

Comments on the draft of General Comment No. 35 on Article 9 of the ICCPR on the right to liberty and security of person and freedom from arbitrary arrest and detention

This submission represents the views of the Child Rights International Network (CRIN) (www.crin.org) on the proposed draft general comment No. 35 by the UN Human Rights Committee. CRIN is a global research, policy and advocacy organisation. Our work is grounded in the United Nations Convention on the Rights of the Child. Our goal is a world where children's rights are recognised, respected and enforced and where every rights violation has a remedy.

Introduction

These comments focus on the sections of the general comment that specifically address or impact on the rights of children in the context of the right to liberty and security of person and freedom from arbitrary arrest and detention.

CRIN argues that this General Comment on article 9 of the International Covenant on Civil and Political Rights (the Covenant) should identify the special measures that states should take to protect children who are arrested, charged with criminal offences or otherwise deprived of their liberty, in line with the requirement set out in Article 24(1) of the Covenant.

This General Comment should identify measures:

- to reiterate the requirement under article 37(b) of the Convention on the Rights on the Child that "[t]he arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time".
- to ensure children are met with a child friendly justice system that minimises the challenges they face in each aspect of a legal proceeding, provides them with free legal representation and ensures the rights and guarantees of a fair trial adapted to their needs.
- to ensure children are met with systems which renounce retribution and focus exclusively on children's rehabilitation, with the necessary attention to public safety and security.

In the light of the above, CRIN suggests the following amendments to the draft General Comment (justification and explanation for the suggested changes has been included at the end of the relevant paragraphs):

I - General remarks:

Paragraph 5

Deprivation of liberty involves more severe restriction of motion within a narrower space than mere interference with liberty of movement under article 12. Examples of deprivations of liberty include police custody, “arraigo,” remand detention, imprisonment after conviction, house arrest, administrative detention, involuntary hospitalization, institutional custody of children, [detention for immigration control, for drug use, for education, for labour, for mental health care, for protection, including self-protection, for national security](#) and confinement to a restricted area of an airport, and also include being involuntarily transported. They also include certain further restrictions on a person who is already detained, for example, solitary confinement or physical restraining devices. During a period of military service, restrictions that would amount to deprivations of liberty for a civilian may not amount to deprivation of liberty if they do not exceed the exigencies of normal military service or deviate from the normal conditions of life within the armed forces of the State party concerned. They also include certain further restrictions on a person who is already detained, for example, solitary confinement or physical restraining devices. During a period of military service, restrictions that would amount to deprivations of liberty for a civilian may not amount to deprivation of liberty if they do not exceed the exigencies of normal military service or deviate from the normal conditions of life within the armed forces of the State party concerned.

The list provided in this paragraph is clearly not intended to be exhaustive, but including a broader range of examples within this list could clarify the scope of Article 9.

Paragraph 9

[States parties remain responsible for their obligations under the Covenant when they privatise services that impact on the right of liberty and security of persons.](#) When private individuals or entities are authorized by a State party to exercise powers of arrest or detention, the State party remains responsible for adherence to article 9. It must rigorously limit those powers and must provide strict and effective control to ensure that those powers are not misused, and do not lead to arbitrary or unlawful arrest or detention. It must also provide adequate remedies for victims if arbitrary or unlawful arrest or detention does occur. [Special measures should be taken to protect children from arbitrary arrest, unlawful arrest and detention. When determining the level or form of reparation, mechanisms should take into account that children can be more vulnerable to the effects of abuse of their rights than adults and that the effects can be irreversible and result in life long damage.](#)¹

Children can be particularly vulnerable to rights violations, are at a higher risk of becoming victims of violence and may lack access to the means to obtain remedies. In setting out the requirement of the obligation of states to provide remedies for victims of arbitrary or unlawful

¹ UN Committee on the Rights of the Child General Comment No. 16, paragraph 31.

arrest or detention in light of Article 24(1) of the Covenant, this General Comment should note the particular vulnerabilities of children in this context.

The UN Committee on the Rights of the Child (CRC) addressed State obligations on the impact of the business sector on children's rights in its General Comment No. 16 (2013). The Committee recalled "it is generally challenging for children to obtain remedy - whether in courts or other mechanisms - when their rights are infringed upon, even more so by business enterprises. Children often lack legal standing, knowledge of remedy mechanisms, financial resources and adequate legal representation. Furthermore, there are particular difficulties for children to obtain remedy for abuses that occur in the context of businesses' global operations".² The CRC also reiterated States' obligation "to provide effective remedies and reparations for violations of the rights of the child, including by third parties such as business enterprises. [...] Meeting this obligation entails having in place child-sensitive mechanisms -criminal, civil or administrative- that are known by children and their representatives, that are prompt, genuinely available and accessible and that provide adequate reparation for harm suffered."³

The CRC's General Comment on the business sector and children's rights also sets out a clear statement of principle that states cannot limit their obligations under the Convention on the Rights of the Child through privatisation.⁴ This principle applies equally to the Covenant, and as this paragraph specifically addresses this issue, it would provide an opportunity to remove any ambiguity on the matter.

II. Arbitrary detention and unlawful detention

Paragraph 18

Detention in the course of proceedings for the control of immigration is not *per se* arbitrary, but the detention must be justified as reasonable, necessary and proportionate in light of the circumstances, and reassessed as it extends in time. 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. To detain them further while their claims are being resolved 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. The decision must consider relevant factors case-by-case, and not be based on a mandatory rule for a broad category; must take into account less invasive means of achieving the same ends, such as reporting obligations, sureties, or other conditions to prevent absconding; and must be subject to periodic reevaluation and judicial review. [Children should not be detained for immigration-related purposes and State parties should take measures to ensure](#)

2 Ibid. at paragraph 4

3 Ibid. at paragraph 30.

4 Ibid. at paragraph 25

that national legislation does not allow for the detention of children in such cases. Decisions regarding the detention of adult migrants must also take into account the effect of the detention on their mental health. Any necessary detention should take place in appropriate, sanitary, non-punitive facilities, and should not take place in prisons. The inability of a State party to carry out the expulsion of an individual does not justify indefinite detention.

In the current draft of General Comment No. 35, the only mention of the standard that children should only be deprived of their liberty as a measure of last resort and for the shortest appropriate period of time is in this paragraph on immigration detention. We are concerned that this risks weakening the relevant standards and is at divergence with the approach of the UN Committee on the Rights of the Child with regards to the detention of children in the context of immigration.

Under the Convention on the Rights of the Child, the requirement that “[t]he arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time”⁵ applies to all forms of detention.

In addressing the detention of children in immigration settings, the Committee on the Rights of the Child has also set higher standards than for other forms of detention, stating that “[c]hildren should not be criminalised or subject to punitive measures because of their or their parents’ migration status. The detention of a child because of their or their parent’s migration status constitutes a child rights violation and always contravenes the principle of the best interests of the child. In this light, States should expeditiously and completely cease the detention of children on the basis of their immigration status.”⁶

In line with the CRC’s recommendation:

- The UN Commission on Human Rights stated in 1998 that “unaccompanied minors should never be detained”.⁷
- The UN Sub-Commission on the Promotion and Protection of Human Rights, in resolution 2002/23, “reminds States that the detention of asylum-seekers and refugees is an exceptional measure and should only be applied in the individual case where it has been determined by the appropriate authority to be necessary in line with international refugee and human rights law, and encourages States to explore alternatives to detention and to ensure that children under 18 are not detained.”⁸

5 UN Convention on the Rights of the Child, Article 37(b).

6 UN Committee on the Rights of the Child, Report on the 2012 Day of General Discussion on the rights of all children in the context of international migration.

7 UN Commission on Human Rights, the Report of the Working Group on Arbitrary Detention: addendum: report on the visit of the Working Group to the United Kingdom on the issue of immigrants and asylum seekers, 18 December 1998, E/CN.4/1999/63/Add.3, para. 37.

8 UN Sub-Commission on the Promotion and Protection of Human Rights, Resolution 2002/23 on International Protection for Refugees, 14 August 2002, E/CN.4/Sub.2/RES/2002/23: Para. 4.

- The UN High Commissioner for Refugees, in the UNHCR Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers, stated that “minors who are asylum-seekers should not be detained”.⁹

Suggestion for an additional paragraph in section I or II:

States parties must take appropriate measures to ensure that any form of deprivation of liberty of children is used only as a measure of last resort and for the shortest appropriate period of time, taking into account their best interests as a primary consideration.

The current draft of General Comment No. 35 makes explicit reference to the requirement that children should only be deprived of their liberty as a measure of last resort for the shortest appropriate period of time, but only in the context of immigration detention. We recommend including this provision in a separate paragraph to avoid implying that it only applies to specific forms of detention.

Article 37 of the UN Convention on the Rights of the Child places very strict limits on any restriction of liberty of offending children: "No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time".

Paragraph 19

States parties should revise outdated laws and practices in the field of mental health in order to avoid arbitrary detention. Any deprivation of liberty must be necessary and proportionate, for the purpose of protecting the person in question from harm or preventing injury to others. It must take into consideration less restrictive alternatives, and must be accompanied by adequate procedural and substantive safeguards established by law. The procedures should ensure respect for the views of the patient, and should ensure that any guardian or representative genuinely represents and defends the wishes and interests of the patient. States parties must offer to institutionalized persons programmes of treatment and rehabilitation that serve the purposes that are asserted to justify the detention. Deprivation of liberty must be reevaluated at appropriate intervals with regard to its continuing necessity. *State parties should ensure that children with mental health problems are not systematically held in institutions and that where detention in the civil setting is only used with the consent of the child or, where the child lacks capacity to decide on his or her treatment, in the best interests of the child.* Patients should be assisted in obtaining access to effective remedies for the vindication of their rights, including initial and periodic

⁹ UN High Commissioner for Refugees, UNHCR Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers, 26 February 1999, Guideline 6.

judicial review of the lawfulness of the detention, and to ensure conditions of detention consistent with the Covenant.

The paragraph currently included in the Draft General Comment does not make a necessary distinction between detention on the basis of mental health in the criminal and civil settings. By not addressing this issue, the General Comment risks generalising and so legitimising discrimination against people with mental health problems. This submission focuses on children's rights, but the concerns raised here also apply to adults.

It should also be noted that the Convention on the Rights of Persons with Disabilities in setting out the right to liberty and security of person prohibits the use of disability - including mental disability¹⁰ - as a ground of deprivation of liberty.¹¹ The detention of a person on the basis of mental health or disability may also constitute discrimination under article 2 of the UN Convention on the Rights of the Child and article 26 of the International Covenant on Civil and Political Rights.¹² Where detention is authorised for children in circumstances in which it would not be permitted for adults, this raises further issues of discrimination on the basis of age.¹³

Criminal setting

Where a person with mental health problems is charged with or convicted of a criminal offence it may be justifiable to detain that person based on the individual's circumstances, but detention here would have to be justified in the same manner as any other criminal detention and in relation to children would have to take account of the best interests of the child and limitations on detention of children in the criminal setting.¹⁴

Civil setting

In the civil setting, the situation is different, as the criminal justice standards and grounds for detention do not apply. The current draft of the General Comment recognises two grounds for detention in the field of mental health: for the protection of the individual and for the protection of others.

Protection of others

10 UN CRPD, Article 1.

11 UN CRPD, Article 14(1)(b). See Bartlett, "A mental disorder of kind or degree warranting confinement: examining justifications for psychiatric detention" *International Journal of Human Rights*, 30 August 2012 for further discussion of the impact of Article 14 of the CRPD as a ground of discrimination.

12 See Richardson, "Balancing autonomy and risk: A failure of nerve in England and Wales?" *International Journal of Law and Psychiatry*, 9 January 2005 for a discussion of discrimination and the justifications of non-consensual treatment in the mental health context.

13 See Stone, "The Civil Commitment Process for Juveniles: An Empirical Study" *University of Detroit Law Review*, Vol. 65, p. 679 for examples of involuntary commitment procedures for children with mental health problems.

14 See CRIN, *Stop making children criminals* for further discussion of the legitimate grounds for the detention of children in the criminal justice system. Available at: www.crin.org/node/31378.

The protection of others is a clear example of preventive detention, recognised within the Draft General Comment as normally constituting arbitrary detention when carried out outside of remit of humanitarian law. Preventive detention is permitted only “under the most exceptional circumstances” and must be in response to “a present, direct and imperative threat ... invoked to justify detention of persons considered to present such a threat”.¹⁵ It is difficult to envisage where such detention could be justified when a criminal offence involving violence had not been committed.

This is not to argue that the criminal process is the best way of addressing people with mental health problems, diversion is likely to be a far more effective way of addressing offending by people with mental health problems,¹⁶ but that to permit detention on the basis of a risk of danger to others without the guarantees of the criminal process would be a violation of the rights of the individual when carried out “to protect others”.

Specifically in relation to children, any detention would not only have to fulfill these requirements set out for preventive detention in general, but have regard to the best interests of the child as a primary consideration, take account of the right of the child to survival and development to the maximum extent possible, prevent separation of the child from his or her parents except when the separation is in the best interests of the child.¹⁷

Protection of the individual

Where the threat of harm is to the individual with mental health problems, to authorise detention on the basis of those health issues is a paternalistic act - a claim that treatment is in interests of the person being treated and should be carried out regardless of consent.

The Convention on the Rights of the Child (CRC) requires States to “assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child”. In developing this concept, the CRC has stated that for children who have the capacity to make decisions about their care, the respect for their views may be determinative of how they ought to be treated and informed consent should be obtained from the child.¹⁸ Where a child lacks capacity to consent, any decision taken concerning the child must be taken in the best interests of the child.¹⁹

¹⁵ Draft General Comment No. 35, paragraph 15.

¹⁶ There is extensive literature on the benefits of diversion, see Centre for Mental Health, *Young People in the Criminal Justice system Resources* for analysis of the merits of mental health diversion in the UK youth justice system. Available at: http://www.centreformentalhealth.org.uk/criminal_justice/youngpeople.aspx.

¹⁷ UN CRC, Articles 3(1), 6 and 9.

¹⁸ UN CRC, General Comment No. 4, paragraph 32.

¹⁹ UN CRC, Article 3(1). “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

Therefore, to detain a child on the grounds of his or her mental health without consent or, where the child does not have capacity to consent, where to do so is not in his or her best interests violates the child's rights under the Convention on the Rights of the Child and falls short of the special protections required under article 24(1) of the ICCPR.

Recommendation

Therefore, we urge the Human Rights Committee to take account of the complicated interaction of human rights with regards to detention on the basis of mental health. Particular focus should be given to ensure that in the civil setting children are only detained with their consent or, where they are not able to consent, in the best interests of the child. As noted in the current Draft General Comment, in order to effectively monitor any detention which does meet these standards, "patients should be assisted in obtaining access to effective remedies for the vindication of their rights, including initial and periodic judicial review of the lawfulness of the detention, and to ensure conditions of detention consistent with the Covenant."²⁰

IV. Judicial control of detention in connection with criminal charges

Paragraph 33

While the exact meaning of "promptly" may vary depending on objective circumstances, delays should not exceed a few days from the time of arrest. In the view of the Committee, forty-eight hours is ordinarily sufficient to transport the individual and to prepare for the judicial hearing; any delay longer than forty-eight hours must remain absolutely exceptional and be justified under the circumstances. Longer detention in the custody of law enforcement officials without judicial control unnecessarily increases the risk of ill-treatment. Laws in most States parties fix precise time limits, sometimes shorter than forty-eight hours, and these should also not be exceeded. An especially strict standard of promptness should be applied [in the case of juveniles, the judicial hearing should be prepared as soon as possible. National legislation could specify time limits, such as 24 hours.](#)

The issue of timing and delays in decision making can have particularly harmful consequences for children.²¹ As the current version of this paragraph already highlights, a strict standard of promptness should be applied. Nonetheless, it is sometimes dangerous to specify the time limit because it may set a new norm causing states to relax standards. Any time frame, even one as short as 24 hours, can be very detrimental to children in certain circumstances. Time limits need to be adapted to each case and to the justice system in place. The CRC in its General Comment No.10 on Children's rights in juvenile justice defines prompt in paragraph 47 to mean "as soon as possible".

²⁰ Draft General Comment No. 35, paragraph 19.

²¹ UN Committee on the Rights of the Child, General Comment No. 14, paragraph 93.

Paragraph 37 and 38

37. The second requirement expressed in the first sentence of paragraph 3 is that the person detained is entitled to trial within a reasonable time or to release. This requirement applies specifically to periods of pretrial detention, that is, detention between the time of arrest and the time of judgment at first instance. Extremely prolonged pretrial detention may also jeopardize the presumption of innocence under article 14, paragraph 2. Persons who are not released pending trial must be tried as expeditiously as possible, to the extent consistent with their rights of defence. The reasonableness of any delay in bringing the case to trial has to be assessed in the circumstances of each case, taking into account the complexity of the case, the conduct of the accused during the proceeding and the manner in which the matter was dealt with by the executive and judicial authorities. Impediments to the completion of the investigation may justify additional time, but general conditions of understaffing or budgetary constraint do not. When delays become necessary, the judge should reconsider alternatives to pretrial detention. Pretrial detention of juveniles **should not only be exceptional, but a measure of last resort, and when it occurs children** are entitled to be brought to trial in especially speedy fashion under article 10, paragraph 2(b).

38. The second sentence of paragraph 3 requires that detention in custody of persons awaiting trial shall be the exception rather than the rule. It also specifies that release from such custody may be subject to guarantees of appearance, including appearance for trial, appearance at any other stage of the judicial proceedings, and (should occasion arise) appearance for execution of the judgment. This sentence applies to persons awaiting trial on criminal charges, that is, after the defendant has been charged, but a similar requirement results from the prohibition of arbitrary detention in paragraph 1. It should not be the general practice to subject defendants to pretrial detention. Detention pending trial must be based on an individualized determination that it is reasonable and necessary in all the circumstances, for such purposes as to prevent flight, interference with evidence or the recurrence of crime. The relevant factors should be specified in law, and should not include vague and expansive standards such as “public security.” Pretrial detention should not be mandatory for all defendants charged with a particular crime, without regard to individual circumstances. Neither should pretrial detention be ordered for a period based on the potential sentence for the crime charged, rather than on a determination of necessity. Courts must examine whether alternatives to pretrial detention, such as bail, electronic bracelets, or other conditions, would render detention unnecessary in the particular case. If the defendant is a foreigner, that fact must not be treated as sufficient to establish that the defendant may flee the jurisdiction. After an initial determination has been made that pretrial detention is necessary, there should be periodic reexamination of whether it continues to

be reasonable and necessary in light of possible alternatives. If the length of time that the defendant has been detained reaches the length of the highest sentence that could be imposed for the crimes charged, the defendant should be released. [Any use of pretrial detention of juveniles should be a measure of last resort and for the shortest possible period of time.](#)

There is consensus within international juvenile justice standards that pretrial detention of children should not only be exceptional but a measure of last resort.

Article 37(b) of the CRC further requires that “[t]he arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time”. This provision includes pretrial detention. Rule 13.1 of the “Beijing Rules” requires that “detention pending trial shall be used only as a measure of last resort and for the shortest possible period of time” and the “Havana Rules” further emphasise that in relation to juveniles, “[d]etention before trial shall be avoided to the extent possible and limited to exceptional circumstances”.²²

The inappropriate use of pretrial detention of children has persistently featured in the Concluding Observations of the Committee on the Rights of the Child, in relation to 22 of the 41 States that reported to the Committee between September 2010 and May 2012. Of this sample, nine recommendations contained a focus on the number of children held in pretrial detention or the frequency with which children are so held. This information indicates that with regards to children, pre-trial detention is in common use, and is used in a way that does not meet international standards, which have established that the pre-trial detention of children should be not only exceptional, but a measure of last resort.

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

Paragraph 40

The right applies to all detention by official action or pursuant to official authorization, including detention in connection with criminal proceedings, military detention, security detention, counter-terrorism detention, involuntary hospitalization, immigration detention, detention for extradition, [detention of children for drug use, systematic detention of children with mental health problems in mental health institutions](#) and wholly groundless arrests. It also applies to detention for vagrancy or drug addiction, and detention of children for educational purposes, and other forms of administrative detention. Detention within the meaning of paragraph 4 also includes house arrest and solitary confinement. When a prisoner is serving the minimum duration of a prison sentence as decided by a court of law after a conviction, either as a sentence

22 United Nations Rules for the Protection of Juveniles Deprived of their Liberty (the “Havana Rules”) para. 17

for a fixed period of time or as the fixed portion of a potentially longer sentence, paragraph 4 does not require subsequent review of the detention.

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

Suggestion for an additional paragraph under this section:

Article 24(1) of the Covenant entitles every child “to such measures of protection as are required by his status as a minor on the part of his family, society and the State.” This Article entails the adoption of special measures to protect children, in addition to the measures required under article 9 to ensure that everyone enjoys the rights provided for in the Covenant.²³ States have an obligation to specifically address the vulnerability of children in guaranteeing the right to liberty and security of person.

The Draft General Comment No. 35 specifically takes into account the rights of children at a number of points. When explaining the relationship between article 9 and other articles within the Covenant, it would be beneficial to explain the basis within the Covenant for the special protection of children.

²³ See General Comment No. 17: Rights of the Child (Art. 24) 07/04/1989 CCPR.