Chapter 5
HUMAN RIGHTS AND ARREST, PRE-TRIAL DETENTION AND ADMINISTRATIVE DETENTION

Learning Objectives

- *To familiarize participants with existing international legal standards regarding the right to liberty and security of the person and which protect human rights both in connection with and during arrest, pre-trial detention and administrative detention;*
- *To illustrate how the various legal guarantees are enforced in practice in order to protect the rights of detained persons and their legal counsel;*
- *To explain what legal measures and/or actions judges, prosecutors and lawyers must take in order to safeguard the rights of the persons arrested or detained.*

Questions

- *On what basis can persons be detained on remand in your country, and what alternatives to such detention are available pending trial?*
- *For how long can people be deprived of their liberty in your country before they must be brought before a judge in order to have the legality of their deprivation of liberty determined?*
- *How does the law in the country where you work as judges, prosecutors or lawyers protect individuals against unlawful or arbitrary arrests and detention?*
- *Do illegal or arbitrary arrests and detentions occur in the country where you exercise your professional responsibilities?*
- *If faced with an arrest and detention that appears to be unlawful or arbitrary, what would you do about it, and what could you do about it, given the present status of the law in the country where you work?*

Questions (cont.d)

- *What remedies exist in your country for persons who consider that they are unlawfully or arbitrarily deprived of their liberty?*
- *If a person is found by a judge to have been unlawfully or otherwise arbitrarily deprived of his or her liberty, is there a right in your country to compensation or reparation for unlawful or arbitrary imprisonment?*
- *On what grounds can persons be subjected to detention by the* **administrative** *authorities in your country, and what legal remedies do they have at their disposal to challenge the legality of the initial and subsequent deprivation of liberty?*
- *At what point following their arrest/detention do persons deprived of their liberty have the right of access to a lawyer in your country?*
- *Does the law in your country authorize resort to* **incommunicado** *detention, and, if so, for how long?*
- *Before joining this course, what did you know about the international legal standards applicable to arrest and detention?*

Relevant Legal Instruments

Universal Instruments

- The Universal Declaration of Human Rights, 1948
- The International Covenant on Civil and Political Rights, 1966

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- The Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment, 1988;
- The Declaration on the Protection of All Persons from Enforced Disappearance, 1992;
- The Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, 1989

Regional Instruments

- The African Charter on Human and Peoples' Rights, 1981
- The American Convention on Human Rights, 1969
- The European Convention on Human Rights, 1950

1. Introduction

The present chapter will provide an analysis of the basic legal rules governing arrest, detention on remand and administrative detention in international human rights law. In so doing, it will, inter alia, deal in some depth with the reasons justifying arrest and continued detention and the right of a person deprived of his or her liberty to challenge the legality of this deprivation of liberty. Emphasis will be laid on the jurisprudence of the Human Rights Committee, the Inter-American and European Courts of Human Rights, and the African Commission on Human and Peoples' Rights, which provide interpretations which are indispensable for a full understanding of the meaning of the international legal rules governing arrest and detention.

As to the treatment of detainees and the specific interests and rights of children and women, these issues, although in many ways very closely linked to the subject matter of the present chapter, will be dealt with in separate chapters focusing specifically on the rights and interests of these groups (see Chapters 8, 10 and 11 of this Manual).

2. Arrests and Detention without Reasonable Cause: a Persistent Problem

All human beings have the right to enjoy respect for their liberty and security. It is axiomatic that, without an efficient guarantee of the liberty and security of the human person, the protection of other individual rights becomes increasingly vulnerable and often illusory. Yet, as is evidenced by the work of the international monitoring organs, arrests and detentions without reasonable cause, and without there being any effective legal remedies available to the victims concerned, are commonplace. In the course of such arbitrary and unlawful deprivations of liberty, the detainees are frequently also deprived of access both to lawyers and to their own families, and also subjected to torture and other forms of ill-treatment.[1].

It is essential, therefore, that the legal rules that exist in international law to remedy and prevent these kinds of human rights violations be adhered to by national judges and prosecutors, and that lawyers are aware of their contents, to enable them to act effectively on behalf of their clients.

Although arbitrary or unlawful arrests and detentions occur, and can occur, at any time, the experience of, inter alia, the Working Group on Arbitrary Detention has shown that the main causes of arbitrary detentions are related to states of emergency.[2] However, the question of emergency powers relating to deprivation of liberty will be dealt with in Chapter 16 of this Manual, and will thus not be considered in the present context.

[1] See e.g. UN doc. E/CN.4/1999/63, *Report of the Working Group on Arbitrary Detention*.

[2] UN doc. E/CN.4/1996/ 40, *Report of the Working Group on Arbitrary Detention*, para. 106.

3. The Right to Liberty and Security of the Person: Field of Applicability of the Legal Protection

3.1 Universal legal responsibility: All States are bound by the law

Article 9(1) of the International Covenant on Civil and Political Rights, article 6 of the African Charter of Human and Peoples' Rights, article 7(1) of the American Convention on Human Rights and article 5(1) of the European Convention on Human Rights guarantee a person's right to "liberty" and "security". Moreover, as stated by the International Court of Justice in its *dictum* in the *Hostages in Tehran* case, "wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights", article 3 of which guarantees "the right to life, liberty and security of person".[3] ***It follows that, notwithstanding that a State may not have ratified or otherwise adhered to any of the preceding human rights treaties, it is nonetheless bound by other legal sources to ensure a person's right to respect for his or her liberty and security.***

3.2 The notion of security of person: State responsibility to act

The present chapter will focus on ***deprivations of liberty***, but it is important to point out that, in spite of being linked to the concept of "liberty" in the above-mentioned legal texts, the notion of ***security of person***, as such, has a ***wider field of application***. The Human Rights Committee has thus held that article 9(1) of the Covenant "protects the right to security of person also outside the context of formal deprivation of liberty", and that an interpretation of article 9 "which would allow a State party to ignore threats to the personal security of non-detained persons subject to its jurisdiction would render totally ineffective the guarantees of the Covenant".[4] In the view of the Committee, "it cannot be the case that, as a matter of law, States can ignore known threats to the life of persons under their jurisdiction, just because he or she is not arrested or otherwise detained"; on the contrary, "States parties are under an obligation to take reasonable and appropriate measures to protect them".[5]

[3] *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), ICJ Reports 1980*, p. 42, para. 91.

[4] Communication No. 711/1996, *Dias v. Angola* (Views adopted on 20 March 2000), in UN doc. *GAOR*, A/55/50 (vol. II), p. 114, para. 8.3.

[5] Communication No. 195/1985, *W. Delgado Páez v. Colombia* (Views adopted on 12 July 1990), in UN doc. *GAOR*, A/45/40 (vol. II), p. 47, para. 5.5.

Three relevant cases

In the case of *Delgado Páez*, where the author had received death threats, been subjected to one personal assault and had a colleague murdered, the Human Rights Committee concluded that article 9(1) had been violated since Colombia either had not taken, or had "been unable to take, appropriate measures to ensure Mr. Delgado's right to security of his person".[6] In the case of *Dias*, the Committee concluded that article 9(1) had been violated since it was the Angolan authorities themselves that were alleged to be the sources of the threats and the State party had neither denied the allegations, nor cooperated with the Committee.[7] Further, in a case where the author was shot from behind before being arrested, the Committee concluded that his right to security of the person as guaranteed by article 9(1) was violated.[8]

All human beings have the right to liberty and security.

*Irrespective of their treaty obligations, all States are bound by international law to respect and ensure everybody's right to liberty and security of the person (***universal legal responsibility***).*

The notion of "security" also covers threats to the personal security of non-detained persons. States cannot be passive in the face of such threats, but are under a legal obligation to take reasonable and appropriate measures to protect liberty and security of person.

4. Lawful Arrests and Detentions

4.1 The legal texts

Article 9(1) of the International Covenant on Civil and Political Rights reads as follows:

> "1. Everyone has the right to liberty and security of person. 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 such procedure as are established by law."

[6] Ibid., p. 48, para. 5.6.

[7] Communication No. 711/1996, *Dias v. Angola* (Views adopted on 20 March 2000), in UN doc. *GAOR*, A/55/50 (vol. II), p. 114, para. 8.3.

[8] Communication No. 613/1995, *Leehong v. Jamaica* (Views adopted on 13 July 1999), in UN doc. A/54/40 (vol. II), p. 60, para. 9.3.

Article 6 of the African Charter on Human and Peoples' Rights provides that:

> "Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained."

Article 7 of the American Convention on Human Rights provides, inter alia, that:

> "1. Every person has the right to personal liberty and security.
>
> 2. No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto.
>
> 3. No one shall be subject to arbitrary arrest or imprisonment."

The European Convention on Human Rights is the only treaty that specifically enumerates the grounds which can lawfully justify a deprivation of liberty in the Contracting States. This list is exhaustive and "must be interpreted strictly".[9] The first paragraph of its article 5 reads:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
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> (a) the lawful detention of a person after conviction by a competent court;
>
> (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
>
> (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
>
> (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
>
> (f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition."

[9] *Eur. Court HR, Bouamar Case, judgment of 29 February 1988, Series A, No. 129*, p. 19, para. 43.

Other legal instruments that will be referred to in this chapter are:

- The Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment, adopted by the General Assembly in 1988;
- The Declaration on the Protection of All Persons from Enforced Disappearance, adopted by the General Assembly in 1992;
- The Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, recommended by Economic and Social Council resolution 1989/65.

4.2 The notions of lawfulness and arbitrariness: their meaning

The four major human rights treaties referred to above all stipulate, albeit in somewhat differing terms, that a deprivation of liberty must in all cases be carried out ***in accordance with the law*** (the principle of legality), and, as regards article 5 of the European Convention, for the exclusive purposes enumerated therein. Furthermore, deprivations of liberty must not be ***arbitrary***, a wider notion which, as will be seen below, makes it possible for the international monitoring organs to consider factors that make the domestic laws or their application unreasonable in the circumstances.

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As to the ***principle of legality***, the Human Rights Committee has held that "it is violated if an individual is arrested or detained on grounds which are not clearly established in domestic legislation"; in other words, the grounds for arrest and detention must be "established by law".[10] In a case where a person was arrested without a warrant, which was issued more than three days later, contrary to the domestic law that lays down that a warrant must be issued within 72 hours after arrest, the Committee concluded that article 9(1) had been violated because the author had been "deprived of his liberty in violation of a procedure as established by law".[11]

With regard to the meaning of the words "***arbitrary arrest***" in article 9(1), the Committee has explained that

> "'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***. ... [T]his means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in the circumstances. Remand in custody must further be necessary in all the circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime".[12]

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[10] Communicaton No. 702/1996, *C. McLawrence v. Jamaica* (Views adopted on 18 July 1997), in UN doc. *GAOR*, A/52/40 (vol. II), pp. 230-231, para. 5.5.

[11] Communication No. 770/1997, *Gridin v. Russian Federation* (Views adopted on 20 July 2000), in UN doc. *GAOR*, A/55/40 (vol. II), p. 175, para. 8.1.

[12] Communication No. 458/1991, *A. W. Mukong v. Cameroon* (Views adopted on 21 July 1994), in UN doc. *GAOR*, A/49/40 (vol. II), p. 181, para. 9.8; footnote omitted from the quotation; emphasis added.

In other words, remand in custody pursuant to lawful arrest must not only be "***lawful***" but also "***reasonable***" and "***necessary***" in all the circumstances for the aforementioned purposes. It is for the State party concerned to show that these factors are present in the particular case.[13]

The Mukong *case*

In the case of *Mukong*, the applicant alleged that he had been arbitrarily arrested and detained for several months, an allegation rejected by the State party on the basis that the arrest and detention had been carried out in accordance with the domestic law of Cameroon. The Committee concluded that article 9(1) had been violated, since the author's detention "was neither reasonable nor necessary in the circumstances of the case".[14] For instance, the State party had not shown that the remand in custody was "necessary ... to prevent flight, interference with evidence or the recurrence of crime" but had "merely contended that the author's arrest and detention were clearly justified by reference to" article 19(3) of the Covenant, which allows for restrictions on the right to freedom of expression.[15] However, the Committee considered that "national unity under difficult political circumstances cannot be achieved by attempting to muzzle advocacy of multi-party democracy, democratic tenets and human rights", and that the author's right to freedom of expression had therefore been violated.[16] Consequently, the Committee also concluded that the author's arrest and detention were contrary to article 9(1) of the Covenant.[17]

In a case where a victim had been held in detention for about 16 months with a view to forcing him to disclose the whereabouts of his brother, the Committee considered that he had been subjected to "arbitrary arrest and detention" contrary to article 9, there being no other criminal charge laid against him.[18] Clearly, when a person is arrested without warrant or summons and then simply kept in detention without any court order, this also amounts to a violation of the right to freedom from arbitrary arrest and detention set forth in article 9(1).[19] In some cases dealt with by the Committee, persons have been kept in detention contrary to article 9(1) of the Covenant without any court order, simply on grounds of their political opinions.[20]

[13] Communication No. 305/1988, *H. van Alphen v. the Netherlands* (Views adopted on 23 July 1990), in UN doc. *GAOR*, A/45/40 (vol. II), p. 115, para. 5.8; emphasis added.

[14] Communication No. 458/1991, *A. W. Mukong v. Cameroon* (Views adopted on 21 July 1994), in UN doc. *GAOR*, A/49/40 (vol. II), p. 181 para. 9.8.

[15] Ibid., loc. cit.

[16] Ibid., p. 181, para. 9.7.

[17] Ibid., para. 9.8.

[18] Communication No. 16/1977, *D. Monguya Mbenge et al. v. Zaire* (Views adopted on 25 March 1983), in UN doc. *GAOR*, A/38/40, p. 140, paras. 20-21.

[19] Communication No. 90/1981, *L. Magana ex-Philibert v. Zaire* (Views adopted on 21 July 1983), in UN doc. *GAOR*, A/38/40, p. 200, paras. 7.2 and 8.

[20] See, for example, Communication No. 132/1982, *M. Jaona v. Madagascar* (Views adopted on 1 April 1985), in UN doc. *GAOR*, A/40/40, p. 186, para. 14.

It is further evident that, where a person is kept in detention in spite of a judicial order of release, this is also contrary to article 9(1) of the Covenant.[21]

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The prohibition of arbitrariness also of course means that deprivations of liberty must not be motivated by discrimination. As further explained in Chapter 13, the States parties to the human rights treaties examined in this Manual undertake to ensure the enjoyment of rights and fundamental freedoms without distinction on such grounds as race, colour, sex, language, religion, and political or other opinion. The African Commission on Human and Peoples' Rights consequently concluded that arrests and detentions carried out by the Rwandan Government "on grounds of ethnic origin alone, ... constitute arbitrary deprivation of the liberty of an individual"; such acts are thus "clear evidence of a violation of" article 6 of the African Charter on Human and Peoples' Rights.[22]

In another case the African Commission held that the ***"indefinite detention*** of persons can be interpreted as arbitrary as the detainee does not know the extent of his punishment"; article 6 of the African Charter had been violated in this case because the victims concerned were detained indefinitely after having protested against torture.[23]

Furthermore, it constitutes an arbitrary deprivation of liberty within the meaning of article 6 of the African Charter to ***detain people without charges and without the possibility of bail***; in this particular case against Nigeria the victims had been held in these conditions for over three years following elections.[24]

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The Inter-American Court on Human Rights has held, with regard to article 7(2) and (3) of the American Convention on Human Rights, that

> "persuant to the first of these provisions, no person may be deprived of his or her personal freedom except for reasons, cases or circumstances expressly defined by law ***(material aspect)*** and, furthermore, subject to strict adherence to the procedures objectively set forth in that law ***(formal aspect)***. The second provision addresses the issue that no one may be subjected to arrest or imprisonment for reasons and by methods which, although classified as legal, could be deemed to be incompatible with the respect for the fundamental rights of the individual because, among other

[21] See, for example, Communication No. R.1/5, *M. H. Valentini de Bazzano et al. v. Uruguay* (Views adopted on 15 August 1977), in UN doc. *GAOR*, A/34/40, para. 10 at p. 129.

[22] *ACHPR, Organisation Contre la Torture and Others v. Rwanda, Communications Nos. 27/89, 46/91, 49/91, and 99/93, decision adopted during the 20th Ordinary session, October 1996*, para. 28; for the text of the decision, see http://www1.umn.edu/humanrts/africa/comcases/27-89_46-91_49-91_99-93.html.

[23] *ACHPR, World Organisation against Torture and Others v. Zaire, Communications Nos. 25/89, 47/90, 56/91 and 100/93, decision adopted during the 19th session, March 1996*, para. 67; for the text see http://www.up.ac.za/chr/.

[24] *ACHPR, Constitutional Rights Project and Civil Liberties Organisation v. Nigeria, Communication No. 102/93, decision adopted on 31 October 1998*, para. 55 of the text published at the following web site: http://www1.umn.edu/humanrts/africa/comcases/102-93.html.

things, they are ***unreasonable, unforeseeable or lacking in proportionality***."[25]

In the case of *Castillo-Páez*, Peru had violated various provisions of article 7 of the American Convention, including paragraphs (2) and (3), since the victim had been detained by members of the Natonal Police without a written order issued by a judicial authority contrary to both the American Convention and the Peruvian Constitution.[26]

Articles 7(1), (2) and (3) of the American Convention were further violated in the *Cesti Hurtado* case, since, in defiance of an order of the Public Law Chamber of the Superior Court of Justice, the Peruvian military proceeded to detain, prosecute and convict Mr. Hurtado.[27]

Lastly, article 7 was violated in the so-called *"Street Children"* case concerning the abduction and murder of several youths perpetrated by State agents contrary to the conditions established by domestic law. The Inter-American Court emphasized its case-law with regard to arrests and the material and formal aspects of the guarantees that need to be fulfilled, and concluded that neither aspect had been observed. It also referred to the jurisprudence of the European Court of Human Rights, according to which "the promptness of judicial control of arrests is of special importance for the prevention of arbitrary arrests".[28]

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With regard to article 5(1) of the European Convention on Human Rights, the European Court has consistently held that the "object and purpose" thereof is "precisely to ensure that no one should be deprived of his liberty in an arbitrary fashion".[29] In other words,

> "the expressions 'lawful' and 'in accordance with a procedure prescribed by law' in Article 5 § 1 stipulate not only full compliance with the ***procedural*** and ***substantive rules of national law***, but also that any deprivation of liberty be ***consistent with the purpose of Article 5 and not arbitrary*** (...). In addition, given the importance of personal liberty, it is essential that the applicable national law meet the standard of 'lawfulness' set by the Convention, which requires that all law, whether written or unwritten, be ***sufficiently precise to allow the citizen – if need be, with appropriate advice – to foresee, to a degree that is reasonable in all circumstances, the consequences which a given action may entail***."[30]

[25] *I-A Court HR, Gangaram Panday Case v. Suriname, judgment of January 21, 1994*, in OAS doc. OAS/Ser.L/V/III.31, doc. 9, *Annual Report of the Inter-American Court of Human Rights 1994*, p. 32, para. 47; emphasis added.

[26] *I-A Court HR, Castillo Páez Case v. Peru, judgment of November 3, 1997*, in OAS doc. OAS/Ser.L/V/III.39, doc. 5, *Annual Report Inter-American Court of Human Rights 1997*, p. 263, para. 56.

[27] *I-A Court HR, Cesti Hurtado Case v. Peru, judgment of September 29, 1999,* in OAS doc. OEA/Ser.L/V/III.47, doc. 6, *Annual Report Inter-American Court of Human Rights 1999*, p. 445, paras. 141-143.

[28] *I-A Court HR, Villagrán Morales et al. Case (The "Street Children" Case), judgment of November 19, 1999*, in OAS doc. OEA/Ser.L/V/III.47, doc. 6, *Annual Report Inter-American Court on Human Rights 1999*, pp. 704-706, paras. 128-136.

[29] *Eur. Court HR, Case of X v. the United Kingdom, judgment of 5 November 1981, Series A, No. 46*, p. 19, para. 43.

[30] *Eur. Court HR, Case of Steel and Others v. the United Kingdom, judgment of 23 September 1998, Reports 1998-VII*, p. 2735, para. 54; emphasis added.

The important question of ***foreseeability*** has inter alia been considered in relation to the concept of *a breach of the peace* under United Kingdom law, with the European Court holding that "the relevant rules provided sufficient guidance and were formulated with the degree of precision required by the Convention".[31] This was so since it was "sufficiently established that a breach of the peace is committed only when an individual causes harm, or appears likely to cause harm, to persons or property or acts in a manner the natural consequences of which would be to provoke others to violence"; it was "also clear that a person may be arrested for causing a breach of the peace or where it is reasonably apprehended that he or she is likely to cause a breach of the peace".[32] However, it found that where applicants had been arrested for about seven hours before being released on bail and where there were no rulings by national courts on the question whether the arrests and detentions accorded with English law, article 5(1) of the Convention had been violated.[33]

To be lawful under international human rights law, arrests and detentions must:

- *be carried out in accordance with both formal and substantive rules of domestic and international law, including the principle of non-discrimination;*
- *be free from arbitrariness, in that the laws and their application must be appropriate, just, foreseeable/predictable and comply with due process of law.*

4.2.1 Unacknowledged detentions, abductions and involuntary disappearances

Where people have been abducted, illegally detained under domestic law, and subsequently murdered or made to disappear, the Human Rights Committee has concluded that the detention violated article 9 of the Covenant.[34] Abduction and detention by agents of one State party of persons in another country provides another example of "an arbitrary arrest and detention".[35]

In its General Comment No. 20 on article 7, the Committee stated, furthermore, that

[31] Ibid., para. 55 at p. 2736.

[32] Ibid., loc. cit.

[33] Ibid., p. 2737, paras. 62-65.

[34] Communication No. 612/1995, *Arhuacos v. Colombia* (Views adopted on 29 July 1997), in UN doc. *GAOR*, A/52/40 (vol. II), pp. 181-182, para. 8.6 (murder); Communication No. 540/1993, *C. Laureano v. Peru* (Views adopted on 25 March 1996), in UN doc. *GAOR*, A/51/40 (vol. II), p. 114, para. 8.6 (disappearance).

[35] Communication No. R.12/52, *D. Saldías de López on behalf of S. R. López Burgos* (Views adopted on 29 July 1981), in UN doc. *GAOR*, A/36/40, p. 183, para. 13.

> "To guarantee the effective protection of detained persons, provisions should be made for detainees to be held in places officially recognized as places of detention and for their names and places of detention, as well as for the names of persons responsible for their detention, to be kept in registers readily available and accessible to those concerned, including relatives and friends. To the same effect, the time and place of all interrogations should be recorded, together with the names of all those present and this information should also be available for purposes of judicial or administrative proceedings."[36]

Principle 12 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, article 10 of the Declaration on the Protection of All Persons from Enforced Disappearance, and Principle 6 of the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions also contain similar requirements with regard, inter alia, to the holding of detained people in officially recognized places of detention and the registration of all relevant information concerning the person deprived of his liberty.

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While accepting that "the State has the right and duty to guarantee its security", the Inter-American Court of Human Rights has emphasized that the State is also "subject to law and morality" and that "disrespect for human dignity cannot serve as the basis for any State action"; it follows that

> "forced disappearance of human beings is a multiple and continuous violation of many rights under the Convention that the States parties are obligated to respect and guarantee. The kidnapping of a person is an arbitrary deprivation of liberty, an infringement of a detainee's right to be taken without delay before a judge and to invoke the appropriate procedures to review the legality of the arrest, all in violation of article 7 of the Convention."[37]

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The European Court of Human Rights has frequently emphasized the fundamental importance of the guarantees contained in article 5 of the European Convention "for securing the rights of individuals in a democracy to be free from arbitrary detention at the hands of the authorities", further stressing that

> "***the unacknowledged detention of an individual is a complete negation of these guarantees and discloses a most grave violation of Article 5.*** Given the responsibility of the authorities to account for individuals under their control, article 5 requires them to take effective measures to safeguard against the risk of disappearance and to conduct a prompt and effective investigation into an arguable claim that a person has been taken into custody and has not been seen since."[38]

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[36] *United Nations Compilation of General Comments*, p. 140, para. 11.

[37] *I-A Court HR, Godinez Cruz Case, judgment of January 20, 1989*, *Series C, No. 5*, pp. 144-145, paras. 162-163; and also the *Velásquez Rodríguez Case, judgment of July 29, 1988, Series C, No. 4*, pp. 146-147, paras. 154-155.

[38] *Eur. Court HR, Case of Çakici v. Turkey, judgment of 8 July 1999, Reports 1999-IV*, p. 615, para. 104; emphasis added.

The Court has further specified that

"the recording of accurate holding data concerning the date, time and location of detainees, as well as the grounds for the detention and the name of the persons effecting it, is necessary for the detention of an individual to be compatible with the requirements of lawfulness for the purposes of Article 5 § 1".[39]

The Çakici *case*

In the case of *Çakici*, the lack of records on the applicant – who was held in unacknowledged detention – disclosed "a serious failing", which was aggravated by the "findings as to the general unreliability and inaccuracy"of the custody records in question. The Court found "unacceptable the failure to keep records which enable the location of a detainee to be established at a particular time".[40] Considering that, in spite of there being three eye-witnesses to the detention of the applicant, "no steps were taken to seek any evidence, beyond enquiring as to entries in custody records, until after the application was communicated to the Government by the [European] Commission [of Human Rights]", the Court concluded that there "was neither a prompt nor a meaningful inquiry into the circumstances of Ahmet Çakici's disappearance".[41] There had consequently been "a particularly grave violation of the right to liberty and security of person" as guaranteed by article 5 of the Convention.[42]

International law outlaws unacknowledged arrests and detentions. States are accountable for all persons in their custody. In particular, the date, time and location of all detentions must be available to families, lawyers and all competent judicial and other authorities at all times, in official registers the accuracy of which should not be open to doubt.

Involuntary or enforced disappearances and unacknowledged detentions constitute particularly serious violations of fundamental human rights, including the right to liberty and security of the person.

[39] Ibid., para. 105 at p. 616.

[40] Ibid., loc. cit.

[41] Ibid., p. 616, para. 106.

[42] Ibid., para. 107.

4.3 Detention after conviction

Although the European Convention, in its article 5(1)(a), is the only treaty explicitly providing for the "lawful detention of a person after conviction by a competent court", this legitimate ground for deprivation of liberty is, of course, implicit in the other treaty provisions. It goes without saying, however, that once the officially determined prison sentence has been served, the convicted person must be released. Where convicted persons have not been released although having fully served their sentence of imprisonment, the Human Rights Committee has naturally found that their detention violated article 9(1) of the International Covenant.[43]

In article 5(1)(a) of the European Convention, "the word 'conviction' ... has to be understood as signifying both a 'finding of guilt', after 'it has been established in accordance with the law that there has been an offence' (...), and the imposition of a penalty or other measure involving deprivation of liberty"; further, the "word 'after' does not simply mean that the 'detention' must follow the 'conviction' in point of time: in addition, the 'detention' must result from, 'follow and depend upon' or occur 'by virtue of' the 'conviction'".[44]

What, then, is the situation where a judgement has two components, whereby, in addition to comprising a penalty involving the deprivation of liberty, it also places the offender at the Government's disposal, a component the execution of which may take different forms ranging from remaining at liberty under supervision to detention?

In the case of *Van Droogenbroeck* the European Court accepted that there had been no violation of article 5(1) of the European Convention by virtue of the decisions of the Minister of Justice to revoke the applicant's conditional release; the Court considered that the manner in which the Belgian authorities "exercised their discretion respected the requirements of the Convention, which allows a measure of indeterminacy in sentencing and does not oblige the Contracting States to entrust to the courts the general supervision of the execution of sentences".[45] However, "a detention that was lawful at the outset would be transformed into a deprivation of liberty that was arbitrary", if the decisions concerned "were based on grounds that had no connection with the objectives of the legislature and the court or on an assessment that was unreasonable in terms of those objectives".[46]

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[43]Communication No. R.2/8, *A. M. García Lanza de Netto on behalf of B. Weismann Lanza and A. Lanza Perdomo* (Views adopted on 3 April 1980), in UN doc. *GAOR*, A/35/40, p. 118, para. 16.

[44]*Eur. Court HR, Van Droogenbroeck Case, judgment of 24 June 1982, Series A, No. 50*, p. 19, para. 35.

[45]Ibid., p. 20, para. 40.

[46]Ibid., loc. cit.

4.4 Arrest and detention for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law

These are both expressly legitimate grounds for depriving a person of his or her liberty under article 5(1)(b) of the European Convention. With regard to the words "to secure the fulfilment of any obligation prescribed by law", the European Court has held that they "denote an obligation, of a specific and concrete nature, ... already incumbent on the person concerned"; they do not therefore cover, for instance, arrest and detention carried out *prior to* the rendering of a court order for compulsory residence in a specified locality.[47]

4.5 Detention on reasonable suspicion of having committed an offence

The most common legitimate ground for deprivation of liberty is no doubt that a person is reasonably suspected of having committed an offence (see *expressis verbis* article 5(1)(c) of the European Convention). However, as will be seen below, such suspicion does not justify an indefinite detention. What might be considered acceptable differs from case to case, but, as stipulated in article 9(3) of the Covenant and articles 7(5) and 5(3) of the American and European Conventions respectively, the suspect has a right to be tried "within a reasonable time or to release" pending trial.

Liberty is the rule, to which detention must be the exception. As stated in Rule 6.1 of the United Nations Standard Minimum Rules for Non-Custodial Measures, the so-called "Tokyo Rules", "pre-trial detention shall be used as a means of last resort in criminal proceedings, with due regard for the investigation of the alleged offence and for the protection of society and the victim".

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The European Court has specified that article 5(1)(c) of the European Convention "permits deprivation of liberty only in connection with criminal proceedings", a view that is "apparent from its wording, which must be read in conjunction both with sub-paragraph (a) and with paragraph 3, which forms a whole with it (...)".[48] It follows that compulsory residence orders, which, unlike a conviction and prison sentence, may be based on suspicion rather than proof, "cannot be equated with pre-trial detention as governed by" article 5(1)(c).[49]

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[47] *Eur. Court HR, Ciulla Case v. Italy, judgment of 22 February 1989, Series A, No. 148*, p. 16, para. 36.

[48] Ibid., p. 16, para. 38.

[49] Ibid., para. 39 at p. 17.

4.5.1 The meaning of "reasonableness"

The European Court has held that the "'reasonableness' of the suspicion on which an arrest must be based forms an essential part of the safeguard against arbitrary arrest and detention, which is laid down in" article 5(1)(c) of the European Convention, and that the fact of "having a 'reasonable suspicion' presupposes the existence of facts or information which would satisfy an ***objective observer*** that the person concerned may have committed the offence"; however, what "may be regarded as 'reasonable' will ... depend upon all the circumstances".[50]

In connection with arrests and detention under criminal legislation enacted to deal with ***acts of terrorism*** connected with the affairs of Northern Ireland, the European Court has explained that

> "in view of the difficulties inherent in the investigation and prosecution of terrorist-type offences, ... the 'reasonableness' of the suspicion justifying such arrests cannot always be judged according to the same standards as are applied in dealing with conventional crime. Nevertheless, the exigencies of dealing with terrorist crime cannot justify stretching the notion of 'reasonableness' to the point where the ***essence*** of the safeguard secured by Article 5 § 1 (c) is impaired... ".[51]

Although "the Contracting States cannot be asked to establish the reasonableness of the suspicion grounding the arrest of a suspected terrorist by disclosing the confidential sources of supporting information or even facts which would be susceptible of indicating such sources of their identity", the Court must nevertheless "be enabled to ascertain whether the essence of the safeguard afforded by Article 5 § 1 (c) has been secured"; this means that "the respondent Government have to furnish at least some facts or information capable of satisfying the Court that the arrested person was reasonably suspected of having committed the alleged offence".[52]

The case of Fox, Campbell and Hartley

In the case of *Fox, Campbell and Hartley*, the European Court accepted that the applicants had been arrested and detained "on a *bona fide* suspicion" that they were terrorists. However, neither the fact that two of them had "previous convictions for acts of terrorism connected with the IRA", nor the fact that they were all questioned during their detention "about specific terrorist acts" did more than "confirm that the arresting officers had a genuine suspicion that they had been involved in those acts". It could not "satisfy ***an objective observer*** that the applicants may have committed these acts"; these elements alone were "insufficient to support the conclusion that there was 'reasonable suspicion'".[53] Consequently, there was a breach of article 5(1).[54]

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[50] *Eur. Court HR, Case of Fox, Campbell and Hartley v. the United Kingdom, 30 August 1990, Series A, No. 182*, p. 16, para. 32; emphasis added.

[51] Ibid., pp. 16-17, para. 32.

[52] Ibid., pp. 17-18, para. 34.

[53] Ibid., p. 18, para. 35; emphasis added.

[54] Ibid., para. 36.

4.6 Detention in order to prevent flight

In the *Mukong* case, the Human Rights Committee made it clear that a detention on remand is legitimate under article 9(1) if lawful and necessary in the particular case, in order to prevent flight, for instance.[55] Article 5(1)(c) of the European Convention, too, foresees the possibility lawfully to detain a person "to prevent his ... fleeing after having" committed an offence. The risk of absconding as a possible justification for continued detention will be further dealt with below.

As a general principle, liberty is the rule and detention the exception.

Deprivation of a person's liberty must at all times be ***objectively*** *justified in that the reasonableness of the grounds of detention must be assessed from the point of view of an objective observer and based on facts and not merely on subjective suspicion.*

The most common grounds for a lawful judicial deprivation of liberty are:

- *after conviction by a competent, independent and impartial court of law;*
- *on reasonable suspicion of having committed an offence or in order to prevent the person from doing so;*
- *in order to prevent a person from fleeing after having committed a crime.*

4.7 Administrative detention

For the purposes of this Manual, ***administrative detention*** is detention ordered by the Executive even though there exists, as should be the case under international human rights law, an a posteriori remedy to challenge the lawfulness of the deprivation of liberty before the courts. The power of administrative and ministerial authorities to order detentions is highly controversial, and some experts believe it should be abolished.[56] It is important to be aware, however, that this form of detention is not outlawed by international law, even though it is surrounded by some important safeguards.

According to General Comment No. 8 of the Human Rights Committee, article 9(1) "is applicable 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.".[57] ***It follows that article 9(1) covers all cases of administrative detention***. However, whilst some other provisions of article 9 "are only applicable to persons against whom criminal charges are brought", others, such as,

[55] See Communication No. 458/1991, *A. W. Mukong v. Cameroon* (Views adopted on 21 July 1994), in UN doc. *GAOR*, A/49/40 (vol. II), p. 181, para. 9.8.

[56] See e.g. the view expressed by Mr. Louis Joinet in para. 18 of his *Report on the practice of administrative detention* (UN doc. E/CN.4/Sub.2/1990/29).

[57] *United Nations Compilation of General Comments*, p. 117, para. 1.

in particular, article 9(4), which provides important judicial guarantees, are also applicable to cases of administrative deprivation of liberty.[58]

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Article 5(1)(d)-(f) of the European Convention authorizes categories of detention which are largely identical to those enumerated by the Human Rights Committee. ***However, it should be emphasized that they may not necessarily be imposed by administrative authorities, but may instead fall within the competence of the ordinary courts of law.*** Article 5(4) of the European Convention also provides important judicial guarantees with regard to ***all*** deprivations of liberty. The same holds true with regard to article 7(6) of the American Convention on Human Rights. These guarantees will be dealt with in further depth below.

4.7.1 Deprivation of liberty for the purpose of educational supervision

In the case of *Bouamar* submitted under the European Convention on Human Rights, the applicant complained of having been subjected to nine periods of detention for up to fifteen days in a remand prison for the purpose of his "educational supervision". The orders in question were based on the Belgian Children's and Young Persons' Welfare Act of 1965.

The Court noted that "the confinement of a juvenile in a remand prison does not necessarily contravene sub-paragraph (d), even if it is not in itself such as to provide for the person's 'educational supervision'". However, in such circumstances "the imprisonment must be speedily followed by actual application" of a regime of supervised education "in a setting (open or closed) designed and with sufficient resources for the purpose".[59] It did not share the Government's view that the placements complained of were part of an educative programme, emphasizing that Belgium "was under an obligation to put in place appropriate institutional facilities which met the demands of security and the educational objectives of the 1965 Act, in order to be able to satisfy the requirements of" article 5(1)(d).[60] "The detention of a young man in a remand prison in conditions of virtual isolation and without the assistance of staff with educational training" could not "be regarded as furthering any educational aim"; consequently, the placement orders – whereby the applicant had been deprived of his liberty for 119 days during a period of 291 days – were incompatible with article 5(1)(d) of the European Convention.[61]

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[58] Ibid., loc. cit.

[59] *Eur. Court HR, Bouamar Case, judgment of 29 February 1988, Series A, No. 129*, p. 21, para. 50.

[60] Ibid., pp. 21-22, para. 52.

[61] Ibid., paras. 51-53.

4.7.2 Deprivation of liberty for reasons of mental health

The Human Rights Committee has concluded that a nine-year detention of a person under the New Zealand Mental Health Act "was neither unlawful nor arbitrary" and did not, consequently, violate article 9(1) of the Covenant.[62] The Committee observed that "the author's assessment under the Mental Health Act followed threatening and aggressive behaviour on the author's part, and ... the committal order was issued according to the law, based on an opinion of three psychiatrists"; furthermore, "a panel of psychiatrists continued to review the author's situation periodically".[63] Since the author's continued detention was also "regularly reviewed by the Courts", neither was there any violation of article 9(4).[64]

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As to the meaning of the words "persons of unsound mind" in article 5(1)(e) of the European Convention, the European Court has held that "this term is not one that can be given a definitive interpretation", but one "whose meaning is continually evolving as research in psychiatry progresses, an increasing flexibility in treatment is developing and society's attitude to mental illness changes, in particular so that a greater understanding of the problems of mental patients is becoming more widespread".[65] It added that article 5(1)(e) "obviously cannot be taken as permitting the detention of a person simply because his views or behaviour deviate from the norms prevailing in a particular society. To hold otherwise would not be reconcilable with the text of Article 5 § 1 which sets out an exhaustive list ... of exceptions calling for a ***narrow*** interpretation".[66] Lastly, such an interpretation would not be "in conformity with the object and purpose of Article 5 § 1, namely, to ensure that no one should be dispossessed of his liberty in an arbitrary fashion".[67]

Applying these criteria, the European Court has held that the following three minimum conditions must be satisfied for there to be a lawful detention of persons with mental problems under article 5(1)(e), namely:

> "except in emergency cases, the individual concerned must be reliably shown to be of unsound mind, that is to say, a true mental disorder must be established before a competent authority on the basis of objective medical expertise; the mental disorder must be of a kind or degree warranting compulsory confinement; and the validity of continued confinement depends upon the persistence of such a disorder".[68]

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[62] Communication No. 754/1997, *A. v. New Zealand* (Views adopted on 15 July 1999), in UN doc. *GAOR*, A/54/40 (vol. II), p. 254, para. 7.2.

[63] Ibid., loc. cit.

[64] Ibid., p. 254, para. 7.3.

[65] *Eur. Court HR, Winterwerp Case v. the Netherlands, judgment of 24 October 1979, Series A, No. 33*, p. 16, para. 37.

[66] Ibid., loc. cit.; emphasis added.

[67] Ibid.

[68] *Eur. Court HR, Case of X. v. the United Kingdom, judgment of 5 November 1981, Series A, No. 46*, p. 18, para. 40.

The Court "has the jurisdiction to verify the fulfilment of these conditions in a given case", although, "since the national authorities are better placed to evaluate the evidence adduced before them, they are to be recognised as having a certain discretion in the matter and the Court's task is limited to reviewing under the Convention the decisions they have taken".[69]

More on detention for reasons of mental health

In "emergency cases" the Court has, however, accepted that a "wide discretion must in the nature of things be enjoyed by the national authority empowered to order such emergency confinements", since "it would be impracticable to require a thorough medical examination prior to any arrest or detention".[70] In such cases, the Court examines, inter alia: ***whether*** the domestic legislation grants the national authorities arbitrary power; ***whether*** it is otherwise incompatible with the expression "the lawful detention of persons of unsound mind"; ***and whether*** the legislation concerned was applied to the applicant in such a way that there might be a breach of article 5(1)(e) of the Convention.[71] ***This implies, in particular, that the Court has to assess whether the interests of the protection of the public prevail over the individual's right to liberty to the extent of justifying an emergency confinement in the absence of the usual guarantees implied in article 5(1)(e); however, the emergency measure must only be for a short duration***.[72]

Where the applicant had a history of psychiatric troubles and, according to his wife, remained "deluded and threatening", the Home Secretary, who acted on medical advice, ordered the applicant's recall, a measure that was, according to the Court, justified "as an emergency measure and for a short duration". Examining the applicant's further detention the Court concluded that it had "no reason to doubt the objectivity and reliability" of the medical judgement submitted to justify this detention.[73]

With regard to the ***extension*** of psychiatric detention, the European Court has stressed that "the lawfulness of the extension of the applicant's placement under domestic law is not in itself decisive", but that "it must also be established that his detention during the period under consideration was in conformity with the purpose of Article 5 § 1 of the Convention which is to prevent persons from being deprived of their liberty in an arbitrary fashion".[74] This means, inter alia, that there must be ***no major delay in the renewal of the detention orders***. Whilst the Court has considered that a delay of two weeks could "in no way be regarded as unreasonable or excessive" and thus did not amount to an arbitrary deprivation of liberty,[75] a period of over two

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[69] Ibid., para. 43 at p. 20.

[70] Ibid., para. 41 at p. 19.

[71] Ibid., loc. cit.

[72] Ibid., pp. 20-21, paras. 44-46.

[73] Ibid., p. 21, para. 46 in conjunction with p. 20, para. 44.

[74] *Eur. Court HR, Case of Erkalo v. the Netherlands, judgment of 2 September 1998, Reports 1998-VI*, p. 2478, para. 56.

[75] *Eur. Court HR, Case of Winterwerp v. the Netherlands, judgment of 24 October 1979, Series A, No. 33*, p. 21, para. 49.

and a half months was considered excessive and constituted a violation of article 5(1). In this latter case, the Court concluded that "the public interest involved" could "not be relied upon as a justification for keeping the applicant, who ... was undergoing psychiatric treatment, in a state of uncertainty for over two and a half months". The Court emphasized that "the onus for ensuring that a request for the extension of a placement order is made and examined in time must be placed on the competent authorities and not on the person concerned".[76]

Article 5(1) was considered violated when the national judge ordering a person's confinement in a psychiatric hospital under the Dutch Mentally Ill Persons Act failed to hear the person concerned "before authorizing her confinement, although the legal conditions under which such a hearing might be dispensed with were not satisfied"; the judge should at "the very least ... have stated, in his decision, the reasons which led him to depart from the psychiatrist's opinion in this respect".[77]

Article 5(1) was further violated when, contrary to domestic law, no registrar was present at the court hearing following which the applicant was confined in a psychiatric hospital; in other words, the terms "procedure prescribed by law" had not been complied with.[78]

4.7.3 Deprivation of liberty of asylum seekers and for purposes of deportation and extradition

The Human Rights Committee has ruled with regard to article 9(1) that "there is no basis for the ... claim that it is per se arbitrary to detain individuals requesting asylum", although "every decision to keep a person in detention should be open to review periodically so that the grounds justifying the detention can be assessed".[79] In any event,

> "detention should not continue beyond the period for which the State can provide appropriate justification. For example, the fact of illegal entry may indicate a need for investigation and there may be other factors particular to the individual, such as the likelihood of absconding and lack of cooperation, which may justify detention for a period. Without such factors detention may be considered arbitrary, ***even if entry was illegal***".[80]

In this specific case, since the State party had not advanced grounds to justify the author's "continued detention for a period of four years", the Committee concluded that the detention was arbitrary and thus contrary to article 9(1).[81]

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[76] *Eur. Court HR, Case of Erkalo v. the Netherlands, judgment of 2 September 1998, Reports 1998-VI*, p. 2479, para. 59.

[77] *Eur. Court HR, Van der Leer Case v. the Netherlands, judgment of 21 February 1990, Series A, No. 170-A*, p. 12, para. 23.

[78] *Eur. Court HR, Wassink Case v. the Netherlands, judgment of 27 September 1990, Series A, No. 185-A*, p. 12, para. 27.

[79] Communication No. 560/1993, *A. v. Australia* (Views adopted on 3 April 1997), in UN doc. *GAOR*, A/52/40 (vol. II), p. 143, paras. 9.3 and 9.4.

[80] Ibid., para. 9.4; emphasis added.

[81] Ibid., loc. cit.

Article 5(1)(f) of the European Convention authorizes "the lawful arrest or detention of a person to prevent his affecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition". This means, for instance, that the detention must not pursue an aim different from that for which it was ordered.[82] Further, in case of extradition, for instance, the deprivation of liberty under this subparagraph "will be justified only for as long as extradition proceedings are being conducted", and, consequently, "if such proceedings are not being prosecuted with due diligence, the detention will cease to be justified under article 5 § 1 (f)".[83] A detention of almost two years has thus been considered "excessive" by the Court, which considered that the reasonable time had already been exceeded after 18 months, when the extradition order was in fact given.[84]

4.7.4 *Preventive detention and detention for reasons of* ordre public

Cases involving preventive detention for reasons of public security or public order often raise particular concerns in a State governed by the rule of law, in view of the difficulty inherent in defining such terms with sufficient clarity and the resulting legal uncertainty to which it gives rise. However, insofar as article 9 of the Covenant is concerned, the Human Rights Committee has stated in General Comment No. 8 that

> "... if so-called preventive detention is used, for reasons of public security, it must be controlled by these same provisions, i.e. it must not be arbitrary, and must be based on grounds and procedures established by law (para. 1), information of the reasons must be given (para. 2) and court control of the detention must be available (para. 4) as well as compensation in the case of a breach (para. 5). And if, in addition, criminal charges are brought in such cases, the full protection of article 9(2) and (3), as well as article 14, must also be granted".[85]

In the case of *Cámpora Schweizer*, the author was held in accordance with the "prompt security measures" under Uruguayan law. Without pronouncing itself on the compatibility of this legal measure per se with the Covenant, the Committee emphasized that, although

> "administrative detention may not be objectionable in circumstances where the person concerned constitutes a clear and serious threat to society which cannot be contained in any other manner, ... the guarantees enshrined in the following paragraphs of article 9 fully apply in such instances".[86]

In this case, however, article 9(3) and (4) of the Covenant had been violated because of the particular modalities under which the "prompt security measures" had been "ordered, maintained and enforced".[87]

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[82] *Eur. Court HR, Case of Quinn v. France, judgment of 22 March 1995, Series A, No. 311*, pp. 18-19, para. 47.

[83] Ibid., p. 19, para. 48.

[84] Ibid., pp. 19-20, para. 48.

[85] *United Nations Compilation of General Comments*, p. 118, para. 4.

[86] Communication No. 66/1980, *D. A. Cámpora Schweizer v. Uruguay* (Views adopted on 12 October 1982), in UN doc. A/38/40, p. 122, para. 18.1.

[87] Ibid., p. 122, para. 18.1 and p. 123, para. 19.

As to the possibility of justifying, under article 5(3) of the European Convention, pre-trial detention on the ground that there is a risk of prejudice to public order, see further below under section 5.1.

The basic legal rules regulating arrest and detention are also applicable to ***administrative detention****, i.e. detention by the Executive for reasons unrelated to criminal activities, such as, for instance, detention for educational supervision, reasons of mental health, for the purpose of deportation and extradition, and in order to protect ordre public.*

International human rights law also provides important judicial guarantees with respect to administrative detention. Domestic law must provide for the possibility of challenging the lawfulness of such detentions before an ordinary court of law applying due process guarantees.

4.8 The right to be promptly informed of reasons for arrest and detention and of any charges against oneself

Article 9(2) of the International Covenant on Civil and Political Rights provides that "anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him". Article 7(4) of the American Convention on Human Rights provides that "anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him", while, according to article 5(2) of the European Convention on Human Rights, "everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him". The African Charter on Human and Peoples' Rights contains no specific provision in this respect, but the African Commission on Human and Peoples' Rights has held that ***the right to a fair trial*** includes, inter alia, the requirement that persons arrested "shall be informed at the time of arrest, in a language which they understand of the reason for their arrest and shall be informed promptly of any charges against them".[88]

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The Human Rights Committee has explained that "one of the most important reasons for the requirement of '***prompt***' information on a criminal charge is ***to enable a detained individual to request a prompt decision on the lawfulness of his or her detention by a competent judicial authority***".[89] It concluded that article 9(2) of the Covenant had been violated in a case where the complainant had not been informed upon arrest of the charges against him and was only informed seven days after he had

[88] See e.g. *ACHPR, Media Rights Agenda (on behalf of Niran Malaolu) v. Nigeria, Communication No. 224/98, decision adopted during the 28th session, 23 October – 6 November 2000*; para. 43 of the text published at: http://www1.umn.edu/humanrts/africa/comcases/224-98.html.

[89] Communication No. 248/1987, *G. Campbell v. Jamaica* (Views adopted on 30 March 1992), p. 246, para. 6.3; emphasis added.

been detained.[90] *A fortiori*, a delay of 45 days or more does not meet the requirements of article 9(2).[91]

Furthermore, it is not sufficient for the purposes of the Covenant, including article 9(2) thereof, to arrest and detain a person on grounds of a ***presumed connection with subversive activities***; the arrested and detained person must be given explanations as to "the scope and meaning of 'subversive activities', which constitute a criminal offence under the relevant legislation".[92] According to the Human Rights Committee, such explanations are particularly important where the authors allege that they have been prosecuted solely for their opinions contrary to article 19 of the Covenant, which guarantees the right to freedom of expression.[93]

The Committee found no violation of article 9(2) of the Covenant where the authors allegedly had to wait for seven and eight hours respectively before being informed of the reasons for arrest, also complaining that they had not understood the charges for lack of a competent interpreter. The Committee concluded that the police formalities had been suspended for three hours until "the interpreter arrived, so that the accused could be duly informed in the presence of legal counsel"; furthermore, the interpreter was fully competent and appointed according to the rules.[94] Consequently, there was no violation of article 9(2) in this case.[95] Similarly, where the author alleged that he was not promptly informed of the charges against him but where there was evidence that he had seen a lawyer during the first week of his detention, the Committee concluded that it was "highly unlikely that neither the author nor his ... counsel were aware of the reasons for his arrest".[96]

Where the author complained that he was not informed about the charges against him until three to four weeks after his arrest, the Committee held that a "general refutation by the State party is not sufficient to disprove the author's claim", and, consequently, the delay violated both article 9(2) and 9 (3) of the Covenant.[97]

It is not sufficient under article 9(2) simply to inform the person arrested and detained that the deprivation of liberty has been carried out on the orders of the President of the country concerned.[98]

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[90] Communication No. 597/1994, *P. Grant v. Jamaica* (Views adopted on 22 March 1996), in UN doc. *GAOR*, A/51/40 (vol. II), p. 212, para. 8.1.

[91] Communication No. 248/1987, *G. Campbell v. Jamaica* (Views adopted on 30 March 1992), p. 246, para. 6.3.

[92] Communication No. R.8/33, *L. B. Carballal v. Uruguay* (Views adopted on 27 March 1981), in UN doc. *GAOR*, A/36/40, pp. 128-129, paras. 12-13.

[93] Ibid., loc. cit.

[94] Communication No. 526/1993, *M. and B. Hill v. Spain* (Views adopted on 2 April 1997), in UN doc. *GAOR*, A/52/40 (vol. II), p. 17, para. 12.2.

[95] Ibid., loc. cit.

[96] Communication No. 749/1997, *D. McTaggart v. Jamaica* (Views adopted on 31 March 1998), in UN doc. *GAOR*, A/53/40 (vol. II), p. 227, para. 8.1.

[97] Communication No. 635/1995, *E. Morrison v. Jamaica* (Views adopted on 27 July 1998), in UN doc. *GAOR*, A/53/40 (vol. II), pp. 123-124, para. 21.2.

[98] Communication No. 414/1990, *P. J. Mika Miha v. Equatorial Guinea* (Views adopted on 8 July 1994), in UN doc. *GAOR*, A/49/40 (vol. II), p. 99, para. 6.5.

The African Commission on Human and Peoples' Rights has held that the failure or negligence on the part of the security agents of a State party "scrupulously" to comply with the requirement to submit reasons for arrest and to inform the persons arrested promptly of any charges against them is a violation of the right to a fair trial as guaranteed by the African Charter.[99] Article 6 of the African Charter was violated where the complainant was arrested in the interest of national security under the Preventive Custody Law of 1992 in Ghana; he was, however, never charged with any offence and never stood trial.[100] In a case against the Sudan, the Commission also explained that article 6 of the African Charter "must be interpreted in such a way as to permit arrests only in the exercise of powers normally granted to the security forces in a democratic society"; since the wording of the relevant Decree allowed "individuals to be arrested for vague reasons, and upon suspicion, not proven acts", it was "not in conformity with the spirit of the African Charter" and violated article 6 thereof.[101]

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With regard to article 5(2) of the European Convention, the European Court has held that it

> "contains the elementary safeguard that any person arrested should know why he is being deprived of his liberty. This provision is an integral part of the scheme of protection afforded by Article 5: by virtue of paragraph 2 any person arrested must be told, in ***simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest, so as to be able, if he sees fit, to apply to a court to challenge its lawfulness in accordance with paragraph 4***. ... Whilst this information must be conveyed '***promptly***' (in French: *'dans le plus court délai'*), it need not be related in its entirety by the arresting officer at the very moment of the arrest. Whether the content and promptness of the information conveyed were sufficient is to be assessed in each case according to its special features."[102]

It is thus not sufficient for the purpose of complying with article 5(2) that the arresting officer simply tells the persons concerned that they are arrested under a particular law ***on suspicion of being terrorists***, although it has been considered to be sufficient if "the reasons why they were suspected of being terrorists were ... brought to their attention during their interrogation" by the police; they must consequently be interrogated in sufficient detail "about their suspected involvement in specific criminal acts and their suspected membership of proscribed organisations".[103]

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[99] *ACHPR, Huri-Laws (on behalf of the Civil Liberties Organisation) v. Nigeria, Communication No. 225/98, decision adopted during the 28th Ordinary Session, 23 October – 6 November 2000*, paras. 43-44 of the text of the decision as published at: http://www1.umn.edu/humanrts/africa/comcases/225-98.html.

[100] *ACHPR, Alhassan Abubakar v. Ghana, Communication No. 103/93, decision adopted during the 20th session, October 1996*, paras. 9-10 of the text of the decision as published at http://www1.umn.edu/humanrts/africa/comcases/103-93.html; like other international monitoring organs, where the respondent Government does not provide any substantive information in reply to the petitioners' allegations, the African Commission will decide the facts as alleged by the complainant; ibid., para. 10.

[101] *ACHPR, Amnesty International and Others, Communications Nos. 48/90, 50/91, 52/91 and 89/93, (decision not dated)*, para. 59 of the text published at http://www1.umn.edu/humanrts/africa/comcases/48-90_50-91_52-91_89-93.html.

[102] *Eur. Court HR, Case of Fox, Campbell and Hartley, judgment of 30 August 1990, Series A, No. 182*, p. 19, para. 40; emphasis added.

[103] Ibid., para. 41.

The European Court has further held that the terms of article 5(2) are "to be interpreted 'autonomously', in particular in accordance with the aim and purpose" of article 5, "which are to protect everyone from arbitrary deprivations of liberty". The term "arrest" thus "extends beyond the realm of criminal-law measures", and the words "*any* charge" were not intended "to lay down a condition for its applicability, but to indicate an eventuality of which it takes account".[104] This interpretation is also supported by the close link between article 5(2) and (4), because "any person who is entitled to take proceedings to have the lawfulness of his detention decided speedily cannot make effective use of that right unless he is promptly and adequately informed of the reasons why he has been deprived of his liberty".[105]

Consequently, the European Court found a violation of article 5(2) in a case where a woman who was in hospital to receive treatment on a voluntary basis was subsequently placed in isolation and informed "that she was no longer free to leave when she wished because of an order made ten days previously". The Court considered that neither "the manner" in which the applicant was informed, "nor the time it took to communicate this information to her, corresponded to the requirements" of article 5(2).[106]

In a case where the applicant, on the very day of his arrest, had been given a copy of the arrest warrant that "set out not only the reasons for depriving him of his liberty but also the particulars of the charges against him", it found that article 5(2) had not been violated.[107]

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In order to comply with the requirement of information States may, as evidenced above, have to resort to interpreters. As expressly stated in Principle 14 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, "a person who does not adequately understand or speak the language used by the authorities responsible for his arrest, detention or imprisonment is entitled to receive promptly in a language which he understands" information regarding, inter alia, the charges against him and the records of his arrest.

> *A person deprived of his or her liberty must be* ***promptly*** *informed of the reasons therefor,* ***in a language which he or she understands*** *and* ***in sufficient detail*** *so as to be enabled to request a prompt decision by a judicial authority on the lawfulness of his or her deprivation of liberty.*

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[104] *Eur. Court HR, Van der Leer Case v. the Netherlands, judgment of 21 February 1990, Series A, No. 170-A*, p. 13, para. 27.

[105] Ibid., para. 28.

[106] Ibid., paras. 30-31.

[107] *Eur. Court HR, Lamy Case v. Belgium, judgment of 30 March 1989, Series A, No. 151*, p. 17, para. 32.

4.9 The right to be promptly brought before a judge or other judicial officer

Article 9(3) of the International Covenant on Civil and Political Rights provides that "anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power". In article 7(5) of the American Convention on Human Rights this right concerns any "person detained". As to article 5(3) of the European Convention on Human Rights, this right appertains to "everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article", which concerns "the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so". The text of the African Charter does not specifically regulate this issue. However, according to article 7(1)(a) of the Charter, every individual shall have "the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force" (see also case-law as to art. 6 of the Charter, below).

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As noted by the Human Rights Committee, the first sentence of article 9(3) of the Covenant *"**is intended to bring the detention of a person charged with a criminal offence under judicial control**"*.[108]

Although the term "promptly" must, according to the jurisprudence of the Human Rights Committee, "be determined on a case-by-case-basis", the delay between the arrest of an accused and the time before he is brought before a judicial authority "***should not exceed a few days***".[109] "In the absence of a justification for a delay of *four days* before bringing the author to a judicial authority", this delay violated the notion of promptness in article 9(3).[110] Furthermore, a one-week delay in a capital case before the author was first brought before a judge "cannot be deemed compatible with" article 9(3).[111] *A fortiori*, where the complainant has been held for two and a half months or more before being brought before a judge, article 9(3) has also been violated.[112]

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[108] Communication No. 521/1992, *V. Kulomin v. Hungary* (Views adopted on 22 March 1996), in UN doc. *GAOR*, A/51/40 (vol. II), p. 80, para. 11.2; emphasis added.

[109] Communication No. 373/1989, *L. Stephens v. Jamaica* (Views adopted on 18 October 1995), in UN doc. *GAOR*, A/51/40 (vol. II), p. 9, para. 9.6; emphasis added.

[110] Communication No. 625/1995, *M. Freemantle v. Jamaica* (Views adopted on 24 March 2000), in UN doc. *GAOR*, A/55/40 (vol. II), p. 19, para. 7.4; emphasis added. See also violation of art. 9(3) where the delay exceeded eight days, Communication No. 373/1989, *L. Stephens v. Jamaica* (Views adopted on 18 October 1995), in UN doc. *GAOR*, A/51/40 (vol. II), p. 9, para. 9.6.

[111] Communication No. 702/1996, *C. McLawrence v. Jamaica* (Views adopted on 18 July 1997), in UN doc. *GAOR*, A/52/40 (vol. II), p. 231, para. 5.6.

[112] Communication No. 330/1988, *A. Berry v. Jamaica* (Views adopted on 7 April 1994), in UN doc. *GAOR*, A/49/40 (vol. II), pp. 26-27, para. 11.1.

In a case where the victims were arrested and kept in detention in Nigeria for a lengthy period of time under the State Security (Detention of Persons) Act of 1984 and the State Security (Detention of Persons) Amended Decree No. 14 (1994), the African Commission on Human and Peoples' Rights concluded that the facts constituted a prima facie violation of the right not be subjected to arbitrary arrest and detention as guaranteed by article 6 of the African Charter. Under the terms of that Decree, the Government could detain people without charge for a three-month period in the first instance; the Decree likewise allowed the Government arbitrarily to hold people critical of its policies for a period of three months without having to submit any explanations and without there being any possibility for the victims "to challenge the arrest and detention before a court of law". Considering that the Government had submitted no arguments in defence of the Decree, either as to its justification in general or as applied in this particular case, the Commission held that it had violated article 6 of the African Charter.[113]

The African Commission has also importantly held that the "right to be tried within a reasonable time by an impartial court or tribunal" as guaranteed by article 7(1)(d) of the African Charter is reinforced by its Resolution on Fair Trial, according to which persons "arrested or detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within reasonable time or to be released".[114]

In the case of *Huri-Laws* against Nigeria, the Commission therefore concluded that Nigeria had violated both articles 7(1)(d) and 26 by failing to bring the two alleged victims promptly before a judge or other judicial officer for trial; the victims had been detained for weeks and months respectively without any charges being brought against them.[115]

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In the case of *Castillo-Páez*, the Inter-American Court of Human Rights concluded that article 7(5) of the American Convention on Human Rights had been violated since the victim "had not been brought before a competent court within 24 hours or otherwise if distance was a factor, nor within fifteen days on suspicion of terrorism, pursuant to Article 7, paragraph 5, of the Convention, and Article 2, paragraph 20(c) of the Constitution of Peru"; indeed, the police officers had denied his arrest and hidden the detainee so that he could not be located by the magistrate, whom they also provided with altered logs of entry of detainees.[116] Article 7(5) was of course also violated in the case of *Suárez-Rosero*, where the victim never appeared before a competent judicial authority during the proceedings.[117]

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[113] *ACHPR, International Pen and Others v. Nigeria, Communications Nos. 137/94, 139/94, 154/96 and 161/97, decision adopted on 31 October 1998*, paras. 83-84 of the text as published at http://www1.umn.edu/humanrts/africa/comcases/137-94_139-94_154-96_161-97.html.

[114] *ACHPR, Huri-Laws (on behalf of Civil Liberties Organisation) v. Nigeria, Communication No. 225/98, decision adopted during the 28th Ordinary session, 23 October – 6 November 2000*, para. 45 of the text as published at http://www1.umn.edu/humanrts/africa/comcases/225-98.html.

[115] Ibid., para. 46.

[116] *I-A Court HR, Castillo Páez Case v. Peru, judgment of November 3, 1997*, in OAS doc. OAS/Ser.L/V/III.39, doc. 5, *Annual Report of the Inter-American Court of Human Rights 1997*, p. 263, paras. 56-58.

[117] *I-A Court HR, Suárez Rosero Case, judgment of November 12, 1997*, ibid. at pp. 296-297, paras. 53-56.

The case of Castillo Petruzzi et al.

In the case of *Castillo Petruzzi et al.*, the Inter-American Court expressed the view that laws that allow the authorities to hold a person suspected of the crime of treason in preventive custody for 15 days, with the possibility of a 15-day extension, without bringing that person before a judicial authority, are contrary to article 7 of the Convention.[118] The detention in this case "occurred amid a terrible disruption of public law and order that escalated in 1992 and 1993 with acts of terrorism that left many victims in their wake", and, "in response to these events, the State adopted emergency measures, one of which was to allow those suspected of treason to be detained without a lawful court order".[119] To Peru's allegation that the declared state of emergency involved a suspension of article 7, the Court replied that it had

> "repeatedly held that the suspension of guarantees must not exceed the limits strictly required and that 'any action on the part of the public authorities that goes beyond those limits, would ... be unlawful.' The limits imposed upon the actions of a State come from 'the general requirement that in any state of emergency there be appropriate means to control the measures taken, so that they are proportionate to the needs and do not exceed the strict limits imposed by the Convention or derived from it'."[120]

In this case, "approximately 36 days ... elapsed between the time of detention and the date on which the alleged victims were brought before a judicial authority", and this time was, in the view of the Court "excessive and contrary to the provisions of the Convention".[121]

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As to article 5(3) of the European Convention, no violation of article 5(3) "can arise if the arrested person is released 'promptly' before any judicial control of his detention would have been feasible"; "if the arrested is not released promptly, he is entitled to a prompt appearance before a judge or judicial officer".[122]

As to the assessment of the term "promptness", it "has to be made in the light of the object and purpose of" article 5, which is to protect "the individual against arbitrary interferences by the State with his right to liberty"; "judicial control of interferences by the executive with the individual's right to liberty is an essential feature of the guarantee embodied in [this article and] is intended to minimise the risk of arbitrariness"; moreover, "judicial control is implied by the rule of law, 'one of the fundamental principles of a democratic society' ... and 'from which the whole Convention draws its inspiration'".[123]

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[118] *I-A Court HR, Castillo Petruzzi et al. Case v. Peru, judgment of May 30, 1999*, in OAS doc. OEA/Ser.L/V/III.47, doc. 5, *Annual Report of the Inter-American Court of Human Rights 1999*, p. 255, para. 110.

[119] Ibid., para. 109.

[120] Ibid., loc. cit.; footnote omitted.

[121] Ibid., p. 256, para. 111.

[122] *Eur. Court HR, Case of Brogan and Others v. the United Kingdom, judgment of 29 November 1988, Series A, No. 145*, pp. 31-32, para. 58.

[123] Ibid., para. 58 at p. 32.

Comparing the English and French texts of the provision, the Court concluded that

> "the degree of flexibility attaching to the notion of 'promptness' is limited, even if the attendant circumstances can never be ignored for the purposes of the assessment under paragraph 3. ***Whereas promptness is to be assessed in each case according to its special features … the significance to be attached to those features can never be taken to the point of impairing the very essence of the right guaranteed by Article 5 § 3***, that is to the point of effectively negativing the State's obligation to ensure a prompt release or a prompt appearance before a judicial authority".[124]

In the case of *Brogan and Others*, which concerned the arrest and detention by virtue of powers granted under special legislation of persons suspected of involvement in terrorism in Northern Ireland, the issue to be decided by the Court was whether, "having regard to the special features relied on by the Government, each applicant's release can be considered as 'prompt' for the purposes of" article 5(3); it is clear that none of the applicants had been brought before a judge or judicial officer during his time in custody.[125] The Court did accept that

> "subject to the existence of adequate safeguards, the context of terrorism in Northern Ireland has the effect of prolonging the period during which the authorities may, without violating Article 5 § 3, keep a person suspected of serious terrorist offences in custody before bringing him before a judge or other judicial officer".[126]

However, the difficulties of judicial control invoked by the Government could not "justify, under Article 5 § 3, dispensing altogether with 'prompt' judicial control",[127] because "the scope for flexibility in interpreting and applying the notion of 'promptness' is very limited".[128] It followed that "even the shortest of the four periods of detention, namely the four days and six hours spent in police custody" by one applicant, fell "outside the strict constraints as to time permitted by the first part of Article 5". In the words of the Court,

> "to attach such importance to the special features of this case as to justify so lengthy a period of detention without appearance before a judge or other judicial officer would be an unacceptably wide interpretation of the plain meaning of the word 'promptly'. An interpretation to this effect would import into Article 5 § 3 a serious weakening of a procedural guarantee to the detriment of the individual and would entail consequences impairing the very essence of the right protected by this provision. The Court thus has to conclude that none of the applicants was either brought 'promptly' before a judicial authority or released 'promptly' following his arrest. The undoubted fact that arrest and detention of the applicants were

[124]Ibid., pp. 32-33, para. 59; emphasis added.

[125]Ibid., p. 33, para. 60.

[126]Ibid., para. 61.

[127]Ibid., loc. cit.

[128]Ibid., p. 33, para. 62.

> inspired by the legitimate aim of protecting the community as a whole from terrorism is not on its own sufficient to ensure compliance with the specific requirements of Article 5 § 3."[129]

Lastly, article 5(4) of the European Convention was also violated in a case where a conscript was placed in detention on remand during military manoeuvres and did not appear before the Military Court until five days after his arrest; the manoeuvres, in which the military members of the court participated, could not be allowed to justify such delay and arrangements should have been made to enable the Military Court "to sit soon enough to comply with the requirements of the Convention, if necessary on Saturday or Sunday".[130]

4.9.1 The legitimate decision-making organ

In the case of *Kulomin*, whose pre-trial detention had been extended several times by the *public prosecutor*, the Human Rights Committee stated that it

> "considers that it is inherent to the proper exercise of judicial power that it be exercised by an authority which is independent, objective and impartial in relation to the issues dealt with".[131]

Consequently, in that particular case, the Committee was "not satisfied that the public prosecutor could be regarded as having the institutional objectivity and impartiality necessary to be considered an 'officer authorized by law to exercise judicial power' within the meaning of" article 9(3) of the Covenant.[132]

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"Before an 'officer' can be said to exercise 'judicial power' within the meaning of [article 5(3) of the European Convention,] he or she must satisfy certain conditions providing a guarantee to the person detained against any arbitrary or unjustified deprivation of liberty".[133] Consequently,

> "the 'officer' must be independent of the executive and the parties. ... In this respect, objective appearances at the time of the decision on detention are material: if it appears at that time that the 'officer' may later intervene in subsequent criminal proceedings on behalf of the prosecuting authority, his independence and impartiality may be open to doubt. ... The 'officer' must hear the individual brought before him in person and review, by reference to legal criteria, whether or not the detention is justified. If it is not so justified, the 'officer' must have the power to make a binding order for the detainee's release...".[134]

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[129] Ibid., pp. 33-34, para. 62.

[130] *Eur. Court HR, Case of Koster v. the Netherlands, judgment of 28 November 1991, Series A, No. 221*, p. 10, para. 25.

[131] Communication No. 521/1992, *Kulomin v. Hungary* (Views adopted on 22 March 1996), in UN doc. *GAOR*, A/51/40 (vol. II), p. 81, para. 11.3; emphasis added.

[132] Ibid., loc. cit.

[133] *Eur. Court HR, Case of Assenov and Others v. Bulgaria, judgment of 28 October 1998, Reports 1998-VIII*, p. 3298, para. 146.

[134] Ibid., loc. cit.

It follows that, where an "officer" does not have the power "to make legally binding decisions as to the detention or release of a suspect", he cannot be considered to be "sufficiently independent" for the purposes of article 5(3).[135] Further, where prosecutors approving the investigator's decision on the question of detention can subsequently act against the detainee in criminal proceeedings, they have been considered not to be "sufficiently independent or impartial for the purposes of" article 5(3).[136] Similarly, where a District Attorney ordered the applicant's detention on remand, conducted the investigation and subsequently acted as prosecuting authority in drawing up the indictment, article 5(3) was found to have been violated.[137] According to the European Court,

> "the Convention does not rule out the possibility of the judicial officer who orders the detention carrying out other duties, but this impartiality is capable of appearing open to doubt ... if he is entitled to intervene in the subsequent criminal proceedings as a representative of the prosecuting authority".[138]

A person arrested or detained on a criminal charge must be promptly brought before a judge or other officer, who is independent and impartial and who has the power to make a binding order for release; the term "promptly" must be interpreted strictly and cannot be deprived of its essence even in crisis situations.

5. The Right to Trial within a Reasonable Time or to Release pending Trial

In addition to the requirement of "promptness" dealt with in section 4.9 above, article 9(3) of the International Covenant on Civil and Political Rights, article 7(5) of the American Convention on Human Rights and article 5(3) of the European Convention on Human Rights provide that everyone detained shall be entitled to trial within "a reasonable time" or to release pending trial. ***This is a logical protection in view both of the fact that everyone charged with a crime has the right to be presumed innocent until proved guilty and of the fact that deprivation of liberty must be an exceptional measure.***

[135] Ibid., p. 3299, para. 148.

[136] Ibid., p. 3299, para. 149.

[137] *Eur. Court HR, Huber Case v. Switzerland, judgment of 23 October 1990, Series A, No. 188*, p. 17, para. 41.

[138] Ibid., p. 18, para. 43.

5.1 The notion of "reasonable time"

The Human Rights Committee has held that "what constitutes 'reasonable time' is a matter of assessment for each particular case".[139] However, a lack of "adequate budgetary appropriations for the administration of criminal justice ... does not justify unreasonable delays in the adjudication of criminal cases. Nor does the fact that investigations into a criminal case are, in their essence, carried out by way of written proceedings, justify such delays".[140] In other words, considerations of "evidence-gathering" do not justify a detention lasting some four years after the victim's arrest, and violate article 9(3) of the Covenant.[141] In another case the Committee found a violation of article 9(3) because the author had been detained for 31 months simply on charges of belonging to a political party considered illegal under the country's then one-party constitution.[142] Furthermore, a detention of four years and four months without any trial date being set was contrary to article 9(3) of the Covenant.[143] In a case where almost four years elapsed between the judgement of the Court of Appeal and the beginning of the retrial, a period during which the author was kept in detention, both article 9(3) and article 14(3)(c) were found to have been violated.[144]

In the absence of "satisfactory" explanations from the State party as to why the author was detained on remand without being tried for one year and nine months, the Committee concluded that this delay too was "unreasonable" and violated article 9(3).[145]

The complaints submitted under the International Covenant concerning undue delay in being brought to trial have often been considered simultaneously under articles 9(3) and 14(3)(c).[146] Further examples will therefore also be considered under the latter provision, which will be dealt with in Chapter 6 on *The Right to a Fair Trial: Part I – From Investigation to Trial.*

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[139] Communication No. 336/1988, *N. Fillastre v. Bolivia* (Views adopted on 5 November 1991), in UN doc. *GAOR*, A/47/40, p. 306, para. 6.5.

[140] Ibid., loc. cit.

[141] Ibid.

[142] Communication No. 314/1988, *P. Chiiko Bwalya v. Zambia* (Views adopted on 14 July 1993), in UN doc. *GAOR*, A/48/40 (vol. II), p. 54, para. 6.3.

[143] Communication No. 386/1989, *F. Kone v. Senegal* (Views adopted on 21 October 1994), in UN doc. *GAOR*, A/50/40 (vol. II), p. 8, para. 8.6.

[144] Communication No.447/1991, *L. Shalto v. Trinidad and Tobago* (Views adopted on 4 April 1995), in UN doc. *GAOR*, A/50/40 (vol. II), p. 19, para. 7.2.

[145] Communication No. 733/1997, *A. Perkins v. Jamaica* (Views adopted on 19 March 1998), in UN doc. *GAOR*, A/53/40 (vol. II), p. 210, para. 11.3.

[146] See, for example, Communication No. 705/1996, *D. Taylor v. Jamaica* (Views adopted on 2 April 1998), in UN doc. *GAOR*, A/53/40 (vol. II), p. 179, para. 7.1; the Committee found a violation both of article 9(3) and of article 14(3)(c) since there had been a lapse of 27 months between arrest and trial.

With regard to the right to trial within a reasonable time or to release pending trial guaranteed in article 5(3) of the European Convention, the European Court of Human Rights has held that "it is the provisional detention of accused persons which must not ... be prolonged beyond a reasonable time", and that the end of the period with which this provision is concerned is the day "on which the charge is determined, even if only by a court of first instance". It follows that it is not the day on which the judgement becomes final.[147] Depending on the circumstances, however, the final date of the period to be taken into consideration may instead be the day of the accused's release after having deposited his security, for instance.[148]

"The reasonableness of an accused person's continued detention must be assessed in each case according to its special features", and "the factors which may be taken into consideration are extremely diverse"; there is consequently a "possibility of wide differences in opinion in assessment of the reasonableness of a given detention".[149] Accordingly,

> "it falls in the first place to the national judicial authorities to ensure that the pre-trial detention of an accused person does not exceed a reasonable time. To this end, they must examine all the circumstances arguing for and against the existence of a genuine requirement of public interest justifying, with due regard to the principle of the presumption of innocence, a departure from the rule of respect for individual liberty and set these out in their decisions on the applications for release. It is essentially on the basis of the reasons given in these decisions and of the true facts mentioned by the detainee in his applications for release and his appeals that the Court is called upon to decide whether or not there has been a violation of article 5 § 3.
>
> The ***persistence of reasonable suspicion*** that the person arrested has committed an offence is a condition *sine qua non* for the validity of the continued detention, but, after a certain lapse of time, it no longer suffices: the Court must then establish whether the other grounds cited by the judicial authorities continued to justify the deprivation of liberty. ***Where such grounds are 'relevant' and 'sufficient', the Court must also ascertain whether the competent national authorities displayed 'special diligence' in the conduct of the proceedings.*** ..."[150]

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[147] *Eur. Court HR, Wemhoff Case v. the Federal Republic of Germany, judgment of 27 June 1968, Series A, No. 7*, p. 22, para. 5 and p. 23, para. 9.

[148] *Eur. Court HR, Case of Van der Tang v. Spain, judgment of 13 July 1995, Series A, No. 321*, p. 18, para. 58

[149] *Eur. Court HR, Wemhoff Case v. the Federal Republic of Germany, judgment of 27 June 1968, Series A, No. 7*, p. 24, para. 10.

[150] *Eur. Court HR, Case of Assenov and Others v. Bulgaria, judgment of 28 October 1998, Report 1998-VIII*, p. 3300, para. 154; emphasis added.

The case of Assenov

In the case of *Assenov*, the applicant had been charged with sixteen or more burglaries and it was feared that he would re-offend if released, but the European Court concluded that he had been denied a "trial within a reasonable time" in violation of article 5(3); while it had taken two years for the case to come to trial, the Court noted that during one of those years "virtually no action was taken in connection with the investigation: no new evidence was collected and Mr. Assenov was questioned only once".[151] The Court added, moreover, that, "given the importance of the right to liberty, and the possibility, for example, of copying the relevant documents rather than sending the original file to the authority concerned on each occasion, the applicant's many appeals for release should not have been allowed to have the effect of suspending the investigation and thus delaying his trial". An additional consideration was the fact that, since the applicant was a minor, it was "more than usually important that the authorities displayed special diligence in ensuring that he was brought to trial within a reasonable time".[152]

Danger of absconding: With regard to the danger of an accused person's absconding, the European Court has emphasized that this danger "cannot be gauged solely on the basis of the severity of the sentence risked", but "must be assessed with reference to a number of other relevant factors which may either confirm the existence of a danger of absconding or make it appear so slight that it cannot justify detention pending trial".[153] For this reason to be given credit, the domestic courts must explain why there is a danger of absconding and not simply confirm the detention in "an identical, not to say stereotyped, form of words, without in any way explaining why there was a danger of absconding",[154] and why they have not sought to "counter it by, for instance, requiring the lodging of a security and placing him under court supervision".[155]

Suspected involvement in serious offences: In a case involving pre-trial detention of a person accused of drug trafficking, the European Court agreed "that the alleged offences were of a serious nature" and that "the evidence incriminating the applicant was cogent"; it emphasized, nonetheless, that "the existence of a strong suspicion of the involvement of the person concerned in serious offences, while constituting a relevant factor, cannot alone justify a long period of pre-trial detention".[156]

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[151] Ibid., p. 3301, paras. 157-158.

[152] Ibid., p. 3301, para. 157.

[153] *Eur. Court HR, Case of Ya?ci and Sargin v. Turkey, judgment of 8 June 1995, Series A, No. 319-A*, p. 19, para. 52.

[154] Ibid., loc. cit. In this case there was a breach of article 5(3) of the Convention, ibid., p. 19, para. 55.

[155] *Eur. Court HR, Case of Tomasi v. France, judgment of 27 August 1992, Series A, No. 241-A*, p. 37, para. 98.

[156] *Eur. Court HR, Case of Van der Tang v. Spain, judgment of 13 July 1995, Series A, No. 321*, p. 19, para. 63.

Risk of relapse into crime: The risk of repetition of offences is another ground that may justify detention on remand, and in the case of *Toth* this ground, as well as the danger of the applicant's absconding, constituted "relevant and sufficient" grounds for justifying his detention on remand, which lasted a little more than two years and one month.[157] The European Court noted that the "contested (domestic) decisions took account of the nature of the earlier offences and the number of sentences imposed as a result", and concluded "that the national courts could reasonably fear that the accused would commit new offences".[158]

Prejudice to public order: The European Court has accepted that, "by reason of their particular gravity and public reaction to them, certain offences may give rise to public disquiet capable of justifying pre-trial detention, at least for a time". In explaining this view, it stated that

> "in exceptional circumstances – and subject, obviously, to there being sufficient evidence ... – this factor may therefore be taken into account for the purposes of the Convention, in any event in so far as domestic law recognises ... the notion of prejudice to public order caused by an offence. However, this ground can be regarded as relevant and sufficient only provided that it is based on facts capable of showing that the accused's release would actually prejudice public order. In addition, detention will continue to be legitimate only if public order remains actually threatened; its continuation cannot be used to anticipate a custodial sentence...".[159]

In the case of *Tomasi* – who was accused of participation in a terrorist attack killing one person, although finally acquitted – the Court accepted that it was "reasonable to assume that there was a risk of prejudice to public order at the beginning [of the detention], but [that] it must have disappeared after a certain time".[160]

The question arises, however, whether, in a democratic society governed by the rule of law, pre-trial detention, however brief, can ever be legally justified on the basis of a legal notion so easily abused as that of public order.

Pressure on witnesses and risk of collusion: A further ground justifying pre-trial detention is the risk of pressure being brought to bear on the witnesses and of collusion between co-accused; however, although such risk is genuine at the outset of the detention, it may gradually diminish, or even disappear altogether.[161] It will be for the national courts and ultimately the European Court of Human Rights to assess such risks.

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[157] *Eur. Court HR, Case of Toth v. Austria, judgment of 12 December 1991, Series A, No. 224*, p. 19, paras. 69-70 and 73.

[158] Ibid., p. 19, para. 70.

[159] *Eur. Court HR, Case of Tomasi v. France, judgment of 27 August 1992, Series A, No. 241-A*, p. 36, para. 91.

[160] Ibid., loc. cit.

[161] Ibid., pp. 36-37, paras. 92-95.

Conduct of the domestic authorities: When the grounds invoked to justify the detention are, in principle, both "relevant" and "sufficient", the European Court may still have to assess the conduct of the domestic authorities themselves to justify the time spent in detention on remand under article 5(3).[162] In this respect it has pointed out that "the right of an accused in custody to have his case examined with all necessary expedition must not hinder the efforts of the courts to carry out their tasks with proper care".[163]

The Court thus found that there was no breach of article 5(3) in a case where the applicant had been held in pre-trial detention for about *three years and two months*, after his case involving drug-trafficking was joined with another criminal investigation, thus making it part of a complex process. The Court was satisfied that "the risk of the applicant's absconding persisted throughout the whole of his detention on remand, the protracted length of which ... was not attributable to any lack of special diligence on the part of the Spanish authorities".[164]

A pre-trial detention of *five years and seven months* was however considered to violate article 5(3) of the Convention where the French courts had not acted "with the necessary promptness" and the length of the contested detention did not "appear to be essentially attributable either to the complexity of the case or to the applicant's conduct".[165] As can be seen, the conduct of the detained person may thus also be a factor to consider in assessing the reasonableness of the pre-trial detention.[166]

5.2 Alternatives to detention on remand: guarantees to appear at trial

Article 9(3) of the International Covenant, article 7(5) of the American Convention and article 5(3) of the European Convention provide that release from detention may be conditioned by guarantees to appear for trial.

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With regard to article 9(3) of the Covenant, the Human Rights Committee has consistently held that

> "pre-trial detention should be the exception and that bail should be granted, except in situations where the likelihood exists that the accused would abscond or destroy evidence, influence witnesses or flee from the jurisdiction of the State party".[167]

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[162] Ibid., pp. 37-39, paras. 99-103.

[163] *Eur. Court HR, Case of Van der Tang v. Spain, judgment of 13 July 1995, Series A, No. 321*, p. 21, para. 72.

[164] Ibid., p. 22, para. 76.

[165] *Eur. Court HR, Case of Tomasi v. France, judgment of 27 August 1992, Series A, No. 241-A*, p. 39, para. 102.

[166] *Eur. Court HR, Case of Clooth v. Belgium, judgment of 12 December 1991, Series A, No. 225*, pp. 15-16, paras. 41-44.

[167] Communication No. 526/1993, *M. and B. Hill v. Spain* (Views adopted on 2 April 1997), UN doc. *GAOR*, A/52/40 (vol. II), p. 17, para. 12.3.

The Committee is also of the opinion that "the mere fact that the accused is a ***foreigner*** does not of itself imply that he may be held in detention pending trial".[168] Furthermore, "the mere conjecture of a State party that a foreigner might leave its jurisdiction if released on bail does not justify an exception to the rule laid down in" article 9(3); consequently, in a case where the State party provided no information to substantiate its concern that the accused would leave the country and as to "why it could not be addressed by setting an appropriate sum of bail and other conditions of release", the Committee concluded that article 9(3) had been violated.[169]

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The European Court has emphasized that, "when the only remaining [reason] for continued detention is the fear that the accused will abscond and thereby subsequently avoid appearing for trial, his release pending trial must be ordered if it is possible to obtain from him guarantees that will ensure such appearance"; where, however, the accused person has not acted in such way as to suggest that he would be prepared to furnish such guarantees and where, moreover, the judicial authorities cannot be criticized for the conduct of the case, the Court has concluded that there has been no violation of article 5(3) of the Convention.[170]

A person detained on a criminal charge has the right to trial within a reasonable time or to release pending trial. The ***reasonableness of pre-trial detention*** *is assessed in the light of all circumstances of the particular case, such as:*

- *the gravity of the offences;*
- *the risk of absconding;*
- *the risk of influencing witnesses and of collusion with co-defendants;*
- *the detainee's behaviour;*
- *the conduct of the domestic authorities,*

including the complexity of the investigation.

Whenever feasible, release should be granted pending trial, if necessary by ordering guarantees that the accused person will appear at his or her trial.

Throughout detention ***the right to presumption of innocence*** *must be guaranteed.*

[168] Ibid., loc. cit.; emphasis added.

[169] Ibid.

[170] *Eur. Court HR, Wemhoff Case v. the Federal Republic of Germany, judgment of 27 June 1968, Series A, No. 7*, p. 25, para. 15.

6. The Right to Have the Lawfulness of the Detention Decided Speedily or Without Delay by a Court

Article 9(4) of the Covenant reads as follows:

"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."

Article 7(6) of the American Convention reads:

"Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person on his behalf is entitled to seek these remedies."

Article 5(4) of the European Convention provides that

"Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

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It is noteworthy that ***these important legal guarantees are applicable to all deprivations of liberty, whether in criminal or in administrative cases.***[171] The Human Rights Committee has also held that a disciplinary penalty imposed on a conscript "may fall within the scope of application of" article 9(4):

"... if it takes the form of restrictions that are imposed over and above the exigencies of normal military service and deviate from the normal conditions of life within the armed forces of the State party concerned. In order to establish whether this is so, account should be taken of a whole range of factors such as the nature, duration, effects and manner of execution of the penalty or measure in question".[172]

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[171] As to article 9(4) of the Covenant, see General Comment No. 8, in *United Nations Compilation of General Comments*, pp. 117-118.

[172] Communication No. 265/1987, *A. Vuolanne v. Finland* (Views adopted on 7 April 1989), in UN doc. *GAOR*, A/44/40, pp. 256-257, para. 9.4.

The Vuolanne *and* Hammel *cases*

Article 9(4) was applicable in the case of *Vuolanne*, where the author had been held in solitary confinement for ten days and nights, a fact that was "in itself outside the usual service and exceeds the normal restrictions that military life entails".[173] Although the disciplinary punishment had been imposed by an administrative authority, the State party was under an obligation "to make available to the person detained the right of recourse to a court of law", although, in this particular case, it did not matter "whether the court would be civilian or military".[174] In the *Hammel* case, where the author had no possibility of taking proceedings before a court to determine the lawfulness of his detention for the purpose of expulsion, the Committee likewise concluded that article 9(4) had been violated.[175]

The right to challenge the lawfulness of one's deprivation of liberty ***must be effectively available***, and the Committee held that there had been a violation of article 9(4) where the person deprived of liberty had been held ***incommunicado*** and thereby been "effectively barred from challenging his arrest and detention".[176]

Similarly, in a case where the author could, in principle, have applied to the courts for a writ of habeas corpus, but where it was uncontested that he had no access to legal representation throughout his detention, the Committee concluded that article 9(4) of the Covenant had been violated.[177] On the other hand, where there was no evidence that either the author or his legal representative applied for such a writ, the Committee was unable to conclude that the former "was denied the opportunity to have the lawfulness of his detention reviewed in court without delay".[178]

Lastly, where the writ of habeas corpus has been inapplicable to persons deprived of their liberty, the Committee has found a violation of article 9(4) since they were denied an effective remedy to challenge their arrest and detention.[179]

[173] Ibid., p. 257, para. 9.5.

[174] Ibid., para. 9.6.

[175] Communication No. 155/1983, *E. Hammel v. Madagascar* (Views adopted on 3 April 1987), in UN doc. *GAOR*, A/42/40, p. 138, para. 20.

[176] Communication No. 84/1981, *H. G. Dermit on behalf of G. I. and H. H. Dermit Barbato* (Views adopted on 21 October 1982), in UN doc. *GAOR*, A/38/40, para. 10 at p. 133.

[177] Communication No. 330/1988, *A. Berry v. Jamaica* (Views adopted on 7 April 1994), in UN doc. *GAOR*, A/49/40 (vol. II), pp. 26-27, para. 11.1.

[178] Communication No. 373/1989, *L. Stephens v. Jamaica* (Views adopted on 18 October 1995), in UN doc. GAOR, A/51/40 (vol. II), p. 9, para. 9.7.

[179] See, for example, Communication No.R.2/9, *E. D. Santullo Valcada v. Uruguay* (Views adopted on 26 October 1979), in UN doc. *GAOR*, A/35/40, p. 110, para. 12, and Communication No. R.1/4, *W. T. Ramírez v. Uruguay* (Views adopted on 23 July 1980), para. 18 at p. 126.

6.1 The legal procedures complying with this requirement

It is clear from the terms of the treaty provisions quoted above that the legality of the detention must be determined by a ***court***. Consequently, an appeal against a detention order to the Minister of the Interior, for instance, does not comply with the requirements of article 9(4) of the International Covenant on Civil and Political Rights. Although the Committee considers that an appeal provides "for some measure of protection and review of the legality of the detention", it "does not satisfy the requirements of" article 9(4),

> "which envisages that the legality of detention will be determined by a court so as to ensure a higher degree of objectivity and independence in such control".[180]

Thus, where the author had been detained under the Finnish Aliens Act under orders of the police, the lawfulness of the detention could not be reviewed by a court until, after seven days, the detention order had been confirmed by the Minister of the Interior. In the Committee's view such delay violated article 9(4), according to which a detained person must be able "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".[181]

The case of A. v. Australia

Article 9(4) was violated in a case concerning a Cambodian citizen who had applied for refugee status in Australia, where "the courts' control and power to order the release of an individual was limited to an assessment of whether this individual was a 'designated person' within the meaning of the Migration Amendment Act"; if "the criteria for such determination were met, the courts had no power to review the continued detention of an individual or to order his/her release".[182]

However, in the opinion of the Committee:

> "Court review of the lawfulness of detention under article 9, paragraph 4, which must include the possibility of ordering release, is not limited to mere compliance of the detention with domestic law. While domestic legal systems may institute differing methods for ensuring court review of administrative detention, ***what is decisive for the purposes of article 9, paragraph 4, is that such review is, in its effects, real and not merely formal***.

[180] Communication No. 291/1988, *M. I. Torres v. Finland* (Views adopted on 2 April 1990), in UN doc. *GAOR*, A/45/40 (vol. II), pp. 99-100, para. 7.2.

[181] Ibid., at p. 100.

[182] Communication No. 560/1993, *A. v. Australia* (Views adopted on 3 April 1997), in UN doc. *GAOR*, A/52/40 (vol. II), p. 143, para. 9.5.

The case of A. v. Australia *(cont.d)*

> By stipulating that the court must have the power to order release 'if the detention is not lawful', article 9, paragraph 4, requires that the court be empowered to order release, if the detention is incompatible with the requirements in article 9, paragraph 1, or in other provisions of the Covenant. This conclusion is supported by article 9, paragraph 5, which obviously governs the granting of compensation for detention that is 'unlawful' either under the terms of domestic law or within the meaning of the Covenant."[183]

Since, in this particular case, the available court review was "limited to a formal assessment of the self-evident fact" that the author was a "designated person" within the meaning of Australian migration law, the Committee concluded that his right to have his detention reviewed by a court, as guaranteed by article 9(4) of the Covenant, was violated.[184]

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The Inter-American Court of Human Rights consistently examines article 7(6) of the American Convention on Human Rights jointly with article 25, regarding the right to judicial protection, which reads as follows:

> "1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.
>
> 2. The States Parties undertake:
> *a.* To ensure that any person claiming such remedy shall have his right determined by the competent authority provided for by the legal system of the State;
> *b.* To develop the possibilities of judicial remedy; and
> *c.* To ensure that the competent authorities shall enforce such remedies when granted."

The Inter-American Court has consistently held that "the right to a simple and prompt recourse or any other effective remedy filed with the competent court that protects that person from acts that violate his basic rights

[183] Ibid., pp. 143-144, para. 9.5; emphasis added.

[184] Ibid., at p. 144.

> 'is one of the fundamental pillars not only of the American Convention, but of the very rule of law in a democratic society in the terms of the Convention. ... Article 25 is closely linked to the general obligation contained in Article 1(1) of the American Convention, in that it assigns duties of protection to the States Parties through their domestic legislation'."[185]

Furthermore,

> "'the absence of an effective remedy to violations of the rights recognized by the Convention is itself a violation of the Convention by the State Party in which the remedy is lacking. In that sense, it should be emphasized that, for such a remedy to exist, it is not sufficient that it be provided for by the Constitution or by law or that it be formally recognized, ***but rather it must be truly effective in establishing whether there has been a violation of human rights and in providing redress*'.**"[186]

In the view of the Court, "this conclusion is true in ordinary and extraordinary circumstances", and, as will be seen in Chapter 16 of this Manual, not even a declaration of state of emergency can be allowed "'to entail the suppression or ineffectiveness of the judicial guarantees that the Convention requires the States Parties to establish for the protection of the rights not subject to derogation or suspension by the state of emergency'".[187]

In the case of *Castillo Petruzzi et al.,* the Inter-American Court found a violation of both article 7(6) and article 25, since the applicants, who were subsequently convicted of treason by a "faceless" military tribunal, had no possibility of recourse to judicial guarantees: one decree-law which regulated the crime of treason "denied persons suspected of terrorism or treason the right to bring actions seeking judicial guarantees", and a second decree-law amended the *Habeas Corpus* and *Amparo* Act to the effect that "the writ of habeas corpus was impermissible when 'petitioner's case is in its examining phase or when petitioner is on trial for the very facts against which remedy is being sought'".[188]

In the case of *Suárez Rosero*, the Court again emphasized that the remedies governed by article 7(6) "must be effective, since their purpose ... is to obtain without delay a decision '*on the lawfulness of* [his] *arrest or detention,*' and, should they be unlawful, to obtain, also without delay, an '*order* [for] *his release*'"; the Court further invoked its Advisory Opinion on *Habeas Corpus in Emergency Situations*, where it held that

> "'in order for habeas corpus to achieve its purpose, which is to obtain a judicial determination of the lawfulness of a detention, ***it is necessary that the detained person be brought before a competent judge or tribunal with jurisdiction over him*** (emphasis added). Here habeas corpus performs a vital role in ensuring that a person's life and physical integrity are respected, in preventing his disappearance or the keeping of his

[185] *I-A Court HR, Castillo Petruzzi et al. Case v. Peru, judgment of May 30, 1999*, in OAS doc. OEA/Ser.L/V/III.47, doc. 6, *Annual Report of the Inter-American Court of Human Rights 1999*, p. 276, para. 184.

[186] Ibid., p. 277, para. 185; emphasis added.

[187] Ibid., para. 186.

[188] Ibid., pp. 275-276, paras. 179-180 and p. 277, para. 188.

whereabouts secret and in protecting him against torture or other cruel, inhuman or degrading punishment or treatment. ...'"[189]

In this particular case, the writ of habeas corpus was disposed of by the President of the Supreme Court more than fourteen months after it was filed, and, contrary to articles 7(6) and 25 of the American Convention, Mr. Suárez Rosero did not, consequently, "have access to simple, prompt and effective recourse".[190]

Lastly, article 7(6) of the American Convention was violated in a case where the Peruvian military refused to abide by the decision of the Public Law Chamber of the Superior Court of Justice in Lima, which had upheld a petition for habeas corpus; the military ignored the decision and went ahead with the arrest.[191]

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The notion of "lawfulness" in article 5(4) of the European Convention on Human Rights "has the same meaning as in paragraph 1" of that article, and the question as to "whether an 'arrest' or 'detention' can be regarded as 'lawful' has to be determined in the light not only of domestic law, but also of the text of the Convention, the general principles embodied therein and the aim of the restrictions permitted by Article 5 § 1".[192] Article 5(4) thus entitles an arrested or detained person "to bring proceedings for the review by a court of the ***procedural and substantive*** conditions which are essential for the 'lawfulness', in the sense of" article 5(1).[193] This means that the review must "moreover be conducted ***in conformity with the aim of Article 5***: to protect the individual against arbitrariness, in particular with regard to the time taken to give a decision".[194]

Article 5(4) further "requires that a person detained on remand must be able to take proceedings ***at reasonable intervals*** to challenge the lawfulness of his detention" and, "in view of the assumption under the Convention that such detention is to be of strictly limited duration, ... ***periodic review at short intervals is called for***...".[195]

Consequently, article 5(4) was violated where the person was held in pre-trial detention for two years but could only have the legality of the continued detention examined once, and then without an oral hearing.[196] On the other hand, it was not violated in a case where the applicants had chosen not to avail themselves of the writ of habeas corpus which existed to challenge the lawfulness of arrests and detentions under

[189] *I-A Court HR, Suárez Rosero Case v. Ecuador, judgment of November 12, 1997*, in OAS doc. OAS/Ser.L/V/III.39, doc. 5, *Annual Report of the Inter-American Court of Human Rights 1997*, p. 298, para. 63.

[190] Ibid., paras. 64-66.

[191] *I-A Court HR, Cesti Hurtado Case v. Peru, judgment of September 29, 1999*, in OAS doc. OEA/Ser.L/V/III.47, doc. 6, *Annual Report of the Inter-American Court of Human Rights 1999*, p. 443, para. 133; for full facts see pp. 437-443.

[192] *Eur. Court HR, Case of Brogan and Others v. the United Kingdom, judgment of 29 November 1988, Series A, No. 145*, p. 34, para. 65.

[193] *Eur. Court HR, Case of Assenov and Others v. Bulgaria, judgment of 28 October 1998, Reports 1998-VIII*, p. 3302, para. 162.

[194] *Eur. Court HR, Keus Case v. the Netherlands, judgment of 25 October 1990, Series A, No. 185-C*, p. 66, para. 24; emphasis added.

[195] *Eur. Court HR, Case of Assenov and Others v. Bulgaria, judgment of 28 October 1998, Reports 1998-VIII*, p. 3302, para. 162; emphasis added.

[196] Ibid., p. 3303, para. 165.

the Prevention of Terrorism (Temporary Provisions) Act 1984 relating to the situation in Northern Ireland.[197]

The principle of equality of arms: According to the case-law of the European Court, "the possibility for a prisoner 'to be heard either in person or, where necessary, through some form of representation' features in certain instances among the 'fundamental guarantees of procedure applied in matters of deprivation of liberty'"; this is "the case in particular where the prisoner's appearance can be regarded as a means of ensuring respect for ***equality of arms***, one of the main safeguards inherent in judicial proceedings conducted in conformity with the Convention".[198] In order to ensure equality of arms it may thus be "necessary to give the applicant the opportunity to appear at the same time as the prosecutor so that he [can] reply to his arguments", and, where this has not been done, article 5(4) has been violated.[199] Similarly, article 5(4) requires "an oral hearing in the context of an adversarial procedure involving legal representation and the possibility of calling and questioning witnesses" "where a substantial term of imprisonment may be at stake and where characteristics pertaining to [the applicant's] personality and level of maturity are of importance in deciding on his dangerousness".[200]

Where the applicant's counsel was, during the first thirty days of custody, "in accordance with the law as judicially interpreted, unable to inspect anything in the file, and in particular the reports made by the investigating judge and the ... police", the European Court concluded that the procedure "failed to ensure equality of arms" and was not, therefore, "truly adversarial"; "whereas Crown Counsel was familiar with the whole file, the procedure did not afford the applicant an opportunity of challenging appropriately the reasons relied upon to justify a remand in custody".[201]

Article 5(4) "does not compel the Contracting States to set up a second level of jurisdiction for the examination of applications for release from detention", but, where this is done, the State concerned "must in principle accord to the detainees the same guarantees on appeal as at first instance", thereby also guaranteeing him or her "truly adversarial" proceedings.[202]

Differentiation in procedural requirements: The requirements of article 5(4) may differ somewhat depending on the specific ground on which the person concerned has been detained under article 5(1)(a)-(f). For instance, contrary to decisions on deprivations of liberty taken by *administrative authorities*, following which the individual concerned "is entitled to have the lawfulness of the decision reviewed by a court",[203] the review required by article 5(4) "is incorporated in the decision depriving

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[197] *Eur. Court HR, Case of Brogan and Others v. the United Kingdom, judgment of 29 November 1988, Series A, No. 145*, pp. 34-35, paras. 63-65.

[198] *Eur. Court HR, Case of Kampanis v. Greece, judgment of 13 July 1995, Series A, No. 318-B*, p. 45, para. 47; emphasis added.

[199] Ibid., p. 48, para. 58.

[200] *Eur. Court HR, Case of Hussain v. the United Kingdom, judgment of 21 February 1996*, *Reports 1996-I*, p. 271, paras. 59-60. Yet the Court has also accepted that the submission of written comments would have constituted "an appropriate means" of having the applicant benefit from an adversarial procedure; see *Eur. Court HR, Sanchez-Reisse Case v. Switzerland, judgment of 21 October 1986, Series A, No. 107*, p. 19, para. 51; article 5(4) was violated in this case.

[201] *Eur. Court HR, Lamy Case v. Belgium, judgment of 30 March 1989, Series A, No. 151*, pp. 16-17, para. 29.

[202] *Eur. Court HR, Case of Toth v. Austria, judgment of 12 December 1991, Series A, No. 224*, p. 23, para. 84.

[203] *Eur. Court HR, Luberti Case v. Italy, judgment of 23 February 1984, Series A, No. 75*, p. 15, para. 31.

a person of his liberty when that decision is made by a court at the close of judicial proceedings", for instance when a prison sentence is imposed after "conviction by a competent court" in accordance with article 5(1)(a) of the Convention.[204]

Periodic review of lawfulness of detention: As noted by the Court, however, article 5(4) "sometimes requires the possibility of subsequent review of the lawfulness of detention by a court", for instance with regard to the detention of persons of unsound mind within the meaning of article 5(1)(e), "where the reasons initially warranting confinement may cease to exist". In the view of the Court, "it would be contrary to the object and purpose of Article 5 to interpret paragraph 4 thereof ... as making this category of confinement immune from subsequent review of lawfulness merely provided that the initial decision issued from a court".[205]

According to the reasoning of the European Court, the same principle applies also "to the detention 'after conviction by a competent court' mentioned in paragraph 1 (a), but only in certain specific circumstances", including, for example:

- "the placing of a recidivist at the Government's disposal in Belgium";
- "the continuing detention of a person sentenced to an 'indeterminate' or 'discretionary' life sentence in Great Britain"; and
- "the detention for security reasons of a person with an underdeveloped and permanently impaired mental capacity in Norway".[206]

In these kinds of circumstances, in particular, there must consequently exist a possibility for persons deprived of their liberty to have the lawfulness of their detention reviewed by a court at regular intervals.

With regard to persons of unsound mind who are "compulsorily confined in a psychiatric institution for an indefinite or lengthy period", they are also "in principle entitled, at any rate where there is no automatic periodic review of a judicial character, to take proceedings at reasonable intervals before a court to put in issue the 'lawfulness' – within the meaning of the Convention ... – of [their] detention, whether that detention was ordered by a civil or criminal court or by some other authority".[207] However, such review should be "wide enough to bear on those conditions which, according to the Convention, are essential for the 'lawful' detention of a person on the ground of unsoundness of mind, especially as the reasons capable of initially justifying such a detention may cease to exist".[208]

[204] *Eur. Court HR, Case of Iribarne Pérez v. France, judgment of 24 October 1995, Series A, No. 325-C*, p. 63, para. 30.

[205] Ibid., loc. cit.

[206] Ibid.

[207] *Eur. Court HR, Case of X. v. the United Kingdom, judgment of 5 November 1981, Series A, No. 46*, para. 52 at p. 23.

[208] Ibid., p. 25, para. 58.

Detention for reasons of mental health: The case of X. v. the United Kingdom

In the case of *X v. the United Kingdom*, article 5(4) was violated since, in spite of the habeas corpus proceedings, there was no "appropriate procedure allowing a court to examine whether the patient's disorder still persisted and whether the Home Secretary was entitled to think that a continuation of the compulsory confinement was necessary in the interests of public safety".[209] Given the Home Secretary's executive discretion in ordering the applicant's return to the psychiatric hospital, the review exercised by the domestic courts in the habeas corpus proceedings solely concerned "the conformity of the exercise of that discretion with the empowering statute".[210]

Detention of juvenile for educational supervision: The case of Bouamar

Where a ***juvenile*** had been deprived of his liberty and placed in remand prison for the purpose of ***educational supervision***, the European Court accepted that the Juvenile Court was "undoubtedly a 'court' from the organisational point of view", albeit emphasizing "that the intervention of a single body of this kind will satisfy Article 5 § 4 only on condition that 'the procedure followed has a judicial character and gives to the individual concerned guarantees appropriate to the kind of deprivation of liberty in question'".[211] In determining whether a proceeding provides adequate guarantees, the Court must have regard "'to the particular nature of the circumstances in which such proceeding takes place'".[212]

While reiterating that the scope of the obligation under article 5(4) "is not identical in all circumstances of [*sic*] for every kind of deprivation of liberty", the Court held that, nevertheless, "in a case of the present kind", involving a minor, "it is essential not only that the individual concerned should have the opportunity to be heard in person but that he should also have the effective [assistance] of his lawyer". In this case the applicant had appeared in person in Court only once, but none of his lawyers had attended the proceedings and, consequently, the applicant, "who was very young at the time", had not been afforded "the necessary safeguards".[213] Furthermore, no remedies were available that satisfied the conditions of article 5(4), since the further proceedings, including on appeal, suffered from the same defect and the ordinary appeals and the appeals on points of law "had no practical effect". Consequently, there was a breach of article 5(4) of the Convention.[214]

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[209] Ibid., loc. cit.

[210] Ibid., p. 24, para. 56.

[211] *Eur. Court HR, Bouamar Case, judgment of 29 February 1988, Series A, No. 129*, p. 23, para. 57.

[212] Ibid., loc. cit.

[213] Ibid., p. 24, para. 60.

[214] Ibid., pp. 24-25, paras. 61-64.

6.2 The notions of "speedily" and "without delay"

The Human Rights Committee has emphasized that, "as a matter of principle, the adjudication of a case by any court of law should take place as expeditiously as possible", although this does not mean "that precise deadlines for the handing down of judgements may be set which, if not observed, would necessarily justify the conclusion that a decision was not reached 'without delay'".[215] On the other hand, "the question of whether a decision was reached without delay must be assessed on a case by case basis".[216] However, where the Committee did not know the reasons why there was a three-month delay in the rendering of the judgement concerned, it decided not to make a finding under article 9(4) of the Covenant.[217] In the same case the Committee was satisfied that the review of the same author's detention under the Extradition Act by the Helsinki City Court at two-week intervals satisfied the requirements of article 9(4) of the Covenant.[218]

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According to the jurisprudence of the European Court, article 5(4) of the European Convention entitles a detainee, after a "reasonable interval", to take proceedings by which the lawfulness of his or her continued detention is decided "speedily" by a "court"[219]. In the view of the Court,

> "the nature of detention on remand calls for short intervals; there is an assumption in the Convention that detention on remand is to be of strictly limited duration (Article 5 § 3), because its *raison d'être* is essentially related to the requirements of an investigation which is to be conducted with expedition".[220]

In the case of *Bezicheri*, an interval of one month was not considered "unreasonable".[221] With regard to the approximately *five and a half months* that elapsed from the time the applicant lodged his application until the investigating judge dismissed it, the Court concluded that the term "speedily" had not been complied with; moreover, the fact that the judge allegedly had a heavy work-load at the time was not relevant, since "the Convention requires the Contracting States to organize their legal systems so as to enable the courts to comply with its various requirements".[222]

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[215] Communication No. 291/1988, *M. I. Torres v. Finland* (Views adopted on 2 April 1990), in UN doc. *GAOR*, A/45/40 (vol. II), p. 100, para. 7.3.

[216] Ibid., loc. cit.

[217] Ibid.

[218] Ibid., p. 100, para. 7.4.

[219] *Eur. Court HR, Case of Bezicheri v. Italy, judgment of 25 October 1989, Series A, No. 164*, p. 10, para. 20.

[220] Ibid., para. 21 at p. 11.

[221] Ibid., loc. cit.

[222] Ibid., p. 12, paras. 22-26.

The same argument was invoked, among others, in a case where approximately two months elapsed between the institution of proceedings and the delivery of the judgement. Part of this delay was caused by administrative problems due to the vacation period. However, in addition to the above-mentioned reasoning, the Court also emphasized that

> "it is incumbent on the judicial authorities to make the necessary administrative arrangements, even during a vacation period, to ensure that urgent matters are dealt with speedily and this is particularly necessary when the individual's personal liberty is at stake. Appropriate provisions for this purpose do not appear to have been made in the circumstances of the present case."[223]

The five weeks that elapsed between the filing of the application for judicial review and the additional three weeks that were required to write the judgement did not comply with the notion of "speedily" in article 5(4) which, consequently, had been violated.[224]

Everyone deprived of his or her liberty has the right to challenge the lawfulness of his or her arrest or detention before a court so that the court may decide ***without delay/speedily*** *on the lawfulness of the detention or order the person's release if the detention is not lawful.*

This right applies to all forms of deprivation of liberty, including ***administrative detention****.*

This judicial remedy must be ***effectively available*** *to the detainee.* ***Incommunicado*** *detention is not a valid ground for refusing a detainee the right to challenge the lawfulness of his or her detention before a court of law.*

The legality of the detention must be determined by a ***court*** *which is* ***independent*** *and* ***impartial****. Appeals to government ministers do not constitute a sufficient remedy for the purposes of challenging the lawfulness of deprivations of liberty.*

The court must have the power to review both the ***procedural*** *and* ***substantive*** *grounds for the deprivation of liberty and be empowered to make a binding order for release of the detained person in the event that his or her deprivation of liberty is unlawful.*

Every person deprived of his or her liberty is entitled to have the lawfulness of the continued detention subjected to ***periodic reviews*** *for the purpose of testing whether the reasons for the deprivation of liberty remain valid; the exception to this rule is detention pursuant to a criminal conviction by a competent court.*

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[223] *Eur. Court HR, Case of E. v. Norway, judgment of 29 August 1990, Series A, No. 181*, p. 28, para. 66.

[224] Ibid., p. 28, paras. 65-67.

*The detained person must be allowed access to a lawyer and to appear in court to argue his or her case on equal terms with the prosecuting or other authorities; this right also implies that the detained person must have access to all relevant information concerning his or her case (**equality of arms**).*

*The court must act **without delay/speedily**, that is, as expeditiously as possible. What is considered to be "without delay" or "speedily" depends on the circumstances of each case. A delay must not be unreasonable and a lack of resources or vacation periods are not acceptable justifications for delay.*

7. The Right of Access to and Assistance of a Lawyer

As provided in Principle 11(1) of the Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment, "a detained person shall have the right to defend himself or to be assisted by counsel as prescribed by law". This right is, of course, a corollary to the principle of ***equality of arms*** that was previously dealt with in connection with article 5(4) of the European Convention on Human Rights.

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Where the complainant had not had access to legal representation from December 1984 to March 1985, the Human Rights Committee concluded that there was a violation of article 9(4) of the Covenant "since he was not in due time afforded the opportunity to obtain, on his own initiative, a decision by a court on the lawfulness of his detention".[225] The same provision was violated in a case where the author had had no access to legal representation for two and a half months.[226] The lack of access to a lawyer, whether counsel of his own choice or a public defender, was also an element in the Committee's decision to conclude that there had been a violation of article 9(3) in the case of *Wolf*, since the author had not been brought promptly before a judge or other judicial officer authorized by law to exercise judicial power.[227]

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[225] Communication No. 248/1987, *G. Campbell v. Jamaica* (Views adopted on 30 March 1992), in UN doc. *GAOR*, A/47/40, p. 246, para. 6.4.

[226] Communication No. 330/1988, *A. Berry v. Jamaica* (Views adopted on 7 April 1994), in UN doc. *GAOR*, A/49/40 (vol. II), p. 26, para. 11.1.

[227] Communication No. 289/1988, *D. Wolf v. Panama* (Views adopted on 26 March 1992), in UN doc. *GAOR*, A/47/40, p. 289, para. 6.2.

However, alleged denial of access to a lawyer during detention, for instance, must be substantiated. Where the author did not show that he had ever requested legal representation during the first year of his detention and that his request was refused, and where he did not claim that he had no legal representation during the preliminary hearing, the Committee rejected the claim as inadmissible.[228]

The right to legal assistance will be dealt with in further depth in Chapter 6 regarding *The Right to a Fair Trial: Part I – From Investigation to Trial.*

A detained person has the right to consult with, and be assisted by, a lawyer in connection with the proceedings taken to test the legality of her or his detention.

8. The Right to Compensation in the Event of Unlawful Deprivation of Liberty

Article 9(5) of the International Covenant on Civil and Political Rights provides that "anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation", and this provision is applicable to all unlawful or arbitrary arrests and detentions.[229] Article 5(5) of the European Convention provides that "everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation".

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In the case of *Monja Jaona*, where the author had been subjected to arbitrary arrest and detention contrary to article 9(1) of the Covenant, the Committee underlined *expressis verbis* that the State party was "under an obligation to take effective measures to remedy the violations which Monja Jaona [had] suffered, to grant him compensation under article 9, paragraph 5, ... on account of his arbitrary arrest and detention, and to take steps to ensure that similar violations do not occur in the future".[230]

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[228] Communication No. 732/1997, *B. Whyte v. Jamaica* (Views adopted on 27th July 1998), in UN doc. *GAOR*, A/53/40 (vol. II), p. 200, para. 7.4.

[229] See General Comment No. 8 (16) in UN doc. *GAOR*, A/37/40, p. 95, para. 1 and p. 96, para. 4.

[230] Communication No. 132/1982, *Monja Jaona v. Madagascar* (Views adopted on 1 April 1985), in UN doc. *GAOR*, A/40/40, p. 186, para. 16.

Article 5(5) of the European Convention

> "is complied with where it is possible to apply for compensation in respect of a deprivaton of liberty effected in conditions contrary to paragraphs 1, 2, 3 and 4. It does not prohibit the Contracting States from making the award of compensation dependent upon the ability of the person concerned to show damage resulting from the breach. In the context of Article 5 § 5, ... the status of 'victim' may exist even where there is no damage, but there can be no question of 'compensation' where there is no pecuniary or non-pecuniary damage to compensate."[231]

However, where the applicants have been arrested and detained lawfully under domestic law but in violation of article 5 of the Convention, there has been a violation of article 5(5) if they had no enforceable claim for compensation before the domestic courts.[232]

Everyone has the right to compensation for unlawful deprivation of liberty by reason of violations of international and/or national law. Such compensation may depend on the demonstration of damage.

9. *Incommunicado* detention

The treatment of persons deprived of their liberty will be covered in Chapter 8, including such issues as the right of access to family and questions of solitary confinement. However, in the present context, one particular issue deserves highlighting, namely that of *incommunicado* detention. The practice of holding detainees *incommunicado*, that is to say, keeping them totally isolated from the outside world without even allowing them access to their family and lawyer, does not per se appear to be outlawed by international human rights law, although the Human Rights Committee has stated in its General Comment No. 20, on article 7 of the Covenant, that "provisions should ... be made against incommunicado detention".[233]

What is clear from the jurisprudence, however, is that *incommunicado* detention is not allowed to interfere with the effective enforcement of the legal guarantees of people deprived of their liberty. In a case where the authors had been held *incommunicado* during the first 44 days of detention, the Committee concluded that both articles 9(3) and 10(1) of the Covenant had been violated because they had not been brought promptly before a judge and because of the *incommunicado* detention.[234]

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[231] *Eur. Court HR, Wassink Case v. the Netherlands, judgment of 27 September 1990, Series A, No. 185-A*, p. 14, para.38.

[232] *Eur. Court HR, Case of Brogan and Others v. the United Kingdom, judgment of 29 November 1988, Series A, No. 145-B*, p. 35, paras. 66-67.

[233] See *United Nations Compilation of General Comments*, p. 139 at p. 140, para. 11.

[234] Communication No. 176/1984, *L. Peñarrieta et al. v. Bolivia* (Views adopted on 2 November 1987), in UN doc. *GAOR*, A/43/40, p. 207, para. 16.

In view of the fact that people arrested and detained are at particular risk of being subjected to torture or other ill-treatment, and even of being made to disappear and killed in the first hours and days following their deprivation of liberty, the question arises whether it should ever be lawful to permit incommunicado detention.

Brief ***incommunicado*** *detention, that is, deprivation of liberty for a short period of time in complete isolation from the outside world, including family and lawyer, does not* ***per se*** *appear to be illegal under international human rights law, but it cannot be used in order to bar the detainee from exercising his or her rights as an arrested or detained person.*

10. Concluding Remarks

This chapter has provided an account of the basic international legal rules that regulate States' power to resort to arrests and detentions and the legal guarantees that exist aimed at preventing unlawful and arbitrary deprivations of liberty. At the general level, adherence to these rules is a sine qua non in a democratic society governed by the rule of law, and, at the individual level, compliance therewith is an indispensable condition for ensuring respect for the rights and freedoms of the individual human being, including, in particular, respect for his or her physical and mental integrity. By effectively guaranteeing everyone's right to personal liberty and security at all times, States will also be promoting their own internal security, without which human rights cannot be enjoyed to the full.