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**DRAFT GENERAL COMMENT NO. 35 ON ARTICLE 9
OF THE INTERNATIONAL COVENANT ON CIVIL AND
POLITICAL RIGHTS**

27 MAY 2014

The Danish Institute for Human Rights (DIHR) would like to thank the UN Human Rights Committee (HRC) for this opportunity to comment on the Draft General Comment on Article 9. DIHR would like to draw the attention to the following issues raised in the Draft General Comment:

INTRODUCTORY REMARKS

DIHR welcomes the overall structure of the draft by which each section / heading corresponds to a certain paragraph in the article, following the chronology of the article.

However, as each section / heading contains various themes, the extent of the draft requires a more detailed structure. In order to make the general comment more accessible DIHR would kindly recommend HRC to add sub-sections / sub-headings for each separate theme treated within each section.

For example Section II would be more accessible if some subheadings were added e.g. para. 15 “Security detention”, para. 18 “Detention and immigration”, para. 19 “Detention and mental health”, para. 23 “Procedures of carrying out deprivation of liberty” etc.

REMARKS ON THE SUBSTANCE

Section I

Para. 5, second sentence

DIHR agrees with the interpretation of the HRC that Article 9 “Deprivation of liberty” involves a more “severe” restriction than Article 12 “Liberty of Movement”. However, HRC seems to maintain that “space” constitutes the essential distinguishing factor between the articles even though it is often claimed, that it is the “nature, intensity and length of the restrictions” that is the distinguishing factor between the articles.

DIHR would recommend that the distinction between Article 9 “Deprivation of Liberty” and Article 12 “Liberty of Movement” is explained in further detail as the distinction is of significant importance.

Para 5, last sentence

DIHR would recommend to add after the last phrase the following phrase:

“In order to establish whether this is the case account should be taken to the nature, intensity and the length of the measure in question.”

Reference could be made to 265/1987, Vuolanne v. Finland, para. 9.4, although using a slightly other wording.

Para 6, second sentence

DIHR would propose to HRC to delete from the second sentence, second part “know that they”.

Para 7, first sentence

DIHR would recommend HRC to elaborate in further detail on the intersection between “Security of Person” under Article 9(1) and the “Right to Freedom of Torture, Inhumane and Degrading Treatment” under Article 7 e.g. on how to distinguish between the articles and whether Article 9 covers something not already covered by Article 7.

DIHR would also recommend HRC to either delete “intentional” or explain it in further detail as “intent” form part of the definition of torture according to Article 1 of the UN Convention Against Torture

(CAT) and in that context the requirement of “intent” has been much debated.

Para. 8 – 9

DIHR would propose to HRC to move para. 8 – 9 before para. 7, leaving para. 7 the last paragraph of Section I with the sub-heading “Security of Person”.

Section II

Para. 11, first sentence, second part

DIHR would recommend HRC to change the wording of the first sentence, second part into:

“while the third sentence prohibits unlawful deprivation of liberty i.e. deprivation of liberty that is not on such...”

Para. 11, second and third sentence

DIHR agrees with HRC on the third sentence, according to which “Arrest or detention that lacks any legal basis is also arbitrary”. As a consequence, DIHR would recommend HRC to clarify which arrest or detention, in the view of HRC, could then fall within the category of arrests and detentions that are “unlawful but not arbitrary” as stated in the second sentence, second part.

Para 14, first – fourth sentence

It is stated that the ICCPR does not provide an enumeration of the permissible reasons for depriving a person of liberty and the grounds and procedures prescribed by law must not be destructive of the right to liberty of person. In this context DIHR would recommend HRC to make a reference to the UN Convention on the Rights of Persons with Disabilities under which the existence of a disability is not a lawful justification for any deprivation of liberty.

Para 14, sixth sentence

It is stated that although conditions of detention are addressed primarily by articles 7 and 10, detention may be arbitrary if the manner in which the detainees are treated does not relate to the purpose for which they are ostensibly being detained. However, the intersection between Article 9 and Articles 7 and 10 remain unclear and DIHR would

thus recommend HRC to elaborate further on when conditions of detentions can be considered “arbitrary” under Article 9 e.g. to address the questions on whether already established detention that is made more severe by solitary confinement without explanation does constitute an “arbitrary” detention under Article 9 and whether Article 9 requires a judicial review or oversight / periodic re-evaluation in case of exceptional severe conditions of detention.

Para. 15 , second and third sentence

In the second sentence it is stated that the risks of arbitrariness in relation to security detentions are mitigated by detailed substantial and procedural rules of international humanitarian law when the threat to the State arises in the context of “international” armed conflict.

In the third sentence it is stated that “outside that context” such detention would normally amount to arbitrary detention...”. Many States would probably argue that the above applies also in case of “non-international” armed conflict. DIHR would thus recommend HRC to specify whether the above applies also in the context of “non-international” armed conflict.

Para. 15, fourth sentence

The conditions for accepting preventive detention seem much more restrictive than according to General Comment No. 8 and previous views from HRC e.g. 66/1980 David Alberto Cámpora Schweizer v. Uruguay. DIHR welcomes the more restricted acceptance of preventive detention and finds this well-founded due to the much controversy about the use of preventive detention of e.g. terror suspects in recent years.

Para. 18, last sentence

It is stated that the inability of a State to carry out the expulsion of an individual does not justify indefinite detention. Due to the intersection between “Deprivation of Liberty” under Article 9 and “Liberty of Movement” under Article 12 DIHR would appreciate HRC’s view on whether such inability may justify indefinite restriction in the “Liberty of Movement” under Article 12.

Para. 22, first sentence

It is stated that that no one shall be deprived of liberty except on such grounds and in accordance with such procedure as are established by “law”. DIHR would recommend HRC to clarify how to interpret “law”.

In Manfred Nowak (2005), *U.N. Covenant on Civil and Political Rights CCPR Commentary*, it is stated that “law” refers “primarily” to domestic law and is to be understood in the strict sense of Parliamentary Statute or equivalent. However, DIHR would kindly ask HRC to address the question whether “law” includes Parliamentary decisions or approval in a Parliamentary Committee.

Para. 23, fourth sentence

It is stated that Article 9 requires compliance with domestic rules providing important safeguards for detained persons, such as making a record of arrest. However, DIHR would request HRC to clarify whether Article 9 also requires the State Parties to adopt such domestic rules as this is the case according to Article 17 of the UN International Convention for the Protection of All Persons from Enforced Disappearance that requires the States Parties to provide for a careful en detailed record-keeping and consistent case law from the European Court of Human Rights regarding Article 5 “Right to liberty and security” of the European Convention on Human Rights.

Section III

Para. 29

It is stated that the second requirement in Article 9(2), notice of criminal charges, applies in both criminal and military prosecutions. This is also the case in relation to the first requirement i.e. notice of reasons for arrest. However, the wording could lead to the impression that it is only the second requirement that applies in both military and criminal prosecution. DIHR would therefore recommend HRC to clarify this.

Para. 30

DIHR would recommend HRC to clarify, if possible, how to interpret “promptly” e.g. whether it is 24 hours, 3-4 days or even months e.g. the UK example with delayed charges of detained terror suspects i.e. prolonged detention without charge.

Section IV

Para. 32, last sentence

It is stated that public prosecutors “generally” lack the institutional objectivity and impartiality necessary to be considered as an officer exercising judicial power under paragraph 3. DIHR would propose to HRC to clarify whether it could ever be accepted that review of detention is carried out by a public prosecutor, in particular with reference to case law from the European Court of Human Rights according to which it is an absolute precondition that the review is undertaken by an independent and impartial body/officer.

Para. 34

It is stated that the individual is entitled to legal assistance during the hearings. However, DIHR would recommend that HRC elaborates further on the intersection between Article 9 and Article 14(3)(d) i.e. the right to legal assistance etc.

Section V

Para. 39, last sentence

DIHR would recommend HRC to explain the last sentence in further detail as the content remains a bit unclear.

Para. 42

DIHR would recommend HRC to clarify whether the detained person can be brought before court through internet/video link and to clarify that the situation differs from that of criminal charges where the detained person *must* be brought to appear physically before court cf. para 34.

Para. 43, second sentence

If possible, DIHR would propose to HRC to indicate the time frame before the individual is again entitled to take proceedings on similar grounds.

Para. 45, first and second sentence

According to the wording it seems as if Article 9(4) requires more “independence” than Article 9(3), cf. para. 32. This might also follow from the wording of Articles 9(3) and (4). However, is it in accordance with the interpretation of HRC and its jurisprudence?

Section VII

Para. 58

Some of the safeguards mentioned would appear to be legally required under the ICCPR, including Article 9. Where this is the case, consequently, DIHR would recommend HRC to revise the wording from “should” to “shall”.

In the third and fourth sentence the rights for relatives and family members of the detained to achieve information about the detention and the right to access are described briefly and reference is made to the Committee on the Rights of the Child, General Comment No. 10, regarding the rights of children deprived from liberty.

However, DIHR would propose to HRC to elaborate further on the intersection between Article 9 and Articles 23 and 24 e.g. the rights of the relatives of the detained, in particular children. Reference is made to the Committee on the Rights of the Child (2011), *Report and Recommendations of the day of general discussion on “children of incarcerated parents”* e.g. recommendation 44 regarding information sharing.

Para. 59

It is stated that Article 10 “complements” Article 9 and that the right to personal security in Article 9(1) is relevant to the treatment of both detained and non-detained persons. However, DIHR request HRC to elaborate in further detail on when the conditions of detention under Article 10 become relevant under Article 9. Please also see remarks regarding para. 14.

In the fourth sentence it is stated that certain conditions of detention (such as denial of access to counsel and family) “may” result in procedural violations of Article 9(3) and (4). However, DIHR would kindly ask HRC to clarify under which conditions access to family can be denied and accordingly the compatibility with Articles 23 and 24.

Regarding conditions of detention, DIHR would also propose that HRC would make a reference to the obligation of States to ensure that people with disabilities deprived of their liberty are entitled to “provision of reasonable accommodation” under the UN Convention on the Rights of Persons with Disabilities.

Para. 63

Regarding the application of international humanitarian law and the influence on the interpretation of Article 9, DIHR would recommend HRC to keep the wording in line with para. 15. Consequently, if HRC maintains in para. 15 that the interpretation of Article 9 is influenced by international humanitarian law only in times of international armed conflicts between States – *not non-international* armed conflict within a State – para. 63 should be consistent with that. If that is the case DIHR would recommend HRC to revise the second sentence into:

“While rules of international humanitarian law may be relevant in times of international armed conflict for the purposes of the interpretation of Article 9...”

Continued dialogue

Please do not hesitate to contact DIHR if we can in any way be of assistance to HRC.

Kind regards,

Christoffer Badse

HEAD OF MONITORING