The Human Rights Committee’s General Discussion on the preparation for a General Comment on Article 9 (Liberty and Security of Person) of the International Covenant on Civil and Political Rights

APT’s preliminary observations
27 September 2012

Following the Human Rights Committee’s invitation for written arguments in advance of the General Discussion on the preparation for a General Comment on article 9, the Association for the Prevention of Torture (APT) welcomes the opportunity to provide some preliminary comments. Since the Human Rights Committee last examined article 9 in General Comment No.8 in 1982, we reference recent international and regional jurisprudence and legal texts to provide complementary authorities for the Committee’s consideration.

The APT is a Geneva-based international NGO with over 35 years’ experience in the prevention of torture and other forms of ill-treatment to persons deprived of their liberty. In particular, the APT promotes the use of procedural and legal safeguards, among other preventive practices.

1. Introduction

Article 9 describes some of the most important procedural safeguards for all persons arrested or detained. In places where persons are deprived of their liberty, State authorities maintain total control, which leaves detainees vulnerable to the risk of abuse. Where there is no independent oversight or supervision, detainees face increased risks of ill-treatment, torture, indefinite detention, enforced disappearance, and other abuse.

2. Deprivation of liberty

The Human Rights Committee has already analysed the meaning of the term ‘deprivation of liberty’ in its previous General Comment. The Committee considered that a deprivation of liberty for the purposes of article 9 must apply to all deprivations of liberty, “whether in criminal cases or in other cases such as, for example, mental illness, vagrancy, drug addiction, educational purposes, immigration control, etc.”

The Committee has also stated that the term “persons deprived of their liberty” should also be given a broad interpretation, in its General Comment on article 10.

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1 Human Rights Committee, General Comment No.8: Right to liberty and security of persons (Art.9), 30 June 1982, para.1.
2 Human Rights Committee, General Comment No.21: Replaces general comment 9 concerning humane treatment of persons deprived of liberty (Art. 10), 10 April 1992, para.2.
While the Committee has given the term ‘deprivation of liberty’, and consequently the moments of ‘arrest’ and ‘detention’, a broad definition in line with the provision’s object and purpose, it has also acknowledged that a threshold must logically exist, before which a violation of the right to freedom of movement might be violated, even if the deprivation is not, per se, severe enough to be characterised as a deprivation of liberty.

Such a broad approach may also be observed through the jurisprudence of the Committee. In the case of Monja Jaona v. Madagascar, the Committee ruled house arrest to be a deprivation of liberty; and in A v. New Zealand, the Committee ruled detention at a psychiatric hospital to be a deprivation of liberty within the scope of article 9.

As in article 9 of the Covenant, the deprivation of liberty is also a key element of some recent international human rights law instruments. The Optional Protocol to the Convention against Torture (OPCAT) which came into force in 2006, defines both a place of detention and a deprivation of liberty, therefore setting out the scope of application for the bodies established under the instrument.

Article 4(2): For the purposes of the present Protocol, deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority.

In adopting the text, consideration was given to the alternative language of “detained”, “place of detention”, and “deprived of liberty”. In the end, all three choices were used. Nevertheless, these largely synonymous terms have been understood very broadly in order to ensure the protection of all persons deprived of their liberty under any circumstances. This means that visits by the bodies established under the Optional Protocol are not limited to prisons and police stations, but also include places such as pre-trial detention facilities, centres for juveniles, places of administrative detention, security force stations, detention centres for migrants and asylum-seekers, transit zones in airports, checkpoints in border zones, mental health institutions and social care homes, transit vehicles, and forced deportation by aircraft or boat. The scope of the mandate of the monitoring bodies

3 See M. Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary (N.P.Engel: Germany, 2005), pp.218-223. Nowak concludes that a broad interpretation of the terms “arrest” and “detention” were intended by the drafters and by the States that agreed the text.
4 See, for instance, in Celepli v. Sweden (No.456/1991, paras.5.2 & 6.1.) the Human Rights Committee stated the assigned residence of a Turkish citizen to a Swedish municipality for nearly seven years and an obligation to report to the police three times a week should be characterised as an interference with his freedom of movement, but not personal liberty.
6 Human Rights Committee, A v. New Zealand (No.754/1997).
also extends to unofficial and secret places of detention, where people are particularly vulnerable to many types of abuse. Institutions where persons are, or may be, deprived of liberty and placed under public or private control are subject to visits by the OPCAT bodies.

The OPCAT’s definition of “detention” or “deprivation of liberty” was designed to be very broad in order to provide the widest possible protection for persons deprived of their liberty. The key elements of this definition concern the fact that an individual deprived of his/her liberty is not able to leave the place of detention of his/her own free will, and that the detention must have some link, direct or indirect, to public authorities. The definition also contains two elements which describe the nature of the connection to the State that must be established in order for a place of detention to fall within the scope of the OPCAT:

- the place must be under a State Party’s jurisdiction and control; and
- the place must contain, or may be used to contain, persons held by virtue of an order given by a public authority, or at its instigation, or with its consent or acquiescence.

In their commentary on the OPCAT, Murray and others assert that the UNHCR applies a definition even broader than that understood from the Optional Protocol, such that detention may be understood as “confinement within a narrowly bounded or restricted location, including prisons, closed camps, detention facilities or airport transit zones, where freedom of movement is substantially curtailed, and where the only opportunity to leave this limited area is to leave the country.”

The APT recommends that the Human Rights Committee reinforces the broad scope of the terms ‘deprivation of liberty’ and ‘detention’ in its General Comment in order to give the widest possible protection to persons deprived of their liberty.

3. Safeguards against ill-treatment and torture in detention

Safeguards are designed to protect persons deprived of their liberty from human rights violations and abuse. There is always a risk of abuse in places of detention, but the implementation of safeguards significantly reduces the risks to detainees. Many safeguards, such as access to a lawyer, contact with family members, and an independent medical examination, significantly reduce the isolation of detainees, thereby providing independent oversight and a witness to events which serves to deter ill-treatment and provides a way to report, record and end abuse. The Human Rights Committee has already identified and described many safeguards against torture and other forms of ill-treatment in General Comment No.20, on article 7 of the Covenant.

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12 UNHCR, Revised Guidelines on Detention, Guideline 1, para.1.
13 Human Rights Committee, General Comment No.20: Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (Art.7), 10 March 1992.
Monitoring bodies, including the Subcommittee on Prevention of Torture and the European Committee for the Prevention of Torture, have reported that acts of torture and ill-treatment can occur very quickly after a person is taken into custody, and therefore emphasise that some fundamental safeguards should take effect from the very moment of arrest. The phrases ‘promptly’ and ‘without delay’ in article 9 illustrate the urgency with which such safeguards should be applied.

Article 9(3)
Paragraph 3 describes the rights of those arrested or detained “on a criminal charge.” The right to be brought promptly before a judge or other judicial officer independent of the executive to hear the case against the accused is a key protection against torture in the early stages of detention, when the risks of torture are greatest. The safeguard provides the person must be brought, thus is a personal right and may not be completed remotely or by proxy.

Article 10 of the Declaration on the Protection of all Persons from Enforced Disappearance, adopted by General Assembly resolution 47/133 of 18 December 1992, and the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment use similar language and convey the same right.

This protective measure reflects the importance of the possibility of removing a detainee from the control of the detaining authority at an early opportunity, as an important way to help reduce the risk of torture and other ill-treatment. The Special Rapporteur on torture has offered further advice:

Those legally arrested should not be held in facilities under the control of their interrogators or investigators for more than the time required by law to obtain a judicial warrant of pre-trial detention which, in any case, should not exceed a period of 48 hours. They should accordingly be transferred to a pre-trial facility under a different authority at once, after which no further unsupervised contact with the interrogators or investigators should be permitted.

When brought before a judge or other judicial officer, the officer can see if there are visible signs of ill-treatment, can ask the detainee how he or she has been treated.

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14 See CPT Standards, supra.
15 The wording of the provision in Art.9(3) permits a person to be brought before a person authorised by law to exercise judicial power. However, expert analysis has indicated that only a person independent of the executive or detaining authority may hold such a role. For further discussion on this issue, see N.Rodley and M.Pollard, The Treatment of Prisoners under International Law (Oxford: University Press, 2009), p457.
16 The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) has stressed that “in its experience, the period immediately following deprivation of liberty is when the risk of intimidation and physical ill-treatment is greatest.” CPT standards, CPT/Inf/E (2002) 1 - Rev. 2011, para.15.
18 Principle 11(1) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by General Assembly resolution 43/173 of 9 December 1988: A person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority. A detained person shall have the right to defend himself or to be assisted by counsel as prescribed by law.
while in detention, can critically examine detention records for gaps or inconsistencies, and can hear allegations made by the detainee. This key moment provides an independent judicial officer with supervisory control over the detainee, and removes the complete control of the detaining authority.

In order to ensure the right is not theoretical and illusionary, but practical and effective, the judge or other judicial officer should be able to examine the detainee, to examine associated records of detention, and to address the detainee in an atmosphere free from intimidation. Requiring any accompanying police officers to leave the court is one way in which this safeguard can be given effect in practice.

If there is any sign of torture or ill-treatment, the judge should inquire into it without delay, even if the detainee did not volunteer any allegation. Where there are reasonable grounds to believe torture has been committed, the judge should initiate a proper investigation and take effective steps to protect the detainee against further ill-treatment.

The APT recommends that the Human Rights Committee recognises the relationship between articles 7, 9(3), 10(1) and 14 of the Covenant, and affirms the important role that these procedural safeguards play in the prevention of ill-treatment and torture.

**Article 9(4)**
The _habeas corpus_ right described in paragraph four is one of the most fundamental protections for persons deprived of their liberty, and as the Committee recognises, applies to all persons deprived of their liberty, whether the detention is a result of criminal charges or other such processes.

In its jurisprudence, the Human Rights Committee has also emphasised the application of the right to all persons deprived of their liberty, which may only be fulfilled through proceedings before a body which is judicial in character and composed as a court, rather than as an administrative hearing.

Although the purpose of a _habeas_ petition is to challenge the legality of the detention, it is also an important safeguard against torture. As with the obligation to be brought before a judge, the _habeas corpus_ proceeding is a key opportunity for the court to assess the detainee for signs of ill-treatment. The Special Rapporteur for torture has urged “judges [to] make full use of the possibilities provided for in the law regarding the proceedings of _habeas corpus_ (procedimiento de amparo). They should, in particular, seek access to the detainee and verify his/her physical condition.”

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21 Article 17(3) of the International Convention for the Protection of All Persons from Enforced Disappearance provides: “Each State Party shall assure the compilation and maintenance of one or more up-to-date official registers and/or records of persons deprived of liberty, which shall be made promptly available, upon request, to any judicial or other competent authority or institution authorized for that purpose by the law of the State Party concerned or any relevant international legal instrument to which the State concerned is a party.” The Convention also lists the information that should be contained in such a register.
23 Human Rights Committee, General Comment No.8: Right to liberty and security of persons (Art.9), 30 June 1982, para.1.
24 A ‘court’ for this purpose may be civil or military in character (see Human Rights Committee, _Vuolanne v. Finland_ (No.265/1987)).
an approach is also supported in an Advisory Opinion of the Inter-American Court on Human Rights, which stated that “the immediate aim of this remedy is to bring the detainee before a judge, thus enabling the latter to verify whether the detainee is still alive and whether or not he or she has been subjected to torture or physical or psychological abuse. The importance of this remedy cannot be overstated, considering that the right to humane treatment recognized in Article 5 of the American Convention on Human Rights is one of the rights that may not be suspended under any circumstances.”

Following the arguments above, it is a duty of every judge and court to appreciate the habeas corpus right as an essential safeguard against torture. At this moment, the judge retains effective supervisory control over the detainee, and has an obligation not to return the detainee to the place of detention if he or she has been ill-treated, pursuant to articles 7 and 10(1) of the Covenant.

The APT recommends that the Human Rights Committee recognises the relationship between articles 7, 9(4), 10(1) and 14 of the Covenant, and urges States Parties to the Covenant to recognise the obligation of habeas corpus proceedings as a duty on all judges and courts to take effective steps to prevent torture.

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