

**THE HUMAN RIGHTS
COMMITTEE'S NEW
GENERAL COMMENT ON
THE RIGHT TO LIBERTY
AND SECURITY OF
PERSON**

AMNESTY INTERNATIONAL'S
PRELIMINARY OBSERVATIONS

**AMNESTY
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THE HUMAN RIGHTS COMMITTEE'S NEW GENERAL COMMENT ON THE RIGHT TO LIBERTY AND SECURITY OF PERSON

AMNESTY INTERNATIONAL'S PRELIMINARY OBSERVATIONS

Following the Human Rights Committee's decision to hold a general day of discussion on the preparation for a new General Comment on article 9 of the International Covenant on Civil and Political Rights (ICCPR), Amnesty International welcomes the opportunity to provide the following preliminary observations on the right to liberty and security of person. Rather than exhaustively reviewing all issues relevant to this right, this submission aims to inform the current process by providing elements of interpretation on some of its key aspects. In addition to the Human Rights Committee's practice, which forms the primary source of interpretation of article 9 ICCPR, this document also draws on pertinent international and regional standards, rulings, decisions and observations with a view to providing supplemental authority for the Committee's consideration.

I.- UNLAWFUL AND ARBITRARY DEPRIVATION OF LIBERTY

According to article 9(1) ICCPR, no one shall be deprived of his or her liberty except on such grounds and in accordance with such procedure as are established by law.¹ The principle of legality, including legal certainty and predictability, demands among others for the law to have a certain level of precision. This requirement is of particular importance when one looks at the lawfulness of what constitutes a major restriction to such an essential aspect of human dignity as the right to liberty of person.² The threshold necessary for this requirement to be

¹ As made clear by this provision, both the procedural and the substantive aspects of the deprivation of liberty must be established by law.

² Article 15(1) ICCPR, which contains the principle *nullum crimen sine lege* and is directly relevant to the interpretation of article 9(1) ICCPR, similarly demands a sufficient level of legal certainty; see, *inter alia*, Human Rights Committee, *Concluding observations on Ethiopia*, CCPR/C/ETH/CO/1, para. 15 (“[...] The State party should ensure that its anti-terrorism legislation defines the nature of those acts with sufficient precision to enable individuals to regulate their conduct accordingly [...]”). This requirement was recalled in similar terms by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; see Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, *Report to the Commission on Human Rights*, E/CN.4/2006/98, para. 46 (“The first requirement of article 15, paragraph 1, [ICCPR] is that the prohibition of terrorist conduct must be undertaken by national or international prescriptions of law. To be ‘prescribed by law’ the prohibition must be framed in such a way that: the law is adequately accessible so that the individual has a proper indication of how the law limits

fulfilled should be set at a sufficiently high level to provide an adequate basis justifying the initial and continuing deprivation of liberty.³ Moreover, not only must all possible restriction on liberty of person be prescribed clearly in the law, but such restrictions should be narrowly interpreted.⁴

To be considered lawful, deprivation of liberty must be compatible with international law as well as domestic law. In particular, the grounds and procedure established by law must conform to international law and the deprivation of liberty must be neither arbitrary (article 9(1) ICCPR), nor violate the safeguards contained in article 9(2) to 9(4) ICCPR or other rights under the Covenant.⁵

his or her conduct; and the law is formulated with sufficient precision so that the individual can regulate his or her conduct”).

³ In its analysis of the right to liberty and security of person under article 5 of the European Convention on Human Rights, the Grand Chamber of the European Court of Human Rights has underlined the particular importance of the principle of legal certainty as follows: “The Court stresses that where deprivation of liberty is concerned it is particularly important that the general principle of legal certainty be satisfied. It is therefore essential that the conditions for deprivation of liberty under domestic and/or international law be clearly defined and that the law itself be foreseeable in its application, so that it meets the standard of “lawfulness” set by the Convention, a standard which requires that all law be sufficiently precise to avoid all risk of arbitrariness and to allow the citizen – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances of the case, the consequences which a given action may entail”, European Court of Human Rights, *Medvedyev and others v. France*, Application No. 3394/03, 29 March 2010 (Grand Chamber), para. 80.

⁴ This is the approach taken by the European Court of Human Rights when looking at the various permissible deprivations of liberty listed in article 5 ECHR, see for instance European Court of Human Rights, *Medvedyev and others v. France*, Application No.3394/03, 29 March 2010 (Grand Chamber), para. 78 (“The list of exceptions to the right to liberty secured in Article 5 § 1 is an exhaustive one [...], and only a narrow interpretation of those exceptions is consistent with the aim of that provision”). See also European Court of Human Rights, *Kurt v Turkey*, Application No. 15/1997/799/1002, para. 122 (“[...] Article 5 § 1 circumscribes the circumstances in which individuals may be lawfully deprived of their liberty, it being stressed that these circumstances must be given a narrow interpretation having regard to the fact that they constitute exceptions to a most basic guarantee of individual freedom”). For instance, article 5(1)(c) ECHR allows for the lawful arrest or detention of a person effected for the purpose of bringing that person before the competent legal authority “on reasonable suspicion” of having committed an offence. The Court has interpreted such reasonable suspicion as follows: “The Court recalls that Article 5 § 1 of the Convention contains an exhaustive list of permissible grounds for deprivation of liberty which must be interpreted strictly [...]. A ‘reasonable suspicion’, referred to in Article 5 § 1 (c) of the Convention, that a criminal offence has been committed presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed an offence. As a rule, problems in this area arise at the level of the facts. The question then is whether the arrest and detention were based on sufficient objective elements to justify a ‘reasonable suspicion’ that the facts at issue had actually occurred [...] in addition to its factual side, the existence of a ‘reasonable suspicion’ within the meaning of Article 5 § 1 (c) requires that the facts relied on can be reasonably considered as falling under one of the sections describing criminal behaviour in the Criminal Code. Thus, there could clearly not be a ‘reasonable suspicion’ if the acts or facts held against a detained person did not constitute a crime at the time when they occurred”, European Court of Human Rights, *Wloch v Poland*, Application No. 27785/95, paras 108-109.

⁵ See, *inter alia*, Human Rights Committee, *Shams and others v Australia*, Communication No. 1255, 1256, 1259, 1260, 1266, 1268, 1270, 1288/2004, para. 7.3; Human Rights Committee, *Abbassi v Algeria*, Communication No.1172/2003, para. 8.3 (house arrest); Human Rights Committee, *Bakhtiyari*

With regard to the meaning of arbitrary detention, the Human Rights Committee has regularly pointed out that “‘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”.⁶ Apart from detentions that are arbitrary from the outset,⁷ such as those resulting from the lawful exercise of the guarantees under the ICCPR, the Human Rights Committee has also considered deprivation of liberty to become arbitrary once it is no longer justified in the circumstances of the case.⁸

The Working Group on Arbitrary Detention considers a deprivation of liberty to be arbitrary notably when it is clearly impossible to invoke any legal basis justifying the deprivation of liberty, when the deprivation of liberty results from the exercise of the rights or freedoms

et al. v. Australia, Communication No. 1069/2002, para. 9.4; Human Rights Committee, *Baban et al. v. Australia*, Communication No. 1014/2001, para. 7.2; Human Rights Committee, *C. v. Australia*, Communication No. 900/1999, para. 8.3; Human Rights Committee, *A. v. New Zealand*, Communication No. 754/1997, para. 7.4; Human Rights Committee, *A. v. Australia*, Communication No. 560/1993, para. 9.5; Human Rights Committee, *Santullo v. Uruguay*, Communication No. 9/1977, paras 12-13. Deprivation of liberty resulting from the exercise of the rights and freedoms guaranteed by the Covenant is a form of arbitrary detention; see, *inter alia*, Human Rights Committee, *Concluding observations on Canada*, CCPR/C/CAN/CO/5, para. 20 (“It notes the State party’s responses that none of the arrests in Montreal have been arbitrary since they were conducted on a legal basis. The Committee, however, recalls that arbitrary detention can also occur when the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by the Covenant, in particular under articles 19 and 21”). Detention contrary to provisions such as articles 11, 15 or 26 ICCPR would likewise be arbitrary; see, *inter alia*, Human Rights Committee, *Fardon v Australia*, Communication No. 1629/2007, para. 7.4(2) (“The Committee therefore considers that detention pursuant to proceedings incompatible with article 15 is necessarily arbitrary within the meaning of article 9, paragraph 1, of the Covenant”).

⁶ Human Rights Committee, *Mukong v Cameroon*, Communication No. 458/1991, para. 9.8. See also, *inter alia*, Human Rights Committee, *Mikhail Marinich v Belarus*, Communication No. 1502/2006, para. 10.4; Human Rights Committee, *Fongum Gorji-Dinka v Cameroon*, Communication No. 1134/2002, para. 5.1; Human Rights Committee, *Jalloh v. The Netherlands*, Communication No. 794/1988, para. 8.2; Human Rights Committee, *Van Alphen v. The Netherlands*, Communication No. 305/1988, para. 5.8. The Human Rights Committee further specified: “This means *inter alia* that remand in custody pursuant to arrest must not only be lawful but reasonable in all the circumstances. Further, remand in custody must be necessary in all the circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime”, Human Rights Committee, *Mikhail Marinich v Belarus*, Communication No. 1502/2006, para. 10.4; see also, *inter alia*, Human Rights Committee, *Kulov v Kirghizistan*, Communication No. 1369/2005, para. 8.3. See also, *inter alia*, Inter-American Court of Human Rights, *Gangaram Panday v Suriname*, para. 47 (“[...] no one may be subjected to arrest or imprisonment for reasons and by methods which, although classified as legal, could be deemed to be incompatible with the respect for the fundamental rights of the individual because, among other things, they are unreasonable, unforeseeable or lacking in proportionality”).

⁷ See, *inter alia*, Human Rights Committee, *Mukong v Cameroon*, Communication No. 458/1991, para. 9.8; Human Rights Committee, *Blanco v Nicaragua*, Communication No. 328/1988, para. 10.3; Human Rights Committee, *Joana v Madagascar*, Communication No. 123/1982, para. 14.

⁸ See, *inter alia*, Human Rights Committee, *Baban et al. v Australia*, Communication No. 1014/2001, para. 7.2 (“[...] the Committee recalls its jurisprudence that, in order to avoid a characterization of arbitrariness, detention should not continue beyond the period for which the State party can provide appropriate justification”); Human Rights Committee, *Abbassi v Algeria*, Communication No. 1172/2003, para. 8.4; Human Rights Committee, *van Alpen v The Netherlands*, Communication No. 305/1988, para. 5.6.

guaranteed by articles 12, 18, 19, 21, 22, 25, 26 and 27 ICCPR, when the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the states concerned, is of such gravity as to give the deprivation of liberty an arbitrary character, and when the deprivation of liberty constitutes a violation of the international law for reasons of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability or other status, and which aims towards or can result in ignoring the equality of human rights.⁹

A.- PREVENTION OF UNLAWFUL AND ARBITRARY DEPRIVATION OF LIBERTY

According to article 2 ICCPR, state parties have undertaken to respect and to ensure to all the rights recognized in the Covenant, including by adopting such laws or other measures as may be necessary to give effect to those rights. The Human Rights Committee has recalled that “the purposes of the Covenant would be defeated without an obligation integral to article 2 to take measures to prevent a recurrence of a violation of the Covenant”.¹⁰ Prevention, in the form of guarantees of non-repetition, is also an essential part of reparation.¹¹

To give effect to the right to liberty of person, it is axiomatic that legal and procedural safeguards must be put in place to prevent unlawful and arbitrary detention in the first place, in addition to preventing its continuance¹² and recurrence. Deprivation of liberty without effective safeguards against unlawful and arbitrary detention cannot be considered as fulfilling the purpose of article 9 ICCPR. Moreover, safeguards should not only be seen as part of the positive obligation of states to prevent violations of article 9 ICCPR, they also allow the detention control mechanisms embodied in articles 9(3) and 9(4) ICCPR to function effectively.

Similarly to a failure to investigate allegations of Covenant rights violations and to a failure to bring to justice perpetrators of such violations, which “could in and of [themselves] give rise to a separate breach of the Covenant”,¹³ a failure to take effective measures, including by adopting the necessary laws and practices, to prevent these violations could be considered as giving rise to a separate breach of the Covenant.

⁹ See, inter alia, Working Group on Arbitrary Detention, *Nasrin Sotoudeh v Islamic Republic of Iran*, Opinion No. 21/2011, para. 3.

¹⁰ Human Rights Committee, General Comment 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13, para. 17.

¹¹ Human Rights Committee, General Comment 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13, para. 16.

¹² Human Rights Committee, General Comment 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13, para. 15 (“Cessation of an ongoing violation is an essential element of the right to an effective remedy”). Cessation of an ongoing violation can be seen as a form of prevention, i.e. a way to prevent the continuance of this violation.

¹³ Human Rights Committee, General Comment 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13, paras 15 and 18.

B.- DEPRIVATION OF LIBERTY, TORTURE AND ENFORCED DISAPPEARANCE

Many issues relating to deprivation of liberty, torture and enforced disappearance are closely intertwined and it is important to have an approach to article 9 ICCPR which takes this reality into account. In particular, many safeguards necessary to prevent arbitrary deprivation of liberty and ensure due process in detention often play a fundamental role in preventing and in helping to detect acts of torture and other forms of ill-treatment, as well as cases of enforced disappearance.

Enforced disappearance, detention in secret, unacknowledged or unofficial locations, and prolonged incommunicado detention constitute among the most straightforward cases of arbitrary detention.¹⁴ Safeguards to prevent such acts and safeguards to prevent arbitrary detention are therefore mutually reinforcing.

¹⁴ See, *inter alia*, Human Rights Committee, *Chihoub v Algeria*, Communication No. 1811/2008, para. 8.7; Human Rights Committee, *Aboufaied v Libya*, Communication No. 1782/2008, para. 7.6; Human Rights Committee, *Berzig v Algeria*, Communication No. 1781/2008, para. 8.7; Human Rights Committee, *Salem Saad Ali Bashasha v The Libyan Arab Jamahiriya*, Communication No. 1776/2008, para. 7.6; Human Rights Committee, *Medjnoune v Algeria*, Communication No. 1297/2004, para. 8.5. With regard to incommunicado detention, see also, *inter alia*, Human Rights Committee, *Concluding observations on Spain*, CCPR/C/ESP/CO/5, para. 14 (up to 13 days); Human Rights Committee, *Concluding observations on Chile*, CCPR/C/CHL/CO/5, para. 11 (up to 10 days); Human Rights Committee, *Concluding observations on Syria*, CCPR/CO/84/SYR, para. 9; Human Rights Committee, General Comment 20, *Prohibition of torture and cruel treatment or punishment (Article 7)*, para. 11. With regard to secret detention, see also, *inter alia*, article 17(1) of the International Convention for the Protection of All Persons from Enforced Disappearance; Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Working Group on Arbitrary Detention, Working Group on Enforced or Involuntary Disappearances, *Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism*, A/HRC/13/42, paras 18 to 23 and 292(a); Working Group on Arbitrary Detention, *Ebrima Manneh v The Gambia*, Opinion No. 14/2009, para. 19 (“The Working Group has classified detention at a secret place as arbitrary detention in terms of Category I of the categories applicable to the examination of cases submitted to the Working Group as being devoid of any legal basis. No jurisdiction can allow for incommunicado detention where no reasons for the arrest and detention are put forward to the detainee, where no access to counsel or relatives is granted, no judicial control over the deprivation of liberty is exercised, no charges known to exist in [...] legislation are laid against the detainee with a view to the conduct of a trial, in short, where no legal procedure established by law whatsoever is followed”). With regard to unacknowledged detention, see, *inter alia*, Human Rights Committee, General Comment 29, *States of emergency (Article 4)*, CCPR/C/21/Rev.1/Add.11, paras 13(b); European Court of Human Rights, *Kurt v Turkey*, Application No. 15/1997/799/1002, para. 124; European Court of Human Rights, *Chitayev and Chitayev v Russia*, Application No 59334/00, paras 172 and 173. With regard to detention in unofficial places of detention, see, *inter alia*, UN Declaration on the Protection of all Persons from Enforced Disappearance, UNGA resolution 47/133, article 10(1); Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Working Group on Arbitrary Detention, Working Group on Enforced or Involuntary Disappearances, *Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism*, A/HRC/13/42, para. 292(a) (“Secret detention should be explicitly prohibited, along with all other forms of unofficial detention”). On arbitrary detention and the CIA rendition programme, see, *inter alia*, Working Group on Arbitrary Detention, *Ibn al-Shaykh al-Libi and 25 other persons v the United States of America*, Opinion No. 29/2006, paras 21-22.

In addition, arbitrary detention is conducive to acts prohibited by article 7 ICCPR, while some forms of arbitrary detention in themselves amount to a violation of this provision.¹⁵

¹⁵ For instance, enforced disappearance violates article 7 ICCPR; see, *inter alia*, Human Rights Committee, General Comment 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13, para. 18; Human Rights Committee, *Chihoub v Algeria*, Communication No. 1811/2008, para. 8.5; Human Rights Committee, *Aboufaied v Libya*, Communication No. 1782/2008, para. 7.4; Human Rights Committee, *Berzig v Algeria*, Communication No. 1781/2008, para. 8.5; Human Rights Committee, *Zarzi v Algeria*, Communication No. 1780/2008, para. 7.5; Human Rights Committee, *El Abani v. Libya*, Communication No. 1640/2007, para. 7.3; Human Rights Committee, *Benaziza v. Algeria*, Communication No. 1588/2007, para. 9.3; Human Rights Committee, *El Hassy v. Libya*, Communication No. 1422/2005, para. 6.8; Human Rights Committee, *Cheraitia and Kimouche v. Algeria*, Communication No. 1328/2004, para. 7.6; Human Rights Committee, *El Alwani v. Libya*, Communication No. 1295/2004, para. 6.5; Human Rights Committee, *Boucherf v. Algeria*, Communication No. 1196/2003, para. 9.6; Human Rights Committee, *Bousroual v. Algeria*, Communication No. 992/2001, para. 9.8; Human Rights Committee, *Sarma v. Sri Lanka*, Communication No. 950/2000, para. 9.5; Human Rights Committee, *Celis Laureano v. Peru*, Communication No. 540/1993, para. 8.5; Human Rights Committee, *Rafael Mojica v Dominican Republic*, Communication No. 449/1991, para. 5.7. See also, *inter alia*, UN Declaration on the Protection of all Persons from Enforced Disappearance, UNGA resolution 47/133, article 2; Committee against torture, *Concluding observations on the United States of America*, CAT/C/USA/CO/2, para. 18 (“The State party should adopt all necessary measures to prohibit and prevent enforced disappearance in any territory under its jurisdiction, and prosecute and punish perpetrators, as this practice constitutes, per se, a violation of the Convention.”); Committee against torture, *Concluding observations on Rwanda*, CAT/C/RWA/CO/1, para. 14; Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, *Report to the UN General Assembly, A/61/259*, paras 55-56; Inter-American Court of Human Rights, *Godínez-Cruz v. Honduras*, paras. 164, 166 and 197; Inter-American Court of Human Rights, *Velasquez Rodriguez v. Honduras*, paras 156 and 187; African Commission on Human and Peoples’ Rights, *Mouvement Burkinabe des Droits de l’Homme et des Peuples v Burkina Faso*, 204/97, para. 44; Human Rights Chamber for Bosnia and Herzegovina, *Palic v Republika Srpska*, Case No. CH/99/3196, para. 74. On prolonged incommunicado detention and secret detention, see also, *inter alia*, Human Rights Committee, *El-Megreisi v Libya*, Communication No. 440/1990, para. 5.4; Committee against Torture, *Concluding observations on the United States of America*, CAT/C/USA/CO/2, para. 17 (“The State party should ensure that no one is detained in any secret detention facility under its de facto effective control. Detaining persons in such conditions constitutes, per se, a violation of the Convention.”); Committee against Torture, *Concluding observations on Rwanda*, CAT/C/RWA/CO/1, para. 11; UN General Assembly, *Resolution on torture and other cruel, inhuman or degrading treatment or punishment*, A/RES/66/150, para. 22 (“Reminds all States that prolonged incommunicado detention or detention in secret places can facilitate the perpetration of torture and other cruel, inhuman or degrading treatment or punishment and can in itself constitute a form of such treatment, and urges all States to respect the safeguards concerning the liberty, security and dignity of the person and to ensure that secret places of detention and interrogation are abolished”); Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, *Report to the Commission on Human Rights*, E/CN.4/2004/56, paras 37-38 (“The Special Rapporteur reiterates the recommendation of his two predecessors and urges all States to declare incommunicado detention illegal”, “Incommunicado detention is aggravated when individuals are held in secret places of detention”); Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, *Report to the UN General Assembly, A/61/259*, para. 56; Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, *Study on the phenomena of torture, cruel, inhuman or degrading treatment or punishment in the world, including an assessment of conditions of detention*, A/HRC/13/39/Add.5, para. 156 (“[...] international human rights law, including the relevant soft law standards, is very detailed in respect of procedural standards during detention which are aimed at preventing torture and ill-treatment. These standards include, as a minimum, the prohibition of all secret and incommunicado detention [...]”). On detention in unofficial places of detention, see, *inter alia*, Human Rights Committee, General

Therefore, here as well, it shall be considered that many safeguards serve a dual purpose, i.e. of preventing arbitrary detention as well as torture and other forms of ill-treatment.¹⁶

The necessity to effectively prevent enforced disappearance, secret and prolonged incommunicado detention, torture and other forms of ill-treatment must be considered when looking at the measures necessary to prevent violations to article 9 ICCPR. Therefore, preventive measures such as the ones contained in the International Convention for the Protection of All Persons from Enforced Disappearance, in particular those listed in articles 17 and 18, are of direct relevance to article 9 ICCPR. The absence of similar measures should be seen as generally incompatible with the purpose of article 9 ICCPR.¹⁷

Safeguards against torture and enforced disappearance such as the issuance of arrest warrants by the competent authority,¹⁸ provisions clearly indicating the authorities authorized

Comment 20, *Prohibition of torture and cruel treatment or punishment (Article 7)*, para. 11 (“To guarantee the effective protection of detained persons, provisions should be made for detainees to be held in places officially recognized as places of detention and for their names and places of detention, as well as for the names of persons responsible for their detention, to be kept in registers readily available and accessible to those concerned, including relatives and friends”); Committee against Torture, *Concluding observations on Rwanda*, CAT/C/RWA/CO/1, para. 11 (“The State party should ensure that no-one is detained in secret or unofficial facilities and prevent all forms of unlawful detention in its territory as well as initiate investigations into such allegations [...] The State party should establish and make public, in law, an official list of all places of detention, and promulgate penalties for those responsible for detaining persons outside of legal detention facilities”); Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, *Report to the Commission on Human Rights*, E/CN.4/2003/68, para. 26(e) (“Interrogation should take place only at official centres and the maintenance of secret places of detention should be abolished under law. It should be a punishable offence for any official to hold a person in a secret and/or unofficial place of detention”).

¹⁶ On the close link between prevention of arbitrary detention and prevention of torture, see for instance UN Human Rights Council, *Resolution on torture and other cruel, inhuman or degrading treatment or punishment: the role and responsibility of judges, prosecutors and lawyers*, A/HRC/RES/13/19, para. 3; Committee against Torture, *Concluding observations on Rwanda*, CAT/C/RWA/CO/1, para. 12.

¹⁷ See, *inter alia*, Human Rights Committee, *Concluding observations on Algeria*, CCPR/C/DZA/CO/3, para. 11. Moreover, measures such as those contemplated in article 22 of the International Convention for the Protection of All Persons from Enforced Disappearance are equally relevant to ensure compliance with article 9 ICCPR (with regard to habeas corpus proceedings, see Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Working Group on Arbitrary Detention, Working Group on Enforced or Involuntary Disappearances, *Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism*, A/HRC/13/42, para. 292(b)).

¹⁸ See, *inter alia*, Human Rights Committee, *Chihoub v Algeria*, Communication No. 1811/2008, para. 8.7; Human Rights Committee, *Aboufaied v Libya*, Communication No. 1782/2008, para. 7.6; Human Rights Committee, *Berzig v Algeria*, Communication No. 1781/2008, para. 8.7; Human Rights Committee, *Njaru v Cameroon*, Communication No. 1353/2005, para. 6.2; Human Rights Committee, *Domukovsky, Tsiklauri, Gelbakhiani, Dokvadze v Georgia*, Communication No. 623/1995, 624/1995, 626/1995, 627/1995, para. 18.4; Human Rights Committee, *Kanana v Zaire*, Communication No. 366/1989, para. 5.2; Human Rights Committee, *Concluding observations on Argentina*, CCPR/C/ARG/CO/4, para. 15. See also, *inter alia*, Committee against Torture, *Concluding observations on Yemen*, CAT/C/YEM/CO/2/Rev.1, para. 13; Working Group on Arbitrary Detention, *Jason Zachary Puracal v Nicaragua*, Opinion No. 10/2012, paras 25 and 30.

to order deprivation of liberty,¹⁹ notification of rights,²⁰ the establishment of detailed and accessible records of detention,²¹ access to lawyers from the outset of deprivation of liberty²²

¹⁹ See article 17(2)(b) of the International Convention for the Protection of All Persons from Enforced Disappearance; UN Declaration on the Protection of all Persons from Enforced Disappearance, UNGA resolution 47/133, article 12; UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UNGA resolution 43/173, Principles 2 and 9. See also, *inter alia*, Committee against Torture, *Concluding observations on Yemen*, CAT/C/YEM/CO/2/Rev.1, para. 13.

²⁰ See UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UNGA resolution 43/173, Principles 13; UN Basic Principles on the Role of Lawyers, para. 5; Committee against Torture, General Comment 2, *Implementation of article 2 by States parties*, CAT/C/GC/2, para. 13; UN Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT), *Report on the Maldives*, CAT/OP/MDV/1, paras 96 to 98 (“It is axiomatic that if people are unaware of their rights, their ability to effectively exercise those rights is adversely affected. The right of persons deprived of liberty to be notified of their rights is a crucial element in the prevention of ill-treatment as well as a prerequisite for effective exercise of due process rights. [...] The SPT recommends that the relevant legislation be amended [...] to spell out, in detail, all the rights of persons deprived of liberty, as well as the right of such persons to be notified of their rights as from the moment of deprivation of liberty and the concomitant obligation of law enforcement officers to ensure such notification and to assist in the exercise of all such rights as from the very outset of deprivation of liberty. [...] The SPT also recommends that a standard notice listing all the rights of persons deprived of liberty should be produced in the languages spoken by detained persons and posted in places of deprivation of liberty where they can be read easily by persons in custody. In addition, the same information should be contained in the form to be signed by each person in custody, and the detainee should be given a copy of that form”); the SPT has made similar recommendations with regard to all persons obliged to stay with the police and further specified that “[i]nformation on rights should be given orally for persons who do not know how to read and through interpretation for persons who do not have sufficient knowledge of any of the languages in which the written version is produced”, UN Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, *Report on Sweden*, CAT/OP/SWE/1, paras 43 and 48-49 (para. 49). See also, *inter alia*, Human Rights Committee, *Concluding observations on Sweden*, CCPR/C/SWE/CO/6, para. 13.

²¹ See, *inter alia*, Human Rights Committee, *Concluding observations on Algeria*, CCPR/C/DZA/CO/3, para. 11; Human Rights Committee, General Comment 20, *Prohibition of torture and cruel treatment or punishment (Article 7)*, para. 11. See also, *inter alia*, European Court of Human Rights, *Kurt v Turkey*, Application No. 15/1997/799/1002, para. 125 (“In the view of the Court, the absence of holding data recording such matters as the date, time and location of detention, the name of the detainee as well as the reasons for the detention and the name of the person effecting it must be seen as incompatible with the very purpose of Article 5 of the Convention”); European Court of Human Rights, *Er and others v Turkey*, Application No. 23016/04, para. 104; European Court of Human Rights, *Akdeniz v Turkey*, Application No.25165/94, para. 130. See also article 17(3) of the International Convention for the Protection of All Persons from Enforced Disappearance; UN Declaration on the Protection of all Persons from Enforced Disappearance, UNGA resolution 47/133, article 10(3); UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UNGA resolution 43/173, Principles 12 and 23; Working Group on Arbitrary Detention, *Report to the Human Rights Council*, A/HRC/7/4, paras 69, 73 and 84; UN Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, *Report on Honduras*, CAT/OP/HND/1, para. 144 (“The Subcommittee considers that keeping proper records of the deprivation of liberty is one of the fundamental safeguards against torture and ill-treatment and a prerequisite for the effective exercise of due process rights, including the right to challenge the lawfulness of deprivation of liberty (habeas corpus) and the prompt appearance of a detained person before a judge.”) and para. 146(a); UN Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, *Report on the Maldives*, CAT/OP/MDV/1, paras 116-117 (detailing the information that should be recorded); UN Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading

and during all proceedings,²³ such as interrogations by the police²⁴ and hearings under article 9(3) and 9(4) ICCPR,²⁵ the presence of the detainee at the hearings under 9(3) and 9(4) ICCPR,²⁶ notification of arrest, detention and transfers to a third party²⁷ and

Treatment or Punishment, *Report on Sweden*, CAT/OP/SWE/1, paras 90-91 (on centralized record systems).

²² See, *inter alia*, Human Rights Committee, *Concluding observations on Algeria*, CCPR/C/DZA/CO/3, para. 18; Human Rights Committee, *Concluding observations on Tajikistan*, CCPR/CO/84/TJK, para. 11; Human Rights Committee, *Concluding observations on Japan*, CCPR/C/JPN/CO/5, para. 18; Human Rights Committee, *Concluding observations on the Republic of Korea*, CCPR/C/KOR/CO/3, para. 14; Human Rights Committee, *Concluding observations on Uzbekistan*, CCPR/C/UZB/CO/3, para. 15.

²³ See, *inter alia*, UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UNGA resolution 43/173, Principle 17. With regard to criminal proceedings, see UN Basic Principles on the Role of Lawyers, para. 1; UN Human Rights Council, *Resolution on torture and other cruel, inhuman or degrading treatment or punishment: the role and responsibility of judges, prosecutors and lawyers*, A/HRC/RES/13/19, para. 6; Council of Europe, *Recommendation of the Committee of Ministers to member states on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse*, Rec(2006)13, para. 25.

²⁴ See, *inter alia*, Human Rights Committee, *Concluding observations on The Netherlands*, CCPR/C/NLD/CO/4, para. 11; Human Rights Committee, *Concluding observations on Japan*, CCPR/C/JPN/CO/5, para. 18; Human Rights Committee, *Concluding observations on Ireland*, CCPR/C/IRL/CO/3, para. 14. See also UN Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, *Report on the Maldives*, CAT/OP/MDV/1, para. 105.

²⁵ On the presence of lawyers during proceedings reviewing the lawfulness of detention, see, *inter alia*, European Court of Human Rights, *Wloch v Poland*, Application No. 27785/95, paras 129 and 131; European Court of Human Rights, *Fodale v Italy*, Application No. 70148/01, paras 43 to 45.

²⁶ See, *inter alia*, UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UNGA resolution 43/173, Principle 32(2); Inter-American Court of Human Rights, *Habeas corpus in emergency situations*, Advisory Opinion OC-8/87, para. 35 ("In order for habeas corpus to achieve its purpose, which is to obtain a judicial determination of the lawfulness of a detention, it is necessary that the detained person be brought before a competent judge or tribunal with jurisdiction over him. Here habeas corpus performs a vital role in ensuring that a person's life and physical integrity are respected, in preventing his disappearance or the keeping of his whereabouts secret and in protecting him against torture or other cruel, inhumane or degrading punishment or treatment"); Council of Europe, *Recommendation of the Committee of Ministers to member states on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse*, Rec(2006)13, para. 28.

²⁷ See, *inter alia*, Human Rights Committee, *Concluding observations on Sweden*, CCPR/C/SWE/CO/6, para. 13. See also, UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UNGA resolution 43/173, Principle 16; UN Declaration on the Protection of all Persons from Enforced Disappearance, UNGA resolution 47/133, article 10(2); UN Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, *Report on Sweden*, CAT/OP/SWE/1, para. 146; Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, *Report to the Commission on human rights*, E/CN.4/2003/68, para. 26(g); Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Working Group on Arbitrary Detention, Working Group on Enforced or Involuntary Disappearances, *Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism*, A/HRC/13/42, para. 292(c); Inter-American Court of Human Rights, *Tibi v Ecuador*, para. 112.

independent monitoring of all places of detention²⁸ all constitute fundamental guarantees against unlawful and arbitrary detention which must be considered essential to prevent violations to article 9 ICCPR, as well as to determine whether such a violation has occurred.

C.- EFFECTIVENESS OF JUDICIAL CONTROL MECHANISMS

The judicial control mechanisms embodied in articles 9(3) and 9(4) ICCPR are critical to ensure compliance with Covenant rights. In particular, they are equally fundamental to protect against unlawful and arbitrary detention, enforced disappearance, torture and other forms of ill-treatment.²⁹

²⁸ See, *inter alia*, Human Rights Committee, *Concluding observations on Algeria*, CCPR/C/DZA/CO/3, para. 11. See also, *inter alia*, UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UNGA resolution 43/173, Principle 29; UN Human Rights Council, *Resolution on torture and other cruel, inhuman or degrading treatment or punishment: the role and responsibility of judges, prosecutors and lawyers*, A/HRC/RES/13/19, para. 14; Committee against Torture, General Comment 2, *Implementation of article 2 by States parties*, CAT/C/GC/2, para. 13; Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Working Group on Arbitrary Detention, Working Group on Enforced or Involuntary Disappearances, *Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism*, A/HRC/13/42, para. 292(a).

²⁹ See, *inter alia*, Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, *Report to the Commission on Human Rights*, E/CN.4/2004/56, para. 39. With regard to mechanisms similar to the ones detailed at article 9(3) and 9(4) ICCPR, the European Court of Human Rights has underlined the following: "It must also be stressed that the authors of the Convention reinforced the individual's protection against arbitrary deprivation of his or her liberty by guaranteeing a corpus of substantive rights which are intended to minimise the risks of arbitrariness by allowing the act of deprivation of liberty to be amenable to independent judicial scrutiny and by securing the accountability of the authorities for that act. The requirements of Article 5 §§ 3 and 4 with their emphasis on promptitude and judicial control assume particular importance in this context. Prompt judicial intervention may lead to the detection and prevention of life-threatening measures or serious ill-treatment which violate the fundamental guarantees contained in Articles 2 and 3 of the Convention [...]. What is at stake is both the protection of the physical liberty of individuals as well as their personal security in a context which, in the absence of safeguards, could result in a subversion of the rule of law and place detainees beyond the reach of the most rudimentary forms of legal protection. [...] The Court emphasises in this respect that the unacknowledged detention of an individual is a complete negation of these guarantees and a most grave violation of Article 5. Having assumed control over that individual it is incumbent on the authorities to account for his or her whereabouts. For this reason, Article 5 must be seen as requiring the authorities to take effective measures to safeguard against the risk of disappearance and to conduct a prompt effective investigation into an arguable claim that a person has been taken into custody and has not been seen since", European Court of Human Rights, *Kurt v Turkey*, Application No. 15/1997/799/1002, paras 123-124. See also, *inter alia*, European Court of Human Rights, *Medvedyev and others v. France*, Application No. 3394/03, 29 March 2010 (Grand Chamber), para. 118 ("The Court also notes the importance of the guarantees afforded by Article 5 § 3 to an arrested person. The purpose of this provision is to ensure that arrested persons are physically brought before a judicial officer promptly. Such automatic expedited judicial scrutiny provides an important measure of protection against arbitrary behaviour, incommunicado detention and ill-treatment"); Inter-American Court of Human Rights, *Habeas corpus in emergency situations*, Advisory Opinion OC-8/87, paras 35 and 36 ("In order for habeas corpus to achieve its purpose, which is to obtain a judicial determination of the lawfulness of a detention, it is necessary that the detained person be brought before

For the protection provided by these mechanisms to be meaningful, states have an obligation to ensure that they are accessible and effective.³⁰ Therefore, even though they are not explicitly mentioned in the text of article 9 ICCPR, numerous measures should be taken into account when considering whether the guarantees under articles 9(3) and 9(4) ICCPR are actually being complied with. In addition to the safeguards previously mentioned, guarantees provided by article 14 ICCPR are of primary importance to make these judicial control mechanisms accessible and effective.³¹ Hence, beside access to a lawyer from the outset³² and during all proceedings,³³ guarantees such as the principle of equality of arms,³⁴ the provision of adequate time and facilities for the preparation of the defence,³⁵ proper access to evidence³⁶ and guarantees against self-incrimination³⁷ are essential not only to ensure fair

a competent judge or tribunal with jurisdiction over him. Here habeas corpus performs a vital role in ensuring that a person's life and physical integrity are respected, in preventing his disappearance or the keeping of his whereabouts secret and in protecting him against torture or other cruel, inhumane, or degrading punishment or treatment [...] This conclusion is buttressed by the realities that have been the experience of some of the peoples of this hemisphere in recent decades, particularly disappearances, torture and murder committed or tolerated by some governments").

³⁰ Human Rights Committee, General Comment 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13, para. 15 ("Article 2, paragraph 3, requires that in addition to effective protection of Covenant rights States Parties must ensure that individuals also have accessible and effective remedies to vindicate those rights").

³¹ See, *inter alia*, Inter-American Court of Human Rights, *Judicial Guarantees in States of Emergency*, Advisory Opinion OC-9/87, paras 24 and 30.

³² See, *inter alia*, European Court of Human Rights, *Dayanan v Turkey*, Application No. 7377/03, paras 31 to 33 (access to a lawyer at the outset of custody and during interrogation must be granted, notwithstanding that the person remains silent); European Court of Human Rights, *Salduz v Turkey*, Application No. 36391/02, para. 55; European Court of Human Rights, *Brusco v France*, Application No. 1466/07, paras 45 and 54 (person questioned as a witness).

³³ See, *inter alia*, Inter-American Court of Human Rights, *Cabrera Garcia and Montiel Flores v Mexico*, paras 154-155; Council of Europe, *Recommendation of the Committee of Ministers to member states on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse*, Rec(2006)13, para. 25.

³⁴ While analyzing the right to challenge the lawfulness of detention (article 5(4) ECHR), the European Court of Human Rights has emphasized that "[a] court examining an appeal against detention must provide guarantees of a judicial procedure. The proceedings must be adversarial and must always ensure 'equality of arms' between the parties, the prosecutor and the detained person", European Court of Human Rights, *Garcia Alva v Germany*, Application No. 23541/94, para. 39; European Court of Human Rights, *Fodale v Italy*, Application No. 70148/01, paras 41 and 42.

³⁵ See, *inter alia*, European Court of Human Rights, *Samoila and Cionca v Romania*, Application No. 33065/03, paras 74 to 81; European Court of Human Rights, *Fodale v Italy*, Application No. 70148/01, paras 43 to 45.

³⁶ See, *inter alia*, European Court of Human Rights, *Garcia Alva v Germany*, Application No. 23541/94, para. 39 ("Equality of arms is not ensured if counsel is denied access to those documents in the investigation file which are essential in order effectively to challenge the lawfulness of his client's detention"). See also, *inter alia*, UN Human Rights Council, *Resolution on torture and other cruel, inhuman or degrading treatment or punishment: the role and responsibility of judges, prosecutors and lawyers*, A/HRC/RES/13/19, para. 6; UN Basic Principles on the Role of Lawyers, para. 21; Special Rapporteur on the independence of judges and lawyers, *Report to the UN General Assembly*, A/64/181, para. 109 (on access at the investigative stage).

trials but also to guarantee that the proceedings under articles 9(3) and 9(4) ICCPR³⁸ are not theoretical and illusory but remain practical and effective.

II.- POLICE CUSTODY AND DETENTION PENDING TRIAL

The length of police custody, the necessarily extraordinary nature of deprivation of liberty, the authority under which a detainee is placed on remand, and the independence of the detention control mechanisms are of particular importance when reviewing state compliance with article 9 ICCPR.

Because restriction to the right to liberty of person must be exceptional, the initial judicial control of the lawfulness of deprivation of liberty must be conducted as soon as possible. In addition, the risk of ill-treatment being particularly high during the initial phase of deprivation of liberty, the state's obligation to prevent torture is a further and compelling basis for demanding that such independent control takes place promptly.³⁹ Because the

³⁷ See, *inter alia*, Human Rights Committee, *Concluding observations on Algeria*, CCPR/C/DZA/CO/3, para. 18; Human Rights Committee, *Concluding observations on The Netherlands*, CCPR/C/NLD/CO/4, para. 11; Human Rights Committee, *Concluding observations on France*, CCPR/C/FRA/CO/4, para. 14; Human Rights Committee, *Concluding observations on Japan*, CCPR/C/JPN/CO/5, para. 19. See also, *inter alia*, UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UNGA resolution 43/173, Principle 27; Committee against Torture, *Concluding observations on Canada*, CAT/C/CAN/CO/6, para. 17 (on intelligence information obtained by torture); European Court of Human Rights, *Brusco v France*, Application No. 1466/07, paras 44-45, 50 and 54-55.

³⁸ While discussing the issue of access to evidence and proceedings under article 5(4) ECHR (similar to 9(4) ICCPR), the European Court of Human Rights analyzed the application of guarantees under article 6 ECHR (similar to article 14 ICCPR) to pre-trial proceedings and concluded that "it follows from the wording of Article 6 – and particularly from the autonomous meaning to be given to the notion of 'criminal charge' – that this provision has some application to pre-trial proceedings [...]. It thus follows that, in view of the dramatic impact of deprivation of liberty on the fundamental rights of the person concerned, proceedings conducted under Article 5 § 4 of the Convention should in principle also meet, to the largest extent possible under the circumstances of an on-going investigation, the basic requirements of a fair trial, such as the right to an adversarial procedure", European Court of Human Rights, *Garcia Alva v Germany*, Application No. 23541/94, para. 39. See also, *inter alia*, European Court of Human Rights, *Osvath v Hungary*, Application No. 20723/02, paras 18-19; European Court of Human Rights, *Fodale v Italy*, Application No. 70148/01, paras 41-42; Working Group on Arbitrary Detention, *Lenard Odillo, Eliya Kadzombe, Jasten Kameta Chinseche and Madison Namithanje v Malawi*, Opinion No. 15/2012, paras 52 and 56.

³⁹ Prevention of unlawful and arbitrary detention and prevention of torture likewise demand that the review of the lawfulness of detention under article 9(4) ICCPR intervenes promptly; see, *inter alia*, UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UNGA resolution 43/173, Principle 32(2); European Court of Human Rights, *Medvedyev and others v. France*, Application No. 3394/03, 29 March 2010 (Grand Chamber), para. 117 ("The Court reiterates that Article 5 of the Convention is in the first rank of the fundamental rights that protect the physical security of an individual, and that three strands in particular may be identified as running through the Court's case-law: the exhaustive nature of the exceptions, which must be interpreted strictly and which do not allow for the broad range of justifications under other provisions (Articles 8-11 of the Convention in particular); the repeated emphasis on the lawfulness of the detention, procedurally and substantively, requiring scrupulous adherence to the rule of law; and the importance of the promptness or speediness of the requisite judicial controls under Article 5 §§ 3 and 4").

mechanism under article 9(3) ICCPR serves this dual purpose,⁴⁰ it is particularly essential that the requirement of promptness is interpreted very strictly in all circumstances⁴¹ and that the starting point of the period under consideration is the actual arrest and not the moment

⁴⁰ See, *inter alia*, UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UNGA resolution 43/173, Principle 37; Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, *Report to the Commission on Human Rights*, E/CN.4/2004/56, para. 39; European Court of Human Rights, *Medvedyev and others v. France*, Application No. 3394/03, 29 March 2010 (Grand Chamber), paras 119-120 ("Article 5 § 3, as part of this framework of guarantees, is structurally concerned with two separate matters: the early stages following an arrest, when an individual is taken into the power of the authorities, and the period pending any trial before a criminal court, during which the suspect may be detained or released with or without conditions. These two limbs confer distinct rights and are not on their face logically or temporally linked [...] Taking the initial stage under the first limb, which is the only one at issue here, the Court's case-law establishes that there must be protection, through judicial control, of an individual arrested or detained on suspicion of having committed a criminal offence. Such control serves to provide effective safeguards against the risk of ill-treatment, which is at its greatest in this early stage of detention, and against the abuse of powers bestowed on law enforcement officers or other authorities for what should be narrowly restricted purposes and exercisable strictly in accordance with prescribed procedures.")

⁴¹ While the Human Rights Committee has held that the term *promptly* "must not exceed a few days" (Human Rights Committee, General Comment 8, *Right to liberty and security of persons (Article 9)*, para. 2) and must be determined on a case by case basis (Human Rights Committee, *McLawrence v. Jamaica*, Communication No. 702/1996, para. 5.6), deprivation of liberty of more than 48 hours without judicial control has been considered unlawful; see, *inter alia*, Human Rights Committee, *Initial report of Thailand – Summary Record of the 2293rd meeting*, CCPR/C/SR.2293, para. 44 and *Concluding observations on Thailand*, CCPR/CO/84/THA, para. 13 ("Detention without external safeguards beyond 48 hours should be prohibited"); Human Rights Committee, *Concluding observations on Zimbabwe*, CCPR/C/79/Add.89, para. 17; Human Rights Committee, *Concluding observations on El Salvador*, CCPR/C/SLV/CO/6, para. 14; Human Rights Committee, *Concluding observations on Uzbekistan*, CCPR/C/UZB/CO/3, para. 14; Human Rights Committee, *Concluding observations on Ukraine*, CCPR/C/UKR/CO/6, para. 8; Human Rights Committee, *Concluding observations on Moldova*, CCPR/C/MDA/CO/2, para. 19. See also, *inter alia*, Committee against Torture, *Inquiry Procedure on Mexico*, CAT/C/75, para. 220(b); Committee against Torture, *Concluding observations on Rwanda*, CAT/C/RWA/CO/1, para. 11; Committee against Torture, *Concluding observations on Yugoslavia*, A/54/44, para.51; Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, *Report to the Commission on Human Rights*, E/CN.4/2003/68, para. 26(g); Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, *Study on the phenomena of torture, cruel, inhuman or degrading treatment or punishment in the world, including an assessment of conditions of detention*, A/HRC/13/39/Add.5, para. 156; Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, *Report to the General Assembly*, A/63/223, para. 45(a); European Court of Human Rights, *Medvedyev and others v. France*, Application No. 3394/03, 29 March 2010 (Grand Chamber), para. 118 ("The Court also notes the importance of the guarantees afforded by Article 5 § 3 to an arrested person. The purpose of this provision is to ensure that arrested persons are physically brought before a judicial officer promptly. Such automatic expedited judicial scrutiny provides an important measure of protection against arbitrary behaviour, incommunicado detention and ill-treatment") and para. 121 ("The judicial control on the first appearance of an arrested individual must above all be prompt, to allow detection of any ill-treatment and to keep to a minimum any unjustified interference with individual liberty. The strict time constraint imposed by this requirement leaves little flexibility in interpretation, otherwise there would be a serious weakening of a procedural guarantee to the detriment of the individual and the risk of impairing the very essence of the right protected by this provision"); European Court of Human Rights, *Brogan and others v the United Kingdom*, Application No.11209/84, 11234/84, 11266/84, 11386/85, paras 58 to 62.

when the person arrives in the place of detention.⁴²

As specified in article 9(3) ICCPR, deprivation of liberty should always remain the exception⁴³ and therefore both the reasons required for detention on remand⁴⁴ and the effective use of alternatives to detention on remand constitute fundamental aspects of the right to liberty of person.⁴⁵ The reasons justifying detention on remand must be clearly established by law, necessary, reasonable and proportionate in all circumstances.⁴⁶ Since

⁴² See Human Rights Committee, *Initial report of Thailand – Summary Record of the 2293rd meeting*, CCPR/C/SR.2293, para. 30 and *Concluding observations on Thailand*, CCPR/CO/84/THA, para. 7.

⁴³ See, *inter alia*, Human Rights Committee, General Comment 8, *Right to liberty and security of persons (Article 9)*, para. 3; Human Rights Committee, *Hill v Spain*, Communication No. 526/1993, para. 12.3; Human Rights Committee, *W.B.E. v The Netherlands*, Communication No. 432/1990, para. 6.3; Human Rights Committee, *Concluding observations on El Salvador*, CCPR/C/SLV/CO/6, para. 15. See also, *inter alia*, European Court of Human Rights, *Labita v Italy*, Application No. 26772/95, para. 152 (“Continued detention can be justified in a given case only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty”); European Court of Human Rights, *Dolgova v Russia*, Application No. 11886/05, para. 44 (“Any system of mandatory detention on remand is per se incompatible with Article 5 § 3 of the Convention”).

⁴⁴ The burden of proof that such conditions are fulfilled lies on the authorities; see, *inter alia*, European Court of Human Rights, *Dolgova v Russia*, Application No. 11886/05, paras 43 and 45 (“The Court observes that the only other ground for the applicant’s continued detention was the domestic courts’ finding that there were no circumstances warranting her release. [...] It is [...] incumbent on the domestic authorities to establish and to demonstrate convincingly the existence of concrete facts relevant to the grounds for continued detention. Shifting the burden of proof to the detained person in such matters is tantamount to overturning the rule of Article 5 of the Convention, a provision which makes detention an exceptional departure from the right to liberty and one that is only permissible in exhaustively enumerated and strictly defined cases”). Moreover, decisions to detain a person on remand must be properly motivated; see, *inter alia*, European Court of Human Rights, *Patsuria v Georgia*, Application No. 30779/04, para. 62 (“Those decisions must contain ‘relevant’ and ‘sufficient’ reasoning and address specific features of the given case in order to justify the deprivation of liberty [...] In other words, any period of detention on remand, whatever its length, requires appropriate motivation by the competent national authorities which, moreover, are obliged to display ‘special diligence’ in the conduct of the proceedings”).

⁴⁵ See, *inter alia*, Human Rights Committee, *Concluding observations on Argentina*, CCPR/C/ARG/CO/4, para. 16 (“The State party should take measures, without delay, to reduce the number of persons held in pretrial detention and the length of pretrial detention by taking such steps as having greater recourse to precautionary measures or making greater use of bail or of electronic bracelets. The Committee reiterates that pretrial detention should not be the norm; instead it should be resorted to only as an exceptional measure and to the extent that it is necessary and consistent with due process of law and with article 9, paragraph 3, of the Covenant. There should be no offences for which it is mandatory”).

⁴⁶ Ground for detention on remand may include the necessity to prevent flight, interference with evidence or the recurrence of crime; see, *inter alia*, Human Rights Committee, *Hill v Spain*, Communication No. 526/1993, para. 12.3 (which further specifies that “[t]he mere fact that the accused is a foreigner does not of itself imply that he may be held in detention pending trial”); Human Rights Committee, *W.B.E. v The Netherlands*, Communication 432/1990, para. 6.3; Human Rights Committee, *van Alpen v The Netherlands*, Communication No. 305/1988, para. 5.8. See also, *inter alia*, European Court of Human Rights, *Labita v Italy*, Application No. 26772/95, para. 153 (“The persistence of reasonable suspicion that the person arrested has committed an offence is a condition sine qua non for the lawfulness of the continued detention, but after a certain lapse of time it no longer suffices. In such cases, the Court must establish whether the other grounds given by the judicial authorities

release pending trial shall be the rule, all possible non-custodial measures, such as bail or undertaking to appear,⁴⁷ must be effectively explored by the judicial authority.⁴⁸ Furthermore, in order to ensure that deprivation of liberty and treatment in detention remain lawful, detention on remand must be regularly reviewed.⁴⁹

The authority under which the person is placed on remand should be considered while reviewing whether the guarantees under article 9(3) ICCPR are made effective. Indeed, in addition to reviewing the lawfulness of detention and ascertaining the treatment in detention, the purpose of this initial judicial control is also, should the person be placed on remand, to prevent an ongoing or an increased risk of ill-treatment. Detention on remand should therefore take place in a facility under a different authority than the one responsible for the investigation.⁵⁰ Such a crucial safeguard against torture should be considered as fulfilling the purpose of article 9 ICCPR and as being part of the states obligations under both articles 7

continued to justify the deprivation of liberty"); European Court of Human Rights, *Dolgova v Russia*, Application No. 11886/05, para. 41 ("As to the grounds for the continued detention, the domestic courts consistently relied on the gravity of the charges as the main factor for the assessment of the applicant's potential to abscond or obstruct the course of justice. However, the Court has repeatedly held that, although the severity of the sentence faced is a relevant element in the assessment of the risk of absconding or re-offending, the need to continue the deprivation of liberty cannot be assessed from a purely abstract point of view, taking into consideration only the gravity of the offence. Nor can continuation of the detention be used to anticipate a custodial sentence").

⁴⁷ See, *inter alia*, Human Rights Committee, *Hill v Spain*, Communication No. 526/1993, para. 12.3; Human Rights Committee, *Concluding observations on Australia*, CCPR/C/AUS/CO/5, para. 11; Human Rights Committee, *Concluding observations on Argentina*, CCPR/C/ARG/CO/4, para. 16 (where bail or electronic bracelet are considered as means of reducing the number of persons held in pre-trial detention). See also, *inter alia*, European Court of Human Rights, *Dolgova v Russia*, Application No. 11886/05, para. 48.

⁴⁸ See, *inter alia*, European Court of Human Rights, *Dolgova v Russia*, Application No. 11886/05, para. 47 ("The Court further emphasises that when deciding whether a person should be released or detained, the authorities have an obligation under Article 5 § 3 to consider alternative measures of ensuring his or her appearance at trial"); European Court of Human Rights, *Jablonski v Poland*, Application No. 33492/96, para. 83; European Court of Human Rights, *Patsuria v Georgia*, Application No. 30779/04, paras 75-76.

⁴⁹ See, *inter alia*, UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UNGA resolution 43/173, Principle 11(3).

⁵⁰ See, *inter alia*, Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, *Report to the Commission on Human Rights*, E/CN.4/2003/68, para. 26(g) ("Those legally arrested should not be held in facilities under the control of their interrogators or investigators for more than the time required by law to obtain a judicial warrant of pre-trial detention which, in any case, should not exceed a period of 48 hours. They should accordingly be transferred to a pre-trial facility under a different authority at once, after which no further unsupervised contact with the interrogators or investigators should be permitted"); Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, *Study on the phenomena of torture, cruel, inhuman or degrading treatment or punishment in the world, including an assessment of conditions of detention*, A/HRC/13/39/Add.5, para. 156 ("[...] to keep police custody as short as possible and usually no longer than 48 hours and to move detainees thereafter to a pre-trial detention facility under a different State authority (usually the Ministry of Justice) [...]"); Committee against Torture, *Concluding observations on Japan*, CAT/C/JPN/CO/1, para. 15; UN Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, *Report on the Maldives*, CAT/OP/MDV/1, para. 78.

and 9(3) ICCPR.⁵¹

Finally, the independence and impartiality of the judicial control of detention are of paramount importance.⁵² Such requirements are critical to ensure that both the lawfulness of detention is properly reviewed and the treatment in detention is effectively ascertained. Should the initial deprivation of liberty be considered lawful and the person be formally charged, and should the placement in remand detention be deemed absolutely necessary in the circumstances of the case and on the basis of lawful, necessary, reasonable and proportionate grounds, the absolute independence and impartiality of the judicial authority will also be crucial to ensure that the person is placed in a remand facility which is under a different authority than the one in charge of investigating the case. Such guarantees of independence and impartiality are implicit in article 9(3) ICCPR,⁵³ which demands that the person be brought promptly before a *judge or other officer authorized by law to exercise judicial power*. The purpose of this provision necessarily entails that the authority entitled to review and decide on the lawfulness of detention, the treatment in detention and the release pending trial or the placement in remand detention⁵⁴ must have the independence and impartiality attached to judicial office.⁵⁵ In this regard, prosecutors generally lack the actual and perceived independence, objectivity and impartiality necessary to qualify as judicial officers under this provision.⁵⁶

⁵¹ See, *inter alia*, Human Rights Committee, *Concluding observations on El Salvador*, CCPR/C/SLV/CO/6, para. 14; Human Rights Committee, *Concluding observations on Azerbaijan*, CCPR/C/AZE/CO/3, paras. 8 and 10.

⁵² See, *inter alia*, UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UNGA resolution 43/173, Use of Terms (f) *a judicial or other authority*.

⁵³ And article 9(4) ICCPR with regard to habeas corpus proceedings.

⁵⁴ See, *inter alia*, European Court of Human Rights, *Medvedyev and others v. France*, Application No. 3394/03, 29 March 2010 (Grand Chamber), para. 124; Inter-American Court of Human Rights, *Bayarri v Argentina*, para. 67.

⁵⁵ The wording of article 9(3) ICCPR is similar to what article 5(3) ECHR prescribes and these terms have been interpreted by the European Court of Human Rights as requiring that such officer must have essentially the same characteristics as a judge, including in terms of independence to the executive branch of government and powers to direct pre-trial detention or release the person arrested; see, *inter alia*, European Court of Human Rights, *Medvedyev and others v. France*, Application No. 3394/03, 29 March 2010 (Grand Chamber), para. 124 ("The judicial officer must offer the requisite guarantees of independence from the executive and the parties, which precludes his subsequent intervention in criminal proceedings on behalf of the prosecuting authority, and he or she must have the power to order release, after hearing the individual and reviewing the lawfulness of, and justification for, the arrest and detention").

⁵⁶ See, *inter alia*, Human Rights Committee, *Kulomin v. Hungary*, Communication No. 521/1992, para. 11.3 ("[...] 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. In the circumstances of the instant case, the Committee is not satisfied that the public prosecutor could be regarded as having the institutional objectivity and impartiality necessary to be considered an 'officer authorized to exercise judicial power' within the meaning of article 9(3)"); Human Rights Committee, *Kulov v Kyrgyzstan*, Communication No. 1369/2005, para. 8.4 ("The Committee notes that the State party has not provided any information, showing that the prosecutor had the institutional objectivity and impartiality necessary to be considered an 'officer authorized to exercise judicial power' within the meaning of article 9, paragraph 3, of the Covenant"); Human Rights Committee, *Reshetnikov v Russian Federation*,

III.- STATE OF EMERGENCY

Arbitrary deprivation of liberty is part of the peremptory norms of international law (*jus cogens*) and states can never invoke article 4 ICCPR as a justification for this practice.⁵⁷ Hence, although article 9 ICCPR is not explicitly listed in article 4 (2) ICCPR, the absolute prohibition of arbitrary detention is non-derogable⁵⁸ and of equal status as, for instance, the prohibition of torture. Moreover, certain forms of arbitrary detention in themselves violate provisions of the Covenant which are explicitly recognized as non-derogable, such as articles 7, 15 and 16 ICCPR.⁵⁹ To give effect to these absolute prohibitions, it is axiomatic that procedural guarantees necessary to ensure the effective protection of non-derogable rights cannot be made subject to measures that would undermine this protection.⁶⁰

Communication No. 1278/2004, para. 8.2; Human Rights Committee, *Zheludkova v Ukraine*, Communication No. 726/1996, para. 8.3. The European Court of Human Rights has had similar conclusions in various cases; see, *inter alia*, European Court of Human Rights, *Medvedyev and others v. France*, Application No. 3394/03, 10 July 2008, para. 61: “[...] the public prosecutor is not a 'competent legal authority' within the meaning the Court's case-law gives to that notion: as the applicants pointed out, he lacks the independence in respect of the executive to qualify as such [...]” - the case was then referred to the Grand Chamber, which did not contradict this finding. Among others, the fact that the prosecutor can intervene in the case at a later stage in the criminal proceedings as representing the prosecuting authorities has been considered problematic; see, *inter alia*, European Court of Human Rights, *Huber v. Switzerland*, Application No. 12794/87, para. 43; European Court of Human Rights, *Brincat v Italy*, Application No. 13867/88, paras 20 and 21. See also, with regard to investigators and prosecutors, European Court of Human Rights, *Assenov and others v. Bulgaria*, Reports 1998-VIII, 90/1997/874/1086, paras 145 to 149; European Court of Human Rights, *Nikolova v Bulgaria*, Application No. 31195/96, paras 49 to 51. See also, with regard to investigating judges, European Court of Human Rights, *H.B. v Switzerland*, Application No. 26899/95, paras 55 to 64.

⁵⁷ Human Rights Committee, General Comment 29, *States of emergency (article 4)*, CCPR/C/21/Rev.1/Add.11, para. 11 (“States parties may in no circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by taking hostages, by imposing collective punishments, through arbitrary deprivations of liberty or by deviating from fundamental principles of fair trial, including the presumption of innocence”); Human Rights Committee, General Comment 24, *Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant*, CCPR/C/21/Rev.1/Add.6, para. 8. See also, *inter alia*, Working Group on Arbitrary Detention, *Liu Xia v China*, Opinion No. 16/2011. para. 12; Working Group on Arbitrary Detention, *Liu Xiaobo v China*, Opinion No. 15/2011. para. 20. See also the ICRC's *Customary International Humanitarian Law Database*, Rule 99 (prohibition of arbitrary deprivation of liberty), accessible at www.icrc.org/customary-ihl/eng/docs/home.

⁵⁸ Examples given by the Human Rights Committee include the taking of hostages, abductions and unacknowledged detention; see Human Rights Committee, General Comment 29, *States of emergency (Article 4)*, CCPR/C/21/Rev.1/Add.11, para. 13(b).

⁵⁹ See *supra* the section on deprivation of liberty, enforced disappearance and torture.

⁶⁰ See Human Rights Committee, General Comment 29, *States of emergency (Article 4)*, CCPR/C/21/Rev.1/Add.11, para. 15 (“It is inherent in the protection of rights explicitly recognized as non-derogable in article 4, paragraph 2, that they must be secured by procedural guarantees, including, often, judicial guarantees. The provisions of the Covenant relating to procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights. Article 4 may not be resorted to in a way that would result in derogation from non-derogable rights”). See also Human

The guarantees mentioned in article 9 ICCPR are essential to prevent arbitrary detention, torture and enforced disappearance. Such practices are violating peremptory norms of international law⁶¹ and therefore these guarantees should be preserved at all times. For instance, in order to avoid the protection against non-derogable rights to be circumvented, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, guaranteed by article 9(4) ICCPR, must be preserved at all times.⁶² For the very same reasons, the similar judicial control mechanism prescribed by article 9(3) ICCPR must likewise be considered as non-derogable,⁶³ together with the measures

Rights Committee, General Comment 32, *Right to equality before courts and tribunals and to a fair trial (Article 14)*, CCPR/C/GC/32, para. 6 (“the guarantees of fair trial may never be made subject to measures of derogation that would circumvent the protection of non-derogable rights”).

⁶¹ See, *inter alia*, Human Rights Committee, General Comment 29, *States of emergency (Article 4)*, CCPR/C/21/Rev.1/Add.11, paras 11 and 13(b); Human Rights Committee, General Comment 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13, para. 18; Committee against Torture, General Comment 2, *Implementation of article 2 by States parties*, CAT/C/GC/2, para. 1.

⁶² Human Rights Committee, General Comment 29, *States of emergency (Article 4)*, CCPR/C/21/Rev.1/Add.11, para. 16 (“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”). See also, *inter alia*, UN Human Rights Commission, *Resolution on habeas corpus*, E/CN.4/RES/1992/35, para. 2; Independent Expert to update the Set of principles to combat impunity, *Updated Set of Principles for the protection and promotion of human rights through action to combat impunity*, Principle 36(b); Working Group on Arbitrary Detention, *Report to the Human Rights Council, A/HRC/7/4*, para. 67 (“In the view of the Working Group these guarantees represent peremptory norms of (customary) international law so that they are also binding on States which are not parties to the Covenant”); Inter-American Court of Human Rights, *Habeas corpus in emergency situations*, Advisory Opinion OC-8/87, paras 35 and 42 to 44; Council of Europe, *Recommendation of the Committee of Ministers to member states on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse*, Rec(2006)13, para. 20; Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Working Group on Arbitrary Detention, Working Group on Enforced or Involuntary Disappearances, *Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism*, A/HRC/13/42, para. 292(b).

⁶³ See, *inter alia*, Human Rights Committee, General Comment 29, *States of emergency (Article 4)*, CCPR/C/21/Rev.1/Add.11, para. 15 and the Human Rights Committee's recommendation related to articles 9(3) and 9(4) ICCPR in *Recommendation submitted by the Committee to the Subcommission on Prevention of Discrimination and Protection of Minorities concerning a draft third optional protocol to the International Covenant on Civil and Political Rights*, Report of the Human Rights Committee (Volume I) A/49/40 (vol. I), annex XI, para. 2, cited in Human Rights Committee, General Comment 29, *States of emergency (Article 4)*, CCPR/C/21/Rev.1/Add.11, footnote 9 (“The Committee is satisfied that States parties generally understand that the right to habeas corpus and *amparo* should not be limited in situations of emergency. Furthermore, the Committee is of the view that the remedies provided in article 9, paragraphs 3 and 4, read in conjunction with article 2 are inherent to the Covenant as a whole”); Human Rights Committee, *Initial report of Thailand – Summary Record of the 2293rd meeting*, CCPR/C/SR.2293, para. 44 and *Concluding observations on Thailand*, CCPR/CO/84/THA, para. 13. See also, Working Group on Arbitrary Detention, *Report to the Human Rights Council, A/HRC/7/4*, para. 64 (“The Working Group reiterates its concerns and recalls that it has continuously considered that states of emergency are a root cause of arbitrary detentions and cautioned against their promulgation [...] The Working Group attaches particular importance to the existence of effective internal control mechanisms over the legality of detention”).

indispensable to ensure the effectiveness of these two mechanisms,⁶⁴ such as the ones mentioned in article 9(2) ICCPR⁶⁵ and 14 ICCPR.⁶⁶

Moreover, the effective protection of a non-derogable right necessarily includes the effective prevention of its violation and precisely because the risk of violations of non-derogable rights is particularly heightened during a state of emergency,⁶⁷ the safeguards essential to the prevention of these violations need particular attention. It follows from these conclusions that the safeguards essential to prevent arbitrary detention, torture and enforced disappearance, such as the ones mentioned in this document,⁶⁸ must be preserved at all times.⁶⁹

IV.- NON-REFOULEMENT

Explicitly recognized in a number of international treaties,⁷⁰ the principle of non-refoulement

⁶⁴ See, *inter alia*, UN Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, *Report on Honduras*, CAT/OP/HND/1, para. 137(c); UN Human Rights Council, *Resolution on torture and other cruel, inhuman or degrading treatment or punishment: the role and responsibility of judges, prosecutors and lawyers*, A/HRC/RES/13/19 ("Recalling that freedom from torture and other cruel, inhuman or degrading treatment or punishment is a non-derogable right that must be protected under all circumstances, including during states of emergency and in times of international or internal armed conflicts or disturbance and that the absolute prohibition of torture and other cruel, inhuman or degrading treatment or punishment is affirmed in relevant international instruments, stressing that legal and procedural safeguards against such acts must not be subject to measures that would circumvent this right, and emphasizing that judges, prosecutors and lawyers play a critical role in safeguarding this right").

⁶⁵ See, *inter alia*, the procedural requirements attached to the prohibition of arbitrary deprivation of liberty mentioned in the ICRC's *Customary International Humanitarian Law Database*, Rule 99, accessible at www.icrc.org/customary-ihl/eng/docs/home.

⁶⁶ See, *inter alia*, Human Rights Committee, General Comment 32, *Right to equality before courts and tribunals and to a fair trial (Article 14)*, CCPR/C/GC/32, para. 6 ("The guarantees of fair trial may never be made subject to measures of derogation that would circumvent the protection of non-derogable rights"); Council of Europe, *Recommendation of the Committee of Ministers to member states on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse*, Rec(2006)13, para. 25(4); Inter-American Court of Human Rights, *Judicial Guarantees in States of Emergency*, Advisory Opinion OC-9/87, paras 24, 30, 38 and 41(3).

⁶⁷ See, *inter alia*, UN Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, *Report on Honduras*, CAT/OP/HND/1, para. 134.

⁶⁸ See supra the section on deprivation of liberty, torture and enforced disappearance.

⁶⁹ The International Convention for the Protection of All Persons from Enforced Disappearance, which contains many crucial safeguards of direct relevance to article 9 ICCPR, does not contain any provision allowing for derogation. See also, *inter alia*, UN Human Rights Council, *Resolution on torture and other cruel, inhuman or degrading treatment or punishment: the role and responsibility of judges, prosecutors and lawyers*, A/HRC/RES/13/19 ("Recalling that freedom from torture and other cruel, inhuman or degrading treatment or punishment is a non-derogable right that must be protected under all circumstances, including during states of emergency and in times of international or internal armed conflicts or disturbance [...], stressing that legal and procedural safeguards against such acts must not be subject to measures that would circumvent this right, and emphasizing that judges, prosecutors and lawyers play a critical role in safeguarding this right").

⁷⁰ See article 16 of the International Convention for the Protection of All Persons from Enforced Disappearance; article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading

is essential to prevent violations of fundamental rights and guarantees.

The Human Rights Committee has underlined that the principle of non-refoulement is an integral feature of the states' general legal obligation under the Covenant and goes beyond articles 6 and 7 ICCPR: "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".⁷¹

With regard to the principle of non-refoulement in relation to arbitrary detention, it is important to recall that some forms of arbitrary detention are considered to be *per se* in violation of article 7 ICCPR.⁷² The principle of non-refoulement therefore prevents a state from removing a person to another state where there are substantial grounds for believing that he or she would be in danger of being subjected to such forms of arbitrary detention.

Moreover, while not violating *per se* article 7 ICCPR, additional forms of arbitrary detention are conducive to treatment violating this provision and therefore states have an obligation to take article 9 ICCPR into account when implementing their non-refoulement obligation under article 7 ICCPR.⁷³

In addition, it is important to underline that, just as the prohibition of torture, the prohibition of arbitrary deprivation of liberty is part of the peremptory norms of international law (*jus cogens*) and states can never invoke article 4 ICCPR as a justification for this practice.⁷⁴ This

Treatment or Punishment; article 33 of the 1951 Convention relating to the Status of Refugees; article 19 of the Charter of Fundamental Rights of the European Union; article 22(8) of the American Convention on Human Rights.

⁷¹ Human Rights Committee, General Comment 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13, para. 12. See also, *inter alia*, Human Rights Committee, General Comment 20, *Prohibition of torture and cruel treatment or punishment (Article 7)*, para. 9; Human Rights Committee, *Kindler v Canada*, Communication No. 470/1991, para. 13.2.

⁷² See *supra* the section on deprivation of liberty, enforced disappearance and torture.

⁷³ See *supra* the section on deprivation of liberty, enforced disappearance and torture. See also, *inter alia*, Working Group on Arbitrary Detention, *Report to the Human Rights Council, A/HRC/4/40*, para. 48 *in fine*. See also, with regard to the importance of taking into account safeguards in detention, Committee against Torture, General Comment No.2, *Implementation of article 2 by States parties*, CAT/C/GC/2, para. 19 ("Additionally, if a person is to be transferred or sent to the custody or control of an individual or institution known to have engaged in torture or ill-treatment, or has not implemented adequate safeguards, the State is responsible, and its officials subject to punishment for ordering, permitting or participating in this transfer contrary to the State's obligation to take effective measures to prevent torture in accordance with article 2, paragraph 1. The Committee has expressed its concern when States parties send persons to such places without due process of law as required by articles 2 and 3").

⁷⁴ See *supra* the section on state of emergency. The Human Rights Committee has likewise considered that fundamental requirements of fair trial are part of *jus cogens* and can never be derogated from (see Human Rights Committee, General Comment 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13, paras 11 and 16, and Human Rights

absolute and universal prohibition would be undermined if states were allowed to expel, return, surrender, extradite, transfer, deport or otherwise remove a person to another state where there would be a real risk that such an absolutely prohibited form of detention would occur.⁷⁵

V.- EXTRA-TERRITORIAL APPLICATION

The extra-territorial scope of the Covenant, including the extra-territorial application of article 9 ICCPR, has been recognized by the Human Rights Committee on various occasions, such as arrest on foreign soil and subsequent transfer to the state's territory⁷⁶ or detention in overseas military facilities.⁷⁷ The Committee made clear that state parties must respect and

Committee, General Comment 32, *Right to equality before courts and tribunals and to a fair trial (Article 14)*, CCPR/C/GC/32, para. 6). A state removing a person to another state where there is a real risk that such fundamental requirements would be violated would therefore violate this peremptory norm of international law; see in this regard, *inter alia*, European Court of Human Rights, *Omar Othman v United Kingdom*, Application No. 8139/09, paras 258 to 285 (violation of article 6 ECHR regarding a deportation); European Court of Human Rights, *Bader and Kanbor v Sweden*, Application No. 13284/04, paras 42 and 47; European Court of Human Rights, *Soering v UK*, Application No. 14038/88, para. 113.

⁷⁵ See, *inter alia*, Human Rights Committee, *G.T. v Australia*, Communication No. 706/1996, para. 8.7; Working Group on Arbitrary Detention, *Report to the Human Rights Council, A/HRC/4/40*, paras 47 (“Where there are substantial grounds for believing that there is a real risk that the person to be removed from the territory will be deprived of his or her liberty in the receiving State [...], the sending State should examine whether such detention would be arbitrary within the meaning of the three categories of arbitrary detention identified in the Working Group’s methods of work: – Deprivation of liberty without legal basis; – Deprivation of liberty to repress the exercise of fundamental freedoms, such as freedom of religion, freedom of opinion, freedom of association; – Deprivation of liberty in grave violation of international fair-trial norms” – NB: since this report, the Working Group has added two categories of arbitrary detention) and *ibid.*, para. 49 (“The cases brought to the Working Group’s attention [...] evidence the need for Governments to include the risk of arbitrary detention in the receiving State per se among the elements to be taken into consideration when asked to extradite, deport, expel or otherwise hand a person over to the authorities of another State [...]. To remove a person to a State where there is a genuine risk that the person will be detained without legal basis, or without charges over a prolonged time, or tried before a court that manifestly follows orders from the executive branch, cannot be considered compatible with the obligation in article 2 of the International Covenant on Civil and Political Rights, which requires that States parties respect and ensure the Covenant rights for all persons in their territory and under their control”); European Court of Human Rights, *Omar Othman v United Kingdom*, Application No. 8139/09, paras 231 to 233; European Court of Human Rights, *Al-Moayad v Germany*, Application No. 35865/03 (dec.), paras 101 and 102; European Court of Human Rights, *Z and T v United Kingdom*, Application No. 27034/05 (dec.); European Court of Human Rights, *Babar Ahmad and Others v United Kingdom*, Application No. 24027/07, 11949/08, 36742/08 (dec.), para. 114.

⁷⁶ Human Rights Committee, *Domukovsky, Tsiklauri, Gelbakhiani, Dokvadze v Georgia*, Communication No. 623/1995, 624/1995, 626/1995, 627/1995, para. 18.2; Human Rights Committee, *Celiberti de Casariego v Uruguay*, Communication No. 56/1979, paras 10.1 to 11; Human Rights Committee, *Lopez Burgos v Uruguay*, Communication No. 52/1979, paras 12.1 to 13. See also, European Court of Human Rights, *Öcalan v Turkey*, Application No. 46221/99, 12 May 2005 (Grand Chamber), para. 91; with regard to the interception of a ship in international waters, see European Court of Human Rights, *Medvedev and others v. France*, Application No. 3394/03, 29 March 2010 (Grand Chamber), para. 67.

⁷⁷ Human Rights Committee, *Concluding observations on the United Kingdom*, CCPR/C/GBR/CO/6, §14; Human Rights Committee, *Concluding observations on the United States of America*,

ensure the Covenant rights to anyone within their power or effective control.⁷⁸ Similar views have been held by the International Court of Justice,⁷⁹ UN Special Procedures,⁸⁰ and, with regard to similar provisions, the Committee against Torture.⁸¹

CCPR/C/USA/CO/3/Rev.1, §10. See also, *inter alia*, European Court of Human Rights, *Al-Saadoon and Mufdhi v United Kingdom*, Application No. 61498/08 (dec.), para. 88 (“The Court considers that, given the total and exclusive de facto, and subsequently also de jure, control exercised by the United Kingdom authorities over the premises in question, the individuals detained there, including the applicants, were within the United Kingdom’s jurisdiction [...]”).

⁷⁸ Human Rights Committee, General Comment 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13, para. 10 (“States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party. As indicated in General Comment 15 adopted at the twenty-seventh session (1986), the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party”). With regard to the issue of state control over an area outside national territory, see also, *inter alia*, Human Rights Committee, *Concluding observations on Israel*, CCPR/C/ISR/CO/3, para. 5; Committee against Torture, *Concluding observations on Israel*, CAT/C/ISR/CO/4, para. 11; European Court of Human Rights, *Al-Skeini and others v United Kingdom*, Application No. 55721/07, paras 139 and 149; European Court of Human Rights, *Ivantoc and others v Moldova and Russia*, Application No. 23687/05, paras 116 to 120; European Court of Human Rights, *Ilaşcu and others v Russia and Moldova*, Application No. 48787/99, paras 314 to 316; European Court of Human Rights, *Cyprus v Turkey*, Application No. 25781/94, para. 77; European Court of Human Rights, *Loizidou v Turkey (Merits)*, Application No. 15318/89, para. 52; European Court of Human Rights, *Loizidou v Turkey (Preliminary objections)*, Application No. 15318/89, paras 62 to 64.

⁷⁹ International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, Advisory Opinion, I.C.J. Reports 2004, para. 111.

⁸⁰ Chairperson-Rapporteur of the Working Group on Arbitrary Detention, Special Rapporteur on the independence of judges and lawyers, Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Special Rapporteur on freedom of religion or belief, Special Rapporteur on the rights of everyone to the enjoyment of the highest attainable standard of physical and mental health, *Report to the UN Commission on Human Rights, Situation of detainees at Guantanamo Bay*, E/CN.4/2006/120, para. 11.

⁸¹ Committee against Torture, General Comment 2, *Implementation of article 2 by States parties*, CAT/C/GC/2, para. 7 (“The Committee also understands that the concept of ‘any territory under its jurisdiction’ [...] includes any territory or facilities and must be applied to protect any person, citizen or non-citizen without discrimination subject to the de jure or de facto control of a State party”) and para. 16 (“Article 2, paragraph 1, requires that each State party shall take effective measures to prevent acts of torture not only in its sovereign territory but also ‘in any territory under its jurisdiction’. The Committee has recognized that ‘any territory’ includes all areas where the State party exercises, directly or indirectly, in whole or in part, de jure or de facto effective control, in accordance with international law. The reference to ‘any territory’ in article 2, like that in articles 5, 11, 12, 13 and 16, refers to prohibited acts committed not only on board a ship or aircraft registered by a State party, but also during military occupation or peacekeeping operations and in such places as embassies, military bases, detention facilities, or other areas over which a State exercises factual or effective control. The Committee notes that this interpretation reinforces article 5, paragraph 1 (b), which requires that a State party must take measures to exercise jurisdiction ‘when the alleged offender is a national of the State’. The Committee considers that the scope of ‘territory’ under article 2 must also include situations where a State party

Moreover, the Human Rights Committee added that the states' obligations under article 2(1) ICCPR "also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation".⁸² The criteria of effective control has also been deemed decisive by the International Law Commission when considering whether a specific conduct is attributable to the contributing state or to a receiving international organization, including in cases of military contingents that a state places at the disposal of the United Nations for peacekeeping operations.⁸³

VI.- HORIZONTAL EFFECT

Following state parties' positive obligation under article 2(1) ICCPR to ensure to everyone within their jurisdiction the rights recognized in the Covenant, states must take action against human rights abuses perpetrated by private persons and entities.⁸⁴ A failure to ensure Covenant rights could take the form of "permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused".⁸⁵ The

exercises, directly or indirectly, de facto or de jure control over persons in detention"); see also, *inter alia*, Committee against Torture, *Concluding observations on the United Kingdom*, CAT/C/CR/33/3, para. 4(b); Committee against Torture, *Concluding observations on the United States of America*, CAT/C/USA/CO/2, para. 15.

⁸² Human Rights Committee, General Comment 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13, para. 10. On the issue of jurisdiction with regard to detention conducted by a national contingent of a multinational force, see, *inter alia*, European Court of Human Rights, *Al-Jedda v United Kingdom*, Application No. 27021/08, paras 84-85.

⁸³ International Law Commission, *Draft articles on the responsibility of international organizations, with commentaries*, 2011, Article 7 ("The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct") and related commentary, including p. 22, para. 8 ("[...] when an organ or agent is placed at the disposal of an international organization, the decisive question in relation to attribution of a given conduct appears to be who has effective control over the conduct in question"). See also Human Rights Committee, *Concluding observations on Kosovo (Serbia)*, CCPR/C/UNKCI/1, para. 17.

⁸⁴ Human Rights Committee, General Comment 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13, para. 8 ("The article 2, paragraph 1, obligations are binding on States Parties and do not, as such, have direct horizontal effect as a matter of international law. The Covenant cannot be viewed as a substitute for domestic criminal or civil law. However the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities").

⁸⁵ Human Rights Committee, General Comment 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13, para. 8 ("There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities"). With regard to the consequences of consent and acquiescence, including individual criminal responsibility, see, *inter alia*, articles 1, 4 and 16 of the Convention against Torture

general obligation of states to provide effective remedies under article 2(3) ICCPR is likewise critical, including the state obligation to put an end to an ongoing abuse by private individuals or entities.⁸⁶

The horizontal effect of Covenant rights has been recognized by the Human Rights Committee notably with regard to article 7 ICCPR. In particular, it considered “implicit in article 7 that States Parties have to take positive measures to ensure that private persons or entities do not inflict torture or cruel, inhuman or degrading treatment or punishment on others within their power.”⁸⁷ Similar observations have been made by the Committee against Torture.⁸⁸

Like freedom from torture and other forms of ill-treatment, the right to liberty and security⁸⁹

and Other Cruel, Inhuman or Degrading Treatment or Punishment and articles 2 and 6 of the International Convention for the Protection of All Persons from Enforced Disappearance; see also UN Declaration on the Protection of all Persons from Enforced Disappearance, UNGA resolution 47/133, para. 3. With regard to states' positive obligations under the European Convention on Human Rights, see, *inter alia*, European Court of Human Rights, *Cyprus v Turkey*, Application No. 25781/94, para. 81 (“[...] the acquiescence or connivance of the authorities of a Contracting State in the acts of private individuals which violate the Convention rights of other individuals within its jurisdiction may engage that State's responsibility under the Convention. Any different conclusion would be at variance with the obligation contained in Article 1 of the Convention”).

⁸⁶ Human Rights Committee, General Comment 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13, para. 8 (“States are reminded of the interrelationship between the positive obligations imposed under article 2 and the need to provide effective remedies in the event of breach under article 2, paragraph 3”) and *ibid.*, para. 15 (“Cessation of an ongoing violation is an essential element of the right to an effective remedy”).

⁸⁷ Human Rights Committee, General Comment 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13, para. 8.

⁸⁸ Committee against Torture, General Comment 2, *Implementation of article 2 by States parties*, CAT/C/GC/2, para. 18 (“The Committee has made clear that where State authorities or others acting in official capacity or under colour of law, know or have reasonable grounds to believe that acts of torture or ill-treatment are being committed by non-State officials or private actors and they fail to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors consistently with the Convention, the State bears responsibility and its officials should be considered as authors, complicit or otherwise responsible under the Convention for consenting to or acquiescing in such impermissible acts. Since the failure of the State to exercise due diligence to intervene to stop, sanction and provide remedies to victims of torture facilitates and enables non-State actors to commit acts impermissible under the Convention with impunity, the State's indifference or inaction provides a form of encouragement and/or de facto permission. The Committee has applied this principle to States parties' failure to prevent and protect victims from gender-based violence, such as rape, domestic violence, female genital mutilation, and trafficking”).

⁸⁹ It is important to highlight that the right to security of person is not limited to situations of deprivation of liberty and is relevant, among others, to issues such as witness protection programmes and other measures of protection against reprisals; see, *inter alia*, Human Rights Committee, *Marcellena and Gumanoy v Philippines*, Communication No. 1560/2007, paras 7.6-7.7 (“[...] the Covenant protects the right to security of person also outside the context of formal deprivation of liberty [...] In the present case, the Committee observes that, given that the victims were human rights workers and that at least one of them had been threatened in the past, there appeared to have been an objective need for them to be afforded protective measures to guarantee their security by the State. However, there is no indication that such protection was provided at any time. On the contrary, the authors claimed that the military was the source of the threats received by [...], and that the fact-finding team was under constant surveillance

of person must be protected by the state not only against violations committed by its agents or other persons acting on their behalf, but also against abuses perpetrated by private individuals and entities.⁹⁰ Failure to take effective legislative, administrative, judicial or other measures to prevent such acts and to provide effective remedies, including by investigating and ending these abuses and bringing the perpetrators to justice, violates state parties' positive obligations under article 9 ICCPR.⁹¹

during its mission. In these circumstances, the Committee concludes that the State party has failed to take appropriate measures to ensure the victims' right to security of person, protected by article 9, paragraph 1, of the Covenant") (threats in relation to human rights related work); Human Rights Committee, *Gunaratna v Sri Lanka*, Communication No. 1432/2005, para. 8.4 ("Article 9, on its proper interpretation, does not allow the State party to ignore threats to the personal security of non-detained persons subject to its jurisdiction") (death threats following complaint); Human Rights Committee, *Njaru v Cameroon*, Communication No. 1353/2005, para. 6.3 (death threats); Human Rights Committee, *Rajapakse v Sri Lanka*, Communication No. 1250/2004 para. 9.7 (threats and intimidation following complaint, lack of witness protection programme); Human Rights Committee, *Jimenez Vaca v Colombia*, Communication No.859/1999, para. 7.1 (death threats and harassment); Human Rights Committee, *Chongwe v Zambia*, Communication No. 821/1998, para. 5.3 (shooting and lack of proper investigation); Human Rights Committee, *Dias v Angola*, Communication No.711/1996, para. 8.3 (harassment and threats); Human Rights Committee, *Leehong v Jamaica*, Communication No. 613/1995, para. 9.3 (shooting before arrest); Human Rights Committee, *Tshishimbi v Zaire*, Communication No. 542/1993, para. 5.4 (abduction); Human Rights Committee, *Bahamonde v Equatorial Guinea*, Communication No. 468/1991, para. 9.2 (harassment, intimidation and threats); Human Rights Committee, *Rafael Mojica v Jamaica*, Communication No. 449/1994, para. 5.4 (death threats); Human Rights Committee, *Bwalya v Zambia*, Communication No. 314/1988, para. 6.4 (harassment and intimidation); Human Rights Committee, *Delgado Paez v. Colombia*, Communication No. 195/1985, para. 5.5 (death threats).

⁹⁰ With regard to forms of arbitrary detention such as enforced disappearance, see, *inter alia*, article 3 of the International Convention for the Protection of All Persons from Enforced Disappearance ("Each State Party shall take appropriate measures to investigate acts defined in article 2 committed by persons or groups of persons acting without the authorization, support or acquiescence of the State and to bring those responsible to justice").

⁹¹ With regard to states' violation of article 9 ICCPR in relation to third parties' abuses of the right to security of person, including death threats, see, *inter alia*, Human Rights Committee, *Jayawardena v Sri Lanka*, Communication No. 916/2000, paras 7.2-7.3; Human Rights Committee, *Jimenez Vaca v Colombia*, Communication No. 859/1999, paras 3.4 and 7.2. Positive obligation to protect individuals from unlawful and arbitrary deprivation of liberty by third parties has been recognized by the European Court of Human Rights in, *inter alia*, European Court of Human Rights, *Rantsev v Cyprus and Russia*, Application No. 25965/04, paras 319, 321, 324 and 325 ("In so far as [...] was detained by private individuals, the Court must examine the part played by the police officers and determine whether the deprivation of liberty in the apartment engaged the responsibility of the Cypriot authorities, in particular in light of their positive obligation to protect individuals from arbitrary detention [...] The Court [...] considers that the national authorities acquiesced in [...]s loss of liberty [...] It has not been argued that [...]s detention in the apartment was lawful. The Court finds that this deprivation of liberty was both arbitrary and unlawful [...] The Court therefore concludes that there has been a violation of Article 5 § 1 on account of [...]s unlawful and arbitrary detention"); European Court of Human Rights, *Riera Blume and others v Spain*, Application No. 37680/97, para. 35.

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