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Draft General comment No. 35

Article 9: Liberty and security of person

I. General remarks

1. This general comment replaces general comment No. 8 (sixteenth session). [Note: In this draft, textual elements of footnotes have been repeated in brackets in text, with their footnote numbers, for the purpose of translation. Other passages in text are bracketed in order to facilitate discussion.]

2. Liberty of person is a right of profound importance.¹ It is precious both for its own sake, and because deprivation of liberty has historically been a principal means by which other human rights are suppressed.

3. Article 9 recognizes and protects both liberty of person and security of person. Liberty of person concerns freedom from confinement of the body. Security of person concerns freedom from injury to the body, or bodily integrity. Article 9 guarantees these rights to everyone. "Everyone" includes girls and boys, soldiers, persons with disabilities, aliens, persons convicted of crime, and persons who have engaged in terrorist activity.²

4. Paragraphs 2 through 5 of article 9 set out specific safeguards for the protection of liberty and security of person.³ [Footnote 3: Other articles of the Covenant also provide protection for liberty or security of person, which may overlap with the guarantees of article 9. See Part VII *infra*.] Some of the provisions of article 9 (part of paragraph 2 and the whole of paragraph 3) apply only in connection with criminal charges. But the rest, in particular the important guarantee laid down in paragraph 4, i.e. the right to review by a court of the legality of detention, applies to all persons deprived of liberty. States parties to the

¹ General Comment No. 24, para. 10.

² 265/1987, *Vuolanne v. Finland*, para. 9.3; 1069/2002, *Bakhtiyari v. Australia*, para. 9.5; 1062/2002, *Fijalkowska v. Poland*, para 8.3; 1090/2002, *Rameka v. New Zealand*, paras. 7.2-7.3; 1051/2002, *Ahani v. Canada*, para. 10.3.

³ Other articles of the Covenant also provide protection for liberty or security of person, which may overlap with the guarantees of article 9. See Part VII *infra*.

Covenant, in their reports, should clearly distinguish between these different aspects of the rights to liberty and security of person.

5. Liberty of person in article 9 refers to freedom from physical confinement, not a general freedom of action.⁴ Deprivation of liberty involves more severe restriction of motion within a narrower space than mere interference with liberty of movement under article 12.⁵

6. Examples of deprivations of liberty include police custody, remand detention, imprisonment after conviction, house arrest,⁶ involuntary hospitalization,⁷ and confinement to a restricted area of an airport,⁸ and also include being involuntarily transported.⁹ They also include certain further restrictions on a person who is already detained, for example, solitary confinement or physical restraining devices.¹⁰ The issuance of an arrest warrant is not in itself a present deprivation of liberty.¹¹ During a period of military service, restrictions that would amount to deprivations of liberty for a civilian may not amount to deprivation of liberty if they do not exceed the exigencies of normal military service or deviate from the normal conditions of life within the armed forces of the State party concerned.¹² Recruitment and retention in service of child soldier, however, amounts to a deprivation of liberty.¹³

7. Deprivation of personal liberty is without free consent. Individuals who go voluntarily to a police station to participate in an investigation, and who know that they are free to leave at any time, are not being deprived of their liberty.¹⁴

8. The right to "security of person" in article 9 is independent from the right to liberty of person, and refers to freedom from bodily injury, including fatal injury.¹⁵ [The right to security of person is [not¹⁶] limited to protection against intentional injury.] Officials of States parties violate the right to personal security when they unjustifiably inflict bodily injury, regardless of whether the victim is detained or non-detained.¹⁷ The right to personal security also obliges States parties to take appropriate measures to protect individuals, whether detained or non-detained, from known threats to life or bodily integrity proceeding from either governmental or private sources.¹⁸ States parties must take both prospective

⁴ 854/1999, *Wackenheim v. France*, para. 6.3.

⁵ 263/1987, *González del Río v. Peru*, para. 5.1; 833/1998, *Karker v. France*, para. 8.5; 456/1991, *Celepli v. Sweden*, para. 6.1.

⁶ 1134/2002, *Gorji-Dinka v. Cameroon*, para. 5.4; see also Concluding observations, United Kingdom 2008, para. 17 (control orders including curfews of up to 16 hours). [Note: in this draft, concluding observations are usually cited from Annual Reports rather than individual documents]

⁷ 754/1997, *A. v. New Zealand*, para. 7.2 (mental health); Concluding observations Moldova 2010, para. 13 (contagious disease).

⁸ Concluding observations Belgium 2004, para. 17.

⁹ R.12/52, *Saldías de López v. Uruguay*, para. 13.

¹⁰ Concluding observations Denmark 2009, para. 11; Czech Republic 2007, para. 13; Republic of Korea 2007, para. 13; Croatia 2010, para. 12.

¹¹ 263/1987, *González del Río v. Peru*, para. 5.1.

¹² 265/1987, *Vuolanne v. Finland*, para. 9.4.

¹³ Concluding observations Chad 2009, para. 33.

¹⁴ 1758/2008, *Jessop v. New Zealand*, para. 7.9-7.10.

¹⁵ 195/1985, *Delgado Páez v. Colombia*, paras. 5.4-5.6.

¹⁶ [For "not", see, e.g., Concluding observations Moldova 2002, para. 9 ("Danger to the health and lives of detainees as a result of the spread of contagious diseases and inadequate care amounts to a violation of article 10 of the Covenant and may also include a violation of articles 9 and 6.")]

¹⁷ 613/1995, *Leehong v. Jamaica*, para. 9.3.

¹⁸ 1560/2007, *Marcellana and Gumanoy v. Philippines*, para. 7.7; Concluding observations Uganda 2004, para. 12 (internally displaced persons subject to attack by insurgents).

measures to prevent future injury and retrospective measures such as enforcement of criminal laws in response to past injury.¹⁹ Where needed, States parties should establish effective witness protection programs.²⁰ States parties must respond appropriately to patterns of violence against categories of victims such as intimidation of human rights defenders and journalists,²¹ violence against women, including domestic violence,²² the hazing of conscripts in the armed forces,²³ violence and abuse against children,²⁴ and violence against sexual minorities.²⁵ They should also protect their populations against excessive use of force in law enforcement,²⁶ abuses by private security forces,²⁷ and the risks posed by excessive availability of firearms.²⁸ The right to security of person does not address all risks to health, and is not implicated in the indirect health impact of being the target of a civil or criminal proceeding.²⁹

9. States parties also have duties to protect the right to liberty of person against deprivations by third parties.³⁰ States parties must take appropriate measures for the purpose of protecting individuals against abduction or detention by individual criminals or groups, including armed or terrorist groups, operating unlawfully within their territory.³¹ They must also protect individuals against wrongful deprivation of liberty by lawful organizations, such as employers, schools and hospitals. States parties should also take appropriate measures, to the extent possible, to protect personal liberty against the activities of another State within their territory.³²

10. When private individuals or entities are authorized by a State party to exercise powers of arrest or detention, the State party remains responsible for adherence to article 9.³³ It must rigorously limit those powers and must provide strict and effective control to ensure that those powers are not misused, and do not lead to arbitrary or unlawful arrest or detention.³⁴ It must also provide adequate remedies for victims if arbitrary or unlawful

¹⁹ 821/1998, *Chongwe v. Zambia*, para. 5.3; 1250/2005, *Lalith Rajapakse v. Sri Lanka*, 9.7; 1432/2005, *Gunaratna v. Sri Lanka*, para. 8.4.

²⁰ Concluding observations Sri Lanka 2003, para. 9; see also Concluding observations, Bosnia and Herzegovina 2006, para. 13, 16; Philippines 2012, para. 16.

²¹ 1560/2007, *Marcellana and Gumanoy v. Philippines*, para. 7.7; Concluding observations Jamaica 2012, para. 15; Philippines 2004, para. 8; Guatemala 2001, para. 21.

²² Concluding observations Georgia 2002, para. 14; Republic of the Congo 2000, para. [271]; Portugal 2012, para. 12.

²³ Concluding observations Lithuania 1998, para. [169]; Ukraine 2002, para. 16.

²⁴ Concluding observations Lithuania 1998, para. [168].

²⁵ Concluding observations El Salvador 2003, para. 16.

²⁶ 613/1995, *Leehong v. Jamaica*, para. 9.3; Concluding observations Romania 1999, para. [371]; Azerbaijan 2009, para. 11; Belgium 2011, para. 14; Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990).

²⁷ Concluding observations Guatemala 2012, para. 16.

²⁸ Concluding observations Philippines 2012, para. 14; United States of America 1995, para. [282]; Yemen 2012, para. 16.

²⁹ 1124/2002, *Obodzinsky v. Canada*, para. 8.5.

³⁰ Concluding observations Guatemala 1996, para. [232]; Yemen 2012, para. 24; Philippines 2012, para. 14.

³¹ Concluding observations Colombia 1997, para. [278]; India 1997, para. [433]; Japan 1999, para. [171]; Uganda 2004, para. 12; Yemen 2012, para. 24.

³² Concluding observations Lebanon 1996, paras. [343, 346]; Republic of the Congo 2000, para. [267]; 319/1988, *Cañón García v. Ecuador*, paras. 5.1-5.2.

³³ Concluding observations United Kingdom 1995, para. [423].

³⁴ Concluding observations Algeria 1998, para. [356]; United Republic of Tanzania 1998, para. [403]; Guatemala 2012, para. 16.

arrest or detention does occur.³⁵ States parties should provide in their reports descriptions of the powers they have granted to private actors and the regulations and procedures by which they ensure supervision.

II. Arbitrary detention and unlawful detention

11. Liberty of person is not absolute. Article 9 recognizes that sometimes deprivation of liberty is justified, for example, in the enforcement of criminal laws for the protection of the rights of others. Paragraph 1 requires that deprivations of liberty must not be arbitrary, and that they be carried out with respect for the rule of law.

12. The second sentence of paragraph 1 prohibits arbitrary arrest and detention, while the third sentence prohibits deprivation of liberty that is not on such grounds and in accordance with such procedure as are established by law. The two prohibitions overlap, in that some arrests or detentions may be both arbitrary and unlawful. Arrest or detention that lacks any legal basis is arbitrary.³⁶ Unauthorized confinement of prisoners beyond the length of their sentences is arbitrary as well as unlawful.³⁷ Continued confinement of prisoners in defiance of a judicial order for their release is arbitrary as well as unlawful.³⁸

13. The notion of “arbitrariness” is not to be equated with “against the law”, but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability, and due process of law.³⁹ Remand in custody must be reasonable and necessary in all the circumstances.⁴⁰ [Footnote 40: Pretrial detention in criminal cases is further discussed in Part IV *infra*.] A decision to keep a person in detention should be open to periodic review, and should not continue beyond the period for which a State party can provide appropriate justification.⁴¹

14. The term “arrest” refers to the initiation of a deprivation of liberty, and “detention” refers to the deprivation that begins with the arrest.⁴² Arrest within the meaning of article 9 need not involve a formal arrest as defined under domestic law.⁴³

15. The Covenant does not provide an enumeration of the permissible reasons for depriving a person of liberty. Article 9 expressly recognizes that individuals may be detained on criminal charges, and article 11 expressly prohibits imprisonment on ground of inability to fulfil a contractual obligation.⁴⁴ [Footnote 44: Detention for criminal offenses such as fraud that are related to civil law debts does not violate article 11, and does not amount to arbitrary detention.] Article 14 provides additional procedural protections for

³⁵ Concluding observations Algeria 1998, para. [356]; Guatemala 2012, para. 16; Yemen 2012, para. 24.

³⁶ 414/1990, *Mika Miha v. Equatorial Guinea*, para. 6.5; 992/2001, *Bousroual v. Algeria*, para. 9.5; 1460/2006, *Yklymova v. Turkmenistan*, para. 7.2.

³⁷ Concluding observations Brazil 2006, para. 16.

³⁸ 856/1999, *Chambala v. Zambia*, para. 7.3.

³⁹ 1134/2002, *Gorji-Dinka v. Cameroon*, para. 5.1.

⁴⁰ 305/1988, *Van Alphen v. The Netherlands*, para. 5.8 (pretrial detention); 560/1993, *A. v. Australia*, para. 9.2 (immigration control); 1369/2005, *Kulov v. Kyrgyzstan*, para. 8.3 (pretrial detention). Pretrial detention in criminal cases is further discussed in Part IV *infra*.

⁴¹ 1324/2004, *Shafiq v. Australia*, para. 7.2.

⁴² See 631/1995, *Spakmo v. Norway*, para. 6.3 (finding that the arrest was not arbitrary or unlawful, but that the duration of the subsequent eight-hour detention was unreasonable and therefore arbitrary).

⁴³ 1460/2006, *Yklymova v. Turkmenistan*, paras. 7.2-7.3 (de facto house arrest); 1096/2002, *Kurbanova v. Tajikistan*, para. 7.2 (actual detention prior to issuance of arrest warrant).

⁴⁴ See [Provisional] Concluding observations, St. Vincent and the Grenadines 2008, para. 7 (citing both articles 9 and 11). Detention for criminal offenses such as fraud that are related to civil law debts does not violate article 11, and does not amount to arbitrary detention. 1342/2005, *Gavrilin v. Belarus*, para. 7.3.

persons charged with a criminal offence. Article 13 addresses some of the procedures to be employed in the expulsion of aliens from the territory of a State party. Other regimes involving deprivation of liberty must be established by law and must be accompanied by procedures that prevent arbitrary detention.⁴⁵ The grounds and procedures prescribed by law must not be unreasonably or unnecessarily destructive of the right to liberty of person.⁴⁶ Although conditions of detention are addressed primarily by articles 7 and 10, detention may be arbitrary if the design of the conditions does not correspond to the ostensible purpose of the deprivation of liberty.⁴⁷ The regime must not amount to an evasion of the limits on the criminal justice system by providing the equivalent of criminal punishment without the applicable protections.⁴⁸ The imposition of a draconian penalty for contempt of court without adequate explanation and without independent procedural safeguards is arbitrary.⁴⁹

16. Examples of arbitrary detention also include detention of innocent family members of alleged criminals, the holding of hostages, and arrests for the purpose of extorting bribes.⁵⁰

17. Arrest or detention as punishment for exercising certain rights protected by the Covenant may also be arbitrary, including freedom of opinion and expression (article 19),⁵¹ freedom of assembly (article 21),⁵² freedom of association (article 22),⁵³ freedom of religion (article 18),⁵⁴ and the right to privacy (article 17).⁵⁵ Arrest or detention on discriminatory grounds in violation of article 26 may also be arbitrary.⁵⁶ In contrast, not every violation of the specific procedural guarantees for criminal defendants in article 14 results in arbitrary detention.⁵⁷ Retroactive criminal punishment in violation of article 15 amounts to arbitrary detention.⁵⁸ Enforced disappearances violate numerous substantive and procedural provisions of the Covenant, and also amount to arbitrary detention.⁵⁹

18. Detention in the course of proceedings for the control of immigration is not *per se* arbitrary, but the detention must be justified as reasonable, necessary and proportionate in

⁴⁵ 66/1980, *Macado de Cámpora v. Uruguay*, para. 18.1 (administrative detention on security grounds must comply with requirements of article 9); 1189/2003, *Fernando v. Sri Lanka*, para. 9.2; 1629/2007, *Fardon v. Australia*, para. 7.3.

⁴⁶ 1629/2007, *Fardon v. Australia*, para. 7.3.

⁴⁷ 1629/2007, *Fardon v. Australia*, para. 7.4(a) (nominally civil detention under same prison regime as prior sentence); Concluding observations, Belgium 2004, para. 18 (placement of mentally ill people in prison psychiatric annexes); United Kingdom 2002, para. 16 (detention of asylum-seekers in prisons).

⁴⁸ 1629/2007, *Fardon v. Australia*, para. 7.4(a)-7.4(c); Concluding observations, United States of America 2006, para. 19; France 2008, para. 16; Germany 2012, para. 14; see General Comment No. 32, paras. 15, 18.

⁴⁹ 1189/2003, *Fernando v. Sri Lanka*, para. 9.2; 1373/2005, *Dissanakye v. Sri Lanka*, para. 8.3.

⁵⁰ Concluding observations Libya 1999, para. [132]; Azerbaijan 1994, para. [298]; Israel 1998, para. [317]; [PCOB] Equatorial Guinea 2004, para. 13; Kenya 2012, para. 18.

⁵¹ 328/1988, *Zelaya Blanco v. Nicaragua*, para. 10.3; Concluding observations Canada 2006, para. 20; Russian Federation 2010, para. 24.

⁵² Concluding observations Canada 2006, para. 20; Moldova 2010, para. 8.

⁵³ Concluding observations Democratic Republic of the Congo, 2006, para. 23; Sudan 2007, para. 29.

⁵⁴ Concluding observations Islamic Republic of Iran 2011, para. 24.

⁵⁵ Concluding observations Cameroon 2010, para. 12; Togo 2011, para. 14.

⁵⁶ 1314/2004, *O'Neill and Quinn v. Ireland*, para. 8.5 (finding no violation); Concluding observations Honduras 2007, para. 13; Colombia 2010, para. 20; Cameroon 2010, para. 12; Togo 2011, para. 14.

⁵⁷ 1007/2001, *Sineiro Fernández v. Spain*, para. 6.3 (absence of review of conviction by higher court violated paragraph 5 of article 14, but not paragraph 1 of article 9).

⁵⁸ 1629/2007, *Fardon v. Australia*, para. 7.4(b).

⁵⁹ 950/2000, *Sarma v. Sri Lanka*, para. 9.3; 1495/2006, *Madoui v. Algeria*, para. 7.6.

light of the circumstances, and reassessed as it extends in time.⁶⁰ Asylum-seekers who unlawfully enter a State party's territory may be detained for a brief initial period in order to document their entry, record their claims, and determine their identity if it is in doubt.⁶¹ To detain them further while their claims are being resolved would be arbitrary absent particular reasons specific to the individual, such as an individualized likelihood of absconding, danger of crimes against others, or risk of acts against national security.⁶² The decision must consider relevant factors case-by-case, and not be based on a mandatory rule for a broad category; must take into account less invasive means of achieving the same ends, such as reporting obligations, sureties, or other conditions to prevent absconding; and must be subject to periodic reevaluation and judicial review.⁶³ The decision must also take into account the needs of children and the mental health condition of those detained.⁶⁴ Any necessary detention should take place in appropriate, sanitary, non-punitive facilities, and should not take place in prisons.⁶⁵ Individuals must not be detained indefinitely on immigration control grounds if the State party is unable to carry out their expulsion.⁶⁶

19. [States parties should explain in their reports what they have done to revise outdated laws and practices in the field of mental health in order to avoid arbitrary detention.⁶⁷ Any deprivation of liberty must be necessary and proportionate, for the purpose of protecting the person in question or preventing injury to others, must take into consideration less restrictive alternatives, and must be accompanied by adequate procedural and substantive safeguards established by law.⁶⁸ The procedures should ensure respect for the views of the patient, and should ensure that any guardian or representative genuinely represents and defends the wishes and interests of the patient.⁶⁹ States parties must provide programmes for institutionalized persons that serve the purposes that are asserted to justify the detention.⁷⁰ Deprivation of liberty must be reevaluated at appropriate intervals with regard to its continuing necessity.⁷¹ Patients should be assisted in obtaining access to effective remedies for the vindication of their rights, including initial and periodic judicial review of

⁶⁰ 560/1993, *A. v. Australia*, paras. 9.3-9.4 (not *per se* arbitrary to detain an individual who requests asylum, but grounds must be reassessed periodically); 794/1998, *Jalloh v. Netherlands*, para. 8.2 (detention for almost four months of minor asylum-seeker pending was not arbitrary because he had previously absconded); 1557/2007, *Nystrom v. Australia*, paras. 7.2-7.3 (nine months of detention pending deportation was not arbitrary because of risks of recidivism and flight).

⁶¹ 560/1993, *A. v. Australia*, para. 9.4; 1069/2002, *Bakhtiyari v. Australia*, paras. 9.2, 9.3.

⁶² 560/1993, *A. v. Australia*, para. 9.4; 1551/2007, *Tarlue v. Canada*, paras. 3.3, 7.6; 1051/2002, *Ahani v. Canada*, para. 10.2.

⁶³ 1014/2001, *Baban v. Australia*, para. 7.2; 1069/2002, *Bakhtiyari v. Australia*, paras. 9.2, 9.3; Concluding observations, Belgium 1999, para. [84]; Canada 2006, para. 14; Bosnia and Herzegovina 2012, para. 14.

⁶⁴ 1014/2001, *Baban v. Australia*, para. 7.2; 1324/2004, *Shafiq v. Australia*, para. 7.3; 900/1999, *C. v. Australia*, para. 8.2.

⁶⁵ Concluding observations, Finland 1998, para. [270], Belgium 2004, para. 17; United Kingdom 2008, para. 21.

⁶⁶ Concluding observations United States of America 1995, paras. [283, 298]; United Kingdom 2002, para. 16; Bosnia and Herzegovina 2012, para. 14.

⁶⁷ See Concluding observations Estonia 2003, para. 10.

⁶⁸ 1062/2002, *Fijalkowska v. Poland*, para. 8.3; 1629/2007, *Fardon v. Australia*, para. 7.3; Concluding observations Canada 2006, para. 17; Russian Federation 2010, para. 19; Bulgaria 2011, para. 17.

⁶⁹ Concluding observations Czech Republic 2007, para. 14; Bulgaria 2011, para. 17; see also Committee on the Rights of the Child, General comment No. 9, para. 48.

⁷⁰ Concluding observations Bulgaria 2011, para. 10, Germany 2012, para. 14.

⁷¹ 754/1997, *A. v. New Zealand*, para. 7.2; Concluding observations Canada 2006, para. 17; Committee on the Rights of the Child, General comment No. 9, para. 50.

the lawfulness of the detention, and to ensure conditions of detention consistent with the Covenant.⁷²]

20. [The Covenant is consistent with a variety of criminal sentencing schemes. Convicted prisoners are entitled to have the duration of their sentences administered in accordance with domestic law, including provisions concerning consideration for early release or parole.⁷³ Denial of release or parole amounts to continuation of detention, and must not be arbitrary within the meaning of article 9.⁷⁴ If parole or conditional release is granted, and then revoked for breach of conditions, the return to prison is a deprivation of liberty subject to article 9.⁷⁵ A prediction of the prisoner's future behavior may be a relevant factor in deciding whether to continue detention,⁷⁶ but State parties must exercise caution and provide appropriate procedural guarantees in evaluating future dangers.⁷⁷]

21. [When a criminal sentence includes a punitive period followed by a preventive period, then once the punitive term of imprisonment has been served, to avoid arbitrariness the preventive detention must be justified by compelling reasons, and regular periodic reviews by an independent body must be assured to determine the continued justification of the detention.⁷⁸ States parties should use such post-conviction preventive detention as a measure of last resort and create detention conditions that are distinct from the treatment of convicted prisoners serving a punitive sentence and are aimed at the detainees' rehabilitation and reintegration into society.⁷⁹ If a prisoner has fully served the sentence imposed at the time of conviction, articles 9 and 15 forbid a retroactive increase in sentence, and a State party may not impose equivalent detention under the label of civil preventive detention.⁸⁰]

22. The third sentence of paragraph 1 provides that no one shall be deprived of liberty except on such grounds and in accordance with such procedure as are established by law. The substantive grounds for arrest or detention must be prescribed by law, and should be defined with sufficient precision to avoid overly broad or arbitrary application.⁸¹ Deprivation of liberty without such legal authorization is unlawful, and violates article 9.⁸² Detention in violation of a judicial order of release is also unlawful.⁸³

23. Procedures for carrying out legally authorized deprivation of liberty should also be established by law, and States parties should ensure compliance with their legally

⁷² 1062/2002, *Fijalkowska v. Poland*, para. 8.3-8.4; 754/1997, *A. v. New Zealand*, para. 7.3; Concluding observations Russian Federation 2010, para. 19; Bulgaria 2011, para. 17; General Comment No. 31, para. 15.

⁷³ 1090/2002, *Rameka v. New Zealand*, para. 7.3.

⁷⁴ 1090/2002, *Rameka v. New Zealand*, paras. 7.2-7.3; 1512/2006, *Dean v. New Zealand*, para. 7.5; 1388/2005, *De León Castro v. Spain*, para. 9.3.

⁷⁵ [Cf. 1385/2005, *Manuel v. New Zealand*, paras. 7.2-7.3 (assuming *arguendo* that recall from parole was a deprivation of liberty, and finding that the recall was not arbitrary).]

⁷⁶ 1512/2006, *Dean v. New Zealand*, para. 6.7; 1492/2006, *Van der Plaat v. New Zealand*, para. 6.3.

⁷⁷ 1629/2007, *Fardon v. Australia*, para. 7.4(d); Concluding observations Germany 2012, para. 14.

⁷⁸ 1090/2002, *Rameka v. New Zealand*, para. 7.3.

⁷⁹ 1512/2006, *Dean v. New Zealand*, para. 7.5; Concluding observations Germany 2012, para. 14.

⁸⁰ 1629/2007, *Fardon v. Australia*, para. 7.4.

⁸¹ See, e.g., Concluding observations Sudan 1998, para. [124] ("national security" vague), Philippines 2004, para. 14 (vagrancy law vague), Mauritius 2005, para. 12 (terrorism law vague), Russian Federation 2010, para. 25 ("extremist activity" vague), United Republic of Tanzania 2009, para. 12 (terrorism law vague), Honduras 2007, para. 13 ("unlawful association" vague).

⁸² 702/1996, *McLawrence v. Jamaica*, para. 5.5 ("[T]he principle of legality is violated if an individual is arrested or detained on grounds which are not clearly established in domestic legislation.").

⁸³ 856/1999, *Chambala v. Zambia*, para. 7.3.

prescribed procedures. Not every violation of a domestic procedural rule, however, amounts to a violation of article 9.⁸⁴ Article 9 requires compliance with domestic rules that define the procedure for arrest by identifying the officials authorized to arrest,⁸⁵ or by specifying when a warrant is required.⁸⁶ It also requires compliance with domestic rules that define when authorization to continue detention must be obtained from a judge or other officer,⁸⁷ where suspects may be detained,⁸⁸ when the detained person must be brought to court,⁸⁹ and legal limits on the duration of detention.⁹⁰ It also requires compliance with domestic rules providing important safeguards for detained persons, such as making a record of an arrest,⁹¹ and permitting access to counsel.⁹²

III. Notice of reasons for arrest and any criminal charges

24. Paragraph 2 of article 9 imposes two requirements for the benefit of persons who are deprived of liberty. First, they shall be informed, at the time of arrest, of the reasons for the arrest. Second, they shall be promptly informed of any charges against them. The first requirement applies broadly to the reasons for any deprivation of liberty. Because “arrest” means the initiation of a deprivation of liberty, this requirement applies regardless of the formality or informality with which the arrest takes place, and regardless of the legitimate or improper reason on which it is based.⁹³ The second, additional requirement applies only to criminal charges.

25. One major purpose of requiring that all arrested persons be informed of the reasons for the arrest is to enable them to seek release if they believe that the reasons given are invalid or unfounded.⁹⁴ The reasons must include not only the general legal basis of the arrest, but enough factual specifics to indicate the substance of the complaint, such as the wrongful act and the identity of an alleged victim.⁹⁵ The “reasons” concern the official basis for the arrest, not the subjective motivations of the arresting officer.⁹⁶

26. Oral notification of reasons for arrest satisfies the requirement. The reasons must be given in a language that the arrested person understands.⁹⁷ Sometimes explicit notification may be superfluous when the reasons are evident from the circumstances of the arrest, because the arresting officer has found an illegal substance in the individual’s possession, or because the individual has brought the crime to the attention of the police;⁹⁸ even then, the better practice would be to avoid the risk of misunderstanding by making the reasons

⁸⁴ 1425/2005, *Marz v. Russian Federation*, para. 5.3.

⁸⁵ 461/2006, *et al., Maksudov et al. v. Kyrgyzstan*, para. 12.2.

⁸⁶ 1110/2002, *Rolando v. The Philippines*, para. 5.5.

⁸⁷ 770/1997, *Gridin v. Russian Federation*, para. 8.1.

⁸⁸ 1449/2006, *Umarov v. Uzbekistan*, para. 8.4.

⁸⁹ 981/2001, *Gómez Casafranca v. Peru*, para. 7.2.

⁹⁰ 2024/2011, *Israil v. Kazakhstan*, para. 9.2.

⁹¹ 1208/2003, *Kurbonov v. Tajikistan*, para. 6.5.

⁹² 1412/2005, *Butovenko v. Ukraine*, para. 7.6;

⁹³ 1460/2006, *Yklymova v. Turkmenistan*, para. 7.2 (de facto house arrest); 414/1990, *Mika Miha v. Equatorial Guinea*, para. 6.5 (presidential fiat); 188/1984, *Martínez Portorreal v. Dominican Republic*, paras. 9.2, 11; Concluding observations, *Canada 2006*, para. 14 (detention under security certificates).

⁹⁴ 43/1979, *Drescher Caldas v. Uruguay*, para. 13.2; 248/1987, *Campbell v. Jamaica*, para. 6.3.

⁹⁵ 43/1979, *Drescher Caldas v. Uruguay*, para. 13.2; 1177/2003, *Wenga and Shandwe v. Democratic Republic of the Congo*, para. 6.2; 1128/2002, *Marques de Morais v. Angola*, para. 6.2.

⁹⁶ 1812/2008, *Levinov v. Belarus*, para. 7.5.

⁹⁷ 868/1999, *Wilson v. The Philippines*, paras. 3.3, 7.5.

⁹⁸ 493/1992, *Griffin v. Spain*, para. 9.2; 647/1995, *Pennant v. Jamaica*, para. 8.1; 373/1989, *Stephens v. Jamaica*, paras. 2.2, 9.5.

explicit,⁹⁹ although failure to inform would not violate paragraph 2 if the individual does know the reasons.

27. Ordinarily this information must be provided immediately upon arrest. In exceptional circumstances, such immediate communication may not be possible. For example, a delay of several hours may be required before an interpreter can be present.¹⁰⁰

28. For some categories of vulnerable persons, directly informing the person arrested is required but not sufficient. When children are arrested, notice of the arrest and the reasons should also be provided directly to their parents, guardians, or legal representatives.¹⁰¹ For certain persons with mental disabilities, notice of the arrest and the reasons should also be provided directly to appropriate family members, guardians, or legal representatives. Additional time may be required to identify and contact the relevant third persons, but notice should be given as soon as possible. The same considerations apply to prompt information concerning any criminal charges.

29. The second requirement of paragraph 2 concerns notice of criminal charges. Persons arrested for the purpose of investigating crimes they may have committed, or for the purpose of holding them for criminal trial, must be promptly informed of the crimes of which they are suspected or accused. This right applies in connection with ordinary criminal prosecutions, and also in connection with military prosecutions or other special regimes directed at criminal punishment.¹⁰²

30. The requirement of notice of charges in article 9, paragraph 2, differs in several respects from the similar requirement in article 14, paragraph 3(a). Article 9, paragraph 2, applies only to persons who are arrested, whereas article 14, paragraph 3(a), applies also to criminal defendants who have remained at liberty.¹⁰³ The right under article 9, paragraph 2, can arise at an earlier stage of the proceedings, if the suspect is arrested for investigation prior to the bringing of formal charges, whereas article 14, paragraph 3(a) applies only once charges have been formally brought.¹⁰⁴ Notice of charges under article 9, paragraph 2, serves to facilitate the determination of the propriety of the provisional detention, whereas notice of charges under article 14, paragraph 3(a), serves to facilitate defence against the charges.¹⁰⁵ Accordingly, article 14, paragraph 3(a), requires information concerning the charges to be provided in greater detail than article 9, paragraph 2, does.¹⁰⁶

31. Paragraph 2 requires that the arrested person be informed “promptly” of any charges, not necessarily “at the time of arrest.” If particular charges are already contemplated, the arresting officer may inform the person of both reasons and charges, or the authorities may explain the legal basis of the detention some hours later. The reasons

⁹⁹ See 597/1994, *Grant v. Jamaica*, para. 8 (a State party “is not absolved from its obligation under article 9, paragraph 2, to inform a person of the reasons for his arrest and the charges against him, because of the arresting officer’s opinion that the arrested person is aware of them”).

¹⁰⁰ 526/1993, *Hill & Hill v. Spain*, para. 12.2; 852/1999, *Borisenko v. Hungary*, para. 4.2, 7.3.

¹⁰¹ See 1402/2005, *Krasnova v. Kyrgyzstan*, para. 8.5; General Comment No. 32, para. 42; see Committee on the Rights of the Child, General Comment No. 10, para. 48.

¹⁰² 248/1987, *Campbell v. Jamaica*, para. 6.3; R.8/33, *Buffo Carballal v. Uruguay*, para. 13; 1782/2008, *Aboufaied v. Libya*, para. 7.6. The requirement of being informed about any charges applies to detention for possible military prosecution, regardless of whether the trial of the detainee by a military court would be prohibited by article 14 of the Covenant. 1649/2007, *El Abani v. Algeria*, paras. 7.6, 7.8.

¹⁰³ General Comment No. 32, para. 31.

¹⁰⁴ General Comment No. 32, para. 31; 253/1987, *Kelly v. Jamaica*, para. 5.8.

¹⁰⁵ 248/1987, *Campbell v. Jamaica*, para. 6.3; 1096/2002, *Kurbanov v. Tajikistan*, para. 7.3.

¹⁰⁶ 702/1996, *McLawrence v. Jamaica*, para. 5.9.

must be given in a language that the arrested person understands.¹⁰⁷ [The requirement of prompt notice of charges parallels the requirement under article 9, paragraph 3, that anyone detained on a criminal charge be brought promptly before a judge to determine the lawfulness of the detention. When the State party complies with the latter obligation, normally within forty-eight hours, the Committee considers that articulation of the proposed or suspected charges at the hearing will satisfy the promptness requirement of paragraph 2.] If the authorities have already informed an individual of the charges being investigated prior to making the arrest, then paragraph 2 does not require prompt repetition of the formal charges so long as they communicate the reasons for the arrest.¹⁰⁸

IV. Judicial control of detention in connection with criminal charges

32. The first sentence of paragraph 3 applies to persons “arrested or detained on a criminal charge,” while the second sentence concerns persons “awaiting trial” on a criminal charge. Paragraph 3 applies in connection with ordinary criminal prosecutions, military prosecutions, and other special regimes directed at criminal punishment.¹⁰⁹ [Footnote 109: Paragraph 3 applies to detention for possible military prosecution, regardless of whether the trial of the detainee by a military court would be prohibited by article 14 of the Covenant.] [If detention is based on suspected criminal activity, and no other legal regime in the State party provides a lawful basis for the detention, paragraph 3 also applies.¹¹⁰]

33. Paragraph 3 requires, firstly, that any person arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power. This requirement applies even before formal charges have been asserted, so long as the person is arrested or detained on suspicion of criminal activity.¹¹¹ The right is intended to bring the detention of a person in a criminal investigation or prosecution under judicial control.¹¹² It is inherent to the proper exercise of judicial power that it be exercised by an authority which is independent, objective and impartial in relation to the issues dealt with.¹¹³ Public prosecutors generally lack the institutional objectivity and impartiality necessary to be considered as an officer exercising judicial power under paragraph 3.¹¹⁴

34. While the exact meaning of “promptly” may vary depending on objective circumstances,¹¹⁵ delays must not exceed a few days from the time of arrest.¹¹⁶ In the view

¹⁰⁷ 868/1999, *Wilson v. The Philippines*, paras. 3.3, 7.5; 493/1992, *Griffin v. Spain*, para. 9.2.

¹⁰⁸ 712/1996, *Smirnova v. Russian Federation*, para. 10.3; cf. 1887/2009, *Peirano Basso v. Uruguay*, para. 9.5 (no violation of article 14, paragraph 3(a), where the defendant has been informed of the charges during the preceding extradition process).

¹⁰⁹ 253/1987, *Kelly v. Jamaica*, para. 5.6; 1177/2003, *Wenga and Shadwe v. Democratic Republic of the Congo*, para. 6.3; 1782/2008, *Aboufaied v. Libya*, para. 7.6. Paragraph 3 applies to detention for possible military prosecution, regardless of whether the trial of the detainee by a military court would be prohibited by article 14 of the Covenant. 1813/2008, *Akwanga v. Cameroon*, paras. 7.4, 7.5; 1914/2009, *Musaev v. Uzbekistan*, para. 9.3.

¹¹⁰ 1186/2003, *Titiahonjo v. Cameroon*, paras. 6.5-6.6.

¹¹¹ 1128/2002, *Marques de Morais v. Angola*, paras. 6.3-6.4; 1096/2002, *Kurbanova v. Tajikistan*, para. 7.2.

¹¹² 521/1992, *Kulomin v. Hungary*, para. 11.3; 1914/2009, *Musaev v. Uzbekistan*, para. 9.3.

¹¹³ 959/2000, *Bazarov v. Uzbekistan*, para. 8.2; 521/1992, *Kulomin v. Hungary*, para. 11.3.

¹¹⁴ 1547/2007, *Torobekov v. Kyrgyzstan*, para. 6.2; 1278/2004, *Reshetnikov v. Russian Federation*, para. 8.2; Concluding observations Tajikistan 2005, para. 12.

¹¹⁵ 702/1996, *McLawrence v. Jamaica*, para. 5.6; 2120/2011, *Kovalev v. Belarus*, para. 11.3.

¹¹⁶ 1128/2002, *Marques de Morais v. Angola*, para. 6.3; 277/1988, *Terán Jijón v. Ecuador* (five days not prompt); 702/1996, *McLawrence v. Jamaica*, para. 5.6 (one week not prompt); 625/1995, *Freemantle*

of the Committee, forty-eight hours is ordinarily sufficient to transport the individual and to prepare for the judicial hearing;¹¹⁷ any delay longer than forty-eight hours should be justified by exceptional circumstances.¹¹⁸ Longer detention in the custody of law enforcement officials without judicial control unnecessarily increases the risk of ill-treatment.¹¹⁹ Laws in most States parties fix precise time limits, sometimes shorter than forty-eight hours, and these should also not be exceeded.¹²⁰ An especially strict standard of promptness, such as 24 hours, should apply in the case of juveniles.¹²¹ States parties should include in their reports information concerning the time limits provided in their laws, and concerning how often they are exceeded in practice.

35. The individual must be brought to appear physically before the judge.¹²² The physical presence of detainees at the hearing gives the opportunity for inquiry into the treatment that they received in custody,¹²³ and facilitates immediate transfer to a remand detention centre if continued detention is ordered.¹²⁴ It thus serves as a safeguard for the right to security of person and the right against torture and cruel, inhuman or degrading treatment. Paragraph 3 also makes the bringing of the detainee before the court an automatic obligation that does not depend on the choice or ability of the detainee to assert it.¹²⁵

36. Incommunicado detention that prevents prompt presentation before a judge inherently violates paragraph 3.¹²⁶ Depending on its duration and other facts, incommunicado detention may also violate other rights under the Covenant, including articles 6, 7, 10, and 14.¹²⁷ States parties should permit immediate access to counsel for detainees in criminal cases, from the outset of their detention.¹²⁸

37. Once the individual has been brought before the judge, the judge must decide whether the individual should be released or remanded in custody, for additional investigation or to await trial. If there is no lawful basis for continuing the detention, the

v. Jamaica (four days not prompt); 1096/2002, Kurbanova v. Tajikistan, para. 7.2 (seven days not prompt).

¹¹⁷ 852/1999, Borisenko v. Hungary, para. 7.4; 911/2000, Nazarov v. Uzbekistan, para. 6.2; 1812/2008, Levinov v. Belarus, para. 7.5; Concluding observations Zimbabwe 1998, para. [219]; Gabon 2001, para. 13; Netherlands 2001, para. 13; Ukraine 2007, para. 17; Ethiopia 2011, para. 20. [But see 583/1994, van der Houwen v. Netherlands, (73 hours was prompt)]

¹¹⁸ 852/1999, Borisenko v. Hungary, para. 7.4; 625/1995, Freemantle v. Jamaica, para. 7.4; see also 649/1995, Forbes v. Jamaica, para. 7.2 (transfer from one police lock-up to another did not justify fourteen day delay); 336/1988, Fillastre v. Bolivia, para. 6.4 (budgetary constraints did not justify ten day delay).

¹¹⁹ Concluding observations Zimbabwe 1998, para. [219], Uzbekistan 2001, para. 11, Hungary 2002, para. 8.

¹²⁰ Concluding observations Kenya 2012, para. 18; Cameroon 2010, para. 20; United Republic of Tanzania 2009, para. 21.

¹²¹ See Committee on the Rights of the Child General Comment No. 10, para. 83.

¹²² 289/1988, Wolf v. Panama, para. 6.2; 613/1995, Lechong v. Jamaica, para. 9.5; Concluding observations Ethiopia 2011, para. 20, Maldives 2012, para. 18.

¹²³ See Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, principle 37, approved by UN GA Res. 43/173.

¹²⁴ Cf Concluding observations Azerbaijan 2009, para. 8.

¹²⁵ Concluding observations Republic of Korea 2007, para. 16; 253/1987, Kelly v. Jamaica (individual opinion).

¹²⁶ 1297/2004, Medjnoune v. Algeria, para. 8.7.

¹²⁷ 1781/2008, Berzig [Djebrouni] v. Algeria, paras. 8.4, 8.5, 8.8; 176/1984, Lafuente Peñarrieta v. Bolivia, para. 16.

¹²⁸ Concluding observations Algeria 1998, para. [369]; Kuwait 2000, para. [472]; Togo 2011, para. 19.

judge must order release -- in this respect the hearing required under paragraph 3 also performs the function of proceedings under paragraph 4.¹²⁹ If additional investigation or trial is justified, the judge must decide whether the individual should be released pending further proceedings because detention is not necessary, an issue addressed more fully by the second sentence of paragraph 3. In the view of the Committee, detention on remand should not involve a return to police custody, but rather to a separate facility under different authority, because continuing custody in the hands of the police creates too great a risk of ill-treatment.¹³⁰

38. The second requirement expressed in the first sentence of paragraph 3 is that the person detained is entitled to trial within a reasonable time or to release. This requirement overlaps with the right to be tried without undue delay protected by paragraph 3(c) of article 14, but article 9 applies specifically to periods of pretrial detention, that is, detention between the time of arrest and the time of judgment at first instance.¹³¹ [Footnote 131: During periods when the accused has been released pending trial, or when the individual is detained after conviction at first instance, paragraph 3(c) of article 14 applies.] Extremely prolonged pretrial detention may also violate the presumption of innocence under article 14, paragraph 2.¹³² Persons denied release pending trial must be tried as expeditiously as possible, to the extent consistent with their rights of defence.¹³³ The reasonableness of any delay in bringing the case to trial has to be assessed in the circumstances of each case, taking into account the complexity of the case, the conduct of the accused during the proceeding and the manner in which the matter was dealt with by the executive and judicial authorities.¹³⁴ Impediments to the completion of the investigation may justify additional time,¹³⁵ but general conditions of understaffing or budgetary constraint do not.¹³⁶ When delays become necessary, the court should reconsider alternatives to pretrial detention.¹³⁷ Pretrial detention of juveniles should be avoided, but when it occurs they are entitled to be brought to trial in especially speedy fashion under article 10, paragraph 2(b).¹³⁸

39. The second sentence of paragraph 3 requires that detention in custody of persons awaiting trial shall be the exception rather than the rule. It also specifies that release from such custody may be subject to guarantees of appearance, including appearance for trial, appearance at any other stage of the judicial proceedings, and (should occasion arise)

¹²⁹ Concluding observations Tajikistan 2005, para. 12; Maldives 2012, para. 18; 647/1995, *Pennant v. Jamaica*, para. 8.2; 1128/2002, *Marques de Morais v. Angola*, para. 6.3.

¹³⁰ Concluding observations Uzbekistan 2001, para. 11; Hungary 2002, para. 8; Lithuania 2004, para. 13; Brazil 2006, para. 16.

¹³¹ General Comment No. 32, para. 35; 1397/2005, *Engo v. Cameroon*, para. 7.2. During periods when the accused has been released pending trial, or when the individual is detained after conviction at first instance, paragraph 3(c) of article 14 applies. General Comment No. 32, para. 35; 928/2000, *Boodlal Sooklal v. Trinidad and Tobago*, paras. 4.7-4.8; 938/2000, *Siewpersaud v. Trinidad and Tobago*, para. 6.2.

¹³² 788/1997, *Cagas v. Philippines*, para. 7.3.

¹³³ General Comment No. 32, para. 35; 818/1998, *Sextus v. Trinidad*, para. 7.2.

¹³⁴ 1085/2002, *Taright v. Algeria*, paras. 8.2-8.4; 386/1989, *Koné v. Senegal*, para. 8.6; General Comment No. 32, para. 35; see also 777/1996, *Teesdale v. Trinidad and Tobago*, para. 9.3 (unexplained delay of seventeen months from arrest to conviction violated article 9, paragraph 3 in the circumstances of the case); 614/1995, *Thomas v. Jamaica*, para. 9.6 (delay of nearly fourteen months from arrest to conviction did not violate article 9, paragraph 3 in the overall circumstances of the case).

¹³⁵ 721/1997, *Boodoo v. Trinidad and Tobago*, para. 6.2.

¹³⁶ 336/1988, *Fillastre v. Bolivia*, para. 6.5; 818/1998, *Sextus v. Trinidad and Tobago*, para. 4.2, 7.2.

¹³⁷ 1085/2002, *Taright v. Algeria*, para. 8.3; 721/1997, *Boodoo v. Trinidad and Tobago*, para. 6.2.

¹³⁸ General Comment No. 21, para. 13; see also General Comment No. 32, para. 42; Committee on the Rights of the Child, General Comment No. 10, para. 83.

appearance for execution of the judgment. This sentence applies to persons awaiting trial on criminal charges, that is, after the defendant has been charged, but a similar requirement results from the prohibition of arbitrary detention in paragraph 1.¹³⁹ Detention pending trial must be based on an individualized determination that it is reasonable and necessary in all the circumstances, for such purposes as to prevent flight, interference with evidence or the recurrence of crime.¹⁴⁰ The relevant factors should be specified in law,¹⁴¹ and should not include vague and expansive standards such as “public security.”¹⁴² Pretrial detention should not be mandatory for all defendants charged with a particular crime, without regard to individual circumstances.¹⁴³ Neither should pretrial detention be ordered for a period based on the potential sentence for the crime charged, rather than on a determination of necessity.¹⁴⁴ Courts must examine whether alternatives to pretrial detention, such as bail, electronic bracelets, or other conditions, would render detention unnecessary in the particular case.¹⁴⁵ If the defendant is a foreigner, that fact must not be treated as sufficient to establish that the defendant may flee the jurisdiction.¹⁴⁶ After an initial determination has been made that pretrial detention is necessary, there should be periodic reexamination of whether it continues to be reasonable and necessary in light of possible alternatives.¹⁴⁷ [If the length of time that the defendant has been detained reaches the length of the highest sentence that could be imposed for the crimes charged, the defendant should be released.¹⁴⁸] Pretrial detention of juveniles should be avoided to the fullest extent possible.¹⁴⁹

40. States parties are requested to include in their reports statistics relevant to paragraph 3, including the average and maximum length of detention for persons detained pending trial on criminal charges, and the number of persons held in remand and their percentage in relation to the entire prison population.^[150]

V. The right to take proceedings for release from unlawful or arbitrary detention

41. Paragraph 4 entitles anyone who is deprived of liberty by arrest or detention to take proceedings before a court, in order that the court may decide without delay on the lawfulness of the detention and order release if the detention is not lawful. It enshrines the principle of *habeas corpus*.¹⁵¹ Review of the factual basis of the detention may, in appropriate circumstances, be limited to review of the reasonableness of a prior

¹³⁹ 1128/2002, *Marques de Morais v. Angola*, paras. 6.1, 6.4.

¹⁴⁰ 1502/2006, *Marinich v. Belarus*, para. 10.4; 1940/2010, *Eligio Cedeño v. Venezuela*, para. 7.9; 1547/2007, *Torobekov v. Kyrgyzstan*, para. 6.3; 1887/2009, *Peirano Basso v. Uruguay*, para. 10.2.

¹⁴¹ Concluding observations Republic of Korea 2000, para. [141]; Senegal 1998, para. [63]; Armenia 1999, para. [107]; Kyrgyzstan 2000, para. [393].

¹⁴² Concluding observations Bosnia and Herzegovina, 2007, para. 18.

¹⁴³ Concluding observations Bolivia 1997, para. [208]; Argentina 2001, para. 10; Sri Lanka 2004, para. 13.

¹⁴⁴ Concluding observations Argentina 2001, para. 10; Spain 2009, para. 15.

¹⁴⁵ 1178/2003, *Smantser v. Belarus*, para. 10.3; Concluding observations Argentina 2010, para. 16; Panama 2008, para. 12.

¹⁴⁶ 526/1993, *Hill & Hill v. Spain*, para. 12.3.

¹⁴⁷ 1085/2002, *Taright v. Algeria*, paras. 8.3-8.4; Concluding observations Moldova 2002, para. 11.

¹⁴⁸ Concluding observations Argentina 1995, para. [157].

¹⁴⁹ General Comment No. 32, para. 42; Concluding observations France 1997, para. [404]; Latvia 2004, para. 10; Norway 2011, para. 12; see Committee on the Rights of the Child, General Comment No. 10, para. 80.

¹⁵⁰ [See Revised Reporting Guidelines (CCPR/C/2009/1), para. 59.]

¹⁵¹ 1342/2005, *Gavrilin v. Belarus*, para. 7.4.

determination.¹⁵² Detention within the meaning of paragraph 4 also includes house arrest and solitary confinement.¹⁵³

42. The right applies not only to detention in connection with criminal proceedings, but to military detention, security detention, counter-terrorism detention, involuntary hospitalization, immigration detention, detention for extradition, and wholly groundless arrests.¹⁵⁴ It also applies to detention for vagrancy or drug addiction, and detention of children for educational purposes,¹⁵⁵ and other forms of administrative detention.¹⁵⁶ When a prisoner is serving the minimum duration of a prison sentence as decided by a court of law after a conviction, paragraph 4 does not require subsequent review of the detention.¹⁵⁷ [Footnote 157: Article 14, paragraph 5, however, guarantees criminal defendants the right to a single appeal from an initial conviction to a higher court.]

43. The object of the right is release (either unconditional or conditional¹⁵⁸) from ongoing unlawful detention; compensation for unlawful detention that has already ended is addressed in paragraph 5. Paragraph 4 requires that the reviewing court must have the power to order release from the unlawful detention.¹⁵⁹ Judicial orders of release under paragraph 4 must be complied with.¹⁶⁰

44. Unlawful detention includes detention that was lawful at its inception but has become unlawful, because the individual has completed serving a sentence of imprisonment, or because the circumstances that justify the detention have changed.¹⁶¹ After a court has held that the circumstances justify the detention, an appropriate period of time may pass, depending on the nature of the relevant circumstances, before the individual

¹⁵² 1051/2002, Ahani v. Canada, para. 10.2; 754/1997, A. v. New Zealand, para. 7.3.

¹⁵³ 1460/2006, Yklymova v. Turkmenistan, para. 7.2-7.4 (house arrest); 1172/2003, Madani v. Algeria, para. 8.5 (house arrest); 265/1987, Vuolanne v. Finland, para. 9.5 (solitary confinement); Concluding observations, United Kingdom 2008, para. 17 (control orders including curfews of up to 16 hours).

¹⁵⁴ See 248/1987, Campbell v. Jamaica, para. 6.4 (criminal proceeding); 962/2001, Mulezi v. Democratic Republic of the Congo, para. 5.2 (military detention); 1051/2002, Ahani v. Canada, para. 10.2 (counter-terrorism); 1062/2002, Fijalkowska v. Poland, para. 8.4 (involuntary committal to psychiatric institution); 560/1993, A. v. Australia, para. 9.5 (immigration detention); 291/1988, Torres v. Finland, para. 7.4 (extradition); 414/1990, Mika Miha v. Equatorial Guinea, para. 6.5 (presidential fiat); Concluding observations India 1997, para. [438], Israel 1998, para. [317] (security detention), United Kingdom 2008, para. 17 (counter-terrorism).

¹⁵⁵ 265/1987, Vuolanne v. Finland, para. 9.5; cf. Concluding observations Rwanda 2009, para. 16 (recommending abolition of detention for vagrancy).

¹⁵⁶ Concluding observations Cameroon 1994, para. [204]; Moldova 2002, para. 11; Lithuania 2004, para. 13.

¹⁵⁷ 954/2000, Minogue v. Australia, para. 6.4; 1342/2005, Gavrillin v. Belarus, para. 7.4 (no requirement of review by supervisory procedure of a final judgment). Article 14, paragraph 5, however, guarantees criminal defendants the right to a single appeal from an initial conviction to a higher court. General Comment No. 32, para. 45.

¹⁵⁸ E.g., 473/1991, Barroso v. Panama, paras. 2.4, 8.2 (habeas corpus for bail from pretrial detention).

¹⁵⁹ 1324/2004, Shafiq v. Australia, para. 7.4.

¹⁶⁰ 856/1999, Chambala v. Zambia, para. 7.2 (continued detention after release order amounted to arbitrary detention in violation of article 9, paragraph 1); Concluding observations India 1997.

¹⁶¹ 1090/2002, Rameka v. New Zealand, paras. 7.3-7.4.

is entitled to take proceedings again on similar grounds.¹⁶² Substantial waiting periods before a detainee can bring a first challenge to detention, in contrast, are impermissible.¹⁶³

45. "Unlawful" detention includes both detention that violates domestic law and detention that is incompatible with the requirements of article 9, paragraph 1, or with any other relevant provision of the Covenant.¹⁶⁴ While domestic legal systems may establish differing methods for ensuring court review of administrative detention, paragraph 4 requires that there be a judicial remedy for any detention that is unlawful on one of these grounds.¹⁶⁵ The Committee recommends that the Covenant be made directly applicable in such proceedings, but other frameworks may produce an equivalent effect.¹⁶⁶ For example, the power of a family court to order release of a child from detention that is not in the child's best interests may satisfy the requirements of paragraph 4 in relevant cases.¹⁶⁷

46. Paragraph 4 entitles the individual to take proceedings before "a court," which need not always be a court within the judiciary. For some forms of detention, a different tribunal of a judicial character may provide the necessary degree of impartiality, independence and procedural adequacy to satisfy the requirement.¹⁶⁸ For disciplinary detention of a soldier on active duty, review by a military court may suffice, although review by a superior military officer would not.¹⁶⁹

47. Paragraph 4 leaves the option of taking proceedings to the persons being detained, or those acting on their behalf; unlike paragraph 3, it does not require automatic initiation of review by the authorities detaining an individual.¹⁷⁰ Laws that exclude a particular category of detainees from the review required by paragraph 4 violate the Covenant.¹⁷¹ Practices that render such review effectively unavailable to an individual, including incommunicado detention, also amount to a violation.¹⁷² Summarily expelling an alien while obstructing access to judicial review of the expulsion order amounts to a violation.¹⁷³ Applications for judicial review of administrative decisions that deny protection against refoulement to persons who fear torture, ill-treatment or death should have suspensive effect.¹⁷⁴

48. Persons deprived of liberty are entitled not merely to take proceedings, but to receive a decision, and without delay. The unjustified refusal by a court to consider a petition for the release of a detained person violates paragraph 4.¹⁷⁵ The question of whether

¹⁶² 1090/2002, *Rameka v. New Zealand*, para. 7.3 (annual review of post-conviction preventive detention); 754/1997, *A. v. New Zealand*, para. 7.3 (regular review of involuntary hospitalization); 291/1988, *Torres v. Finland*, para. 7.4 (review every two weeks of detention for extradition).

¹⁶³ 291/1988, *Torres v. Finland*, para. 7.2 (seven days); Concluding observations Sri Lanka 1995 (one year).

¹⁶⁴ 1255/2004 et al., *Shams et al. v. Australia*, para. 7.3; 1460/2006, *Yklymova v. Turkmenistan*, para. 7.4; 1751/2008, *Aboussedra v. Libyan Arab Jamahiriya*, para. 7.6.

¹⁶⁵ 1255/2004 et al., *Shams et al. v. Australia*, para. 7.3.

¹⁶⁶ See General Comment No. 31, paras. 13, 15.

¹⁶⁷ 1069/2002, *Bakhtiyari v. Australia*, para. 9.5.

¹⁶⁸ 1090/2002, *Rameka v. New Zealand*, para. 7.4 (discussing ability of Parole Board to act in judicial fashion as a court); 291/1988, *Torres v. Finland*, para. 7.2 (finding review by the Minister of the Interior insufficient).

¹⁶⁹ 265/1987, *Vuolanne v. Finland*, para. 9.6.

¹⁷⁰ 373/1989, *Stephens v. Jamaica*, para. 9.7.

¹⁷¹ R.1/4, *Torres Ramírez v. Uruguay*, para. 18; 1449/2006, *Umarov v. Uzbekistan*, para. 8.6.

¹⁷² R.1/5, *Hernández Valentini de Bazzano v. Uruguay*, para. 10; 1751/2008, *Aboussedra v. Libyan Arab Jamahiriya*, para. 7.6; 1062/2002, *Fijalkowska v. Poland*, para. 8.4 (state's failures frustrated the ability of a patient to challenge involuntary committal).

¹⁷³ 155/1983, *Hammel v. Madagascar*, para. 19.4.

¹⁷⁴ Concluding observations Ireland 2008, para. 19; Bosnia and Herzegovina 2012, para. 14.

¹⁷⁵ 712/1996, *Smirnova v. Russia*, para. 10.1; 1128/2002, *Marques de Morais v. Angola*, para. 6.5.

a decision has been reached without delay must be assessed on a case-by-case basis.¹⁷⁶ Delays attributable to the petitioner do not count as judicial delay.¹⁷⁷ The Committee has suggested that a period of almost three months between filing for judicial review and the decision at first instance was in principle too extended, at least absent explanation.¹⁷⁸ A delay of seventeen days before examining a challenge to pretrial detention has been found consistent with paragraph 4.¹⁷⁹ [Footnote 179: The Committee did find a violation of paragraph 3, because the pretrial detention had not been brought promptly under the control of a court.] Where review of the security-related detention of an asylum-seeker extended over nine and a half months, the Committee concluded that an interim decision on his detention should have been taken earlier.¹⁸⁰ The Committee has recommended that detention on mental health grounds be judicially reviewed within a few days.¹⁸¹

49. The Covenant does not require that a court decision upholding the lawfulness of detention be subject to appeal. If a State party does provide for appeal or further instances, the standard of delay may reflect the changing nature of the proceeding.¹⁸²

50. States parties are requested to include in their reports statistics relevant to paragraph 4, including the number of cases filed in court seeking release from any form of unlawful detention and their outcome.^[183]

VI. The right to compensation for unlawful or arbitrary arrest or detention

51. Paragraph 5 of article 9 of the Covenant provides that anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation. Like paragraph 4, paragraph 5 articulates a specific example of an effective remedy for human rights violations, which States parties are required to afford. These specific remedies do not replace, but are included alongside, the other remedies that may be required in a particular situation by article 2, paragraph 3 of the Covenant.¹⁸⁴ Whereas paragraph 4 provides a swift remedy for release from ongoing unlawful detention, paragraph 5 clarifies that victims of unlawful arrest or detention are also entitled to financial compensation.

52. Paragraph 5 obliges State parties to establish the legal framework within which compensation can be afforded to victims,¹⁸⁵ as a matter of enforceable right and not as a matter of grace or discretion. It does not specify the precise form of procedure, which may

¹⁷⁶ 291/1988, *Torres v. Finland*, para. 7.3.

¹⁷⁷ 1051/2002, *Ahani v. Canada*, para. 10.3.

¹⁷⁸ 291/1988, *Torres v. Finland*, para. 7.3.

¹⁷⁹ 1178/2003, *Smantser v. Belarus*, para. 9.5. The Committee did find a violation of paragraph 3, because the pretrial detention had not been brought promptly under the control of a court. *Ibid.* para. 10.2.

¹⁸⁰ 1051/2002, *Ahani v. Canada*, para. 10.3.

¹⁸¹ Concluding observations Ireland 2000, para. [450]; see also Concluding observations Estonia 2003, para. 10 (fourteen days of detention for mental health reasons without any review by a court is incompatible with the Covenant); Kyrgyzstan 2000, para. [396] (persons detained on mental health grounds should have prompt access to judicial review).

¹⁸² 1752/2008, *J.S. v. New Zealand*, paras. 6.3-6.4 (finding periods of eight days at first instance, three weeks at second instance, and two months at third instance satisfactory in context).

¹⁸³ [See Revised Reporting Guidelines (CCPR/C/2009/1), paras. 61-62.]

¹⁸⁴ General Comment No. 31, paras. 16, 18; 238/1987, *Bolaños v. Ecuador*, para. (compensation as well as release pending the outcome of the criminal proceedings); 962/2001, *Mulezi v. Democratic Republic of the Congo*, para. 7 (compensation as well as investigation of unlawful arrest and detention).

¹⁸⁵ Concluding observations Guyana 2000, para. [367-368]; United States of America 1995, para. [299]; cf. General Comment No. 32, para. 52 (requirement of compensation for wrongful convictions).

include remedies against the state itself,¹⁸⁶ or against individual state officials responsible for the violation.¹⁸⁷ Paragraph 5 does not require that a single procedure be established providing compensation for all forms of unlawful arrest, but only that an effective system of procedures exist that provides compensation in all the cases covered by paragraph 5. The remedy must not exist merely in theory, but must operate effectively and make payment within a reasonable period of time.¹⁸⁸ Paragraph 5 does not oblige States parties to compensate victims *sua sponte*, but rather permits them to leave commencement of proceedings for compensation to the initiative of the victim.¹⁸⁹

53. Unlawful arrest and detention within the meaning of Paragraph 5 include those arising within either criminal or noncriminal proceedings, or in the absence of any proceedings at all.¹⁹⁰ The “unlawful” character of the arrest or detention may result from violation of domestic law or violation of the Covenant itself, such as substantively arbitrary detention and detention that violates procedural requirements of other paragraphs of article 9.¹⁹¹ However, the fact that a criminal defendant was ultimately acquitted, at first instance or on appeal, does not in and of itself render any preceding detention “unlawful.”¹⁹²

54. The financial compensation required by paragraph 5 relates specifically to the pecuniary and nonpecuniary harms resulting from the unlawful arrest or detention.¹⁹³ When the unlawfulness of the arrest arises from the violation of other human rights, such as freedom of expression, the State party may have further obligations to provide compensation or other reparation in relation to those other violations, as required by article 2, paragraph 3 of the Covenant.¹⁹⁴

55. States parties are requested to include in their reports statistics relevant to paragraph 5, including the number of complaints brought seeking compensation for any form of unlawful detention, against the State party or against individual officers, and their outcome.^[195]

VII. Relationship of article 9 with other articles of the Covenant

56. The procedural and substantive guarantees of article 9 both overlap and interact with other guarantees of the Covenant. Some forms of conduct amount independently to a violation of article 9 and another article, such as delays in criminal proceedings that violate both paragraph 3 of article 9 and paragraph 3(c) of article 14. Other forms of conduct

¹⁸⁶ See Concluding observations Guyana 2000, para. [367]; Cameroon 2010, para. 19.

¹⁸⁷ Concluding observations Argentina 1995, para. [153]; cf. 1432/2005, *Gunaratna v. Sri Lanka*, para. 7.4.

¹⁸⁸ Concluding observations Cameroon 2010, para. 19; United States of America 1995, para. [299]; cf. General Comment No. 32, para. 52.

¹⁸⁹ 414/1990, *Mika Miha v. Equatorial Guinea*, para. 6.5; 962/2001, *Mulezi v. Democratic Republic of the Congo*, para. 5.2; 1134/2002, *Gorji-Dinka v. Cameroon*, para. 4.6.

¹⁹⁰ 754/1997, *A. v. New Zealand*, paras. 6.7, 7.4; 188/1984, *Martínez Portorreal v. Dominican Republic*, para. 11; 328/1988, *Zelaya Blanco v. Nicaragua*, para. 12; 962/2001, *Mulezi v. Democratic Republic of the Congo*, para. 5.2.

¹⁹¹ 1128/2002, *Marques de Morais v. Angola*, para. 6.6; see also 328/1988, *Zelaya Blanco v. Nicaragua*, para. 10.3 (arbitrary detention); 728/1996, *Sahadeo v. Guyana*, para. 11 (violation of article 9(3)); R.2/9, *Santullo Valcada v. Uruguay*, para. 13 (violation of article 9(4)).

¹⁹² 432/1990, *W.B.E. v. Netherlands*, para. 6.5; 963/2001, *Uebergang v. Austria*, para. 4.4.

¹⁹³ 1157/2003, *Coleman v. Australia*, para. 6.3.

¹⁹⁴ See, e.g., 1157/2003, *Coleman v. Australia*, para. 9; 1128/2002, *Marques de Morais v. Angola*, para. 8; General Comment No. 31, para. 16.

¹⁹⁵ [See Revised Reporting Guidelines (CCPR/C/2009/1), para. 61.]

violate article 9 because they violate another article, for example, detention that is arbitrary because it represents punishment for freedom of expression.

57. Article 9 also reinforces the obligations of States parties under the Covenant and under the Optional Protocol to protect individuals against reprisals, including physical intimidation or threats to personal liberty, in retaliation for submitting communications or for providing information to the Committee in connection with a State party's reports.¹⁹⁶

58. The right to life guaranteed by article 6 of the Covenant, including the right to protection of life under article 6, paragraph 1, overlaps with the right to security of person guaranteed by article 9, paragraph 1.¹⁹⁷ The right to personal security may be considered broader to the extent that it also addresses injuries that are not life-threatening.¹⁹⁸ [The right to personal security may also be considered narrower to the extent that it does not address non-intentional risks to life.] Some extreme forms of arbitrary detention are themselves life-threatening, and violate the rights to personal liberty and personal security as well as the right to protection of life (as well as other rights).¹⁹⁹

59. The prohibition of torture and cruel, inhuman or degrading treatment or punishment under article 7 of the Covenant overlaps significantly with both the right to liberty and the right to security in article 9. Arbitrary detention creates risks of ill-treatment, and several of the procedural guarantees in article 9 serve to reduce the likelihood of ill-treatment. Prolonged incommunicado detention violates article 9 and also amounts to ill-treatment or even torture in violation of article 7.²⁰⁰ The right to personal security protects interests in bodily integrity that are also protected by article 7.²⁰¹

60. Several safeguards that are essential for the prevention of torture are also necessary for the protection of persons in any form of detention against arbitrary detention and infringement of personal security.²⁰² Detainees should be held only in facilities officially acknowledged as places of detention.²⁰³ An official register should be kept of the names and places of detention, as well as of the names of persons responsible for their detention, and made readily available and accessible to those concerned, including relatives and friends.²⁰⁴ Prompt and regular access should be given to independent medical personnel and lawyers and, under appropriate supervision when the investigation so requires, to family members.²⁰⁵ Detainees should be promptly informed of their rights, in a language they

¹⁹⁶ See General Comment No. 33, para. 4; 241/1987 and 242/1987, *Birindwa ci Birhashwirwa and Tshisekedi wa Mulumba v. Zaire*, para. 12.5; Concluding observations Maldives 2012, para. 26.

¹⁹⁷ Concluding observations Republic of the Congo 2000, paras. [267-268]; Uganda 2004, para. 12; Democratic Republic of the Congo 2006, para. 15; Philippines 2012, para. 14.

¹⁹⁸ Concluding observations Czech Republic 2006, para. 14; Georgia 2002, para. 14; Hungary 2002, para. 10.

¹⁹⁹ 449/1991, *Mojica v. Dominican Republic*, para. 5.4; 1753/2008, *Guezout v. Algeria*, paras. 8.4, 8.7.

²⁰⁰ 1782/2008, *Aboufaied v. Libya*, paras. 7.4, 7.6; Communication no. 440/1990, *El-Megreisi v. Libyan Arab Jamahiriya*, para. 5.4.

²⁰¹ General Comment No. 20, para. 2.

²⁰² See General Comment No. 20, para. 11; Committee Against Torture, General Comment No. 2, para. 13.

²⁰³ Concluding observations Algeria 2008, para. 11; Sudan 2007, para. 22; United States of America 2006, para. 12; Democratic Republic of the Congo 2006, para. 19.

²⁰⁴ Concluding observations Algeria 2008, para. 11; India 1997, para. [439]; [PCOB] Equatorial Guinea 2004, para. 5.

²⁰⁵ Concluding observations Algeria 2008, para. 11; Armenia 2012, para. 19; Belgium 2011, para. 17; Benin 2005, para. 16; Vietnam 2002, para. 13; Kuwait 2012, para. 19; see Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, principles 17-19, 24, approved by UN GA Res. 43/173; Committee on the Rights of the Child, General Comment No. 10, para. 87.

understand.²⁰⁶ Independent and impartial mechanisms should be established for visiting and inspecting all places of detention, including mental health institutions.²⁰⁷

61. Slavery and other forms of forced labour forbidden by article 8 of the Covenant often involve physical detention or infliction of bodily injury that implicate the rights to personal liberty and personal security under article 9. The motivation to exploit the service of the victim is central to the article 8 violation and may be incidental to the article 9 violation, and the Committee has more often viewed such situations under the rubric of article 8.²⁰⁸

62. Article 10 of the Covenant, involving the rights of persons deprived of liberty, is closely related to article 9. To say that article 9 addresses the fact of detention, while article 10 addresses the conditions of detention, is only approximately true. The right to personal security in article 9, paragraph 1, is relevant to the treatment of both detained and non-detained persons. The conditions prevailing in detention are sometimes relevant to whether detention is arbitrary within the meaning of article 9, and certain conditions of detention (such as denial of access to counsel and family) may result in procedural violations of paragraphs 3 and 4 of article 9. Article 10, paragraph 2(b), reinforces for juveniles the requirement in article 9, paragraph 3, that pretrial detainees be brought to trial expeditiously.

63. The liberty of movement protected by article 12 of the Covenant overlaps with liberty of person protected by article 9. Detention is a particularly severe form of restriction of liberty of movement, but in some circumstances both articles may come into play together.²⁰⁹ Temporary detention, including involuntary transportation, is often used as a means of enforcing restrictions on freedom of movement. Article 9 addresses such uses of detention in the implementation of expulsion, deportation, or extradition, but does not directly address the substance of migration or extradition policies, which may raise issues under article 12 or other provisions such as articles 6, 7, 13, 17, 23, 24, or 26.²¹⁰ Article 13 of the Covenant deals with procedures to be employed in the expulsion (including extradition) of an alien lawfully in the territory of a State party, and interacts with article 9

²⁰⁶ Concluding observations Armenia 2012, para. 19; Belgium 1999, para. [83]; Benin 2005, para. 16; Bosnia and Herzegovina 2007, para. 17; see Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, principles 13-14, approved by UN GA Res. 43/173; United Nations Rules for the Protection of Juveniles Deprived of their Liberty, paras. 24-25, adopted by UN GA Res. 45/113 (regarding explanation of rights to detained juveniles).

²⁰⁷ Concluding observations Algeria 2008, para. 11; Azerbaijan 2009, para. 11; Russian Federation 2010, para. 19 (mental health institutions); Iceland 2012, para. 11 (places of detention, including psychiatric facilities).

²⁰⁸ But see Concluding observations Chad 2009, para. 33 (citing articles 8, 9, and 24 with regard to child soldiers).

²⁰⁹ General Comment No. 27, para. 7; 1134/2002, *Gorji-Dinka v. Cameroon*, para. 5.4, 5.5 (finding house arrest to be a violation of both article 9 and article 12); 241/1987 and 242/1987, *Birindwa ci Birhashwirwa and Tshisekedi wa Mulumba v. Zaire*, paras. 12.2, 13(b) (internal banishment of one author, including internment in military camps, characterized as violation of article 12); 138/1983, *Mpandanjila et al. v. Zaire*, paras. 8, 10 (arbitrary detention in violation of article 9, followed by internal banishment in violation of article 12, accompanied by ill-treatment during the period of banishment in violation of article 10); [Provisional] Concluding observations, Equatorial Guinea 2004, para. 13 (calling for elimination of military roadblocks in connection with both article 9 and article 12).

²¹⁰ 961/2000, *Everett v. Spain*, paras. 6.3-6.6; 1557/2007, *Nystrom v. Australia*, paras. 7.2-7.13.

when the individual is detained either pending the decision or for the purpose of its implementation.²¹¹

64. The overlap between article 9 and article 14 of the Covenant, regarding civil and criminal trials, has already been illustrated. Article 9 addresses deprivations of liberty, only some of which take place in connection with civil or criminal proceedings within the scope of article 14. Article 9, paragraph 1, requires the protection of personal liberty against both formalized and informal government action, and also against deprivation by private parties, whereas article 14 concerns adjudicatory procedures employed by a State party for the resolution of disputes.²¹² The procedural requirements of paragraphs 2 through 5 of article 9 apply in connection with article 14 proceedings only when actual arrest or detention occurs.²¹³

65. In light of article 2, paragraph 1, of the Covenant, States parties have obligations to respect and to ensure the rights under article 9 to all persons who may be within their territory and to all persons subject to their jurisdiction.²¹⁴ Given that arrest and detention bring a person within a state's effective control, States parties must not arbitrarily or unlawfully arrest or detain individuals outside their territory.²¹⁵ States parties must not subject persons outside their territory to prolonged incommunicado detention, or deprive them of review of the lawfulness of their detention.²¹⁶ States parties also must not purport to exercise jurisdiction over persons outside their territory by sentencing them to death without trial.²¹⁷ The extraterritorial location of an arrest may be a circumstance relevant to an evaluation of promptness under paragraph 3.

66. [The Committee has never found that a State party would violate article 9 if it returned an individual to a country where a real risk of a violation of article 9 existed. Given the wide range of actions that may violate article 9, the Covenant does not require a broad rule to that effect. Severe violations of liberty of person or security of person would amount, at a minimum, to inhuman treatment in violation of article 7. Risks of irreparable harm to liberty or security should therefore be considered within the context of articles 6 and 7 of the Covenant.²¹⁸]

67. With regard to article 4 of the Covenant, the Committee first observes that, like the rest of the Covenant, article 9 applies also in situations of armed conflict to which the rules

²¹¹ General Comment No. 15, paras. 9-10; 319/1988, *Cañón García v. Ecuador*, paras. 6.1 (finding violations of article 7, 9 and 13 in irregular removal by narcotics agents); 1051/2002, *Ahani v. Canada*, para. 10.2-10.8 (discussing different aspects of court proceedings with regard to detention and expulsion under articles 9 and 13); 193/1985, *Giry v. Dominican Republic*, paras. 5.4-5.5 (finding violation of article 13 in irregular extradition and not considering article 9 issue; concurring opinion would find violation of article 9 rather than article 13).

²¹² General Comment No. 32, paras. 7, 15.

²¹³ 263/1987, *González del Río v. Peru*, para. 5.1; 1758/2008, *Jessop v. New Zealand*, para. 7.9-7.10.

²¹⁴ General Comment No. 31, para. 10.

²¹⁵ See General Comment No. 31, para. 10; 12/52, *Saldías de López v. Uruguay*, paras. 12.1-13; R.13/56, *Celiberti de Casariego v. Uruguay*, para. 10.1-11; Communications nos. 623/1995 et al., *Domukovsky et al. v. Georgia*, para. 18.2; Concluding observations Croatia 1993, para. [362]; Yugoslavia 1993, para. [388]; Israel 1998, para. [317]; Syrian Arab Republic 2005, para. 8; United States of America 2006, paras. 12, 18.

²¹⁶ Concluding observations, Israel 1998, para. [317]; United States of America 2006, para. 12, 18.

²¹⁷ Concluding observations, Islamic Republic of Iran 1993, para. [256].

²¹⁸ See General Comment No. 31, para. 12.

of international humanitarian law are applicable.²¹⁹ While more specific rules of international law may be especially relevant for the purposes of the interpretation of article 9, both spheres of law are complementary, not mutually exclusive.²²⁰ In conflict situations, access by the International Committee of the Red Cross to all places of detention becomes an essential additional safeguard for the rights to liberty and security of person.²²¹

68. Article 9 is not included in the list of non-derogable rights of article 4, paragraph 2 of the Covenant, but there are limits on States parties' power to derogate. States parties derogating from normal procedures required under article 9 in circumstances of armed conflict or other public emergency must ensure that such derogations do not exceed those strictly required by the exigencies of the actual situation.²²² Derogating measures must also be consistent with a State party's other obligations under international law, and non-discriminatory.²²³ The prohibitions against taking of hostages, abductions or unacknowledged detention are therefore not subject to derogation.²²⁴

69. There are other elements in article 9 that in the Committee's opinion cannot be made subject to lawful derogation under article 4. The fundamental guarantee against arbitrary detention is non-derogable.²²⁵ The existence and nature of a public emergency which threatens the life of the nation may, however, be relevant to a determination of whether a particular arrest or detention is arbitrary. Valid derogations from other derogable rights may also be relevant, when a deprivation of liberty is characterized as arbitrary because of its interference with another right protected by the Covenant. During armed conflict, whether international or non-international, substantive and procedural rules of international humanitarian law become applicable and help to prevent the abuse of a State's emergency powers.²²⁶

70. The procedural guarantees protecting liberty of person may never be made subject to measures of derogation that would circumvent the protection of non-derogable rights.²²⁷ In order to protect non-derogable rights, including those in articles 6 and 7, 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 measures of derogation.²²⁸

71. While reservations to certain clauses of article 9 may be acceptable, it would be incompatible with the object and purpose of the Covenant for a State party to reserve the right to engage in arbitrary arrest and detention of persons.²²⁹

²¹⁹ General Comment No. 31, para. 11; General Comment No. 29, para. 3; Concluding observations India 1997, paras. [433, 438-439]; Israel 1998, para. [317]; Sri Lanka 2004, para. 10, 13; Uganda 2004, para. 12; United States of America 2006, paras. 12, 18; Yemen 2012, paras. 16, 24.

²²⁰ General Comment No. 31, para. 11; General Comment No. 29, para. 3, 12, 16.

²²¹ Concluding observations Bosnia and Herzegovina 1993, para. [332], Russian Federation 1995, para. [390], India 1997, para. [439], Algeria 1998, para. [435], United States of America 2006, para. 12.

²²² General Comment No. 29, paras. 4-5; Concluding observations Syrian Arab Republic 2005, para. 6; Israel 2003, para. 12.

²²³ General Comment No. 29, paras. 8, 9.

²²⁴ General Comment No. 29, para. 13(b).

²²⁵ General Comment No. 29, para. 11.

²²⁶ General Comment No. 29, para. 3.

²²⁷ See General Comment No. 32, para. 6.

²²⁸ General Comment No. 29, para. 16; Concluding observations Israel 1998, para. [317]; Albania 2005, para. 9.

²²⁹ General Comment No. 24, para. 8.