

AMICUS BRIEF

**ON ARTICLE 26
OF THE LAW ON POLICE
SERVICE FOCUSED ON
TEMPORARY DETENTION
SUBMITTED TO THE
CONSTITUTIONAL COURT
OF MONGOLIA (TSETS)**

**AMNESTY
INTERNATIONAL**



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Amnesty International is a global movement of 10 million people in more than 150 countries and territories, who campaign on human rights. Our vision is for every person to enjoy all the rights enshrined in the Universal Declaration of Human Rights and other international human rights instruments. We research, campaign, advocate and mobilize to end abuses of human rights. Amnesty International is independent of any government, political ideology, economic interest or religion. Our work is largely financed by contributions from our membership and donations.

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I. INTRODUCTION

1. This written submission is provided by Amnesty International pursuant to the request received in March 2024 from the Constitutional Court of Mongolia (Tsets), (hereinafter “the Constitutional Court”). Amnesty International was invited to submit written responses to questions 2.1 to 2.7 (listed in the annex attached to this brief) posed by the Constitutional Court as they relate to Article 26 of the Law on Police Service which concerns Temporary Detention.
2. With this amicus curiae brief, Amnesty International undertakes to assist the Constitutional Court by submitting applicable international and regional human rights law and standards on detention, with a particular focus on the right to liberty and security of person.

II. INTEREST OF THE AMICUS CURIAE ORGANISATION

3. Amnesty International is an international non-governmental human rights organisation. It aims to secure the observance of the Universal Declaration of Human Rights, to advocate for global compliance with international human rights law, the development of human rights norms, and the effective enjoyment of human rights throughout the world. Amnesty is a movement of over 10 million members, activists and supporters in more than 150 countries and territories, including in Mongolia. It is independent of any government, political ideology, economic interest or religion.
4. To achieve its objectives Amnesty monitors state compliance with international human rights law and engages in research, advocacy, strategic litigation and education to prevent and end human rights violations and to demand justice for those whose rights have been violated.
5. Amnesty International has extensive experience with strategic litigation including submitting amicus curiae briefs and other third-party submissions in international and regional courts over the past two decades to assist them in resolving fundamental questions of international law. For example, the organization has intervened before the International Criminal Court, the European Court of Human Rights, the African Court of Human Rights and the Inter-American Court of Human Rights. In addition, Amnesty International has also litigated and submitted amicus curiae and other third-party interventions in a number of cases before national courts, including the Constitutional Court of the Republic of Korea, the Bangkok Civil Court, The Constitutional Court of South Africa, the National Supreme Court of Justice of Mexico, the Supreme Court of the United Kingdom and the United States Supreme Court.
6. Amnesty International has long worked on the issue of arbitrary detention and fair trial rights, including in the publication of Amnesty’s Fair Trial Manual.¹ The manual is an authoritative guide to international and regional standards for fair trial rights, including those which apply in instances of detention, and explains how these rights have been interpreted by human rights bodies and international courts. As explained in the text of the manual, it seeks to provide a practical guide to the relevant human rights standards for anyone involved in examining how well a criminal trial or a justice system meets international standards of fairness. It is intended for the use of trial observers and others assessing the fairness of an individual case, as well as for anyone seeking to evaluate the extent to which a country’s criminal justice system guarantees respect for international standards of fair trial. It may also serve as a guide for law makers, judges, prosecutors and defence lawyers or as a training tool.
7. In sum, Amnesty International has a strong and continuing interest in the promotion and protection of human rights and is thus well placed to assist the Constitutional Court with wider international law issues relevant to the adjudication of this matter.

¹ Amnesty International, *Fair Trial Manual – Second Edition* (Index: POL 30/002/2014), April 9 2014, [amnesty.org/en/documents/pol30/002/2014/en/](https://www.amnesty.org/en/documents/pol30/002/2014/en/)

III. APPLICATION OF INTERNATIONAL LAW IN MONGOLIA

8. Mongolia is a party to major international human rights instruments, including the International Covenant on Civil and Political Rights (ICCPR) and its Second Optional Protocol; the Convention against Torture and Other Cruel, Inhuman or Degrading treatment or Punishment and its Optional Protocol; and the International Convention for the Protection of All persons from Enforced Disappearance and its inquiry procedure.
9. International treaties that Mongolia has ratified or acceded to, as well as customary international law form part of Mongolian law.
10. Specifically, Article 10 of the Constitution of Mongolia provides that:
 - (1) Mongolia adheres to the universally recognized norms and principles of international law and pursues a peaceful foreign policy.
 - (2) Mongolia fulfils in good faith its obligations under international treaties to which it is a Party.
 - (3) The international treaties to which Mongolia is a Party become effective as domestic legislation upon the entry into force of the laws on their ratification or accession.
 - (4) Mongolia may not abide by any international treaty or other instruments incompatible with its Constitution.
11. There is therefore no question that all persons within the jurisdiction of Mongolia are protected against any breaches of the state's obligations under international law and can rely on the rights and freedoms guaranteed by those international treaties within domestic courts.

IV. DETENTION BEGINS AT THE POINT AT WHICH A PERSON IS DEPRIVED OF THEIR LIBERTY

12. Everyone has the right to personal liberty and security of person. This right is guaranteed in article 9(1) of the ICCPR and is widely recognised in international human rights treaties.²
13. The United Nations Human Rights Committee (UNHRC), which is the body established to monitor compliance with the ICCPR, has recognised the profound importance of article 9 of the ICCPR both for individuals and for society as a whole.³ The UNHRC has also explained that liberty and security of person are precious for their own sake, and also because the deprivation of liberty and security of person have historically been principle means for impairing the enjoyment of other rights.⁴
14. Depriving a person of their liberty is often the starting point that facilitates the conditions for individuals to be subjected to torture and other ill-treatment. In this regard, the UNHRC has recognised that keeping under systemic review methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment is a key step in preventing cases of torture and ill-treatment.⁵
15. Under international human rights law and standards, there are a number of common themes in definitions of what constitutes deprivation of liberty.
 - (1) First, a person needs to have their movement severely restricted by reason of them being held by the state. The UNHRC describes how “liberty of person concerns freedom from confinement of

² See for example, article 3 of the Universal Declaration of Human Rights, article 7(1) of the American Convention on Human Rights, article 5(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, article 6 of the African Charter on Human and Peoples Rights; and article 14(1) of the Arab Charter on Human Rights.

³ UN Human Rights Committee (HRC), General Comment 35, Article 9 (Liberty and Security of Person), 16 December 2014, UN Doc CCPR/C/GC/35, para 2.

⁴ UN Human Rights Committee (HRC), General Comment 35, Article 9 (Liberty and Security of Person), 16 December 2014, UN Doc CCPR/C/GC/35, para 2.

⁵ UN Human Rights Committee, General Comment 20, Article 7 (Prohibition of torture and cruel treatment or punishment), UN Doc. HRI/GEN/1/Rev.1, para. 11.

the body, not a general freedom of action.”⁶ The UNHRC further provides that “deprivation of liberty involves more severe restriction of motion within a narrower space than mere interference with liberty of movement under article 12 [freedom of movement].” Examples of deprivation of liberty include police custody, *arraigo*, remand detention, imprisonment after conviction, house arrest, administrative detention, involuntary hospitalization, institutional custody of children and confinement to a restricted area of an airport, as well as being involuntarily transported” (emphasis added).⁷ In keeping with this, the European Court of Human Rights describes a “a person’s confinement in a particular restricted space for a not negligible length of time”⁸ as a crucial element of deprivation of liberty.

(2) Second, there is a requirement that the person has not consented to their confinement, as highlighted by the UN Working Group on Arbitrary Detention (UNWGAD)⁹ which is the body of experts mandated to investigate cases of arbitrary deprivation of liberty; the UNHRC¹⁰, and the European Court of Human Rights.¹¹

16. Deprivation of liberty clearly occurs in circumstances where individuals are coerced into accompanying state authorities to a police station without being free to leave and where they are made to remain until their release.¹² In instances of questioning, suspects who find that they are not at liberty to leave after being interrogated are, in fact, being detained from the moment they come under the control of the relevant authorities.¹³ Deprivation of liberty can occur in any type of location and does not need to be officially labelled as an arrest or detention to engage protection against arbitrary detention.¹⁴ Equally, any period of time, even for a few hours, qualifies as detention.¹⁵ UNWGAD has recognised that the term “deprivation of liberty” can cover the period from the initial moment of apprehension until arrest, pretrial and post-trial detention periods. This includes placing individuals in temporary custody in protective detention.¹⁶ It follows that for the purposes of identifying relevant time periods, detention begins at the point in which a person is deprived of their liberty.

V. DETENTION IS ONLY LAWFUL WHERE IT IS IN ACCORDANCE WITH INTERNATIONAL HUMAN RIGHTS LAW

17. The right to personal liberty is not absolute. Under article 9 (1) of the ICCPR, deprivation of liberty must be carried out with respect for the rule of law.¹⁷ The UNHRC has affirmed that detention “must not be arbitrary, and must be based on grounds and procedures established by law, information of the reasons must be given and court control of the detention must be available.”¹⁸ The permissible circumstances in which a person may be deprived of their liberty should be narrowly construed. Domestic laws authorising arrest and detention, and domestic laws setting out procedures for arrest and detention, must conform to international standards.¹⁹ Examples of arrests and detentions that do not conform to

⁶ UN Human Rights Committee (HRC), General Comment 35, Article 9 (Liberty and Security of Person), 16 December 2014, UN Doc CCPR/C/GC/35, para 3.

⁷ *Ibid.* para 5.

⁸ European Court of Human Rights, Decision, *Storck v Germany*, Application no. 61603/0016 June 2005, para 74.

⁹ Working Group on Arbitrary Detention, Report, United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, 6 July 2015, UN Doc A/HRC/30/37.

¹⁰ UN Human Rights Committee (HRC), General Comment 35, Article 9 (Liberty and Security of Person), 16 December 2014, UN Doc CCPR/C/GC/35, para 6

¹¹ European Court of Human Rights, Decision, *Storck v Germany*, Application no. 61603/0016 June 2005, para 74.

¹² UN Human Rights Committee, Decision, *Mursalov et al v. Azerbaijan*, 13 January 2023, UN Doc CCPR/C/136/D/3153/2018, para 9.7.

¹³ UN Working Group on Arbitrary Detention, Report, Visit to Mongolia, 5 July 2023, UN Doc. A/HRC/54/51/Add.2, para 38.

¹⁴ Working Group on Arbitrary Detention, Report, United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, 6 July 2015, UN Doc A/HRC/30/37.

¹⁵ UN Working Group on Arbitrary Detention, Report, Visit to Mongolia, 5 July 2023, UN Doc. A/HRC/54/51/Add.2, para 37.

¹⁶ Working Group on Arbitrary Detention, Report, United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, 6 July 2025, UN Doc A/HRC/30/37, para 9.

¹⁷ UN Human Rights Committee (HRC), General Comment 35, Article 9 (Liberty and Security of Person), 16 December 2014, UN Doc CCPR/C/GC/35, para 10.

¹⁸ UN Human Rights Committee (HRC), General Comment 8, Article 9 (Liberty and Security of Person), 30 June 1982, UN Doc CCPR/C/GC/35, para 4.

¹⁹ Inter-American Commission on Human Rights, Resolution 1/08, 13 March 2008, Principle IV of the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas. See also, *A v Australia*, Human Rights Committee, Decision, UN Doc.

domestic laws include arrests for offences for which the law does not permit arrest,²⁰ and holding individuals in custody for longer than the period authorised in national law.²¹

18. International law provides that a permissible ground for arrest is to bring someone before the competent legal authorities on reasonable suspicion of having committed an offence.²² The European Court of Human Rights has ruled that reasonable suspicion justifying an arrest exists when there are “facts or information which would satisfy an objective observer that the person concerned may have committed the offence”.²³ Furthermore, the reasonable suspicion must relate to acts that constituted an offence at the time that they were committed.²⁴ Where an individual was detained under a law permitting preventive detention, allegedly to prevent him from committing a crime, but no investigation was conducted and he was not charged, that same court concluded that the detention violated his right to liberty.²⁵ Along similar lines, the Inter-American Commission on Human Rights, which is authorised to monitor compliance with the American Convention on Human Rights and the American Declaration on the Rights and Duties of Man, requires that administrative detention²⁶ may only be used for compelling reasons relating to law enforcement, health or other public purposes, and derogations may warrant a longer period of preventative detention provided it is strictly necessary, subject to judicial oversight and not indefinite.²⁷ Amnesty International opposes preventative detention, sometimes referred to as administrative or security detention, on the basis that it is used to circumvent the protection of the criminal law.
19. The UNHRC recognises that to the extent that states impose administrative detention not in contemplation of prosecution on a criminal charge, that such detention presents severe risks of arbitrary deprivation of liberty.²⁸ Such detention would normally amount to arbitrary detention as other effective measures addressing the threat, including the criminal justice system, would be available.²⁹
20. In general, pre-trial detention must be an exceptional measure and based on an individualised determination that it is reasonable and necessary, specified in law and without vague and expansive standards. The burden rests on the state to establish that it is necessary and proportionate to deprive individuals of their liberty pending trial and must establish that release would create a substantial risk of flight, harm to others or interfere with the evidence or investigation in a way that cannot be allayed by other means.³⁰ Moreover, if the length of time that the defendant has been held in pre-trial detention

CCPR/C/59/D/560/1993 (1997) para 9.5; European Court of Human Rights, *Bozano v France*, Application no. 9990/82, 1986, para 54; European Court of Human Rights, Decision, *Lukanov v Bulgaria*, Application no. 21915/93, (1997) para 41, European Court of Human Rights, Decision, *Baranowski v Poland*, Application no. 28358/95, 2000, paras 50-52; European Court of Human Rights, *Medvedyev and Others v France*, Grand Chamber decision, Application no. 3394/03, 2010, paras 79-80; Inter-American Court of Human Rights, Decision, *Gangaram-Panday v Suriname*, 1994 paras 46-47; Alfonso Martin Del Campo Dodd v Mexico 12.228, Report 117/09, Inter-American Commission on Human Rights, 2009, para 22.

²⁰ UN Human Rights Committee, Decision, *Latifulin v Kyrgyzstan*, 10 May 2010, UN Doc. CCPR/C/98/D/1312/2004, para 8.2.

²¹ Working Group on Arbitrary Detention, Opinion 10/2009 (Venezuela), UN Doc.A/HRC/13/30/Add.1 (2009) pp172-179 paras 52(b)-53; Alfonso Martin Del Campo Dodd v Mexico (12.228, Report 117/90), Inter-American Commission (2009) paras 22-25.

²² Article 5(1) of the European Convention on Human Rights.

²³ European Court of Human Rights: *Fox, Campbell and Hartley v United Kingdom* (Application nos. 12244/86, 12245/86, 12383/86), (1990) para 32; *Murray v United Kingdom*, Grand Chamber, Application no. 14310/88, 1994, paras 50-63. See also Guideline VII(1) of the Council of Europe Guidelines on Human Rights and the Fight Against Terrorism, 11 July 2002; European Commission against Racism and Intolerance, General Policy Recommendation No. 11 on Combating Racism and Racial Discrimination in Policing, 29 June 2007, para 3.

²⁴ European Court of Human Rights, Decision, *Wloch v Poland* Application no. 27785/95, (2000) paras 108-109; *Kandzhov v Bulgaria* Application no. 68294/01, 2008, paras 52-62.

²⁵ European Court of Human Rights, *Jėčius v Lithuania* Application no. 4578/97, 2000, paras 47-52.

²⁶ Administrative detention refers to measures under which individuals are detained by order of state authorities without intent to prosecute them in a criminal trial.

²⁷ Inter-American Commission on Human Rights, Report on Terrorism and Human Rights, Executive Summary, OEA/Ser.L/V/II.116, Doc. 5 rev.1 (22 October 2002), paras. 23, 25.

²⁸ UN Human Rights Committee (HRC), General Comment 35, Article 9 (Liberty and Security of Person), 16 December 2014, UN Doc CCPR/C/GC/35, para 15, referring to HRC concluding observations: Colombia (UN Doc. CCPR/C/COL/CO/6, 2010), para. 20, and Jordan (UN Doc. CCPR/C/JOR/CO/4, 2010), para. 11.

²⁹ UN Human Rights Committee (HRC), General Comment 35, Article 9 (Liberty and Security of Person), 16 December 2014, UN Doc CCPR/C/GC/35, para 15.

³⁰ Human Rights Committee, *Marinich vs. Belarus*, 19 August 2010, UN Doc. CCPR/C/99/D/1502/2006, para. 10.4

reaches the length of the longest sentence that could be imposed for the crimes charged, the defendant should be released.³¹

21. Amnesty International further submits that states should not detain anyone unless they are promptly charged with one or more recognisable criminal offences: reasons outside of this scope more frequently than not are neither necessary nor proportionate. Recognisable criminal offences in this context mean that the offence is a crime under national law that 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 (e.g., the exercise of freedom of peaceful assembly). Where relevant rules and safeguards exist under a state's criminal procedure, it is unacceptable for governments to circumvent these rights' protections by means of an alternative administrative procedure, and it is a serious violation of human rights for states to detain people whom they do not intend to prosecute. 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 precept of liberty and security of the person, and an underlying principle of international human rights law.

VI. DETENTION MUST BE IN ACCORDANCE WITH THE PRINCIPLE OF LEGAL CERTAINTY AND THE AVOIDANCE OF ARBITRARINESS

22. Article 9(1) of the ICCPR states that “no one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with procedure as are established by law” (emphasis added). In a similar vein, principle 2 of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment makes clear that “arrest, detention or imprisonment shall only be carried out strictly in accordance with the provisions of the law and by competent officials or persons authorized for that purpose.” Further, detention may be arbitrary if the manner in which the detainees are treated does not relate to the purpose for which they are ostensibly being detained.³²
23. The UNWGAD has affirmed that the prohibition of arbitrary detention constitutes a peremptory norm of international law.³³ An arrest or detention without basis in law is arbitrary. However, the UNHRC has also affirmed that an arrest or detention may be authorized by domestic law and nonetheless be arbitrary.³⁴ The notion of “arbitrariness” is not to be equated with “against the law”, but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law,³⁵ as well as elements of reasonableness, necessity and proportionality.³⁶ For detention to be considered ‘in accordance with the law’ the detention must satisfy the principle of legal certainty. Legal certainty requires the law to be set out in a precise manner that is readily understood by those subjected to it so that they can regulate their conduct accordingly. Domestic laws may be arbitrary if they are over-broad³⁷: to satisfy the requirement of legal certainty, it must be sufficiently foreseeable for people to understand how the law operates in practice. This is a particularly pertinent consideration when multiple legal regimes exist concurrently, and a broad level of discretion is bestowed upon individual state decision-makers as to which laws to apply in analogous circumstances. It is for this reason that Amnesty International is deeply concerned that the existence of parallel and conflicting laws that regulate both temporary detention and criminal procedure which enable broad discretion on the part of individual police officers can contravene the principle of legal certainty and result in arbitrariness.

³¹ UN Human Rights Committee (HRC), General Comment 35, Article 9 (Liberty and Security of Person), 16 December 2014, UN Doc CCPR/C/GC/35, para 38.

³² UN Human Rights Committee, General Comment 35, Article 9 (Liberty and Security of Person), 16 December 2014, UN Doc CCPR/C/GC/35, para 14.

³³ Working Group on Arbitrary Detention, Report, 24 December 2012, UN Doc. A/HRC/22/44 paras 37-75.

³⁴ UN Human Rights Committee, General Comment 35, Article 9 (Liberty and Security of Person), 16 December 2014, UN Doc CCPR/C/GC/35, para 12.

³⁵ 1134/2002, *Gorji-Dinka v. Cameroon*, para. 5.1; 305/1988, *Van Alphen v. Netherlands*, para. 5.8.

³⁶ UN Human Rights Committee (HRC), General Comment 35, Article 9 (Liberty and Security of Person), 16 December 2014, UN Doc CCPR/C/GC/35, para 12.

³⁷ UN Human Rights Committee, Concluding Observations, Ethiopia, UN Doc CCPR/C/ ETH/CO/1 (2011) para 15.

24. Arrest or detention as punishment for the legitimate exercise of rights guaranteed by the ICCPR is arbitrary, which includes the exercise of the rights to freedom of opinion and expression (protected under art. 19),³⁸ freedom of assembly (protected under art. 21) and freedom of association (protected under art. 22).³⁹ Particularly of note is that the state obligation to respect and ensure peaceful assemblies imposes negative and positive duties on states before, during and after assemblies. The negative duty entails that there be no unwarranted interference with peaceful assemblies. States are obliged, for example, not to disrupt peaceful assemblies without compelling justification, nor to sanction participants or organizers without legitimate cause.⁴⁰ This means that in circumstances where detention is used to disproportionately disrupt individuals organising or engaging in peaceful protest, the state is not only contravening its obligations under article 9 ICCPR, it is also acting in violation of article 21. The African Commission on Human and Peoples' Rights, tasked with the interpretation of the African Charter on Human and Peoples' rights, has held that "where individuals have been detained without charges being brought...this constitutes an arbitrary deprivation of their liberty".⁴¹
25. Specifically in the context of Mongolia, following its country visit to the state in October 2022, UNWGAD has recalled that detaining individuals on the basis of their activities as human rights defenders violates their right to equality before the law, to equal protection of the law under article 7 of the Universal Declaration of Human Rights and their protected status under article 26 of the ICCPR.⁴²
26. Detention can be arbitrary even if it extends for a short period of time. The European Court of Human Rights has recognised that detention for the length of fifty-five minutes falls within the meaning of article 5(1) of the European Convention on Human Rights, as the applicant was brought to a police station against his will and was held there in a cell.⁴³ The relatively short duration of the interference does not affect this position.⁴⁴

VII. ANYONE DETAINED SHOULD BE INFORMED AS SOON AS REASONABLY POSSIBLE AS TO THE REASONS FOR THEIR DETENTION AND MUST HAVE ACCESS TO LEGAL ASSISTANCE

27. Article 9(2) ICCPR provides that anyone who is arrested or detained must be informed of the reasons why they are being deprived of their liberty.⁴⁵ This right should apply at all times. A key purpose of this requirement is to enable an individual to challenge their detention if they believe it is unlawful or unfounded. Therefore, the reasons given must be specific. They must include a clear explanation of both the legal provision under which the individual is being held and the essential factual basis for the arrest or detention.⁴⁶

³⁸ Human Rights Committee, Decision, *Zelaya Blanco v. Nicaragua*, 20 July 1994, Communication no. 328/1988, para. 10.3.

³⁹ UN Human Rights Committee (HRC), General Comment 35, Article 9 (Liberty and Security of Person), 16 December 2014, UN Doc CCPR/C/GC/35, para 17.

⁴⁰ UN Human Rights Committee, General Comment 37, on the right to peaceful assembly (article 21), 16 September 2020, UN Doc CCPR/C/GC/37 para 23.

⁴¹ African Commission on Human and Peoples Rights, Decision, *Constitutional Rights Project & Another v Nigeria*, Communication No. 102/93, 31 October 1998, para 55.

⁴² UN Working Group on Arbitrary Detention, Report, Visit to Mongolia, 5 July 2023, UN Doc. A/HRC/54/51/Add.2, para 25.

⁴³ European Court of Human Rights, *Novotka v Slovakia*, Application no. 47244/99 (4 November 2003).

⁴⁴ European Commission of Human Rights (First Chamber), *Järvinen v. Finland*, Application no. 30408/96, (15 January 1998).

⁴⁵ This right is also recognised in Article 7(4) of the American Convention on Human Rights; Article 14(3) of the Arab Charter on Human Rights; Article 5(2) of the European Convention on Human Rights; Principle 10 of the Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; The African Commission on Human and Peoples' Rights, Section M(2)(a) of the Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa; Principle V of the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas; See Articles 55(2) and 60(1) of the International Criminal Court Statute, Rule 117(1) of the International Criminal Court Rules of Procedure and Evidence, Rule 53 bis of the Rwanda Rules, Rule 59 bis (B) of the Rules of Procedure and Evidence of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committee in the Territory of the Former Yugoslavia since 1991.

⁴⁶ European Court of Human Rights: *Shamayev and Others v Georgia* Application no. 36378/02, (2005) para 413, *Kortesis v Greece* Application no. 60593/10, (2012) paras 58-62, *Nechiporuk and Yonkalo v Ukraine* Application no. 42310/04, (2011) paras 209-211; UN Human Rights Committee, Decision, *Kelly v Jamaica* UN Doc. CCPR/C/41/D/253/1987 (1991) para 5.8.

28. The Human Rights Committee concluded that it was not sufficient simply to inform detainees that they were being arrested on security grounds without any indication of the substance of the alleged offence.⁴⁷ In her report on Israel and the Occupied Palestinian Territories, the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism criticised the practice of the Israeli military orders governing arrest and detention of Palestinians in the West Bank for not requiring Israeli authorities to inform the individual of the reason for their detention at the time of arrest. The Special Rapporteur emphasized that “there is no good reason for failing to inform a person of the reasons for their detention”.⁴⁸ The Inter-American Court has clarified that the right to be informed requires both the accused and their lawyer to be informed.⁴⁹
29. As regards to timing, article 9(2) of the ICCPR also makes clear that an individual must be notified of the reasons for arrest at the time of arrest. Similarly, article 5(2) of the European Convention on Human Rights and principle V of the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas (approved by the Inter-American Commission) require prompt notification of reasons for arrest. The timeliness of the notification is generally assessed in light of the circumstances of the case. Some unavoidable delay may be tolerated, for example to find an interpreter, provided the person arrested is sufficiently aware of the reasons for arrest and no questioning takes place before the reasons are given.
30. In order to exercise one’s rights, one must know that they exist. International standards require that anyone arrested or detained is informed of their rights and is provided with an explanation of how they may avail themselves of such rights.⁵⁰ These standards variously require notification of rights including:
- 30.1. the right to notify a third person,⁵¹
 - 30.2. the right to legal counsel (either their lawyer of choice or an appointed lawyer)⁵²
 - 30.3. the right to medical assistance,⁵³
 - 30.4. the right to challenge the lawfulness of detention,⁵⁴
 - 30.5. the right not to incriminate oneself, including the right to remain silent,⁵⁵ and
 - 30.6. the right to complain and recourse for complaints about ill-treatment or conditions.⁵⁶
31. In a similar vein, the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (SPT), which is a UN treaty body with a mandate focused on preventing torture and ill-treatment, has recommended that the full enjoyment of fundamental legal safeguards of detainees, such as the right to contact relatives and lawyers and the right to be examined by a doctor, be ensured.⁵⁷ To enable detained individuals their right to access to a lawyer, the SPT has recommended that “the State party take effective measures to guarantee that all persons deprived of their liberty are

⁴⁷ UN Human Rights Committee, Decision, Adolfo Drescher Caldas v Uruguay, UN Doc. A/38/40 Supp. 40 at 192 (1983) para 13.2; See also UN Human Rights Committee, Concluding Observations: Sudan, UN Doc. CCPR/C/79/Add.85 (1997) para 13; UN Human Rights Committee, Decision, Nechiporuk and Yonkalo v Ukraine, Communication no. 42310/04.

⁴⁸ Special Rapporteur on human rights and counter-terrorism, Israel and the Occupied Palestinian Territories, UN Doc. A/HRC/6/17/Add.4 (2007) para 22.

⁴⁹ Inter-American Court of Human Rights, Decision, Tibi v Ecuador, (2004) para 109.

⁵⁰ Committee Against Torture, General Comment no. 2, Implementation of article 2 by States parties, 24 January 2008, UN doc CAT/C/GC/2, para 13; Principles 13 and 14 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

⁵¹ Principle 16 the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

⁵² Principle 17(1) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; Principle 5 of the UN Basic Principles of the Role of Lawyers, Article 55(2)(c) of the Statute of the International Criminal Court.

⁵³ Principle 24 the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

⁵⁴ Article 9(4) ICCPR, “anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.”

⁵⁵ UN Human Rights Committee Concluding Observations: France, UN Doc. CCPR/C/FRA/CO/4 (2008) para 14, Netherlands, UN Doc. CCPR/C/NLD/CO/4 (2009) §11; CAT: Mexico, UN Doc. CAT/C/75 (2003) para 220 (e).

⁵⁶ UN Human Rights Committee (HRC), General Comment 35, Article 9 (Liberty and Security of Person), 16 December 2014, UN Doc CCPR/C/GC/35, para 42.

⁵⁷ Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Report, Visit to Bulgaria, 28 October 2022, UN Doc CAT/OP/BGR/ROSP/1, paras 58-59; Rule 41 of the Rules of Procedure and Evidence of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committee in the Territory of the Former Yugoslavia since 1991.

afforded, in law and in practice, from the time they are arrested, the right to have prompt access to an independent lawyer and, if necessary, to effective legal aid in accordance with international standards. Such legal aid should also ensure that persons deprived of their liberty are adequately informed of their rights, of the legal process itself and of the consequences of decisions that they may make throughout the process. Detainees' lack of knowledge of their rights, the legal process and the consequences of the decisions that they make places them in a situation of vulnerability".⁵⁸

32. Suspects must have prompt access to a lawyer from the very outset of deprivation of liberty in order to guarantee the presence of a lawyer in person, including during investigation interviews.⁵⁹ This access to a defence counsel applies to proceedings whether they are criminal or non-criminal in nature.⁶⁰ Amnesty International highlights the right provided for by article 16.13 of the Constitution of Mongolia that guarantees a person arrested to have their family and counsel notified within a period of time established by law of the reasons for and grounds of arrest. Amnesty International recognises that it is important for procedural safeguards to operate in practice, and draws the Constitutional Court's attention to a recommendation of the SPT for persons deprived of liberty to be able to immediately inform a family member or other next of kin of their detention.⁶¹ The UNWGD has made clear that the right to legal assistance must be conveyed to suspects upon their arrest by law enforcement officials and must be duly respected and facilitated.⁶² The SPT has recognised that the exercise of that right should not depend on the prosecutor or investigator, or the administration of the detention facility. Further, any decision by investigators or prosecutors to restrict the right to inform the next of kin must be for objective and verifiable reasons related to the investigation and subject to judicial review.⁶³

VIII. INTERNATIONAL LAW REQUIRES THAT ANYONE ARBITRARILY DETAINED HAS A RIGHT TO REDRESS

33. International law requires that anyone arbitrarily detained has a right to redress.⁶⁴ Redress enables individuals to obtain their right to an effective remedy for human rights violations, which is a "core tenet of international human rights law"⁶⁵ that is enshrined in customary international law.⁶⁶ All victims of human rights violations have a right to an effective remedy, which derives from the general principle of international human rights law that every breach gives rise to a corresponding obligation to provide an effective remedy.⁶⁷
34. The right to remedy was first enshrined in article 8 of the UN Universal Declaration of Human Rights which guarantees every person the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted them by law. Article 2(3) of ICCPR gives particular effect to the general rights of individuals to an effective remedy. The ICCPR emphasises that States must "ensure that any person claiming such a remedy shall have his right thereto determined by competent

⁵⁸ Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Report, Visit to Australia, 20 December 2023, UN Doc CAT/OP/AUS/ROSP/1 para 47.

⁵⁹ Committee against Torture, Concluding Observations on the second periodic report of Mongolia, 5 September 2016, UN Doc. CAT/C/MNG/CO/2, para 12.

⁶⁰ Working Group on Arbitrary Detention: Opinions adopted by the Working Group on Arbitrary Detention at its sixty-fifth session, 14–23 November 2012 - No. 48/2012 (Islamic Republic of Iran) UN Doc. A/HRC/WGAD/2012/48. para 22; A/HRC/WGAD/2013/10; Opinions adopted by the Working Group on Arbitrary Detention at its sixty-sixth session, 29 April-3 May 2013 – No.10/2013 (United States of America) UN Doc A/HRC/WGAD/2013/10 para 32.

⁶¹ Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Report, Visit to Kazakhstan, 7 February 2019, UN Doc CAT/OP/KAZ/1 para 46.

⁶² UN Working Group on Arbitrary Detention, Report, Visit to Mongolia, 5 July 2023, UN Doc. A/HRC/54/51/Add.2, para 48.

⁶³ Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Report, Visit to Kazakhstan, 7 February 2019, UN Doc CAT/OP/KAZ/1 para 46.

⁶⁴ Article 9(5) of the ICCPR provides that "Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation."

⁶⁵ UN Human Rights Council, Report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development (10 May 2016), A/HRC/32/19, para. 6.

⁶⁶ Prosecutor v. André Rwamakuba, Case No. ICTR-98-44C, Decision on Appropriate Remedy, para 40 (31 January 2007); Prosecutor v. André Rwamakuba, Case No. ICTR-98-44C-A, Decision on Appeal Against Decision on Appropriate Remedy, paras 23-5 (13 September 2007); and Cantoral-Benavides v. Perú, 2001 Inter-Am. Ct. H.R. (ser.C) No. 88, para 40.

⁶⁷ Permanent Court of International Justice, *Chorzów Factory (Germany v. Poland)*, 1928, (series A) No. 17, para 73.

judicial ... authorities ... and ... develop the possibilities of judicial remedy”.⁶⁸ UN treaty bodies have clarified that States’ obligation to take all appropriate measures to implement treaty rights, encompasses the duty to provide “judicial or other effective remedies”.⁶⁹ Specifically it has been stated that: “Without reparation, the obligation to provide an appropriate remedy is not discharged.”⁷⁰ UNWGAD understands that these judicial remedies are essential to preserve legality.⁷¹

35. The right to challenge the lawfulness of detention before a court is a self-standing human right, the absence of which constitutes a human rights violation. It applies to all forms of deprivation of liberty, including temporary and administrative detention.⁷² It is a judicial remedy designed to protect personal freedom and physical integrity against arbitrary arrest, detention, including secret detention, exile, forced disappearance or risk of torture and other cruel, inhuman or degrading treatment or punishment. It is also a means of determining the whereabouts and state of health of detainees and of identifying the authority ordering or carrying out the deprivation of liberty.⁷³
36. Moreover, guideline 7 of UNWGAD on the right to bring proceedings before a court to challenge the arbitrariness and lawfulness of detention states that no substantial waiting period shall exist before a detainee can bring a first challenge to the arbitrariness and lawfulness of detention.⁷⁴ Governments are required to create procedures which enable individuals to challenge the lawfulness of detention and obtain release if the detention is unlawful. Such procedures must apply throughout the period of detention. They must be simple and expeditious⁷⁵ and free of charge if the detainee cannot afford to pay.⁷⁶
37. To ensure effective oversight, good international practice requires states to actively monitor breaches of international law. All complaints of arbitrary detention must be promptly, thoroughly and impartially investigated. Legal and institutional frameworks must enable the effective investigation of alleged instances of arbitrary detention, and effective records should be kept about the outcomes and impacts of those investigations.⁷⁷ This facilitates guarantees of non-repetition. Where individuals have been arbitrarily detained, victims should be granted redress to ensure effective remedies are secured.

IX. CONCLUSION

38. International laws and standards, binding on the state of Mongolia and enshrined in its domestic law through article 10 of its constitution, provide a clear prohibition on arbitrary detention. It is respectfully submitted that the international law and standards provided in this submission can guide the court in considering the current case before it.
39. Amnesty International hopes that the Constitutional Court will find this amicus curiae brief useful to its adjudication of this matter.

⁶⁸ ICCPR, Article 2(3). See also ICERD, Article 6; UN General Assembly, *Convention Against Torture*, 10 December 1984, Article 4.

⁶⁹ UN Committee on Economic, Social and Cultural Rights, General Comment 3 on the nature of States parties obligations (Art. 2, par. 1), paras 3, 5; UN Committee on the Elimination of Discrimination against Women, General Recommendation 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, paras 30 – 32.

⁷⁰ UN Committee on the Elimination of Discrimination against Women, General Recommendation, 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, para 32.

⁷¹ Working Group on Arbitrary Detention, Report, United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, 6 July 2015, UN Doc A/HRC/30/37, para 3.

⁷² Human Rights Council, Resolution 15/18 on Arbitrary detention, 6 October 2010, paras 4(d)-(e).

⁷³ Working Group on Arbitrary Detention, Report, United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, 6 July 2015, UN Doc A/HRC/30/37, para 2.

⁷⁴ Working Group on Arbitrary Detention, Report, United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, 6 July 2015, UN Doc A/HRC/30/37, para 61.

⁷⁵ European Court of Human Rights, Decision, Grand Chamber, *Chahal v United Kingdom*, Application no. 22414/93, (1996) para 130.

⁷⁶ Principle 32(2), UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

⁷⁷ See, for example UN Human Rights Committee, General Comment No. 21: Humane treatment of persons deprived of their liberty (Article 10), UN Doc. HRI/GEN/1/Rev.9 (Vol. I) at pp. 202-203, paras 6-7.

X. ANNEX

1. Please answer whether the 6 hours of temporary detention shall be calculated from the time of delivery to the temporary detention facility in Article 26.2 of the Law on Police Service, is in line with the international human rights law and with the good practice of democratic countries that respect human rights.
2. Please answer the following questions from the perspective of good practices of democratic countries that respect human rights and international human rights law.
 - 2.1. On what grounds is a police officer (law enforcement officer) allowed to temporarily detain a person without the permission of the court or prosecutor? Does the good practice regarding the ground correspond to the basis specified in Section 26.1 of Article 26 of the Law on the Police Service of Mongolia? Are these grounds clear enough?
 - 2.2. Whether there is a limit on the period of temporary detention, and if so, when does the period of detention start, and whether Article 26, Sections 26.1 and 26.2 of the Law on the Police Service of Mongolia is consistent with good practice in this regard?
 - 2.3. Is there a concept of a temporary detention center, and if so, what is included in it? Whether the official who has the authority to temporarily detain a person considers the period from the time he has control until the time of temporary detention as part of the temporary detention period provided by law? If there is a country that regulates differently the time of delivery to the temporary detention center and the time after temporarily detained whether the time limit has been set, and whether Sections 26.1 and 26.2 of Article 26 of the Law on the Police Service of Mongolia is consistent with the good practice in this regard?
 - 2.4. What procedures are legally followed for temporary detention, i.e. which official applies the procedure for temporary detention on what basis, where and for how long, and whether this procedure is regulated by law, good practices regarding the procedure are consistent in Article 26 of the Law on the Police Service of Mongolia and other procedures.
 - 2.5. Does a detainee have the right to know the reason for temporary detention within a certain period, as well as the right to know about the case of being accused of a crime or petty crime, to notify his family and lawyer, and to seek legal assistance, and if so, when to exercise these rights and whether the good practices of these rights are consistent with Article 26.3 of the Law on the Police Service of Mongolia and other provisions, and whether a person temporarily detained in Mongolia enjoys these rights?
 - 2.6. Whether the court reviews whether the temporary detention was following the grounds and procedures specified in the law, whether the court is required to exercise this control, or whether it is exercised by the detainee's complaint.
 - 2.7. Are the reasons and procedures for temporary detention different from arrest without court permission in cases where it cannot be delayed during criminal proceedings, and if so, how are the reasons and procedures different (whether the period of temporary detention is included in the period of arrest)