A COMMENTARY ON THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

The UN Human Rights Committee's Monitoring of ICCPR Rights

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Article 9: Liberty and Security

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

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

Comparable Provisions in Other International Instruments

European Convention: Article 5.
American Convention on Human Rights: Article 7.
African Charter on Human and Peoples' Rights: Article 6.

INTRODUCTION

Scope

Article 9(1) proclaims two independent rights: the right to liberty and the right to personal security. The right to liberty occupies nearly all of the text of Article 9 and is summarised in the commands that no one shall be subjected to 'arbitrary' arrest or detention, or deprived of liberty except on grounds, and according to procedures, established by law.[1] It regulates detention directed at a wide variety of ends, including criminal law enforcement (and non-compliance of a lawful court order), the protection of national security, border control, the institutional care of children, involuntary hospitalisation of the mentally ill or drug addicts (for their protection or that of others), and to contain infectious or contagious disease.[2]

The term 'arbitrary' is the instrumentality for subjecting any loss of liberty to close scrutiny wherever it occurs. It requires, among other things, cogent and individualised justification for detention, frequent periodic reassessment of its necessity (especially as circumstances change), the shortest duration necessary to achieve its objectives, and the use of the least restrictive alternatives. Additional stringency applies to the vulnerable, such as children and those with mental conditions.

The safeguards in support of the right to liberty offer substantive, not merely procedural, protection. Article 9(2) and (3) directs that anyone arrested be '*promptly*' informed of any charges against them; and anyone arrested or detained on a criminal charge be both '*promptly*' brought under judicial

1 For detailed coverage of UN guarantees against arbitrary arrest and detention, see Nigel Rodley and Matt Pollard, *The Treatment of Prisoners under International Law* (Oxford University Press, 2009), ch. 11.

2 European Convention Art. 5 provides a detailed listing of permitted purposes for detention, but the Commission on Human Rights preferred to rely on the more flexible concept of 'arbitrary' arrest or detention than such a listing (A/2929 (1955), Ch.VI. p. 35, [28]–[29]). For further examples, see *General Comment No. 35: Article 9 (Liberty and Security of Person)*, 16 December 2014, CCPR/C/GC/35 (GC 35) [5].

supervision and entitled to be tried within a '*reasonable*' time or released. Article 9(4) aims to bring to a head whether any detention is permissible, and lends haste to the process by entitling anyone suffering a loss of liberty to take proceedings before a court to determine '*without delay*' the lawfulness of their arrest or detention. Article 9(5) provides an enforceable right to compensation where it is unlawful.

These italicised terms impose discipline on States to meet strict temporal limits, providing an early opportunity for objection to the unlawfulness or arbitrariness of any detention in order to forestall its continuation. If detention is to continue pending trial, judicial authority is to be exercised to secure appropriate conditions for further custodial remand. In order to enable challenges to improper detention anyone detained is also to have access to legal counsel, medical assistance where necessary, and may inform family members (though this is established by practice rather than the text of Article 9).

The safeguards within Article 9 provide valuable support to other Covenant guarantees. For example, Article 9(3) aims to avoid trial delays which are also contrary to the fair trial provisions of Article 14(1) and (3)(c) (undue delay), of acute importance on charges concerning capital offences because of the added need to minimise uncertainty about the accused's fate. Prompt judicial control under Article 9(3) militates against incommunicado detention which routinely jeopardises the right to life protected by Article 6. The very presence of the accused in court at that stage may disclose marks of ill-treatment and prevent further violation of Article 7. Issues of forced confession may be raised then to prevent an unfair trial (Articles 14(3)(g)), and in capital cases may avoid the imposition of the death penalty in violation of Article 6. When addressing continued detention of juveniles regard must be had for their vulnerability and the need to promote rehabilitation under Article 14(4), as well as broader protective measures owed under Article 24.

In short, Article 9 operates to regulate strictly the treatment of those arrested or detained. It provides the apparatus for assessing, halting and redressing unlawful arrest and detention, and the violation of other Covenant rights ensuing from vulnerability while detained.

Article 9 speaks little of the right to personal security beyond enunciating in Article 9(1) that 'everyone has the right to … security of person'. No other Covenant provision makes mention of it. It is an unusual example of a right subsisting solely in the form of proclamation, without elaboration in further guarantees and without clearly stated scope or limits. The right is concerned with bodily and mental integrity and arises in different contexts which overlap with other rights, particularly as it relates to death threats or attempts on life, the excessive use of force, and intimidation (e.g., of trial witnesses, journalists or activists, or as an aspect of hate crime).

Article 9 is not listed in Article 4 as non-derogable, though as discussed in the chapter on Article 4, certain aspects of Article 9 are treated as non-derogable.[3]

Interaction between Article 9 and Other Covenant Provisions

Article 9 issues are enlivened in a broad range of circumstances involving the parallel violation of other Covenant rights, including: Article 6, when life and personal security are threatened by enforced disappearance,[4] by violence against civilians in times of internal conflict,[5] or hate crime such as that against LGBTI individuals[6] and members of religious, racial or other minorities;[7] Articles 7 and 10 through confinement involving isolation,[8] secrecy,[9] mandatory or indefinite immigration detention[10] (personal security may also the threatened by abuse from fellow detainees and staff,[11] as well as the mistreatment of vulnerable detainees);[12] Article 12 in unlawful house arrest,[13] or the arrest of those not complying with restrictions on movement imposed in a non-official curfew;[14] Article 13 by the detention of aliens (while their status is being determined) where it is not reasonable, necessary and proportionate,[15] and also involving Article 24 if inadequate protection is accorded to children.[16] Article 14 is

3 See chapter on Article 4: Derogation in Times of Officially Proclaimed Public Emergency Threatening the Life of the Nation, section 'Article 4(2): Non-derogable Rights and Freedoms'.
4 See chapter on Article 6: The Right to Life, section 'Enforced Disappearance'.
5 Congo CCPR/C/COD/CO/4 (2017) 27. For similar situations, see chapter on Article 6: The Right to Life, section 'War'.
6 E.g., Kuwait CCPR/C/KWT/CO/3 (2016) 12; Morocco CCPR/C/MAR/CO/6 (2016) 11; Turkmenistan CCPR/C/TKM/CO/2 (2017) 8; Belize CCPR/C/BLZ/CO/1/Add.1 (2018) 14(b); Lebanon CCPR/C/LBN/CO/3 (2018) 13; Liberia CCPR/C/LBR/CO/1 (2018) 18.
7 E.g., Pakistan CCPR/C/PAK/CO/1 (2017) 33 (religious minorities); Serbia CCPR/C/SRB/CO/3 (2017) 10 (Roma); Hungary CCPR/C/HUN/CO/6 (2018) 17 (Roma, Muslims, migrants and refugees); Norway CCPR/C/NOR/CO/7 (2018) 16 (Romani /Tater, Roma, migrants, Muslims, Jews and Sami).
8 E.g., Poland CCPR/C/POL/CO/7 (2016) 35 (juveniles in temporary isolation rooms as a form of disciplinary sanction); Norway CCPR/C/NOR/CO/7 (2018) 24, 26 (isolation and exclusion, including for those with psychosocial disabilities).
9 E.g., Congo CCPR/C/COD/CO/4 (2017) 35 (secret detention at unofficial places); Gambia CCPR/C/GMB/CO/2 (2018) 31 (detention in unofficial places, including the '*bambadinka*' (crocodile hole)); Lithuania CCPR/C/LTU/CO/4 (2018) 23 (secret detention).
10 E.g., USA CCPR/C/USA/CO/4 (2014) 15; Kuwait CCPR/C/KWT/CO/3 (2016) 28; Australia CCPR/C/AUS/CO/6 (2017) 37. See also section 'Reasonableness, Necessity and Proportionality', below.
11 Spain CCPR/C/ESP/CO/6 (2015) 15; Cameroon CCPR/C/CMR/CO/5 (2017) 13(c).
12 See chapter on Article 6: The Right to Life, section 'Detainees (on Remand or in Prison Custody, or Detained for Health Reasons)'.
13 *Gorji-Dinka* v. *Cameroon*, CCPR/C/83/D/1134/2002, 17 March 2005 [5.4]; *Yklymova* v. *Turkmenistan*, CCPR/C/96/D/1460/2006, 20 July 2009 [2.3], [7.5].
14 Turkmenistan CCPR/C/TKM/CO/2 (2017) 28.
15 See chapter on Article 13: Procedural Safeguards in the Expulsion of Aliens, section 'Interaction between Article 13 and Other Covenant Provisions'.
16 *F.K.A.G. et al.* v. *Australia*, CCPR/C/108/D/2094/2011, 26 July 2013 [9.3]. See section 'Reasonableness, Necessity and Proportionality', below; Czech Republic CCPR/C/CZE/CO/2 (2007) 15 (concern that a foreigner under 18 awaiting deportation may be detained for up to ninety days (Arts 10 and 24)).

relevant (with Articles 2 and 26) where over-representation in prison of certain sections of society (notably indigenous or foreigners) suggests discrimination in sentencing.[17] Article 14 concerns also arise in connection with detention regimes which allow automatic extension with inadequate judicial review,[18] the excessive length of pre-trial detention (an area of overlap between Articles 9(3) and 14(3)(c)),[19] and the operation of laws granting broad powers of arrest and detention for the vaguely defined offences, usually directed at terrorism.[20] Article 9 combines with Article 17 in the automatic DNA testing of those subject to a custodial sentence;[21] and Article 18 when members of religious minorities are detained under laws which restrict or prohibit religious practice.[22] Article 19 applies with Article 9 in a broad range of circumstances, including to detention in response to acts perceived as offensive to the State religion or insulting to the monarchy,[23] defamation against public authorities[24] or blasphemy,[25] or occurs as a reaction merely to political opposition[26] (including detention for the purpose of 'attitude adjustments').[27] Both limbs of Article 9 are relevant in combination with Article 19 when journalists, human rights defenders and political opponents are detained, and exposed to personal security risks,[28] which often takes the form of intimidation and violence (and in some cases murder).[29] Article 9 coincides with Article 21, where the arbitrariness of

17 E.g., Australia CCPR/C/AUS/CO/6 (2017) 39; Italy CCPR/C/ITA/CO/6 (2017) 30.
18 Italy CCPR/C/ITA/CO/6 (2017) 32. See also Switzerland CCPR/C/CHE/CO/4 (2017) 38 (confinement of mentally ill offenders in regular prisons, or in psychiatric institutions for long periods, which may be renewed irrespective of the sentence given).
19 See section 'Trial Within a Reasonable Time', below.
20 E.g., Kazakhstan CCPR/C/KAZ/CO/2 (2016) 47; Morocco CCPR/C/MAR/CO/6 (2016) 17; Bangladesh CCPR/C/BGD/CO/1 (2017) 9; Jordan CCPR/C/JOR/CO/5 (2017) 12; Swaziland CCPR/C/SWZ/CO/1 (2017) 36; Bahrain CCPR/C/BHR/CO/1 (2018) 29; Liberia CCPR/C/LBR/CO/1 (2018) 14. For other broad terrorism laws, see Australia CCPR/C/AUS/CO/6 (2017) 15 (risk that such emergency measures could, over time, become the norm rather than the exception); Algeria CCPR/C/DZA/CO/4 (2018) 17; Lithuania CCPR/C/LTU/CO/4 (2018) 23.
21 *S.L.* v. *Netherlands*, CCPR/C/120/D/2362/2014, 18 July 2017 [10.11].
22 Azerbaijan CCPR/C/AZE/CO/4 (2016) 32 (Jehovah's Witnesses); Turkmenistan CCPR/C/TKM/CO/2 (2017) 38 (Protestants and Jehovah's Witnesses); Lao CCPR/C/LAO/CO/1 (2018) 31 (Christians).
23 E.g., Morocco CCPR/C/MAR/CO/6 (2016) 43; Bahrain CCPR/C/BHR/CO/1 (2018) 53.
24 E.g., Azerbaijan CCPR/C/AZE/CO/4 (2016) 36; Guinea CCPR/C/GIN/CO/3 (2018) 43.
25 E.g., Kuwait CCPR/C/KWT/CO/3 (2016) 40.
26 E.g., Bahrain CCPR/C/BHR/CO/1 (2018) 53; Lao CCPR/C/LAO/CO/1 (2018) 33.
27 E.g., Thailand CCPR/C/THA/CO/2 (2017) 25.
28 E.g., Azerbaijan CCPR/C/AZE/CO/4 (2016) 36; Ghana CCPR/C/GHA/CO/1 (2016) 39; Congo CCPR/C/COD/CO/4 (2017) 39; Turkmenistan CCPR/C/TKM/CO/2 (2017) 42; Bahrain CCPR/C/BHR/CO/1 (2018) 53; Guinea CCPR/C/GIN/CO/3 (2018) 43; Sudan CCPR/C/SDN/CO/5 (2018) 45.
29 Azerbaijan CCPR/C/AZE/CO/4 (2016) 36; Burkina Faso CCPR/C/BFA/CO/1 (2016) 25; Colombia CCPR/C/COL/CO/7 (2016) 38; Bangladesh CCPR/C/BGD/CO/1 (2017) 27(a); Dominican Republic CCPR/C/DOM/CO/6 (2017) 31; Honduras CCPR/C/HND/CO/2 (2017) 40; Madagascar CCPR/C/MDG/CO/4 (2017) 49; Pakistan CCPR/C/PAK/CO/1 (2017) 37; Bahrain CCPR/C/BHR/CO/1 (2018) 59; El Salvador CCPR/C/SLV/CO/7 (2018) 37; Gambia CCPR/C/GMB/CO/2 (2018) 39(c); Guatemala CCPR/C/GTM/CO/4 (2018) 36.

detention is self-evident in the mass detention of demonstrators;[30] in preventive detention aimed at stopping them participating in planned demonstrations;[31] and the unjustified detention of individuals including at purely peaceful assemblies.[32] The personal security limb of Article 9 is especially important to Article 21 to answer excessive use of force at assemblies (in some cases endangering life).[33] Article 9 is enlivened concurrently with: Article 22 in criminal legislation prohibiting alternatives to detention for certain public disorder offences, including those limiting freedom of association,[34] though more typically rendering participation in certain organisations illegal; Articles 17 and 23, where immigration detention causes family separation,[35] or the domestic legal framework provides for involuntary hospitalisation of those with intellectual disabilities and enables sterilisation;[36] Article 24, when detention of children fails to have due regard for their protection,[37] including in the use of police lock-ups,[38] excessive use of pre-trial detention,[39] the ill-treatment of children in institutional settings,[40] lack of segregation of children from adults (coincident with Article 10 for those detained under criminal processes),[41] compounded by lack of supervision when juveniles are held with adults.[42] Article 26 is particularly relevant to Article 9 where arbitrary arrest and imprisonment occurs on the basis of sexuality (e.g., under criminal provisions prohibiting same-sex relations),[43] religion,[44] or other status such as in the

30 E.g., Kazakhstan CCPR/C/KAZ/CO/2 (2016) 17.
31 E.g., Azerbaijan CCPR/C/AZE/CO/4 (2016) 38; Kazakhstan CCPR/C/KAZ/CO/2 (2016) 29; Belarus CCPR/C/BLR/CO/5 (2018) 33.
32 E.g., Azerbaijan CCPR/C/AZE/CO/4 (2016) 38; Algeria CCPR/C/DZA/CO/4 (2018) 45; Belarus CCPR/C/BLR/CO/5 (2018) 51.
33 E.g., Azerbaijan CCPR/C/AZE/CO/4 (2016) 38; Burkina Faso CCPR/C/BFA/CO/1 (2016) 25; Kazakhstan CCPR/C/KAZ/CO/2 (2016) 17; Morocco CCPR/C/MAR/CO/6 (2016) 45; Algeria CCPR/C/DZA/CO/4 (2018) 45; Bahrain CCPR/C/BHR/CO/1 (2018) 35; Belarus CCPR/C/BLR/CO/5 (2018) 51; Guinea CCPR/C/GIN/CO/3 (2018) 31; Liberia CCPR/C/LBR/CO/1 (2018) 30. For Art. 6 issues concerning excessive force, see chapter on Article 6: The Right to Life, sections 'Arbitrary Deprivation of Life', 'Excessive Use of Force'.
34 E.g., El Salvador CCPR/C/SLV/CO/7 (2018) 37.
35 *Bakhtiyari et al.* v. *Australia*, CCPR/C/79/D/1069/2002, 29 October 2003 [9.6].
36 E.g., Lithuania CCPR/C/LTU/CO/4 (2018) 13. See also chapter on Article 7: Torture, Cruel, Inhuman or Degrading Treatment or Punishment, section 'Reproductive Rights (Denial of Abortion and Sterilisation)'.
37 E.g., Hungary CCPR/C/HUN/CO/6 (2018) 29 (high number of minors in conflict with the law deprived of liberty).
38 E.g., Jamaica CCPR/C/JAM/CO/4 (2016) 43.
39 E.g., Hungary CCPR/C/HUN/CO/6 (2018) 37.
40 E.g., Moldova CCPR/C/MDA/CO/3 (2016) 39; Lithuania CCPR/C/LTU/CO/4 (2018) 29.
41 See chapter on Article 10: Treatment of Those Deprived of Their Liberty, sections 'Article 10(2)(b): Segregation of "Accused Juveniles" from Adults (in Pre-trial Detention) and Speedy Appearance for Adjudication, and 'Article 10(3): Segregation of Juvenile Offenders from Adults, Treatment Appropriate to Their Age and Status, and the Purpose of Penal System'.
42 E.g., Switzerland CCPR/C/CHE/CO/4 (2017) 36.
43 See chapter on Article 26: Equality before the Law Equal Protection of the Law, section 'Sexual Orientation, Gender Identity, Transgender Status'.
44 See references to Art. 18 above in this paragraph.

incarceration of the homeless,[45] or on grounds of disability (in the involuntary confinement of those with intellectual disabilities (including children),[46] in some cases indefinitely,[47] without a court order or adequate review procedures).[48] Article 27 may be invoked together with Article 9 if members of minorities are selected for arbitrary detention, including as a response to members of indigenous minorities protesting against land leases and concessions affecting the natural resources on which they depend.[49]

Chapter Outline

This chapter follows closely the text of Article 9. Because the Committee's OP1 decisions are so numerous the case citations provided are representative only, and where they adequately cover the ground they are not supplemented with Concluding Observations which merely mention relevant Article 9 provisions without adding more.

ARTICLE 9(1): THE RIGHT TO PERSONAL SECURITY

The right to personal security concerns bodily and mental integrity, or freedom from injury to the body and the mind.[50] The entirety of Article 9, apart from the simple reference to security of person in Article 9(1), concerns the right to liberty. This suggests that the right to security may arise only when there is a loss of liberty. However, it is clear from *Delgado Páez* v. *Colombia* and subsequent decisions that the right to personal security exists autonomously. The Committee found a violation of Article 9(1) because of the State's failure to provide protective measures to guarantee the author's security. He was a secondary school teacher of religion and ethics, but his social views differed from those of the authorities. When he did not bow to pressure to resign he was subjected to criminal proceedings on theft charges (later determined to be unfounded), exposed to public scorn, and was suspended from teaching with his salary payments frozen. He was threatened with death if he did not withdraw complaints at this treatment, he was attacked, and a work colleague was shot dead by unknown assailants. Fearing for his own life, he left the country and sought political asylum abroad. The Committee could find no basis to narrow the right to security only to situations of formal deprivation of liberty: 'An interpretation of Article 9 which would allow

45 E.g., Hungary CCPR/C/HUN/CO/6 (2018) 33.
46 E.g., Azerbaijan CCPR/C/AZE/CO/4 (2016) 12.
47 E.g., Guatemala CCPR/C/GTM/CO/4 (2018) 26.
48 E.g., Serbia CCPR/C/SRB/CO/3 (2017) 16; Hungary CCPR/C/HUN/CO/6 (2018) 21; Lithuania CCPR/C/LTU/CO/4 (2018) 13.
49 E.g., Lao CCPR/C/LAO/CO/1 (2018) 39. 50 GC 35 [3].

a State party to ignore threats to the personal security of non-detained persons within its jurisdiction would render totally ineffective the guarantees of the Covenant.'[51] Of course, risks to personal security are frequently occasioned by detention. The personal security of the author in *Lalith Rajapakse* v. *Sri Lanka* was at issue both during and after his time in police detention. While in custody under investigation for robbery (it transpired there were no complainants to the robbery) he was tortured and rendered unconscious for fifteen days with 'traumatic encephalitis', endangering his life. The formal allegations he made after release of police torture and threats went unheeded and led to him to go into hiding out of fear of reprisals. In the event, the Committee only addressed post-detention matters for the purposes of his right to security of person.[52]

There is a close nexus between Articles 6 and the right to personal security. Deliberate attempts on an individual's life may violate Article 6 (in failure on the part of the State to protect life), and also Article 9(1), a prominent example being *Chongwe* v. *Zambia* which concerned the attempt on the life of Dr Kenneth Kaunda, in which shots fired by police on the vehicle on which he was travelling slightly wounded the former president and inflicted life-threatening harm on the author. It resulted in findings that both provisions were violated because the State authorised the use of lethal force against the author without lawful reasons (Article 6), and police shot at him, wounding and nearly killing him (Article 9).[53]

In cases concerning the excessive use of force by security services, issues of proportionality are approached in a similar way under Articles 6 and 9. In *Suarez de Guerrero* v. *Colombia* relevant factors were whether the victims were first warned, whether they posed a threat, and whether they had the opportunity to surrender. Because that case involved a fatal shooting the Committee found a violation of Article 6 but did not make a separate finding under Article 9(1).[54] When the Committee approached a non-fatal shooting in *Leehong* v. *Jamaica* as a violation of the right to personal security (rather than the right to life) similar relevant factors were that the author was shot by the police from behind, with palpable risk to his life, without any warning or an order to stop.[55] The right to personal security is violated when officials '*unjustifiably* inflict bodily injury' or there is '*unjustifiable* use of force in law enforcement',[56] but the right to personal security is broader than the right to life, as it also addresses injuries that are not life-threatening.[57]

51 *Páez* v. *Colombia*, CCPR/C/39/D/195/1985 (1990), 12 July 1990 [5.5]–[5.6]. See also *Dias* v. *Angola*, CCPR/C/68/D/711/1996, 20 March 2000 [8.3].
52 *Rajapakse* v. *Sri Lanka*, CCPR/C/87/D/1250/2004, 14 July 2006 [9.7].
53 *Chongwe* v. *Zambia*, CCPR/C/70/D/821/1998, 25 October 2000 [5.2]–[5.3].
54 *Suarez de Guerrero* v. *Colombia*, A/37/40 (1982) at 137, 31 March 1982 [13.3].
55 *Leehong* v. *Jamaica*, CCPR/C/66/D/613/1995, 12 August 1999 [9.3].
56 GC 35 [9], citing *Leehong* v. *Jamaica*.
57 GC 35 [55]. For examples of excessive use of force at assemblies, see section 'Interaction between Article 9 and Other Covenant Provisions', above, and in other contexts Gambia CCPR/

The intentional infliction of bodily harm or mental injury may also constitute a violation of Article 7 (where it amounts to torture or cruel, inhuman or degrading treatment or punishment) according to the separate standards of that provision.

State failure to take appropriate action in response to a threat to personal security may itself violate Article 9(1).[58] The authors in *Marcellana and Gumanoy* v. *Philippines* were human rights fact-finders, one of whom had been threatened several times because of her work. She was forced to reveal her identity when ten armed men stopped the vehicle she was in, and asked for her by name. The dead bodies of her and a colleague were found the following day with gun-shot wounds. In these circumstances (when at least one of the team had been threatened) there was an objective need for protective measures to guarantee the authors' security. The Committee found a violation of Article 9(1) in the State's failure to afford reasonable and appropriate protective measures.[59] As the Committee indicated in *Jiménez Vaca* v. *Colombia*, the State's inability (rather than just its unwillingness) to take those measures also does not excuse it.[60]

The State is under a duty to investigate death threats and other allegations of violation of the right to personal security (as with allegations under Articles 6 and 7), and the Committee frequently makes a separate finding of violation of Article 9(1) because of the State's failure to do so.[61] On the requirement for preventive measures more generally General Comment 35 stipulates as follows:

C/GMB/CO/2 (2018) 29 (great deal of discretion in the use of force by law enforcement officials); Guatemala CCPR/C/GTM/CO/4 (2018) 36.

58 *Páez* v. *Colombia*, CCPR/C/39/D/195/1985 (1990), 12 July 1990 [5.5]: 'It cannot be the case that, as a matter of law, States can ignore known threats to the life of persons under their jurisdiction, just because he or she is not arrested or otherwise detained. States parties are under an obligation to take reasonable and appropriate measures to protect them.'

59 *Marcellana and Gumanoy* v. *Philippines*, CCPR/C/94/D/1560/2007, 30 October 2008 [7.7].

60 *Vaca* v. *Colombia*, CCPR/C/74/D/859/1999, 25 March 2002 [7.2]. See also *Dias* v. *Angola*, CCPR/C/68/D/711/1996, 20 March 2000 [8.3] (harassment and threats by State authorities because the author conducted his own investigation into the death of his business partner (following the absence of a serious investigation by the police) in which he found evidence implicating high-ranking officials, followed by disappearance of one of the witnesses to the murder – as a consequence of the threats against him he was unable to enter Angola); *Njaru* v. *Cameroon*, CCPR/C/89/D/1353/2005, 19 March 2007 [6.3] (repeatedly requested to testify alone at a police station, harassed and threatened).

61 *Chongwe* v. *Zambia*, CCPR/C/70/D/821/1998, 25 October 2000 [5.3] (State refusal to carry out an independent investigation following the police attempt on the life of the author and Kenneth Kaunda constituted a violation); *Vaca* v. *Colombia*, CCPR/C/74/D/859/1999, 25 March 2002 [7.2] (death threats and attempt on the life of a legal adviser to several trade unions and people's and peasants' organisations followed by failure to take adequate measures to guarantee the author's right to security of person by State agents); *Jayawardena* v. *Sri Lanka*, A/57/40 (2002) at 234, 22 July 2002 [7.3] (failure to investigate threats to life following assertions made by the President of Sri Lanka on the state-owned media about the author's alleged involvement with a separatist Tamil group violated the right to security of person under Art. 9(1)); *Gunaratna* v. *Sri Lanka*, CCPR/C/95/D/1432/2005, 17 March 2009 [8.4] (failure of the State to investigate death threats to pressurise the author to withdraw complaints and failure to provide any protection violated his right to security of person); *Rajapakse* v. *Sri Lanka*, CCPR/C/87/D/1250/2004, 14 July 2006 [9.7] (finding a violation in the absence of a witness protection programme and in

> States parties must take both measures to prevent future injury and retrospective measures, such as enforcement of criminal laws, in response to past injury. For example, States parties must respond appropriately to patterns of violence against categories of victims such as intimidation of human rights defenders and journalists, retaliation against witnesses, violence against women, including domestic violence, the hazing of conscripts in the armed forces, violence against children, violence against persons on the basis of their sexual orientation or gender identity, and violence against persons with disabilities. They should also prevent and redress unjustifiable use of force in law enforcement, and protect their populations against abuses by private security forces, and against the risks posed by excessive availability of firearms. The right to security of person does not address all risks to physical or mental health and is not implicated in the indirect health impact of being the target of civil or criminal proceedings.[62]

The Committee is generally able to dispense with detailed analysis of whether particular conduct is justifiable if the State does not cooperate, if it does not engage with substantive argument, or where it offers general denial, such as in *Chiiko Bwalya* v. *Zambia*[63] and *Ole Bahamonde* v. *Equatorial Guinea*,[64] when the victims were repeatedly subjected to politically motivated harassment, intimidation and threats, and in *Purna Maya* v. *Nepal* when the author was threatened and harassed by members of the Army amid numerous other Article 9 violations.[65] For similar reasons the Committee provides little reasoning in cases of enforced disappearance. These typically engage Article 7,[66] Article 9 (both the right to liberty and personal security), Article 10 (treatment in detention with humanity and respect), Article 16 (right to recognition as a person before the law), and (with less consistency since there may still be hope that the victim may be alive) Article 6 (right to life).[67]

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the face of harassment and pressure to withdraw a complaint against police); *Mambu* v. *Congo*, CCPR/C/118/D/2465/2014, 3 November 2016 [9.2] (complaints of abduction not investigated).

62 GC 35 [9] (footnotes ommitted).

63 *Bwalya* v. *Zambia*, CCPR/C/48/D/314/1988, 14 July 1993 [6.4].

64 *Bahamonde* v. *Equatorial Guinea*, CCPR/C/49/D/468/1991, 20 October 1993 [9.2].

65 *Maya* v. *Nepal*, CCPR/C/119/D/2245/2013, 17 March 2017 [3.4], [12.7].

66 For the linkages between arbitrary detention and instances of torture and ill-treatment, see *Report of the Working Group on Arbitrary Detention*, A/HRC/39/45 (2018) p. 28. David Weissbrodt and Brittany Mitchell reviewed the Working Group's output across different aspects of Art. 9 in 'The United Nations Working Group on Arbitrary Detention: Procedures and Summary of Jurisprudence', (2016) 38(3) Hum. Rts Q., p. 655.

67 E.g., *Mojica* v. *Dominican Republic*, CCPR/C/51/D/449/1991, 15 July 1994; *Sarma* v. *Sri Lanka*, CCPR/C/78/D/950/2000, 16 July 2003; *Bousroual* v. *Algeria*, CCPR/C/86/D/1196/2003, 30 March 2006; *Grioua* v. *Algeria*, CCPR/C/90/D/1327/2004, 10 July 2007; *Kimouche* v. *Algeria*, CCPR/C/90/D/1328/2004, 10 July 2007; *El Alwani* v. *Libya*, CCPR/C/90/D/1295/2004, 11 July 2007; *Aber et al.* v. *Algeria*, CCPR/C/90/D/1439/2005, 13 July 2007; *Benaziza* v. *Algeria*, CCPR/C/99/D/1588/2007, 26 July 2010; *Guezout et al.* v. *Algeria*, CCPR/C/105/D/1753/2008, 19 July 2012; *Millis* v. *Algeria*, CCPR/C/122/D/2398/2014, 6 April 2018 [7.4].

As with all Covenant rights, the State's obligation extends to securing liberty and security against threats of impairment from private sources,[68] as well as the acts of other States,[69] even those occurring overseas.[70]

ARTICLE 9(1): THE RIGHT OF LIBERTY

The remainder of the chapter will address the separate elements of Articles 9(1)–(5), though more often than not they are violated in different combinations. Enforced disappearance, for example, invariably violates most elements in arbitrary capture or continued detention, without reasons and with no judicial supervision or opportunity to challenge the lawfulness of the detention.[71]

'Arrest' and 'Detention'

Article 9 requires a number of safeguards upon an individual's 'arrest' or 'detention'. 'Arrest' in its narrowest sense occurs when a person is apprehended, including for questioning,[72] or by house arrest,[73] and whether arrest occurs with or without a formal warrant.[74] It may occur while already in custody.[75] 'Detention' occurs when a person is

68 See chapter on Article 2: To 'Respect and to Ensure' Covenant Rights, sections 'The Significance and Reach of Article 2', 'The Twin Obligations'.

69 *García* v. *Ecuador*, CCPR/C/43/D/319/1988 at 90, 5 November 1991 [6.1] (violations of Arts 7, 9 and 13 as a result of Ecuadorian police officers acting on behalf of Interpol and the US Drug Enforcement Agency when removing the author from Ecuadorian jurisdiction without the formal extradition procedures under the US–Ecuador Extradition Treaty).

70 *Burgos* v. *Uruguay*, Communication No. R.12/52, A/36/40 (1981) at 176, 29 July 1981 [12.1]. States Parties also violate the right to security of person if they purport to exercise jurisdiction over a person outside their territory by issuing a *fatwa* or similar death sentence authorising the killing of the victim. See, e.g., Iran CCPR/C/79/Add.25 (1993) [9]; GC 35 [63] (discussing extraterritorial application).

71 E.g., *Sharma et al.* v. *Nepal*, CCPR/C/122/D/2364/2014, 6 April 2018 [9.9]; *Boudjema* v. *Algeria*, CCPR/C/121/D/2283/2013, 30 October 2017 [8.9]. See also less explicit findings of all such elements in *Tharu et al.* v. *Nepal*, CCPR/C/114/D/2038/2011, 3 July 2015 [10.8]; *Serna et al.* v. *Colombia*, CCPR/C/114/D/2134/2012, 9 July 2015 [9.4] (enforced disappearance by paramilitary groups); *Dovadzija et al.* v. *Bosnia and Herzegovina*, CCPR/C/114/D/2143/2012, 22 July 2015 [3.5]; *Kadirić et al.* v. *Bosnia and Herzegovina*, CCPR/C/115/D/2048/2011, 5 November 2015 [3.6]; *Basnet* v. *Nepal*, CCPR/C/112/D/2051/2011, 12 July 2016 [10.8]; *Dhakal et al.* v. *Nepal*, CCPR/C/119/D/2185/2012, 17 March 2017 [11.9]; *Sharma et al.* v. *Nepal*, CCPR/C/122/D/2265/2013, 6 April 2018 [3.4], [10.8]; *Bolakhe* v. *Nepal*, CCPR/C/123/D/2658/2015, 19 July 2018 [7.17].

72 *Saidarov et al.* v. *Kyrgyzstan*, CCPR/C/119/D/2359/2014, 17 March 2017 [7.3]; *Saidov* v. *Tajikistan*, CCPR/C/122/D/2680/2015, 4 April 2018 [9.2]. Cf. GC 35 [6], which refers to questioning with freedom to leave.

73 *Jaona* v. *Madagascar*, CCPR/C/OP/2 at 161, 1 April 1985 [13]–[14]; *Gorji-Dinka* v. *Cameroon*, CCPR/C/83/D/1134/2002, 17 March 2005 [5.4]; *Madani* v. *Algeria*, CCPR/C/89/D/1172/2003, 28 March 2007 [8.3]; *Yklymova* v. *Turkmenistan*, CCPR/C/96/D/1460/2006, 20 July 2009 [7.2].

74 *Kurbanov* v. *Tajikistan*, CCPR/C/79/D/1096/2002, 6 November 2003 [7.2] (detention for seven days without an arrest warrant).

75 *Morrison* v. *Jamaica*, CCPR/C/63/D/635/1995, 27 July 1998 [22.3] (arrest for one murder while in custody for another murder).

deprived of liberty from the moment of arrest and continues until release.[76] It includes confinement to a specific circumscribed location and certain restrictions on movement.[77] It concerns constraint, rather than limits on freedom to act as one wishes.[78]

Deprivation of Liberty Must be Lawful

Deprivation of liberty must be both lawful (since '[no] one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established *by law*') and must not be arbitrary ('[n]o one shall be subject to *arbitrary* arrest or detention').

There is a failure to meet the lawfulness stipulation if an individual is arrested or detained 'on grounds which are not clearly established in domestic legislation',[79] where not 'carried out with respect for the rule of law',[80] or if it occurs in violation of domestic law.[81] If detention 'lacks any legal basis' both the lawfulness injunction and the requirement that the arrest or detention not be 'arbitrary' are breached, exemplified by *Mika Miha* v. *Equatorial Guinea* when the author was not given any explanations of the reasons for his arrest and detention, except that the president of the Republic had ordered it,[82] and *Chambala* v. *Zambia* when detention continued in spite of a court determination that there were no grounds for it.[83] (The Committee has also addressed similar instances of continued detention in reviewing State reports.[84]) The Committee

76 GC 35 [13]. Different occurrences of arrest and detention are illustrated in *Spakmo* v. *Norway*, CCPR/C/67/D/631/1995, 11 November 1999 [6.3].

77 *González del Río* v. *Peru*, CCPR/C/46/D/263/1987, 28 October 1992 [5.1] (claim not substantiated merely where a warrant for the author's arrest was issued but the author was not subjected to either arrest or detention, or confined to a specific, circumscribed location or restricted in his movements).

78 *Wackenheim* v. *France*, CCPR/C/75/D/854/1999, 15 July 2002 [6.3] (inadmissible *ratione materiae*).

79 *McLawrence* v. *Jamaica*, CCPR/C/60/D/702/1996, 18 July 1997 [5.5]. 80 GC 35 [10].

81 *Bakur* v. *Belarus*, CCPR/C/114/D/1902/2009, 15 July 2015 [7.2] (administrative apprehension never recorded as required by law); *Amanklychev* v. *Turkmenistan*, CCPR/C/116/D/2078/2011, 31 March 2016 [7.3] (detention in violation of the Criminal Procedure Code); *Askarov* v. *Kyrgyzstan*, CCPR/C/116/D/2231/2012, 31 March 2016 [8.4] (detention not registered for nearly 24 hours, when required within 3 hours of detention); *Ortikov* v. *Uzbekistan*, CCPR/C/118/D/2317/2013, 26 October 2016 [10.3] (convicted person not transferred as required from pre-trial detention to a prison at the latest ten days after sentence); *Allaberdiev* v. *Uzbekistan*, CCPR/C/119/D/2555/2015, 21 March 2017 [8.4]–[8.5]. Cf. *Ambaryan* v. *Kyrgyzstan*, CCPR/C/120/D/2162/2012, 28 July 2017 [8.5] (the State successfully rebutted the claim of unlawfulness).

82 *Mika Miha* v. *Equatorial Guinea*, CCPR/C/51/D/414/1990, 8 July 1994 [6.5] (the author was not given any explanations for the reasons of his arrest and detention, except that the president of the Republic had ordered both); GC 35 [11]. A similar conclusion could have been reached in *Mbenge* v. *Zaire*, CCPR/C/OP/2 at 76 (1990), 25 March 1983, when the author was arrested in order to force him to disclose the whereabouts of his brother, and was released sixteen months later without any criminal charge against him.

83 *Chambala* v. *Zambia*, CCPR/C/78/D/856/1999, 15 July 2003 [7.3].

84 E.g., Côte d'Ivoire CCPR/C/CIV/CO/1 (2015) 18 (recommendation that detainees who have served their sentences be released as soon as possible); Iraq CCPR/C/IRQ/CO/5 (2015) 33 (not

appears to have accepted the author's claim in *Samathanam* v. *Sri Lanka* that he was not detained on lawful grounds when the grounds for his initial arrest were neither reasonable nor probable and those who arrested him did not inform him of any discernible reason for his arrest.[85]

There was some suggestion by the Committee in *Fardon* v. *Australia* that the requirement for grounds and procedures to be established by law serves as a precondition for the State to take advantage of the permissive limits of Article 9(1), in much the same way that the 'prescribed by law' precondition of limitation operates in other provisions:[86]

> Article [9(1)] ... provides for certain permissible limitations on [the right to liberty], by way of detention, where the grounds and the procedures for doing so are established by law. Such limitations are indeed permissible and exist in most countries in laws which have for object, for example, immigration control or the institutionalised care of persons suffering from mental illness or other conditions harmful to themselves or society.[87]

Whether or not the principle of legality should operate in that way, there is no doubt that a finding of violation of Article 9(1) should follow if the grounds and procedure by which a loss of liberty occurs are not established by law, regardless of whether it is also 'arbitrary'.[88] The Committee's customary approach to findings on this element of Article 9(1) is to state that 'deprivation of liberty is permissible only when it takes place on such grounds and in accordance with such procedure as are established by domestic law and when this is not arbitrary. In other words, the first issue before the Committee is whether the authors' deprivation of liberty was in accordance with the State party's relevant laws.'[89] The Committee has fastened on non-compliance with the 'established by law' requirement alone in many instances.[90] It has done so even

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all detainees were released immediately after discharge by courts or having served their sentences).

85 *Samathanam* v. *Sri Lanka*, CCPR/C/118/D/2412/2014, 28 October 2016 [3.4], [6.4].

86 See Arts 18(3) and 22(2), the 'provided by law' provisions of Arts 12(3), 19(3), and the 'in conformity with the law' requirement of Art. 21.

87 *Fardon* v. *Australia*, CCPR/C/98/D/1629/2007, 18 March 2010 [7.3] (the Committee continued in response to the aspect of preventive detention: 'However, limitations as part of, or consequent upon, punishment for criminal offences may give rise to particular difficulties ... in these cases, the formal prescription of the grounds and procedures in a law which is envisaged to render these limitations permissible is not sufficient if the grounds and the procedures so prescribed are themselves either arbitrary or unreasonably or unnecessarily destructive of the right itself'). See also *Tillman* v. *Australia*, CCPR/C/98/D/1635/2007, 18 March 2010 [7.3] in similar terms (based on similar circumstances).

88 GC 35 [10]–[11].

89 E.g., *Maksudov et al.* v. *Kyrgyzstan*, CCPR/C/93/D/1461, 1462, 1476 & 1477/2006, 16 July 2008 [12.2]; *Khoroshenko* v. *Russian Federation*, CCPR/C/101/D/1304/2004, 29 March 2011 [9.3]; *Butovenko* v. *Ukraine*, CCPR/C/102/D/1412/2005, 19 July 2011 [7.6]. See also *Israil* v. *Kazakhstan*, CCPR/C/103/D/2024/2011, 31 October 2011 [9.2].

90 Sometimes the Committee's supporting explanation for violation on the basis of the legality requirement is scant when allegations are not contested (e.g., *Gridin* v. *Russian Federation*, CCPR/C/69/D/770/1997, 18 July 2000 [8.1]; *Casafranca de Gomez* v. *Peru*, CCPR/C/78/D/981/

where a finding of 'arbitrary' loss of liberty was readily available,[91] while on other occasions it has based its decision on both elements.[92]

Deprivation of Liberty Must Not be 'Arbitrary'

The Committee's General Comment synopsis on when loss of liberty is 'arbitrary' is very close to that under Article 6 for the purposes of determining whether an individual is deprived of life 'arbitrarily'.[93]

Reasonableness, Necessity and Proportionality

The clearest statement on the meaning of 'arbitrariness' under Article 9 is provided in General Comment 35:

> The notion of '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, as well as elements of reasonableness, necessity and proportionality. For example, remand in custody on criminal charges must be reasonable and necessary in all the circumstances. Aside from judicially imposed sentences for a fixed period of time, the decision to keep a person in any form of detention is arbitrary if it is not subject to periodic re-evaluation of the justification for continuing the detention.[94]

In some cases the Committee has substituted 'illegality' for 'due process', for example, *Tarighat* v. *Algeria*, but 'due process' is more inclusive.[95]

The comment that 'arbitrariness' includes 'elements of inappropriateness, injustice, lack of predictability and due process of law' draws on the drafting history of Article 9, and is taken from Committee dicta in a number of cases,

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2001, 22 July 2003 [7.2]; *Rolando* v. *Philippines*, CCPR/C/82/D/1110/2002, 3 November 2004 [5.5]; *Umarova* v. *Uzbekistan*, CPR/C/100/D/1449/2006), 19 October 2010 [8.4]; *Israil* v. *Kazakhstan*, CCPR/C/103/D/2024/2011, 31 October 2011 [9.2]).

91 E.g., *Umarova* v. *Uzbekistan*, CCPR/C/100/D/1449/2006, 19 October 2010 [8.4].

92 E.g., *Chambala* v. *Zambia*, CCPR/C/78/D/856/1999, 15 July 2003, [7.3] (detention for two months following court determination that there were no grounds to hold the author). Note also the generality of the Committee's findings in *Coronel et al.* v. *Colombia*, CCPR/C/76/D/778/1997, 24 October 2002 [9.4]; and *Kurbonov* v. *Tajikistan*, CCPR/C/86/D/1208/2003, 16 March 2006 [6.5].

93 *General Comment No. 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life*, CCPR/C/GC/36, 30 October 2018, advance unedited version (GC 36)) [12] substantially adopts GC 35 [12] (without the examples).

94 GC 35 [12] (footnotes omitted). For interpretation of 'arbitrariness' more broadly than 'against the law', see, e.g., *Jalloh* v. *Netherlands*, CCPR/C/74/D/794/1998, 26 March 2002 [8.2] (the detention was lawful in the Netherlands). The *travaux* show that the drafters considered that 'arbitrariness' includes 'incompatibility with the principles of justice or with the dignity of the human person': *A* v. *Australia*, CCPR/C/59/D/560/1993, 3 April 1997 [7.6]. On the drafting history of 'arbitrary' under Art. 9(1), see P. Hassan, 'International Covenant on Civil and Political Rights: Background Perspectives on Article 9 (1)', (1973) 3 Denv. J. Int. L. & Pol., p. 153.

95 *Tarighat et al.* v. *Algeria*, CCPR/C/86/D/1085/2002, 15 March 2006 [8.3].

including *Van Alphen* v. *Netherlands* and *Gorji-Dinka* v. *Cameroon*.[96] This formula has become a familiar part of the word-stock of Article 9(1) decision-making, but in those particular cases these elements were explained to mean that detention 'must not only be lawful but *reasonable* and *necessary* in all circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime'. The Committee found a violation in *Van Alphen* when a solicitor in a tax fraud matter was held for nine weeks 'for reasons of accessibility' when he refused to waive his professional obligation to secrecy to assist the investigation; in *Gorji-Dinka* when the author was repeatedly arrested and detained, and only after several such occurrences were criminal charges of high treason filed without any legal basis for political motives; in *Andrei Sannikov* v. *Belarus* because the remand in custody and other constraints applied to a politician and activist arrested following his presence at a protest did not take into account the circumstances, and neither the authorities nor the courts provided any explanation for their necessity;[97] and in *Spisso* v. *Venezuela* for imprisonment of a mayor for contempt by a special procedure which precluded his ability to challenge the legality of his detention, when contempt could have been prosecuted through an ordinary criminal proceeding.[98]

By contrast, in *Nystrom* v. *Australia* the author's detention pending deportation was not in violation of Article 9(1), by virtue of his substantial criminal record, risk of recidivism, the need to protect the Australian community, concern that he might harm the detention centre personnel and inmates, and his risk of flight.[99]

In some cases the key evidence to justify detention is contradicted or missing, as in *Amarasinghe* v. *Sri Lanka* concerning an arrest for being drunk and for obstructing traffic when the toxicology report showed that there was no alcohol in the victim's blood system and no evidence that he had been obstructing traffic;[100] and in *Chani* v. *Algeria* when the case file contained neither the grounds for detention, nor authorisations from the public prosecutor for detention.[101]

Immigration Detention (including Mandatory Detention)

The Committee does not always mention the term 'proportionality' in its Views, although it has shown greater inclination to do so in cases of immigration detention, when stating on a number of occasions that 'remand in custody could be considered arbitrary if it is not necessary in all the circumstances of the case, for

96 *Van Alphen* v. *Netherlands*, CCPR/C/39/D/305/1988 23 July 1990 [5.8] (omitting 'due process of law'); *Gorji-Dinka* v. *Cameroon*, CCPR/C/83/D/1134/2002, 17 March 2005 [5.1]. See also *Mukong* v. *Cameroon*, CCPR/C/51/D/458/1991, 21 July 1994 [9.8].
97 *Sannikov* v. *Belarus*, CCPR/C/122/D/2212/2012, 6 April 2018 [6.5].
98 *Spisso* v. *Venezuela*, CCPR/C/119/D/2481/201, 17 March 2017 [7.2]–[7.5].
99 *Nystrom* v. *Australia*, CCPR/C/102/D/1557/2007, 18 July 2011 [7.3].
100 *Amarasinghe* v. *Sri Lanka*, CCPR/C/120/D/2209/2012, 13 July 2017 [6.7].
101 *Chani* v. *Algeria*, CCPR/C/116/D/2297/2013, 11 March 2016 [7.5].

example to prevent flight or interference with evidence: *the element of proportionality becomes relevant in this context*'.[102] *A* v. *Australia* illustrates the Committee's requirements that detention be properly justified, in that instance when addressing Australia's policy of mandatory detention for certain border claimants.[103] It is not per se arbitrary to detain individuals requesting asylum, and there is no rule of customary international law that would render all such detention arbitrary. But the Committee answered the issue of whether the author's unlawful entry into Australia and his perceived incentive to abscond were sufficient to justify indefinite and prolonged detention, by a number of important principles. First, that every decision to keep a person in detention should be open to review periodically, so that the grounds justifying the detention may be assessed. Secondly, detention should not continue beyond the period for which the State can provide appropriate justification. Relevant factors might be the likelihood of absconding and lack of cooperation. Without these detention may be considered arbitrary, even if entry was illegal. The Article 9(1) violation lay in the State's failure to advance any grounds, particular to the author's case, which would justify his continued detention for a period of four years, during which he was shifted between different detention centres.[104] General reasons for detention will not suffice.[105] In *C.* v. *Australia* the Committee also found that immigration detention for over two years was arbitrary (without specifically referring to proportionality) because the State failed to provide justification for continued detention with the passage of time and intervening circumstances, in particular by showing there were not less invasive means of achieving compliance with its immigration policies, such as by reporting obligations, sureties or other conditions which would take account of the author's deteriorating physical condition.[106]

A proper assessment of the necessity for continued detention must take account of the different circumstances of the individual family members detained. The family that was the subject of *Bakhtiyari* v. *Australia* claimed they had left Afghanistan together but became separated in transit. Mr Bakhtiyari arrived by boat illegally ahead of his wife and five children, although they were all carried by

102 *A* v. *Australia*, CCPR/C/59/D/560/1993 (1997), 3 April 1997 [9.2]; *Madafferi* v. *Australia*, CCPR/C/81/D/1011/2001, 26 July 2004 [9.2]; *Nystrom* v. *Australia*, CCPR/C/102/D/1557/2007, 18 July 2011 [7.3].

103 Daniel Wilsher traces the use of long-term detention of immigrants without judicial control, and the challenges posed in an age of global migration, in *Immigration Detention: Law, History, Politics* (Cambridge University Press, 2011).

104 *A* v. *Australia*, CCPR/C/59/D/560/1993, 3 April 1997 [9.3]–[9.4].

105 *Kwok* v. *Australia*, CCPR/C/97/D/1442/2005, 23 October 2009 [9.3] (the State advanced general reasons to justify the author's detention but no grounds particular to her case which would justify mandatory detention for four years before being released into community detention).

106 *C.* v. *Australia*, CCPR/C/76/D/900/1999, 28 October 2002 [8.2]. A similar analysis was undertaken by the Committee in *Baban* v. *Australia*, CCPR/C/78/D/1014/2001, 6 August 2003 [7.2]; *Bakhtiyari et al.* v. *Australia*, CCPR/C/79/D/1069/2002, 29 October 2003 [9.2]–[9.3].

the same smuggler. The Committee decided there was no Article 9 violation when Mr Bakhtiyari was detained for seven months following his arrival, without dependants, while his identity was in doubt and he claimed to be from a State suffering serious internal disorder. That period of detention ended when he was granted a protection visa on the basis of Afghan nationality and Hazara ethnicity. His visa was cancelled as a result of proceedings which followed the revelation that he was not an Afghan farmer, as he had claimed, but rather a plumber and electrician from Quetta in Pakistan. Mrs Bakhtiyari, on the other hand, was detained in immigration detention for nearly three years at the time of the Committee's decision and continued to be detained, while their children were released on interim orders of the Family Court after two years and eight months. The Committee found the detention of Mrs Bakhtiyari and the children to be arbitrary 'taking into account in particular the composition of the Bakhtiyari family', because that detention lacked justification for such an extended period without demonstrating that less intrusive measures could not achieve compliance with Australia's immigration policy, for example, through reporting obligations, sureties or other conditions.[107]

In *Griffiths* v. *Australia* the Committee was also influenced in its finding of violation by the fact that detention pending extradition was not limited in time under domestic law and that, as a general rule, individuals could be held in custody in extradition cases whether or not their detention was necessary.[108] The background legal framework can therefore be highly significant. The finding of violation of Article 9(1) in *Nasir* v. *Australia* was because the author was kept in mandatory immigration detention for almost five months without formal charges (even though he was subsequently convicted of people smuggling).[109]

The onset of mental illness, or other relevant change of circumstance, during an individual's detention should itself prompt a review. Article 9(1) was violated on this basis in *Shafiq* v. *Australia*. The justification provided for mandatory immigration detention was the State's general experience that asylum seekers abscond if not retained in custody. The author was placed in a psychiatric institution as a result of his mental illness, which was the consequence of six years' detention in Australia. He had not attempted to abscond even though he had been held in an 'open' environment. The fact that he had become mentally ill during his detention should have been a sufficient ground for a prompt and substantive review.[110]

107 *Bakhtiyari and Bakhtiyari* v. *Australia*, CCPR/C/79/D/1069/2002, 29 October 2003 [4.1], [4.7], [9.2]–[9.3].

108 *Griffiths* v. *Australia*, CCPR/C/112/D/1973/2010 (2015) 21 October 2014 [7.2]–[7.4]. On detention pending extradition (which could not exceed three months by law), see *Israil* v. *Kazakhstan*, CCPR/C/103/D/2024/2011, 31 October 2011 [9.2].

109 *Nasir* v. *Australia*, CCPR/C/116/D/2229/2012, 29 March 2016 [7.4].

110 *Shafiq* v. *Australia*, CCPR/C/88/D/1324/2004, 31 October 2006 [7.3]. Cf. *Madafferi* v. *Australia*, CCPR/C/81/D/1011/2001, 26 July 2004 [9.2] (no violation owing to high risk of flight), even though the author's mental health had deteriorated. Ben Saul examines the

The Committee draws a distinction between initial detention for the purposes of ascertaining identity and other issues, as is common in immigration control, and continuing extended detention. In *Jalloh* v. *Netherlands*, for example, detention during an investigation into the identity of the author was not arbitrary. Detention was not unreasonable for a limited time (three and a half months) until the administrative procedures were completed, given that he had previously absconded from an open reception facility and went into hiding. Once a reasonable prospect of expelling him no longer existed his detention was terminated.[111] The Committee described the position beyond this initial period of detention in *F.K.A.G. et al.* v. *Australia* and in *F.J. et al.* v. *Australia*:

> Asylum seekers who unlawfully enter a State party's territory may be detained for a brief initial period in order to document their entry, record their claims and determine their identity if it is in doubt. To detain them further while their claims are being resolved would be arbitrary absent particular reasons specific to the individual, such as an individualized likelihood of absconding, danger of crimes against others, or risk of acts against national security. The decision must consider relevant factors case-by-case, and not be based on a mandatory rule for a broad category . . . The decision must also take into account the needs of children and the mental health condition of those detained. Individuals must not be detained indefinitely on immigration control grounds if the State party is unable to carry out their expulsion.[112]

In both cases the authors were kept in mandatory detention upon arrival and subsequently as a result of adverse security assessments. There was nothing to demonstrate, on an individual basis, that continuous indefinite detention was justified, nor did the State demonstrate that other, less intrusive, measures could not have been used to respond even to the security risk said to be posed. The authors were not informed of the specific risk attributed to each of them or of the efforts undertaken to find solutions which would allow them to be at liberty. They were also deprived of legal safeguards allowing them to challenge their indefinite detention.[113]

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international human rights law impacts of adverse security assessments affecting refugee parents, children and families in Australian immigration detention centres, in 'Indefinite Security Detention and Refugee Children and Families in Australia: International Human Rights Law Dimensions', (2013) 20 Austl. Int. L.J., p. 55.

111 *Jalloh* v. *Netherlands*, CCPR/C/74/D/794/1998, 26 March 2002 [8.2]. Cf. *Kulov* v. *Kyrgyzstan*, CCPR/C/99/D/1369/2005, 26 July 2010 [8.3] (violation where no evidence of wish to escape or to obstruct the inquiries); *Marinich* v. *Belarus*, CCPR/C/99/D/1502/2006 (2010), [10.4] (continued extension of incarceration).

112 *F.K.A.G. et al.* v. *Australia*, CCPR/C/108/D/2094/2011, 26 July 2013 [9.3]–[9.4]; *F.J. et al.* v. *Australia*, CCPR/C/116/D/2233/2013, 22 March 2016 [10.3]–[10.4].

113 For almost identical reasoning, see also *M.M.M. et al.* v. *Australia*, CCPR/C/108/D/2136/2012, 25 July 2013 [10.3]–[10.4]. In different contexts, see also *D. and E.* v. *Australia*, CCPR/C/87/D/1050/2002, 11 July 2006 [7.2]; *Al-Gertani* v. *Bosnia and Herzegovina*, CCPR/C/109/D/1955/2010, 1 November 2013 [10.3]–[10.4]. For an examination of the practice of preventive detention, see Claire Macken, 'Preventive Detention and the Right of Personal Liberty and

In its Concluding Observations the Committee has similarly repeatedly stressed the need to ensure that the detention of migrants and asylum seekers is reasonable, necessary and proportionate in the light of the circumstances,[114] that alternatives to detention should be adopted whenever possible,[115] taking into account less invasive means of achieving the same end,[116] that detention should be used as a measure of last resort,[117] that those awaiting deportation should be detained for the shortest time necessary,[118] and that any detention should be subject to periodic evaluation and judicial review.[119] It has been especially critical where detention is systematic,[120] or otherwise without regard for individual circumstances,[121] or where there is mandatory detention of certain categories of immigrants which rules out individualised decision-making.[122]

Preventive Detention

Preventive detention generally entails loss of liberty pursuant to aims which are protective and non-punitive, and has been deployed in involuntary psychiatric committal (to protect the patient and/or public), and in criminal sentencing policy (to protect the public).[123] The practice is frequently exposed to criticism.[124] *A* v. *New Zealand* concerned a committal order to which the author was subjected followed threatening and aggressive behaviour, on the opinion of three psychiatrists. A panel of psychiatrists continued to review his situation periodically. The Committee was influenced to find this was neither unlawful nor arbitrary because his continued detention was regularly reviewed by the

Security under the International Covenant on Civil and Political Rights, 1966' (2005) 26 Adel. L. Rev., p. 1.

114 E.g., Malta CCPR/C/MLT/CO/2 (2014) 16; Finland CCPR/C/FIN/CO/6 (2013) 10; Greece CCPR/C/GRC/CO/2 (2015) 28; Denmark CCPR/C/DNK/CO/6 (2016) 32.

115 E.g., Cyprus CCPR/C/CYP/CO/4 (2015) 14; Greece CCPR/C/GRC/CO/2 (2015) 28; Lithuania CCPR/C/LTU/CO/4 (2018) 19.

116 E.g., Greece CCPR/C/GRC/CO/2 (2015) 28.

117 E.g., Malta CCPR/C/MLT/CO/2 (2014) 16; Korea CCPR/C/KOR/CO/4 (2015) 39.

118 E.g., Cyprus CCPR/C/CYP/CO/4 (2015) 14; Greece CCPR/C/GRC/CO/2 (2015) 28; Korea CCPR/C/KOR/CO/4 (2015) 39.

119 E.g., Finland CCPR/C/FIN/CO/6 (2013) 10.

120 E.g., Malta CCPR/C/MLT/CO/2 (2014) 16.

121 E.g., Greece CCPR/C/GRC/CO/2 (2015) 27.

122 E.g., Australia A/55/40 vol. 1 (2000) 526; Canada CCPR/C/CAN/CO/5 (2006) 14 (foreign nationals who are not permanent residents); Australia CCPR/C/AUS/CO/5 (2009) 23; USA CCPR/C/USA/CO/4 (2014) 15; Australia CCPR/C/AUS/CO/6 (2017) 37.

123 Diane Webber advances an approach to preventive detention as a counter-terrorism tool, by reference to key minimum criteria drawn from international human rights principles and best practices from domestic laws, in *Preventive Detention of Terror Suspects: a New Legal Framework* (Routledge, 2016). Lawrence Hill-Cawthorne offers a detailed examination of the procedural rules that apply to detention in non-international armed conflict, with the focus on preventive security detention, or 'internment', in *Detention in Non-international Armed Conflict* (Oxford University Press, 2016).

124 For discussion in wider legal and medical context, see Bernadette McSherry and Patrick Keyzer (eds), *Dangerous People: Policy, Prediction, and Practice* (Routledge, 2011).

courts.[125] In keeping with its OP1 practice of limited factual review, the Committee did not undertake a separate evaluation of the facts or the application of the law since this is for the national courts rather than the Committee, unless the decisions of those courts are manifestly arbitrary or amount to a denial of justice. Involuntary psychiatric detention, consistent with general principle, would, however, be arbitrary if the medical criteria necessitating it do not, or cease to, exist. In practice, it is expedient to adopt a system of mandatory periodic review, coupled with judicial control.[126]

Given the special vulnerability of those detained for reasons of mental health there is a need to ensure that their views are respected, that any one purportedly representing them genuinely reflects and defends their wishes and interests, and that psychiatric care is aimed at preserving the individual's dignity.[127] Particular attention must be given to ensure there is no loss of substantive or procedural safeguards.[128] In *Bozena Fijalkowska* v. *Poland* the author's committal for involuntary psychiatric treatment was found to be arbitrary for want of adequate safeguards. She was not served with a copy of the committal order, she was not assisted or represented by anyone who could have informed her she could challenge it, and it was not until after her release that she became aware she could appeal it. When she did, her appeal was dismissed because it was filed outside the statutory deadline.[129]

Preventive detention within criminal sentencing has been particularly controversial. The rationale for it was put pointedly by Mr Walter Kälin in *Rameka et al.* v. *New Zealand*: '[a]lthough preventive detention is always triggered by the commission of a serious crime, it is not imposed for what the person concerned did in the past, but rather for what he is, i.e. for being a dangerous person who might commit crimes in the future'.[130] In order to justify preventive detention as a measure to protect the public once a punitive term of imprisonment has been served the Committee required the existence of 'compelling reasons' throughout the period of detention. This was satisfied because once a non-parole period of sentence had expired, there were compulsory annual

125 *A* v. *New Zealand*, CCPR/C/66/D/754/1997, 3 August 1999 [7.2]–[7.3].
126 See also Concurring Opinion of Messrs Pocar and Scheinin in *A* v. *New Zealand*; *Shafiq* v. *Australia*, CCPR/C/88/D/1324/2004, 31 October 2006 [7.2].
127 Croatia CCPR/C/HRV/CO/3 (2015) 16.
128 E.g., Poland A/47/40 (1992) 176 (legislation should provide for an appeal against a decision to place a person in a psychiatric institution); Estonia CCPR A/58/40 (2003) 79(10) (noting the obligation to enable a person detained for mental health reasons to initiate proceedings in order to review the lawfulness of the detention).
129 *Fijalkowska* v. *Poland*, CCPR/C/84/D/1061/2002, 26 July 2005 [8.3].
130 Individual Opinion of Committee member Mr Walter Kälin (dissenting in part) in *Rameka et al.* v. *New Zealand*, CCPR/C/79/D/1090/2002, and in *A* v. *New Zealand*, CCPR/C/66/D/754/1997, 3 August 1999.

reviews of detention by the Parole Board, which were court reviewable, with the power to order the prisoner's release if no longer a significant danger to the public.[131]

A number of dissenting Committee members voiced their conviction that the arbitrariness of such detention lay in the fact that the science underlying the assessment of the likelihood of reoffending was unsound. How could anyone seriously assert that there is a '20% likelihood' that a person will re-offend? In their view a forecast made according to such vague criteria was contrary to Article 9(1).[132]

Preventive detention is sometimes challenged as an excessive measure, as it was in *Dean* v. *New Zealand*. The Committee disagreed given that the author had a long history of sexual assault and indecency offences, that he had been warned on several occasions he would be sentenced to preventive detention if he reoffended, and he did so within three months of his release from prison for a similar offence. It also pointed out that it is the duty of the State in cases of preventive detention to provide the necessary assistance that would allow release as soon as possible without being a danger to the community.[133]

Excessive Sentence

Any criminal sentence may be arbitrary if excessive. Examples include *Fernando* v. *Sri Lanka*, which concerned 'rigorous imprisonment' of one year for a single instance of the author 'rais[ing] his voice' in court and refusing to apologise (there was no reasoned explanations for this severity);[134] and *Dissanakye* v. *Sri Lanka* a similar sentence but for two years because the author stated at a public meeting that he would not accept any 'disgraceful decision' of the Supreme Court.[135] These cases also suggest that the sentence did not relate to its ostensible purpose.

131 *Rameka et al.* v. *New Zealand*, CCPR/C/79/D/1090/2002 [7.3]; *A* v. *New Zealand*, CCPR/C/66/D/754/1997, 3 August 1999 [7.3]. Followed in *Dean* v. *New Zealand*, CCPR/C/95/D/1512/2006, 29 March 2009 [7.4].

132 Partly Dissenting Opinion of Mr Prafullachandra Natwarlal Bhagwati, Ms Christine Chanet, Mr Glèlè Ahanhanzo and Mr Hipólito Solari Yrigoyen in *Rameka et al.* v. *New Zealand*. Committee member Mr Rajsoomer Lallah (dissenting) was disquieted by the fact that it concerned crimes which had not been, and which might never be, committed. For examples of Committee concerns with preventive detention in Concluding Observations, see: Belgium A/47/40 (1992) 421 (lack of judicial authority to deal with preventive detention); France CCPR/C/FRA/CO/4 (2008) 16 and France CCPR/C/FRA/CO/5 (2015) 11 (detention of criminal defendants for 'dangerousness' after they have served their prison sentences, where they had not complied with the conditions to ensure security supervision when not part of the original sentence); Germany CCPR/C/DEU/C)/6 (2012) 14 (the Committee recommended the use of post-conviction preventive detention as a measure of last resort involving conditions only aimed at rehabilitation and reintegration); Italy CCPR/C/ITA/CO/5 (2006) 14 (period for preventive detention set by reference to the penalty for the offence); Panama CCPR/C/PAN/CO/3 (2008) 12 (concern at the continuing high percentage of prisoners in preventive detention).

133 *Dean* v. *New Zealand*, CCPR/C/95/D/1512/2006, 17 March 2009 [7.3], [7.5].

134 *Fernando* v. *Sri Lanka*, CCPR/C/83/D/1189/2003, 31 March 2005 [9.2].

135 *Dissanakye* v. *Sri Lanka*, CCPR/C/93/D/1373/2005, 22 July 2008 [8.3].

Parole Revocation

Revocation of parole may constitute arbitrary detention if there is insufficient nexus between the offence for which the subject was convicted and the offence committed while on parole. In *Manuel* v. *New Zealand* the necessary nexus was established because the author, who had been convicted of murder, was recalled for engaging in violent or dangerous conduct while on parole, including driving with excess blood alcohol, disorderly behaviour, intentional damage and threatening language, and dangerous driving (reversing a car over his sister). He was also charged and acquitted (after his recall) with assault on a female.[136]

Commuting a death sentence to one of life imprisonment, with a prospect of parole in the future, was found not to be tainted with arbitrariness in *Reece* v. *Jamaica*.[137]

Changes which limited eligibility for parole prevented a lawyer convicted of fraud qualifying for it in *De León Castro* v. *Spain* because parole only became available to those who satisfied the civil liabilities arising from their offence (which he had not). The Committee could not conclude 'that the denial of parole to the author made his imprisonment for the entire duration of his sentence arbitrary'.[138]

Arbitrariness Where Detention is Incompatible with a Covenant Provision

The Committee's decision in *De León Castro* was strongly criticised in Ruth Wedgwood's Dissenting Opinion because even under its terms the legislation which introduced the changes should not have subjected the author to a stricter parole regime. She considered that his denial of parole violated Article 15(1), prohibiting criminal penalties being increased retrospectively to the detriment of a defendant after the offence has been committed. She observed, importantly, that a penalty imposed in violation of Article 15(1) was 'arbitrary' within the meaning of Article 9.[139]

The Committee took the issue of Covenant incompatibility further in *Fardon* v. *Australia* when finding that the 'grounds' and the 'procedures' which are to be 'established by law' as required by Article 9(1) were themselves arbitrary. Just before the author's fourteen-year sentence expired, legislation came into effect that allowed a prisoner who was shown to be a serious danger to the community to be detained in custody for an indefinite term for control, care or treatment. The Committee determined that in their application to the author the relevant provisions were arbitrary for four reasons. First, his continued detention amounted in

136 *Manuel* v. *New Zealand*, CCPR/C/91/D/1385/2005, 18 October 2007 [7.3].
137 *Reece* v. *Jamaica*, CCPR/C/78/D/796/1998, 14 July 2003 [7.7].
138 *De León Castro* v. *Spain*, CCPR/C/95/D/1388/2005, 19 March 2009 [9.3].
139 Dissenting Opinion of Ms Wedgwood in *De León Castro* v. *Spain*.

substance to a fresh term of imprisonment, which was not permissible in the absence of a conviction for which imprisonment was a sentence prescribed by law. Secondly, because imprisonment is penal in character and could only be imposed for an offence in the same proceedings in which the offence was tried. In this instance, the further term was the result of court orders made fourteen years after his conviction and sentence, for predicted future criminal conduct which had its basis in the very offence for which he had already served his sentence. He was also subjected to a heavier penalty 'than the one that was applicable at the time when the criminal offence was committed' contrary to Article 15(1). Thirdly, the procedure for obtaining the court orders was designed to be civil in character and did not meet the due process guarantees required under Article 14 for a fair trial in which a penal sentence was imposed. Fourthly, the basis for his detention was feared or predicted dangerousness to the community, based on opinion as distinct from factual evidence. To avoid arbitrariness in these circumstances the State should have demonstrated that the author's rehabilitation could not have been achieved by means less intrusive than continued imprisonment or even detention. Each one of these reasons would, by itself, be sufficient for finding a violation.[140]

The second reason echoes Ruth Wedgwood's contention in *De León Castro* that detention in violation of Article 15(1) is *eo ipso* 'arbitrary' within the meaning of Article 9(1). Mr Lallah's Dissenting Opinion in *Rameka et al.* v. *New Zealand* similarly emphasised that 'both the grounds and the procedure required to be prescribed by law under article 9, paragraph 1, must be consistent with the other rights recognised in the Covenant', as the Committee's first but not latest General Comment stipulated in reference to preventive detention.[141] He would have based his finding in the State's failure to construe Article 9(1) in the light of other Covenant provisions, namely, Articles 14(1) and 15(1), which he considered were independently violated.

The issue of compatibility with the Covenant was at the fore of the Committee's decision in *David Hicks* v. *Australia*. As a result of a transfer arrangement between the United States and Australia the author was sent to Australia to serve the outstanding portion of a prison sentence imposed on him by the US Military Commission. The Committee found that by keeping him in prison for seven months under that arrangement Australia violated Article 9(1) because, by giving effect to sentences under an agreement resulting from a flagrant denial of justice was a disproportionate restriction of the right to liberty. Australia not only made no attempt to negotiate the terms of the arrangement in a manner compatible with its obligations under the Covenant, but also exercised a significant degree of

140 *Fardon* v. *Australia*, CCPR/C/98/D/1629/2007, 18 March 2010 [7.4].

141 Individual Opinion of Committee member Mr Rajsoomer Lallah (dissenting) in *Rameka et al.* v. *New Zealand*, CCPR/C/79/D/1090/2002, 6 November 2003, referring to *CCPR General Comment No. 8: Article 9 (Right to Liberty and Security of Persons)*, 30 June 1982 [4].

influence over the formulation of a plea agreement, on which his immediate return to Australia was contingent. It was incumbent on Australia to show, which it failed to do, that it had done everything possible to ensure that the terms of the arrangement as negotiated did not cause it to violate the Covenant, particularly as the author was one of its nationals.[142]

Arbitrariness Where Detention is Punishment for the Legitimate Exercise of Covenant Rights, or is Discriminatory

The Committee has found arrest and detention to be arbitrary where it results from expressing political or other convictions. Examples include *Marques de Morais* v. *Angola* in the arrest of a journalist at gunpoint and incommunicado detention for being critical of the Angolan president (rendering the president 'accountable for the promotion of incompetence, embezzlement and corruption as political and social values');[143] *Zelaya Blanco* v. *Nicaragua* in the arrest of a university professor without a warrant the day after the assumption of power by the Sandinista Government, on account of his outspoken criticism of the Marxist orientation of the Sandinistas;[144] *Tshiongo a Minanga* v. *Zaire* when a founding member of a political party opposed to the regime of President Mobutu was taken to a special branch of the Zairian political police on the pretext that he was to meet the agency's director but was tortured overnight and left for dead on the roadside the following morning;[145] *Adelaida Kim* v. *Uzbekistan*, in the arrest following a peaceful protest against the conduct of law enforcement authorities in Tashkent, for 'disobeying or resisting [the] lawful orders of [a] police officer';[146] *Berik Zhagiparov* v. *Kazakhstan*, when a journalist who covered a public gathering on the issue of mortgage rights was sentenced to fifteen days of administrative detention for participating in an unsanctioned public gathering;[147] *Liubou Pranevich* v. *Belarus*, in the detention of a journalist when covering a book presentation, an unauthorised public event;[148] *Yuriy Bakur* v. *Belarus*, in the arrest for participating in a meeting held by a political party in private premises;[149] *Melnikov* v. *Belarus* in the arrest and detention for distributing leaflets advertising a gathering on the worsening economic situation and socio-economic problems in Belarus;[150] and *Young-kwan Kim et al.* v. *Korea* in the detention of a large number of conscientious

142 *Hicks* v. *Australia*, CCPR/C/115/D/2005/2010, 5 November 2015 [4.7]–[4.10].
143 *Marques de Morais* v. *Angola*, CCPR/C/83/D/1128/2002, 29 March 2005 [2.1], [6.1].
144 *Blancov* v. *Nicaragua*, CCPR/C/51/D/328/1988 (1994), 20 July 1994 [10.3].
145 *Tshiongo a Minanga* v. *Zaire*, CCPR/C/49/D/366/1989 (1993), 2 November 1993 [5.2].
146 *Kim* v. *Uzbekistan*, CCPR/C/122/D/2175/2012, 4 April 2018 [13.10].
147 *Zhagiparov* v. *Kazakhstan*, CCPR/C/124/D/2441/2014, 25 October 2018 [13.6].
148 *Pranevich* v. *Belarus*, CCPR/C/124/D/2251/2013, 15 October 2018 [6.2].
149 *Bakur* v. *Belarus*, CPR/C/114/D/1902/2009, 15 July 2015 [7.2].
150 *Melnikov* v. *Belarus*, CCPR/C/120/D/2147/2012, 14 July 2017 [8.8].

objectors for refusing military service while legitimately exercising their Article 18 right to do so.[151]

The Committee also found in *Ribeiro* v. *Mexico* that the detention was punitive and consequently arbitrary of a journalist and human rights defender on charges of defamation and calumny after she revealed the existence of a corruption and child exploitation ring. The Committee referred to the call it made in the General Comment on Article 19 for States to consider decriminalising defamation. 'Since defamation should never result in a penalty of deprivation of liberty being imposed on the grounds that it is not an appropriate penalty, then *a fortiori* no detention based on charges of defamation may ever be considered either necessary or proportionate.'[152] Although the Committee in *Ribeiro* adverted to the principle that detention is arbitrary when it is used as a penalty for the legitimate exercise of Covenant rights, the 'grounds' and the 'procedures' on which the detention was based may themselves be said to be arbitrary for their Covenant incompatibility.

Arrest or detention on discriminatory grounds in violation of Articles 2(1), 3 or 26 is also in principle arbitrary.[153]

ARTICLE 9(2): THE RIGHT TO BE INFORMED, AT THE TIME OF ARREST, OF THE REASONS FOR ARREST AND PROMPTLY BE INFORMED OF ANY CHARGES

Warrants provide a measure of safeguard against the elements of 'inappropriateness, injustice, lack of predictability and due process of law' at arrest. The Committee has therefore been concerned where detention is allowed without a warrant,[154] or occurs (particularly for prolonged periods) without a warrant;[155] a warrant is required but is not obtained;[156] relevant procedures are not complied

151 *Kim et al.* v. *Korea*, CCPR/C/112/D/2179/2012, 15 October 2014 [7.5] (footnote omitted, referring to *Blanco* v. *Nicaragua*).

152 *Ribeiro* v. *Mexico*, CCPR/C/123/D/2767/2016, 17 July 2018 [10.8]–[10.11]. See also *Khadzhiyev et al.* v. *Turkmenistan*, CCPR/C/122/D/2252/2013, 6 April 2018 [7.7] (arrest and detention for journalistic and human rights work); Belize CCPR/C/BLZ/CO/1/Add.1 (2018) 32 (use of detention as a means of intimidation).

153 GC 35 [17]; see also examples in section 'Interaction between Article 9 and Other Covenant Provisions', above.

154 E.g., Korea CCPR/C/KOR/CO/3 (2006) 15 (excessive use of urgent arrest procedure, allowing detention without an arrest warrant for up to 48 hours); Argentina CCPR/C/ARG/CO/5 (2016) 17 (police practice, permitted by regulation, of taking people into custody without a warrant to verify their identity and then detaining them for lengthy periods); Pakistan CCPR/C/PAK/CO/1 (2017) 19 (law provides for detention by the army without warrant).

155 E.g., Syria CCPR/CO/71/SYR (2001) 14 (detention without an arrest warrant or indictment and without judicial procedures, in many cases for many years); Algeria CCPR/C/DZA/CO/4 (2018) 35 (detention for lengthy periods without an arrest warrant ever having been issued).

156 E.g., Iraq CCPR/C/IRQ/CO/5 (2015) 33 (despite legal safeguards, security forces carry out arrests without judicial warrants); Honduras CCPR/C/HND/CO/1 (2006) 13 (frequent use of

with;[157] or prisoners remain in custody under expired custody warrants.[158] Failure to enter an arrest in an official register can provide a basis for wider Article 9(1) findings.[159]

All detainees in criminal matters should have immediate access to a lawyer from the outset of detention,[160] a principle which also covers migration detention and the Article 13 safeguards to be accorded to aliens facing expulsion.[161]

Notice of Reasons for Arrest

A major purpose in requiring that those who are arrested be informed of the reasons for their arrest is to enable them to seek release if they believe that the reasons given are invalid or unfounded.[162] This aspect of Article 9(2) applies to any form of arrest, whereas the separate requirement for notice of charges applies only to criminal charges. 'Arrest' here means 'the initiation of a deprivation of liberty regardless of whether it occurs in criminal or administrative proceedings'.[163] The reasons must include not only the general basis of the arrest, but enough factual specifics to indicate the substance of the complaint.[164] It is not

arrest on suspicion by members of the security forces, including mass round-ups based on appearance alone and with no warrant from a competent authority).

157 E.g., Cambodia CCPR A/54/40 (1999) 304 (the law requiring a court to order immediate release of a person arrested without a warrant is not always complied with); Congo CCPR/C/COD/CO/3 (2006) 19 (warrant is often not produced).

158 E.g., Guinea CCPR/C/GIN/CO/3 (2018) 38 (continued custody without renewal of expired custody warrants).

159 *Neupane et al.* v. *Nepal*, CCPR/C/120/D/2170/2012, 21 July 2017 [10.9] (enforced disappearance).

160 GC 35 [35]; chapter on Article 14: Fair Trial Rights, sections 'Article 14(3)(b) Adequate Time and Facilities for Preparation of Defence and to Communicate with Counsel', 'Communication with Counsel'. For recent illustrative Concluding Observations, see Congo CCPR/C/COD/CO/4 (2017) 36; Algeria CCPR/C/DZA/CO/4 (2018) 17; Bahrain CCPR/C/BHR/CO/1 (2018) 39; Lao CCPR/C/LAO/CO/1 (2018) 28; Lebanon CCPR/C/LBN/CO/3 (2018) 32; Sudan CCPR/C/SDN/CO/5 (2018) 42(d).

161 See chapter on Article 13: Procedural Safeguards in the Expulsion of Aliens, sections 'The Rights to Submit Reasons against Expulsion, and of Review, with Representation, Except where Compelling Reasons of National Security Otherwise Require', 'Case Review'.

162 *Al-Gertani* v. *Bosnia and Herzegovina*, CCPR/C/109/D/1955/2010, 1 November 2013 [10.5]. For one of many examples of failure to provide reasons for arrest, see *Aboufaied* v. *Libya*, CCPR/C/104/D/1782/2008, 21 March 2012 [7.6]. For concern at the routine violation of this right, see, e.g., Congo CCPR/C/COD/CO/4 (2017) 35.

163 *F.K.A.G. et al.* v. *Australia*, CCPR/C/108/D/2094/2011, 26 July 2013 [6.9], [9.5] (at the time of their initial detention the authors were merely advised that they would not be granted a permanent visa as they did not meet security requirements, and would be detained while resettlement solutions were explored); cf. *M.M.M. et al.* v. *Australia*, CCPR/C/108/D/2136/2012, 25 July 2013 [10.5].

164 *Al-Gertani* v. *Bosnia and Herzegovina*, CCPR/C/109/D/1955/2010, 1 November 2013 [10.5] (the lack of information provided when the author was placed in immigration detention and to the courts on the reasons why he was considered a threat to the security undermined his right to seek release before a court).

sufficient simply to inform the subject, for example, that they are being arrested under security measures.[165]

The timing requirement is strict. It may not be feasible to give reasons for arrest *instanter*, and one common cause of delay is in procuring an official translator, since reasons must be given in a language intelligible to the addressee.[166] A delay of 7 or 8 hours has been allowed in such circumstances, while police procedures were suspended.[167] Two days following arrest has been found to be too late.[168] A person already in detention must promptly be informed of new charges.[169] Even if arrest is lawful any subsequent detention must be separately justified.[170]

In the case of children, it is necessary to inform their parents or guardians, both of the reasons for arrest and the charges.[171] General Comment 35 suggests that for those with mental disabilities notice of the arrest and the reasons should be given to any designated person or appropriate family members (allowing additional time to do so).[172]

Notice of Criminal Charges

The right to be informed of any charges is necessarily confined to the criminal context.[173] It includes charges for arraignment at a military court.[174]

'Promptly' means that anyone arrested need not be informed of the charges against them at the precise time of their arrest. A few hours would be sufficiently short (in a language understood by them),[175] but not a matter of days or weeks

165 *Caldas* v. *Uruguay*, CCPR/C/OP/2 at 80 (1990), 21 July 1983 [13.2]; *Ilombe et al.* v. *Congo*, CCPR/C/86/D/1177/2003, 17 March 2006 [6.2] ('a breach of state security').

166 *Albert Wilson* v. *Philippines*, CCPR/C/79/D/868/1999, 30 October 2003 [3.3], [7.5]. For an example of a claim (successfully refuted by the State) of failure to inform of the reasons for the arrest promptly and the charges in a language understood, see *Ambaryan* v. *Kyrgyzstan*, CCPR/C/120/D/2162/2012, 28 July 2017 [8.6].

167 *Hill* v. *Spain*, CCPR/C/59/D/526/1993, 2 April 1997 [12.2].

168 *Ismailov* v. *Uzbekistan*, CCPR/C/101/D/1769/2008, 25 March 2011 [7.2]. For other examples of arrest without reasons, see *Medjnoune* v. *Algeria*, CCPR/C/87/D/1297/2004, 14 July 2006 [8.6] (incommunicado detention without being informed of the reasons for his arrest for 218 days); *Njaru* v. *Cameroon*, CCPR/C/89/D/1353/2005, 19 March 2007 [6.2]; *Ashurov* v. *Tajikistan*, CCPR/C/89/D/1348/2005, 20 March 2007 [6.4]; *Engo* v. *Cameroon*, CCPR/C/96/D/1397/2005, 22 July 2009 [7.3]; *Khoroshenko* v. *Russian Federation*, CCPR/C/101/D/1304/2004, 29 March 2011 [9.2].

169 E.g., *Morrison* v. *Jamaica*, CCPR/C/63/D/635/1995, 27 July 1998 [22.3]; *Leehong* v. *Jamaica*, 613/1995, CCPR/C/66/D/613/1995, 12 August 1999 [9.4].

170 *Spakmo* v. *Norway*, CCPR/C/67/D/631/1995, 11 November 1999 [6.3] (two arrests were found to be reasonable in the circumstances but not detention following the second arrest).

171 *Krasnov* v. *Kyrgystan*, CCPR/C/101/D/1402/2005, 29 March 2011 [8.5] (violation in failure to inform a 14-year-old child and his legal representative of the reasons for the child's arrest). See also CRC, *General Comment No. 10 (2007): Children's Rights in Juvenile Justice*, 25 April 2007, CRC/C/GC/10, [48].

172 GC 35 [28]; *Krasnov* v. *Kyrgystan*, CCPR/C/101/D/1402/2005, 29 March 2011 [8.5].

173 GC 35 [24] bears out this distinction.

174 *Kurbanov* v. *Tajikistan*, CCPR/C/79/D/1096/2002, 6 November 2003 [7.2]; *Akwanga* v. *Cameroon*, CCPR/C/101/D/1813/2008, 22 March 2011 [7.4]–[7.5].

175 *Griffin* v. *Spain*, CCPR/C/53/D/493/1992 (1995), 4 April 1995 [9.2].

later.[176] In Concluding Observations it has been a matter of concern that 'short-term arrests' of up to 12 hours without charge remain possible,[177] or that 72 hours may elapse.[178] The level of detail of the charges need not be as extensive as required under Article 14(3)(a) to allow a defendant to prepare for trial.[179] If details of the charges were previously provided (e.g., during police questioning) then there is no violation if they are not repeated.[180] Judicial control under Article 9(3) provides additional safeguard if insufficient detail of the charges is provided.

ARTICLE 9(3): JUDICIAL CONTROL OF DETENTION

'Shall be Brought Promptly Before a Judge'

The essence of this provision is to bring anyone arrested or detained on a criminal charge under judicial control that is independent, objective and impartial in relation to the issues dealt with.[181] The prosecuting authority may therefore not constitute an 'officer authorized to exercise judicial power'.[182]

176 Violation of Art. 9(2) in detention without being informed of the charges for seven days (*Kurbanov* v. *Tajikistan*, CCPR/C/79/D/1096/2002, 6 November 2003 [7.2]); nine days (*Morrison* v. *Jamaica*, CCPR/C/64/D/663/1995, 25 November 1998 [8.2]; ten days (*Latifulin* v. *Kyrgyzstan*, CCPR/C/98/D/1312/2004, 10 March 2010 [8.3]); thirteen days (*Kirpo* v. *Tajikistan*, CCPR/C/97/D/1401/2005, October 27 2009 [6.2]); twenty-five days (*Khoroshenko* v. *Russian Federation*, CCPR/C/101/D/1304/2004, 29 March 2011 [9.2]); forty days (*Marques de Morais* v. *Angola*, CCPR/C/83/D/1128/2002, 29 March 2005 [6.2]).

177 Hungary CCPR/C/HUN/CO/5 (2010) 13.

178 Uzbekistan CCPR/CO/71/UZB (2001) 12 (72 hours); Georgia CCPR/CO/74/GEO (2002) 9 (72 hours). See also St Vincent and the Grenadines A/45/40 (1990) 252 (seven days); Morocco CCPR A/50/40 (1995) 110 (concern at the long period of detention without charge); Ireland CCPR A/55/40 (2000) 438 (seven days permitted for drug trafficking matters); Paraguay CCPR/C/PRY/CO/3 (2013) 20.

179 *McLawrence* v. *Jamaica*, CCPR/C/60/D/702/1996, 18 July 1997 [5.5], [5.9] (the duty to inform the accused of the nature and cause of the charge against him under Art. 14(3)(a) is more precise than that for arrested persons under Art. 9(2)).

180 *Smirnova* v. *Russian Federation*, CCPR/C/81/D/712/1996, 5 July 2004 [10.3].

181 *Bazarov et al.* v. *Uzbekistan*, CCPR/C/87/D/959/2000 (2006), 14 July 2006 [8.2]; *Musaeva* v. *Uzbekistan*, CCPR/C/104/D/1914,1915 & 1916/2009, 21 March 2012 [9.3].

182 *Zheludkova* v. *Ukraine*, CCPR/C/75/D/726/1996, 29 October 2002 [8.3]; *Reshetnikov* v. *Russian Federation*, CCPR/C/95/D/1278/2004, 23 March 2009 [8.2]; *Khoroshenko* v. *Russian Federation*, 1304/2004, CCPR/C/101/D/1304/2004, 29 March 2011 [9.2]; *Toshev* v. *Tajikistan*, CCPR/C/101/D/1499/2006, 30 March 2011 [6.5]; *Torobekov* v. *Kyrgyzstan*, CCPR/C/103/D/1547/2007, 27 October 2011 [6.2]. Among relevant Concluding Observations, see Russian Federation CCPR/C/79/Add.54 (1995) 16; Belarus CCPR/C/79/Add.86 (1997) 10 (procurator not a judge competent to decide on matters relating to continued detention); Mali CCPR/CO/77/MLI (2003) 10 (police custody may be extended beyond 48 hours if authorised by the public prosecutor); Suriname CCPR/C/SUR/CO/3 (2015) 31 (prosecutor may decide to extend detention for a further period without judicial review); Turkmenistan CCPR/C/TKM/CO/2 (2017) 24 (remand authorised by a prosecutor); Lao CCPR/C/LAO/CO/1 (2018) 27 (remand authorised by a prosecutor who also decides on any subsequent extensions).

The purpose is to ensure that proper judicial power is exercised at an early stage in order to bring those detained to trial within a reasonable time or to dispose of any complaint against them if it has no basis, so that they may be released. If they are to be tried, this process ensures that any decision concerning custodial remand meets the requirements of necessity for further detention.[183] It is therefore a matter of concern if the maximum period of police custody allowed in domestic laws is exceeded.[184] It may not be extended for those accused of a capital offence.[185] Judicial control is also directed at preventing the sort of vulnerability that results from being in police detention,[186] incommunicado or prolonged detention without access to a lawyer. Judicial control is to be automatic, unprompted on the part of the detainee.[187] The appearance of the accused 'live' provides the opportunity to examine issues concerning the detainee's treatment while in custody, which is particularly important in ensuring that any confessions are voluntary, including those of co-accused (in *Saimijon and Bazarov* v. *Uzbekistan* the marks of torture on the author's co-accused who admitted to falsely testifying against him under torture became the subject of enquiry during court proceedings).[188] The court must have power to order the detainee's presence.[189]

The exact meaning of 'promptly' depends on objective circumstances but implies that delays must not exceed a few days.[190] An aspect of some Article 9(3) findings is

183 *Madani* v. *Algeria*, CCPR/C/89/D/1172/2003, 28 March 2007 [8.4], citing *C.* v. *Australia*, CCPR/C/76/D/900/1999, 28 October 2002 [8.2].

184 E.g., Côte d'Ivoire CCPR/C/CIV/CO/1 (2015) 18 (maximum 48-hour period of police custody may be renewed once, and is not always respected); Moldova CCPR/C/MDA/CO/2(2009) 19 (maximum duration of police custody subsequent to arrest is 72 hours and is frequently exceeded).

185 E.g., Kenya A/36/40 (1981) 17 (concern at the differential between the time an accused must be brought before a judge (24 hours) and that applied to a person accused of a capital offence (fourteen days); the latter is incompatible with Art. 9(3).

186 E.g., Jamaica CCPR A/53/40 (1998) 86 (noting the opportunity for beatings and other forms of police brutality); Lithuania CCPR A/53/40 (1998) 170 (police power to detain for up to 5 hours could be used for harassment or intimidation); Hungary CCPR A/57/40 vol. I (2002) 80(8) (deep concern at on-going detention on police premises and the high risk of ill-treatment which it entails).

187 *Pichugina* v. *Belarus*, CCPR/C/108/D/1592/2007, 17 July 2013 [7.3]–[7.5] (the State relied on the fact that the author did not initiate a complaint to justify not bringing her before a judge).

188 *Bazarov et al.* v. *Uzbekistan*, CCPR/C/87/D/959/2000 (2006), 14 July 2006 [8.3] (the co-accused confirmed torture, but the presiding judge summoned the two investigators and accepted their denial, resulting in a finding of violation of Art. 14(1)). See also Uzbekistan CCPR/C/UZB/CO/4 (2015) 15 (concern that *habeas corpus* hearings occur in the absence of the detainee, especially in politically related cases).

189 GC 35 [42].

190 Examples of failure in promptness (without justification) included three days in *Borisenko* v. *Hungary*, CCPR/C/75/D/852/1999, 14 October 2002 [7.4], four days in *Freemantle* v. *Jamaica*, CCPR/C/68/D/625/1995, 24 March 2000 [7.4]; and five days in *Nazarov* v. *Uzbekistan*, CCPR/C/81/D/911/2000 (2004), 6 July 2004 [6.2], *Jijón* v. *Ecuador*, CCPR/C/44/D/277/1988 at 76, 26 March 1992 [5.3], and *Nazarov* v. *Uzbekistan*, CCPR/C/81/D/911/2000 (2004), 6 July 2004 [6.2].

detention without a real opportunity to speak with a lawyer.[191] The period for evaluating promptness begins at the time of arrest and not at the time when the person arrives in a place of detention.[192] Incommunicado detention 'as such may violate Article 9(3)',[193] and it inevitably violates numerous other Covenant provisions.[194] The Committee considers that 48 hours is ordinarily sufficient to transport the individual and to prepare for the judicial hearing, and that any delay beyond that must remain absolutely exceptional and be justified under the circumstances.[195] Findings of violation of this aspect include delays of seven days,[196] three weeks,[197] forty days,[198] three months,[199] five months,[200] 218 days,[201] five years[202] and six years.[203] The expectation of the CRC is 24 hours in the case of every child.[204]

'Trial within a Reasonable Time'

Entitlement to trial within a reasonable time in Article 9(3) applies specifically to those in pre-trial detention (as indicated by the words 'shall be entitled to trial within a reasonable time or to release').[205] There is overlap with the right to be

191 *Umarova* v. *Uzbekistan*, CCPR/C/100/D/1449/2006, 19 October 2010 [8.5].
192 *Kovsh* v. *Belarus*, CCPR/C/107/D/1787/2008, 27 March 2013 [7.3]; *Pichugina* v. *Belarus*, CCPR/C/108/D/1592/2007, 17 July 2013 [7.3].
193 *Marques de Morais* v. *Angola*, CCPR/C/83/D/1128/2002, 29 March 2005 [6.3] (referring to *Jijón* v. *Ecuador*, CCPR/C/44/D/277/1988 at 76, 26 March 1992 [5.3]); *Boimurodov* v. *Tajikistan*, CCPR/C/85/D/1042/2001, 20 October 2005 [7.4]; *Medjnoune* v. *Algeria*, CCPR/C/87/D/1297/2004, 14 July 2006 [8.7]. See also Morocco CCPR A/50/40 (1995) 119 (incommunicado detention should be restricted to very limited and exceptional cases); Nigeria CCPR/C/79/Add.64 (1996) 7; Gambia CCPR CCPR/CO/75/GMB (2002) 11 (incommunicado detention is contrary to Art. 9); Suriname CCPR/CO/80/SUR (2004) 14; Iran CCPR/C/IRN/CO/3 (2011) 18.
194 For further discussion of incommunicado detention, see chapter on Article 10: Treatment of Those Deprived of Their Liberty, sections 'Article 10(1): Treatment of Detainees and Prisoners in Violation of Article 10(1) and/or Article 7', 'Incommunicado Detention'.
195 GC 35 [33]. See also *Grishkovtsov* v. *Belarus*, CCPR/C/113/D/2013/2010, 1 April 2015 [8.3]. The Committee often refers to the 48-hour rule when examining State reports, with particular concern if it may be extended or there is no provision for this limit in domestic law (see 'Implementation' section, below), though note in particular steps taken by States to circumvent it, e.g.: Ghana CCPR/C/GHA/CO/1 (2016) 41 (suspects arrested during the weekend to avoid respecting the 48-hour period); Kazakhstan CCPR/C/KAZ/CO/2 (2016) 25 (72 hours coupled with inaccurate recording of the time of arrest to circumvent this legal time frame). Extreme cases include periods of ten–thirty days (Russian Federation CCPR/C/79/Add.54 (1995) 16); forty-four days (Suriname CCPR/CO/80/SUR (2004) 14; and four and a half months (Sudan CCPR/C/SDN/CO/4 (2014) 18).
196 *John-Jacques Tshidika* v. *Congo*, CCPR/C/115/D/2214/2012, 22 July 2015 [6.3].
197 *Traore* v. *Côte d'Ivoire*, CCPR/C/103/D/1759/2008, 31 October 2011 [7.5].
198 *Marques de Morais* v. *Angola*, CCPR/C/83/D/1128/2002, 29 March 2005 [6.4].
199 *Leehong* v. *Jamaica*, CCPR/C/66/D/613/1995, 12 August 1999 [9.5].
200 *Aber* v. *Algeria*, CCPR/C/90/D/1439/2005, 13 July 2007 [7.6]; *Burdyko* v. *Belarus*, CCPR/C/114/D/2017/2010, 15 July 2015 [8.3].
201 *Medjnoune* v. *Algeria*, CCPR/C/87/D/1297/2004, 14 July 2006 [8.7].
202 *Zogo* v. *Cameroon*, CCPR/C/121/D/2764/2016, 8 November 2017 [7.2].
203 *Madani* v. *Algeria*, CCPR/C/89/D/1172/2003, 28 March 2007 [8.4]. 204 CRC GC 10 [83].
205 GC 35 [37].

tried without undue delay in Article 14(3)(c), and both are often violated simultaneously.[206] Article 14(3)(c) applies whether or not the accused is detained, to avoid prolonged uncertainty about the fate of those subject to criminal charge, and to serve the interests of justice, for example, because relevant witnesses are more likely to be available and their recollections more reliable.

'Reasonable time' is invested with particular meaning in the specific circumstances of pre-trial detention and the Committee has adopted much of its 'without undue delay' jurisprudence from Article 14(3)(c) when addressing what is 'reasonable' under Article 9(3), including that those remanded in custody must be tried as expeditiously 'as possible'.[207] However, this must not occur so quickly that it prejudices the accused's right under Article 14(3)(b) to have adequate time and facilities to prepare for their defence. Inevitably, most cases concern undue delay rather than precipitous speed. 'Reasonableness' is to be assessed in the individual circumstances of each case, taking into account such matters as its complexity, the conduct of the accused, and the manner in which the matter was dealt with by the administrative and judicial authorities.[208] The burden of proof for justifying any delay and showing that a case was, for example, particularly complex rests with the State.[209] The fact that the State may have suffered general problems and instabilities following a coup attempt avails little.[210] A shorter period of pre-trial detention is appropriate in cases involving serious charges such as homicide or murder.[211]

An excessive period of pre-trial detention may also affect the right to be presumed innocent (under Article 14(2)).[212] The Committee has routinely found, in the absence of any justification or satisfactory explanation from the State, that periods of between two years and three and a half years before being brought to trial violate Article 9(3).[213] As always in the event of delay the judicial authority should reassess the necessity and reasonableness for continued pre-trial detention.[214]

206 *General Comment No. 32: Article 14 (Right to Equality before Courts and Tribunals and to Fair Trial)*, 23 August 2007, CCPR/C/GC/32 (GC 32) [61]; *Hendricks* v. *Guyana,* CCPR/C/75/D/838/1998, 25 October 2002 [6.3]; *Evans* v. *Trinidad and Tobago*, CCPR/C/77/D/908/2000, 21 March 2003 [6.2].

207 GC 35 [37], drawing on GC 32 [35] and jurisprudence such as *Barroso* v. *Panama*, CCPR/C/54/D/473/1991, 19 July 1995 [8.5]; *Sextus* v. *Trinidad and Tobago*, CCPR/C/72/D/818/1998, 16 July 2001 [7.2].

208 GC 35 [37]; GC 32 [35]. For illustration of how these factors were applied, see *Taright et al.* v. *Algeria*, CCPR/C/86/D/1085/2002, 15 March 2006 [8.2]–[8.4].

209 *Barroso* v. *Panama*, CCPR/C/54/D/473/1991, 19 July 1995 [8.5].

210 *Sextus* v. *Trinidad and Tobago*, CCPR/C/72/D/818/1998, 16 July 2001 [7.2].

211 *Sextus* v. *Trinidad and Tobago*, CCPR/C/72/D/818/1998, 16 July 2001 [7.2]; *Teesdale* v. *Trinidad and Tobago*, CCPR/C/74/D/677/1996, 1 April 2002 [9.3].

212 *Cagas et al.* v. *Philippines*, CCPR/C/73/D/788/1997, 23 October 2001 [7.3].

213 *Boodoo* v. *Trinidad and Tobago*, CCPR/C/74/D/721/1996, 2 April 2002 [6.2]; *Hendricks* v. *Guyana*, CCPR/C/75/D/838/1998, 25 October 2002 [6.3]; *Evans* v. *Trinidad and Tobago*, CCPR/C/77/D/908/2000, 21 March 2003 [6.2].

214 *Taright et al.* v. *Algeria*, CCPR/C/86/D/1085/2002, 15 March 2006 [8.4].

The entitlement to trial within a reasonable time refers to trial by a first instance decision[215] (under Article 14(3)(c) the right to be tried without undue delay applies at all stages, including first instance decisions and their appeal).[216]

Release or Custody Pending Trial

Pre-trial detention should be the exception rather than the norm,[217] consistent with the presumption of innocence,[218] and should be as short as possible.[219] It is to be used only when 'necessary'.[220] Excessive use may be indicated where a high percentage of the prison population is represented by those in pre-trial detention, or contributes to overcrowding.[221] As with every form of detention it must be justifiable,[222] and it is a matter of Committee concern when a case-by-case assessment is precluded, for example, by laws which exclude bail for certain types of offence,[223] or pre-trial detention is determined by reference to the penalty stipulated for the offence.[224] In some instances pre-trial detention lasts for periods longer than the maximum sentence for the crime.[225] It is of particular concern where those investigated for offences which carry the death penalty may be remanded indefinitely.[226] States are encouraged to adopt maximum, non-extendable terms of pre-trial detention,[227] and to adopt non-

215 GC 35 [37]; *Engo* v. *Cameroon*, CCPR/C/96/D/1397/2005, 22 July 2009 [7.2].
216 GC 32 [35].
217 *Cagas et al.* v. *Philippines*, CCPR/C/73/D/788/1997, 23 October 2001 [7.4]; *Smantser* v. *Belarus*, CCPR/C/94/D/1178/2003, 23 October 2008 [10.3]; *Basso* v. *Uruguay*, CCPR/C/100/D/1887/2009, 19 October 2010 [10.2]. See also, e.g., Albania CCPR/CO/82/ALB 2 (2004) 16; Costa Rica CCPR/C/CRI/CO/6 (2016) 28; Sweden CCPR/C/SWE/CO/7 (2016) 29; Congo CCPR/C/COD/CO/4 (2017) 35.
218 E.g., Uruguay CCPR/C/79/Add.19 (1993) 9 and Uruguay CCPR/C/URY/CO/5 (2013) 8.
219 GC 35 [37]; *Cagas et al.* v. *Philippines*, CCPR/C/73/D/788/1997, 23 October 2001 [7.4]; *Pichugina* v. *Belarus*, CCPR/C/108/D/1592/2007, 17 July 2013 [7.3].
220 *Kozulina* v. *Belarus*, CCPR/C/112/D/1773/2008, 21 October 2014 [9.7] (violation where necessity not make out); Dominican Republic CCPR A/56/40 (2001) 78(11) ('strictly necessary').
221 E.g., Mauritius A/44/40 (1989) 16 (36%); Paraguay CCPR/C/PRY/CO/3 (2013) 20 (70%); Uruguay CCPR/C/URY/CO/5 (2013) 9 (65%); Bolivia CCPR/C/BOL/CO/3 (2013) 19 (80%); Argentina CCPR/C/ARG/CO/5 (2016) 19 (over 50%); Burkina Faso CCPR/C/BFA/CO/1 (2016) 29; Ghana CCPR/C/GHA/CO/1 (2016) 41; Morocco CCPR/C/MAR/CO/6 (2016) 29 (almost 50%); Pakistan CCPR/C/PAK/CO/1 (2017) 27; Guinea CCPR/C/GIN/CO/3 (2018) 37 (60–80% of the population of detainees); Liberia CCPR/C/LBR/CO/1 (2018) 36.
222 E.g., Belgium CCPR A/54/40 (1999) 84; Sweden CCPR/C/SWE/CO/7 (2016) 29.
223 E.g., Mauritius A/44/40 (1989) 15; Mauritius CCPR/C/MUS/CO/5 (2017) 27.
224 E.g., Argentina CCPR/CO/70/ARG (2000) 10 (duration of pre-trial detention was determined by reference to the possible length of sentence following conviction; there should not be any offences for which pre-trial detention is obligatory); Spain CCPR/C/ESP/CO/5 (2009) 15 (a practice which the Committee recommended be ended); Moldova CCPR/C/MDA/CO/2 (2009) 19; Poland CCPR/C/POL/CO/7 (2016) 29 (pre-trial detention on the ground of the severity of the penalty).
225 E.g., Pakistan CCPR/C/PAK/CO/1 (2017) 27.
226 E.g., Iraq CCPR/C/IRQ/CO/5 (2015) 33. See also Belize CCPR/C/BLZ/CO/1/Add.1 (2018) 32 (up to seven years).
227 E.g., Poland CCPR/C/POL/CO/6 (2010) 16.

custodial alternatives.[228] Those detained should have access to a doctor,[229] as well as legal counsel,[230] and should be able to inform their family.[231] All restrictions on contacts for pre-trial detainees should require justification on the basis of necessity and proportionality in the light of all the relevant circumstances, and the extent of their application should be subject to constant review.[232]

Remand in custody could be considered arbitrary if it is not necessary in all the circumstances,[233] for example, to prevent the recurrence of crime,[234] or where the likelihood exists that the accused will abscond,[235] destroy evidence, influence witnesses or flee from the jurisdiction.[236] As to the requirement of lawfulness, the Committee has repeatedly objected to ill-defined concepts of 'public safety' and 'public order',[237] 'national security'[238] and 'public security'[239] empowering pre-trial detention. Any release pending trial may be conditioned upon guarantees to appear at trial, at any other stage of the judicial proceedings and, eventually,

228 E.g., Paraguay CCPR/C/PRY/CO/3 (2013) 20; Costa Rica CCPR/C/CRI/CO/6 (2016) 28; Sweden CCPR/C/SWE/CO/7 (2016) 29; Dominican Republic CCPR/C/DOM/CO/6 (2017) 21; Hungary CCPR/C/HUN/CO/6 (2018) 41; Lithuania CCPR/C/LTU/CO/4 (2018) 21. See also Rule 6 of the United Nations Standard Minimum Rules for Non-Custodial Measures (the Tokyo Rules): resolution adopted by the General Assembly, 2 April 1991, A/RES/45/110; and for standards applicable to women (in both custodial and non-custodial measures) the United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (the Bangkok Rules): note by the Secretariat, 6 October 2010, A/C.3/65/L.5.

229 E.g., Mauritania A/69/40 (2014) 129 (18); Côte d'Ivoire CCPR/C/CIV/CO/1 (2015) 18.

230 E.g., Kyrgyzstan CCPR/CO/69/KGZ (2000) 9; Hungary CCPR/C/HUN/CO/5 (2010) 13; Paraguay CCPR/C/PRY/CO/3 (2013) 20; Albania CCPR/C/ALB/CO/2 (2013) 17 (recommending access to a lawyer be assured immediately following arrest); Bolivia CCPR/C/BOL/CO/3 (2013) 19; Côte d'Ivoire CCPR/C/CIV/CO/1 (2015) 18 (from the very outset of deprivation of liberty); Sweden CCPR/C/SWE/CO/7 (2016) 29; France CCPR/C/FRA/CO/5 (2015) 9 (concern that access to counsel for terrorism suspects could be delayed for 72 hours); Mongolia CCPR/C/MNG/CO/6 (2017) 24.

231 E.g., Hungary CCPR A/57/40 vol. I (2002) 80(8); Congo CCPR/C/COD/CO/3 (2006) 19; Kuwait CCPR/C/KWT/CO/2 (2011) 19; Burkina Faso CCPR/C/BFA/CO/1 (2016) 29, 30; Mongolia CCPR/C/MNG/CO/6 (2017) 24.

232 E.g., Sweden CCPR/C/SWE/CO/7 (2016) 29.

233 *A* v. *Australia*, CCPR/C/59/D/560/1993, 3 April 1997 [9.2]; *Cedeño* v. *Venezuela*, CCPR/C/106/D/1940/2010, 29 October 2012 [7.10], citing *Van Alphen* v. *Netherlands* [5.8].

234 *Torobekov* v. *Kyrgyzstan*, CCPR/C/103/D/1547/2007, 27 October 2011 [6.3] (no violation in view of seriousness of the crime and previous record).

235 *Smantser* v. *Belarus,* CCPR/C/94/D/1178/200323, 23 October 2008 [10.3] (risk of absconding not made out).

236 *Abdelhamid Taright et al.* v. *Algeria*, CCPR/C/86/D/1085/2002, 15 March 2006 [8.3]; *Hill* v. *Spain*, CCPR/C/59/D/526/1993, 2 April 1997 [12.3].

237 Mauritius A/44/40 (1989) 152 (powers of detention allowing arrest on reasonable suspicion of activities likely to cause a serious threat to public safety or public order are incompatible with Art. 9(3) and (4)).

238 Sudan CCPR A/53/40 (1998) 124 (vague and legally undefined concept of 'national security' used as a basis for arrest and detention, creating an atmosphere of fear and oppression for anyone critical of the government. See also Canada CCPR/C/CAN/CO/5 (2006) 14 (the use of 'security certificates' on grounds of national security).

239 Bosnia and Herzegovina CCPR/C/BIH/CO/1 (2006) [18]; A/68/40 (2013) 112 [15] (recommended removing the ill-defined concept of public security or security of property as a ground for ordering pre-trial detention).

delivery of the judgment. Mere conjecture or the bare assertion of a well-founded concern about such risk is insufficient,[240] as also is mere assumption on the part of the State that such a risk exists,[241] without proper substantiation both of the concern and why it cannot adequately be addressed by setting particular conditions of release.[242] Pre-trial detention was justified, for example, in the case of a fugitive who was the subject of an extradition request.[243]

Juveniles should not be kept in custody if at all possible.[244] The CRC recommends strict legal provisions to ensure that the legality of pre-trial detention is reviewed regularly, preferably every two weeks,[245] and urges States to introduce provisions to ensure that a final decision on charges is made within six months of being presented.[246] Pre-trial detention should not involve the accused returning to police custody, but instead being placed under a different authority (where risks to the rights of the detainee can be more easily mitigated).[247]

Rafael Marques de Morais v. *Angola* illustrates the distinction between the first and second sentences of Article 9(3). The author was detained for a total of forty days without being brought before a judge, in violation of the first sentence. He was charged on the day of his release, but there was no violation of the second sentence for the earlier period of detention because he was not then 'awaiting trial'.[248]

ARTICLE 9(4): RIGHT TO TAKE PROCEEDINGS BEFORE A COURT REGARDING THE LAWFULNESS OF DETENTION

Article 9(4) is fundamental to the scheme and purpose of Article 9. It entitles anyone arrested or detained to take court proceedings to determine the lawfulness of their arrest or detention. Since many, if not most, detainees will not know of this right, they are to be informed of it.[249] Principle 14 of The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment requires this to be effected in a language understood by them.[250] Indirect means of

240 *Hill* v. *Spain*, CCPR/C/59/D/526/1993, 2 April 1997 [12.3].
241 *Cedeño* v. *Venezuela*, CCPR/C/106/D/1940/2010, 29 October 2012 [7.10].
242 *Hill* v. *Spain*, CCPR/C/59/D/526/1993, 2 April 1997 [12.3].
243 *Basso* v. *Uruguay*, CCPR/C/100/D/1887/2009, 19 October 2010 [10.2].
244 GC 32 [42]; CRC GC 10 [80] (the duration of pre-trial detention of juveniles should also be limited by law and be subject to regular review).
245 CRC GC 10 [83]. 246 CRC GC 10 [83]. 247 GC 35 [36].
248 *Marques de Morais* v. *Angola*, CCPR/C/83/D/1128/2002, 29 March 2005 [6.4].
249 This aspect was in factual dispute in *McLawrence* v. *Jamaica*, CCPR/C/60/D/702/1996, 18 July 1997 [5.7].
250 The 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 for the Protection of Those in Detention), Principles 13 and 14.

denying the right to challenge detention may equally offend Article 9(4), including denial of access to a lawyer,[251] and (in the case of psychiatric detention) failing to serve the relevant committal order.[252] As with Article 9(3) it is particularly important in the case of juveniles.[253]

The entitlement to take 'proceedings before a court' usually refers to judicial proceedings, but the term is broad enough to allow for specialist tribunals, such as a parole board, if it is sufficiently independent, impartial and supported by procedures for the purpose of determining the lawfulness of continued detention.[254] It applies to military detention, but the fact that military discipline is firmly regulated by law does not mean that the legal and procedural safeguards of Article 9(4) do not apply.[255] Examples of review which are not comparable to judicial scrutiny include review by a superior military officer,[256] a prosecutor[257] and ministerial review[258] (a higher degree of objectivity and independence is required). Among the Committee's recommendations to the United States to protect those detained in Guantanamo Bay was to correct the lack of independence of the reviewing courts from the executive branch and the army.[259]

As to the purpose of court proceedings (to decide 'without delay' on the lawfulness of the detention),[260] the Committee seems to allow some latitude. It found a claim to be unsubstantiated when an application for *habeas corpus* at first instance was heard within six days and decided two days later, and the appeal was decided within three weeks.[261] There was a violation where review by a court was possible only when, after seven days, the detention had been confirmed by order of the minister (a challenge had to be delayed until the second week of detention).[262] If proceedings are likely to be prolonged, one option for the State is to seek interim

251 *Madani* v. *Algeria*, CCPR/C/89/D/1172/2003, 28 March 2007 [8.5]; *Marques de Morais* v. *Angola*, CCPR/C/83/D/1128/2002, 29 March 2005 [6.5].
252 *Fijalkowska* v. *Poland*, CCPR/C/84/D/1061/2002, 26 July 2005 [8.4].
253 *Berezhnoy* v. *Russian Federation*, CCPR/C/118/D/2107/2011, 28 October 2016 [9.2]–[9.3].
254 *Rameka et al.* v. *New Zealand*, CCPR/C/79/D/1090/2002 [7.4].
255 *Vuolanne* v. *Finland*, A/44/40 (1989) at 311, 7 April 1989 [9.4] (a measure may fall within Art. 9(4) if it takes the form of restrictions imposed over and above the exigencies of normal military service and deviate from the normal conditions of life within the armed forces).
256 *Vuolanne* v. *Finland*, A/44/40 (1989) at 311, 7 April 1989 [9.6].
257 *Umarova* v. *Uzbekistan*, CPR/C/100/D/1449/2006), 19 October 2010 [8.6]; *Kirpo* v. *Tajikistan*, CCPR/C/97/D/1401/2005, 27 October 2009 [6.5]; *Timoshenko* v. *Belarus*, CCPR/C/114/D/1950/2010, 22 July 2015 [7.2]; *Khadzhiyev et al.* v. *Turkmenistan*, CCPR/C/122/D/2252/2013, 6 April 2018 [7.8]; *Sannikov* v. *Belarus*, CCPR/C/122/D/2212/2012, 6 April 2018 [6.6].
258 *Torres* v. *Finland*, CCPR/C/38/D/291/1988, 2 April 1990 [7.2].
259 USA CCPR/C/USA/CO/3/Rev.1 (2006) 18.
260 The Committee when reviewing Dominican Republic CCPR A/56/40 (2001) 78(13) commented that 'the courts should rule on the legality of detentions as quickly as possible'. See also Trinidad and Tobago A/40/40 (1985) 115 (long delays occurred between arrest and trial was not consistent with Art. 9 and could give rise to serious miscarriages of justice).
261 *J.S.* v. *New Zealand*, CCPR/C/104/D/1752/2008, 26 March 2012 [6.4].
262 *Torres* v. *Finland*, CCPR/C/38/D/291/1988, 2 April 1990 [7.2]. See also *Timoshenko* v. *Belarus*, CCPR/C/114/D/1950/2010, 22 July 2015 [7.3] (violation in a delay of 10 days in transmitting the author's appeal to court).

judicial authorisation for the detention.[263] Procedural rules on their own provide no excuse.[264] In any event, petitioner delay does not constitute delay for these purposes.[265] The decision of the relevant court need not be appellable.[266]

The words 'or to release' require the court to determine the lawfulness of detention, on substantive grounds, if it is to continue, which must include the possibility to order release if the detention is incompatible with the requirements of the Covenant, in particular those of Article 9(1). A merely formal assessment of compliance under domestic law is not enough.[267] What is decisive for the purposes of Article 9(4) is that such a review is, in its effects, real and not merely formal.[268] The court must be empowered to order release if it makes a finding that detention is not lawful.[269] If there has been a violation of Article 9(2), the Article 9(4) proceedings will expose any lack of sufficient reason for arrest and detention. The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment embody the right in Article 9(4). The relevant authority is also to produce the detainee in person before the reviewing court.[270]

In order to protect non-derogable rights, the right in Article 9(4) must not be diminished by a State's decision to derogate from the Covenant.[271]

263 *Ahani* v. *Canada*, CCPR/C/80/D/1051/2002, 29 March 2004 [10.3].

264 *Zogo* v. *Cameroon*, CCPR/C/121/D/2764/2016, 8 November 2017 [7.2] (the State relied on purely procedural grounds, as the case has been transferred to the Special Criminal Court, without a substantive examination of detention).

265 *Ahani* v. *Canada*, CCPR/C/80/D/1051/2002, 29 March 2004 [10.3]. 266 GC 35 [48].

267 *C.* v. *Australia*, CCPR/C/76/D/900/1999, 28 October 2002 [8.3] (the court review was confined purely to a formal assessment of the question whether the person in question was a 'non-citizen' without an entry permit). See also *M.M.M. et al.* v. *Australia*, CCPR/C/108/D/2136/2012, 25 July 2013 [10.6]; *F.K.A.G. et al.* v. *Australia*, CCPR/C/108/D/2094/2011, 26 July 2013 [9.6]; *Baban* v. *Australia*, CCPR/C/78/D/1014/2001, 6 August 2003 [7.2]; *Bakhtiyari et al.* v. *Australia*, CCPR/C/79/D/1069/2002, 29 October 2003 [9.4] (detention of non-citizens without an entry permit continued in mandatory terms, until removal or grant of a permit, with review confined to mere compliance of the detention with domestic law).

268 *Griffiths* v. *Australia*, CCPR/C/112/D/1973/2010 (2015) 21 October 2014 [7.4]–[7.5] (detention pending extradition for over two years, with neither any chance of obtaining substantive judicial review, nor of being released on this ground except through bail application requiring 'special circumstances' and 'extraordinary' factors); *A* v. *Australia*, CCPR/C/59/D/560/1993, 3 April 1997 [9.5].

269 *A* v. *Australia*, CCPR/C/59/D/560/1993, 3 April 1997 [9.5]; *Shafiq* v. *Australia*, CCPR/C/88/D/1324/2004, 31 October 2006 [7.4]; *Shams et al.* v. *Australia*, CCPR/C/90/D/1255, 1256, 1259, 1260, 1266, 1268, 1270 & 1288/2004, 20 July 2007 [7.3] (the inability of the judiciary to challenge a detention that was contrary to Art. 9(1) was a violation of Art. 9(4)); *Aboussedra* v. *Libya*, CCPR/C/100/D/1751/2008, 25 October 2010 [7.6].

270 Principles for the Protection of Those in Detention, Principle 32[2].

271 *General Comment No. 29: Article 4 (Derogations during a State of Emergency)*, 31 August 2001, CCPR/C/21/Rev.1/Add.11 [16]. On exceeding the limits permitted by Art. 4, see, e.g., Israel CCPR/C/79/Add.93 (1998) 21; Israel CCPR/CO/78/ISR (2003) 12. Note also Senegal CCPR A/48/40 (1993) 112 (though not as a matter of derogation under Art. 4) where the Committee did not agree with the government's contention that the provisions of the Covenant must be interpreted and applied against the background of the conditions prevailing in the country.

Given the requirement for the necessity of detention to be kept under review, any relevant change of circumstances triggers the right under Article 9(4).[272] However, in the view of some Committee members that provision cannot be construed so as to give a right to judicial review on an unlimited number of occasions.[273]

Judicial review of the lawfulness of detention must include the possibility to order release if the detention is incompatible with the requirements of the Covenant, in particular those of Article 9(1).[274] It was violated in *F.J. et al.* v. *Australia* because the Committee was not convinced that it was open to the domestic court to review the justification of the authors' indefinite immigration detention in substantive terms given authoritative domestic rulings which declared such detention lawful.[275]

In *Bakhtiyari* v. *Australia* there was a violation of Mrs Bakhtiyari's right under Article 9(4) to have the lawfulness of her detention determined, because the court review would at best be confined purely to a formal assessment of whether she was a 'non-citizen' without an entry permit, without power to review the justification of her detention in substantive terms. The children were in the same position as their mother, until as a result of various appeal processes it was found that there was jurisdiction under child welfare legislation to order the release of children from immigration detention, and from that moment the violation of the children's rights under Article 9(4) ended.[276]

Article 9(4) requires that courts reviewing the lawfulness of detention take into account all relevant factors. *Al-Gertani* v. *Bosnia and Herzegovina* disclosed an Article 9(4) violation because the reviewing courts did not have access to the information leading the Intelligence and Security Agency to conclude that the author was a threat to the public order, peace and security and did not question the reasons why they themselves could not be informed of the grounds on which such assessment was based.[277]

The United Nations Basic Principles and Guidelines on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, prepared by the Working Group on Arbitrary Detention, are intended to guide States in their

272 *A* v. *Australia*, CCPR/C/59/D/560/1993, 3 April 1997 [7.3]; *Rameka et al.* v. *New Zealand*, CCPR/C/79/D/1090/2002 [7.3].

273 *Rameka et al.* v. *New Zealand*, Individual Opinion of Mr Shearer and Mr Roman Wieruszewski, and Mr Nisuke Ando (dissenting in part).

274 *Bakhtiyari et al.* v. *Australia*, CCPR/C/79/D/1069/2002, 29 October 2003 [9.4]; *Shams et al.* v. *Australia*, CCPR/C/90/D/1255, 1256, 1259, 1260, 1266, 1268, 1270 & 1288/2004, 20 July 2007 [7.3] (in both cases the court review available was confined purely to a formal assessment of whether the individual was a 'non-citizen' without an entry permit).

275 *F.J. et al.* v. *Australia*, CCPR/C/116/D/2233/2013, 22 March 2016 [10.5]. See also *Nasir* v. *Australia*, CCPR/C/116/D/2229/2012, 29 March 2016 [7.4].

276 *Bakhtiyari et al.* v. *Australia*, CCPR/C/79/D/1069/2002, 29 October 2003 [9.4]–[9.5].

277 *Al-Gertani* v. *Bosnia and Herzegovina*, CCPR/C/109/D/1955/2010, 1 November 2013 [10.6]. See also *Ahani* v. *Canada*, CCPR/C/80/D/1051/2002, 29 March 2004 [10.2]–[10.3].

international obligations, including those under Article 9, and to facilitate access to this judicial remedy.[278]

ARTICLE 9(5): ENFORCEABLE RIGHT TO COMPENSATION FOR VICTIMS OF UNLAWFUL ARREST OR DETENTION

The enforceable right to pecuniary compensation to which any victim of unlawful arrest or detention is to be entitled under Article 9(5) supplements the obligation of States in Article 2(3)(a) to ensure victims an effective remedy. The right must be secured effectively within each jurisdiction, but the precise manner of implementation is left open to States. Remedies should be speedy and effective,[279] and should apply to all forms of detention.[280]

In order to assert violation of this provision the author must in fact claim compensation for unlawful arrest or detention.[281] A discretionary award of compensation does not qualify as 'an enforceable right'. The fact that someone arrested or detained was subsequently acquitted does not in itself render the pretrial detention unlawful and give rise to entitlement to compensation.[282] It applied when unlawful detention was the result of release a day late from a prison sentence (attributable to a prison director), when no compensation was granted.[283]

IMPLEMENTATION

Covenant provisions that represent customary international law (and *a fortiori* when they have the character of peremptory norms) may not be the subject of

278 Report submitted by the Working Group on Arbitrary Detention, A/HRC/30/37, 6 July 2015.

279 E.g., USA CCPR/C/79/Add.50 (1995) 34 (recommendation that appropriate measures should be adopted to provide speedy and effective remedies to compensate those subjected to unlawful or arbitrary arrests). See also Guyana CCPR/C/79/Add.121 (2000) 15 (regret the law does not provide an enforceable right to compensation in case of unlawful arrest); Albania CCPR/CO/82/ALB 2 (2004) 16 (concern at lack of availability of compensation).

280 E.g., Luxembourg CCPR A/48/40 (1993) 144 (recommendation to provide an effective remedy for those who have been subjected to solitary confinement in a prison or to internment in a facility for the mentally ill).

281 *Mika Miha* v. *Equatorial Guinea*, CCPR/C/51/D/414/1990, 8 July 1994 [6.5]. See also *Coleman* v. *Australia*, CCPR/C/87/D/1157/2003 (2006), 17 July 2006 [6.3] (claim under Art. 9(5) not substantiated but compensation payable under Art. 2(3)(a) for unlawful detention). Among successful examples, see *A.S.* v. *Nepal*, CCPR/C/115/D/2077/2011, 6 November 2015 [3.8], [8.3] (the uncontested claim was that the author was prevented from exercising his right to an effective remedy); *Maya* v. *Nepal*, CCPR/C/119/D/2245/2013, 17 March 2017 [12.7] (the author was never compensated for unlawful detention despite the numerous avenues that she pursued).

282 E.g., *W.B.E.* v. *Netherlands*, CCPR/C/46/D/432/1990, 23 October 1992 [6.5]; *Uebergang* v. *Australia*, CCPR/C/71/D/963/2001, 22 March 2001 [4.4].

283 *Esergepov* v. *Kazakhstan*, CCPR/C/116/D/2129/2012, 29 March 2016 [11.10].

reservations. A State may therefore not reserve the right to arbitrarily arrest and detain persons.[284] As Martin Scheinin recounts, there have been a number of reservations concerning Article 9 in respect of procedures, which are quite precise in their formulation, and produce very few objections.[285]

As with other Covenant provisions which are laden with protective safeguards (notably Article 14), the Committee's implementation concerns with Article 9 focus on whether the required stipulations exist in domestic law. It has recommended review and amendment of legislation and practice: to ensure that the criteria for extending police custody are defined by law in line with General Comment 35;[286] to correct legislation which authorises the review of detention by someone other than an officer exercising judicial power,[287] or permits detention for more than the 48-hour period ordinarily allowed to bring the detention under judicial control;[288] to ensure prompt access to counsel;[289] to prevent excessive use of pre-trial detention[290] (and to deduct the time already served in pre-trial detention from imposed sentences);[291] to guarantee the right to a trial within a reasonable time;[292] to ensure the release of anyone detained arbitrarily, and the thorough and independent investigation into any allegation of arbitrary arrest,[293] and full reparation;[294] to develop a comprehensive and effective juvenile justice system that takes into account the age, specific needs and vulnerability of children;[295] to conform terrorism legislation with Article 9;[296] to bring legislation and practices relating to immigration detention, particularly mandatory detention, in line with Article 9;[297] to provide for a maximum period of

284 *General Comment No. 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*, 4 November 1994, CCPR/C/21/Rev.1/Add.6 [8]. In this context, see Sandy Ghandhi, 'The Human Rights Committee and Reservations to the Optional Protocol', (2001) 8(1) Canterbury L. Rev., p. 13.

285 Martin Scheinin, 'Reservations to the International Covenant on Civil and Political Rights and Its Optional Protocols: Reflections on State Practice', unpublished manuscript.

286 E.g., Madagascar CCPR/C/MDG/CO/4 (2017) 34.

287 E.g., Turkmenistan CCPR/C/TKM/CO/2 (2017) 25; Belarus CCPR/C/BLR/CO/5 (2018) 32.

288 E.g., Kazakhstan CCPR/C/KAZ/CO/2 (2016) 26 (recommendation of 48 hours for adults and to 24 hours for juveniles); Kuwait CCPR/C/KWT/CO/3 (2016) 27; Moldova CCPR/C/MDA/CO/3 (2016) 26; Turkmenistan CCPR/C/TKM/CO/2 (2017) 25; Belarus CCPR/C/BLR/CO/5 (2018) 32; El Salvador CCPR/C/SLV/CO/7 (2018) 28.

289 E.g., Lao CCPR/C/LAO/CO/1 (2018) 28.

290 E.g., Poland CCPR/C/POL/CO/7 (2016) 35, 36 (especially for juveniles); Hungary CCPR/C/HUN/CO/6 (2018) 38.

291 E.g., Mauritius CCPR/C/MUS/CO/5 (2017) 30.

292 E.g., Hungary CCPR/C/HUN/CO/6 (2018) 37; Lao CCPR/C/LAO/CO/1 (2018) 28.

293 E.g., Algeria CCPR/C/DZA/CO/4 (2018) 36.

294 E.g., Sudan CCPR/C/SDN/CO/5 (2018) 42. See also Kuwait CCPR/C/KWT/CO/3 (2016) 41; Cameroon CCPR/C/CMR/CO/5 (2017) 34; Thailand CCPR/C/THA/CO/2 (2017) 26.

295 E.g., Moldova CCPR/C/MDA/CO/3 (2016) 40.

296 E.g., Morocco CCPR/C/MAR/CO/6 (2016) 18; Mauritius CCPR/C/MUS/CO/5 (2017) 28; Liberia CCPR/C/LBR/CO/1 (2018) 15.

297 E.g., Australia CCPR/C/AUS/CO/5 (2009) 23; Australia CCPR/C/AUS/CO/6 (2017) 38; Hungary CCPR/C/HUN/CO/6 (2018) 46.

detention for those awaiting administrative deportation, and judicial remedies enabling them to seek review of the lawfulness of their detention;[298] and has recommended consideration be given to establishing an appropriate framework allowing for authorities to visit detainees held abroad.[299]

CONCLUSION

Article 9 not only prohibits arbitrary detention but requires a number of valuable practical protective safeguards to be installed domestically to enable any unjustified detention to be ended as quickly as possible, and with it the vulnerability to abuse to which detainees are exposed in violation of numerous other Covenant rights.

The concept of 'arbitrariness' is common to Articles 6, 9, 12(4) and 17. It applies with transparent similarity across Articles 6 and 9, as reflected in the General Comments applicable to each, to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as of reasonableness, necessity and proportionality. This formula has also occasionally been applied under Article 17 in cases of obvious procedural irregularity.[300] It was particularly apt to address Article 9 claims such as *Van Alphen* v. *Netherlands* (involving manifestly disproportionate use of detention powers) and *Gorji-Dinka* v. *Cameroon* (a wide range of politically motivated abuses). Of all the elements listed within the formula, the most prominent and generalised is the demand for the proven 'necessity' of any detention, which sounds out across the Committee's decisions, Concluding Observations and relevant General Comments like a symphonic theme.

The decision-making in which arbitrariness is found in detention as punishment for the legitimate exercise of Covenant right perhaps vindicates most of all the element of 'inappropriateness' though obviously in the official treatment giving rise to those particular claims the State also appears to have departed from any plausible adherence to principles of reasonableness, necessity and proportionality.

Incompatibility with a Covenant provision has been a function of arbitrariness particularly in the more vexed questions surrounding preventive detention. Covenant consistency is closely related but appears to be more firmly embedded in the Article 17 concept of arbitrariness, in company with the enduring demand for reasonableness ('even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in

298 E.g., Kuwait CCPR/C/KWT/CO/3 (2016) 29.
299 E.g., Liechtenstein CCPR/C/LIE/CO/2 (2017) 24.
300 See chapter on Article 17: Privacy, Home, Correspondence; Honour and Reputation, section 'Inappropriateness, Injustice, Lack of Predictability and Due Process of Law'.

any event, reasonable in particular circumstances'),[301] which has been interpreted so that 'reasonableness' incorporates principles of necessity and proportionality, again giving prominence to the necessity. The Committee interestingly carried over that same test, common to Articles 9 and 17, for the purposes of Article 12(4), which is notorious for offering little permissive scope, since there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable.[302]

Even though Articles 6, 9, 12(4) and 17 differ considerably from each other in the guarantees they offer, there is commonality in many of the instances of arbitrariness behind the violation of each, whether in punitive, discriminatory, ill-motivated or excessive measures, in Covenant-incompatible policy-making (most often when domestic border control and security issues take highest priority), as well as in the failure (particularly in the case of Articles 6 and 9) to provide the protective cover those provisions require.

301 *CCPR General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation*, 8 April 1988 [4]. See chapter on Article 17: Privacy, Home, Correspondence: Honour and Reputation, section 'Disproportionate Impact of an Interference to its Objectives'.

302 See chapter on Article 12: Freedom of Movement of the Person, section 'Arbitrariness'. Note also Joint Opinion of Committee members Gerald L. Neuman, Yuji Iwasawa and Walter Kälin (concurring) in *Timur Ilyasov* v. *Kazakhstan*, CCPR/C/111/D/2009/2010, 23 July 2014 (Article 12(4) is designed to extend extraordinarily strong protection – more than the usual proportionality standard).