

UNITED NATIONS HUMAN RIGHTS COMMITTEE
109th Session of the UN Human Rights Committee
14 October to 1 November 2013

**INTERNATIONAL COMMISSION OF JURISTS: INITIAL COMMENTS
ON DRAFT GENERAL COMMENT 35 ON ARTICLE 9 OF THE INTERNATIONAL
COVENANT ON CIVIL AND POLITICAL RIGHTS**

Submitted 16 October 2013

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

ICJ Initial Comments to the Human Rights Committee on Draft General Comment 35 on Article 9 of the ICCPR

1. The International Commission of Jurists (ICJ) provides these initial comments to the Human Rights Committee (the Committee) on its continued first reading of draft General Comment 35 on article 9 of the International Covenant on Civil and Political Rights (ICCPR).¹ The ICJ plans to provide more extensive submissions after a revised draft is presented for public comment.

2. The ICJ commends the Committee on the draft and expresses concurrence with much of the text. The present submission is focussed on four points:

- I. The General Comment should explicitly address procedural guarantees required for article 9(4) proceedings to be fair and effective, in particular the right to equality of arms and the right of access to and assistance by a lawyer in connection with such proceedings.
- II. The General Comment should affirm that administrative or other "preventive" detention on security grounds is in principle not capable of justification in the absence of a valid derogation in a declared state of emergency.
- III. The General Comment should not foreclose but rather should affirm that *non-refoulement* obligations can arise in relation to a real risk of violations of article 9, such as prolonged arbitrary detention.
- IV. Suggestions for strengthening the language on judicial supervision of all forms of deprivation of liberty (as the Committee has already discussed in relation to paragraphs 13 and 19 of the present draft).

I. GUARANTEES FOR THE EFFECTIVENESS AND FAIRNESS OF ARTICLE 9(4) PROCEEDINGS

a. Equality before the courts and the principle of equality of arms in relation to article 9(4)

3. The ICJ respectfully submits that the General Comment would be strengthened if it were explicitly to affirm the application of the principle of equality of arms in the proceedings provided for by article 9(4) ICCPR.

4. As the Committee noted in General Comment No. 32, the right to equality before courts and tribunals must be respected not only in "the determination of any criminal charge against" a person and any determination of the person's "rights and obligations in a suit at law", but whenever domestic law entrusts a judicial body with a judicial task.² The Committee recognized that the right to equality before courts and tribunals incorporates the guarantees of "equal access and equality of arms", independent of any other specific provisions of article 14.³

5. As already recognised by this Committee in the present draft (paras 41, 43, 46), review of the lawfulness of detention constitutes a judicial task to be undertaken by a judicial body. In particular, the text of article 9(4) specifies that procedures must be available to challenge the lawfulness of detention "before a court". It follows that

¹ UN Doc CCPR/C/107/R.3 (28 January 2013).

² Human Rights Committee, General Comment No. 32, UN Doc CCPR/C/GC/32 (2007), para 7, citing Communication No. 1015/2001, *Perterer v. Austria*, para. 9.2 (disciplinary proceedings against a civil servant); Communication No. 961/2000, *Everett v. Spain*, para. 6.4 (extradition).

³ Human Rights Committee, General Comment No. 32, paras 8, 13.

the right to equality before courts and tribunals, and thus the guarantee of equality of arms, applies to proceedings under article 9(4). Indeed, Committee has on several occasions explicitly referred in Concluding Observations to "equality of arms" as a requirement of proceedings under article 9(4).⁴

6. The Committee described the principle of equality of arms in General Comment No. 32 as requiring "that the same procedural rights be provided to all parties unless distinctions are based on the law and can be justified on objective reasonable grounds not entailing actual disadvantage or other unfairness to the defendant".⁵ As an illustration, the Committee noted the requirement that "each side be given the opportunity to contest all the arguments and evidence adduced by the other party",⁶ which it held to apply not only in criminal proceedings (as explicitly provided for by article 14(3)(e)) but in civil proceedings as well. Furthermore the ICJ considers that it should be noted that fairness, equality of arms, and effective protection of the detainee against violations of his or her rights under the Covenant would also require that the individual be brought before the court.

7. The ICJ recommends that:

a) The General Comment explicitly state that proceedings under article 9(4) of the ICCPR must respect the principle of equality before the law, and equality of arms in particular. Incorporation into the draft General Comment of the description of equality of arms contained in paragraph 13 of General Comment 32 would bring further clarity.

b) The General Comment specifically clarify that fairness, equality of arms, and effective protection of the detainee against violations of his or her rights under the Covenant would also require that the individual be brought before the court.

c) Such amendments to the draft could be made in Part V (perhaps around paragraphs 43 or 47) and/or in the discussion of the overlap between articles 9 and 14, in paragraph 64.

b. The right of access to and assistance by legal counsel

8. The ICJ respectfully submits that the General Comment should expressly affirm and elaborate on the right of access to and assistance by a legal counsel as a minimum requirement for the right under article 9(4) to be effective.

⁴ See Concluding Observations on Tajikistan, UN Doc CCPR/CO/84/TJK (18 July 2005), para 12; Bosnia and Herzegovina, UN Doc CCPR/C/BIH/CO/1 (22 November 2006), para 17; United Kingdom, UN Doc CCPR/C/GBR/CO/6 (30 July 2008), para 17. See also Concluding Observations on the report of India, 30 July 1997, at para 24: "the decision as to continued detention must be considered as a determination falling within the meaning of article 14, paragraph 1, of the Covenant, and ... proceedings to decide the continuation of detention must, therefore, comply with that provision". The application of the requirement of equality of arms to such proceedings has also been expressly affirmed by the European Court of Human Rights (under article 5(4) of the European Convention on Human Rights), for instance in *Mamedova v. Russia*, Application No. 7064/05, 1 July 2006, para. 89; *García Alva v. Germany*, Application No. 23541/94, 13 February 2001, para. 39. See also *A and Others v the United Kingdom* [GC], Application No. 3455/05, 19 February 2009, paras 203-224.

⁵ Human Rights Committee, General Comment No. 32, para 13, citing *Dudko v. Australia*, UN Doc CCPR/C/90/D/1347/2005 (23 July 2007), para 7.4.

⁶ Human Rights Committee, General Comment No. 32, para 13, citing Communication No. 846/1999, *Jansen-Gielen v. The Netherlands*, para. 8.2 and No. 779/1997, *Äärelä and Näkkäläjärvi v. Finland*, para. 7.4.

9. The current draft does not directly refer to this right in relation to article 9(4) (i.e. in Part V).⁷ A later paragraph states that, as a safeguard against both torture and arbitrary detention, prompt and regular access should be provided to lawyers,⁸ but does not mention several elements the Committee has already held necessary for such access to be effective in relation to article 9, such as confidentiality of communications.

10. The right to prompt and regular access to a lawyer from the outset of deprivation of liberty has been repeatedly recognised by the Committee as essential to making the right to challenge the lawfulness of detention under article 9(4) practical and effective.⁹ The Committee has not restricted the scope of this right to criminal proceedings to which article 14(3) would apply; as article 9(4) proceedings must be available as regards any deprivation of liberty on any ground, the right of access to a lawyer for purposes of bringing an article 9(4) proceeding must similarly apply to all deprivations of liberty on any grounds.¹⁰

11. The ICJ submits that the General Comment would be strengthened by adding an express reference to the right of access to and assistance by a lawyer from the outset of any deprivation of liberty as a necessary element for article 9(4) proceedings to be effective. In addition, the ICJ submits that key aspects of such access and assistance in relation to article 9 should also be added, whether in the discussion of article 9(4) or the discussion of overlap with article 7: the right to prompt access to one's lawyer of choice; the requirement that any assigned lawyer be competent and free to carry out his or her functions; and the requirement that communications be confidential.

12. In this regard, every individual deprived of liberty (whether in criminal justice or other settings) has in principle the right to access to and assistance by legal counsel of his or her choice.¹¹ Where a lawyer is assigned to the person, for instance in extraordinary circumstances in which access to his or her own lawyer is denied, if the legal assistance is not in practice independent or competent,¹² or if legal counsel

⁷ Only an indirect reference is made at paragraph 47 ("Practices that render such review effectively unavailable to an individual, including incommunicado detention, also amount to a violation").

⁸ See para 60 in the section discussing the relationship between article 9 and article 7 ("Prompt and regular access should be given to medical personnel and lawyers and, under appropriate supervision when the investigation so requires, to family members").

⁹ Human Rights Committee, *Paul Kelly v. Jamaica*, UN Doc CCPR/C/41/D/253/1987 (8 April 1991), para 5.6; *Rafael Marques de Morais v. Angola*, UN Doc CCPR/C/83/D/1128/2002 (29 March 2005), paras 6.3, 6.5; *Umarova (re Umarov) v Uzbekistan*, UN Doc CCPR/C/100/D/1449/2006 (19 October 2010), paras 8.5-8.6; *Bousroual v Algeria*, UN Doc CCPR/C/86/992/2001 (30 March 2006), paras 9.6 and 9.7. See also: Concluding Observations on Israel, UN Doc CCPR/C/CO/78/ISR (2003), paras 12-13; Azerbaijan CCPR/C/AZE/CO/3, (2009); Belgium CCPR/C/BEL/CO/5 (2010); Portugal CCPR/C/PRT/CO/4 (2012); Suriname CCPR/CO/80/SUR (4 May 2004), para 14; Egypt CCPR/CO/76/EGY (28 November 2002), para 14; CCPR/C/TUR/CO/1 (13 November 2012), para 17; CCPR/CO/72/CZE (27 August 2001), para 17; CCPR/C/NLD/CO/4 (25 August 2009), para 11.

¹⁰ See also in this regard UN Basic Principles on the Role of Lawyers, unanimously endorsed by the General Assembly in resolution 45/166 of 18 December 1990, Principle 7: "Governments shall further ensure that all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer, and in any case not later than forty-eight hours from the time of arrest or detention", and Guideline 4 para 44(c) provides: "To ensure that detained persons have prompt access to legal aid in conformity with the law, States should take measures:(c) To ensure legal representation at all pretrial proceedings and hearings".

¹¹ Human Rights Committee, Concluding Observations on Spain, UN Doc CCPR/C/ESP/CO/5 (2008) para 14. See also: UN Basic Principles on the Role of Lawyers, Principles 1, 5. UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by General Assembly resolution 43/173 of 9 December 1988, Principles 17, 18.

¹² See e.g. *Komarovski v Turkmenistan*, UN Doc CCPR/C/93/D/1450/2006 ((24 July 2008), paras 2.7, 3.4, 7.4.

is prevented from carrying out his or her functions through harassment or intimidation, the failings can themselves result in violation of article 9(4).¹³

13. Finally, confidentiality of detainee-lawyer communications (including for purposes of proceedings contemplated by article 9) must be guaranteed from the outset of any deprivation of liberty, and regardless of whether the State intends to use at trial any information obtained in breach of the confidentiality.¹⁴

14. The ICJ recommends that:

a) An explicit reference be added in Part V of the draft General Comment to the principle that the right of access to and assistance by a lawyer from the outset of deprivation of liberty is necessary for the right under article 9(4) to be effective. The text should also note that the Committee has found violations of article 9(4) where a lawyer assigned to a detainee was not competent or could not carry out his or her functions due to fear of reprisals or other interference.

b) Whether in relation to article 9(4) in particular (i.e in Part V), or to the right of persons deprived of liberty to access a lawyer in general (i.e. in para 60), the ICJ recommends that the General Comment note that the right is to access to a lawyer of one's choice or, in the absence of a lawyer of choice, suitably competent and effective appointed counsel, free of charge if the individual is unable to pay, and that the confidentiality of communications between a person deprived of liberty and legal counsel must be respected.

c. Characteristics of the court

15. In paragraph 46, line 1, of the draft General Comment it is stated that: "Paragraph 4 entitles the individual to take proceedings before 'a court', which need not always be a court within the judiciary". Most of the paragraph addresses the exceptional circumstances in which the "court" is not within the ordinary judiciary.

16. The ICJ recommends that the draft be strengthened by reversing the emphasis in paragraph 46. The Comment would then more clearly emphasise that such a "court", satisfying the essential requirements of competence, independence and impartiality, is usually found within the ordinary judiciary. Before noting that some exceptions may exist, the Comment would note that the Committee has repeatedly found other entities outside the ordinary justice system to be insufficient in particular cases (for instance, in the two Finnish cases already cited with the paragraph). The exceptions would then follow later as a subsidiary point rather than the opening sentence. For instance, the paragraph could be revised to read something along the following lines:

"Paragraph 4 entitles the individual to take proceedings before 'a court.' In most circumstances the forum for such proceedings will be the ordinary courts, in so far as they have the necessary degree of impartiality, independence and procedural safeguards. (A footnote, perhaps to General Comment 32, paras 19-24, could be added here.) Indeed, the Committee has in individual cases held certain bodies outside of the ordinary court system to

¹³ See e.g. *Akhadov v. Kyrgyzstan*, UN Doc CCPR/C/101/D/1503/2006 (25 March 2011), paras 2.2, 7.4.

¹⁴ UN Basic Principles on the Role of Lawyers, Principles 8 and 22. Concluding Observations on Spain, UN Doc CCPR/C/ESP/CO/5 (2008) para 14; Austria, UN Doc CCPR/C/AUT/CO/4 (30 October 2007), para 16. United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, UN GA Res 67/187 (20 December 2012), para 43(d). UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 18(4).

fail to satisfy the characteristics of a 'court' (footnote to *Torres v Finland*, and *Vuolanne v Finland*). For some forms of detention, however, a tribunal of a judicial character outside of the ordinary judiciary may exceptionally satisfy the requirements of a court. For disciplinary detention of a soldier on active duty, for instance, review by a military court may suffice, although review by a superior military officer would not (footnote to *Vuolanne v Finland*)."

17. The ICJ recommends that paragraph 46 be amended to more clearly emphasise that in most cases the "court" referred to in article 9(4) should be found within the ordinary judiciary and that the Committee has frequently held other kinds of bodies not to satisfy the definition of a "court".

II. ADMINISTRATIVE OR OTHER "PREVENTIVE" SECURITY DETENTION AND THE NECESSITY FOR DEROGATION¹⁵

18. The ICJ respectfully submits that the General Comment should affirm that administrative or other "preventive" detention on security grounds is in principle not capable of justification in the absence of a valid derogation in a declared state of emergency.¹⁶

19. While the Committee may not to date have explicitly articulated this principle in an individual case or Concluding Observation, it has generally found a violation of article 9 in the examination of specific instances of administrative or preventive detention.¹⁷ Indeed, the ICJ is unaware of any instance where the Committee has held an administrative or other "preventive" security detention regime, particularly outside of the scope of any derogation, to comply with the ICCPR. The ICJ considers that advancing such a principle in the General Comment would be consistent with the Committee's jurisprudence and concluding observations to date, and would point the way towards an important progressive development in the Committee's interpretation of the Covenant that would also ensure a global approach that is no less protective, and consistent with, that prevailing within the European human rights system (the first explicitly to address this point).

20. Administrative or "preventive" security detention is, as a general matter, anathema to respect for human rights under the rule of law. The ICJ Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights concluded the following in its 2008 Report, after extensive international deliberations and public hearings:¹⁸

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

¹⁵ The ICJ thanks the students and staff at the Human Rights Clinic of the University of Essex for their research assistance on this issue.

¹⁶ This submission does not examine in detail the specific requirements for and limitations to a valid derogation from article 9, which is already to a large extent addressed in the Draft General Comment No. 35, at paras 68-70, as well as General Comment No. 29.

¹⁷ See, e.g., *Capora Schweizer v. Uruguay*, Communication 66/1980, UN Doc Supp. No. 40 (A/38/40) at 117 (1983), para 18.1; Concluding Observations on Jordan, UN Doc CCPR/C/JOR/CO/4 (2010), para 11; Colombia, UN Doc CCPR/C/COL/CO/6 (2010), para 20; Israel, UN Doc CCPR/CO/78/ISR (21 August 2003) para 12 and UN Doc CCPR/C/ISR/CO/3 (3 September 2010), para 7, even in the presence of a declared derogation; Canada, UN Doc CCPR/C/CAN/CO/5 (20 April 2006), para 14; Sri Lanka CCPR/CO/79/LKA (1 December 2003), para 13.

¹⁸ International Commission of Jurists, Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights, *Assessing Damage, Urging Action* (2009), pp. 166-167 <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/04/Report-of-the-Eminent-Jurists-Panel-on-terrorism-couter-terrorism-Annual-Report-2009.pdf>.

21. Such forms of detention, particularly where they are prolonged, render persons held vulnerable to torture or other ill-treatment and other violations of human rights.¹⁹ The UN Special Rapporteur on Torture in 2002 concluded in his general recommendations that “countries should consider abolishing, in accordance with relevant international standards, all forms of administrative detention”.²⁰ The Committee against Torture has similarly found administrative detention to be inadmissible and a practice that should be eliminated.²¹ The widespread use of administrative detention also poses a danger for the rule of law and protection of human rights beyond the violation of rights in individual cases, as the practice frequently erodes or even to some extent displaces the role of the normal criminal justice system (with its stronger substantive and procedural protections for individual liberty).

22. In the context of the European Convention, Article 5(1)(a) to (f) of the ECHR contain an exhaustive list of permissible grounds for deprivation of liberty. Under the case-law of the European Court of Human Rights, it has been established for more than 50 years that “the list of grounds of permissible detention in Article 5 § 1 does not include internment or preventive detention where there is no intention to bring criminal charges within a reasonable time”.²² Administrative security detention, absent a valid derogation, is consequently prohibited within the European regional system, albeit due at least in part to the particular wording of the European Convention on a point not explicitly addressed by the ICCPR.

23. The ICJ recommends that the General Comment affirm that administrative or other “preventive” detention on security grounds is in principle not capable of justification in the absence of a valid derogation in a declared state of emergency.

III. NON-REFOULEMENT OBLIGATIONS WITH REGARD TO ARTICLE 9

24. The ICJ respectfully submits that the General Comment should not foreclose but rather should affirm that *non-refoulement* obligations can arise in relation to a real risk of serious violations of article 9, such as prolonged arbitrary detention.

25. The ICJ considers that while there is room for General Comments to suggest progressive interpretations of the ICCPR on issues for which there may not yet be specific Committee jurisprudence or Concluding Observations, it would not be advisable for a General Comment pre-emptively to rule out possible findings of human rights violations in future cases on the basis that the Committee has not yet reached such a finding on the facts of any cases brought to it to date. This is particularly the case in this area where, indeed, the jurisprudence of the Committee, notably in the case of *G.T. v. Australia*, does not rule out such a finding,²³ and furthermore when

¹⁹ See Concluding Observations on Egypt, UN Doc CCPR/C/79/Add.23, para 10; Ukraine, UN Doc CCPR/C/79/Add.52, A/50/40, paras 305-333.

²⁰ UN Doc E/CN.4/2003/68 (17 December 2002), para 26 (h).

²¹ See, e.g., Committee against Torture Concluding Observations on: Jordan, UN Doc A/65/44, para 60(13); Moldova, UN Doc CAT/C/CR/30/7 (2003), para 6(d); Egypt, UN Doc CAT/C/CR/29/4 (2002), para 6(f); and China, UN Doc A/55/44, para 101. See also Report of the Working Group on Arbitrary Detention, UN Doc A/HRC/10/21, para 54(b).

²² See for example ECtHR (Grand Chamber), *Al-Jedda v. the United Kingdom*, Application no. 27021/08 (7 July 2011), para 100; (Grand Chamber), *A. and others v. the United Kingdom*, Application no. 3455/05 (19 February 2009), para 172, referring to *Lawless v. Ireland (No. 3)*, judgment of 1 July 1961, paras 13 and 14, Series A no. 3.

²³ The Committee’s point of departure in its detailed consideration of the evidence in *G.T. v. Australia*, CCPR/C/61/D/706/1996 (4 December 1997) was that a State may violate its obligations if it deports a person in the face of a real risk that the individual’s rights “under the Covenant” would be violated in another jurisdiction (para 8.2) as well the existence as a matter of principle of *non-refoulement* obligations under Article 9 (para 8.7). However, the Committee did not find that the case of a potential violation by Australia of its *non-refoulement* obligations

such a conclusion would be inconsistent with refugee law,²⁴ the jurisprudence of the European Court of Human Rights, and the approach of the Working Group on Arbitrary Detention.

26. In particular, in relation to the issue of *non-refoulement* obligations arising from a real risk of arbitrary detention, absent overlapping risks of torture or other ill-treatment or arbitrary deprivation of life, the ICJ notes that the jurisprudence of the European Court of Human Rights has explicitly held such obligations to arise, at least in relation to a real risk of “flagrant violations” of article 5 of the European Convention on Human Rights,²⁵ as has the Working Group on Arbitrary Detention with respect to risk of arbitrary detention more generally.²⁶

27. The ICJ considers that adoption of paragraph 66 of the draft General Comment, as presently formulated, would therefore appear to be inconsistent with the Committee’s own jurisprudence, and worryingly create an inconsistency of approach at the global and European levels. It may also result in states considering themselves relieved of their *non-refoulement* obligations under Article 9.

28. *The ICJ recommends at a minimum that the wording of paragraph 66 of the draft General Comment, presently in parentheses, be deleted. In its place the ICJ would welcome a statement to the effect that non-refoulement obligations under Article 9 arise when States know or ought to know that the removal of a person from their jurisdiction would expose the concerned individual to a real risk of a serious violation of article 9, such as prolonged arbitrary detention. Non-refoulement obligations enjoin States from removing the concerned person from their jurisdiction by whatever means, and/or require them to take all necessary measures to prevent third parties from doing so.*

IV. CLARIFICATIONS REGARDING JUDICIAL SUPERVISION

29. The ICJ notes that the Committee has already in its discussions on first reading of paragraphs 13 and 19 of the draft General Comment, determined to clarify and strengthen the language on judicial supervision of all deprivations of liberty.

30. The ICJ welcomes the fact that in reference to the mental health detention context, the current draft at paragraph 19 recommends “initial and periodic judicial review of the lawfulness of the detention”. At a minimum, the ICJ would recommend that the same language used in paragraph 19 in the mental health detention context, including that the review should be judicial in character, be reproduced in paragraph 13 of the current draft, which, in turn, appears to address all forms of detention.

31. However, the ICJ considers this issue to be of such importance to securing respect for the right to liberty, that it recommends the Committee elaborate further, for instance by adopting additional text along the following lines:

in proceeding with the removal of the complainant’s husband to Malaysia had been made out on the evidence (para 8.7).

²⁴ See, *inter alia*, the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees HCR/IP/4/Eng/REV.1, para 51, “There is no universally accepted definition of ‘persecution’, and various attempts to formulate such a definition have met with little success. From Article 33 of the 1951 Convention, **it may be inferred that a threat to life or freedom** on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution. Other serious violations of human rights -- for the same reasons -- would also constitute persecution”, **(emphasis added)**.

²⁵ ECtHR, *Othman (Abu Qatada) v. the United Kingdom*, Application no 8139/09 (17 January 2012), paras 226-235; (Grand Chamber), *El-Masri v. the former Yugoslav Republic of Macedonia*, Application No 39630/09 (13 December 2012), para 239.

²⁶ Report of the Working Group on Arbitrary Detention, UN Doc A/HRC/4/40 (9 January 2007), para 49.

"While article 9(3) expressly requires that anyone detained under criminal charge be brought promptly before a judge or other officer authorized by law to exercise judicial power, adoption of the same practice for all persons deprived of liberty on any ground would serve as a fundamental safeguard against arbitrary detention, as well as other human rights violations.²⁷

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

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

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

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

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

32. The ICJ recommends clarifying and strengthening the language in the draft General Comment on judicial supervision of all forms of deprivation of liberty, along the lines suggested in our submission.

V. CONCLUSION

33. The International Commission of Jurists thanks the Human Rights Committee for its careful deliberations on the draft General Comment on article 9 and the transparency it has demonstrated in its process of review. The ICJ hopes the Committee will find these submissions to be of assistance to its work, and looks forward to the eventual publication by the Committee of a second draft for further comment.

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