

Human Rights Committee, Draft General Comment No. 35
Article 9: Liberty and Security of Person

COMMENTS BY THE GOVERNMENT OF CANADA

1. The Government of Canada appreciates the work of the Human Rights Committee in promoting human rights and wishes to thank the Committee for the opportunity to comment on Draft General Comment No. 35 on Article 9: Liberty and Security of Person (“the Draft General Comment”).¹ Canada welcomes constructive dialogue and engagement between the United Nations treaty bodies and States parties on issues such as the content of General Comments.
2. Canada recognises the independence and impartiality of the Committee, and its ability to issue General Comments. Canada reiterates, however, that General Comments are capable only of providing guidance to States parties in their interpretation of their obligations. The Comments do not create binding legal obligations in and of themselves, nor do they reflect an interpretation of the Covenant that is necessarily agreed upon by States parties.
3. The specific comments below are not exhaustive, but rather highlight areas of concern. Silence in respect of other areas does not constitute acquiescence in the Committee’s interpretation of States’ obligations. Canada has six main areas of comment in relation to the Draft General Comment.
4. The first is with respect to paragraph 57, which addresses States parties’ obligations under the *International Covenant on Civil and Political Rights* (“ICCPR”) in the context of the removal of foreign nationals. The text states that where there is “a real risk of a severe violation of liberty or security of person such as prolonged arbitrary detention”, the removal may amount to inhuman treatment in violation of Article 7. Canada is of the view that this sentence does not sufficiently emphasize the requirement of a real and personal risk for the individual subject to removal. Canada is also of the view that the sentence does not make it sufficiently clear that it would be the removal – and not the treatment upon return – that would potentially constitute a violation.
5. Canada would therefore suggest the following rephrasing of paragraph 57: “Returning an individual to a country where there are substantial grounds for believing that they face a real and personal risk of a severe violation of liberty or security of person amounting to inhuman treatment, such as prolonged arbitrary detention, may amount to a real risk of irreparable harm constituting a violation of Article 7 of the Covenant”.
6. Canada’s second area of comment is on paragraph 62 of the Draft General Comment, which addresses the territorial scope of Article 9 in light of Article 2(1) of the ICCPR. Canada would insist on the language of Article 2(1): “all individuals within its territory and subject to its jurisdiction” in the first sentence.

¹ CCPR/C/GC/R.35/Rev.3 (10 April 2014), Revised draft prepared by the Rapporteur for general comment No. 35, Mr. Gerald L. Neuman. Online: <http://www.ohchr.org/EN/HRBodies/CCPR/Pages/DGCArticle9.aspx>

7. In the second sentence of paragraph 62, Canada is unable to agree that the test is “effective control over the person”. The State in whose territory the detention occurs retains the obligations to respect and to protect Article 9 rights against arbitrary detention by another State within its territory. Canada would therefore suggest a rephrasing of the second sentence of paragraph 62, to remove the reference to “effective control”. In the third sentence, the Committee may indicate its view that States parties “should not arbitrarily or unlawfully arrest or detain individuals outside their territory.” Canada would remove the fourth sentence of paragraph 62.
8. Canada’s third area of comment is on paragraphs 7 and 8 of the Draft General Comment. Paragraph 7 mixes the analysis of State and non-State action, for example when it refers to an obligation “more generally to protect individuals from foreseeable threats to life or bodily integrity proceeding from either governmental or private actors”. In Canada’s view, the Draft General Comment would benefit from a more careful articulation of States parties’ obligations to take reasonable measures to protect individuals from threats to their security of the person by non-State actors, as distinct from the discussion of Article 9 as it applies to governmental action. In the same vein, Canada does not view the examples in paragraphs 7 and 8 as providing clear or consistent guidance to States parties on the scope of their obligations with respect to State and non-State action.
9. Canada notes the statement in paragraph 7 that States parties “should also prevent and redress unjustifiable use of force in law enforcement...”. Canada is of the view that in this instance the use of “should” is an incorrect statement of States parties’ obligations under the ICCPR, for example as defined in Articles 2(1) and 2(3). Rather, States parties “must take measures to prevent and redress unjustifiable use of force in law enforcement...”.
10. Canada is unable to agree with the vague statement in paragraph 8 that States parties “should do their utmost to take appropriate measures to protect personal liberty against the activities of another State within their territory.” In Canada’s view, a clearer and more correct statement would be that a State party “must take measures to ensure its officials do not acquiesce or participate in abuses committed by another State’s officials in the State party’s territory.”
11. Canada’s fourth area of comment relates to international humanitarian law. Consideration of obligations under Article 9 must take into account the fact that international humanitarian law is the *lex specialis* in factual situations of armed conflict and therefore the controlling body of law in armed conflict. Due weight must be given to the controlling body of law throughout the Draft General Comment. Alternatively, the references to the application of Article 9 to situations of armed conflict should be removed.
12. Fifth, Canada has difficulties with the discussion of security detention in paragraph 15. Canada is concerned by the suggestion that international humanitarian law only applies to international armed conflicts. The relevant international humanitarian law rules governing detention, prosecution and any remedy available to the individual will govern in the case of armed conflict, whether international or non-international. Therefore Canada would replace “international armed conflict” with “armed conflict” in the second sentence. Likewise, in the fifth sentence of paragraph 65, Canada would replace “international armed

conflict” with “armed conflict” to avoid the suggestion that international humanitarian law only applies to international armed conflicts.

13. Canada sees no basis at international law for the statement that security detention “would normally amount to arbitrary detention” for the sole reason that “other effective measures addressing the threat, including the criminal justice system, would be available.” In both international and non-international armed conflicts, a State may detain enemy combatants consistent with the law of armed conflict until the end of hostilities. Canada would not agree with the proposition that, in an armed conflict situation, conduct that is otherwise lawful under international humanitarian law is rendered unlawful simply because law enforcement mechanisms continue to operate effectively. Similarly, to the extent that paragraphs 15 and 66 are intended to address detention in situations of armed conflict, Canada would not agree that, in all cases, there is a “right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention” in situations of armed conflict.
14. Canada’s sixth area of comment concerns derogation. Article 4(2) explicitly lists the ICCPR articles that are non-derogable. Canada accepts that any derogations from a State party’s obligations under the Covenant must always be consistent with Article 4(1) of the Covenant, which requires that any derogation be “strictly required by the exigencies of the situation” and “not inconsistent with their other obligations under international law,” including international humanitarian law as applicable. Canada also accepts that States parties may not invoke Article 4 as justification for acting in violation of international humanitarian law or peremptory norms of international law. Canada is unable to agree, however, with the sweeping proposition in paragraph 65 that: “The fundamental guarantee against arbitrary detention is non-derogable.” Article 9 is not included in Article 4(2), and Canada considers that there is insufficient evidence to establish that there is a rule of *jus cogens* in respect of the right not to be subject to arbitrary detention. Additionally, Canada sees no basis in international law for the standard of “necessity and proportionality” proposed in paragraph 65.
15. More generally, Canada recommends that the Committee use terms consistently throughout. Canada recommends clarifying the text to ensure that a consistent approach is used for detention in the criminal law context and for detention in the non-criminal context. For example, the Draft General Comment appears to use “deprivation of liberty”, “arrest” and “detention” interchangeably. Paragraph 6 uses both “personal liberty” and “liberty” to refer to “liberty of the person”. Canada also recommends consistency with the ICCPR terms. For example, paragraph 9 refers to “adequate remedy” instead of “effective remedy” as found in Article 2(3)(a).
16. Canada assumes that paragraphs 31 and 40 are not intended to discuss detentions in the context of situations of armed conflict and would recommend more precise terms for the discussion of offences under military law. In paragraph 31, Canada suggests “military prosecutions that are criminal rather than disciplinary in nature” in the second sentence. This clarification would recognize that “military prosecutions” in respect of minor disciplinary offences are outside the scope of Article 9(3), while recognizing that military offences which are truly criminal in nature are captured by Article 9(3). In paragraph 40,

Canada would suggest “detention in connection with offences under military law”, rather than “military detention”.

17. In paragraph 26, Canada does not accept that explicit notification of the reasons for arrest could be “superfluous”. Anyone who is arrested shall be informed, at the time of the arrest, of the reasons for his arrest, even if those reasons are “evident” or this information may appear “superfluous” in the circumstances.
18. In paragraph 45, the reference to “disciplinary detention of a soldier on active duty” is under-inclusive. It would be preferable to refer to “disciplinary detention of an individual who is subject to the jurisdiction of military tribunals” so as to include all those who fall within military jurisdiction at various times. Canada, amongst other States, currently has, and exercises, military jurisdiction over reserve force members and civilians in limited circumstances, such as civilians accompanying the armed forces.
19. Canada respects the importance of ensuring that all individuals arrested on criminal charges appear before a judge or justice of the peace. In Canadian practice, both civil and military, first appearances are frequently conducted by video conference. Appearance by video conference provides safeguards against ill-treatment and ensures a prompt judicial review of the legality or necessity of detention. In Canada’s experience, it reduces the hardships and risks for the individual, particularly during transportation. Therefore, Canada recommends that the Committee mention the merits of appearance by video conference in paragraph 34.
20. In conclusion, Canada reiterates its appreciation of the opportunity to review the Draft General Comment, and more generally its support for the work of the Committee. Canada avails itself of the opportunity to renew to the Committee the assurances of its highest consideration.

Ottawa
06 October 2014