**Human Rights Committee, DGD, 25 October 2012 – HRW statement**

Thank you Mr. Chair.

Human Rights Watch welcomes the opportunity to provide input to the Human Rights Committee. We have carried out extensive research on the rights to liberty and security around the globe.

We note that the practice of one or a few States that deviates from traditional understanding of Article 9 obligations does not alter those obligations. The existence of an armed conflict or the threat of transnational terrorism does not alter States’ obligations to protect the liberty and security of persons in their territory or subject to their jurisdiction by virtue of being within their power or effective control anywhere in the world.

We believe the General Comment could be particularly useful in setting out in detail the meaning of the Covenant on the following issues

* the permitted grounds for detention under article 9, including during a declared state of emergency in accordance with article 4.
* the rights for detainees that cannot be derogated even during an article 4 state of emergency, in particular the right to judicial review of detention (as first set out in General Comment no 29, paragraph 16).
* the meaning, including time limits, of 'promptly' under article 9, including whether this changes during a state of emergency.

We have submitted more details on the article and detention in the connection of health and disabilities, and terrorism and immigration.

**[Regarding terrorism and immigration]**

**Article 9, paragraph 1**

*[Application of Article 9 in non-international armed conflicts, including those between one or more States and non-state armed groups]*

The protections of Article 9 remain in effect during times of armed conflict, including armed conflict not of an international character, and measures derogating from the Covenant are allowed under Article 4 only if and to the extent that the situation constitutes a threat to the life of the nation. During non-international armed conflict, non-criminal detention must only take place in accordance with the requirements of the Article, meaning such detention must be established in accordance with law. Per General Comment 29, “All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.” Executive proclamation, military decree, or legislation established after the detention has occurred will not normally satisfy the requirements of paragraph 1.

*[Use of immigration detention and deportation proceedings instead of criminal prosecutions]*

Immigration detention and deportation proceedings should not be used to bypass due process requirements of criminal justice systems. In particular, states have used immigration detention and deportation proceedings against foreign nationals suspected of involvement of terrorism where the evidence against them would not satisfy the more rigorous due process requirements for detention under the criminal law. Immigration detention should not be used as a proxy for criminal pre-trial and post-trial detention. Persons suspected of criminal acts should be charged with those crimes and afforded all protections guaranteed under Article 9 and states using immigration proceedings against foreign terrorism suspects should be required to show due diligence in relation to efforts to prosecute.

*[Use of material witness and similar laws instead of criminal prosecutions]*

“Material witness” and similar laws normally used to detain persons for their appearance as a witness at trial should likewise not be used to bypass due process requirements of criminal justice systems. States have used material witness provisions against persons suspected of involvement of terrorism where the evidence against them would not satisfy the more rigorous due process requirements for detention under the criminal law. Material witness provisions should not substitute for criminal pre-trial detention.

**Article 9, paragraph 4**

*[Use of secret evidence in administrative detention and deportation proceedings]*

Secret evidence, variously termed “closed” or “classified,” is evidence not available to the public, the person in detention and often the detainee’s legal counsel. No person should be deprived of liberty or kept in detention on the basis of evidence to which the detainee does not have the ability to respond, including immigration and other forms of administrative detention. The use of specific attorneys, advocates, or representatives who have access to such evidence but cannot share or discuss it with the detainee is insufficient to protect the detainee’s right to liberty.

**Recommendations on detention and health and disabilities**

**Human Rights Watch recommends that, in addressing the issue of detention for the purposes of “treatment” or “rehabilitation,” the General Comment:**

#### Make explicit that no one should be detained solely because of drug dependence.

* Recognize that all persons confined who would be prevented from leaving if they attempted to do so should be considered detained, and entitled to all the basic rights of detainees, including judicial review of detention.
* Recognize that, even if provided by national law, detention for “treatment” or “rehabilitation” that is random, capricious, or disproportionate, not reasonable or necessary given the circumstances of the case, or when it is not accompanied by fair procedures for legal review, constitutes arbitrary detention.
* Take note of the Convention on the Rights of Persons with Disabilities (CRPD) provisions protecting rights to liberty and security, legal capacity, and to live in the community, and recommend that governments reform domestic legislation to fully comply with the CRPD, and to reflect the international standards that all people with disabilities should have equal legal capacity, and equal rights to live in the community, as other citizens.
* Recognize that persons with disabilities are still detained for purposes of Article 9 when they live in institutions but where adequate community-based support services were not presented to them or do not exist.
* Call on States to adopt measures to ensure that all health care services, including mental health care services, are based on the informed consent of the person concerned.
* Recommend measures to improve accountability, including accessible grievance mechanisms for children with disabilities or their parents or guardians to report barriers to care and mistreatment by institution staff.

**In addressing detention in hospital settings, Human Rights Watch recommends that the General Comment:**

* Clarify that deprivation of liberty includes the practice of keeping insolvent patients under guard and prohibiting them from leaving the hospital.
* Highlight the importance of states’ adherence to Article 11 of the Covenant, which prohibits detention for nonpayment of a debt, as an essential component of preventing arbitrary detention.

**In addressing detention in prison, Human Rights Watch recommends that the General Comment:**

* Recognize that, even if provided by national law, detention of family members or other associates as “co-conspirators” if the primary target cannot be found, absent other evidence, constitutes arbitrary detention.
* Clarify the meaning of “promptly” and the criteria for “reasonable time” under the Covenant.
* Underscore the importance of the availability and accessibility of non-custodial pre- and post-trial alternatives where appropriate and that pretrial detention should be the exception, not the rule.
* Provide more detail on the circumstances under which pretrial detention would be justified, as opposed to less restrictive measures.

**In addressing detention deprivation of liberty covered by Art. 9(1), Human Rights Watch recommends that the General Comment:**

* Call on States to prevent and eliminate all forms of violence, abuse, exploitation, and non-consensual medical treatment of all detainees, including persons with disabilities, and to provide appropriate living conditions for individuals living in institutions, including adequate food, water, and sanitation facilities.

Thank you for your attention.