

MAKALAH



ICCPR article 9: Human Rights and procedural requirements on deprivation of liberty

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The Right to Liberty and Security of person

■ Article 9

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.

2. 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.

3. 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 and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

4. 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.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Introductory remarks

- The provision in article 9 talks about **liberty** and **security**, but does these two nouns have different application?
- Most of the article elaborates on liberty. The right to security must be seen in the light of the right to liberty of person and the protection of the individual against arbitrariness.
- In accordance with **practice from the ECHR**, the right to security of person has played a role in cases where prisoners have **disappeared**.
- Usually security means something more than liberty. It is therefore quite probable that courts would recognise the **physical integrity of people** under this provision.

Legal Sources complementing the convention

- ICCPR art. 9.
- General Comment No. 08: Right to liberty and security of persons (Art. 9) . 30.06.1982. CCPR General Comment No. 8.
 - This is old and gives very little information on application, definitions and interpretation of the article.
- Legal theory and established understandings.
- (Jurisprudence from courts in jurisdictions where this is relevant).

Scope of application

- Gen.Com 08:
 - It is true that some of the provisions of article 9 (part of para. 2 and the whole of para. 3) are only applicable to persons against whom **criminal charges** are brought. But the rest, and in particular the important guarantee laid down in paragraph 4, i.e. the right to **control by a court of the legality of the detention**, applies to all persons **deprived of their liberty** by arrest or detention. Furthermore, States parties have in accordance with article 2 (3) also to ensure that an **effective remedy** is provided in other cases in which an individual claims to be deprived of his liberty in violation of the Covenant.

Definitions

- **Deprivation of Liberty**

According to GC 08: The Committee points out that paragraph 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

Definitions

- **Deprivation of Liberty vs. restriction of liberty**

The important question then will be where is the threshold between restriction and deprivation of liberty?

Court practice from the ECHR has specified certain standards too assess:

- The individual situation of the person concerned
- Account must be taken of the special circumstances such as the type of deprivation of liberty, duration, effects and manner of implementation of the measure in question
- The degree of supervision and the effects on the possibilities of maintaining normal social contacts are also relevant
- Certain restrictions of the liberty of movement of soldiers - obligation to be present in barracks at particular times, also during leisure – which would constitute a deprivation of liberty for civilians, may be permitted if those restrictions are not “beyond the exigencies of normal military service”, the Engel Case

Definitions

- **Deprivation of liberty by private persons**
Under which circumstances are the Contracting States responsible for a deprivation of liberty that is primarily carried out by private persons?
 - Does the state have an active or passive part in the facilitation?
 - Imagine the state knows a person is deprived of liberty by private persons but do nothing.
 - What kind of deprivation?

Article 9, paragraph 3

- Gen Com. Paragraph 2
 - Paragraph 3 of article 9 requires that in criminal cases any person arrested or detained has to be **brought "promptly" before a judge** or other officer authorized by law to exercise judicial power. More precise time-limits are fixed by law in most States parties and, in the view of the Committee, **delays must not exceed a few days**. Many States have given insufficient information about the actual practices in this respect.
 - ECHR: Maximum 4 to 7 days.
- Paragraph 3.
 - Another matter is the **total length of detention pending trial**. In certain categories of criminal cases in some countries this matter has caused some concern within the Committee, and members have questioned whether their practices have been in conformity with the entitlement **"to trial within a reasonable time or to release"** under paragraph 3. Pre-trial detention should be an exception and as short as possible.

General Comment 08

- Also 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

Habeas Corpus

- ***Habeas corpus*** ("may you have the body") is a [writ](#) (legal action) that requires a person under arrest to be brought before a judge or into court. The principle of Habeas Corpus ensures that a prisoner can be released from unlawful [detention](#)—that is, detention lacking sufficient cause or evidence. The remedy can be sought by the prisoner or by another person coming to the prisoner's aid.
- It has historically been an important legal instrument safeguarding [individual freedom](#) against [arbitrary state action](#).

ICCPR art. 9(4) HABEAS CORPUS

The right to control by a court of the legality of the detention

- Habeas Corpus (Magna Carta 1215)
- Article 9 (4) grants to everybody who is deprived of his liberty by arrest or detention the right to take proceedings by which the **lawfulness** of such deprivation of liberty will be reviewed **speedily** by a court and his release ordered if the latter decides that the detention is unlawful.
- This paragraph constitutes an independent provision, meaning it can be violated even though paragraph 1 is not.
 - Even if the review by the court find that the detention was lawful, an assessment must be made of whether the detained person at the time had the possibility to have the **lawfulness reviewed by a domestic court**.
- The provision requires that the arrested person be informed of the **reason of his arrest** in order to be in a position to take proceedings with a view to having the lawfulness of his detention determined.

HABEAS CORPUS

Applicability

- The Habeas Corpus guarantees extend to all cases of deprivation of liberty provided for in paragraph (1)
- The content of the obligation is not necessarily the same in all circumstances and as regards **every category of deprivation of liberty**
 - Where a national court, after convicting a person of a criminal offence, imposes a fixed sentence of imprisonment for the purpose of punishment, the supervision required by article 9 (4), has already taken place
 - This view is based on the assumption that in those cases the judicial review of the lawfulness of the detention, which is guaranteed by 9 (4), has already taken place. This situation must be distinguished from situations in which an **indeterminate sanction is imposed**. See jurisprudence.

HABEAS CORPUS

Review of lawfulness at reasonable intervals

- The ECHR has stated that a case of detention of a person of unsound mind “would appear to require a review of lawfulness to be available at reasonable intervals”.
- In a follow up case a person was detained on remand. Subsequent to a first judicial review of the lawfulness of the detention, he was according to the Court, entitled “after a reasonable interval, to take proceedings by which the lawfulness of his continued detention” was decided.
- According to established case law the right to take proceedings exists at any rate where there is no “automatic periodic review of a judicial character”.
- In the Bezicheri Case, the person concerned, detained under article 5 (3), submitted his application for release one month after the first judicial review. The Italian government argued that this period was too short to be reasonable. The Court held that “detention on remand calls for short intervals”. Was no breach of the article.
- In another case (De Jong, Baljet and Van den Brink Case) the applicants were in remand seven, eleven and six days respectively without any remedy against their deprivation of liberty. The Court held that this amounted to a breach of Article 9(4).

HABEAS CORPUS

Review by a Court

- Article 9(4) entitles the accused to a **decision by a court**
- What is a Court?
 - The tribunal or competent authority must (ECHR):
 - Be independent both of the executive and of the parties of the case
 - Comply with both the substantial and procedural rules of the national legislation and art. 5 of the ECoHR = ICCPR art. 9
 - The procedural requirements according to art 5(4) must, though not be as extensive as art. 6(1) at least consist of the basic requirement of a fair trial:
 - Procedure must be adversarial (Contradiction)
 - Ensure “equality of arms” (exmpl: access to essential documents of investigation)
 - Access to court
 - Right to legal counsel
 - Independent and impartial tribunal
- Article 5 (4) does not require an appeal possibility . For a decision on deprivation on liberty the intervention of one organ satisfies art. 5(4).
 - As long as the proceedings has a judicial character and gives to the detainee guarantees appropriate to the kind of deprivation of liberty in question.

HABEAS CORPUS

Speedy decision

- Art 9(4) requires that anyone deprived of their liberty shall be entitled to take proceedings before a court, in order that that court may decide **without delay** on the lawfulness of the detention
- ECoHR use the word “shall be decided speedily”.
- How speedily?
 - Compliance must be assessed in light of the specific circumstances of the case
 - Complexity
 - The conduct of the applicant
 - How the authority has handled the case
- The notion speedily (without delay?) indicates a lesser urgency than art. 5(3) “promptly”