Joint Submission to the

United Nations Human Rights Committee

Comments on Draft General Comment No. 35 on Article 9 of the International Covenant on Civil and Political Rights

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Contents

A. Introduction

1. Following the Human Rights Committee's invitation for written comments on the finalized first reading draft of General Comment No. 35 on Article 9 of the International Covenant on Civil and Political Rights (ICCPR), we, the undersigned organisations, welcome the opportunity to provide our views and recommendations.

2. We commend the Committee on the draft General Comment No. 35, which has been strengthened following the conclusion of the first reading, and are in agreement with much of the text. The present submission focuses on several areas where, we respectfully submit, the text could be further strengthened in order to ensure that the General Comment clearly articulates the obligations of States under Article 9 and the steps that must be taken to ensure that the rights of persons under Article 9 are sufficiently protected.

3. In this regard, one overarching comment which is addressed in various sections throughout this submission is the important nexus between the obligations of States parties under Article 9 of the ICCPR, and those under Article 7. As is discussed in further detail below, we would like to highlight that the legal safeguards required under Article 9 protect against both arbitrary detention as well as torture and other cruel, inhuman or degrading treatment or punishment (or 'ill-treatment'). Our organisations respectfully suggest that this relationship should be more clearly articulated in General Comment No. 35.

4. The content of this submission is organized so as to reflect the structure of the draft General Comment, for your ease of reading and convenience. Where proposals for suggested wording to include in the General Comment are made, these can be found in the text boxes throughout this submission.

B. General Remarks (paragraphs 1-9)

Deprivations of liberty by third parties

5. We welcome **paragraph 8** of the draft General Comment No. 35, which concerns States parties' duty to protect the right to liberty of persons against deprivations by third parties. We also welcome the acknowledgement that States parties must protect individuals "against wrongful deprivation of liberty by lawful organizations, such as employers, schools and hospitals". This reflects the Committee's understanding that "the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities".[1] As such "there may be circumstances in which a failure to ensure Covenant rights as required by Article 2 would give rise to violations by States parties of those rights, as a result of States parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities".[2] We suggest that it may be helpful for the Committee to refer specifically in footnote 27 of the draft to this understanding of the effect of the Covenant as set out in paragraph 8 of General Comment

[1] Human Rights Committee, 'General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant', CCPR/C/21/Rev.1/Add.13 (2004) ("HRC General Comment 31"), para. 8.
[2] *Ibid.*

No. 31, in order to make it absolutely clear that "third party" is not defined narrowly in this context.

6. In its Concluding Observations on State party reviews, the Committee has regularly expressed concern about violations experienced by migrant workers, and in particular low-skilled workers such as construction workers and migrant domestic workers.[3] Such workers are particularly vulnerable to multiple violations of their rights – including the right to liberty and security of the person when, for example, they are prevented from leaving their workplace.[4] Such deprivation of liberty is a violation in itself, increases vulnerability to other human rights violations, and blocks access to remedies. In some cases, the pattern of conduct may also amount to trafficking of persons and other serious human rights violations including sexual exploitation, forced labour, slavery or servitude.[5] Although these violations are widespread, they are not necessarily thought of when considering the rights guaranteed under Article 9, and it would therefore be helpful to make specific reference to these concepts in **paragraph 8**. It may also be helpful to include reference to "employees" in the list of people covered by the term "everyone" in **paragraph 3**.

7. We also suggest that the Committee includes in **paragraph 8** a more specific recommendation about the types of steps that States parties should take to protect individuals against, and respond to wrongful deprivation of liberty by third parties. This may include effective regulation and inspection of schools, hospitals, care homes, and places of work, including the workplace of domestic workers.[6] It may also require ensuring the right to change employer,[7] accessible complaints mechanisms, systematic efforts to identify victims of trafficking,[8] provision of support shelters and other assistance for victims,[9] and systematic efforts to identify and prosecute perpetrators.[10] States may also be encouraged to ratify treaties relating to the abolition of slavery,

[3] See, eg. Concluding Observations on Hong Kong, China, CCPR/C/CHN-HKG/CO/3 (2013) ("HRC Concluding Observations on Hong Kong, China"), para. 21; Concluding Observations on Kuwait, CCPR/C/KWT/CO/2 (2011) (HRC Concluding Observations on Kuwait"), para. 18; Concluding Observations on Paraguay, CCPR/C/PRY/CO/3 (2013) ("HRC Concluding Observations on Paraguay"), para. 18. On the particular vulnerability of migrant domestic workers see Committee on Migrant Workers, 'General Comment No. 1: Migrant Domestic Workers', CMW/C/GC/1, (2011) ("CMW General Comment No. 1"); Report of the Special Rapporteur on the Human Rights of Migrants, A/HRC/26/35 (2014), in particular paras. 50-52.

[4] See CMW General Comment No. 1, *ibid*, paras. 7, 12, 13(a). See further Report of the Special Rapporteur on the Human Rights of Migrants, *ibid.*, in particular paras. 18, 37, 51, 55 concerning restrictions on freedom to leave the workplace. As to deprivation of liberty by confinement in a person's home see Human Rights Committee, 'General Comment No. 28: Equality of rights between men and women (article 3)', CCPR/C/21/Rev.1/Add.10 (2000), para. 14.

[5] See, eg. HRC Concluding Observations on Hong Kong, China, *supra* n. 3, para. 20. See further Report of Special Rapporteur on the Human Rights of Migrants, *supra* n. 3, paras. 46-47. The Protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the United Nations Convention against Transnational Organized Crime (the "Palermo Protocol") defines trafficking in persons as "the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs".

[6] In this regard, in relation to effective measures to ensure compliance with regulation see HRC Concluding Observations on Hong Kong, China, *ibid*, para. 21; HRC Concluding Observations on Kuwait, *supra* n. 3, para. 18; HRC Concluding Observations on Paraguay, *supra* n. 3, para. 18. See also CMW General Comment No. 1, para. 41; and Report of the Special Rapporteur on the Human Rights of Migrants, *supra* n. 3, paras. 62-63.

[7] See further Report of the Special Rapporteur on the Human Rights of Migrants, *ibid*, para. 52.

[8] HRC Concluding Observations on Hong Kong, China, *supra* n. 3, para. 20.

[9] *Ibid.*

[10] *Ibid.*

protection from trafficking and protection of workers, including the prohibition of forced labour.[11]

8. In view of the violence experienced by many workers, including in particular domestic workers, reference could also be made to "violence against workers, including domestic workers" in **paragraph 7** concerning security of the person.

9. In addition, we suggest that a sentence is included in **Section VI (Compensation)** to recall the Committee's jurisprudence in General Comment No. 31 on States parties' separate obligations under the Convention "to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities" in the context of unlawful deprivation of liberty.[12]

Summary: We suggest that specific reference is made to paragraph 8 of General Comment No. 31 in the first sentence of **paragraph 8** of the draft General Comment**.** We suggest it is also strengthened further by drawing on the Committee's experience to make reference to (i) migrant workers as a group particularly vulnerable to wrongful deprivation of liberty by third parties, including criminal groups and employers, (ii) the link to trafficking of persons and other related serious human rights violations, and (iii) the types of steps that States parties should take to protect against such unlawful deprivations of liberty. We also suggest that the word "employees" is included in the last sentence of **paragraph 3**, that reference to violence against workers is included in **paragraph 7** on the right to security of the person, and that a sentence is included in **Section VI (Compensation)** to address redress for victims of violations by third parties.

C. Arbitrary detention and unlawful detention (paragraphs 10-23)

Safeguards on arrest and in detention

10. The Committee has consistently made it clear that in order to prevent violations of Article 9, States must put in place certain safeguards against unlawful or arbitrary deprivation of liberty for those deprived of their liberty by State authorities. The draft General Comment addresses these safeguards in a number of paragraphs, including **paragraph 23** (compliance with domestic regulation on safeguards), **paragraphs 34 and 35** (access to a lawyer), **paragraph 46** (access to counsel to facilitate review of detention), and **paragraph 58** (relationship with the prohibition of torture and ill-treatment). They are dealt with in most detail in the latter.

11. Given the central importance of these safeguards to States' obligations to ensure respect for Article 9(1), we urge the Committee to include a separate detailed stand-alone paragraph or paragraphs on safeguards in Section II. Considering their very close links, this same paragraph should also refer to the importance of such safeguards for upholding the prohibition of torture and ill-treatment, with a shorter cross-reference and more detailed explanation of *how* such safeguards promote the prohibition of torture and ill-

[11] Including the Slavery Conventions, the Palermo Protocol, *supra* n. 5, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, ILO Conventions Nos. 97 and 143 concerning migrant workers, No. 29 concerning forced or compulsory labour, No. 105 concerning the abolition of forced labour, and No. 182 concerning the prohibition and immediate action for the elimination of the worst forms of child labour. See further HRC Concluding Observations on Hong Kong, China, *supra* n. 3, para. 20 (concerning the Palermo Protocol) and Report of the Special Rapporteur on contemporary forms of slavery, including its causes and consequences, Gulnara Shahinian: Addendum – Mission to Kazakhstan, A/HRC/24/43/Add.1 (2013), para. 118.

[12] HRC General Comment 31, *supra* n. 1, para. 8.

treatment in the section dealing specifically with the relationship between Articles 7 and 9.

12. It is also very important that the General Comment clarifies that these safeguards must be provided to any person deprived of their liberty by State authorities and private actors acting on their behalf; not only to those arrested by police. This is already included in the current text of **paragraph 58**,[13] but we consider it is important that the broad scope of Article 9 should be clearly set out and explained in order to enhance the protection of detainees, especially in situations in which there is a high risk of both arbitrary detention and ill-treatment. For example, in a number of countries there may be a greater risk of arbitrary detention and torture and ill-treatment in facilities run by intelligence officials which are outside of the ordinary criminal justice system.[14]

13. The safeguards referred to should include those currently referred to in **paragraph 58** of the draft. With reference to the safeguard that "Prompt and regular access should be given to independent medical personnel and lawyers", we respectfully submit that this wording should be further strengthened to explain that the dual purpose of providing access to medical personnel should be to both allow for medical and/or psychological treatment and to document the medical condition of the detainee.[15] In addition, we suggest the inclusion of reference to two additional very important safeguards.

14. First, a particularly important safeguard that the Committee has previously recommended is the **right to promptly contact a relative or third party** to inform them about the arrest.[16] Without this safeguard, other safeguards, including obtaining access to an independent lawyer and doctor, may be illusory.

15. Second, for foreign nationals who are detained, the **right of access to consular assistance** is of crucial importance.[17] This requires both that foreign detainees are informed of their right to contact their embassy, and that there is free communication between the detainee and consular staff, including that consular officials be allowed to visit the detainee in person.[18] Foreign nationals who are detained are often unfamiliar with the local language and the local legal system. Access to consular assistance is a crucial safeguard against both arbitrary detention and against torture and other forms of ill-treatment,[19] and crucial to ensure the right to a fair trial.[20]

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[13] Current text of paragraph 58 reads: "Several safeguards that are essential for the prevention of torture are also necessary for the protection of persons in any form of detention against arbitrary detention and infringement of personal security".

[14] See further REDRESS, 'Extraordinary Measures, Predictable Consequences: Security Legislation and the Prohibition of Torture', September 2012, http://www.redress.org/downloads/publications/1209security_report.pdf.

[15] UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, A/RES/43/173 (1988), Principles 24-26.

[16] See further Concluding Observations on Switzerland, CCPR/CO/73/CH (2001), para. 12 ("The Committee is particularly concerned at persistent reports that detainees have been denied the right to contact a lawyer upon arrest or to inform a close relative of their detention"); Concluding Observations on Sweden, CCPR/C/SWE/CO/6 (2009), para. 13 ("take effective measures to ensure that fundamental legal safeguards are guaranteed in practice to all persons held in custody, in particular …to promptly inform a close relative or a third party concerning their arrest"). See also United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, adopted by the UN General Assembly December 2012, Guideline 3, paragraph 43(e).

[17] See, eg. Vienna Convention on Consular Relations, U.N.T.S. Nos. 8638-8640, vol. 596, pp. 262-512, 24 April 1963, Article 36.

[18] *Ibid.*

[19] See further, eg. Committee against Torture (CAT) Concluding Observations on Canada, CAT/C/CR/34/CAN (2005), para. 5(d); CAT Concluding Observations on Saudi Arabia, CAT/C/CR/28/5 (2002), para. 8(h).

[20] As to the importance of the right to consular assistance for detained foreign nationals see further Inter-American Court of Human Rights, *The Right* to *Information on Consular assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion No. OC-16/99, Inter-Am Ct. H.R. (Ser A) No. 16 (1999), http://www1.umn.edu/humanrts/iachr/A/OC-16ingles-sinfirmas.html; Inter-American Commission on Human

16. In addition, we suggest that greater prominence is given to the important role played by independent monitoring of places of detention. In draft **paragraph 58**, the Committee already states "Independent and impartial mechanisms should be established for visiting and inspecting all places of detention, including mental health institutions".[21] We suggest that this reference is expanded and developed in a separate paragraph and that it be explicitly clear that this applies to all places where persons are deprived of their liberty, defined in its broadest sense. In addition to mental health institutions, it would be helpful to refer to intelligence agency offices[22] and immigration detention centres as examples.[23]

17. The Optional Protocol to the Convention against Torture ("OPCAT") is an instrument specifically directed to protecting persons deprived of their liberty, and establishes a system of independent monitoring of places of detention.[24] Recognising its importance as a framework to guard against both arbitrary detention and torture and other ill-treatment, the Committee has recommended that States parties ratify the OPCAT.[25] The Committee has also regularly welcomed the adoption of OPCAT,[26] and the establishment of national preventive mechanisms ("NPMs") under it.[27] It has further recommended swift adoption of legal provisions to establish NPMs,[28] and expressed concern when NPMs envisaged in laws have not been made operational.[29] The Working Group on Arbitrary Detention has also recommended, within its mandate, that States ratify the OPCAT,[30] and that NPMs roles be strengthened, including to extend their mandates "to the aspect of legality of detention which is not ordered by a court, including administrative detention and 'detention within detention' as a form of disciplinary measure".[31]

18. Given this important opportunity provided by the OPCAT, and the important role it can play in preventing both arbitrary deprivation of liberty and torture and ill-treatment of those deprived of their liberty, we suggest that the General Comment specifically recommend that States parties ratify the OPCAT and establish independent and effective NPMs in line with its provisions. Where States parties have not ratified OPCAT, they should establish independent bodies in line with Articles 17-23 of the OPCAT and the

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Rights, 'Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas', approved by the Commission during its 131st regular period of sessions, held from March 3-14, 2008, http://www.cidh.org/Basicos/English/Basic21.a.Principles%20and%20Best%20Practices%20PDL.htm, Principle 5. See further International Court of Justice, *Avena and Other Mexican Nationals (Mexico v. United States of America)* [2004] ICJ Rep 12; *LaGrand Case (Germany v United States of America)* [2001] ICJ Rep 466.

[21] See Concluding observations on Algeria, CCPR/C/DZA/CO/3 (2007), para. 11; Concluding Observations on Azerbaijan, CCPR/C/AZE/CO/3 (2009), para. 11; Concluding Observations on Russian Federation, CCPR/C/RUS/CO/6 (2009), para. 19 (mental health institutions); Concluding Observations on Iceland, CCPR/C/ISL/CO/5 (2012), para. 11 (places of detention, including psychiatric facilities).

[22] See further Concluding Observations on Jordan, CCPR/C/JOR/CO/4 (2010), para. 10.

[23] See CAT Concluding Observations on Italy, CAT/C/ITA/CO/4 (2007), para. 16; Report of the Working Group on Arbitrary Detention: Visit to Malaysia, A/HRC/16/47/Add.2 (2011), paras. 126-128; Report of the Special Rapporteur on Migrants: Detention of Migrants in an Irregular Situation, A/HRC/20/24 (2012), para. 32.

[24] Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, adopted on 18 December 2002 by resolution A/RES/57/199, entered into force on 22 June 2006.

[25] Concluding Observations on Jordan, *supra* n. 22, para. 10.

[26] See, eg. Concluding Observations on Turkey, CCPR/C/TUR/CO/1 (2012), para. 4; Concluding Observations on Peru, CCPR/C/PER/CO/5 (2013), para. 3; Concluding Observations on Serbia, CCPR/C/SRB/CO/2 (2011), para. 4; Concluding Observations on Mauritania, CCPR/C/MRT/CO/1 (2013), para. 3.

[27] Concluding Observations on Peru, *ibid*, para. 19; Czech Republic, CCPR/C/CZE/CO/3 (2013), para. 5.

[28] *Al Gertani v. Bosnia and Herzegovina*, Comm. No. 1955/2010, para. 10.3; *F.K.AG et Al v. Australia*, Comm No. 2094/2011, para. 9.5; *M.M.M. et al v. Australia*, Comm. No. 2136/2012, para 10.2; Concluding Observations on Argentina, CCPR/C/ARG/CO/4 (2010), para. 18.

[29] Concluding Observations on Peru, *supra* n. 26, para. 19; Czech Republic, CCPR/C/CZE/CO/3 (2013), para. 5.

[30] Report of the Working Group on Arbitrary Detention: Mission to Angola, A/HRC/7/4/Add.4 (2008), para. 104(i).

[31] Report of the Working Group on Arbitrary Detention: Mission to Malta, A/HRC/13/30/Add.2 (2010), para. 79(l).

Guidelines on NPMs adopted by the Subcommittee on Prevention of Torture (SPT),[32] to monitor all places where individuals are deprived of their liberty. Such bodies should be independent, and adequately resourced financially and in terms of personnel, to enable them to undertake regular unannounced visits and conduct private interviews with those deprived of their liberty. The establishment of such independent bodies should not be to the exclusion of other organisations such as civil society organisations which may visit places where individuals are deprived of their liberty.

Summary: We suggest that the Committee highlights the importance of detention safeguards to ensure respect for Article 9 of the Covenant by including a stand-alone paragraph on the issue in **Section II** of the General Comment. It would be helpful if the paragraph set out clearly that such safeguards apply to all types of detention by state authorities and private actors acting on their behalf; not just to those arrested by police. In addition to those safeguards mentioned in current draft **paragraph 58**, we suggest that the right to promptly inform a relative or third party of arrest is included. We also suggest that a separate paragraph on independent monitoring of places of detention be included, with a recommendation that States parties ratify the OPCAT, and ensure sufficiently resourced independent bodies to monitor all places of detention.

In accordance with law

19. Article 9(1) which requires that deprivations of liberty must be in accordance with law applies to all deprivations of liberty, not only arrests of those who are suspected of having committed a crime.[33] We therefore suggest that, where **paragraph 23** of the draft currently states "where suspects may be detained", the word "suspects" is replaced by the word "individuals".

20. The penultimate sentence in paragraph 23 is very important and related to the safeguards against unlawful and/or arbitrary deprivation of liberty referred to above. Again, a particularly important safeguard that we suggest should also be included is compliance with regulations giving detainees the right to contact a relative or third party to inform them of their arrest.[34] We also urge the Committee to include reference to the right of prompt access to an independent doctor as an important safeguard of the right to security of the person.

21. As discussed above and set out further in the draft (at paragraph 58), there are other crucial safeguards required under Article 7 to protect detainees from torture and other prohibited ill-treatment.[35] We suggest that this is clarified in the final sentence of paragraph 23, as proposed below.

[32] Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Guidelines on national preventive mechanisms, CAT/OP/12/5 (2010).
[33] Human Rights Committee, General Comment No. 8: Article 9 (Right to liberty and security of persons), HRI/GEN/1/Rev.1 (1982), para. 1.
[34] See further Concluding Observations on Switzerland, CCPR/CO/73/CH (2001), para. 12 ("The Committee is particularly concerned at persistent reports that detainees have been denied the right to contact a lawyer upon arrest or to inform a close relative of their detention"); Sweden, CCPR/C/SWE/CO/6 (2009), para. 13 ("take effective measures to ensure that fundamental legal safeguards are guaranteed in practice to all persons held in custody, in particular …to promptly inform a close relative or a third party concerning their arrest").
[35] See further General Comment No. 20: Article 7 on the Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment, A/44/40 (1992), para. 11.

Suggested wording: 23.… It also requires compliance with domestic rules that define when authorization to continue detention must be obtained from a judge or other officer,[36] where ~~suspects~~ individuals may be detained,[37] when the detained person must be brought to court,[38] and legal limits on the duration of detention.[39] It also requires compliance with domestic rules providing important safeguards for detained persons, such as making a record of an arrest,[40] granting detained persons the right to promptly inform a relative or third party of their arrest,[41] and permitting prompt access to counsel and an independent doctor.[42] Violations of domestic procedural rules not related to such issues may not raise an issue under Article 9,[43] although they may raise issues under other provisions of the Covenant, including Article 7.[44]

Administrative Detention

22. While we welcome the Committee's reference to administrative detention, in our view it needs further elaboration and emphasis. To the extent that States parties impose administrative detention (also known as security or preventive detention or internment), not in contemplation of prosecution on a criminal charge, the Committee has expressed its view that such detention presents a severe risk of arbitrary deprivation of liberty. Due to the lack of judicial oversight, administrative detention increases the risk of torture and ill-treatment. Further, the Committee has expressed its concern about the use of administrative detention for the control of illegal immigration[45] as well as for the stigmatisation of certain groups.[46] Hence, the Committee has called on member states to end the practice of administrative detention.[47]

23. The Committee has found that any deprivation of liberty, including administrative detention, falls under Article 9 of the ICCPR and thus needs to respect the rights enshrined therein.[48] These include *inter alia* the right not to be arbitrarily detained, the right to be informed of the reasons for his or her arrest and of any charges against him or her, the right to access to a lawyer, and the right to have one's detention reviewed by an independent court. According to the Committee, the right to judicial review is non-derogable[49] and thus also applicable during times of armed conflict. Furthermore the Committee has expressed its view that other provisions of the Covenant that are not listed in Article 4(2), contain elements that cannot be made subject to lawful derogation. In particular the right of all persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person, and the prohibitions against abductions or unacknowledged detention are not subject to derogation. The absolute nature of these prohibitions, even in times of emergency, is justified by their status as norms of general international law.[50] Other elements of Article 9 are derogable but underlie the requirements of Article 4 of the ICCPR. This means that the obligations in Article 9 can only be derogated if the State officially proclaims a public emergency and if

[36] *Gridin v. Russian Federation*, Comm. No. 770/1997, para. 8.1.
[37] *Umarov v. Uzbekistan*, Comm. No. 1449/2006, para. 8.4.
[38] *Gómez Casafranca v. Peru*, Comm. No. 981/2001, para. 7.2.
[39] *Israil v. Kazakhstan*, Comm. No. 2024/2011, para. 9.2.
[40] *Kurbonov v. Tajikistan*, Comm. No. 208/2003, para. 6.5.
[41] Concluding Observations on Switzerland, CCPR/CO/73/CH (2001), para. 12.
[42] *Butovenko v. Ukraine*, Comm. No. 1412/2005, para. 7.6.
[43] See, e.g., *Marz v. Russian Federation*, Comm. No. 1425/2005, para. 5.3.
[44] See further General Comment No. 20, *supra* n. 35, para. 11.
[45] *M.M.M. et al. v. Australia*, *supra* n. 26.
[46] Concluding Observation on Colombia, CCPR/C/COL/CO/6, (2010), para. 20.
[47] Concluding Observations on Jordan, *supra* n. 22, para. 11.
[48] See e.g. Concluding observation on Tajikistan, CCPR/CO/84/TJK (2005), para. 13.
[49] General Comment No. 29 on States of Emergency, CCPR/C/21/Rev.1/Add.11 (2001), para. 16.
[50] *Ibid*, para. 13(a-b).

there is a threat to the life of the nation.[51] Typically, these elements are present in an armed conflict in which additional rules and safeguards regulated in international humanitarian law apply. Derogating measures must also be proportionate to the exigencies of the situation—in practice, this serves to ensure that no provision of the Covenant, however validly derogated from, will be entirely inapplicable.[52] It is important to note that the the existence of a conflict and the applicability of international humanitarian law is not per se sufficient or a valid criterion to render lawful a deprivation of liberty considered arbitrary outside the context of an Article 4 situation.

Enforced Disappearance

24. As mentioned already in the draft General Comment No. 35, enforced disappearance is a particularly serious form of arbitrary detention.[53] International jurisprudence has recognised that enforced disappearance constitutes, in and of itself, a form of torture for the disappeared person as well as ill-treatment, and in some cases torture, for his or her family.[54] The Human Rights Committee has recognised enforced disappearance as a violation of many rights enshrined in the Covenant, including the right to liberty and security of the person under Article 9 and the right not to be subjected to torture under Article 7, and has specified that the violation of Article 7 is in relation to the disappeared person as well as his or her family members.[55]

25. Given the aggravated nature of enforced disappearance as a form of arbitrary detention and a form of torture and cruel, inhumane or degrading treatment, our organisations respectfully submit that this issue needs further elaboration and emphasis in the General Comment on Article 9. In particular, we suggest that the sentence on enforced disappearance in **paragraph 17** should be highlighted in a separate detailed standalone paragraph recalling the prohibition of enforced disappearances and the obligation to criminalise and punish this crime.

Suggested language: New paragraph: Enforced disappearance constitutes a particularly aggravated form of arbitrary detention under Article 9 of the Covenant. Enforced disappearance also violates other substantive and procedural provisions of the Covenant, including Articles, 2, 7, 10, 14, 26 and often 6.[56] The suffering caused to a victim by an enforced disappearance as a result of the continuous unacknowledged detention and deprivation of all contact with the outside world amounts to a violation of Article 7, and the anguish and distress caused to the family of a victim of enforced disappearance may also amount to a violation of Article 7.[57] As stated in General Comment 31, States parties are

[51] *Ibid*; See also the Annual Report of the Working Group on Arbitrary Detention, E/CN.4/2003/8, para. 64, in which the preventive detention of suspected terrorists in Guantanamo Bay was declared incompatible with Article 9 of the ICCPR because the United States did not derogate from the Convention in terms of Article 4 of the ICCPR.
[52] HRC General Comment No. 29, para. 4.
[53] Draft General Comment No. 35, CCPR/C/107, para. 17.
[54] European Court of Human Rights, Application No. 15/1997/799/1002, *Kurt v. Turkey* (1998); Inter-American Commission on Human Rights, *Velasquez Rodriguez Case* (1988);
[55] HRC General Comment 31, *supra* n. 1, para. 18; *Benaziza v. Algeria*, Comm. No. 1588/2007, para. 9.3; *Madoui v. Algeria*, Comm. No. 1495/2006, para. 7.2; *Aboufaied v. Libyan Arab Jamahiriya*, Comm. No. 1782/2008, para. 7.3; *El Abani v. Libyan Arab Jamahiriya*, Comm. No. 1640/2007, para. 7.3.
[56] HRC General Comment 31, *ibid*, para. 18; *Benaziza v. Algeria*, Comm. No. 1588/2007, para. 9.3; *Madoui v. Algeria*, Comm. No. 1495/2006, para. 7.2; *Aboufaied v. Libyan Arab Jamahiriya*, Comm. No. 1782/2008, para. 7.3; *El Abani v. Libyan Arab Jamahiriya*, Comm. No. 1640/2007, para. 7.3.
[57] *Benaziza v. Algeria*, Comm. No. 1588/2007, paras. 9.5-9.6; *Madoui v. Algeria*, Comm. No. 1495/2006, para. 7.5; *Aboufaied v. Libyan Arab Jamahiriya*, Comm. No. 1782/2008, paras. 7.4-7.5; *El Abani v. Libyan Arab Jamahiriya*, Comm. No. 1640/2007, paras. 7.4-7.5.

under an obligation to criminalise enforced disappearance and to prosecute and punish perpetrators.

Vulnerable Persons

26. We welcome the sections of the General Comment dealing specifically with the deprivation of liberty of persons with mental disabilities as well as migrants, refugees and asylum-seekers. However, our organisations are of the view that the draft would be significantly strengthened by including greater emphasis on the position of vulnerable persons (children, migrants and refugees, women, among others) more generally, in particular in terms of decision to detain and conditions of detention. Paragraphs 74-78 below address the question of the decision to detain members of certain vulnerable groups in more detail.

27. In the context of migrants, the Special Rapporteur on the Human Rights of Migrants has called on States to ensure that in cases where vulnerable individuals are deprived of their liberty, "this should only be on the certification of a qualified medical practitioner that detention will not adversely affect their health and well-being", so as to mitigate the undue risks that vulnerable persons in detention may face.[58] The Special Rapporteur has also called for regular follow up of such persons in detention by skilled personnel, as well as access to adequate health services, medication and counselling.[59] Our organisations are of the view that it would be highly important for the General Comment to include reference to this important safeguard to ensure that the rights of vulnerable persons are not breached as a result of their deprivation of liberty.

28. In addition, there are a number of soft-law instruments which have been adopted by the UN addressing the rights of individuals from specific groups who are deprived of their liberty. We suggest that these should be referenced and recognized in General Comment No. 35, in particular, the UN Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (the Bangkok Rules)[60], the Standard Minimum Rules for the Treatment of Prisoners[61], and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment Regarding the Situation of Immigrants and Asylum Seekers.

Specific Proposals

29. Without prejudice to other groups of vulnerable people, we would like to make some proposals with regard to the sections of the General Comment which address deprivation of liberty of children.

30. Draft General Comment No. 35 refers to deprivation of liberty for children as a measure of last resort in paragraph 18, which appears to refer only to detention of children in the context of immigration. However, a number of UN instruments and bodies have clearly stated that deprivation of liberty for all children should be a measure of last resort and for the shortest appropriate time.[62] We therefore suggest that in order to clarify that the for *all* children, deprivation of liberty should be a measure of last resort, that this sentence

[58] Report of the Special Rapporteur on the Human Rights of Migrants: Migrants in an irregular situation, *supra* n. 23, para. 43.
[59] *Ibid.*
[60] Concluding Observations on Uruguay, CCPR/C/URY/CO/5 (2013), para. 9.
[61] Concluding Observations on Turkey, CCPR/C/TUR/CO/1 (2012), para. 18; Concluding Observations on Bulgaria, CCPR/C/BGR/CO/3 (2011), para. 18; Concluding Observations on Peru, CCPR/C/PER/CO/5 (2013), para. 21; Concluding Observations on Rwanda, CCPR/C/RWA/CO/3 (2009), para. 14.
[62] UN Convention on the Rights of the Child, adopted by resolution A/44/25 (1989), entered into force 2 September 1990, Article 37(b).

should be moved to a separate paragraph relating to the specific measures that must be taken in the context of deprivation of liberty of vulnerable persons.

31. In addition, in paragraph 18, for the sentence beginning with "Decisions regarding the detention of adult migrants…", we suggest that the reference to 'adult' is omitted as this issue can concern children too. In addition the wording could be strengthened - we propose primarily to strengthen it by including specific reference to victims of torture or ill treatment (or as an alternative, more general wording e.g. "in compliance with other human rights instruments").

Suggested wording: 18…. Decisions regarding the detention of ~~adult~~ migrants must also take into account the effect of the detention on their mental health, in compliance with other human rights instruments.

New Paragraph 19: Children may be deprived of liberty only as a measure of last resort and for the shortest appropriate period of time, taking into account their best interests as a primary consideration with regard to the duration and conditions of detention.[63]

D. Judicial control of detention in connection with criminal charges (paragraphs 31-38)

32. We are pleased to note that the section of the draft general comment addressing judicial oversight of detention (paras 31-38) has undergone some important amendments from previous versions of the draft. In particular, we welcome the inclusion of language which specifically refers to the requirement to bring a person detained on criminal charges or on suspicion of criminal activity promptly before a judge, and that this is a rule that applies in all cases and is not dependent on the choice or ability of the detainee to assert it.

33. There are some aspects of this section which our organisations respectfully submit could be strengthened to more clearly articulate the obligations of states to ensure the legal safeguards required under Article 9(3) of the Covenant are sufficiently protective. In this regard, it is important to highlight the nexus between State party obligations under Article 9 and those that arise under Article 7, and emphasise that the safeguards required under Article 9 are in place to mitigate equally against arbitrary and unlawful detention as they are against torture and ill-treatment.

Detention in police custody

34. It is widely acknowledged that detainees in police custody are at risk of both torture (for prohibited purposes including to obtain information, to punish, to intimidate and for discrimination) and other forms of ill-treatment, and the Committee has regularly expressed concern about allegations of torture in police custody.[64] We therefore suggest that this is recognised clearly in **paragraphs 33 and 36** by making explicit reference to torture as follows:

[63] *Bakhtiyari v. Australia*, Comm. No.1069/2002, paras. 9.3, 9.7; *D. & E. v. Australia*, Comm. No. 1050/2002, para. 7.2; *Jalloh v. Netherlands*, Comm. No. 794/1998, para. 8.2; see also Convention on the Rights of the Child, Art. 37(b).

[64] See eg. Concluding Observations on Tanzania, CCPR/C/TZA/CO/4 (2009), para. 18; Concluding Observations on Malawi, CCPR/C/MWI/CO/1 (2012), para. 11; Concluding Observations on Moldova, CCPR/C/MDA/CO/2 (2009), para. 9; Concluding Observations on Kuwait, CCPR/C/KWT/CO/2 (2011), para. 21.

Suggested wording: 33. Longer detention in the custody of law enforcement officials without judicial control unnecessarily increases the risk of torture and other ill-treatment.[65]

36.…. In the view of the Committee, detention on remand should not involve a return to police custody, but rather to a separate facility under different authority, so as to minimise the risk of a violation of Article 7.

41.The object of the right is release (either unconditional or conditional) from ongoing unlawful detention; compensation for unlawful detention that has already ended is addressed in paragraph 5. Another important function of this right is for detainees to complain of torture and cruel, inhuman or degrading treatment that has taken place in custody. Paragraph 4 requires that the reviewing court must have the power to order release from the unlawful detention.

The right to legal counsel

35. The right of access to legal counsel is dealt with in a number of places in the draft, including:
    - **paragraph 34**, which states (in the context of the right to be brought before a judge) that "the individual is entitled to legal assistance, which should in principle be by counsel of choice";
    - **paragraph 35**, which states (in relation to incommunicado detention) that "States parties should permit and facilitate access to counsel for detainees in criminal cases, from the outset of their detention";[66]
    - **paragraph 46**, which provides (in the context of review of detention) that "[t]o facilitate effective review, detainees should be afforded prompt and regular access to counsel"; and
    - **paragraph 58**, which provides (in the context of the link between Articles 7 and 9) that "[p]rompt and regular access should be given to independent medical personnel and lawyers and, under appropriate supervision when the legitimate purpose of the detention so requires, to family members".

36. We stress the importance of this guarantee for the protection of rights under Article 9, and agree that it should be mentioned in each of these contexts. However, given its importance we urge the Committee to include a separate paragraph on the guarantee, with detailed reference to what it requires.[67] In addition to the Committee's own jurisprudence, we suggest that reference is made to the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems,[68] adopted by the UN General Assembly in December 2012, which includes detailed guidelines on the right of access to a lawyer for persons detained on criminal charges.

37. Points that we suggest are important to include in this paragraph are:
    - Detainees' right to access a lawyer **from the outset of detention and during all interrogations and proceedings**.

[65] See Concluding Observations on Zimbabwe, CCPR/C/79/Add.89 (1998), para. 17; Concluding Observations on Uzbekistan, CCPR/CO/71/UZB (2001), para. 11; Concluding Observations on Hungary, CCPR/CO/74/HUN (2002), para. 8.
[66] See General Comment No. 32, paras. 32, 34, 38; Concluding Observations on Algeria, CCPR/C/79/Add.95 (1998), para. 12; Concluding Observations on Togo,CCPR/C/TGO/CO/4 (2011), para. 19; paragraph 58 infra.
[67] This could be done in either of the above paragraphs, or in a separate section concerning safeguards (as to which see above, paragraphs 10-18).
[68] United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, *supra* n. 16.

We suggest that the Committee provide further guidance about what "prompt" access to a lawyer means, and that it includes access to a lawyer while in police custody.[69] It would be helpful to clarify that, to enable prompt access to a lawyer, officials should "facilitate access for legal aid providers assigned to provide assistance to detained persons in police stations and other places of detention for the purpose of providing that assistance".[70] We also suggest that the Committee clearly state that law should "prohibit interviewing of a person by the police in the absence of a lawyer, unless the person gives his or her informed and voluntary consent to waive the lawyer's presence and to establish mechanisms for verifying the voluntary nature of the person's consent" and that "[a]n interview should not start until the legal aid provider arrives".[71]

- States' obligations to provide **legal aid** to enable access to independent counsel for all those arrested, detained, suspected of or charged with a criminal offence punishable by a term of imprisonment or the death penalty.[72]

  Here it would be helpful if the Committee gave recognition to the principle contained in the UN Guidelines that "[i]t is the responsibility of police, prosecutors and judges to ensure that those who appear before them who cannot afford a lawyer and/or who are vulnerable are provided access to legal aid",[73] and that the means of contacting legal aid providers should be made available in police stations and other places of detention.[74] It should be stressed that "States should ensure that, prior to any questioning and at the time of deprivation of liberty, persons are informed of their right to legal aid and other procedural safeguards as well as of the potential consequences of voluntarily waiving those rights".[75] Although legal aid may be means tested, the UN Guidelines provide that "[p]ersons urgently requiring legal aid at police stations, detention centres or courts should be provided preliminary legal aid while their eligibility is being determined. Children are always exempted from the means test".[76]

- The **confidentiality** of communications between a detainee and legal counsel.[77]

Summary: Given the crucial importance of the right of access to a lawyer and legal assistance to upholding the right to liberty and security of the person, and other rights protected under the Covenant, we urge the Committee to include a separate paragraph on this issue. We suggest that the paragraph provide further guidance to States parties in relation to the times and places at which access to a lawyer is required, the obligation to provide legal aid to allow access to a lawyer, and the confidentiality of communications between a detainee and lawyer. It would be helpful if this paragraph referred to the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems as a helpful guide for States.

Requirement for detainees to appear physically before a judge

38. We are pleased to note that **paragraph 34** of the draft General Comment No. 35 refers to the need for individuals to be brought to appear physically before a judge or other officer authorized by law to exercise judicial power. The importance of this

[69] *Ibid*, Guidelines 3 and 4.
[70] *Ibid*, Guideline 4, para. 44(b).
[71] *Ibid*, Guideline 3, para. 43(b).
[72] *Ibid*, Principle 3, para. 20.
[73] *Ibid*, Principle 3.
[74] *Ibid*, Guideline, para. 43(h).
[75] *Ibid*, Principle 8.
[76] *Ibid*, Guideline 1, para. 41 (c).
[77] *Ibid*, Principle 7, para. 28.

requirement as a fundamental safeguard against torture and ill-treatment should not be underestimated as this gives the judge an opportunity not only to inquire about the treatment of the detainee, but also to carry out a visual check of the detainee's physical condition so as to identify any obvious signs of injury on the detainee that may be the result of torture or ill-treatment, and to take the necessary action thereafter. The physical presence of the suspect before a judge or other judicial officer can also provide him/her with the opportunity to challenge evidence that was obtained through torture and ill-treatment, which is prohibited under international law[78], and to protect his or her right to protection against self-incrimination.

39. While in many States parties, detained criminal suspects are brought to the court to be presented before a judge within the required time frame in order for a judicial order of detention to be issued, in some countries it is standard practice for the detainee to be held in the court house jail during these proceedings rather than to appear physically before the judge. Instead, the judge is provided with the investigation file and uses this as the basis upon which to make the decision regarding the continued detention of the suspect. The failure of the judge to physically view the detainee in-person entirely undermines the ability of this judicial oversight to effectively serve as a safeguard against torture and ill-treatment. In the view of our organisations, the visual check is an important component of the judge's role in preventing and protecting against torture, and this should be more clearly articulated in General Comment No. 35.

40. In several states, the judges or other authorized officers simply approve extension of pre-charge detention or imposition of pre-trial detention on the basis of police reports, without further investigation or inquiry. In order to ensure the effectiveness of the safeguard provided by judicial oversight of detention, it is also necessary to ensure that those judges or other authorized officers are competent, in terms of the powers vested in them, as well as in terms of their independence and willingness to question information furnished to them by the police, to determine whether continued detention should be ordered. In our view, these competencies are an important aspect of judicial oversight of detention which should be reflected in General Comment No. 35. The lack of independence of the judicial authority responsible can severely undermine the effectiveness of judicial oversight of detention. For example, in some legal systems, the Public Prosecutor is responsible for deciding whether pre-charge detention should be extended for certain levels of crime. From our experience working in those countries where there are concerns that the Public Prosecution does not exercise sufficient independence, including from the police, their role in deciding on the continued detention of a criminal suspect is highly problematic.

Summary: In light of the important role played by the judge or other authorized officer in visually identifying possible signs of injury that may be indicative of the kind of treatment experienced by a detainee, we suggest including a sentence in paragraph 34 which more explicitly refers to this.

Suggested wording: 32. ….It is inherent to the proper exercise of judicial power that it be exercised by a <u>competent</u> authority which is independent, objective and impartial in relation to the issues dealt with, <u>so as to ensure that detention is not left to the sole discretion of the state agents responsible for carrying out the detention.</u>

[78] UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by resolution A/RES/39/46 (1984), Article 15.

34. The individual must be brought to appear physically before a competent judge or other officer authorized by law to exercise judicial power. The physical presence of detainees at the hearing gives the opportunity for inquiry into the treatment that they received in custody as well as to visually identify any signs of injury on the detainee which may be indicative of the use of torture or cruel, inhuman or degrading treatment or punishment. Suspects, or their legal counsel on their behalf, should have the right to speak during such proceedings, as well as the right to present witnesses. The physical presence of detainees also facilitates immediate transfer to a remand detention centre if continued detention is ordered….

Requirement for detainees to be brought "promptly before a judge"

41. We welcome the draft General Comment's strong language regarding the Committee's understanding of the requirement for detainees to be brought "promptly" before a judge, i.e. within 48 hours, and that any longer delay must be "absolutely exceptional and justified under the circumstances." In its jurisprudence, the Committee has held that "any longer delay would require special justification to be compatible with Article 9, paragraph 3 of the Covenant."[79]

42. In the wake of 11 September 2001 and the ensuing so-called 'war on terror', a number of states have adopted legislation which allows extended pre-charge detention well beyond the 48 hours envisaged by the Committee. For example, under the Penal Code of Algeria, those suspected of terrorism or terrorism-related crimes may be detained for up to 12 days in pre-charge detention.[80] REDRESS has documented security legislation in a number of other States which similarly allows for extended pre-charge detention of those suspected of terror-related offenses.[81] We respectfully submit that in order to prevent an overly broad interpretation of the circumstances in which a delay of longer than 48 hours would be justified, it would be helpful for the General Comment to provide some elaboration as to what such justifications and circumstances may entail, and/or clarification as to what justifications would not be considered acceptable, as well as the maximum upper limit for pre-charge detention exceeding 48 hours.

Summary: Elaborate in **Paragraph 33** the circumstances and justifications that would, or would not be acceptable for a legitimate delay of the requirement to bring a detainee before a judge "promptly", i.e. within 48 hours. Consider including in the General Comment the maximum upper limit for pre-charge detention exceeding 48 hours.

E. VI. The right to compensation for unlawful or arbitrary arrest or detention (paras. 49-52)

Right to compensation v. right to reparation

43. Paragraph 49 of the current draft of General Comment No. 35 refers to paragraph 4 and 5 of Article 9 of the ICCPR regarding remedies for unlawful or arbitrary arrest or detention (i.e release from ongoing unlawful detention (Article 9(4)); financial compensation (Article 9(5)).

44. We note that during the discussion of the Human Rights Committee on the draft General Comment No. 35 at the 109th session in October 2013, a debate took place between the Committee's members on the differences between the equally

[79] *Kovsh v. Belarus*, Comm. No. 1787/2008, para. 7.4.
[80] Algeria Code of Criminal Procedure (2007), http://www.joradp.dz/TRV/FPPenal.pdf.
[81] REDRESS, 'Extraordinary Measures, Predictable Consequences, *supra* n. 14.

authoritative English, French and Spanish texts of Article 9(5).[82] The English text refers to the enforceable **right to compensation** for unlawful arrest or detention, where the French and Spanish texts speak of the **right to reparation** (French: reparation, Spanish: reparación). Some Committee members expressed particular concern at the fact that the draft text of the General Comment had narrowed the scope of this provision by referring to 'financial compensation'. Indeed the 'right to reparation' is a much broader concept than 'compensation'. We support Mr. Kälin's position that suggested that the General Comment should at least recall the discrepancy of translations.

45. The Rapporteur, Mr. Gerald L. Neuman, argued that there was no additional value to modify Article 9(5), as Article 2(3) provides for other forms of reparation. He specified that paragraph 49 of the General Comment states that "these specific remedies [under paragraph 4 and paragraph 5 of Article 9 do not replace, but are included alongside, the other remedies that may be required in a particular situation by article 2, paragraph 3 of the Covenant". We welcome this mention. Paragraph 52 also provides that:

> When the unlawfulness of the arrest arises *from the violation of other human rights*, such as freedom of expression, the State party may have further obligations to provide compensation or other reparation in relation to those other violations, as required by Article 2, paragraph 3 of the Covenant (emphasis added).

46. However as paragraph 52 is currently drafted, it suggests that Article 2(3) is only relevant where other violations are present. We think it is crucial that the Committee clarifies this key point. We consider that the General Comment should better clarify that reparation required by the Covenant *for violations of Article 9* will generally be broader than compensation alone.

47. We note that the practice of the Committee does not always refer strictly to financial compensation but also to the concept of reparation. In its Concluding Observations, it regularly provides recommendations regarding intertwined violations of rights that include a breach of Article 9. The Committee doesn't restrict itself to request compensation but usually recommends taking effective measures to prevent unlawful and arbitrary detention, investigating the alleged cases, prosecuting those held responsible and ensuring that full reparation is granted, including fair and adequate compensation. [83] The right to compensation for unlawful and arbitrary detention is therefore one form of reparation that the Committee has referred to, but not the only one.

48. The Committee has also referred to the broader concept of "reparation" instead of "compensation". In its 2006 Concluding Observations regarding the USA, the Committee requested specifically under Article 9 that individuals that were "improperly detained receive[d] *appropriate reparation*". [84] The Committee did not refer strictly to financial compensation.

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82 UN Treaty Body Webcast, Human Rights Committee 109th Session: Draft General Comment on Article 9 http://www.treatybodywebcast.org/hrctte-109-session-draft-general-comment-on-article-9/.

83 See Concluding Observations on Uganda, CCPR/CO/80/UGA (2004), para. 17; Concluding Observations on Yemen, CCPR/C/YEM/CO/5 (2012), para.15; Concluding Observations on Colombia, CCPR/CO/80/COL (2004), para. 67(11).

84 See Concluding Observations on USA, CCPR/C/USA/CO/3 (2006), para.19

49. Regarding enforced disappearance that constitutes an aggravated form of arbitrary detention under Article 9 of the Covenant, the Committee regularly requests investigation, prosecution and punishment of perpetrators and reparation to victims or their families that includes once more, among others, compensation.[85] As discussed in section C above, enforced disappearance may also constitute a breach of other articles of the Covenant, however it is crucial not to create inconsistency regarding the different forms of redress for arbitrary detention.

50. As discussed under section C of this submission, different types of detention may amount in itself both to arbitrary detention under Article 9, and torture or cruel, inhuman or degrading treatment or punishment under Article 7. Among other forms or arbitrary detention, enforced disappearances[86], prolonged incommunicado detention[87] or some forms of confinement[88] may constitute *per se* torture or ill-treatment.

51. Such a violation would entail a right to reparation under Articles 9.5 and 2(3) of the Covenant and Article 14 of the Convention against Torture, if applicable. We draw the attention of the Committee to the General Comment No. 3 of the Committee against Torture about the implementation of Article 14 of the Convention against Torture. It clearly states that "monetary compensation alone may not be sufficient redress for a victim of torture and ill-treatment".[89] We consider that it is important that draft General Comment No. 35 reflects this point in section VI on the right to compensation.

52. We also note that draft General Comment No. 35 refers to rehabilitation only twice with reference to punitive sanction and institutionalised persons. We consider that rehabilitation is an important element of the due redress to be mentioned and considered, in particular in case of victims of torture. As affirmed by the Committee against Torture, "rehabilitation for victims should aim to restore, as far as possible, their independence, physical, mental, social and vocational ability; and full inclusion and participation in society".[90] It emphasizes that the obligation of States parties to provide the means for "as full rehabilitation as possible" refers to the need to restore and repair the harm suffered by a victim whose life situation, including dignity, health and self-sufficiency may never be fully recovered as a result of the pervasive effect of torture. The obligation does not relate to the available resources of States parties and may not be postponed.

53. Not restricting only to the right to compensation, General Comment No. 35 could also recall that certain forms of reparation could prevent further arbitrary detention. For instance initiating serious, impartial and effective investigations, establishing the facts, determining the possible perpetrators, bringing them to prosecution and trial are

[85] See Concluding Observations on Lybia, CCPR/C/LBY/CO/4 (2007), para.14; Concluding Observations on Turkey, CCPR/C/TUR/CO/1 (2012), para. 11; *Quinteros v. Uruguay*, Comm. No. 107/1981, para. 15.
[86] Paragraph 17 of Draft General Comment No. 35 recognizes that enforced disappearances constitute a particularly aggravated form of arbitrary detention under Article 9.
[87] Paragraphs 35 and 56 of Draft General Comment No. 35 states that incommunicado detention or incommunicado detention that prevents prompt presentation before a judge violates Article 9.
[88] Paragraph 11 of Draft General Comment No. 35 states that "unauthorized confinement of prisoners beyond the length of their sentences is arbitrary as well as unlawful; the same is true for unauthorized extension of other forms of detention. Continued confinement of detainees in defiance of a judicial order for their release is arbitrary as well as unlawful."
[89] See Committee against Torture, General Comment No. 3, CAT/C/GC/3 (2012), para 9.
[90] *Ibid.* paras. 11-15.

not only a part of the duty to remedy the wrong, but they also perform a preventive function.

54. Regarding the development of the concept of 'reparation' in the 2000s by different UN bodies,[91] we consider that it is important to keep consistency in the interpretation given to the right to redress. The General Comment should reflect this more specifically and should refer to the different concepts encompassed by the term "reparation" instead of being limited to the right to financial compensation.

Right to redress the harm caused by private persons or entities

55. As hereinbefore mentioned in this submission (See section B on deprivation of liberty by third parties), we suggest that a sentence is included in Section VI (Compensation) of the draft General Comment to recall the Committee's jurisprudence in General Comment No. 31 on States parties' separate obligations under the Convention "to take appropriate measures or to exercise due diligence to prevent, punish, investigate or *redress the harm caused by such acts by private persons or entities*" in the context of unlawful deprivation of liberty.[92]

A remedy against the State must always be available.

56. **Paragraph 50** of the General Comment provides for the legal framework of the implementation of the right to compensation. It states that Article 9(5) "does not specify the precise form of procedure, which may include remedies against the state itself,[93] or against individual state officials responsible for the violation".[94] We agree that Article 9(5) does not provide any detail on the procedure but we are concerned by the drafting of this sentence which may encourage States to provide a procedure for claims against State officials only. We consider that a remedy against the State is a crucial issue and must always be available. The Committee has recently considered a case where a judgment awarding compensation was made against state officials but not enforced, and found the State responsible for a violation of Article 2(3). The Committee stressed that "a State cannot elude its responsibility for violations of the Covenant committed by its own agents" and "should use all appropriate means and organize their legal system in such a way so as to guarantee the enforcement of remediums".[95]

57. By definition, where a violation of the Covenant arises from the actions of a State official, the State is responsible for those actions, and liable to pay reparation under the Covenant.[96] In practice, individual officials often do not have means to provide reparation to victims. We suggest that the Committee modifies the second sentence of paragraph 50 to reflect that there must always be a procedure to claim directly against the State.[97] It is up to the State to recover eventually from the individual official.

[91] See *ibid;* General Comment No. 31, *supra* n. 1; Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law adopted by resolution 60/147 in 2005.
[92] HRC General Comment 31, *supra* n. 1, para. 8.
[93] See Concluding Observations on Guyana, CCPR/C/79/Add.121 (2000), para. 367; Concluding Observations on Cameroon, CAT/C/CMR/CO/4 (2010), para. 19.
[94] See Concluding Observations on Argentina, A/50/40 (1995), para. 153; *Gunaratna v. Sri Lanka*, Comm. No. 1432/2005, para. 7.4.
[95] *Corinna Horvath v. Australia*, Comm. No. 1885/2009, paras. 8.4-8.8.
[96] HRC General Comment 31, *supra* n. 1, para. 16.
[97] See Committee against Torture, Concluding Observations on Paraguay, A/52/44 (1997), paras. 189-213.

Procedures for providing reparation must be transparent and readily accessible

58. **Paragraph 50** of the General Comment states that "Paragraph 5 does not require that a single procedure be established providing compensation for all forms of unlawful arrest, but only that an effective system of procedures exist that provides compensation in all the cases covered by paragraph 5. The remedy must not exist merely in theory, but must operate effectively and make payment within a reasonable period of time." We consider that it is significant to highlight that procedures for providing compensation for all forms of unlawful arrest and detention must be transparent and readily accessible. Individuals must have access to relevant information concerning reparation mechanisms. Victims must have an equal, transparent, effective and prompt access to remedies and reparation mechanisms. [98] In order to meet the requirement for effectiveness, victims should not be required to wait for the outcome of criminal proceedings, notwithstanding the evidentiary benefits to victims afforded by a criminal investigation.[99]

Vulnerability of persons deprived of liberty

59. We also point out the necessity to take into account the vulnerability of persons deprived of liberty. There is a risk of reprisals to consider in many countries if an individual seek remedy while still in custody (e.g. to be released from unlawful detention, to request for an investigation into illegal actions by State agents). Some specific categories of detainees are particularly vulnerable such as women, children or foreigners (asylum seekers, migrants, etc – who may face particular challenges regarding the local language and the absence of familiarity with the local legal system). We therefore suggest that these points should be highlighted in paragraph 50.

Suggested wording: 50. …Paragraph 5 does not require that a single procedure be established providing compensation for all forms of unlawful arrest, but only that an effective system of procedures exist that provides compensation in all the cases covered by paragraph 5. States parties must ensure that individuals have access to relevant information concerning available reparation mechanisms. [100] Victims must have an equal, transparent, effective and prompt access to remedies and reparation mechanisms. Such remedies should be appropriately adapted so as to take into account of the vulnerability of person deprived of liberty. [101] The remedy must not exist merely in theory…

Monetary compensation may not be sufficient redress and remedies under other relevant human rights instruments

60. As hereinbefore mentioned, some forms of arbitrary detention, such as enforced disappearances[102], prolonged incommunicado detention[103] or some forms of confinement[104] may constitute *per se* torture or ill-treatment. General Comment No. 3 of the Committee against Torture regarding the implementation of Article 14 of the Convention against Torture clearly states that monetary compensation alone may not be

[98] See Basic Principles and Guidelines on the Right to a Remedy and Reparation, *supra* n. 91, para. 11.
[99] CAT, General Comment No. 3, *supra* n. 89, para. 26.
[100] See Basic Principles and Guidelines on the Right to a Remedy and Reparation, *supra* n. 91, para. 11
[101] See HRC General Comment 31, *supra* n. 1, para. 15.
[102] Paragraph 17 of Draft General Comment No. 35 recognizes that enforced disappearances constitute a particularly aggravated form of arbitrary detention under Article 9.
[103] Paragraph 35 and 56 of Draft General Comment No. 35 states that incommunicado detention or incommunicado detention that prevents prompt presentation before a judge violates Article 9.
[104] Paragraph 11 of Draft General Comment No. 35 states that "unauthorized confinement of prisoners beyond the length of their sentences is arbitrary as well as unlawful; the same is true for unauthorized extension of other forms of detention. Continued confinement of detainees in defiance of a judicial order for their release is arbitrary as well as unlawful."

sufficient redress for a victim of torture and ill-treatment.[105] It would be significant for the draft General Comment to reflect this.

61. **Paragraph 52** also states that "when the unlawfulness of an arrest arises from the violation of other human rights, such as freedom of expression, the State party may have further obligations to provide compensation or other reparation in relation to those other violations, as required by Article 2, paragraph 3 of the Covenant." We suggest adding as an alternative to Article 2 of the ICCPR a reference to remedies under other relevant human rights instruments.

F. VII. Relationship of Article 9 with other articles of the Covenant (paragraphs 53-66)

The link between Article 9 and Article 7

62. As mentioned in the introductory paragraphs, it is our view that the General Comment would be strengthened through the inclusion of language more clearly linking the rights and obligations under Article 9 of the Covenant to those under Article 7.

63. Paragraph 56 of the draft recognises that:

> Arbitrary detention creates risks of torture and ill-treatment, and several of the procedural guarantees in Article 9 serve to reduce the likelihood of such risks. … The right to personal security protects interests in bodily and mental integrity that are also protected by Article 7.[106]

64. Paragraph 58 then goes on to list a number of safeguards that are important to protect against both arbitrary detention and torture and other prohibited ill-treatment. We have suggested that the substance of this paragraph is moved to an earlier section in the General Comment, to highlight the importance of these safeguards to protecting rights under Article 9. In this section, we suggest that the text explain how the safeguards required by Article 9, including those specifically referred to in Article 9(2), (3) and (4), also reduce the risk of torture ill-treatment, and why they should be granted at the outset of arrest.

Summary: We suggest that this section explain how the safeguards set out in Article 9, and other safeguards important to protect the right to liberty and security of the person, are also crucial for the prevention of torture and other ill-treatment, and why it is important that they are available from the point of arrest.

Solitary confinement and other types of detention that may amount to torture or cruel, inhuman or degrading treatment or punishment

65. Paragraph 56 of the draft recognises that "[p]rolonged incommunicado detention violates Article 9 and may also amount to ill-treatment or even torture in violation of Article 7".[107] This is an important issue, but we suggest that this is expanded further to refer to other types of detention that may also amount to ill-treatment or even torture.

[105] See CAT, General Comment No. 3, *supra* n. 89, para 9.
[106] General Comment No. 20, *supra* n. 35, para. 2.
[107] *Aboufaied v. Libya*, Comm. No. 1782/2008, paras. 7.4, 7.6; *El-Megreisi v. Libyan Arab Jamahiriya*, Comm. No. 440/1990, para. 5.4.

Solitary confinement

66. There is no internationally agreed definition of 'solitary confinement' however the Istanbul Statement on the Use and Effects of Solitary Confinement defines it as the physical isolation of individuals who are confined to their cells for 22 to 24 hours a day.[108] Those subject to solitary confinement may be allowed out of their cells for solitary exercise, but "meaningful contact with other people is typically reduced to a minimum".[109] Solitary confinement is a form of deprivation of liberty under Article 9 of the ICCPR. The current draft of General Comment No. 35 refers to solitary confinement as a form of deprivation of liberty in paragraph 5, as well as in paragraph 40.

67. Solitary confinement has implications for other provisions of the Covenant, namely Articles 7 and 10, particularly where it is 'prolonged'. General Comment No. 20 of the Human Rights Committee notes that "prolonged solitary confinement of the detained or imprisoned person may amount to acts prohibited by Article 7."[110] The UN Special Rapporteur on torture and other cruel, inhuman, degrading treatment or punishment has stated that solitary confinement exceeding 15 days should be considered prolonged.[111]

68. The current draft of General Comment No. 35 refers to solitary confinement as a form of deprivation of liberty in paragraph 5, as well as in paragraph 40. Our organisations respectfully submit that given the serious risk of cruel, inhuman or degrading treatment or punishment, and in some cases torture, arising from the practice of solitary confinement, and in particular prolonged solitary confinement, it is important that the General Comment on Article 9 include more detailed language outlining the necessary limits and restrictions that should be applied in the use of solitary confinement in order to ensure respect for the rights of persons deprived of their liberty.

69. The Human Rights Committee has in its periodic country reviews addressed the issue of solitary confinement, clarifying that it should be an exceptional measure and strictly limited in duration,[112] and calling on States parties to take steps to ensure solitary confinement is used only in urgent necessity[113] and that those held in solitary confinement are monitored daily by fully qualified medical staff.[114] The Committee has also called on States parties to immediately stop the use of "long periods of solitary confinement" and to put an end to the sentence of solitary confinement.[115]

70. A number of other UN human rights bodies and mechanisms have also clarified the circumstances in which solitary confinement should be applied in order to prevent violations of the rights of persons deprived of their liberty:
    - The Subcommittee on the Prevention of Torture has recommended that a medical officer should visit detainees held in solitary confinement every day in order to ensure their health is safeguarded.[116]

[108] See further Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment, A/66/268 (2011), para. 25.
[109] *Ibid.*
[110] General Comment No. 20, *supra* n. 35, para. 6.
[111] Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment, *supra* n. 108, para. 26.
[112] Concluding Observations on Norway, CCPR/C/NOR/CO/6 (2011), para. 11; Concluding Observations on Denmark, CCPR/C/DNK/CO/5 (2008), para. 11; Concluding Observations on Japan, CCPR/C/JPN/CO/5 (2008), para. 16.
[113] Concluding Observations on Denmark, CCPR/CO/70/DNK (2000), para. 12.
[114] Concluding Observations on Portugal, CCPR/CO/78/PRT (2004), para. 16.
[115] Concluding Observations on Rwanda, CCPR/C/RWA/CO/3 (2009), para. 14.
[116] Report of the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to the Republic of Paraguay, CAT/OP/PRY/1 (2010).

- The Subcommittee and the Committee against Torture have recommended that children under the age of 18 years should not be subjected to solitary confinement. The Committee on the Rights of the Child has also clarified that solitary confinement of detained juveniles as a disciplinary must be strictly forbidden as it would be in violation of Article 37 of the Convention on the Rights of the Child.[117]
- The Committee against Torture has recommended that solitary confinement should be used as a measure of last resort when all other alternatives for control have failed; for the shortest possible time; under strict medical supervision; and with the possibility of judicial control.[118]

71. It should also be highlighted that the Special Rapporteur on torture has recommended that the practice of solitary confinement as an extortion technique in pre-trial detention or for the purpose of punishment, as well as the use of solitary confinement of minors and persons with mental disabilities, should be abolished.[119] The Special Rapporteur on torture also recommends the abolition of indefinite solitary confinement.[120] Furthermore, according to the Special Rapporteur, special regard should be given to the material conditions of confinement, because they can themselves lead to severe mental and physical pain or suffering, and therefore to a violation of Article 7.[121]

Summary: Our organisations respectfully submit that the General Comment No. 35 would be strengthened through the addition of a new paragraph to Section VII of the General Comment addressing specifically the issue of solitary confinement. Such an addition could follow current paragraph 59.

Suggested wording: New paragraph. <u>As the Committee has noted in General Comment 20, "prolonged solitary confinement of the detained or imprisoned person may amount to acts prohibited under Article 7." Though not prohibited per se under the Covenant, the practice of solitary confinement (which refers to the physical isolation of individuals who are confined to their cells for 22-24 hours a day and who are granted minimal contact with others[122]) for persons deprived of their liberty must be applied in such a manner so as to ensure the protection of their rights under Articles 7 and 10 of the Covenant. More specifically, the practice of solitary confinement should be an exceptional measure of last resort used only in urgent necessity, which is strictly limited in duration and for the shortest possible time and subject to judicial control.[123] Persons in solitary confinement should be under strict medical supervision.[124] Minors below the</u>

[117] Interim Report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment, *supra* n. 108, paras. 31-32.
[118] CAT, Concluding Observations on Japan, CAT/C/JPN/CO/2 (2013), para. 14; CAT, Concluding Observations on Peru, *supra* n. 26, para. 10; CAT, Concluding Observations on the Netherlands, CAT/C/NLD/CO/5-6 (2013), para. 21.
[119] Interim Report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment, *supra* n. 108, paras. 72; 85-86.
[120] *Ibid*, para. 87.
[121] *Ibid*, para. 74.
[122] Istanbul Statement on the Use and Effects of Solitary Confinement, adopted by 24 international experts in 2007, http://www.solitaryconfinement.org/Istanbul.
[123] Concluding Observations on Norway, *supra* n. 112, para. 11; Concluding Observations on Denmark, *supra* n. 112, para. 11; Concluding Observations on Japan, *supra* n. 112, para. 16; Concluding Observations on Denmark, *supra* n. 113, para. 12; Concluding Observations on Rwanda, *supra* n. 115, para. 14.
[124] Interim Report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment, *supra* n. 108, para. 100; CAT, Concluding Observations on Japan, CAT/C/JPN/CO/2 (2013), para. 14; CAT, Concluding Observations on Peru, CAT/C/PER/CO/5-6 (2013), para. 10; CAT, Concluding Observations on the Netherlands, CAT/C/NLD/CO/5-6 (2013), para. 21.

age of 18 years and persons with mental disabilities should not be subjected to solitary confinement. [125] The practice of indefinite and prolonged solitary confinement should be abolished.[126]

Other forms of detention that may amount to torture or other ill-treatment

Prolonged or arbitrary detention without the prospect of challenge, or indefinite detention without charge

72. The Committee recently found in views adopted in the Optional Protocol procedure concerning Australia that arbitrary detention of a number of asylum seekers also amounted to a violation of Article 7.[127] The Committee found that "the combination of the arbitrary character of the authors' detention, its protracted and/or indefinite duration, the refusal to provide information and procedural rights to the authors and the difficult conditions of detention are cumulatively inflicting serious psychological harm upon them, and constitute treatment contrary to Article 7 of the Covenant".[128] UN Special Procedures mandate holders have also taken a similar view in relation to detention by the United States at Guantánamo Bay, finding that "the general conditions of detention, in particular the uncertainty about the length of detention and prolonged solitary confinement, amount to inhuman treatment…".[129]

73. The Committee Against Torture has also stressed that detaining persons indefinitely without charge "constitutes *per se* a violation of the Convention [against Torture]".[130]

Detention of particularly vulnerable individuals, with particular reference to torture survivors

74. Research shows that detention or imprisonment of asylum seekers has widespread and seriously damaging effects on the mental (and sometimes physical) health of those incarcerated.[131] Imprisonment can be particularly damaging to those who are already psychologically vulnerable because of past trauma, such as torture.[132] In this regard, the UN Special Rapporteur on the human rights of migrants has pointed out that "[detention can be particularly damaging to vulnerable categories of migrants, including victims of torture, unaccompanied older persons, persons with a mental or physical disability, and persons living with HIV/AIDS."[133]

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[125] Interim Report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment, *supra* n. 108, paras. 31-32.
[126] Concluding Observations on Thailand, CCPR/CO/84/THA (2005), para. 16.
[127] *F.K.A.G. et al. v Australia*, Comm. No. 2094/2011; *M.M.M. et al. v Australia*, Comm. No. 2136/2012.
[128] *Ibid*., paras. 9.8 and 10.7 respectively.
[129] Report of the Chairperson of the Working Group on Arbitrary Detention, Ms. Leila Zerrougui, the Special Rapporteur on the independence of judges and lawyers, Mr. Leandro Despouy; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Mr. Manfred Nowak; the Special Rapporteur on freedom of religion or belief, Ms. Asma Jahangir and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Mr. Paul Hunt., E/CN.4/2006/120 (2006), para. 87.
[130] CAT Concluding Observations on USA, CAT/C/USA/CO/2 (2006), para. 22.
[131] See, e.g.,Coffey et al. (2010), 'The Meaning and Mental Health Consequences of Long-Term Immigration Detention for People Seeking Asylum', 70 *Social Science & Medicine* 2070-2079. See also Newman, Dudley and Steel (2008), 'Asylum, Detention and Mental Health in Australia', 27(3) Refugee Survey Quarterly 110-127.
[132] Zachary Steel and Derrick M Silove (2001), 'The mental health implications of detaining asylum seekers', (2001) MJA 2001 175: 596-599 (footnotes omitted), http://www.mja.com.au/public/issues/175_12_171201/steel/steel.html.
[133] Report of the Special Rapporteur on the Human Rights of Migrants: Detention of Migrants in an Irregular Situation, *supra* n. 23, para. 43.

75. The potential for additional trauma, and the steps that must be taken to prevent this by ensuring that torture survivors are identified and only detained in exceptional circumstances, has been recognised both by international human rights bodies, and by national governments.[134] For example, the Inter-American Court of Human Rights and Inter-American Commission on Human Rights have recognised that special measures must be taken to protect vulnerable people when their liberty is at stake.[135] Similarly, Guideline 9 of the UNHCR 2012 Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum-seekers provides that:

> [v]ictims of torture and other serious physical, psychological or sexual violence also need special attention and should generally not be detained…. Detention can and has been shown to aggravate and even cause the aforementioned illnesses and symptoms.[136]

76. International human rights bodies have recognised that the additional trauma caused to a torture survivor by imprisonment or detention can be of such gravity that it may amount to inhuman or degrading treatment. In *A v. The Netherlands* the Committee against Torture expressed its concern that

> the author has been held in detention since his arrival in the Netherlands on 24 November 1988, i.e. only two months after he was allegedly tortured. The Committee considers that if torture did indeed take place, the fact of keeping him in detention for such a prolonged period could have an aggravating effect on his mental health and ultimately amount to cruel or inhuman treatment.[137]

77. The Special Rapporteur on the human rights of migrants has also recognised that "[v]ictims of torture are already psychologically vulnerable due to the trauma they have experienced and detention of victims of torture may in itself amount to inhuman and degrading treatment".[138] He has suggested that the same principles apply to the detention of any person with pre-existing mental illness, holding that "serious consideration must be given to alternatives to detention or other arrangements that meet their treatment needs, ensuring their protection from cruel, inhuman or degrading treatment or punishment, and the right to humane conditions of detention".[139]

78. We suggest that this issue is addressed both in relation to immigration detention (at **paragraph 18** of the draft), along with considerations of detention of vulnerable migrants and asylum seekers more generally, and in the section on the link between Articles 7 and 9.

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[134] For example, in the United Kingdom, government policy is that people in immigration detention must be screened to identify those for whom there is evidence of torture, and that such people should be detained only "*in very exceptional circumstances*". The policy towards the detention of persons who claim to have been victims of torture is covered by a number of over-lapping policy and instruction documents: Chapter 55 of the Enforcement Instructions and Guidance (EIG), Detention Centre Rules 2001, Detention Services Order 03/2008, Asylum Process Instruction (Rule 35).

[135] IACtHR, Advisory Opinion on the Juridical Condition and Rights of Undocumented Migrants, OC-18, 17 September 2003, Ser. A No. 18/03, para. 121.

[136] Office of the United Nations High Commissioner for Refugees, UNHCR's Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-seekers and Alternatives to Detention (2012), http://www.unhcr.org/505b10ee9.html.

[137] CAT, *A v. The Netherlands*, Comm. No. 124/1998, in particular paras 6.3 and 9. See also an analogous interpretation of the European Court of Human Rights in *Price v United Kingdom* (2002), Application No. 33394/96 (2001), paras. 29-30 (in relation to the detention of a person with physical disabilities).

[138] Report of the Special Rapporteur on Migrants: Detention of Migrants in an Irregular Situation, *supra* n. 23, para. 44.

[139] *Ibid.* para. 46.

Life imprisonment without prospect of release

79. Another type of imprisonment which itself raises concerns under Article 7 is whole life terms without the prospect of release where there is no longer sufficient penological justification for continued detention. The Grand Chamber of the European Court of Human Rights has held that such detention is a violation of the right under Article 3 of the European Convention on Human Rights to be free from inhuman or degrading treatment or punishment.[140] The Grand Chamber has found that prisoners sentenced to life imprisonment need a real prospect of release. Such an adequate mechanism must be in place at the time when the sentence of life imprisonment was imposed which enables a review to be conducted that would determine whether there was still sufficient penological justification for the continued detention of the person.

The death row phenomenon

80. Circumstances of detention on death row, following imposition of the death penalty, may also result in a violation of Article 7 and/or 10. Described as the "death row phenomenon", this

> consists of a combination of circumstances that produce severe mental trauma and physical deterioration in prisoners under sentence of death. Those circumstances include the lengthy and anxiety-ridden wait for uncertain outcomes, isolation, drastically reduced human contact and even the physical conditions in which some inmates are held. Death row conditions are often worse than those for the rest of the prison population, and prisoners on death row are denied many basic human necessities.[141]

81. The Committee has recognised the existence of the death row phenomenon as a possible breach of Article 7, requiring a careful examination of the facts in each case.[142] During State party reviews, the Committee has also regularly expressed concern over the living condition of prisoners on death row in relation to Articles 7 and 10 of the Covenant.[143] Regional and national courts have found in a number of cases that the death row phenomenon resulted in a violation of the prohibition of torture and other ill-treatment and right to humane treatment.[144]

82. Similarly, the Special Rapporteur on torture has found that the death row phenomenon is a violation of Article 7, because "[t]he anxiety created by the threat of death and the other circumstances surrounding an execution, inflicts great psychological pressure and trauma on persons sentenced to death". In his view, "[a] prolonged stay on death row, along with the accompanying conditions, constitutes a violation of the prohibition of torture itself".[145]

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[140] ECtHR, *Vinter & Ors v United Kingdom*, Appl. Nos. 66069/09, 3896/10 and 130/10 (2013).
[141] Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/67/279, 9 August 2012, para. 42.
[142] *Kindler v. Canada*, Comm. No. 470/1991, paras. 15.2-15.3.
[143] See, eg. Concluding observations on Japan, *supra* n. 112; Concluding Observations on Thailand, CCPR/CO/84/THA (2005); Concluding Observations on Uzbekistan, CCPR/CO/71/UZB (2001); Concluding Observations on Tanzania, CCPR/C/TZA/CO/4 (2009).
[144] See, eg. ECtHR, *Soering v. United Kingdom* Appl. No. 14038/88 (1989), para. 111; Inter-American Court on Human Rights, *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago* (2002), Judgment of 21 June 2002, paras. 167 and 168; Inter-American Commission on Human Rights, *The Death Penalty in the Inter-American Human Rights System: From Restrictions to Abolition*, OEA/Ser.L/V/II, Doc. 68 (31 December 2011); Privy Council in *Pratt v. Attorney General for Jamaica*, Appeal No. 10.22 (1993); Supreme Court of Canada in *Kindler v. Canada (Minister of Justice)*, 2 S.C.R. 779 (1991); Supreme Court of Zimbabwe of 24 June 1993 in *Catholic Commissioner for Justice and Peace in Zimbabwe v. Attorney General* (4) SA 239 (ZS).
[145] Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, *supra* n. 141, para. 78.

Summary: We suggest that this section states clearly that, in addition to solitary confinement, other types of detention, and in some circumstances detention in itself, can amount to a violation of Article 7. This may include prolonged or arbitrary detention without the prospect of challenge, indefinite detention without charge, life imprisonment without parole, circumstances of detention on death row leading to the "death row phenomenon", and the detention of particularly vulnerable individuals, including survivors of torture. This last point, concerning the detention of vulnerable migrants and asylum seekers, should also be made clearly in **paragraph 18**.

Submitted jointly by:

- Action des Chrétiens pour l'Abolition de la Torture (ACAT)
- Association for the Prevention of Torture (APT)
- Centre for Civil and Political Rights (CCPR Centre)
- DIGNITY – Danish Institute Against Torture
- Human Rights Implementation Centre – University of Bristol Law School
- International Rehabilitation Council for Victims of Torture (IRCT)
- REDRESS
- World Organisation Against Torture (OMCT)