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HUMAN RIGHTS COMMITTEE

Ninetieth session

SUMMARY RECORD (PARTIAL)* OF THE 2475th MEETING**

Held at the Palais Wilson, Geneva,
on Tuesday, 24 July 2007, at 10 a.m.

Chairperson: Mr. SHEARER
(Vice-Chairperson)

later: Mr. RIVAS POSADA
(Chairperson)

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* No summary record was prepared for the rest of the meeting.

** No summary records were issued for the 2472nd to 2474th meetings.

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The meeting was called to order at 10.15 a.m.

GENERAL COMMENTS OF THE COMMITTEE (continued) (CCPR/C/GC/32/CRP.1/Rev.5; revised paragraphs 5, 22-24, 39, 41, 44 and 61, document without a symbol circulated in the meeting room)

Draft general comment on article 14 of the Covenant (continued)

1. The CHAIRPERSON invited the Committee to resume consideration of draft general comment No. 32 relating to article 14 of the Covenant (CCPR/C/GC/32/CRP.1/Rev.5). He drew attention to a document circulated in the meeting room which contained paragraphs 5, 22-24, 39, 41, 44 and 61 as revised on the basis of the Committee's earlier deliberations (CCPR/C/SR.2468 and 2469).

2. Mr. KÄLIN, Rapporteur on draft general comment No. 32, introduced revised paragraphs 5, 22-24, 39, 41, 44 and 61.

Paragraph 5

3. Mr. IWASAWA said that his observations should not be interpreted as justifying any form of torture or ill-treatment. It was important that the Committee's general comments, even though intended to interpret the Covenant, should be consistent with other relevant human rights treaties. The interpretation of provisions of international treaties evolved as the world changed, but the language of general comments should not be at variance with relevant provisions of treaties that reflected commitments States had undertaken in respect of a given issue at a given point in time. If it were to exceed the scope of existing provisions, the Committee might undermine its reputation as the most prestigious of the human rights bodies, and even the authority of its general comments.

4. Article 15 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provided that "any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings". No reference was made to any other cruel, inhuman and degrading treatment, and the draft general comment should equally limit itself to statements obtained through torture. The term "degrading treatment" was in fact very broad and difficult to define. The Convention referred exclusively to "statements" obtained through torture, and so the phrase "or, in principle, other evidence" in the penultimate sentence of paragraph 5 would best be deleted. However, should the majority wish to retain the paragraph as it stood, he would not impede a consensus.

5. Sir Nigel RODLEY supported revised paragraph 5 as it stood. International law pertaining to torture and other cruel, inhuman or degrading treatment established that cruel or inhuman treatment, if carried out for the purpose of obtaining information or a confession, constituted torture ipso facto. He agreed that the notion of "degrading treatment" was less clear.

6. Mr. LALLAH pointed out that paragraph 5 concerned non-derogable rights established in article 7 of the Covenant. Article 4 did not specify that non-derogation provisions applied to torture only. The admissibility of a given piece of evidence or statement depended on the

circumstances of each individual case. “Other evidence” could, for example, be so intimately linked to torture that a court might decide to disallow it, even if it was provided by a witness who had not been subjected to torture directly. Revised paragraph 5 should be retained in its current form.

7. The CHAIRPERSON agreed. The interpretation of article 7 as reflected in paragraph 5 was not inconsistent with the Convention against Torture, although it admittedly constituted a progressive development. Footnote 3 did not suggest that the torture provisions in the Convention and the Covenant were identical.

8. Mr. KÄLIN pointed out that article 16, paragraph 2, of the Convention stated that the provisions of the Convention were without prejudice to the provisions of any other international instrument or national law which prohibited cruel, inhuman or degrading treatment or punishment. There was thus no impediment for other instruments to go beyond the scope of the Convention.

9. With regard to statements and confessions obtained under circumstances amounting to cruel, inhuman or degrading treatment, it was important to bear in mind that the Covenant dealt with a range of guarantees other than the prohibition of torture. The draft general comment concerned article 14, which in paragraph 3 (g) provided that a person must not be “compelled to testify against himself or to confess guilt”, thus prohibiting the exertion of any pressure on a person, irrespective of whether it amounted to a violation of article 7. Paragraph 3 (g) was clear and the act of being “compelled” could not be limited to instances of torture. The inadmissibility of evidence obtained in violation of article 7 related to fair-trial guarantees; compatibility with the Convention against Torture, which did not address fair trial, was thus not an issue.

10. The CHAIRPERSON said he took it that the Committee wished to adopt revised paragraph 5 as it stood.

11. Revised paragraph 5, was adopted.

12. Mr. KÄLIN said that paragraphs 39, 41 and 61 would need to be amended to ensure consistency with revised paragraph 5.

Paragraph 39

13. Mr. KÄLIN proposed amending the last sentence of paragraph 39 to read: “Within these limits, and subject to the limitations on the use of statements, confessions and other evidence obtained in violation of article 7, it is primarily for the domestic legislatures of States parties to determine the admissibility of evidence and how their courts assess it.” A cross-reference to paragraph 5, which would become paragraph 6 in the final version, should be included in the footnote.

14. Revised paragraph 39, as amended, was adopted.

Paragraph 41

15. Mr. KÄLIN said that he had originally amended the last sentence of paragraph 41 to read: "The law must ensure that statements or confessions or, in principle, other evidence obtained in violation of article 7 of the Covenant from the accused or any other person, are excluded as evidence, except if such material is used as evidence that torture or other treatment prohibited in the provision occurred, and that in such cases the burden is on the State to prove that statements made by the accused have been given of their own free will." However, since paragraph 3 (g) specifically referred to confessions or testimony given against oneself, the words "or in principle, other evidence" and "or any other" were best deleted.

16. Mr. LALLAH said that, while he would not object, he would have preferred to retain the references to provide for situations where the police might take the accused person to the locus in quo and, using threats, compel him to provide evidence. Any such evidence would not be brought before the court by the accused himself, but should still be addressed in the general comment.

17. Mr. KÄLIN said that such situations could be covered by adding a footnote to paragraph 41 referring to paragraph 5 for issues relating to the use of other evidence. The right not to testify against oneself was very specific and paragraph 41 should reflect its limited scope.

18. Revised paragraph 41, as amended, was adopted.

Paragraph 61

19. Mr. KÄLIN said that the last sentence of paragraph 61 should be deleted, and the phrase "on the prohibition to admit evidence obtained through such methods, see paragraph 41 above" should be added to footnote 22.

20. Revised paragraph 61, as amended, was adopted.

Paragraph 22

21. The CHAIRPERSON drew the Committee's attention to a proposed amendment submitted by Mr. Amor at the 2468th meeting (CCPR/C/SR.2468).

22. Mr. KÄLIN said that, in an attempt to reach consensus, the revised version of paragraph 22 as reflected in the text in square brackets incorporated some of the ideas referred to by Mr. Amor, without contradicting the Committee's case law.

23. Mr. AMOR said that it was important for the Committee not to appear divided on an issue as important as a general comment. He would be able to agree to the revised text, provided it was improved. While consistency with the Committee's case law was important, it was equally important to take account of dissenting opinions. Given those two objectives, the second sentence of Mr. Kälin's proposal should be amended to read "Trials of civilians by military courts or special courts should be exceptional, justified by need and based on objective and serious reasons." The rest of the sentence should be deleted.

24. Sir Nigel RODLEY said that he would be willing to endorse Mr. Kälin's proposal, notwithstanding certain reservations. One of the issues at stake was that military courts or special courts should be a last resort when, civilian courts were unable to undertake the relevant trials. The point had not been included in the new proposal, although he and other members might have preferred to retain it. The other contentious issue appeared to be the fact that the burden to demonstrate the necessity to resort to a military or special court was placed on the State. He would strongly object to eliminating references to both issues from the text. If no mention was made of alternative civilian courts, the reference to the State's obligation must remain. He failed to understand what objection there could be to requiring a State to show that resorting to military and special courts was necessary and justified by objective and serious reasons. He was perplexed to note that that requirement could be interpreted as causing offence, and was not prepared to endorse its deletion.

25. Mr. LALLAH said it was only in the context of communications that States parties would actually be required to justify recourse to military or special courts. While considering communications, the Committee usually took other articles of the Covenant into consideration. Even if it did not, it would adopt the same position as in the past, requiring that the State party explain its reasons for its actions. He did not support Mr. Amor's proposal because it omitted reference to "the specific class of individuals and offences". Moreover, it was futile to avoid reference to the requirement that States parties should show why resorting to military or special trials was necessary, since in the context of communications it was clear that the burden of proof was on the State party. Mr. Kälin's version made that clear, thus constituting advice to States parties on the Committee's expectations, which was the purpose underlying general comments.

26. Sir Nigel RODLEY said that, if the Committee agreed to compromise by adopting Mr. Kälin's alternative text, he would insist that the phrase "the State party can show that resorting to such trials is necessary and justified by objective and serious reasons" not be deleted.

27. Mr. O'FLAHERTY supported Mr. Kälin's alternative text, with no amendments. Finding a compromise text was a legitimate exercise only when it did not go so far as to contradict the Committee's jurisprudence. Any further dilution of Mr. Kälin's text would render the general comment inconsistent with the Committee's Views.

28. He noted that the paragraph proposed by Mr. Kälin addressed both transfer from civilian to military courts and the circumstances for the establishment of special courts. In that context, it was regrettable that the phrase "with regard to the specific class of individuals and offences at issue" had not been integrated into the text. Several States parties had established the practice of setting up special courts for one purpose, then maintaining them indefinitely to cover a wide range of cases for which they had not originally been intended. In particular, many special courts had been set up to deal with terrorism, and had subsequently assumed responsibility for serious crime cases. The reference to "the specific class of individuals and offences" therefore had enormous practical significance in the light of actual circumstances in many States parties.

29. The CHAIRPERSON said he took it that the majority of members supported the amendment proposed by Mr. Kälin. Mr. Amor preferred not to have a text that called on States parties to justify resorting to military or special courts.

30. Mr. AMOR emphasized his point that States parties' recourse to trials of civilians by military or special courts should be exceptional, justified by need, and based on objective and serious reasons.

31. Mr. KÄLIN said that, while he appreciated Mr. Amor's clarification, he could not see a way of bridging the gap between his proposed text and Mr. Amor's position. General comments should provide guidance to Governments. If they were too laconic, they would not provide that guidance. His proposed amendment to the paragraph provided guidance on what the Committee would expect in terms of justification for such recourse, in line with recent decisions it had made.

32. Mr. KHALIL, acknowledging Mr. Kälin's excellent efforts to find a compromise, said that he maintained the position he had explained earlier in the debate on the paragraph.

33. Mr. AMOR requested that the Committee should note that the paragraph would be adopted by a majority, not by consensus.

34. Mr. IWASAWA proposed that, in the second sentence of Mr. Kälin's proposed text, the words "limited to cases" should be deleted for the purposes of consensus.

35. Mr. LALLAH suggested taking that proposal further and replacing the phrase "i.e. limited to cases where the State party can show that resorting to such trials is necessary and justified by objective and serious reasons" by "i.e. where it can be shown that resorting to such trials is necessary and justified by objective and serious reasons".

36. Mr. AMOR said that he could not agree to the use of the word "shown" in that context. The inclusion of the phrase "justified by objective and serious reasons" was sufficient to communicate the Committee's position on that issue.

37. Sir Nigel RODLEY recalled that several members had agreed to compromise on that paragraph. The previous version had distinguished between civilian trials, military trials and trials by special courts in terms that were highly relevant to case law the Committee had discussed. While he had wanted to maintain that language, he had agreed to its deletion for the sake of compromise. He requested clarification of what compromise Mr. Amor had made. While he preferred the use of the word "shown", he would agree to its replacement by the word "justified". He would, however, insist that it should be followed by the words "by the State party" in order to make it clear that that was where the Committee put the burden of proof.

38. Mr. AMOR said that he had made a substantial effort to reach a compromise.

39. Ms. PALM said that although she had hoped that the Committee would achieve consensus on the compromise text, the issue had now been debated at length, and she was not in favour of deferring it further. She was prepared to endorse the alternative wording proposed by Mr. Kälin, which took into account all the relevant points and used less forceful language.

40. Mr. AMOR requested that his dissenting opinion on paragraph 22 be duly reflected in the summary record and asked what would be the fate of that opinion.

41. The CHAIRPERSON said that that issue would be addressed at the end of the consideration of the draft general comment. In the absence of further comments, he took it that the Committee wished to adopt paragraph 22, having deleted the text in bold and replaced it by Mr. Kälin's alternative proposal in square brackets.

42. It was so decided.

43. Revised paragraph 22, as amended, was adopted.

Paragraph 23

44. Revised paragraph 23 was adopted.

Paragraph 24

45. Mr. O'FLAHERTY, proposed that, in the first sentence, the word "important" should be replaced by "relevant", and the words "in its legal order" deleted because of their restrictive nature. Although it might not be in its legal order, a State might recognize or respect customary jurisdiction in practice. In the second sentence, he proposed replacing the words "minor civil matters and criminal matters" by "minor civil and criminal matters" to prevent any misunderstanding. He also drew attention to the excessive burden that would be placed on States by the validation of customary procedures.

46. Mr. BHAGWATI shared Mr. O'Flaherty's view regarding the notion of validation.

47. Mr. AMOR endorsed Mr. O'Flaherty's proposal to replace "important" by "relevant". He pointed out the difficulty of determining what constituted a "minor" civil matter. Trials often concerned land disputes - highly sensitive matters for the complainants, which could also cause conflict in the community. He therefore considered that the proceedings concerned should preferably be referred to as "civil and criminal matters". But most importantly, judgements handed down by customary courts should not be binding in all cases; they should be validated by the State in order to become binding. All States had the capacity to perform the validation procedure, inter alia through an enforcement order or an arbitral award. Such validation would ensure that judgements were in full conformity with the law and, in particular, the Covenant.

48. The CHAIRPERSON, drawing attention to the phrase "in its legal order", asked the Rapporteur whether validation should be interpreted to mean that judgements handed down by customary courts were to be validated individually by a government institution or that such judgements were granted a general degree of recognition by the legal system of the State party.

49. Mr. KÄLIN said he had no objection to reverting to "relevant", which had been his initial proposal. He was in favour of retaining "in its legal order", reiterating that it was not a general comment on customary courts that was under discussion, but the circumstances in which judgements rendered by such courts could be recognized by the State and enforced - even though the initial proceeding had not fully complied with article 14. In the interests of the administration of justice, that should be restricted to situations in which the State was not in a position to provide a fully functional judicial system, and only minor matters should be concerned. In that connection, he confirmed that the text should be amended to read "minor civil and criminal matters".

50. In the validation process, States must ensure that any judgement in apparent violation of the Covenant was not enforced. For the purpose of clarity, he suggested rearranging the paragraph by inserting the penultimate sentence after the first sentence, deleting the words “If these requirements are not met” from the penultimate sentence and adding at the end of that sentence the words “unless the following requirements are met”, followed by the list of requirements.

51. Mr. RIVAS POSADA considered that the inclusion of the words “in its legal order” continued to pose a problem. He recalled the discussion held at a previous meeting concerning the inherent problem with requesting that legislation should directly or indirectly reflect the existence of customary courts. He thought the Committee had agreed that States could tacitly accept decisions taken by such courts without their existence being explicit in the legal order.

52. Mr. O’FLAHERTY said that if the phrase “in its legal order” was retained, which he was willing to endorse, the last sentence of the paragraph should be made less restrictive by replacing the words “such courts” by “customary and religious courts”.

53. Mr. KÄLIN read out the text of his proposal: “Article 14 is also relevant where a State, in its legal order, recognizes courts based on customary law, or religious courts, to carry out or entrust them with judicial tasks. It must be ensured that such courts cannot hand down binding judgements recognized by the State unless the following requirements are met: appropriate measures must be taken in order to ensure that proceedings before such courts are limited to minor civil and criminal matters and meet the basic requirements of fair trial and other relevant guarantees of the Covenant and that their judgements are validated by State courts in light of the guarantees set out in the Covenant and can be challenged by the parties concerned in a procedure meeting the requirements of article 14 of the Covenant. These principles are notwithstanding the general obligation of the State to protect the rights under the Covenant of any persons affected by the operation of customary and religious courts and procedures.”

54. Sir Nigel RODLEY said that the structure of the second sentence would now suggest that the “appropriate measures” were only one among a list of the “following requirements”. It was necessary, therefore, to choose between “appropriate measures” or “following requirements” in order to prevent confusion.

55. Revised paragraph 24, as amended, was adopted, subject to editorial changes.

Paragraph 44

56. Mr. O’FLAHERTY said that the use of “such persons” was grammatically incorrect. The words “measures other than criminal proceedings to deal with such persons” should be replaced by “measures other than criminal proceedings should be considered”.

57. Revised paragraph 44, as amended, was adopted.

58. Draft general comment No. 32 as a whole, as amended, was adopted, subject to editorial changes.

59. The CHAIRPERSON invited comments on ways of reflecting individual opinions relating to particular paragraphs of the general comment.

60. Mr. KÄLIN drew attention to rule 104 of the rules of procedure, which stated that any member of the Committee who had participated in a decision might request that his or her individual opinion be appended to the Committee's Views or decision. That rule was contained in section XVII entitled "Procedure for the consideration of communications received under the Optional Protocol", suggesting that the rules of procedure did not provide for the reflection of individual opinions in the case of other decisions taken by vote. In the context of a vote, members had the possibility of commenting on their own vote and having it recorded. In the case of Views adopted under the Optional Protocol, the public text of the Views listed the names of participants. In such cases, it was important for members present and listed to be able to reflect their dissenting opinion on any decision reached. That was not the case with other decisions though, notably decisions on a general comment.

61. The CHAIRPERSON said that rule 51 should also be taken into consideration. It stated that, except as otherwise provided in the Covenant or elsewhere in the rules, decisions of the Committee should be made by a majority of the members present. He took it, therefore, that the decision of the Committee to adopt a general comment was not otherwise referred to in the rules of procedure and that there was no specific provision relating to individual or dissenting opinions.

62. Mr. AMOR recalled that a vote had been taken but consensus had not been achieved on paragraph 22. Rule 104 related to individual communications. The decisions of the Committee were adopted by a majority of members but there was no prohibition on individual opinions. Endeavouring at all times to be open to discussion, he welcomed the expression of differing views and could not understand why that approach was met with such reluctance. He requested clarification from a legal standpoint of why the fact that dissenting opinions were not provided for in the context of the general comment should be interpreted as a prohibition.

63. The CHAIRPERSON pointed out that all the views expressed by members before the general comment's adoption would be reflected in the summary record. The question the Committee had to decide was whether to set a precedent by allowing a dissenting opinion to be attached to a general comment. When the same issue had been raised previously, the Committee had reached the conclusion that no dissenting opinions should be attached to general comments since that might sow confusion. In view of the fact that the rules of procedure contained no explicit prohibition, however, the Committee could still decide to allow a dissenting opinion to be attached to general comment No. 32.

64. Mr. O'FLAHERTY said that, in any case, a decision to allow a dissenting opinion to be attached to general comment No. 32 would require a majority vote. No dissenting opinion had ever been attached to the general comments of any United Nations treaty body in the past, nor should they in the future, if only for the sake of harmonization. More important, however, was the fact that the attachment of dissenting opinions to a general comment would increase its complexity, diminish its value and reduce its legibility. It might even lead, for example, to situations where members of the Committee referred to the legal systems of their own countries, which would be unacceptable. He therefore opposed the idea and urged his colleagues not to press for it to be adopted.

65. Sir Nigel RODLEY agreed with Mr. O'Flaherty. He recalled that the general comment had just been adopted by consensus and that, when the Chairperson had asked if there were any objections, none had been voiced. Moreover, the substantive objection to the wording of paragraph 22 had yet to be articulated. Since amendments could be made to summary records, he wondered whether those Committee members who objected to specific wording in general comment No. 32 might have an opportunity to insert text in the summary record of the current meeting so as to express their dissenting views.

66. Mr. KÄLIN said that it was common practice for decisions of a non-judicial nature, regardless of the kind of body taking the decision, to be adopted without the attachment of dissenting opinions. Judicial decisions were the only exception since the individual responsibility of judges must be reflected. Human rights bodies effectively sat in a quasi-judicial capacity, for example, when considering communications. Their authority would be seriously undermined, however, if dissenting opinions were attached, for example, to general comments, concluding observations and election results. Dissenting views should be reflected in the summary records instead.

67. Mr. Rivas Posada (Chairperson) took the Chair.

68. Mr. LALLAH recalled that it had never been the intention of the Committee to enable dissenting opinions to be attached to general comments, whereas rule 104 of the rules of procedure stated that any member of the Committee who participated in a decision might request that his or her individual opinion be appended to the Committee's Views or decision. He agreed that, if it so wished, the Committee could decide to set a precedent and allow dissenting opinions to be attached to general comments, but that would not be helpful. The views of anyone who disagreed with specific aspects of a general comment were reflected in the summary records. He had not in fact received the summary records for some time and had therefore not had the opportunity to amend them.

69. Ms. PALM said it had always been agreed that dissenting opinions should not be attached to general comments, the aim of which was to guide both the Committee and States parties. Attaching dissenting opinions to them would not only blur their meaning and diminish their importance, but would also make it difficult for committees to reach a consensus when considering future general comments. Although Committee members could never completely agree with every aspect of a general comment, a consensus or majority decision should always be reached.

70. Mr. KHALIL agreed that, although Committee members were free to express dissenting opinions, the general comments were adopted by consensus.

71. Mr. AMOR said that the fundamental principle of human rights was freedom, whereas prohibition or limitation should be the exception to that principle. Nothing in the Committee's rules of procedure explicitly prohibited the attachment of dissenting opinions to general comments, yet the Committee had decided in favour of an implicit prohibition. The only irrefutable argument for not allowing a dissenting opinion to be attached was that doing so would

be detrimental to the general comment. Out of respect for the Committee, he would not therefore insist on having his dissenting opinion attached to general comment No. 32. Nevertheless, he felt that he had been deprived of the right to express and publicize his views freely.

72. Mr. BHAGWATI agreed with Ms. Palm. The Committee's general comments were not binding decisions but the joint expression of its views on how to interpret the Covenant. Since Mr. Amor was not insisting on having his dissenting opinion attached to the general comment, he considered the matter settled.

73. The CHAIRPERSON agreed. He thanked Mr. Amor for not pressing his point and assured him that his dissenting opinion would be reflected in the summary record. That way the Committee's tradition of not attaching dissenting opinions to general comments could be maintained.

The discussion covered in the summary record ended at 12.25 p.m.