



## ARTICLES

*Claire Macken* \*

### **PREVENTIVE DETENTION AND THE RIGHT OF PERSONAL LIBERTY AND SECURITY UNDER THE *INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, 1966***

#### ABSTRACT

*Preventive detention enables a person to be deprived of liberty, by executive determination, for the purposes of safeguarding national security or public order without that person being charged or brought to trial.*

*This paper examines Article 9(1) of the International Covenant on Civil and Political Rights, 1966 to assess whether preventive detention is prohibited by the phrase 'arbitrary arrest and detention'. To analyse this Article, this paper uses a textual and structural analysis of the Article, as well as reference to the travaux préparatoires and case law of the Human Rights Committee.*

*This paper argues that preventive detention is not explicitly prohibited by Article 9(1) of the International Covenant on Civil and Political Rights 1966. If preventive detention is 'arbitrary', within the wide interpretation of that term as argued in this paper, it will be a permissible deprivation of personal liberty under Article 9(1) of the International Covenant on Civil and Political Rights, 1966. Preventive detention will, however, always be considered 'arbitrary' if safeguards for those arrested and detained are not complied with, in particular the right to judicial review of the lawfulness of detention.*

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## I INTRODUCTION

A deprivation of personal liberty prior to criminal conviction in modern legal systems characteristically occurs as a precautionary measure to ensure that the administration of criminal justice is not frustrated or obstructed by those who may become subject to its processes.<sup>1</sup> A person is arrested on reasonable suspicion that they have committed a criminal offence, and is detained in custody until a trial takes place to pass judgment on their suspected criminal conduct. The principal objective of criminal law is to punish convicted offenders.<sup>2</sup> In all cases, the courts are generally empowered to judicially determine whether a person should be deprived of their liberty in accordance with grounds enumerated in national legislation or international instrument.

Yet, in recent decades, decisions of the executive arm of government have increasingly eschewed all of the typical features of the criminal justice system through the practice of preventive detention.

‘Preventive detention’ is often called ‘administrative detention’ for the reason that such detention is ordered by the executive and the power of decision rests solely with the administrative or ministerial authority.<sup>3</sup> Although a remedy *a posteriori* may exist in the courts against the decision, if the courts are responsible only for considering the lawfulness of the decision and/or its proper enforcement, detention will fall within the concept of preventive detention.<sup>4</sup>

The purpose of preventive detention is to safeguard national security or public order.<sup>5</sup> A person is detained, not for punishment for a proven transgression of the criminal law, but because the individual is considered a potential threat to state security.<sup>6</sup> The accusation typically refers to some imprecise activities, allegedly prejudicial to the public interest and in which, it is claimed, the detainee is likely to

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<sup>1</sup> United Nations Department of Economic and Social Affairs, *Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile* (United Nations, 1964), 62–3.

<sup>2</sup> John Hatchard, *Individual Freedoms & State Security in the African Context: The Case of Zimbabwe* (1993), 46.

<sup>3</sup> United Nations Economic and Social Council, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, ‘Report on the Practice of Administrative Detention, submitted by Mr Louis Joinet’, E/CN.4/Sub.2/1989/27 (6 July 1989), 7.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.* 3.

<sup>6</sup> In *R v Halliday* (1917) AC 216, Lord Finlay described it as ‘not a punitive but a precautionary measure’.

become involved unless detained.<sup>7</sup> In some cases the suspicion itself is based on the detainee's past criminal infractions or associations, but in other cases, such suspicion may be purely speculative.

Detention occurs without charge or trial. As detention is preventive in that no criminal offence has actually been committed, the detainee is not subjected to a charge, nor afforded the opportunity of trial before a competent court.

In *Union of India v Paul Nanickan and Anr*, the Supreme Court of India stated:

the object of preventive detention is not to punish a man for having done something but to intercept him, before he does it, and to prevent him from doing it. No offence is proved, nor any charge formulated; and the justification for such detention is suspicion or reasonable probability and not criminal conviction, which can only be warranted by legal evidence.<sup>8</sup>

Gross' definition of 'preventive detention' is:

Administrative detention, sometimes known as preventive detention, refers to a situation where a person is held without trial. The central purpose of such confinement is to prevent the detainee from committing offences in the future. Detention is based on the danger to state or public security posed by a particular person against whom the government issues a detention order. In other words, if the detainee were released, he would likely threaten the security of the state and the ordinary course of life.<sup>9</sup>

The International Commission of Jurists' Study on States of Emergency defined 'administrative detention' as:

the deprivation of a person's liberty, whether by order of the Head of State or of any executive authority, civil or military, for the purposes of safeguarding national security or public order, or other similar purposes, without that person being charged or brought to trial.<sup>10</sup>

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<sup>7</sup> Andrew Harding and John Hatchard (eds), *Preventive Detention and Security Law: A Comparative Survey* (1993).

<sup>8</sup> *Union of India v Paul Nanickan and Anr*, Appeal (Crl) 21 of 2002, (13 October 2003).

<sup>9</sup> Emanuel Gross, 'Human Rights, Terrorism and the Problem of Administrative Detention in Israel: Does a Democracy Have the Right to Hold Terrorists as Bargaining Chips?' (2001) 18(3) *Arizona Journal of International and Comparative Law* 721, 752.

<sup>10</sup> International Commission of Jurists, *States of Emergency: Their Impact on Human Rights* (1983), 394.

The United Nations Commission on Human Rights developed an interest in the practice of administrative detention in its resolution 1985/16 of 11 March 1985. The Sub-Commission on Prevention of Discrimination and Protection of Minorities requested its Special Rapporteur, Mr Louis Joinet, to prepare an explanatory paper concerning administrative detention. According to the synopsis of material received from non-governmental organisation:

Administrative detention was ... common practice in more than 30 countries, where thousands of persons were said to be held in detention without charge or trial, merely by executive decision, either because they were viewed as a potential threat to national security or public order.<sup>11</sup>

Joinet further commented:

... contrary to what one might suppose, administrative detention is not banned on principle under international rules.<sup>12</sup>

The purpose of this paper is to address the question of whether preventive detention is a permissible deprivation of personal liberty under one international instrument, the *International Covenant on Civil and Political Rights*, 1966 ('ICCPR'). Further, assuming preventive detention is lawful under the ICCPR, what safeguards apply to those in preventive detention?

To examine Article 9(1) of the ICCPR, this paper applies a textual and structural analysis of the Article, as well as reference to the *travaux préparatoires* and case law of the Human Rights Committee. This interpretative approach is consistent with the principles of treaty interpretation in Article 31 of the *Vienna Convention on the Law of Treaties* ('Vienna Convention').

## II THE PROHIBITION ON ARBITRARY ARREST AND DETENTION

Preventive detention is not explicitly prohibited by the ICCPR. Whether preventive detention is a permissible deprivation of liberty depends on whether it falls within the prohibition on arbitrary arrest and detention under Article 9(1) of the ICCPR. This Article states:

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

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<sup>11</sup> Joinet, E/CN.4/Sub.2/1989/27, above n 3.

<sup>12</sup> United Nations Economic and Social Council, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 'Revised Report on the Practice of Administrative Detention, submitted by Mr Louis Joinet', E/CN.4/Sub.2/1990/29.

liberty except on such grounds and in accordance with such procedure as are established by law.

Consistent with Article 31(1) of the Vienna Convention, this paper will firstly apply a textual analysis to the ordinary meaning of Article 9(1) of the ICCPR as a starting point for interpretation. This Article of the Vienna Convention recommends:

A treaty shall be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

There are two possible interpretations of the word ‘arbitrary’:

- a) An arrest or detention is ‘arbitrary’ if it is *unlawful*, that is, not in accordance with procedure as laid down by law; (‘narrow interpretation’)  
OR
- b) An arrest or detention is ‘arbitrary’ if it is *unlawful* or *unjust*, that is, under the provisions of a law that do not accord with the principles of justice. Arrest or detention is ‘arbitrary’ if under a law the purpose of which is incompatible with respect for the right to liberty and security of person (‘wide interpretation’).

#### A *Narrow Interpretation of ‘Arbitrary’*

Article 9(1) of the ICCPR states: ‘No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law’. By referring to the procedure as *established by law*, it could be argued the word ‘arbitrary’ is simply requiring arrest and detention to be ‘lawful’, that is, in accordance with legislative procedures.

The provisions of the ICCPR providing for judicial review of detention similarly support a restrictive interpretation of the word ‘arbitrary’. Article 9(4) of the ICCPR provides:

Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the *lawfulness of his detention* and order his release if the detention is *not lawful*.

The right to compensation in Article 9(5) also applies to *unlawful* arrest and detention.

The fact that the Article refers to ‘lawful’ and ‘unlawful’ arrest and detention arguably militates in favour of a restrictive interpretation of the word ‘arbitrary’, that is, contrary to a procedure established by law.

If the narrow interpretation of ‘arbitrary’ is correct, preventive detention is permissible under the ICCPR once it is within the scope of, and in accordance with, the legislative or executive authorisation permitting the detention to occur. Preventive detention, even as a result of despotic, tyrannical, objectively unreasonable legislation, would therefore be acceptable under this Article of the ICCPR.

### B *Wide Interpretation of ‘Arbitrary’*

Given the effect of the narrow interpretation of ‘arbitrary’ for preventive detention, it is contended the wide interpretation of ‘arbitrary’ is more persuasive. The word ‘arbitrary’ should not just require a deprivation of liberty to be in accordance with procedures as established by law, but also imposes an additional higher requirement. The word ‘arbitrary’ is concerned with the actual content of laws, not just compliance with procedures in accordance with law.

#### 1 *Ordinary meaning of ‘arbitrary’*

The dictionary meaning of the word ‘arbitrary’ supports a contention that the term in the ICCPR should be accorded a wide interpretation. The ‘ordinary meaning’ of the word ‘arbitrary’ clearly contemplates more than just ‘unlawful’. The plain meaning of ‘arbitrary’ is:

- (1) depending on individual discretion (as of a judge) and not fixed by law;
- (2a) not restrained or limited in the exercise of power: ruling by absolute authority; <an arbitrary government>;
- (2b) marked by or resulting from the unrestrained and often tyrannical exercise of power <protection from arbitrary arrest and detention>;
- (3a) based on or determined by individual preference or convenience rather than by necessity or the intrinsic nature of something; <an arbitrary standard>;
- (3b) existing or coming about seemingly at random or by chance or as a capricious and unreasonable act of will.<sup>13</sup>

#### 2 *Structural analysis of Article 9(1) ICCPR*

That the word ‘arbitrary’ should be accorded a wide meaning is also supported by a structural analysis. Article 9(1) is comprised of three sentences:

Everyone has the right to liberty and security of person [*‘first sentence’*]. No one shall be subjected to arbitrary arrest or detention [*‘second sentence’*]. No

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<sup>13</sup> This example is taken from the Merriam-Webster Online Dictionary, <http://www.m-w.com/cgi-bin/dictionary?book=Dictionary&va=arbitrary>.

one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law [*third sentence*].

In this Article:

- (a) There is a right accorded to personal liberty and security in the first sentence;
- (b) There is a prohibition on arbitrary arrest and detention in the second sentence; and
- (c) There is a requirement that a deprivation of liberty be in accordance with procedures established by law ('the principle of legality') in the third sentence.

If the drafters had intended a restrictive interpretation of the word 'arbitrary', there would be no point in including both the second and third sentences of the Article. The prohibition on arbitrary arrest and detention would be entirely superfluous because protection against solely unlawful arrest and detention would be covered by the principle of legality. On a structural analysis, a different meaning must have been intended for the prohibition on arbitrary arrest and detention, distinct from the principle of legality, protecting unlawful arrest and detention.

As drafted, the Covenant is consistent if a distinct meaning is attributable to the prohibition on arbitrary detention (focusing on unlawful arrest and detention), and the principle of legality (concerned with the protection from arbitrary laws in addition to unlawful acts).<sup>14</sup>

### 3 *Contextual analysis of 'unlawful' in other Articles of the ICCPR*

The context of the word 'arbitrary' and 'unlawful' in other Articles of the ICCPR support the proposition that a wide interpretation should be accorded to the word 'arbitrary' in Article 9(1).

Three other Articles of the ICCPR are relevant:

- a) Article 17 – The right to privacy provides:

No one shall be subjected to *arbitrary* or *unlawful* interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

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<sup>14</sup> Laurent Jr Marcoux, 'Protection from Arbitrary Arrest and Detention Under International Law' (1982) 5(2) *Boston College International and Comparative Law Review* 345, 359.

b) Article 6(1) – The right to life provides:

Every human being has the inherent right to life. This right shall be protected by law. No one shall be *arbitrarily* deprived of his life.

c) Article 12(4) – The right to enter own country provides:

No one shall be *arbitrarily* deprived of the right to enter his own country.

In referring to Article 17, the Human Rights Committee supported a distinct meaning being accorded to the word ‘arbitrary’ and ‘unlawful’. In General Comment 16, the Committee commented:

The term ‘unlawful’ means that no interference can take place except in cases envisaged by the law. Interference authorised by States can only take place on the basis of law, which itself must comply with the provisions, aims and objectives of the Covenant.

In this General Comment, the Office further commented that the reference to ‘arbitrary interference’ was of a wider consideration than the word ‘arbitrary’:

The introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances.<sup>15</sup>

In *Toonen v Australia*, the Human Rights Committee interpreted this requirement of reasonableness in Article 17 of the ICCPR to ‘imply that any interferences with the privacy must be proportional to the end sought and be necessary in the circumstances of any given case’.<sup>16</sup>

In relation to the right to life, the Human Rights Committee in *Suárez de Guerrero* found a breach of Article 6 had occurred even though the killings were deemed ‘lawful’ under Columbian municipal law.<sup>17</sup> By distinguishing between killings in accordance with the law and arbitrary deprivation of life, the Committee necessarily implies a distinct meaning should be accorded to the word ‘arbitrary’.

<sup>15</sup> Human Rights Committee, General Comment No 16: The right to respect of privacy, family, home and correspondence, and protection of honour and reputation (Art. 17) (08/04/1988).

<sup>16</sup> *Toonen v Australia*, Communication No.488/1992, UN Doc CCPR/C/50/D/488/1992 (1994), para 8.3.

<sup>17</sup> Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (2000), 110.



In General Comment 27 the Human Rights Committee also supported the wide definition of ‘arbitrary’ by extending it beyond the concept of ‘unlawful’ when applied to Article 12 of the ICCPR, the right to enter one’s own country. The Committee commented:

The reference to the concept of arbitrariness in this context is intended to emphasize that it applies to all State action, legislative, administrative and judicial: it guarantees that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, *reasonable in the particular circumstances*.<sup>18</sup>

#### 4 *The Travaux Préparatoires of Article 9 of the Universal Declaration of Human Rights 1948*

In interpreting the meaning of ‘arbitrary’ in Article 9(1) of the ICCPR, reference is also made to the *Guide to the Travaux Préparatoires the International on Civil and Political Rights*.<sup>19</sup> Reference to the *travaux préparatoires* is consistent with the rule of interpretation recommended in Article 32 of the Vienna Convention. This Article refers to ‘supplementary means of interpretation’ and provides:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.

Further insight as to the appropriate interpretation of the word ‘arbitrary’ may be assisted by considering *travaux préparatoires* of the *Universal Declaration of Human Rights 1948* (‘Universal Declaration’). As pointed out by Marcoux, although an 18 year difference exists between the adoption of the Universal Declaration and the adoption of the ICCPR, the initial drafting work of the two documents began at the same time.<sup>20</sup> ‘Both instruments were not only drafted by the same bodies, but generally by the same draftsmen as well’.<sup>21</sup> The Articles in both instruments are similarly worded. Article 3 of the Universal Declaration states: ‘Every person has the right to life, liberty and security of person’. Article 9 states: ‘No one shall be subject to arbitrary arrest, detention or exile’.

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<sup>18</sup> Human Rights Committee, General Comment No 27: Freedom of Movement (Art.12), 02/11/99 [21].

<sup>19</sup> Marc J Bossuyt, *Guide to the ‘Travaux Préparatoires of the International Covenant on Civil and Political Rights* (1987).

<sup>20</sup> Marcoux, above n 14, 359.

<sup>21</sup> *Ibid.*

Tracing the drafting of Article 9 of the Universal Declaration through the *travaux préparatoires* reveals that the draftsman intended a wide definition of the term ‘arbitrary’.

The initial draft of this Article prohibited arrest and detention ‘save in the cases provided for and in accordance with the procedure prescribed by law’.<sup>22</sup> At the next stage of drafting (the Drafting Committee Stage), the draft prohibited arbitrary arrest and detention ‘except in cases prescribed by law and after due process’.<sup>23</sup>

At the Third Session of the Commission on Human Rights, the preference was expressed that the Declaration should consist of brief Articles and that detailed Articles would be more appropriate for a future Covenant. The Commission on Human Rights completed its draft Declaration at the third session, and accepted the joint Chinese, Indian and British proposal that the Article simply state: ‘No one shall be subjected to arbitrary arrest or detention’.<sup>24</sup>

The draft Universal Declaration then went to the Third Committee of the UN General Assembly. Mr Pavlov of the USSR opposed use of the word ‘arbitrary’ because it allowed for subjective interpretation.<sup>25</sup> A number of representatives objected to an attempt to delete the word ‘arbitrary’. The Brazilian representative argued against the amendment and noted that ‘there might be cases in which anti-democratic governments had promulgated undesirable laws’.<sup>26</sup> Mr Davies of the United Kingdom stated:

Arbitrary was the key word in the text before the Committee, the Article would lose greatly if that word were deleted. There might be certain countries where arbitrary arrest was permitted. The object of the Article was to show that the United Nations disapproved of such practices. National legislation should be brought into line with the standards of the United Nations. Rights should not derive from law, but law from rights.<sup>27</sup>

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<sup>22</sup> This, in fact, was the Secretariat draft examined and revised by Mr Rene Cassin of the Commission on Human Rights Drafting Committee. The drafting of the Universal Declaration in fact started with a United Nations Secretariat draft Declaration prepared by Dr John Humphrey. For a detailed discussion of the drafting process of the Universal Declaration see Marcoux, above n 14, 351–57.

<sup>23</sup> Commission on Human Rights, Report of First Session of the Drafting Committee, Annex F., UN Doc. E/CN.4/21 (1947) referred to in Marcoux, above n 14, 352.

<sup>24</sup> Commission on Human Rights, Third Session, Summary Record of the 54th Meeting, UN Doc. E/CN.4/SR.54, 4–8 (1948) referred to in Marcoux, above n 14, 353.

<sup>25</sup> Ibid 354.

<sup>26</sup> General Assembly, Third Session, Summary Record of the 113<sup>th</sup> Meeting, 3 UN GAOR C.3, pt. 1, 247, UN Doc. A/C.3/SR.113 (1948) referred to in *ibid*.

<sup>27</sup> *Ibid*.

Clearly the *travaux préparatoires* of the Universal Declaration support a wide interpretation of the word ‘arbitrary’.

### 5 *The Travaux Préparatoires of Article 9(1) ICCPR*

In drafting Article 9(1) of the ICCPR, the United Kingdom proposed the following clause:

Everyone has the right to liberty and security of person. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law and as are not in themselves incompatible with respect for the right to liberty and security of the person.

The amendment proposal removed the phrase ‘no one shall be subjected to arbitrary arrest or detention’. The amendment was proposed to avoid the legal grounds and procedures on the criterion of legality being themselves open to question on the ground of arbitrariness.<sup>28</sup>

The United Kingdom considered the term ‘arbitrary’ in the second sentence (‘No one shall be subjected to arbitrary arrest or detention’) as being too vague as a criterion. The term ‘arbitrary’ was also used in the *Universal Declaration of Human Rights* and other legal texts was of a general character.<sup>29</sup> As such, it was necessary to clarify the intention underlying the use of the term ‘arbitrary’.<sup>30</sup>

The United Kingdom proposal for Article 9(1) was unsuccessful because the purpose of the amendment was covered by the first sentence of the paragraph ‘everyone has the right to liberty and security of the person’.<sup>31</sup>

The *travaux préparatoires* show that different schools of thought existed as to the meaning of ‘arbitrary’. One opinion equated the term ‘arbitrary’ with ‘contrary to the national legislation’ or ‘without legal grounds’ (that is, ‘illegal’).<sup>32</sup> The Commission pointed out that if this were the case, the sentence ‘no one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law’ would be a repetition of the sentence ‘no one shall be subjected to arbitrary arrest and detention’.<sup>33</sup> If ‘arbitrary’ was merely to be equated with ‘illegal’, all acts of the executive would be within the terms of the ICCPR provided that the acts in question conformed to municipal laws.

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<sup>28</sup> Bossuyt, above n 19, 200.

<sup>29</sup> Ibid.

<sup>30</sup> Ibid.

<sup>31</sup> Ibid.

<sup>32</sup> Ibid 197.

<sup>33</sup> Ibid.

The other opinion stated that the word ‘arbitrary’ meant not only ‘illegal’ but also ‘unjust’ and that all legislation would have to conform to the principles of justice or with the dignity of the human person.<sup>34</sup> In this case, the third sentence of Article 9(1) ‘no one shall be subjected to arbitrary arrest and detention’ *qualifies* the fundamental idea set forth in the sentence ‘no one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law’. The deprivation should conform to the principle of justice, and should also be on such grounds and in accordance with such procedures as are established by law.<sup>35</sup> In other words, it was a safeguard against the injustices of States because it applied not only to laws but also to statutory regulations and to all acts *performed by the executive*.<sup>36</sup>

Other representatives also considered that the phrase ‘No one shall be subjected to arbitrary arrest or detention’ referred to cases where the liberty and security of the person were infringed before a court had passed a sentence or without any judicial proceedings. ‘The intention was to ensure that the executive and the police were endowed with discretionary powers in the public interest and did not exercise those powers without due regard for the rights of the individual’.<sup>37</sup>

Hassan’s analysis of the *travaux préparatoires* of the ICCPR also argues that the protection against arbitrary arrest and detention was retained because the majority of the members of the Commission had considered that ‘the rule of law did not provide adequate safeguards against the possible promulgation of unjust laws’ and that accordingly, by using the word ‘arbitrary’, the requirement would be added that all legislation must conform to the ‘principles of justice’.<sup>38</sup>

It is apparent that the draftsmen of the ICCPR gave a distinct meaning to the terms ‘unlawful’ and ‘arbitrary’. At the Report of the Third Committee, the majority stated:

[Arbitrary] was a safeguard against the injustices of States, because it applied not only to laws but also to statutory regulation and to all acts performed by the executive. An arbitrary act was any act which violated justice, reason or legislation, or was done according to someone’s will or discretion or which was capricious, despotic, imperious, tyrannical or uncontrolled.<sup>39</sup>

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<sup>34</sup> Ibid 201.

<sup>35</sup> Ibid 198.

<sup>36</sup> Ibid 201.

<sup>37</sup> Ibid.

<sup>38</sup> Parvez Hassan, 'The International Covenant on Civil and Political Rights: Background and Perspective on Article 9(1)' (1973) 3(2) *Denver Journal of International Law and Policy* 153, 179.

<sup>39</sup> Ibid, quoting Report of the Third Committee, A/4045 (Dec.9, 1958), 13 GAOR, Annexes, Agenda Item 32, 7 (1958–1959).

The *travaux préparatoires* of the ICCPR also show consideration as to the meaning of the word ‘arbitrary’ in the second sentence of Article 9(1) which provides: ‘No one shall be subjected to arbitrary arrest or detention’. According to the *travaux préparatoires* a few representatives were of the opinion that this sentence:

referred to cases where the liberty and security of the person declared in the first sentence were infringed before a court had passed a sentence or without any judicial proceedings; the intention was to ensure that the executive and the police, which in all countries were endowed with discretionary powers in the public interest, did not exercise those powers without due regard for the rights of the individual.<sup>40</sup>

Representatives also considered ‘arbitrary’ to mean not only ‘illegal’ but also ‘unjust’ and incompatible with the principles of justice or with the dignity of the human person.<sup>41</sup> ‘An arbitrary act was any act which violated justice, reason or legislation, or was done according to someone’s will or discretion; or which was capricious, despotic, imperious, tyrannical or uncontrolled’.<sup>42</sup> Further, ‘arbitrary’ ‘was a safeguard against the injustices of States, because it applied not only to laws but also to statutory regulations and to all acts performed by the executive.’<sup>43</sup>

## 6 *United Nations Study Analysis of ‘Arbitrary Arrest and Detention’*

At its twelfth session, the Commission on Human Rights mandated the United Nations Economic and Social Council to conduct a study into the phrase ‘arbitrary arrest and detention’. In defining the terms of the Study, the suggestion was made that the word ‘arbitrary’ should be understood to mean arrest and detention either:

- a) on grounds or in accordance with procedures other than those established by law; or
- b) under the provisions of a law the basic purpose of which is incompatible with respect for the right to liberty and security of person.<sup>44</sup>

To define ‘arbitrary’, the United Nations Committee considered the *travaux préparatoires* of Article 9 of the Universal Declaration and Article 9(1) of the ICCPR, as well as the United Nations Seminars on the Protection of Human Rights in Criminal Law or Procedure. The United Nations Committee adopted the following definition:

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<sup>40</sup> Bossuyt, above n 19, 201.

<sup>41</sup> Ibid.

<sup>42</sup> Ibid.

<sup>43</sup> Ibid.

<sup>44</sup> United Nations 1964 Study, above n 1, 6.

An arrest or detention is arbitrary if it is (a) on grounds or in accordance with procedures other than those established by law, or (b) under the provisions of a law the purpose of which is incompatible with respect for the right to liberty and security of person.<sup>45</sup>

The Committee therefore adopted the wide interpretation of ‘arbitrary’, in particular stating that ‘while an illegal arrest or detention is almost always arbitrary, an arrest or detention which is in accordance with law may nevertheless be arbitrary’.<sup>46</sup>

### 7 Case Law of the Human Rights Committee

In *Van Alphen v The Netherlands*, the Human Rights Committee considered the meaning of ‘arbitrary’ in Article 9(1) of the ICCPR. In this case the applicant was detained from 5 December 1983 to 9 February 1984 (a period of over nine weeks) without criminal charge or trial. The Committee confirmed that

‘arbitrariness’ is not to be equated with ‘against the law’, but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. This means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all the circumstances.<sup>47</sup>

A similar result was found by the Human Rights Committee in *A v Australia* where it held:

The Committee recalls that the notion of ‘arbitrariness’ must not be equated with ‘against the law’ but interpreted more broadly to include such elements as inappropriateness and injustice.<sup>48</sup>

At the thirteenth session of the Third Committee of the General Assembly one meaning of ‘arbitrary’ submitted was arrest or detention pursuant to a law which was in itself ‘unjust’ or ‘incompatible with the dignity of the human person’ or incompatible with the respect for the right to liberty and security of person’.<sup>49</sup>

It is therefore consistent from a textual and structural analysis of Article 9(1), the *travaux préparatoires* of both the Universal Declaration and ICCPR, case law of the Human Rights Committee and the United Nations Study that the prohibition on

<sup>45</sup> Ibid 7.

<sup>46</sup> Ibid.

<sup>47</sup> *Van Alphen v The Netherlands*, Communication No. 305/88, UN Doc. CCPR/C/39/D/305/1988.

<sup>48</sup> *A v Australia*, Communication No. 560/1993, UN Doc. CCPR/C/59/D/560/1993 (30 April 1997).

<sup>49</sup> United Nations 1964 Study, above n 1, 6, referring to Official Records of the General Assembly, Thirteenth Session, Annexes, Agenda Item 32, document A/4045, [43–9].

arbitrary arrest or detention should be accorded a wide interpretation. This in turn, leads to two propositions:

- a) The deprivation of liberty must be lawful, in that it must accord with procedures as established by law. The arrest and detention must be specifically authorised and sufficiently circumscribed by law;<sup>50</sup> and
- b) The legislative enactment that permits arrest and detention must not itself be arbitrary. Legislation must conform to the principles of justice or with dignity of the human person, and must not be inappropriate or unjust.

To have a contrary interpretation would mean that any act or oppressive law of a government would be indomitable provided arrest and detention accorded with legislative enactment.<sup>51</sup>

This interpretation of the word 'arbitrary' is consistent with the purposes of the Universal Declaration, in particular 'protecting individuals from despotic legislation and to establish that deprivations of liberty, such as occurred under the Nazi regime, are not consistent with human rights merely because they were prescribed by national law'.<sup>52</sup> Further, 'only an international minimum standard which operates independently of the vagaries of national legal systems can effectively protect human rights'.<sup>53</sup>

### III THE PROHIBITION ON ARBITRARY ARREST AND DETENTION APPLIED TO PREVENTIVE DETENTION

Preventive detention is not explicitly provided for in international human rights law, nor does the prohibition on arbitrary arrest and detention exclude preventive detention *per se*.

That preventive detention is not prohibited under the arbitrary arrest and detention provisions of the international human rights instruments is supported by the fact

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<sup>50</sup> Joseph, Schultz and Castan, above n 17, 211.

<sup>51</sup> Parvez Hassan, 'The International Covenants on Human Rights: An Approach to Interpretation' (1969-1970) 19 *Buffalo Law Review* 35, 37.

<sup>52</sup> Yoram Dinstein, 'Right to Life, Physical Integrity, and Liberty' in Louis Henkin (ed), *The International Bill of Rights: The Covenant on Civil and Political Rights* (1983), 131.

<sup>53</sup> *Ibid* 130.

that the authoritative international institutions have refused on several occasions to condemn the practice in unequivocal terms.<sup>54</sup>

In fact, preventive detention was clearly contemplated by the General Comments of the Human Rights Committee on Article 9 of the ICCPR:

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) ....<sup>55</sup>

That preventive detention is consistent with the right to personal liberty and security and does not offend the prohibition on arbitrary arrest and detention is a view similarly evidenced by India's reservation to Article 9 of the ICCPR.<sup>56</sup>

Preventive detention is provided for in Article 22 of the *Constitution of India*, permitting preventive detention in non-emergency situations, allowing the detention of a person without charge or trial for a period of up to three months without judicial review. Article 22(3) of the *Constitution of India* excludes procedural guarantees to any person who is arrested or detained under any law providing for preventive detention. A person in preventive detention is not entitled to be informed of the grounds for such arrest nor entitled to judicial review before a Magistrate. Article 22(4) of the *Constitution of India* prohibits preventive detention for a period of longer than three months unless an Advisory Board finds sufficient cause for continued detention.

In respect of the preventive detention provisions of the *Constitution of India*, the Indian Government entered a reservation to Article 9 of the ICCPR:

With reference to Article 9 [the right to personal liberty] ... the Government of the Republic of India takes the position that the provisions of the Article shall be so applied as to be in consonance with the provisions of clauses (3) to (7) of Article 22 of the Constitution of India.<sup>57</sup>

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<sup>54</sup> Derek P Jinks, 'The Anatomy of an Institutionalised Emergency: Preventive Detention and Personal Liberty in India' (2001) 22 *Michigan Journal of International Law* 311, 27.

<sup>55</sup> Human Rights Committee, General Comment 8, Article 9 (Sixteenth Session, 1982), UNDoc.HRI/GEN/1/Rev.1, 8 (1994).

<sup>56</sup> Several academics have studied preventive detention in India – in particular see David H Bayley, *Preventive Detention in India: A Case Study in Democratic Social Control* (1962) and Derek P Jinks, 'The Anatomy of an Institutionalised Emergency: Preventive Detention and Personal Liberty in India' (2001) 22 *Michigan Journal of International Law* 311.

<sup>57</sup> Jinks, *ibid.*



A reservation in international law is a statement that purports to exclude or modify the legal effect of a treaty in its application to a State.<sup>58</sup> According to General Comment 24 of the Human Rights Committee, ‘if a so-called reservation merely offers a State’s understanding of a provision but does not exclude or modify that provision in its application to that State, it is, in reality, not a reservation’.<sup>59</sup>

The reservation by India does not purport to exclude or modify Article 9 of the ICCPR, but instead puts the other State Parties on notice that India’s interpretation of Article 9 is consistent with and reflected in its Constitution.<sup>60</sup> The Indian Government’s view is that preventive detention laws under Article 22 of the *Constitution of India* do not involve an arbitrary or an unlawful deprivation of liberty.

That Article 9(1) can be used in cases of preventive detention has also been confirmed by the Human Rights Committee in *Campora Schweizer v Uruguay*, in which it was stated:

According to Article 9(1) of the Covenant, no one shall be subjected to arbitrary arrest or detention. 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 Committee emphasizes that the guarantees enshrined in the following paragraphs of article 9 fully apply in such instances.<sup>61</sup>

In this case the applicant was kept under ‘prompt security measures’ without charges at the disposal of the executive authorities. He had been arrested on grounds of ‘association to break the law’. The Court held that the applicant’s imprisonment violated Article 9(3) and (4) since he had not been brought before a judge and could not take proceedings to challenge his arrest and detention.

Although preventive detention is not in itself a violation of the ICCPR, the wide definition of ‘arbitrary’ discussed above has significant consequences for preventive detention.

The wide definition of ‘arbitrary’ means unjust preventive detention legislation will violate Article 9(1) ICCPR. If the provisions of a law authorising preventive

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<sup>58</sup> Human Rights Committee, General Comment No. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under Article 41 of the Covenant, CCPR/C/21/Rev.1/Add.6 (04/11/94), 2.

<sup>59</sup> Ibid.

<sup>60</sup> Jinks, above n 56, 22.

<sup>61</sup> *David Alberto Campora Schweizer v Uruguay*, Communication No. 66/1980 (15 March 1980), UN Doc.Supp.No.40 (A/38/40), 117 (1983), [18.1].

detention has elements of inappropriateness, injustice and lack of predictability, it will be ‘arbitrary’ for the purposes of the right to personal liberty and security. For example, when preventive detention is used to counter-terrorism it may be considered *arbitrary*, an issue beyond the scope of this paper.

Further, although preventive detention is not, *per se*, excluded by the prohibition on arbitrary arrest and detention, detention will be ‘arbitrary’ when a detainee is not accorded procedural safeguards. In cases where preventive detention abrogates the safeguards in Article 9, there will be a breach of the prohibition on arbitrary arrest and detention, as well as a violation of the specific Article in question.

#### IV SAFEGUARDS APPLICABLE TO THOSE IN PREVENTIVE DETENTION

Each of the safeguards that apply to a person deprived of personal liberty under Article 9 of the ICCPR are intended to avoid unlawful or arbitrary conduct from the moment of the deprivation of freedom. This section of the paper addresses the issue of the safeguards under Article 9 of the ICCPR apply to a person in preventive detention.

##### A *Article 9(2) – Right to be Informed of the Reasons for the Detention*

Article 9(2) of the ICCPR provides:

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.

Two rights exist:

- (i) Anyone who is arrested has the right to be informed at the time of arrest of the reasons for his arrest (‘first element’); and
- (ii) A person charged with an offence has the right to be promptly notified of a charge or charges against him (‘second element’).

The description must go beyond a mere reference to the legal basis for detainment and enable the detainee to discern the substance of the complaint against him.<sup>62</sup> In *Drescher Caldas v Uruguay*, the Human Rights Committee held in relation to the ICCPR:

the Committee is of the opinion that Article 9(2) of the Covenant requires that anyone who is arrested shall be informed sufficiently of the reasons for his

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<sup>62</sup> Scott N Carlson and Gregory Gisvold, *Practical Guide to the International Covenant on Civil and Political Rights* (2003), 84.

arrest to enable him to take immediate steps to secure his release if he believes that the reasons given are invalid or unfounded.<sup>63</sup>

In this case simply informing Adolfo Drescher Caldas that he was being arrested under the prompt security measures without any indication of the substance of the complaint against him was a breach of Article 9(2) of the ICCPR.<sup>64</sup>

According to the Human Rights Committee in *Campbell v Jamaica*:

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.<sup>65</sup>

That the right to be informed of the reasons for detention at the time of arrest (the first element) applies to cases of preventive detention has been confirmed by General Comment 8 on Article 9 by the Human Rights Committee.<sup>66</sup> The right serves the purpose of placing the detained person in a position to make use of their right to review the lawfulness of detention pursuant to Article 9(4).<sup>67</sup>

### B *Article 9(3) – Trial Within a Reasonable Time*

Article 9(3) of the ICCPR provides:

Anyone arrested or detained on a *criminal charge* shall be brought promptly before a judge or other officer authorised 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 judgment.

This Article only applies to those ‘arrested or detained on a criminal charge’. In *Kulomin v Hungary*, the Human Rights Committee confirmed that the first sentence

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<sup>63</sup> *Adolfo Drescher Caldas v Uruguay*, Communication No.43/1979 (11 January 1979), UN Doc.Supp. No 40 (A/38/40), 192 (1983), [13.2].

<sup>64</sup> *Ibid.*

<sup>65</sup> *Campbell v Jamaica*, Communication No 618/1995, 20 October 1998 [1998] IJHR, 115 (20 October 1998), [6.3].

<sup>66</sup> General Comment No 8, above n 55, [4].

<sup>67</sup> Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (1993), 174.

of Article 9(3) of the ICCPR is intended to ‘bring the detention of someone charged with a criminal offence under judicial control’.<sup>68</sup>

Preventive detention, by definition, is based on predictive criminal conduct; no intention or reasons exists to charge or bring the detainee to criminal trial. Accordingly, those in preventive detention are not accorded a right to be brought promptly before a judge or other officer, nor a right to trial within a reasonable time or to release pending trial.

That Article 9(3) only applies to detention in which a criminal charge is brought, necessarily precluding its application to preventive detention, is also supported by General Comment 8 of the Human Rights Committee:

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 ... applies to all persons deprived of their liberty by arrest and detention’.<sup>69</sup>

In cases of preventive detention the Human Rights Committee further indicated the provisions of Articles 9(1), 9(2), 9(4) and 9(5) were applicable. The Committee added that if criminal charges are brought in cases of preventive detention, the full protection of, inter alia, Article 9(3) must be granted.<sup>70</sup>

That Article 9(3) does not apply to preventive detention is also confirmed by the *travaux préparatoires* of the ICCPR. At the 5<sup>th</sup> Session of the Commission of Human Rights, a proposal by the Union Soviet Socialist Republic was made so Article 9(3) would read:

Any person who is arrested or detained on the charge of having committed a crime *or of preparing to commit a crime* shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release.<sup>71</sup>

If accepted, the proposed amendment by the USSR would have extended the right to appearance before judicial authority to those in preventive detention.

This submission is demonstrably inconsistent with that of Mr Bertil Wennerg in *Kelly v Jamaica*. In this case, although he agreed the scope of application of Article 9(3) appears to be limited to arrests and detentions ‘on a criminal charge’ (that is,

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<sup>68</sup> *Vladimir Kulomin v Hungary*, Communication No 521/1992, UN Doc CCPR/C/50/D/521/1992.

<sup>69</sup> General Comment No 8, above n 55.

<sup>70</sup> *Ibid.*

<sup>71</sup> Bossuyt, above n 19, 207.

where a formal criminal charge has been actually served), he argued this was not actually the meaning of the article. He asserted:

It is, however, abundantly clear from the *travaux preparatoires* that the formula ‘on a criminal charge’ was meant to cover as broad a scope of application as the corresponding provision in the European Convention. All types of arrest and detention in the course of crime prevention are therefore covered by the provision, whether it is preventive detention pending investigation or detention pending trial’.<sup>72</sup>

He further considered the French version of this paragraph conveyed this meaning better than the English version, that is: ‘*detenu du chef d’une infractin penale*’.<sup>73</sup>

### 1 *Does the right limiting the length of pre-trial detention apply to those in preventive detention?*

Article 9(3) also overlaps with Article 14(3)(c) which provides:

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
  - (c) To be tried without undue delay.

Article 9(3) regulates the length of pre-trial *detention*, entitling trial within a reasonable time or release. Article 14(3)(c) refers to the total length of time that passes before trial.<sup>74</sup> Article 14(3)(c) guarantees that an individual’s criminal trial will be held within a reasonable period of time after formal charge, but Article 9(3) guarantees that an individual will not be held in detention for an unreasonable period of time prior to trial.<sup>75</sup>

The fact that Article 9(3) is only applicable to those actually charged with a criminal offence, means that the ICCPR does not regulate the permissible length of detention for a person in preventive detention. . As the right of appearance before judicial authority only applies to those detained on criminal charges, preventive detention is potentially a serious denial of the right to liberty because detention can lawfully occur for a prolonged period without the prospect of any trial within a reasonable time.<sup>76</sup>

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<sup>72</sup> From the individual opinion submitted by Mr Bertil Wennerg pursuant to rule 94, paragraph 3 of the Committee’s rules of procedure, *Kelly v Jamaica*, Communication No.253/1987, UN Doc. Supp. No 40 (A/46/40), 241 (1991).

<sup>73</sup> Ibid.

<sup>74</sup> Joseph, Schultz and Castan, above n 17, 225.

<sup>75</sup> Ibid.

<sup>76</sup> Subrata Roy Chowdhury, *Rule of Law in a State of Emergency: The Paris Minimum Standards of Human Rights Norms in a State of Emergency* (1989), 176.

It is, however, the prohibition on arbitrary arrest and detention discussed above, that protects a person in preventive detention from indefinite detention. Where a person in preventive detention is detained without criminal charge, detention will be ‘arbitrary’ if it extends beyond a reasonable length of time.

In *Monguya Mbenge v Zaire*, the applicant, a former Governor of a region of Zaire was arrested on 1 September 1977 in order to force him to disclose the whereabouts of his brother, Simon Biyanga. He was not released from detention until late in 1978 or early in 1979.<sup>77</sup> ‘The State Party has not claimed that there was any criminal charge against him’.<sup>78</sup> Accordingly, it was the view of the Human Rights Committee, that ‘he was subject to arbitrary arrest and detention contrary to Article 9 of the Covenant’.<sup>79</sup>

In *A v Australia*, the author was a Cambodian national who entered Australia by boat without authorisation. An application for refugee status was rejected and the author continued to appeal. The author was detained for the entire time his refugee status was being considered, a period in excess of four years. The Committee referred to the *travaux préparatoires* on Article 9(1) to confirm that ‘arbitrariness’ ‘included incompatibility with the principles of justice or with the dignity of the human person’.<sup>80</sup> Although holding that it is not arbitrary to detain individuals requesting asylum, the Committee held

every decision to keep a person in detention should be open to review periodically so that the grounds justifying the detention can be assessed. In any event, detention should not continue beyond the period for which the State can provide appropriate justification.<sup>81</sup>

As an example, the Committee pointed to factors which may justify detention for a significant period of time. These included the fact that unauthorised entry may have warranted investigation, and other factors such as the likelihood of absconding and lack of cooperation. The Committee held that in this case the State party did not advance any grounds particular to the applicant’s case that would justify continued detention for a period of four years. As such, the Committee held the author’s detention was arbitrary within the meaning of Article 9(1).<sup>82</sup>

The view of the Committee in *Monguya Mbenge v Zaire* equates the prohibition on arbitrary arrest and detention with a requirement to actually charge the detainee

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<sup>77</sup> *Mbenge v Zaire*, Communication No.16/1977, UN Doc. Supp.No 40 (A/38/40) 134 (1983) [20].

<sup>78</sup> Ibid.

<sup>79</sup> Ibid.

<sup>80</sup> *A v Australia*, above n 48, [7.6].

<sup>81</sup> Ibid [9.4].

<sup>82</sup> Ibid.

with a criminal offence. A similar view has been expressed by the African Commission on Human and People's Rights ('ACHPR') in relation to Article 6 of the African Charter. In *Constitutional Rights Project and Civil Liberties Organisation v Nigeria* the ACHPR said:

The government does not dispute that many people, including human rights activists and journalists, were detained without having charges brought against them and without the possibility of bail. The government maintains that 'many' of these individuals have since been released. Where individuals *have been detained without charges being brought, particularly since the time of elections, a period of now over three years*, this constitutes an arbitrary deprivation of liberty and thus violates Article 6.<sup>83</sup>

In its comments on Peru in 1996, the Human Rights Committee indicated:

The Committee takes note with concern that provisions in Article 2, [24] (f) of the Constitution, which permits preventive detention for up to 15 days in cases of terrorism, espionage and illicit drug trafficking, as well as Decree Law 25,475, which authorises extension of preventive detention in certain cases for up to 15 days, raise serious issues with regard to Article 9 of the Covenant.<sup>84</sup>

In making recommendations, the Human Rights Committee suggested that 'the duration of preventive detention should be reasonable and any arrested person should be brought promptly before a judge'.<sup>85</sup>

In Concluding Comments on Ukraine, the Human Rights Committee was also concerned with the length of preventive detention in holding that Article 9, *inter alia*, was not fully complied with. In particular:

in cases of administrative detention, in particular of vagrants, denial of access of detainees to legal counsel and long periods of pre-trial detention are matters of great concern.<sup>86</sup>

If a person is arrested and detained without criminal charge, after a certain period of time it appears beyond dispute that the detention will offend the prohibition on arbitrary arrest and detention. It should be recalled that as preventive detention is a

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<sup>83</sup> *ACHPR (African Commission on Human & People's Rights), Constitutional Rights Project and Civil Liberties Organisation v Nigeria*, Communication No.102/93, Decision of the African Commission of Human and Peoples' Rights, [1998] IIHRL 111 (1 October 1998), [55].

<sup>84</sup> Human Rights Committee, Comments on Peru, UN Doc. CCPR/C/79/Add.67 (1996), [18].

<sup>85</sup> *Ibid* 24.

<sup>86</sup> Human Rights Committee, Comments on Ukraine, UN Doc CCPR/C/79/Add.52. [13].

measure based on preventing future criminal conduct, no charge can, in fact, exist. That is, the objective of detention is to protect society from anticipated criminal behaviour of the suspect (and therefore acquiring the status of ‘preventive’), detention occurs before an offence has even occurred. The assessment of the above human rights institutions supports the view that preventive detention for a short period of time is acceptable, but detention for an indefinite duration will become ‘arbitrary’ and therefore unlawful under international human rights law. It is not the case, however, that preventive detention of itself offends any prohibition on arbitrary arrest and detention simply because there is no criminal charge or trial.

### C Article 9(4) – Right to Challenge Detention

Article 9(4) ICCPR provides:

Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

The principle of judicial control over detention stems from, and is analogous to, the English remedy of *habeas corpus*, enabling a person arrested or detained to challenge the validity of his detention before court, and obtain release if detention is unlawful. The right of judicial control ensures persons who are arrested and detained are given the right to judicial review of the lawfulness of the measure to which they are subjected.<sup>87</sup> The *travaux préparatoires* of the ICCPR show that the initial draft of Article 9(4) read:

Everyone who is deprived of his liberty by arrest or detention shall have an effective remedy in the nature of ‘habeas corpus’ by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.<sup>88</sup>

According to the Commission on Human Rights and relevant Reports of the Third Committee of the General Assembly (A/2929), ‘the reference to *habeas corpus* was deleted in order to specify that States must be free to allow for such a right of appeal within the framework of their own legal systems’.<sup>89</sup>

The right to review the lawfulness of detention contained in Article 9(4) of the ICCPR is applicable to *any* person arrested or detained, not just those charged with a criminal offence, and as such includes those in preventive detention. This

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<sup>87</sup> *Cases of De Wilde, Ooms and Versyp (‘Vagrancy’) v. Belgium* (2832/66) [1970] ECHR 2 (18 November 1970), para. 76.

<sup>88</sup> Bossuyt, above n 19, 212.

<sup>89</sup> *Ibid* 213.



interpretation of Article 9(4) of the ICCPR has been confirmed by the Human Rights Committee:

[T]he 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.<sup>90</sup>

Article 9(4) also applies to cases of detention ordered by the executive. In *Vuolanne v Finland* the Human Rights Committee stated:

[W]henever a decision depriving a person of his liberty is taken by an administrative body or authority, there is no doubt that Article 9, paragraph 4, obliges the State Party concerned to make available to the person detained the right of recourse to a court of law.<sup>91</sup>

In *Mario Ines Torres v Finland*, the Committee indicated that Article 9(4) envisaged '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'.<sup>92</sup> In this case the Human Rights Committee found a violation of Article 9(4) for a failure to permit judicial review of executive detention under the *Aliens Act*. Review before a court of law was possible only when, after several days, the detention was confirmed by order of the Minister.<sup>93</sup>

As argued by Dinstein, Article 9(4) means that the freedom of action of the executive branch of government is circumscribed. A temporary executive detention is permissible — if authorised by law — but the detainee must be brought promptly before the judiciary.<sup>94</sup>

The right to review the legality of detention by a court is extremely important for those in preventive detention. Such detainees are excluded from the rights of those held on criminal charge of being brought promptly before judicial authority in Article 9(3). As such, the right under Article 9(4) is the only judicial remedy available.<sup>95</sup>

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<sup>90</sup> General Comment No 8, above n 55.

<sup>91</sup> *Antti Vuolanne v. Finland*, Communication No 265/1987, UN Doc. Supp. No 40 (A/44/40) 311 (1989), [9.6].

<sup>92</sup> *Mario Ines Torres v Finland*, Communication No.291/1988: Finland 05/04/90, [7.2].

<sup>93</sup> *Ibid.*

<sup>94</sup> Dinstein, above n 52, 132.

<sup>95</sup> Helena Cook, 'Preventive Detention - International Standards and the Protection of the Individual' in Stanislaw Frankowski and Dinah Shelton (eds), *Preventive Detention: A Comparative and International Law Perspective* (1992), 25.

Article 9(4) of the ICCPR requires review of the lawfulness of detention ‘without delay’. The Human Rights Committee in *Inés Torres v Finland* emphasised that:

as a matter of principle, the adjudication of a case by any court of law should take place as expeditiously as possible. This does not mean, however, that precise deadlines for the handing down of judgments may be set which, if not observed would necessarily justify the conclusion that a decision was not reached ‘without delay’. Rather, the question of whether a decision was reached without delay must be assessed on a case by case basis.<sup>96</sup>

In this case almost three months had passed between the filing of the author’s appeal against the decision of the Ministry of the Interior and the decision of the Supreme Administrative Court. The delay was found to be ‘in principle too extended’.<sup>97</sup>

In *A v Australia* the control and power of the Court to order the release of an individual was limited to an assessment of whether the applicant was a ‘designated person’ within the meaning of the *Migration Amendment Act*.<sup>98</sup> In the Committee’s opinion:

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 effect, real and not merely formal.<sup>99</sup>

Here the court review available to the applicant was limited to a formal assessment of the self-evident fact that he was a ‘designated person’ within the meaning of the Act. It was held that the applicant’s right to have review of the detention by a court was violated.<sup>100</sup>

In *Hammel v Madagascar*, incommunicado detention for three days, during which time it was impossible for the author to gain access to a court to challenge his detention, was held to breach Article 9(4).<sup>101</sup> On the other hand in *Portorreal v Dominican Republic*, the Human Rights Committee found no breach of Article 9(4)

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<sup>96</sup> *Mario Ines Torres v Finland*, above n 92, [7.3].

<sup>97</sup> Ibid.

<sup>98</sup> *A v Australia*, above n 48, [9.5].

<sup>99</sup> Ibid.

<sup>100</sup> Ibid.

<sup>101</sup> *Eric Hammel v Madagascar*, Communication No. 155/1983 (2 April 1986), UN Doc. CCPR/C/OP/2, 11 (1990) referred to in Joseph, Schultz and Castan, above n 17, 231.

when the author was held for 50 hours without having the opportunity to challenge the legality of his detention.<sup>102</sup>

D *Article 9(5) – Right to Compensation for Unlawful Arrest or Detention*

Article 9(5) of the ICCPR provides:

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

The ICCPR applies to all ‘unlawful detentions’. This would include detentions which are unlawful under the ICCPR, or detentions which are unlawful under a State’s own domestic law.<sup>103</sup> In *A v Australia* it was confirmed by the Human Rights Committee that compensation will be payable even when detention is ‘lawful’ under domestic law, but contrary to the ICCPR, for example when it is ‘arbitrary’.<sup>104</sup>

## V CONCLUSION

The analysis in this paper of the safeguards for those arrested and detained under the ICCPR when applied to preventive detention has argued that, at the time of arrest, a detainee must be informed of the reasons for their preventive detention.

A person under preventive detention has, however, no right to be brought promptly before a judge or other officer to exercise judicial power. There is no right of a trial within a reasonable time for a person in preventive detention. Neither of these rights exist because they are predicated on criminal charge and trial — neither of which are relevant to preventive detention. None of the safeguards in international instruments explicitly prohibit indefinite preventive detention although such detention would fall within the general prohibition on ‘arbitrary arrest and detention’.

The right provided for in Article 9(4) of the ICCPR does not make a distinction between executive and judicial detention. As such, this Article recognises that every person in preventive detention has the right to take proceedings before a court

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<sup>102</sup> *Ramon B Portorreal v Dominican Republic*, Communication No. 188/1984, UN Doc. Supp. No 40 (A/43/40) 207 (1988), referred to in Joseph, Schultz and Castan, above n 17, 231.

<sup>103</sup> Stephen Bailey, 'Rights in the Administration of Justice' in David Harris and Sarah Joseph (eds), *The International Covenant on Civil and Political Rights and United Kingdom Law* (1995).

<sup>104</sup> *A v Australia*, above n 48.

to decide without delay on the lawfulness of the arrest or detention, where that court has the power to order release if the detention is not lawful.

In the event of a violation of the ICCPR, a person in preventive detention is entitled to compensation.

Preventive detention is not explicitly prohibited by the ICCPR. Preventive detention is not, in itself, ‘arbitrary arrest and detention’ and is therefore, *prima facie*, a permissible deprivation of liberty under Article 9(1). Yet, given the wide interpretation of ‘arbitrary’ argued in this paper, preventive detention must conform to the principles of justice and must not be inappropriate or unjust. This means that, if a preventive detention law of a signatory State is oppressive, and does not conform with the principles of justice or dignity of the human person, it will fall within the prohibition on arbitrary arrest and detention under the ICCPR. An assessment of the legality of preventive detention legislation within a State must therefore be based on a specific analysis of the appropriateness and proportionality of the particular preventive detention measures.