

# **UN HUMAN RIGHTS COMMITTEE**

**OBSERVATIONS ON THE  
REVISED DRAFT GENERAL  
COMMENT 35 ON ARTICLE 9  
OF THE INTERNATIONAL  
COVENANT ON CIVIL AND  
POLITICAL RIGHTS**

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# INTRODUCTION

Following the Human Rights Committee's call for comments on the revised draft General Comment 35 on article 9 of the International Covenant on Civil and Political Rights (hereafter "*revised draft*"), Amnesty International welcomes the opportunity to provide the following observations. These comments supplement Amnesty International's initial remarks submitted prior to the general day of discussion held in October 2012.<sup>1</sup> Rather than commenting on every aspect of the *revised draft*, the present submission aims to inform the current process by providing Amnesty International's main observations and recommendations. It follows, to the maximum extent possible, the order of the *revised draft* and therefore should not be seen as implying an order of prioritisation of the issues commented on. In addition to the Human Rights Committee's practice, which forms the primary source of interpretation of article 9 of the International Covenant on Civil and Political Rights (ICCPR), this document also draws on pertinent international and regional standards, rulings, decisions and observations with a view to providing supplemental authority for the Committee's consideration.

## I. FREEDOM OF MOVEMENT (PARAGRAPH 5)

While the relationship between deprivation of liberty and freedom of movement is referred to in paragraphs 5 and 60 of the *revised draft*, **Amnesty International recommends that further guidance be provided to allow for a better assessment of situations where movements are restrained.**

For instance, while emphasizing the need for a case-by-case approach, the European Court of Human Rights has in this regard stated that "the starting-point must be [the person's] concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question. The difference between deprivation of and restriction upon liberty is one of degree or intensity, and not of nature or substance".<sup>2</sup>

## II. THE RIGHT TO SECURITY OF PERSON (PARAGRAPHS 3, 7, 34, 55 TO 59)

Amnesty International welcomes the emphasis given in the *revised draft* to the importance of the right to security of person, including the fact that this right entails protection of both physical and mental integrity and is not restricted to cases occurring during deprivation of liberty.<sup>3</sup> **Amnesty**

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<sup>1</sup> See Amnesty International, *The Human Rights Committee's New General Comment on the Right to Liberty and Security of Person, Amnesty International's Preliminary Observations*, AI Index: IOR 40/021/2012, September 2012, available at <https://www.amnesty.org/en/library/info/IO40/021/2012/en>

<sup>2</sup> See, *inter alia*, European Court of Human Rights (Grand Chamber), *Austin and Others v United Kingdom*, Application No. 39692/09, 40713/09 and 41008/09, para 57.

<sup>3</sup> *Inter alia*, Human Rights Committee, *Marcellena and Gumanoy v Philippines*, Communication No. 1560/2007, paras 7.6-7.7; Human Rights Committee, *Gunaratna v Sri Lanka*, Communication No. 1432/2005, para. 8.4; Human Rights Committee, *Njaru v Cameroon*, Communication No. 1353/2005, para. 6.3; Human Rights Committee, *Rajapakse v Sri Lanka*, Communication No. 1250/2004 para. 9.7; Human Rights Committee, *Jimenez*

**International recommends that the *revised draft* further elaborates on the scope and content of this right, preferably under a separate section to reflect its distinct character.**

Paragraph 7 of the *revised draft* underlines the obligation of states parties to take “prospective measures to prevent future injury and retrospective measures such as enforcement of criminal laws in response to past injury”. This obligation to prevent and remedy violations to the right to security of person would benefit from further substantiation. In particular, the Human Rights Committee may want to recall that similarly to a failure to investigate allegations of violations to the right to security of person and to a failure to bring perpetrators to justice, which could in and of themselves give rise to a separate breach of the Covenant,<sup>4</sup> a failure to take effective measures, including by adopting the necessary laws and practices, to prevent violations to the right to security of person, could be considered as giving rise to a separate breach of the Covenant.

In addition, given the clear similarities and overlap between aspects of the right to security of person and the right to freedom from torture and other cruel, inhuman or degrading treatment or punishment, both rights being aimed at protecting physical and mental integrity, **Amnesty International recommends that, in addition to the references mentioned in paragraphs 34 and 56 to 58, the Human Rights Committee makes a general clarification, possibly in paragraph 7, according to which measures necessary to ensure respect for the right to freedom from torture and other ill-treatment are likewise applicable and necessary to ensure respect for the right to security of person.**

The Human Rights Committee may also want to emphasize in paragraph 7 the similarities and overlap between enforced disappearance and violations to the right to security of person applied to situations of deprivation of liberty. In particular, effective safeguards to prevent enforced disappearance must be considered as being likewise applicable and necessary to prevent violations to the right to security of person.

The *General Comment* should also further elaborate on areas such as the unnecessary or excessive use of force by officials against protestors and members of the public at large, in particular in situations not involving control over the victim, as well as intimidation of human rights defenders, journalists, whistle-blowers, and witnesses.

It should also address the harmful enforcement of laws that violate persons’ sexual and reproductive rights, as well as the need to ensure that members of groups such as sex workers and runaway youths can report acts of violence against them without fear of criminalisation or acts of violence, extortion, and similar treatment at the hands of authorities.

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*Vaca v Colombia*, Communication No.859/1999, para. 7.1; Human Rights Committee, *Chongwe v Zambia*, Communication No. 821/1998, para. 5.3; Human Rights Committee, *Dias v Angola*, Communication No. 711/1996, para. 8.3; Human Rights Committee, *Leehong v Jamaica*, Communication No. 613/1995, para. 9.3; Human Rights Committee, *Tshishimbi v Zaire*, Communication No. 542/1993, para. 5.4; Human Rights Committee, *Bahamonde v Equatorial Guinea*, Communication No. 468/1991, para. 9.2; Human Rights Committee, *Rafael Mojica v Jamaica*, Communication No. 449/1994, para. 5.4; Human Rights Committee, *Bwalya v Zambia*, Communication No. 314/1988, para. 6.4; Human Rights Committee, *Delgado Paez v. Colombia*, Communication No. 195/1985, para. 5.5.

<sup>4</sup> Human Rights Committee, General Comment 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13, paras 15 and 18.

Finally, the *revised draft* mentions in paragraph 7 that “[s]tates parties must respond appropriately to patterns of violence against categories of victims”. Amnesty International respectfully submits in this regard that states parties should not only respond appropriately to “patterns of violence”, but must also adequately prevent and remedy violations not yet reaching such a relatively high threshold.<sup>5</sup> It would therefore be useful to clarify this point in order to avoid potential misunderstanding. In addition, the *revised draft* could provide further analysis of states parties’ response to different types of harm by non-state actors,<sup>6</sup> including intimidation, harassment and sexual abuse, bullying through texts and social media, threats and violence against domestic workers, and other types already included in paragraph 7.

### III. HORIZONTAL EFFECT OF THE RIGHT TO LIBERTY AND SECURITY OF PERSON (PARAGRAPHS 7, 8, 61)

Amnesty International welcomes the Human Rights Committee’s views on the horizontal effect of the right to liberty and security of person. **The organization recommends in this regard that additional clarifications are provided in order to ensure greater understanding of its scope.**

In particular, the types of measures states must take to ensure protection against violations of the right to liberty and security of person under their jurisdiction by third parties, including activities by other states, could be more comprehensively listed. Following the Human Rights Committee’s General Comment 31, this section of the *revised draft* (paragraphs 7 and 8) could be supplemented by a general remark asserting that a failure to ensure protection of the right to liberty and security of person could take the form of “permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused”.<sup>7</sup>

Also, while paragraph 7 of the *revised draft* emphasises the obligation of states parties to take appropriate measures to protect individuals from acts by “governmental or private actors”, Amnesty International would recommend clarifying that the horizontal effect of the right to security of person would likewise cover “other third parties” such as foreign officials or entities.<sup>8</sup> This clarification would also be in line with statements made in paragraph 8 with regard to the right to liberty of person. Paragraph 61 of the *revised draft* should in this regard be amended to reflect the statement made in the first sentence of paragraph 8, i.e. by adding an explicit reference to any third parties.

### IV. PERIODIC REVIEW/RE-EVALUATION OF DETENTION (PARAGRAPH 12 *IN FINE*)

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<sup>5</sup> Human Rights Committee, General Comment 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13, para. 8.

<sup>6</sup> See, *inter alia*, Human Rights Committee, *Jayawardena v Sri Lanka*, Communication No. 916/2000, paras 7.2-7.3; Human Rights Committee, *Jimenez Vaca v Colombia*, Communication No. 859/1999, paras 3.4 and 7.2.

<sup>7</sup> Human Rights Committee, General Comment 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13, para. 8.

<sup>8</sup> See Human Rights Committee, General Comment 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13, para. 8; Committee against Torture, General Comment 2, *Implementation of article 2 by States parties*, CAT/C/GC/2, para. 18.

Amnesty International welcomes and supports the Human Rights Committee's view according to which "the decision to keep a person in detention is arbitrary if it is not subject to periodic re-evaluation of the justification for continuing the detention" (paragraph 12). **Amnesty International recommends that the Committee make explicit the fact that such requirement for periodic re-evaluation applies to all types of deprivation of liberty, including outside the criminal justice system** (as illustrated by examples in paragraphs 15, 18 and 19).

As regards deprivation of liberty following criminal convictions, specific mention could be made about the need to ensure consideration for parole or other forms of early release, which should occur particularly at frequent intervals in the case of juvenile offenders. The *revised draft* currently makes a reference to such reviews in paragraph 20 in relation to cases where these are foreseen by domestic law. However, re-evaluation of the justification for continuing a prisoner's detention, including in light of the general objective of social rehabilitation, should likewise be mentioned as an essential aspect of article 9 (1) ICCPR *per se*, including with regard to life sentence regimes.<sup>9</sup>

## V. PRINCIPLE OF LEGALITY APPLIED TO THE RIGHT TO LIBERTY OF PERSON (PARAGRAPHS 10, 11, 14, 22, 23)

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<sup>9</sup> Taking into account, *inter alia*, article 10(3) ICCPR, the Human Rights Committee's General Comment 21 and the UN Standard Minimum Rules for the Treatment of Prisoners while analysing life sentence regimes under article 3 ECHR, the European Court of Human Rights has recently stated the following: "111. [...] What may be the primary justification for detention at the start of the sentence may not be so after a lengthy period into the service of the sentence. It is only by carrying out a review of the justification for continued detention at an appropriate point in the sentence that these factors or shifts can be properly evaluated", "112. Moreover, if such a prisoner is incarcerated without any prospect of release and without the possibility of having his life sentence reviewed, there is the risk that he can never atone for his offence: whatever the prisoner does in prison, however exceptional his progress towards rehabilitation, his punishment remains fixed and unreviewable. If anything, the punishment becomes greater with time: the longer the prisoner lives, the longer his sentence. Thus, even when a whole life sentence is condign punishment at the time of its imposition, with the passage of time it becomes [...] a poor guarantee of just and proportionate punishment [...]"; "114. [...] there is also now clear support in European and international law for the principle that all prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved", "119. For the foregoing reasons, the Court considers that, in the context of a life sentence, Article 3 must be interpreted as requiring reducibility of the sentence, in the sense of a review which allows the domestic authorities to consider whether any changes in the life prisoner are so significant, and such progress towards rehabilitation has been made in the course of the sentence, as to mean that continued detention can no longer be justified on legitimate penological grounds", "122. Although the requisite review is a prospective event necessarily subsequent to the passing of the sentence, a whole life prisoner should not be obliged to wait and serve an indeterminate number of years of his sentence before he can raise the complaint that the legal conditions attaching to his sentence fail to comply with the requirements of Article 3 in this regard. This would be contrary both to legal certainty and to the general principles on victim status within the meaning of that term in Article 34 of the Convention. Furthermore, in cases where the sentence, on imposition, is irreducible under domestic law, it would be capricious to expect the prisoner to work towards his own rehabilitation without knowing whether, at an unspecified, future date, a mechanism might be introduced which would allow him, on the basis of that rehabilitation, to be considered for release. A whole life prisoner is entitled to know, at the outset of his sentence, what he must do to be considered for release and under what conditions, including when a review of his sentence will take place or may be sought. Consequently, where domestic law does not provide any mechanism or possibility for review of a whole life sentence, the incompatibility with Article 3 on this ground already arises at the moment of the imposition of the whole life sentence and not at a later stage of incarceration", European Court of Human Rights (Grand Chamber), *Vinter and Others v United Kingdom*, Application No. 66069/09, 130/10, 3896/10, paragraphs 111, 112, 114, 119, 122. Similar considerations would be relevant to article 9 ICCPR, including given its close relationship with article 7 ICCPR.

While noting with appreciation the Human Rights Committee's reference to requirements resulting from the principle of legality, in particular in paragraph 22, **Amnesty International recommends that the *General Comment 35* contains a clear statement underlining the importance of this principle to the right to liberty of person.**

The principle of legality, including legal certainty and predictability, demands among others for the law to have a certain level of precision, as recalled in the *revised draft* with regard to substantive grounds for arrest or detention. A similar requirement will apply to procedural aspects of the deprivation of liberty and this should be made clear in paragraph 22. Furthermore, the *revised draft* should make explicit that this requirement is of particular importance when one looks at the lawfulness of what constitutes a major restriction to such an essential aspect of human dignity as the right to liberty of person.<sup>30</sup> It should set the threshold necessary for this requirement to be fulfilled at a sufficiently high level to ensure domestic law provides an adequate basis justifying the initial and continuing deprivation of liberty.<sup>31</sup> Moreover, even though the "Covenant does not provide an enumeration of the permissible reasons for depriving a person of liberty" (paragraph 14), the *revised draft* should mention that not only must all possible restrictions on liberty of person be prescribed clearly in the law, but such restrictions must be narrowly interpreted.<sup>32</sup>

## VI. SECURITY DETENTION (PARAGRAPH 15)

Amnesty International welcomes the recognition by the Human Rights Committee in paragraph 15 of the *revised draft* that: "To the extent that States parties impose security detention (sometimes known as administrative detention or internment), not in contemplation of prosecution on a criminal charge, the Committee considers that such detention presents severe risks of arbitrary deprivation of liberty". Amnesty International has long held the view that such detention almost invariably leads to arbitrary deprivation of liberty. And for this reason Amnesty International has a long-standing opposition to administrative detention on security grounds. **Amnesty International recommends that paragraph 15 of the *revised draft* is amended with a view to reject the use of administrative detention on security grounds.**

Anyone deprived of their liberty by the state should promptly be charged with a cognizable criminal offence<sup>33</sup> and tried within a reasonable period, unless action is being taken to extradite them within

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<sup>30</sup> Article 15(1) ICCPR, which contains the principle *nullum crimen sine lege* and is directly relevant to the interpretation of article 9(1) ICCPR, similarly demands a sufficient level of legal certainty; see, *inter alia*, Human Rights Committee, *Concluding observations on Ethiopia*, CCPR/C/ETH/CO/1, para. 15. This requirement was recalled in similar terms by the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; see UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, *Report to the Commission on Human Rights*, E/CN.4/2006/98, para. 46.

<sup>31</sup> See, *inter alia*, European Court of Human Rights (Grand Chamber), *Medvedyev and others v. France*, Application No. 3394/03, para. 80.

<sup>32</sup> See, *inter alia*, European Court of Human Rights (Grand Chamber), *Medvedyev and others v. France*, Application No. 3394/03, para. 78; European Court of Human Rights, *Kurt v Turkey*, Application No. 15/1997/799/1002, para. 122, and European Court of Human Rights, *Wloch v Poland*, Application No. 27785/95, paras 108-109.

<sup>33</sup> The term "cognizable criminal offence" is used by Amnesty International to mean that the offence is a crime under national law, is defined with sufficient precision as to meet the principle of legality and legal certainty and does not otherwise arbitrarily infringe the exercise of human rights.



a reasonable period. The procedures, rules of evidence and burden and standard of proof in the criminal justice system minimize the risk of innocent individuals being deprived of their liberty for prolonged periods. It is unacceptable for governments to circumvent these safeguards, and it is a serious violation of human rights for states to detain people whom they do not intend to prosecute (or extradite). The requirement that the government use the institutions and procedures of ordinary criminal justice, including the presumption of innocence, whenever it seeks to deprive a person of liberty based on allegations of essentially criminal conduct is a fundamental bulwark of the right to liberty and security of person, and an underlying principle of international human rights law.

Amnesty International's opposition to administrative detention also stems from pragmatic concerns. The organization is unaware of any regime of administrative detention on security grounds that in practice has not proved fertile ground for a range of serious human rights violations, including arbitrary detention. In our long and global experience of researching and documenting human rights violations and abuses in countries around the world, creating a system of detention without trial, regardless of substitute safeguards, results in the long-term imprisonment of individuals who in fact have not planned or perpetrated acts of violence or other serious crimes.

In case the Human Rights Committee decides to stop short of opposing administrative detention itself, it could nevertheless strengthen the protection against arbitrary deprivation of liberty in such settings by affirming in paragraph 15 that a state cannot administratively detain on security grounds except following proper derogation in response to a genuine public emergency that threatens the life of the nation. In this regard, when referring to "the most exceptional circumstances" in the fourth sentence of paragraph 15, the *revised draft* should establish a more explicit link with the requirements contained in article 4 ICCPR. In doing so, it could refer to paragraph 3 of the Committee's General Comment 29 which reminds states that: "The Covenant requires that even during an armed conflict measures derogating from the Covenant are allowed only if and to the extent that the situation constitutes a threat to the life of the nation".<sup>14</sup> This remark has proved particularly apt in light of the resort to prolonged administrative detention by some states involved in extra-territorial non-international armed conflicts, despite the fact that such participation has had limited perceptible impact on life in the territory of these states.

Furthermore, the end of paragraph 15 should make clear that the list of guarantees mentioned is not exhaustive. In addition, including given the heightened risk of arbitrary detention, such guarantees should not be qualified. The terms "preferably" and "at least the essence" should therefore be deleted from the last sentence of paragraph 15. The heightened risk for the security of person similarly prescribes that effective legal and procedural safeguards, including to prevent torture and other ill-treatment, must be complied with.

## VII. WHISTLE-BLOWER PROTECTION AND PRESS FREEDOM (PARAGRAPH 17)

In light of paragraph 17 of the *revised draft*, where the Human Rights Committee recalls that arrest

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<sup>14</sup> Human Rights Committee, General Comment 29, *States of emergency (Article 4)*, CCPR/C/21/Rev.1/Add.11, paras 3.

or detention as punishment for the legitimate exercise of the right to freedom of opinion and expression is arbitrary, **Amnesty International recommends that the revised draft elaborate on the need for strong guarantees in domestic law and practice against arrest, detention and prosecution of persons for disclosing public interest information, including on human rights violations.** Whistle-blowers, human rights defenders and journalists, and by extension the public's right to know, must be protected.<sup>15</sup>

As the Human Rights Committee recalled in its General Comment 34, "[f]reedom of expression is a necessary condition for the realization of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights".<sup>16</sup> Freedom of expression includes the right to seek, receive and impart information of public interest, such as on human rights violations, and the public's rights to know and to have access to information held by public bodies.<sup>17</sup> In this regard, the Human Rights Committee has made clear that it is not compatible with article 19(3) ICCPR to invoke "treason laws and similar provisions relating to national security, whether described as official secrets or sedition laws or otherwise [...] to suppress or withhold from the public information of legitimate public interest that does not harm national security or to prosecute journalists, researchers, environmental activists, human rights defenders, or others, for having disseminated such information".<sup>18</sup>

Instead of putting in place effective measures to protect against attacks aimed at silencing those exercising their right to freedom of expression, states often subject whistle-blowers, human rights defenders and journalists to various forms of retaliation, including arrest, detention and prosecution, for disclosing information governments want to keep secret.<sup>19</sup> This includes

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<sup>15</sup> See, *inter alia*, Parliamentary Assembly of the Council of Europe, *National Security and Access to Information*, Resolution 1954(2013), paras 7, 8 and 9.7; Global Principles on National Security and the Right to Information ("*Tshwane Principles*"), June 2013, Parts VI to VIII, available at <http://www.opensocietyfoundations.org/sites/default/files/global-principles-national-security-10232013.pdf>. The *Tshwane Principles*, drafted by 22 organisations and academic centres in consultation with more than 500 experts from more than 70 countries, has notably gained the support of the Parliamentary Assembly of the Council of Europe, see Parliamentary Assembly of the Council of Europe, *National Security and Access to Information*, Resolution 1954(2013), paras 7 and 8, and Recommendation 2024(2013), para. 1.3 (calling on member states of the Council of Europe to take into account the *Tshwane Principles* in modernising their legislation and practice). See also Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, *Report to the General Assembly*, A/68/362, paras 106 to 108 (also expressing support for the *Tshwane Principles*, see para. 106); Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, *Report to the Human Rights Council*, A/HRC/23/40, para. 84.

<sup>16</sup> Human Rights Committee, *General Comment 34 on Article 19: Freedoms of opinion and expression*, CCPR/C/GC/34, para. 3.

<sup>17</sup> See Human Rights Committee, *General Comment 34 on Article 19: Freedoms of opinion and expression*, CCPR/C/GC/34, paras 11, 13, 18 and 19; Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, *Report to the General Assembly*, A/68/362, paras 87 to 95.

<sup>18</sup> Human Rights Committee, *General Comment 34 on Article 19: Freedoms of opinion and expression*, CCPR/C/GC/34, para. 30; see also Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, *Report to the General Assembly*, A/68/362, paras 99 and 100.

<sup>19</sup> See, *inter alia*, Human Rights Committee, *General Comment 34 on Article 19: Freedoms of opinion and expression*, CCPR/C/GC/34, para. 23.

information about human rights violations.<sup>20</sup>

## VIII. ARREST OR DETENTION ON DISCRIMINATORY GROUNDS (PARAGRAPH 17)

Arrest or detention contrary to the provisions of the Covenant proscribing discrimination always constitute arbitrary detention, **Amnesty International therefore recommends the deletion of the word “may” in the second sentence of paragraph 17.** Amnesty International notes in this regard that in the case mentioned in footnote 59 of the *revised draft* the Human Rights Committee concluded that the detention did not amount to arbitrary detention under article 9(1) ICCPR precisely because it did not find a violation of article 26 ICCPR. This case therefore cannot serve as a basis for asserting that arrest or detention on discriminatory grounds violating article 26 ICCPR is not necessarily arbitrary, as seemingly stated in the current wording of paragraph 17 of the *revised draft*.

## IX. DEPRIVATION OF LIBERTY RELATED TO SEXUAL AND REPRODUCTIVE CONDUCT (PARAGRAPH 17)

As noted in paragraph 17 of the *revised draft*, arbitrary deprivation of liberty includes arrest or detention as punishment for the legitimate exercise of rights, including the right to privacy, and also arrest or detention on discriminatory grounds. Persons exercising their sexual and reproductive rights, especially marginalized groups, are particularly vulnerable as this is an area in which conduct and decision-making are regulated through a range of criminal laws and other legal restrictions. These laws regulate and punish behaviours which do not live up to prevailing stereotypes and norms regarding sexual and reproductive conduct leading, in some cases, to arbitrary deprivation of liberty.

**Amnesty International recommends that the *revised draft* includes a reference to the arbitrary deprivation of liberty resulting from persons’ exercise of their sexual and reproductive rights, including a call for the repeal of domestic laws leading to such detentions.**

For instance, numerous countries worldwide criminalize same-sex consensual activity. Punishments for this activity range from fines, corporal punishment, lengthy imprisonment, and in a few countries, to the death penalty. These laws are contrary to the ICCPR,<sup>21</sup> and their enforcement, which results in detention and imprisonment on grounds of sexual orientation, leads to arbitrary deprivation of liberty.<sup>22</sup> The Human Rights Committee has called on states to abolish such laws

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<sup>20</sup> See, *inter alia*, Parliamentary Assembly of the Council of Europe, *National Security and access to information*, Resolution 1954(2013), paras 9.5 to 9.7; Global Principles on National Security and the Right to Information (“*Tshwane Principles*”), Principles 10 and 37; Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, *Report to the General Assembly*, A/68/362, paras 88, 91, 92, 106.

<sup>21</sup> See Human Rights Committee, *Toonen v. Australia*, Communication No. 499/1992, para. 8.7.

<sup>22</sup> See Working Group on Arbitrary Detention, Opinion No. 42/2008. See also, Human Rights Committee, *Concluding observations on the Islamic Republic of Iran*, CCPR/C/IRN/CO/3, para. 10; Working Group on Arbitrary Detention, *Report to the Human Rights Council*, A/HRC/16/47, at Annex para. III.8(e).

which violate the rights to privacy and non-discrimination.<sup>23</sup>

Also, in a number of countries, sexual activity, or any intimate relations outside marriage between a man and a woman, is treated as a serious crime and can carry severe penalties. Punishments range from lengthy prison sentences to flogging or, in a small number of states, death by stoning.<sup>24</sup> While these laws may be gender-neutral on their face, they are often disproportionately applied to women.<sup>25</sup> International human rights bodies, including the Human Rights Committee, have called for the repeal of such laws.<sup>26</sup>

Moreover, states around the world use a wide range of laws and policies to restrict or punish sex work. Criminalizing sex workers frequently denies them necessary health care and other services and can lead to a host of other human rights violations, including arbitrary detention.<sup>27</sup> The United Nations (UN) Committee on the Elimination of Discrimination against Women and the Special Rapporteur on the right of everyone to the highest attainable standard of physical and mental health have explicitly called for decriminalization of sex work.<sup>28</sup>

With regard to conduct related to pregnancy, the criminalization of abortion and the imprisonment of women for undergoing abortions deemed illegal under domestic law breach a wide range of human rights. The Human Rights Committee as well as other UN Treaty Bodies and Special Procedures have called for the removal of punitive measures for abortion.<sup>29</sup> The Human Rights Committee has also called on countries to suspend the prosecution of women for the offence of abortion, to release women who have been imprisoned for undergoing illegal abortions and to reform their abortion laws.<sup>30</sup>

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<sup>23</sup> See Human Rights Committee, *Concluding Observations on Chile*, CCPR/C/79/Add.104, para. 20; Human Rights Committee, *Concluding Observations on Cameroon*, CCPR/C/CMR/CO/4, para. 12. See also Special Rapporteur on the right of everyone to the highest attainable standard of physical and mental health, *Report to the Human Rights Council*, A/HRC/14/20, para. 76(a).

<sup>24</sup> See, *inter alia*, Amnesty International, *Death Sentences and Executions 2013*, AI Index: ACT/50/001/2014, March 2014, available at <http://www.amnesty.org/en/death-penalty>; Amnesty International Australia, *Save Indonesian Woman from Being Caned*, May 2014, available at <http://www.amnesty.org.au/action/action/34551/>

<sup>25</sup> See, *inter alia*, Human Rights Committee, *Concluding Observations on Indonesia*, CCPR/C/IDN/CO/1, para 15.

<sup>26</sup> See, *inter alia*, Human Rights Committee, *Concluding Observations on Indonesia*, CCPR/C/IDN/CO/1, para 15.

<sup>27</sup> See, *inter alia*, Amnesty International, *Stonewalled: Police Abuse and Misconduct against Lesbian, Gay, Bisexual and Transgender People in the United States*, AI Index: AMR/51/122/2005, September 2005, available at <http://www.amnesty.org/en/library/info/AMR51/122/2005>

<sup>28</sup> See Committee on the Elimination of Discrimination against Women, *Concluding Observation on Albania*, CEDAW/C/ALB/CO/3, para. 29; Special Rapporteur on the right of everyone to the highest attainable standard of physical and mental health, *Report to the Human Rights Council*, A/HRC/14/20, para. 76(b). See also Global Commission on HIV and the Law, *Risks, Rights and Health*, July 2012, p. 10, available at <http://www.hivlawcommission.org/index.php/report>

<sup>29</sup> See Human Rights Committee, *Concluding Observations on El Salvador*, CCPR/C/SLV/CO/6, para. 10; Human Rights Committee, *Concluding Observations on Costa Rica*, CCPR/C/79/Add.107, para. 11; Committee on the Rights of the Child, *Concluding Observations on Nicaragua*, CRC/C/NIC/CO/4, para. 59 (b); Special Rapporteur on the right of everyone to the highest attainable standard of physical and mental health, *Report to the General Assembly*, paras 21 and 65(h).

<sup>30</sup> See Human Rights Committee, *Concluding Observations on El Salvador*, CCPR/C/SLV/CO/6, para. 10; Human Rights Committee, *Concluding Observations on Moldova*, CCPR/C/MDA/CO/2, para. 17; see also European Court

Also, in some countries pregnant women have been imprisoned for various types of conduct, such as alcohol use or use of illicit drugs, during pregnancy. Prosecutions have occurred under laws relating to child abuse, attempted murder and manslaughter. Other jurisdictions have enacted legislation authorizing institutionalization of women who have used drugs during pregnancy.<sup>31</sup> The Special Rapporteur on the right of everyone to the highest attainable standard of physical and mental health has noted that the application of criminal law to regulate conduct during pregnancy is a disproportionate response and ineffective deterrent.<sup>32</sup> He has called for states to suspend the application of existing criminal laws to various forms of conduct during pregnancy,<sup>33</sup> suggesting that: "In order to realize public health outcomes effectively and simultaneously promote the right to health of women, states should not criminalize such conducts during pregnancy, but rather ensure the provision of health care goods, services and information that promote health throughout pregnancy and childbirth."<sup>34</sup>

Finally, numerous countries around the globe have adopted punitive HIV-specific laws, or have used general criminal or civil laws to prosecute or isolate people for HIV transmission, exposure or non-disclosure.<sup>35</sup> The UN International Guidelines on HIV/AIDS and Human Rights emphasize in this regard that: "The right to liberty and security of person should [...] never be arbitrarily interfered with, based merely on HIV status by using measures such as quarantine, detention in special colonies, or isolation. There is no public health justification for such deprivation of liberty. Indeed, it has been shown that public health interests are served by integrating people living with HIV within communities and benefiting from their participation in economic and public life".<sup>36</sup>

## X. DETENTION FOLLOWING UNFAIR TRIAL (PARAGRAPH 17)

Amnesty International notes that the *revised draft* currently states that "[i]mprisonment after a manifestly unfair trial" constitutes a form of arbitrary detention. While each and every single irregularity may not necessarily in itself render a trial as a whole unfair, imprisonment following an

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of Human Rights, *P and S v. Poland*, Application No. 57375/08, paras 144 to 149 (finding a violation of the right to liberty for separating a pregnant teenage rape victim from her mother and detaining her in a juvenile facility, on alleged protective grounds, because she and her mother had petitioned for a legal abortion).

<sup>31</sup> See Special Rapporteur on the right of everyone to the highest attainable standard of physical and mental health, *Report to the General Assembly*, A/66/254, paras 38-39.

<sup>32</sup> See Special Rapporteur on the right of everyone to the highest attainable standard of physical and mental health, *Report to the General Assembly*, A/66/254, para. 42.

<sup>33</sup> See Special Rapporteur on the right of everyone to the highest attainable standard of physical and mental health, *Report to the General Assembly*, A/66/254, para. 65(n).

<sup>34</sup> See Special Rapporteur on the right of everyone to the highest attainable standard of physical and mental health, *Report to the General Assembly*, A/66/254, para. 42.

<sup>35</sup> See Global Commission on HIV and the Law, *Risks, Rights and Health*, July 2012. See also Special Rapporteur on the right of everyone to the highest attainable standard of physical and mental health, *Report to the Human Rights Council*, A/HRC/14/20, para. 76(c).

<sup>36</sup> Office of the UN High Commissioner for Human Rights and UNAIDS, *International Guidelines on HIV/AIDS and Human Rights*, para. 133, p. 95, available at <http://www.ohchr.org/EN/Issues/HIV/Pages/InternationalGuidelines.aspx>

unfair trial<sup>37</sup> is necessarily arbitrary. Amnesty International therefore recommends the deletion of the term “manifestly” in the last sentence of paragraph 17.

## XI. DETENTION RELATED TO IMMIGRATION CONTROL (PARAGRAPH 18)

Amnesty International recommends that the *revised draft* clarifies that recognized refugees and migrants with a regular status should never have their rights to liberty or freedom of movement restricted for immigration purposes.

Everyone, including all migrants and asylum-seekers, regardless of legal status, has the right to liberty and the right to freedom of movement, including protection from arbitrary arrest and detention.

There should be a presumption, established by law, against detention for the purposes of immigration control. Alternative non-custodial measures should always be considered first and given preference before resorting to detention.<sup>38</sup> Any restrictions on the rights to liberty or to freedom of movement for immigration control purposes should be considered only to prevent irregular migrants or asylum-seekers from absconding, to verify their identity, or ensure their compliance with a removal order. Detention of irregular migrants and asylum-seekers will therefore only be lawful when the authorities can demonstrate in each individual case that alternatives will not be effective, and that it is necessary and proportionate to achieve one of these three objectives.

Amnesty International recommends that the *revised draft* makes clear that both irregular migrants and asylum-seekers must benefit from protection against unlawful and arbitrary deprivation of liberty.

Amnesty International also recommends that the *revised draft* explicitly mention that **alternative non-custodial measures must always be considered first and given preference before resorting to detention**. In particular, it may mention that in considering alternatives to detention states parties must take full account of individual circumstances, including with regard to vulnerable groups such as children, pregnant women, victims of trafficking, torture or other ill-treatment, persons with disabilities, the elderly, or persons with serious medical conditions. It may also specify cases where persons should never be detained. Detention of vulnerable groups could form a separate section of the *General Comment*.

Amnesty International finally recommends the deletion of the terms “danger of crimes against others, or risk of acts against national security” in the third sentence and of the term “indefinite” in the last sentence of paragraph 18.

## XII. SAFEGUARDS PRESCRIBED BY LAW (PARAGRAPH 23)

Amnesty International recommends that paragraph 23 of the *revised draft* is amended to make clear that compliance with article 9 ICCPR demands that effective legal and procedural

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<sup>37</sup> See, *inter alia*, Amnesty International, *Fair Trial Manual*, Second Edition, AI Index: POL 30/002/2014, April 2014, available at <http://www.amnesty.org/en/library/info/POL30/002/2014/en>

<sup>38</sup> See, *inter alia*, Amnesty International, *Irregular Migrants and Asylum-Seekers: Alternatives to Detention*, AI Index: POL 33/001/2009, April 2009, available at <http://www.amnesty.org/en/library/info/POL33/001/2009/en>

**safeguards must be provided in domestic law, and not only that should these safeguards, including but not limited to the ones mentioned in this paragraph, exist in domestic law they should be respected.** The current drafting of paragraph 23 may indeed lead to misunderstanding in this regard.

These and other safeguards are essential for ensuring that the right to liberty and security of person is upheld. Likewise, they are fundamental measures necessary to prevent enforced disappearance, torture and other forms of ill-treatment.

**Amnesty International recommends also that the last sentence of paragraph 23 should be either clarified or deleted in order to avoid confusion.** Alternatively it should read "such or similar issues".

### **XIII. PROMPT JUDICIAL REVIEW (PARAGRAPHS 32, 34, 35)**

As mentioned in other parts of the *revised draft* (paragraphs 15 and 19), prompt *ex officio* judicial review of the legality of detention should not be limited to detention ordered within the criminal justice system. Indeed, since this mechanism is essential to prevent and/or cease unlawful and arbitrary detention, torture and other forms of ill-treatment, enforced disappearance, and violations to the right to security of person (explicitly recalled in paragraph 34), prompt and regular judicial review of legality of detention should take place in all types of detention.

In addition, similar to the presumption against detention (see third sentence of paragraph 38 of the *revised draft*), although it is explicitly mentioned only in article 9(3) ICCPR the requirement for a prompt *ex officio* judicial review of the legality of detention results from the right to liberty and security of person under article 9(1), including the prohibition of arbitrary detention.

**Amnesty International therefore recommends the insertion of an explicit statement recalling that prompt *ex officio* judicial review of the legality of and of the treatment in detention must take place in all types of detention.**

**Amnesty International also recommends the deletion of the terms "in principle" at the end of paragraph 34.** Access to and presence of a lawyer of choice during the hearing is indeed critical to ensure the effectiveness of this judicial control mechanism.

### **XIV. SAFEGUARDS AND GUARANTEES IN DETENTION REVIEW PROCEEDINGS (PARAGRAPHS 34, 46, 61)**

While paragraphs 34 and 46 mention the need for access to lawyers, **Amnesty International recommends that more substantial reference is made to the multiple safeguards and procedural guarantees that are required for the judicial control mechanisms of the legality of detention to be effective.**

Judicial control mechanisms, including those explicitly required by articles 9(3) and 9(4) ICCPR, are essential to ensure compliance with Covenant rights. In particular, they are equally fundamental to protect against unlawful and arbitrary detention, enforced disappearance, torture and other forms of ill-treatment, and violations of the right to security of person.<sup>39</sup>

For the protection provided by these mechanisms to be meaningful, states have an obligation to ensure that they are accessible and effective.<sup>40</sup> Therefore, even though they are not explicitly mentioned in the text of article 9 ICCPR, numerous safeguards and procedural guarantees must be put in place for a state party to be considered to be complying with the requirements of article 9 ICCPR. In this regard, in addition to the safeguards against violations to article 9(1) ICCPR,<sup>41</sup> guarantees provided by article 14 ICCPR are of primary importance to make these judicial control mechanisms accessible and effective.<sup>42</sup> **Hence, Amnesty International recommends that the revised draft makes clear that in addition to access to a lawyer from the outset<sup>43</sup> and during all proceedings,<sup>44</sup> fundamental guarantees such as the principle of equality of arms,<sup>45</sup> the provision of adequate time and facilities for the preparation of the defence,<sup>46</sup> proper access to**

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<sup>39</sup> See, *inter alia*, Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, *Report to the Commission on Human Rights*, E/CN.4/2004/56, para. 39. With regard to mechanisms similar to the ones detailed at article 9(3) and 9(4) ICCPR, see, *inter alia*, European Court of Human Rights, *Kurt v Turkey*, Application No. 15/1997/799/1002, paras 123-124; European Court of Human Rights (Grand Chamber), *Medvedyev and others v. France*, Application No. 3394/03, para. 118; Inter-American Court of Human Rights, *Habeas corpus in emergency situations*, Advisory Opinion OC-8/87, paras 35 and 36.

<sup>40</sup> Human Rights Committee, General Comment 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13, para. 15.

<sup>41</sup> The issuance of arrest warrants by the competent authority, provisions clearly indicating the authorities authorized to order deprivation of liberty, notification of rights, the establishment of detailed and accessible records of detention, access to lawyers from the outset of deprivation of liberty and during all proceedings, such as interrogations by the police and hearings under article 9(3) and 9(4) ICCPR, the presence of the detainee at the hearings under 9(3) and 9(4) ICCPR, notification of arrest, detention and transfers to a third party and independent monitoring of all places of detention all constitute fundamental safeguards essential to prevent violations to article 9 ICCPR, as well as to determine whether such a violation has occurred.

<sup>42</sup> See, *inter alia*, Human Rights Committee, *Concluding observations on India*, CCPR/C/79/Add. 81, para. 24; Inter-American Court of Human Rights, *Judicial Guarantees in States of Emergency*, Advisory Opinion OC-9/87, paras 24 and 30.

<sup>43</sup> See, *inter alia*, European Court of Human Rights, *Dayanan v Turkey*, Application No. 7377/03, paras 31 to 33; European Court of Human Rights (Grand Chamber), *Salduz v Turkey*, Application No. 36391/02, para. 55; European Court of Human Rights, *Brusco v France*, Application No. 1466/07, paras 45 and 54.

<sup>44</sup> See, *inter alia*, Inter-American Court of Human Rights, *Cabrera Garcia and Montiel Flores v Mexico*, paras 154-155; Council of Europe, *Recommendation of the Committee of Ministers to member states on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse*, Rec(2006)13, para. 25.

<sup>45</sup> While analysing the right to challenge the lawfulness of detention (article 5(4) ECHR), the European Court of Human Rights has emphasised that "[a] court examining an appeal against detention must provide guarantees of a judicial procedure. The proceedings must be adversarial and must always ensure 'equality of arms' between the parties, the prosecutor and the detained person", European Court of Human Rights, *Garcia Alva v Germany*, Application No. 23541/94, para. 39; European Court of Human Rights, *Fodale v Italy*, Application No. 70148/01, paras 41 and 42.

<sup>46</sup> See, *inter alia*, European Court of Human Rights, *Samoila and Cionca v Romania*, Application No. 33065/03, paras 74 to 81; European Court of Human Rights, *Fodale v Italy*, Application No. 70148/01, paras 43 to 45.



evidence<sup>47</sup> and guarantees against self-incrimination<sup>48</sup> are an integral part of the obligation under article 9 ICCPR to control the legality of detention, including by means of the mechanisms under articles 9(3) and 9(4) ICCPR.<sup>49</sup>

## **XV. ENFORCED DISAPPEARANCE, SECRET, UNACKNOWLEDGED OR UNOFFICIAL DETENTION, PROLONGED INCOMMUNICADO DETENTION (PARAGRAPHS 17, 35, 56)**

Enforced disappearance, detention in secret, unacknowledged or unofficial locations, and prolonged incommunicado detention constitute among the most straightforward cases of arbitrary detention.<sup>50</sup> In addition, while arbitrary detention is conducive to violations of the right to security

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<sup>47</sup> See, *inter alia*, European Court of Human Rights, *Garcia Alva v Germany*, Application No. 23541/94, para. 39 (“Equality of arms is not ensured if counsel is denied access to those documents in the investigation file which are essential in order effectively to challenge the lawfulness of his client’s detention”). See also, *inter alia*, UN Human Rights Council, *Resolution on torture and other cruel, inhuman or degrading treatment or punishment: the role and responsibility of judges, prosecutors and lawyers*, A/HRC/RES/13/19, para. 6; UN Basic Principles on the Role of Lawyers, para. 21; Special Rapporteur on the independence of judges and lawyers, *Report to the UN General Assembly*, A/64/181, para. 109 (on access at the investigative stage).

<sup>48</sup> See, *inter alia*, Human Rights Committee, *Concluding observations on Algeria*, CCPR/C/DZA/CO/3, para. 18; Human Rights Committee, *Concluding observations on The Netherlands*, CCPR/C/NLD/CO/4, para. 11; Human Rights Committee, *Concluding observations on France*, CCPR/C/FRA/CO/4, para. 14; Human Rights Committee, *Concluding observations on Japan*, CCPR/C/JPN/CO/5, para. 19. See also, *inter alia*, UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UNGA resolution 43/173, Principle 27; Committee against Torture, *Concluding observations on Canada*, CAT/C/CAN/CO/6, para. 17 (on intelligence information obtained by torture); European Court of Human Rights, *Brusco v France*, Application No. 1466/07, paras 44-45, 50 and 54-55.

<sup>49</sup> See, *inter alia*, Working Group on Arbitrary Detention, *Lenard Odillo, Eliya Kadzombe, Jasten Kameta Chinseche and Madison Namithanje v Malawi*, Opinion No. 15/2012, paras 52 and 56; European Court of Human Rights, *Garcia Alva v Germany*, Application No. 23541/94, para. 39; European Court of Human Rights, *Osvath v Hungary*, Application No. 20723/02, paras 18-19; European Court of Human Rights, *Fodale v Italy*, Application No. 70148/01, paras 41-42.

<sup>50</sup> See, *inter alia*, Human Rights Committee, *Chihoub v Algeria*, Communication No. 1811/2008, para. 8.7; Human Rights Committee, *Aboufaied v Libya*, Communication No. 1782/2008, para. 7.6; Human Rights Committee, *Berzig v Algeria*, Communication No. 1781/2008, para. 8.7; Human Rights Committee, *Salem Saad Ali Bashasha v The Libyan Arab Jamahiriya*, Communication No. 1776/2008, para. 7.6; Human Rights Committee, *Medjnoune v Algeria*, Communication No. 1297/2004, para. 8.5. With regard to incommunicado detention, see also, *inter alia*, Human Rights Committee, *Concluding observations on Spain*, CCPR/C/ESP/CO/5, para. 14 (up to 13 days); Human Rights Committee, *Concluding observations on Chile*, CCPR/C/CHL/CO/5, para. 11 (up to 10 days); Human Rights Committee, *Concluding observations on Syria*, CCPR/CO/84/SYR, para. 9; Human Rights Committee, General Comment 20, *Prohibition of torture and cruel treatment or punishment (Article 7)*, para. 11. With regard to secret detention, see also, *inter alia*, article 17(1) of the International Convention for the Protection of All Persons from Enforced Disappearance; Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Working Group on Arbitrary Detention, Working Group on Enforced or Involuntary Disappearances, *Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism*, A/HRC/13/42, paras 18 to 23 and 292(a); Working Group on Arbitrary Detention, *Ebrima Manneh v The Gambia*, Opinion No. 14/2009, para. 19. With regard to unacknowledged detention, see, *inter alia*, Human Rights Committee, General Comment 29, *States of emergency (Article 4)*, CCPR/C/21/Rev.1/Add.11, paras 13(b); European Court of Human Rights, *Kurt v Turkey*, Application No. 15/1997/799/1002, para. 124; European Court of Human Rights, *Chitayev and Chitayev v Russia*, Application No 59334/00, paras 172 and 173.

of person under article 9(1) ICCPR and of article 7 ICCPR, some forms of arbitrary detention amount *per se* to a violation of the right to security of person and the prohibition of torture and other forms of ill-treatment.<sup>51</sup>

Given that they reflect a particularly flagrant negation of the rights under article 9 ICCPR, **Amnesty International recommends that the *revised draft* elaborates further, preferably in a separate section, on the need to end enforced disappearance, secret, unacknowledged or unofficial detention, and prolonged incommunicado detention.**

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With regard to detention in unofficial places of detention, see, *inter alia*, UN Declaration on the Protection of all Persons from Enforced Disappearance, UNGA resolution 47/133, article 10(1); Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Working Group on Arbitrary Detention, Working Group on Enforced or Involuntary Disappearances, *Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism*, A/HRC/13/42, para. 292(a). On arbitrary detention and the CIA rendition programme, see, *inter alia*, Working Group on Arbitrary Detention, *Ibn al-Shaykh al-Libi and 25 other persons v the United States of America*, Opinion No. 29/2006, paras 21-22.

<sup>51</sup> On enforced disappearance, see, *inter alia*, Human Rights Committee, General Comment 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13, para. 18; Human Rights Committee, *Chihoub v Algeria*, Communication No. 1811/2008, para. 8.5; Human Rights Committee, *Aboufaied v Libya*, Communication No. 1782/2008, para. 7.4; Human Rights Committee, *Berzig v Algeria*, Communication No. 1781/2008, para. 8.5; Human Rights Committee, *Zarzi v. Algeria*, Communication No. 1780/2008, para. 7.5; Human Rights Committee, *El Abani v. Libya*, Communication No. 1640/2007, para. 7.3; Human Rights Committee, *Benaziza v. Algeria*, Communication No. 1588/2007, para. 9.3; Human Rights Committee, *El Hassy v. Libya*, Communication No. 1422/2005, para. 6.8; Human Rights Committee, *Cheraitia and Kimouche v. Algeria*, Communication No. 1328/2004, para. 7.6; Human Rights Committee, *El Alwani v. Libya*, Communication No. 1295/2004, para. 6.5; Human Rights Committee, *Boucherf v. Algeria*, Communication No. 1196/2003, para. 9.6; Human Rights Committee, *Bousroual v. Algeria*, Communication No. 992/2001, para. 9.8; Human Rights Committee, *Sarma v. Sri Lanka*, Communication No. 950/2000, para. 9.5; Human Rights Committee, *Celis Laureano v. Peru*, Communication No. 540/1993, para. 8.5; Human Rights Committee, *Rafael Mojica v Dominican Republic*, Communication No. 449/1991, para. 5.7. See also, *inter alia*, UN Declaration on the Protection of all Persons from Enforced Disappearance, UNGA resolution 47/133, article 2; Committee against torture, *Concluding observations on the United States of America*, CAT/C/USA/CO/2, para. 18; Committee against torture, *Concluding observations on Rwanda*, CAT/C/RWA/CO/1, para. 14; Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, *Report to the UN General Assembly*, A/61/259, paras 55-56; Inter-American Court of Human Rights, *Godínez-Cruz v. Honduras*, paras. 164, 166 and 197; Inter-American Court of Human Rights, *Velasquez Rodriguez v. Honduras*, paras 156 and 187; African Commission on Human and Peoples' Rights, *Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso*, 204/97, para. 44; Human Rights Chamber for Bosnia and Herzegovina, *Palic v Republika Srpska*, Case No. CH/99/3196, para. 74. On prolonged incommunicado detention and secret detention, see also, *inter alia*, Human Rights Committee, *El-Megreisi v Libya*, Communication No. 440/1990, para. 5.4; Committee against Torture, *Concluding observations on the United States of America*, CAT/C/USA/CO/2, para. 17; Committee against Torture, *Concluding observations on Rwanda*, CAT/C/RWA/CO/1, para. 11; UN General Assembly, *Resolution on torture and other cruel, inhuman or degrading treatment or punishment*, A/RES/66/150, para. 22; Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, *Report to the Commission on Human Rights*, E/CN.4/2004/56, paras 37-38; Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, *Report to the UN General Assembly*, A/61/259, para. 56; Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, *Study on the phenomena of torture, cruel, inhuman or degrading treatment or punishment in the world, including an assessment of conditions of detention*, A/HRC/13/39/Add.5, para. 156. On detention in unofficial places of detention, see, *inter alia*, Human Rights Committee, General Comment 20, *Prohibition of torture and cruel treatment or punishment (Article 7)*, para. 11; Committee against Torture, *Concluding observations on Rwanda*, CAT/C/RWA/CO/1, para. 11; Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, *Report to the Commission on Human Rights*, E/CN.4/2003/68, para. 26(e).

## XVI. PLACE OF REMAND CUSTODY (PARAGRAPH 36)

Amnesty International recommends that the last sentence of paragraph 36 of the *revised draft* be strengthened by making clear that detention on remand must never involve a return to police custody.

In addition to reviewing the lawfulness of detention and ascertaining the treatment in detention, the purpose of this initial judicial control is also, should the person be placed on remand, to prevent an ongoing or an increased risk of ill-treatment, including violation to the right to security of person under article 9(1) ICCPR. This requirement therefore demands that detention on remand takes place in a facility under a different authority than the one responsible for the investigation.<sup>52</sup>

## XVII. ALTERNATIVES TO PRETRIAL DETENTION (PARAGRAPH 37)

Reference to the potential impact on the presumption of innocence should not be limited to “extremely prolonged” pretrial detention. The presumption of innocence, which reinforces the presumption against remand detention,<sup>53</sup> should be mentioned as a factor that should always be taken into consideration. **Amnesty International therefore recommends the deletion of terms “extremely prolonged” in the third sentence of paragraph 37 of the *revised draft*.**

Furthermore, in light of the general presumption against detention (recalled in paragraph 38 of the *revised draft*), alternatives to detention must be considered at each and every hearing reviewing the necessity, reasonableness and proportionality of the deprivation of liberty. **Amnesty International therefore recommends that in the seventh sentence of paragraph 37 of the *revised draft* the terms “should reconsider” be replaced by a more assertive statement, such as “must give additional attention to”.**

## XVIII. HABEAS CORPUS PROCEEDINGS (PARAGRAPHS 42, 43, 45, 48)

Amnesty International recommends the deletion of the terms “In general” in the second

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<sup>52</sup> See, *inter alia*, Human Rights Committee, *Concluding observations on El Salvador*, CCPR/C/SLV/CO/6, para. 14; Human Rights Committee, *Concluding observations on Azerbaijan*, CCPR/C/AZE/CO/3, paras 8 and 10; Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, *Report to the Commission on Human Rights*, E/CN.4/2003/68, para. 26(g); Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, *Study on the phenomena of torture, cruel, inhuman or degrading treatment or punishment in the world, including an assessment of conditions of detention*, A/HRC/13/39/Add.5, para. 156; Committee against Torture, *Concluding observations on Japan*, CAT/C/JPN/CO/1, para. 15; UN Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, *Report on the Maldives*, CAT/OP/MDV/1, para. 78.

<sup>53</sup> See, *inter alia*, European Court of Human Rights (Grand Chamber), *Labita v Italy*, Application No. 26772/95, para. 152.

**sentence of paragraph 42 of the revised draft.** Given the importance of this mechanism for the protection of the right to security of person and the effective prevention of enforced disappearance, torture and other forms of ill-treatment, detainees must always have the right to appear in person. Such an approach would also ensure consistency with the statement made in paragraph 34 of the *revised draft* in relation to article 9(3) ICCPR.

In addition, nothing should prevent a person from taking proceedings before a court in accordance with article 9(4) ICCPR. Indeed the use of this mechanism by the person(s) concerned should remain flexible and mandatory periods between two such proceedings or following an initial *ex officio* review (such as under article 9(3) ICCPR) may result in detention contrary to article 9(1) ICCPR.

**Amnesty International therefore recommends the deletion of the following section of paragraph 43 of the revised draft:** *"After a court has held that the circumstances justify the detention, an appropriate period of time may pass, depending on the nature of the relevant circumstances, before the individual is entitled to take proceedings again on similar grounds. In criminal proceedings, once detention has been upheld in a prompt hearing before a judge in compliance with article 9, paragraph 3, an appropriate period of time may pass before the individual is entitled to take additional proceedings under article 9, paragraph 4"*.

Furthermore, the wording in paragraph 45 of the *revised draft* suggests that in some types of detention the right to a hearing before a court could be met by proceedings before a tribunal outside the judiciary. Even if provided for by domestic law, this would not be an adequate substitute to a hearing before an ordinary court, and would not provide a sufficient safeguard against arbitrary deprivation of liberty. **Amnesty International recommends that paragraph 45 of the revised draft be amended accordingly.**

Finally, given the importance of preventing unlawful and arbitrary deprivation of liberty, although article 9 ICCPR does not mention it explicitly decisions upholding lawfulness of detention should be open to appeal. The appeal process would also contribute to ensuring proper implementation of the necessary safeguards and procedural guarantees that need to be provided during the habeas corpus proceeding, including in light of the state parties' obligation to respect the right to security of person and the prohibition of torture and other forms of ill-treatment. **Amnesty International recommends that paragraph 48 of the revised draft be amended accordingly.**

## **XIX. REPARATION FOR UNLAWFUL OR ARBITRARY ARREST OR DETENTION (PARAGRAPHS 49 TO 52)**

**Amnesty International recommends that section VI of the revised draft be amended to include all forms of reparation.** Unlawful or arbitrary arrest or detention may result in a range of harm, including financial, physical, psychological and harm to reputation, which may not always be economically assessable or addressed effectively by compensation alone. Other forms of reparation, including restitution, rehabilitation, satisfaction and guarantees of non-repetition, may be required. The UN Committee against Torture has in this regard emphasized that, despite the express reference to compensation in Article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, "monetary compensation alone may not be sufficient redress for a victim of torture and ill-treatment. The Committee affirms that the provision

of monetary compensation only is inadequate for a State party to comply with its obligations under article 14".<sup>54</sup> Amnesty International further notes the fact that the French and the Spanish versions of Article 9(5) ICCPR use the broader term "reparation".

**Amnesty International also recommends that the *revised draft* include the right to compensation for miscarriage of justice.** At present, the *revised draft* does not address the right to compensation for miscarriage of justice which also violates the right to liberty. The *revised draft* could in this regard set out the criteria when a person should qualify for compensation. Amnesty International notes that in some systems compensation for miscarriage of justice can be provided if a charge is dismissed or an accused is acquitted at trial or on appeal.<sup>55</sup>

**Amnesty International further recommends that the *revised draft* mention that legal aid should be available to individuals seeking reparation.** Victims of unlawful or arbitrary detention and miscarriage of justice must have the means to seek reparation, if they are to realise their rights. In many cases, access to legal aid will be necessary.<sup>56</sup>

**Finally, Amnesty International recommends that the scope of the obligation to provide reparation, including compensation, be further explained.** The *revised draft* currently provides that compensation relates to pecuniary or non-pecuniary harms. It should also expressly state, consistent with its assertion that it is an enforceable right, and not a matter of grace or discretion, the well-established principle of *restitutio in integrum*. In addition, specifically in relation to compensation, it should reflect that compensation awarded to a victim should be sufficient to compensate for any economically assessable damage resulting from unlawful or arbitrary arrest or detention or miscarriage of justice. Specific examples of forms of reparation that may be particularly relevant to victims of these violations should be listed, including restoration of reputation, expunging criminal records, reimbursement for loss of earnings and earning potential and lost opportunities such as employment and education, reimbursement of legal or specialist assistance, and other costs associated with challenging their arrest or detention or miscarriage of justice, reimbursement of costs in seeking redress, apology, psychological rehabilitation, vocational or educational training.

## XX. DETENTION UNDER SENTENCE OF DEATH

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<sup>54</sup> Committee against Torture, General Comment No.3, *Implementation of article 14 by States parties*, CAT/C/GC/3, para. 9.

<sup>55</sup> See, *inter alia*, Amnesty International, *Fair Trial Manual*, Second Edition, AI Index: POL 30/002/2014, April 2014, section 30.2.

<sup>56</sup> See, *inter alia*, United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, UNGA Resolution 67/187, Guideline 11, para. 55(b): "55. In order to encourage the functioning of a nationwide legal aid system, States should, where it is appropriate, undertake measures [...] (b) To provide legal aid to persons who have been unlawfully arrested or detained or who have received a final judgement of the court as a result of a miscarriage of justice, in order to enforce their right to retrial, reparation, including compensation, rehabilitation and guarantees of non-repetition; [...]".

## (PARAGRAPHS 53 AND 55)

Amnesty International opposes the death penalty in all circumstances, and therefore opposes detention under sentence of death.

The Human Rights Committee has repeatedly expressed concern that the death penalty is still provided for under certain domestic criminal codes and being applied by the domestic courts, including in the case of crimes committed by children, and has stated that the death penalty may not, under any circumstances, be imposed in violation of the guarantees provided for in article 6 of the Covenant.<sup>57</sup> It has also called for the commutation of all existing death sentences for offenders under the sentence of death who had been convicted of a crime committed while under the age of 18.<sup>58</sup> **In light of the views expressed by the Human Rights Committee, Amnesty International recommends that the revised draft makes an explicit reference to the incompatibility with article 9 ICCPR of detention following a violation of the guarantees provided by article 6 ICCPR.**

## XXI. NON-REFOULEMENT (PARAGRAPH 57)

Amnesty International welcomes the reference made in paragraph 57 of the *revised draft* recalling the state parties' obligation to respect the principle of non-refoulement in cases involving a risk of violation of the right to liberty and security of person amounting to treatment prohibited by article 7 ICCPR. However, in order to avoid any misunderstanding and to be in line with the statement made by the Human Rights Committee in its General Comment 31,<sup>59</sup> **Amnesty International recommends that the following terms be added to paragraph 57 (emphasis added): "[...] where there are substantial grounds for believing that a real risk [...]".**

Moreover, Amnesty International wishes to underline that while not violating *per se* article 7 ICCPR, additional forms of arbitrary detention are conducive to treatment violating this provision, as well as the right to security of person, and therefore states have an obligation to take article 9 ICCPR into account when implementing their non-refoulement obligation under article 7 ICCPR.<sup>60</sup>

In addition, it is important to underline that, just as the prohibition of torture, the prohibition of arbitrary deprivation of liberty is part of the peremptory norms of international law (*jus cogens*) and states can never invoke article 4 ICCPR as a justification for this practice.<sup>61</sup> This absolute and

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<sup>57</sup> See Human Rights Committee, *Concluding observations on Mauritania*, CCPR/C/MRT/CO/1, para. 12; Human Rights Committee, *Concluding observations on Yemen*, CCPR/C/YEM/CO/5, para. 14; Human Rights Committee, *Concluding observations on Sudan*, CCPR/C/SDN/CO/3, para. 20.

<sup>58</sup> Human Rights Committee, *Concluding observations on Iran*, CCPR/C/IRN/CO/3, para. 13.

<sup>59</sup> Human Rights Committee, General Comment 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13, para. 12.

<sup>60</sup> See, *inter alia*, Working Group on Arbitrary Detention, *Report to the Human Rights Council*, A/HRC/4/40, para. 48 *in fine*. See also, with regard to the importance of taking into account safeguards in detention, Committee against Torture, General Comment No.2, *Implementation of article 2 by States parties*, CAT/C/GC/2, para. 19.

<sup>61</sup> The Human Rights Committee has likewise considered that fundamental requirements of fair trial are part of *jus cogens* and can never be derogated from (see Human Rights Committee, General Comment 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13, paras 11 and 16, and Human Rights Committee, General Comment 32, *Right to equality before courts and tribunals and to a fair trial (Article 14)*, CCPR/C/GC/32, para. 6). A state removing a person to another state where there are substantial grounds for believing that there is a real risk that such fundamental requirements would be violated

universal prohibition would be undermined if states were allowed to expel, return, surrender, extradite, transfer, deport or otherwise remove a person to another state where there are substantial grounds for believing that there is a real risk that such an absolutely prohibited form of detention would occur.<sup>62</sup>

Amnesty International therefore recommends that the *revised draft* further elaborate on the applicability of the principle of non-refoulement entailed by article 2 ICCPR<sup>63</sup> to instances where there are substantial grounds for believing that there is real risk of violation to the right to liberty and security of person.

## XXII. THE RIGHT TO LIBERTY AND SECURITY OF PERSON AND THE PROHIBITION OF TORTURE AND ENFORCED DISAPPEARANCE (PARAGRAPH 56 TO 58)

The necessity to effectively prevent enforced disappearance, secret, unacknowledged or unofficial detention, prolonged incommunicado detention, torture and other forms of ill-treatment must be considered when looking at the measures necessary to prevent violations of article 9 ICCPR.

Preventive measures such as the ones contained in the International Convention for the Protection of All Persons from Enforced Disappearance, in particular those listed in articles 17 and 18, are of direct relevance to article 9 ICCPR. The absence of similar measures must be seen as generally incompatible with the purpose of article 9 ICCPR.<sup>64</sup>

Essential safeguards against torture and enforced disappearance such as the issuance of arrest warrants by the competent authority,<sup>65</sup> provisions clearly indicating the authorities authorized to

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would therefore violate this peremptory norms of international law; see in this regard, *inter alia*, European Court of Human Rights, *Omar Othman v United Kingdom*, Application No. 8139/09, paras 258 to 285; European Court of Human Rights, *Bader and Kanbor v Sweden*, Application No. 13284/04, paras 42 and 47; European Court of Human Rights, *Soering v UK*, Application No. 14038/88, para. 113.

<sup>62</sup> See, *inter alia*, Human Rights Committee, *G.T. v Australia*, Communication No. 706/1996, para. 8.7; Working Group on Arbitrary Detention, *Report to the Human Rights Council, A/HRC/4/40*, paras 47 and 49; European Court of Human Rights, *Omar Othman v United Kingdom*, Application No. 8139/09, paras 231 to 233; European Court of Human Rights, *Al-Moayad v Germany*, Application No. 35865/03 (dec.), paras 101 and 102; European Court of Human Rights, *Z and T v United Kingdom*, Application No. 27034/05 (dec.); European Court of Human Rights, *Babar Ahmad and Others v United Kingdom*, Application No. 24027/07, 11949/08, 36742/08 (dec.), para. 114.

<sup>63</sup> Human Rights Committee, General Comment 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13, para. 12. See also, *inter alia*, Human Rights Committee, *Kindler v Canada*, Communication No. 470/1991, para. 13.2.

<sup>64</sup> See, *inter alia*, Human Rights Committee, *Concluding observations on Algeria*, CCPR/C/DZA/CO/3, para. 11. Moreover, measures such as those contemplated in article 22 of the International Convention for the Protection of All Persons from Enforced Disappearance are equally relevant to ensure compliance with article 9 ICCPR (with regard to habeas corpus proceedings, see Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Working Group on Arbitrary Detention, Working Group on Enforced or Involuntary Disappearances, *Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism*, A/HRC/13/42, para. 292(b)).

<sup>65</sup> See, *inter alia*, Human Rights Committee, *Chihoub v Algeria*, Communication No. 1811/2008, para. 8.7; Human

order deprivation of liberty,<sup>66</sup> notification of rights,<sup>67</sup> the establishment of detailed and accessible records of detention,<sup>68</sup> access to lawyers from the outset of deprivation of liberty<sup>69</sup> and during all proceedings,<sup>70</sup> such as interrogations by the police<sup>71</sup> and hearings under article 9(3) and 9(4) ICCPR,

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Rights Committee, *Aboufaied v Libya*, Communication No. 1782/2008, para. 7.6; Human Rights Committee, *Berzig v Algeria*, Communication No. 1781/2008, para. 8.7; Human Rights Committee, *Njaru v Cameroon*, Communication No. 1353/2005, para. 6.2; Human Rights Committee, *Domukovsky, Tsiklauri, Gelbakhiani, Dokvadze v Georgia*, Communication No. 623/1995, 624/1995, 626/1995, 627/1995, para. 18.4; Human Rights Committee, *Kanana v Zaire*, Communication No. 366/1989, para. 5.2; Human Rights Committee, *Concluding observations on Argentina*, CCPR/C/ARG/CO/4, para. 15. See also, *inter alia*, Committee against Torture, *Concluding observations on Yemen*, CAT/C/YEM/CO/2/Rev.1, para. 13; Working Group on Arbitrary Detention, *Jason Zachary Puracal v Nicaragua*, Opinion No. 10/2012, paras 25 and 30.

<sup>66</sup> See article 17(2)(b) of the International Convention for the Protection of All Persons from Enforced Disappearance; UN Declaration on the Protection of all Persons from Enforced Disappearance, UNGA resolution 47/133, article 12; UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UNGA resolution 43/173, Principles 2 and 9. See also, *inter alia*, Committee against Torture, *Concluding observations on Yemen*, CAT/C/YEM/CO/2/Rev.1, para. 13.

<sup>67</sup> See UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UNGA resolution 43/173, Principles 13; UN Basic Principles on the Role of Lawyers, para. 5; Committee against Torture, General Comment 2, *Implementation of article 2 by States parties*, CAT/C/GC/2, para. 13; UN Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, *Report on the Maldives*, CAT/OP/MDV/1, paras 96 to 98; UN Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, *Report on Sweden*, CAT/OP/SWE/1, paras 43 and 48-49 (para. 49). See also, *inter alia*, Human Rights Committee, *Concluding observations on Sweden*, CCPR/C/SWE/CO/6, para. 13.

<sup>68</sup> See, *inter alia*, Human Rights Committee, *Concluding observations on Algeria*, CCPR/C/DZA/CO/3, para. 11; Human Rights Committee, General Comment 20, *Prohibition of torture and cruel treatment or punishment (Article 7)*, para. 11. See also, *inter alia*, European Court of Human Rights, *Kurt v Turkey*, Application No. 15/1997/799/2002, para. 125; European Court of Human Rights, *Er and others v Turkey*, Application No. 23016/04, para. 104; European Court of Human Rights, *Akdeniz v Turkey*, Application No.25165/94, para. 130. See also article 17(3) of the International Convention for the Protection of All Persons from Enforced Disappearance; UNGA Declaration on the Protection of all Persons from Enforced Disappearance, UNGA resolution 47/133, article 10(3); UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UNGA resolution 43/173, Principles 12 and 23; Working Group on Arbitrary Detention, *Report to the Human Rights Council*, A/HRC/7/4, paras 69, 73 and 84; UN Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, *Report on Honduras*, CAT/OP/HND/1, para. 144, and para. 146(a); UN Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, *Report on the Maldives*, CAT/OP/MDV/1, paras 116-117; UN Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, *Report on Sweden*, CAT/OP/SWE/1, paras 90-91.

<sup>69</sup> See, *inter alia*, Human Rights Committee, *Concluding observations on Algeria*, CCPR/C/DZA/CO/3, para. 18; Human Rights Committee, *Concluding observations on Tajikistan*, CCPR/CO/84/TJK, para. 11; Human Rights Committee, *Concluding observations on Japan*, CCPR/C/JPN/CO/5, para. 18; Human Rights Committee, *Concluding observations on the Republic of Korea*, CCPR/C/KOR/CO/3, para. 14; Human Rights Committee, *Concluding observations on Uzbekistan*, CCPR/C/UZB/CO/3, para. 15.

<sup>70</sup> See, *inter alia*, UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UNGA resolution 43/173, Principle 17; UN Basic Principles on the Role of Lawyers, para. 1; UN Human Rights Council, *Resolution on torture and other cruel, inhuman or degrading treatment or punishment: the role and responsibility of judges, prosecutors and lawyers*, A/HRC/RES/13/19, para. 6; Council of Europe, *Recommendation of the Committee of Ministers to member states on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse*, Rec(2006)13, para. 25.

<sup>71</sup> See, *inter alia*, Human Rights Committee, *Concluding observations on The Netherlands*, CCPR/C/NLD/CO/4, para. 11; Human Rights Committee, *Concluding observations on Japan*, CCPR/C/JPN/CO/5, para. 18; Human Rights Committee, *Concluding observations on Ireland*, CCPR/C/IRL/CO/3, para. 14. See also UN Subcommittee



<sup>72</sup> the presence of the detainee at the hearings under 9(3) and 9(4) ICCPR,<sup>73</sup> notification of arrest, detention and transfers to a third party<sup>74</sup> and independent monitoring of all places of detention<sup>75</sup> all constitute fundamental guarantees which must be considered essential to prevent violations to article 9 ICCPR, as well as to determine whether such a violation has occurred. Paragraph 58 of the revised draft explicitly mentions some but not all of these safeguards.

Therefore, while commending the Human Rights Committee for the *revised draft's* reference to the interconnectedness between the right to liberty and security of person and the prohibition of torture and other forms of ill-treatment, **Amnesty International recommends that:**

- **In addition to reference to article 7 ICCPR, paragraphs 56 to 58 of the *revised draft* likewise underline the relationship of the right to liberty and security of person with the prohibition of enforced disappearance;**
- **The list of safeguards mentioned in paragraph 58 be expanded and include the ones indicated above;**
- **Paragraph 58 of the *revised draft* explicitly indicates that the list of safeguards mentioned is non-exhaustive;**
- **This list of safeguards be presented in a more prescriptive form;**
- **It is made clear that safeguards such as the ones mentioned in paragraph 58 form an**

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on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, *Report on the Maldives*, CAT/OP/MDV/1, para. 105.

<sup>72</sup> See, *inter alia*, European Court of Human Rights, *Wloch v Poland*, Application No. 27785/95, paras 129 and 131; European Court of Human Rights, *Fodale v Italy*, Application No. 70148/01, paras 43 to 45.

<sup>73</sup> See, *inter alia*, UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UNGA resolution 43/173, Principle 32(2); Inter-American Court of Human Rights, *Habeas corpus in emergency situations*, Advisory Opinion OC-8/87, para. 35; Council of Europe, *Recommendation of the Committee of Ministers to member states on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse*, Rec(2006)13, para. 28.

<sup>74</sup> See, *inter alia*, Human Rights Committee, *Concluding observations on Sweden*, CCPR/C/SWE/CO/6, para. 13. See also, UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UNGA resolution 43/173, Principle 16; UN Declaration on the Protection of all Persons from Enforced Disappearance, UNGA resolution 47/133, article 10(2); UN Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, *Report on Sweden*, CAT/OP/SWE/1, para. 146; Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, *Report to the Commission on human rights*, E/CN.4/2003/68, para. 26(g); Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Working Group on Arbitrary Detention, Working Group on Enforced or Involuntary Disappearances, *Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism*, A/HRC/13/42, para. 292(c); Inter-American Court of Human Rights, *Tibi v Ecuador*, para. 112.

<sup>75</sup> See, *inter alia*, Human Rights Committee, *Concluding observations on Algeria*, CCPR/C/DZA/CO/3, para. 11. See also, *inter alia*, UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UNGA resolution 43/173, Principle 29; UN Human Rights Council, *Resolution on torture and other cruel, inhuman or degrading treatment or punishment: the role and responsibility of judges, prosecutors and lawyers*, A/HRC/RES/13/19, para. 14; Committee against Torture, General Comment 2, *Implementation of article 2 by States parties*, CAT/C/GC/2, para. 13; Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Working Group on Arbitrary Detention, Working Group on Enforced or Involuntary Disappearances, *Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism*, A/HRC/13/42, para. 292(a).

integral part of the states parties' obligation to protect the right to liberty and security of person.

### XXIII. DEROGATION TO PROCEDURAL GUARANTEES PROTECTING THE RIGHT TO LIBERTY OF PERSON (PARAGRAPH 66)

Amnesty International welcomes the fact that the *revised draft* recalls the non-derogability of the absolute prohibition of arbitrary detention, as well as the fact that "[t]he procedural guarantees protecting liberty of person may never be made subject to measures of derogation that would circumvent the protection of non-derogable rights" (paragraph 66). Because the risk of violations of non-derogable rights is heightened during a state of emergency, the safeguards essential to the prevention of these violations need particular attention. **Amnesty International therefore recommends that the *revised draft* elaborate further on this issue.**

The guarantees mentioned in article 9 ICCPR are essential to prevent arbitrary detention, torture and enforced disappearance. Such practices are violating peremptory norms of international law<sup>76</sup> and therefore these guarantees should be preserved at all times. For instance, as recalled in paragraph 66 of the *revised draft*, in order to avoid the protection against non-derogable rights to be circumvented, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, guaranteed by article 9(4) ICCPR, must be preserved at all times.

For the very same reasons, similar judicial control mechanisms such as the one prescribed by article 9(3) ICCPR must likewise be considered as non-derogable,<sup>77</sup> together with the measures indispensable to ensure the effectiveness of these mechanisms, such as the ones mentioned in article 9(2) ICCPR<sup>78</sup> and 14 ICCPR.<sup>79</sup>

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<sup>76</sup> See, *inter alia*, Human Rights Committee, General Comment 29, *States of emergency (Article 4)*, CCPR/C/21/Rev.1/Add.11, paras 11 and 13(b); Human Rights Committee, General Comment 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13, para. 18; Committee against Torture, General Comment 2, *Implementation of article 2 by States parties*, CAT/C/GC/2, para. 1.

<sup>77</sup> See, *inter alia*, Human Rights Committee, General Comment 29, *States of emergency (Article 4)*, CCPR/C/21/Rev.1/Add.11, para. 15 and the Human Rights Committee's recommendation related to articles 9(3) and 9(4) ICCPR in *Recommendation submitted by the Committee to the Subcommission on Prevention of Discrimination and Protection of Minorities concerning a draft third optional protocol to the International Covenant on Civil and Political Rights*, Report of the Human Rights Committee (Volume I) A/49/40 (vol. I), annex XI, para. 2, cited in Human Rights Committee, General Comment 29, *States of emergency (Article 4)*, CCPR/C/21/Rev.1/Add.11, footnote 9; Human Rights Committee, *Initial report of Thailand – Summary Record of the 2293<sup>rd</sup> meeting*, CCPR/C/SR.2293, para. 44 and *Concluding observations on Thailand*, CCPR/CO/84/THA, para. 13. See also, Working Group on Arbitrary Detention, *Report to the Human Rights Council*, A/HRC/7/4, para. 64.

<sup>78</sup> See, *inter alia*, the procedural requirements attached to the prohibition of arbitrary deprivation of liberty mentioned in the ICRC's *Customary International Humanitarian Law Database*, Rule 99, accessible at [www.icrc.org/customary-ihl/eng/docs/home](http://www.icrc.org/customary-ihl/eng/docs/home).

<sup>79</sup> See, *inter alia*, Human Rights Committee, General Comment 32, *Right to equality before courts and tribunals and to a fair trial (Article 14)*, CCPR/C/GC/32, para. 6; Council of Europe, *Recommendation of the Committee of Ministers to member states on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse*, Rec(2006)13, para. 25(4); Inter-American Court of Human Rights, *Judicial*

Moreover, enforced disappearance is a form of arbitrary detention and the safeguards against enforced disappearance therefore act as safeguards against arbitrary detention. It is noteworthy in this regard that the International Convention for the Protection of All Persons from Enforced Disappearance, which contains many safeguards protecting the non-derogable guarantee against arbitrary detention, does not foresee any element that can be made subject to lawful derogation.

## **XXIV. RESERVATIONS (PARAGRAPH 67)**

Amnesty International recommends that paragraph 67 of the *revised draft* explicitly rejects reservations to the right to liberty and security of person and to the legal and procedural safeguards essential to its protection, including the ones explicitly mentioned in article 9 ICCPR.

In particular, it would be contrary to the object and purpose of the Covenant if non-derogable rights and guarantees, including the ones similar to those available under customary international humanitarian law, could be made subject to reservations.

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*Guarantees in States of Emergency*, Advisory Opinion OC-9/87, paras 24, 30, 38 and 41(3).

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