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**INTERNATIONAL COMMISSION OF JURISTS (ICJ) SUBMISSION TO THE  
WORKING GROUP ON ARBITRARY DETENTION**  
*“The definition and scope of arbitrary deprivation of liberty in customary  
international law”*

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*Composed of 60 eminent judges and lawyers from all regions of the world, the International Commission of Jurists promotes and protects human rights through the Rule of Law, by using its unique legal expertise to develop and strengthen national and international justice systems. Established in 1952, in consultative status with the Economic and Social Council since 1957, and active on the five continents, the ICJ aims to ensure the progressive development and effective implementation of international human rights and international humanitarian law; secure the realization of civil, cultural, economic, political and social rights; safeguard the separation of powers; and guarantee the independence of the judiciary and legal profession.*

*“The definition and scope of arbitrary deprivation of liberty in customary international law”*

Pursuant to the call by the Working Group on Arbitrary for written information to assist in its deliberations on “the definition and scope arbitrary deprivation of liberty under customary international law”, the International Commission of Jurists (ICJ) offers this submission pertaining to the definition, scope and content of arbitrary detention, under international standards and jurisprudence. This submission surveys primarily international and not domestic legal sources. The ICJ considers that the standards and jurisprudence from universal and regional human rights instruments, courts, treaty bodies and other authoritative sources, taken as a whole, constitutes the general international law in this area.

In general terms, the ICJ notes that exists reasonably clarity as to the definition and scope of arbitrary deprivation of liberty in ordinary situations involving detention before, during and after ordinary criminal proceedings. It is more irregular forms of detention that will warrant particular concern. Accordingly, following a general exposition of standards and jurisprudence, this submission will accent the question of administrative and preventive detention, including in respect of counter-terrorism measures, which has given rise to the most abusive practices by States in respect of the rights to liberty. It will also briefly highlight the question of detention of migrants. The submission will not cover all forms of non-criminal detention, such as involuntary confinement in psychiatric institutions or childcare facilities. Nor will it discuss detention in situations of detention in armed conflict. These areas, of course, nonetheless warrant substantial treatment in order to give a full accounting of the scope of arbitrary deprivation of liberty.

## **I. DEFINITION AND SCOPE OF ARBITRARY DETENTION**

- a) International Standards. The following universal and regional standards establish the normative of arbitrary deprivation of liberty.

### United Nations

- Universal Declaration of Human Rights: articles 3, 8, 9 and 10;
- International Covenant on Civil and Political Rights (ICCPR): 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;
- International Convention for the Protection of All Persons From Enforced Disappearances: 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);
- United Nations Rules for the Protection of Juveniles Deprived of their Liberty<sup>1</sup>: part III and rule K;
- United Nations Standard Minimum Rules for the Administration of Juvenile Justice (“The Beijing Rules”).<sup>2</sup>

<sup>1</sup> United Nations Rules for the Protection of Juveniles Deprived of their Liberty, adopted by General Assembly resolution 45/113 of 14 December 1990.

<sup>2</sup> United Nations Standard Minimum Rules for the Administration of Juvenile Justice, Adopted by General Assembly resolution 40/33 of 29 November 1985.

#### Council of Europe

- Convention for the Protection of Human Rights and Fundamental Freedoms: articles 5, 6 (1) and 15;
- 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 Prisoners:<sup>3</sup> rules 6, 37, and 38;
- Recommendation No. R (79) 6 concerning the search for missing persons: Para. 1 and 2;
- Recommendation Rec (2000) 21 on the freedom of exercise of the profession of lawyer: rule IV (1);
- European Prison Rules.<sup>4</sup>

#### European Union

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

#### 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.

#### 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 Africa:<sup>5</sup> Principle M;
- Guidelines and Measures for the Prohibition and Prevention of Torture or Degrading Treatment or Punishment in Africa (Robben Island Guidelines):<sup>6</sup> guidelines 20 to 37.

#### Arab Charter

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

#### Others

- United Nations Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile<sup>7</sup>: principles 34, 35, 36, 37 and 38;
- 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.

#### b) Jurisprudence and commentary of international authorities

##### **United Nations**

Detention is the deprivation of a person's liberty. The primary permissible basis for a lawful deprivation of liberty, with narrow and limited exceptions, is the enforcement of criminal law. The International Covenant on Civil and Political Rights (ICCPR)

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<sup>3</sup> Recommendation No. (73)5 adopted by the Council of Europe Committee of Ministers on 19 January 1973.

<sup>4</sup> Recommendation Rec(2006)2, adopted by the Council of Europe Committee of Ministers on 11 January 2006.

<sup>5</sup> African Union Doc. DOC/OS (XXX) 247.

<sup>6</sup> Resolution adopted by the African Commission on Human and People's Rights on 23 October 2002.

<sup>7</sup> Draft principles elaborated by the Committee of the Commission on Human Rights in charge of the study. UN Doc. E/CN.4/826/Rev.1, Annex.

provides for the obligation (under article 9) of states to respect and protect the right to liberty, including by ensuring that any such deprivation is not arbitrary.

Article 9:

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.
4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

The UN Human Rights Committee, pursuant to its mandate under the ICCPR, has considered a significant number of cases involving alleged breaches of obligations under article 9. In its jurisprudence, the Committee has clarified the scope of two key criteria provided under article 9(1): that arrest and detention must be lawful and not arbitrary, and that there be an enforceable right to reparation for violations of this right.

*Lawful*

The grounds and procedures for arrest and detention must be prescribed by law (ICCPR, art. 9(1)).<sup>8</sup> This means that the law must be accessible understandable, non-retroactive, applied in a consistent and predictable way to everyone equally, including authorities, and be consistent with other applicable law. Lawfulness under the ICCPR relates to both domestic and international legal standards.<sup>9</sup>

*Not arbitrary*

- Lawfulness is a necessary but insufficient condition to satisfy the requirements of ICCPR article 9. Deprivations of liberty “must not only be lawful, but also reasonable and necessary in all the circumstances”.<sup>10</sup>

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<sup>8</sup> The Human Rights Committee emphasizes that “maintenance of the principles of legality and rule of law” is especially important and needed during states of emergency. Human Rights Committee, General Comment No. 29 – States of Emergency (article 4), CCPR/C/21/Rev.1/Add.11, (2001), para.2. The Committee states further: “When proclaiming a state of emergency with consequences that could entail derogation from any provision of the Covenant, States must act within their constitutional and other provisions of law that govern such proclamation and the exercise of emergency powers; it is the task of the Committee to monitor the laws in question with respect to whether they enable and secure compliance with article 4. In order that the Committee can perform its task, States parties to the Covenant should include in their reports submitted under article 40 sufficient and precise information about their law and practice in the field of emergency powers.”

<sup>9</sup> See *Report of the Working Group on Arbitrary Detention, Addendum, Mission to China*, (2004) UN Doc. E/CN.4/2005/6/Add.4, para. 54.

<sup>10</sup> Communication No. 305/1988, *Case Hugo van Alphen vs The Netherlands*, CCPR/C/39/D/305/1988, 15 August 1990, para.5.8. See also Communication N° 631/1995, *Case Aage vs Norway*, para. 6.3 (CCPR/C/67/D/631/1995), 5 November 1999; Communication N° 458/1991, *Case Albert Womah Mukong vs. Cameroon*, (CCPR/C/51/D/458/1991), 21 July 1994, para.9(8); Communication No 560/1993, *Case A (name deleted) vs. Australia*, UN Doc. CCPR/C/59/D/560/1993, 3 April 1997, para. 9.

- The criteria of reasonableness and necessity relate both to the substantive nature of the law and to procedural safeguards, as set out below.

#### *Procedural safeguards*

- The following safeguards apply at all times, including during proclaimed states of emergency (under ICCPR article 4):
  - a) *Inform detainee*: Detainees must be promptly informed of the grounds for arrest and detention (ICCPR article 9(2)) and of their rights and how to avail themselves of those rights, including safeguards against torture or other ill-treatment.<sup>11</sup> Indefinite detention without charge is prohibited.<sup>12</sup>
  - b) *Inform others*: Incommunicado detention is strictly prohibited and detainees must be kept in a recognized place of detention.<sup>13</sup> “In all circumstances, a relative of the detainee should be informed of the arrest and place of detention within 18 hours.”<sup>14</sup> Registries of both detainees and responsible officials must be accessible to those concerned, including doctors, lawyers, relatives and friends.<sup>15</sup>
  - c) *Facilitate access to lawyers*: A detainee must be given prompt and regular access to legal counsel within 24 hours of arrest.<sup>16</sup>
  - d) *Ensure judicial control*: A detainee must be brought promptly before a judge or other competent authority (ICCPR, art. 9(3)) and has a right to have a court determine the lawfulness of the detention (ICCPR, art. 9(4)).<sup>17</sup>

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<sup>11</sup> *Report of the Special Rapporteur on Torture*, UN Doc. E/CN.4/2004/56, 23 December 2003, para.30-33, affirming and elaborating on principles 13 and 14 in *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, A/RES/43/173, 9 December 1988. The prohibition against torture and procedures to enforce this prohibition are non-derogable rights of detainees.

<sup>12</sup> *Concluding observations of the Human Rights Committee - Zambia*, CCPR/C/79/Add.62, 3 April 1996, para.14, regarding two journalists “held in indefinite detention before release, contrary to the provisions of article 9 of the Covenant.”

<sup>13</sup> Human Rights Committee, *General Comment No 20: concerning prohibition of torture and cruel treatment or punishment*, para 11. “To 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. To the same effect, the time and place of all interrogations should be recorded, together with the names of all those present and this information should also be available for purposes of judicial or administrative proceedings. Provisions should also be made against *incommunicado* detention. In that connection, States parties should ensure that any places of detention be free from any equipment liable to be used for inflicting torture or ill-treatment. The protection of the detainee also requires that prompt and regular access be given to doctors and lawyers and, under appropriate supervision when the investigation so requires, to family members.” See also *Concluding Observations of the Human Rights Committee- Nigeria*, CCPR/C/79/Add.64, 3 April 1996, para. 7, stating: “incommunicado detention for an indefinite period and the suppression of *habeas corpus* constitute violations of article 9 of the Covenant.”

<sup>14</sup> *Report of the Special Rapporteur on Torture*, UN Doc. E/CN.4/2004/56, 23 December 2003, 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, para. 16-17.

<sup>15</sup> Human Rights Committee, *General Comment No 20: concerning prohibition of torture and cruel treatment or punishment*, para 11. Principle 15, *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, A/RES/43/173, 9 December 1988.

<sup>16</sup> Principles 15, *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, A/RES/43/173, 9 December 1988; Human Rights Committee, *General Comment No 20: concerning prohibition of torture and cruel treatment or punishment*, para 11; *Report of the Special Rapporteur on Torture*, UN Doc. E/CN.4/2004/56, 23 December 2003, para. 32, citing Commission on Human Rights Resolution 1994/37; Human Rights Committee, *Concluding observations of the Human Rights Committee - Israel*, CCPR/CO/78/ISR, 21 August 2003, para 13. In paragraph 12 of the latter report, the Committee examined Israel’s emergency derogation practices, expressing concern regarding “the frequent use of various forms of administrative detention”, including “restrictions on access to counsel”, that endanger “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.

<sup>17</sup> *Body of Principles on Detention*, Principles 11, 32, 37; *Report of the Special Rapporteur on Torture*, UN Doc. E/CN.4/2004/56, 23 December 2003, para. 39; Human Rights Committee, *Concluding Observations of the Human Rights Committee - Nigeria*, CCPR/C/79/Add.64, 3 April 1996, para. 7, stating: “incommunicado detention for an indefinite period and the suppression of *habeas corpus* constitute violations of article 9 of the Covenant.” See also *Concluding observations of the Human Rights Committee - Israel*,

The *habeas corpus* writ or similar remedy must not be limited or restricted under any circumstances.<sup>18</sup> Any delay of judicial scrutiny beyond 48 hours would be hard to justify under international law.<sup>19</sup>

- e) Provide human treatment: All persons deprived of their liberty must be treated with humanity and with respect for the inherent dignity of the human person (ICCPR, art.10)<sup>20</sup> and have access to prompt medical care.<sup>21</sup>
- f) Ensure right to fair trial: If charges are brought, the detainee is entitled to a fair trial by a competent, independent and impartial tribunal established by law within reasonable time or release (ICCPR, art. 9(3), art.14).<sup>22</sup> The trial must be conducted in accordance with international fair trial standards.<sup>23</sup>

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CCPR/CO/78/ISR, 21 August 2003, para 12, where the Committee expressed concern regarding “the frequent use of various forms of administrative detention particularly for Palestinians from the Occupied Territories entailing restrictions on access to counsel and to full reasons of the detention. These 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.” Regarding these rights during states of emergency, the Human Rights Committee, *General Comment No. 29: States of Emergency (article 4)*, para. 15, states that “The presumption of innocence must be respected. In order to protect non-derogable rights [including the right to life; the prohibition against torture, inhuman or degrading treatment; prohibition against discrimination; the principle of legality; recognition of everyone as a person before the law; freedom of thought conscience and religion], the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State party's decision to derogate from the Covenant.”

<sup>18</sup> During non-international armed conflict, the right to fair trial continues with all judicial guarantees. See ICRC, Rule 100. With regard to international human rights law in general, see UN Human Rights Committee, *General Comment No. 29*, paras. 14 and 16; *Concluding Observations of the Human Rights Committee: Japan*, CCPR/C/79/Add.102, 19 November 1998, para. 24; Also see, among others, the *Concluding Observations of the Human Rights Committee: Nigeria*, CCPR/C/79/Add.64, para. 7; *Views of 26 October 1979, Communication No. 9/1977, Edgardo Dante Santullo Valcada vs. Uruguay*, CCPR/C/8/D/9/1977; *Views of 29 July 1980, Communication No. 6/1977, Miguel A. Millan Sequeira vs. Uruguay*, CCPR/C/10/D/6/1977; and *Views of 27 March 1981, Communication No. 37/1978, Esther Soriano de Bouton vs. Uruguay*, CCPR/C/12/D/37/1978; *Concluding Observations of the Human Rights Committee: Dominican Republic*, CCPR/CO/71/DOM, 26 March 2001.

<sup>19</sup> See *Aksoy v Turkey*, European Court of Human Rights, Judgment of 18 December 1996, 23 EHHR 417; and *Concluding Observations of the UN Human Rights Committee on Thailand*, CCPR/CO/84/THA (13), 28 July 2005.

<sup>20</sup> ICCPR, art. 10. See also Human Rights Committee, *General Comment No. 29 – States of Emergency (Article 4)*, CCPR/C/21/Rev.1/Add.11, 31 August 2001, para.13(a).

<sup>21</sup> *Body of Principles on Detention*, Principle 24; *Report of the Special Rapporteur on Torture*, UN Doc. E/CN.4/2004/56, 23 December 2003, para. 42.

<sup>22</sup> Human Rights Committee, *Concluding Observations of the Human Rights Committee - Jordan*, 10 August 1994, CCPR/C/79/Add.35, section 4, expressing concern about administrative detention and prolonged pre-trial detention without charge; *Concluding observations of the Human Rights Committee: Viet Nam*, 5 August 2002, CCPR/CO/75/VNM, para.8, expressing concern regarding prolonged administrative detention (referred to by State as ‘probation’) and recommending “that no persons are subjected to arbitrary restriction of their liberty and that all persons deprived of their liberty are promptly brought before a judge or other officer authorized to exercise judicial power by law, and that they can only be deprived of their liberty on the basis of a judgement based on law, as required by article 9, para.3-4, of the Covenant”. See also *Concluding observations of the Human Rights Committee - Cameroon*, CCPR/C/79/Add.116, 4 November 1999, para.19, expressing concern about the “indefinite extension” of administrative detention without remedy by way of appeal or habeas corpus. Regarding these rights during states of emergency, see Human Rights Committee, *General Comment No. 29: States of Emergency (article 4)*, para.16: “The Committee is of the opinion that the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency. Only a court of law may try and convict a person for a criminal offence. The presumption of innocence must be respected.”

<sup>23</sup> ICCPR, article 14; *Human Rights Committee, General Comment 32*, para. 6: “While article 14 is not included in the list of non-derogable rights of article 4, para.2 of the Covenant, States derogating from normal procedures required under article 14 in circumstances of a public emergency should ensure that such derogations do not exceed those strictly required by the exigencies of the actual situation. The guarantees of fair trial may never be made subject to measures of derogation that would circumvent the protection of non-derogable rights.”

## The European Court of Human Rights

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.”<sup>24</sup> 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.”<sup>25</sup>

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.”<sup>26</sup> The European Court has also 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 minimize 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 2 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.”<sup>27</sup>

In addition, the ECHR has held 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.”<sup>28</sup>

## The Inter-America system

The Inter-American Court of Human Rights has considered the question of arbitrary deprivation of liberty extensively.

The Court has determined that

“[a]rticle 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

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<sup>24</sup> 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.

<sup>25</sup> 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.

<sup>26</sup> See, *inter alia*, judgment of 15 November 1996, *Chahal v. United Kingdom*, para.118.

<sup>27</sup> Judgment of 25 May 1998, *Kurt v. Turkey*, para. 123

<sup>28</sup> *Ibid.*, para. 124.

defined by law (material aspect) and, furthermore, subject to strict adherence to the procedures objectively set forth in that law (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.<sup>29</sup>

Concerning *habeas corpus*, the Inter-American Court has affirmed 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."<sup>30</sup>

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."<sup>31</sup> 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".<sup>32</sup> The Court has 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."<sup>33</sup>

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."<sup>34</sup> 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:

<sup>29</sup> 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.

<sup>30</sup> 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.

<sup>31</sup> 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.

<sup>32</sup> 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.

<sup>33</sup> Judgment of 7 September 2004, *Tibi v. Ecuador*, para. 130 (original version in Spanish, free translation).

<sup>34</sup> Report No. 28/96, Case 11.297 (Guatemala) of 16 October 1996, para. 51.



- 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.”<sup>35</sup>

### The African system

The African Commission on Human and Peoples’ Rights (ACHPR) has noted 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.”<sup>36</sup>

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 arbitrary.<sup>37</sup> 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)”<sup>38</sup>.

The Commission has also determined 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).”<sup>39</sup>

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 held such detention to be incompatible with the provisions of the African Charter and that, under this system, persons could effectively be detained indefinitely.<sup>40</sup> The Commission also declared that the panel could not be considered

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<sup>35</sup> *Report on Terrorism and Human Rights*, OAS Doc. OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr. 22 October 2002, para. 138.

<sup>36</sup> Decision on May 2003, Communication No. 241/01, *Purohit and Morre v. Gambia*, para. 65.

<sup>37</sup> 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.

<sup>38</sup> Decision of 15 November 1999, Communications No. 143/95, and 150/96, *Constitutional Rights Project and Civil liberties Organization v. Nigeria*, para. 28.

<sup>39</sup> *Ibid.*, para. 31.

<sup>40</sup> Decision of 15 November 1999, Communication No. 153/96, *Constitutional Rights Project v. Nigeria*, para. 12.

impartial or be said to meet judicial standards,<sup>41</sup> 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.<sup>42</sup>

In a case about a decree that empowered a Minister of Interior to detain without charge and to extend the period of detention indefinitely,<sup>43</sup> the African Commission considered that “this power granted to the Minister renders valueless the provision enshrined in article 7-1-d of the Charter.”<sup>44</sup>

## II. EXCEPTIONAL SITUATIONS OF DETENTION

### a) Administrative/Preventive Detention

Preventive detention is a form of administrative deprivation of liberty ordered by the executive branch of the Government without judicial authorization or the bringing of criminal charges. The detainee may not even be suspected of criminal conduct. Under certain forms of preventive detention, the detainee is held for purposes on the assumption that he or she poses a future threat to national security or public safety. In other cases, not considered here, an individual may be preventively detained in order to address other risks, such as capacity to inflict harm due to mental illness, flight from immigration proceedings, or a failure to appear in court.

Preventive detention, as a general matter, is a practice anathema to respect for human rights under the rule of law, creating conditions not only for arbitrary detention, but also related human rights violations. The ICJ Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights concluded the following in its 2008 Report, after extensive international deliberations and public hearings:

“States should repeal laws authorizing administrative detention without charge or trial outside a genuine state of emergency; even in the latter case, States are reminded that the rights to *habeas corpus* must be granted to all detainees and in all circumstances.”

To the extent that a state may resort to preventive detention, they may only do so to the extent strictly necessary to meet a threat to the life of a nation, and then only during a properly declared state of emergency pursuant to Article 4 of the ICCPR.

Security justifications are alleged in many of the preventive detention cases examined by the Human Rights Committee. The Committee typically has held these justifications to be inadequate and the practice to be in breach of the state party’s obligations under article 9 of the ICCPR. In applying article 9 standards, the Committee has determined that preventive detention is arbitrary when States are unable to demonstrate “that other, less intrusive, measures could not have achieved the same end,” or that “it is not necessary in all circumstances of the case and proportionate to the ends sought.”

Administrative detention, more broadly speaking, covers deprivation of liberty ordered by the executive on any number of grounds, including preventive reasons, where criminal charges are not brought against a detainee.<sup>45</sup> Generally, it is defined as

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<sup>41</sup> *Ibid.*, paras. 14 and 15.

<sup>42</sup> 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.

<sup>43</sup> Decision of 11 May 2002, Communications No. 147/95 and 149/96, *Sir Dawda K. Jawara v. Gambia*, para.61.

<sup>44</sup> *Ibidem.*

<sup>45</sup> This categorization does not include pre-trial detention or cases where criminal charges are imminent.

“*detention without charge or trial*”. The UN Working Group on Arbitrary Detention has described ‘administrative detention’ as “*arrest and detention of individuals by State authorities outside the criminal law context, for example for reasons of security, including terrorism, as a form of preventive detention, as well as to restrain irregular migrants*”.<sup>46</sup> Administrative detention is typically situated outside the ordinary process of arrest with a view to bringing suspects into the criminal justice system.<sup>47</sup> Administrative detention is sometimes seen as necessary for security reasons, even without any suspicion of criminal conduct of the detained person.<sup>48</sup>

**Administrative detention, with limited exceptions, is generally incompatible with the Rule of Law and international human rights obligations**

Administrative detention, as a general matter, is a practice anathema to respect for human rights under the Rule of Law. Administrative detention, particularly where it is prolonged, renders persons held to torture, ill-treatment and other violations of human rights.<sup>49</sup> The widespread use of administrative detention also poses a danger beyond the violation of rights in individual cases, as the practice can serve to erode or even displace the normal criminal justice system. So serious is this danger, that the widespread or systematic use of administrative detention may in some circumstances constitute a crime under international law. In this respect, the Rome Statute of the International Criminal Court, provides that “*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 humanity.<sup>50</sup>

The jurisprudence from UN treaty bodies and regional courts is largely in concurrence that detention without charge is incompatible with international law and standards. For instance, the UN Human Rights Committee has generally found the practice of preventive detention to be in breach of the state party’s obligations under article 9 of the ICCPR and has disproved of purported security concerns as a ground to undermine the right to liberty.<sup>51</sup>

The Committee against Torture has considered certain forms of administrative detention constitute proscribed ill-treatment under article 16 of the Convention against Torture.<sup>52</sup> For this reason, the Committee has recommended in the elimination of all forms of administrative detention<sup>53</sup> and has applauded the abolition of administrative detention

<sup>46</sup> *Report of the Working Group on Arbitrary Detention*, (WGAD), UN Doc. A/HRC/13/30, 18 January 2010, para. 77.

<sup>47</sup> *Human Rights and Pre-Trial detention*, Center for Human Rights, Professional Training Series N°3, 1994, para. 177.

<sup>48</sup> *Report of the WGAD*, UN Doc. A/HRC/13/30, 18 January 2010, para. 77. The UN Human Rights Committee expressed its concern towards the placement of criminal defendants under renewable one-year terms of civil preventive detention because of ‘dangerousness’, even after they have completed their original prison sentence. See *Concluding Observations of the Human Rights Committee: France*, UN Doc. CCPR/C/FRA/CO/4, 31 July 2008.

<sup>49</sup> See *Concluding Observations of the Committee against Torture: Jordan*, Annual Report of the Committee against Torture 2009-2010, UN Doc. A/65/44, para. 60 (13); *Concluding Observations of the Human Rights Committee: Egypt*, UN Doc. CCPR/C/79/Add.23, para. 10; and *on Ukraine*, UN Doc. CCPR/C/79/Add.52, A/50/40, paras. 305-333.

<sup>50</sup> Article 7 of the *Rome Statute of the International Criminal Court*, UN Doc. A/CONF. 183/9; 37 ILM 1002 (1998), 2187 UNTS 90.

<sup>51</sup> See for example: Human Rights Committee, *Shafiqe v. Australia*, Communication 1324/2004, UN Doc. CCPR/C/88/D/1324/2004, 13 November 2004, para. 7.2; Human Rights Committee, *David Alberto Cámpora Schweizer v Uruguay*, Communication No. 66/1980, 1982, para. 18.1. See also: *Report of the Human Rights Committee A/65/40* (Vol. I), 2010, p. 78, *Concluding Observations on Jordan*, UN Doc. CCPR/C/JOR/CO/4, 2010, para. 11; *on Colombia*, UN Doc. CCPR/C/COL/CO/6, 2010, para. 20; *on New Zealand*, UN Doc. CCPR/C/79/Add. 47, 1995, para. 14; *Comments on Jordan*, UN Doc. A/49/40, 1994, para. 241.

<sup>52</sup> Human Rights Committee, *Conclusions and recommendations: Israel*, UN Doc. A/57/44, paras. 47-53.

<sup>53</sup> *Concluding Observations: Jordan*, Annual Report of the Committee against Torture 2009-2010, UN Doc. A/65/44, para. 60 (13); *Conclusions and recommendations of the Committee against torture: Republic of Moldova*, UN Doc. CAT/C/CR/30/7, 27 May 2003, para. 6(d); *on Egypt*, UN Doc. CAT/C/CR/29/4, 23 December 2002 para. 6 (f); *on China*, A/55/44, para.101.

in certain countries<sup>54</sup> The UN Special Rapporteur on Torture in 2002 concluded that “countries should consider abolishing, in accordance with relevant international standards, all forms of administrative detention.”<sup>55</sup>

In the context of the European Convention, Article 5 § 1 sub-paragraphs (a) to (f) of the ECHR contain an exhaustive list of permissible grounds for deprivation of liberty. No deprivation of liberty will be lawful unless it falls within one of those grounds.<sup>56</sup> Under the case-law of the ECtHR, it has long been established that “the list of grounds of permissible detention in Article 5 § 1 does not include internment or preventive detention where there is no intention to bring criminal charges within a reasonable time.”<sup>57</sup>

The Inter American Commission, similarly has affirmed that:

“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.”<sup>58</sup>

In a case in which a number of political opponents 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, rendered the detention arbitrary.<sup>59</sup> Also in a case of detention of persons for State security reasons, without a charge or trial during several months, the ACHPR has stated that: “detention of individuals without charge or trial is a clear violation of Articles 6 and 7(1)(a) and (d)”.<sup>60</sup>

### **Exception to the prohibition: Public emergency, pursuant to a lawful derogation**

A State may resort to administrative (preventive) detention in limited circumstances, namely when lawfully derogating from the right to liberty namely under a properly declared state of emergency. Any such derogation may not extinguish the right to liberty, but may only be made to the extent strictly necessary to meet a threat to the life of a nation.<sup>61</sup> As noted by the UN Human Rights Committee stressed that “*derogating from the provisions of the Covenant must be of an exceptional and temporary nature and be*

<sup>54</sup> *Conclusions and recommendations of the Committee against Torture: Finland*, UN Doc. A/51/44, para.127.

<sup>55</sup> *Report of the Special Rapporteur on the question of torture*, UN Doc. E/CN.4/2003/68, 17 December 2002, para. 26 (h).

<sup>56</sup> See *inter alia*, ECtHR, Judgment of 19 January 2012, case *Reiner v. Germany*, para. 77; ECtHR Judgment of 17 December 2009, case *M. v. Germany*, para. 86; ECtHR, Judgment of 6 November 1980, case *Guzzardi v. Italy*, para. 96.

<sup>57</sup> See, *inter alia*, ECtHR, Judgment of 7 July 2011, case *Al-Jedda v. the United Kingdom*, para. 100; Judgment of 19 February 2009, case *A. and others v. the United Kingdom*, para. 172; ECtHR, case of *Guzzardi v. Italy*, *op.cit.*, fn. ..., para. 102; ECtHR, Judgment of 1 July 1961, case *Lawless v. Ireland (no. 3)*, paras. 13 and 14.

<sup>58</sup> *Report on the Situation of Human Rights in Uruguay*, OEA/Ser.L/V/II.43, doc. 19, corr. 1, Chapter IV, of 31 January 1978, para. 10.

<sup>59</sup> 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.

<sup>60</sup> Decision of 15 November 1999, Communications No. 143/95, and 150/96, *Constitutional Rights Project and Civil Liberties Organisation v. Nigeria*, para. 28.

<sup>61</sup> See, Human Rights Committee, General Comment 29, the *Study on the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile*, UN Doc. E/CN.4/826/Rev.1, 1964, paras. 783-787; ECtHR, Judgment of 28 October 1994, case *Murray v. United Kingdom*, para. 51; ECtHR, Judgment of 30 August 1990, case *Fox, Campbell and Hartley v. United Kingdom*, para. 32; ECtHR, Judgment of 18 January 1978, case *Ireland v. United Kingdom*, para. 214; ECtHR, case *Lawless v. Ireland*, *op. cit.*, fn. ..., paras. 13, 15 and 20; IACHR, *Report on Terrorism and Human Rights*, OAS Doc. OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr., 22 October 2002, para. 138; *Concluding Observations of the Human Rights Committee: Jordan*, UN Doc. CCPR/C/79/Add.35, 27 July 1994, paras. 226-244; and *Morocco*, UN Doc. CCPR/C/79/Add.44, 2 November 1994, para. 21; and *Annual Report of the IACHR*, OAS Doc. OEA/Ser.L/V/II.40, Doc. 5 corr. 1, 7 June 1977, Section II, Part I.

*limited to the extent strictly required*".<sup>62</sup> In that respect the Committee considered that measures of administrative detention must be restricted to very limited and exceptional cases,<sup>63</sup> such as where a detainee would constitute a clear and serious threat to society that cannot be contained in any other manner.<sup>64</sup>

Under article 5 of the ECHR, all persons are entitled not to be deprived, or not to continue to be deprived, of their liberty.<sup>65</sup> The European Court has considered "extrajudicial" deprivation of liberty (detention without trial) to be only permissible in the framework of the derogations allowed in article 15 of the Convention, ie times of public emergency threatening the life of the nation.<sup>66</sup> The Court recently recalled "that it has, on a number of occasions, found internment and preventive detention without charge to be incompatible with the fundamental right to liberty under Article 5 § 1, in the absence of a valid derogation under Article 15."<sup>67</sup>

Similarly, the Inter American Commission recognised that deprivation of liberty may be justified in connection with the "*administration of state authority*" outside the criminal justice context where such measures are "*strictly necessary*" in times of emergency.<sup>68</sup> In such emergency times, "*the rule of law does not preclude, under certain circumstances, the adoption of extraordinary measures*".<sup>69</sup>

Derogations to the right to liberty and security are subject to a number of strict conditions and constraints.<sup>70</sup> The following principles are applicable:

- ***Principles of legality and primacy of the law.*** Legality, ie. legal certainty, as a general principle must be observed at all times in a context of deprivation of liberty.<sup>71</sup> The constitution or legislation should set out the circumstances, the permissible grounds for detaining a person administratively and the procedural rules regulating states of emergency, including the proceedings and safeguards available to individuals whose rights are thereby affected.<sup>72</sup> States must act within these constitutional and other provisions when governing the emergency powers. A state of emergency should moreover be officially proclaimed, with notice to the UN Secretary General, and ratified by the legislature.<sup>73</sup>

<sup>62</sup> *Concluding Observations of the Human Rights Committee: Israel*, UN Doc. CCPR/C/ISR/CO/3, 3 September 2010, para. 7.

<sup>63</sup> *Concluding Observations of the Human Rights Committee: Jordan*, UN Doc. CCPR/C/79/Add.35; A/49/40, paras. 226-244; and *Morocco*, UN Doc. CCPR/C/79/Add.44, para. 21.

<sup>64</sup> Case *David Alberto Campora Schweizer vs. Uruguay*, Communication No. 66/1980, UN Doc. CCPR/C/17/D/66/1980, Views of 12 October 1982, para. 18.1.

<sup>65</sup> ECtHR, Judgment of 18 February 2010, case *Garkavyv v. Ukraine*, para. 63.

<sup>66</sup> ECtHR, case *Ireland v. United Kingdom*, *op.cit.*, fn. ..., para. 214 ; ECtHR, case *Lawless v. Ireland*, *op. cit.*, fn. ..., paras. 13, 15, 20 and following; ECtHR, case *Ireland v. United Kingdom*, *op.cit.*, fn. ..., para. 214.

<sup>67</sup> ECtHR, case *A. and others v. the United Kingdom*, *op. cit.*, fn. ..., para. 172.

<sup>68</sup> IACHR, *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116, doc. 5, rev. 1 corr., 22 October 2002, para. 124.

<sup>69</sup> *Report on the Situation of Human Rights in Argentina*, OAS Doc. OEA/Ser.L/V/II.49, Doc. 19 corr.1, 11 April 1980, Chapter I.

<sup>70</sup> The Human Rights Committee has emphasized that the totality of ICCPR Article 9 safeguards apply even when there is a "*clear and serious threat to society which cannot be contained in any other manner*" except through preventive detention. See case *Cámpora Schweizer v. Uruguay*, Communication No. 66/1980, CCPR, Views of 12 October 1982, para. 18.1.

<sup>71</sup> See ECtHR, case *Garkavyv v. Ukraine*, *op. cit.*, fn. ..., para. 64.

<sup>72</sup> Human Rights Committee, *General Comment No. 29 – States of Emergency (Article 4)*, CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 2: "*When proclaiming a state of emergency with consequences that could entail derogation from any provision of the Covenant, States must act within their constitutional and other provisions of law that govern such proclamation and the exercise of emergency powers; it is the task of the Committee to monitor the laws in question with respect to whether they enable and secure compliance with article 4. In order that the Committee can perform its task, States parties to the Covenant should include in their reports submitted under article 40 sufficient and precise information about their law and practice in the field of emergency powers.*"; *State of Emergency – Their Impact on Human Rights*, International Commission of Jurists, Geneva, 1983.

<sup>73</sup> *General Comment No. 29 – States of Emergency (Article 4)*, CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 2.

- **Principle of legitimacy.** Derogation measures that serve the legitimate goal of responding to a public emergency, must be the least restrictive means of achieving that goal, and must not be used to curtail the legitimate exercise of fundamental rights or freedoms, such as freedoms of opinion, expression, assembly and association. They must be of “*an exceptional and temporary nature*”, and aimed at “*restoration of a state of normalcy*” as expeditiously as possible.<sup>74</sup>

- **Temporary character.** Administrative detention must be strictly limited to a brief period of time and may never be indefinite.<sup>75</sup> When a state of emergency is terminated, the authority to detain administratively should cease automatically and administrative detainees should be released.<sup>76</sup> The UN Human Rights Committee further considers that any measure of administrative detention, as well as its prolongation, must be based both on objective grounds and necessity and proportionality criteria, and must be a reasonable measure. In case these grounds and/or criteria do not exist or do not exist anymore during the prolongation of the administrative detention, the detention becomes arbitrary.<sup>77</sup>

The IACHR has stressed 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.”<sup>78</sup> Even in extraordinary situations,<sup>79</sup> the IACHR has determined that “[t]he detention of persons without trial, for prolonged or indefinite periods of time, constitutes a serious violation of the rights to freedom, liberty and justice and of the right to due process of law.”<sup>80</sup>

- **Principles of necessity and proportionality.** Any specific derogation measures taken pursuant to ICCPR article 4, based on a “*careful analysis*”,<sup>81</sup> must be necessary and proportionate to real and demonstrable threats to the life of the nation that give rise to the emergency situation, taking into account its “*duration, geographical coverage and material scope*”.<sup>82</sup> The UN Human Rights Committee has, for example, determined that preventive detention is arbitrary and a breach of article 9 of the ICCPR as a State could not show “*that other, less intrusive, measures could not have achieved the same end*,”<sup>83</sup> or that “*it is not necessary in all the circumstances of the case and proportionate to the ends sought*”.<sup>84</sup> The Committee has also been emphatic that the totality of ICCPR article 9 procedural safeguards applies when there is “*a clear and serious threat to society which cannot be*

<sup>74</sup> *Ibid.*, paras. 1 and 2.

<sup>75</sup> *Concluding Observations of the Human Rights Committee: Cameroon*, CCPR/C/79/Add.116, 2003, para. 19; on Cameroon, CCPR/C/79/Add.33, 1994, para. 22; on Israel, CCPR/CO/78/ISR, 1996, para 12; on Switzerland, CCPR/C/79/Add.70, para. 26.

<sup>76</sup> *State of Emergency – Their Impact on Human Rights*, International Commission of Jurists, Geneva, 1983.

<sup>77</sup> *Case A (name deleted) v. Australia*, Communication No 560/1993, UN Doc. CCPR/C/59/D/560/1993, Views of 3 April 1997, para. 9.4.

<sup>78</sup> *Inter-American Commission on Human Rights – Annual Report of 1976*, OAS Doc. OEA/Ser.L/V/II.40, Doc. 5 corr. 1, 7 June 1977, Section II, Part I.

<sup>79</sup> See Press Release, *10 Years After Detentions in Guantanamo Began, the IACHR Repeats its Call to Close the Detention Center*, 11 January 2012, available at [http://www.oas.org/en/iachr/media\\_center/PReleases/2012/003.asp](http://www.oas.org/en/iachr/media_center/PReleases/2012/003.asp).

<sup>80</sup> *Inter-American Commission on Human Rights - Annual Report of 1978*, OAS Doc. OEA/Ser.L/V/II.47, Doc. 13 rev. 1, 29 June 1979, Part II; and *Annual Report 1980-1981*, OAS Doc. OEA/Ser.L/V/II.54, Doc. 9 rev. 1, 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, 11 April 1980, Chapter IV; *Report on the Situation of Human Rights in Uruguay*, OEA/Ser.L/V/II.43, doc. 19, corr. 1, 31 January 1978, Chapter IV, para. 11.

<sup>81</sup> Human Rights Committee, *General Comment No. 29 – States of Emergency (Article 4)*, UN. Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, para 6.

<sup>82</sup> *Ibid.*, para 3.

<sup>83</sup> Human Rights Committee, case *Bakhtiyari v. Australia*, Communication 1069/2002, UN Doc. CCPR/C/79/D/1069/2002, 29 October 2003, para. 9.3.

<sup>84</sup> Human Rights Committee, case *Shafique v. Australia*, Communication 1324/2004, UN. Doc. CCPR/C/88/D/1324/2004, 13 November 2004, para. 7.2.

contained in any other manner” except through preventive detention.<sup>85</sup> The European Court has held that the use of administrative detention must be shown to be “strictly required by the exigencies of the situation” and necessary, proportionate and non-discriminatory in the context of the particular emergency situation that prevails.<sup>86</sup>

- **Principle of non-discrimination.** Derogation measures must not discriminate on grounds of “race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.<sup>87</sup>

- **Right to judicial review and reparation.** Cutting across the aforementioned principles is the unrestricted right of all persons without discrimination to a legal remedy for violations of the right to liberty and security at all times and in all circumstances, as well as to appeal to a judicial body.<sup>88</sup> The right to take proceedings before a court to enable the court to decide without delay on the lawfulness of the detention is effectively a non-derogable right, even during a state of emergency. According to the UN Working Group on Arbitrary Detention, these guarantees are customary international law and as a result, they are also binding on States that are not parties to the ICCPR.<sup>89</sup>

Judicial supervision of the lawfulness of administrative detention, including the right to *habeas corpus* and protected by Article 9.4 ICCPR, Article 5.4 ECHR, Article 7.6 ACHR and Article 14.6 ArCHR, assumes a crucial role in a system based on the Rule of Law,

<sup>85</sup> Human Rights Committee, case *David Alberto Cámpora Schweizer v Uruguay*, Communication No. 66/1980, CCPR, Views of 12 October 1982, para. 18.1; See also: *Concluding Remarks on New Zealand*, UN Doc. CCPR/C/79/Add. 47, 1995, para. 14; *Comments on Jordan*, UN Doc. A/49/40, 1994, para. 241.

<sup>86</sup> ECtHR, case *A. and Others v. United Kingdom*, *op. cit.*, fn. ...., para. 172.

ECtHR, case *Ireland v. United Kingdom*, *op. cit.*; fn. ...., paras. 194-196 and 212-213; ECtHR, case *Lawless v. Ireland*, *op. cit.*, fn. ...., paras. 13 and 14.

<sup>87</sup> ICCPR, article 26. See also ECtHR, Judgment of 19 February 2009, case *A. and Others v. United Kingdom*, *op. cit.*, fn. ...., para. 164, 172, 190.

<sup>88</sup> See *inter alia*: *Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile*, UN Doc E/CN.4/826/Rev.1, 1964, paras. 783 to 787; *Concluding Observations of the Human Rights Committee: Lithuania*, UN Doc. CCPR/CO/80/LTU, 1 April 2004, para. 13; *on the Republic of Moldova*, UN Doc. CCPR/CO/75/MDA, 25 July 2002, para. 11; *on Cameroon* UN Doc. CCPR/C/79/Add.116, 3 November 1999, para. 19; *on Cameroon*, UN Doc. CCPR/C/79/Add.33, 7 April 1994, para. 22; Human Rights Committee, case *Mansour Ahani v. Canada*, Communication N° 1051/2002, UN Doc. CCPR/C/80/D/1051/2002, Views of the 29 March 2004, 15 June 2004, para. 10.2; case *Henry Kalenga v. Zambia*, Communication N° 326/1988, UN Doc. CCPR/C/48/D/326/1988, Views of 27 July 1993, 2 August 1993, para. 6.3; Case *William Torres Ramirez v. Uruguay*, Communication N° 4/1977, UN Doc. CCPR/C/10/D/4/1977, Views of 23 July 1980, 8 April 1980, para. 18; Case *Alba Pietrarroia v. Uruguay*, Communication N° 44/1979, UN Doc. CCPR/C/12/D/44/1979, Views of 27 March 1981, 9 April 1981, para. 17; *Conclusions and recommendations of the Committee against Torture: Israel*, UN Doc. A/57/44, paras. 47-53; *Report of the Special Rapporteur on Torture*, UN Doc A/57/173, 2 July 2002, paras. 39, 16; UN Doc. E/CN.4/2003/68, 17 December 2002, para. 26 (i); *Report of the Independent Expert on the question of protection of human rights and fundamental freedoms while countering terrorism*, UN Doc. E/ CN.4/2005/103, 7 February 2005, para. 37; *Report on the practice of administrative detention*, UN Doc. E/CN.4/Sub.2/1990/29, 24 July 1990, paras. 64 and ff; *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, 27 July 1982, para. 203; European Court of Human Rights: case *Lawless v. Ireland*, *op. cit.*, fn. ....; case *Ireland v. United Kingdom*, *op. cit.*, fn. ....; Judgment of 26 May 1993, case *Brannigan and McBride v. United Kingdom*, Application N° 14553/89, 14554/89; Inter-American Commission on Human Rights: *Report on the Situation of Human Rights in Paraguay*, OAS Doc. OEA/Ser.L/V/II.43, doc. 13 corr. 1, 31 January 1978, Chapter VIII, Recommendations 1 to 4.5; *Report on the Status of Human Rights in Chile*, OAS Doc. OEA/Ser.L/V/II.34, doc. 21 corr.1, 25 October 1974, Chapter XVII Recommendations, Recommendation N° 3; *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; the African Commission on Human and Peoples' Rights: *Constitutional Rights Project and Civil liberties Organisation v. Nigeria*, Communications 143/95, 150/96, 15 November 1999. The ACommHPR has derived the right to judicial review of detention under the right to access to a court and fair trial (Article 7 ACHPR), see ACommHPR, 43<sup>rd</sup> Ordinary Session, 7-22 May 2008, *IHRDA and others v. Republic of Angola*, Communication No. 292/2004, paras. 58-60; ACommHPR, 20<sup>th</sup> Ordinary Session, October 1996, *RADDH v. Zambia*, Communication No. 71/92, para. 30.

<sup>89</sup> *Report of the WGAD*, UN Doc. A/HRC/7/4, 10 January 2008, para. 67. See also *Report of the WGAD*, UN Doc. A/HRC/13/30, 18 January 2010, para. 74.

and its absence violates the fundamental principle of the separation of powers.<sup>90</sup> Judicial review of detention constitutes a fundamental protection against arbitrary detention, as well as against torture or ill-treatment in detention,<sup>91</sup> and is essential for the protection of various rights.<sup>92</sup>

Periodic review of the lawfulness of administrative detention without delay, even in cases of prolonged or extended detention, must be guaranteed to explore the reasonableness and the justification on substantial grounds of the measure.<sup>93</sup> In this respect, the Human Rights Committee has affirmed that detainees “shall be entitled to take proceedings before a court, in order that 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).”<sup>94</sup>

The European Court has affirmed that the deprivation of the detainee’s right to *habeas corpus* or any other judicial review, on national security grounds, to challenge the lawfulness of the detention is not compatible with article 5 paragraph 4 of the ECHR (speedy decision on the lawfulness of the detention by a court and the release of the detainee in case the detention is not lawful).<sup>95</sup>

The InterAmerican Commission specified that where an administrative detention is not subject to review by the judiciary, “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.”<sup>96</sup>

The African Commission on Human and Peoples Rights, for its part, has indicated that the “prohibition 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.”<sup>97</sup>

<sup>90</sup> Report of the Special Rapporteur on Torture, UN Doc. A/57/173, 2 July 2002, para. 15; IACHR– 1980-1981, OAS Doc. OEA/Ser.L/V/II.54, Doc. 9 rev. 1, 16 October 1981, Chapter V.

<sup>91</sup> See, *inter alia*, IACtHR, case of *Yvon Neptune v. Haiti*, para. 115; IACtHR, Judgment of 1 March 2005, case of *Serrano Cruz Sisters v. El Salvador*, Series C No. 120, para. 79; IACtHR, Judgment of 29 November 2006, case *La Cantuta v. Peru*, IACtHR, Series C No. 162, para. 111.

<sup>92</sup> Preliminary note of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment: Mission to Equatorial Guinea, UN Doc. A/HRC/10/44/Add. 1, 23 January 2009, para. 17; IACtHR, Advisory Opinion OC-8/87, *Habeas Corpus in Emergency Situations (arts. 27 (2), 25 (1) and 7 (6) American Convention on Human Rights)*.

<sup>93</sup> See *inter alia*: Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile, UN Doc. E/CN.4/826/Rev.1, 1964, paras. 783-787; Human Rights Committee, case *Mansour Ahani v. Canada*, *op. cit.*, fn. 43; case *A (name deleted) v. Australia*, *op. cit.*, fn. ..., para. 9.4; *Concluding Observations of the Human Rights Committee: Israel*, *op. cit.*, fn. ..., para. 21; Report WGAD, UN Doc. E/CN.4/2005/6, 1 December 2004, para. 77; Report of the Special Rapporteur on Torture, UN Doc A/57/173, 2 July 2002, paras. 16, 39 and UN Doc. E/CN.4/2003/68, 17 December 2002, para. 26 (i); ECtHR: Case *Lawless v. Ireland*, *op. cit.*, fn. .... ; case *Ireland v. United Kingdom*, *op. cit.*, fn. .... ; case *Brannigan and McBride v. United Kingdom*, *op. cit.*, fn. .... ; IACHR: Report on Terrorism and Human Rights, *op. cit.*, fn. ..., 22 October 2002, paras. 126, 127, 139 and 140 and Recommendation 7; The African Commission on Human and Peoples’ Rights has derived the right to judicial review of detention under the right to access to a court and fair trial (Article 7 ACHPR), see ACommHPR, Communication No. 292/2004, 43<sup>rd</sup> Ordinary Session, 7-22 May 2008, *IHRDA and others v. Republic of Angola*, paras. 58-60; ACommHPR, Communication No. 71/92, 20<sup>th</sup> Ordinary Session, October 1996, *RADDH v. Zambia*, para. 30.

<sup>94</sup> *Concluding Observations of the Human Rights Committee: Cameroon*, UN Doc. CCPR/C/79/Add.33, para. 22; *on Lithuania*, UN Doc. CCPR/CO/80/LTU, para. 13; *on Republic of Moldova*, UN Doc. CCPR/CO/75/MDA, para. 11; *on Cameroon*, UN Doc. CCPR/C/79/Add.116, para. 19; Human Rights Committee, case *Mansour Ahani vs. Canada*, *op. cit.*, fn. ..., para 10.2, case *Henry Kalenga vs. Zambia*, UN Doc. CCPR/C/48/D/326/1988, Views of 27 July 1993, para. 6.3; case *Alba Pietraroia vs. Uruguay*, Communication No. 44/197, UN. Doc. CCPR/C/12/D/44/1979, Views of 23 July 1980, para. 17; Case *William Torres Ramirez vs. Uruguay*, UN Doc. CCPR/C/10/D/4/1977, Communication No. 4/1977, Views of 27 March 1981, para. 18.

<sup>95</sup> ECtHR, Judgment of 15 November 1996, case *Chahal v. United Kingdom*, paras. 132 et 133.

<sup>96</sup> *Inter-American Commission on Human Rights – Annual Report 1980-1981*, OAS Doc. OEA/Ser.L/V/II.54, Doc. 9 rev. 1, 16 October 1981, Chapter V.

<sup>97</sup> Decision on May 2003, *Purohit and Morre v. Gambia*, Communication No. 241/01, para. 65.



The right to judicial review of detention applies to persons subject to any form of deprivation of liberty, whether lawful or unlawful, and requires effective access to an independent court or tribunal to challenge the lawfulness of their detention, and that the persons or their representative have the opportunity to be heard before the court.<sup>98</sup> There must be prompt access to court when a person is first detained, and thereafter there must be periodic judicial review of the lawfulness of the detention.<sup>99</sup> Particular public interest concerns, such as national security, are not grounds to restrict the right to judicial review of detention, in the absence of derogation.<sup>100</sup>

The right to review of the lawfulness of the detention is designed to protect against arbitrariness: it is therefore a right to review not only of the detention's compliance with national law, but also of its compliance with principles of human rights law, including freedom from arbitrary detention.<sup>101</sup> Judicial review of detention must provide a practical, effective and accessible means of challenging detention. The principle of accessibility implies that the State must ensure that the detainee has a realistic possibility of using the remedy, in practice as well as in law.<sup>102</sup>

This judicial review must be frequent and deal with "*substantive justification of detention*" and with the "*reasonableness*" of the measure of detention. The judicial decision must be made "*without delay*".<sup>103</sup> The Human Rights Committee has observed that the prolongation of the procedure of judicial review over several months is incompatible with article 9 (4) of the ICCPR.<sup>104</sup> The judicial review also must be effective – substantive and not only formal, ie, the tribunals must be authorized to order the person's release. According to the Committee:

"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 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."<sup>105</sup>

- **Other guarantees.** Aside from the right of access to a legal remedy and the possibility of reparation for unlawful detention, the detainee 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 Prisoners*.<sup>106</sup> Whatever the nature of emergency, detainees should be the subject of several minimum rights and principles that should be recognised in states subscribing the Rule of Law. Such rights and principles include among others: communication with and representation by a legal

<sup>98</sup> See, *inter alia*, ECtHR, Judgment of 20 June 2002, case *Al-Nashif v. Bulgaria*, para. 92; ECtHR, Judgment of 24 October 1979, case *Winterwerp v. the Netherlands*. See also IACtHR, Judgment of 23 November 2010, case *Vélez Looz v. Panama*, para. 124.

<sup>99</sup> IACtHR, case *Vélez Looz v. Panama*, *op. cit.*, fn. ... , para. 107-109.

<sup>100</sup> ECtHR, case *Al-Nashif v. Bulgaria*, *op. cit.*, fn. ... , para. 94.

<sup>101</sup> ECtHR, case *A. and Others v. United Kingdom*, *op. cit.*, fn. ... , para. 202.

<sup>102</sup> ECtHR, Judgment of 11 October 2007, case *Nasrulloev v. Russia*, para. 86. See also IACtHR, case of *Vélez Looz v. Panama*, *op. cit.*, fn. ... , para. 129.

<sup>103</sup> Human Rights Committee, case *Mansour Ahani vs. Canada*, *op. cit.*, fn. ... , para 10.3.

<sup>104</sup> *Ibidem*.

<sup>105</sup> Human Rights Committee, case *A v. Australia*, *op. cit.*, fn ... , para 9.5.

<sup>106</sup> Rule 95 of the *UN Standard Minimum Rules for the Treatment of Prisoners*. See also *Report of the Special Rapporteur*, UN Doc E/CN.4/2003/68, of 17 December 2002, para. 26(h).

advisor,<sup>107</sup> humane treatment with respect for the inherent dignity of the human person,<sup>108</sup> notification of the reasons and grounds of the detention,<sup>109</sup> being informed of the remedies to which the detainee is entitled,<sup>110</sup> the allowance of visits from family members<sup>111</sup> and medical personnel,<sup>112</sup> and the obligation to publicly register the name of the detainee.<sup>113</sup>

### **Detention in the context of counter-terrorism measures**

The UN Working Group on Arbitrary Detention has been concerned at the increased use of administrative detention in relation to the fight against terrorism and in 2009 concluded that administrative detention is inadmissible in relation to persons suspected of terrorism-related conduct.<sup>114</sup> The Working Group has emphasized that counter-terrorism measures themselves must always be taken with strict regard to the principles of legality, necessity, proportionality and non-discrimination. In undertaking counterterrorism measures, 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. It should be underscored the right to *habeas corpus* necessarily applies to individuals detained on suspicion of terrorism-related offences.<sup>115</sup>

The UN Independent Expert on the protection of human rights and fundamental freedoms while countering terrorism pointed out 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 detentions are

<sup>107</sup> See *Concluding observations of the Human Rights Committee : Israel*, UN Doc. CCPR/CO/78/ISR, Communication No 326/1988, para 13; *on Switzerland*, UN Doc. CCPR/C/79/Add.70, para. 26; *on Australia*, CCPR, *Report of the Human Rights Committee to the General Assembly*, 55th Session, Vol.I, UN Doc. A/55/40 (2000), para. 526; Human Rights Committee, case *Henry Kalenga v. Zambia*, UN Doc. CCPR/C/48/D/326/1988, Views of 27 July 1993, para. 6.3; *European Guidelines on Accelerated Asylum Procedures*, CMCE, *op. cit.*, fn. ..., Guideline XI.5 and 6. The IACtHR has held that the provision of legal assistance is an obligation inherent to Article 7.6 (right to *habeas corpus*) and Article 8 (due process), and that in cases involving detention free legal assistance is an “imperative interest of justice” (IACtHR, case *Vélez Loor v. Panama*, *op. cit.*, fn. ..., paras. 132-133, 146).

<sup>108</sup> ICCPR, article 10.

<sup>109</sup> This right is protected by Article 5.2 ECHR, Article 9.2 ICCPR, Article 7 and 8 ACHR, and Article 14.3 ArCHR. Although Article 5.2 ECHR refers expressly only to the provision of reasons for “arrest”, the ECtHR has held that this obligation applies equally to all persons deprived of their liberty through detention, including immigration detention, as an integral part of protection of the right to liberty (see ECtHR, Judgment of 22 september 2009, case *Abdolkhani and Karimnia v. Turkey*, paras. 136-137; ECtHR, Judgment of 12 april 2005, case *Shamayev and Others v. Georgia and Russia*, paras. 413-414). The Inter-American Court has held that information on the reasons for detention must be provided “when the detention takes place, [which] constitutes a mechanism to avoid unlawful or arbitrary detentions from the very instant of deprivation of liberty and, also, guarantees the right to defense of the individual detained.” (IACtHR, case *Vélez Loor v. Panama*, *op. cit.*, fn. ..., para. 160 and 180). See also IACtHR, case *Yvon Neptune v. Haiti*, *op. cit.*, fn. ..., para. 105; IACtHR, Judgment of 7 June 2003, case *Humberto Sanchez v. Honduras*, para. 82.

<sup>110</sup> *Concluding Observations of the Human Rights Committee: Jordan*, UN. Doc. CCPR/C/79/Add.35; A/49/40, paras.226-244; *on Morocco*, UN Doc. CCPR/C/79/Add.44, para. 21; *on Vietnam*, UN Doc. CCPR/CO/75/VNM, para. 8; *on Cameroon*, UN Doc. CCPR/C/79/Add.116, para. 19

<sup>111</sup> See article 18.1 of the *International Convention for the Protection of All Persons from Enforced Disappearance*.

<sup>112</sup> ECtHR, case *Algür v. Turkey*, *op. cit.*, fn. ..., para. 44; IACtHR, case *Vélez Loor v. Panama*, *op. cit.*, fn. ..., paras. 220, 225, 227.

<sup>113</sup> The ECtHR, for instance, considered in the context of administrative detention that “ (...) the unacknowledged detention of an individual is a complete negation of the fundamentally important guarantees contained in Article 5 of the Convention and discloses a most grave violation of that provision. The absence of a record of such matters as the date, time and location of detention, the name of the detainee, the reasons for the detention and the name of the person effecting it must be seen as incompatible with the requirement of lawfulness and with the very purpose of Article 5 of the Convention” (Judgment of 9 March 2006, case *Menesheva v. Russia*, para. 87). See also Judgement of 25 October 2005, case *Fedotov v. Russia*, para. 78 and the Report of the WGAD, UN. Doc. A/HRC/7/4, 10 January 2008, para. 69: “ (...) It is obvious that a proper registration book is essential for preventing disappearances, abuse of power for corruption purposes and excessive detention beyond the authorized period of time, which amounts to arbitrary detention without any legal basis”.

<sup>114</sup> Report of the WGAD, UN Doc. A/HRC/10/21, 16 February 2009, para. 54.

<sup>115</sup> Report of the WGAD, UN Doc. E/CN.4/2005/6, 1 December 2004, para. 75.

prohibited under international human rights law, even during states of emergency.<sup>116</sup> Any deprivation of liberty should be based upon grounds and procedures established by law and should be of a reasonable length, detainees should equally be informed of the reasons of the detention, be promptly notified of the charges against them, and they should have access to legal remedies and provided with access to legal counsel.<sup>117</sup> The Independent Expert concluded: “At all times, therefore, States must refrain from detaining suspected terrorists for indefinite or prolonged periods and must provide them with access to legal counsel, as well as prompt and effective access to courts or other appropriate tribunals for the protection of their non-derogable rights.”<sup>118</sup>

The UN Special Rapporteur on Torture has stressed that extensive periods of detention in custody without charge or trial are said to have been contemplated or enacted in order to provide sufficient time to collect evidence leading to charges under anti-terrorist legislation. Indefinite administration detention furthermore has been used as an alternative to prosecution. As such “states have created informal criminal justice systems in which detainees are denied rights that they would normally have in the ordinary judicial systems.”<sup>119</sup> The Special Rapporteur has pointed in this context 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.”<sup>120</sup>

### **Detention of migrants for purposes of immigration control**

According to the Working on Arbitrary Detention, mandatory detention of illegal immigrants and asylum-seekers, who are not held as criminal suspects or convicts, is a growing concern.<sup>121</sup> International standards establish that, in immigration control, detention must be the exception, rather than the rule, and should undertaken as a measure be a measure of last resort.<sup>122</sup> States can resort to it only in exceptional circumstances.<sup>123</sup> The Working Group on Arbitrary Detention, while “fully aware of the sovereign right of States to regulate migration” has stated that “immigration detention should gradually be abolished”.<sup>124</sup>

The deprivation of liberty of migrants can only be justified if adequately prescribed by law. This safeguard reflects the human rights principle of legal certainty, being a particularly vital principle in cases where individual liberty is at stake.<sup>125</sup> Not only must

<sup>116</sup> *Protection of human rights and fundamental freedoms while countering terrorism*, UN Doc. E/CN.4/2005/103, 7 February 2005, para. 37.

<sup>117</sup> *Ibidem*.

<sup>118</sup> *Ibidem*.

<sup>119</sup> *Report of the Special Rapporteur*, UN Doc. A/57/173, of 2 July 2002, para. 7.

<sup>120</sup> *Ibid*, para. 15.

<sup>121</sup> *Report of the Working Group on Arbitrary Detention*, UN Doc. A/HRC/7/4, 10 January 2008, para. 45; *Concluding observations of the Committee against Torture: Finland*, UN Doc. A/66/44, 2010-2011, Annual Report of the Committee against Torture 2010-2011, para. 54 (15) and (17).

<sup>122</sup> *Concluding observations of the Committee Against Torture: Finland*, A/66/44, Committee against Torture – Annual Report 2010-2011, para. 54 (17); *on Liechtenstein*, Committee against Torture-Annual Report 2009-2010, UN Doc. A/65/44, para. 61 (16); *Report of the WGAD*, UN. Doc. A/HRC/13/30, 18 January 2010, para. 59; *Report of the WGAD*, UN Doc. A/HRC/7/4, 10 January 2008, para. 51; WGAD, *Annual Report 2008*, UN Doc. A/HRC/10/21, 16 February 2009, paras. 67 and 82; *Guidelines on human rights protection in the context of accelerated asylum procedures*, adopted by the Committee of Ministers of the Council of Europe on 1 July 2009 at the 1062<sup>nd</sup> meeting of the Ministers’ Deputies, principle XI.1. See also, *Conclusion No. 7 (XXVIII)*, UNHCR, *Expulsion*, ExCom, UNHCR 28<sup>th</sup> Session, 1977, para. e: “an expulsion order should only be combined with custody or detention if absolutely necessary for reasons of national security or public order and that such custody or detention should not be unduly prolonged”. See also, *Conclusion No. 44 (XXXVII) Detention of Refugees and Asylum-Seekers*, ExCom, UNHCR, 37<sup>th</sup> Session, 1986, para. B; *Concluding Observations on Bahamas*, CERD, UN Doc. CERD/C/64/CO/1, 28 April 2004, para. 17; IACtHR, case *Yvon Neptune v. Haiti*, *op. cit.*, fn. ...para. 90; IACtHR, Judgement of 21 November 2007, case *Álvarez and Iñiguez v. Ecuador*, Series C No. 170, para. 53; IACtHR, case *Vélez Loor v. Panama*, *op. cit.*, fn. ..., paras. 116, 166-171.

<sup>123</sup> *Concluding Observations of the Committee against Torture: Switzerland*, Annual Report of the Committee against Torture 2009-2010, A/65/44, para. 62 (13).

<sup>124</sup> *Report of the WGAD*, UN Doc. A/HRC/13/30, 18 January 2010, para. 58.

<sup>125</sup> ECtHR, Judgment of 29 March 2010, case *Medvedyev v. France*, para. 80.

detention be in accordance with the law, the law should also be sufficiently prescriptive to protect the individual from arbitrariness.<sup>126</sup>

The detention of migrants must not be arbitrary, unnecessary or disproportionate in the circumstances of the individual case.<sup>127</sup> In this regard, the WGAD has determined that “while administrative detention of asylum-seekers and illegal immigrants is not prohibited a priori by international law, it can amount to arbitrary detention if it is not necessary in all circumstances of the case”.<sup>128</sup>

In the case of *C v. Australia*, the UN Human Rights Committee found a violation of Article 9.1 on the basis that the State did not consider less intrusive means other than detention.<sup>129</sup> States thus have the obligation to consider alternatives to administrative custody from which foreigners can benefit.<sup>130</sup> If detention is nonetheless applied, a maximum period of detention must be established by law and upon expiry of this period, the detainee should be automatically released.<sup>131</sup> In any event, the detention period must be as short as possible.<sup>132</sup>

Particular attention should be given to the detention of migrants that are vulnerable by their age, state of health or past traumatic experiences.<sup>133</sup> Concerning unaccompanied children, the Committee against Torture stressed that States should ensure that administrative detention is not at all practiced.<sup>134</sup>

In case the detention of migrants can be justified, international human rights law poses further requirements and constraints on the place and regime of detention, the conditions of detention, and the access to social and medical services. The most relevant standard for the treatment of detainees is the prohibition of cruel, inhuman and degrading treatment.<sup>135</sup>

<sup>126</sup> See, *inter alia*, ECtHR, Judgement of 5 February 2002, case *Conka v. Belgium*, para. 39; IACtHR, Judgment of 21 September 2006, case *Servellón-García et al. v. Honduras*, paras. 88-89. See also, UN WGAD, *Annual Report 1998*, UN Doc. E/CN.4/1999/63, 18 December 1998, para. 69, Guarantee 2; WGAD, *Annual Report 1999*, UN Doc. E/CN.4/2000/4, 28 December 1999, Annex II, Deliberation No. 5 “Situations regarding immigrants and asylum-seekers”, Principle 6; WGAD, *Annual Report 2008*, UN Doc. A/HCR/10/21, 16 February 2009, paras. 67 and 82.

<sup>127</sup> *Report of the Working Group on Arbitrary Detention*, UN Doc. A/HRC/13/30, 18 January 2010, para. 59 and 64; *Concluding Observations of the Committee against Torture: Switzerland*, Annual Report of the Committee against Torture 2009-2010, UN Doc. A/65/44, para. 62 (13); Human Rights Committee: case *A v. Australia*, *op. cit.*, fn. ..., para. 9.3: “The State must provide more than general reasons to justify detention: in order to avoid arbitrariness, the State must advance reasons for detention particular to the individual case. It must also show that, in the light of the author’s particular circumstances, there were no less invasive means of achieving the same ends.”; case *Saed Shams and others v. Australia*, Communication No.1255/2004, 11 September 2007; case *Samba Jalloh v. the Netherlands*, Communication No. 794/1998, Views of 15 April 2002: “‘arbitrariness’ must be interpreted more broadly than ‘against the law’ to include elements of unreasonableness”.

<sup>128</sup> *Report of the WGAD*, UN Doc. A/HRC/7/4, 10 January 2008, para. 46.

<sup>129</sup> Human Rights Committee, *C. v. Australia*, *op. cit.*, fn. ....

<sup>130</sup> *Report of the WGAD*, UN Doc. A/HRC/7/4, 10 January 2008, pag. 2; *Annual Report of the Committee Against Torture*, UN Doc. A/66/44, 2010-2011, Concluding observations on Finland, para. 54 (17), stressing that states should increase the use of non-custodial measures towards illegal foreigners.

<sup>131</sup> *Report of the WGAD*, UN Doc. A/HRC/13/30, 18 January 2010, para. 61.

<sup>132</sup> See, *Concluding Observations of the Committee against Torture: Liechtenstein*, Annual Report of the Committee against Torture 2009-2010, UN Doc. A/65/44, para. 61 (16); UNHCR *Revised Guidelines on Applicable Criteria and Standards relating to Detention of Asylum-Seekers*, 26 February 1999, para. 3. See also WGAD, *Annual Report 1998*, *op. cit.*, fn. ..., para. 69, Guarantee 10; WGAD, *Annual Report 1999*, *op. cit.*, fn. ..., Principle 7; WGAD, *Annual Report 2008*, *op. cit.*, fn. ..., paras. 67 and 82.

<sup>133</sup> Regarding persons for whom detention is likely to have a particularly serious effect on psychological well-being, see UNHCR *Revised Guidelines*, *op. cit.*, fn. 66, guideline 7. See also Human Rights Committee, case *C. v. Australia*, *op. cit.*, fn. ....; see also, regarding the detention of minors, *Report of the WGAD*, UN Doc. A/HRC/13/30, 18 January 2010, para. 60; *Concluding Observations of the Committee against Torture: Liechtenstein*, Annual Report of the Committee against Torture 2009-2010, A/65/44, para. 61 (17).

<sup>134</sup> *Concluding Observations of the Committee Against Torture: Finland*, Annual Report of the Commission against Torture 2010-2011, UN. Doc. A/66/44, para. 54 (17).

<sup>135</sup> Article 16 CAT, Article 7 and 10.1 ICCPR, Article 3 ECHR, Article 5 ACHR, Article 5 ACHPR, Article 8 ArCHR. All illegal immigrants should be detained with dignity and in a humane fashion in accordance with article 1 of the UDHR and the Body Principles for the Protection of All Persons under Any Form of Detention

More particular international guidance provides that, except for short periods, detained migrants should be held in specifically designed centres in conditions tailored to their legal status and catering for their particular needs.<sup>136</sup> Facilities where migrants are detained must moreover provide conditions that are sufficiently clean, safe, and healthy.<sup>137</sup> Poor or overcrowded conditions of detention for migrants have regularly been found by international courts and human rights bodies to violate the right to be free from cruel, inhuman or degrading treatment.<sup>138</sup>

Concerning procedural guarantees, comparable minimum rights and principles apply to persons detained for purposes of immigration control as for persons detained for other reasons. The procedural protections for migrants include the right to be informed promptly and comprehensively about the reasons for detention,<sup>139</sup> the right of free access to a lawyer<sup>140</sup> and to medical care,<sup>141</sup> the right to judicial review of detention and reparation for unlawful detention,<sup>142</sup> and the right to inform family members or others of the detention.<sup>143</sup> Detained migrants also should be guaranteed the right to access to the UNHCR<sup>144</sup> and the right to consular access.<sup>145</sup>

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or Imprisonment (adopted by the General Assembly in resolution 43/173), see *Report of the WGAD*, UN Doc. A/HRC/7/4, 10 January 2008, para. 50.

<sup>136</sup> European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (CPT), *The CPT Standards*, CoE Doc. CPT/Inf/E (2002) 1 – Rev. 2010, Strasbourg, December 2010, page 54, Extract from 7th General Report [CPT/Inf (97) 10], para. 29; CMCE, *European Guidelines on accelerated asylum procedures*, op. cit., fn. ..., Principle XI.7: “detained asylum seekers should normally be accommodated within the shortest possible time in facilities specifically designated for that purpose, offering material conditions and a regime appropriate to their legal and factual situation and staffed by suitably qualified personnel. Detained families should be provided with separate accommodation guaranteeing adequate privacy.” See also, IACtHR, *Vélez Lóor v. Panama*, op. cit., fn. ..., para. 209.

<sup>137</sup> See for example ECtHR, Judgment of 11 June 2007, case *S.D. v. Greece*, paras. 52-53; IACtHR, Judgment of 5 July 2006, case *Montero-Aranguren et al (Detention Center of Catia) v. Venezuela*, Series C No. 150, para. 97; IACtHR, case *Vélez Lóor v. Panama*, op. cit., fn. ..., paras. 215-216.

<sup>138</sup> See for example ECtHR, Judgment of 21 June 2007, case *Kanttyrev v. Russia*, paras. 50-51; ECtHR, Judgment of 16 June 2005, case *Labzov v. Russia*, para. 44; ECtHR, Judgment of 22 October 2009, case *Orchowski v. Poland*, para 122.

<sup>139</sup> See, for example, ECtHR, 22 september 2009, case *Abdolkhani and Karimnia v. Turkey*, paras. 136-137; ECtHR, Judgment of 29 January 2008, case *Saadi v. United Kingdom*, para. 70-74; ECtHR, Judgment of 12 April 2005, case *Shamayev and Others v. Georgia and Russia*, paras. 413-414; IACtHR, case *Yvon Neptune v. Haiti*, op. cit., fn. ..., paras. 106-107; IACtHR, case *Vélez Lóor v. Panama*, op. cit. fn. ..., para. 116.

<sup>140</sup> *Concluding Observations of the Committee against Torture: Liechtenstein*, Annual Report of the Committee against Torture 2009-2010, UN Doc. A/65/44, para. 61 (16); *Concluding Observations on Australia*, Report of the Human Rights Committee to the General Assembly, 55th Session, Vol.I, UN Doc. A/55/40 (2000), para. 526, where the Committee expressed concern “at the State Party’s policy, in this context of mandatory detention, of not informing the detainees of their right to seek legal advice and of not allowing access of non-governmental human rights organisations to the detainees in order to inform them of this right”. See also ECtHR, Judgment of 12 March 2003, case *Öcalan v. Turkey*, para. 72.

<sup>141</sup> See, for example, ECtHR, Judgment of 22 October 2002, case *Algür v. Turkey*, para. 44; IACtHR, case *Vélez Lóor v. Panama*, op. cit., fn. ..., paras. 220, 225 and 227.

<sup>142</sup> See general comments about the right to judicial review above. About the detention of migrants in particular, see *Report of the WGAD*, UN Doc. A/HRC/13/30, 18 January 2010, para. 61.

<sup>143</sup> Protected by, among others, the following international standards: Article 17.2(d) CPED; Article 10.2, UN Declaration on the Protection of All Persons from Enforced Disappearance; Principle 16, *Body of Principles for the Protection of all persons deprived of their liberty*; CPT, *2nd General Report on the CPT’s activities covering the period 1 January to 31 December 1991*, CPT, CoE Doc. Ref.: CPT/Inf (92) 3, 13 April 1992, para. 36.

<sup>144</sup> *Body of Principles for the Protection of all Persons Deprived of their Liberty*, Principle 16.2; *European Guidelines on accelerated asylum procedures*, CMCE, op. cit., fn. ..., Principle XIV.

<sup>145</sup> See article 36 of the Vienna Convention on Consular Relations of 1963.