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Right to Liberty and Pre-trial Detention: A
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Standards and Chinese Law and Practice

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Abbreviations

CPL	Criminal Procedure Law
ECHR	European Convention for the Protection of Human Rights
ECtHR	European Court of Human Rights
HRC	Human Rights Committee
ICCPR	International Covenant of Civil and Political Rights
MPC	Ministry of Public Security
RTL	Reeducation Through Labor
SPC	Supreme People's Court
SPP	Supreme People's Procuratorate
UDHR	Universal Declaration of Human Rights

1 Introduction

1.1 China's gradual merging into the international human rights regime

From its earliest days, the People's Republic of China employed human rights proactively as part of its domestic and foreign policy. In the 1950s and 1960s, China supported sovereignty and self-determination claims of the third world emerging states, arguing that these were human rights claims. Before its entry into the United Nations in 1971, "China did not normally legitimate its policies in terms of human rights, but rather in terms of the achievements of the revolution in ending class exploitation, and promoting the material needs and welfare of the working people."¹ After 1971, China became, in theory, a party to the basic human rights principles embodied in the U.N. Charter. In 1982, China was elected to become a formal member of the U.N. Human Rights Commission. Since then, China has participated in the Sub-commission on Prevention of Discrimination and Protection of Minorities² and in working groups concerned with the rights of indigenous populations, freedom of communications, the rights of children, the rights of migrant workers, and the issue of torture. China promoted the idea of a "right to development" with other Third World countries, which the U.N. General Assembly enacted by resolution in 1986. The events in Tiananmen Square in June 1989 brought about a radical shift in international public opinion about China. Since then, China has become the primary target for other countries' human rights diplomacy. The anti-China atmosphere thereafter defeated China's 1993 bid to host the 2000 Olympic Games, and weakened Beijing's negotiating position in talks over intellectual property rights and entry into the GATT/WTO.

¹ Ann Kent, *Between Freedom and Subsistence: China and Human Rights* (1993), p 100

² In 1999 the Economic and Social Council changed its title from Sub-Commission on Prevention of Discrimination and Protection of Minorities to Sub-Commission on the Promotion and Protection of Human Rights.

Since 1990's, China has expressed many times in the international forum that it was willing to abide by international human rights instruments. The 1991 Human Rights White Paper formally acknowledged the international aspect of human rights.³ In Premier Li Peng's Government Work Report in March 1992, Li stated, "We believe that human rights and fundamental freedoms of all mankind should be respected everywhere. ... China agrees that questions concerning human rights should be the subject of normal international discussion."⁴ In April 1994, the Minister of the Foreign Affairs of Chinese government, Qian Qichen, declared that, "China respects the Universal Declaration of Human Rights, the Proclamation of Teheran, the Declaration on the Rights to Development, and other international documents related to human rights."⁵ In the 1995 White Paper *The Progress of Human Rights in China*, Chinese government stated that "China respects the purposes and principles of the Charter of the United Nations related to the promotion of human rights and fundamental freedoms. In recent years China has, as always, actively supported and participated in international activities in the human rights field and has made new efforts to promote the healthy development of international human rights since the Cold War." In October 1997, in his press Conference with American President Bill Clinton, Chinese President, Jiang Zemin, stated: "It goes without saying that, as for general rules universally abided by in the world, China also abides by these rules."⁶

The signing of both the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) by the government of China in 1997 and 1998 respectively was a historical landmark in the transition to the rule of law and more respect for human rights in China. This indicated that China had not

³ See 1991 White Paper on Human Rights, issued by the Information Office of State Council of PR China in 1991

⁴ See 15 Beijing Review xvi (1992). For more information, please refer to the Journal's website at <http://www.bjreview.com>

⁵ The Progress of Human Rights in China, Part X: Working Hard to Promote the Healthy Development of International Human Rights Activities, China Internet Information Centre, at <http://www.china.org.cn/e-white/phumanrights19/p-11.htm> (Dec. 1995)

⁶ Clinton and Jiang in Their Own Words: Sharing a Broad Agenda, N.Y. Times, Oct. 30, 1997, at A20

paid only lip service in promoting protection of human rights, on the contrary, had stridden forward a substantial step. With the approval of the ICESCR by the National People's Congress of China in February 2001, and after China's entry into the WTO in December, 2001, the ratification of the ICCPR has become a more foreseeable development in near future. Although ratification of the Covenant by China may still take some time, the on-going preparation is already a positive sign of real progress in the right direction. The active preparation is a process recognizing the ICCPR as a code of universal standards. It requires the reform of the law and practice in the light of the standards. Preparing the ratification of the ICCPR requires comprehensive assessment and adjustment of the Chinese laws according to the ICCPR standards.

1.2 Motivation of the thesis

In implementing the ICCPR standards, criminal justice is an area of great potential for improvement in China. From the 1990s to date, China succeeded in making a series of important changes to its criminal law, the law of criminal procedure, and the laws governing the judiciary, the prosecutors, the police and the legal profession. These changes include that acts not stipulated in explicit terms as crimes are no longer deemed as crime (*nullum crimen, nulla poena sine praevia lege poenali*), the highly ideologically-motivated category of "crimes of counterrevolution" was repealed and replaced by "crimes endangering national security", a person is presumed innocent until proven guilty by a court or tribunal at the closing of the trial and so on. The reform of the law, which is still going, has greatly reduced the gap between the Chinese criminal laws and the relevant ICCPR standards.

However, important issues still need to be addressed through continuing reform of the Chinese criminal justice system. To prepare for the ratification of the ICCPR, the reformers need to examine the remaining differences and

see what can be done to reduce them. This is the starting point of this Master's thesis. To cover all aspects of the issues in such a paper is unrealistic. It would be more proper to confine the research scope into a specific issue. In this case, this thesis will focus on the issues related to the right to liberty and pre-trial detention.

The right to liberty and security of person, expressed in Article 9 of ICCPR, as well in other international and regional human rights instruments, is one of the oldest and most fundamental rights. It is to be found in medieval charters, beginning with the *Magna Charta Libertatum* in 1215.⁷ Prohibition of arbitrary arrest and detention as provided for in those documents mentioned above shares a common history with the more programmatic slogan of the right to liberty. In the words of the *Magna Charta*:⁸

No free man shall be taken or imprisoned or disseised or outlawed or exiled or in any way ruined, nor we go or send against him, except by lawful judgement of his peers or by the law of the land.

Even though the *Magna Charta* guaranteed rights only to a limited group of people, namely feudal nobleman, it nevertheless required that arrest and detention be lawful, and protected against the excesses of his ruler.

Protection against arbitrary arrest and detention as one of the main dimensions and concretizations of the right to liberty of person was further expressed in the *British Bill of Rights* (1689) and *Habeas Corpus Acts* (1640, 1679). The right was further developed, and its scope of application widened, after the French Revolution and the *French Declaration of Rights of Man* (1789), as the right to liberty was guaranteed to all nationals in the constitutions of national States.⁹

⁷ M. Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary*, 1993, Strasbourg, 159

⁸ G. Alfredsson and A. Eide (eds.), *The Universal Declaration of Human Rights: A Common Standard of Achievement*, 209

⁹ United Nations, "Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile", UN Publication Sales no 65.XIV.2, pp. 9-17.

The UDHR and ICCPR, together with other international human right instruments, further widen the sphere of persons protected by human rights. Article 2(1) of ICCPR and Principle 5 of the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* which was adopted by General Assembly resolution 43/173 of 9 December 1988 express that all of their State parties should ensure the rights prescribed in the instruments apply to all persons within the territory of any given State, without distinction of any kind, such as race, colour, sex, language, religion or religious belief, political or other opinion, national, ethnic or social origin, property, birth or other status.

The current pre-trial detention system of China, to a large extent, does have a long way to go to meet the international standards set down by ICCPR and other international human rights instruments, and it is urgent to assess the distance in order to promote a sound reform before ratifying the Covenant. As a legal practitioner from the prosecution service (People's Procuratorate) of China, I have long been concerned myself with the human rights issues within my professional field. According to Chinese law, prosecutors have the powers to decide, approve and supervise pre-trial detention although the reasonability of the law itself is doubtful. A comparative study on the international human rights standards and the Chinese law and practice on the issue of right to liberty and pre-trial detention would be helpful to develop my academic knowledge and practical skills in dealing with the problems of violation of human rights occur in my daily work.

1.3 Research scope of the thesis

The structure of the thesis when analyzing the international human right standards and examining the domestic laws and legal practice of China follows that of article 9 of ICCPR, namely, follow the arrangement of the paragraphs of article 9. Actually, article 9 of ICCPR, as mentioned in

General Comment 8 of the Human Rights Committee (hereinafter HRC), deals with a much broader concept of deprivation of liberty than the pre-trial detention. That is why this paper also covers other human rights issues contained in article 9 of ICCPR in addition to pre-trial detention. A general and comprehensive understanding of article 9 and the right of liberty has its inherent value as when a State, i.e. China, facing ratifying the Covenant, it needs to examine all human right issues related to article 9 and the right to liberty, but not merely its pre-trial detention system.

As for the international human rights standards referred to in this thesis, there are two main categories: those set forth within the framework of ICCPR, including the text of the Covenant, General Comments, jurisprudences, and Concluding Observations of the Human Right Committee (HRC) and those set forth in other international human rights instruments, such as *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, UNGA resolution 43/173, 1988. Furthermore, when discussing some specific issues, for example, who should be deemed as “other officer authorized by law to exercise judicial power” in article 9(3), it seems that documents of HRC did not provide clear criteria, whereas the jurisprudence of European Court of Human Rights did so. Thus, those criteria concluded in the findings of European Court of Human Rights are quoted when necessary in the thesis to understand and explain the specific question. The “domestic law” of China examined in this thesis should be understood as a broad concept of law,¹⁰ which includes (a) these legislated by National People’s Congress (hereinafter NPC) and its Standing Committee, such as the *Constitutional Law*, *Criminal Procedure Law* (hereinafter CPL), *Legislation Law* and so on; (b) these enacted by Supreme People’s Court (hereinafter SPC) and Supreme People’s Procuratorate (hereinafter SPP), such as *SPC’s Interpretation on Several Issues Regarding Implementation of the Criminal Procedure Law* and *SPP’s People’s Procuratorates’ Rules on Implementation of the Criminal*

¹⁰ English version of the text of the laws cited in this thesis can be found at: <http://en.chinacourt.org>

Procedure Law; (c) these promulgated by the State Council, Ministry of Public Security (MPC), and Ministry of Justice, such as *Decision on Reeducation Through Labor*, *Rules on the Process of Handling Criminal Cases by Public Security Organs*. Furthermore, current legal practice related to deprivation of liberty and human rights protection are also to be discussed, however, it is not the issue to be emphasized in this thesis. Although the real right is different from the legal right, this is not a problem that exists only in the field of human rights law, but a prevalent one existing in the fields of other laws of China.

2 Right to liberty and security of person

The right to liberty contemplates individual liberty in its classic sense, that is, the physical liberty of the person. Its aim is to ensure that a person is not deprived of his liberty in an arbitrary manner. The right to security, on the other hand, is the right to the protection of the law in the exercise of the right to liberty. “Liberty and security are the two sides of the same coin.”

¹¹ Article 9 of UDHR and article 9 (1) of ICCPR respectively prescribe the general requirement of the right to liberty and prohibition of arbitrary arrest and detention. The final text of Article 9 of UDHR is short and vague:

No one shall be subjected to arbitrary arrest, detention or exile.

It prohibits arbitrary arrest, detention and exile without giving any more detailed explanation about the meaning of the words. In fact, in the early draft of the UDHR, requirements as lawful arrest, the right to an immediate judicial hearing in front of a judge, and the right to trial within reasonable time can be found.¹²

The Commission on Human Rights, in its second session in 1947, decided that the Bill of Human Rights should include three separate instruments - declaration, convention and implementation. Several proposals for inclusion of the permissible grounds for detention in the convention were presented to the Drafting Committee. It was clear that there was no consensus on the wording of the permissible grounds for detention.¹³

¹¹ J.E.S. Fawcett, *The Application of the European Convention on Human Rights* (Oxford: Clarendon Press, 1987), p. 70

¹² See drafts before the Drafting Committee Secretariat Draft E/CN.4/AC.1/3 art 6, British draft art 9-10 E/CN.4/AC.1/4, Cassin draft art 10 E/CN.4/AC.1/W.2/Rev.1 and Committee on Human Rights at its second session art 5 Annex to E E/600

¹³ See E/CN.4/95 p. 20-26

The discussion of article 9 by the Third Committee of the General Assembly concerned the style of the declaration, which “should be a brief and simple statement of general principles; precise legal provisions should rather be included in the covenant.”¹⁴ In the final vote in the Third Committee, all specific limitations were defeated and thus left to the future convention.

Article 9 (1) of ICCPR reads:

Every one has the right to liberty and security of person. No one shall be subjected to arbitrary arrest and detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

The final text of Article 9 was formulated in the Commission on Human Rights and is based primarily on British drafts that go back to 1947.¹⁵ The 1947 draft of a working group contained a number of grounds, including imprisonment, pretrial detention, failure to obey a court order, mental illness, custody of minors and detention prior to expulsion. This draft was followed by proposals from the United States, South Africa, China and a number of other States containing roughly 40 additional reasons for restriction: for alcoholics, persons with contagious diseases, members of the military, nationals of an enemy State, spies, suicidal persons, witnesses, etc. Since it quickly became clear that it would be impossible to agree on an exhaustive list of permissible cases of deprivation of liberty, and because a list of such length would not make a very favorable impression,¹⁶ the Commission on Human Rights unanimously adopted in 1949 an Australian proposal prohibiting anyone from being arbitrarily arrested or detained.¹⁷ A supplementary motion by India, which aimed at the lawfulness of deprivation of liberty, was approved shortly thereafter by a vote of 10:6 in a

¹⁴ G. Alfredsson and A. Eide (eds.), *The Universal Declaration of Human Rights: A Common Standard of Achievement*, 209

¹⁵ E/CN.4/21, Annex B (Art.10).

¹⁶ See A/2929, 35 (para 28).

¹⁷ E/CN.4/SR.95, 6.

form amended by the Philippines.¹⁸ A British motion that sought to replace the second sentence (and thus the uncertain word “arbitrary”) with the requirement - hardly any clearer - of respect for the right to liberty and security of person was defeated by a large majority.¹⁹ A Dutch proposal to return to an exhaustive listing of permissible deprivations of liberty met with as little success as the attempts to replace the word “arbitrary” with “illegal”. Despite the differing views, para. 1 of the HRCComm draft was finally approved unamended without dissent.

2.1 International human rights standards

2.1.1 Right to liberty

In contrast to such absolute rights as the prohibition of slavery and torture, the basic right of personal liberty does not strive toward the ideal of a complete abolition of State measures that deprive liberty; rather, it merely represents a procedural guarantee. It is not the deprivation of liberty in and of itself that is disapproved of but rather that which is arbitrary and unlawful.²⁰ It is the obligation of the State’s legislature to define precisely the cases in which is permissible and the procedure to be applied.²¹

The HRC’s General Comment 8 on Article 9 of ICCPR expands on the meaning of the right to liberty:

Article 9 which deals with the right to liberty and security of persons has often been somewhat narrowly understood in reports by States parties, and they have therefore given incomplete information. The Committee points out that paragraph 1 is applicable to all deprivations of liberty, whether in criminal cases or in other cases such as, for example, mental illness,

¹⁸ E/CN.4/234; E/CN.4/SR.96, 9.

¹⁹ E/CN.4/353/Add.10; E/CN.4/SR.147, Para 35.

²⁰ M. Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary, 1993, Strasbourg, 160

²¹ Ibid

vagrancy, drug addiction, educational purposes, immigration control, etc. It is true that some of the provisions of article 9 (part of para. 2 and the whole of para. 3) are only applicable to persons against whom criminal charges are brought. But the rest, and in particular the important guarantee laid down in paragraph 4, i.e. the right to control by a court of the legality of the detention, applies to all persons deprived of their liberty by arrest or detention. Furthermore, States parties have in accordance with article 2 (3) also to ensure that an effective remedy is provided in other cases in which an individual claims to be deprived of his liberty in violation of the Covenant.

Nowak points out that the term *liberty of person* provided for in article 9 of ICCPR is quite narrow and must not be confused with that of liberty in general. Liberty of person relates only to a very specific aspect of human liberty: the freedom of bodily movement in the narrowest sense. An interference with personal liberty results only from the forceful detention of a person at a certain, narrowly bounded location in the cases enumerated in General Comment 8. All less grievous restrictions on freedom of bodily movement, such as limitations on domicile or residency, exile, or expulsion from State territory do not fall within the scope of the right to personal liberty but instead under freedom of movement under article 12 and 13 of ICCPR.²²

The finding of the HRC concerning the case *Celepi v. Sweden* (456/91) holds the same opinion with Nowak.²³ In this case, Celepi was prohibited from traveling freely throughout the State, as he was confined to certain city limits. The State Party argued that article 9 did not apply to mere restriction on liberty of movement which was covered by article 12. The restrictions on the author's freedom of movement were not so severe that his situation could be characterized as a deprivation on liberty within the meaning of article 9 of the Covenant. Moreover, the author was free to leave Sweden to

²² Ibid

²³ *Celepi v. Sweden* (456/91), CCPR/C/51/D/456/1991, para. 6.1

go to another country of his choice.²⁴

The author responded that a residence restriction could be considered a deprivation of liberty when it was of considerable duration or when it has serious consequences. He claimed that his condition, being under residence restriction for nearly seven years and having to report to the police three times a week for five years, had been so severe as to amount to a deprivation of liberty, within the meaning of article 9 of the Covenant.²⁵

The Committee found the complaint incompatible with the Covenant, so it apparently agreed with the State party.²⁶ It seems that article 9 therefore applies only to severe deprivations of liberty, such as incarceration within a certain building (e.g. prison, psychiatric institution, immigration center), rather than restrictions on one's ability to move freely around a State, or even smaller locality. The latter circumstances raise issues with regard to article 12 rather than article 9.

2.1.2 Right to security of person

Article 9 has usually been invoked in the context of deprivation of liberty. However, the article also guards the right to security of the person. The significance of this right is controversial, for example, the European Court of Human Rights does not attribute any independent significance beyond personal liberty to the right to security in article 5 of the ECHR.²⁷

The answer to the question that whether this right applies to persons out of detention can be found in the case *Delgado Paez v. Colombia* (195/85).²⁸

The author in the case was a Colombia teacher of religion and ethics who

²⁴ *Celepi v. Sweden* (456/91), CCPR/C/51/D/456/1991, para. 4.5

²⁵ *Celepi v. Sweden* (456/91), CCPR/C/51/D/456/1991, para. 5.3

²⁶ *Celepi v. Sweden* (456/91), CCPR/C/51/D/456/1991, para. 6.1

²⁷ See, e.g., *CASE OF BOZANO v. FRANCE*, judgment of 18 December, 1986, Series A 111, para. 2

²⁸ *Delgado Paez v. Colombia* (195/85), CCPR/C/31/D/194/1985, para 5.5

had made complaints against the Apostolic Prefect and the education authorities concerning discrimination against him. The author received death threats as a result of these complaints and was attacked in the city of Bogota. After a work colleague was shot dead by unknown assailants, the author fled the country and obtained political asylum in France. The author filed a complaint alleging that Colombia government had violated its obligation to protect his right to equality, justice, and life, and as such he had been forced to leave the country. Although not initially invoked by the author, the Committee found a violation of article 9(1) in the following terms:

... The first sentence of article 9 does not stand as a separate paragraph. Its location as a part of that paragraph could lead one to the view that the right to security arises only in the context of arrest and detention. ... Although in the Covenant the only reference to the right to security of the person is to be found in article 9, there is no evidence that it was intended to narrow the concept of the right to security only to situations of formal deprivation of liberty. ... It cannot be the case that, as a matter of law, States can ignore known threats to the life of persons under their jurisdiction, just because he or she is not arrested or otherwise detained. State parties are under an obligation to take reasonable and appropriate measures to protect them. An interpretation of article 9 which would allow a State party to ignore threats to the personal security of non-detained persons within its jurisdiction would render totally ineffective the guarantees of the Covenant.

The Committee's decision in the case above illustrates that the right to personal security is independent of the guarantee of liberty. It also reveals that the State is under an obligation to protect a person's right to personal security against attacks by private persons. The Delgado Paez decision regarding security of the person and obligations of the State parties to protect these who are not arrested or otherwise detained has been followed in *Tshishmbi v. Zaire* (542/93)²⁹ and *Leehong v. Jamaica* (613/95).³⁰

²⁹*Tshishmbi v. Zaire* (542/93), CCPR/C/56/D/542/1993, para 5.4

2.1.3 Definitions of “arrest” and “detention”

When the British delegate in the 3rd Committee of the GA submitted his amendment to replace the words “unlawful arrest or deprivation of liberty” in 9(5) of the draft of Commission on Human Right with “unlawful arrest or detention”, other delegates viewed that the British motion as restricting the scope of the compensation claim.³¹ In the final text of article 9 of ICCPR, two cases of deprivation of liberty are emphasized: “arrest” and “detention”. In accordance with their ordinary meaning, both forms refer only to the acts of State officials and do not cover any other forms of deprivation of one’s liberty, such as holding of minors, mentally ill persons, alcohol or drug addicts or vagrants. However, according to Nowak, this logical-systematic interpretation leads to absurd results, which do not comport with the object and purpose of this provision.³² Nowak pointed out that:

*It must be assumed that the narrow majority of 30 States (against 27) that voted in favour of the above-mentioned British motion in the 3rd Committee of GA supported a broad interpretation of the term “arrest” and “detention”. This means that article 9 does not recognize any other forms of deprivation of liberty beyond these two cases. Therefore, the holding of minors, mentally ill persons, alcohol or drug addicts or vagrants, as well as deprivation of liberty by private person, are to be understood as arrest or detention, making the guarantees in para. 1, 4 and 5 fully applicable. Only para. 2 and 3 are of limited applicability.*³³

In the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, “arrest” is interpreted as the act of apprehending a person for the alleged commission of an offence or by the

³⁰ Leehong v. Jamaica (613/95), CCPR/C/66/D/613/1995, para 9.3

³¹ A/C.3/SR.863, Para 42

³² M. Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary, 1993, Strasbourg, 168

³³ Ibid

action of an authority; and “detention” is interpreted as the condition of detained persons as defined above (“detained person”, in the same Body of Principles, means any person deprived of personal liberty except as a result of conviction for an offence).³⁴

So it is very clear that, the scope of the terms of “arrest” and “detention” extends to all forms of deprivation of one’s liberty, but cannot be understood narrowly as criminal coercive measures.

2.1.4 Requirement of legality

There are two permissible limitations to one’s right to liberty under article 9. First the deprivation of liberty is permissible only if it is ‘in accordance with procedures as are established by law’. Hence, arrest and subsequent detention must be specifically authorized and sufficiently circumscribed by law.³⁵ Secondly the law itself and the enforcement of that law must not be arbitrary. The principle of legality is based on an Indian proposal, which aimed at the lawfulness of the procedure and was submitted as an alternative to an exhaustive listing of all permissible cases of deprivation of liberty.³⁶

The word “law” refers to the domestic legal system. The requirement of lawful detention does not favour any particular legal tradition. Both statutory law and common law systems may fulfil the requirement of lawfulness. The term “law” is to be understood here in the strict sense of a general-abstract, parliamentary statute or an equivalent, unwritten norm of common law accessible to all individuals subject to the relevant jurisdiction. Administrative provisions are thus not sufficient.

An example of an “unlawful” arrest occurred in *Domukovsky et al. v.*

³⁴ See General Assembly resolution 43/173 of 9 December 1988

³⁵ Y. Dinstein, ‘Right to Life, Physical Integrity, and Liberty’ in L. Henkin (ed.), *The International Bill of Rights* (Columbia University Press, New York, 1981), 130

³⁶ E/CN.4/234

Georgia (623-624/95, 626-627/95).³⁷ One of the authors was kidnapped from Azerbaijani territory by Georgian agents, in breach of Azerbaijani law and article 9. This case appears to confirm that an arrest must be “lawful” within the law of both the arresting State and the State where the arrest takes place. Of course, in most cases, these State will be one and the same. Furthermore, the principle of legality is violated if somebody is either arrested or detained on grounds which are not clearly established in a domestic law, or which are contrary to such law as in the case of *Bolanos v. Ecuador* (238/87).³⁸

2.1.5 Prohibition of arbitrariness

Whether the word “arbitrary” has any substantive content remains a question. The issue was considered in the *travaux preparatoires* of the UDHR, during which it emerged that term “arbitrary” means the same as “illegal”, or “unjust” or “both illegal and unjust”. In the end, none of these expressions was included in the text of the Declaration.³⁹ Later, in 1965, the UN Study on this article adopted the following definition:

*An arrest of detention is arbitrary if it is (a) on grounds or in accordance with procedures other than those established by law, or (b) under the provisions of a law the purpose of which is incompatible with respect for the right to liberty and security of person.*⁴⁰

As with the requirement of legality, the prohibition of arbitrariness was adopted by the Commission on Human Rights as an alternative to an exhaustive listing of all permissible cases of deprivation of liberty. It is based on an Australian proposal that was highly controversial in both the

³⁷Domukovsky et al. v. Georgia (623-624/95, 626-627/95), CCPR/C/62/D/623/1995, para 18.2

³⁸ Bolanos v. Ecuador (238/87), CCPR/C/36/D/238/1987, para.9

³⁹ Human Rights Commission E/CN.4/SR.47, para. 43. Third Committee of the GA A/4045, para. 43-49

⁴⁰ United Nations, “ Study of the Right of Everyone to be Free from the Arbitrary Arrest, Detention and Exile”. UN Publication Sales No 65.XIV.2 (1965), para. 7

Commission on Human Rights and the 3rd Committee of GA. Some delegates were of the view that the word “arbitrary” meant nothing more than unlawful, the majority stressed that its meaning went beyond this and contained elements of injustice, unpredictability, unreasonableness, capriciousness and unproportionality, as well as the Anglo-American principle of due process of law.⁴¹

The meaning of arbitrariness in the context of article 9(1) was considered by Human Rights Committee in the case *Van Alphen v. The Netherlands* (305/88) concerning a Dutch solicitor who was detained for more than nine weeks in order to force him to waive his professional obligation to secrecy and to solicit evidence which could be used in the criminal investigation against his client. The Committee held that:

*... The drafting history of article 9, para. 1, confirms that ‘arbitrariness’ is not to be equated with ‘against the law’, but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. This means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all the circumstances. Further, remand in custody must be necessary in all the circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime. ...*⁴²

Even if one’s initial arrest is not arbitrary, the subsequent period of detention may breach article 9(1). In *Spakmo v. Norway* (631/95), the author was twice arrested for failure to abide by a police order to cease demolition work on a particular site. Both arrests conformed to article 9(1). However, the State Party failed to demonstrate that Spakmo’s detention for eight hours after the second arrest was reasonable, so that detention breached article 9(1).⁴³

⁴¹ See views of the Committee in *Van Alphen v. The Netherlands* (305/88), para 5.8

⁴² *ibid*

⁴³ *Spakmo v. Norway* (631/95), CCPR/C/67/D/631/1995, para 6.3

2.2 Chinese laws and practice

2.2.1 Introduction of the laws protecting the right to liberty

In China, the right to liberty is in the first place prescribed in Constitutional Law. Article 37 of the *Constitutional Law of PR China* stipulates that:

*The freedom of person of citizens of the People's Republic of China is inviolable. No citizen may be arrested except with the approval or by decision of a people's procuratorate or by decision of a people's court, and arrests must be made by a public security organ. Unlawful deprivation or restriction of citizens' freedom of person by detention or other means is prohibited; and unlawful search of the person of citizens is prohibited.*⁴⁴

It seems that “arrest” in article 37 of the Constitutional Law specially refers to the criminal proceedings as it requires “approval or by decision of a people's procuratorate or by decision of a people's court”. But the clause “Unlawful deprivation or restriction of citizens' freedom of person by detention or other means is prohibited” here does not contain any implication that it should only apply to criminal detention.

The *Criminal Procedure Law* and some other laws and rules related to criminal justice,⁴⁵ especially these interpretations of law issued by the Supreme People’s Court and the Supreme People’s Procuratorate, contain more detailed provisions which provide procedure guarantees of the right to

⁴⁴ English version of the provisions quoted here is from its official website of Supreme People’s Court of P.R. China, <http://en.chinacourt.org>

⁴⁵ for instance, *Provisional Interpretation on Several Issues Regarding Implementation of the Criminal Procedure law* issued by the Supreme People’s Court, *People’s Procuratorates’ Rules on Implementation of the Criminal Procedure Law* issued by the Supreme People’s Procuratorate.

liberty.⁴⁶ How and in what degree these laws and rules protect the right to liberty are to be discussed latter.

It is worthy to mention two newly enacted laws. The first one is the Administrative Punishment Law (1996) which requires that any coercive measures involving limitation or deprivation of an individual's personal liberty be authorized by legislation must be passed by the National People's Congress or its Standing Committee.⁴⁷ The second one is the Legislation Law (2000), passed by the NPC, also contains an analogous clause which clearly eliminates the possibility of any state organ other than the NPC or its Standing Committee legislating to authorize coercive measures limiting or depriving individuals of their liberty.⁴⁸

2.2.2 Violations of article 9(1) caused by administrative detentions

Despite of such provisions guaranteeing the right to liberty, a number of violations of the right to liberty, which could be ascribed to the nature of the legal system, still exist in China today. A typical example is that various types of administrative detention continue to be practiced in China. These include: "Taking-in for questioning" (*liuzhi panwen*), "Reeducation through labor," (*Laodong Jiaoyang*, hereinafter "RTL") and "Solitary confinement for investigation" (*geli shencha*). Usually initiated by the police, these measures fall outside of judicial control and review. They are applied frequently and indiscriminately against specific populations such as migrant workers (Taking-in for questioning), corruption suspects (Solitary confinement for investigation) or those who commit minor offence but their

⁴⁶ In China, law implementation agencies have vast power to make detailed rules on the implementation of laws. The SPC and SPP have issued comprehensive implementation rules for virtually every major law passed by the NPC and its Standing Committee. To name a number of examples, the SPC enacted general rules on implementation of the General Principles of Civil Law, the Civil Procedure Law, the Administrative Litigation Law, as well as the Marriage Law. The rules on implementation of the laws passed by the NPC and its Standing Committee are inferior to the laws themselves.

⁴⁷ See article 9 of the Administrative Punishment Law of P.R. China

⁴⁸ See article 8(5) of the Legislation Law of P.R. China

acts do not merit criminal punishment (RTL).

Under these administrative detentions, detainees are deprived of their freedom by the administrative authorities for certain purposes. According to the HRC's General Comment 8 and the findings of its jurisprudences, these administrative detentions clearly fall within the scope of article 9(1) of ICCPR. These forms of deprivation are covered by the terms of "arrest" and "detention" prescribed in article 9(1) of ICCPR and the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*.⁴⁹

Furthermore, the UN Center for Human Rights (now known as the Office of the High Commissioner for Human Rights) has outlined general guidelines for the application of administrative detention in the event it must be used. These guidelines stipulate that:

The law which authorizes administrative detention should be formulated specifically, with precise guidelines and criteria as to when detention is appropriate. These criteria should limit detention to persons who pose an extreme and imminent danger to security

*All persons arrested under an administrative detention order should be served with a copy of that order, which should clearly indicate the reason they are being detained. Persons detained should have the right to appear in court, with legal counsel, within days after their arrest in order that the court may determine the necessity of continued detention...*⁵⁰

Administrative detentions as practiced in China clearly do not meet such standards. In many cases, administrative detentions are abused by officials who seek to circumvent detention time limits or expeditiously punish those whose guilt cannot be proved through normal judicial procedures.

⁴⁹ See supra Definitions of "arrest" and "detention", 2.1.3

⁵⁰ Human Rights and Pre-trial Detention, A Handbook of International Standards relating to Pre-trial Detention, Professional Training Series, No. 3, (United Nations; NY: 1994), p. 43

2.2.2.1 “Taking-in for questioning” and “coercive summons”

By “Taking-in for questioning” (*liuzhi panwen*), police may hold a suspect detained on the spot while patrolling for as long as 24 hours, with a possible extension of an extra 24 hours.⁵¹ This is a “stop-frisk” detention authorized by the Police Law. Since the Police Law does not specify that this measure can only be employed in the process of official patrolling, police may use it at any time. Some prosecutors reported that on occasion police deliberately use it together with the other coercive measures prescribed in the Criminal Procedure Law, such as the coercive summons, in order to keep crime suspects in official custody as long as possible.⁵²

Having similarities with “Taking-in for questioning”, “coercive summons” is a measure by which authorities may forcibly take in a suspect for questioning for a period as long as 12 hours.⁵³ All the public security organs (police), procuratorate and courts may apply this measure.⁵⁴ According to interpretations issued by these agencies, a person held under this measure must be present at a designated (though undefined) place. Although the CPL itself does not specify what type of place this must be, it need not necessarily be a police station.⁵⁵ The CPL does not specifically limit the number of times coercive summons may be used to prolong a

⁵¹ Article 9 of the Police Law provides: “in order to maintain public security order, people’s police may, upon showing an official identification, question and examine those who are suspected of breaking laws or committing crimes at the scene. Police may take them in for further questioning upon finding the following situations:

1. they are accused of crimes;
2. they are suspected of committing crimes at the scene;
3. they are suspected of committing crimes and their identification is unclear;
4. they are carrying items that are suspected to be stolen.

The duration of such questioning shall last no more than 24 hours after the suspects are taken into custody, while under certain special circumstances and upon being approved by a public security department of above county level, lasting no more than 48 hours”

⁵² See, Questions & Answers, “Could Coercive Summons and Taking-in for Questioning Be Used in Turn?”, Procuratorate Daily, August 12, 1999. Located at: http://www.jcrb.com.cn/jbhg/1999/html/1999/08/12/C19990812_04.htm.

⁵³ Article 50 of the CPL.

⁵⁴ Articles 63-65 of the SPC Interpretations, articles 32-36 of the SPP Rules and articles 60-62 of the MPS Measures stipulate the detailed practices in applying this measure.

⁵⁵ See Article 35 of the SPP Rules and Article 60 of the MPS Measures.

person's detention. According to some reports, some public security department personnel repeatedly reapplied the coercive summons measure to the same person without discontinuing questioning.⁵⁶

There is no apparent legal differentiation between "taking in for questioning" and "coercive summons" in terms of crime investigation. Therefore, these two methods can be conveniently manipulated or abused by officials. Some reports suggest that officials have employed these two measures in turn as a means to hold suspects in custody for a longer time period.⁵⁷ Some have strongly opposed such administrative measures and have advocated limits on time period people can be held in custody using these measures. One article suggests that the time limit for the Police Law should not be longer than the coercive summons (i.e., not exceeding 12 hours).⁵⁸ Others have proposed that there should be at least a 24 hour break between two coercive summonses,⁵⁹ since some police officers use this measure consecutively despite the prohibition against unlawful detention through the use of consecutive coercive summonses stipulated in the CPL. Currently, the CPL does not limit the number of times coercive summons may be used nor does it specify how long authorities must wait between the use of consecutive coercive summonses.⁶⁰

2.2.2.2 Reeducation through labor

Taking "reeducation through labor" as an other example, it still remains a preferred option for police to detain suspects and punish minor offenders since it is entirely at the discretion of the public security organ. By invoking this measure, the public security organs may punish those suspects whose

⁵⁶ Chen Guangzhong et al, *Study on the Issues of Implementation of the Criminal Procedure Law*, China Legal System Press, Beijing, May 2000, p. 83-84.

⁵⁷ Some commentators warned that the maximum detention using a combination of *liuzhi panwen* and *juchuan* could be 60 hours. See Wang Ting, "How Does Law Enforcement Work Fit in the Revised Criminal Procedure Law?", *Jurisprudence*, No. 5, 1997, p. 14.

⁵⁸ See Li Yonghong: "Perfecting Legislation on Administrative Coercive Measures Limiting Citizens' Personal Liberty" (*xianzhi gongmin renshen ziyou de xingzheng qiangzhi cuoshi ji lifa wanshan*), *Jurisprudence (faxue)*, No. 9, 1997, p. 35.

⁵⁹ Chen, *Study on the Issues of Implementation of the CPL*, p. 84

⁶⁰ Article 92 of CPL.

guilt officials are unable to prove through normal procedures. Until 1957, RTL was not authorized by any formal national decision. Then on 1st August, 1957, the State Council submitted a Decision on RTL to the National People's Congress Standing Committee for approval. The NPC Standing Committee passed this decision, authorizing the State Council to administer the use of RTL, which in practice meant that implementation was under the Ministry of Public Security.⁶¹ From 1957 to 1979, RTL was employed in a very flexible way, both in terms of the scope of application, as well as the length of sentence. On November 29, 1979, the State Council issued a second Decision on RTL, with the approval of the NPC Standing Committee.⁶² In this decision, for the first time terms for RTL were fixed at between one and three years, with a possible extension of one year.

On January 21, 1982, the Ministry of Public Security issued its first set of comprehensive regulations on RTL, which were approved by the State Council.⁶³ The Regulations stipulated the procedure for deciding on RTL sentences, detailed the categories of people punishable under RTL⁶⁴ and allocated responsibilities for the administration of RTL facilities. Following the enactment of these regulations, in May 1983 the management of RTL facilities was handed over to the Ministry of Justice, while the Ministry of Public Security retained the authority to decide who should be punished under the RTL regulations.

⁶¹ NPC Standing Committee: Resolution on Approving the Decision of the State Council on the Issue of the Reeducation through Labor, August 1, 1957.

⁶² NPC Standing Committee: Resolution on Approving the Supplementary Decision of the State Council on the Issue of Re-education through Labor, November 29, 1979.

⁶³ The Notice of the State Council on Circulating the Trial Practices of the Ministry of Public Security on Re-education through Labor, January 21, 1982.

⁶⁴ These categories of people are:

- 1, Those counterrevolutionaries or elements who oppose the Chinese Communist Party or Socialism, where their offenses are minor, but do not merit criminal punishment;
- 2, Those who commit minor offenses relating to group crimes of murder, robbery, rape and arson, but whose acts do not merit criminal punishment;
- 3, Those who commit minor offenses such as hooliganism, prostitution, theft, or fraud but whose acts do not merit criminal punishment;
- 4, Those who gather to fight, disturb social order, or instigate turmoil but whose acts do not merit criminal punishment;
- 5, Those who have a job but repeatedly refuse to work, and disrupt labor discipline, complain endlessly, as well as disrupt production order, work order, school and research institute order and the people's normal life, but whose acts do not merit criminal punishment;
- 6, Those who instigate others to commit crimes, but whose acts do not merit criminal punishment.

Therefore, it is not difficult to find that RTL is currently only authorized by a resolution by the NPC approving measures proposed by the State Council, not by national legislation passed by the NPC nor its Standing Committee. Strictly speaking, this is a violation of the Administrative Punishment Law and Legislation Law.⁶⁵

In Nowak's view, the term "law", which prescribes "lawful detention", is to be understood in the strict sense of a general-abstract, parliamentary statute or an equivalent, and "administrative provisions are thus not sufficient".⁶⁶ The current regulatory framework of RTL is issued by the administrative authorities, and obviously belongs to administrative provision, but not the "parliamentary statute or an equivalent". It thus cannot meet the requirement of legality set up by the article 9(1) of ICCPR.

While initially the targets of RTL were so called "counterrevolutionaries" who had committed only minor offenses, the 1957 Decision shifted the measure's focus, providing for the detention of "lazy people" who were to be "reformed" in order to become self-sufficient. The scope of people who can be held under RTL is extremely unclear under the 1982's Regulations on RTL and thus the measure can easily be manipulated by the authorities. Besides, punishment under RTL is heavier than that provided for many crimes in the Criminal Code.⁶⁷ The longest length of deprivation of one's liberty can be four years, which expressly reflects RTL's inappropriateness. RTL is inherently an arbitrary form of deprivation of one's liberty.

⁶⁵ Article 9 of the Administrative Punishment Law of P.R. China and article 8(5) of the Legislation Law of P.R. China, see supra note 47, 48 and accompanying text.

⁶⁶ M. Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary, 1993, Strasbourg, p 171

⁶⁷ See Article 38 of The Criminal Law of PR China: The term of public surveillance shall be not less than three months but not more than two years. Article 42: A term of criminal detention shall be not less than one month but not more than 6 months. Article 45: A term of fixed-term imprisonment shall be not less than six months but not more than 15 years, except as stipulated in Articles 50 and 69 of this Law.

2.3 Conclusion

The administrative detention “taking in for questioning” should not deliberately used by the police officer together with other coercive measures prescribed by the Criminal Procedure Law, such as the coercive summons, in order to keep crime suspects in official custody as long as possible. Rules of forbidding alternate using of the two different types of deprivation of liberty may be issued in the form of an independent document by the MPS or embodied through amendment of the Police Law. Furthermore, there should be an advisable time break between two coercive summonses in order to prevent the investigation authorities from conveniently manipulating or abusing the power. CPL may detail the limit of the times of coercive summons may be used or specify how long authorities must wait between the use of consecutive coercive summonses, for example, at least 24 hours.

Reeducation Through Labor is inherently an arbitrary detention due to its absence of judicial review, vague scope of application and more severe punishment than some of those stipulated in criminal code. It is neither consistent with the international human rights norms, nor conformed to the relevant domestic laws of China.⁶⁸ It would be a proper and even imperative choice to abolish such an administrative detention in order to meet the standards of article 9(1) of ICCPR. However, recently, the Ministry of Justice indicated that legislation governing RTL would be passed soon. According to a statement by Wang Yunsheng, the director of the Ministry’s RTL Bureau, the NPC is presenting drafting such a law, in consultation with the “relevant departments.” He stated that changes were being considered in the following areas: the people covered by the system, the approval procedure, the implementation process and the length of the terms.” Wang clearly ruled out abolition of the measure, stating that:

⁶⁸ See 2.2.2.2

*For such a populous nation as China, the RTL system, which aims at stopping those on the verge of committing serious crimes, is an effective one for reducing crime... The new law will function as a better guide for the RTL system and contribute to the stability of the rule of law.*⁶⁹

It seems that the authorities have realized some of the human rights problems brought by RTL, however, RTL will, hopefully with a revised form, still exist in China in the future for quite a long time as the authorities so far do not wish to give up such an “effective” instrument. A reform of RTL may probably reduce the distance between the international human rights standards and Chinese laws. At least the contradiction of domestic laws could be cleared up and the requirement of legality could be fulfilled.

⁶⁹ Shao Zongwei, “reeducation law revamp due soon,” *China Daily*, February 5, 2001.

3 Right to be informed

The discussions on paragraph 2 of article 9 of ICCPR related to whether a person must be informed of the reasons for his arrest at the time it occurred or only promptly thereafter. In 1949 a US proposal that applied the word “promptly” to both informational duties in paragraph 2 was unanimously approved.⁷⁰ Upon a motion by Chile, however, a compromise was reached in 1950 that the specific charges were to be made promptly after arrest, and the reasons for arrest were to be given at the time thereof.⁷¹ The final text of article 9(2) of ICCPR is:

Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3.1 International human rights standards

Article 9(2) contains a two-stage notification process: at the moment of arrest, a person must be told the reason why he is being taken into custody; within a short period of time, the person must be informed of the charge against him. The same clause also appears in Principle 10 of the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*. So the requirement of “be informed, at the time of arrest, of the reasons for his arrest” is applicable to every person who is arrested, while the requirement of “be informed promptly of any charges against him” is only applicable to the person who has been charged with a criminal act.⁷² The HRC made a comment about the relationship between article 9(2)

⁷⁰ E/CN.4/170/Add.4; E/CN.4/SR.98, 14.

⁷¹ E/CN.4/399, 406; E/CN.4/SR.145, para 56

⁷² See General Comment 8, para. 1: “It is true that some of the provisions of article 9 (part of para. 2 and the whole of para. 3) are only applicable to persons against whom criminal charges are brought.”

and article 14(3)(a) in the case *Kelly v. Jamaica* (253/87):

*Article 14, paragraph 3(a), requires that any individual under criminal charges shall be informed promptly and in detail of the nature and the charges against him. The requirement of prompt information, however, only applies once the individual has been formally charged with a criminal offence. It does not apply to those remanded in custody pending the result of police investigations; the latter situation is covered by article 9, paragraph 2 of the Covenant.*⁷³

“Reasons” which are to be furnished to the arrested person at the time of his arrest are distinguished from “charges” which are of a more exact and serious nature. The initial information (reason of arrest), which is to be provided “at the time of arrest” may usually be limited to a general (i.e., not legally founded) description of the reasons for arrest. The subsequent information (charges), which is to be provided “promptly” (i.e., during the first interrogation at the latest), must contain the specific accusations in a legal sense, enabling the person concerned to submit a well-founded application for remand.⁷⁴

A proposal made when article 9 of ICCPR was being drafted that the charges should be written and incorporated in a document issued by the authorized person, in order to prevent the detention of persons on vague, questionable or non-existent grounds, was supported in principle. But the inclusion in this article of such a detailed procedural provision was not favoured.⁷⁵ There was no opposition in principle to another proposal that the reasons and charges be furnished to the arrested person in a language which he understands, but it was felt that the amendment was implicit in the existing text⁷⁶ that, in any case, the Covenant provides that its articles were

⁷³ *Kelly v. Jamaica* (253/87), para 5.8

⁷⁴ M. Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary*, 1993, Strasbourg, p 175

⁷⁵ UN documents A/2929, Chapter VI, section 34; A/4045, section 50, 53, 54.

⁷⁶ See Article 2 (1) of ICCPR

to be applied without any discrimination.⁷⁷ Another explanation for the exclusion of “in a language which he understands” is that the point at which initial information is to be provided (“promptly”) would worsen the position of the person arrested.⁷⁸ However, a bare indication of the legal basis of the arrest is insufficient. In *Caldas v. Uruguay* (43/79), a former Uruguayan trade-union official who was arrested in Montevideo by officers who appeared to belong to the navy but did not identify themselves or produce any judicial warrant, was informed that he was being arrested under the “prompt security measures” without any indication of the substance of the complaint against him, the HRC held that 9(2) had been violated because he was not sufficiently informed of the reasons for his arrest.⁷⁹

In *Stephens v. Jamaica* (373/89), the Committee rejected an allegation violation of article 9(2) on the basis that the author was fully aware of the reasons for his detention as he had surrendered himself to the police and a detective had cautioned the author whilst he was in custody.⁸⁰ But in *Grant v. Jamaica* (597/94), the author was arrested some weeks after the murder with which he was subsequently charged, and the State party did not contested that he had not been informed of the reasons for his arrest until seven days later, therefore the Committee concluded that there had been a violation of article 9, paragraph 2.⁸¹

3.2 Right to be informed in China

3.2.1 The criminal coercive measures prescribed by CPL

The Criminal Procedure Law of P.R. China (CPL) prescribes altogether five

⁷⁷ Nihal Jayawickrama, *The Judicial Application of Human Rights Law*, Cambridge 2002, p. 397.

⁷⁸ See A/C.3/L.687.

⁷⁹ *Dreshcer Caldas v. Uruguay* (43/1979), para. 13.2

⁸⁰ *Stephens v. Jamaica* (373/89), para. 9.5

⁸¹ *Grant v. Jamaica* (597/94), para. 8.1

types of criminal coercive measures: coercive summons, criminal detention, arrest, obtaining a guarantee and awaiting trial and supervised residence. The first three are custodial pretrial detentions, and the last two are non-custodial ones. The “coercive summons” is a measure by which authorities may forcibly take in a suspect for questioning for a period as long as 12 hours. The “criminal detention” here means the deprivation of one’s liberty by the investigating authorities in a relative short time under some circumstance prescribed by CPL without the approval of Procuratorate or decision of Court. “Arrest” here is not mere an action in the sense as established by the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, but also means a deprivation of one’s liberty in a relative long time with the approval of Procuratorate or decision of Court. Therefore, both the “criminal detention” and “arrest” prescribed by CPL contain the forms of arrest and detention as defined by the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*.

3.2.2 No sufficient information of the reason of criminal detention

Article 64 of the CPL requires the public security organ must produce a detention warrant when detaining a person; and Article 71 requires public security organ must produce an arrest warrant when making an arrest. But there is no requirement of instant information, which means the public security organ is not obligated to inform the detainees of the reason of arrest at the time of his arrest. The warrant of *criminal detention* only contains its legal procedural basis, namely, based on which legal provisions the detention is decided, but not any indication of the substance of the complaint against him. The CPL does not stipulate that the arresting authority should inform the detainee the reason of his arrest orally, neither. This does not conform to the Committee’s standard set forth in *Drescher Caldas v. Uruguay* (43/1979), in which it requires sufficient information of

the reason of arrest must contain a substantive complaint against the detainee.

According to article 93 of CPL, when interrogating a criminal suspect, the investigators shall first ask the criminal suspect whether or not he has committed any criminal act, and let him state the circumstances of his guilt or explain his innocence; then they may ask him questions. This is logically confused. It's seems that it is the detained person himself, but not the arresting authority, is obliged to provide the information why he has been arrested.

Nevertheless, article 64 of CPL stipulates that within 24 hours after a person has been detained, his family or the unit to which he belongs shall be notified of the reasons for detention and the place of custody, except in circumstances where such notification would hinder the investigation or there is no way of notifying them. Article 71 also stipulates an analogous provision. It could be reasoned that, there is still a distance between “within 24 hours” and “at the time of arrest”. The right to be informed serves the legal interests of arrested persons concerned. Its purpose is to enable the arrested person to remove any mistake or misunderstanding in the mind of the arresting authority at the earliest opportunity. It should be doubted that if such a goal could be achieved by just notifying one’s family or the unit to which he belongs to within 24 hours after his arrest or detention.

3.3 Conclusion

The relevant provisions of CPL need to be modified to expressly stipulate that the investigation authorities should be obligated to inform the detainees of the reason of arrest at the time of his arrest. According to the HRC’s decision in *Dreshcer Caldas v. Uruguay* (43/1979), such a information must be a sufficient one, thus the warrant of criminal detention should contains not only legal basis, but also indication of the substance of the complaint

against him/her. Besides, although there's no requirement of the form of information set forth in article 9(2) of ICCPR, under the circumstances in which the warrant of criminal detention is not required, the CPL must stipulate that the arresting authority should inform the detainee the reason of his arrest orally.

Article 93 of CPL also needs to be modified that when interrogating a criminal suspect, the investigators shall not first ask the criminal suspect whether or not he has committed any criminal act, but just let him state the circumstances of his guilt or explain his innocence, because the detained person himself should not be obliged to provide the information why he has been arrested.

4 Rights for persons detained on criminal charges

The unconditional obligation set up by article 9(3) of ICCPR is designed to provide person arrested or detained on suspicion of having committed a criminal offence with a guarantee against any arbitrary or unjustified deprivation of liberty. It says:

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 and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.

The discussion on paragraph 3 dealt mainly with the search for an appropriate formulation for the personal scope of application. Following a number of drafts, a formulation was finally reached in a drafting group in 1950 that covered the charge of a mere attempted or planned criminal act. The principle set down in the second sentence that pretrial detention may not become the general rule is based on a British proposal, whose specific formulation with respect to the depositing of bail was augmented by a French amendment.

There are three elements of the judicial control within article 9(3).⁸² First, the judicial control should be prompt. Second, it must be automatic. It cannot depend on a previous application by the detained person. This requirement must be distinguished from the separate right which an arrested

⁸² Nihal Jayawickrama, *The Judicial Application of Human Rights law*, Cambridge 2002, pp. 405.

person enjoys to institute proceedings to have the lawfulness of his or her detention reviewed by a court. Thirdly, the judicial officer must himself or herself hear the detained person before taking the appropriate decision.

4.1 Prompt presentation before a judicial officer

4.1.1 International human rights standards

It has been left open by article 9(3), as well as by the largely equivalent provisions in article 5(3) of the ECHR and article 7(5) of *African Charter on Human and People's Rights*, what is meant by “promptly”. Principle 37 of *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* also has an analogous provision of article 9(3) of ICCPR, but still it does not detail the term of “promptly”. In many states, the length of custody is limited to 48 hours, in others, even to 24 hours.⁸³ Therefore, one of the keys to interpretation of article 9(3) of ICCPR is the meaning of the word “promptly”. The General Comment 8 says:

...Paragraph 3 of article 9 requires that in criminal cases any person arrested or detained has to be brought "promptly" before a judge or other officer authorized by law to exercise judicial power. More precise time-limits are fixed by law in most States parties and, in the view of the Committee, delays must not exceed a few days. Many States have given insufficient information about the actual practices in this respect. ...

The General Comment is quite vague, specifying the period of “a few days”. In *Kelly v. Jamaica* (253/87), Committee Member Mr. Wennergren, in a separate opinion, expressed the view that ‘the word “promptly” does not

⁸³ M. Nowak, UN Covenant on Civil and Political Rights: ICCPR Commentary, 1993, Strasbourg, 176

permit a delay of more than two to three days'.⁸⁴ However, in *Portorreal v. Dominican Public* (188/84), the Committee found that there was no violation of article 9(3) even though the author was held for 50 hours before being brought to judge.⁸⁵ In *Van der Houwen v. The Netherlands* (583/94), 73 hours of detention without being brought before a judge was held not to be a violation of article 9(3).⁸⁶

On the other hand, in *Jijon v. Ecuador* (277/88) the Committee found a violation of article 9(3) when the author was held incommunicado for five days without being brought before a judge and without having access to legal counsel. In *Grant v. Jamaica* (597/94), a delay of at least seven days before the accused was brought before a magistrate was found to constitute a violation of article 9(3).

The jurisprudences above-mentioned indicate that the limit of “promptness” for the purpose of the article 9(3) guarantee of judicial review lies somewhere between seventy-three hours (*Van der Houwen v. The Netherlands* (583/94)), where no violation arose, and five days (*Jijon v. Ecuador* (277/88)), where article 9(3) was violated.

Furthermore, in its 1998 Conclusion Observation on Zimbabwe, the HRC took such a stricter view on the requirement of “promptly”:⁸⁷

219. With regard to pre-trial detention, the Committee expresses concern that under the Criminal Procedure and Evidence Act the maximum period of detention of 48 hours before being brought to a judge or magistrate may be extended to 96 hours by a senior police officer, a practice which is incompatible with article 9 of the Covenant. The Committee is especially concerned that this practice provides opportunity for ill treatment and intimidation of detainees. The law relating to arrest and detention should be

⁸⁴ *Paul Kelly v. Jamaica* (253/87), CCPR/C/41/D/253/1987, Mr. Wennergren’s separate opinion.

⁸⁵ *Portorreal v. Dominican Public* (188/84), para. 10.2

⁸⁶ *Van der Houwen v. The Netherlands* (583/94), para. 4.3

⁸⁷ (1998) UN doc. CCPR/C/79/Add. 89

reviewed to bring it into conformity with article 9 of the Covenant and to ensure that individuals are not held in pre-trial custody for longer than 48 hours without court order.

The HRC's Concluding Observation on Lesotho in 1999 reiterated its opinion:⁸⁸

261. With regard to pre-trial detention, the Committee is concerned about the detention of suspects for periods longer than 48 hours before they are brought before a magistrate. In particular, it notes with concern that the officers who were involved in the mutiny of 1994 were held for many months before the commencement of court-martial proceedings, as were the junior officers involved in the mutiny of 1998. The Committee recommends that the State party take firm action to enforce compliance with its own legislative provision limiting pre-trial detention to 48 hours before appearance before a magistrate.

The European Court, unlike the HRC, has given more exact interpretation of the word “promptly” in its jurisprudence. No violation of the ECHR was found when the time had not exceeded four days, but longer period has been found to be unacceptable.⁸⁹

4.1.2 Chinese laws and practice

According to the CPL, crime investigation authorities may detain people without a warrant under certain emergency circumstances.⁹⁰ The duration of criminal detention is usually limited to three days before the crime investigation authorities sends the case to the prosecution service and

⁸⁸ (1999) UN doc. CCPR/C/79/Add. 106

⁸⁹ CASE OF BROGAN AND OTHERS v. THE UNITED KINGDOM, Judgment of 29, December, 1988, A145-B, para. 55-62.

⁹⁰ Article 61 of the CPL lists the seven situations under which the public security departments may detain people without obtaining advance approval from prosecutors.

applies for formal arrest, and may be extended to 7 days.⁹¹ The time limit can be further prolonged for up to 30 days if those detained are suspected of committing crimes repeatedly (*duoci zuoan*), in conjunction with others (*jiehuo zuoan*), or roaming around committing crimes (*liucuan zuoan*).⁹² The extensions of the criminal detention can be approved just by the head of the public security organs of County level or above.⁹³

Though it has been left open by article 9(3) what is meant by “promptly”, the maximum duration of criminal detention of 30 days prescribed in CPL is unjustifiably long no matter being judged by the General Comment 8, jurisprudences of the Committee or the Concluding Observations mentioned above. More seriously, the public security organs have reportedly applied the maximum 30 days period to all pre-arrest detention indiscriminately.⁹⁴

More disputable regulation appears in article 112 of the *Rules on the Process of Handling Criminal Cases by Public Security Organs*, in which if a criminal suspect does not tell his true name or address, and his identity cannot be found out by the public security organ within 30 days, time limit for holding him in criminal detention shall be calculated from the date on which his identity is found out. However, the investigation into his crime and obtaining of evidence shall not be ceased. The same as the above two extensions, an approval of such a “clock resetting” can be obtained from a head of a public security organ of County level or above. In other words, the possibility of a deprivation of one’s liberty during the criminal detention without time limitation and without any judicial control does exist as long as the detained person does not tell his true name or address, and his identity cannot be found out by the public security organ within 30 days in any circumstance.

⁹¹ Article 69 of the CPL.

⁹² *Ibid*

⁹³ See article 109, *Rules on the Process of Handling Criminal Cases by Public Security Departments*, April 20, 1998

⁹⁴ See, “Strictly Abiding by the Law and Avoiding Blind Spots”, *People’s Public Security (renmin gongan)*, No.19, 1997, p. 13

It is also contrary to related provisions of CPL. Firstly, CPL does not authorize the public security organs to detain a person more than 30 days; and secondly, the condition of a formal arrest stipulated in article 60 of CPL is when there is evidence to support the facts of a crime and the criminal suspect, but not the identity of the suspect, therefore the public security organ should apply to the procuratorate for a formal arrest only if there is evidence to support the facts of a crime and the criminal suspect no matter the identity of the detained suspect is clear or not. According to the hierarchy of the laws of China, the CPL is superior to the *Rules on the Process of Handling Criminal Cases by Public Security Organs*.⁹⁵ Then, the ensuing result of the contradiction is to amend or abolish the related provisions existing in the inferior law.⁹⁶ But surprisingly, in article 23 of the *Rules on the Issues of Implementation of Criminal Coercive Measures*, enacted by combination of SPP and MPS, reiterate that if a criminal suspect does not tell his true name or address, and his identity cannot be found out by the public security organ within 30 days, time limit for holding him in criminal detention shall be calculated from the date on which his identity is found out.

In short, the currently practised criminal detention (pre-arrest detention) in China, regardless being evaluated by international human rights standards or domestic laws, really remains a form of arbitrary detention.

4.2 Judge or other officer authorized by law

4.2.1 International human rights standards

9(3) of ICCPR leaves a choice between two categories of authorities: a Judge or other officer authorized by law to exercise judicial power, it is therefore implicit in such a choice that these categories are not identical.

⁹⁵ See article 79, Legislation Law of PRC, 2000

⁹⁶ See article 87, Legislation Law of PRC, 2000

Nevertheless, the “other officer” must have some of the attributes of a judge and offer guarantees befitting the judicial power conferred on him by law, that is to say, he must satisfy certain conditions each of which constitutes a guarantee for the person arrested.

The Committee expressed its opinion regarding the “other officer authorized by law” in *Kulomin v. Hungary* (521/92).

The author, a Russian citizen living in Hungary, was arrested for murder. He was detained for over a year before he was brought to trial. The State Party explained that his arrest and detention were regulated by the legislation which gave the public prosecutor authority to extend a person’s pre-trial detention. In this case the author’s pre-trial detention was ordered and subsequently renewed on several occasions by the public prosecutor. The State claimed that there were no violation of article 9(3) as the accused had been brought promptly before an “other officer authorized by law”. In this case the State made the argument that the public prosecutor fell within the meaning of this term:⁹⁷

10.4 As regards the compatibility of the procedure with the requirements of article 9, paragraph 3, the State party interprets the term "other officers authorized by law" as meaning officers with the same independence towards the executive as the Courts. In this connection, the State party notes that the law in force in Hungary in 1988 provided that the Chief Public Prosecutor was elected by and responsible to Parliament. All other public prosecutors were subordinate to the Chief Public Prosecutor. The State party concludes that the prosecutor's organization at the time had no link whatsoever with the executive and was independent from it. The State party therefore argues that the prosecutors who decided on the continued detention of Mr. Kulomin can be regarded as other officers authorized by law to exercise judicial power within the meaning of article 9, paragraph 3, and that no violation of the Covenant has occurred.

⁹⁷ *Kulomin v. Hungary* (521/92), para. 10.4

The Committee rejected the State Party's arguments in relation to article 9(3), making the following comments:

11.3 The Committee notes that, after his arrest on 20 August 1988, the author's pre-trial detention was ordered and subsequently renewed on several occasions by the public prosecutor, until the author was brought before a judge on 29 May 1989. The Committee considers that it is inherent to the proper exercise of judicial power, that it be exercised by an authority which is independent, objective and impartial in relation to the issues dealt with. In the circumstances of the instant case, the Committee is not satisfied that the public prosecutor could be regarded as having the institutional objectivity and impartiality necessary to be considered an "officer authorized to exercise judicial power" within the meaning of article 9(3).⁹⁸

It seems that the Committee did not explain why it was 'not satisfied that the public prosecutor could be regarded as having the institutional objectivity and impartiality necessary to be considered an "officer authorized by law to exercise judicial power" within the meaning of article 9(3)'. The Committee needs to clarify the detailed circumstance of the instant case on which it bases its finding, but such clarification is totally lacking in the Committee's view.⁹⁹

The ECtHR has developed more detailed criteria about the "officer authorized by law to exercise judicial power" within the meaning of article 5 (2) of ECHR in *Schiesser v. Switzerland*:

- a) an institutional guarantee: he must be independent of the executive and of the parties;
- b) a procedural guarantee: he must be obliged to himself hear the individual

⁹⁸ *Kulomin v. Hungary* (521/92), para. 11.3

⁹⁹ See Individual opinion by Committee member Nisuke Ando, *Kulomin v. Hungary* (521/92)

brought before him;

c) a substantive guarantee: he must be obliged to review the circumstances militating for or against detention; to decide, by reference to legal criteria, whether there are reasons to justify detention; and to order release if there are no such reasons.¹⁰⁰

4.2.2 Chinese laws and practice

In each People's Procuratorate of China, there is a department that routinely deals with the applications for a formal arrest from the public security organ or the investigation department of itself or other criminal investigation authorities.¹⁰¹ In other words, the prosecutors in China authorize most of the approvals of criminal arrest, only in some special occasions the approval of arrest decided by the People's Court.¹⁰² It seems that the Committee's decision in *Kulomin v. Hungary* (521/92) strongly challenge the current arrest approval system of China as in legal attributes the Chinese prosecutors have some similarities with their Hungarian counterparts. Both of the legal systems in China and Hungary have been deeply affected by the model set up by the former Soviet Union.

As same as the State Council and the local government at different levels, the Supreme People's Procuratorate and the local procuratorate at different levels are responsible to the National People's Congress and the local people's congress at different levels. This means the government and the procuratorate are independent with each other in China. Article 129 of the Constitution of PRC says:

The people's procuratorates of the People's Republic of China are state

¹⁰⁰ See *Schiesser v. Switzerland*, Judgment of 4, December, 1979, A 34, para. 31

¹⁰¹ According to article 4, article 225 of CPL, these investigation authorities are Bureau of State Security, Safeguarding Department of Military Force and Prison.

¹⁰² See article 77 of the SPC's Interpretation on Several Issues Regarding Implementation of the Criminal Procedure Law

organs for legal supervision.

This is a general description of the function of the procuratorate. What does “legal supervision” mean? If we seek the answer in criminal proceeding, legal supervision means to supervise the whole process of criminal cases, including filing a case, investigation, trial, and execution.¹⁰³ It can be understood that authorizing approval of arrest should be deemed as an investigation supervision.

Furthermore, Article 3 of the Criminal Procedure Law says:

The public security organs shall be responsible for investigation, detention, execution of arrests and preliminary inquiry in criminal cases. The People's Procuratorates shall be responsible for procuratorial work, authorizing approval of arrests, conducting investigation and initiating public prosecution of cases directly accepted by the procuratorial organs.¹⁰⁴ The People's Courts shall be responsible for adjudication. Except as otherwise provided by law, no other organs, organizations or individuals shall have the authority to exercise such powers

The CPL elaborates the functions of procuratorate in criminal proceedings. Then can we say that the powers of procuratorate of China authorized by both Constitution and CPL belong to judicial power? In China, the Procuratorate and the Court are unified as “judicial organs” (*Sifa Jiguan*), and one of the evidences is that both the Interpretations of law issued by the Supreme People’s Procuratorate and the Supreme People’s Court are called “judicial interpretations”. However, this creates confusion with the

¹⁰³ See article 8, article 87, article 66, article 181, article 212 of CPL of PRC

¹⁰⁴ The English version of quoted here is from the official website of the Supreme People’s Court, but I doubt there is a mistake in translation. According to the official Chinese text, the translation should be:

The People's Procuratorates shall be responsible for procuratorial work, authorizing approval of arrests, conducting investigation of cases directly accepted by the procuratorial organs and initiating public prosecution.

This means the procuratorate investigates the cases directly accepted by itself, but initiates public prosecution of all the criminal cases.

established English meaning of the word “judicial”, which exclusively used to refer to Court or administration of justice. In my opinion, it would be more proper, if necessary, to translate “*Sifa Jiguan*” as “law enforcement/implementation agencies”. Thus, to correctly understand the inherent meaning of “other judicial officer authorized by law to exercise judicial power” in 9(3) of ICCPR, the truth cannot be found just by examining the words themselves.

Mr. Ando, in his individual opinion of *Kulomin v. Hungary* (521/92), gave out such a statement:

... As a matter of fact, in the domestic law of many States parties, public prosecutors are granted certain judicial power, including the power to investigate and prosecute suspects in criminal cases. In the case of Hungarian law in 1988, this power included the power to extend the detention of suspects up to one year before they were committed to trial.

... Nevertheless, I am unable to accept the categorical statement of the Committee, as quoted above, to the effect that in the Hungarian type of system the Public Prosecutor necessarily lacks the institutional objectivity and impartiality necessary to be considered as an "officer authorized to exercise judicial power" within the meaning of article 9, paragraph 3. Even in that type of system, a prosecutor's decision on the extension of the detention of a particular suspect in a given case may well be impartial and objectively justifiable. To deny such impartiality and objectivity, the Committee needs to clarify the detailed circumstances of the instant case on which it bases its finding, but such clarification is totally lacking in the Committee's Views.¹⁰⁵

Here, Mr. Ando characterized the power to “investigate” and “prosecute suspects” as judicial power. But it seems that these powers more like executive powers, because the prosecutor is obviously one of the parties

¹⁰⁵ *Kulomin v. Hungary* (521/92), Individual Opinion by Mr. Nisuke Ando

during the stages of both investigation and trial. However, Mr. Ando was correct in criticizing the vagueness of the majority's decision regarding article 9(3) of ICCPR, which does little to illuminate the words "other officer authorized by law to exercise judicial power".

It is true in China that, when the procuratorate directly conducting investigation of criminal cases, the prosecutor who should decide the approval of an arrest is to be different from the one who applies for approval of an arrest. But in this case, the "deciding" and "applying" prosecutors work for the same procuratorate, and are subject to the leadership of the same chief prosecutor and the same procuratorial committee.¹⁰⁶ It is reasonable to doubt the objectivity and impartiality of the authorization of the approval of arrest in such a case.

As for the cases that the public security organ requests a approval of arrest, the prosecutor can impose an, if not judicial, external control of the arrest. If the prosecutor disapproves the arrest, the public security organ shall, upon receiving notification, immediately release the detainee and inform the prosecutor of the result without delay.¹⁰⁷ Therefore the prosecutor in China does have the "power to release". This is an important attribute of "an officer authorized by law to exercise judicial power" according to the decisions of ECtHR. An advisory committee on internment in Northern Ireland and a magistrate in Malta are excluded by ECtHR as "other officer authorized by law to exercise the judicial power" since they have not the power to order release.¹⁰⁸

So, it would be too rough to conclude that the prosecutor in China is absolutely not conform to the requirement of "officer authorized by law to

¹⁰⁶ Each people's procuratorate has a procuratorial committee. The committee is expected to institute the system of democratic centralism and, under the direction of the chief prosecutor, to discuss and decide important cases and other major issues, on the principle of the minority being subordinate to the majority. If the chief prosecutor disagrees with the majority's decision on an important matter, it is referred to the standing committee of the people's congress at the corresponding level for final decision.

¹⁰⁷ See article 69 of CPL of PRC

¹⁰⁸ See *Ireland v. United Kingdom* (1978) 2 EHRR 25; *TW v. Malta* (1999) EHRR 185

exercise judicial power”, especially so far the Committee has not created any more detailed and clearer explanation than these in *Kulomin v. Hungary* (521/92). However, it is doubtless that when deciding the application of approval of arrest, which submitted by his colleagues, a Chinese prosecutor is not of an institutional objectivity and impartiality.

4.3 Length of pre-trial detention

4.3.1 International human rights standards

In relation to pretrial detention, article 9(3) states that persons shall be entitled to trial within a reasonable time or release. The General Comment 8 says:

3. Another matter is the total length of detention pending trial. In certain categories of criminal cases in some countries this matter has caused some concern within the Committee, and members have questioned whether their practices have been in conformity with the entitlement "to trial within a reasonable time or to release" under paragraph 3. Pre-trial detention should be an exception and as short as possible. The Committee would welcome information concerning mechanisms existing and measures taken with a view to reducing the duration of such detention.

There is no precise interpretation of “reasonable time” in the General Comment, and in fact, it is impossible to do so. Whether a time limit is appropriate can be evaluated only in light of all the circumstances of a given case. According to Nowak, it begins with the point at which an arrest is made or pre-trial detention is imposed, and it ends with prosecution.¹⁰⁹ However, Mr. Nihal Jayawichrama holds a different opinion on when is the end of the period of the detention covered by the requirement of a

¹⁰⁹ M. Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary, 1993, Strasbourg, 177

“reasonable time”. He interprets the word “trial” in article 9(3) as the whole of the proceedings before the court, not merely to its commencement. The words “entitled to trial” are not to be equated with “entitled to be brought to trial”.¹¹⁰ Nowak’s view may seem to be correct because the period of detention after the commencement of a trial shall fall within the scope of article 14(3)(c) (to be tried without undue delay).

In *Fillastre and Bizouran v. Bolivia* (336/88), two French private detectives were arrested and detained in Bolivia for a number of offences. The communication was brought by one of the victim’s wives. It was submitted that two men were held in custody for ten days without being informed of the charges against them and that there was a delay of over three years for the adjudication of the case at first instance. The State responded:

*4.6 As to the author's complaint about undue delays in the judicial proceedings, the State party points out that criminal investigations under Bolivian law are carried out in written form, which implies that administrative and other delays may occur. Furthermore, the absence of an adequate budget for a proper administration of justice means that a number of criminal cases and certain specific procedural phases of criminal proceedings have experienced delays.*¹¹¹

The Committee made the following comments regarding the State’s claims about budgetary constraints:

Under article 9, paragraph 3, anyone arrested or detained on a criminal charge “shall be entitled to trial within a reasonable time...”. What constitutes “reasonable time is a matter of assessment for each particular case. The lack of adequate budgetary appropriations for the administration of criminal justice alluded to by the State party does not justify unreasonable delays in the adjudication of criminal cases. Nor does the fact

¹¹⁰ Nihal Jayawickrama, *The Judicial Application of Human Rights Law*, Cambridge 2002, p. 410

¹¹¹ *Fillastre and Bizouran v. Bolivia* (336/88), para. 6.5

that investigations into a criminal case are, in their essence, carried out by way of written proceedings, justify such delays. In the present case, the Committee has not been informed that a decision at first instance had been reached some four years after the victims' arrest. Considerations Of evidence-gathering do not justify such prolonged detention. The Committee concludes that there has been, in this respect, a violation of article 9, paragraph 3.

In another case, *Kone v. Senegal* (386/89), the Committee again expressed its concern about “reasonable time”:

... What constitutes “reasonable time” within the meaning of article 9(3) must be assessed on a case-by-case basis.

A delay of four years and four months during which the author was kept in custody... cannot be deemed compatible with article 9(3), in the absence of special circumstances justifying such delay, such as that there were, or had been, impediments to the investigations attributable to the accused or to his representative. No such circumstances are discernible in the present case. Accordingly, the author's detention was incompatible with article 9(3)...¹¹²

The above case confirms that there is no set period of permissible pre-trial detention under article 9(3). However, it must be doubted whether pre-trial detention of four years could ever be justified.

Compared with the Committee, ECtHR has developed more specific standards when deciding on the reasonableness of the period of detention on remand. In its jurisprudences, the Court held that two principal questions must be examined.¹¹³ First, whether there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual

¹¹² *Kone v. Senegal* (386/89), para. 8.6 to 8.7

¹¹³ *Wemhoff v. Germany*, Judgment of 27, June, 1968, Series A no. 7, As to the law, para. 16 10; *Scott v. Spain*, Judgment of 18, December, 1996, Reports 1996 VI, para. 74

liberty. Second, assuming that relevant and sufficient circumstance do exist for not releasing the accused person pending trial, whether the authorities have conducted the case in a manner which has unreasonably prolonged the detention on remand, thus imposing on the accused person a greater sacrifice than could reasonably be expected of a person presumed to be innocent.

4.3.2 Chinese laws and practice

The CPL of China generally limit pre-trial detention (post-arrest detention) for investigation to two months after arrest. Article 124 of the CPL, however, allows authorities to extend post-arrest pre-trial detention by an additional month with permission from the procuratorate of an immediately higher level. Furthermore, Article 126 lists four situations under which such detention can be prolonged for an additional two months with approval from provincial level procuratorates.¹¹⁴ Moreover, Article 127 permits the authorities to extend detention by two more months if the investigation in question has not been completed after the two-month extension prescribed by Article 126 and the alleged crimes may merit a sentence of more than ten years' imprisonment. When the case transferred to procuratorate from investigation authorities, the prosecutor shall make a decision within one month with a recommendation to initiate a prosecution; an extension of half a month may be allowed for major or complex cases.¹¹⁵ In examining a case that requires supplementary investigation, the procuratorate may remand the case to a public security organ for supplementary investigation or conduct

¹¹⁴ Article 126 of CPL stipulates:

With respect to the following cases, if investigation cannot be concluded within the time limit specified in Article 124 of this Law, an extension of two months may be allowed upon approval or decision by the People's Procuratorate of a province, autonomous region or municipality directly under the Central Government:

- 1) grave and complex cases in outlying areas where traffic is most inconvenient;
- 2) grave cases that involve criminal gangs;
- 3) grave and complex cases that involve people who commit crimes from one place to another; and
- 4) grave and complex cases that involve various quarters and for which it is difficult to obtain evidence.

¹¹⁵ article 138 of CPL

the investigation itself. In cases where supplementary investigation is to be conducted, it shall be completed within one month. Supplementary investigation may be conducted twice at most. When supplementary investigation is completed and the case is transferred to the procuratorate, the time limit for examination and prosecution shall be recalculated by the procuratorate.¹¹⁶

This is only a general description of the time limits of pretrial detention in China. It is fair to say that the time limits of post-arrest detention stipulated in CPL is quite loose if we bear in mind that the Human Rights Committee has implied that a six-month limit on pre-trial detention is too long to be compatible with Article 9(3).¹¹⁷ Nevertheless, detentions of people in excess of time limits do happen often all over China. Statistics coming from the annual reports of the provincial people's procuratorates to the annual meetings of the provincial people's congresses held in 2000 may illustrate the severity of the problem.

**Statistics for 1999 from the Provincial People's Procuratorates on
People Detained in Excess of the Time Limits**

Provinces	Numbers found	Numbers Corrected
Chongqing	3,444	3,203
Fujian	--	2,826
Gansu	--	922
Guangdong	--	10,559
Hainan	--	1,253
Henan		9,952
Hubei	--	3,602
Hunan	3,793	4,025

¹¹⁶ article 140 of CPL

¹¹⁷ Official Records of the General Assembly, Forty-fourth Session, Supplement No. 40 (A/44/40), vol. I, para. 47 (Democratic Yemen), as cited in *Handbook of International Standards*, para. 85, p. 17,

Jilin	1,533	--
Liaoning	2,352	--
Qinghai	34	--
Zhejiang	746	734
National		74,051*

* This number comes from the SPP report to the NPC on March 10, 2000.¹¹⁸

The legislation loopholes are the main factor resulting in detention of people in excess of time limit. First, it is hard to condemn the officials who create detention in excess of time limit. The staff of investigation authorities may ignore the time limit of pre-trial detention which set up in CPL and seldom take account of the result of their outright violation of CPL. Though some scholars argue that the crime of “illegal detention” prescribed in article 238 of the Criminal Law covers the case of detention of people in excess of time limits,¹¹⁹ it is now just under the discussing in theory otherwise thousands of officials of the investigation authorities would be charged with committing the crime of “illegal detention” according to the statistics in the above table.

As prescribed in CPL, after arrest, each extension of the pretrial detention should be initiated by approval of the procuratorate. For the criminal cases investigated by the public security organs, there is a kind of, if not judicial, external control of the pretrial detention which imposed by the procuratorate, whereas, for these investigated by the procuratorate,¹²⁰ the control of pretrial

¹¹⁸ SPP’s report to the NPC on March 10, 2000 can be found on website:

www.spp.gov.cn

¹¹⁹ See *Put an end to the detention of people in excess of time limits _ the citizen’s expectation*, Procuratorate Daily, July 23, 2003

¹²⁰ According to article 18 of CPL, crimes of embezzlement and bribery, crimes of dereliction of duty committed by State functionaries, and crimes involving violations of a citizen’s personal rights such as illegal detention, extortion of confessions by torture, retaliation, frame-up and illegal search and crimes involving infringement of a citizen’s democratic rights -- committed by State functionaries by taking advantage of their functions and powers -- shall be placed on file for investigation by the People’s Procuratorates. If cases involving other grave crimes committed by State functionaries by taking advantage of their functions and powers need be handled directly by the People’s Procuratorates, they may be placed on file for investigation by the People’s Procuratorates upon decision by the People’s Procuratorates at or above the provincial level.

detention only comes from internal supervision. Furthermore, after the cases being transferred to procuratorate, the discretion of whether to initiate the supplementary investigation is left to the procuratorate itself. Thus, in the later two cases, a danger of arbitrary extension of pretrial detention exists.

The CPL allows crime investigation authorities to hold suspects beyond stipulated time limits without higher-level approval in two situations. First, officials may continue to detain a suspect indefinitely as long as his or her real identity is unknown.¹²¹ Second, the period of detention may be recounted if a “new major crime” is discovered in the process of investigation.¹²² However, no details are given in the CPL on what may constitute “new major crimes.” It should be noted that, in the two situations, the investigation authorities are virtually granted the power to approve arrest, which is supposed to be imposed by the arrest-approval department of procuratorate.

In practice, the investigation authorities frequently “cooperate” with the prosecution department in such a way that if a criminal case under investigation could not be transferred to prosecution within the time limit regulated by CPL due to the slowness of the investigation, the investigation authorities would still transfer the case to the procuratorate, and then immediately the procuratorate remand the case to the investigation authorities for supplementary investigation. The investigation authorities obtain one more month to conduct investigation and the detention therefore may be extended one more month. The same “cooperation” could be used twice in one case.

The time limits themselves which set up by the CPL are not a question needs to be emphasized here because what constitutes “reasonable time” is a matter of assessment in each particular case, and there is a difference of complication existing between case and case. The current problem in China

¹²¹ CPL, Article 128

¹²² *Ibid.*

is how to control the extensions of the time limits of the pretrial detention.

4.4 Right to release pending trial

4.4.1 International human rights standards

Article 9(3) contains a principle, which is not mentioned in article 5 of ECHR or article 7 of ACHR, that pre-trial detention may not become the general rule. It is thus to be limited to essential reasons. In the following case, the HRC discussed instances where departure from this norm would be permissible.

The author in *W.B.E. v. The Netherlands* (432/90) claimed his pre-trial detention of three months, on a charge of drug smuggling, breached article 9(3). The Committee found the allegation inadmissible, and made the following comments regarding the permissibility of pre-trial detention:

6.3 With regard to the author's allegation that his pre-trial detention was in violation of article 9 of the Covenant, the Committee observes that article 9, paragraph 3, allows pre-trial detention as an exception; pre-trial detention may be necessary, for example, to ensure the presence of the accused at the trial, avert interference with witnesses and other evidence, or the commission of other offences. On the basis of the information before the Committee, it appears that the author's detention was based on considerations that there was a serious risk that, if released, he might interfere with the evidence against him.

6.4 The Committee considers that, since pre-trial detention to prevent interference with evidence is, as such, compatible with article 9, paragraph 3, of the Covenant, and since the author has not substantiated, for purposes of admissibility, his claim that there was no lawful reason to extend his

*detention, this part of the communication is inadmissible under articles 2 and 3 of the Optional Protocol.*¹²³

Article 9(3) also contains an indirect claim to release from pre-trial detention in exchange for bail or some other guarantee. This results from the principle that pre-trial detention is an exception, together with the authority to make release dependent on the necessary guarantees. In *Hill and Hill v. Spain* (526/93), the authors, who were British citizens, were arrested in Spain on suspicion of having firebombed a car. One of the claims made by the authors was that the State Party had violated article 9(3) as they were not released on bail after their arrest. The State Party justified the authors' extended pre-trial detention as follows:

*9.7 The State party submits that the duration of 16 months of pretrial detention was not unusual. It was justified in view of the complexities of the case; bail was not granted because of the danger that the authors would leave Spanish territory, which they did as soon as release was granted.*¹²⁴

The Committee made the following comment on the State party's statement:

12.3 As for article 9, paragraph 3, of the Covenant, which stipulates that it shall not be the general rule that persons awaiting trial shall be detained in custody, the authors complain that they were not granted bail and that, because they could not return to the United Kingdom, their construction firm was declared bankrupt. The Committee reaffirms its prior jurisprudence that pre-trial detention should be the exception and that bail should be granted, except in situations where the likelihood exists that the accused would abscond or destroy evidence, influence witnesses or flee from the jurisdiction of the State party. The mere fact that the accused is a foreigner does not of itself imply that he may be held in detention pending trial. The State party has indeed argued that there was a well-founded

¹²³ *W.B.E. v. The Netherlands* (432/90), para. 6.3, 6.4

¹²⁴ *Hill and Hill v. Spain* (526/93), para. 9.7

*concern that the authors would leave Spanish territory if released on bail. However, it has provided no information on what this concern was based and why it could not be addressed by setting an appropriate sum of bail and other conditions of release. The mere conjecture of a State party that a foreigner might leave its jurisdiction if released on bail does not justify an exception to the rule laid down in article 9, paragraph 3, of the Covenant. In these circumstances, the Committee finds that this right in respect of the authors has been violated.*¹²⁵

Furthermore, the Committee has also expressed its opinion that pre-trial detention is the exception, and bail should be granted except where the person concerned constitutes a clear and serious threat to society which cannot be contained in any other manner.¹²⁶ The seriousness of a crime or the need for continued investigation, considered alone, do not justify pre-trial detention.¹²⁷

4.4.2 Chinese laws and practice

4.4.2.1 Scope of permissibility of arrest

Article 60 of CPL stipulates the permissibility of arrest as follows:

When there is evidence to support the facts of a crime and the criminal suspect or defendant could be sentenced to a punishment of not less than imprisonment, and if such measures as allowing him to obtain a guarantee pending trial or placing him under supervised residence would be insufficient to prevent the occurrence of danger to society, thus necessitating his arrest, the criminal suspect or defendant shall be immediately arrested according to law. ...

¹²⁵ Hill and Hill v. Spain (526/93), para. 12.3

¹²⁶ Schweizer v. Uruguay (66/80), HRC 1983 Report, Annex VIII

¹²⁷ Bolanos v. Ecuador, (238/87), HCC 1989 Report, Annex X.1.

According to article 60 of CPL, the scope of permissibility of arrest is quite wide as article 60 has established very low general standards to impose “arrest” – just *when there is evidence to support the facts of a crime and the criminal suspect or defendant could be sentenced to a punishment of not less than imprisonment*. However, the Human Rights Committee only recognizes a few circumstances that justify detention before trial. These include: detention to prevent flight, interference with evidence, or the recurrence of crime as well as detention to prevent a clear and serious threat to society that cannot otherwise be contained.¹²⁸ These circumstances are very close to these expressed by the Committee in *W.B.E v. The Netherlands* (432/90) and *Hill and Hill v. Spain* (526/93). Obviously, they define a much narrower scope of applying pre-trial detention than these stipulated in CPL.

4.4.2.2 Pretrial detention remains the rule rather than the exception

In addition to the types of custodial coercive measures, the CPL stipulates two types of non-custodial coercive measures. One is called “obtaining a guarantee and awaiting trial” (*qubao houshen*) and the other is “supervised residence” (*jianshi juzhu*). The wording of the CPL on this two measures sheds some light on the nature of the non-custodial detentions. According to Article 51 of the CPL:

*The People's Courts, the People's Procuratorates and the public security organs **may** allow criminal suspects or defendants under any of the following conditions to obtain a guarantee and awaiting trial or subject them to supervised residence: (emphasis added)*

(1) They may be sentenced to public surveillance, criminal detention or simply imposed with supplementary punishments; or

¹²⁸ *Human Rights and Pre-trial Detention, A Handbook of International Standards relating to Pre-trial Detention, Professional Training Series, No. 3, (United Nations; NY: 1994), p. 14-15.*

(2) They may be imposed with a punishment of fixed-term imprisonment at least and would not endanger society if they are allowed to obtain a guarantee and awaiting trial or are placed under supervised residence.

and article 60 of CPL:

...If a criminal suspect or defendant who should be arrested is seriously ill or is a pregnant woman or a woman breast-feeding her own baby, he or she may be allowed to obtain a guarantor pending trial or be placed under residential surveillance.

It is clear that the CPL establishes no mandatory bail provision. Application of such a measure is an official *option* rather than a defendant's *right*. Authorities are not legally obligated to consider bail for a suspect or defendant. This coercive measure is not designed to protect a defendant's right to be free from arbitrary detention. Rather, it is an alternative to those coercive measures that fully strip a defendant of liberty.¹²⁹ Besides, the manipulation of granting procedure is under a closed executive model. In other words, there is no opportunity for judicial review in this measure. Whether or not a request for obtaining a guarantee will be granted entirely rests with the discretion of the law implementation agency concerned.¹³⁰ If the application was rejected by the authorities, there would be no legal remedy for the detained person and his counsel. This is a obvious violation of article 3.5 of the *United Nations Standard Minimum Rules for Non-custodial Measures* (Tokyo Rules) and makes the bail granting authorities convenient to hold the criminal suspects or defendants in custody

¹²⁹ See article 74 of CPL which says: If a case involving a criminal suspect or defendant in custody cannot be closed within the time limit stipulated by this Law for keeping the criminal suspect or defendant under custody for the sake of investigation, for conducting examination before prosecution, or for the procedure of first or second instance and thus further investigation, verification and handling are needed, the criminal suspect or defendant may be allowed to obtain a guarantor pending trial or subjected to residential surveillance

¹³⁰ The CPL stipulates that all three law implementation organs have independent power to decide if a "taking a guarantee and awaiting trial" is appropriate when the case is being handled by the organ in question.

during the pretrial proceedings. Chinese officials have sought to justify this situation by arguing that pretrial release, or other measures restricting official power, do not fit the country's "national special circumstances".¹³¹ The final result is that pretrial detention remains the rule rather than the exception. This is at odds with international standards which state that those awaiting trial should generally not be detained. The ICCPR articulates this general principle in article 9(3). This view is also adopted by the Tokyo Rules which asserts, "Pre-trial detention shall be used as a means of last resort in criminal proceedings."¹³² Contrary to these principles, an overwhelming majority of criminal suspects in China are held in detention while awaiting trial.

In addition, the CPL mandates that all three authorities, namely the police, prosecutors and the courts, may apply the measure of "obtaining a guarantee and awaiting trial" to the same suspect or defendant. All three authorities can apply the measure for one year under their own rules; therefore, a suspect or defendant may be put under the measure for three years altogether. Scholars call upon coordination among these three organs to guarantee that the entire time limit for the measure does not exceed one year.¹³³ Nevertheless, there has been no indication that authorities have abided by the one-year time limit.

Prior to the 1996 CPL revisions, some scholars criticized the law for being too vague on the nature and scope of supervised residence, and argued that it should be incorporated into arrest or other types of detention so as to avoid it being used as a disguised form of solitary confinement.¹³⁴ However, instead of removing it, the CPL put new restrictions on its application by

¹³¹ Guo Xiaobin, "In Reform and Development of the Work of Crime Investigation After the New Criminal Procedure Law Took Effect", *Study of Crime Investigation*, No. 1, 1998, p. 10

¹³² Rule 6.1 of the United Nations Standard Minimum Rules for Non-custodial Measures, General Assembly resolution 45/110, 14 December 1990.

¹³³ Chen Guangzhong, et al, *Study on the Issues of Implementation of the Criminal Procedure Law*, p. 88-89.

¹³⁴ See Chen Guangzhong and Yan Duan, *Proposed Draft of Revisions to the Criminal Procedure Law of the People's Republic of China and Commentary on Them*, China Fangzheng Press, 1995, p. 200.

specifying the place of detention as the person's "residence" and limiting the time period to a maximum of six months. Under the old CPL, one might be incarcerated in a designated place for an indefinite time.¹³⁵ The apparent difference between the two non-custodial involves the terms of treatment. Under "supervised residence," a suspect is subjected to much stricter official control. He is not allowed to leave his residence without permission, and is required to obtain official approval for meeting with people other than those who live with him. Initially, even lawyers were required to obtain approval from the crime investigation authority in order to meet with their clients who were subject to this measure. With the promulgation of the Joint Provisions in 1998, lawyers were finally allowed to freely visit clients held under supervised residence.¹³⁶

4.5 Conclusion

4.5.1 Requirement of "promptly"

The maximum duration of the criminal detention is 30 days and is too long to meet the requirement of "promptly" of article 9(3) of ICCPR as such a detention can be approved just by the head of the public security organs of County level or above. It is very dangerous that there is no judicial control of the criminal detention, which would possibly induce torture or other infringement of the rights of the detained person. Thus, the maximum duration of the criminal detention should be reduced to meet the international standards. As a maximum duration of a criminal detention without approval from procuratorate in any circumstance, 7 days would be closer, but not exactly conform to the international standard set forth in the jurisprudences of the Committee.¹³⁷ My view is that no matter how

¹³⁵ It was a common practice before 1996 that many were held in solitary confinement under supervised residence since the old CPL did not specify the terms of custody.

¹³⁶ Article 24 of the Six Department Rules states: "criminal suspects and defendants under supervised residence can meet with their counsel without needing to obtain approval."

¹³⁷ Van der Houwen v. The Netherlands (583/94), Jijon v. Ecuador (277/88)

complicated the case is, it is unnecessary to detain the suspect for such a long period of time before the investigation authority applying for an arrest approval. The purpose of criminal detention is to confine the liberty of those who are conducting a crime or have a major suspicion of having committed a crime, but not to keep them in custody for a quite long time to dig out all the detailed circumstances of a criminal case, which is supposed to be the work of the next stage of the criminal proceedings.

A more serious problem is brought by article 112 of the *Rules on the Process of Handling Criminal Cases by Public Security Organs*, in which if a criminal suspect does not tell his true name and address and his identity cannot be found out by the public security organ within 30 days, the time limit for holding him in criminal detention shall be calculated from the date on which his identity is found out. This absolutely contravenes the requirement of article 9(3) of ICCPR. Such a “clock resetting” can be easily misused because what constitutes the condition that one’s identity cannot be found out by the public security organ within 30 days is at the discretion of the police. It is also contrary to related provisions of CPL, which shall prevail according to the hierarchy of laws in China. So from the view of both international human rights norms and domestic legal system, it would be proper to abolish such an arbitrary rule on criminal detention.

4.5.2 The prosecutors’ power to approve the arrest

As for the “other officer authorized by law to exercise judicial power”, it is too rough to conclude that the prosecutor in China is absolutely not conform to the requirement of “officer authorized by law to exercise judicial power”. One reason is that so far the Committee has not created any detailed and clear criteria either in its General Comments or jurisprudence. Besides, the prosecutor in China has no power to direct the police to conduct investigation, whereas the domestic laws entitle the prosecutor to supervise the investigation of the police, in other words, the prosecutor is independent

from the police. However, as the Committee has expressed its viewpoint in *Kulomin v. Hungary* (521/92) that “*the Committee is not satisfied that the public prosecutor could be regarded as having the institutional objectivity and impartiality necessary to be considered an "officer authorized to exercise judicial power" within the meaning of article 9(3)*”, China may have two choices before ratifying the Covenant. One is to make a reservation to article 9(3);¹³⁸ another one is to amend its domestic laws to meet the standards set up by the Committee. At present, the proper way, in my opinion, is the former one. Abolishing the prosecutor’s power to approve the arrest would result in exquisite changes of the current legal system and a huge relocation of the human resource of legal practitioners in China, which would make China to pay an excessive cost to achieve the aim of the reform. But, for the cases investigated by prosecutors, it is not reasonable for the prosecutors themselves to decide the application of approval of arrest which submitted by their colleagues. In such a case, a Chinese prosecutor dose not possess an institutional objectivity and impartiality in making the decision. Thus it would be more advisable to revise the CPL’s related provisions to entitle the judge to approve the arrest when the prosecutor conducts criminal investigation.

4.5.3 Length of pre-trial detention

One of the issues need to be addressed when discussing the length of pre-trial detention is that the length of pre-trial detention should not be deemed as equal to that of the pre-trial proceedings. Unfortunately, CPL does not strictly separate the pre-trial detention from the pre-trial proceedings. In most cases, the suspects and defendants are detained during the investigation, which is obviously not conformed to article 9(3) of ICCPR. The CPL establishes no mandatory bail provision. Application of such a measure is an official *option* rather than a defendant’s *right*. Therefore, a sufficient protection of the right to release pending trial needs

¹³⁸ When ratifying ICCPR in 1975, Finland made a reservation to article 9(3).

to be protected by revising the current CPL, for example, the scope of applying “obtaining a guarantee and awaiting trial” should be extended according to the article 9(3) of ICCPR and Tokyo Rules. Furthermore, the manipulation of granting procedure is to be subject to a judicial review, which would provide a legal remedy for those whose application for bail was rejected by the authorities.

Another issue related to the length of pre-trial detention is the arbitrary extensions of the pre-trial detention, which includes five basic types.¹³⁹ The solution to the problem is to establish judicial review system of the extension of pre-trial detention. The discretion of whether to extend the pre-trial detention cannot be left to the investigation authorities who would likely prolong the pre-trial detention for the convenience of investigation.

CPL and the Interpretation of Laws issued by the law enforcement authorities should expressly prohibit detentions of people in excess of time limits. Furthermore, to revise the laws which run short of provisions of punishment for the officials who create detentions of people in excess of time limits could be an effective method to confine or solve the problem of detention in excessive time limit.

¹³⁹ See 4.3.2

5 Right to Take Proceedings before a Court/Habeas Corpus

Article 9(4) entitled any person who has been arrested or detained for whatever reason to challenge the lawfulness of his/her detention in a court without delay. This right stems from the Anglo-American legal principle of Habeas Corpus, and exists regardless of whether deprivation of liberty is actually unlawful.¹⁴⁰

The first draft of paragraph 4 of article 9 of ICCPR provided for the right to an effective remedy in the nature of “habeas corpus”. The express reference was, however, replaced with the neutral expression “proceedings before a court” in order to allow States to establish remand proceedings within the framework of their own legal systems.¹⁴¹ Article 9 (4) of ICCPR says:

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.

5.1 International human rights standards

5.1.1 Not Automatically

This right, unlike article 9(3), does not have to be performed by the State. Instead it occurs at the instigation of the author or his/her representatives. The State cannot be held responsible for the author’s failure to seek review of the lawfulness of his/her detention. In *Stephens v. Jamaica* (373/89), the

¹⁴⁰ M. Nowak, UN Covenant on Civil and Political Rights: ICCPR Commentary, 1993, Strasbourg, 178

¹⁴¹ See A/2929, para.35

Committee held that:

9.7 With respect to the alleged violation of article 9(4), it should be noted that the author did not himself apply for Habeas Corpus. He could have, after being informed on 2 March 1983 that he was suspected of having murdered Mr. Lawrence, requested a prompt decision on the lawfulness of his detention. There is no evidence that he or his legal representative did so. It cannot, therefore, be concluded that Mr. Stephens was denied the opportunity to have the lawfulness of his detention reviewed in court without delay.¹⁴²

5.1.2 Without Delay

The judicial review on the lawfulness of one's detention must be made "without delay". However, this time limit, just like the "reasonable time" in article 9(3), depends on the circumstance of a given case. In *Torres v. Finland* (291/88), the author challenged the legality of his detention and argued that his detention had breached article 9(4) due to the delay in the publication of the court's decision regarding the legality. The Committee held that:

7.3 With respect to the second question, the Committee emphasizes that, as a matter of principle, the adjudication of a case by any court of law should take place as expeditiously as possible. This does not mean, however, that precise deadlines for the handing down of judgments may be set which, if not observed, would necessarily justify the conclusion that a decision was not reached "without delay". Rather, the question of whether a decision was reached without delay must be assessed on a case-by-case basis. The Committee notes that almost three months passed between the filing of the author's appeal, under the Alien's Act, against the decision of the Ministry of the Interior and the decision of the Supreme Administrative Court. This

¹⁴² *Stephens v. Jamaica* (373/89), para. 9,7

*period is in principle too extended, but as the Committee does not know the reasons for the judgment being issued only on 4 March 1988, it makes no finding under article 9, paragraph 4, of the Covenant.*¹⁴³

There is a question about the Committee's findings. Should a State party benefit from not providing the information about a delayed judgment? Even "*This period is in principle too extended*", no violation was found in respect of the delayed judgment.

In *Hammel v. Madagascar* (153/83), incommunicado detention for three days, during which time it was impossible for the author to gain access to a court to challenge his detention, was held to breach article 9(4). On the other hand, in *Portorreal v. Dominican Republic* (188/84), the Committee found no breach of article 9(4) when the author was held for fifty hours without having the opportunity to challenge his detention.

5.1.3 Proceedings must be before a "court"

In *Vuolanne v. Finland* (256/87), the Committee stressed that the right of recourse to a court of law can also be satisfied by a military court, however, the mere right to have the punishment reviewed by a higher military officer who "cannot be deemed to be a court" constitute a violation of article 9(4).

¹⁴⁴

Therefore, the word "court" is not necessarily to be understood as signifying a court of law of classic kind, integrated within the standard judicial machinery of the state. But in order to constitute a court, an authority must be independent of the executive and of the parties to the case, and also provide the fundamental guarantees of judicial procedure.

¹⁴³ *Torres v. Finland* (291/88), para.7.3

¹⁴⁴ *Vuolanne v. Finland* (256/87), para. 9.3

5.1.4 Effectiveness of right to challenge detention

The text of article 9(4) requires that one must have an opportunity to challenge the “lawfulness” of one’s detention before a court. In *A v. Australia* (560/93), the author did have such an opportunity. However, the relevant Australian legislation, which essentially authorized the detention of aliens in the author’s position, precluded any chance of success. The author’s detention was automatically lawful in municipal law. The Committee held:

*9.5 The Committee observes that the author could, in principle, have applied to the court for review of the grounds of his detention before the enactment of the Migration Amendment Act of 5 May 1992; after that date, the domestic courts retained that power with a view to ordering the release of a person if they found the detention to be unlawful under Australian law. In effect, however, the courts' control and power to order the release of an individual was limited to an assessment of whether this individual was a "designated person" within the meaning of the Migration Amendment Act. If the criteria for such determination were met, the courts had no power to review the continued detention of an individual and to order his/her release. In the Committee's opinion, court review of the lawfulness of detention under article 9, paragraph 4, which must include the possibility of ordering release, is not limited to mere compliance of the detention with **domestic law**. While domestic legal systems may institute differing methods for ensuring court review of administrative detention, what is decisive for the purposes of article 9, paragraph 4, is that such review is, in its effects, real and not merely formal. By stipulating that the court must have the power to order release "if the detention is not lawful", article 9, paragraph 4, requires that the court be empowered to order release, if the detention is incompatible with the requirements in article 9, paragraph 1, or in other provisions of the Covenant. This conclusion is supported by article 9, paragraph 5, which obviously governs the granting of compensation for detention that is "unlawful" either under the terms of domestic law or within*

*the meaning of the Covenant. As the State party's submissions in the instant case show that court review available to A was, in fact, limited to a formal assessment of the self-evident fact that he was indeed a "designated person" within the meaning of the Migration Amendment Act, the Committee concludes that the author's right, under article 9, paragraph 4, to have his detention reviewed by a court, was violated.*¹⁴⁵

The Committee's finding of a violation of 9(4) confirms that "lawfulness" in article 9(4) means "lawfulness" under the Covenant, rather than "lawfulness" in municipal law. In this case, "lawful" in article 9(4) seems equate with "not arbitrary". This conclusion is reinforced by Mr. Bhagwati's separate concurring opinion.¹⁴⁶ The Committee's decision here seems to redress a drafting flaw in article 9(4). A narrow reading of "lawful" would have meant that States could reduce the Covenant's right of habeas corpus to a mere formal provision with little substantive value by passing laws which authorize broad powers to detain persons on any grounds.

5.1.5 Other international human rights documents

Besides article 9(4) of ICCPR, many other international human rights documents also provide the procedure through which the detained persons may recourse to judicial review on the lawfulness of his detention. For example, Principle 32 of the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* provides that "A detained person or his counsel shall be entitled at any time to take proceedings according to domestic law before a judicial or other authority to

¹⁴⁵ A v. Australia (560/93), para. 9.5

¹⁴⁶ In his separate concurring opinion, Mr. Bhagwati points out: The interpretation contended for by the State will make it possible for the State to pass a domestic law virtually negating the right under article 9, paragraph 4, and making non-sense of it. The State could, in that event, pass a domestic law validating a particular category of detentions and a detained person falling within that category would be effectively deprived of his/her right under article 9, paragraph 4. I would therefore place a broad interpretation on the word "lawful" which would carry out the object and purpose of the Covenant and in my view, article 9, paragraph 4, requires that the court be empowered to order release "if the detention is not lawful", that is, the detention is arbitrary or incompatible with the requirement of article 9, paragraph 1, or with other provisions of the Covenant.

challenge the lawfulness of his detention in order to obtain his release without delay, if it is unlawful”.

5.2 Chinese laws and practice

Article 8 of the UDHR provides: “Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law”. The Constitution of China does grant people the right to liberty, however, there is no mechanism for detained individuals to challenge the lawfulness of deprivation of their liberty before a judicial authority. So far the pre-trial detention is not subject to any form of judicial review.

As discussed before, the application and the extension of detention in China rest with the discretion of non-judicial officials. The CPL provides an executive or self-review of the lawfulness of the detention imposed by the investigation authorities. The detained person may appoint a lawyer to provide him with legal advice and to file petitions and complaints on his behalf.¹⁴⁷ It is very questionable that the detained person may obtain any remedy under the internal review because the investigation authority and the detained person are the totally opposite two parties in the criminal proceedings. Furthermore, there is even no concrete provision pertinent to the time limit of the review, and that which level of the authorities should review the detention has not been clarified yet. For these who are not able to afford the counsel, it is more like an empty promise as to challenge the detention they are enduring is far beyond their abilities. It is interesting that if the public security organ considers the People's Procuratorate's decision to disapprove an arrest to be incorrect, it may request a reconsideration. If the public security organ's opinion is not accepted, it may request a review by the People's Procuratorate at the next higher level. The People's Procuratorate at the higher level shall immediately review the matter, decide

¹⁴⁷ See Article 96 of CPL

whether or not to make a change and notify the People's Procuratorate at the lower level and the public security organ to implement its decision.¹⁴⁸

5.3 Conclusion

What provided by CPL for the review of the lawfulness of the detention is an executive or self-review imposed by the investigation authorities. This is completely different from the requirement of article 9(4) of ICCPR and Principle 32 of the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*. It is fair to say that there is no right of Habeas Corpus at all in China. This may be the most serious hamper for China to ratify the Covenant in terms of article 9. A revision may have to be made to introduce this system into the Chinese law. To incorporate relevant provisions about the right of Habeas Corpus into CPL should be the basic work which needs to be done right now. As for the concrete procedures of how individuals employ their right of Habeas Corpus could be prescribed by the interpretation issued by Supreme People's Court.

¹⁴⁸ See article 70 of CPL

6 Right to compensation

Article 9(5) provides for a right of compensation to all who have been unlawfully deprived of their liberty of person. It says:

Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

The right to compensation in paragraph 5 is found in the first British draft of 1947.¹⁴⁹ Efforts by the US and the Netherlands in the HRCComm to strike this provision and the US motion to recognize the claim for compensation only as against a person who acted culpably were finally unsuccessful.¹⁵⁰ A British motion to replace the words “deprivation of liberty” with “detention” was approved by the narrow majority of 30:27, with 14 abstentions, after the British delegate had assured that this would not narrow the protective scope of this provision.¹⁵¹

6.1 International human rights standards

Right to compensation contained in article 9(5) of ICCPR can be considered a specific type of domestic remedy within the meaning of article 2(3) relating to liberty of person. Article 2(3) provides for a general right to a remedy for violation of any Covenant provision, but it is not an autonomous Covenant right. One is not entitled to a remedy under article 2(3) in the absence of a violation of a substantive Covenant right.¹⁵² In *Aduayom v. Togo* (422/90), Mr. Pocar argues that, in contrast to article 2(3), article 9(5) is an autonomous right. A finding of violation of article 9(5) should not therefore be dependent upon a violation of another Covenant right,

¹⁴⁹ E/CN. 4/21, Annex B (Art. 10(6))

¹⁵⁰ E/CN. 4/170/Add.4; E/CN. 4/365; E/CN. 4/394.

¹⁵¹ A/C.3/L.686; A/C.3/SR.863, para. 4, SR.864, para.21, SR.866, para .42

¹⁵² S.E. v Argentina (275/88), para. 5.3

specifically another right in article 9.

Unlike the analogous provision in article 5(5) of the ECHR which guarantees compensation only in the event of a violation article 5, the claim set down in article 9(5) of ICCPR is available to every victim of unlawful arrest or detention.¹⁵³ Here the compensation must apply to the detentions which are unlawful under a State's own domestic law, even if they are permitted under article 9 itself. However, the Committee in *A v. Australia* (560/93) confirmed that article 9(5) also prescribes the payment of compensation when the detention is "lawful" within domestic law, but contrary to the Covenant. Thus, as with article 9(4), the HRC has imported a sanction for "arbitrary yet lawful detentions" into article 9(5) despite the omission of any reference to "arbitrary detention" in the provision. Even in cases in which deprivation of liberty was in itself lawful but the claim to remand was violated, the person concerned is entitled to a right to compensation.¹⁵⁴ Perhaps in order to avoid such a broad scope of compensation, when ratifying the Covenant, Italy declared that it would only apply the term "unlawful arrest or detention" to cases in which article 9(1) was violated.¹⁵⁵

Article 9 does not provide any details as how the compensation claim is specifically to be implemented. Article 9(5) refers only to an "enforceable right", suggesting a claim that can be effectively enforced before a domestic authority. The amount of compensation turns on the national statutory provisions, although the claim under article 9(5) also covers non-pecuniary damage.

6.2 Chinese laws and practice

¹⁵³ M. Nowak, UN Covenant on Civil and Political Rights: ICCPR Commentary, 1993, Strasbourg, 181

¹⁵⁴ *Santullo v. Uruguay* (9/77), para. 12-13

¹⁵⁵ ICCPR/C/2/Rev.3

6.2.1 Legal base of state compensation in China

The establishment of right to compensation is one of the symbols of a civilized society of rule of law. Article 41 of the Constitution of China entitles its citizens who have suffered losses through infringement of their civil rights by any state organ or functionary the right to compensation in accordance with law. Article 121 of the General Principles of the Civil Law of PR China also provides a legal basis for right to compensation that if a state organ or its personnel, while executing its duties, encroaches upon the lawful rights and interests of a citizen or legal person and causes damage, it shall bear civil liability.

The Law of State Compensation was enacted in 1994 and went into effect in 1995. This law set up two main state compensation systems, namely, the administrative and criminal compensation. Several articles of the law specially apply to the unlawful deprivations of liberty, including unlawful administrative coercive measures and unlawful criminal detention and arrest.

¹⁵⁶ Besides, the law stipulates specific authorities liable for the compensation and detailed procedure guaranteeing the substantive remedies. The forms of compensation for unlawful deprivation of liberty includes monetary payment, eliminating the evil effects for the victim, rehabilitating his reputation, and extending an apology within the scope of influence of the tortious act.

¹⁵⁶ Article 3 of the Law of State Compensation says: The victim shall have the right to compensation if an administrative organ or its functionaries, in exercising their administrative functions and powers, commit any of the following acts infringing upon the right of the person of a citizen:

(1) Detaining a citizen in violation of the law or unlawfully taking compulsory administrative measures in restraint of his personal freedom;

(2) Unlawfully taking a citizen into custody or depriving him of his right of the person by other unlawful means.

Article 15 says: The victim shall have the right to compensation if an organ in charge of investigatory, procuratorial, judicial or prison administration work, or its functionaries, infringe upon his right of the person in the exercise of its functions and powers in any of the following circumstances:

(1) Wrong detention of a person without incriminating facts or proof substantiating a strong suspicion of the commission of a crime;

(2) Wrong arrest of a person without incriminating facts

6.2.2 Legislation flaw

It is fair to say that the Law of State Compensation has greatly pushed China forward to meet the international human rights norms. However, there still exists an apparent legislation flaw, that is, the detention exceeding stipulated time limit is precluded by the law. Victims who suffer from excessive pretrial detention have no opportunity to obtain the state compensation according to the law. This may explain why the detention of people in excess of time limit remains prevalent in China.

6.3 Conclusion

There is a comprehensive and normative system in China providing the State compensation for these suffered form unlawful deprivations of liberty. However, the Committee in *A v. Australia* (560/93) confirmed that article 9(5) also prescribes the payment of compensation when the detention is “lawful” within domestic law, but contrary to the Covenant. Therefore, if China ratified the Covenant, the scope of State compensation would have to be widen since the HRC has imported a sanction for “arbitrary yet lawful detentions” into article 9(5) despite the omission of any reference to “arbitrary detention” in the provision. In *Santullo v. Uruguay* (9/77), even the deprivation of liberty was in itself lawful but the claim to remand was violated, the person concerned is entitled to a right to compensation. So before ratifying the Covenant, China needs to carefully exam all its current forms of arbitrary deprivation of liberty, including lack of protection of the right to Habeas Corpus. What needs to be revised as soon as possible is the Law of State Compensation of China which precludes the detention exceeding stipulated time limit because the detention exceeding stipulate time limit is an obvious unlawful detention no matter in the light of international human rights norms or the domestic laws.

7 Conclusion

It is a common idea sought by the mankind to realize and enjoy human rights, and it is a sacred obligation of the State to protect and promote human rights. By signing the International Covenant on Civil and Political Rights in 1998, the government of China expressed its strong willing to participate into the international human rights regime. Since then, scholars and officials have been keeping an active attitude in discussing the issue of ratifying the Covenant. If ratification of the Covenant is delayed for a lengthy period, there will have a negative impact on the progress made to date ensuring that Chinese law more compatible with international standards. Delay would also turn China into a passive partner in international relations.

Some Chinese scholars, when researching the distance between article 9 of ICCPR and the current domestic laws and legal practice, argued that:

The above provisions¹⁵⁷ are based on China's situation and consistent with the requirement of the Covenant. However, on the issue of judicial review required under paragraph 4 of the Article, there are some differences between the Chinese practice and the Covenant. In order to fully fulfil the obligations under the Covenant and protect the lawful rights of arrested and detained persons, China should improve judicial review of detention and arrest. In general, China does not need to make a reservation to article 9 of the Covenant.

It seems to be a quite optimistic estimate. On the contrary, this thesis delivers an angst about this issue and hold a serious doubt on the allegation that the current law and legal practice in China is, in general, conformed to the international human rights standards set up in article 9 of the Covenant.

¹⁵⁷ Here it means the Constitution of PR China, the Criminal Procedure Law of PR China and the Law of State Compensation. See Chen Guanzhong, et al, A Study on the Issues of Ratifying and Implementing of International Covenant on Civil and Political Rights, China Legal System Press, Beijing, April 2000, p 512

The distances between the international human rights standards set forth in article 9 of ICCPR and the current laws and legal practice of China can be summarized as three categories. First one is the issue of right to Habeas Corpus, which is required under article 9(4). An entire new system needs to be established to ensure the right to Habeas Corpus as such a right has not been acknowledged at all in China.

The second category includes issues of the current administrative detentions, such as RTL and “taking in for questioning” and rights for the person detained on criminal charges, which are mainly related to article 9(1) and article 9(3) of ICCPR. As for this category, some thorough or relatively major reforms related to right to liberty and pre-trial detention are necessary. Effort will focus on revisions of relevant provisions of CPL, abolishment or amendment of arbitrary administrative detentions and relocation of the financial and human resource of the law enforcement agencies. This could be a huge work. Of course, there is an optional method - to make reservations to article 9 to avoid such a dramatic legal reform, however, from the long views, reform is preferable to making reservation.

The third category consists of right to be informed and right to compensation, which are prescribed respectively by article 9(2) and article 9(5). Unlike the former two categories, the third one could be deemed as a category with a need of minor improvement on relevant human rights issues. For example, there has already been a relatively comprehensive system of laws providing state compensation for those suffered from unlawful deprivations of liberty. What needs to be revised is the Law of State Compensation which precludes the detention exceeding stipulated time limit. As for the right to be informed, the warrant of criminal detention used by prosecutors has contained both procedure legal basis and indication of the substance of the complaint against the suspect. It would not be difficult for the police to follow the method in the near future.

In general, to clear up the hampers of the ratification of the ICCPR is not an easy task, especially when dealing with the issues related to right to liberty and pre-trial detention in China. However, it is a work must be done. A sober and critical evaluation of the distance between the international human rights standards and Chinese laws and practice can never be deemed as a pessimistic attitude toward China's ratification of ICCPR. By entering the ICCPR, China is voluntarily making itself subject to certain level of international scrutiny and must fulfil its obligations under the Covenant. Ratification and implementation of the Covenant will be a significant event with a long-term impact on all aspects of life in China.

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