MONASH University
Castan Centre for Human Rights Law

Submission for General Discussion on Article 9

The Castan Centre for Human Rights Law thanks the Human Rights Committee for the opportunity to provide this written submission for the discussion on article 9 of the International Covenant on Civil and Political Rights ('Covenant').

We confine our comments to bringing issues to the attention of the Committee, which may otherwise be missed in its reconsideration of a General Comment on Article 9. We will not provide an overview of the extensive Committee jurisprudence which has arisen on the provision since the adoption of General Comment 8, as the Secretariat will provide advice in that regard.

In the Centre's view, there are several areas of uncertainty which could usefully be resolved in a new General Comment on article 9, including:

- Preventive detention – when does it become arbitrary and which forms of review are required?
- Control orders and curfews – when do they effectively become 'deprivations of liberty' rather than merely restrictions on freedom of movement?
- Disproportionate sentences
- Extraterritorial detention – do the principles articulated in General Comment 31 apply?
- To what extent is detention in the name of public health, for example through quarantine or isolation, permissible?
- Detention for mental health purposes
- Outstanding issues relating to Articles 9(2) and 9(5)

Preventive Detention

Preventive detention is increasingly being used to combat the perceived dangerousness of certain offenders, particularly convicted sex offenders, but also for persons associated with terrorism.[1] The Committee has issued a number of cases on preventive detention, namely *Rameka v New Zealand*,[2] *Dean v New Zealand*,[3] *Fardon v Australia*[4] and *Tillman v Australia*.[5]

[1] See eg Cole, 'Out of the Shadows: Preventive Detention, Suspected Terrorists, and War,' *California Law Review* Vol 97 (2009), p 693.
[2] CCPR/C/79/D/1090/2002, Views adopted 11 June 2003.
[3] CCPR/C/95/D/1512/2006, Views adopted 17 March 2009.
[4] CCPR/C/98/D/1629/2007, Views adopted 18 March 2010.
[5] CCPR/C/98/D/1635/2007, Views adopted 18 March 2010.

The reasoning behind the different results in the New Zealand and Australian cases, as well as the circumstances in which preventive regimes are compliant with Article 9, should be explored in the new General Comment. Issues that should be addressed include:

- In what circumstances, if any, can a person's "perceived dangerousness" be a factor in their continued incarceration?
- Could preventive detention in a dedicated facility be more compatible with Article 9 than continued imprisonment? When is supervised release not demanded as an alternative?
- What standard of review of preventive detention is required under Article 9(1)?
- When is preventive detention deemed to be punitive and when is it deemed to be preventive or rehabilitative? What difference does this classification make?

Control Orders and Curfews

Court orders which restrict an individual's personal liberty are hardly novel. However, with the advent of 'control orders' intended to prevent terrorist attacks, there has been increasing use of stringent conditions such as curfews and confinement to a particular geographical area. Such measures are also used in the immigration context.

In the UK, the courts have found that curfews of 18 hours per day amount to deprivations of liberty, whereas it found that curfews of 14 hours per day do not.[6] The European Court of Human Rights ('ECtHR') has held that conditions must be considered cumulatively, such that a nine hour curfew combined with a prohibition from leaving a small island effectively amounts to a deprivation of liberty.[7] In the Committee's own jurisprudence, confinement to a small town, even combined with strict reporting conditions, has not been found to constitute a deprivation of liberty.[8]

Given that orders restricting movement and imposing curfews or strict reporting requirements are now a fixture of the law in the UK and Australia, with comparable regimes in Canada and France,[9] it would be useful for the Committee to provide some guidance as to their compatibility with article 9. The Committee might also wish to address arguments that if such measures constitute 'pre-emptive punishment' they may be fundamentally incompatible with human rights.[10]

Disproportionality of Sentences

The Committee should clarify when, if ever, a disproportionate criminal sentence will breach Article 9(1). The majority of the HRC's jurisprudence relates to a failure to comply with

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[6] See *Deprivations of liberty,* Joint Select Committee on Human Rights, 10th Report (February 2008), Part 3: <http://www.publications.parliament.uk/pa/jt200708/jtselect/jtrights/57/5706.htm>.
[7] See *Guzzardi v Italy,* Application 7367/76, Decision of 11 June 1980.
[8] See *Celepli v Sweden*, CCPR/C/51/D/456/1991, Views of 18 July 1994, paragraph 5.2. See also Karker v France CCPR/C/70/D/833/1998, Views of 26 October 2000, paragraph 8.5.
[9] See *Control Orders in 2011: Final Report of the Independent Reviewer on the Prevention of Terrorism Act 2005* (March 2012): <http://terrorismlegislationreviewer.independent.gov.uk/publications/control-orders-2011>.
[10] See eg Zedner, 'Preventive Justice or Pre-punishment? The Case of Control Orders,' *Current Legal Problems* Vol 60 No 1 (2007), pp 174-203.

procedural safeguards. In *Fernando v Sri Lanka*,[11] the HRC found that a draconian penalty, coupled with a lack of procedural safeguards, breached Article 9(1). When, if ever, can a draconian penalty of itself breach Article 9(1)?

A related issue is the extent to which mandatory sentencing regimes are compliant with Article 9. A further related issue may relate to the extent to which Article 9 regulates parole and parole conditions, if at all.

Extraterritorial Detention

Extraterritorial detention for non-military purposes, in particular for immigration purposes, is a feature of US and Australian government policy. In the course of its discussions on the extraterritorial application of article 9, it would be helpful if the Committee could examine the examples of the US's detention of Haitian and Cuban asylum seekers in Guantanamo Bay and the Australian Government's offshore/regional processing initiatives for asylum seekers.

In the case of Australian immigration detention and/or processing on Nauru and Manus Island in Papua New Guinea, the centres are run by private contractors on the territory of another sovereign State, which potentially complicates the application of Australia's international obligations. In the Centre's view, it is clear that the principle of 'effective control' expounded in General Comment 31 applies to these cases, but it would be useful to include a more specific statement in this regard in the next General Comment on article 9.

Detention for Public Health Purposes

In 2010, the US Centers for Disease Control and Prevention placed an individual in enforced isolation on suspicion that he had an 'extensively drug-resistant' form of tuberculosis.[12] It eventually transpired that the initial diagnosis was incorrect, and that his tuberculosis was susceptible to some drug treatments, which led to questions about his confinement.[13]

The US Government has broad powers to detain individuals to prevent the spread of communicable diseases.[14] The Australian High Court has also held that administrative detention for the purpose of preventing the spread of infectious disease is a valid exercise of Executive power.[15] The World Health Organisation has provided guidance on involuntary detention for control of extensively drug-resistant tuberculosis,[16] based in part on the Siracusa Principles.[17] Yet scholars disagree on the extent to which such measures may be justified.[18]

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[11] CCPR/C/83/D/1189/2003, Views adopted 31 March 2005.

[14] Ibid.
[15] See eg *Chu Kheng Lim v Minister for Immigration Local Government & Ethnic Affairs* [1992] HCA 64 (8 December 1992), paragraph 24.
[16] See <http://www.who.int/tb/features_archive/involuntary_treatment/en/index.html>.
[17] UN Doc E/CN.4/1985/4, Annex.
[18] See eg Boggio et al, 'Limitations on human rights: Are they justifiable to reduce the burden of TB in the era of MDR- and XDR-TB?' *Health and Human Rights,* Vol 10, No 2 (2008). Cf Amon et al, 'Limitations on human rights in the context of drug-resistant tuberculosis: A reply to Boggio et al,' *Health and Human Rights*, Perspectives Archives 2009: <http://www.hhrjournal.org/index.php/hhr/article/view/230/337>.

The ECtHR has set out requirements for such measures to be compatible with article 5 of the European Convention (which contains a specific quarantine exception) in the case of *Enhorn v Sweden*.[19]

It would be useful for the Committee to explain how article 9 of the Covenant applies to public health situations including enforced isolation (reactive) and quarantine (preventive).

Involuntary Detention for Mental Health Purposes

The Committee has dealt with the issue of confinement for mental health purposes on a number of occasions, such as in *A v New Zealand*[20] and *Fijalkowska v Poland*.[21] It would be useful for the Committee to outline the parameters within which involuntary detention for psychiatric purposes is permitted under Article 9.

Article 9(2)

In General Comment 8, the Committee outlined that *part* of this provision applied exclusively to criminal charges. The Committee should outline the circumstances in which it applies outside the context of criminal charges.

Article 9(5)

Given the invigoration of the right to a remedy under Article 2(3) of the ICCPR, the Committee should explain the purpose of Article 9(5), and its relationship to Article 2(3).

28 September 2012

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[19] Application 56529/00, Decision of 25 January 2005.
[20] CCPR/C/66/D/754/1997, Views adopted 15 July 1999.
[21] CCPR/C/84/D/1061/2002, Views adopted 26 July 2005.