

TREATY BODY MONITOR

International Service for Human Rights



Human Rights Monitor Series

HUMAN RIGHTS COMMITTEE 90TH SESSION REVISED GENERAL COMMENT NO. 32 ON ARTICLE 14 OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

Day 1	2
Section VI: Juvenile persons.....	2
Section VII: Review by a higher tribunal.....	2
Section VIII: Compensation	3
Section IX: Ne bis in idem.....	3
Section X: Relationship of Article 14 with other provisions of the Covenant	3
Section 1: General Remarks on Article 14	4
Day 2	4
Section II: Fair and public hearing by a competent, independent and impartial tribunal	4
Section IV: Presumption of Innocence	6
Day 3 and Day 4	7
Adoption of the General Comment	7

Continuation of the second reading

The Human Rights Committee (the Committee) continued its second reading of the Draft General Comment 32 (the Draft) and then adopted the General Comment at its 90th session from 16 – 24 July 2007 in Geneva.¹ The General Comment is concerned with Article 14 of the *International Covenant on Civil and Political Rights* (the Covenant) that safeguards both the right to equality before courts and tribunals and the right to fair trial. The first reading of the Draft was completed at the 88th session of the Committee from 16 October to 3 November 2006 in Geneva and the second reading began at the 89th session of the Committee from 12 March to 30 March 2007 in New York.

¹ The only available draft at the time of writing is the document CCPR/C/GC/32/CRP.1/Rev.3 of 28 November 2006. The draft is available on the OHCHR website at <http://www.ohchr.org/english/bodies/hrc/gc14.htm>. The numbering of the paragraphs used in this report mirrors the number that the Committee used in its discussion of the Draft. The numbering used by the Committee was not always consistent across different translations, and the numbering was often two paragraphs ahead of that in the aforementioned draft. For example, paragraph 40 in the cited version of the draft was number 42 in the discussion of the Committee. As a result, it is helpful to first look at under which subheading the discussion took place, and then proceed to match the paragraphs. Where possible, the first paragraph discussed of each section will be footnoted to provide guidance by referencing the number used in the discussion to that of the cited draft.

The draft observations on General Comment 32 of Article 14 of the ICCPR commenced on the morning of 16 July with the Chair, Mr. Posada, giving the floor to the Special Rapporteur of the General Comment, Mr. Kälin.

Mr. Kälin updated the Committee on the progress of the past year, noting that he had received numerous comments from governments and organizations. Since the second reading of the draft had started, Mr. Kälin informed the Committee that §s² 1-41 had been discussed and that he had taken it upon himself to insert the changes that had been adopted in New York. He applauded Mr. Shearer for volunteering to edit the language of the draft, and expressed his commitment to using gender neutral language. Noting that he wished to speed up the work, Mr. Kälin suggested that the Committee work from § 42 to the end, and then return to §1 and then work through the draft again. The key themes discussed were juvenile persons and fair trials, military and special tribunals and the application of the Covenant to customary and traditional law courts. General Comment No 32 was adopted by the Committee at the end of the session.

Day 1

Section VI: Juvenile persons

The Chairperson opened the floor to comments on the §s 42³, 43 and 44 that deal with juvenile persons and how their rights, and the judicial procedures afforded to juveniles by the State, may differ from that of adults. Mr. Lallah opened by conditionally approving of the three §s, but he conveyed concern about what States might actually think it means to be a “juvenile,” as well as what he perceived to be a lack of flexibility in allowing hearings for juveniles to be closed to the public. Mr. O’Flaherty echoed general support for the three §s, but recommended that the words “take into account age and situation” be inserted into § 42, and suggested that with regard to defining what it means to be juvenile, the Committee might take account of recent General Comments of the Committee on the Rights of the Child (CRC), which imposed the age of 12 as the minimum acceptable age. Ms. Chanet put forward that anything that relates to a minimum age should come under article 24, and not 14, as 14 only looks at issues of *procedure* that are applicable to minors. Therefore, she opined that setting a minimum age is unnecessary and irrelevant. Mr. Shearer commented on § 44, suggesting that that “conferences with the family of the perpetrator” be added as another possible measure for dealing with juveniles. Mr. Iwasawa stated that as far as the General Comment was concerned, the aim of the Committee should be to restate the principles established in the individual communications and concluding observations. From this perspective, he believed that §s 42-44 were different because they reproduced the principles in the Convention on the Rights of the Child. He expressed satisfaction with the §s as they were, and expressed his discomfort with any changes that might stray from the language used in the CRC.

Mr. Kälin then addressed several of the aforementioned concerns. With regard to public hearings, he highlighted that this issue was dealt with in § 29, which talks about exceptions to the principle of public hearings, and invited Mr. Lallah to broach the subject when the Committee returned to analyze that paragraph. As for the question of what constitutes a juvenile, Mr. Kälin noted that his first draft provided that juveniles were people below the age of 18, or lower if domestic law so provides. However, the majority of the Committee decided that such references should be taken out, and hence it was deleted. Mr. Kälin then expounded that although Article 14 is about procedure, age is related to procedure, as it touches on issues as to who should be put before the court and exposed to criminal proceedings.

Section VII: Review by a higher tribunal

² The symbol § denotes paragraph.

³ Paragraph 40

Mr. Kälin brought the attention of the Committee to the first line of § 45⁴, noting that Ms. Wedgwood’s proposal to use the phrasing “anyone” convicted of a crime rather than “everyone” was accepted. Mr. Kälin stated that while § 47 was fine by his standards, Ms. Wedgwood had raised concerns, and he asked her to expand upon them. Ms. Wedgwood elaborated that she was concerned with the possibility of an appellate chamber reversing a finding of innocence and then instituting the guilty verdict on a particular *charge de novo* on the appellate level. Noting that such a practice is not permitted, she wondered if the language should be modified to include a ban on such practices at the international level. In response, Mr. Posada put forward that from his personal point of view, it was clear that the ICCPR was for State Parties, so anything referring to international tribunals eclipsed the mandate. Ms. Wedgwood countered that Articles 14 and 5 of the ICCPR were pleaded at the Yugoslav tribunals, and therefore relevant at the international level. She explained that the Committee presents Article 14 as the minimum standard of fairness, and that unless a phrase that specifically says “in the national legal system” is added to the §, that defense counsels would take the general comment and raise it in every case. Mr. Kälin then proposed that perhaps something could be added in the first sentence of § 47 to make it clear that the § only referred to domestic law.

Mr. Kälin then guided the discussion on § 48 concerning the right to appeal, noting that there were several issues to consider. He explicated that the first part of the § speaks of the right of appeal, but that it occurred to him that the phrasing may be misleading in the sense of creating a right to go to an appellate court, and that he preferred to use the more complicated but legally correct language that there was simply the right to have ones conviction and sentence reviewed. He noted that in the second sentence, Ms. Wedgwood had proposed to delete the words “or legal aspects,” as in many systems there is only the possibility to have a review of the legality of the decision, and not a re-evaluation of the facts *de novo*. Mr. Kälin explained that a point about the last sentence was also raised by Ms. Wedgwood, who noted that in common law systems the weighing of evidence is left to a jury and not the court. Mr. Kälin acknowledged her point, and proposed simply deleting the phrase “to rule out errors” as a remedy. Mr. Shearer expressed his support for the modifications, but suggested finding another phrase after striking “to rule out errors” from the §.

Section VIII: Compensation

Mr. Kälin proposed to replace the phrase in § 53⁵ “political in nature,” with the phrase “discretionary in nature.”

Section IX: Ne bis in idem

Ms. Wedgwood broached concern regarding the second sentence of § 56⁶. She highlighted that although the § is distinguishing between two or more States, it was unclear whether the § accommodated the entity of Federal States, meaning two sovereigns in the same territory. As an example, she explained that in the USA, persecution by the State of Massachusetts would not preclude persecution by the federal government. Mr. Kälin responded by suggesting that the wording of the § is very rough, and it might be better just to delete it, as the principles are already covered by international conventions. Ms. Wedgwood replied that, although she did not “want the reputation of a pushy broad,” the issue was very important, especially with respect to complex, multi-jurisdictional transactions and conspiracies. She opined that the way the sentence reads, it forbids federal State and State persecutions within the same system. Mr. Kälin reiterated that the second part of the sentence could be deleted, and the Chair Mr. Posada quickly espoused his support for striking “but only prohibits double jeopardy with regard to an offence adjudicated in the same State” from the text.

Section X: Relationship of Article 14 with other provisions of the Covenant

⁴ Paragraph 43

⁵ Paragraph 51

⁶ Paragraph 54

Mr. Kälin informed the Committee that § 58 should not apply to expulsion proceedings, as the language of Article 14 references the determination of criminal charges, and that expulsion is not a criminal charge. However, he explained, it was his understanding that the core content of paragraph 1 of Article 14 is applicable in such situations. Sir Rodley opined that the problem with drafting is that Article 13 is reflected in Article 14, and that it is not clear exactly how the provision should be interpreted.

After concluding the discussion by approving § 65, the Committee returned to the beginning of the draft.

Section 1: General Remarks on Article 14

Ms. Wedgwood expressed serious concern with § 5, specifically with regard to its provisions relating to the exclusionary rule, or when evidence cannot be omitted. For example, she explained, it is clear that evidence obtained directly through torture cannot be admitted. However, she drew attention to the ‘fruit of the poisonous tree’ doctrine and raised the question of whether later evidence, based upon the evidence garnered through coercion, is acceptable. As the wording of the § presently reads that no “evidence obtained through” coercion is permissible, only the direct evidence from that action would be excluded, as the further removed evidence would not be a direct result of the coercive action. She questioned how the Committee wanted to deal with issue, and also expressed concern about the use of exculpatory statements that are obtained through coercion. For instance, she asked, what if under torture someone says that he is innocent, and whether that statement could be used. Mr. O’Flaherty responded that it was unacceptable for the Committee to acknowledge any implication of statements obtained through torture to be permitted, but that he believed that ‘no fruit of any poisonous tree’ should be admitted. Mr. Amor echoed these opinions, and Sir Rodley expressed his conditional approval. Mr. Kälin then suggested that the Committee discuss these concerns in depth, but noted that the time for the present meeting was finished.

Day 2

Mr. Kälin opened the discussion by noting that in the second reading of the draft, and after private sessions, that all of the §§ from 1-21 had been approved. Hence, the discussion of the day would begin with § 22 on the subject of military and special courts. He urged the Committee to remember that the subject was not military courts in general, but the trying of civilians by such courts.

Section II: Fair and public hearing by a competent, independent and impartial tribunal

Ms. Motoc suggested that with respect to § 22 the text needed to reflect the principles that in all issues of massive violations of human rights, military courts could not try civilians and that minors could never be tried in military courts. Mr. Posada opined that § 22 focuses on Article 14, and that the Committee needed to be extremely careful about extending these guarantees to areas not covered under Article 14. For example, he said, references to juvenile justice are not directly covered by Article 14, and that the intent of the current text, and especially § 22, was about civilians and how they should be tried. He explained that the § is not supposed to cover the entire issue of military courts, but simply mentions them in the context of trying civilians. He recommended that the focus remain on setting the standards for such trials.

Mr. Amor put forward that Article 14 must be applied in all circumstances, and therefore both specialized and military courts must be included in the discussion and the § in order to ensure that the provisions are respected. Sir Rodley echoed this sentiment, stating that while it was not the job of the Committee to determine which courts should be used, it is the job of the Committee to assess the extent to which a particular court would give a fair and impartial hearing. He stated that not only are military and special courts dangerous, but that the concern should be extended to all courts, as in many places the civilian court system is

corrupted. Sir Rodley then put forward 3 basic premises: 1) ordinary civilian courts should do the job of trying civilians, 2) the last resort to try civilians is in military courts, 3) where civil courts cannot be relied on, we must look towards something else.

After listening to the discussion, Mr. Kälin put forward a proposal, suggesting that the language be modified to reflect the idea that trials by military or special courts should be exceptional, and generally conform to all guarantees. He advocated that it would be incumbent upon the State party to demonstrate that regular civilian courts would be unable to do the job with regard to the specific class of individuals being tried. Mr. Amor commented that such language moved in a direction he fully supported. At this point Mr. Posada advised that Mr. Kälin construct a draft § that the Committee could then discuss at a later time. Ms. Wedgwood tendered that when taking the second look at the §, that the Rapporteur make sure it is consistent with the Third and Fourth Geneva Conventions, as she wondered to what extent military courts could substitute themselves as ordinary courts in occupied territories. She noted that IHL has always been sensitive that their founding documents not be trampled upon. Mr. Posada noted his displeasure with the possibility of saying that military courts should be “very exceptional,” as the word very simply allows for too many shades of meanings. He then moved the discussion to § 23⁷.

Sir Rodley took issue with the §’s mention of the “facelessness” of judges, and that the construction of the last sentence implied that either the list of irregularities that would violate Article 14 would only be seen as violations in regard to tribunals with faceless judges. Mr. Kälin acknowledged this point, and suggested that the language be modified to read “tribunals with or without faceless judges.” Sir Rodley gave his conditional assent. The discussion then moved on to § 24 and the issue of how the Convention impacts upon customary law courts and practices.

Ms. Motoc suggested that legal pluralism takes into account customary laws and courts that were established by parallel bodies, referencing tribal councils as an example. She then raised the question as to what the Committee understood to be the basic requirements for fair trials, and what were the minimal conditions that these customary courts needed to meet. Ms. Wedgwood stated that she had many concerns after hearing the recent State reports of the 90th session, and suggested that the issue be approached very carefully. She put forward that the Committee needed to examine which courts are the effective power on the ground, and that any effective power be subject to the Convention. She asked the Committee members for their opinions on how to make it clear that the demands of the Convention must be observed by a customary court. Mr. Posada echoed his general agreement with Ms. Wedgwood, but also expressed his belief that the State in question needed to officially recognize the customary law courts in order for the Convention to apply. Mr. Amor continued with a similar line of reasoning, suggesting that the State should simply ensure the fair trial standards as positive rights, articulating that a State must be responsible for how its justice system works. He firmly opined that there could be no binding decisions handed down by customary law courts unless the decisions were validated by a State’s judicial system. Sir Rodley broached his concern that fundamental guarantees of a fair trial were often not available at customary courts of law, citing the absence of lawyers as an example, and that the § should therefore concentrate on the validation process by the State.

Mr. Sanchez-Cerro highlighted that in his opinion, as it is States that sign on to covenants, groups that exercise customary rights are not required to observe the covenants of international instruments. Mr. O’Flaherty put forward that it was not appropriate for the Committee to try to identify the proper criteria for traditional procedures, and that the point of engagement has to be that of validation. He suggested that perhaps it would be simpler to state that the affected individual has a right to the process of validation. Mr. Bhagwati advised that customary courts, although called courts, do not have the sanction of law. Perhaps decisions could be validated by going to courts of law, but that without such validation, such decisions by customary entities could not be given the status of a decision within the context and meaning of Article 14. Ms. Wedgwood countered by asking about countries where and instances when a customary tribunal is the

⁷ Paragrah 21

effective public power. She referred to the finding of the Inter-American Court in the Vasquez Rodriguez case, where the court found that the fact that the State claimed to not be involved did not matter. She continued by explaining that when any body is exercising the effective power of the State, then it has to fall within the Covenant. She cited the frequent excuses used by State's in instances of customary law practice, when the State proffers that while it is working on a particular issue, that customary practices are hard to change, and that the State can therefore do nothing else.

Mr. O'Flaherty responded by suggesting that the purpose of Article 14 is not to encompass guidelines for customary courts, but to simply serve as a distinct due process provision. Mr. Lallah stated that the Committee needed to approach the subject with some humility, but that he joined with Ms. Wedgwood in her belief that the question must be whether or not the customary courts are the effective power. If such entities are exercising judicial power, he reasoned that certain notions of fairness must then be applied. He suggested that at a minimum, the § would state that the general applicability of Article 14 also becomes relevant where a State allows or continues to allow entities based on customary or religious law to exercise judicial functions. He firmly argued that if States allow a practice, then that practice falls within terms of the Covenant. Mr. Posada then attempted to narrow the discussion to two issues, explaining that the debate was down to 1) the possibility of extending observance of provisions of Article 14 on the work of customary courts and not necessarily requiring any validation by the State; 2) to determine whether or not this validation could be supplemented by a victim's means of recourse, appeal, and to challenge a judgment before another court. He then went on to differ from Mr. Lallah's suggestions by stating that customary law courts are a social function, and not a State creation.

Mr. Kälin put forward that customary law courts do work well, but only if the participants are at an equal level socially. He noted that wherever inequalities were entrenched in society the outcome would be very discriminatory. By virtue of the system, there would be no redress, and such decisions would just be reproduced and replicated. He then addressed Ms. Wedgwood's desire to instruct governments that they must tell such courts to apply Article 14 by stating that it was an illusion to expect any governments follow such guidance, as the customary courts were often beyond the reach of the government or occupied a distinct and separate sphere. As an example, he asked how one could ask a council made up of members of the Ku Klux Klan to apply Article 14. He expressed his conviction that the issue of validation was key, because only then is the State making the decision formally binding. Ms. Wedgwood countered that while she recognized this issue, simply changing the word "entrusts" to "accepts" would cure many of the issues, as that would imply a positive action on the part of the State. Mr. Kälin expressed his support for that change, and steered the Committee away from the issue.

Section IV: Presumption of Innocence

§ 30⁸ was the next paragraph to generate serious discussion, as Mr. Kälin informed the Committee that Ms. Wedgwood had proposed to delete the reference to private media. Ms. Wedgwood explained her reasoning, arguing that it was an issue of fair trial and free press. She reasoned that there were important interests in making sure that the jury or fact finder not be prejudiced by a public carnival, but that any restrictions on the media should be limited to that which was State owned or controlled. Mr. Rodley responded by stating that perhaps the language could be changed, but that it must remain clear that the key issue is the extent to which media coverage would impinge negatively on the presumption of innocence in the process. Ms. Wedgwood replied that she was in favor of Mr Rodley's proposal to link the language to coverage that makes a fair trial impossible. She suggested phrasing to the effect that the media should avoid inflammatory coverage that would make a fair trial impossible. Sir Rodley expressed his desire to go even further, and include the language that the media should be "obliged to avoid" such coverage. Ms. Wedgwood stated that she could not accept that, as it extended too great a control over the media.

⁸ Paragraph 27

Mr. Kälin expressed his desire to rework the §. He suggested that the word “avoid” should be used, as any talk of obligations could be easily abused. He highlighted that the focus should be on how to make it clear that the § is talking not so much about the content of media coverage, but rather its effect. He proposed that the language read that “the media should avoid news coverage undermining the presumption of innocence.” Ms. Wedgwood retorted that the second phrase of the sentence should be stricken, as it might impinge on an individual author’s ability to present a view, and that the § must not interfere with one’s ability to make an argument in the press. The Committee expressed its support of Mr. Kälin's language with Ms. Wedgwood’s suggestion taken into account.

Day 3 and Day 4

Mr. Kälin proposed that the Committee go back to examine §§ **5** (use of evidence), **22** (military and special courts), **23** and **24** (the Covenant and customary law). Due to time constraints, the meeting was brief, and further discussion was postponed until the following morning, during which a private session took place. The next public session was held on the morning of 24 July 2007, and the discussion continued on the aforementioned §§. With regard to § **5**, Mr. Iwasawa registered his opposition to any statement that could appear to tolerate torture and expressed his belief that the Committee should use the same language as in other human rights treaties in order to not go beyond what States are ready to accept. He noted that Article 15 of the Convention against Torture provided that all States Parties shall ensure that any statement made under torture is inadmissible. He expressed his concern that the language in the text goes beyond what Article 15 of CAT provides. The Chairperson reaffirmed his belief that the present text was preferable. He explained that Article 15 of CAT was very hard to understand, and that while the Committee was interpreting the ICCPR, it was entitled to draw its own views even if they might seem inconsistent with CAT. Mr. Kälin noted that Article 16 of CAT reads that provisions are without prejudice to other Covenants, and gave his interpretation that the drafters assumed that other instruments would go further than CAT. He affirmed his support of the present text.

The discussion then returned to § **22**. Mr. Amor stated that he could support the § so long as it was specified that trials by military courts should be exceptional, and that they were justified by a need based upon objective and serious reasons. Sir Rodley expressed his conditional support, but noted that two issues had been abandoned, and that this was unacceptable. The text omitted any mention that military courts were a last resort after civilian courts, and had omitted that the burden was put on the State to demonstrate why civilian courts would not prove satisfactory. The Chairperson noted that regardless of the language, it was clear that the burden was the State’s to show. He further expounded that General Comment 29 was very clear on these points. He expressed his support for Kälin’s version, noting that eventually the Committee would require the State to demonstrate why military courts were being used. Mr. Amor continued to take issue with the present construction, and asked if there was any prohibition on him writing a dissenting comment. The President stated that his question would be dealt with at the end of the meeting.

The Committee then moved on to § **24**. Mr. Kälin insisted that the Committee not go beyond what they had been asked to do, explaining that they were simply determining under what circumstance they were accepting that a judgment can be recognized by the State and therefore enforced. Mr. O’Flaherty suggested that if the phrase “in its legal order” were retained, then the final sentence would have to be reformulated so as not to limit the § to just customary and religious courts. Mr. Kälin concurred, and the Chairperson declared that the § had been adopted.

Adoption of the General Comment

The Chairperson then put the entire General Comment before the members of the Committee for its final adoption and declared the text to be adopted. The Committee then moved to discuss whether or not differing views could be taken into account within the General Comment.

Mr. Kälin emphatically stated that it was clear that procedures do not allow for individual opinions for cases that are taken by a vote. He noted that it was typical for views adopted under optional protocols to list the names of those who had participated, but that this was not the case with other decisions. No decisions on General Comments or general reports list who participated or who voted. As a result, he did not believe that any individual comments were necessary. Mr. Amor, referring to Rule 4, noted that nothing prohibits individual opinions, even when dealing with General Comments. He explained that he was open to discussion about the possible damage of divergent views, but that he did not understand why other opinions could not be accepted. In response, the Chairperson put forward that since there was no direct prohibition, the Committee must consider if it should accept now, for the first time in its history, that general comments be accompanied by concurring or dissenting opinions. Mr. O'Flaherty took the opportunity to register his opposition to any individual opinions, stating that General Comments would be much less valuable if they were fragmented. Sir Rodley echoed this sentiment, and suggested that if any members wanted to ensure that the summary records reflect their concern on a particular issue, that they be allowed to insert what they would have said orally into the appropriate summary record. He suggested that this would do justice to the sacrifice that they had made in going along with the consensus. Ms. Palm opined that the purpose of General Comments is to guide the States in promoting the implementation of the Covenant, and that separate opinions would skew the meaning. The Chairperson declared that any members could insert what they would have said orally into the summary record, and declared the issue closed.

Mr. Kälin expressed his pleasure in completing the longest General Comment in the history of the Human Rights Committee, and expressed his gratitude for all the support he had received as Rapporteur.

Last revised and updated: 9 August 2007.

TREATY BODY MONITOR STAFF

Gareth Sweeney, Human Rights Officer, Deputy Manager, Geneva Program

Eléonore Dziurzynski, Communications Officer, Geneva

Michelle Evans, Representative to the UN, New York

Kobi-Renee Leins, Human Rights Officer, New York

AUTHOR OF THE REPORT

Christopher Lee, Intern

ABOUT THE PUBLICATION

The *Treaty Body Monitor* forms part of the Human Rights Monitor Series produced by ISHR. It reports on each country reviewed by the six treaty bodies (all but the Committee on the Rights of the Child) and provides an overview of every treaty body session. It is currently an online publication that can be found at <http://www.ishr.ch/hrm/TMBs>.

COMMENTS AND FURTHER INFORMATION

We would welcome your feedback on this publication so please send any comments and suggestions to information@ishr.ch. You can check the latest Treaty Body Monitor reports published on <http://www.ishr.ch/hrm/TMBs>.

COPYRIGHT AND DISTRIBUTION

Copyright © 2007 International Service for Human Rights

Material from this publication may be reproduced for training, teaching or other non-commercial purposes as long as ISHR is fully acknowledged. You can also distribute this publication and link to it from your website as long as ISHR is fully acknowledged as the source. No part of this publication may be reproduced for any commercial purpose without the prior express permission of the copyright holders.

DISCLAIMER

While every effort has been made to ensure the accuracy and reliability of the information contained in this publication, ISHR does not guarantee, and accepts no legal liability whatsoever arising from any possible mistakes in the information reported on or any use of this publication. We are however happy to correct any errors you may come across so please notify information@ishr.ch.