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**COMMENTS ON DRAFT GENERAL COMMENT 35 ON ARTICLE 9 OF THE
INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS AS FINALISED AT
FIRST READING BY THE HUMAN RIGHTS COMMITTEE IN MARCH 2014 DURING
ITS 110TH SESSION**

Submitted on 1 June 2014

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.

INTERNATIONAL COMMISSION OF JURISTS' COMMENTS ON DRAFT GENERAL COMMENT 35 ON ARTICLE 9 OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS AS FINALISED AT FIRST READING BY THE HUMAN RIGHTS COMMITTEE IN MARCH 2014 DURING ITS 110TH SESSION

Introduction

1. The International Commission of Jurists (ICJ) welcomes the opportunity to provide the following comments to the Human Rights Committee (the Committee) on its finalised first reading of draft General Comment 35 on article 9 of the International Covenant on Civil and Political Rights (the Covenant): the right to liberty and security of person and freedom from arbitrary arrest and detention.¹ The ICJ provided a set of initial comments to the Committee on its then ongoing first reading of draft General Comment 35 during its 109th session in October 2013.²

2. The ICJ commends the Committee on its finalised first reading of draft General Comment 35 (hereinafter: "the present draft" or "the draft") and expresses concurrence with much of the text. The present submission is divided into five sections:

I. Comments on section "I. General remarks";

II. Comments on section "II. Arbitrary detention and unlawful detention";

III. Recommendations for strengthening the language on judicial supervision of all forms of deprivation of liberty;

IV. Additional concerns arising from section V. of the present draft; and

V. The *non-refoulement* content of Article 9.

I. Comments on section "I. General remarks"

3. Regarding the duty to protect personal liberty from activities of a foreign state acting within the territory of a state party, set out in the last sentence of para. 8 of the present draft, the ICJ recommends that the Committee's view in *Mohammed Alzery v. Sweden* be added as an additional authority in footnote 29.³

II. Comments on section "II. Arbitrary detention and unlawful detention"

Para. 15 of the present draft

4. This section sets out the ICJ's concerns arising in connection with para. 15's unqualified use of the expressions "the threat to the State" and "a present, direct and imperative threat".

¹ In March 2014, during its 110th session, the Committee finalised its first reading of draft General Comment 35 on article 9 of the Covenant, and invited all interested stakeholders, including "Member States, other UN and regional human rights mechanisms, UN organisations or specialised agencies, National Human Rights Institution, Non-Governmental Organisations (NGOs), research institutions, and academics" to comment on the Committee's Draft; see <http://www.ohchr.org/EN/HRBodies/CCPR/Pages/DGCArticle9.aspx>.

² See, ICJ Initial Comments to the Human Rights Committee on Draft General Comment 35 on Article 9 of the ICCPR, submitted on 16 October 2013, <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2013/10/16-10-13-FINAL-Submission-DRAFT-GC35.pdf>.

³ *Mohammed Alzery v. Sweden*, CCPR/C/88/D/1416/2005, UN Human Rights Committee (HRC), 10 November 2006.

5. In discussing "security detention (sometimes known as administrative detention or internment)", para. 15 of the present draft, on the one hand, speaks of "the threat to the State" arising "in the context of international armed conflict" (IAC) without explicitly qualifying that "the threat" is a "threat to the life of nation"; while, on the other, it also affirms that, outside the IAC context, "under the most exceptional circumstances, a present, direct and imperative threat" may "justify [security] detention of persons considered to present such a threat", again, without clarifying the nature of the threat it purports to address.⁴ As a result, on this point para. 15 is at best ambiguous, particularly given States Parties' widespread resort to internment of those said to present "a threat to national security".
6. In this context, the ICJ notes that Article 4(1) of the Covenant refers exclusively to a "public emergency which threatens the life of the nation" as the only ground justifying the taking of measures derogating from some provisions of the Covenant and -- even then -- it affirms that such measures can only be authorized to the extent strictly required by the exigencies of the situation. Further, the Committee's General Comment No. 29 refers exclusively to "a threat to the life of the nation".⁵ Moreover, the ICJ observes that nowhere does General Comment No. 29 use the terms "a present, direct and imperative threat".
7. The organization is concerned that the reference in para. 15 of the present draft to "a present, direct and imperative threat", particularly when discussing "security detention", i.e. internment, and especially given the reference in the same para. to IAC, will unwittingly give rise to some unhelpful misapprehensions in the interpretation of the General Comment, the Covenant itself, and human rights law more generally. In this context, the ICJ notes that, pursuant to international humanitarian law applicable to IAC, "imperative reasons of security" may justify interment.⁶
8. In this connection, the Committee may be aware that the Legal Division of the International Committee of the Red Cross (ICRC) has been engaged in two separate processes of consultation with states on the one hand, and civil society organizations, on the other, with a view to providing input to "the ICRC's on-going effort to strengthen international humanitarian law" (IHL), including in the area of grounds and procedures for detention, particularly internment, in non-international armed conflict (NIAC).⁷
9. Given that, at present, there is no binding international standard authorizing or setting out procedures for interment or detention in NIAC,⁸ the ICJ is concerned that as currently formulated -- i.e., in particular because of the reference to "a present, direct and imperative threat" -- para. 15 of the present draft will be used by some as authority for the proposition that international human rights law

⁴ Conversely, para. 65 of the present draft does specifically refer to "the existence and nature of a public emergency which threatens the life of the nation".

⁵ General Comment No. 29 on Article 4, adopted at the 1950th meeting, on 24 July 2001, CCPR/C/21/Rev.1/Add.11, paras. 2, 3, 5 and 6.

⁶ Under Article 78 of the 1949 Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, internment in international armed conflicts may be imposed for "imperative reasons of security".

⁷ Among other things, Resolution 1 adopted by the 31st International Conference of the Red Cross and Red Crescent in November 2011 invites the ICRC to consult with states and other relevant actors on strengthening IHL in respect of the protection of persons deprived of their liberty in NIACs. The Resolution also asks the ICRC to report back in 2015 with options and recommendations for a way forward. For more information, see <http://www.icrc.org/eng/what-we-do/other-activities/development-ihl/index.jsp>.

⁸ Neither Common Article 3 of the Geneva Conventions nor Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, provides authority/ground for depriving people of their liberty for reasons related to the armed conflict, whether they are interned or detained. The lawful basis for such deprivation of liberty must therefore be provided in national law.

provides ground/s for (i.e. authority or power of) internment in a NIAC context -- or even outside that context -- even when the national law of the state on whose territory internment occurs does not.⁹

10. In addition, the ICJ is concerned that, as currently formulated, para. 15 may be relied on as authority, on the one hand, to justify internment on the basis of status alone by selectively transposing some IAC rules featured in the Third Geneva Convention of 1949 relative to the Treatment of Prisoners of War to NIAC contexts, while, on the other, simultaneously dispensing with those provisions in the Third Geneva Convention pertaining to the protection of POWs. In light of this, moreover, the ICJ fears that para. 15 may inadvertently be used to justify internment of individuals on the basis of their "status" throughout the course of a NIAC, who may, nonetheless, become liable to criminal prosecutions at the end of the hostilities.

Recommendations about para. 15 of the present draft

11. In place of a reference to "a present, direct and imperative threat" in para. 15, the ICJ recommends that the present draft be amended to reflect the requirement that "security detention" may only take place pursuant to lawful derogating measures and only to the extent strictly required by the exigencies of the situation. Such an amendment would be consistent with the first part of the last sentence of para. 65 of the present draft, which states that "Outside that context, the requirements of strict necessity and proportionality constrain any derogating measures involving security detention, which must be limited in duration and accompanied by procedures to prevent arbitrary application".
12. Furthermore the ICJ recommends that the General Comment should make clear that administrative detention on the basis of status alone, including membership of an organization that is illegal under domestic law, should be addressed through the criminal law and in no way could constitute a lawful ground for internment under the Covenant.
13. The General Comment should emphasize that while IHL governing NIAC contains no provisions in respect of the procedural rights of those subject to "security detention", under the Covenant any measure derogating from the right to liberty and security of person must be "strictly required by the exigencies of the situation" of a public emergency necessitating the derogation, which may be taken only to the extent required, and which must comply with the principle of proportionality and the prohibition of discrimination. Further, the General Comment should also make clear that administrative detention must not be punitive but preventative, and that detention conditions must reflect its non-punitive nature.¹⁰
14. The ICJ urges the Committee to strengthen the present draft by explicitly asserting that administrative or "preventive" security detention is, as a general matter, anathema to respect for human rights, the principle of legality, the rule of law and the separation of powers. In light of this, the organization repeats its previous submission to the Committee that the General Comment should affirm that administrative or other "preventive" detention on security grounds (e.g.

⁹ In this context, the ICJ considers that it should also be borne in mind that several states have for a number of years now expressed doubts as to the applicability of human rights law to NIAC; while other states have been asserting, in particular, that their human rights obligations do not apply extraterritorially in NIAC or IAC, including when they detain individuals extraterritorially.

¹⁰ See, Jelena Pejic's Procedural principles and safeguards for internment/administrative detention in armed conflict and other situations of violence, which now represent the views of the ICRC on these matters, in particular the section entitled "Internment/administrative detention is not an alternative to criminal proceedings", p. 381; International Review of the Red Cross, Volume 87 Number 858 June 2005, pp. 375-391, available at http://www.icrc.org/eng/assets/files/other/irrc_858_pejic.pdf.

interment) where there is no intention to bring criminal charges within a reasonable time is in principle not capable of justification in the absence of a valid derogation in a declared state of emergency.¹¹

Further concerns about para. 15 of the present draft and recommendations addressing them

15. In addition to the concerns noted above in connection with para. 15 of the present draft, the ICJ is also concerned that para. 15 provides too limited a formulation of the detainee's right to disclosure of the evidence on which the decision to detain is taken. Such limited formulation may unwittingly render the effectiveness of the review illusory, as detainees and their representatives would not be able to challenge the reasons for detention effectively. The ICJ considers that limiting disclosure would be inconsistent with the principle of equality of arms.¹²
16. The organization recommends that the General Comment should instead make clear that any limitation on disclosure of the evidence on which the decision to detain is taken, including on the grounds of national security, should be decided by court, the latter preferably being a different one from that which would hear the challenge to detention and/or review its reasons. Further, any limitation on disclosure must be counterbalanced by safeguards to ensure that detainees can challenge the lawfulness of their detention effectively by being provided with sufficient evidence of its reasons.¹³ In this connection, the ICJ draws the Committee's attention to the fact that when reviewing a case in which information had been withheld from the detainee and his lawyer, purportedly to prevent the suspect from tampering with evidence, the European Court clarified that information essential for assessing the lawfulness of detention should be made available in an appropriate manner to the suspect's lawyer.¹⁴ The organization considers that the current formulation in para. 15 falls short of this disclosure standard, including because of its reference to "the essence of the evidence" rather than, for instance, calling for disclosure of **essential** details.
17. The ICJ is also concerned that footnote 48 in para. 15 of the present draft fails to reflect the fact that immigration detention powers have been used to intern individuals indefinitely, without charge or trial, on the basis that they were said to present a "national security threat".¹⁵ Indeed, para. 18 of the present draft acknowledges this eventuality and refers to immigration detention for purposes other than immigration control in connection with the detention of asylum-seekers on the basis of the existence of a "risk of acts against national security". Further, the use of mental health legislation for the purposes of incarcerating political dissidents, activists, lawyers, etc. in psychiatric institutions is well documented in various countries.¹⁶

¹¹ ICJ Initial Comments to the Human Rights Committee on Draft General Comment 35 on Article 9 of the ICCPR, op. cit., paras. 18-23.

¹² In this context, the ICJ notes that even the ICRC's position on disclosure is broader, see Procedural principles and safeguards for internment/administrative detention in armed conflict and other situations of violence, op. cit., the section entitled "Right to information about the reasons for internment/administrative detention", p. 384.

¹³ *Lebedev v Russia* (493/04), European Court (2007) para. 77; *A and Others v United Kingdom* (3455/05) European Court Grand Chamber (2009) paras. 202-224 (particularly 205, 218-224).

¹⁴ *Garcia Alva v Germany* (23541/94), European Court (2001) para. 42.

¹⁵ See, e.g. the UK's Part IV of the Anti-terrorism, Crime and Security Act 2001, which bolted onto immigration legislation powers to detain foreign nationals said to pose a threat to the UK's national security indefinitely, without charge or trial.

¹⁶ See, e.g. ICJ, Kazakhstan: Psychiatric detention of lawyer must be ended, 3 September 2013, <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2013/09/Statement-Kazakhstan-030913.pdf>.

18. In light of this, the ICJ recommends that footnote 48 of the present draft be deleted since the real motives behind States Parties' resort to "security detention" are the determinant factors, rather than the type of legislation used to enforce it.

Paras. 15, 45 and 65 of the present draft

19. This section sets out the ICJ's concern in respect of certain elements of paras. 15, 45 and 65. Namely, that if those paras. were adopted as currently formulated in the present draft, the General Comment would assert that, in certain circumstances, there is no requirement for:

- a) judicial supervision of detention pursuant to Article 9(3); or
- b) for a judge to preside over proceedings brought pursuant to Article 9(4) of the Covenant to challenge the lawfulness of detention.

20. The ICJ wishes to draw the Committee's attention to the worrying fact that elements of the present draft have been cited, including by ICRC officials, in support of the proposition that it would be consistent with the Covenant, in particular, and human rights law more generally, if the body reviewing detention initially and/or periodically and/or hearing *habeas*-type challenges to the lawfulness of detention was not a judicial body or court so long as it were "independent and impartial". Simultaneously, they also appeared to have erroneously conflated detention reviews with *habeas*-type challenges to the lawfulness of detention.

21. Indeed paras. 15, 45 and 65 of in the present draft may be cited as authority for these propositions given that:

- a) para. 15 refers to "Prompt and regular review by a court or other tribunal possessing the same attributes of independence and impartiality as the judiciary" (emphasis added);
- b) while para. 45, in turn, affirms that "Paragraph 4 entitles the individual to take proceedings before "a court," which should ordinarily be a court within the judiciary. Exceptionally, for some forms of detention, legislation may provide for proceedings before a tribunal outside the judiciary" (emphasis added); and infers by its language that not all bodies hearing such challenges need to be **both** independent of the legislative and executive branches of government, **and** independent and impartial when deciding legal matters in proceedings that are judicial in nature;¹⁷ and
- c) para. 65 speaks of "review by a court or an equivalently independent and impartial tribunal", (emphasis added).

22. In light of this, the ICJ is particularly concerned that the above-mentioned formulations in paras. 15, 45 and 65 do not require **judicial supervision** of detention under Article 9(3) nor the right to a *habeas*-type challenge to the lawfulness of detention under Article 9(4) before a **judge/court**. As presently formulated, those shortcomings may unwittingly be exploited to justify holding people in administrative detention without access to a judge or court, under Article 9(3) or 9(4) of the Covenant.

23. Indeed, on both of these counts, these formulations are inconsistent with the Covenant itself, since Article 9(3), on the one hand, speaks of "a judge or other officer authorized by law to exercise judicial power", as well as of "judicial proceedings";¹⁸ while Article 9(4), on the other, refers to "proceedings before a court".¹⁹

¹⁷ In addition, it implies that those presiding over the body hearing the challenge need not have legal training and expertise.

¹⁸ In addition to the Covenant itself, see, as applicable only in criminal cases, Article 16(6) of the Migrant Workers Convention, Article 14(5) of the Arab Charter, Article 5(3) of the European

24. In addition and for the same reasons, paras. 15, 45 and 65 fall short of the pertinent formulations in other General Comments²⁰ and recommendations by the Committee on these matters.²¹ Further, notwithstanding the fact that the right to take proceedings to challenge the lawfulness of detention before a court is not listed in Article 4 among the non-derogable provisions of the Covenant, the Committee has determined that Article 9(4) is non-derogable as an essential element of the right to liberty and security of person and must be preserved under any circumstances.²² Such a right must always apply, even in times of

Convention, Section M(3) of the Principles on Fair Trial in Africa, Article 59(2) of the ICC Statute. Further, see, as applicable to all people deprived of liberty, i.e. beyond the criminal context, Article 7(5) of the American Convention, Article XI of the Inter-American Convention on Disappearance, Principles 4 and 11(1) of the Body of Principles, Article 10(1) of the Declaration on Disappearance, Guideline 27 of the Robben Island Guidelines.

¹⁹ HRC: *Vuolanne v Finland*, UN Doc. CCPR/C/35/D/265/1987 (1989) paras. 9.6-10, *Umarova v Uzbekistan*, UN Doc. CCPR/C/100/D/1449/2006 (2010) para. 8.6; *Kulov v Kyrgyzstan*, UN Doc. CCPR/C/99/D/1369/2005 (2010) para. 8.5; *Constitutional Rights Project v Nigeria* (153/96), African Commission, 13th Annual Report (1999) paras. 11-18; Inter-American Court: *Chaparro Álvarez and Lapo Íñiguez v Ecuador*, (2007) para. 128, *Habeas Corpus* in Emergency Situations Advisory Opinion OC-8/87 (1987) para. 42; European Court: *Ramishvili and Kokhreidze v Georgia*, (1704/06), (2009) paras. 128-136; see *Varbanov v Bulgaria* (31365/96), (2000) paras. 58-61.

²⁰ General Comment No. 29, for example, affirms that "In order to protect non-derogable rights, 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", op. cit. para. 16 (**emphasis added**). See also, paras. 14, 15 and the remainder of para. 16 in General Comment 29. See also General Comment no. 8: Article 9 (Right to liberty and security of persons), Sixteenth session (1982), para. 4: "Also if so-called preventive detention is used, for reasons of public security, it must be controlled by these same provisions, i.e. ... **and court control of the detention must be available** (para. 4) ...", (**emphasis added**).

²¹ See, e.g., the Concluding Observations of the Committee on the USA in 2006, UN Doc. CCPR/C/USA/CO/3/REV.1 (2006) para. 18, when the Committee raised concern that the initial bodies that reviewed the detention of individuals held at Guantánamo Bay failed to meet the requirements of independence essential to the notion of a "court", due to their lack of independence from the executive and army and that the release of a detainee was not guaranteed, even if those bodies determined that the individual should no longer be held. In particular, the Committee expressed concern that "following the Supreme Court ruling in *Rasul v. Bush* (2004), proceedings before Combatant Status Review Tribunals (CSRTs) and Administrative Review Boards (ARBs), mandated respectively to determine and review the status of detainees, may not offer adequate safeguards of due process, in particular due to: (a) their lack of independence from the executive branch and the army, (b) restrictions on the rights of detainees to have access to all proceedings and evidence, (c) the inevitable difficulty CSRTs and ARBs face in summoning witnesses, and (d) the possibility given to CSRTs and ARBs, under Section 1005 of the 2005 Detainee Treatment Act, to weigh evidence obtained by coercion for its probative value. The Committee is further concerned that detention in other locations, such as Afghanistan and Iraq, is reviewed by mechanisms providing even fewer guarantees. (article 9) The State party should ensure, in accordance with article 9 (4) of the Covenant, that persons detained in Guantanamo Bay are entitled to proceedings before a court to decide, without delay, on the lawfulness of their detention or order their release. Due process, independence of the reviewing courts from the executive branch and the army, access of detainees to counsel of their choice and to all proceedings and evidence, should be guaranteed in this regard".

²² See HRC, General Comment No. 29, op. cit. paras. 14, 15 and 16. See also, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 32. This is also consistent with international human rights law in general, including the jurisprudence of international and regional human rights bodies, see Concluding Observations of the HRC: Japan, CCPR/C/79/Add.102, 19 November 1998, para. 24; the Concluding Observations of the HRC: 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 HRC:

emergency. It safeguards the right to liberty and other rights, including non-derogable rights such as the right to be free from torture and other ill-treatment.²³

25. Therefore, the adoption of paras. 15, 45 and 65 as currently formulated would represent a most regrettable, regressive step, which could lead to diminishing rather than enhancing protection of detained individuals, including those interned on grounds of security within or outside the context of NIAC.

Recommendations about paras. 15, 45 and 65 of the present draft

26. In light of the concerns set out above, the ICJ urges the Committee to make it clear that, at all times, whether in the context of proceedings pursuant to Article 9(3) or Article 9(4), the body reviewing the lawfulness of detention must be a court that is impartial and independent of the executive. To this end:

- para. 15, in particular, and para. 65 which refers back to it, should be amended: a) to emphasize that a review pursuant to Article 9(3) must be before a judge or judicial authority, in order to ensure judicial supervision of detention; and b) to indicate that all courts or judicial authorities exercising such functions must be independent of both the legislative and executive branches of government **and** (not "or") enjoy independence in deciding legal matters in proceedings that are judicial in nature, **as well as being impartial**; and
- the following words should be deleted from para. 45 "Exceptionally, for some forms of detention, legislation may provide for proceedings before a tribunal outside the judiciary, which must be established by law, and must either be independent of the executive and legislative branches or must enjoy judicial independence in deciding legal matters in proceedings that are judicial in nature."

27. The ICJ also recommends that the Committee ensure that General Comment 35 make it clearer than is currently set out in para. 46 (regarding Article 9(4)) that the right itself and the procedures to give effect to the right to be brought promptly before "a judge or other officer authorized by law to exercise judicial power" envisaged under Article 9(3) of the Covenant is distinct from the right and the procedures contemplated by Article 9(4) and initiated by or on behalf of the detainee, such as *habeas corpus* or *amparo*, and from regular periodic administrative review of detention.²⁴ The availability of *habeas corpus* or other such procedures does not excuse a state's failure to bring a detainee promptly before a judicial authority.²⁵

III. Suggestions for strengthening the language on judicial supervision of all forms of deprivation of liberty

28. The ICJ welcomes the fact that the Committee has already resolved to clarify and strengthen the language on judicial supervision of all deprivations of liberty. In

Dominican Republic, CCPR/CO/71/DOM, 26 March 2001. Further, during non-international armed conflict, the right to fair trial continues with all judicial guarantees. See ICRC, Rule 100.

²³ HRC General Comment 29, op. cit. para. 16; Inter-American Court: Advisory Opinion OC-8/87 (1987) para. 41(1) and para. 42; CHR resolution 1992/35, para. 2; UN Mechanisms Joint Report on secret detention, UN Doc. A/HRC/13/42 (2010), paras. 46-47; WGAD, UN Doc. A/HRC/7/4 (2008) para. 67, 82(a); SPT: Honduras, UN Doc. CAT/OP/HND/1 (2010), para. 282(a)-(b).

²⁴ European Court: *McKay v United Kingdom* (543/03), Grand Chamber (2006) para. 34, *De Jong, Baljet and Van den Brink v the Netherlands* (8805/79 8806/79 9242/81), (1984) paras. 51, 57, *Jecius v Lithuania* (34578/1997), (2000) para. 84.

²⁵ *De Jong, Baljet and Van den Brink v the Netherlands* (8805/79, 8806/79, 9242/81), European Court (1984) paras. 51, 57; *Berry v Jamaica*, HRC, UN Doc. CCPR/C/50/D/330/1988 (1994) para. 11.1.

this context, the ICJ commends the affirmation of the right of those detained in the mental health context to "initial and periodic judicial review of the lawfulness of detention" set out in para 19.

29. In the last sentence in para. 10 of the present draft, the Committee affirms that "Paragraph 1 requires that deprivations of liberty.... must be carried out with respect for the rule of law." Further, in elucidating Article 9(3) of the Covenant, para. 32 of the present draft affirms that "The right is intended to bring the detention of a person in a criminal investigation or prosecution under judicial control." Further, the last sentence in para. 12 of the present draft affirms that "Aside from judicially imposed sentences for a fixed period of time, the decision to keep a person in detention is arbitrary if it is not subject to periodic re-evaluation of the justification for continuing the detention."
30. In this context the ICJ notes that indeed any form of detention without judicial control is inconsistent with the rule of law, the separation of powers, the principle of legality and the right to liberty and security of person, as well as other human rights.
31. Further, the organization considers that the very same reasons for which the Committee has held the guarantee in Article 9(4) to be non-derogable in any circumstances (as stated above), apply, *mutatis mutandis*, to the need to ensure that any individual under any form of detention should be brought promptly before a judge or other officer authorized by law to exercise judicial power promptly after the commencement of his or her deprivation of liberty and periodically thereafter, automatically, throughout the duration of the detention, so that its lawfulness may be determined, and reassessed at regular intervals, to ensure compliance with the right liberty and security of person, other human rights, as well as the principle of legality, the rule of law and the separation powers. "To hold the contrary view -- that is, that the executive branch is under no obligation to give reasons for a detention and may prolong such a detention indefinitely.... without bringing the detainee before a judge ...would, in the opinion of the Commission, be equivalent to attributing uniquely judicial functions to the executive branch, which would violate the principle of separation of powers, a basic characteristic of the rule of law and of democratic systems."²⁶
32. In light of the above, at a minimum, the ICJ would recommend that the same language used in para. 18,²⁷ and in particular in para. 19 in relation to the mental health detention context, including that the review should be judicial in character, be adopted to address any detention in any context.
33. Given the importance of judicial supervision of detention to securing respect for the right to liberty and other human rights, the ICJ also recommends the Committee elaborate further, for instance by adopting additional text along the following lines:

"While article 9(3) expressly requires that anyone detained under criminal charge be brought promptly before a judge or other officer authorized by law to exercise judicial power, adoption of the same practice for all persons

²⁶ *Habeas Corpus* in Emergency Situations (Arts. 27(2) and 7(6) of the American Convention on Human Rights), Advisory Opinion OC-8/87, op. cit., para. 12.

²⁷ However, the ICJ notes that the formulation in para. 18 concerning immigration detention falls short of the UN High Commissioner for Refugees' *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012; see in particular, Guideline 7 entitled "Decisions to detain or to extend detention must be subject to minimum procedural safeguards", available at: <http://www.refworld.org/docid/503489533b8.html>.

deprived of liberty on any ground would serve as a fundamental safeguard against arbitrary detention, as well as other human rights violations.²⁸

"States are under a corresponding obligation to ensure that all forms of detention or imprisonment be ordered by, or subject to, the effective control of a judicial authority, including through regular, periodic judicial review of the lawfulness of detention.

"Judicial oversight of detention serves to safeguard the right to liberty and in criminal cases, the presumption of innocence. It also aims to prevent human rights violations, including torture or other ill-treatment, arbitrary detention and enforced disappearance. It ensures that detainees are not exclusively at the mercy of the authorities detaining them.

"The purposes of bringing the detainee promptly before a judge include:

- to assess whether sufficient legal reasons exist for the arrest or detention, and to order release if not,
- to safeguard the well-being of the detainee,
- to prevent violations of the detainee's rights,
- if the initial detention or arrest was lawful, to assess whether the individual should be released from custody and if any conditions should be imposed.

"States have an obligation to ensure that people arrested or detained are brought before a judge promptly, regardless of whether a detainee challenges their detention. This procedure is distinct from procedures contemplated by article 9(4) and initiated by or on behalf of the detainee, such as *habeas corpus* or *amparo*, and from regular periodic administrative review of detention. The availability of habeas corpus or other such procedures does not excuse a state's failure to bring a detainee promptly before a judicial authority."

34. The ICJ recommends that the word "only"²⁹ in para. 4 of the present draft be replaced with "expressly" so as to ensure consistency with the above-mentioned language set out in paras 18 and 19 of the draft, and also, if they are adopted, with the suggestions contained above for strengthening the language on judicial supervision of all forms of deprivation of liberty.

IV. Additional concerns arising from section V. of the present draft³⁰

35. The ICJ is concerned that paragraph 41 of the present draft, when read in conjunction with para. 48, would appear to indicate that a ruling in the context of Article 9(4) proceedings that detention of an individual is unlawful is appealable, while a ruling that the detention of an individual is lawful is not. Moreover, the organization is concerned that, pursuant to the present wording of para. 41, an

²⁸ See e.g. Declaration on the Protection of all Persons from Enforced Disappearance, General Assembly resolution 47/133 of 18 December 1992, Article 10(1); Commission on Human Rights resolution 2005/27 on enforced or involuntary disappearances, paragraph 4(c); UN General Assembly resolution 65/205 on torture and other cruel, inhuman or degrading treatment or punishment adopted on 21 December 2010, paragraph 20; General Assembly resolution 67/180 on enforced or involuntary disappearances, 20 December 2012, paragraphs 7 and 8; Human Rights Committee, Concluding Observations on Vietnam, UN Doc CCPR/CO/75/VNM (5 August 2002), para 8. See also Principle 4 of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UN General Assembly resolution 43/173 of 9 December 1988.

²⁹ The relevant sentence in para. 4 reads as follows: "Some of the provisions of article 9 (part of paragraph 2 and the whole of paragraph 3) apply only in connection with criminal charges", (emphasis added).

³⁰ Section V. is entitled "The right to take proceedings for release from unlawful or arbitrary detention", see para. 39 to 48 of the present draft.

order for immediate release following a judicial decision that detention is unlawful is not immediately executable, but requires execution before becoming "operative" (*exécutoire*).

36. In light of this, the ICJ recommends that the last sentence of para. 41 be amended to read: "if the detention is ruled to be unlawful, the court must order release; such order must be complied with immediately; continued detention would be arbitrary, in violation of Article 9, paragraph 1".
37. Further, para. 48, in turn, should be amended as follows: the first sentence, should be deleted in its entirety; and, in the remaining sentence, the words "or further instances" should also be deleted. Therefore, para. 48 would read: "If a State party does provide for appeal, the standard of delay may reflect the changing nature of the proceeding" (footnote in the original omitted), if the suggested deletions are adopted.
38. The ICJ is concerned about the last sentence in para. 43 of the draft and is not aware of any authority that supports it.³¹ Detainees may be at risk of ill-treatment, for instance, even following a judicial decision to remand them to custody, particularly in circumstances where such remand is in the custody of the investigating authorities or when the detainee may be transferred back to them during remand. The risk of ill-treatment may be even greater in situations where the individuals concerned do not have prompt and regular access to a lawyer. As a result, the ICJ would recommend deletion of the last sentence of para. 43.

V. The *non-refoulement* content of Article 9

39. While the ICJ considers that para. 57 of the draft constitutes a welcome improvement from its precursor,³² the organization is concerned that the *non-refoulement* content of Article 9 continues to be inadequately canvassed, since, as presently formulated, it appears to be framed not in terms of a violation of Article 9 in its own right, but exclusively in conjunction with Article 7 of the Covenant. While the ICJ concurs with much of what para. 57 affirms, the organization considers that its present wording is both too prescriptive and too restrictive and, as such, it is inconsistent with and fails to reflect the following:
- a) General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, para. 12 of which states, *inter alia*, "12. Moreover, the article 2 obligation requiring that States parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by Articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed."
 - b) the jurisprudence of the Committee, notably in the case of *G.T. v. Australia*,³³ which does not rule out the possibility of finding in future

³¹ It reads: "In criminal proceedings, once detention has been upheld in a prompt hearing before a judge in compliance with article 9, paragraph 3, an appropriate period of time may pass before the individual is entitled to take additional proceedings under article 9, paragraph 4."

³² What then was para. 66 in UN Doc CCPR/C/107/R.3 (28 January 2013).

³³ The Committee's point of departure in its detailed consideration of the evidence in *G.T. v. Australia*, CCPR/C/61/D/706/1996 (4 December 1997) was that a State may violate its obligations if it deports a person in the face of a real risk that the individual's rights "under the Covenant" would be violated in another jurisdiction (para 8.2) as well the existence as a matter of principle of *non-refoulement* obligations under Article 9 (para 8.7). However, the Committee

- cases a violation of the States Parties' *non-refoulement* obligations arising pursuant to Article 9;
- c) international refugee law;³⁴
 - d) the jurisprudence of the European Court of Human Rights;³⁵
 - e) the approach of the Working Group on Arbitrary Detention;³⁶
 - f) the opening sentence of para. 7 of the draft of General Comment 35 which affirms that "The right to security of person protects individuals against intentional infliction of bodily or mental injury, regardless of whether the victim is detained or non-detained";
 - g) para. 14 of the present draft of General Comment 35, the Committee affirms, among other things that "Although conditions of detention are addressed primarily by articles 7 and 10, detention may be arbitrary if the manner in which the detainees are treated does not relate to the purpose for which they are ostensibly being detained"; and
 - h) the whole of para. 17 of the present draft.³⁷

40. In light of the above, the ICJ would welcome the inclusion of a statement to the effect that *non-refoulement* obligations under Article 9 arise when States Parties know or ought to know that the removal of a person from their jurisdiction would expose the concerned individual to a real risk of a serious violation of article 9, such as prolonged incommunicado detention. *Non-refoulement* obligations enjoin States from removing the concerned person from their jurisdiction by whatever means and/or require them to take all necessary measures to prevent third parties from doing so.

did not find that the case of a potential violation by Australia of its *non-refoulement* obligations in proceeding with the removal of the complainant's husband to Malaysia had been made out on the evidence (para 8.7).

³⁴ See, inter alia, the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees HCR/IP/4/Eng/REV.1, para 51, "There is no universally accepted definition of 'persecution', and various attempts to formulate such a definition have met with little success. From Article 33 of the 1951 Convention, it may be inferred that a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution. Other serious violations of human rights -- for the same reasons -- would also constitute persecution."

³⁵ European Court, *Othman (Abu Qatada) v. the United Kingdom*, Application no 8139/09 (17 January 2012), paras 226-235; European Court (Grand Chamber), *El-Masri v. the former Yugoslav Republic of Macedonia*, Application No 39630/09 (13 December 2012), para 239.

³⁶ Report of the Working Group on Arbitrary Detention, UN Doc A/HRC/4/40 (9 January 2007), para 49.

³⁷ Para. 17 affirms that "Arrest or detention as punishment for the legitimate exercise of rights as guaranteed by the Covenant is arbitrary, including freedom of opinion and expression (article 19), freedom of assembly (article 21), freedom of association (article 22), freedom of religion (article 18), and the right to privacy (article 17). Arrest or detention on discriminatory grounds in violation of article 2, paragraph 1, article 3, or article 26 may also be arbitrary. Retroactive criminal punishment in violation of article 15 amounts to arbitrary detention. Enforced disappearances violate numerous substantive and procedural provisions of the Covenant, and constitute a particularly aggravated form of arbitrary detention. Imprisonment after a manifestly unfair trial is arbitrary, but not every violation of the specific procedural guarantees for criminal defendants in article 14 results in arbitrary detention", (footnotes in the original omitted).