



INTERNATIONAL
COMMISSION
OF JURISTS

**MEMORADUM
ON
INTERNATIONAL LEGAL FRAMEWORK
ON
ADMINISTRATIVE DETENTION
AND
COUNTER-TERRORISM**

March 2006

I. PRESENTATION	2
II. INTRODUCTION	3
1. Definitions of Administrative Detention.....	3
2. Other matters	6
III. THE ICJ AND ADMINISTRATIVE DETENTION.....	8
IV. INTERNATIONAL NORMS	12
1. Universal System	13
2. Council of Europe.....	13
3. European Union.....	14
4. Inter-American System	14
5. African System	14
6. Arab Charter.....	14
7. International Humanitarian Law.....	14
8. Others	14
V. DOCTRINE AND JURISPRUDENCE.....	15
1. United Nations.....	16
a) Committee of the Human Rights Commission in Charge of the Study on the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile	16
b) The Human Rights Committee.....	17
i) General Considerations	17
ii) Administrative Detention	19
c) The Committee Against Torture.....	22
d) Working Group on Arbitrary Detention	23
e) Working Group on Enforced and Involuntary Disappearances.....	27
f) The Special Rapporteur on the Question of Torture	28
g) The Expert on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism.....	30
h) The Expert of the Sub-Commission on Administrative Detention	31
i) The Special Rapporteur on the Question of Human Rights and States of Siege or Emergency.....	31
j) Other Special Procedures.....	33
2. The European Court of Human Rights	33
a) General Considerations	33
b) Administrative Detention of Aliens.....	34
c) Administrative Detention and the Fight against Terrorism.....	35
i) Police Custody	35
ii) Administrative Detention <i>Stricto Sensu</i>	36
3. Inter-American system.....	37
a) Inter-American Court of Human Rights	37
b) Inter-American Commission on Human Rights.....	39
i) General Considerations	39
ii) Administrative Detention and Military Regimes.....	39
iii) Administrative Detention and Counter-Terrorism Measures	42
4. African system.....	43
VI. ADMINISTRATIVE DETENTION UNDER INTERNATIONAL HUMANITARIAN LAW	44
1. Administrative Detention in International Armed Conflicts.....	45
2. Administrative Detention in Non-International Armed Conflicts.....	49
3. IACHR Position on Administrative Detention in Armed Conflicts	49

I. PRESENTATION

Following the terrorist attacks of September 11, 2001 and subsequent measures which States have taken or envisaged, administrative detention for security reasons has again become a topical question.

Resorting to administrative detention on grounds of public order, State, or national security – *inter alia* the fight against terrorism – is not a new practice. In different contexts, such as decolonisation, the Cold War, separatist conflicts, military regimes, states of siege, “national security” and the “fight against insurrection” doctrine, much legislation allowing to resort to administrative detention has been promulgated or implemented¹. Administrative detention was and still is mentioned in many Constitutions or Fundamental Laws. In 1985, The International Commission of Jurists (ICJ) counted that at least 85 countries had legislation allowing for the practice of administrative detention on the basis of public order, State, or national security grounds. Amongst these 85 countries, 43 adopted provisions allowing the deprivation of liberty for an indefinite period of time, several years, or even decades².

The present memorandum attempts to compile and systematise the jurisprudence of international organs and mechanisms, as well as the doctrine related to administrative detention on security grounds. It also takes into account jurisprudence and doctrine relating to other forms of deprivation of liberty, as long as these measures are taken in the framework of the fight against terrorism, or wherever jurisprudence mentions principles, which are applicable to all forms of detention. This memorandum also states the position of the International Commission of Jurists on the question of administrative detention on security grounds, as well as on international norms that are applicable to this phenomenon. With regard to the question of administrative detention or internment during armed conflict, the memorandum does not address the issue of prisoners of war – given the specificity of the subject – and only addresses the issue of internment of civilians.

¹ Such as, for instance, legislations on administrative detention in: South Africa under the apartheid regime (Internal Security act of 1950, Terrorism Act of 1967 and Police Amendment of 1980) ; Argentina (PEN legislation, Institutional Act of September 1 of 1977, Law 21.650 of September 26 of 1977, etc.) ; Burma (Laws No. XXVIII and No. LXXIX of 1947) ; Bulgaria (Law of 10 January 1959) ; Chile (Legislation on the State of Siege and the “State of War”, 1973) ; Colombia (article 28 of the Constitution 1886 ; Decree No. 2686 of 1966) ; Ghana in 1958 (Law No. 57 of 1958, Law No. 5 de 1959) ; Greece (Martial Law Act « Delta Xi Theta » of 1912 and Constitutional Act “Beta” of 1967) ; India (Defence of India Act and Defence of India Rules of 1939, Prevention Detention Act of 1951) ; Malaysia (Internal Security Act of 1960) ; Paraguay (legislation on state of siege, 1959) ; Philippines (Martial law, 21 September 1972) ; Poland (Martial Law 1981-1982) ; Singapore (Preservation of Public Security Ordinance of 1955 ; Ordinances of 1958 and 1959) ; Uruguay (Decree N° 393/973) ; United Kingdom and Northern Ireland ; Zambia (Preservation of Public Security Regulations).

² *ICJ Newsletter No. 24*, January /March 1985, page 53.

II. INTRODUCTION

1. Definitions of Administrative Detention

Administrative detention is generally defined as “detention without charge or trial.” As a matter of fact, administrative detention may encompass several phenomena, depending on the adopted approach: administrative detention and/or detention of illegal immigrants or of asylum-seekers to be deported for public order or State security reasons; administrative detention of persons with mental illness³; disciplinary administrative detention⁴; administrative detention or confinement for public health reasons⁵; administrative detention in the context of extradition; administrative detention related to the status of aliens⁶ and asylum-seekers (deportation or *refoulement*); administrative detention aiming at social control and /or “rehabilitation”⁷; administrative detention related to the juveniles⁸; and confinement during armed conflicts. Indeed, as underlined by the UN Centre for Human Rights, “administrative detention applies to a broad range of situations outside the process of police arresting suspects and bringing them to the criminal system”⁹.

Administrative detention on the basis of public order or State security grounds may bear different names, depending on national systems: “administrative detention” (*detención administrativa, détention administrative*); “preventive detention”; “detention without charge or trial”; “ministerial detention”; “mise aux arrêts”; “a disposición del poder ejecutivo nacional”; “administrative internment” (*internement administratif*); “rétention administrative”; “extrajudicial detention” (*détention extrajudiciaire*) and “house arrest” (*detención domiciliaria, assignation a résidence*).

Certain international organs for the protection of human rights have used the phrase “preventive detention” (*détention préventive, detención preventiva*) to refer to administrative detention¹⁰. As underlined by Niall Mac Dermot, “this practice [the administrative detention] is known in most common law countries as preventive detention.”¹¹ However, the use of the expression “preventive detention” may be misleading, notably because it is synonymous, in many national systems, of “detention in custody pending trial”, “policy custody”, “pre-trial detention”, “garde-à-vue”, “custodia policial”, “detención preventiva,” etc. That is to say, it is deprivation of liberty effected or ordered by administrative authorities, with the aim to bring detainees to justice.

Administrative detention is also called “administrative internment”. This phrase may be confusing, in the sense that it is more frequently used for administrative internment for

³ See the Principles for the protection of persons with mental illness and the improvement of mental health care, adopted by United Nations General Assembly (Resolution 46/119 of 17 December 1991), principles 16, 17, 18 and 20. See also the Declaration on the Rights of Mentally Retarded Persons (General Assembly Resolution (XXVI) of 20 December 1971), Articles 4 and 7; and Article 5.1.e of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

⁴ *Inter alia* regarding disciplinary military rules or legislation, police and other State bodies in charge of security.

⁵ *Inter alia* concerning the spread of infectious diseases, drug addiction and alcoholism.

⁶ *Inter alia* regarding “international zones”, deportation and *refoulement*.

⁷ See, *inter alia*, Article 5.1.e of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

⁸ See, *inter alia*, the United Nations Rules for the Protection of Juveniles Deprived of their Liberty, adopted by General Assembly Resolution 45/113 of 14 December 1990, principle 11.a.

⁹ Centre for Human Rights, *Human Rights and Pre-Trial Detention*, Professional Training Series No. 3, 1994, para. 177.

¹⁰ Notably the United Nations Human Rights Committee.

¹¹ *ICJ Newsletter No. 24*, January /March 1985, page 52.

grounds of public health, mental health, or social control. Moreover, it also refers to internment of civilians during armed conflicts.

Assigned residence (*assignation à résidence, house arrest, arresto domiciliario, detención domiciliaria*), as deprivation of liberty¹², is also used to refer to administrative detention for national security grounds. Indeed, experience demonstrates that administrative detention practices *stricto sensu* are not limited to deprivations of liberty in places – official or not – of detention. In several countries, such as Myanmar, Tunisia, the Democratic Republic of Congo, and Vietnam, many people who are subject to administrative detention measures on the basis of national security grounds are actually assigned to residence¹³. Accordingly, this study deals with assigned residence whenever it is used as a form of administrative detention. However, this modality is used in several countries, by different procedures, and for different goals. Thus, assigned residence is also used as a criminal sentence, either principal or substitutive¹⁴; as a temporary measure during a judicial criminal procedure¹⁵; as a contravention or disciplinary or criminal sentence; as a “security measure”; as a conservation measure in procedures of deportation and extradition.

Therefore, in the context of this study, the best expression is administrative detention (*détention administrative, detención administrativa*).

Generally, international norms do not provide a definition of administrative detention, but use expressions such as “persons arrested or imprisoned without charge”¹⁶.

The UN Centre for Human Rights and the UN Crime Prevention and Criminal Justice Branch have provided elements to define administrative detention: “Administrative detention applies to a broad range of situations outside the process of police arresting suspects and bringing them into the criminal justice system.”¹⁷ However, as recognised by the Centre for Human Rights and the UN Crime Prevention and Criminal Justice Branch, this definition also covers detention on the grounds of mental health. Concerning international humanitarian law, the ICRC has provided the following operational definition: ““Interned”: this term generally means deprivation of liberty ordered by the executive authorities when no specific criminal charge is made against the individual concerned.”¹⁸

In his Report on the practice of administrative detention, the Expert of the Sub-Commission on Prevention of Discrimination and Protection of Minorities (Sub-

¹² Human Rights Committee, Views of 17 March 2005, *Fongum Gorji-Dinka v. Cameroon*, Communication No. 1134/2002, UN Doc. CCPR/C/83/D/1134/2002, paragraph 5.4; Human Rights Committee, Views of 26 July 2004, *Francesco Madafferi y Anna María Immacolata Madafferi v. Australia*, Communication No. 1011/2001, UN Doc. CCPR/C/81/D/1011/2001, paragraph 9.2; European Court of Human Rights, Judgment of 2 August 2001, *Vittorino and Luigi Mancini v. Italy*, No. 44955/98.

¹³ In Vietnam, administrative detention can be executed through assigned residence for up to 2 years without any judicial intervention (CP-31 Decree).

¹⁴ For example, Law 296 in Italy; The Decree N° 32-96 in Guatemala.

¹⁵ In Portugal, for instance, assignment to residence can be decreed in cases where a person is suspected of having committed a serious crime.

¹⁶ Rule 93 of the UN Standard Minimum Rules for the Treatment of Prisoners.

¹⁷ Centre for Human Rights - Crime Prevention and Criminal Justice Branch, *Human Rights and Pre-Trial Detention*, Professional Training Series No. 3, UN Publication, Geneva 1994, page 42.

¹⁸ ICRC, Commentary on article 75 of Protocol I to the Geneva Conventions. <http://www.icrc.org/ihl.nsf/b466ed681ddfcfd241256739003e6368/e46340b132ac1b86c12563cd004367bf?OpenDocument>

Commission on Human Rights), Mr. Louis Joinet, provides the following definition: “Detention is considered as “administrative detention” if, *de jure* and/or *de facto*, it has been ordered by the executive and the power of decision rests solely with the administrative or ministerial authority, even if a remedy *a posteriori* does exist in the courts against such a decision. The courts are responsible only for considering the lawfulness of this decision and/or its proper enforcement, but not for taking the decision itself.”¹⁹ Such a definition of “administrative detention” is exclusive of certain modalities of deprivation of liberty such as detention in custody; pre-trial detention; detention *in flagrancia*; pre-trial detention without any charges; and, with certain conditions, detention in custody pending trial of an excessive length.

Experience shows that administrative detention in the fight against terrorism encompasses at least three kinds of deprivation of liberty:

- Administrative detention *stricto sensu*, that is to say a deprivation of liberty decided by order of the executive authorities and only relevant to administrative or ministerial authorities for security reasons, and notably the fight against terrorism. It is irrelevant whether this detention is submitted to judicial review or to a remedy before a tribunal.
- Administrative detention *lato sensu*, that is to say deprivation of liberty decided by the executive authorities or by an agent of the executive – *de jure* or *de facto* – with the aim to bring to justice the detainee charged with terrorist acts or acts related to terrorism. This concerns detention *in flagrancia*, detention in custody, policy custody, pre-trial detention, detention in custody pending trial, etc.
- Administrative detention with a view to control immigration, deportation, or extradition. This is deprivation of liberty ordered by executive authorities, either in the context of immigration powers or deportation or extradition procedures.

Although the aim of these three kinds of measures is to fight terrorism and they are all ordered by the executive authorities, there is an essential element of distinction between them, which is itself characteristic: the *aim* of the detention. Administrative detention *lato sensu* – police custody – aims to submit the detainee to justice. The detention also aims to make the inquiry easier with a view to submitting the case to the courts. The third kind of detention aims to maintain the detainee in custody while a decision on his/her deportation or extradition is pending. Administrative detention *stricto sensu* does not aim to bring the detainee to justice, or to maintain him/her in custody during the immigration or extradition procedure. It only aims to maintain the detainee in custody on grounds of security. This does not prevent the detainee from being brought to justice or submitted to a deportation or extradition procedure at a later time.

Along the same lines, we will use the following operational definition of administrative detention *stricto sensu*:

The deprivation of liberty is ordered by the executive on the basis of the fight against terrorism, and is only relevant to the administrative or the ministerial authority. It does not aim to bring the detainee to justice or to submit him/her to a procedure of deportation or

¹⁹ Report on the practice of administrative detention, UN Doc. E/CN.4/Sub.2/1989/27 of 6 July 1989, para. 17.

extradition, and does not depend on the possibility that the detention might be submitted to judicial review or to a remedy before a tribunal.

2. Other matters

Frequently, administrative detention on the grounds of security is presented as an “exceptional measure” in “exceptional circumstances.” In legal terms, international law does not provide a definition of “exceptional circumstances” or “exceptional measure.” However, generally speaking, the concept of “exceptional circumstances,” and, consequently, “exceptional measure,” is directly linked to the concepts of restrictions²⁰ and derogations²¹ to human rights and to limitations imposed on powers and on the use of force.²²

In case of gross human rights violations such as torture, extrajudicial execution, and enforced disappearance, all violations of non-derogable human rights and absolute prohibitions, the concept of “exceptional circumstances” refers to internal political instability, a threat to national security, a state of war, or a threat of war or any other public emergency.²³ In other words, it is circumscribed to a state of emergency, *de iure* or *de facto*,²⁴ independently of the term used by national legislation to describe this situation.²⁵

Under the ICCPR and the jurisprudence of the Human Rights Committee, “exceptional circumstances” applies to two kinds of situations, namely in the context of derogations and states of emergency, and in the case of restrictions or limitations to rights outside the framework of derogations and states of emergency. The Human Rights Committee itself uses “exceptional circumstances” in different ways, more frequently in reference to states of emergency.²⁶ Indeed, under article 4 of the ICCPR, “exceptional circumstances” could justify certain derogations under certain conditions prescribed by the ICCPR and international law. These “exceptional circumstances” are restricted to the situation of states of emergency. For the Human Rights Committee, in the context of states of

²⁰ See, *inter alia*, International Covenant on Civil and Political Rights, articles 10(2), 12, 13, 14.1, 18.3, 19.3, 21, 22, 25; International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (articles 17.2 and 22.3); Standard Minimum Rules for the Treatment of Prisoners, Rule 17; and Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, principles 16.4 and 18.3.

²¹ See, *inter alia*, International Covenant on Civil and Political Rights, article 4.

²² See, *inter alia*, Code of Conduct for Law Enforcement Officials, article 3, Commentary a); Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Principles 9 and 10.

²³ See, *inter alia*, International Covenant on Civil and Political Rights, article 4; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 2 (2); Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, Principle 1; Declaration on the Protection of all Persons from Enforced Disappearance, article 7; Code of Conduct for Law Enforcement Officials, article 5; and Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Principle 8.

²⁴ See, *inter alia*, UN Human Rights Committee (“observations and conclusion: Suriname”, in UN Doc. A/35/40, Supplement No. 40, para. 297), Report of the UN Special Rapporteur on States of emergency (See *inter alia* UN Doc. E/CN.4/Sub.2/1982/15, E/CN.4/Sub.2/1988/18/Rev.1, E/CN.4/Sub.2/1993/23/Rev.1) and the International Law Association (Seoul Conference, 1986, Committee on the Enforcement of Human Rights). For the ILA, *de facto* states of emergency means “unproclaimed states of emergency [...] characterized by such indicia as the concentration of power in the executive; the suspension or abolition of the legislature; the suspension or limitation of existing guarantees of individual rights; and the imposition of special ‘national’ laws providing for administrative detention...” (Page 8). The UN Special Rapporteur also includes in this category states of emergency that are illegally extended.

²⁵ See, *inter alia*, *state of siege, état de siege, estado de sitio; state of emergency, état d'urgence, estado de emergencia; état d'exception, estado de excepción; martial law, loi martiale, ley marcial; conmoción interior; suspensión de garantías constitucionales; estado de alerta; medidas prontas de seguridad; state defense, état de defense, estado de defensa, etc.*

²⁶ See, *inter alia*, General Comment No. 29: States of Emergency (article 4); Concluding Observations of the Human Rights Committee: Canada, UN Doc. CCPR/C/CAN/CO/5, of 2 November 2005, para. 13.

emergency, exceptional measures derogating from rights protected by the ICCPR (art. 4) must meet, *inter alia*, a fundamental condition: “the situation must amount to a public emergency which threatens the life of the nation.”²⁷ In this context, the Committee has added that “[n]ot every disturbance or catastrophe qualifies as a public emergency which threatens the life of the nation, as required by article 4, paragraph 1.”²⁸ Indeed, “[i]f States purport to invoke the right to derogate from the Covenant during, for instance, a natural catastrophe, a mass demonstration including instances of violence, or a major industrial accident, they must be able to justify not only that such a situation constitutes a threat to the life of the nation, but also that all their measures derogating from the Covenant are strictly required by the exigencies of the situation. In the opinion of the Committee, the possibility of restricting certain Covenant rights under the terms of, for instance, freedom of movement (article 12) or freedom of assembly (article 21) is generally sufficient during such situations and no derogation from the provisions in question would be justified by the exigencies of the situation.”²⁹□

With regard to rights’ restrictions or limitations outside the framework of derogations and states of emergency, only Article 10 (2) of the ICCPR refers to “exceptional circumstances”. Even article 10 (2) does not refer to the criteria that have to be taken into account to determine when circumstances are exceptional. However, the Human Rights Committee has developed important jurisprudence in that respect.³⁰ For example, the Committee considers that some practical difficulties, such as a shortage of staff and space, are not “exceptional circumstances”.³¹

Other ICCPR articles (12, 13, 14.1, 18.3, 19.3, 21, 22, 25) also admit the possibility of restrictions or limitations. However, in each case the ICCPR prescribes the criteria for its restriction and limitation. The Human Rights Committee refers to “exceptional circumstances” in the context of freedom of movement (Article 12, 3 of the ICCPR) where it is necessary to restrict this freedom to protect national security, public order (*ordre public*), public health or morals, and the rights and freedoms of others.³² Nevertheless, the Committee has noted that “[t]o be permissible, restrictions must be provided by law, must be necessary in a democratic society for the protection of these purposes and must be consistent with all other rights recognized in the Covenant”³³ and “with the fundamental principles of equality and non-discrimination”.³⁴ These “exceptional circumstances,” and consequently the restriction to the freedom of movement, could be relevant in cases of administrative detention. Indeed, in a case of “house arrest” for a two-year period that was decreed by an administrative authority, the Human Rights Committee did not find exceptional circumstances to justify the restriction to the freedom of movement. It concluded that the house arrest was in itself unlawful, arbitrary, and a violation of article 12 (1) of the ICCPR, and that it constituted an unlawful and therefore arbitrary deprivation of liberty (art. 9 of the ICCPR).³⁵

²⁷ *General Comment No. 29: States of Emergency (article 4)*, para. 1.

²⁸ *Ibid.*, para. 3.

²⁹ *Ibid.*, para. 5.

³⁰ See, *inter alia*, *Concluding Observations of the Human Rights Committee: Paraguay*, UN Doc. CCPR/C/79/Add.48 and A/50/40, para. 210.

³¹ *Concluding Observations of the Human Rights Committee: Finland*, UN Doc. CCPR/CO/82/FIN of 2 December 2004, para. 11.

³² *General Comment No. 27: Freedom of movement (Art.12)*, para. 11.

³³ *Ibidem*.

³⁴ *Ibid.*, para. 18.

³⁵ Views of 17 March 2005, *Fongum Gorji-Dinka v. Cameroon*, Communication No. 1134/2002, in UN Doc. CCPR/C/83/D/1134/2002, paras. 5.4 and 5.5.

In matters of detention, international human rights standards refer to exceptional circumstances to authorize certain restrictions to the rights of detainees. Article 10 (2) of the ICCPR and Article 17(2) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families state that, in “exceptional circumstances,” detainees in pre-trial detention are not segregated from convicted prisoners. Article 22 (3) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families states that the “decision shall be communicated to them in a language they understand. Upon their request where not otherwise mandatory, the decision shall be communicated to them in writing and, save in exceptional circumstances on account of national security, the reasons for the decision likewise stated. The persons concerned shall be informed of these rights before or at the latest at the time the decision is rendered.” Rule 17 (3) of the Standard Minimum Rules for the Treatment of Prisoners provides that: “In exceptional circumstances, whenever a prisoner is removed outside the institution for an authorized purpose, he shall be allowed to wear his own clothing or other inconspicuous clothing.” Under the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, the notification of arrest to the person deprived of his liberty, or to members of his family or other appropriate persons of his choice, should only be delayed “for a reasonable period where exceptional needs of the investigation so require” (principle 16, 4) and “[t]he right of a detained or imprisoned person to be visited by and to consult and communicate, without delay or censorship and in full confidentiality, with his legal counsel may not be suspended or restricted save in exceptional circumstances, to be specified by law or lawful regulation, when it is considered indispensable by a judicial or other authority in order to maintain security and good orders” (principle 18, 3) .

According to the Human Rights Committee, pre-trial detention is *per se* an exceptional measure, which can be justified for strict reasons of necessity and consistently “with due process of law and article 9 (3) [of the ICCPR].”³⁶ The Human Rights Committee has also addressed the question of the detention of witnesses in view of obtaining their testimony. The Committee has considered that this kind of detention is an exceptional measure, which must be regulated by strict criteria in law and in practice, and requests that existing special circumstances justified this detention.³⁷

III. THE ICJ AND ADMINISTRATIVE DETENTION

Since the late 1950s, the International Commission of Jurists (ICJ) has studied the issue of administrative detention on grounds of public order, security of States, and national security³⁸. In its 1964 study on the right to communication of detainees, the ICJ recommended, on the subject of administrative detention during times of emergency, “that whatever the nature of the emergency, the following minimum rights and principles should be legally recognised in states subscribing to the Rule of Law: 1) The detainee shall have all the rights of an unconvicted prisoner, unless deprivation of these rights is

³⁶ *Concluding Observations of the Human Rights Committee: Argentina*, UN Doc. CCPR/CO/70/ARG, 3 November 2000, para. 10.

³⁷ Views on 24 March 1993, *John Campbell v. Jamaica*, Communication No.307/1988, UN doc. CCPR/C/47/D/307/1988, para. 6.4.

³⁸ Since 1959, the ICJ published a series of studies on this issue. See, *inter alia*, *Journal of the International Commission of Jurists*, Winter 1959 /Spring–Summer 1960, Vol. II, No. 2; *Journal of the International Commission of Jurists*, Winter 1961, Vol. III, No. 2; *Journal of the International Commission of Jurists*, Spring 1961, Vol. III, No. 1; *Journal of the International Commission of Jurists*, Summer 1964, Vol. V, No. 1.

genuinely necessary in the interest of internal and external security. 2) The detainee shall not in any event be deprived of his rights of communication with his legal adviser.³⁹

This issue has also been addressed during conferences and in declarations adopted by the ICJ. The African Conference on the Rule of Law, organised by the ICJ in 1961 in Lagos (Nigeria), adopted a Resolution providing: “3. That fundamental human rights, especially the right to personal liberty, should be written and entrenched in the Constitutions of all countries and that such personal liberty should not in peacetime be restricted without trial before a Court of Law.”⁴⁰

In its Conclusions, the Conference stated the following clause:

“5. (i) No. person of sound mind shall be deprived of his liberty except upon a charge of a specific criminal offence; further, except during a public emergency, preventive detention without trial is held to be contrary of the Rule of Law;

(ii) During a public emergency, legislation often authorizes preventive detention of an individual if the Executive finds that public security so requires. Such legislation should provide the individual with safeguards against continuing arbitrary confinement by requiring a prompt administrative hearing and decision upon the need and justification for detention with a right to judicial review. It should be required that any declaration of public emergency by the Executive be reported to and subject to ratification by the Legislature. Moreover, both the declaration of public emergency and any consequent detention of individual should be effective only for a specified and limited period of time (not exceeding six months).

(iii) Extension of the period of public emergency should be effected by the Legislature only after careful and deliberate consideration of the necessity therefore. Finally, during a period of public emergency the Executive should only take measures as are reasonably justifiable for the purpose of dealing with the situation that exists during that period.⁴¹

At the ICJ Bangkok Congress in 1965, the Congress adopted the following conclusions by the First Working Commission:

- “It should be lawful only during a period of public emergency threatening the life of nation;
- The detainee should be supplied forthwith with the grounds and particulars of the grounds for his detention;
- There should be a prompt administrative hearing and decision upon the need and justification for detention with a right to judicial review, and with representation by counsel at all stages;

³⁹ “Report of the International Commission of Jurists – The right of arrested persons to communicate with those whom it is necessary for them to consult in order to ensure their defence or to protect their essential interest”, in *Journal of the International Commission of Jurists*, Summer 1964, Vol. V, No. 1, page 111.

⁴⁰ See the Resolution’s text in *Journal of the International Commission of Jurists*, Spring 1961, Vol. III, No. 1, page 9.

⁴¹ *Ibid.*, page 13.

- Public emergency should be reported forthwith to, and be subject to ratification by, the Legislature;
- Except in time of war, should be effective only for a specified period of time, not exceeding six months, and renewable only by the Legislature after careful consideration of its necessity”.⁴²

In 1976, following Resolution 3453 (XXX) of the UN General Assembly requesting the UN Commission on Human Rights to study the question of the elaboration of a *body of principles for the protection of all persons detained or imprisoned*, the ICJ submitted draft principles to the Commission on Human Rights.⁴³ The ICJ draft principles were based, *inter alia*, on the *Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile* made by a special committee established by the Commission on Human Rights (see point V,1,a).⁴⁴ In its draft principles, the ICJ raised the question of administrative detention.⁴⁵ The ICJ proposed that:

- the administrative detention only proceed in the framework of special powers given to the executive authority for case of urgency or abnormal situation;
- a copy of the detention order containing the grounds of detention, together with a statement of the facts and circumstances justifying it, shall be immediately provided to the detainee;
- the detainee shall have the right to challenge the order and to be assisted by a lawyer.

In the 1980s, in the framework of the activities on states of emergency and human rights of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, the ICJ underlined that “the deprivation of liberty with no charge that a law has been violated is in itself a serious denial of basic rights, and can be justified only in extreme circumstances.”⁴⁶ The ICJ pointed out that “Where it [the administrative detention] is unavoidable, care must be taken all unnecessary prejudice to other rights of the detained individuals, including access to a lawyer, family visits, reputation, right of access to information, right to medical care and adequate nutrition, right of physical integrity and the like.”⁴⁷ □

In its study on states of emergency, the ICJ ended up with the following conclusion: “Depriving an individual of his freedom without evidence of criminal conduct and without the prospect of a trial in which his guilt or innocence will eventually be established, is in itself a serious denial of human rights, justifiable only in extreme circumstances”.⁴⁸ The ICJ made, *inter alia*, the following recommendations:

- “16. Administrative detention should not be resorted to other than under states of emergency. Accordingly the constitution or legislation should provide that a formal

⁴² ICJ Newsletter No. 24, January /March 1985, pages 52 and 53.

⁴³ See written statement by the ICJ with the ICJ Draft Principles in UN Doc. E/CN.4/NGO/191 of 12 February 1976.

⁴⁴ *Study on the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile*, UN Doc. E/CN.4/826/Rev.1.

⁴⁵ Draft Principles 15, 16 and 17.

⁴⁶ Written statement of the International Commission of Jurists, “states of siege or emergency and their effects on Human Rights” page 15 in UN Doc. E/CN.4/Sub.2/NGO/93, 26 August 1981.

⁴⁷ *Ibid.*, page 16.

⁴⁸ *State of Emergency – Their Impact on Human Rights*, International Commission of Jurists, Geneva, 1983, page 429.

proclamation of a state of emergency is a precondition for the use of administrative detention”;

- “17. The introduction of administrative detention should require authorisation by a democratically elected parliament and the need for its continuance should be reviewed periodically by parliament at intervals of not more than six months”;
- “18. When a state of emergency is terminated, the authority to detain administratively should cease automatically and administrative detainees should be released”;
- «19. The permissible grounds for detaining a person administratively should be clearly stated in the constitution or legislation”;
- “20. Resort should be had to administrative detention only when absolutely necessary to protect national security or public order. Persons suspected of economic or other crimes should be dealt with in accordance with the ordinary laws of criminal procedure, and not be subjected to administrative detention”;
- ¶21. A detention order, containing the grounds of detention together with a statement of the facts and circumstances justifying it, should be issued before arrest or, at latest, within 24 hours of arrest, and the detainee should be provided immediately with a copy of the order”;
- “22. The civilian judiciary should retain jurisdiction during a state of emergency to review individual cases of detention at least (i) to ensure the stated grounds for detention are valid and sufficient, (ii) to ensure that proper procedures have been complied with, and (iii) to ensure that the conditions of detention are lawful”;
- “23. A detainee should be able to consult in private with a lawyer of his choice immediately after arrest and at any time thereafter”;
- “24. An order for administrative detention should lapse unless within one month of its issue it is confirmed by an independent and impartial tribunal or committee over by a judge of superior court”;
- “25. The detainee should have a right of representation in proceeding before any court, tribunal or committee”;
- “26. Regular visits by his family or friends should be permitted”;
- “34. A central registry of all persons detained should be maintained”;
- “35. Administrative detainees should be entitled to the most favourable conditions of detention and treatment consistent with security and in any event not less favourable than those afforded to convicted prisoners”;
- “36. Names of detainees, with the date of the order, should be published in an official gazette, and names of persons released should be similarly published, with the date of release”;

- “37. Regular visits to places of detention by independent authorities and by international bodies such as the International Committee of the Red Cross should be permitted.”⁴⁹

The ICJ also made recommendations regarding interrogations, confessions, and medical examination and assistance⁵⁰.

On August 29, 2004, at its Berlin Congress, the ICJ adopted the “ICJ Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism.” The ICJ again took a position on administrative detention in the following words: “Administrative detention must remain an exceptional measure, be strictly time-limited and be subject to frequent and regular judicial supervision”.⁵¹ The ICJ Declaration also points out that “States may never detain any person secretly or incommunicado and must maintain a register of all detainees. They must provide all persons deprived of their liberty, wherever they are detained, prompt access to lawyers, family members and medical personnel. States have the duty to ensure that all detainees are informed of the reasons for arrest and any charges and evidence against them and are brought promptly before a court. All detainees have a right to *habeas corpus* or equivalent judicial procedures at all times and in all circumstances, to challenge the lawfulness of their detention.”⁵² The ICJ Declaration underlines that “counter-terrorism measures themselves must always be taken with strict regard to the principles of legality, necessity, proportionality and non-discrimination”⁵³ and that “[i]n combating terrorism, states should apply and where necessary adapt existing criminal laws rather than create new, broadly defined offences or resort to extreme administrative measures, especially those involving deprivation of liberty.”⁵⁴

IV. INTERNATIONAL NORMS

Generally, international norms only provide few explicit references to administrative detention. However, many prescriptions about deprivation of liberty are applicable to administrative detention, since they generally refer to all kinds of deprivation of liberty and to all detainees, without specifying whether the detention is of a judicial or an administrative nature. In this regard, it should be noted that the Commission on Human Rights has stated that “the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, (...) also covers administrative detention.”⁵⁵

The question of administrative detention cannot be limited to norms on the right not be arbitrarily deprived of liberty. Indeed, the administrative detention practice concerns other rights, such as the right to a remedy, the right to a tribunal, the right to a lawyer, etc. This practice is also related to other norms on derogations, enforced disappearance, ill

⁴⁹ *Ibid.* pages 461-463.

⁵⁰ *Ibid.* See recommendations No. 27, 28, 29, 30, 31, 32 and 33.

⁵¹ Principle 6, “Deprivation of liberty” of the *ICJ Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism*.

⁵² *Ibidem*.

⁵³ Principle 1, “Duty to Protect”.

⁵⁴ Principle 3, “Principles of Criminal Law”.

⁵⁵ Resolution 1993/36 (PP.6 : “Recalling that the General Assembly, in its Resolution 43/173 of 9 December 1988, adopted the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, which also covers administrative detention, and that, consequently, there is no longer a purpose in treating the question of administrative detention independently, even if, in certain cases, the procedure of administrative detention gives rise to specific abuses”) and Resolution 1994/32 PP.4.

treatment, etc. In this large framework, many norms deal with different aspects of the practice of administrative detention.

1. Universal System

- Universal Declaration of Human Rights: articles 3, 8, 9 and 10;
- International Covenant on Civil and Political Rights: articles 2 (3), 4, 5, 9, 10 (1), and 14 (1);
- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families: articles 16 (1, 4, 5, 7, 8 and 9), 17 (1, 5, 6 and 7), and 18 (1);
- Standard Minimum Rules for the Treatment of Prisoners: rules 4 (1), 95, Part I and Part II-C;
- Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment: 1, 2, 4, 9, 11, 12, 13, 14, 15, 16, 17, 18, 19, 32, 33 and 35;
- Basic Principles on the Role of Lawyers: principles 1, 7, 19, 21 and 22;
- Declaration on the Protection of All Persons from Enforced Disappearances: articles 9, 10, 11 and 12;
- Draft Convention for the Protection of All Persons From Enforced Disappearance, adopted in September 2005 by the Inter-Sessional Working group of the UN Commission on Human Rights⁵⁶—articles 1, 17, 18, 20, 21, and 22;
- General Assembly Resolution 34/178 (*habeas corpus*) and Commission on Human Rights Resolution 1992/35 (*habeas corpus*) and Resolution 1993/36 (para. 16).

2. Council of Europe

- Convention for the Protection of Human Rights and Fundamental Freedoms: articles 5, 6 (1) and 15;
- European Prison Rules⁵⁷—rules 1, 7, 8, 26, 29, 43, and 44;
- Council of Europe Guidelines on Human Rights and the Fight Against Terrorism: guidelines II, III, VII, VIII, and XI;
- Standard Minimum Rules for the Treatment of Prisoners⁵⁸: rules 6, 37, and 38,
- Recommendation No. R (79) 6 concerning the search for missing persons: Para. 1 and 2;

⁵⁶ UN Doc. E/CN.4/2005/WG.22/WP.1/REV.4 of 23 September 2005.

⁵⁷ Recommendation No. R (87) 3, adopted by the Council of Europe Committee of Ministers on 12 February 1987.

⁵⁸ Recommendation No. (73) 5 adopted by the Council of Europe Committee of Ministers on 19 January 1973.

- Recommendation Rec (2000) 21 on the freedom of exercise of the profession of lawyer: rule IV (1).

3. European Union

- Charter of Fundamental Rights of the European Union: articles 6 and 47.

4. Inter-American System

- American Declaration of the Rights and Duties of Man: articles I, XVIII, XXV, and XXVIII;
- American Convention on Human Rights: articles 5, 7, 8 (1), 25, and 27;
- Inter-American Convention on Forced Disappearance of Persons: articles X and XI.

5. African System

- African Charter on Human and Peoples' Rights: articles 6 and 7;
- Principles and guidelines on the right to a fair trial and legal assistance in Africa⁵⁹: Principle M;
- Guidelines and Measures for the Prohibition and Prevention of Torture or Degrading Treatment or Punishment in Africa (Robben Island Guidelines)⁶⁰: guidelines 20 to 37.

6. Arab Charter

- Arab Charter on Human Rights: articles 4, 12, 14 and 20.

7. International Humanitarian Law

- Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Convention IV): articles (*inter alia*) 41, 42, 43, 46, 66, 68, 78, 79, 80, 132, 133, 134, and 135;
- Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I): article 75 (3) (6);
- Protocol Additional to the Geneva Convention of 12 August 1949 Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II): articles 4 (1) and 5.

8. Others

- United Nations Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile⁶¹: principles 34, 35, 36, 37, and 38;

⁵⁹ African Union Doc. DOC/OS (XXX) 247.

⁶⁰ Resolution adopted by the African Commission on Human and Peoples' Rights on 23 October 2002.

- United Nations Draft Third Protocol to the International Covenant on Civil and Political Rights: article 1;
- Syracuse Principles about the Limitation and Derogation of Rights in the International Covenant on Civil and Political Rights: Principle 70.

It should be recalled that, in accordance with the Rome Statute of the International Criminal Court, “imprisonment or severe deprivation of physical liberty in violation of fundamental rules of international law,” when committed “as part of a widespread or systematic attack directed against any civilian population” is a crime against humanity⁶².

It is also important to recall that the Statute of the International Tribunal for the Former Yugoslavia qualifies the unlawful detention of civilians as a grave breach of the Geneva Conventions⁶³ and as a crime against humanity “when committed in armed conflict (...) and directed against any civilian population.”⁶⁴ The Statute of the International Tribunal for Rwanda qualifies imprisonment “when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds” as a crime against humanity.⁶⁵

V. DOCTRINE AND JURISPRUDENCE

It is important to underline that, in certain contexts, political organs of intergovernmental systems have required concerned countries to abrogate administrative detention. Thus, for instance, regarding South Africa, the United Nations General Assembly condemned the practice of internment of persons for their opposition to *apartheid* and urged their unconditional release⁶⁶. Concerning Myanmar, the General Assembly condemned the detention of political leaders several times, *inter alia* on an administrative basis or because they were assigned to residence⁶⁷. Regarding Nigeria, the General Assembly condemned the detention of political leaders – amongst who several were under administrative detention measures – because of their fight for the return to democracy⁶⁸. In the case of the Palestinian Occupied Territories, the General Assembly called on Israel, the occupying Power, “to accelerate the release of all remaining Palestinians arbitrarily detained or imprisoned, in line with agreements reached,”⁶⁹ which comprised persons who were under administrative internment measures or “administrative prisoners”⁷⁰. The General

⁶¹ Draft principles elaborated by the Committee of the Commission on Human Rights in charge of the study. United Nations Doc. E/CN.4/826/Rev.1, Annex.

⁶² Article 7 of the Rome Statute.

⁶³ Article 2 of the Statute of the International Tribunal for the Former Yugoslavia.

⁶⁴ Article 5 of the Statute of the International Tribunal for the Former Yugoslavia.

⁶⁵ Article 3 of the Statute of the International Tribunal for Rwanda.

⁶⁶ See, *inter alia*, Resolution 3055 (XXVIII) of 26 October 1973, para. 1; and Resolution 2923 (XXVII) E of 15 November 1972, para. 3.

⁶⁷ See, *inter alia*, Resolutions 51/117 of 12 December 1996; 50/194 of 22 December 1995; and 47/144 of 18 December 1992. Several political leaders were detained or assigned to residence in accordance with a 1975 Law on the Protection of the State (amended in August 1991).

⁶⁸ Resolutions 51/109, of 12 December 1996 and 50/199 of 22 December 1995.

⁶⁹ Resolution 51/134 of 13 December 1996.

⁷⁰ In 1994, the Special Rapporteur on the situation of human rights in Occupied Palestinian Territories since 1967, Mr. René Felber, concluded, “all persons submitted to administrative detention – 356 persons by the end of 1993 – should be released as far as they had not participated in acts of violence.” (E/CN.4/1994/14 of 28 January 1994, para. 42). In his report of 1995, Mr. Felber used the term “administrative prisoners” (E/CN.4/1995/19 of 13 December 1995, para. 8).

Assembly also requested Member States “to release any person who, within their jurisdiction and contrary to the provisions of the above-mentioned international instruments [the Universal Declaration of Human Rights, articles 5, 10, 19 and 20; the International Covenant on Civil and Political Rights, article 22; the International Covenant on Economic, Social and Cultural Rights, article 8; and the ILO Convention No.87 concerning Freedom of Association and Protection of the Rights to Organise], may be under arrest or detention on account of trade union activities.”⁷¹ At the European level, the Parliamentary Assembly of the Council of Europe required the abrogation of administrative detention in Armenia, following administrative detention of persons for their participation in political opposition demonstrations⁷².

1. United Nations

a) Committee of the Human Rights Commission in Charge of the Study on the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile⁷³

In its Study, delivered in 1962, the Committee reached the following conclusions⁷⁴:

- Administrative detention for public security reasons should be restricted to cases of states of public emergency, where normal laws and procedures are unsuitable to face the danger, and if such a measure is strictly required;
- Control over the use of special powers should be vested in organs or authorities independent of those exercising the powers, and persons who are held responsible for abusing their authority should be subject to sanctions;
- Before a person is arrested or detained, an order in writing should be required from the competent authority indicating the reasons and facts supporting the order, and a copy of the order should be given to the person at the time of his arrest;
- Persons held in administrative detention should be entitled to the same safeguards as under ordinary criminal procedure;
- Persons held in administrative detention should be entitled to:
 - a *habeas corpus* remedy at all times and in all circumstances;
 - be informed of the detention grounds, notably in writing;
 - be heard *de jure* by an ordinary court within twenty-four hours of their arrest and, if the ordinary courts are not functioning, by some other independent authority;
 - periodic reviews of their case;
 - have legal counsel:

⁷¹ Resolution 33/169 “Protection of the human rights of arrested or detained trade union activists” of 20 December 1978, para. 3 (b).

⁷² Resolution 1405 (2004) on the implementation of Resolutions 1361 (2004) and 1374 (2004) on the honouring of obligations and commitments by Armenia. Resolution 1374 (2004), paragraph 9.iv, stated cases of administrative detention of persons for their participation in demonstrations.

⁷³ The Committee was set up by the Commission on Human Rights in 1956 with the purpose of carrying out several studies. Its mandate to carry out the study on the right of everyone to be free from arbitrary arrest, detention and exile was endorsed in Resolution 624 B (XXII) of the Economic and Social Council.

⁷⁴ *Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile*, United Nations Doc. E/CN.4/826/Rev.1, paras. 783 to 787.

- have their relatives be informed of their detention, have regular contact with them, and be visited regularly;
- a right to reparation if the court declares their administrative detention to have been arbitrary or abusive.

b) The Human Rights Committee

The Human Rights Committee has issued several statements on the practice of arbitrary detention. Before looking at its jurisprudence, it is important to recall some essential points raised by the Committee on any form of deprivation of liberty.

i) General Considerations

Concept of arbitrary deprivation of liberty. The Committee has considered, in the framework of a temporary or pre-trial detention of a judicial nature, that: “The drafting history of article 9, paragraph 1, confirms that “arbitrariness” is not to be equated with “against the law”, but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. This means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all circumstances. Further, remand in custody must be necessary in all circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime”⁷⁵. Several general criteria can be identified from the Committee’s jurisprudence, although every kind of deprivation of liberty may require additional and/or specific criteria: legality, legitimacy (of the detention’s goal), necessity, proportionality, and protection of human rights, concerning, *inter alia*, the right to a remedy and to security of person.

Deprivation of liberty as a rule of exception. The Committee has considered on several occasions that pre-trial detention is a rule of exception. The Human Rights Committee has indicated that “[a]s for article 9, paragraph 3 of the Covenant, which stipulates that it shall not be the general rule that persons awaiting trial shall be detained in custody [...] pre-trial detention should be the exception and that bail should be granted, except in situations where the likelihood exists that the accused would abscond or destroy evidence, influence witnesses or flee from the jurisdiction of the State party. The mere fact that the accused is a foreigner does not of itself imply that he may be held in detention pending trial.”⁷⁶

Treatment of detainees. The Committee has stated that “Article 10, paragraph 1 of the Covenant provides that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person [...] [and] that this article supplements article 7 as regards the treatment of all persons deprived of their liberty.”⁷⁷ In the Committee’s view, it is a fundamental and universally applicable rule [...] [that] must be applied without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”⁷⁸ In

⁷⁵ Decision of 23 July 1990. Communication No. 305/1988, *Hugo van Alphen v. The Netherlands*, paragraph 5.8, CCPR/C/39/D/305/1988 of 15 August 1990. See also decisions of 5 November 1999, Communication No. 631/1995, *Aage vs Norway*, paragraph 6.3 (CCPR/C/67/D/631/1995) of 21 July 1994; Communication No. 458/1991, *Albert Womah Mukong v. Cameroon*, paragraph 9(8), (CCPR/C/51/D/458/1991); Views of 3 April 1997, Communication No. 560/1993, *A (name deleted) v. Australia*, UN Doc. CCPR/C/59/D/560/1993, para. 9.2.

⁷⁶ Views of 2 April 1997, Communication No. 526/1993, *Michael and Brian Hill v. Spain*, para. 12.3, UN Doc. CCPR/C/59/D/526/1993.

⁷⁷ *General Comment No. 09: Humane treatment of persons deprived of liberty (Art. 10)*, para. 1.

⁷⁸ *General Comment No. 21: concerning humane treatment of persons deprived of liberty*, para. 4.

this context, and even though article 10 of the ICCPR is not in the list of non-derogable rights found under article 4, the Committee has considered that it is the expression of “a norm of general international law not subject to derogation. This is supported by the reference to the inherent dignity of the human person in the preamble to the Covenant and by the close connection between articles 7 and 10.”⁷⁹

Places of detention. The Committee has stated that “[t]o guarantee the effective protection of detained persons, provisions should be made for detainees to be held in places officially recognized as places of detention and for their names and places of detention, as well as for the names of persons responsible for their detention, to be kept in registers readily available and accessible to those concerned, including relatives and friends.”⁸⁰

Habeas corpus. The Committee has considered that the *habeas corpus* remedy has to be maintained at all times and in all circumstances, concerning any modality of deprivation of liberty, because it offers a protection against serious human rights violations such as torture. Thus, the Committee has indicated: “It is inherent in the protection of rights explicitly recognized as non-derogable in article 4, paragraph 2, that they must be secured by procedural guarantees, including, often, judicial guarantees. The provisions of the Covenant relating to procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights. Article 4 may not be resorted to in a way that would result in derogation from non-derogable rights.”⁸¹ The Committee has also considered that “incommunicado detention for an indefinite period and the suppression of *habeas corpus* constitute violations of article 9 of the Covenant.”⁸²

Judicial review of the detention. The Committee has considered that “features limit the effectiveness of judicial review, thus endangering the protection against torture and other inhuman treatment prohibited under article 7 and derogating from article 9 more extensively than what in the Committee's view is permissible pursuant to article 4.”⁸³

Duration of detention and detention for an indefinite period of time. The Committee has stated against deprivations of liberty for an indefinite period of time, be they pre-trial detention, imprisonment sentence⁸⁴ (except imprisonment for life), or administrative detention⁸⁵.

Access to a lawyer. The Human Rights Committee has stated: “the protection of the detainee also requires that prompt and regular access be given to [...] lawyers”⁸⁶. The Committee has considered that “the use of prolonged detention without any access to a lawyer or other persons of the outside world violates articles the Covenant (arts. 7, 9, 10 and 14, para. 3 (b))” and has recommended “that no one is held for more than 48 hours without access to a lawyer.”⁸⁷

⁷⁹ *General Comment No. 29: States of Emergency (article 4)*, para. 13 (a).

⁸⁰ *General Comment No. 20: Concerning prohibition of torture and cruel treatment or punishment*, para. 11.

⁸¹ *General Comment No. 29: States of Emergency (article 4)*, para. 15.

⁸² *Concluding Observations of the Human Rights Committee: Nigeria*, CCPR/C/79/Add.64, para. 7.

⁸³ *Concluding Observations of the Human Rights Committee: Israel*, CCPR/CO/78/ISR, para. 12.

⁸⁴ *Concluding Observations of the Human Rights Committee: Finland*, para. 18, CCPR/C/79/Add.91.

⁸⁵ *Concluding Observations of the Human Rights Committee: Zambia*, para. 14, CCPR/C/79/Add.62.

⁸⁶ *General Comment No. 20: Concerning prohibition of torture and cruel treatment or punishment*, para. 11.

⁸⁷ *Concluding Observations of the Human Rights Committee: Israel*, CCPR/CO/78/ISR, para. 13.

Certain modalities of detention. The Committee has considered that “The prohibitions against taking of hostages, abductions or unacknowledged detention are not subject to derogation. The absolute nature of these prohibitions, even in times of emergency, is justified by their status as norms of general international law.”⁸⁸ The Committee has noted “that prolonged solitary confinement of the detained or imprisoned person may amount to acts prohibited by article 7 [of the ICCPR]”⁸⁹ and recommended that “Provisions should also be made against incommunicado detention.”⁹⁰

Deprivation of liberty and legitimate exercise of a fundamental freedom or right. The Committee considers measures of deprivation of liberty aiming at punishing the legitimate exercise of a fundamental freedom or right to be incompatible with the ICCPR. In a case where a journalist was being detained without any charge for a prolonged period of time because he had expressed his opinion, the Committee has considered that “[a]ny restriction of the freedom of expression pursuant to paragraph 3 of article 19 must cumulatively meet the following conditions: it must be provided for by law, it must address one of the aims enumerated in paragraphs 3 (a) and (b) of article 19 and it must be necessary to achieve the legitimate purpose. The State party has indirectly justified its actions on grounds of national security and/or public order by arguing that the author's right to freedom of expression was exercised without regard to the country's political context and continued struggle for unity. While the State party has indicated that the restrictions on the author's freedom of expression were provided for by law, it must still be determined whether the measures taken against the author were necessary for the safeguard of national security and/or public order. The Committee considers that it was not necessary to safeguard an alleged vulnerable state of national unity by subjecting the author to arrest, continued detention and treatment in violation of article 7. It further considers that the legitimate objective of safeguarding and indeed strengthening national unity under difficult political circumstances cannot be achieved by attempting to muzzle advocacy of multi-party democracy, democratic tenets and human rights. In this regard, the question of deciding which measures might meet the "necessity" test in such situations does not arise.”⁹¹

ii) Administrative Detention

The Committee has considered several times that the practice of administrative detention, whenever it is prolonged, is likely to expose accused persons to torture, ill-treatment, and other violations of human rights⁹².

The Human Rights Committee has considered that the administrative detention ordered by executive authorities on national security grounds does not result *ipso facto* in arbitrary detention that is contrary to article 9, paragraph 1.⁹³ The Human Rights Committee has also stated that administrative detention of individuals requesting asylum is not *per se*

⁸⁸ *General Comment No. 29: States of Emergency (article 4)*, para. 13 (b).

⁸⁹ *General Comment No. 20: Concerning prohibition of torture and cruel treatment or punishment*, para. 6.

⁹⁰ *Ibid.*, para. 11. See also: *Report of the Human Rights Committee*, A/54/40, Concluding Observations on Chile (para. 209); *Report of the Human Rights Committee*, A/53/40, Concluding Observations on Tanzania (para. 393) and Uruguay (242).

⁹¹ Views of 21 July 1994, Communication No. 458/1991, *Albert Womah Mukong v. Cameroon*, para. 9.7, UN Doc. CCPR/C/51/D/458/1991.

⁹² See, *inter alia*, *Concluding Observations of the Human Rights Committee : Egypt*, CCPR/C/79/Add.23, para. 10; and *Concluding Observations of the Human Rights Committee : Ukraine*, CCPR/C/79/Add.52; A/50/40, paras.305-333.

⁹³ See, *inter alia*, Views of 29 March 2004, Communication No. 1051/2002, *Mansour Ahani v. Canada*, CCPR/C/80/D/1051/2002, para. 10.2.

arbitrary and it cannot “find any support for the contention that there is a rule of customary international law which would render all such detention arbitrary.”⁹⁴

The Committee has expressed its position on general conditions that shall rule administrative detention. Thus in its General Comment on article 9 of the Covenant, the Committee stated that “[a]lso if so-called preventive detention is used, for reasons of public security, it must be controlled by these same provisions, i.e. it must not be arbitrary, and must be based on grounds and procedures established by law (para. 1), information of the reasons must be given (para. 2) and court control of the detention must be available (para. 4) as well as compensation in the case of a breach (para. 5). And if, in addition, criminal charges are brought in such cases, the full protection of article 9 (2) and (3), as well as article 14, must also be granted.”⁹⁵

In certain country observations and recommendations, the Committee has considered that all safeguards provided in article 9 of the Covenant apply to administrative detention. Thus, in its recommendations to Norway, the Committee “recommends that the enabling legislation and practice be reviewed with regard to both pre-trial and administrative detention, with a view to guaranteeing full compliance with all provisions of article 9 of the Covenant.”⁹⁶ In a decision about an individual case, the Committee indicates that “[...]According to article 9 (1) of the Covenant, no one shall be subjected to arbitrary arrest or detention. Although administrative detention may not be objectionable in circumstances where the person concerned constitutes a clear and serious threat to society which cannot be contained in any other manner, the Committee emphasizes that the guarantees enshrined in the following paragraphs of article 9 fully apply in such instances. In this respect, it appears that the modalities under which “prompt security measures” are ordered, maintained and enforced do not comply with the requirements of article 9.”⁹⁷

The Committee considers that:

- measures of administrative detention and incommunicado detention shall be restricted to very limited and exceptional cases;⁹⁸
- administrative detention shall be limited in time, *inter alia* for a short period of time, and shall not be for an indefinite period⁹⁹. The Committee expresses concern that, in some cases, “the administrative detention of foreign nationals without a temporary or permanent residence permit, including asylum-seekers and minors over the age of 15, for three months while the decision on the right of temporary residence is being prepared, and for a further six months, and even one year with the agreement of the judicial authority, pending expulsion. The Committee notes that these time-limits are

⁹⁴ Views of 3 April 1997, Communication No. 560/1993, *A (name deleted) v. Australia*, UN Doc. CCPR/C/59/D/560/1993, para. 9.3.

⁹⁵ *General Comment No. 08: Right to liberty and security of persons (Art. 9)*, para. 4.

⁹⁶ *Concluding Observations of the Human Rights Committee: Norway*, CCPR/C/79/Add.112, para. 11.

⁹⁷ Views of 12 October 1982, Communication No. 66/1980, *David Alberto Campora Schweizer v. Uruguay*, UN Doc. CCPR/C/17/D/66/1980, para. 18.1.

⁹⁸ *Concluding Observations of the Human Rights Committee: Jordan*, CCPR/C/79/Add.35; A/49/40, paras. 226-244; *Concluding Observations of the Human Rights Committee: Morocco*, CCPR/C/79/Add.44, para. 21;

⁹⁹ *Concluding Observations of the Human Rights Committee: Cameroon*, CCPR/C/79/Add.33, para. 22; *Concluding Observations of the Human Rights Committee: Cameroon*, CCPR/C/79/Add.116, para. 19; *Concluding Observations of the Human Rights Committee: Israel*, CCPR/CO/78/ISR, para. 12; *Concluding Observations of the Human Rights Committee: Switzerland*, CCPR/C/79/Add.70, para. 26.

considerably in excess of what is necessary, particularly in the case of detention pending expulsion;”¹⁰⁰

- Any measure of administrative detention, as well as its prolongation, shall be based both on objective grounds and necessity and proportionality criteria, and shall be a reasonable measure. If these grounds and/or criteria do not or no longer exist during the prolongation of the administrative detention, then the detention becomes arbitrary;¹⁰¹
- Any measure of administrative detention shall comply with provisions from articles 2, 7, 9, and 16 of the ICCPR;¹⁰²
- Persons being subjected to measures of administrative detention shall be brought promptly before a judge, and shall be entitled to trial within a reasonable time or to release¹⁰³ (Article 9, 3 ICCPR);
- Administrative detention shall be subjected to regular “judicial reviews.”¹⁰⁴ Such judicial review must be regular enough and must deal with both the “substantive justification of detention” and the “reasonableness” of the measure of detention. The judicial decision is made “without delay”. However, the Committee observes “that when judicial proceedings that include the determination of the lawfulness of detention become prolonged the issue arises whether the judicial decision is made “without delay” as required by the provision, unless the State party sees to it that interim judicial authorization is sought separately for the detention.”¹⁰⁵ In this case, the Committee considers that the prolongation of the procedure of judicial review over several months is incompatible with article 9(4) of the ICCPR.¹⁰⁶ The judicial review has to be effective – substantive and not only formal – that is to say that tribunals have to be authorized to order the person’s release. Thus the Committee considered that “court review of the lawfulness of detention under article 9, paragraph 4, which must include the possibility of ordering release, is not limited to mere compliance of the detention with domestic law. While domestic legal systems may institute differing methods for ensuring court review of administrative detention, what is decisive for the purposes of article 9, paragraph 4, is that such review is, in its effects, real and not merely formal. By stipulating that the court must have the power to order release “if the detention is not lawful”, article 9, paragraph 4, requires that the court be empowered to order release, if the detention is incompatible with the requirements in article 9, paragraph 1, or in other provisions of the Covenant. This conclusion is

¹⁰⁰ *Concluding Observations of the Human Rights Committee : Switzerland*, CCPR/C/79/Add.70, para. 15.

¹⁰¹ Views of 3 April 1997, Communication No. 560/1993, *A (name deleted) v. Australia*, UN Doc. CCPR/C/59/D/560/1993, para. 9.4.

¹⁰² *Concluding Observations of the Human Rights Committee: Israel*, CCPR/C/79/Add.93, para. 21; *Concluding Observations of the Human Rights Committee: Colombia*, CCPR/CO/80/COL., para. 9.

¹⁰³ *Concluding Observations of the Human Rights Committee: Jordan*, CCPR/C/79/Add.35; A/49/40, paras. 226-244; *Concluding Observations of the Human Rights Committee: Morocco*, CCPR/C/79/Add.44, para. 21; *Concluding Observations of the Human Rights Committee: Vietnam*, CCPR/CO/75/VNM, para. 8; *Concluding Observations of the Human Rights Committee: Cameroon*, CCPR/C/79/Add.116, para. 19

¹⁰⁴ Views of 29 March 2004, Communication No. 1051/2002, *Mansour Ahani v. Canada*, CCPR/C/80/D/1051/2002, para. 10.2; Views of 3 April 1997, Communication No. 560/1993, *A (name deleted) v. Australia*, UN Doc. CCPR/C/59/D/560/1993, para. 9.4; *Concluding Observations of the Human Rights Committee: Israel*, CCPR/C/79/Add.93, para. 21.

¹⁰⁵ Views of 29 March 2004, Communication No. 1051/2002, *Mansour Ahani v. Canada*, CCPR/C/80/D/1051/2002, para. 10.3.

¹⁰⁶ *Ibidem*.

supported by article 9, paragraph 5, which obviously governs the granting of compensation for detention that is "unlawful" either under the terms of domestic law or within the meaning of the Covenant."¹⁰⁷□

- A person being subjected to measures of administrative detention “shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful” (Article 9 (4) of the ICCPR).¹⁰⁸ The Committee considered “that the time-limit of 96 hours for the judicial review of the detention decision or the decision to extend detention is also excessive and discriminatory, particularly in the light of the fact that in penal matters this review is guaranteed after 24 or 48 hours depending on the [Swiss] canton concerned.”¹⁰⁹□
- Persons being subjected to measures of administrative detention shall be informed of the remedies to which they are entitled¹¹⁰;
- Persons being subjected to measures of administrative detention shall have access to a lawyer in the shortest delay.¹¹¹ In some cases, the Committee recommended a delay of less than 48 hours.¹¹²

c) The Committee Against Torture

The Committee Against Torture has examined the practice of administrative detention through the prism of the prohibition of torture and ill treatment. In several observations, it has recommended the elimination of all forms of administrative detention¹¹³ and has considered the abolition of administrative detention in certain countries to be a positive step.¹¹⁴ The Committee has considered certain modalities of administrative detention to be constitutive of ill treatment under article 16 of the Convention against Torture.¹¹⁵

The Committee has stated that all persons being detained, without any exception – including persons deprived of their liberty because of measures of administrative detention – shall be “brought promptly before a judge and (be) ensured prompt access to a

¹⁰⁷ Views of 3 April 1997, Communication No. 560/1993, *A (name deleted) v. Australia*, UN Doc. CCPR/C/59/D/560/1993, para. 9.5.

¹⁰⁸ *Concluding Observations of the Human Rights Committee: Cameroon*, CCPR/C/79/Add.33, para. 22; *Concluding Observations of the Human Rights Committee: Lithuania*, CCPR/CO/80/LTU, para. 13; *Concluding Observations of the Human Rights Committee: Republic of Moldova*, CCPR/CO/75/MDA, para. 11; *Concluding Observations of the Human Rights Committee: Cameroon* CCPR/C/79/Add.116, para. 19; Views of 29 March 2004, Communication No. 1051/2002, *Mansour Ahani v. Canada*, UN Doc. CCPR/C/80/D/1051/2002, para. 10.2; Views of 27 July 1993, Communication No. 326/1988, *Henry Kalenga v. Zambia*, UN Doc. CCPR/C/48/D/326/1988, para. 6.3; Views of 23 July 1980, Communication No. 4/1977, *William Torres Ramirez v. Uruguay*, CCPR/C/10/D/4/1977, para. 18; Views of 27 March 1981, Communication No. 44/1979, *Alba Pietraroia v. Uruguay*, CCPR/C/12/D/44/1979, para. 17.

¹⁰⁹ *Concluding Observations of the Human Rights Committee : Switzerland*, CCPR/C/79/Add.70, para. 15.

¹¹⁰ *Concluding Observations of the Human Rights Committee : Switzerland*, CCPR/C/79/Add.70, para. 26

¹¹¹ *Concluding Observations of the Human Rights Committee : Israel*, CCPR/CO/78/ISR, para. 13; *Concluding Observations of the Human Rights Committee : Switzerland*, CCPR/C/79/Add.70, para. 26; Views of 27 July 1993, Communication No. 326/1988, *Henry Kalenga v. Zambia*, UN Doc. CCPR/C/48/D/326/1988, para. 6.3.

¹¹² Views of 3 April 1997, Communication No. 560/1993, *A (name deleted) v. Australia*, UN Doc. CCPR/C/59/D/560/1993, para. 9.5.

¹¹³ *Conclusions and recommendations of the Committee Against Torture: Egypt*, para. 6 (f), CAT/C/CR/29/4 of 23 December 2002; *Conclusions and recommendations of the Committee Against Torture: Republic of Moldova*, para. 6(d), CAT/C/CR/30/7 of 27 May 2003; *Conclusions and recommendations of the Committee Against Torture: China*, A/55/44, para.101.

¹¹⁴ *Conclusions and recommendations of the Committee Against Torture : Finland*, A/51/44, para.127.

¹¹⁵ *Conclusions and recommendations : Israel*, A/57/44, paras. 47-53.

lawyer”.¹¹⁶ It is also important to underline that the Committee has, on several occasions, recommended to abolish modalities of incommunicado detention.¹¹⁷

d) Working Group on Arbitrary Detention

The Working Group on Arbitrary Detention (WGAD) has examined the question of administrative detention in the context of anti-terrorist measures, and with respect to asylum seekers, “rehabilitation”, measures of social control, and immigrants. Several of the WGAD’s deliberations and recommendations concerning modalities of administrative detention, other than those related to the fight against terrorism, are highly useful and applicable *mutatis mutandis* to any form of administrative detention.

In cases of administrative detention of asylum-seekers or immigrants, the WGAD considers that:

- Notification of the custodial measure and of available remedies must be given to any asylum-seeker or immigrant;
- Any asylum-seeker or immigrant placed in custody must be able to apply for a remedy to a judicial or other authority, which shall decide promptly on the lawfulness of the measure, and, where appropriate, order the release of the person concerned. In the event that continued detention is authorized, detainees should be able to initiate further challenges against the reasons for detention;
- Any asylum-seeker or immigrant must have the possibility, while in custody, of communicating with the outside world and of contacting a lawyer, a consular representative, and relatives;
- Any asylum-seeker or immigrant placed in custody must be brought promptly before a judicial or other authority;
- Any asylum-seeker or immigrant, when placed in custody, must enter his or her signature in a register which is numbered and bound, or affords equivalent guarantees, indicating the person's identity, the grounds for the custody, and the competent authority which decided on the measure, as well as the time and date of admission into and release from custody;
- Any asylum-seeker or immigrant, upon admission to a centre for custody, must be informed of the internal regulations, and, where appropriate, of the applicable disciplinary rules and any possibility of his or her being held incommunicado, as well as of the guarantees accompanying such a measure.
- A maximum period should be set by law and the custody may in no case be unlimited or of excessive length¹¹⁸.

¹¹⁶ *Conclusions and recommendations: Israel*, A/57/44, paras. 47-53.

¹¹⁷ *Report of the Committee Against Torture* (1997), A/54/44, observations on Georgia (para. 121(d)), Ukraine (para. 146); *Report of the Committee Against Torture* (1998), A/53/44, observations on Spain (para. 135); *Report of the Committee Against Torture* (1999), A/54/44, observations on Libyan Arab Jamahiriya (para.18).

¹¹⁸ Deliberation No. 5 “Situation of immigrants and asylum-seekers”, principles 1, 2, 3, 4, 7 and 8, in UN Doc. E/CN.4/2000/4, Annex II. See also: *Report of the Working Group on Arbitrary Detention*, UN Doc. E/CN.4/1999/63, paras. 69-70 and 76-78; *Report of the Working Group on Arbitrary Detention – Visit to Australia*, UN. Doc

In the framework of administrative detention aiming at rehabilitation through labour¹¹⁹, the WGAD considers that:

- Detentions of unspecified duration necessarily have, as such, a totally or partly arbitrary character. This also applies to cases where the measure, although initially limited in duration, may be and is continually re-imposed;
- Where the main purpose of the measure is “political and/or cultural rehabilitation through self-criticism, the deprivation of freedom is, by reason of its very purpose, inherently arbitrary”¹²⁰;
- Administrative measures must ensure that effective judicial (and not merely hierarchic) remedies are available, and that they are exercised according to a procedure that does not involve any particularly serious violations of the right to a fair trial. In the absence of such remedies, the detention is arbitrary.

Regarding the use of administrative detention as a restriction imposed to freedom of expression and association, which allows for the arrest and detention of several political opponents during a certain period of time without grounds or suspicions in a country, the WGAD has recommended to the Government to reconsider the legal framework regarding administrative detention and give priority to: “Ensure that administrative detention is not used to repress peaceful demonstrations, the dissemination of information or the exercise of freedom of opinion and expression.”¹²¹

Categories established by the WGAD should also be taken into account, notably category II: “When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights.”

Concerning administrative detention on counter-terrorism grounds, the WGAD has stated “that there can be no doubt that the fight against terrorism may require the adoption of specific measures limiting certain guarantees, including those relating to detention and the right to a fair trial; it nonetheless points out that in all circumstances deprivation of liberty must remain consistent with the norms of international law.”¹²² The WGAD considers “that the right to challenge the legality of detention or to petition for a writ of *habeas corpus* or remedy of *amparo* is a personal right, which must in all circumstances be guaranteed by the jurisdiction of the ordinary courts.”¹²³

The WGAD considers:

E/CN.4/2003/8/Add.2; and *Report on the visit of the Working Group to the United Kingdom on the issue of immigrants and asylum seekers*, UN Doc E/CN.4/1999/63/Add.3, paras. 26-40.

¹¹⁹ Deliberation No. 4, in *Report of the Working Group on Arbitrary Detention*, UN Doc. E/CN.4/1993/24. See also *Report of the Working Group on Arbitrary Detention - Visit to the People's Republic of China*, UN Doc. E/CN.4/1998/44/Add.2, paras. 80-99 and 109.

¹²⁰ Deliberation No. 4, op. cit., Point III.

¹²¹ UN Doc. E/CN.4/2005/6/Add.3, para. 86, b).

¹²² *Report of the Working Group on Arbitrary Detention*, UN Doc. E/CN.4/2004/3, 15 December 2003, para. 84.

¹²³ *Report of the Working Group on Arbitrary Detention*, UN Doc. E/CN.4/2004/3, 15 December 2003, para. 85. Along the same lines, *Report of the Working Group on Arbitrary Detention*, UN Doc. E/CN.4/1994/27, para. 74.

- “that the fight against terrorism may undeniably require specific limits on certain guarantees, including those concerning detention and the right to a fair trial. It nevertheless points out that under any circumstances, and whatever the threat, there are rights which cannot be derogated from, that in no event may an arrest based on emergency legislation last indefinitely, and it is particularly important that measures adopted in states of emergency should be strictly commensurate with the extent of the danger invoked.”¹²⁴
- “In its experience, the right to challenge the legality of detention is one of the most effective means of preventing and combating arbitrary detention. As such, it should be regarded not as a mere element in the right to a fair trial but, in a country governed by the rule of law, as a personal right which cannot be derogated from even in a state of emergency. That is why it considers that the absence of such a remedy deprives the persons concerned of a powerful means of defence against arbitrary detention, or at least a way of promptly remedying injury caused by unlawful or unjust imprisonment. However, it finds that, even under legal systems where the remedy of *amparo* or *habeas corpus* exists, in the fight against terrorism, especially when a state of emergency is declared or related prerogatives are exercised, it is often suspended or in effect rendered impracticable.”¹²⁵
- “The Working Group expresses its concern about the frequent use of various forms of administrative detention, entailing restrictions on fundamental rights. It notes a further expansion of States’ recourse to emergency legislation diluting the right of *habeas corpus* or *amparo* and limiting the fundamental rights of persons detained in the context of the fight against terrorism. In this respect, several States enacted new anti-terror or internal security legislation, or toughened existing ones, allowing persons to be detained for an unlimited time or for very long periods, without charges being raised, without the detainees being brought before a judge, and without a remedy to challenge the legality of the detention. This kind of administrative detention, which often is also secret, aims at circumventing the legal time limits governing police custody and pre-trial detention and at depriving the persons concerned of the judicial guarantees recognized to all persons suspected or accused of having committed an offence.”¹²⁶

The WGAD has considered that a case of administrative detention where the persons were being detained without having been officially informed of any charge, without being able to communicate with their families and without a court being asked to rule on the lawfulness of their detention was “in contravention of articles 9 and 10 of the Universal Declaration of Human Rights and articles 9 and 14 of the International Covenant on Civil and Political Rights, to which the United States is a party, and principles 10 to 12 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.”¹²⁷

The WGAD has also pointed out that: “Prolonged periods of administrative detention,

¹²⁴ Report of the Working Group on Arbitrary Detention, UN Doc. E/CN.4/2004/3, 15 December 2003, para. 60.

¹²⁵ Report of the Working Group on Arbitrary Detention, UN Doc. E/CN.4/2004/3, 15 December 2003, para. 62.

¹²⁶ Report of the Working Group on Arbitrary Detention, UN Doc. E/CN.4/2005/6, 1 December 2004, para. 61.

¹²⁷ Opinion No. 21/2002 (USA), para. 17, in UN Doc. E/CN.4/2004/3/Add.1. Along the same lines, see the *legal opinion regarding the deprivation of liberty of persons detained at Guantanamo Bay*, in UN Doc. E/CN.4/2003/8, para. 64.

without remedy, would render the detention illegal. The detainees have a right to be tried without undue delay. Such a course of conduct on the part of the State violates the rights guaranteed under articles 9 and 10 of the Universal Declaration and articles 9 and 14 of the International Covenant on Civil and Political Rights, as well as of principles 10, 11, 12 and 23 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. The violation of the right to a fair trial is of such gravity as to confer on the deprivation of liberty an arbitrary character.”¹²⁸

The WGAD has also considered that administrative detention, where the detained are deprived of any contact with their families and lawyers and their families have not been informed of the reasons for their arrest and detention, is an arbitrary detention. The WGAD has stated that such a situation “constitutes a violation of articles 9 and 10 of the Universal Declaration of Human Rights and of principles 10, 11, 12, 13, 15, 16, 17, 18, 19 and 33 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment which is of such gravity as to confer on the deprivation of liberty an arbitrary character.”¹²⁹

The WGAD has examined cases of detention where persons were being detained “without charge or trial, by virtue of a purely administrative measure which is in fact within the sole and exclusive competence of the Executive, in the person of the President, and without ever having had the possibility of challenging the legality of their detention in a court or exercising a judicial remedy.” The WGAD has stated that “[t]he observed absence of the most elementary guarantees of the right to a fair trial, as established by the relevant articles of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, to which Zambia is a party, is so serious that it confers an arbitrary character on the detention measures.”¹³⁰ The WGAD considered these cases of detention to be “in contravention of articles 9, 10 and 11 of the Universal Declaration of Human Rights and articles 9 and 14 of the International Covenant on Civil and Political Rights.”¹³¹

The WGAD has made the following general recommendations, covering the practice of the administrative detention for security reasons:

- “When taking legitimate measures to countering terrorism, States shall bear in mind that effective safeguards against arbitrary deprivation of liberty, such as *habeas corpus*, *amparo* and the like, belong among the fundamental achievements of human rights. Therefore, measures restricting resort to judicial control of detainees suspected of terrorism-related activity shall be strictly proportionate to the legitimate need to fight against terrorism. Unreasonably harsh restrictions on judicial control easily become counterproductive, in that they may compromise the very foundation of democratic societies governed by the rule of law.”¹³²□
- “[...] the right not to be detained incommunicado over prolonged periods of time cannot be derogated from, even where a threat to the life of the nation exists, and

¹²⁸ Opinion No. 10/1998 (Israel), adopted on 15 May 1998, para. 11. See also Opinion No. 11/1998 (Israel) adopted on 15 May 1998 (para. 11).

¹²⁹ Opinion No. 15/1997 (Bahrain) adopted on 19 September 1997, para. 9, in UN Doc. E/CN.4/1998/44/Add.1, 3 November 1997.

¹³⁰ Decision No. 49/1993 (Zambia), adopted on 30 September 1993, para. 6, in UN Doc. E/CN.4/1994/27.

¹³¹ *Ibid.*, para. 8, a.

¹³² *Report of the Working Group on Arbitrary Detention*, UN Doc. E/CN.4/2005/6, 1 December 2004, para. 75.

recommends that all States review their legislation and practice in the light of this principle.□¹³³

- “[...] international human rights law provides for a number of rights specific to persons deprived of their liberty on the ground of suspicion that they were involved in an offence. These guarantees apply whether such suspicions have been formalized in criminal charges or not. The use of “administrative detention” under public security legislation, migration laws or other related administrative law, resulting in a deprivation of liberty for unlimited time or for very long periods without effective judicial oversight, as a means to detain persons suspected of involvement in terrorism or other crimes, is not compatible with international human rights law. The Working Group therefore recommends that all States review their legislation and practice so as to ensure that persons suspected of criminal activity or any other activities giving rise under domestic law to deprivation of liberty are in fact afforded the guarantees applicable to criminal proceedings.□¹³⁴

e) Working Group on Enforced and Involuntary Disappearances

Since it started its activities, the Working Group on Enforced and Involuntary Disappearances (WGEID) has examined the question of administrative detention in relation to the practice of enforced disappearance. The WGEID examined South African legislation providing for lawful administrative incommunicado detention and the denial of relatives’ access to information about deprivation of liberty. It considered that incommunicado detention for an indefinite period of time does not constitute *per se* an enforced disappearance if the authorities acknowledge that the person is in detention. However, regarding several cases related to the implementation of this legislation where the authorities denied any information about the deprivation of liberty, the WGEID stated that they were constitutive of enforced disappearance¹³⁵. The WGEID concluded that such legislation allowed technically enforced disappearance¹³⁶.

The WGEID has indicated that article 10 of the Declaration on the Protection of all Persons from Enforced Disappearance, in which paragraph 1 provides that “[a]ny person deprived of liberty shall be held in an officially recognized place of detention and, in conformity with national law, be brought before a judicial authority promptly after detention”, combines three obligations, which, if observed, would effectively prevent enforced disappearances: recognised place of detention, limits of administrative or pre-trial detention, and judicial intervention¹³⁷. The WGEID has also considered that “[i]t is not enough for the place of detention to be an “officially recognized place of detention” or for accurate information to be available on the place where the individual is being held. The Declaration takes into account a more substantive aspect of detention in stipulating that administrative or pre-trial detention must be only temporary, as the person deprived of liberty must be “brought before a judicial authority”¹³⁸. The WGEID has stated that «[t]he third commitment is to ensure that the person in question is brought before a judicial authority “promptly after detention”. This underlines the transitional and temporary nature

¹³³ *Ibid.*, para. 75.

¹³⁴ *Ibid.*, para. 77.

¹³⁵ UN. Doc. E/CN.4/1435, of 22 January 1981, para. 175 and following.

¹³⁶ UN. Docs. E/CN.4/1492, of 31 December 1981, para. 158; E/CN.4/1983/14, of 21 January 1983, para. 96.

¹³⁷ General Comment on Article 10 of the Declaration, in UN.Doc E/CN.4/1997/34, para. 23.

¹³⁸ *Ibid.*, para. 28.

of administrative or pre-trial detention which, *per se*, is not a violation of international law or of the Declaration unless it is unduly prolonged and the detained person is not brought "promptly" before a judicial authority. Consequently, any detention which is prolonged unreasonably or where the detainee is not charged so that he can be brought before a court is a violation of the Declaration. The fact that this provision does not set a time-limit for administrative detention should not be interpreted as allowing for unlimited tolerance, since the principles of reasonableness and proportionality and the very spirit of the provision dictate that the period in question should be as brief as possible, i.e., not more than a few days, as this is the only conceivable interpretation of "promptly after detention"¹³⁹.

f) The Special Rapporteur on the Question of Torture

The Special Rapporteur has stated that "[a]dministrative detention often puts detainees beyond judicial control. Persons under administrative detention should be entitled to the same degree of protection as persons under criminal detention. At the same time, countries should consider abolishing, in accordance with relevant international standards, all forms of administrative detention."¹⁴⁰ Since his very first report, the Special Rapporteur has observed that administrative and incommunicado detention facilitate the practice of torture and other serious violations of human rights¹⁴¹.

The Special Rapporteur has considered that, with extensive periods of detention without charge or trial, with sufficient time to collect evidence leading to charges under anti-terrorist legislation in a criminal case before a judge or other, or with indefinite administrative detention as an alternative to prosecution, "States have created informal criminal justice systems in which detainees are denied rights that they would normally have in the ordinary judicial systems."¹⁴² The Special Rapporteur has noted that "judicial control of interference by the executive power with the individual's right to liberty is an essential feature of the rule of law."¹⁴³

The Special Rapporteur has stated, in the context of anti-terrorist measures, that "[a]rrests without proper procedures may open the door to further human rights abuses, including torture. The Special Rapporteur notes that, to prevent such abuses, law enforcement officials should clearly identify themselves, or, at least, the unit to which they belong. Their vehicles should be clearly identifiable and carry number plates at all times. Information on any arrest, including the reasons for the arrest, the time and place of the arrest, and the identity of the officers involved should be duly recorded."¹⁴⁴

The Special Rapporteur has made the following recommendations on counterterrorism measures on all deprivation of liberty, including administrative detention:

- "the arrested persons shall be informed, at the time of arrest, of the reasons for their arrest and of their rights, including safeguards against torture or ill-treatment."¹⁴⁵

¹³⁹ *Ibid.*, para. 29.

¹⁴⁰ *Report of the Special Rapporteur*, UN Doc E/CN.4/2003/68, of 17 December 2002, para. 26 (h).

¹⁴¹ UN Doc. E/CN.4/1986/15, para. 136.

¹⁴² *Report of the Special Rapporteur*, UN Doc A/57/173, of 2 July 2002, para. 7.

¹⁴³ *Ibid.*, para. 15.

¹⁴⁴ *Report of the Special Rapporteur*, UN Doc. E/CN.4/2004/56, of 23 December 2003, para. 30.

¹⁴⁵ E/CN.4/2004/56, para. 30.

- “Further, relatives or a third person of the arrested person’s choice shall be notified at the time of arrest, detention, imprisonment or transfer. [...] In all circumstances, a relative of the detainee should be informed of the arrest and place of detention within 18 hours”¹⁴⁶. As far as the detention of foreign citizens is concerned, the consular authorities of the State of origin of a detained foreigner shall be informed without delay of his or her arrest or detention.
- “legal provisions should ensure that detainees are given access to legal counsel within 24 hours of detention (...). Security personnel who do not honour such provisions should be disciplined. In exceptional circumstances, under which it is contended that prompt contact with a detainee’s lawyer might raise genuine security concerns and where restriction of such contact is judicially approved, it should at least be possible to allow a meeting with an independent lawyer, such as one recommended by a bar association”¹⁴⁷
- “Some basic guarantees shall be applied to avoid torture during interrogation.”¹⁴⁸
- Incommunicado detention should be made illegal and is the most important determining factor as to whether an individual is at risk of torture.¹⁴⁹
- “the maintenance of secret places of detention should be abolished under law. It should be a punishable offence for any official to hold a person in a secret and/or unofficial place of detention. Any evidence obtained from a detainee in an unofficial place of detention and not confirmed by the detainee during interrogation at official locations should not be admitted as evidence in court.”¹⁵⁰
- Prompt and effective access to a judicial or other competent authority should be granted to individuals deprived of their liberty. The judicial or other competent authority shall review the lawfulness of the detention as well as monitor that the detained individual is entitled to all his/her rights, including the right not to be subjected to torture or other forms of ill treatment. Provisions should give all detained persons the ability to challenge the lawfulness of the detention, e.g. through *habeas corpus* or *amparo*. Such procedures should function expeditiously.¹⁵¹
- All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person (as a norm of general international law not subject to derogation).¹⁵²
- Persons deprived of their liberty shall have access to prompt and adequate medical care.¹⁵³

¹⁴⁶ E/CN.4/2004/56, para. 31. See also E/CN.4/2003/68, para. 26 (g)). See also *Report of the Special Rapporteur*, UN Doc A/57/173, of 2 July 2002, paras. 16 and 17.

¹⁴⁷ E/CN.4/2004/56, para. 32 and *Report of the Special Rapporteur*, UN Doc A/57/173, of 2 July 2002, paras. 16 and 17.

¹⁴⁸ *Ibid.*, para. 33.

¹⁴⁹ *Ibid.*, para. 37 and *Report of the Special Rapporteur*, UN Doc A/57/173, of 2 July 2002, para. 16.

¹⁵⁰ *Ibid.*, para. 38

¹⁵¹ *Ibid.*, para. 39. See also E/CN.4/2003/68, para. 26 (i) and *Report of the Special Rapporteur*, UN Doc A/57/173, of 2 July 2002, para. 16.

¹⁵² *Ibid.* para. 41.

¹⁵³ *Ibid.*, para. 42.

- Persons deprived of their liberty shall be permitted to have contact with, and receive regular visits from, their relatives, lawyers, doctors, and, when security requirements so permit, third parties such as human rights organizations or other persons of their choice. Access to the outside world can only be denied on reasonable conditions and restrictions as specified by law or lawful regulations.¹⁵⁴
- The abolition of solitary confinement as a punishment, or the restriction of its use, should be undertaken and encouraged.¹⁵⁵

The Special Rapporteur has noted that, “in accordance with international law, and as confirmed by States’ practice, the following basic legal safeguards should remain in fact in any legislation relating to arrest and detention, including any type of anti-terrorist legislation: the right to *habeas corpus*, the right to have access to a lawyer within 24 hours from the time of arrest and the right to inform a relative or friend about the detention. These safeguards guarantee the access of any person in detention to the outside world and thus ensure his or her humane treatment while in detention.”¹⁵⁶

g) The Expert on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism

The Independent Expert on the protection of human rights and fundamental freedoms while countering terrorism,¹⁵⁷ Robert K. Goldman, has noted that detention for prolonged periods without contact with lawyers or other persons and without access to courts or other appropriate tribunals to supervise the legality and conditions of their detention is prohibited under international human rights law even during states of emergency.¹⁵⁸

The Independent Expert has stated that:

- “Applicable human rights protections require, *inter alia*, that any deprivation of liberty be based upon grounds and procedures established by law, that detainees be informed of the reasons for their detention and promptly notified of the charges against them, and that they be provided with access to legal counsel. [...]
- “prompt and effective oversight of detention by a judge or other officer authorized by law to exercise judicial power must be ensured to verify the legality of the detention and to protect other fundamental rights of the detainee. [...]
- “other protections fundamental to upholding the non-derogable rights of detainees cannot be justifiably suspended during a state of emergency, including access to legal counsel and prescribed and reasonable limits upon the length of preventative detention.”¹⁵⁹

He concludes that: “At all times, therefore, States must refrain from detaining suspected terrorists for indefinite or prolonged periods and must provide them with access to legal

¹⁵⁴ *Ibid.*, para. 43.

¹⁵⁵ *Ibid.* para. 47.

¹⁵⁶ *Report of the Special Rapporteur*, UN Doc A/57/173, of 2 July 2002, para. 18.

¹⁵⁷ The UN Commission on Human Rights under Resolution 2004/87 established this one-year mandate.

¹⁵⁸ *Protection of human rights and fundamental freedoms while countering terrorism*, UN Doc. E/CN.4/2005/103 of 7 February 2005, paragraph 37.

¹⁵⁹ *Ibidem*.

counsel, as well as prompt and effective access to courts or other appropriate tribunals for the protection of their non-derogable rights.¹⁶⁰

h) The Expert of the Sub-Commission on Administrative Detention

In his report on the practice of administrative detention, the Expert of the Sub-Commission, Mr. Louis Joinet, indicates the following:

- The right to liberty and safety is an inalienable right, and situations in which a person may be deprived of his or her liberty must, therefore, be subject to restricted interpretation, since the decision in question falls within the powers of the executive authority¹⁶¹;
- In the absence of any rules or regulations on administrative detention, analogies have to be established on the basis of the system of judicial detention¹⁶²;
- Administrative detainees should in principle enjoy the same rights as other detainees, and, in particular, benefit from the Body of Principles and the Standard Minimum Rules for the Treatment of Prisoners¹⁶³;
- All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person, and shall not be subjected to torture and other cruel, inhuman or degrading treatment or punishment¹⁶⁴. There shall be a ban on secret detention and solitary confinement¹⁶⁵.
- All persons deprived of their liberty shall have the right to visits from persons such as doctors, lawyers, and family members; the place of detention should be officially recognized; the name and place of detention of each person deprived of his liberty should be entered in a register made available for consultation to any person concerned, such as relatives¹⁶⁶.
- All persons deprived of their liberty shall be entitled to a remedy (*habeas corpus*) to challenge the lawfulness of his deprivation of liberty, at all times and in all circumstances¹⁶⁷.
- The indefinite extension of administrative detention – without any judicial remedy – is a source of abuse and facilitates torture as well as impunity¹⁶⁸.

i) The Special Rapporteur on the Question of Human Rights and States of Siege or Emergency

¹⁶⁰ *Ibidem*.

¹⁶¹ *Report on the practice of administrative detention*, UN Doc. E/CN.4/Sub.2/1990/29, of 24 July 1990, para. 48.

¹⁶² *Ibidem*.

¹⁶³ *Ibid.*, para. 56.

¹⁶⁴ *Ibid.*, para. 57.

¹⁶⁵ *Ibid.*, para. 63.

¹⁶⁶ *Ibidem*.

¹⁶⁷ *Ibid.*, paras. 64 and following.

¹⁶⁸ *Ibid.*, para. 74.

In her 1982 study, the Special Rapporteur, Nicole Questiaux, underlined the current practice of administrative detention in situations of state of emergency and demonstrated its negative impact in terms of human rights. She observed that, in practice, in the majority of cases of persons at the disposal of the executive power, there was a quasi-total absence of guarantees provided to detainees¹⁶⁹. The Special Rapporteur made the following recommendations:

- All arrests should be made public, in order to avoid enforced disappearance;
- The holding of detainees incommunicado should be prohibited, or at least restricted to exceptional cases, for which limitation provisions would be made, and for a very brief period;
- Administrative internment of unlimited duration should be prohibited; and
- Demands for *habeas corpus* or “substitute” guarantees should be kept¹⁷⁰.

The draft Guidelines for the development of legislation on states of emergency elaborated by Special Rapporteur Leandro Despouy provide that:

- The legislation should indicate that nothing done pursuant to a state of emergency may be incompatible with enjoyment of a) the right of persons deprived of their liberty to be informed of the reasons for their detention, promptly and in writing, in a language which they understand; b) the right to have their family informed of the detention without delay and to receive visits; c) the right of prompt and regular access to a lawyer of their choice; and d) the right to challenge the legality of the deprivation of liberty before a court of law by *habeas corpus* or other prompt and effective remedy.
- If the exigencies of the emergency are such that the detention of persons not accused of an offence is strictly necessary, then:
 - Deprivation of liberty may only be authorized by a special authority established for this purpose, which shall be impartial and independent from any other public authority;
 - No. person shall be detained without charge for longer than strictly necessary;
 - Persons detained without charge pursuant to measures authorized by the declaration of emergency shall be detained separately from prisoners charged or convicted of an offence, in circumstances which fully take into account their status, and shall not be obliged to perform work or to participate in rehabilitation programmes;
 - All possible measures shall be taken to protect the family of the detainee from the adverse consequences of detention¹⁷¹.

¹⁶⁹ *Study of the implication for human rights of recent developments concerning situations known as states of siege or emergency*, UN Doc. E/CN.4/Sub.2/1982/15, of 27 July 1982, para. 184.

¹⁷⁰ *Ibid.*, paras. 187, 188, 189 and 203.

¹⁷¹ *Report on the question of human rights and states of emergency*, UN Doc. E/CN.4/Sub.2/1991/28, of 24 June 1991, annex I.

j) Other Special Procedures

Various Special Procedures of the UN Commission on Human Rights have raised concerns about the issue of administrative detention on security grounds.

The Special Rapporteur on the situation of human rights in Myanmar has expressed concern at the “practice extending the detention of political prisoners who have already completed their prison sentence by placing them under “administrative detention” under section 10 (a) of the 1975 State Protection Act. [...] [The Special Rapporteur] reiterates his recommendation that such legislation be repealed as it is in clear contravention of international human rights standards.”¹⁷²

The Special Rapporteur on the situation of human rights in the DPRK has recommended the end of preventive or administrative detention.¹⁷³ The Special Rapporteur on violence against women has recommended that Israel “cease the use of administrative detention and allow detainees access to lawyers and doctors from the outset of their detention.”¹⁷⁴

On several occasions, the UN Commission on Human Rights requested that, under the apartheid regime, South Africa both repeal the Public Security law of 1953 allowing administrative detention on security grounds, and release detainees held under it.¹⁷⁵

2. The European Court of Human Rights

a) General Considerations

The European Court of Human Rights (ECHR) has indicated that “the list of exceptions to the right to liberty secured in Article 5 § 1 [of the European Convention] is an exhaustive one and only a narrow interpretation of those exceptions is consistent with the aim of that provision, namely to ensure that no one is arbitrarily deprived of his or her liberty”¹⁷⁶. The ECHR has also considered that “judicial control of interferences by the executive with the individual's right to liberty provided for by article 5 (art. 5) is implied by one of the fundamental principles of a democratic society, namely the rule of law”¹⁷⁷. The ECHR has ruled that any deprivation of liberty must comply with “the obligation to conform to the substantive and procedural rules of national law, but it requires in addition that any deprivation of liberty should be in keeping with the purpose of Article 5 (art. 5), namely to protect the individual from arbitrariness.”¹⁷⁸ The ECHR has also declared that only prompt judicial intervention can effectively lead to the detection and prevention of the risk that

¹⁷² UN Doc. E/CN.4/2004/33, para. 39.

¹⁷³ UN Doc. E/CN.4/2005/34, para. 68.

¹⁷⁴ UN Doc. E/CN.4/2005/72/Add.4, para. 78.

¹⁷⁵ See, *inter alia*, Resolution 1992/19 of 28 February 1992, preambular paragraph 12 and operational paragraph 13 and Resolution 1994/10, para. 23.

¹⁷⁶ Judgment of 6 April 2000, *Labita v. Italy*, para. 170. Along the same lines, see judgment of 22 March 1995, *Quinn v. France*, para. 42; and judgment of 25 May 1998, *Kurt v. Turkey*, para. 122.

¹⁷⁷ Judgment of 26 May 1993, *Brannigan and McBride v. United Kingdom*, para. 48. See also judgment of 29 November 1988, *Brogan and others v. United Kingdom*, para. 32; Judgment of 27 September 2001, *Günay and others v. Turkey*, para. 22; Judgment of 26 November 1997, *Murat Sakik and others v. Turkey*, para. 44.

¹⁷⁸ See, *inter alia*, judgment of 15 November 1996, *Chahal v. United Kingdom*, para. 118.

detainees are subjected to ill treatment with the objective, *inter alia*, of obtaining information¹⁷⁹.

The ECHR has recalled “that the authors of the Convention reinforced the individual’s protection against arbitrary deprivation of his or her liberty by guaranteeing a corpus of substantive rights which are intended to minimise the risks of arbitrariness by allowing the act of deprivation of liberty to be amenable to independent judicial scrutiny and by securing the accountability of the authorities for that act. The requirements of Article 5 §§ 3 and 4 with their emphasis on promptitude and judicial control assume particular importance in this context. Prompt judicial intervention may lead to the detection and prevention of life-threatening measures or serious ill treatment which violate the fundamental guarantees contained in Articles 5 and 3 of the Convention (...). What is at stake is both the protection of the physical liberty of individuals as well as their personal security in a context which, in the absence of safeguards, could result in a subversion of the rule of law and place detainees beyond the reach of the most rudimentary forms of legal protection”¹⁸⁰.

The ECHR has ruled that “the unacknowledged detention of an individual is a complete negation of these guarantees and a most grave violation of Article 5. Having assumed control over that individual it is incumbent on the authorities to account for his or her whereabouts”¹⁸¹.

b) Administrative Detention of Aliens

The ECHR has examined several modalities of administrative detention, notably those called “extrajudicial deprivations of liberty.” Although the issue of administrative detention of aliens and asylum-seekers extends beyond the limits of the present memo, the ECHR’s case law is nevertheless helpful on the question of administrative detention in the framework of the fight against terrorism. The ECHR stated that, following an administrative measure, prolonged holding of alien asylum-seekers in the international zone of an airport, without any legal, humanitarian or social assistance, involved a violation of their right to liberty and security and was, therefore, equivalent in practice to a deprivation of liberty¹⁸².

The Court has also indicated that prolonging the holding measure required speedy review by the courts, a traditional safeguard of individual freedoms. Above all, such a holding measure shall not deprive the asylum-seeker of his/her right to be given effective access to the procedure to seek refugee status.

The *Chahal v. United Kingdom* case is of particular importance, as it relates to administrative detention in the context of a procedure for the deportation of a person suspected of committing terrorist acts. The Court has stated that “the Convention does not demand that the detention of a person against whom action is being taken with a view to deportation be reasonably considered necessary, for example to prevent his committing an offence or fleeing; in this respect Article 5 para. 1 (f) (art. 5-1-f) provides a different level of protection from Article 5 para. 1 (c) (art. 5-1-c)(...)” If such proceedings are not

¹⁷⁹ Judgment of 22 May 2001, *Altay v. Turkey*, para. 65.

¹⁸⁰ Judgment of 25 May 1998, *Kurt v. Turkey*, para. 123.

¹⁸¹ *Ibid.*, para. 124.

¹⁸² Judgment of 25 June 1996, *Amuur v. France*.

prosecuted with due diligence, the detention will cease to be permissible under Article 5 para. 1(f) (art. 5-1-f)”¹⁸³. The Court therefore states that the deprivation, on national security grounds, of the detainee’s right to *habeas corpus* or any other judicial review to challenge the lawfulness of the detention, is not compatible with article 5 para. 4 of the Convention, which covers the right to take proceedings by which the lawfulness of the detention shall be decided speedily by a court and release shall be ordered if the detention is not lawful¹⁸⁴.

The Court also provides that a procedure before an “advisory panel” where the detainee was not entitled to legal representation before it, and while it had no power of decision and its advice was not binding, could not be considered a court.¹⁸⁵

c) Administrative Detention and the Fight against Terrorism

The European Court has examined the issue of administrative detention on the grounds of public order or security of the State, in the context of the fight against terrorism and from two perspectives: police custody as “extrajudicial deprivation of liberty” as far as it concerns detention without a judicial warrant, and administrative detention as such.

i) Police Custody

Although it does not constitute administrative detention *stricto sensu*, as this kind of deprivation of liberty aims at bringing the detainee to justice, the question of police custody is an important one. In this regard, the ECHR analyses it on the basis of article 5 (par. 1, c)) of the Convention. The Court has stated that irrespective of whether extrajudicial deprivation of liberty was or was not founded in the majority of cases on suspicions of a kind that would render detention on remand justifiable under the Convention, such detention is permissible under Article 5 para. 1 (c) (art. 5-1-c) only if it is “effected for the purpose of bringing [the detainee] before the competent legal authority”¹⁸⁶. The Court further declares that the detainee should be entitled to be speedily informed why he is being arrested, to be promptly brought to courts, to be promptly tried or released pending a decision, to “take proceedings by which the lawfulness of [the] detention [would] be decided speedily by a court,” and “release ordered if the detention” proved to be “not lawful”¹⁸⁷. The ECHR also considers that even though authorities face particular problems while investigating terrorist acts, “This does not mean, however, that the investigating authorities have carte blanche under Article 5 (art. 5) to arrest suspects for questioning, free from effective control by the domestic courts or by the Convention supervisory institutions, whenever they choose to assert that terrorism is involved.”¹⁸⁸ In this regard, the ECHR states that detaining a person for up to four days and six hours without bringing him/her before a court goes beyond the time-limit provided in article 5 (3) of the Convention, even though it aims at preventing the whole community from terrorist acts.¹⁸⁹

¹⁸³ Judgment of 15 November 1996, *Chahal v. United Kingdom*, paras. 112 and 113.

¹⁸⁴ *Ibid.*, paras. 132 and 133.

¹⁸⁵ *Ibid.*, para. 130.

¹⁸⁶ Judgment of 18 January 1978, *Ireland v. United Kingdom*, para.196. Along the same lines see judgement of 1 July 1961, *Lawless v. Ireland*, para. 14.

¹⁸⁷ Judgment of 18 January 1978, *Ireland v. United Kingdom*, paras. 197, 198, 199 and 200.

¹⁸⁸ Judgment of 27 September 2001, *Günay and others v. Turkey*, para. 21; judgment of 26 November 1997, *Murat Sakik and others v. Turkey*, para.22. See also judgment of 21 September 1994, *Murray v. United Kingdom*, para. 58.

¹⁸⁹ Judgment of 29 November 1988, *Brogan and others v. United Kingdom*, para. 33.

The ECHR also considers that the right to a remedy, established in article 5-4 of the European Convention, implies first of all that the authority which decides upon the detention must be a judicial one, i.e. independent of the executive power¹⁹⁰. Thus, the Court has stated that a prosecutor who is operating as a judge in the Department of Public Prosecutions cannot be the authority who determines the remedy because it would not be seen as independent in the article 5 (4) sense.¹⁹¹

It should be noted that such an “extrajudicial” deprivation of liberty can only be effected “on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so”¹⁹². The ECHR has stated that “[t]he “reasonableness” of the suspicion on which an arrest must be based forms an essential part of the safeguard against arbitrary arrest and detention (...) The Court agrees (...) that having a “reasonable suspicion” presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence”¹⁹³. Thus, the Court has made it clear that “facts which raise a suspicion need not be of the same level as those necessary to justify a conviction or even the bringing of a charge, which comes at the next stage of the process of criminal investigation”¹⁹⁴. Nevertheless, the ECHR has also indicated that “the exigencies of dealing with terrorist crime cannot justify stretching the notion of ‘reasonableness’ to the point where the essence of the safeguard secured by Article 5 para. 1 (c) (art. 5-1-c) is impaired”¹⁹⁵.

The ECHR also considers that if article 5 (1) (c) provides for “the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence,” then it is clear that the persistence of such a suspicion is a condition *sine qua non* of the lawfulness of maintaining the concerned person deprived of his/her liberty.¹⁹⁶ However, the Court indicates that article 5 (3) obviously implies that the persistence of suspicion does not suffice to justify, after some time, the prolongation of detention. It requires that the detention not exceed a reasonable time.¹⁹⁷ It may be useful to recall that the ECHR has stated that, where the behaviour of which the applicant is accused does not constitute a criminal offence, “the deprivation of liberty imposed is not a lawful detention based on “reasonable suspicion of [his] having committed an offence”¹⁹⁸.

ii) Administrative Detention *Stricto Sensu*

Concerning administrative detention strictly speaking, i.e. “extrajudicial” deprivation of liberty ordered by an authority of the executive power and which does not aim at bringing the detainee before a judge, the ECHR has considered this kind of measure to only be

¹⁹⁰ Judgment of 22 October 2002, *Murat Sakik and others v. Turkey*, para. 31.

¹⁹¹ *Ibidem*.

¹⁹² Article 5, paragraph 1 c) of the Convention for the Protection of Human Rights and Fundamental Freedoms.

¹⁹³ Judgment of 30 August 1990, *Fox, Campbell and Hartley v. United Kingdom*, para. 32. See also judgment of 21 September 1994, *Murray v. United Kingdom*, para. 51.

¹⁹⁴ Judgment of 21 September 1994, *Murray v. United Kingdom*, para. 55. See also judgment of 29 November 1988, *Brogan and others v. United Kingdom*, para. 53.

¹⁹⁵ Judgment of 30 August 1990, *Fox, Campbell and Hartley v. United Kingdom*, para. 32. See also judgment of 21 September 1994, *Murray v. United Kingdom*, para. 51.

¹⁹⁶ Judgment of 10 November 1969, *Stögmüller v. Austria*, para. 4.

¹⁹⁷ *Ibidem*.

¹⁹⁸ Judgment of 20 March 1997, *Lukanov v. Bulgaria*, paras. 43 and 45.

possible in the framework of derogations allowed under article 15 of the Convention¹⁹⁹. Nevertheless, the ECHR has indicated that administrative detention based on an article 15 derogation must include several safeguards. In various cases²⁰⁰, the ECHR has identified the following safeguards:

- Administrative detention measures have to be taken in the framework of the derogation regime set out in article 15 of the Convention: in time of war or other public emergency threatening the life of the nation; there must be a need for the measure and an insufficiency of “ordinary measures”; the derogation must be strictly limited to exigencies of the situation; there must be proportionality of the measure; there must be consistency with other obligations under international law.
- The law must establish “safeguards designed to prevent abuses in the operation of the system of administrative detention,”²⁰¹ such as constant supervision by Parliament, which not only reviews its enforcement but can also annul the emergency law. The ECHR also identified the following safeguards to prevent abuses: a “Detention Commission” consisting of a commissioned officer of the Defence and two judges to whom any person arrested or detained may apply to have his/her case considered; a report on the release of detainees; a procedure to release any detainee who undertook to refrain from being a member of or assisting any organisation engaged in terrorist activity.
- The right to *habeas corpus* remedy;
- The right to consult a solicitor within forty-eight hours from the time of arrest. Although the Court considers that this right’s effectiveness may be delayed, it has to be based on reasonable grounds. Moreover, “the decision to delay access to a solicitor is susceptible to judicial review and, in such proceedings, the burden of establishing reasonable grounds for delaying access rests on the authorities”²⁰².
- The right of detainees to inform relatives or friends of their detention and to be examined by a doctor.

3. Inter-American system

a) Inter-American Court of Human Rights

The Inter-American Court of Human Rights has made important precisions about the deprivation of liberty, applicable *inter alia* to administrative detention. The Court has indicated that “Article 7 of the Convention [...] contains specific guarantees against illegal or arbitrary detentions or arrests, as described in clauses 2 and 3, respectively. Pursuant to the first of these provisions, no person may be deprived of his or her personal freedom except for reasons, cases or circumstances expressly defined by law (material aspect) and, furthermore, subject to strict adherence to the procedures objectively set forth in that law

¹⁹⁹Judgment of 1 July 1961, *Lawless v. Ireland*, paras. 13, 15, 20 and following and judgment of 18 January 1978, case *Ireland v. United Kingdom*, para. 214.

²⁰⁰ Judgment of 1 July 1996, *Lawless v. Ireland*; Judgment of 18 January 1978, *Ireland v. United Kingdom*; and judgment of 26 May 1993, *Brannigan and McBride v. United Kingdom*.

²⁰¹ Judgment of 1 July 1961, *Lawless v. Ireland*, para. 37.

²⁰² Judgment of 26 May 1993, *Brannigan and McBride v. United Kingdom*, para. 64.

(formal aspect). The second provision addresses the issue that no one may be subjected to arrest or imprisonment for reasons and by methods which, although classified as legal, could be deemed to be incompatible with the respect for the fundamental rights of the individual because, among other things, they are unreasonable, unforeseeable or lacking in proportionality.²⁰³

Concerning *habeas corpus*, the Inter-American Court has provided that: "In order for *habeas corpus* to achieve its purpose, which is to obtain a judicial determination of the lawfulness of a detention, it is necessary that the detained person be brought before a competent judge or tribunal with jurisdiction over him. Here *habeas corpus* performs a vital role in ensuring that a person's life and physical integrity are respected, in preventing his disappearance or the keeping of his whereabouts secret and in protecting him against torture or other cruel, inhumane, or degrading punishment or treatment. [...] it follows that writs of *habeas corpus* and of "amparo" are among those judicial remedies that are essential for the protection of various rights whose derogation is prohibited by Article 27(2) and that serve, moreover, to preserve legality in a democratic society".²⁰⁴ The Court has also indicated that: "the judicial guarantees essential for the protection of the human rights not subject to derogation, according to Article 27(2) of the Convention, are those to which the Convention expressly refers in Articles 7(6) and 25(1), considered within the framework and the principles of Article 8, and also those necessary to the preservation of the rule of law, even during the state of exception that results from the suspension of guarantees."²⁰⁵ The Inter-American Court has also stated that writs of *habeas corpus* and of "amparo" aim "to prevent abuse and illegal detention practiced by the State", and that these writs are reinforced by the condition that States have the responsibility to guarantee the rights of individuals under their custody and to provide information and evidence relating to the detainee"²⁰⁶. The Court also underlined that "safeguarding against an arbitrary exercise of the public power is the fundamental objective of the international protection of human rights. In this sense, the non-existence of an effective internal remedy places a person in a defenceless state."²⁰⁷

Although the Court has never had to consider cases about administrative detention *stricto sensu*, in relation to Peruvian cases, it has done considered cases of administrative detention in the context of the fight against terrorism. In a case in which the police without any warrant had arrested two persons and not in any flagrant situation, in the context of the fight against terrorism and in a region under a state of emergency, the Court considered the detention to be arbitrary²⁰⁸. While a state of emergency had been declared, arrests had occurred, without any judicial warrant, outside the framework of the legislation on administrative detention. The Court stated that these detentions violated the right to be brought before a judge, the right to a fair trial, and the right to protection under the law.

²⁰³ Judgment of 21 January 1994, *Gangaram Panday v. Suriname*, paras. 46-47. See also Judgment of 8 July 2004, *Gómez Paquiyauri v. Peru*, para. 83; Judgment of 23 November 2003, *Maritza Urrutia v. Guatemala*, para. 65; Judgment of 18 September 2003, *Bulacio v. Argentina*, para. 125; Judgment of 7 June 2003, *Juan Humberto Sánchez v. Honduras*, para. 78.

²⁰⁴ Advisory Opinion No. OC-8/87 of 30 January 1987, *Habeas corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights)*, paras. 35 and 42.

²⁰⁵ Advisory Opinion OC-9/87 of 6 October 1987, *Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and (8) American Convention on Human Rights)*, para. 38.

²⁰⁶ Judgment of 7 September 2004, *Tibi v. Ecuador*, para. 129 (original version in Spanish, free translation). See also: Judgment of 8 July 2004, *Gómez Paquiyauri v. Peru*, para. 98; Judgment of 18 September 2003, *Bulacio v. Argentina*, para. 138.

²⁰⁷ Judgment of 7 September 2004, *Tibi v. Ecuador*, para. 130 (original version in Spanish, free translation).

²⁰⁸ Judgment of 8 July 2004, *Gómez Paquiyauri v. Peru*, paras. 86 and following.

b) Inter-American Commission on Human Rights

i) General Considerations

The Inter-American Commission on Human Rights (IACHR) has considered that Article 7 of the Inter-American Convention on the right to personal liberty “guarantees a basic human right, which is protection of the individual against arbitrary interference by the State in exercising his or her right to personal liberty”²⁰⁹.

The IACHR has stated that “[i]n circumstances not involving a state of emergency as strictly defined under applicable human rights instruments, states are fully bound by the restrictions and limitations under international human rights law governing deprivations of personal liberty. These include the rights of persons:

- Not to be deprived of physical liberty except for the reasons and under conditions established by law;
- To be informed, in a language they understand, of the reasons for their detention and to be promptly notified of the charge(s) against them;
- When detained, to prompt contact with his or her immediate family and to legal and medical assistance;
- To be brought promptly before a competent court to determine the lawfulness of his or her arrest or detention and to order his or her release if the arrest or detention is unlawful;
- To be tried within a reasonable time or to be released without prejudice to the proceedings, which release may be subject to guarantees to assure his or her appearance for trial;
- To information on consular assistance in cases involving the arrest, commitment to prison or custody pending trial, or detention in any other manner, of foreign nationals;
- To implementation of an effective system for registering arrests and detentions and providing that information to family members, attorneys, and other persons with a legitimate interest in the information.”²¹⁰

The IACHR only envisages administrative detention on grounds of public order, security of the State, or national security in times of emergency or armed conflict.

ii) Administrative Detention and Military Regimes

²⁰⁹ Report No. 28/96, Case 11.297 (Guatemala) of 16 October 1996, para. 51.

²¹⁰ *Report on Terrorism and Human Rights*, OAS Doc. OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr. 22 October 2002, para. 138.

In the 1970s, the IACHR has had to examine the question of administrative detention in the context of a state of emergency, following coups in Latin America. Generally speaking, the IACHR has considered that «[i]n the life of any nation, threats to the public order or to the personal safety of its inhabitants, by persons or groups that use violence, can reach such proportions that it becomes necessary, temporarily, to suspend the exercise of certain human rights. [...] Each government that confronts a subversive threat must choose, on the one hand, the path of respect for the rule of law, or, on the other hand, the descent into state terrorism. [...] [R]espect for the rule of law does not preclude, under certain circumstances, the adoption of extraordinary measures. When the emergency situation is truly serious, certain restrictions may be imposed, for example, on the freedom of information, or limitations on the right of association, within the framework established in the constitution. In more extreme cases, persons may be detained for short periods without it being necessary to bring specific charges against them. It is true that such measures can ultimately pose the risk that the rule of law will be lost; but that is not inevitable provided that governments act responsibly; if they register arrests and inform the families of the detainees of the detentions; if they issue strict orders prohibiting torture; if they carefully recruit and train security forces, weeding out sadists and psychopaths; and lastly, if there is an independent Judiciary to swiftly correct any abuse of authority.»²¹¹

With respect to administrative detention for prolonged or indefinite periods of time, even during a state of siege or public emergency, the IACHR has stated that:

- “the declaration of a state of emergency or a state of siege cannot serve as a pretext for the indefinite detention of individuals, without any charge whatever. It is obvious that when these security measures are extended beyond a reasonable time they become true and serious violations of the right to freedom.”²¹²
- “no [...] international legal norm justifies, merely by invoking this special power, the holding of detainees in prison for long and unspecified periods, without any charges being brought against them for violation of the Law of National Security or another criminal law, and without their being brought to trial so that they might exercise the right to a fair trial and to due process of law.”²¹³
- the detention of persons without trial, for prolonged or indefinite periods of time, constitutes a serious violation of the rights to freedom, liberty, justice, and due process of law.²¹⁴ The IACHR pointed out that “this type of detention has in practice become a true penalty, without legal due process, since individuals are kept indefinitely under the Executive”.²¹⁵

²¹¹ *Report on the Situation of Human Rights in Argentina*, OAS Doc. OEA/Ser.L/V/II.49, Doc. 19 corr.1 of 11 April 1980, Chapter I.

²¹² *Inter-American Commission on Human Rights – Annual Report, 1976*, OAS Doc. OEA/Ser.L/V/II.40, Doc. 5 corr. 1 of 7 June 1977, Section II, Part I.

²¹³ *Report on the Situation of Human Rights in Uruguay*, OEA/Ser.L/V/II.43, doc. 19, corr. 1 of 31 January 1978, Chapter IV, para. 10.

²¹⁴ *Annual Report of the Inter-American Commission on Human Rights – 1978*, OAS Doc. OEA/Ser.L/V/II.47, Doc. 13 rev. 1 of 29 June 1979, Part II; and *Annual Report of the Inter-American Commission on Human Rights – 1980-1981*, OAS Doc. OEA/Ser.L/V/II.54, Doc. 9 rev. 1 of 16 October 1981, Chapter V. See also: *Report on the Situation of Human Rights in Argentina*, OAS Doc. OEA/Ser.L/V/II.49, Doc. 19 corr.1 of 11 April 1980, Chapter IV; and *Report on the Situation of Human Rights in Uruguay*, OEA/Ser.L/V/II.43, doc. 19, corr. 1 of 31 January 1978, Chapter IV, para. 11.

²¹⁵ *Report on the Situation of Human Rights in Argentina*, OAS Doc. OEA/Ser.L/V/II.49, Doc. 19 corr.1 of 11 April 1980, Chapter IV.

- When the administrative detention is “not subject to review by the judiciary, [this] also implies the negation of the functions of the latter power, which constitutes an attempted violation of the separation of public powers which is one of the bases of any democratic society.”²¹⁶

With respect to Argentinean legislation on administrative detention²¹⁷, the IACHR has recommended that the following measures be adopted:

a) That the power granted to the Head of State pursuant to Article 23 of the Constitution, which authorizes the detention of persons during a state of siege, be made subject to a test of reasonable cause, and that such detentions not be extended indefinitely;

b) That the following persons, detained at the disposal of the Executive (PEN), be released:

- i. Persons who have been detained without reasonable cause or for a prolonged period of time;
- ii. Persons who have been acquitted or who have already completed their sentences;
- iii. Persons who are eligible for parole.²¹⁸

In the case of Chile, in cases of persons detained without charges or a time limit and on order of the Executive Branch under war time legislation, the IACHR has recommended, in order to guarantee the rights referred to in Article XVIII of the American Declaration, that:

- The Executive Branch make clear the rules that should be enacted to ensure the rights of persons detained without charge;
- Such rules must ensure that the detainees have the right to a judicial remedy to challenge their detention (*amparo* or *habeas corpus*) before a civil judge;
- The intervention of that judge shall require that administrative officials bring the prisoner before the judge, to provide him with a complete copy of the decree under which the detention was ordered, to inform him exactly where the prisoner is being detained, and to inform him immediately of any subsequent transfer to another place of detention.²¹⁹

In the case of administrative detention under a “state of internal war” legislation in Uruguay, the IACHR has recommended that the State: “release, at the earliest possible date, all detainees against whom no charges have been filed, including those detained in

²¹⁶ Annual Report of the Inter-American Commission on Human Rights – 1980-1981, OAS Doc. OEA/Ser.L/V/II.54, Doc. 9 rev. 1 of 16 October 1981, Chapter V.

²¹⁷ Detainees placed at the disposal of the Executive without trial, in exercise of the exceptional powers under the State of Siege, under article 23 of the Constitution and PEN legislation (*personas a disposición del Poder Ejecutivo Nacional*).

²¹⁸ Report on the Situation of Human Rights in Argentina, OAS Doc. OEA/Ser.L/V/II.49, Doc. 19 corr.1 of 11 April 1980, Chapter Conclusions and Recommendations, Recommendation No. 5.

²¹⁹ Report on the Status of Human Rights in Chile, OAS Doc. OEA/Ser.L/V/II.34, doc. 21 corr.1, of 25 October 1974, Chapter XVII Recommendations, Recommendation No. 3.

application of the Prompt Security Measures, or else immediately submit them to a fair trial and due process of law, should there be legal grounds for such action.”²²⁰

Concerning decrees issued by the Executive Branch of Paraguay ordering detentions in the exercise of special powers under a state of siege, the IACHR has recommended that:

- “in the event that circumstances of grave danger or public calamity make its [the detention’s] maintenance absolutely necessary, to issue without delay in accordance with the corresponding provisions of the Constitution, the regulatory law called for in order to establish the indispensable compatibility which must exist between that institution and permanent respect for fundamental human rights. These provisions should establish a procedure under which detentions are carried out on written orders issued by competent authorities, with a copy of the same being formally transmitted within a fixed period of time to a member of the family or an individual indicated by the detainee. The order of detention should contain all information necessary to identify with precision the detainee and the individual taking him into custody, as well as the location where the detention is to be carried out and the name and authority ordering the measure.
- “These regulatory provisions should also provide for additional safeguards, such as a medical examination carried out both upon entry and upon departure from places of detention. Above all, the full legal effectiveness of the remedies of *habeas corpus* and *amparo* for all classes of detainees should be re-established or guaranteed by means of a special law, in view of the fact that under ordinary procedures these remedies are now considered incompatible with the institution of special powers.
- “To release as soon as possible all individuals detained under the state of siege against whom charges have not been filed; or, should there be legal cause for such action, to submit them immediately to due process of law including a fair trial. [...]”
- “To adopt administrative and practical measures aimed at ensuring that any official who commits abuses or uses cruel and inhuman methods against detainees will be made an example and duly punished.”²²¹

iii) Administrative Detention and Counter-Terrorism Measures

According to human rights instruments and Inter-American jurisprudence, the right to liberty may be subjected to derogations in times of emergency. The IACHR has considered that some components of the right to liberty can never be denied, including underlying principles that law enforcement authorities must observe in making an arrest, even during an emergency. The IACHR has specified the following fundamental standards for the protection of detainees -- who include persons under administrative detention -- which may not be suspended even when derogation is permissible in emergency situations that threaten the independence or security of a State:

²²⁰ *Report on the Situation of Human Rights in Uruguay*, OEA/Ser.L/V/II.43, doc. 19, corr. 1 of 31 January 1978, Chapter IX, Recommendation 5.

²²¹ *Report on the Situation of Human Rights in*, OEA/Ser.L/V/II.43, doc. 13 corr. 1, 31 January 1978, Chapter VIII, Recommendations 1 to 4.5.

- The right to the writ of *habeas corpus* and to resort to a competent court, “which by its nature is necessary to protect non-derogable rights during criminal or administrative detention”;
- The right to humane treatment;
- The grounds and procedures for detention, and reasonable limits on the length of preventative detention, shall be prescribed by law;
- The right to be informed of the reasons for detention;
- Prompt access to legal counsel, family, and, where necessary or applicable, medical and consular assistance;
- Guarantees against prolonged *incommunicado* detention, including access to legal counsel, family, and medical assistance following arrest;
- A central registry of detainees;
- Extension of administrative detention:
 - A State might be justified in subjecting individuals to periods of preventative or administrative detention for a period longer than would be permissible under ordinary circumstances where the extended detention is demonstrated to be strictly necessary by reason of the emergency situation;
 - Appropriate judicial review mechanisms are required to review detentions on a regular basis when detention is prolonged or extended;
 - Any such detention must continue for only such period as is necessitated by the situation and remain subject to the non-derogable protections described above.²²²

4. African system

The African Commission on Human and Peoples’ Rights (ACHPR) has indicated that the “[p]rohibition against arbitrariness requires among other things that deprivation of liberty shall be under the authority and supervision of persons procedurally and substantively competent to certify it.”²²³

In a case in which several political opponents had been arrested upon order of a military government and had been detained without charges, the ACHPR considered that detaining persons on the basis of their political belief, particularly in instances in which charges have not been brought against the detained individuals, makes the detention arbitrary²²⁴.

²²² *Report on Terrorism and Human Rights*, OAS Doc. OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr. 22 October 2002, paras. 126, 127, 139 and 140 and Recommendation 7.

²²³ Decision on May 2003, Communication No. 241/01, *Purohit and Morre v. Gambia*, para. 65.

²²⁴ Decision of November 1999, Communications No. 140/94, 141/94 and 145/95, *Constitutional Rights Project, Civil Liberties Organization and Media Rights Agenda v. Nigeria*, para. 51.

In a case concerning the detention of persons for State security reasons, without charge or trial during several months, the African Commission has stated that “[t]he detention of individuals without charge or trial is a clear violation of Articles 6 and 7(1)(a) and (d)”²²⁵. The Commission has also stated that the decree suspending a *habeas corpus* remedy for persons detained for State security reasons “must be seen as a further violation of Articles 6 and 7(1)(a) and (d)”²²⁶.

In a case in which an Act provided that the Chief of General Staff may order that a person be detained without charge for State security reasons, and that a panel consisting of the Attorney-General, the Director of the Prison Service, a representative appointed by the Inspector-General of Police, and six persons appointed by the President had a mandate to review the detention every six weeks, the Commission stated that such detention was incompatible with the provisions of the African Charter and that, under this system, persons could be detained indefinitely²²⁷. The Commission also declared that the panel could not be considered impartial or be said to meet judicial standards²²⁸, as the majority of its members were appointed by the President (the Executive), and the other three were also representatives of the executive branch. The ACHPR stated that this detention was arbitrary, and therefore in violation of the right to a fair trial within a reasonable delay and to a remedy.²²⁹

In a case about a decree that empowered a Minister of Interior to detain without charge and to extend the period of detention indefinitely²³⁰, the African Commission considered that “this power granted to the Minister renders valueless the provision enshrined in article 7-1-d of the Charter”²³¹.

VI. ADMINISTRATIVE DETENTION UNDER INTERNATIONAL HUMANITARIAN LAW

The law of armed conflicts and international humanitarian law (IHL) deals with administrative detention, also known as internment.²³² Administrative detention or internment can affect prisoners of war (POWs) in an international armed conflict, combatants in internal armed conflict, civil aliens, and civilians.

This memorandum does not address the internment of POWs in international armed conflicts, which is a separate regime of deprivation of liberty. However, it is relevant to look at the opinion of the IACHR regarding combatants (lawful or unlawful). The IACHR has stated that, while combatants have a right to a fair procedure to determine their status (as POWs or not) in order to ensure that they are afforded the international protections to

²²⁵ Decision of 15 November 1999, Communications No. 143/95, and 150/96, *Constitutional Rights Project and Civil Liberties Organization v. Nigeria*, para. 28.

²²⁶ *Ibid.*, para. 31.

²²⁷ Decision of 15 November 1999, Communication No. 153/96, *Constitutional Rights Project v. Nigeria*, para. 12.

²²⁸ *Ibid.*, paras. 14 and 15.

²²⁹ Along the same lines, see decision of 31 October 1998, Communications No. 137/94, 139/94 and 161/97, *International Pen, Constitutional Rights Project, Interights on behalf of Ken Saro v. Nigeria*, paras. 83 and following.

²³⁰ Decision of 11 May 2002, Communications No. 147/95 and 149/96, *Sir Dawda K. Jawara v. Gambia*, para. 61.

²³¹ *Ibidem*.

²³² Articles 11 to 15 of Convention V respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (The Hague, 18 October 1907); articles 3, 21 and 22 of Convention XIII concerning the Rights and Duties of Neutral Powers in Naval War (The Hague, 18 October 1907); Articles 21 and following of the Third Geneva Convention; Articles 41- 43, 68, 78-135 of the Fourth Geneva Convention; Article 75 (3) and (6) of Protocol I to the Geneva Conventions; Articles 5 and 7 of Protocol II to the Geneva Conventions.

which they are entitled, “applicable international law should not be considered to provide for any entitlement on the part of detained combatants to be informed of the reasons for their detention, to challenge the legality of their detention, or, in the absence of disciplinary or criminal proceedings, to be provided with access to legal counsel.”²³³ In conclusion, the IACHR has made the following recommendations:

☐ Where terrorist acts may trigger or otherwise take place in the context of an international armed conflict, member states must respect and ensure the right to personal liberty and security as informed by the applicable *lex specialis* of international humanitarian law, according to which:

(a) ☐ Privileged combatants who fall into the hands of an enemy generally may be interned until their repatriation at the cessation of active hostilities; ☐

(b) unprivileged combatants may also be interned and, moreover, may be subject to prosecution for their unprivileged belligerency;

(c) ☐ The detention of combatants remains subject to supervision by the mechanisms prescribed under international humanitarian law, including the Protecting Powers regime and access by the International Committee of the Red Cross. Where these mechanisms are not available or prove ineffective in ensuring the proper treatment of detainees, however, international human rights law and domestic law standards and procedures may supersede international humanitarian law in order to guarantee the effective protection of detainees in all circumstances;

(d) enemy aliens in the territory of a party to an international armed conflict or civilians in occupied territory may not be administratively detained or interned except where the security of the detaining or occupying power make it absolutely necessary. Where such detention or internment is imposed, it must be subject to reconsideration or appeal with the least possible delay and, if it is continued, subject to regular review by an appropriate or competent body, court or other tribunal designated for that purpose. ²³⁴

1. Administrative Detention in International Armed Conflicts

Administrative detention or internment of civilians is regulated by IHL as an exceptional measure, particularly when other measures of less restrictive control are not sufficient. Indeed, in the case of aliens, administrative internment is resorted to if other measures of less restrictive control are not sufficient, and only where the security of the State makes it absolutely necessary.²³⁵ The ICRC has stated that a State “may intern people or place them in assigned residence if it has serious and legitimate reason to think that they are members of organizations whose object is to cause disturbances, or that they may seriously prejudice its security by other means, such as sabotage or espionage [...] the mere fact that a person is a subject of an enemy Power cannot be considered as threatening the security of the country where he is living; it is not therefore a valid reason for interning him or placing him in assigned residence. To justify recourse to such measures the State must have good reason to think that the person concerned, by his activities, knowledge or

²³³ *Report on Terrorism and Human Rights*, OAS Doc. OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr. 22 October 2002, para. 142.

²³⁴ *Ibid.*, Recommendations 7 and 8.

²³⁵ Articles 41 and 42 of the Fourth Geneva Convention.

qualifications, represents a real threat to its present or future security”.²³⁶ In the case of civilians in occupied territories, the administrative detention or internment can only proceed “for imperative reasons of security”.²³⁷ The ICRC has pointed out that “[i]n occupied territories the internment of protected persons should be even more exceptional than it is inside the territory of the Parties to the conflict; for in the former case the question of nationality does not arise. That is why Article 78 speaks of imperative reasons of security; there can be no question of taking collective measures: each case must be decided separately.”²³⁸ The ICRC has also specified that “they can therefore only be interned, or placed in assigned residence, within the frontiers of the occupied country itself. In any case, such measures can only be ordered for real and imperative reasons of security; their exceptional character must be preserved.”²³⁹

In the case of aliens, IHL establishes, *inter alia*, the following safeguards and guarantees:

- The person affected by the internment measure has a right to appeal to an appropriate court or administrative board²⁴⁰. The ICRC points out that the administrative board must offer “the necessary guarantees of independence and impartiality”.²⁴¹ The ICRC also pointed out that “any protected person who has been interned or placed in assigned residence is entitled to have his case reconsidered ‘as soon as possible’ by an appropriate court or administrative board designated for the purpose by the Detaining Power”.²⁴²
- The internment is submitted, at least twice yearly, to a review by an appropriate court or administrative board with a view to favourably amending the initial decision if circumstances permit.²⁴³ The ICRC points out that “these periodical reconsiderations will be automatic once a protected person has made his first application to the responsible authority”.²⁴⁴
- Unless the concerned protected persons object, the Detaining Power shall, as rapidly as possible, give the Protecting Power the names of any protected persons who have been interned or subjected to assigned residence, or who have been released from internment or assigned residence, and inform about the decisions adopted by court or administrative board.²⁴⁵
- The internment, if it has not been previously withdrawn, “shall be cancelled as soon as possible after the close of hostilities”.²⁴⁶ The ICRC points out that “The duration of restrictive measures does not therefore depend in any way on the date of conclusion of

²³⁶ ICRC Commentary on article 42 of the Fourth Geneva Convention.
<http://www.icrc.org/ihl.nsf/b466ed681ddfcfd241256739003e6368/39da992c377a08aec12563cd0042c131?OpenDocument>

²³⁷ Article 78 of the Fourth Geneva Convention.

²³⁸ ICRC Commentary on article 78 of the Fourth Geneva Convention.
<http://www.icrc.org/ihl.nsf/b466ed681ddfcfd241256739003e6368/d794403e436f0823c12563cd0042cf9a?OpenDocument>

²³⁹ *Ibid.*

²⁴⁰ Article 43 of the Fourth Geneva Convention.

²⁴¹ ICRC Commentary on article 43 of the Fourth Geneva Convention.

²⁴² ICRC Commentary on article 79 of the Fourth Geneva Convention.

<http://www.icrc.org/ihl.nsf/b466ed681ddfcfd241256739003e6368/f754ec50c072deb9c12563cd0042d014?OpenDocument>

²⁴³ Article 43 of the Fourth Geneva Convention.

²⁴⁴ ICRC Commentary on article 43 of the Fourth Geneva Convention.

²⁴⁵ Article 43 of the Fourth Geneva Convention.

²⁴⁶ Article 46 of the Fourth Geneva Convention.

a peace treaty. This rule, which is in accordance with the usual practice among States, is justified by the fact that a fairly long time may elapse between the close of hostilities and the conclusion of a peace treaty; during that time the continuation of security and control measures would no longer be warranted. There are many restrictive measures -- in particular those of a less severe character than internment or assigned residence -- which cannot always, for one reason or another, be cancelled immediately hostilities end; they are removed by stages as the law of the country is gradually adjusted to peacetime conditions.”²⁴⁷

In the case of administrative detention of civilians in occupied territory, IHL establishes *inter alia* the following safeguards and guarantees:

- Internment shall be made according to a regular procedure to be prescribed by the Occupying Power in accordance with the provisions of the Fourth Geneva Convention.²⁴⁸ The ICRC points out that the rule “sets forth the procedural safeguards which are designed to ensure that the principles of humanity will be borne in mind when people are interned [...] It is for the Occupying Power to decide on the procedure to be adopted; but it is not entirely free to do as it likes; it must observe the stipulations in Article 43 [of the Fourth Geneva Convention], which contains a precise and detailed statement of the procedure to be followed when a protected person who is in the territory of a Party to the conflict when hostilities break out, is interned or placed in assigned residence. The persons subjected to these measures are not, in theory, involved in the struggle. The precautions taken with regard to them cannot, therefore, be in the nature of a punishment.”²⁴⁹
- This procedure shall include the right of appeal for the parties concerned.²⁵⁰ The ICRC points out that “The acknowledged right of those concerned to appeal against any decision to intern them or place them in assigned residence is a further safeguard, and an important one.”²⁵¹
- Appeals shall be decided with the least possible delay, and in the event of the decision being upheld, it shall be subject to periodical review, if possible every six months, by a competent body set up by the said Power.²⁵² The ICRC points out that “The details given concerning the practical application of the appeal procedure -- including the recommendation that decisions which are upheld should be reviewed every six months -- show that the authors of the Convention took every possible care to prevent any form of abuse. They did, however, leave it to the Occupying Power to entrust the consideration of appeals either to a "court" or a "board". That means that the decision will never be left to one individual. It will be a joint decision, and this offers the protected persons a better guarantee of fair treatment.”²⁵³

²⁴⁷ ICRC Commentary on article 46 of the Fourth Geneva Convention.

<http://www.icrc.org/ihl.nsf/b466ed681ddfcfd241256739003e6368/6e26942241f09588c12563cd0042c2f9?OpenDocument>

²⁴⁸ Article 78 of the Fourth Geneva Convention.

²⁴⁹ ICRC Commentary on article 78 of the Fourth Geneva Convention.

<http://www.icrc.org/ihl.nsf/b466ed681ddfcfd241256739003e6368/d794403e436f0823c12563cd0042cf9a?OpenDocument>

²⁵⁰ Article 78 of the Fourth Geneva Convention.

²⁵¹ ICRC Commentary on article 78 of the Fourth Geneva Convention.

<http://www.icrc.org/ihl.nsf/b466ed681ddfcfd241256739003e6368/d794403e436f0823c12563cd0042cf9a?OpenDocument>

²⁵² Article 78 of the Fourth Geneva Convention.

²⁵³ ICRC Commentary on article 78 of the Fourth Geneva Convention.

<http://www.icrc.org/ihl.nsf/b466ed681ddfcfd241256739003e6368/d794403e436f0823c12563cd0042cf9a?OpenDocument>

In both cases, IHL establishes, *inter alia*, the following safeguards and guarantees:

- Interned persons shall be promptly informed, in a language they understand, of the reasons why these measures have been taken.²⁵⁴
- Each interned person shall be released with the minimum delay possible, and, in any event, as soon as the circumstances justifying the arrest, detention or internment have ceased to exist.²⁵⁵ The ICRC points out that “Expressed in very general terms, this rule forms the counterpart to the principle stated in Article 42 [of the Fourth Geneva Convention] -- i.e., that internment may be ordered only if the security of the Detaining Power makes it absolutely necessary.”²⁵⁶
- Internees shall retain their full civil capacity and shall exercise such attendant rights as may be compatible with their status.²⁵⁷ The ICRC points out that the rule “is one more affirmation of the principle [...] that protected persons are entitled under all circumstances to respect for their honour and family rights.”²⁵⁸
- The Detaining Power has the obligation not to set up places of internment in areas particularly exposed to the dangers of war, and to inform the enemy Powers about the geographical location of places of internment of civilians.²⁵⁹ The ICRC points out that this is a consequence of “the prohibition on using the presence of protected persons to render certain points or areas immune from military operations [...]. The internees have been treated here by analogy with the prisoners of war. Since the obligation to place prisoners of war outside danger areas had already been set forth in the 1929 Geneva Conventions it was all the more necessary to give the benefit of a similar clause to civilians detained as a mere precautionary measure.”²⁶⁰

The Appeals Chamber of the International Tribunal for the Former Yugoslavia has stated that “[t]he offence of unlawful confinement of a civilian, a grave breach of the Geneva Conventions which is recognised under Article 2(g) of the Statute of the Tribunal, is not further defined in the Statute. As found by the Trial Chamber, however, clear guidance can be found in the provisions of Geneva Convention IV. The Trial Chamber has found that the confinement of civilians during armed conflict may be permissible in limited cases, but will be unlawful if the detaining party does not comply with the provisions of Article 42 of Geneva Convention IV [...]. Thus the involuntary confinement of a civilian where the security of the Detaining Power does not make this absolutely necessary will be unlawful. Further, an initially lawful internment clearly becomes unlawful if the detaining party does not respect the basic procedural rights of the detained persons and does not establish an appropriate court or administrative board as prescribed in Article 43 of

²⁵⁴ Article 75 (3) of Protocol I to the Geneva Conventions and article 105 of the Fourth Geneva Convention.

²⁵⁵ Article 75 (3) of Protocol I to the Geneva Conventions and article 132 of the Fourth Geneva Convention.

²⁵⁶ ICRC Commentary on article 132 of the Fourth Geneva Convention.

<http://www.icrc.org/ihl.nsf/b466ed681ddfcfd241256739003e6368/7c6e5b454191543cc12563cd0042e29c?OpenDocument>

²⁵⁷ Article 80 of the Fourth Geneva Convention.

²⁵⁸ ICRC Commentary on article 80 of the Fourth Geneva Convention.

<http://www.icrc.org/ihl.nsf/b466ed681ddfcfd241256739003e6368/550ac9028a3c26dcc12563cd0042d07f?OpenDocument>

²⁵⁹ Article 83 of the Fourth Geneva Convention.

²⁶⁰ ICRC Commentary on article 83 of the Fourth Geneva Convention.

<http://www.icrc.org/ihl.nsf/b466ed681ddfcfd241256739003e6368/b7e3e8b9b22cf76fc12563cd0042d181?OpenDocument>

Geneva Convention IV”.²⁶¹ The Appeals Chamber recalls that Articles 5 and 43 of Geneva Convention IV “reinforce[s] the principle behind Article 42, that restrictions on the rights of civilian protected persons, such as deprivation of their liberty by confinement, are permissible only where there are reasonable grounds to believe that the security of the State is at risk.”²⁶²

The Appeals Chamber has underlined that “the exceptional measure of confinement of a civilian will be lawful only in the conditions prescribed by Article 42, and where the provisions of Article 43 are complied with”.²⁶³ In consequence, the Appeals Chamber has considered that “the detention or confinement of civilians will be unlawful in the following two circumstances: (i) when a civilian or civilians have been detained in contravention of Article 42 of Geneva Convention IV, i.e. they are detained without reasonable grounds to believe that the security of the Detaining Power makes it absolutely necessary; and (ii) where the procedural safeguards required by Article 43 of Geneva Convention IV are not complied with in respect of detained civilians, even where their initial detention may have been justified.”²⁶⁴

2. Administrative Detention in Non-International Armed Conflicts

Articles 4 and 5 of Protocol II provide a general framework of safeguards to persons whose liberty has been restricted, including administrative detention or internment. However, the safeguards deal essentially with the material conditions of deprivation of liberty: humane treatment and prohibition of torture; medical care and examination; essential minimum requirements on food, drinking water, hygiene and shelter; the right to correspond; prohibition of placing the internees close to the combat zone, etc.

3. IACHR Position on Administrative Detention in Armed Conflicts

The IACHR has examined administrative detention in armed conflict situations, and has recalled the different legal regimes applicable to combatants and civilians.

Regarding administrative detention or internment of civilians, the IACHR has stated that:

- The detention or internment can proceed “only under exceptional circumstances.”²⁶⁵
- “such detention may only be undertaken pursuant to specific provisions, and may be authorized only when imperative concerns of security require it, when less restrictive measures[s] could not accomplish the objective sought, and when the action is taken in compliance with the grounds and procedures established in pre-existing law.”²⁶⁶
- “any detention may be made pursuant to a “regular procedure,” which shall include the right of the detainee to be heard and to appeal the decision, and any continuation of the detention must be subject to regular review. [...] In all instances, however, minimum

²⁶¹ ICTY Appeals Chamber, Judgment of 20 February 2001, *Prosecutor v. Zejnil Delalic and Others*, Case No. IT-96-21-A, para. 320.

²⁶² *Ibid.*, para. 321.

²⁶³ *Ibid.*, para. 322.

²⁶⁴ *Ibidem.*

²⁶⁵ *Report on Terrorism and Human Rights*, OAS Doc. OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr. 22 October 2002, para. 143.

²⁶⁶ *Ibidem.*

standards of human rights law require that detention review proceedings comply with the rules of procedural fairness. These rules include the requirements that the decision-maker meets prevailing standards of impartiality, that the detainee is given an opportunity to present evidence and to know and meet the claims of the opposing party, and that the detainee be given an opportunity to be represented by counsel or other representative.²⁶⁷

- “that even where armed hostilities may occur over a prolonged period, this factor alone cannot justify the extended detention or internment of civilians; their detention is only justified as long as security concerns strictly require it.”²⁶⁸

²⁶⁷ *Ibidem.*

²⁶⁸ *Ibidem.*