

Liberty and Security of Persons – Article 9 ICCPR

1. Preliminary Remarks

The right to liberty and security of persons is enshrined both in Article 9 ICCPR as well as in Article 3 of the Human Rights Declaration. Two years ago, on 15th December 2014,¹ the Human Rights Committee adopted General Comment No. 35 replacing the mostly outdated General Comment No. 8 adopted in 1982.

The liberty of persons guarantees the freedom from confinement of the body, not a general freedom of action.² The notion “security of persons” on the other hand, concerns the freedom from injury to the body and the mind and the bodily and mental integrity.³

The Human Rights Committee previously considered, *inter alia*, the following examples to be cases of deprivation of liberty: police custody, *arraigo*, remand detention, imprisonment after conviction, house arrest,⁴ administrative detention and institutional custody of children as well as being involuntarily transported.⁵

The scope of Article 9 ICCPR is rather broad. The State party itself is obliged to refrain from any infringement of said provision. Article 9 ICCPR additionally requires the Member State to take appropriate measures to protect the right to liberty of persons against deprivation by *third parties*.⁶ Such third parties are individual criminals or irregular groups, including armed or terrorist groups, operating within their territory, lawful organizations, such as employers, schools and hospitals and other States within the Member State’s territory.⁷

In 1991, a Working Group on Arbitrary Detention was established⁸ mandated until 2016.⁹ The Working Group counts five members and it is currently chaired by Mr. Sètondji Adjovi [Benin]. This Group of experts is mandated to “To investigate cases of deprivation of liberty imposed arbitrarily or otherwise inconsistently with the relevant international standards set forth in the Universal Declaration of

¹ Human Rights Committee, General Comment No. 35, UN Doc. CCPR/C/GC/35.

² Human Rights Committee, „General Comment No. 35”, UN Doc. CCPR/C/GC/35 para. 3.

³ Human Rights Committee, „General Comment No. 35”, UN Doc. CCPR/C/GC/35 para. 3.

⁴ Human Rights, *Gorji-Dinka v. Cameroon*, Committee, Communication No. 1134/2002 para. 5.4.

⁵ Human Rights Committee, *Saldías de López v. Uruguay*, Communication No. R.12/52, para. 13.

⁶ Human Rights Committee, „General Comment No. 35”, UN Doc. CCPR/C/GC/35 para. 7; Human Rights Committee, Consideration of reports submitted by States parties under article 40 of the Covenant: Yemen, UN Doc. CCPR/C/YEM/CO/5 para. 24.

⁷ Human Rights Committee, „General Comment No. 35”, UN Doc. CCPR/C/GC/35 para. 7.

⁸ Human Rights Committee, Resolution No. 1991/42.

⁹ Human Rights Committee, Resolution No. 24/7, UN Doc. A/HRC/24/L.15.

Human Rights or in the relevant international legal instruments accepted by the States concerned”.¹⁰ It furthermore seeks and receives information from Governments and intergovernmental and non-governmental organizations as well as from individuals concerned.¹¹

The current¹² issues in focus of the Working Group are detention in the context of drug control, peaceful protests and arbitrary detention and remedies for arbitrary detention.¹³ Previously it focused on military justice, over-incarceration and protective custody.¹⁴

The Working Group conducts regular country visits. From 1st to 10 October 2008 it visited Colombia and in February 1999 Indonesia. A visit to Kenya¹⁵ and a follow-up visit to Indonesia¹⁶ are requested.

2. Colombia

Between 2009 and 2016 the Working Group received three complaints on the basis of Article 9 ICCPR, two of them were filed in 2009, one in 2010. In *Andrés Elías Gil Gutiérrez v. Colombia*¹⁷ the Working Group found a violation of Article 9 ICCPR. Mr. Andrés Elías Gil Gutiérrez is a “leader of legitimate farmers’ trade unions for the benefit of members”¹⁸ and was detained for an alleged corporation with FARC.¹⁹ In *Edison Palomino Banguero v. Colombia*, the Working Group has not filed an opinion yet.

In 2014, Colombia submitted its seventh periodic report under article 40 of the Covenant.²⁰ Regarding administrative developments in the context of Article 9 ICCPR, the government emphasized that “plans implemented by the Ministry of Defense include training courses for military personnel on arrest procedures, with a focus on clearly determining whether the arrest is in flagrante delicto or has been ordered by a judicial authority, the procedure to be followed and the role of first responders. The purpose of this is to prevent arbitrary detentions that might violate or jeopardize the rights of any citizen at the moment of arrest.”²¹

¹⁰ Human Rights Commission, Fact Sheet No. 26, The Working Group on Arbitrary Detention p. 3.

¹¹ Human Rights Commission, Fact Sheet No. 26, The Working Group on Arbitrary Detention p. 3.

¹² Working Group on Arbitrary Detention, Report of the Working Group on Arbitrary Detention, UN Doc. A/HRC/30/36.

¹³ For an overview of all previous issues in focus see: <http://www.ohchr.org/EN/Issues/Detention/Pages/Issues.aspx>.

¹⁴ <http://www.ohchr.org/EN/Issues/Detention/Pages/Issues.aspx>.

¹⁵ Working Group on Arbitrary Detention, Report of the Working Group on Arbitrary Detention 2015, UN Doc. A/HRC/30/36 para. 44.

¹⁶ Working Group on Arbitrary Detention, Report of the Working Group on Arbitrary Detention 2015, UN Doc. A/HRC/30/36 para. 44.

¹⁷ Working Group, *Andrés Elías Gil Gutiérrez v. Colombia*,

¹⁸ Working Group on Arbitrary Detention, *Andrés Elías Gil Gutiérrez v. Colombia*, Opinion No. 19/2009 para. 13.

¹⁹ Working Group on Arbitrary Detention, *Andrés Elías Gil Gutiérrez v. Colombia*, Opinion No. 19/2009 para. 4.

²⁰ Colombia, Seventh Periodic Report due in 2014, UN Doc. CCPR/C/COL/7.

²¹ Colombia, Seventh Periodic Report due in 2014, UN Doc. CCPR/C/COL/7 para. 94.

Colombia furthermore stressed the adoption of Act No. 1436 in 2011, which “provides for measures to protect victims of kidnapping and their families. The Act stipulates that civil servants who are victims of the crimes of kidnapping, hostage-taking or enforced disappearance after their appointment has ended can benefit from the Act on the same terms as if they were still serving.”²²

Finally, Colombia pointed to the Constitutional Court’s ruling regarding arrest warrants. The Court has declared “as unconstitutional regulations that do not comply with the legal requirements for issuing arrest warrants or the exceptions to those requirements, namely cases of flagrante delicto and pretrial detention.”²³

A table attached to the report indicates a decreasing number of kidnappings. In 2014 Colombia reported only 14 cases of kidnapping compared to the significantly higher number of 245 in 2013 and 813 in 2012.²⁴

The Human Rights Committee when considering Colombia’s seventh report²⁵ requested additional information on “measures taken, including the resources allocated, to guarantee the rights and meet the specific needs of minors, women, persons with diverse sexual orientations or gender identities and persons with psychosocial or intellectual disabilities who are deprived of their liberty, and the results of these measures”.²⁶

In 2008, the Working Group visited Colombia. Arbitrary detention constituted the focus of the subsequent report and was the main point of criticism. The Group criticized particularly the practice of detentions in the “poor areas of the big cities, especially of beggars”²⁷ and of mass detention.²⁸ They equally critiqued “the lack of solid evidence required to carry out an arrest, particularly when the only evidence is the accusation of former guerillas”.²⁹ The Working Group put a special focus on detention in city neighborhoods when emphasizing that “National Police is continuing its practice of carrying out round-ups or raids in big cities, justifying the practice as a preventive measure”.³⁰ Victims of these raids

²² Colombia, Seventh Periodic Report due in 2014, UN Doc. CCPR/C/COL/7 para. 91.

²³ Colombia, Seventh Periodic Report due in 2014, UN Doc. CCPR/C/COL/7 para. 92.

²⁴ Colombia, Seventh Periodic Report due in 2014, UN Doc. CCPR/C/COL/7 Table 2 p. 17.

²⁵ Human Rights Committee, List of issues in relation to the seventh periodic report of Colombia, UN Doc. CCPR/C/COL/Q/7.

²⁶ Human Rights Committee, List of issues in relation to the seventh periodic report of Colombia, UN Doc. CCPR/C/COL/Q/7 para. 20 (f).

²⁷ Working Group, Report of the Working Group on Arbitrary Detention, Visit to Colombia, UN Doc. A/HRC/10/21/Add.3 p. 2.

²⁸ Working Group, Report of the Working Group on Arbitrary Detention, Visit to Colombia, UN Doc. A/HRC/10/21/Add.3 p. 2.

²⁹ Working Group, Report of the Working Group on Arbitrary Detention, Visit to Colombia, UN Doc. A/HRC/10/21/Add.3 p. 2.

³⁰ Working Group, Report of the Working Group on Arbitrary Detention, Visit to Colombia, UN Doc. A/HRC/10/21/Add.3 p. 15 para. 56.

are particularly Members of sexual minorities beggars, destitute, vagrants, street vendors³¹ and Afro-Colombian minors.³² Often upon the Mayor's request to "authorized the police to "carry out the checks necessary to hold temporarily persons who have outstanding issues with the law until their legal situation has been clarified".³³

The practice of detention in urban neighborhoods also concerns minors and juveniles. Between 15th March 2007 and 31st August 2008 in Bogota alone 5.000 minors were processed through the Criminal Justice System for Adolescents.³⁴ The main reasons for detention were illegal possession of weapons, theft, drug trafficking, homicide, attempted homicide and personal injury.³⁵

The Working Group concluded in recommending "that that the Government eradicate the practice of mass arrests and administrative pretrial detention; eliminate the practice of detentions by military personnel and agents of private companies".³⁶

3. Kenya

Despite significant deficits in the context of Article 9 ICCPR, Kenya has so far not been the focus of the Working Group on Arbitrary Detention. A visit has been requested but not conducted yet. No communication based on an alleged violation of Article 9 ICCPR has reached the group of experts.

Kenya equally seems to neglect the issue of arbitrary detention. In its third periodic State report submitted in 2010,³⁷ the Kenyan government stated that "there are no new developments under these articles [9-12] since the last report except more focus on juvenile justice under Article 10".³⁸ The Working Group in its response to Kenya's report was mainly concerned with the problematic

³¹ Working Group, Report of the Working Group on Arbitrary Detention, Visit to Colombia, UN Doc. A/HRC/10/21/Add.3 p. 15 para. 56.

³² Working Group, Report of the Working Group on Arbitrary Detention, Visit to Colombia, UN Doc. A/HRC/10/21/Add.3 p. 15 para. 58.

³³ Working Group, Report of the Working Group on Arbitrary Detention, Visit to Colombia, UN Doc. A/HRC/10/21/Add.3 p. 15 para. 58.

³⁴ Working Group, Report of the Working Group on Arbitrary Detention, Visit to Colombia, UN Doc. A/HRC/10/21/Add.3 p. 21 para. 90.

³⁵ Working Group, Report of the Working Group on Arbitrary Detention, Visit to Colombia, UN Doc. A/HRC/10/21/Add.3 p. 21 para. 88.

³⁶ Working Group, Report of the Working Group on Arbitrary Detention, Visit to Colombia, UN Doc. A/HRC/10/21/Add.3 p. 2.

³⁷ Consideration of reports submitted by States parties under article 40 of the Covenant, Third periodic report of States parties, Kenya, UN Doc. CCPR/C/KEN/3.

³⁸ Consideration of reports submitted by States parties under article 40 of the Covenant, Third periodic report of States parties, Kenya, UN Doc. CCPR/C/KEN/3 para. 153.

overcrowding of in prisons and places of detention by law enforcement personnel.³⁹ It therefore urged the State party to “take [...] measures to address overcrowding in detention centers and prisons, including through increased resort to alternative forms of punishment such as parole and community service.”⁴⁰

In its list of issues relating to Article 9 ICCPR, the Working Group asked “What measures have been taken to address the problem of prolonged detention without trial, ill-treatment and massive violations of the rights of detainees as well as the reported high numbers of deaths in custody?”⁴¹ The WG further wanted to know what measures have been taken to “prevent unlawful or arbitrary arrest by the police, including arrests for the purpose of extorting bribes as well as other abuses”⁴² and what kind of “remedies available to victims of unlawful or arbitrary arrest, and the measures taken to ensure that arrested persons are promptly brought before a judge.”⁴³

This rather mildly reaction of the Working Group contrasts the Human Rights Watch report of 2015. The NGO reported a series of mass detention in the cities of Nairobi and Mombasa of at least 4.000 people by the Kenyan police caused by “series of grenade and gun attacks in Nairobi’s Eastleigh neighborhood”.⁴⁴

The Kenyan authorities equally apply the practice of arbitrary arrest and detention without charge or on trumped up charges to sanction same-sex conduct.⁴⁵

4. Indonesia

Indonesia submitted its first State report only in 2014.⁴⁶ The government emphasized that “Indonesia upholds the right to personal liberty and the rights to recognition as a person, and provides protection for every person from arbitrary arrest and detention. This principle applies in every case, including

³⁹ Consideration of reports submitted by States parties under article 40 of the Covenant, Concluding observations adopted by the Human Rights Committee at its 105th session, 9-27 July 2012, UN Doc. CCPR/C/KEN/CO/3 para. 16.

⁴⁰ Consideration of reports submitted by States parties under article 40 of the Covenant, Concluding observations adopted by the Human Rights Committee at its 105th session, 9-27 July 2012, UN Doc. CCPR/C/KEN/CO/3 para. 16.

⁴¹ Working Group, List of issues to be taken up in connection with the consideration of the third periodic report of Kenya, UN Doc. CCPR/C/KEN/3 para. 13.

⁴² Working Group, List of issues to be taken up in connection with the consideration of the third periodic report of Kenya, UN Doc. CCPR/C/KEN/3 para. 14.

⁴³ Working Group, List of issues to be taken up in connection with the consideration of the third periodic report of Kenya, UN Doc. CCPR/C/KEN/3 para. 14.

⁴⁴ Word Report 2015: Kenya, <https://www.hrw.org/world-report/2015/country-chapters/kenya>.

⁴⁵ Word Report 2015: Kenya, <https://www.hrw.org/world-report/2015/country-chapters/kenya>.

⁴⁶ Consideration of reports submitted by States parties under article 40 of the Covenant Initial reports of States parties Indonesia, CCPR/C/IDN/1.

cases of arrest and detention of persons with mental illness, homeless people, and people with drug dependence, as well as cases of detention for the purpose of education or immigration control.”⁴⁷ Yet there are a number of exceptions to this general guarantee of personal freedom and liberty. In criminal cases for instance or “criminal proceedings against a person (including arrest and detention) allow the reduction of a person’s rights in accordance with the applicable legislation.”⁴⁸ Another broad exception relates to the detention practice against foreigners. Here, the State is allowed to take them under arrest, if “they [should] be under suspicion of engaging in activities considered to be harmful to Indonesian security and public order, or not respectful of, or obeying Indonesian laws and regulations”.⁴⁹

Indonesia presents a number of legislative improvements relating to, *inter alia*, the domestic police force and the period of pre-trial detention. Accordingly, the government has formed “a new response unit in the police force to react more swiftly to criminal cases. Indonesia National Police Chief Decree No. Pol: JUKNIS/01/11/1982, point 5 b, states that the investigation of any criminal case should be conducted in the shortest time possible”⁵⁰ Furthermore, it has taken measures “to reduce the period of pre-trial detention in order to expedite the court proceedings, Indonesia has also taken measures to reduce the number of pre-trial detentions. This measure is mainly to reduce the number of detentions for public safety reasons.”⁵¹

The Human Rights Committee presented its concluding observations on the initial report of Indonesia in 2013. Regarding compliance with Article 9 ICCPR, the Committee made the following requests. “The Committee is concerned that under the Criminal Procedure Code a detained person may be held in police custody for a period up to 20 days, without being brought before a judge, which period might be extended up to 60 days and even longer for suspects of terrorism. While appreciating that the State party is in the process of revising the Criminal Procedure Code and taking into account the additional information provided by the State party’s delegation, the Committee is concerned that the new bill only proposes a reduction of the period of detention from 20 days to 5 days (art. 9). The Committee encourages the State party to ensure that the Criminal Procedure Code be revised in order to provide that anyone arrested or detained on a criminal charge is brought before a judge within 48 hours.”⁵²

⁴⁷ Consideration of reports submitted by States parties under article 40 of the Covenant Initial reports of States parties Indonesia, CCPR/C/IDN/1 para. 129.

⁴⁸ Consideration of reports submitted by States parties under article 40 of the Covenant Initial reports of States parties Indonesia, CCPR/C/IDN/1 para. 132.

⁴⁹ Consideration of reports submitted by States parties under article 40 of the Covenant Initial reports of States parties Indonesia, CCPR/C/IDN/1 para. 134.

⁵⁰ Consideration of reports submitted by States parties under article 40 of the Covenant Initial reports of States parties Indonesia, CCPR/C/IDN/1 para. 143.

⁵¹ Consideration of reports submitted by States parties under article 40 of the Covenant Initial reports of States parties Indonesia, CCPR/C/IDN/1 para. 144.

⁵² Human Rights Committee, Concluding observations on the initial report of Indonesia, UN Doc. CCPR/C/IND/CO/1 para. 19.

Furthermore the Human Rights Committee criticize the oversight of correctional facilities: “While taking note of the State party’s efforts to sign Memorandum of Understandings with, inter alia, the Ombudsman, and Komnas HAM in order to improve oversight over correctional facilities, the Committee is concerned that no oversight body is allowed to conduct unannounced visits to places of deprivation of liberty in the State party. The Committee is also concerned at reports of undue restrictions on oversight bodies to visit places of deprivation of liberty that are under the authority of the military (art. 9). The State party should revise its policies to ensure that oversight bodies for correctional facilities have the power to conduct unannounced visits of all prisons and detention facilities. Furthermore, the State party should facilitate the conduct of visits by these oversight bodies to all places of deprivation of liberty including those under the authority of the military.”⁵³

The updated information requested by the Committee are due in 2017.⁵⁴ Only then will become apparent in how far Indonesia is willing to amend domestic legislation and administrative acts.

As indicated above, the Working Group on Arbitrary Detention conducted a visit to Indonesia in 1999.⁵⁵ Its main point of criticism related to deficiencies of the legislation and of the application of the law. “[F]or example, the absence of a legal obligation to present an arrested person promptly before a judicial authority [)]. This underlines the urgent need to revise several provisions of the Code of Criminal Procedure and to abrogate the existing emergency laws and measures.”⁵⁶ The Committee criticized the practice of “the authorities and judicial officers who must apply the law, be they police officers, prosecutors, judges or even lawyers. Such deficiencies may relate to routine matters (lack of notification of prolongation of detention) or to serious breaches of professional ethics or of the duty of impartiality (for example, corruption). This underlines the importance of education in this area and the necessity for exemplary and severe sanctions, which should be administered in all proven cases.”⁵⁷ Yet, these requests were made 17 years ago and can therefore hardly be representative of the current situation. The requested follow-up visit to Indonesia will show in how far the situation has improved and what is left to be done.

Filep Jacob Samuel Karma v. Indonesia constitutes the latest communication received against Indonesia on the basis of Article 9 ICCPR. The case concerned the detention of Mr. Karma after his

⁵³ Human Rights Committee, Concluding observations on the initial report of Indonesia, UN Doc. CCPR/C/IND/CO/1 para. 20.

⁵⁴ Human Rights Committee, Concluding observations on the initial report of Indonesia, UN Doc. CCPR/C/IND/CO/1 para. 33.

⁵⁵ Working Group, Report of the Working Group on Arbitrary Detention on its visit to Indonesia (31 January-12 February 1999), E/CN.4/2000/4/Add.2.

⁵⁶ Working Group, Report of the Working Group on Arbitrary Detention on its visit to Indonesia (31 January-12 February 1999), E/CN.4/2000/4/Add.2 para. 90 (b).

⁵⁷ Working Group, Report of the Working Group on Arbitrary Detention on its visit to Indonesia (31 January-12 February 1999), E/CN.4/2000/4/Add.2 para. 90 (c).

participation in a flag-raising ceremony. The Committee found a violation of Article 9 ICCPR in 2011.⁵⁸ Yet, he was only released in November last year. Amnesty International took note of this event, criticized however the “decade in prison for his peaceful political expression”.⁵⁹ The NGO generally puts a focus on the worrying arrest and detention of peaceful activists in the country.⁶⁰ Amnesty International stated that “despite commitments made during his election campaign in 2014, President Joko Widodo failed to address past human rights violations. Freedom of expression was further restricted and the use of the death penalty for drug-related offences increased.”⁶¹ One incident is considered particularly dramatic: “264 peaceful activists who had planned peaceful protests marking the 52nd anniversary of the handover of Papua to the Indonesian government by the UN. A further 216 members of the West Papua National Committee (KNPB) were arbitrarily detained for participating in peaceful demonstrations in support of Papua’s application to join the Melanesian Spearhead Group – a sub-Pacific intergovernmental organization. While most were later released, 12 were charged for participating in the protest, including under the “rebellion” laws.”⁶² As shown by these instances and the latest communication received against Indonesia, arbitrary detention often occurs in the context of peaceful demonstrations and are a result of the freedom expressions (criticism of the government etc.) Human Rights activists and journalists are the most endangered group in this regard.

Yet, this problem does not seem to constitute an urban phenomenon. This might be different in the case of Colombia. In Kenya too, arbitrary detention is not mainly conducted in urban neighborhoods but wherever deemed necessary by the government.

⁵⁸ Working Group on Arbitrary Detention, Filep Jacob Samuel Karma v. Indonesia, Opinion No. 48/2011, U.N. Doc. A/HRC/WGAD/2011/48 (2011) para. 27.

⁵⁹ Amnesty International, Annual Report 2016/2016 on Indonesia, <https://www.amnesty.org/en/countries/asia-and-the-pacific/indonesia/report-indonesia/>.

⁶⁰ The NGO focused on the “Freedom of Expression” as well as on the “Freedom of Religion and Belief”, Amnesty International, Annual Report 2016/2016 on Indonesia, <https://www.amnesty.org/en/countries/asia-and-the-pacific/indonesia/report-indonesia/>.

⁶¹ Amnesty International, Annual Report 2016/2016 on Indonesia, <https://www.amnesty.org/en/countries/asia-and-the-pacific/indonesia/report-indonesia/>.

⁶² Amnesty International, Annual Report 2016/2016 on Indonesia, <https://www.amnesty.org/en/countries/asia-and-the-pacific/indonesia/report-indonesia/>.