irregularities, did not satisfy basic fair-trial standards. The possibility of using faceless judges had thus not been ruled out altogether.
13. Ms. WEDGWOOD said that the justifiability of faceless judges in some cases might be made even clearer if the word "particularly" in the phrase referred to by the Chairperson were deleted.
14. Mr. AMOR said that Sir Nigel Rodley's amendment referring to the fact that faceless judges could not be challenged seemed to rule out their use altogether. He withdrew his own proposed amendment and suggested reverting to the original wording with Ms. Wedgwood's amendment.
15. Ms. Palm (Vice-Chairperson) took the Chair.
16. Mr. KÄLIN said he agreed with Mr. Shearer and Mr. Amor. In addition to deleting "particularly", he would redraft the second sentence to read: "Such courts suffer not only from the fact that the identity and status of the judges are not made known to the accused but also from other irregularities ...".
17. Paragraph 21, as amended, was adopted.

Paragraph 28

18. Mr. SHEARER said he had reservations about the penultimate sentence, according to which the requirements of article 14, paragraph 3 (a), could be met by stating the charge "orally or in writing". Circumstances might arise in which the accused was informed orally of the charges on arrest but then heard nothing further until the case came to trial. It should be made clear that if the charges were stated orally, they should be confirmed in writing within a reasonable time.

19. Mr. AMOR proposed inserting a reference at the end of the paragraph to the right to challenge decisions rendered in absentia.

20. Mr. KÄLIN said he agreed with Mr. Amor's proposal and would consider how best to incorporate it in the text.

21. He also agreed with Mr. Shearer that orally preferred charges might be ambiguous and difficult to understand without the assistance of a lawyer. He suggested stating that the information must be given in writing and indicate both the law and the alleged facts. To his knowledge, the Committee had never taken the view in an individual communication that oral preferment of charges was sufficient.

22. The CHAIRPERSON asked whether he intended to delete the reference to "orally" altogether. She felt that the accused would benefit from being informed of the charges both orally and in writing.

23. Ms. WEDGWOOD said that there was no reference in the Covenant itself to written preferment of charges. There were some circumstances, for instance in remote regions of developing countries or in summary courts, where it was not easy to produce a typewritten document.

24. According to the second sentence, the guarantee did not apply to cases of arrest in the sense of article 9 of the Covenant. That could be mistakenly interpreted, for instance by a police officer, as meaning that there was no requirement to inform a person of criminal charges at the time of arrest. She proposed indicating that notice of the reasons for an arrest was separately guaranteed under article 9, paragraph 2, of the Covenant.

25. With regard to the requirement in the penultimate sentence to indicate "both the law and the alleged facts", article 14, paragraph 3 (a), referred to the "nature and cause of the charge". There was often an understandable reluctance to specify the facts of a case before a detailed investigation had taken place. She therefore proposed using the wording of article 14.

26. Mr. ANDO, noting that article 14 dealt with court proceedings, said the reference to "the alleged facts" should be viewed in that context.

27. He requested clarification of the passage in the third sentence that read "i.e. when, in the course of an investigation, a court or an authority of the prosecution decides to take procedural steps against a person suspected of a crime ...". Legal systems differed from country to country but in most cases it was the prosecution which, in the course of an investigation, took a decision to prosecute.

28. Mr. KÄLIN said he was unable to provide the requested clarification precisely because there were so many different domestic systems. He had refrained from specifying that a formal charge was made pursuant to a decision by the prosecution because in some cases a court might trigger the procedure.

29. He would reword the second sentence as proposed by Ms. Wedgwood.

30. He had used the words “alleged facts” because “the cause of the charge” could be a police officer’s prejudiced conduct or even the political context, which was not, of course, the purport of article 14. He invited Ms. Wedgwood to suggest alternative wording.
31. He had no objection to amending “either orally or in writing” to read “both orally and in writing”. Where a State party was unable under special circumstances to prefer written charges, it should derogate from article 14.
32. Ms. WEDGWOOD, responding to Mr. Kälin’s request, proposed the following wording: “... provided that the information indicates both the law and the alleged general facts”.
33. Paragraph 28, as amended, was adopted.

Paragraph 29

34. Mr. WIERUSZEWSKI, supported by Mr. Amor, said that the word “not” should be inserted before “held” in the penultimate sentence. Also, the Committee had noted in the past that the responsibility of the State was somewhat greater in the case of lawyers appointed ex officio; he suggested amending the text to reflect that position.
35. Mr. AMOR suggested that the word “stipule” in the first sentence of the French version of the text should be replaced by “dispose”.
36. He proposed replacing the words “was insufficient” in the fourth sentence by “was considered insufficient”. The word “must” in the same sentence seemed unnecessarily strong; there might be compelling reasons for the defence to refrain from requesting adjournment. Furthermore, while there were certain objective grounds on which to assess the experience of a lawyer, it was unclear who should be in a position to make such an assessment.
37. Ms. WEDGWOOD proposed that in the fourth sentence the word “must” should be replaced by “have the responsibility to”. In the second sentence, the word “application” might be more appropriate than “emanation”.
38. There should be no absolute obligation to grant requests for adjournment, except for cases involving the death penalty, since defence lawyers’ motives for such requests were not always honourable. It might be preferable to replace the word “grant” in the last sentence by a term that expressed the obligation to consider such requests objectively.
39. Mr. KÄLIN said that he had no objection to using the word “application” in the second sentence.
40. Acknowledging that the current wording of the fourth sentence might not reflect the underlying idea accurately, he undertook to provide the Committee with a new version.
41. Deletion of the words “in particular” from the last sentence might make it clear that the obligation to grant requests for adjournment applied only to offences carrying the death penalty.
42. Ms. WEDGWOOD proposed amending the last sentence to read: “There is an obligation to grant reasonable requests for adjournment, especially when the accused is charged with an

offence carrying the death penalty”. In some death penalty cases, the defence counsel might attempt to defer trial as long as possible, with attendant negative repercussions on witness protection, inter alia.

43. Mr. KÄLIN endorsed Ms. Wedgwood’s proposal concerning the last sentence. He further undertook to conduct additional research into Committee jurisprudence on standards applicable to counsel appointed ex officio, with a view to adding a relevant reference.

44. Paragraph 29 was adopted on that understanding.

Paragraph 30

45. Mr. SOLARI YRIGOYEN said that, in the Spanish text, the word “testimonios” in the first sentence should be replaced by “pruebas”.

46. Mr. WIERUSZEWSKI said that “Adequate facilities” should also include access to information that was normally only available to prosecutors, including the results of laboratory tests.

47. Mr. KÄLIN observed that adding a relevant reference would require in-depth discussion, since there was no precedent for such a proposal.

48. Ms. WEDGWOOD, endorsing Mr. Wieruszewski’s proposal, said that fibre analyses, DNA analyses and similar evidence were increasingly used in criminal proceedings. Expert opinions were not always reliable and the accused should have the right to obtain an alternative view.

49. Mr. RIVAS POSADA pointed out that the current wording of the sentence did not expressly exclude that possibility and should be retained.

50. It was so decided.

51. Mr. AMOR proposed amending the last sentence to indicate that the relevant documents in the case file should be made available to the defendant or his counsel, since not all defendants chose to be represented by counsel.

52. Ms. WEDGWOOD said the second sentence could be interpreted as justifying a failure to provide translations of documents relevant to the case. Access to the content of documents was crucial to a successful defence and the sentence should accordingly be deleted.

53. Mr. ANDO pointed out that, in some cases, it might be sufficient to inform the defendant of the content of documentary evidence without providing a word for word translation.

54. Ms. WEDGWOOD observed that, while most countries granted the defendant access to exculpatory evidence, there might be good reasons for keeping certain evidence confidential. The first sentence should be reformulated with that concern in mind.

55. Mr. ANDO disagreed. While the wording of the second sentence might not be entirely felicitous, the principle guaranteeing the defendant access to all relevant documents must be upheld at all times.
56. Mr. AMOR, supported by Mr. BHAGWATI, suggested narrowing the scope of that sentence to include documents or evidence that might be used against the accused only.
57. Ms. WEDGWOOD proposed replacing the words “it is sufficient” by “it may be sufficient”. The first sentence could be amended to read “access to documents and other evidence which will be offered in court against him or which are exculpatory”.
58. Mr. SOLARI YRIGOYEN disagreed. Access to all evidence relevant to the case was a fundamental right of the accused and the first sentence should be retained as it stood.
59. Mr. KÄLIN said that, while in the continental European legal system the defendant had access to all documents in the case file, in the common law system the two adversarial parties each possessed a much larger number of documents, not all of which were necessarily pertinent or used in court. Ms. Wedgwood’s proposal concerning the first sentence was only applicable to the common law system. In the continental system, the wording would create the possibility of limiting access, which currently did not exist.
60. The practice with confidential documents was to disclose those aspects that were relevant to the defence only.
61. Ms. Wedgwood’s proposal to replace “is sufficient” in the second sentence by “may be sufficient” created an undesirable ambiguity that might redound to the disadvantage of the accused. He proposed amending the sentence to read: “... it is sufficient that the relevant documents in the case file are made available to the defendant or counsel, but there is normally no right to have them translated”.
62. Mr. SHEARER, endorsing Mr. Kälin’s proposal, suggested retaining the first sentence and adding another sentence that read: “This access must, at a minimum, include the material which will be offered in court against him or which is exculpatory.”
63. Paragraph 30, as amended, was adopted.

Paragraph 31

64. Mr. WIERUSZEWSKI proposed that, in the first sentence, the words “this possibility without undue delay” should be replaced by “prompt access to counsel”, since such access should be immediate in the majority of cases.
65. Mr. AMOR proposed that in the second sentence of the French text, “communications” should be replaced by “entretiens”.
66. Mr. SHEARER said that the English term “communications” should not be amended, given that it covered all forms of communication between lawyer and client. In civil law, at least, all such communication was subject to privilege and could not therefore be used as evidence.

67. The CHAIRPERSON observed that the question appeared to be one of translation. A French term was required which would adequately cover all forms of communication between lawyer and client.

68. Mr. ANDO said that, in the last sentence, the phrase “established professional standards” was open to different interpretations since such standards varied between States and legal systems. He asked whether the phrase “without any restrictions, influence, pressure or undue interference from any quarter” was necessary.

69. Mr. KÄLIN pointed out that the phrase “established professional standards” had been taken from the previous general comment.

70. Mr. SHEARER said that, while that phrase was quite adequate, an alternative was “common standards of ethics”. The notion should not be deleted from the paragraph, since some indication of the need for lawyers to adhere to rules was relevant in that context.

71. Mr. AMOR, supported by Mr. GLÈLÈ AHANHANZO, suggested that, in the French version, the words “aux normes et critères établis de la profession” should be replaced by “à la déontologie de la profession”.

72. Mr. KÄLIN proposed replacing the phrase “established professional standards” by “standards of professional ethics”. The rest of the sentence should be retained: while it was important that lawyers respected professional ethics, other parties should not be allowed to influence or restrict lawyers’ representation of their clients.

73. Ms. WEDGWOOD considered that the phrase “professional ethics” should be used as it would embrace the notion that there should not be any conflict of interests in lawyers’ representation of their clients. She suggested that the phrase “professional ethics and standards” would be broader in scope. She questioned inclusion of the phrase “without any restrictions”, since some restrictions were necessary at times, such as reasonable procedures for clearing lawyers who sought access to sensitive information.

74. Sir Nigel RODLEY said that that was not a question of standards or ethics, but counsel of choice, which was addressed in paragraph 34. While he found the existing text of paragraph 31 to be satisfactory, it was true that in some States the professional associations that set the standards or ethics were not totally independent. It might therefore be advisable to delete the last sentence, since it was open to abuse. If the sentence was maintained, he proposed deleting the word “their” and replacing the phrase “established professional standards” by “generally recognized professional ethics”. That would also incorporate relevant professional ethics at the international level, such as the United Nations Basic Principles on the Role of Lawyers. The French term “déontologie de la profession” would be adequately translated by “professional ethics”.

75. Mr. KÄLIN, Mr. BHAGWATI and Mr. ANDO supported that proposal.

76. Paragraph 31, as amended, was adopted.

Paragraph 32

77. Ms. WEDGWOOD suggested that, in the first sentence, the explanation why a person should be tried without undue delay should be deleted, since it did not cover all the reasons. If the explanation was maintained, reference should be made to the fact that trials should take place before evidence became outdated or unavailable as a result of time having passed, as provided by statutes of limitations. In the same sentence, she proposed deleting the word “absolutely”.

78. Mr. WIERUSZEWSKI proposed deleting the entire first sentence since elsewhere in the text no explanations had been provided for the reasons underlying rights protected under article 14.

79. Mr. SOLARI YRIGOYEN proposed that in the Spanish version the fourth sentence should be deleted since it merely repeated the provision in article 14, paragraph 3 (c). That sentence did not appear in the English version.

80. Mr. AMOR proposed maintaining the first two sentences of the paragraph, which contained the essential points, and deleting the remainder.

81. Mr. KÄLIN proposed maintaining the first sentence, but inserting the words “not only” before the phrase “designed to avoid”, and adding the phrase “but also serves the interests of justice” at the end. He agreed that the word “absolutely” should be deleted. He also agreed that the third sentence should be deleted as it referred to specific contexts. The fourth and fifth sentences, however, should be kept since they described the scope of application of article 14, paragraph 3 (c). The wording of subparagraph (c) was vague and could be interpreted to indicate the period from the time when charges were brought until the trial began. It was necessary to make it clear that it referred to each individual stage of detention and to the overall detention time. He proposed deleting the text in square brackets, which had been included in case members had felt the need to summarize the Committee’s case law on that provision.

82. Mr. RIVAS POSADA agreed with Mr. Kälin that the first sentence of paragraph 32 should be retained, and that the sentences in square brackets should be deleted. There should be no repetition of the term “sin dilación indebida”.

83. Mr. WIERUSZEWSKI also agreed with Mr. Kälin that the first sentence could be maintained if it was amended as Ms. Wedgwood had proposed. He agreed that the sentences in square brackets should be deleted, but would prefer to maintain references to the Committee’s jurisprudence.

84. The CHAIRPERSON agreed that references to the Committee’s jurisprudence could be useful. The repetition problem mentioned by Mr. Rivas Posada did not occur in the English text, but the Spanish text would be amended accordingly.

85. Ms. WEDGWOOD proposed the deletion of the words “involving serious charges such as homicide or murder, and” from the third sentence. She was concerned that reference to the final judgement on appeal was not appropriate for common law cases.

86. Sir Nigel RODLEY said he disagreed with Ms. Wedgwood since not all common law jurisdictions worked in the same way. The Committee’s case law had always been that all stages

until the final conviction on appeal should be conducted in accordance with the principle of trial without undue delay. He agreed with Mr. Rivas Posada that the term did not need to be repeated throughout the paragraph, but stressed that the principle of trial without undue delay should be included in every stage of the judicial process, from the first charge to the trial, during the trial, during the application for appeal and during the appeal procedure.

87. He was concerned that the English text did not use gender-neutral language, and suggested that the use of the masculine form alone should be avoided.

88. Mr. ANDO said that the obligation to try without undue delay only referred to the trial stage of proceedings.

89. Mr. KÄLIN agreed that the third sentence could be amended as proposed by Ms. Wedgwood. On the issue of undue delay only referring to the trial stage, he said he would add a footnote, referring to the relevant communications that the Committee had considered.

90. Turning to the issue of gender-neutral language, he said that he had tried to avoid the use of the masculine form in the English draft, but had retained that form when quoting the Covenant and had followed the precedent set by former general comments. He would, however be prepared to amend the draft.

91. The CHAIRPERSON said she would prefer the draft to be amended to avoid the use of the masculine form only.

92. Mr. SHEARER suggested waiting until the substance of the draft general comment had been approved, and then tackling all editorial issues throughout the text.

93. It was so decided.

94. Paragraph 32, as orally amended, was adopted.

95. Ms. Chanet (Chairperson) resumed the Chair.

Paragraph 33

96. Mr. AMOR said that the accused was not “required” to be present during his or her trial, as stated in the second sentence of paragraph 33, but rather was “entitled” to be present, in accordance with article 14, paragraph 3, of the Covenant. The paragraph should be amended accordingly.

97. It was so decided.

98. Ms. WEDGWOOD proposed that in the fifth sentence the word “justified” should be replaced by “authorized”, since “justified” seemed to be advocating the concept of trials in absentia. Under common law, trial in absentia was inadmissible, and international law should not override that fact. In the fourth sentence the words “in systems where it is customary” should be inserted between “Also” and “it does not rule out”.

99. The CHAIRPERSON pointed out that distinguishing between national legal systems was unprecedented in the Committee's practice.

100. Sir Nigel RODLEY said that he shared Ms. Wedgwood's concerns. He suggested deleting the fourth sentence altogether and, in the fifth sentence, replacing the word "are" by "may be" and the word "justified" by "permissible".

101. Mr. KÄLIN accepted Sir Nigel Rodley's suggestion.

102. Mr. WIERUSZEWSKI said that the reference to "Violations" should be removed from the final sentence.

103. Ms. WEDGWOOD expressed concern about the tone of the final sentence, since it seemed to refer approvingly to trials in absentia.

104. Mr. KÄLIN said that although he would prefer to retain the final sentence, which related to violations of the principle of summoning the accused in a timely manner, informing him or her about the date and place of the trial, and requesting his or her participation in the proceedings. He would not, however, stand in the way of a consensus, and would agree to delete that sentence, should the Committee so wish.

105. The CHAIRPERSON agreed that the final sentence of the paragraph should be deleted.

106. Paragraph 33, as orally amended, was adopted.

107. The discussion on the adoption of the draft general comment was suspended.

The meeting rose at 1 p.m.