

**Observations by the Government of the United Kingdom of Great Britain and Northern Ireland
on draft General Comment 35 on Article 9 of the International Covenant on Civil and Political
Rights (ICCPR) - liberty and security of person**

Introduction and General Points

1. The United Kingdom of Great Britain and Northern Ireland (the “United Kingdom”) is grateful to the Human Rights Committee for advance sight of its draft General Comment 35. The United Kingdom welcomes the opportunity to comment on it and to engage in a constructive dialogue on the Committee’s work on these important matters.
2. The United Kingdom wishes to underline at the outset that it strongly supports the work of the Human Rights Committee, including in issuing General Comments as provided in Article 40(4) of the ICCPR. It is grateful for the opportunity provided under Article 40(5) ICCPR to submit to the Committee certain observations on General Comments. The United Kingdom is, of course, aware that the General Comments adopted by the Committee are not legally binding. They nevertheless command great respect, given the eminence of the Committee and the status of the ICCPR. The United Kingdom takes its international human rights obligations and commitments seriously, including those set out in ICCPR. The opportunity for the United Kingdom to comment on this important work of the Committee is particularly timely given the United Kingdom’s upcoming celebrations of the 800th anniversary of the Magna Carta, which first codified habeas corpus.
3. The Committee’s draft General Comment raises important issues of general interest, which require careful consideration by the Committee. The United Kingdom therefore makes the following specific comments on the draft General Comment.
4. Further, there are several requests in the draft General Comment to States Parties to the ICCPR to provide additional statistical indicators on various issues. The United Kingdom will of course make every effort to provide the requested information in future periodic reports but it cannot guarantee that this will be practical in all instances, taking into account that the statistics will have to cover the three jurisdictions within the United Kingdom, and also the Crown Dependencies and the British Overseas Territories to which the ICCPR has been extended. The Committee may wish to note that the Core Document, which is currently being updated, already provides a set of basic statistical indicators.

Section I. General remarks

5. Footnote 15 (paragraph 7) to the draft General Comment provides that “*State parties also violate the right to security of the person if they purport to exercise jurisdiction over a person outside their territory by issuing a fatwa or similar death sentence authorising the killing of the victim*”. Whilst the United Kingdom considers that the issuing of such fatwas raises serious concerns, it questions whether the object of any such fatwa would necessarily be within the jurisdiction of the State for the purposes of the ICCPR. The question of jurisdiction would need to be considered on a case-by-case basis.

Section II. Arbitrary detention and unlawful detention

6. The United Kingdom agrees that individuals have a right under article 9(1) of the ICCPR not to be subject to arbitrary and unlawful detention. However, we would identify the following concerns regarding the Committee's consideration of this right.

Periodic reviews

7. Paragraph 12 of the draft General Comment provides that *“Aside from judicially imposed sentences for a fixed period of time, the decision to keep a person in detention is arbitrary if it is not subject to periodic re-evaluation of the justification for continuing the detention.”*
8. The United Kingdom accepts this statement insofar as it applies to detentions taking place before an individual is convicted. In respect of judicially imposed sentences the United Kingdom would want to ensure that *“a fixed period of time”* includes the tariff (the punitive element of an indeterminate sentence). This part of the sentence is also fixed by the court and a prisoner is not considered for parole/release until that part of the sentence has been served. This should also include a whole life sentence where the court determines that no review is required. The United Kingdom does not consider that there is a requirement for periodic review or re-evaluation of detention pursuant to a fixed tariff or whole life sentence as imposed by a court. The United Kingdom would therefore welcome clarification that *“sentences for a fixed period of time”* includes whole life tariff sentences.
9. Paragraph 12 also provides that - *“The notion of “arbitrariness” is not to be equated with “against the law”, but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability, and due process of law.”* The United Kingdom is unclear as to what “inappropriateness” is intended to mean in this context and would be grateful for clarification.

Detention in the course of proceedings for the control of immigration

10. The United Kingdom agrees that detention in the course of proceedings for the control of immigration must be justified as reasonable and proportionate in light of the circumstances, and reassessed as it extends in time. The United Kingdom considers detentions on a case by case basis and only detains in order to establish a person's identity or basis of claim or for the purposes of removal. However, the United Kingdom has the following specific comments in respect of paragraph 18 of the draft General Comment.
11. Paragraph 18 (second sentence) acknowledges that *“asylum-seekers who unlawfully enter a State party's territory may be detained for a brief initial period in order to document their entry, record their claims, and determine their identity if it is in doubt”*. In respect of this second sentence, the United Kingdom considers that it is unclear whether the Committee considers that such detention for a brief period is intended to apply only at the time of entry or at any time the individual is discovered and would welcome clarification on this point. Under the United Kingdom Detained Fast Track (DFT) scheme, an asylum applicant may be detained both at the time of entry and on subsequent discovery in order to examine his claim on the basis that the claim is capable of being decided quickly. Detention under the DFT scheme is also not limited to those who enter the country unlawfully; and detention is not necessarily solely for the purposes listed in paragraph 18 of the draft General Comment. It is, however, restricted to those in respect of whom there is a power to detain (i.e. pending examination or if there are reasonable grounds for suspecting that the person is someone in respect of whom removal directions may be given). The lawfulness of

the DFT scheme has been upheld by both the domestic Courts and the European Court of Human Rights¹ and the United Kingdom considers that detention under the DFT scheme is necessary for the system to operate effectively. The United Kingdom would, therefore, welcome the Committee's consideration of amending this second sentence to read as follows: "*Asylum-seekers may be detained for a limited period in order to examine the person, to document their entry, record their claims, and to determine their identity and immigration status if it is in doubt.*"

12. The United Kingdom also notes that paragraph 18 goes on to provide that continued detention beyond the initial period "*would be arbitrary absent particular reasons specific to the individual, such as an individualized likelihood of absconding, danger of crimes against others, or risk of acts against national security*", that such factors are to be assessed on a case by case basis, and that detention should not be subject to a "*mandatory rule for a broad category*". The United Kingdom agrees that cases should be considered on their own facts. However, it does not consider that there is a requirement to demonstrate individual risks of absconding or offending where the asylum seeker's claim is being considered under a prioritised or fast track system.
13. Paragraph 18 of the draft General Comment provides that the decision must also take into account the "*mental health condition of those detained*". The United Kingdom agrees that the mental health condition should be taken account but that such considerations will not be applicable in every case. Accordingly, that this requirement should only apply where relevant to the particular case.
14. The penultimate sentence of paragraph 18 states that any detention should take place in "*non-punitive facilities, and should not take place in prisons.*" The United Kingdom agrees that in most circumstances, such persons should be detained in "*non-punitive facilities*", however, it may well be appropriate to detain such persons in prisons in particular circumstances. Specially, there may well be individuals who are subject to immigration detention who have committed criminal offences and pose a risk of reoffending or to national security. In which case, it may well be appropriate in the circumstances to detain those individuals in a prison facility.

Post conviction preventative detention

15. Paragraph 21 of the draft General Comment provides that "*States parties should only use such post-conviction preventive detention as a measure of last resort; and when they do impose such detention the conditions in detention must be distinct from the conditions for convicted prisoners serving a punitive sentence and must be aimed at the detainees' rehabilitation and reintegration into society. If a prisoner has fully served the sentence imposed at the time of conviction, articles 9 and 15 forbid a retroactive increase in sentence, and a State party may not impose detention equivalent to penal imprisonment under the label of civil preventive detention.*"
16. The United Kingdom agrees that the State should only use post-conviction detention as a measure of last resort. However, the United Kingdom requests clarification that this does not affect the imposition by a court of an indeterminate sentence where preventative detention is a feature of the sentence. Indeterminate sentences (life sentences and imprisonment for public protection sentences) have two parts to the punishment element (the punitive element - the tariff or whole

¹ House of Lords in *R v Secretary of State for the Home Department ex parte Saadi* [2002] 1WLR 131 and by the Court of Appeal in *R (Refugee Legal Centre) v Secretary of State for the Home Department* [2004] EWCA Civ 1481; *Saadi v UK* [2008] 47 EHRR 17

life order and the preventative element where the prisoner's release is subject to a reduction of risk as decided by an independent court like body). Accordingly the United Kingdom seeks clarification that the proposed text is not intended to prejudice the use by a court of such detention in appropriate circumstances or in accordance with the law.

17. Further, where a court imposes an indeterminate sentence, whilst it is considered that the second part of the sentence is the preventative or rehabilitative part of the sentence, the detention conditions will not necessarily be distinct as the prisoner is still serving the sentence imposed by the court. The United Kingdom's concerns on this issue would be removed if the Committee can clarify that this paragraph is not directed at detention imposed by a court.

Section IV. Judicial control of detention

18. Article 9(3) of the ICCPR provides that "*Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power...*" Paragraph 33 of the draft General Comment provides that "*An especially strict standard of promptness, such as 24 hours, should apply in the case of juveniles*" While the United Kingdom agrees that it is important that juveniles are brought promptly before a judge or other officer authorized by law, the reference to 24 hours in respect of juveniles goes further than the requirements of Article 9(3) of the ICCPR.

Section V. The right to take proceedings for release from unlawful or arbitrary detention

19. Section V of draft General Comment concerns article 9(4) of the ICCPR, that "*Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful*".
20. The United Kingdom agrees with the general guarantee that anyone deprived of their liberty is entitled to challenge the basis of that detention before a judicial authority. However, the United Kingdom has some concerns as to any application of article 9(4) to detentions that take place during armed conflict.
21. The Committee states in paragraph 40 that the right in article 9(4) applies not only to detention in connection with criminal proceedings, but to "*military detention, security detention, counterterrorism detention...*"² The United Kingdom assumes that "*military detention*" is intended to refer to detention of military personnel or civilians subject to military jurisdiction following proceedings before courts of the armed services³. To the extent that it might be suggested that "*military detention*" encompasses detention in situations of armed conflict, the

² 1051/2002, *Ahani v. Canada*, para. 10.2 and concluding observations United Kingdom 2008, para. 17, are both given as examples of 'counter-terrorism' detention. The first concerned domestic security detention and deportation and the second control orders. Concluding observations Israel 1998, para [317] is given as an example of 'security detention'. However, this concerned administrative detention and detention in occupied territories.

³ The authorities cited by Committee do not provide compelling support for the application of article 9(4) to detention of captured persons by the military during armed conflict overseas. *Mulezi v. Democratic Republic of the Congo*, para. 5.2 is given as an example of 'military detention'. The Government understand the Committee to cite this in support of the proposition that Article 9 applies to military detention outside armed conflict.

United Kingdom does not consider that there is a general right under article 9(4) for such persons to take proceedings before a court for the following reasons:

(a) In respect of captured persons detained in armed conflict overseas, the United Kingdom does not consider that the ICCPR automatically applies extra-territorially to a State's military activities overseas (see our further comments at paragraph 27 below on extra-territorial application of the ICCPR);

(b) Persons detained during an armed conflict are held in accordance with the laws of armed conflict, also referred to as international humanitarian law. International humanitarian law is a separate, self-contained system of international law specifically designed to cover situations of armed conflict. Thus, even if there were extraterritorial jurisdiction in such circumstances, it is the United Kingdom's position that international humanitarian law is the *lex specialis* in situations of armed conflict; and that it displaces or modifies Article 9 of the ICCPR in respect of detention; and

(c) The United Kingdom's domestic case law recognises the limited application of *habeas corpus*⁴ to the detention of an enemy alien captured and detained in a territory that does not form part of the United Kingdom.⁵ The United States domestic courts have also considered, in recent years, the limits of *habeas corpus* jurisdiction.⁶

Incompatibility with other relevant provisions of the ICCPR

22. In paragraph 44, the draft General Comment provides that “*unlawful*” detention includes both detention that violates domestic law and detention that is incompatible with the requirements of article 9, paragraph 1, or with any other relevant provisions of the Covenant.” The United Kingdom would welcome further clarification on this paragraph since it does not consider that non-compliance with other relevant provisions of the ICCPR (for example, where the right to a fair trial is breached due to delay) would necessarily result in a detention being unlawful.

Section VII. Relationship of article 9 with other articles of the Covenant

⁴ *Habeas corpus* provides an entitlement to take proceedings in a court to determine the lawfulness of detention, in accordance with Article 9(4).

⁵ *R v Schiever* (1759) 2 Keny. 473, 96 Eng Rep 1249; *Furly v. Newnham* (1780) 2 Dougl 419; *The Case of Three Spanish Sailors* (1779) 2 W Bl 1324; *Ex p Weber* [1916] 1 KB 280; *R v Vine Street Police Supt, ex p Liebmann* [1916] 1 KB 268; *R v Home Secretary, ex parte L* [1945] KB 7; *R v Bottrill ex p Kuechenmeister* [1946] 2 All ER 434; *R v Earl of Crewe, ex p Sekgome* [1910] 2 KB 576; *Re Ning Yi-Ching* (1939) 56 TLR 3; and, *Re Mwenya* [1960] 1 QB 241. The Committee will also be aware of the recent decision in the High Court of *Serdar Mohammed v Ministry of Defence and Qasim, Nazim & Abdullah v Secretary of State for Defence* [2014] EWHC 1369 (QB), which is subject to appeal.

⁶ Whilst the Supreme Court accepted in *Boumediene v Bush* 553 U.S. 723 (2008) that detainees held in Guantánamo Bay have the right to apply for *habeas corpus*, the same is not true of those held in Afghanistan. The Columbia District Court of Appeals in *Fadi Al Maqaleh v Gates*, 21 May 2010, Columbia Circuit, Court of Appeals concluded that the situations in Guantánamo Bay and in Afghanistan, in terms of de facto sovereignty, were different. More importantly (pp.22-26), the detention facility in Afghanistan was in a theatre of war. All of the attributes of a facility exposed to the vagaries of war were present; it was in a territory neither under the de jure nor de facto sovereignty of the US; detention was in the territory of another nation, “which itself creates practical difficulties”; there was no indication that the US had sought to evade judicial review by moving detainees into an active conflict zone; and, “[s]uch trials would hamper the war effort and bring aid and comfort to the enemy”.

23. The United Kingdom considers that the relationship between article 9 and other articles of the ICCPR raises some complex issues and offers the following comments in this respect.

Places of detention

24. Paragraph 58 of the draft General Comment provides that “*Detainees should be held only in facilities officially acknowledged as places of detention. An official register should be kept of the names and places of detention, and times of arrival and departure, as well as of the names of persons responsible for their detention, and made readily available and accessible to those concerned, including relatives.*”
25. Although the United Kingdom agrees with the above general propositions in paragraph 58, there are situations where an individual can be taken to a safe place that is not officially acknowledged as a place of detention and required to stay there. For example, where there an urgent need to take an individual to a place of safety that is not necessarily an acknowledged as a place of deprivation of liberty in order for their longer term health needs to be assessed.⁷
26. Also, there may be situations where releasing such information could pose security risks to the detainees and the authorities running the detention facilities. Accordingly, the United Kingdom would propose the following alternative wording: “*and made readily available and accessible to those concerned, including relatives, except where the transmission of the information would adversely affect the privacy or safety of the person detained or the state agents supervising their detention, hinder a criminal investigation, or for other equivalent reasons where they are necessary and in accordance with the law, and in conformity with applicable international law.*”

Extraterritorial application

27. Paragraph 62 of the draft General Comment provides that “*In light of article 2, paragraph 1, of the Covenant, States parties have obligations to respect and to ensure the rights under article 9 to all persons who may be within their territory and to all persons subject to their jurisdiction. Given that arrest and detention bring a person within a state’s effective control, States parties must not arbitrarily or unlawfully arrest or detain individuals outside their territory. States parties must not subject persons outside their territory to prolonged incommunicado detention, or deprive them of review of the lawfulness of their detention. The extraterritorial location of an arrest may be a circumstance relevant to an evaluation of promptness under paragraph 3*”.
28. Footnotes 214 and 215 to paragraph 62 of the draft General Comment refer to General Comment No 31, paragraph 10. The United Kingdom responded to General Comment No. 31 in its Sixth periodic report to the Human Rights Committee and made clear its position in respect of extra-territorial application of the ICCPR in paragraph 59 of that report. The United Kingdom maintains that position.

Derogations and reservations

29. Paragraph 65 of the draft General Comment provides that “*The fundamental guarantee against arbitrary detention is non-derogable*” and that “*During international armed conflict, substantive*

⁷ Sections 135 and 136 of the UK’s *Mental Health Act*.

and procedural rules of international humanitarian law remain applicable and limit the ability to derogate, thereby helping to mitigate the risk of arbitrary detention.”

30. The United Kingdom 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. The United Kingdom position is that derogations must be consistent with Article 4(1) of the ICCPR, including with other obligations under international law.
31. Paragraph 67 of the draft General Comment provides that “*While reservations to certain clauses of article 9 may be acceptable, it would be incompatible with the object and purpose of the Covenant for a State party to reserve the right to engage in arbitrary arrest and detention of persons.*” The United Kingdom would refer the Human Rights Committee to its previous position on reservations to the ICCPR in its response to General Comment No. 24.