



## Written Information

submitted to the Human Rights Committee

### General Discussion on Article 9 (Liberty and Security of Person) of the International Covenant on Civil and Political Rights

SEPTEMBER 2012

Presented by

**TRIAL (*Swiss Association against Impunity*)**

In view of the Half-Day of General Discussion on Article 9 of the International Covenant on Civil and Political Rights ("ICCPR") organised by the Human Rights Committee ("HRC"), and taking into account the concept note drafted by the HRC's Rapporteur on the General Comment on Article 9, Mr. Gerald L. Neuman, TRIAL wishes to submit the present written information.

Given the particular field of work and expertise of TRIAL, this document focuses mainly on matters related to Article 9 ICCPR and enforced disappearance. Reference is made also to the application of Article 9 ICCPR in situations of armed conflict. However, TRIAL considers of the utmost importance also other issues related to Article 9 ICCPR, including those mentioned by Mr. Neuman in his concept note. Accordingly, TRIAL looks forward to listening and actively taking part to the overall debate that will take place on 25 October 2012 in Geneva, as well as commenting on the text of the General Comment resulting from the first reading once it will be made public.

The present written information aims at raising in a schematic manner some issues that TRIAL considers of pivotal importance in the interpretation and implementation of Article 9 ICCPR; and at providing some references that the subscribing association wishes could be taken into account by the HRC when drafting the General Comment.

TRIAL  
P.O. Box 5116  
CH-1211 Geneva 11  
Tél/Fax: +41 22 3216110  
info@trial-ch.org  
www.trial-ch.org  
CCP: 17-162954-3

## Article 9

**1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.**

- ▶ This provision shall be read in light of Articles 17 and 18 of the International Convention for the Protection of All Persons from Enforced Disappearance (“the 2007 Convention”) as well as Articles 10-12 of the 1992 Declaration on the Protection of All Persons from Enforced Disappearance (“the 1992 Declaration”).
- ▶ The conditions to deprive someone of his or her liberty must be established by law and be fully consistent with international law and standards concerning the deprivation of liberty, including, besides Article 9 ICCPR, Article 3 of the Universal Declaration of Human Rights; the United Nations Code of Conduct for Law Enforcement Officials (1979); and the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990). Notably, the Working Group on Arbitrary Detention (“WGAD”) established a framework for evaluating whether or not the grounds upon which a person has been deprived of liberty are arbitrary.<sup>1</sup> The interpretation of Article 9 ICCPR shall be consistent with such framework.
- ▶ Secret detention, which constitutes per se a violation of Article 9 ICCPR, may constitute torture or ill-treatment for the direct victims as well as for their families,<sup>2</sup> and must, as such, be read also in conjunction with Articles 7 and 10 ICCPR.
- ▶ Arbitrary detention places persons deprived of their liberty in a state of absolute vulnerability and outside the protection of the law. As corroborated also by a number of cases dealt with by the HRC and by the WGAD, arbitrary detention often leads to further violations of human rights, in particular torture and inhumane or degrading treatment or punishment. In this respect, the Committee against Torture (“CAT”) spelled out a number of measures that States must adopt in order to prevent the occurrence of torture in places of detention, including “[...] the right of detainees to be informed of their rights, the right to receive promptly independent legal assistance, independent medical assistance, and to contact relatives, [...] and the availability to detainees and persons at risk of torture and ill-treatment of judicial and other remedies”.<sup>3</sup>
- ▶ With regard to secret detention it must be stressed that if the International Committee of the Red Cross (“ICRC”) is granted access by the authorities to a detention facility, the detention will still be secret if the ICRC is not permitted to register the case, or is not permitted by the State to, or does not for whatever other reason, notify the next of kin of the detainee of his or her whereabouts.<sup>4</sup>
- ▶ In its General Comment on Article 10 of the 1992 Declaration, the Working Group on Enforced or Involuntary Disappearances (“WGEID”) stresses that “[...] this provision combines three

<sup>1</sup> Report of the Working Group on Arbitrary Detention (WGAD), doc A/HRC/16/47, Annex, para. 8.

<sup>2</sup> *Joint study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism; the Special Rapporteur on Torture; the WGAD; and the Working Group on Enforced or Involuntary Disappearance (WGEID)*, doc. A/HRC/13/42 (“Joint Study”), paras. 8-56.

<sup>3</sup> Committee against Torture (CAT), General Comment No. 2, doc. CAT/C/BDI/GC/2, para. 13.

<sup>4</sup> Joint Study, *cit.*, para. 11.

obligations which, if observed would effectively prevent enforced disappearances: recognized place of detention, limit of administrative or pre-trial detention and judicial intervention”.<sup>5</sup> Accordingly, places of detention “must be official- whether they be police, military or other premises – and in all cases clearly identifiable and recognized as such. *Under no circumstances, including states of war or public emergency, can any State interests be invoked to justify or legitimize secret centres or places of detention which, by definition, would violate the Declaration, without exception*”.<sup>6</sup>

- ▶ The prohibition of secret detention is strictly connected to the guarantee of access to information on persons deprived of their liberty to any persons with a legitimate interest in this information, such as relatives of the person deprived of liberty, their representatives or their counsel. In this sense, Article 18 of the 2007 Convention establishes the core-information that must be disclosed to the mentioned persons with a legitimate interest.<sup>7</sup> This must be taken into account also by the HRC and is a crucial preventive measure vis-à-vis enforced disappearance.<sup>8</sup>
- ▶ Moreover, a fundamental measure to be undertaken to prevent secret detention and arbitrary deprivation of liberty is the establishment, compilation and maintenance of or more up-to-date official registers and/or records of persons deprived of liberty, which shall be made promptly available, upon request, to any judicial or other competent authority or institution authorized for that purpose by the law of the State Party concerned or any relevant international legal instrument to which the State concerned is a party. In this sense, Article 17, para. 3, of the 2007 Convention sets forth a particularly articulated regime.<sup>9</sup> Detention records should be kept, including in times of armed conflict, as required by the Geneva Conventions, and should also include the number of detainees, their nationality and the legal basis on which they are being held, whether as prisoners of war or civilian internees.<sup>10</sup>
- ▶ A fundamental guarantee against arbitrary deprivation of liberty and detention is related to the access by competent and legally authorized authorities and institutions to places where persons are deprived of their liberty. In this sense, among others, Article 17, para. 2 (e), of the 2007 Convention must be taken into account, as well as Article 9, paras. 2 and 3, of the 1992 Declaration. In this sense, States shall provide for regular independent unannounced and unrestricted access of internal inspections and independent mechanisms to all places where

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<sup>5</sup> WGEID, doc. E/CN.4/1997/34, para. 23.

<sup>6</sup> *Ibid.*, para. 24.

<sup>7</sup> See also para. 26 of WGEID, doc. E/CN.4/1997/34 (General Comment on Article 10 of the 1992 Declaration).

<sup>8</sup> See also WGEID, *General Comment on the Right to the Truth in Relation to Enforced Disappearance*, para. 2, at: [http://www.ohchr.org/Documents/Issues/Disappearances/GC-right\\_to\\_the\\_truth.pdf](http://www.ohchr.org/Documents/Issues/Disappearances/GC-right_to_the_truth.pdf).

<sup>9</sup> See also para. 27 of WGEID, doc. E/CN.4/1997/34 (General Comment on Art. 10 of the 1992 Declaration).

<sup>10</sup> See in particular 1949 Geneva Convention III; Standard Minimum Rules for the Treatment of Prisoners; and Body of Principles for the Protection of All Persons under Any Form of Detention and Imprisonment. Most notably, European Court of Human Rights, *Kurt v. Turkey*, Judgment of 25 May 1998, para. 125 reads: “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.” This reasoning shall be applied mutatis mutandis to Article 9 ICCPR. See also CAT, *General Comment No. 2, cit.*, para. 13.

persons are deprived of their liberty for monitoring purposes, at all times.<sup>11</sup> In times of armed conflict, the location of all detention facilities shall be disclosed to the ICRC.

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#### **2. Anyone who is arrested shall be informed, at the time of the arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.**

- ▶ This provision shall be read in conjunction with Articles 17 and 18 of the 2007 Convention.
- ▶ “Promptly” in this context shall be interpreted as “within a few hours”.<sup>12</sup> Moreover, this provision must be read in conjunction with Article 14 ICCPR and the fundamental guarantees thereby enshrined.
- ▶ Persons deprived of their liberty must be guaranteed access to the outside world, as spelled out, among others, besides the already quoted Articles 17 and 18 of the 2007 Convention, by other international law instruments and standards, including the United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988); the United Nations Standard Minimum Rules for the Treatment of Prisoners (1955); the United Nations Basic Principles on the Role of Lawyers (1990); and the Vienna Convention on Consular Relations (1963).<sup>13</sup>
- ▶ Only when a person is under the protection of the law and the deprivation of liberty is subjected to judicial control may the right to information on detainees be restricted, on an exceptional basis, where strictly necessary and provided for by law. Article 20 of the 2007 Convention provides sound guidance in this sense. The restriction of information on the detained person and of the access to the outside world of the latter may be permitted only where all of the following criteria are met: a) such measures are provided for by law; b) such measures are necessary and proportionate to a specified and limited set of purposes;<sup>14</sup> c) such measures are applied temporarily, reasonably no longer than 48 hours;<sup>15</sup> d) the detained person is brought before a judge or another independent judicial authority promptly after detention; and e) the person

<sup>11</sup> See, among others, Special Rapporteur on Torture: doc A/56/156, paras. 34-38; doc. E/CN.4/2006/6, paras. 20-27; doc. A/61/259, paras. 72-73; and doc. A/65/273, paras. 75-86. Moreover, see Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Twelfth session, Geneva, 15–19 November 2010, Guidelines of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in relation to visits to States parties, doc. CAT/OP/12/4. See also CAT, *General Comment No. 2, cit.*, para. 13.

<sup>12</sup> HRC, Case *Grant v. Jamaica*, views of 22 March 1996, para. 8.1: information given seven days later is considered to be a breach of Article. 9, para. 2, ICCPR.

<sup>13</sup> See also CAT, *General Comment No. 2, cit.*, para. 13.

<sup>14</sup> UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principles 16(4) and 15.

<sup>15</sup> In the context of a regime of judicially-supervised unacknowledged detention on suspicion of extremely threatening crimes, the European Committee for the Prevention of Torture (“ECPT”) found that a maximum period of five days was too long and recommended that a statutory maximum of 48 hours should be imposed: see CPT/Inf (2000) 5, 13 April 2000, paras. 22 and 23. The CAT against Torture voiced concerns over the fact that incommunicado detention (with the detainee not having access to a lawyer or to a doctor of his choice and not being able to notify his family) up to a maximum of five days has been maintained for specific categories of particularly serious offences, in CAT, Concluding Observations on Spain, doc. CAT/C/CR/29/3, para. 10. See also HRC, Case *Marieta Terán Jijón v. Ecuador*, views of 26 March 1992, para. 5.3.

deprived of his or her liberty has access to and receives independent professional and ethical medical treatment.

- ▶ As specified by the HRC “being subjected to prolonged *incommunicado* detention in an unknown location constitutes torture and cruel and inhuman treatment”,<sup>16</sup> amounting to a violation of Articles 7 and 10 ICCPR. On its part, the CAT confirmed that “the *incommunicado* regime, regardless of the legal safeguards for its application, facilitates the commission of acts of torture and ill-treatment”.<sup>17</sup> The Special Rapporteur of Torture and other cruel, inhuman or degrading treatment or punishment explicitly spelled out that “*incommunicado* detention is the most important determining factor as to whether an individual is at risk of torture. As such, the Special Rapporteur reiterates the recommendation of his predecessor and urges all States to declare *incommunicado* detention illegal”.<sup>18</sup>

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**3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.**

- ▶ Article 17, para. 2 (f), of the 2007 Convention shall be taken into account when interpreting this provision of the ICCPR.
- ▶ The already mentioned General Comment by the WGEID on Article 10 of the 1992 Declaration highlights that “the second commitment is to ensure that any person deprived of liberty is ‘brought before a judicial authority’, which complements the preceding provision on the place of detention and availability of information. It is not enough for the place of detention to be an ‘officially recognized place of detention’ or for accurate information to be available on the place where the individual is being held. The Declaration takes account of a more substantive aspect of detention in stipulating that administrative or pre-trial detention must be only temporary, as the person deprived of liberty must be ‘brought before a judicial authority’. This obligation is in addition to those considered above”.<sup>19</sup> These considerations must be read in conjunction with the General Comment on the definition of enforced disappearance issued by the WGEID, according to which “even though the Working Group, in its general observation on article 10 of the Declaration, has said that any detention that is unduly prolonged constitutes a violation of the Declaration, *this does not mean that any short-term detention is permitted by the Declaration, since the Working Group immediately clarifies that a detention where the detainee is not charged so that he can be brought before a court, is a violation of the Declaration*”.<sup>20</sup>

<sup>16</sup> HRC, Case *El-Mehreisi v. Libyan Arab Jamahiriya*, views of 23 March 1994, para. 5.4. See also Joint Study, *cit.*

<sup>17</sup> CAT, *Concluding Observations on Spain, cit.*, para. 10.

<sup>18</sup> Special Rapporteur on Torture, doc. A/54/426, para. 42.

<sup>19</sup> WGEID, doc. E/CN.4/1997/34, para. 28.

<sup>20</sup> WGEID, doc. A/HRC/7/2, para. 26 (para. 8 of the General Comment).

- ▶ With regard to the interpretation of “promptly”, the WGEID specified that “[...] any detention which is prolonged unreasonably or where the detainee is not charged so that he can be brought before a court is a violation of the Declaration. The fact that this provision does not set a time limit for administrative detention *should not be interpreted as allowing for unlimited laxity, since the principles of reasonableness and proportionality and the very spirit of the provision dictate that the period in question should be as brief as possible, i.e., not more than a few days, as this is the only conceivable interpretation of ‘promptly after detention’*”.<sup>21</sup>
- ▶ With regard to the issue of potential exceptions or derogability of the provision, the WGEID has clarified that “[...] not even the existence of a state of emergency can justify non-observance. Moreover, all of the commitments laid down must be observed as minimum conditions if the provisions of this article of the Declaration are to be interpreted as having been fulfilled by the State concerned. In this connection, reference is made to the jurisprudence of the Human Rights Committee with respect to article 9.3 of the International Covenant on Civil and Political Rights and to other relevant United Nations standards concerning administrative detention”.<sup>22</sup>
- ▶ With regard to the “release” of persons deprived of their liberty, Article 11 of the 1992 Declaration and Article 21 of the 2007 Convention must be taken into account, in the sense that States must “take the necessary measures to ensure that persons deprived of their liberty are released in a manner permitting reliable verification that they have actually been released”. States shall “assure the physical integrity of such persons and their ability to exercise fully their rights at the time of release, without prejudice to any obligations to which such persons may be subject under national law”.

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**4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.**

- ▶ On the *habeas corpus* procedure, the WGEID has clarified that it is a non-derogable right.<sup>23</sup> Indeed, effective *habeas corpus* and *amparo* reviews by independent judicial bodies are central to ensuring respect for the right to personal liberty. Therefore, domestic legislative frameworks should not allow for any exceptions from *habeas corpus* or *amparo*, and concerned tribunals must fulfil all the requirements of independence, impartiality, and authority needed to discharge their functions, including by operate independently of the detaining authority and from the place and form of deprivation of liberty. National law should provide penalties for officials who refuse to disclose relevant information during *habeas corpus* or *amparo* proceedings.<sup>24</sup>

<sup>21</sup> *Ibid.*, para. 29 (emphasis is added).

<sup>22</sup> *Ibid.*, para. 30.

<sup>23</sup> WGEID, *General Comment on the Right to the Truth in Relation to Enforced Disappearance*, para. 2. On this see also Inter-American Court of Human Rights (IACHR), *Advisory Opinion on Habeas Corpus in Emergency Situations*, 30 January 1987; and *Advisory Opinion on Judicial Guarantees in States of Emergency*, 8 October 1987.

<sup>24</sup> Joint Study, *cit.*, para. 292 (b).



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### **5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.**

- ▶ It is important that “compensation” in this provision is interpreted in accordance with the United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (General Assembly resolution A/RES/60/147 of 16 December 2005). Accordingly, compensation shall be prompt, fair and adequate and cover any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of the case (including physical or mental harm; lost opportunities; material damages and loss of earnings; moral damage; costs required for legal or expert assistance, medicine and medical services, and psychological and social services). Moreover, victims shall be guaranteed measures of restitution, rehabilitation, satisfaction, and guarantees of non-repetition.
- ▶ With regard to “who should provide compensation”, the State shall provide reparation to victims for acts or omissions which can be attributed to the State. In cases where a person, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim. In general, States should endeavour to establish national programmes for reparation and other assistance to victims in the event that the party liable for the harm suffered is unable or unwilling to meet their obligations.<sup>25</sup> With specific reference to enforced disappearance, the WGEID has held that “in addition to the applicable criminal penalties, the alleged perpetrators of enforced disappearance bear general civil liability”.<sup>26</sup>
- ▶ Compensation and reparation cannot be separated from the right of victims of access to justice and the corresponding obligation of the States to investigate violations (in this case of Article 9 of the ICCPR) effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law. When alleged violations of Article 9 ICCPR are being investigated, the State shall make sure that the persons suspected of having committed the crime concerned are not in a position to influence the progress of an investigation by means of pressure or acts of intimidation or reprisal aimed at the complainant, witnesses, relatives of the complainant or their defence counsel or at persons participating in the investigation. Finally, sanctions for public officials found guilty of unlawful deprivations of liberty, enforced disappearance, and in general violations of Article 9 ICCPR shall guarantee that those responsible suffer administrative disqualification. In the event of an enforced disappearance, disciplinary sanctions against the responsible State officials and purely administrative compensation claims are not effective remedies.<sup>27</sup> Similarly national human rights

<sup>25</sup> See Principles 15-17 of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (2005).

<sup>26</sup> WGEID, doc. A/HRC/16/48/Add.3 of 28 December 2010, para. 46. See also WGEID, *General Comment on No. 19 of the Declaration*, doc. E/CN.4/1998/43, paras. 72-75; and Article 24, paras. 4 and 5 of the 2007 Convention.

<sup>27</sup> Among others, see HRC, Case *Nydia Erika Bautista v. Colombia*, views of 27 October 1985, para 8.2.

institutions<sup>28</sup> or Truth Commissions<sup>29</sup> are in most of the cases not considered as a judicial remedy either. In order to effectively prevent impunity, it is essential to guarantee that persons who have or are alleged to have committed gross human rights violations, including enforced disappearance, do not benefit from any special amnesty law or similar measures that might have the effect of exempting them from any criminal proceedings or sanction.<sup>30</sup>

### Further Considerations concerning Article 9 and Enforced Disappearance

- ▶ Enforced disappearance cannot be understood as only an aggravated form of arbitrary detention, as this does not correspond to the extremely serious nature of this human rights violation.<sup>31</sup> Accordingly, “the phenomenon of disappearance is a complex form of human rights violation that must be understood and confronted in an integral fashion”.<sup>32</sup> In this sense, enforced disappearance must be dealt with integrally, examining the entrenched violations of fundamental rights, including the right to personal liberty and security, together. In this sense, the Inter-American Court of Human Rights held that enforced disappearance “constitutes a violation of different legal interests that continues in time depending on the perpetrators’ will who, by refusing to offer information on the victim’s whereabouts, keep committing that violation at every moment. Therefore, when analyzing a case of forced disappearance, it should be noted that the deprivation of liberty must only be understood as the beginning of a complex violation that continues in time until the fate and whereabouts of the alleged victim is known. Based on the foregoing, it is necessary then to consider in full the forced disappearance as an autonomous and continuing or permanent crime, with multiple and intricately interconnected elements. As a consequence, the analysis of a possible forced disappearance should not be approached in an isolated, divided and segmented way, based only on the detention or possible torture or risk to lose one’s life, but on the set of facts presented in the case brought to the Court’s attention [...]”.<sup>33</sup>
- ▶ “Deprivation of liberty” is in fact one of the constitutive elements of the crime of enforced disappearance. Taking into account the existing definitions of such crime in international law, it is essential to stress that the generic expression “deprivation of liberty” shall be interpreted as covering a variety of situations, thus including kidnapping, abduction, detention, arrest, etc. In fact, as noted by the WGEID, “under the definition of enforced disappearance [...], the criminal offence in question starts with an arrest, detention or abduction against the will of the victim, *which means that enforced disappearance may be initiated by an illegal detention or an initially*

<sup>28</sup> HRC, Case *Yubraj Giri v. Nepal*, views 24 March 2011, para. 6.3.

<sup>29</sup> IACHR, Case *Zambrano Velez v. Ecuador*, judgment of 4 July 2007, paras. 112, 114-115, 120, 129-130.

<sup>30</sup> See, among others, Article 18 of the 1992 Declaration; and WGEID, doc. A/HRC/16/48/Add.3, paras. 48-51.

<sup>31</sup> In this sense see United Nations, Commission on Human Rights, *Report submitted by Mr. Manfred Nowak, independent expert charged with examining the existing international criminal and human rights framework for the protection of persons from enforced or involuntary disappearances*, doc. E/CN.4/2002/71 of 8 January 2002, para. 76.

<sup>32</sup> IACHR, Case *Velásquez Rodríguez v. Honduras*, judgment of 29 July 1988, para. 150. See also WGEID, *General Comment on Enforced Disappearance as a Continuous Crime*, at: <http://www.ohchr.org/Documents/Issues/Disappearances/GC-EDCC.pdf>.

<sup>33</sup> IACHR, Case *Ticona Estrada and others v. Bolivia*, judgment of 27 November 2008, Ser. C No. 191, para. 56.



*legal arrest or detention. That is to say, the protection of a victim from enforced disappearance must be effective upon the act of deprivation of liberty, whatever form such deprivation of liberty takes, and not be limited to cases of illegitimate deprivation of liberty*.<sup>34</sup>

- ▶ It is important to recall that to meet the definition of enforced disappearance under international law, the first constitutive element of “deprivation of liberty” is not subjected to any temporal requirement. This is to say that, as long as all the constitutive elements of enforced disappearance are present, the actual deprivation of liberty of the victim may last even few hours or days. In this sense, the WGEID has clarified that “[...] when the dead body of the victim is found mutilated or with clear signs of having been tortured or with the arms or legs tied, those circumstances clearly show that the detention was not immediately followed by an execution, but that the *deprivation of liberty had some duration, even of at least a few hours or days*. [...] a detention, followed by an extrajudicial execution, as described in the preceding paragraph, is an enforced disappearance proper, as long as such detention or deprivation of liberty was carried out by governmental agents of whatever branch or level, or by organized groups or private individuals acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the government, and, subsequent to the detention, or even after the execution was carried out, state officials refuse to disclose the fate or whereabouts of the persons concerned or refuse to acknowledge the act having been perpetrated at all”.<sup>35</sup>
- ▶ When interpreting the relationship between detention and enforced disappearance, it is important to recall the findings of the WGEID in the sense that “[...] if a detention, even if short-term, is followed by an extrajudicial execution, such detention cannot be considered of administrative or pre-trial nature under article 10 of the Declaration, but rather as a condition where the immediate consequence is the placement of the detainee beyond the protection of the law”.<sup>36</sup>

### Article 9 ICCPR and its Application in Armed Conflicts

- ▶ The deprivation of liberty of persons during an armed conflict involves the application of international humanitarian law, as well as human rights law.<sup>37</sup> In international armed conflicts the detention of prisoners of war and civilians is regulated by the III and IV Geneva Convention (1949) respectively. Protocol I to the Four Geneva Conventions (1977), also contains a number of provisions applicable to prisoners of war (especially Articles 41-45). Article 2, para. 2, of Protocol II to the Four Geneva Convention applicable to non-international armed conflicts (1977) establishes that “at the end of the armed conflict, all the persons who have been deprived of their liberty or whose liberty has been restricted for reasons related to such conflict, as well as those deprived of their liberty or whose liberty is restricted after the conflict for the same reasons, shall enjoy the protection of Articles 5 and 6 until the end of such deprivation or restriction of liberty”.

<sup>34</sup> WGEID, doc. E/CN.4/1996/38, para. 55 (emphasis is added); and doc. A/HRC/16/48/Add.3 of 28 December 2010, paras. 22-24.

<sup>35</sup> WGEID, doc. A/HRC/7/2, para. 26 (paras. 9 and 10 of the General Comment, emphasis is added).

<sup>36</sup> Ibid., para. 26 (para. 9 of the General Comment).

<sup>37</sup> International Court of Justice (ICJ), *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004, para. 106; ICJ, *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)*, 19 December 2005, para. 216.

The application of international humanitarian law does not diminish the fundamental standards embodied in Article 9 ICCPR. In fact, as the HRC clarified “the Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive”.<sup>38</sup>

- ▶ A number of rules concerning prisoners of war and arbitrary deprivation of liberty have attained the status of customary international humanitarian law.<sup>39</sup>
- ▶ In case of detention of prisoners of war, the WGAD held that these detainees “enjoy the protection afforded by Article 13 of the Third Geneva Convention (“Prisoners of war must at all times be humanely treated”), and [...] the right to have the lawfulness of their detention reviewed and the right to a fair trial provided under Articles 105 and 106 of that Convention so that the absence of such rights may render the detention of the prisoners arbitrary.”<sup>40</sup> If, on the one hand the detention of fighters captured on the battlefield does not require an evaluation of necessity, the fundamental right of *habeas corpus* is not totally irrelevant. For instance persons may only be held as prisoners of war if they meet certain requirements to fall into such category. It often happens that controversies arise on the actual status of a person captured in the context of an armed conflict. In such cases Article 5, para. 2, of the III Geneva Convention provides that “Should any doubt arise as to whether persons [...] belong to any other categories [of prisoners of war] enumerated in article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal” of the detaining power. The competent authority is therefore a judicial body. Therefore it stands to reason that prisoners of war do not “forfeit their quality of human beings and their right, under human rights law, to contest the lawfulness of their detention”.<sup>41</sup> In the case where the benefit of prisoner of war status should not be recognized by the competent tribunal, the situation of detainees would be governed by the relevant provisions of the ICCPR and, in particular, by Article 9 which guarantees that the lawfulness of a detention shall be reviewed by a competent court.
- ▶ In case of detention of civilians for reasons of security or military necessity pursuant to Article 42 or Article 78 of the IV Geneva Convention, the Inter-American Commission of Human Rights stressed the paramount importance of ensuring that detainees are not left at the sole discretion of State agents that are responsible for their detention. This represents the “essential rationale of the right to *habeas corpus*, a protection that is not susceptible to abrogation.”<sup>42</sup> Indeed the procedure foreseen in those provisions (which prescribes for a review by a competent body set up by the Detaining Power) are to be interpreted in light of human rights law so as to ensure that the appeal is heard by a judicial-type body independent of the executive.<sup>43</sup>

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<sup>38</sup> HRC, General Comment No. 31, para. 11.

<sup>39</sup> See rules 106 and 128. Furthermore, rule 99 establishes that “arbitrary deprivation of liberty is prohibited”. See, in particular [http://www.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule99](http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule99).

<sup>40</sup> WGAD, doc. E/CN.4/2003/8, para. 64.

<sup>41</sup> L. Doswald-Beck, *Human Rights in times of Conflict and Terrorism*, Oxford, 2011, p. 279.

<sup>42</sup> IAComHR, Case *Coard et al. v. United States of America*, Report No. 109/99, 29 September 1999, para. 48.

<sup>43</sup> L. Doswald-Beck, *Human Rights in times of Conflict and Terrorism*, Oxford, 2011, p. 278.

## Information on the Association submitting the Present Written Information

**TRIAL** (*Swiss Association against Impunity*) is a Geneva-based NGO established in 2002 and in consultative status with the United Nations Economic and Social Council (ECOSOC). It is apolitical and non-confessional. Its principal goals are: the fight against impunity of perpetrators, accomplices and instigators of genocide, war crimes, crimes against humanity, enforced disappearances and acts of torture. TRIAL has set up an Advocacy Centre, born from the premise that, despite the existence of legal tools able to provide redress to victims of international crimes, these mechanisms are considerably underused and thus their usage should be enforced.



TRIAL is active on cases concerning Algeria, Bosnia and Herzegovina, Burundi, Kenya, Libya, Mexico and Nepal. TRIAL is also considering expanding its activities to other countries in the Balkan region.

TRIAL is litigating a number of cases, mainly relating to arbitrary executions, torture and enforced disappearance, before the Human Rights Committee, the European Court of Human Rights and the Committee against Torture.

**E-mail:** [philip.grant@trial-ch.org](mailto:philip.grant@trial-ch.org)

**Address:** TRIAL (*Swiss Association against Impunity*), P.O. Box 5116, 1211, Geneva 11, Switzerland

**Tel./Fax No.:** + 41 22 321 61 10

**Website:** [www.trial-ch.org/](http://www.trial-ch.org/)