



The Slynn Foundation

HUMAN RIGHTS IMPLEMENTATION CENTRE

BUILDING HUMAN RIGHTS INTO PRACTICE

A Training Manual for Judges and Prosecutors on the Application of Human Rights Law in the Administration of Criminal Justice in Palestine

The Arab Partnership



Foreign &
Commonwealth
Office

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ABBREVIATIONS

ACHR:	American Convention on Human Rights
ACHPR	African Charter on Human and Peoples' Rights
AU:	African Union
CAT:	UN Committee Against Torture
CEDAW:	Convention on the Elimination of All Forms of Discrimination Against Women
CRC:	UN Committee on the Rights of the Child
CRPD:	Convention on the Rights of Persons with Disabilities
ECHR:	European Convention on Human Rights
HRC:	Human Rights Council
ICCPED:	International Convention for the Protection of All Persons from Enforced Disappearance
ICCPR:	International Covenant on Civil and Political Rights
ICERD:	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR:	International Covenant on Civil and Political Rights
ICJ:	International Court of Justice
NGO:	Non-governmental organisation
OAS:	Organisation of American States
OAU:	Organisation of African Unity
OHCHR:	Office of the High Commissioner for Human Rights
UNCRC:	Convention on the Rights of the Child
UDHR:	Universal Declaration of Human Rights
UN:	United Nations
UNCAT:	UN Convention Against Torture, Cruel, Inhuman or Degrading Treatment or Punishment
UPR:	Universal Periodic Review

I. Introduction: How this Manual works

1. This manual is designed to form the basis for training for judges and prosecutors in Palestine. It describes the international law framework for protecting and promoting human rights in the administration of justice, both at the United Nations and at the regional level. It outlines first some fundamental principles on which international human rights law is based, including the requirements of legality, rule of law, and effective remedy and the prohibition on retrospective criminal laws as well as the position of international law in domestic law and specifically in Palestinian law. Specific issues are then considered. These are human rights in states of emergency and limitations on rights, negative and positive obligations, equality and non-discrimination, as well as extra-territorial application and non-State actors.
2. The manual then goes on to consider the rights relevant to the administration of justice. It draws on international and regional human rights treaties, in particular the ICCPR to examine the right to life, protection from torture and inhuman and degrading treatment and punishment, the right to liberty and detention conditions, and fair trial. Reference is also made to the rights to privacy, freedom of expression and assembly and freedom of religion where it relates to administration of justice.

Sources of Human Rights within the Manual

3. The human rights standards at the core of this manual and training programme are those derived from the international human rights mechanisms at the UN as well as those at the regional level. It draws upon the treaties in Africa, the Americas and Europe as well as the provisions of the Arab Charter, and other sources of international human rights law.

II. The International Framework to Promote and Protect Human Rights: An Overview

A. The United Nations and the Birth of the Universal Human Rights System

1. Human rights, as they are now commonly understood, emerged from the creation of the United Nations. In the aftermath of World War II, governments committed themselves to establishing the UN with the primary goal of promoting international peace and preventing conflict, thereby laying the modern foundation for *jus ad bellum* (international laws governing recourse to the use of force).
2. The Charter of the United Nations was signed on 26 June 1945. Its Preamble asserts that the main objectives of the organisation are, amongst other things, to:
 - save succeeding generations from the scourge of war....and
 - reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small,¹
3. In 1946, the UN established a Commission on Human Rights, which was charged with the task of submitting proposals on an International Bill of Rights.²
4. The Draft declaration was adopted by the General Assembly in 1948 and came to be known as the Universal Declaration of Human Rights (UDHR). This instrument has had a profound impact on the development of regional and global standards for the protection of general or specific human rights.
5. A consequence of the UDHR is to establish a universal language of human rights. Human rights have become universal values if, for no other reason, than that they are derived from the international community. They therefore originate from the UN as an expression of global values.³

¹ Article 1(3) of the Charter states that, one of the aims of the UN is to achieve international co-operation in 'promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion'. What the UN Charter does not do is to specify the contents of any 'human rights,' nor does it establish any mechanisms for the protection of human rights in the members of the United Nations.

² The Commission was chaired by Eleanor Roosevelt, widow of the former President. The steering committee members that drafted the UDHR included:

- Dr Chang – Vice-Chair and Chinese Confucian philosopher
- Charles Malik – Rapporteur and Lebanese philosopher
- René Cassin – French lawyer and philosopher, Jewish with personal experience of the Holocaust.

³ These values were reaffirmed as recently as 1993 at the Vienna UN Conference on Human Rights, which pledged: 'Universal respect for and observance of human rights and fundamental freedoms for all... the universal nature of these freedoms is beyond question...'. And also: 'While the significance

B. The Universal Declaration of Human Rights (UDHR)

6. The UDHR is premised on the fundamental principle that human rights are based on the 'inherent dignity of all members of the human family' and are the 'foundation of freedom, justice and peace in the world'.⁴
7. The UDHR recognises that to be able to guarantee human dignity, both economic and social, as well as civil and political, rights need to be included. It contains, among others:
 - the right to life, liberty and security of person;
 - the right to an adequate standard of living;
 - the right to seek and to enjoy in other countries asylum from persecution;
 - the right to own property;
 - the right to freedom of opinion and expression;
 - the right to education,
 - freedom of thought, conscience and religion and
 - the right to freedom from torture and degrading treatment.
8. Although the Declaration is not a legally binding document, it has inspired many human rights treaties and other documents, which together constitute an international standard of human rights. Many of its provisions are also considered to be reflective of customary international law, and therefore binding on states that have not signed up to some of the instruments subsequently adopted.

C. The Human Rights Covenants

9. The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) were adopted in 1966 and entered into force in 1976. They have both been ratified by the State of Palestine.⁵ They were intended to provide legal effect to the provisions in the UDHR. There are additional Protocols to these Covenants that provide for additional rights and mechanisms of accountability.
10. The ICCPR details the basic civil and political rights of individuals, and duties attach to the state. Among the rights of the individual are:
 - The right to life

of national and regional peculiarities and various historical, cultural and religious backgrounds must be borne in mind...'.⁴

⁴ The Universal Declaration of Human Rights was adopted on December 10, 1948, by 56 members of the United Nations 'as a common standard of achievement for all people and nations'.

⁵ The State of Palestine deposited its instrument of ratification for both the ICCPR and ICESCR in April 2014.

- The right to liberty and freedom of movement
- The right to equality before the law
- The right to presumption of innocence until proven guilty
- The right to be recognised as a person before the law
- The right to privacy and protection of that privacy by law
- The right to legal recourse when rights are violated,
- Freedom of thought, conscience, and religion
- Freedom of opinion and expression
- Freedom of assembly and association

11. The ICCPR forbids, *inter alia*, torture and inhuman or degrading treatment, slavery, arbitrary arrest and detention, propaganda advocating either war or hatred based on race, religion, national origin or language.

12. It guarantees the rights of children and prohibits discrimination based on race, sex, colour, national origin, or language. The Covenant permits governments to temporarily suspend some of these rights in cases of civil emergency only, and lists those rights which cannot be suspended for any reason.⁶

13. The ICCPR establishes the UN Human Rights Committee to consider reports submitted by States parties on the measures they have adopted which give effect to the rights set forth in the Covenant.⁷ It can also receive and consider communications from States,⁸ and also individuals claiming to be victims of violations of the rights set forth in the Covenant, but only, in respect of the latter, if the country under consideration has ratified the Optional Protocol. The State of Palestine has not yet ratified the Optional Protocol. The Human Rights Committee also adopts General Comments interpreting the provisions of the ICCPR.

14. The rights in the International Covenant on Economic, Social and Cultural Rights (ICESCR) include:

- Right to work
- Right to equal pay for equal work
- Equal opportunity for advancement
- Right to form and join trade unions
- Right to strike
- Right to social security
- Special protection to the family, mothers and children
- Right to an adequate standard of living, including food, clothing and housing
- Right to education
- Right to a scientific and cultural life.

⁶ See section V.B. below.

⁷ Article 40 ICCPR.

⁸ Article 41 ICCPR.

15. A Committee on Economic, Social and Cultural Rights has the mandate to receive reports from States on the measures adopted to implement the ICESCR,⁹ to adopt General Comments, and since 2013 to receive and examine communications if the State has ratified the Optional Protocol.

D. Specific Issue Human Rights Treaties

16. A number of other human rights treaties have been adopted under the UN which cover certain themes, each with their own Committee:

- Torture (UNCAT)¹⁰ and the Committee Against Torture (CAT). The State of Palestine is a party to this treaty. An Optional Protocol to the Convention (OPCAT) provides for international and national monitoring bodies to visit places of detention to prevent torture. The State of Palestine has yet to ratify this Protocol;
- Enforced disappearances (ICCPED) and the Committee on Enforced Disappearances (CED). The State of Palestine is not yet a party to this treaty;
- Genocide (the Genocide Convention). The State of Palestine is a party to this treaty.¹¹

17. Other instruments have been adopted to protect especially vulnerable populations or classes of persons, such as:

- Racism (ICERD)¹² and the Committee on the Elimination of Racial Discrimination (CERD). The State of Palestine is a party;
- Disabled persons (CRPD),¹³ and its Committee on the Rights of Persons with Disabilities. The State of Palestine is a party;
- Migrant workers and their families. The State of Palestine is not a party;¹⁴
- Women (CEDAW);¹⁵ and its Committee on the Elimination of Discrimination Against Women. The State of Palestine is a party;
- Children (UNCRC)¹⁶ and its Committee on the Rights of the Child (CRC). The State of Palestine is also a party to this treaty.

⁹ Article 16(1) ICESCR.

¹⁰ The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984. The State of Palestine acceded on 2nd April 2014.

¹¹ Convention on the Prevention and Punishment of the Crime of Genocide, 1948. The State of Palestine acceded on 2nd April 2014.

¹² The Convention on the Elimination of All Forms of Racial Discrimination, 1966 (CERD). The State of Palestine acceded on 2nd April 2014.

¹³ Convention on the Rights of Persons with Disabilities, 2006. The State of Palestine acceded on 2nd April 2014.

¹⁴ Convention on the Protection of the Rights of all Migrant Workers and their Family Members, 1990. This has not been signed or ratified by the State of Palestine.

¹⁵ Convention on the Elimination of All Forms of Discrimination against Women, 1979 (CEDAW). The State of Palestine acceded on 2nd April 2014.

¹⁶ Convention on the Rights of the Child, 1989 (CRC). The State of Palestine acceded on 2nd April 2014.

18. As with the ICCPR and ICESCR, these treaties also provide for mechanisms to monitor State compliance with their obligations. These include State reporting procedures, inquiries,¹⁷ and communication procedures.¹⁸ The latter permit States¹⁹ and individuals to submit a complaint alleging violations of the rights in the respective treaty. The State of Palestine has not ratified any of the Optional Protocols or made the necessary declarations which permit the right to individual petition to the UN human rights treaties.

E. Additional UN Mechanisms to Protect and Promote Human Rights

19. Under the UN Charter, through the UN's Human Rights Council, Universal Periodic Review (UPR) has been established.

20. Under UPR, all UN Member States must submit to a 4 yearly audit of human rights protection within their jurisdictions. The first cycle of this process has been concluded and therefore all member States of the UN have been reviewed now at least once.

21. UPR is based on three reports: a national report prepared by the government; a report by the Office of the High Commissioner for Human Rights (OHCHR) which includes information from other UN agencies and programmes and civil society organisations; and an 'outcome report' listing recommendations made to the State under review, including those that it accepted and which it will have to implement before the next review.

22. UPR is a peer review mechanism. It is a dialogue between Member States on the Human Rights Council and the State under review. The process is intended to be cooperative, constructive, non-confrontational and non-political. There is no obligation to accept the recommendations of the outcome report. There are no punitive measures.

23. As well as the treaty bodies identified above and UPR, the UN has also developed additional procedures to protect and promote human rights mandated under the Charter itself. These are important because they are applicable to all members of the UN without reference to whether they have become parties to particular treaties.

24. Thematic special rapporteurs, independent experts and working groups have a broad mandate to investigate and report on the causes and consequences of the violations of the particular right in question. They thus attempt to identify commonalities in violations, draw broad conclusions, and

¹⁷ Article 20 UNCAT; Article 8 Optional Protocol CEDAW; Article 6, Optional Protocol to the CRPD; Article 33 ICCPR; Article 11 Optional Protocol, ICESCR; Article 13 Optional Protocol to the UNCRC.

¹⁸ Under ICCPR; ICERD; CAT; CEDAW; CRPD; CED and ICESCR. The communication procedures for the Committee on Migrant Workers and the Committee on the Rights of Child have yet to enter into force.

¹⁹ These have never been used but are available before: CAT, CMW, CED, ICESCR and CRC. There is a dispute resolution procedure before CERD and the CRPD Committee.

make recommendations on conditions applicable to the right in issue. They may however also visit particular States and intervene with governments when they feel it appropriate. Special Rapporteurs and working groups have been adopted on a number of themes including torture; disappearances; summary or arbitrary executions; religious intolerance; mercenaries; internally displaced persons; violence against women; education; extreme poverty and health; and promoting and protecting human rights whilst countering terrorism.

25. There are also country-specific mandates. These are independent experts or special rapporteurs which focus on a particular State, including, for example, for Sudan, Iran, Myanmar, the Palestinian Occupied Territories and Syria.

F. Regional Human Rights Instruments

26. Along with the universal treaties that aim at worldwide membership, there also exist regional human rights systems, based on treaties whose membership is restricted to states within a particular region. These are:

- The Arab Charter on Human Rights adopted by the Arab League on 15 September 1994, and which entered into force in March 2008.²⁰
- African [Banjul] Charter of Human and People's Rights (1981) adopted by the Organisation of African Unity (now the African Union);
- American Convention on Human Rights and Duties of Man (1969) adopted by the Organisation of American States;
- European Convention for the Protection of Human Rights and Fundamental Freedoms, (1950) adopted by the Council of Europe;
- Although not a binding treaty, the ASEAN Human Rights Declaration was adopted by the Summit of the Association of South East Asian Nations (ASEAN) in November 2012.

[The Council of Europe](#)

Key Human Rights Instruments

27. The Council of Europe was formed in May 1949 between the western democratic European States. Its statutory principles are pluralist democracy, respect for human rights and the rule of law. Since 1989 membership has increased as states from the former eastern bloc have joined or submitted applications to join. There are currently 47 member States.

²⁰ The Arab League of Nations was founded on 1945 in Egypt and its members include Egypt, Iraq, Lebanon, Saudi Arabia, Syria, Jordan and Yemen, which are its founding members, and Algeria, Bahrain, Comoros, Djibouti, Kuwait, Libya, Mauritania, Morocco, Oman, The State of Palestine, Qatar, Somalia, Southern Yemen, Sudan, Tunisia, and the United Arab Emirates.

28. The key human rights instruments of the Council of Europe are²¹:
- European Convention for the Protection of Fundamental Rights and Freedoms (ECHR), 1950 and 14 Protocols;
 - European Social Charter (ESC), 1961, Additional Protocol of 1988, Amending Protocol of 1991, Additional Protocol of 1995 providing for a system of collective complaints;
 - The European Social Charter is gradually being 'replaced' (for those States which have ratified it) by the Revised European Social Charter (Strasbourg, 3 May 1996, entered into force 1 July 1999);
 - European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 1987 (and 2 Protocols of 1993);
 - Framework Convention for the Protection of National Minorities, 1995.
29. The Council of Europe framework distinguishes between civil and political rights and economic and social rights. Civil and political rights are contained within the ECHR while economic and social rights are in the European Social Charter.
30. The ECHR is the cornerstone of the Council of Europe system for the protection of human rights. All member States of the Council of Europe must be parties to the ECHR.
31. Many of the rights enshrined in ECHR are the same as those contained within the International Covenant on Civil and Political Rights (ICCPR).
32. The rights guaranteed under the ECHR have been supplemented by subsequent Protocols:
- Protocol No. 1, 1952: right to property, education and free elections.
 - Protocol No. 4, 1963: freedom of movement; prohibition of expulsion of nationals; prohibition of collective expulsion of aliens.
 - Protocol No. 6, 1983: abolition of death penalty.
 - Protocol No. 7, 1984: safeguards in relation to the expulsion of aliens; right of appeal to a higher court against conviction or sentence in criminal matters; compensation for wrongful conviction; protection against double jeopardy; equality of spouses during and on dissolution of marriage.
 - Protocol No. 12, 2000: non-discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, and association with a national minority, property, birth or other status. The Protocol entered into force on 4 April 2005.
 - Protocol No. 13, 2002: abolition of death penalty in all circumstances.

²¹ There are many other Conventions addressing particular human rights violations such Violence Against Women and Trafficking in Human Beings.

33. States are only bound by those Protocols to which they have become parties.

Implementation Mechanisms

34. **The European Court of Human Rights:** The ECHR is enforced through a permanent, full-time European Court of Human Rights that sits in Strasbourg.²²

35. The Court consists of Judges of an equal number of States parties to the ECHR. A single judge can reject cases without a fully reasoned decision when they are clearly inadmissible. Where there is evidence of the case raising matters on which the Court has already ruled, it will be dealt with by a Committee of three judges. To rule on the admissibility of more complex cases or on the merits of admissible cases, the Court sits in Chambers comprising seven Judges. A Grand Chamber of seventeen Judges sits in certain situations.

36. The European Court has jurisdiction over inter-state and individual complaints:

- **Inter-state complaint:** Any State party may refer an alleged breach of the Convention or substantive Protocols by another State party. This procedure has been little used, although cases have been brought, for example, by Ireland against the United Kingdom; by the Scandinavian States against Greece during the military regime; by Denmark against Turkey; and by Cyprus against Turkey. Georgia and Russia have also taken cases against each other.
- **Individual complaint:** Individuals and non-governmental organisations may also lodge complaints to the European Court for violations allegedly committed by State Parties to the Convention.

37. The Court can also provide an **advisory opinion** at the request of the Committee of Ministers of the Council Europe on questions relating to the interpretation of the European Convention and its Protocols.

38. Execution of the Court's judgments is overseen by the Committee of Ministers, a political body composed of government representatives of all the Member States.

Other Council of Europe Mechanisms

39. **European Committee for the Prevention of Torture:** The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment establishes a European Committee that, through visits to the penal and other institutions within States parties, examines the treatment of those deprived of their liberty with a view to strengthening (if necessary) the protection of such persons from torture.

²² From when the ECHR came into force in 1953 until 1 November 1998, enforcement was through the institutional machinery of the Committee of Ministers, the European Commission on Human Rights and the European Court of Human Rights in Strasbourg. This machinery was overhauled in 1994 by Protocol No. 11 that entered into force on 1 November 1998.

The Committee members are independent experts and States are required to allow such visits.

40. Visits to any state are normally scheduled in advance but occasional ad hoc visits may also take place. Once it is in a State, the CPT can visit any place where people are deprived of their liberty without giving advance notice. Its meetings are private, as are its discussions and reports. The report may be published if the State fails to co-operate and the Committee decides by a two third majority to do so.
41. **European Committee of Social Rights:** The function of the European Committee of Social Rights is 'to judge the conformity of national law and practice with the European Social Charter'. It operates two monitoring procedures: a reporting system and collective complaint system (e.g. by NGOs). Note that in its constituent instruments the Committee is called a Committee of experts/Committee of independent experts.
42. **European Commissioner for Human Rights:** The position of the Commissioner for Human Rights of the Council of Europe was established in 1999. The role of the Commissioner is to promote the effective observance and full enjoyment of human rights, to identify possible shortcomings in the law and practice and to assist member states in their efforts at addressing those shortcomings.
43. The Commissioner can undertake regular visits to member states and address the situation of vulnerable persons; such as, women in prisons, children with mental health issues, refugees and ethnic minorities and publishes an annual report covering his activities, including summaries of reports on the human rights situation in countries visited.

Organisation of American States

Key instruments

44. The Organisation of American States is established under the OAS Charter adopted by Ninth International Conference of American States in 1948 and entered into force in 1951.
45. The key human rights instruments of the Organisation of American States are:
 - American Declaration of the Rights and Duties of Man (1948)
 - The American Convention on Human Rights (1969)
 - The Protocol of San Salvador in the Area of Economic, Social and Cultural Rights (1988)
 - The Protocol to Abolish the Death Penalty (1990)
 - The Inter-American Convention to Prevent and Punish Torture (1985)
 - The Inter-American Convention on the Forced Disappearance of Persons (1994)

- The Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará) (1994)
 - Discrimination against Persons with Disabilities (1999)
 - The Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities (1999)
46. The American Convention on Human Rights (ACHR) is the framework human convention of the OAS. It contains primarily civil and political rights similar to the ICCPR.

Implementation Mechanisms

47. The **Inter-American Commission on Human Rights** and the **Inter-American Court of Human Rights** are the two organs that are mandated to monitor the implementation of the rights guaranteed under the Convention. The supervisory system provided by the Convention is legally binding only on the states parties to it.
48. The competence of the **Inter-American Commission** includes the power to:
- Receive and investigate individual complaints or petitions alleging violations of the rights guaranteed under the American Declaration or the American Convention. There is no requirement of specific recognition of the competence of the Commission by the state concerned.
 - Refer cases to the Inter-American Court of Human Rights under the American Convention and appear before the Court.
 - Request advisory opinions from the Court on questions of interpretation of the American Convention.
 - Monitor the human rights situation in member states, carry out country visits and publish special reports.
49. With respect to the individual complaints mechanism, the petitioner does not have to be the victim or persons/organisation acting on his/her behalf. Any 'person or group of persons, or any non-governmental entity established in one or more member States' may submit petitions to the Commission.
50. The Inter-American Court of Human Rights is the principal judicial organ established by the American Convention. The Court is a part time body composed of seven judges elected for a term of six years who may be re-elected once. It has its seat in San José, Costa Rica.
51. The **Inter-American Court** has both an advisory and contentious jurisdiction:
- **Advisory Jurisdiction:** the Court's Advisory Jurisdiction extends to requests for an advisory opinion submitted by all OAS member states, including those who are not parties to the American Convention or did not recognise the Court's jurisdiction. The request

for an advisory opinion may be on questions relating the interpretation of the Convention or any other treaty concerning the protection of human rights in the Americas as well as the compatibility of domestic laws with international human rights treaties (Article 64 ACHR).

- **Contentious Jurisdiction:** The Court has jurisdiction to adjudicate claims brought against State who have made a declaration accepting the Jurisdiction of the Court under (Article 62(1) ACHR). Only the Inter –American Commission and States have the right bring claims before the Court. Individual complaints must first be addressed to the Commission, which may refer the claim to the Court. States may accept the Court’s jurisdiction for a specific period of time or for specific issues.

The African Union

Key Instruments

52. The African Union is the successor of the Organisation of African Unity (OAU). The Assembly of the Heads of State and Governments of the OAU adopted the Constitutive Act that established the African Union (AU) on 11 July 2000 and this entered into force in May 2001.

53. The principal instrument in the African human rights system is the African Charter on Human and Peoples’ Rights (ACHPR) (1986). A number of other treaties have also been adopted including the Protocol on the Rights of Women in Africa (2003); the Convention on Specific Aspects of the Refugee Problem in Africa (1969); the African Charter on the Rights and Welfare of the Child (1990); and the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights (1998); and the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (2009).

Implementation Mechanism

54. The **African Commission** and **African Court on Human and Peoples’ Rights** are the two bodies established to monitor implementation of the ACHPR.

55. The **African Commission** is composed of eleven members, who are elected for a term of six years by the Assembly of the African Union from a list of persons nominated by States parties to the Charter. It has the power to:

- Receive and examine communications from both individuals and States alleging violations of the rights in the Charter;
- Examine reports from member States;
- Interpret provisions in the African Charter upon request by an AU member state, an AU organ or and African organisation recognised by the AU.

56. As part of its function to promote human and peoples' rights, the African Commission shall 'undertake studies and researches on African problems in the field of human and peoples' rights', organise events and disseminate information, encourage national and local institutions and make recommendations to Governments. It can also formulate principles and rules in relation legal problems concerning human and peoples' rights and fundamental freedoms as possible guides to domestic legislation.²³

57. **The African Court** was established by the OAU in 1998 with the adoption of the Protocol to the African Charter on Human and Peoples Rights on the Establishment of an African Court on Human and Peoples' Rights. This came into force 25 January 2004. In 2008 the AU adopted a further Protocol on the Statute of the African Court of Justice and Human Rights, which would merge the African Court on Human and Peoples' Rights with the Court of Justice of the African Union and replace the existing Protocol. In 2014 the AU adopted a further Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights which would extend the jurisdiction of this proposed merged court further to include international crimes. Neither Protocol has yet come into force since the required number of ratifications has not been attained.

58. The African Court on Human and Peoples' Rights is composed of eleven judges elected in their individual capacity by the Assembly of the African Union who serve for a six-year term and can be re-elected only once. It has its seat in Arusha, Tanzania.

59. The Court has both an advisory and contentious jurisdiction.

- The Court can issue an advisory opinion 'on any legal matter relating to the Charter or any other relevant human rights instruments'. Requests for an advisory opinion may be submitted by any AU member state, an organ of the AU or an African organisation recognised by the AU.
- The Court also has jurisdiction over disputes relating to the African Charter, or any relevant instruments, including international human rights treaties ratified by the State party in question. It can also apply any such sources as sources of law in its rulings.

60. Only the African Commission, States parties and African intergovernmental organisations can bring a case to the African Court. Individuals and NGOs, however, can only do so if the State party involved has made an additional declaration accepting the jurisdiction of the Court.

²³ Article 45, ACHPR.

Arab Charter on Human Rights

Key instruments

61. The League of Arab States adopted the Arab Charter on Human Rights in May 2004 and it came into force on 15th March 2008. The State of Palestine is a party to the Charter. The Arab Charter provides for a range of rights including the right to life, prohibition of torture and medical and scientific experimentation, prohibition of slavery and forced labour, the right to equality and non-discrimination, equality before the law, fair trial, liberty and security of the person, presumption of innocence, dignity and privacy, among others. There are also political rights, freedom of movement, nationality, freedom of thought conscience and religion, freedom of expression, as well as economic social and cultural rights including the right to work, to form and join trade unions, social security, education, and an adequate standard of living and the highest attainable standard of health.

Implementation mechanisms

62. The Arab Charter on Human Rights establishes a seven member independent Arab Human Rights Committee, the members being elected by States parties. It has the mandate to:

- Consider and make recommendations on reports submitted by the States parties on the measures they have taken to give effect to the rights and freedoms.
- Submit an annual report to the Council of the League of Arab States.

III. Fundamental Human Rights Principles

A. Sources of Human Rights

1. International human rights law is derived from international law. According to Article 38(1) of the Statute of the International Court of Justice, the sources of international law are:
 - International conventions or treaties;
 - International custom as evidence of a general practice accepted as law;
 - General principles of law recognized by the community of [civilised] nations;
 - Judicial decisions and the teachings of the most highly qualified publicists...as subsidiary means for the determination of rules of law.
2. One of the principal sources of human rights law are treaties. These are formal, written agreements between States. Once these treaties have been adopted, signed and ratified they are binding upon the States who are party to the treaty.

Customary International Law

3. Customary international law consists of rules of law derived from the consistent conduct of States acting out of the belief that the law required them to act accordingly. Customary international law applies to all States, it is not dependent upon ratification of a treaty.
4. It is generally held that there are two essential elements to customary international law:
 - General Practice
 - *Opinio Iuris*

General Practice

5. In any circumstance, a custom may be said to exist only where there is a certain degree of concurrency of behaviour amongst the relevant actors. According to the International Court of Justice, for a rule to become part of customary international law, evidence must be shown of a 'constant and uniform usage practiced by States'.²⁴ State practice, in this respect, may include treaties, decisions of national and international courts, national legislation, diplomatic correspondence, opinions of national legal advisors and the practice of international organisations. In some cases, a treaty provision might be regarded as becoming part of customary international law 'even without the passage of any considerable period of time' if the treaty enjoyed a 'very widespread and representative participation'²⁵ and the practice includes 'that of States whose interests are specially affected'.²⁶ A State that has persistently

²⁴ ICJ, *North Sea Continental Shelf cases*, p.14.

²⁵ ICJ, *North Sea Continental Shelf cases*, para 71.

²⁶ ICJ, *North Sea Continental Shelf cases*, p.42.

objected, however, to the practice may in theory not be bound by a subsequent customary international law.²⁷

Opinio Iuris

6. Concurrency of practice is clearly not sufficient, in and of itself, to show the existence of customary international law. In addition, there must be evidence that the States concerned regarded themselves as acting out of a sense of legal obligation. Evidence of this subjective element can be shown through, for example, declarations and statements of States affirming the obligation. It can be difficult to justify.
7. Although there is not an authoritative and universally agreed upon list of customary international rules, it has been held to include the prohibition of genocide, freedom from slavery and racial discrimination.²⁸ In addition, some of the principles in the UDHR are considered to have attained the status of customary international law. The Human Rights Committee has also included prohibition of torture, arbitrary killing, arbitrary arrest and detention, denial of the freedom of thought, conscience and religion, presumption of innocence, the right to a fair trial in general terms, prohibition on the execution of pregnant women and children, prohibition on national, racial or religious hatred, the right to marry, and the right of minorities to enjoy their own culture, profess their religion, use their language.²⁹

Ius cogens

8. It is not infrequently the case that certain rights are spoken of, not only in terms of their being part of customary international law, but as having the status of *ius cogens*. The term *ius cogens* is primarily used to refer to those rules or principles of general international law which are regarded as being 'peremptory' in nature and as enjoying a non-derogable character.³⁰
9. *Erga omnes* obligations are those that are owed to the international community as a whole, rather than other individual states. If a rule gives rise to an obligation *erga omnes*, it will allow any other state to institute a claim against it before an international court or tribunal irrespective of whether or not it (or its nationals) might have been palpably 'injured' by the action in question. It gives rise, in other words, to a general right of enforcement. Obligations *erga omnes* may well also justify the assertion of universal jurisdiction by national courts or tribunals.

Other sources of international law

10. Article 38(1) of the ICJ Statute refers to other sources of international law including general principles and judicial decisions or writings of jurists. General

²⁷ ICJ, *Nicaragua (Merits), Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996.

²⁸ ICJ, *Reservations to the Genocide Convention, Advisory Opinion*, ICJ Reports 1951, p.23.

²⁹ Human Rights Committee, General Comment No.24, CCPR/C/21/Rev.1/Add.6 (1994).

³⁰ Article 53 Vienna Convention on the Law of Treaties.

principles include, for example, the principle of good faith,³¹ and the principle of *non bis in idem* (no one shall be tried twice for the same offence).³²

11. In addition there are a range of 'soft law' documents and principles including declarations adopted by the UN General Assembly, such as the Universal Declaration on Human Rights, guidelines, rules and regulations. Whilst these may be adopted under the auspices of an international organisation, such as the UN or the Arab League, they may not be intended to create legal obligations on the State parties. They are however authoritative sources of rights and how they should be applied.
12. Further sources of soft law include statements from those responsible for implementing human rights treaties, such as the General Comments and the decisions on communications of the UN treaty bodies such as the Human Rights Committee under the ICCPR. Although these are highly respected, there is some debate over whether they are binding. This is to be contrasted with decisions of international courts such as the Inter-American Court of Human Rights, the African Court of Human and Peoples' Rights and the European Court of Human Rights whose judgments are binding on the State party to the litigation.

In this manual all sources of human rights are relied upon.

B. The position of international human rights law in domestic law

13. The Vienna Convention provides that a treaty obligation is binding upon the States parties, that it must be performed in good faith and that the parties cannot invoke domestic legislation as a justification for their failure to perform their obligation.³³ Beyond this, States generally have significant discretion in how they choose to incorporate international law into domestic law or in implementing their international legal obligations. State practice, however, reveals two major approaches which are based on two different theories regarding the relationship between international law and domestic law and the mechanisms used to ensure compliance with international obligations. The two major approaches are known as the *monist* and *dualist* theories.
14. For the strictly *monist* theory, international law and domestic law are not separate but belong to the same legal order. Accordingly, a treaty becomes part of domestic law upon ratification or accession by a State, without the need to take further measures for its incorporation into domestic law. For the *dualist* doctrine, however, international and national laws belong to two separate legal systems. As such, it is necessary that the State authorities enact an implementing legislation for an international treaty to be applicable at the domestic level. The introduction of the treaty into domestic law may take the form of a domestic legislation adopting the text of the treaty or a piece of

³¹ ICJ, *Nuclear Tests Cases (Australia v France; New Zealand v France)*, [1974] ICJ Reports p.253.

³² See *Chorzow' Factory Case (Interpretation)* (1927) PCIJ Ser. A 9, at p. 27.

³³ Articles 26 and 27 of the Vienna Convention on the Law of Treaties.

legislation that provides for the domestic application of a treaty without incorporating the detailed contents of the treaty.

15. In practice, however, many countries adopt a hybrid of a monist and dualist approach. For example, some States give primacy to their respective constitutions thus requiring a constitutional amendment for certain treaties to become part of the domestic law, while some States require enabling legislation. Others States pursue one or the other approach depending on the nature of the subject matter covered by the treaty.
16. The Palestinian Basic Law does not provide detail on the relationship between international law and domestic law.

C. Human rights as the guarantor of human dignity

17. The rationale of human rights can be summarised as the guarantee of human dignity.³⁴ As part of that guarantee of human dignity, human rights standards are also concerned to ensure that power is exercised in an accountable manner. As such dignity, human rights and the rule of law are intimately and intrinsically linked. Power, in this context, to all intents and purposes means the State. However, there are arguments that it is not just the State that exercises power and violates human rights standards but that non-State actors, such as the actions of terrorist groups can also amount to a violation of human rights.³⁵
18. Human rights standards seek to realise their aims of dignity and accountability in four ways:
 - Firstly, human rights identify certain core values which are essential to the realisation of human dignity. These range from protection from torture to private life, from the right to a fair trial to an adequate standard of living.
 - Second, the extent to which these rights can be balanced or even derogated from, taking into account the public interest, is considered.
 - Third if particular rights can be lawfully interfered with, the legality, necessity and proportionality of that interference is measured, taking into account protection from discrimination.
 - Finally, where there is a reasonable assertion that an individual's human rights are (or maybe) being violated, that individual is entitled to an effective remedy.
19. Internationally recognised human rights standards therefore require the government policy and decision-makers to factor into that process certain key universal principles. This imposes a level of discipline and rigour upon government agencies, which if they ignore, or if they misapply those human rights standards, ought to be held accountable before an independent and impartial court.

³⁴ Article 1 UDHR; preamble to UN Charter.

³⁵ See section V.D. below.

20. As a general principle, the more severe the potential human rights violation, the greater the human rights scrutiny to be carried out by both decision-maker and court. Human rights standards require a targeted response. If a particular mischief is identified which needs to be addressed, for example incitement to religious violence, the control imposed by those human rights standards should mean that only that particular problem is addressed and others are not affected.
21. What the State considers to be in its best interests will not necessarily trump human rights. Policies to secure the State's interests must be compatible with human rights. For example, in the context of counter terrorism, under extreme circumstances there may be a requirement to lawfully derogate from human rights standards. But, at the same time, this requirement for a targeted or proportionate response may mean that it is inappropriate to adopt counter terrorism or emergency measures and, in fact, the normal workings of the criminal law are suitable to respond to the particular issue.
22. State policy and practice will therefore only be effective when it has understood and integrated human rights within it.

D. Implementing Human Rights

23. The guiding spirit of the application of human right standards is that their enjoyment is not limited to citizens of States parties. They are available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons who find themselves in a State party's territory or subject to its jurisdiction.
24. The procedural mechanisms that international human rights standards use to guarantee substantive rights are:
 - Legality
 - The Rule of Law
 - The Right to an Effective Remedy
 - Non-Retroactivity of Criminal Penalties
25. Each of these obligations is dependent upon the other and is mutually reinforcing. The right to an effective remedy and non-retrospective criminal penalties are specifically acknowledged within international human rights treaties, whereas principles of legality and the rule of law have been read into those treaties.

The requirement of legality

26. The first obligation imposed by human rights standards is the requirement that any interference with human rights standards must have a clear legal basis.
27. There must be a legal basis in national law for an interference, and the law must be accessible and sufficiently precise. This requirement is intended to avoid the risk of arbitrariness on the part of the State. What this means is that:

- An individual must be able to know or find out what the law is that permits an interference with their human rights and they must be able to regulate their conduct in accordance with it.
- Any powers that are assumed by law enforcement officers must have their basis in statute, or an Act of the Legislature.
- The legislative body should therefore confer the power on the administrative agency responsible for law enforcement, such as the police, immigration or security service.
- Any power that is conferred must be precise. It cannot be general or loosely described and it must be challengeable before an independent and impartial tribunal.
- Where agencies are expected to exercise their discretion that discretion has to be effectively circumscribed by accessible law.

The Rule of Law³⁶

28. As a general principle of human rights law, this requirement for legality imports the rule of law (*nullum crimen, nulla poena sine lege*). Human rights law and the rule of law are, as concepts, therefore indissociable.³⁷ The rule of law also requires a clear legal basis for an interference with human rights standards. It also insists that the law applies to everyone and that no one is exempt, or above the law, whoever they may be, or for whatever reason they have acted.
29. Essentially the rule of law can be summed up as providing all persons (individuals, institutions and government) are subject to the same law. It is a restraint on the arbitrary exercise of power by government. Once this principle is accepted, it acknowledges the supremacy of law and establishes that it is law, not those that are in power, that provides the framework for government.
30. The rule of law has been variously interpreted, but it must be distinguished from a purely formalistic concept under which any action of a public official which is authorised by law is said to fulfil its requirements. Over time, the essence of the rule of law in some countries was distorted so as to be equivalent to 'rule by law', or 'rule by the law', or even 'law by rules'. These interpretations permitted authoritarian actions by governments and do not reflect the meaning of the rule of law today.
31. The rule of law in its proper sense is an inherent part of any democratic society and the notion of the rule of law requires everyone to be treated by all decision-makers with dignity, equality and rationality and in accordance with the law, and to have the opportunity to challenge decisions before independent and impartial courts for their unlawfulness, where they are accorded fair procedures. The rule of law thus addresses the exercise of power and the relationship between the individual and the state. However, it is important to recognise that during recent years due to globalisation and deregulation there are international and

³⁶ See Report on the Rule of Law, Adopted by the Venice Commission, 86th plenary session, (Venice, 25-26 March 2011).

³⁷ See UDHR, preamble and Article 3. UN Millennium Declaration, A/RES/55/2.

transnational public actors as well as hybrid and private actors with great power over state authorities as well as private citizens.

32. The rule of law requires both individuals and governments to be subject to known and accessible laws. In turn this affirms the principle of equality before the law and fundamental guarantees such as the presumption of innocence.

33. Laws ought not to be too easily changeable. Stable laws are a prerequisite of the certainty and confidence which form an essential part of individual freedom and security.

34. Separation of powers between the executive, legislative and judicial branches of government is at the heart of the rule of law. Law, the executive administration and prerogative decree are distinct. A failure to maintain the formal differences between these leads to a concept of law as nothing more than authorisation for power, rather than the guarantee of liberty, equally to all.

35. The rule of law can be summarised as:

- Law must be made in a clearly defined and public way;
- The law must be accessible and so far as possible intelligible, clear and predictable;
- Questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion;
- The laws of the land should apply equally to all, save to the extent that objective differences justify differentiation;
- The law must afford adequate protection of fundamental human rights;³⁸
- Means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve;
- Ministers and public officers at all levels must exercise the powers conferred on them reasonably, in good faith, for the purpose for which the powers were conferred and without exceeding the limits of such powers;
- Adjudicative procedures provided by the State should be fair; and
- The State must comply with its obligations in international law, the law which whether deriving from treaty or international custom and practice governs the conduct of nations.

The Right to an Effective Remedy

36. To be meaningful, human rights have at their core, the right to an effective remedy for a violation of human rights standards.³⁹ This obligation is found in a

³⁸ Not all human rights may be essential components of the rule of law, but all the human rights identified in this Manual are inherent to the rule of law.

³⁹ Special Rapporteur on the Question of Impunity, Principles for the protection and promotion of human rights through action to combat impunity, UN Doc.E/CN.4/Sub.2/1997/20/Rev.1. October 1997, Principle 33. UN Doc.E/CN.15/1997/16, *Use and application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, note by the Secretary-General. See also European Convention on the Compensation of Victims of Violent Crimes, entered into force Feb 1988;

number of treaties⁴⁰ and is designed to combat impunity and to ensure that rights are practical and effective and not rendered worthless and insignificant because they can be ignored.

37. Where a human right is being violated, or an aggrieved individual considers, with arguable grounds, a right is being violated, that person must be able to challenge the alleged violation. If it is established that there has been a breach that person must be granted an appropriate resolution.⁴¹ This remedy may or may not involve compensation.

38. As the Special Rapporteur on the Independence of Judges and Lawyers has noted, while judicial protection applies to any right, the right to an effective remedy applies only to those protected under the constitution or legislation of the State, or international treaties. For example, Article 2(3) ICCPR provides a remedy for those rights protected under the ICCPR.⁴²

39. The right to an effective remedy requires the following:

- The remedy must be accessible and effective.⁴³ An effective remedy requires adequate measures of reparation for the victim.⁴⁴
- It should be 'appropriately adapted' to meet the needs of specific categories of persons.⁴⁵
- States should establish appropriate domestic mechanism to bring claims.⁴⁶
- It should provide a reasonable prospect of success.⁴⁷

40. While the specific nature of the remedy depends on the nature of the rights violations, there is a growing recognition that an effective remedy presupposes a judicial procedure and determination.⁴⁸ The UN Human Rights Committee has held that 'purely disciplinary and administrative remedies cannot be deemed to constitute adequate and effective remedies within the meaning of article 2, paragraph 3, of the Covenant, in the event of particularly serious violations of human rights'.⁴⁹ The requirement of a judicial process extends to

⁴⁰ Article 8, UDHR; Article 2(3), ICCPR; Article 23, Arab Charter; Article 13, ECHR, Article 13 CAT, Article 6 ICERD; Article 2(c) CEDAW; Article 25 ACHR. Article 32, Palestinian Basic Law.

⁴¹ Human Rights Committee, General Comment No.31, CCPR/C/21/Rev.1/Add/13 (2004), para 15.

⁴² Report of the Special Rapporteur on the Independence of Judges and Lawyers, A/HRC/8/4, 13 May 2008, para 19. Article 14 CAT.

⁴³ Human Rights Committee, General Comment No.31, CCPR/C/21/Rev.1/Add/13 (2004), para 15.

⁴⁴ UN Human Rights Committee, Communication No. 847/1999, *Blazek et al v Czech Republic*, CCPR/C/72/D/857/1999. European Court of Human Rights, *Lawless v Ireland*, 1st July 1961; *X v Sweden*, European Court of Human Rights, 2 Mar 1964; .

⁴⁵ Human Rights Committee, General Comment No.31, CCPR/C/21/Rev.1/Add/13 (2004), para 15.

⁴⁶ Human Rights Committee, General Comment No.31, CCPR/C/21/Rev.1/Add/13 (2004), para 15; General Comment No.20, 44th Session 1992, para 14.

⁴⁷ E.g. African Commission, Communication 155/96, *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*, 27 October 2001; European Court of Human Rights *Silver v. United Kingdom*, 25 March 1983, para. 113(b); American Court of Human Rights, *Mayagna (Sumo) Awas Tigni Community v Nicaragua*, Judgment, 31 August 2001, para 112.

⁴⁸ Article 7 ACHR; Article 47 of the Charter of Fundamental Rights of the European Union guarantees the right to an effective remedy before a tribunal in the case of violations of rights and freedoms protected by the law of the Union.

⁴⁹ Communication 563/1993, *Nydia Erika Bautista v Colombia*, CCPR/C/55/D/563/1993, paragraph 8(2). European Court of Human Rights, *De Souza Ribeiro v. France*, Judgment (Grand Chamber), 13

grave violations, including torture, extrajudicial execution and enforced disappearances and shall include prompt, impartial and thorough investigations leading to the identification, where appropriate, of the authors of the violation.⁵⁰

41. An investigation into serious human rights violations should not depend on the filing of a complaint and should be initiated as soon as there are grounds for believing that ill-treatment has occurred.⁵¹

42. Undue delay in domestic proceedings also amounts to a denial of a prompt and effective remedy and entitles victims to bring claims before appropriate regional or international bodies.⁵² In *Rajapakse v. Sri Lanka* (1250/04), the UN Human Rights Committee held that the fact that it has taken more than three months to start criminal investigations and the lack of progress in the proceedings before the domestic court for four years after the incident amounted to an unreasonably prolonged delay.⁵³

43. There are a range of different forms of reparation. These include:

- restitution;⁵⁴
- compensation,⁵⁵ including compensation for pecuniary damages, as well as moral damages,⁵⁶ including the psychological the impact on a family of the disappearance of their relative;⁵⁷
- rehabilitation, for example, for victims of torture;⁵⁸ or victims of abuse;⁵⁹
- satisfaction;
- public apologies and public memorials;
- amendments to laws and practices;
- punishment of perpetrators;⁶⁰

December 2012, para 79; See also Communication 612/1995, *Case José Vicente and Amado Villafañe Chaparro, Luis Napoleón Torres Crespo, Angel María Torres Arroyo and Antonio Hugues Chaparro Torres v Colombia*, CCPR/C/60/D/612/1995, paragraph 8(2). See also UN Human Rights Committee, General Comment No.29, CCPR/C/21/Rev.1/Add.11, para.15.

⁵⁰ See Human Rights Committee, General Comment No.20, para. 14; Human Rights Committee, Communication 778/1997, *Case Coronel et al v Colombia*, CCPR/C/70/D/778/1997, paragraph 6(4); Inter-American Court, *Barrios Altos v. Peru*, Judgment (Merits) 14 March 2001, paras. 42, 43; European Court, *Kaya v. Turkey*, 19 February 1998; *Aksoy v Turkey*, 18th December 1996.

⁵¹ See, e.g. *Servellón-García v Honduras*, 21 September 2006, para 119. Human Rights Committee, Communication No. 1416/2005, *Alzery v Sweden*, 25 October 2006, para. 11.7.

⁵² Communication 73/1980, *Pietroroia v Uruguay*, A/36/40; Inter-American Commission, *Capote et al v Venezuela*, Report 96/06, 21 Oct 2006, para 72; African Commission, Communication 97/93, *Modise v Botswana*, 6 November 2000; European Court, *Selmouni v France*, 28 July 1999.

⁵³ Communication 1250/04, *Rajapakse v. Sri Lanka*, 5 Sep 2006, para. 9.2. African Commission, Communication No. 275/2003, *Article 19 v Eritrea*, May 2007, para 99.

⁵⁴ Communication No. 857/1999, *Blazek et al. v. the Czech Republic*, UN doc.A/56/40 (vol. II), p. 173, para. 7.

⁵⁵ UN Doc.A/ CONF.144/20, annex, Guide for Practitioners, p. 21, para. 83. Article 14(1) CAT.

⁵⁶ E.g. European Court, *Mahmut Kaya v. Turkey*, judgment of 28 March 2000.

⁵⁷ Inter-American Court, *Velásquez Rodríguez Case, Compensatory damages*, judgment of July 21, 1989, Series C, No. 7, p. 54, para. 52.

⁵⁸ Article 14(1) CAT; CAT, UN Doc. AOR, A/56/44, p. 29, para. 65(e),

⁵⁹ Article 39 CRC; Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women, Article 8.

⁶⁰ Human Rights Committee, General Comment No.31, CCPR/C/21/Rev.1/Add/13 (2004), para 16.

- guarantees of non-repetition.⁶¹
44. Ending the violation is part of the right to an effective remedy.⁶²
45. If the State claims available remedies exist, it has the burden of proving their effectiveness.⁶³
46. Failure to carry out an investigation into allegations of violations may also infringe the right to a remedy.⁶⁴
47. The right to effective remedy entails a corresponding obligation on the State which, according to the UN Human Rights Committee, cannot be suspended even in situations of state of emergency although the particular remedies can be subject to such adjustments as “are strictly required by the exigencies of the situation”.⁶⁵ The State must also make sure that remedies are available to all persons within its jurisdiction, which includes areas over which the State exercises effective control outside its territory.⁶⁶

Retrospectivity

48. A key aspect of the principle of legality is the outlawing of retrospective criminal laws and penalties.⁶⁷ Such absolute protection is found in all the major human rights treaties. Therefore in a number of cases the Human Rights Committee has found a violation of the prohibition of retrospective criminal law where individuals were convicted and sentenced for membership of subversive organisations, which were political parties that were subsequently banned.⁶⁸
49. Offences include those created under domestic as well as international law.⁶⁹
50. A helpful illustration of how the prohibition on retroactive criminal law works involves cases where officers of the German Democratic Republic (GDR) were prosecuted, following the reunification of Germany, for shooting people who had sought to escape to the West. The applicants in those cases argued that they had acted lawfully at the time according to the laws of the GDR.

⁶¹ Special Rapporteur on the Right to Restitution, Compensation and Rehabilitation for Victims, UN Doc.E/CN.4/2000/62.

⁶² Human Rights Committee, General Comment No.31, CCPR/C/21/Rev.1/Add.13 (2004), para 15.

⁶³ Communication R.1/4, *W. Torres Ramírez v. Uruguay*, 23 July 1980, para. 5.

⁶⁴ European Court, *Atiman v Turkey*, 23 Sep 2014; Inter-American Court, *Barrios Family v. Venezuela*, Judgment of 24 November 2011. Series C No. 237, para. 393. African Commission, Communications 54/91-61/91-96/93-98/93-164/97, 196/97-210/98, *Malawi African Association, Amnesty International, Ms Sarr Diop, Union interafricaine des droits de l'Homme and RADDHO, Collectif des veuves et ayants-Droit, Association mauritanienne des droits de l'Homme v Mauritania*, 11 May 2000; Human Rights Committee, Communication 1910/2009, *Zhuk v. Belarus*, 30 October 2013; Communication 1890/2009, *Kitenge v. Democratic Republic of Congo*, 27 March 2014.

⁶⁵ General Comment No.29, CCPR/C/21/Rev.1/Add.11, para. 14.

⁶⁶ *Al- Saadoon v. United Kingdom*, 2 March 2010; *Ilaşcu v. Moldova and Russia*, Judgment (Grand Chamber), 8 July 2004.

⁶⁷ See for example, European Court, *Korbely v Hungary*, 19 Sep 2008.

⁶⁸ Communication 28/1978, *Weisz v Uruguay*, 29 Oct 1980).

⁶⁹ Article 15(1) ICCPR, Article 7(1) ECHR; Article 11(2) UDHR.

51. In a string of cases before international courts and tribunals, these arguments were rejected. It was held that the fact that there were no prosecutions did not mean the law permitted them to take the actions that they took. This was particularly the case because the GDR was a party to the International Covenant on Civil and Political Rights, which guarantees the right to life.⁷⁰
52. Furthermore, even if their actions had been lawful as a matter of law in the GDR, it is likely that Germany could have relied upon the fact that shooting people under those circumstances would be considered “criminal according to the general principles of law recognised by the community of nations.”
53. A further example of where the defence’s argument of the application of retrospective criminal laws was rejected was in relation to the use of child soldiers in Sierra Leone. The Special Court set up to try war crimes arising out of the conflict in Sierra Leone during the 1990s held that by 1997, the state of customary international law was such that the recruitment of under-15 year olds engaged individual criminal responsibility.⁷¹
54. The imposition of sentences that were more severe than those applicable at the time the offence was committed is also prohibited. However, in order to determine this, the international body will look at the actual sentence imposed on the individual and whether this was within the range of available sentences at the time of the offence.⁷²

⁷⁰ Communication 960/2000, *Baumgarten v Germany*, 31 July 2003.

⁷¹ *Prosecutor v Sam Hinga Norman* (Case SCSL – 03 –I), Appeals Chamber, 31 May 2004.

⁷² Communication 987/2001, *Gombert v France*, 18 March 2003.

IV. How Human Rights Work: General Application

A. “Practical and Effective”

1. Human rights standards are intended to guarantee not rights that are theoretical or illusory, but rights which are ‘practical and effective’.⁷³ As far as international tribunals are concerned, merely asserting the existence of rights is not sufficient to satisfy this test of ‘practical and effective’.
2. Rights have to be genuinely accessible. Therefore in a key case concerning access to court involving a particularly unpleasant divorce, the unavailability of legal aid for a women with no ability to pay for legal advice, meant that in reality she had no access to court, even though in theory such a right existed.⁷⁴
3. This obligation to ensure the practicality and effectiveness of rights is directly linked to the right to an effective remedy and the rule of law.

B. The nature of civil and political rights

4. Civil and political rights can be categorised into different types:
 - Absolute rights permit no qualification or interference under any circumstances. These are dealt with below.⁷⁵
 - Limited rights which can be limited within the constraints spelt out in the Article itself.
 - Qualified rights which are intended to be balanced either between the individual on the one hand and the community on the other, or between two competing rights.

Limiting rights

5. The right to liberty, is a good example of a limited right.⁷⁶ The right is asserted in the first paragraph of the relevant treaty Article, but then it goes on to state that there may be limits to it, and it spells those limits out. For example, the right to liberty can be taken away from an individual following conviction by a competent court.
6. The right to a fair trial⁷⁷ is absolute to the extent that the trial taken as a whole must be fair; however, there are certain specific and implied limits that have been read into it.

⁷³ This principle is endorsed by the ICCPR’s Human Rights Committee, which in General Comment No.31, CCPR/C/21/Rev.1/Add/13 (2004), affirms that the ICCPR be ‘accessible, effective and enforceable’.

⁷⁴ European Court, *Airey v Ireland*, 9 October 1979.

⁷⁵ See section V.B. below.

⁷⁶ See section VIII below.

⁷⁷ Article 6, ECHR.

Qualified rights

7. Qualified rights are those rights where the right is first asserted– for example, the guarantee of freedom of expression or freedom of association – and then permissible restrictions can be applied. The relevant Articles then go on to qualify the right and to explain the circumstances in which it can be lawful to interfere with it.
8. The presumption is that rights will be interpreted broadly and limitations interpreted strictly.⁷⁸
9. The Human Rights Committee has noted ‘States Parties must refrain from violation of the rights recognized by the Covenant, and any restrictions on any of those rights must be permissible under the relevant provisions of the Covenant. Where such restrictions are made, States must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights. In no case may the restrictions be applied or invoked in a manner that would impair the essence of a Covenant right’.⁷⁹
10. Some of the rights in human rights treaties are qualified, namely, the right is first asserted– for example, the guarantee of freedom of expression or freedom of association – and then permissible restrictions can be applied. The relevant Articles then go on to qualify the right and to explain that it can be lawful to interfere with it if it is necessary in a democratic society to do so and that there is a legal basis for such an interference. Therefore, it can be lawful to place limits on the right to freedom of expression, the right to private life, the right to protest and join trades unions, and the right to manifest religious belief.⁸⁰
11. To make lawful an interference with any qualified rights, the State must be able to satisfy the following:
 - It must be prescribed by law;
 - It must be necessary to protect one of the grounds listed;
 - The restrictions must be proportionate to the need for which they are limited;
 - It must not ‘be imposed for discriminatory purposes or applied in a discriminatory manner’.⁸¹

Prescribed by law

12. To be lawful the restriction must be imposed by legislation or equivalent. It must be sufficiently certain and ‘use precise criteria and may not confer unfettered

⁷⁸ Human Rights Committee, General Comment No.10, HRI/GEN/1/Rev.9, Vol.I (1983) paragraph 4; General Comment No.22, CCPR/C/21/Rev.1/Add.4, (1993) paragraph 8; General Comment No.27, CCPR/C/21/Rev.1/Add.9 (1999), paragraphs 2 and 13; Communication No. 780/1997, *V P Laptsevich v Belarus*, 13 April 2000, paragraph 8.2.

⁷⁹ General Comment No.31, CCPR/C/21/Rev.1/Add/13 (2004), para 6.

⁸⁰ For further discussion of these rights see sections X below.

⁸¹ Human Rights Committee, General Comment No.27, CCPR/C/21/Rev.1/Add.9 (1999).

discretion on those charged with their execution'.⁸² Administrative provisions on their own will be insufficient,⁸³ as will restrictions in traditional, religious or customary law.⁸⁴ The law itself must also comply with international human rights standards.⁸⁵ The law must also be accessible to the public.

For the purpose of protecting one of the grounds in the treaty

13. The second test requires being able to justify the interference by reference to the recognised grounds, or aims and purposes, for restricting rights. These generally include national security, public order or safety, protecting the rights and freedoms of others, prevention of disorder and crime, and protecting health and morals. These enumerated aims or purposes are not to be interpreted loosely.
14. Public safety, for example, according to the Siracusa Principles, should be characterised as 'protection against danger to the safety of persons, to their life or physical integrity or serious damage to their property'.⁸⁶ National security may be invoked by States to justify measures limiting certain rights only when they are taken to protect the existence of the nation or its territorial integrity or political independence against force or the threat of force.⁸⁷
15. National security cannot be invoked as a reason for imposing limitations to prevent merely local or relatively isolated threats to law and order⁸⁸ or used as a pretext for imposing vague or arbitrary limitations and may only be invoked when there exist adequate safeguards and effective remedies against abuse. The Siracusa Principles also note that '[n]ational security cannot be used as a pretext for imposing vague or arbitrary limitations and may only be invoked when there exists adequate safeguards and effective remedies against abuse'.⁸⁹
16. Public order is defined as 'the sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded'.⁹⁰
17. Limitations are permitted for the protection of the rights of others. This provision is to be read in the light of Article 20, paragraph 2, of ICCPR, which prohibits any advocacy of national, racial or religious hatred, and Article 5, which

⁸² Human Rights Committee, General Comment No. 27, CCPR/C/21/Rev.1/Add.9 (1999), paragraph 13

⁸³ Communication No. 633/1995, *R W Gauthier v Canada*, 5 May 1999, paragraphs 13.5 and 13.6. European Court, *Gillan v UK*, 12 Jan 2010.

⁸⁴ Human Rights Committee, General Comment No.34, CCPR/C/GC/34 (2011), para 24.

⁸⁵ Human Rights Committee, General Comment No.16, HRI/GEN/1/Rev.9 (Vol. I) p.191 (1988), para 3.

⁸⁶ Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR, E/CN.4/1985/4, annex, para.33.

⁸⁷ *Ibid.* para.29. See also Human Rights Committee, Communication No. 833/1998, *Karker v France*, 30 October 2000.

⁸⁸ *Ibid.* para.30 and M. Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary*, 2nd ed. (Kehl/Strasbourg/Arlington, N. P. Engel, 2005), p.506.

⁸⁹ Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR, E/CN.4/1985/4, annex, para 31.

⁹⁰ *Ibid.* para 22.

excludes from the protection of the Covenant activities or acts 'aimed at the destruction of any of the rights and freedoms recognised' in the Covenant.⁹¹

18. With respect to public health or morals, the Human Rights Committee has noted 'the concept of morals derives from many social, philosophical and religious traditions' and so restrictions on freedoms 'must be based on principles not deriving exclusively from a single tradition'.⁹² Equally, there is 'no universally applicable common standard'.⁹³

Necessity and proportionality

19. 'Necessary' does not mean indispensable, but neither does it mean 'reasonable' or 'desirable'.⁹⁴ It requires that the limitations are for a 'compelling governmental interest',⁹⁵ and are only imposed for the purposes for which they were intended and that they must be 'directly related and proportionate to the specific need on which they are predicated'.⁹⁶
20. Therefore the limitations must be 'appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result'.⁹⁷
21. What proportionality requires is that there is a reasonable relationship between the means employed and the aims sought to be achieved. Essentially proportionality requires a court ultimately to determine whether a measure of interference which is aimed at promoting a legitimate public policy is either:
- Unacceptably broad in its application; or
 - Has imposed an excessive or unreasonable burden on certain individuals.⁹⁸
22. Factors to consider when assessing whether or not an action is disproportionate are:
- Have relevant and sufficient reasons been advanced in support of it?
 - Was there a less restrictive measure?
 - Has there been some measure of procedural fairness in the decision making process?
 - Do safeguards against abuse exist?
 - Does the restriction in question destroy the 'very essence' of the right in question?

⁹¹ Ibid. See also Communication 117/1981, *M.A. v Italy*, 10 April 1984, para 13.3.

⁹² Human Rights Committee, General Comment No. 22, CCPR/C/21/Rev.1/Add.4 (1993), paragraph 8.

⁹³ Communication No. 61/1979, *L. Hertzberg et al v Finland*, 2 April 1982, para 10.3.

⁹⁴ *Sunday Times v UK*, European Court, 26 April 1979.

⁹⁵ Inter-American Court, *Ivcher Bronstein v Peru*, 6 Feb 2001, Series C. No.74, para 156.

⁹⁶ Human Rights Committee, General Comment No. 22, CCPR/C/21/Rev.1/Add.4 (1993), paragraph 8.

⁹⁷ Human Rights Committee, General Comment No. 27, CCPR/C/21/Rev.1/Add.9 (1999), paragraph 14.

⁹⁸ Human Rights Committee, General Comment No.31, CCPR/C/21/Rev.1/Add/13 (2004).

23. A decision made taking into account proportionality principles should:

- Impair as little as possible the right in question.
- Be carefully designed to meet the objectives in question.
- Not be arbitrary, unfair or based on irrational considerations.

24. The mere fact that a measure is sufficient to achieve the intended aim, for example protecting national security or public order, is not necessarily enough to satisfy proportionality.

25. Proportionality requires that the way in which the right is being interfered with is actually necessary to protect national security or public order, and that the approach adopted is the least restrictive and least intrusive method among those that might achieve the desired result.⁹⁹

26. Finally, proportionality always requires that a balance is struck between the burden placed on the individual whose rights are being limited and the interests of the general public in achieving the aim that is being protected.

*Should not discriminate*¹⁰⁰

27. The restriction must not be imposed for the purpose of discrimination and neither must it be applied in a discriminatory way.¹⁰¹

28. As a general principle, a distinction will be considered discriminatory if:

- It has no objective and reasonable justification;
- It does not aim to achieve a purpose provided for under the particular treaty.¹⁰²

29. Discrimination is in relation to the range of grounds included in the treaty, but also, includes, for example, sexual orientation and gender identity.¹⁰³

C. Issues arising under the Civil and Political Rights

Waiver of rights

30. Some human rights can be waived, but only in limited circumstances; and certain rights can never be waived, such as the right to liberty and protection from torture. Other human rights may be waived but that waiver must be established in an unequivocal manner. For example, while under the ECHR it

⁹⁹ CCPR/C/21/Rev.1/Add.13, para 6.

¹⁰⁰ Equality and non-discrimination is examined in section V.A. below.

¹⁰¹ Human Rights Committee, General Comment No.22, CCPR/C/21/Rev.1/Add.4 (1993), para 8.

¹⁰² Human Rights Committee, General Comment No.18, HRI/GEN/1/Rev.9 (Vol. I) p.195 (1989), paragraph 13.

¹⁰³ Communication 488/1992, *Toonen v Australia*, 31 March 1994; Concluding Observations on Kuwait, Human Rights Committee, CCPR/C/KWT/CO/2.

can be lawful to waive your right to a public hearing in the context of the right to a fair trial,¹⁰⁴ this is not considered lawful under the ICCPR.¹⁰⁵

Negative and positive obligations

31. Human rights treaties, such as the ICCPR, require States to 'respect and to ensure' the rights in the Covenant.¹⁰⁶
32. The obligation to 'respect' requires the State to refrain from interfering with human rights.¹⁰⁷ The obligation also requires States to adopt legislative and other measures to fulfil their obligations in the treaty.¹⁰⁸
33. The Human Rights Committee has interpreted 'ensuring' as necessitating 'specific activities by the States parties to enable individuals to enjoy their rights'.¹⁰⁹ This imposes a positive duty on States. The extent of this obligation will vary according to such factors as the nature of the right at issue and the importance of the right for the individual.¹¹⁰
34. A positive obligation according to the Inter-American Court 'implies the duty of the States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights'.¹¹¹

Prohibition of the abuse of rights and duties and responsibilities

35. Rights, such as freedom of expression, cannot be exercised to destroy the rights of others.¹¹² The general purpose of this principle is to prevent totalitarian groups from exploiting in their own interests using the principles enunciated by human rights treaties. Therefore, religious assemblies are also protected by the right to manifest religious belief and privacy rights probably protect private assemblies, i.e. family and friends. Protesters, however, cannot rely upon their right to peaceful assembly in order to destroy the rights of others.

¹⁰⁴ European Court, *H. v Belgium* 30 Nov 1987, para 54.

¹⁰⁵ Communication 215/1986, *Van Meurs v the Netherlands*, 13 July 1990, para 6.1.

¹⁰⁶ Article 2(1) ICCPR; States are to 'ensure' the rights without distinction under Article 3(1) of the Arab Charter.

¹⁰⁷ Human Rights Committee, General Comment No.31, CCPR/C/21/Rev.1/Add. 13, para 6.

¹⁰⁸ Human Rights Committee, General Comment No.31, CCPR/C/21/Rev.1/Add. 13, para 7.

¹⁰⁹ General Comment No.3, HRI/GEN/1/Rev.9 (Vol. I) p.174 (1981), para 1. See also Article 1 ACHR; African Commission, *Communication No.231/99 Avocats Sans Frontières (on behalf of Gaëtan Bwampamye) v. Burundi*, 23 October – 6 November 2000, para. 31; European Court, *McCann and Others v. the United Kingdom*, 27 September 1995, para. 161.

¹¹⁰ European Court, *Plattform Ärzte für das Leben v Austria*, 21 June 1988.

¹¹¹ *Velásquez Rodríguez v Honduras*, judgment of July 29, 1988, Series C, No. 4, pp. 151-152, para. 166.

¹¹² This is contained in Article 5, ICCPR; Article 43, Arab Charter; Article 30 UDHR, Article 27(2) ACHPR, Article 17, ECHR. See also European Court, *Glimmerveen and Hagenbeek v Netherlands*, 1 Oct 1979.

36. Any measure taken under this principle must be strictly proportionate to the threat to the rights of others.
37. Some rights also carry with them corresponding duties.¹¹³ The Human Rights Committee has held that any restrictions on rights 'may not put in jeopardy the right itself' and that 'the relation between the right and the restriction and between the norm and the exception must not be reversed'.¹¹⁴

¹¹³ See e.g. Article 19(3) ICCPR; Articles 27-29 ACHPR.

¹¹⁴ Human Rights Committee, General Comment No.34, CCPR/C/GC/34 (2011), para 21.

V. Specific Issues

1. As well as being able to understand the basic principles of how rights work, those implementing human rights strategies must also address certain specific issues which may be directly relevant to ensuring that human rights are used to their best. These are:
 - Equality and non-discrimination
 - Extra-territorial application of human rights
 - Accountability of non-State actors

A. The Importance of Equality and Protection from Discrimination in International Human Rights Law

2. A guarantee of equal treatment is essential to democracy and that democracy is founded on the principle that each individual has equal value.
3. The protection against discrimination is the cornerstone of international human rights law's commitment to equality. Equality lies at the heart of post war human rights protection and access to equality and the rooting out of unjustified discrimination has been the motivation behind the emergence of modern human rights standards. Principles of equality should be seen as the thread that draws together human rights, and the values of a democratic society, which flow from them.
4. All human rights treaties include an equality guarantee,¹¹⁵ as do most domestic constitutional frameworks.¹¹⁶ Similarly at the national level, there are often comprehensive laws forbidding discrimination. However, there are various ways of seeking to ensure equality and non – discrimination. For example, all human rights treaties provide for formal equality or consistency in treatment by prohibiting unjustified differential treatment. This is known as 'direct discrimination'.¹¹⁷ Others also impose an obligation on States to secure substantive equality by, in particular, prohibiting unjustified conditions, which, whilst neutral in appearance, disadvantage certain protected groups. This is known as 'indirect discrimination'.¹¹⁸

¹¹⁵ Articles 1, 2 and 7 UDHR; Articles 1, 2, 3 and 26 ICCPR; Articles 1, 2 and 3 ICESCR; articles 1 and 2 ICERD; Articles 1-4 CEDAW; Articles 2, 50 and 30 CRC; Articles 2, 3, 4, 5 and 12, CRPD; Article 3 Arab Charter; Article 14 ECHR; Article 2 ACHPR; Article 1 ACHR.

¹¹⁶ Palestinian Basic Law, Article 9.

¹¹⁷ Human Rights Committee, General Comment No.18, HRI/GEN/1/Rev.9 (Vol. I) p.195 (1989). CERD General Recommendation No.14, 42nd Session (1993). Communication 24/1977, *Lovelace v Canada*, 30 July 1981; Communication 35/1978, *Aumeeruddy –Cziffra v Mauritius*, 9 April 1981; before the European Court, *Belgian Linguistics Case*, 23 July 1968; African Commission, Communications 27/89 et al, *Organisation Mondiale contre Torture and others v Rwanda*, 31 October 1996; Inter-American Commission, Case 11.671, *Carlos Garcia Sacone v Argentina*, Report No.8/98, 2 March 1998.

¹¹⁸ CERD General Recommendation No.14, 42nd Session (1993). See also CERD, Communication 31/2003, *LR et al v Slovak Republic*, 10 March 2005. Human Rights Committee, Communication 208/1986, *Bhinder v Singh v Canada*, 9 November 1989. *DH and others v Czech Republic*, 13th November 2007, European Court. *Belgian Linguistics Case*, 23 July 1968.

5. Some human rights treaties go even further and expressly require positive action on the part of States to eliminate discrimination on prohibited grounds.¹¹⁹ However, certain treaties protect equality only in the enjoyment of identified substantive rights (commonly described as ‘ancillary’ protection).¹²⁰ This means that instead of a free standing right to equality, protection against discrimination is available only in relation to the application of the other rights protected by the relevant treaty. This can have the effect of making equality and non-discrimination more marginal.
6. It is generally understood that mere formal equality – that is a requirement that there be no difference in treatment as between persons in like situations (or ‘direct discrimination’) - is not sufficient to guarantee real equality. Simple equality of treatment, without regard to the differences between the persons or groups of persons concerned, may operate so as to entrench existing disadvantages. Thus, a prohibition on wearing head gear at work imposed on all employees is, formally speaking, equal treatment (so long as no exceptions are made) but can readily be seen as disadvantaging those groups for whom the wearing of head gear might have some religious or cultural significance.
7. The Human Rights Committee has interpreted ‘discrimination’ to mean ‘any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise of all persons, on an equal footing, of all rights and freedoms’.¹²¹ Also included among the prohibited grounds in Article 2 ICCPR are sexual orientation and gender identity.¹²² The concept of ‘other status’ has been given a broad meaning to include not just intrinsically personal qualities but also other such as marital professional and financial status.¹²³

Protecting Against Indirect Discrimination

8. Protection against ‘indirect’ discrimination provides a better opportunity to challenge entrenched discrimination arising out of structural factors. Indirect discrimination is perhaps best explained by a policy, rule or practice that is essentially neutral on its face, in that in theory it applies to everyone, which, however, may be indirectly discriminatory if it has a disparate impact on people belonging to a particular group.

¹¹⁹ Examples include the International Convention on the Elimination of All Forms of Discrimination (CERD) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

¹²⁰ E.g. Article 2(2) ICESCR, Article 14 ECHR.

¹²¹ General Comment No.18, HRI/GEN/1/Rev.9 (Vol. I) p.195 (1989), para 7.

¹²² Communication No.488/1992, *Toonen v Australia*, 31 March 1994; Concluding Observations on Kuwait, CCPR/C/KWT/CO/2.

¹²³ E.g. European Court, *Rasmussen v Denmark*, 28 November 1984; *Van der Musselle v Belgium*, 23 November 1983.

9. Nevertheless the concept of 'indirect' discrimination has its limits. The concept of indirect discrimination, though prohibiting conditions that disadvantage certain groups, does not require positive measures to ensure that any existing disadvantage or difference is overcome or accommodated.
10. Additionally the 'indirect discrimination' model only prohibits 'unjustified' discriminatory conditions. So where individuals claimed to have been discriminated against because they were retired and the government's decision to abolish some benefits disproportionately affected them, the Human Rights Committee held that as this did not disproportionately affect those of a particular race or colour and the abolition was based on reasonable and objective grounds, no violation occurred.¹²⁴

Burden of proof

11. It is generally for the applicant to show that they have been treated differently from a person in a comparable situation.¹²⁵ Once the applicant has shown a prima facie case, the burden will shift to the State to justify the discrimination.¹²⁶

Using Positive Action to Tackle Entrenched Discrimination

12. An obligation to bring about change by the imposition of a positive duty so as to tackle structural disadvantage goes further towards securing substantive equality, and this is recognised in a number of international and regional human rights treaties.¹²⁷ Such an approach is sometimes considered controversial because of the assumption that positive duties, or affirmative action, violate conventional principles of equality. Yet it does represent the high point in the protection against discrimination.¹²⁸ Positive action measures may not amount to unjustified discrimination and must therefore be temporary, reasonable, objective and proportionate.¹²⁹
13. States also have obligations in relation to specific groups. These include the duty to:
 - eliminate stereotypical roles for men and women as well as gender-based violence;¹³⁰

¹²⁴ Human Rights Committee, Communication 998/2001, *Althammer v Austria*, 22 September 2013; European Court, *Marckx v Belgium*, 13 June 1979.

¹²⁵ European Court, *Fredin v Sweden*, 18 Feb 1991.

¹²⁶ Human Rights Committee, Communication 208/1986, *Bhinder Singh v Canada*, 9 November 1989; Committee Against Torture, Communication 185/2001, *Chedi Ben Ahmed Karoui v Sweden*, 25 May 2002. European Court, *DH and others v Czech Republic*, 13 Nov 2007.

¹²⁷ Human Rights Committee General Comment No.18, HRI/GEN/1/Rev.9 (Vol. I) p.195 (1989), para 10; ICERD, Article 1(4) and Article 2(2); CERD, General Comment No.32, CERD/C/GC/32 (2009); Article 4(1) CEDAW; General Recommendation No.25, CEDAW Committee; ICESCR General Comment No.16, E/C.12/2005/4 (2005), para 15. See also Article 3(3) Arab Charter.

¹²⁸ See Human Rights Committee, Communication 198/1985, *Stalla v Costa v Uruguay*, 9 July 1987

¹²⁹ CERD, General Comment No.32, CERD/C/GC/32 (2009), paras 16 and 21. CEDAW General Recommendation No.25.

¹³⁰ CEDAW, Articles 2(f), 5 and 16(e) and CEDAW Committee, General Recommendation No.19., 11th Session (1992), para 24.

- prohibit discrimination on the grounds of sexual orientation or sexual identify and provide protection for individuals from homophobic violence and prevent torture and cruel, inhuman and degrading treatment;¹³¹
 - protect and promote the rights of minorities including taking positive action to promote their cultures;¹³²
 - ensure the persons with disabilities are treated as equal before and under the law.¹³³
14. There is not necessarily an obligation on the State to provide any particular system of education but, if it does so, access to the system cannot be restricted on discriminatory grounds.¹³⁴

Inter-sectionality

15. It is important to recognise that discrimination may occur on multiple grounds. People do not possess a single defining characteristic and it may not be clear whether a person has suffered discrimination because of his religion, or her ethnic identity or race, or her sex or gender, or for a mix of different prejudices. Human rights treaty bodies have recognised the concept of intersectionality¹³⁵ but may still treat the different grounds of discrimination separately.¹³⁶

Protecting the Group

16. Further, many of the international human rights treaties, recognise the need to protect not only the individual but also the individual as a member of a minority¹³⁷ or of the group, the 'people', itself.¹³⁸
17. What is a 'minority' can include racial, religious, ethnic, linguistic groups,¹³⁹ but generally is not meant to include sexual minorities, women or those with disabilities.
18. States are required to protect the existence of the minorities within their territory or jurisdiction,¹⁴⁰ and 'take measures to create favourable conditions to enable persons belonging to minorities to express their characteristics and

¹³¹ A/HRC/19/41.

¹³² Declaration on the Rights of Persons belonging to National, Ethnic, Religious or Linguistic Minorities, Articles 1 and 4.

¹³³ Article 5 CRPD.

¹³⁴ European Court, *Belgian Linguistics Case*, 23 July 1968.

¹³⁵ See e.g. CERD General Comment No.25, 56th Session (2000); General Comment No.27, CCPR/C/21/Rev.1/Add.9 (1999), para 6; CESCR General Comment No.20, E/C.12/GC/20 (2009).

¹³⁶ E.g. Communication 24/1977, *Lovelace v Canada*, 30 July 1981; Communications 9214/80 et al, *Abdulaziz, Cabales and Balkandali v UK*, 28 May 1985, European Court.

¹³⁷ E.g. Article 27 ICCPR; Article 30 UNCRC. Human Rights Committee General Comment No.23, U.N. Doc. CCPR/C/21/Rev.1/Add.5 (1994). European Framework Convention for the Protection of National Minorities.

¹³⁸ Article 1(1) ICCPR.

¹³⁹ Declaration on the Rights of Persons belonging to National, or Ethnic, Religious or Linguistic Minorities, 1992: GA Res.47/135.

¹⁴⁰ Declaration on the Rights of Persons belonging to National, or Ethnic, Religious or Linguistic Minorities, 1992: GA Res.47/135: Article 1(1).

to develop their culture, language, religion, traditions and customs, expect where specific practices are in violation of national laws and contrary to international standards'.¹⁴¹

19. The restrictions on an individual's rights, however, must have a reasonable and objective justification and be necessary to protect the existence of the minority.¹⁴²

B. Absolute Rights and Human Rights within a State of Emergency

38. Under exceptional circumstances, it may be possible to derogate from certain obligations under international human rights standards. Article 4, ICCPR and Article 4 of the Arab Charter,¹⁴³ permit States to go beyond simply limiting rights where it is lawful to do so, to derogating from them or suspending them in times of emergency that threaten the life of the nation.

Derogations are of an exceptional and temporary measure

39. The power to derogate in human rights treaties is seen as exceptional and should be dealt with as a temporary measure.¹⁴⁴

There must be a public emergency which threatens the life of the nation

40. As the Human Rights Committee has noted, not every situation will amount to a public emergency, only those which threaten the life of the nation.¹⁴⁵

There must be an official and prompt proclamation of the state of emergency

41. The state must proclaim a state of emergency in order to invoke the derogation and this must be in compliance with relevant national laws.¹⁴⁶ It must inform other States, through the UN Secretary General, with full information about the measures taken and an explanation.¹⁴⁷

¹⁴¹ Ibid, Art.4(2).

¹⁴² Human Rights Committee, Communication 197/1985, *Kitok v Sweden*, 27 July 1988.

¹⁴³ See also Articles 110-112 of the Palestinian Basic Law. Other treaties which have derogation provisions include ECHR, Article 15; ACHR, Article 27. There is no derogation provision in the African Charter.

¹⁴⁴ Human Rights Committee, General Comment No.29, CCPR/C/21/Rev.1/Add.11 (2001), para 2.

¹⁴⁵ Ibid, para 3.

¹⁴⁶ Human Rights Committee, General Comment No.29, CCPR/C/21/Rev.1/Add.11 (2001), para 2.

¹⁴⁷ Human Rights Committee, General Comment No.29, CCPR/C/21/Rev.1/Add.11 (2001), para 17. See also e.g. Concluding observations on Mexico, CCPR/C/79/Add.109, para 12. See also European Court, *Brannigan and McBride v UK*, 25 May 1993.

Measures must be proportionate and strictly required

42. The measures taken derogating from rights must be only those which are strictly required by the exigencies of the situation.¹⁴⁸ The Human Rights Committee will, for example, take into account the duration, geographical coverage and material scope of the emergency.¹⁴⁹ States must justify the proclamation of a state of emergency as well as the measures taken in response.¹⁵⁰

Measures taken must not be discriminatory

43. Measures taken derogating from the treaty must not discriminate against individuals on the grounds as set out in the treaty.¹⁵¹

Measures must not be inconsistent with other international obligations

44. Article 4(1) of the ICCPR notes that measures taken to derogate from rights must not be inconsistent with other obligations in the Covenant as well as other obligations under international humanitarian law, including any which are deemed to be crimes in international law.¹⁵² In an interesting case before the European Court, however, involving detention of an individual by British forces in Iraq, the Court found that a State may also be permitted to deprive individuals of their liberty, under international humanitarian law, where there was an international armed conflict.¹⁵³

Certain rights are non-derogable

45. Article 4(2), ICCPR acknowledge that certain rights are non-derogable, regardless of the situation. These are the:

- The right to life;
- Protection from torture, cruel, inhuman and degrading treatment and punishment or medical or scientific experimentation without consent;
- Protection from slavery;
- Prohibition of imprisonment for failure to fulfil a contractual obligation;
- Protection from retrospective criminal penalties and law;
- Protection of everyone as a person before the law;
- Freedom of thought, conscience and religion.

¹⁴⁸ Human Rights Committee, General Comment No.29, CCPR/C/21/Rev.1/Add.11 (2001), para 4. See also Concluding Observations on Israel, 1998, CCPR/C/79/Add/93, para 11. *Aksoy v Turkey*, European Court, 18 December 1996.

¹⁴⁹ Human Rights Committee, General Comment No.29, CCPR/C/21/Rev.1/Add.11 (2001), para 4.

¹⁵⁰ *Ibid*, para 5.

Ibid, para 8..

¹⁵² *Ibid*, paras 9 and 12. See also Statute of the International Criminal Court, Articles 6 and 7.

¹⁵³ *Hassan v UK*, European Court, 16 September 2014.

46. To this list in the Covenant, the Human Rights Committee has also added, humane treatment of detainees and human dignity, prohibition of taking of hostages, abductions or unacknowledged detention; rights of persons belonging to minorities; deportation or forcible transfer of a population contrary to Article 7 of the Rome Statute; propaganda for war or advocacy of national, racial or religious hatred; fair trial and procedural guarantees.¹⁵⁴ Other treaties include additional rights which are also non-derogable¹⁵⁵ and simply because they are not included in the list in the treaty does not mean that other rights can also be non-derogable. As the Human Rights Committee has said ‘the legal obligation to narrow down all derogations to those strictly required by the exigencies of the situation establishes both for states parties and for the Committee a duty to conduct a careful analysis under each article of the Covenant based on an objective assessment of the actual situation’.¹⁵⁶
47. Guarantees of due process are absolute to the extent that the trial taken as a whole must be fair: the requirements of competence, independence and impartiality cannot be derogated from, neither can the presumption of innocence.¹⁵⁷
48. Therefore, while, for example, terrorist threats may threaten the life of the nation, this does not justify the limits on non-derogable rights.¹⁵⁸

C. Extra-Territorial Application of International Human Rights Standards

20. Human rights treaties secure rights to all within the territory of the State and subject to its jurisdiction.¹⁵⁹ What amounts to jurisdiction for the purposes of these treaties depends upon the extent of control that a Member State has in relation to territory, even territory outside its geographic boundaries.¹⁶⁰ The ICCPR under Article 2 requires States to guarantee the rights to ‘all within its territory and subject to its jurisdiction’.¹⁶¹ The Human Rights Committee has made it clear that the ICCPR has extra-territorial reach where persons are within the power or effective control of the State Party, even if not situated in the territory of the State Party.¹⁶² To hold otherwise, it has noted ‘would be unconscionable to permit a state to perpetrate violations on foreign territory which violations it could not perpetrate on its own territory.’¹⁶³ Similarly, the International Court of Justice (ICJ), in its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian*

¹⁵⁴ Human Rights Committee, General Comment No.29, CCPR/C/21/Rev.1/Add.11 (2001), para 13.

¹⁵⁵ The Arab Charter includes among the list of non-derogable rights the principle of habeas corpus, the rights to fair trial, human dignity, freedom of movement, political asylum and nationality, among others.

¹⁵⁶ Human Rights Committee, General Comment No.29, CCPR/C/21/Rev.1/Add.11 (2001), para 6.

¹⁵⁷ Human Rights Committee, General Comment No.29, CCPR/C/21/Rev.1/Add.11, paras 11 and 16.

¹⁵⁸ Report of the Working Group on Arbitrary Detention, E/CN.4/2004/3.

¹⁵⁹ Article 3, Arab Charter; Article 1 ECHR;

¹⁶⁰ See *Louzidou v Turkey*, European Court, 23 March 1995; *Bankovic v Belgium & Others*, European Court, 1 December 2001.

¹⁶¹ See also Article 3(1) Arab Charter, ‘subject to its jurisdiction’.

¹⁶² General Comment No.31, CCPR/C/21/Rev.1/Add.13 (2004), para 10.

¹⁶³ Communication No. R 12/52, *Lopez Burgos v Uruguay*, 6 June 1979, para 10. See before the European Court, *Issa v Turkey*, 16 November 2005; *Ocalan v Turkey*, 12 May 2005.

Territories held that the ICCPR extends to ‘acts done by a State in the exercise of its jurisdiction outside of its own territory’.¹⁶⁴ It is under these principles that the ICCPR and all other human rights treaties ratified by the United States were considered to extend to the actions of the United States in relation to persons detained at Guantanamo Bay.¹⁶⁵ The Human Rights Committee has upheld the extraterritorial application of the ICCPR in this context and others including targeted killings by ‘drones’ as part of counter-terrorism operations.¹⁶⁶

21. In *Al-Skeini and others v UK*,¹⁶⁷ the European Court held that extraterritorial jurisdiction was exceptional, but this could be recognised either on a personal or spatial notion of jurisdiction.
22. As to personal jurisdiction, this will arise if the State ‘when, through the consent, invitation or acquiescence of the government of that territory, it exercises all or some of the public powers normally to be exercised by that government’.¹⁶⁸ Further: ‘whenever the State through its agents exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section 1 of the Convention that are relevant to the situation of that individual’.¹⁶⁹
23. In addition, the European Court also held that ‘where the territory of one Convention State is occupied by the armed forces of another, the occupying State should in principle be held accountable under the Convention for breaches of human rights within the occupied territory. ...However, the importance of establishing the occupying State’s jurisdiction in such cases does not imply, *a contrario*, that jurisdiction under Article 1 of the Convention can never exist outside the territory covered by the Council of Europe Member States’.¹⁷⁰ Given, therefore in this case that the UK had exercised some of the ‘public powers normally to be exercised by a sovereign government’, it therefore exercised authority and control over the individuals killed.¹⁷¹
24. Where individuals are in the physical control of the State agent, they will be presumed to be within the State’s jurisdiction.¹⁷²

¹⁶⁴ ICJ, *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004, para 109; see also ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, 19 December 2005, paras 178-180, and 216-217.

¹⁶⁵ ‘Situation of detainees at Guantanamo Bay’, E/CN.4/2006/120. See similar approach by the Inter-American Commission, *Victor Saldano v Argentina*, Report no.38/99, 11 March 1999, para 17.

¹⁶⁶ Human Rights Committee, *Concluding Observations on the Fourth Periodic Report of the United States of America*, CCPR/C/USA/CO/4, 23 April 2014.

¹⁶⁷ European Court, 7 July 2011.

¹⁶⁸ *Ibid*, para 135.

¹⁶⁹ *Ibid*, para 136.

¹⁷⁰ *Ibid*, para 142.

¹⁷¹ *Ibid*, para 149.

¹⁷² Human Rights Committee, Communication 56/1979, *Lilian Celiberti de Casariego v Uruguay*, 29 July 1981.

25. International treaty bodies have also presumed a State will have authority and control in situations of military occupation and therefore its human rights obligations apply.¹⁷³

D. Accountability of Non-State Actors

26. Technically, human rights obligations only attach to States. Human beings are the beneficiaries of human rights and States parties have the corresponding obligation to guarantee the rights contained in human rights treaties. So, for example, Article 1 of the UNCAT defines torture as acts of 'severe pain or suffering' if 'by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity'.¹⁷⁴

27. It is incumbent, therefore, upon the State to have in place comprehensive laws, both criminal and civil to deal with the consequences of acts of private individuals as well as to protect from it. Failure to have in place such provisions would be a violation of human rights obligations imposed upon the State.

28. Acts carried out by private individuals, including, for example, terrorism will by definition also amount to the commission of an offence and, as such, the perpetrators can be prosecuted under domestic criminal law and any other appropriate domestic laws. As the enforcement mechanisms of international human rights treaties only apply to State parties, the reality is that there are no procedures in respect of non-State actors. Outside of international criminal law and the Rome Statute creating the International Criminal Court, there are no means, as a matter of international human rights law, to establish that a non-State actor has violated human rights. Therefore paramilitary organisations, or terrorist groups cannot be held to account, internationally, for violation of human rights standards.

29. The circumstances where a State can be held responsible for a human rights violation committed by a non-State actor are as follows:

- where the State has privatised State activity or the State permits that activity to be carried out in the private sector, the State can be held accountable for violation of human rights under those circumstances.¹⁷⁵
- where a violation of human rights occurs between two private individuals, the State cannot escape its liability in connection with those violations, if the laws governing the activity that caused the violation are inadequate.¹⁷⁶
- State responsibility will also arise when national authorities 'fail to take appropriate measures or to exercise due diligence to prevent, punish,

¹⁷³ ICJ, *Democratic Republic of Congo v Uganda*, para 216; ICJ, *Advisory Opinion on the Wall*, para 78. African Commission, Communication 227/99, *DRC v Burundi, Rwanda and Uganda*, 29 May 2003, paras 79-80.

¹⁷⁴ See also Human Rights Committee, General Comment No.31, CCPR/C/21/Rev.1/Add/13 (2004), para 8.

¹⁷⁵ European Court, *Costello Roberts v UK*, 25 March 1993; also E/CN.4/2005/7, 22 December 2004.

¹⁷⁶ European Court, *MC v Bulgaria*, 4 December 2003; also *A v UK*, 23 September 1998.

investigate and redress the harm caused by such acts by private persons or entities¹⁷⁷

- the State cannot also hide behind its responsibilities by merely asserting the activities which violated an individual's rights were carried out by private parties, or non-State actors.¹⁷⁸
- Certain rights presume positive measures need to be taken by States to deal with the activities of private entities.¹⁷⁹ These include privacy,¹⁸⁰ prohibition of torture,¹⁸¹ and prohibition of discrimination in housing or work.

30. So, for example, in a case before the African Commission on Human and Peoples' Rights concerning the behaviour of an oil consortium between the State oil company and Shell in Nigeria,¹⁸² the African Commission found a number of violations of the African Charter of Human and Peoples' Rights, and pointed to the positive obligation of States with regard to private actors.

31. Similarly, before the European Court, Spain was found to have violated the right to private and family life when a local authority failed to regulate the operation of a waste treatment plant,¹⁸³ and Italy violated the right to private life where it failed to provide relevant information about pollution from a factory.¹⁸⁴

¹⁷⁷ Human Rights Committee, General Comment No.31, CCPR/C/21/Rev.1/Add/13 (2004), para 8.

¹⁷⁸ Inter-American Court, *Velasquez Rodriguez v Honduras*, judgment of July 29, 1988, Series C, No. 4,

¹⁷⁹ Human Rights Committee, General Comment No.31, CCPR/C/21/Rev.1/Add/13 (2004), para 8.

¹⁸⁰ Article 17 ICCPR.

¹⁸¹ Article 7 ICCPR.

¹⁸² Communication 155/96 *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*, 27 October 2001.

¹⁸³ European Court, *Lopez Ostra v Spain*, 9 December 1994.

¹⁸⁴ European Court, *Guerra and others v Italy*, 19 February 1998.

VI. The Right to Life

Relevant international provisions

UDHR Article 3

Everyone has the right to life, liberty and security of person.

Article 6 ICCPR

- 1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.*
- 2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.*
- 3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.*
- 4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.*
- 5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.*
- 6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.*

Arab Charter, Article 5

- 1. Every human being has the inherent right to life.*
- 2. This right shall be protected by law. No one shall be arbitrarily deprived of his life.*

Article 6

Sentence of death may be imposed only for the most serious crimes in accordance with the laws in force at the time of commission of the crime and pursuant to a final judgment rendered by a competent court. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence.

Article 7

1. Sentence of death shall not be imposed on persons under 18 years of age, unless otherwise stipulated in the laws in force at the time of the commission of the crime.
2. The death penalty shall not be inflicted on a pregnant woman prior to her delivery or on a nursing mother within two years from the date of her delivery; in all cases, the best interests of the infant shall be the primary consideration.

Relevant domestic law provisions

There is no express right to life in the Palestinian Basic Law. However, Article 10(1) provides as follows:

Basic human rights and liberties shall be protected and respected.

A. The primacy of the right to life

1. The right to life is fundamental and non-derogable. Together with the protection from torture, the right to life enshrines the basic values of democratic societies, and its pre-eminence has been consistently reaffirmed in treaties and by international agencies, courts and tribunals. As noted by a 1982 UN General Assembly Resolution, safeguarding of the right to life is an essential condition for the enjoyment of the entire range of economic, social, cultural as well as civil and political rights.¹⁸⁵

B. The negative obligation to refrain from taking life

2. The right to life, therefore, clearly imposes a negative obligation on the State to refrain from taking life. It should be noted that the right to life is not concerned only with intentional killings, but may also be violated where force is permitted which may result, as an unintended outcome, in the deprivation of life.¹⁸⁶ The right to life also relates to the right to die and euthanasia, as well as issues of abortion, although the human rights bodies have been cautious in engaging with these.¹⁸⁷

Use of force by law enforcement officials

3. It is essential that law enforcement agencies understand the limited circumstances where it can be lawful to use lethal force.¹⁸⁸ The Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions has noted that 'in short, the police may only intentionally use lethal force where it is necessary

¹⁸⁵ GA Res. 37/189A

¹⁸⁶ *McCann and others v UK*, European Court, 27 September 1995.

¹⁸⁷ *Pretty v UK*, European Court, 28 April 2002; re abortion see Article 4 ACHR; European Court: *Vo v France*, 8 July 2004.

¹⁸⁸ Code of Conduct for Law Enforcement Officials GA Resolution 34/169, 1979. Basic Principles on the Use of Force and Firearms by Law Enforcement Officials Adopted by the 8th UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 Aug – 7 Sep 1990.

to protect life'.¹⁸⁹ Some of the most common situations in which police killings occur are during attempts to arrest suspected criminals;¹⁹⁰ and to control a riot or crowd.¹⁹¹

4. Law enforcement officials must only use force when 'strictly necessary and to the extent required for the performance of their duty'.¹⁹² The circumstances in which it may be appropriate to use firearms include:
 - Self defence;
 - Defence of others against the imminent threat of death or serious injury;¹⁹³
 - To prevent a serious crime;
 - To arrest a person presenting such a danger and resisting authority. Failure to attempt arrests, even in hostile territory, inevitably gives rise to suspicions that a State lacks evidence to place such persons on trial and therefore prefers to dispose of them arbitrarily;¹⁹⁴
 - To prevent his or her escape;
 - When less extreme means are insufficient.¹⁹⁵
5. As to what is 'necessary', the use of firearms should be 'only when less extreme means are insufficient to achieve these objectives'.¹⁹⁶ Therefore using other means such as negotiation should be attempted first¹⁹⁷ and if this proves ineffective then it may be permissible to escalate the level of force including through restraint.¹⁹⁸
6. If the use of firearms is necessary, a 'clear warning should be given with sufficient time for the warning to be observed'.¹⁹⁹ Lethal use of force should only be carried out when 'strictly unavoidable'.²⁰⁰
7. Force should also be proportionate, namely 'proportionate to the seriousness of the offence and the legitimate objectives to be achieved'.²⁰¹

¹⁸⁹ Report on Police Oversight Mechanisms, A/HRC/14/24/Add.8, para 8.

¹⁹⁰ E/CN.4/2006/53/Add.4, para 42.

¹⁹¹ A/HRC/11/2/Add.6, para 72.

¹⁹² Code of Conduct for Law Enforcement Officials, Article 3.

¹⁹³ Communication 45/1979 *Suárez de Guerrero v. Colombia*, 31 March 1982, para 13.3.

¹⁹⁴ The UN Human Rights Committee has not allowed Israel's justification of its policy and practice of assassinations on grounds of self-defence. Israel has claimed that it is not possible to arrest and try suspects, particularly where they are in areas controlled by the Palestinian Authority. See the Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied by Israel since 1967 (E/CN.4/2004/6).

¹⁹⁵ Basic Principles, Principle 9. Human Rights Committee, Communication 821/1998, *Chongwe v. Zambia*, 25 October 2000 para 5.2, See also Communication 859/1999, *Jiménez Vaca v. Colombia*, 25 March 2002, para 7.3.

¹⁹⁶ Special Rapporteur on extrajudicial, Summary or arbitrary executions, A/61/311, 2006, para 41.

¹⁹⁷ Basic Principles, Principle 4.

¹⁹⁸ Code of Conduct, Article 3.

¹⁹⁹ Basic Principles, Principle 10.

²⁰⁰ Basic Principles, Principle 9.

²⁰¹ Basic Principles, Principle 5.

8. These principles will apply, for example, in the context of a riot or insurrection. Throwing stones at fully armed and protected officers is unlikely to justify resort to lethal force. Appropriate riot control procedures and equipment must be used.²⁰² In relation to prison uprisings, the proportionality of the use of fatal force will be strictly applied. Therefore, when lethal force was used to contain a prison uprising involving serious and violent offenders resulting in extensive loss of life, the manner of the use of lethal force was found to be excessive and disproportionate and consequently a violation of the right to life.²⁰³
9. There should be an appropriate regulation of the use of firearms which is in accordance with international standards including the United Nations Principles on the Use of Force and Firearms by Law Enforcement Officials.²⁰⁴
10. A targeted killing, namely, according to the Special Rapporteur on Extrajudicial Arbitrary and Summary Executions, one that is 'intentional, premeditated and deliberate killing by law enforcement officials' cannot be legal as it has its sole objective to kill.²⁰⁵ Similarly, 'shoot to kill' policies will also violate international human rights law.²⁰⁶

Deaths in custody

11. Where an individual dies in custody there is a presumption of State responsibility.²⁰⁷ The burden of proof falls on the State to identify the cause of death.²⁰⁸

Extra-judicial summary or arbitrary executions

12. States are required to conduct thorough, prompt and impartial investigations into any suspected cases of extrajudicial, summary or arbitrary execution.²⁰⁹
13. States are also required to bring the perpetrators of such executions to justice and provide compensation to victims' families.²¹⁰
14. In its concluding observations, the Human Rights Committee has expressed concern with respect to the alleged use of so-called 'targeted killings' of suspected terrorists. The Committee has emphasised that State parties,

²⁰² *Gulec v Turkey*, European Court, 27 July 1998.

²⁰³ Inter-American Court, *Neira Alegria v Peru*, judgment 19 Sep 1996.

²⁰⁴ See e.g. Human Rights Committee, Concluding Observations: Portugal, CCPR/CO/78/PRT (2003), para. 9.

²⁰⁵ Report on targeted killings, A/HRC/14/24/Add.6, para 33.

²⁰⁶ *Ibid.* See also A/61/311; E/CN.4/2006/53, paras 44-54.

²⁰⁷ A/HRC/13/24, para 49.

²⁰⁸ Special Rapporteur on extrajudicial executions, A/61/311, paras 49-54. *Varnava and others v Turkey*, 18 September 2009.

²⁰⁹ Principles on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions, ECOSOC Resolution 1989/65, Annex. GA Resolution 67/168, 15 March 2013, para 3.

²¹⁰ *Ibid.*

‘should not use “targeted killings” as a deterrent or punishment. The State party should ensure that the utmost consideration is given to the principle of proportionality in all its responses to terrorist threats and activities... Before resorting to the use of deadly force, all measures to arrest a person suspected of being in the process of committing acts of terror must be exhausted’.²¹¹

15. Extrajudicial summary or arbitrary executions can also amount to genocide, crimes against humanity and war crimes under international law against which each State should protect its population.²¹²

C. The positive obligations to safeguard life

16. The right to life also creates positive obligations on the State.²¹³ This also includes protecting the right to life against infringements by private actors.²¹⁴

17. The term ‘non-state actors’ can encompass a range of entities including paramilitary groups, private forces, private individuals, among others.²¹⁵ The Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions has stated that where such groups operate ‘at the behest of the government, or with its knowledge or acquiescence’, the State is then responsible in international law for any violations they commit.²¹⁶

18. For those private organisations or actors which exercise functions which are State functions, States are required to report on their activities and the State will still be responsible.²¹⁷

19. An additional area regarding the acts of non-state actors is where the violation was carried out by a private individual but the state failed to ‘deter, prevent and punish the perpetrators as well as to address any attitudes or conditions within society which encourage or facilitate such crimes’.²¹⁸ In such instances the Special Rapporteur on extrajudicial executions has noted that ‘once a pattern becomes clear in which the response of the Government is clearly inadequate, its responsibility under international human rights law becomes applicable.

²¹¹ Concluding observations of the Human Rights Committee: Israel, CCPR/CO/78/ISR, 21 August 2003, para. 15. Special Rapporteur on extrajudicial, summary or arbitrary executions, E/CN.4/2005/7. See also Report of Special Rapporteur on extrajudicial, summary or arbitrary executions on Targeted Killings, A/HRC/14/24/Add.6, May 2010.

²¹² General Assembly Resolution 60/1, 16 September 2005; 63/308, 14 September 2009.

²¹³ Human Rights Committee General Comment No.6, HRI/GEN/1/Rev.6, (2003) at 127. See also Communication 763/1997, *Lantsov v Russian Federation*, 26 March 2002.

²¹⁴ E/CN.4/2005/7, paras 65-76.

²¹⁵ Ibid.

²¹⁶ Ibid, para 69.

²¹⁷ Human Rights Committee, General Comment No.20, 44th Session (1992), para 13; *Communication 1020/2001, Cabal and Pasini Bertran v. Australia*, 7 August 2003, para. 7.2.

²¹⁸ E/CN.4/2005/7, para 71.

Through its inaction the Government confers a degree of impunity upon the killers'.²¹⁹ The responsibility of the State is to exercise due diligence.²²⁰

20. For armed opposition groups, although traditionally their activities would be seen as criminal, rather than human rights violations per se, it has been argued that complaints can be addressed to them about human rights violations and they can be asked to respect human rights standards.²²¹
21. More generally, States should take appropriate steps to safeguard the lives of those within the jurisdiction.²²² This may involve the provision of information regarding a possible risk to life caused by actions of the State,²²³ and this obligation may extend to discouraging individuals from causing serious risks to their own health.²²⁴
22. Further, the positive obligation under the right to life requires that the law must properly prohibit and punish killings, and that unlawful killing must be subject to criminal sanctions, regardless of who carried out the killings.
23. This positive obligation to protect life may under certain circumstances require the State to protect certain individuals from identifiable threats to their lives. On a day-to-day level, these threats may arise from other private individuals, environmental hazards or even from themselves. In some instances, human rights courts have gone further to say that the right may also encompass access to food, shelter and a 'dignified existence', an approach recognised by the Arab Charter's Articles 5, 38 and 40.²²⁵
24. The extent of the positive obligation to protect life is not limitless. An appropriate balance must be struck. If law enforcement agencies fail to act, for example, by opting not to arrest someone who then goes on to take a life this will not necessarily violate the right to life. In *Osman v UK*, the European Court found no violation of the right to life where the police did not arrest an individual who was harassing a family and who then went on to shoot and kill the father of that family. The police, under the circumstances, had no reason to believe such a tragic event might occur.²²⁶
25. The right to life should be understood as creating two obligations; a substantive obligation in relation to the guarantee of life itself and a procedural obligation where there has been a loss of life. Both requirements are considered to be of equal importance.

²¹⁹ Ibid.

²²⁰ *Velásquez Rodríguez v. Honduras*, judgment of July 29, 1988, Series C, No. 4.; E/CN.4/2000/68, para. 53. Report on targeted killings, A/HRC/14/24/Add.6, para 47; E/CN.4/2005/7, paras 71-74; Human Rights Committee, *Communication 859/1999, Jiménez Vaca v. Colombia*, 25 March 2002, para 7.3.

²²¹ E/CN.4/2005/7, para 76.

²²² *LCB v UK*, European Court, 9 June 1998.

²²³ Ibid.

²²⁴ *Oneryildiz v Turkey*, European Court, 30 November 2004.

²²⁵ Inter-American Court of Human Rights, *Villagran Morales v Guatemala*, Series C No.63 (1999), at para 144. See also African Commission, *Communication 155/96, Social and Economic Rights Action Centre and Centre for Economic and Social Rights v Nigeria*, 27 October 2001, at paras 44-47.

²²⁶ *Osman v UK*, 28 October 1998.

Obligation to investigate

26. Under the obligation to respect and protect life the State should hold an independent investigation into a deprivation of life.²²⁷ This can be satisfied by an independent police investigation, but a national commission of inquiry has also been recommended.²²⁸
27. Such investigations must satisfy certain criteria: they must be carried out 'promptly, thoroughly and effectively through independent and impartial bodies'.²²⁹ They must not be a mere formality.²³⁰ Other requirements are that:
- The institution carrying out the investigation must comply with international human rights standards. The same will apply to military tribunals.²³¹
 - The purpose of the investigation should be to determine the cause, time and manner of death and who was responsible.²³²
 - Individuals should be punished in a manner commensurate with the crimes they have committed.²³³
 - Those undertaking the investigation should have the necessary powers to access relevant documentation and information and to summon witnesses and other individuals.²³⁴
 - Those conducting the investigation and assisting it should be protected from reprisals.²³⁵
 - Relatives and legal representatives of the deceased should have access to any hearing, information and be also able to present information themselves.²³⁶
 - A written report should be made available within a reasonable period of time²³⁷ and the results of any investigation must be made public, and include details of who undertook the investigation and how.²³⁸

²²⁷ *McCann v UK*, 27 September 1995. *Jordan v UK*, European Court, 4 May 2001.

²²⁸ See e.g. Special Rapporteur on extrajudicial executions, A/HRC/8/3.

²²⁹ Human Rights Committee General Comment No.31, CCPR/C/21/Rev.1/Add.13 (2004), para 15.

²³⁰ Inter-American Court of Human Rights, *Velásquez Rodríguez Case*, Judgment of July 29, 1988, paragraph 177.

²³¹ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, E/CN.4/2006/53, 8 March 2006, para 37.

²³² Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, E.S.C. res. 1989/65, annex, 1989 U.N. ESCOR Supp. (No. 1) at 52, U.N. Doc. E/1989/89 (1989), Principle 9.

²³³ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, E/CN.4/2006/53, 8 March 2006, para 39.

²³⁴ Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, E.S.C. res. 1989/65, annex, 1989 U.N. ESCOR Supp. (No. 1) at 52, U.N. Doc. E/1989/89 (1989), Principle 10.

²³⁵ Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, E.S.C. res. 1989/65, annex, 1989 U.N. ESCOR Supp. (No. 1) at 52, U.N. Doc. E/1989/89 (1989), Principle 15.

²³⁶ *Ibid*, Principle 16.

²³⁷ *Ibid*, Principle 17.

²³⁸ E/CN.4/2005/7, paragraph 86.

Disappearances

28. An 'enforced disappearance' is defined in Article 2 of the Convention for the Protection of All Persons from Enforced Disappearance (ICCPED)²³⁹ as the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.

29. The prohibition on enforced disappearances is absolute²⁴⁰ and the widespread or systematic use of enforced disappearance is a crime against humanity.²⁴¹

30. Parties to the Convention undertake to:

- investigate acts of enforced disappearance and bring those responsible to justice;
- ensure that enforced disappearance constitutes an offence under its criminal law;
- establish jurisdiction over the offence of enforced disappearance when the alleged offender is within its territory, even if they are not a citizen or resident;
- cooperate with other states in ensuring that offenders are prosecuted or extradited, and to assist the victims of enforced disappearance or locate and return their remains;
- respect minimum legal standards around the deprivation of liberty, including the right for imprisonment to be challenged before the courts;
- establish a register of those currently imprisoned, and allow it to be inspected by relatives and counsel;
- ensure that victims of enforced disappearance or those directly affected by it have a right to obtain reparation and compensation.

31. Enforced disappearances can engage a number of other rights including the right to life, right to liberty, protection from torture,²⁴² due process rights and the right to a remedy.

32. Even where there is no direct evidence that a person has been abducted and detained by agents of the State, where the State fails to investigate properly a disappearance, this will amount to a failure to guarantee human rights, including protection from torture and the right to life.²⁴³ Similarly, a 'refusal to acknowledge the deprivation of liberty or by concealment of the

²³⁹ Adopted by the UN General Assembly on 20 December 2006, entered into force on 23 December 2010.

²⁴⁰ Article 1, ICCPED.

²⁴¹ Article 6, ICCPED.

²⁴² Human Rights Committee, Communication 449/91, *Mojica v. Dominican Republic*, 15 July 1994

²⁴³ Inter-American Court, *Velasquez Rodriguez v Honduras*, judgment of July 29, 1988, Series C, No. 4.

fate or whereabouts of the disappeared person', will be a violation of the right to life.²⁴⁴

33. The rights of victim's families are particularly important, including their right to a fair trial to have those responsible for the disappearance prosecuted and punished. As the Human Rights Committee has noted: 'the anguish and stress caused to the author (wife of the victim) by the disappearance of her husband and the continued uncertainty concerning his fate and whereabouts reveal a violation of article 7 of the Covenant with regard to the author's husband as well as the author herself'.²⁴⁵

D. The Death Penalty and the Right to Life

34. Many human rights treaties have stated that abolition of the death penalty, if not prohibited by the treaty itself, is desirable.²⁴⁶ Where the death penalty does exist, certain obligations will apply.
35. The penalty should only be imposed in accordance with a law available at the time the offence was committed.²⁴⁷
36. The sentence must be imposed by a competent court.
37. There is a requirement that states limit it to exceptional circumstances and only to the most serious crimes.²⁴⁸ In its General Comment No. 6, the Human Rights Committee noted that the terms 'most serious crimes' must be interpreted 'restrictively'. The offences for which capital punishment will be applied should not be vaguely defined.²⁴⁹
38. The trial leading to the imposition of the death penalty should be fair and in compliance with the provisions of the relevant treaty in this regard. Failure to do so will not only violate the right to life but also the right to a fair trial.²⁵⁰
39. The death penalty must be carried out 'in such a way as to cause the least possible physical and mental suffering'.²⁵¹

²⁴⁴ Communication 1874/2009, *Faraoun v. Algeria*, 18 October 2013, para 7(4)

²⁴⁵ Communication 992/2001, *Bousroual v. Algeria*, 30 March 2006.

²⁴⁶ See Human Rights Committee, General Comment No.6, HRI/GEN/1/Rev.6, (2003) para 6.

²⁴⁷ The principle on non-retroactivity.

²⁴⁸ E.g. Article 6(2) ICCPR; Human Rights Committee General Comment No.6, HRI/GEN/1/Rev.6, (2003) para 7.

²⁴⁹ Concluding Observations: Viet Nam CCPR/CO/75/VNM (2002), para 7. Similarly Syria, CCPR/CO/71/SYR (2001), para. 9 and Togo CCPR/CO/76/TGO (2002), para 10.

²⁵⁰ Human Rights Committee General Comment No.32, CCPR/C/GC/32 (2007), para 59. See also Inter-American Court of Human Rights, *Tibi v. Ecuador*, 7 September 2004. Series C No. 114, para 146; See also *Maritza Urrutia v. Guatemala*, 27 November, 2003. Series C No. 103, para 93; *Cantoral-Benavides v. Peru*, 18 August 2000, Series C No. 69, par. 104. Human Rights Committee General Comment No.6, HRI/GEN/1/Rev.6 at 127 (2003), para 16. Communication 702/1996, *McLawrence v Jamaica*, 18 July 1997, para 5.13.

²⁵¹ Communication 470/1991, *Kindler v Canada*, 30 July 1993.

40. Where the death penalty exists, States are also required to undertake periodic independent reviews to consider the applicability of international human rights law and evidence which may indicate the innocence of the accused.²⁵²
41. Mandatory death sentences will not be consistent with international human rights law.²⁵³ Therefore 'a mandatory death sentence for a broadly defined offense of murder, without regard to the defendant's personal circumstances or the circumstances of the particular offense', violated the right to life.²⁵⁴
42. The death penalty should not be applied to juveniles.²⁵⁵
43. Those sentenced to death have a right to seek a pardon or commutation of the sentence.²⁵⁶
44. The Special Rapporteur on Extrajudicial executions has noted the failure of states to provide information on the death penalty will violate international human rights law which includes 'full and accurate reporting' of the incidents where it is used.²⁵⁷
45. Extradition of a person to a country where one faces the death penalty can constitute a violation of the right to life.²⁵⁸

E. The Right to Life and Armed Conflict

46. Even in situations which could be categorised as an armed conflict, the right to life remains relevant.²⁵⁹ As the UN has reiterated, 'the central point is that there is nothing in the fact of occupation that justifies the targeting and killing of civilians'.²⁶⁰ Therefore where people have been killed by the armed forces seeking to suppress an armed insurrection failure to properly investigate the loss of life will violate the right to life. The simple assertion that the loss of life was a legitimate consequence of fighting is insufficient. The fact that a criminal file has been opened and an investigation is commenced but then closed will not necessarily, in and of itself, satisfy the procedural requirements of the right to life.

²⁵² E/CN.4/2005/7, para 61.

²⁵³ *Boyce and Joseph v. The Queen*, Privy Council Appeal No. 99 of 2002, Judgment of 7 July 2004, para. 6. See also E/CN.4/2005/7, para 63.

²⁵⁴ Communication 806/1998, *Thompson (Eversley) v. St. Vincent and the Grenadines*, 18 October 2000, para. 8.2.

²⁵⁵ A/HRC/11/2, paras 29-42.

²⁵⁶ A/HRC/8/3, paras 59-67.

²⁵⁷ E/CN.4/2005/7, para 57 and para 59.

²⁵⁸ Human Rights Committee, Communication 829/1998, *Judge v Canada*, 5 August 2000. Communication 469/1991, *NG v Canada*, CCPR/C/49/D/469/1991 (1994).

²⁵⁹ Special Rapporteur on extrajudicial executions, E/CN.4/2005/7, section B.

²⁶⁰ High-level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, report of the Secretary-General's High-level Panel on Threats, Challenges and Change (United Nations, 2004), para 160.

47. International human rights law and international humanitarian law will apply simultaneously unless there is a conflict between them.²⁶¹

48. Reprisal killings will be illegal: as the Special Rapporteur on extrajudicial executions has noted, 'one side's unlawful use of civilian shields, for example, does not affect the other side's obligation to ensure that airstrikes do not kill civilians in excess of the military advantage of killing the targeted fighters'.²⁶²

F. Territorial application of the procedural obligation imposed by the right to life

49. The State is under a duty to meet the obligations imposed by the right to life within its jurisdiction. The State's jurisdiction is primarily territorial, but the acts of the State performed or producing effects outside its territory can amount to an exercise of jurisdiction in exceptional circumstances. These circumstances include, among others, where a State agent exercises control and authority over an individual, for example when taking them into custody, or where the State, outside its territory, exercises all or some of the public powers normally exercised by a sovereign government.²⁶³ In *Al-Skeini v UK*, the UK was therefore under the procedural obligation to investigate the deaths of civilians killed by British soldiers in Iraq.

50. The right to life can be violated by a state even if the violation is carried out occurs 'by authorized agents of the State on foreign territory, 'whether with the acquiescence of the Government of [the foreign State] or in opposition to it'.²⁶⁴

G. Amnesty and Impunity

51. It has been consistently held by international and regional human rights bodies that amnesties for gross violations of human rights will violate international human rights law.²⁶⁵ Neither will impunity be permitted where violations have been committed by private actors.²⁶⁶

²⁶¹ Special Rapporteur on extrajudicial executions, E/CN.4/2005/7, para 50. See also A/HRC/11/2/Add.4.

²⁶² Special Rapporteur on extrajudicial Executions, A/HRC/14/24, para 40.

²⁶³ *Al-Skeini and others v UK*, 7 July 2011.

²⁶⁴ Human Rights Committee, Communication 52/1979, *Lopez v. Uruguay*, 29 July 1981, paras. 12.1-12.3. See also ICJ, *Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004, paras. 108-111.

²⁶⁵ See e.g. Human Rights Committee, Communication No. 322/1988, *H Rodríguez v. Uruguay* 19 July 1994, para. 12.4

²⁶⁶ Inter-American Court, *Velásquez Rodríguez Case*, judgment of July 29, 1989, Series C, No. 4, pp. 155-156, para. 176; European Court, *Case of Mahmut Kaya v. Turkey*, 28 March 2000, para. 91

H. The right to a remedy

52. If the state is found to be responsible for the violation of the right to life, there is a corresponding right in customary international law and through treaty law to reparation either through compensation and/or satisfaction.²⁶⁷

53. Such a remedy should be 'accessible, effective and enforceable'.²⁶⁸

²⁶⁷ A/HRC/11/2/Add.4, para 35.

²⁶⁸ Communication 1828/2008, *Olmedo v. Paraguay*, 26 April 2012 para 7.4; Human Rights Committee, General Comment No.31, CCPR/C/21/Rev.1/Add.13 (2004).

VII. The Absolute Prohibition of Torture, Inhuman and Degrading Treatment and Punishment

Relevant international provisions:

UDHR, Article 5:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

UNCAT, Article 1:

For the purposes of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

ICCPR Article 7:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

Article 10(1):

All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

Arab Charter, Article 8

- 1. No one shall be subjected to physical or psychological torture or to cruel, degrading, humiliating or inhuman treatment.*
- 2. Each State party shall protect every individual subject to its jurisdiction from such practices and shall take effective measures to prevent them. The commission of, or participation in, such acts shall be regarded as crimes that are punishable by law and not subject to any statute of limitations. Each State party shall guarantee in its legal system redress for any victim of torture and the right to rehabilitation and compensation.*

Palestinian Basic Law:

Article 13

- 1. No person shall be subject to any duress or torture. Indictees and all persons deprived of their freedom shall receive proper treatment.*

2. *All statements or confessions obtained through violation of the provisions contained in paragraph 1 of this article shall be considered null and void.*

1. The need to protect against torture in international human rights law is not disputed and guarantees are included in UN and regional treaties.²⁶⁹ Similarly, torture committed as part of a widespread or systematic attack against civilians is a crime against humanity, as identified by the International Criminal Court.²⁷⁰
2. Protection against torture, inhuman or degrading treatment or punishment is essential to the scheme of the application of human rights standards. Taken together with the right to life, it forms the essential elements for guaranteeing human dignity. The prohibition of torture is treated as a pre-emptory norm of international law (*jus cogens*)²⁷¹ and is a non-derogable right. As such, and as reaffirmed by Article 2(2) of the UNCAT, Article 4(2) of the ICCPR and Article 4(2) of the Arab Charter, it can never be possible to justify subjecting someone to torture or inhuman or degrading treatment or punishment – even in war or a national emergency.

A. Definition of torture

3. Article 1 of the UN Convention Against Torture provides a widely-accepted definition of torture. This has a number of elements:
 - Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as:
 - a. Obtaining from him or a third person information or a confession,
 - b. Punishing him for an act he or a third person has committed or is suspected of having committed, or
 - c. Intimidating or coercing him or a third person, or for any reason based on discrimination of any kind;
 - When such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.
 - It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.²⁷²

²⁶⁹ Specific instruments relating to torture include the UN Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, 1984; European Convention for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment, 1987; Inter-American Convention to Prevent and Punish Torture 1985. See also Standard Minimum Rules for the Treatment of Prisoners, 1955; Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, 1988; Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1982; Code of Conduct for Law Enforcement Officials, 1979.

²⁷⁰ See Geneva Conventions, Common Article 3, Article 75 of Additional Protocol 1 and Article 4 of Additional Protocol 2. Article 7, Rome Statute of the International Criminal Court.

²⁷¹ Human Rights Committee General Comment No.24, CCPR/C/21/Rev.1/Add.6 (1994), para 10.

²⁷² However see the more recent Rome Statute of the International Criminal Court (1998). Its definition is less circumscribed, Torture is defined as ‘the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions’.

4. Article 7 of the ICCPR does not provide such a definition, neither does the Arab Charter, and the Human Rights Committee has been clear about not limiting the acts that could fall within this provision.²⁷³
5. The provisions on prohibition of torture cover both physical and mental ill treatment.²⁷⁴
6. Not all types of treatment or punishment will fall within that which is torture or cruel, inhuman and degrading. Whether something amounts to torture, as opposed to cruel, inhuman or degrading treatment or punishment, is not always defined by the relevant treaty body. There are no definitions of what is 'cruel', 'inhuman' or 'degrading' and as the Committee Against Torture has noted 'in practice, the definitional threshold between cruel, inhuman or degrading treatment or punishment and torture is often not clear'.²⁷⁵ The Human Rights Committee has held that it does not wish to make such distinctions but that it will consider 'the nature, purpose and severity of the treatment applied'.²⁷⁶ The Inter-American and African systems have taken a similar approach.²⁷⁷ In contrast the European Court has set out criteria for what amounts to the different acts.²⁷⁸ Here torture carries a particular stigma which is determined by the severity of the treatment as well as the purpose for which it was imposed.²⁷⁹ Yet even the European Court is unwilling to draw up a list of acts which will amount to torture and maintains discretion in this regard. Similarly, the UN Special Rapporteur on Torture has concluded that 'the decisive criteria for distinguishing torture from [cruel, inhuman or degrading treatment] may best be understood to be purpose of the conduct and the powerlessness of the victim, rather than the intensity of the pain or suffering inflicted'.²⁸⁰
7. The following acts have been held to amount to either torture, cruel or inhuman or degrading treatment or punishment:
 - Rape;²⁸¹
 - Wall-standing;
 - Hooding;
 - Subjection to noise;
 - Deprivation of sleep

²⁷³ Human Rights Committee, General Comment No.20, 44th Session (1992), para 4.

²⁷⁴ Human Rights Committee General Comment No.20, 44th Session (1992), para 5.

²⁷⁵ Committee Against Torture, General Comment No.2, CAT/C/GC/2/CRP.1/Rev.4 (2007), para 3.

²⁷⁶ *Ibid*, para 4.

²⁷⁷ Inter-American Court, see e.g. *Gómez-Paquiyaui Brothers v Peru*, 8 July 2004; *Luis Lizardo Cabrera v Dominican Republic*, 17 Feb 1998. African Commission, Communications 137/94 et al, *International Pen and others (on behalf of Ken Saro-Wiwa Jr.) v Nigeria*, 31 October 1998.

²⁷⁸ *The Greek Case*, European Court, 1969; *Ireland v UK*, 18 January 1978.

²⁷⁹ *Selmouni v France*, 28 July 1999.

²⁸⁰ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, UN Doc. E/CN.4/2006/06, 23 December 2005, para 39.

²⁸¹ *Aydin v Turkey*, European Court of Human Rights, (Grand Chamber) 25 September 1997. Inter-American Commission, *Report No. 5/96, Case 10.970 v. Peru*, March 1, 1996, , *Annual Report of the Inter-American Commission on Human Rights 1995*, pp. 158-159.

- Deprivation of food and drink;²⁸²
 - Handcuffing of prisoners with terminal illnesses to a hospital bed,²⁸³ although handcuffing in general probably does not reach the minimum level of severity necessary to amount to degrading treatment;²⁸⁴
 - Using chains and leg-irons resulting in an inability to clean oneself;²⁸⁵
 - Placing an individual in a dark cell.²⁸⁶
8. Corporal punishment, 'including excessive chastisement ordered as a punishment for a crime as an educative or disciplinary measure' is considered to be unlawful under international law.²⁸⁷ Therefore, for example, 'imposing a sentence of whipping with ten strokes of the tamarind switch' is a violation of Article 7 ICCPR,²⁸⁸ caning,²⁸⁹ flogging and amputation of limbs will also violate international law.²⁹⁰
9. Intimidation and threats fall within the definition of torture and ill treatment.²⁹¹ The UN Special Rapporteur on Torture has pointed out that threats and intimidation are often a crucial element in assessing whether a person is at risk of physical torture and other forms of ill-treatment.
10. The significance of protecting against discrimination in international human rights law cannot be overemphasised. This also applies in the context of detention.²⁹² As has been stressed, a difference of treatment which cannot be justified is likely to amount to unlawful discrimination. It is also worth noting that severe forms of institutionalised racism can amount to inhuman and degrading treatment.²⁹³

B. Duties on the state

11. The State has a duty in respect of the prohibition of torture under Article 7 of the ICCPR to 'protect both the dignity and physical and mental integrity of the individual' through legislative and other measures.²⁹⁴ The duty encompasses the following:

²⁸² *Ireland v UK*, European Court, 18 January 1978.

²⁸³ *Henaf v France*, European Court, 27 February 2004.

²⁸⁴ *Raninen v Finland*, European Court, 16 December 1997.

²⁸⁵ *Namumjepo and others v The Commanding Officer, Windhoek Prison and Other*, Namibia Supreme Court, 9 July 1999, 2000 (6) BCLR (NmS); [2000] 3 LRC 360; (1999) 2 CHRLD 331 (Namibia).

²⁸⁶ UN Standard Minimum Rules for the Treatment of Prisoners, Principle 7.

²⁸⁷ Human Rights Committee, General Comment No.20, 44th Session (1992), para 5. Similarly, CAT, 59 UN doc. A/52/44, p. 37, para. 250.

²⁸⁸ Human Rights Committee, Communication 759/1997, *Osbourne v Jamaica*, 15 March 2000, para. 9.1; see also African Commission, Communication 236/2000, *Curtis Francis Doebbler v. Sudan*, (2003).

²⁸⁹ European Court, *Tyrer v UK*, 25 April 1978, p. 14, 17.

²⁹⁰ CAT, CAT/C/XXVIII/CONCL.6 *Conclusions and Recommendations: Saudia Arabia*, adopted on 15 May 2002, para. 4(b).

²⁹¹ Resolution 2001/62, Commission on Human Rights.

²⁹² Standard Minimum Rules for the Treatment of Prisoners, Article 6(1); Body of Principles for the protection of all Persons under Any Form of Detention or Imprisonment, Principle 5(1).

²⁹³ *East African Asians (British Protected Persons) v UK*, European Court, 15 December 1973.

²⁹⁴ Human Rights Committee, General Comment No.20, 44th Session (1992), para 2.

Duty to prevent

12. States have an obligation to prevent torture according to Article 2(1) of UNCAT. They should take 'effective legislative, administrative, judicial or other measures' to prevent acts of torture or other cruel, inhuman or degrading treatment or punishment in any territory under its jurisdiction.²⁹⁵ This will include, according to the UN Subcommittee on Prevention of Torture:

'ensuring that a wide variety of procedural safeguards for those deprived of their liberty are recognized and realized in practice. These will relate to all phases of detention, from initial apprehension to final release from custody. Since the purpose of such safeguards is to reduce the likelihood or rise of torture or ill-treatment occurring, they are of relevance irrespective of whether there is any evidence of torture or ill-treatment actually taking place'.²⁹⁶

13. This is an obligation separate from the obligation to prohibit. It is a 'wide ranging', proactive duty and one which is continually evolving.²⁹⁷ It encompasses more 'than compliance with legal commitments' and includes 'as many as possible of those things which in a given situation can contribute towards the lessening of the likelihood or risk of torture or ill-treatment occurring'.²⁹⁸

14. The duty to prevent therefore includes identifying and reducing the risks and causes of torture and other forms of ill treatment before they occur, as well as ensuring torture and ill treatment does not re-occur if it has already happened.²⁹⁹

15. Risk factors include:³⁰⁰

- the political and social environment and context in the State, including the respect for human rights and the rule of law;
- the extent of legal protection in place and its implementation, including the procedural safeguards in place for those deprived of their liberty;
- how the criminal justice system operates;
- the broader regulatory and institutional environment;
- the vulnerability of the individual, particularly those held in detention.³⁰¹

16. Where there were structural problems in Bulgarian law which resulted in prisoners being unable to seek appropriate redress for the conditions in which

²⁹⁵ Articles 2(1) and 16 UNCAT.

²⁹⁶ 'The Approach of the Subcommittee to the Concept of Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment under the Optional Protocol', UN Doc CAT/OP/12/6, para 5(c).

²⁹⁷ CAT, General Comment No.2, CAT/C/GC/2/CRP.1/Rev.4 (2007), para 4.

²⁹⁸ 'The Approach of the Subcommittee to the Concept of Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment under the Optional Protocol', UN Doc CAT/OP/12/6, para 3.

²⁹⁹ APT, Asia-Pacific Forum, OHCHR, *Preventing Torture. An Operational Guide for National Human Rights Institutions*, 2010, p.10.

³⁰⁰ Ibid.

³⁰¹ Inter-American Court, *Case of the "Juvenile Re-education Institute"*, 2 September 2004, Series C. No.112.

they were detained, the European Court of Human Rights held that changes to that national law and practice were necessary to ensure preventive remedies and that therefore had been a violation of Article 3 of the ECHR and prohibition of inhuman and degrading treatment.³⁰²

17. A system of regular visits by independent bodies to places of detention is also considered to minimise the risk of torture and ill treatment occurring.³⁰³

Duty to criminalise torture

18. Article 4 of UNCAT requires states to adopt legislation to criminalise torture in domestic law.³⁰⁴

19. This applies even to those states where international law is directly applicable at the national level.³⁰⁵

Duty to investigate

20. This State has the duty to investigate allegations of torture or other ill treatment,³⁰⁶ as soon as the State is aware of the allegations,³⁰⁷ and even if there has not been a formal complaint.³⁰⁸ It is considered to be part of the requirement for the victim to know the truth. Where an individual is in good health when they are taken into custody but has injuries when they are released, the State will bear the burden of proving how the injuries occurred.³⁰⁹ The Istanbul Protocol on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment³¹⁰ sets out some general principles that should apply to such investigations. These include that investigations:

- identify measures to prevent future instances;
- should comply with international standards;³¹¹
- are carried out promptly. Eighteen days between the allegation being reported and the investigation starting was considered too long;³¹²
- clarify the facts and be 'capable of leading to the identification and punishment of those responsible';³¹³
- meet the highest professional standards;

³⁰² European Court of Human Rights, *Neshkov and others v Bulgaria*, 27 January 2015 (pilot judgment).

³⁰³ See 'Monitoring and inspecting places of detention' below.

³⁰⁴ See also Article 2(2) ICCPR.

³⁰⁵ CAT General Comment No.2, CAT/C/GC/2/CRP.1/Rev.4 (2007).

³⁰⁶ Article 12 UNCAT; Article 2, 7 ICCPR. Article 8 Inter-American Convention to Prevent and Punish Torture.

³⁰⁷ Inter-American Court, *Servellón Garcia v Honduras*, 21 Sep 2006, para 119.

³⁰⁸ Articles 12, 13 and 16 UNCAT.

³⁰⁹ European Court, *Ribitsch v Austria*, 4 December 1995; *Stefan Iliev v Bulgaria*, 10 May 2007.

³¹⁰ Office of the High Commissioner for Human Rights, Istanbul Protocol. Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Geneva, August 1999.

³¹¹ Inter-American Court, *Vargas Areco v Paraguay*, 26 September 2006.

³¹² CAT, Communication 59/1996, *Blanco Abad v Spain*, 14 May 1998.

³¹³ European Court, *Assenov and others v Bulgaria*, 28 October 1998, para 102. CAT Committee *Blanco Abad v Spain*, *ibid*.

- be carried out by competent and impartial experts, who are independent of the suspected perpetrators and the agency they serve;
- have access to all necessary information, budgetary resources and technical facilities;
- have the authority to issue summonses to alleged perpetrators and witnesses, and to demand the production of evidence;
- ensure that those responsible are disciplined or prosecuted;
- Medical experts involved in the investigation should comply with the highest ethical standards and examinations should conform with the principle of informed consent, be conducted in private and result in a confidential written report;
- The findings of the investigation should be made public;
- The alleged victims and their legal representatives should have access to any hearing and to all information relevant to the investigation;
- Investigators should be able to talk to individuals of their choosing in private;
- Alleged victims of torture, witnesses, those conducting the investigation and their families shall be protected from violence, threats of violence or any other form of intimidation that may arise pursuant to the investigation;
- Victims should be provided with reparation and redress including compensation, medical care and rehabilitation;
- Those potentially implicated in torture shall be removed from any position of control or power, whether direct or indirect, over complainants, witnesses and their families, as well as those conducting the investigation.³¹⁴

21. The right to lodge a complaint must be protected in domestic law.³¹⁵

22. Where investigatory procedures are not adequate, or where it is suspected that senior officials are implicated in the torture, investigations may be carried out by an independent commission of inquiry. Such commissions should afford the individual the minimum procedural international human rights law standards. The commission's investigators should receive the necessary resources and support including access to impartial legal advice and medical expertise.³¹⁶

23. Any investigation should obtain as much physical evidence as possible, including through unrestricted access to the place of detention. Evidence should be correctly collected and handled and include samples, medical evidence, sketches of the premises, colour photographs, inventories, witness statements and documents.³¹⁷

³¹⁴ CAT Committee *Blanco Abad v Spain*, *ibid*; Human Rights Committee, Communication 1416/2005, *Alzery v Sweden*, 25 October 2006. Human Rights Committee General Comment No.20, 44th Session (1992),. Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol) (1999).

³¹⁵ Human Rights Committee, General Comment No.20, 44th Session (1992), para 13.

³¹⁶ Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol) (1999), paras 85-87.

³¹⁷ Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol) (1999), paras 102-106.

Duty to prosecute or extradite

24. Those who violate the prohibition on torture must be held responsible.³¹⁸ Those responsible may include those within the institution in which the detainee was held who knew or ought to have known that the torture or ill treatment was taking place and who failed to prevent it or report it.
25. Article 5 of the UNCAT requires states to ‘take such measure as may be necessary to establish jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction’, or to extradite them to another state.

Duty to protect from acts of private actors

26. The prohibition in the ICCPR and in the other instruments does not just relate to whether the act was carried out by a public official, but there is also a duty on the state to protect against acts committed by private actors.³¹⁹ This may arise in a number of circumstances:
- Where groups or persons exercise de facto government or state authority.³²⁰
 - Where the state failed to respond to acts of private individuals and therefore ‘acquiesced’.³²¹
 - ‘where State authorities...know or have reasonable grounds to believe that actors of torture or ill-treatment are being committed by non-State officials or private actors and they fail to exercise due diligence to prevent, investigate, prosecute and punish...the State bears responsibility’.³²²

Duty to provide effective remedies

27. States have an obligation under Articles 2(3) and 7 of the ICCPR to provide an effective remedy to those who have been tortured or subject to ill treatment.³²³
28. This includes the ability to lodge a complaint, through a procedure which is ‘effective and reliable’,³²⁴ and which must be protected in domestic law.³²⁵

C. Safeguards for those deprived of their liberty

Conditions of detention

29. Although also directly relevant to the right to liberty, detention conditions can amount to inhuman and degrading treatment and punishment, and even

³¹⁸ Ibid.

³¹⁹ Ibid; and General Comment No.31, CCPR/C/21/Rev.1/Add/13 (2004), para 8. However, UNCAT is less specific on this point.

³²⁰ CAT, Communication 83/1997, *GRB v Sweden*, 15 May 1998, para 6.5.

³²¹ CAT, *Dzemajil and others v Yugoslavia*, 21 November 2002.

³²² CAT General Comment No.2, CAT/C/GC/2/CRP.1/Rev.4 (2007), para 18.

³²³ Human Rights Committee, General Comment No.20, 44th Session (1992), para 14.

³²⁴ CAT, UN doc. A/55/44, p. 22, para. 94

³²⁵ Ibid.

torture.³²⁶ Article 10(1) of the ICCPR requires that ‘all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person’. The obligation to treat persons deprived of their liberty with dignity and humanity is a fundamental and universally applicable rule, and is not dependent on the material resources available to the State party.³²⁷

30. In assessing detention conditions the following factors are relevant:

- The space at the disposal of detainees, including their sleeping accommodation which should ‘meet all requirements of health, due regard being paid to climatic conditions and particular to cubic content of air, minimum floor space, lighting, heating and ventilation’.³²⁸
- The supply of water and other articles needed for personal hygiene,³²⁹ including soap, toothpaste, toilet paper.³³⁰ Sanitation ‘shall be adequate to enable every prisoner to comply with the ends of nature when necessary in a clean and decent manner’.³³¹
- The provision of adequate clothing and bedding;³³²
- The quantity and quality of food and drinking water. This should be ‘of nutritional value adequate for health and strength, of wholesome quality and well prepared and served’.³³³ Serving rotten food will violate these provisions.³³⁴
- Recreational facilities. This should include ‘at least one hour of suitable exercise in the open air daily if the weather permits’.³³⁵
- Admission of visitors.
- Provision of medical assistance.
- heating, lighting and ventilation: ‘windows shall be large enough to enable prisoners to read or work by natural light, and shall... allow the entrance of fresh air whether or not there is artificial ventilation’.³³⁶
- The disciplinary regime;
- The effective and reliable complaints system which is recognised in domestic law;³³⁷ and
- The behaviour of prison personnel.³³⁸

³²⁶ Human Rights Committee, Communication 253/1987, *Kelly v Jamaica*, 8 April 1991; Communication 410/1990, *Párkányi v Hungary*, 27 July 1992.

³²⁷ Human Rights General Comment No.21, HRI/GEN/1/Rev.6 at 153 (2003), para 3.

³²⁸ Standard Minimum Rules for the Treatment of Prisoners, Rule 10.

³²⁹ *Ibid*, Rule 15.

³³⁰ Communication 731/1996, *M. Robinson v. Jamaica* 13 April 2000, paras. 10.1-10.2

³³¹ Standard Minimum Rules for the Treatment of Prisoners, Rule 12.

³³² Standard Minimum Rules for the Treatment of Prisoners, Rule 17 and Rule 19. Communication 533/1993, *H. Elahie v. Trinidad and Tobago* 28 July 1997, para. 8.3.

³³³ Standard Minimum Rules for the Treatment of Prisoners, Rule 20.

³³⁴ African Commission, Communications Nos. 64/92, 68/92 and 78/92, *Krishna Achuthan and Amnesty International (on behalf of Aleke Banda and Orton and Vera Chirwa) v. Malawi*, 27 April 1994, para. 34.

³³⁵ Standard Minimum Rules for the Treatment of Prisoners, Rule 21.

³³⁶ *Ibid*, Rule 11(a).

³³⁷ Human Rights Committee General Comment No.20, 44th Session (1992), para 14. CAT, UN doc. GAOR, A/55/44, p. 22.

³³⁸ See UN Standard Minimum Rules for the Treatment of Prisoners.

Methods of restraint

31. Instruments of restraint including handcuffs, chains, irons and straitjackets should only be used for security purposes and never be applied as a punishment.³³⁹ For example, CAT has recommended abolition of 'electro-shock stun belts and restraint chairs' noting that they often result in breaches of UNCAT.³⁴⁰
32. Instruments of restraint should be used only to prevent escape during a transfer, on medical grounds or as a last resort to prevent prisoners from injuring themselves or others or from damaging property, or where all other means are ineffective.³⁴¹ Rule 34 of the UN Standard Minimum Rules states that instruments of restraint must not be applied for any longer than is strictly necessary.
33. Where means of restraint or force have been used against a detainee, they have the right to be examined immediately and be provided with medical treatment if necessary.³⁴²

Solitary Confinement

34. Although the Committee Against Torture has recommended that solitary confinement be abolished except in exceptional circumstances,³⁴³ for other treaty bodies it does not of itself violate international human rights law but it can cross the threshold of inhuman and degrading treatment and punishment depending on the aim, length of time and conditions in which the individual is detained. Therefore, 'prolonged solitary confinement of the detained or imprisoned person may amount to acts prohibited by article 7'.³⁴⁴
35. The impact on the individual may be important if it 'produced any adverse physical or mental effects'. So where an individual was detained in a cell of 2 x 3 meters and only permitted to leave for half an hour a day, the Human Rights Committee found no violation of the ICCPR.³⁴⁵ However, detention for seven months in solitary confinement,³⁴⁶ and detention in an underground cell, where the individual was tortured and denied medical treatment, were violations.³⁴⁷
36. The use of solitary confinement should be 'strictly and specifically regulated by law'.³⁴⁸

³³⁹ UN Standard Minimum Rules for the Treatment of Prisoners, Rule 33. UN Human Rights Fact Sheet, Torture, Combating Torture, No.4, Rev.1, p.36. See also e.g. *Ashot Harutyunyan v Armenia* finding a violation of Article 3 ECHR on account of the applicant's placement in a metal cage during the appeal proceedings.

³⁴⁰ CAT, re the USA, 45 UN doc.A/55/44, p. 32, para. 180(c).

³⁴¹ Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Principle 4.

³⁴² CPT/INF/E (2002), 1, p.19.

³⁴³ UN doc. A/53/44, p. 17, para. 156 (Norway) and A/52/44, p. 34, para. 225 (Sweden).

³⁴⁴ Human Rights Committee General Comment No.20, 44th Session (1992), para 6.

³⁴⁵ Human Rights Committee, Communication 265/1987, *A. Vuolanne v. Finland*, 7 April 1989.

³⁴⁶ Communication 109/1981, *T. Gómez de Voituret v. Uruguay* UN doc. A/39/40, p. 168.

³⁴⁷ Communication R.14/63, *R. S. Antonaccio v. Uruguay* UN doc. A/37/40, p. 120

³⁴⁸ UN docs. A/53/44, p. 17, para. 156 (Norway) and A/52/44, p. 34, para. 225 (Sweden).

37. Furthermore, it is essential that the prisoner should be able to have an independent judicial authority review the merits of, and reasons for, a prolonged measure of solitary confinement.³⁴⁹
38. Measures such as solitary confinement should be resorted to only exceptionally and after every precaution has been taken. In order to avoid any risk of arbitrariness, substantive reasons must be given when a protracted period of solitary confinement is extended.

Secret or Incommunicado detention

39. Solitary confinement and incommunicado or secret detention have been found to violate the prohibition on torture³⁵⁰ and the Human Rights Committee has recommended that 'provisions should be made against' it.³⁵¹ Torture is most frequently practised when a person is held without access to a lawyer, and/or his or her family and relatives or groups from civil society (incommunicado detention).³⁵² As the former Commission on Human Rights noted, 'prolonged incommunicado detention may facilitate the perpetration of torture and can in itself constitute a form of cruel, inhuman or degrading treatment'.³⁵³ There is a direct link between secret or incommunicado detention and enforced disappearances.
40. Prolonged incommunicado detention may facilitate the perpetration of torture and can in itself constitute a form of cruel, inhuman or degrading treatment.³⁵⁴ Furthermore, even in cases where no independent risk of torture exists for a person held in incommunicado detention, where such detention is prolonged, that in itself may amount to inhuman and degrading treatment. If prolonged incommunicado detention takes place in a secret or unknown place, this may amount to torture.
41. As part of its review of Spain's compliance with CAT, the Committee Against Torture has pointed out that it 'continues to be deeply concerned by the fact that incommunicado detention up to a maximum of five days has been maintained for specific categories of particularly serious offences. During this period, the detainee has no access to a lawyer or to a doctor of his choice nor is he able to notify his family. Although the State party explains that

³⁴⁹ UN Body of Principles for the Protection of All Persons under Any Form of Detention and Imprisonment, Principles 15 and 16.

³⁵⁰ See e.g. Human Rights Committee, General Comment No.20, 44th Session (1992), para 6; Communication 1295/2004, *El Alwani v. Libyan Arab Jamahiriya*, 11 July 2007, para 6.5; Communication 1297/2004, *Medjnoune v. Algeria*, 14 July 2006, para 8.4; Inter-American Court of Human Rights, *Bámaca-Velásquez v. Guatemala*, 25 November 2000. Series C No. 70. para 150; African Commission, Communication. 222/98 and 229/99 *Law Office of Ghazi Suleiman v. Sudan*, (2003).

³⁵¹ Human Rights Committee, General Comment No.20, 44th Session (1992), para 11.

³⁵² See UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment which requires those arrested or detained to have the right to inform their family or friends, Principle 16.

³⁵³ Res.1999/32, para 5.

³⁵⁴ Resolution 1999/32 (para 5).

incommunicado detention does not involve the complete isolation of the detainee, who has access to an officially appointed lawyer and a forensic physician, the Committee considers that the incommunicado regime, regardless of the legal safeguards for its application, facilitates the commission of acts of torture and ill-treatment'.³⁵⁵

42. An individual held for three years without visits from relatives in an unknown location was held to be a violation of Articles 7 and 10(1) of the ICCPR.³⁵⁶ However, an earlier case held that 15 days was also in violation of the Covenant.³⁵⁷

43. The UN Standard Minimum Rules require regular contact with family and friends³⁵⁸ and international human rights law requires the right of a detainee to visitors.³⁵⁹

Access to a doctor and denial of medical treatment

44. In addition to the right to access a lawyer,³⁶⁰ a detainee's right to prompt and regular access to a doctor is also a crucial safeguard against abuse.³⁶¹

45. The UN Special Rapporteur on Torture has recommended that 'At the time of arrest a person should undergo a medical inspection, and medical inspections should be repeated regularly and should be compulsory upon transfer to another place of detention'.³⁶²

46. It has been recommended that the best guarantor of effectiveness in this regard is for detainees to be given the opportunity to undergo a medical examination before a doctor of their choice in addition to any examination by a State appointed official.³⁶³

47. Each facility should have 'at least one qualified medical officer who should have some knowledge of psychiatry', and 'sick prisoners who require specialist treatment shall be transferred to specialised institutions or to civil hospitals'.³⁶⁴

³⁵⁵ Concluding observations of the Committee against Torture: Spain (CAT/C/CR/29/3), at para. 10.

³⁵⁶ Communication 440/1990, *Y. El-Megreisi v. the Libyan Arab* UN doc. A/49/40 (vol. II), p. 130.

³⁵⁷ Communication 147/1983, *L. Arzuaga Gilboa v. Uruguay* UN doc. A/41/40, p. 133, para. 14

³⁵⁸ Rule 37. Body of Principles, Principle 15. See also Human Rights Committee, Communication 577/1994, *Polay v. Peru* 6 November 1997.

³⁵⁹ See e.g. Inter-American Commission, *Report No. 38/96, Case 10.506 v. Argentina, October 15, 1996*, in OAS doc. OEA/Ser.L/V/II.95, doc. 7 rev., *Annual Report of the Inter-American Commission on Human Rights 1996*.

³⁶⁰ See section VIII.B. below.

³⁶¹ Human Rights Committee, General Comment No.20, 44th Session (1992), para 11.

³⁶² Report of the Special Rapporteur on Torture, UN Doc.A/56/156, July 2001, para 39(f). See also Body of Principles for the Protection of All Persons Under any Form of Detention or Imprisonment, Principle 24.

³⁶³ UN Body of Principles for the Protection of All persons under Any Form of Detention or Imprisonment, Principle 25. CPT/Inf/E (2002) 1, p.6, para 36.

³⁶⁴ Standard Minimum Rules for the Treatment of Prisoners, Rule 22.

48. The intentional withholding of medical treatment from persons in places of detention or from persons injured by an act attributable to public officials will engage the protection from torture, inhuman and degrading treatment. Medical officers should daily see all sick prisoners and any prisoner to whom their attention is specially directed, and should report to the director of the institution whenever they consider that a prisoner's physical or mental health has been or will be harmed by continued imprisonment or by any condition of imprisonment.³⁶⁵
49. Appropriately qualified medical officers should regularly inspect and advise the director on the quantity and quality of food, the hygiene and cleanliness of the institution and the prisoners, and observance of the rules concerning physical education.³⁶⁶

Hunger Strikes and Forced Feeding

50. The World Medical Association considers that force-feeding of an individual will amount to inhuman or degrading treatment. In their view doctors should never be used to break hunger strikes through acts such as force-feeding.³⁶⁷
51. As part of his report on the situation of detainees in Guantanamo Bay, the UN Special Rapporteur on the right to health made the following observation: 'From the perspective of the right to health, informed consent to medical treatment is essential, as is its "logical corollary" the right to refuse treatment. A competent detainee, no less than any other individual, has the right to refuse treatment. In summary, treating a competent detainee without his or her consent - including force-feeding - is a violation of the right to health, as well as international ethics for health professionals'.³⁶⁸

D. Interrogation

52. Interrogation techniques can also violate the prohibition on torture and cruel, inhuman and degrading treatment. Therefore the legal system needs to provide fundamental safeguards against ill treatment and States are required to keep under review rules and practices relating to interrogation for those in detention.³⁶⁹ Judges and prosecutors play a key role in safeguarding against such ill treatment. Essential safeguards include:
- The right of detainees to have the fact of their detention notified to a third party of their choice (family, friend or consulate);
 - The right of prompt access to a lawyer;
 - The right to challenge the legality of the detention (habeas corpus);
 - The right to a medical examination by a doctor of his or her choice.

³⁶⁵ Ibid, and Rule 25.

³⁶⁶ Ibid, Rule 26.

³⁶⁷ <http://www.wma.net/e/policy/h31.htm>. See also *X v Germany*, European Court, (1984) 7 EHRR 152.

³⁶⁸ E/CN.4/2006/120, 27 February 2006.

³⁶⁹ Article 11 UNCAT. Human Rights Committee General Comment No.20, 44th Session (1992), para 11.

53. Proper custody records must also be taken.³⁷⁰ The UN Special Rapporteur on Torture also recommends that 'all interrogation sessions should be recorded and preferably video-recorded, and the identity of all persons present should be included in the records', with evidence from interrogations that have been recorded excluded from court.³⁷¹ Other human rights bodies have required that individuals only be interrogated in the presence of the lawyer.³⁷²

54. As far as interrogation techniques are concerned, international human rights law has identified the following practices to be in violation of the absolute protection from torture, inhuman or degrading treatment and punishment:³⁷³

- 'Stress and duress techniques', such as prolonged standing or kneeling, hooding, blindfolding with spray-painted goggles, 24-hour lighting, and also the keeping of detainees in painful or awkward positions.³⁷⁴
- Suspending someone from their arms;
- Rape;
- Deprivation of the natural senses, such as sight or hearing, or of his awareness of place and the passing of time;
- Methods of interrogation which impair his or her decision-making capacity or judgment;
- Mock executions;
- Thumb presses;
- Immersion in blood, urine, vomit and/or excrement;
- Immersion in water;
- Medical experimentation that may be detrimental to his or her health;
- Electric shocks;
- Mock amputations;
- Forced to remain naked;
- Threats to family;
- Deliberate destruction of homes and communities;
- Sleep deprivation;
- Hooding;
- Wall standing;
- Use of noise;
- Deprivation of food and water;
- Humiliation;

³⁷⁰ Human Rights Committee, General Comment No.20, 44th Session (1992), para 11; before European Court, see *Cakici v Turkey*, Judgment 8 July 1999, para 104.

³⁷¹ Report of the Special Rapporteur on Torture, UN Doc.A/56/156, July 2001, para 39(f).

³⁷² Inter-American Commission on Human Rights, OEA/Ser.L/V/11.62, doc.10, rev.3, 1983, at 100.

³⁷³ These are examples only. This is not a finite list. See also Committee Against Torture, Conclusions and Recommendations: USA, 15 May 2000, UN Doc.A/55/44, para 180(c). UN Standard Minimum Rules on the Treatment of Prisoners. See also African Commission, *Communications Nos. 25/89, 47/90, 56/91 and 100/93, World Organisation against Torture and Others v. Zaire*, 4 April 1996, para. 65; *Communications Nos. 64/92 et al, Krishna Achuthan and Amnesty International (on behalf of Aleke Banda and Orton and Vera Chirwa) v. Malawi*, O27 April 1994, para. 33.

³⁷⁴ Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, E/CN.4/2004/56/Add.1, at para. 1813.

- Placing someone in the truck of a vehicle.³⁷⁵

55. As a matter of international human rights law, security service investigators are not lawfully authorised to use 'physical means' or a 'moderate degree of physical pressure' during interrogation, particularly where such interrogation could involve serious physical injury and the risk of death. Even in the context of counter-terrorism strategies only normal investigative procedures are authorised.³⁷⁶

E. Reliance on Evidence Obtained Through Torture

56. Evidence obtained through torture, cruel, inhuman or degrading treatment will be inadmissible and cannot be adduced at a trial or relied upon in any way to form the case for the prosecution (the 'exclusionary rule').³⁷⁷

57. This should be protected by domestic law.³⁷⁸

58. Prosecutors should refuse to use evidence which they 'know or believe on reasonable grounds' has been obtained through torture or other forms of ill treatment.³⁷⁹

59. The principle also applies to evidence that was gathered as a result of statements made under torture.³⁸⁰

F. Medical and scientific experimentation

60. Article 7 of the ICCPR, Article 9 of the Arab Charter and Article 16 of the Palestinian Basic Law prohibit scientific or medical experimentation without free consent.³⁸¹ Greater protection is accorded by the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment which prohibits such experimentation on detainees even with the consent of the individual involved.³⁸²

³⁷⁵ Inter-American Court of Human Rights, *Castillo-Páez v Peru*, 3 November 1997, in OAS doc. OAS/Ser.L/V/III.39, doc. 5, *Annual Report Inter-American Court of Human Rights 1997*, p. 264.

³⁷⁶ *Public Committee Against Torture v State of Israel*, Supreme Court of Israel, 6 September 1999

³⁷⁷ Article 15 UNCAT; Article 13(2) Palestinian Basic Law; Article 10 American Convention to prevent and Punish Torture.

³⁷⁸ Human Rights Committee, General Comment No.20, 44th Session (1992), para 12.

³⁷⁹ Guidelines on the Role of Prosecutors, Guideline 16.

³⁸⁰ CAT Concluding Observations on UK, UN Doc.A/54/44, 1999, para 76(d).

³⁸¹ See also Human Rights Committee General Comment No.20, 44th Session (1992), para 7.

³⁸² Principle 22.

G. Retaliation against victims, witnesses and any other person acting on behalf of torture victims

61. Protection against torture extends to those who act on behalf of torture victims. As such, the Special Rapporteur on Torture will intervene when measures of retaliation are taken or threatened against victims of torture, their relatives, members of civil society, lawyers working on torture complaints and medical or other experts acting on behalf of torture victims.
62. Article 13, CAT states: 'Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given'.³⁸³

H. Expulsion, Deportation, Rendering and Extradition

63. It is a guiding principle of human rights law that a State is not absolved of its human rights responsibilities where it returns an individual to another State where that individual is then exposed to a real risk of a violation of his or her core human rights by that receiving State or a third State.³⁸⁴
64. The absolute nature of protection from torture or inhuman or degrading treatment means that it would violate the right to protection from torture, inhuman and degrading treatment to deport (*refoulement*), render or extradite an individual in the knowledge that they will be tortured or subject to inhuman or degrading treatment.³⁸⁵ The principle of *non-refoulement* prohibits the expulsion of persons to States where there are substantial grounds for believing they would be at risk of torture or other serious human rights violations.³⁸⁶
65. Whether the State is regarded as being aware of the risk of ill-treatment if the applicant is removed includes not only actual knowledge, but also constructive knowledge, i.e. situations in which the State must have known of the risk.³⁸⁷
66. The risk of such treatment has to be 'personal and present'. A mere suspicion of torture is insufficient to engage this protection, but the test need not meet the standard of being highly probable.³⁸⁸

³⁸³ See also Istanbul Protocol, para 2(b).

³⁸⁴ This obligation extends to circumstances where the individual is at risk from non-State actors and the receiving State is either unwilling or unable to protect the individual from these non-State agents.

³⁸⁵ Article 3 UNCAT, Article 33, Convention Relation to the status of Refugees. *Soering v UK*, European Court of Human Rights, 7 July 1989.

³⁸⁶ See e.g. *N v Sweden*, 20 July 2010, a case involving a deportation order to Afghanistan of a woman separated from her husband, where the European Court found a violation of Article 3. See also e.g. *Auad v Bulgaria*, 11 January 2012, where the Court emphasised the 'lack of a legal framework providing adequate safeguards' in the respondent State and stressed the need for 'rigorous scrutiny'. See also e.g. *Iskandarov v Russia*, 21 February 2011

³⁸⁷ *Garabayev v Russia*, 30 January 2008.

³⁸⁸ CAT General Comment No.1, U.N. Doc. A/53/44, annex IX at 52 (1998).

67. Where there is a risk of torture, a deporting country may receive ‘diplomatic assurances’ that the individual will not be tortured on return. For example, in a case involving the deportation of an Egyptian suspected of terrorism to Egypt, the Human Rights Committee rejected Sweden’s reliance on diplomatic assurances stating that it had not ‘shown that the diplomatic assurances procured were in fact sufficient in the present case to eliminate the risk of ill-treatment to a level consistent with the requirements of article 7 of the Covenant. The author’s expulsion thus amounted to a violation of article 7 of the Covenant’.³⁸⁹
68. On numerous occasions, the Human Rights Committee has emphasised its position in relation to *refoulement*. For example, the Committee has stressed that it was, ‘concerned about the formulation of the draft law on the legal status of foreigners, which...may allow for the removal of foreigners who are regarded as a threat to State security, despite the fact that they may be exposed to a violation of their rights under [ICCPR] Article 7 in the country of return’.³⁹⁰
69. The Committee has also emphasised that Security Council Resolution 1373³⁹¹ does not give permission to violate human rights. It has pointed out that, ‘the State Party is requested to ensure that counter-terrorism measures, whether taken in connection with Security Council resolution 1373 (2001) or otherwise, are in full conformity with the Covenant. In particular, it should ensure absolute protection for all individuals, without exception, against *refoulement* to countries where they risk violation of their rights under article 7’.³⁹²
70. Significantly, the Human Rights Committee has criticised States parties for not ensuring that those who are returned are protected from torture, inhuman and degrading treatment. For example, the Committee has noted that, ‘...nationals suspected or convicted of terrorism abroad and [returned] have not benefited in detention from the safeguards required to ensure that they are not ill-treated, having notably been held incommunicado for periods of over one month (Articles 7 and 9 of the Covenant)’.³⁹³
71. The Special Rapporteur on Torture has similarly stressed the binding nature of the obligation to protect against torture in the context of deportation. Governments therefore have been urged to:
- Refrain from deporting persons to a country where they would be at risk of torture (or to a transit country where they would be at serious risk of further deportation to such a country); unless

³⁸⁹ Human Rights Committee, Communication 1416/2005, *Alzery v Sweden*, 25 October 2006, para. 11.3 to 11.5.

³⁹⁰ Concluding observations of the Human Rights Committee: Lithuania, CCPR/CO/80/LTU.

³⁹¹ The key Resolution at the UN imposing obligations on States to counter terrorism.

³⁹² Concluding observations of the Human Rights Committee: Lithuania, CCPR/CO/80/LTU. See also Concluding observations of the Human Rights Committee: Yemen, CCPR/CO/75/YEM; Concluding observations of the Committee against Torture: Yemen, CAT/C/CR/31/4. See also Human Rights Committee, Communication 1051/2002, *Ahani v. Canada*, 29 March 2004

³⁹³ Concluding observations of the Human Rights Committee: Egypt, CCPR/CO/76/EGY.

- It obtains unequivocal guarantees that the persons concerned will not be subjected to ill-treatment; and
- Establishes a system to monitor their treatment after their return.

72. Importantly, the deporting State may incur responsibility where the authorities of the target country are 'unable or unwilling' to provide effective protection from ill treatment by non-State agents.

73. Due process safeguards must also be put in place to ensure that any person subject to return can challenge their return, including reliance on any diplomatic assurance and propose monitoring arrangements, before an independent and impartial tribunal.

I. Monitoring and inspecting places of detention

74. Instruments such as the Optional Protocol to the UN Convention Against Torture (OPCAT) recognise that 'regular inspection to places of detention, especially when carried out as part of a system of periodic visits, constitutes one of the most effective preventive measures against torture'.³⁹⁴

75. Such inspections should be regular, independent, whereby the inspectors are able to speak with detainees in private.³⁹⁵ OPCAT in particular requires States to establish their own independent monitoring body or bodies at the national level to monitor places of detention.

J. Rendition

76. The UN High Commissioner for Human Rights has also expressed significant concerns about the use of unlawful rendition or the transfer of non-national suspected terrorists who are considered to pose a security risk to their countries of origin or third countries.

77. Transfer, in this context, is defined as the involuntary relocation of non-citizens across borders from the custody of one government to another, regardless of the procedure used and its basis in law, or lack thereof. Often, these transfers are carried out on the basis of assurances from receiving States that persons will not be tortured or ill-treated.

78. The High Commissioner for Human Rights has pointed out that cases have come to light that demonstrate that some of these transfers are taking place outside the law, in the absence of procedural safeguards such as due process protection and judicial oversight. Persons subject to such transfers often have no ability to challenge the legality of their transfer or the reliability of the

³⁹⁴ Special Rapporteur on Torture, E/CN.4/1995/34, para 926.

³⁹⁵ See OPCAT, also European Convention for the Prevention of Torture; Human Rights Committee, Japan, A/54/40 (vol. I), p. 67.

assurances given by the receiving State that they will be protected from torture and other ill treatment.³⁹⁶

79. Extraordinary renditions under these circumstances will constitute grave violations of international human rights law, including but not limited to the absolute prohibition on torture and other ill-treatment (of which the absolute principle of *non-refoulement* is an integral part), the rights to liberty and security of the person, and the absolute prohibition on enforced disappearances where the detention is unacknowledged or the whereabouts of the person are not disclosed. As such it is incumbent upon States to have in place procedures to ensure accountability for extraordinary rendition and any complicity a State may have in the process, whether by the activities of their own agents, the presence of foreign agents or the use of their airspace. A victim of an 'extraordinary rendition' must be afforded an effective remedy and full and adequate reparation by each responsible entity.³⁹⁷

³⁹⁶ Report of the High Commissioner for Human Rights, E/CN.4/2006/94, 16 February 2006.

³⁹⁷ See the UN Convention on the Protection of All Persons from Enforced Disappearances (2006).

VIII. The Right to Liberty and Protection from Arbitrary Detention

Relevant international standards:

UDHR: Article 3:

Everyone has the right to life, liberty and security of person.

Article 9:

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

ICCPR Article 9

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

2. 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. 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 judgement.

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

Article 10

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

2.(a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;

(b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.

3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

Arab Charter: Article 14

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest, search or detention without a legal warrant.

2. No one shall be deprived of his liberty except on such grounds and in such circumstances as are determined by law and in accordance with such procedure as is established thereby.

3. *Anyone who is arrested shall be informed, at the time of arrest, in a language that he understands, of the reasons for his arrest and shall be promptly informed of any charges against him. He shall be entitled to contact his family members.*
4. *Anyone who is deprived of his liberty by arrest or detention shall have the right to request a medical examination and must be informed of that right.*
5. *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. His release may be subject to guarantees to appear for trial. Pre-trial detention shall in no case be the general rule.*
6. *Anyone who is deprived of his liberty by arrest or detention shall be entitled to petition a competent court in order that it may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful.*
7. *Anyone who has been the victim of arbitrary or unlawful arrest or detention shall be entitled to compensation.*

Relevant Domestic Law

Palestinian Basic Law

Article 11

1. *Personal freedom is a natural right, shall be guaranteed and may not be violated.*
2. *It is unlawful to arrest, search, imprison, restrict the freedom, or prevent the movement of any person, except by judicial order in accordance with the provisions of the law. The law shall specify the period of prearrest detention. Imprisonment or detention shall only be permitted in places that are subject to laws related to the organization of prisons.*

Article 12

Every arrested or detained person shall be informed of the reason for their arrest or detention. They shall be promptly informed, in a language they understand, of the nature of the charges brought against them. They shall have the right to contact a lawyer and to be tried before a court without delay.

1. Human rights relating to detention are inextricably linked with freedom from torture and the right to a fair trial. There is a recognition that where arbitrary and unlawful deprivations of liberty occur, there is an increased likelihood of torture and ill-treatment against those detainees.³⁹⁸ Deprivation of liberty is also more likely during times of emergency.³⁹⁹
2. International human rights law recognises that all persons should be protected from interference with the right to liberty except under defined and limited circumstances. At the same time, international human rights law also recognises that those in detention require special protection due to their vulnerable position (vulnerable because they are entirely in the power of the state and, due to their imprisonment, face a higher risk of abuse). The right to liberty is therefore a test of the legality of detention and a procedural guarantee.

³⁹⁸ See, e.g. E/CN.4/1999/63.

³⁹⁹ E/CN.4/1996/40.

3. International human rights law has laid down detailed criteria about when it is lawful to detain people and how such people should be treated in detention.⁴⁰⁰

A. Deprivation of the Right to Liberty

What amounts to deprivation

4. Every individual has a right to respect for their liberty and security of the person.⁴⁰¹ States are under an obligation to protect against arbitrary deprivations of liberty.⁴⁰²
5. Deprivation of liberty is more than a mere interference with the freedom of movement.⁴⁰³ Examples of deprivations of liberty include:
 - Control orders including curfews of up to 16 hours;⁴⁰⁴
 - Involuntary hospitalization;⁴⁰⁵
 - Confinement to a restricted area of an airport;⁴⁰⁶
 - Abduction and involuntary transportation from one country to another;⁴⁰⁷
 - House arrest;⁴⁰⁸
 - Military detention;⁴⁰⁹
 - Detention for drug addiction and vagrancy;⁴¹⁰
 - Detention of children for educational purposes.

⁴⁰⁰ See also UN Body of Principles for the Protection of all Persons under Any form of Detention or Imprisonment, 1988; UN Rules for the Protection of Juveniles Deprived of their Liberty; Standard Minimum Rules for the Treatment of Prisoners (1957); the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988); UN Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules); Code of Conduct for Law Enforcement Officials (1978); Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1982); Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum Seekers and Alternatives to Detention; European Prison Rules, 2006.

⁴⁰¹ Article 9 ICCPR; Article 14 Arab Charter; Article 6 ACHPR; Article 7 ACHR; Article 5 ECHR.

⁴⁰² Human Rights Committee, Communication 195/1985, *W. Delgado Páez v Colombia*, 12 July 1990.

⁴⁰³ Human Rights Committee, Communication 263/1987, *González del Río v. Peru*, 18 July 1988, para. 5.1; Communication No. 833/1998, *Karker v. France*, 30 Oct 2000, para. 8.5; Communication 456/1991, *Celepili v. Sweden*, 18 July 1994, para. 6.1.

⁴⁰⁴ Human Rights Committee, Concluding observations, United Kingdom, CCPR/C/GBR/CO/6 (2008), para. 17.

⁴⁰⁵ Human Rights Committee, Communication 754/1997, *A. v. New Zealand*, 3 August 1999, para. 7.2; CAT, Concluding observations Moldova CAT/C/MDA/CO/2 (2010), para. 13.

⁴⁰⁶ Human Rights Committee, Concluding observations Belgium CCPR/CO/81/BEL (2004), para. 17.

⁴⁰⁷ Communication 52/1979, *Lopez v. Uruguay*, 29 July 1981.

⁴⁰⁸ Communication 1460/2006, *Yklymova v. Turkmenistan*, 20 July, 2009, para. 7.2-7.4; Communication 1172/2003, *Madani v. Algeria*, 28 March 2007, para. 8.5.

⁴⁰⁹ Communication 962/2001, Human Rights Committee, *Mulezi v. Democratic Republic of the Congo*, 8 July 2004, para. 5.2. Communication No. 265/1987, *Vuolanne v. Finland*, 7 April 1989, para. 9.4.

⁴¹⁰ Human Rights Committee, Concluding Observations Rwanda, CCPR/C/RWA/CO/3 (2009), para. 16.

Deprivation of liberty must be prescribed by law and in accordance with the law

6. Any deprivation of liberty must be prescribed by law.⁴¹¹ The grounds must be 'clearly established in domestic legislation'.⁴¹² So where the law provides for an arrest only if a warrant has been issued, and a person is arrested without such warrant, this will violate this provision.⁴¹³
7. The principle of legality has been held by the Human Rights Committee to include 'elements of inappropriateness, injustice, lack of predictability and due process of law'.⁴¹⁴
8. National law must be precise, accessible and foreseeable. There must also be a continued legal basis for the detention. For example, where national law only permits detention under a particular circumstance for 12 hours and an individual is detained for 12 hours and 40 minutes the detention for 40 minutes will be unlawful.⁴¹⁵

Derogation from the right to liberty

9. The right to liberty is not an absolute right and it can be derogated from during times of war or other emergency subject to the requirements noted above.⁴¹⁶

When Detention is Lawful

10. Deprivation of liberty should always be the exception and not the rule.⁴¹⁷
11. 'Unlawful detention' will be where detention violates the domestic law, and that which does not comply with the requirements of the treaty, for example, Article 9(1) ICCPR.⁴¹⁸
12. Detention can start out lawful and then become unlawful. This may occur, for example, if the sentence has been completed but the individual is still detained, or because the circumstances which warranted the detention have changed.⁴¹⁹

⁴¹¹ Communication 992/2001, *Bousroual v. Algeria*, 30 March 2006, para. 9.5; Communication 1460/2006, *Yklymova v. Turkmenistan*, 20 July 2009, para. 7.2.

⁴¹² Communication 702/1996, *C. McLawrence v Jamaica*, 11 July 1997..

⁴¹³ Communication 770/1997, *Gridin v Russian Federation*, 18 July 2000.

⁴¹⁴ Communication 458/1991, *A.W. Mukong v Cameroon*, 21 July 1994.

⁴¹⁵ European Court, *K-F v Germany*, 27 November 1997.

⁴¹⁶ See section V.B. above.

⁴¹⁷ Human Rights Committee, General Comment No.8, HRI/GEN/1/Rev.6 at 130 (2003), para. 3; Communication 526/1993, *Hill v Spain*, 2 April 1997, para. 12.3; Communication 432/1990, *W.B.E. v The Netherlands*, 23 October 1992, para. 6.3; *Concluding observations on El Salvador*, CCPR/C/SLV/CO/6, para. 15

⁴¹⁸ Report of the Working Group on Arbitrary Detention, A/HRC/27/47, para 14. See Communications 1255/2004 et al., *Shams et al. v. Australia*, 20 July 2007, para. 7.3; Communication 1460/2006, *Yklymova v. Turkmenistan*, 20 July 2009, para. 7.4 and 1751/2008, *Aboussedra v. Libyan Arab Jamahiriya*, 14 March 2012, para. 7.6.

⁴¹⁹ Communication 1090/2002, *Rameka v. New Zealand*, 6 November 2003, paras. 7.3 and 7.4.

Detention on reasonable suspicion of having committed an offence:

13. Detention pursuant to arrest must satisfy the conditions of lawfulness, reasonableness and necessity.⁴²⁰ It should be considered the exception.⁴²¹
14. Pre-trial detention must be based on an assessment of the individual case, taking into account factors such as the risks of flight,⁴²² tampering with evidence or the likelihood of recurrence. It should not be mandatory for a class of offences without individualised considerations.⁴²³
15. Alternatives to pre-trial detention, such as bail, electronic bracelets, or other conditions, must be considered.⁴²⁴
16. A pre-trial detention order or a remand shall be subject to a periodic review⁴²⁵ and a defendant should be released if he or she has been detained for a period that is equal to the maximum prison sentence that could be imposed for the crime charged.⁴²⁶
17. Pre-trial detention of juveniles should be avoided and in the event of detention they shall be brought to trial in a particularly speedy manner.⁴²⁷

Detention post-conviction

18. Once the prison sentence has been served, the individual must be released.⁴²⁸

Preventative and/or Administrative Detention

19. Administrative detention, namely that ordered by the executive, is controversial, yet under certain circumstances may be permitted in international human rights law.⁴²⁹
20. The guarantees under Article 9(1) of the ICCPR will apply to administrative detention,⁴³⁰ and Article 9(4) is particularly important in such contexts.

⁴²⁰ Communication 305/1988, *H. Van Alphen v The Netherlands*, 23 July 1990.

⁴²¹ Communication 526/1993, *Hill v. Spain*, 2 April 1997, para. 12.3.

⁴²² Communication 458/1991, *A. W. Mukong v. Cameroon* 21 July 1994, para. 9.8.

⁴²³ Human Rights Committee, Communication 526/1993, *Hill v Spain*, 2 April 1997, para. 12.3; Communication 432/1990, *W.B.E. v The Netherlands*, 23 October 1992, para. 6.3; Communication 305/1988, *van Alpen v The Netherlands*, 23 July 1990, para. 5.8.

⁴²⁴ Communication 1178/2003, *Smantser v. Belarus*, 23 October 2008, para. 10.3; Concluding observations Argentina CCPR/C/ARG/CO/4 (2010), para. 16.

⁴²⁵ Communication 1085/2002, *Taright v. Algeria*, 15 March 2006, paras. 8.3-8.4; Concluding observations Moldova 2002, para. 11.

⁴²⁶ Human Rights Committee, Concluding observations Argentina CCPR/C/79/Add.46 (1995), para. 157.

⁴²⁷ Concluding observations Latvia CCPR/CO/79/LVA/Add.1 (2004), para. 10; Human Rights Committee General Comment No. 21, HRI/GEN/1/Rev.6 at 153 (2003), para. 13; and General Comment No. 32, CCPR/C/GC/32 (2007) para. 42; Committee on the Rights of the Child, General Comment No. 10, CRC/C/GC/10 (2007), para. 83.

⁴²⁸ Communication No. R.2/8, *A. M. García Lanza de Netto on behalf of B. Weismann Lanza and A. Lanza Perdomo* 3 April 1980, p. 118.

⁴²⁹ See Report on the practice of administrative detention, UN.Doc.E/CN.4/Sub.2/1990/29.

⁴³⁰ Human Rights Committee, General Comment No.8, HRI/GEN/1/Rev.6 at 130 (2003), para 1.

21. With respect to detention on grounds of public order or security, the Human Rights Committee has stated that such detention must not be arbitrary and must comply with the provisions of the ICCPR. If the person is a 'clear and serious threat to society which cannot be contained in any other manner', then such preventive detention may be justified.⁴³¹ The guarantees under the Covenant would still apply.
22. The Special Rapporteur on the human rights of migrants has addressed the relationship between counter-terrorism measures and migration. She has pointed out that: '[T]he strengthening of security policies and the tendency to consider migration as a matter falling under State security plans pose a threat to the human rights of migrants'. She has recommended that there should be 'regard for the individual history of the persons in question' and 'procedural safeguards and guarantees established by international human rights law and national law in criminal proceedings be applied to any form of detention'.
23. Detention on the grounds of mental health may be permissible. For example, a detention of an individual after their threatening and aggressive behaviour following the opinion of three psychiatrists, and the regular review of this detention, was not a violation of Article 9 of the ICCPR.⁴³²
24. The European Court has established a five-stage test for the detention of persons on the ground of mental health:
 - a. The mental disorder must be established by objective medical expertise
 - b. The nature and degree of the disorder must be sufficiently extreme to justify the detention
 - c. Detention should only last as long as the medical disorder and its required severity persists
 - d. In cases where detention is potentially indefinite, periodical reviews must take place by a tribunal which has powers to discharge
 - e. Detention must take place in a hospital, clinic or other appropriate institution authorised to detain such persons.⁴³³

Detention for the purposes of deportation and extradition:

25. Individuals requesting asylum can be detained but such decisions should be periodically reviewed.⁴³⁴
26. Detention should only continue for as long as it can be justified, for example, to conduct an investigation, or to prevent an individual from absconding. Detention beyond the required period will then be unlawful even if the individual entered into the state illegally.⁴³⁵

Detention in the context of an international armed conflict

27. In *Hassan v UK*, the European Court held that detention would also be permitted in the context of an international armed conflict provided it was

⁴³¹ Communication 66/1980, *D. A. Cámpora Schweizer v. Uruguay*, 12 October 1982, para. 18.1.

⁴³² Communication 754/1997, *A. v. New Zealand*, 3 August 1999.

⁴³³ *Winterwerp v Netherlands*, European Court, 24 October 1979.

⁴³⁴ Communication 560/1993, *A. v. Australia* 3 April 1997.

⁴³⁵ *Ibid.*

consistent with international humanitarian law.⁴³⁶ Here the UK had not derogated from its ECHR obligations.

B. Procedural safeguards

Reasons for Detention

28. Persons deprived of their liberty should be informed of the reasons of their arrest at the time of the arrest irrespective of the nature or any justifications for the arrest.⁴³⁷
29. The reasons must be detailed, prompt and comprehensible⁴³⁸ and include factual details regarding the substance of the complaint, not just the legal grounds, such as the wrongful act and the identity of the alleged victim, if any. So, for example, in *Drescher Caldas v Uruguay*, the Human Rights Committee considered it insufficient to simply inform the detainee 'that he was being arrested under the prompt security measures without any indication of the substance of the complaint against him'.⁴³⁹
30. The reasons must be given in a language that the arrested person understands.⁴⁴⁰
31. In the case of children, notice of and the reasons for the arrest should also be provided directly to their parents, guardians, or legal representatives.⁴⁴¹
32. The right to be informed about any charges applies to criminal prosecutions, as well as to military prosecutions or other proceedings directed at criminal punishment.⁴⁴²
33. Notice of charges shall be sufficient to facilitate the determination of the legality of or appropriateness of the detention and does not have to meet the

⁴³⁶ *Hassan v UK*, European Court, 16 September 2014.

⁴³⁷ Human Rights Committee, Communication 1460/2006, *Yklymova v. Turkmenistan*, 20 July 2009, para. 7.2; Communication 414/1990, *Mika Miha v. Equatorial Guinea*, 8 July 1994, para. 6.5; Communication 188/1984, *Martínez Portorreal v. Dominican Republic*, 5 November 1987, paras. 9.2, 11; Concluding observations, Canada CCPR/C/CAN/CO/5 (2006), para. 14.

⁴³⁸ Report of the Special Rapporteur on the Independence of Judges and Lawyers, A/HRC/8/4, para 27. Communication 43/1979, *Adolfo Dreschler Caldas v Uruguay*, 21 July 1983.

⁴³⁹ Communication 43/79 *Drescher Caldas v Uruguay*, 11 January 1979, para 13.2. See also Communication 1177/2003, *Wenga and Shandwe v. Democratic Republic of the Congo*, 17 March 2006, para. 6.2; Communication 1128/2002, *Marques de Moraes v. Angola*, 29 March 2005, para. 6.2.

⁴⁴⁰ Communication 868/1999, *Wilson v. The Philippines*, 30 October 2003, paras. 3.3, 7.5.

⁴⁴¹ Human Rights Committee, Communication 1402/2005, *Krasnova v. Kyrgyzstan*, 29 March 2011, para. 8.5; General Comment No. 32, CCPR/C/GC/32 (2007), para. 42; see Committee on the Rights of the Child, General Comment No. 10, CRC/C/GC/10 (2007), para. 48.

⁴⁴² Communication 1782/2008, *Aboufaied v. Libya*, 21 March 2012, para. 7.6; Communication 1649/2007, *El Abani v. Algeria*, paras. 7.6, 7.8.

requirements of Article 14(3) ICCPR,⁴⁴³ which aims at assisting an accused in the preparation of his/her defence.⁴⁴⁴

34. Reasons for detention must be given promptly⁴⁴⁵ and as soon as the person is charged with the criminal offence.⁴⁴⁶ The promptness of reasons depends upon the circumstances of the case. Prompt does not necessarily mean immediate and a few hours might suffice. A delay of seven hours where the individual had access to a competent interpreter was held not to violate the ICCPR.⁴⁴⁷ A three to four week delay where the state gave no more than a 'general refutation' of the applicant's claim, will be a violation of this provision.⁴⁴⁸

35. The age and mental state of the detained person is also relevant. It may be that a responsible third person must be informed promptly of the reasons for the detention.

36. Interpreters may therefore be required for the individual to understand the charges against them.⁴⁴⁹

Access to a Lawyer⁴⁵⁰

37. The right of access to lawyers is also a crucial right that should be afforded from the outset of the deprivation of liberty.⁴⁵¹

Right to Bail⁴⁵²

38. There is a presumption in favour of bail⁴⁵³ and pre-trial detention should be the exception.⁴⁵⁴ Detention without the possibility of bail may render deprivation of liberty arbitrary.⁴⁵⁵ If bail is denied, then the length of delay will be carefully

⁴⁴³ Namely, that individuals be provided with a number of minimum guarantees in the determination of any criminal charge against him.

⁴⁴⁴ Human Rights Committee, Communication 248/1987, *Campbell v. Jamaica*, 30 March 1992, para. 6.3; Communication 1096/2002, *Kurbanov v. Tajikistan*, 6 November 2003, para. 7.3.

⁴⁴⁵ Article 9(2) ICCPR; UN Body of Principles for the Protection of All Persons under any form of Detention or Imprisonment, Principle 12.

⁴⁴⁶ Human Rights Committee, Communications 1128/2002, *Marques de Morais v Angola*, 29 March 2005, para 5.4; Communication 253/1987, *Kelly v Jamaica*, 8 April 1991, para 5.8.

⁴⁴⁷ Communication 526/1993, *Hill v. Spain* 2 April 1997, para. 12.2.

⁴⁴⁸ Communication 635/1995, *E. Morrison v. Jamaica* 27 July 1998, para. 21.2.

⁴⁴⁹ UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 14.

⁴⁵⁰ This is dealt with in more detail in section IX below.

⁴⁵¹ Human Rights Committee, General Comment No. 20, HRI/GEN/1/Rev.6 at 151 (2003), para 11; Human Rights Committee, Concluding Observations on Gabon, CCPR/CO/70/GAB (2000); Communication 1412/2005, *Butovenko v. Ukraine*, 19 July 2011, para. 7.6; see also UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UN General Assembly resolution 43/173, Principle 17.

⁴⁵² Article 9(3) ICCPR; Article 5(3), ECHR.

⁴⁵³ European Court, *Tomasi v France*, 27 August 1992.

⁴⁵⁴ Communication No. 526/1993, *Hill v. Spain*, 2 April 1997, para. 12.3.

⁴⁵⁵ African Commission, Communications Nos. 25/89, 47/90, 56/91 and 100/93, *OMCT and Others v. Zaire*, 4 April 1996 para. 67.

considered and the person must be tried as quickly as possible,⁴⁵⁶ particularly where the offence is a serious one⁴⁵⁷ Reasons for delay may include, for example, that the investigation or evidence is complex,⁴⁵⁸ but even this will not justify a delay of over three years.⁴⁵⁹

39. Bail can be refused if there is a likelihood that the accused will:

- Abscond or flee the jurisdiction of the State;
- Destroy evidence;
- Influence witnesses;⁴⁶⁰

40. Conditional bail is permitted and is preferable to pre-trial detention. A bail hearing must be fair and in accordance with fair trial principles. Any objections to bail must be relevant and sufficient and reasons should be given.

41. In relation to bail conditions, the right to liberty requires only what is necessary to ensure presence. That right was violated when bail was calculated on the basis of the loss imputed to the alleged victim.⁴⁶¹ Conditions might include reporting to a local police station and/or the surrender of a passport.

C. The Right to Challenge the Legality of Detention – Habeas Corpus⁴⁶²

42. According to international law, anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court,⁴⁶³ 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. This is a 'self-standing right'.⁴⁶⁴

43. The right of *habeas corpus* is an absolute, and non-derogable, right⁴⁶⁵ protected under both treaty and customary international law⁴⁶⁶ and international

⁴⁵⁶ Human Rights Committee, General Comment No.32, CCPR/C/GC/32 (2007), para 35. See also European Court, *Jablonski v Poland*, [2000] ECHR 685, para 102.

⁴⁵⁷ Communication 473/1991, *Barosso v Panama*, 19 July 1995, .

⁴⁵⁸ Communication 818/1998, *Sextus v Trinidad and Tobago*, 16 July 2001, para 7.2.

⁴⁵⁹ Communication 473/1991, *Barosso v Panama*, 19 July 1995.

⁴⁶⁰ Communication No. 526/1993, *Hill v. Spain* , 2 April 1997, para. 12.3.

⁴⁶¹ *Neumeister v Austria*, European Court, 27 June 1968.

⁴⁶² Articles 8 and 9 UDHR; Article 9(4) ICCPR and its General Comment No.8, HRI/GEN/1/Rev.6 at 130 (2003); Article 17(2)(f) ICCPED. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principles 4, 11 and 32. See also Article 14(6) Arab Charter on Human Rights. Article 12 Palestinian Basic Law; Article 7(1) ACHPR; African Commission, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, 2003. Inter-American Court Advisory Opinion OC-8/87, 30th Jan 1987. Inter-American Commission on Human Rights, *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the America*, 2008. See Report of the Working Group on Arbitrary Detention, 30 June 2014, A/HRC/27/47.

⁴⁶³ This is also now part of customary international law and constitutes jus cogens, see Working Group on Arbitrary Detention, A/HRC/22/44.

⁴⁶⁴ Working Group on Arbitrary Detention, A/HRC/19/57, para 61.

⁴⁶⁵ Ibid.

⁴⁶⁶ Working Group on Arbitrary Detention, A/HRC/22/44, para 47.

humanitarian law.⁴⁶⁷ This is even the case during situations of armed conflict⁴⁶⁸ and during states of emergency.⁴⁶⁹ The absolute nature of this provision applies also in the context of counter-terrorism measures.⁴⁷⁰ So, for example, several UN and regional human rights bodies have reiterated in the context of Guantanamo Bay, that 'procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights' and that 'any person deprived of his or her liberty must enjoy continued and effective access to habeas corpus proceedings, and any limitations to this right should be viewed with the utmost concern'.⁴⁷¹

44. The right applies to all forms of detention ranging from detention in connection with criminal proceedings to groundless arrests, including military detention,⁴⁷² involuntary detention in a psychiatric institution⁴⁷³ or immigration facility.⁴⁷⁴

45. In the case of disciplinary detentions of soldiers, an impartial, independent review by a military court may satisfy the requirements of Article (4), if the detainee is afforded with adequate procedural safeguards.⁴⁷⁵

46. Where individuals cannot exercise the right, because for example, in the case of enforced disappearances, States are required under the International Convention for the Protection of All Persons from Enforced Disappearances to 'guarantee that...any persons with a legitimate interest, such as relatives of the person deprived of their liberty, their representatives or their counsel, shall, in all circumstances, be entitled to take proceedings before a court'.⁴⁷⁶

47. The right requires that:

- The individual be heard promptly by a judicial or other authority.⁴⁷⁷ This should be no more than a 'few days'.⁴⁷⁸

⁴⁶⁷ Working Group on Arbitrary Detention, A/HRC/27/47, para 22.

⁴⁶⁸ A/HRC/16/47, para 51; See also UN GA Res.2675 (XXV). See also ICJ, *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, 8th July 1996; Human Rights Committee, General Comment No.31, CCPR/C/12/Rev.1/Add.13, para 11.

⁴⁶⁹ Subcommittee on Prevention of Torture, CAT/OP/HND.1, para 137. Committee on Enforced Disappearances, CED/C/ESP/CO/1, para 26.

⁴⁷⁰ Working Group on Arbitrary Detention, E/CN.4/2004/3, para 85.

⁴⁷¹ E/CN.4/2006/120, para 124.

⁴⁷² Communication 1051/2002 *Ahani v. Canada*, 29 March 2004, para. 10.2 and Concluding Observation, United Kingdom 2008, para. 17. Communication 962/2001, *Mulezi v. Democratic Republic of the Congo*, 8 July 2004, para. 5.2.

⁴⁷³ Communication 1062/2002, *Fijalkowska v. Poland*, 25 July 2006, para 8.4.

⁴⁷⁴ Communication 560/1993, *A. v. Australia*, 3 April 1997, para. 9.5.

⁴⁷⁵ Human Rights Committee, Communication 265/1987, *Vuolanne v. Finland*, 7 April 1989, para. 9.6.

⁴⁷⁶ ICCPED, Article 17(2)(f).

⁴⁷⁷ UN Body of Principles of All Persons under Any Form of Detention or Imprisonment, Principle 11(1).

⁴⁷⁸ Communication 373/1989, *L. Stephens v. Jamaica* 18 October 1995, para. 9.6. Communication 155/83 *Hammel v Madagascar*, Concluding Observations on Spain (1996) CCPR/C/79/Add.61, para 12.

- The judicial or other authority be independent, objective and impartial,⁴⁷⁹ and empowered to review the continuance of the detention.⁴⁸⁰ Review of a petitioner's claim before a superior military officer lacked the "judicial character" of a court hearing.⁴⁸¹ So, where an individual was subsequently detained in prison despite the Criminal Court of First Instance ordering bail, the High Court of Justice in Ramallah ordered his release on the basis that this detention was arbitrary.⁴⁸²
- The proceedings should be 'simple and expeditious and at no cost for the detained persons without adequate means'.⁴⁸³
- The detaining authority should produce without unreasonable delay the detained person before the judicial authority.⁴⁸⁴
- The judicial or other authority should produce their decision without delay.⁴⁸⁵
- The individual should have a right to trial within a reasonable time or be released.⁴⁸⁶

48. The right to challenge the legality of detention applies to all persons deprived of their liberty and is considered to be a 'fundamental safeguard against torture' and other ill treatment.⁴⁸⁷ It applies from the moment of arrest⁴⁸⁸ and proceedings can be started by the detainee or their representative.⁴⁸⁹

49. The individual should be informed in a language they understand of the right to take proceedings.⁴⁹⁰

50. Secret detention will violate the right to personal liberty and the prohibition on arbitrary arrest and detention.⁴⁹¹

⁴⁷⁹ Communication 521/1992, *Kulomin v. Hungary* 22 March 1996. A review by a minister will not be sufficient: Communication No. 291/1988, *Torres v. Finland*, 2 April 1990, para. 7.2; Communications 1090/2002, *Rameka v New Zealand*, 6 November 2003, para 7.4. General Comment No.32, CCPR/C/GC/32 (2007), paras 18-22.

⁴⁸⁰ UN Body of Principles of All Persons under Any Form of Detention or Imprisonment, Principle 32.

⁴⁸¹ Communication 265/1987, *Vuolanne v Finland*, 7 April 1989

⁴⁸² H.H.S.A v. Central Prison of Nablus, High Court of Justice of Ramallah, 30 October 2005.

⁴⁸³ UN Body of Principles of All Persons under Any Form of Detention or Imprisonment, Principle 32.

⁴⁸⁴ Ibid

⁴⁸⁵ Communication 291/1988, *Torres v Finland*, 2 April 1990, para 7.3. See also CAT General Comment No.2, CAT/C/GC/2/CRP.1/Rev.4 (2007),, para 8.

⁴⁸⁶ See section IX.N. below.

⁴⁸⁷ CAT/OP/HDN/1, para 137. See also CAT/C/CUB/CO/2, para 8.

⁴⁸⁸ Communication 291/1988, *Torres v. Finland*, 2 April 1990, para. 7.2; Concluding observations: Sri Lanka (1995).

⁴⁸⁹ Communication 373/1989, *Stephens v. Jamaica*, 18 October 1995, para. 9.7.

⁴⁹⁰ Concluding observations: Switzerland (1996), para. 111; and Benin (2004), para. 16.

⁴⁹¹ Joint study on secret detention by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, the Special Rapporteur on Torture, the Chair-Rapporteur on the Working Group on Enforced or Involuntary Disappearances, and the Vice-Chair of the Working Group on Arbitrary Detention, A/HRC/13/42. See also A/HRC/16/47, para 54.

D. Places of detention

51. Detainees must be held in 'places officially recognised as places of detention'.⁴⁹²

52. Registers should be kept and be accessible of the names and places of detention and those detainees held there as well as those responsible for those places.⁴⁹³ This register should include, in respect of each prisoner, their identity, the reasons for their detention, the hour of admission and release, the reasons for arrest, the time of the arrest, their first appearance before a court or judicial authority, the identity of the law enforcement officials and precise information about the place of custody.⁴⁹⁴

53. Under the Convention for the Protection of All Persons from Enforced Disappearances family members are entitled to information on a detained relative including the date, time and place of the detention.⁴⁹⁵

54. Records should be kept of interrogations.⁴⁹⁶

E. Safeguards for Particular Categories of Detainees

55. All detained people have the right to equal treatment but particular allowances will also have to be made for certain special categories including women, juveniles, older persons, non-nationals, ethnic minorities, sexual minorities, those who are ill and persons with disabilities. Some groups may need particular protection from abuse from other detainees as well as from those detaining them.

Women in detention

56. The UN's Standard Minimum Rules for the Treatment of Prisoners set out basic ground rules for the detention of women. These are:

- Women in custody should be supervised by female members of staff;
- They should also be held in separate institutions or segregated within an institution under the authority of female staff;
- No male staff should enter the part of the institution set apart for women unaccompanied by a female member of staff;
- In institutions where women are held in custody, facilities for pre-natal and post-natal care and treatment must be provided;

⁴⁹² Human Rights Committee, General Comment No.20, 44th Session (1992), para 11.

⁴⁹³ Ibid. See also Declaration on the Protection of All Persons from Enforced Disappearance, Article 10, Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and summary Executions, Principle 6.

⁴⁹⁴ Standard Minimum Rules for the Treatment of Prisoners Rule 7. Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment, Principle 12(1).

⁴⁹⁵ Article 18, ICCPED.

⁴⁹⁶ Ibid. See also Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 12.

- Wherever possible, arrangements should be made for children to be born in hospitals outside the institution.⁴⁹⁷

57. Female staff should be present during interrogations of detainees and only female staff should be permitted to conduct body searches on female detainees.⁴⁹⁸ Detention of women in detention centres where male officers have access or run exclusively by male officers can give rise to particular problems and, in some cases, very serious abuse.⁴⁹⁹ For example a 17-year-old female detainee was found to have been tortured having been detained by gendarmerie in an unofficial and unacknowledged detention centre, isolated from her father and sister-in-law (both detained with her), blindfolded, stripped, sprayed with cold water, raped and beaten.⁵⁰⁰ It is difficult to see how any of that could have occurred had proper safeguards including the ability to have immediate access to counsel and effective judicial scrutiny been in place.

Juvenile detention

58. Some specific obligations also apply in relation to children. These are found, principally, in the UN Convention on the Rights of the Child. The Convention applies to children up to the age of 18, who would normally be regarded as juveniles within most criminal justice systems.

59. Article 37 of the Convention emphasises that detention of children should be a measure of last resort and used for the shortest possible period of time.⁵⁰¹ It requires due account to be taken of their needs and states that they should be kept separate from adults unless, as in the case of detention of their carer or parents, it is considered in their best interests to be kept together.⁵⁰²

60. In addition, 'each case shall from the outset be handled expeditiously, without any unnecessary delay',⁵⁰³ there should be a right of appeal to a prompt decision (within two weeks after a challenge is made), and for effective complaints procedures to be put in place.⁵⁰⁴

Persons with disabilities

61. Article 14 of the CRPD provides that states must 'ensure that persons with disabilities...are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law. ...If persons with disabilities are deprived of their liberty through any process, they are, on an

⁴⁹⁷ Rules 8(a), 23 and 53.

⁴⁹⁸ Human Rights Committee, General Comment No.16, HRI/GEN/1/Rev.6 at 142 (2003), para 8.

⁴⁹⁹ Observations by the Human Rights Committee, USA, UN Doc.CCPR/C/79/Add.50, 7 April 1995, para 20.

⁵⁰⁰ *Aydin v Turkey*, 25 September 1997.

⁵⁰¹ Convention on the Rights of the Child, Article 37(b).

⁵⁰² See also UN Rules for the Protection of Juveniles Deprived of their Liberty, Rule 13; UN Standard Minimum Rules for the Administration of Juvenile Justice, Rule 7.1.

⁵⁰³ UN Standard Minimum Rules for the Administration of Juvenile Justice, Rule 20.1.

⁵⁰⁴ Committee on the Rights of the Child, General Comment No.10, CRC/C/15/Add.193.

equal basis with others, entitled to guarantees in accordance with international human rights law’.

62. Detention solely on the grounds of disability is considered to violate article 14 of the CRPD.⁵⁰⁵

63. The UN Standard Minimum Rules for the Treatment of Prisoners also requires that those with mental health issues are ‘observed and treated in specialized institutions under medical management’ rather than prisons.⁵⁰⁶

64. States also need to ensure due process guarantees apply in relation to deprivation of liberty in these contexts⁵⁰⁷ and individuals should be able to challenge their detention through a judicial body.⁵⁰⁸

Migrants and asylum seekers

65. Refugees should be able to challenge their detention in accordance with the UN Convention Relating to the Status of Refugees⁵⁰⁹ and UNHCR Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum Seekers and Alternatives to Detention.⁵¹⁰

66. Such challenges should be able to be made before a court of law at any time.⁵¹¹

67. Guarantees include that the custodial measures should be made in writing and in a language that they understand, they should include the grounds and conditions for detention and the detention must be approved by a judge or body that complies with standards of competence, impartiality and independence.⁵¹²

68. A maximum period of detention should be provided for by law⁵¹³ and decisions on detention regularly reviewed.⁵¹⁴

F. Compensation for unlawful detention

69. There is a right to compensation for unlawful detention. This is a specific remedy that does not displace other remedies, including release from

⁵⁰⁵ Committee on the Rights of Persons with Disabilities, CRPD/C/PER/CO/1, paras 28 and 29.

⁵⁰⁶ UN Standard Minimum Rules, para 82.

⁵⁰⁷ CRPD/C/ARG/CO/1.

⁵⁰⁸ Working Group on Arbitrary Detention, E/CN.4/2004/3, para 87.

⁵⁰⁹ Articles 16, 32(2).

⁵¹⁰ Working Group on Arbitrary Detention, E/CN.4/1999/63.

⁵¹¹ Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers and Alternatives to Detention, 2012, guideline 7.

⁵¹² Special Rapporteur on the human rights of migrants, Report, 2012, A/HRC/20/24. See also Working Group on Arbitrary Detention, opinions 55/2011, and 14/2011. E/CN.4/2000/4, principle 8. See also International Convention on the Protection of the Rights of All Migrant Workers and their Families, Article 16, and the General Comment No.2 (2013), by its Committee.

⁵¹³ Article 9(4) ICCPR; A/HRC/13/30, para 61.

⁵¹⁴ Human Rights Committee, CCPR/C/59/D/560/1993, para 9.4.

detention.⁵¹⁵ So in *Mulezi v. Democratic Republic of the Congo*, the Human Rights Committee recommended compensation as well as investigation of unlawful arrest and detention.⁵¹⁶

70. States are required to establish a legal framework for compensation.⁵¹⁷

⁵¹⁵ Human Rights Committee, General Comment No. 31, CCPR/C/21/Rev.1/Add.13 (2004), paras. 16

⁵¹⁶ Human Rights Committee, Communication 962/2001, *Mulezi v. Democratic Republic of the Congo*, 8 July 2004, para. 7.

⁵¹⁷ Concluding observations Guyana 2000, para. 367-368; United States of America 1995, para. 299; General Comment No. 32, CCPR/C/GC/32 (2007), para. 52.

IX. The Right to a Fair Trial

Relevant international provisions:

Article 10 UDHR:

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 14 ICCPR:

- 1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.*
- 2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.*
- 3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him; (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing; (c) To be tried without undue delay; (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it; (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court; (g) Not to be compelled to testify against himself or to confess guilt.*
- 4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.*
- 5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.*
- 6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.*

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Articles 12 and 13 of the Arab Charter:

Article 12: All persons are equal before the courts and tribunals. The States parties shall guarantee the independence of the judiciary and protect magistrates against any interference, pressure or threats. They shall also guarantee every person subject to their jurisdiction the right to seek a legal remedy before courts of all levels.

Article 13: 1. Everyone has the right to a fair trial that affords adequate guarantees before a competent, independent and impartial court that has been constituted by law to hear any criminal charge against him or to decide on his rights or his obligations. Each State party shall guarantee to those without the requisite financial resources legal aid to enable them to defend their rights.

2. Trials shall be public, except in exceptional cases that may be warranted by the interests of justice in a society that respects human freedoms and rights.

*Article 8 ACHR
Article 6 ECHR
Article 7 ACHPR*

Relevant Domestic Provisions:

Palestinian Basic Law

Article 14

An accused person is considered innocent until proven guilty in a court of law that guarantees the accused the right to a defense. Any person accused in a criminal case shall be represented by a lawyer.

Article 30

- 1. Submitting a case to court is a protected and guaranteed right for all people. Each Palestinian shall have the right to seek redress in the judicial system. Litigation procedures shall be organized by law to guarantee prompt settlement of cases.*
- 2. Laws may not contain any provisions that provide immunity to any administrative decision or action or against judicial review.*
- 3. Judicial error shall result in a remedy by the National Authority. Conditions and methods of such remedy shall be regulated by law.*

Article 98

Judges shall be independent and shall not be subject to any authority other than the authority of the law while exercising their duties. No other authority may interfere in the judiciary or in judicial affairs.

Article 99

1. *Appointment, transfer, secondment, delegation, promotion and questioning of judges shall be as prescribed in the Judicial Authority Law.*
2. *Judges may not be dismissed except in cases that are allowed in the Judicial Authority Law.*

Article 105

Court hearings shall be public, unless a court decides to make them in camera due to considerations related to public order or public morals. In all cases, the sentence shall be pronounced in a public hearing.

A. Introduction

1. The right to a fair trial encompasses a range of different elements which will be explored below. The right to a fair trial in both civil and criminal proceedings is dealt with together, although where the standards differ this is noted.
2. We start with an examination of whether there are certain circumstances in which it may be permissible to derogate from the right, before moving on to consider core obligations in the right. These include the presumption of innocence, access to court and access to a lawyer.
3. Consideration is then given to examining what amounts to a ‘criminal offence or charge’ within the meaning of, for example, Article 14 ICCPR, or the circumstances in civil proceedings which trigger the protections under the right to a fair trial.
4. The various components of the right will then be examined including the requirement of being informed in a language one understands of the charges against you, the time and facilities to prepare a defence, the importance of an independent and impartial tribunal and the principle of equality of arms. It will then move on to discuss the requirements that the trial take place within a reasonable time, the hearing is in public, with the assistance of an interpreter, and the rule of double jeopardy.
5. The section concludes with an examination of the obligations and safeguards post-trial, including delivery of the judgment, a right to an appeal, sentencing compensation and the rights of victims.

B. The importance of the right to a fair trial

6. The closely related principles of “due process” and “the rule of law” are fundamental to the protection of human rights. Such rights can only be protected and enforced if an individual has recourse to courts and tribunals, independent of the State, which can resolve disputes in accordance with fair procedures. The protection of procedural due process is not, in itself, sufficient to protect against human rights abuses but it is the foundation stone for

“substantive protection” against State power. The protection of human rights therefore begins but does not end with fair trial rights.⁵¹⁸

7. Fair trial rights are not only a fundamental safeguard to ensure that individuals are not unjustly punished under the criminal law, but they are also indispensable for the protection of other human rights,⁵¹⁹ including the right to freedom from torture and the right to life, and, especially in political cases, the right to freedom of expression, and freedom of association. Furthermore, a key feature of the right to a fair trial is that, ultimately, it is through the medium of fair trial that the right to an effective remedy is guaranteed.⁵²⁰
8. The right to a fair trial is applicable to both criminal and civil/non-criminal proceedings, however, there are differences in how the requirements apply in respect of each.⁵²¹
9. The Human Rights Committee has noted that ‘Article 14 contains guarantees that States parties must respect, regardless of their legal traditions and their domestic law. While they should report on how these guarantees are interpreted in relation to their respective legal systems, the Committee notes that it cannot be left to the sole discretion of domestic law to determine the essential content of Covenant guarantees’.⁵²²

C. Is the right to a fair trial absolute?

10. Although some aspects of the right to a fair trial can be derogated from (where such derogation provisions are available),⁵²³ this cannot be the case if it would result in violations of non-derogable rights. The following rights are also absolute for those charged with criminal offences:
 - a. The right to be informed of the charges against the individual, promptly, in a language they understand;
 - b. Adequate time and facilities for preparation of the defence, including communication confidentially with a lawyer;
 - c. The right to a lawyer of one’s choice and free legal assistance if necessary;
 - d. For the defendant to be present at the trial;
 - e. To obtain the attendance and examination of defence witnesses.⁵²⁴

⁵¹⁸ Clayton, R. and Tomlinson H. *Fair Trial Rights* (2001)

⁵¹⁹ Human Rights Committee General Comment No.32, CCPR/C/GC/32 (2007), para 58.

⁵²⁰ Human Rights Committee, General Comment No.32, CCPR/C/GC/32 (2007), para 58; Communication 823/1998, *Czernin v Czech Republic*, 29 March 2005, para 7.5. Communication 1033/2001, *Singarasa v Sri Lanka*, 24 July 2004, para 7.4.

⁵²¹ Human Rights Committee, Communication 1142/2002, *AJ and G v Netherlands*, 27 July 2003, para 57.

⁵²² General Comment No.32, CCPR/C/GC/32 (2007), para 4.

⁵²³ Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR, E/CN.4/1985/4, annex., para 70. Article 4 ICCPR, Article 15 ECHR.

⁵²⁴ General Comment No.32, CCPR/C/GC/32 (2007), para 6. See also General Comment No.29, CCPR/C/21/Rev.1/Add.11..

11. The Human Rights Committee has noted that:

‘While article 14 is not included in the list of non-derogable rights in article 4, paragraph 2 of the Covenant, States derogating from normal procedures required under article 14 in circumstances of a public emergency should ensure that such derogations do not exceed those strictly required by the exigencies of the actual situation. The guarantees of fair trial may never be made subject to measures of derogation that would circumvent the protection of non-derogable rights. Thus, for example, as article 6 of the Covenant is non-derogable in its entirety, any trial leading to the imposition of the death penalty during a state of emergency must conform to the provisions of the Covenant, including all the requirements of article 14. Similarly, as article 7 is also non-derogable in its entirety, no statements or confessions or, in principle, other evidence obtained in violation of this provision may be invoked as evidence in any proceedings covered by article 14, including during a state of emergency, except if a statement or confession obtained in violation of article 7 is used as evidence that torture or other treatment prohibited by this provision occurred. Deviating from fundamental principles of fair trial, including the presumption of innocence, is prohibited at all times.’⁵²⁵

12. The Human Rights Committee has stated that ‘While reservations to particular clauses of article 14 may be acceptable, a general reservation to the right to a fair trial would be incompatible with the object and purpose of the Covenant’.⁵²⁶

D. The presumption of innocence

13. A fundamental principle of the right to fair trial is the right of every person charged with a criminal offence to be presumed innocent unless and until proven guilty in accordance with the law after a fair trial.⁵²⁷ This right is absolute even during times of emergency.⁵²⁸

14. This right applies from when a detainee is suspected of or charged with a criminal offence,⁵²⁹ right through until a conviction is confirmed following a final appeal. It applies to all public officials, including prosecutors and police.⁵³⁰ The presumption of innocence can be infringed by, for example, unqualified public statements by the police or prosecution which refer to an individual as the

⁵²⁵ Human Rights Committee, General Comment No.32, CCPR/C/GC/32 (2007), para 6.

⁵²⁶ Human Rights Committee, General Comment No.32, CCPR/C/GC/32 (2007), para 5. See also its General Comment, No. 24 CCPR/C/21/Rev.1/Add.6 (1994).

⁵²⁷ Article 11 of the UDHR, Article 14(2) of the ICCPR, Article 16 Arab Charter. Article 14, Palestinian Basic Law.

⁵²⁸ Human Rights Committee, General Comment No.32, CCPR/C/GC/32 (2007), paras 6, 11 and 16.

⁵²⁹ UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, GA, 9 December 1988, principle 36(1).

⁵³⁰ Human Rights Committee General Comment No.13, HRI/GEN/1/Rev.6 at 135 (2003), para. 7. The presumption of innocence is *not*, however, considered to be violated if the authorities inform the public about criminal investigations and in doing so name a suspect, or state that a suspect has been arrested or has confessed, provided there is no declaration that the person is guilty: *Krause v. Switzerland* 6 October 1983, and *Worm v Austria*, 29 August 1997.

perpetrator of an offence,⁵³¹ or by the dismissal of the accused from their post at work while criminal proceedings were ongoing.⁵³²

15. The presumption of innocence requires the following:
 - a. The court should not predetermine the case.
 - b. The burden of proof rests on the prosecution to prove the guilt of the accused beyond reasonable doubt.⁵³³
 - c. Treatment of the accused should not be such that he is presumed guilty. If, for example, 'the expression of a hostile attitude from the public or support for one party in the court room that is tolerated by the court, thereby impinging on the right to defence, or is exposed to other manifestations of hostility with similar effects', the hearing will be unfair.⁵³⁴ Holding the accused in a cell within the courtroom or requiring the accused to wear handcuffs, shackles or prison uniform, could impact on the presumption of innocence.⁵³⁵
16. Once a person is acquitted, that judgment is binding on all state authorities, and therefore police and prosecutors should refrain from questioning a person's innocence.
17. Acquittal of a criminal offence does not prohibit courts from establishing civil liability based on the same set of facts and using a lower standard of proof. However, it may also be relevant in relation to compensation proceedings which raise suspicions about an individual's guilt.
18. How long an individual is in pre-trial detention should not be taken as evidence of guilt.⁵³⁶ The Human Rights Committee has recognised that an excessive length of time on remand, in one case over nine years, may affect the presumption of innocence.⁵³⁷

Obligations on the media

19. The presumption of innocence also applies to the media and the manner in which they report any court proceedings. The media and public authorities should avoid undermining the presumption of innocence,⁵³⁸ although clear instructions to the jury can protect against this.⁵³⁹

⁵³¹ European Court, *Alenet de Ribemont v France*, 10 February 1995.

⁵³² European Court, *Celik v Turkey*, 16 July 2013.

⁵³³ Article 66(3) of the ICC and Human Rights Committee General Comment No. 13, HRI/GEN/1/Rev.6 at 135 (2003), para. 7. Communication 1870/2009, *Sobhraj v Nepal*, 27 July 2010, para 7.3.

⁵³⁴ Human Rights Committee General Comment No.32, CCPR/C/GC/32 (2007), para 30. Communication 770/1997, *Gridlin v Russian Federation*, 18 July 2000, para 8.2.

⁵³⁵ Human Rights Committee General Comment No.32, CCPR/C/GC/32 (2007), para 30.

⁵³⁶ *Ibid.* Human Rights Committee Concluding Observations Argentina, CCPR/CO/70/ARG (2000), para 10.

⁵³⁷ Human Rights Committee Communication 788/1997, *Cagas v Philippines*, 23 October 2001, para 7.2.

⁵³⁸ *Ibid.*

⁵³⁹ Human Rights Committee Communication 1347/2005, *Dudko v Australia*, 23 July 2007, para 6.3. See also *Gridlin v Russian Federation*, para 8.3.

20. The presumption of innocence will be violated if a statement of a public official concerning a person charged with a criminal offence reflects an opinion that he is guilty before he has been proved so according to law. The presumption of innocence may be infringed not only by a judge or court but also by others representing public authorities, such as the police, prosecutors or other government officials. Public officials in their statements must therefore take care with the choice of words before a person has been tried and found guilty of an offence. Whether a statement of a public official is in breach of the presumption of innocence must be determined in the context of the particular circumstances in which the statement is made.⁵⁴⁰

The freedom from self-incrimination and the right to silence

21. The right not to incriminate oneself is an essential guarantee to ensure that the prosecution in a criminal case seeks to prove their case against the defendant without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused.⁵⁴¹

22. Protection from self-incrimination applies to all criminal proceedings and it is not confined to statements of admission of wrongdoing nor to remarks that are directly incriminating.⁵⁴²

23. An accused cannot therefore be compelled to testify against himself in court.

24. It is still permissible to require the production of other evidence including blood and bodily samples and, in some limited circumstances, to compel an individual to answer questions. If the law requires an individual to answer questions, a failure to do so may result in the offence of non-cooperation with the authorities.⁵⁴³

25. The right to silence means that an individual cannot be convicted solely on the basis of the accused remaining silent or refusing to answer questions.

26. This also means that the accused cannot be compelled, through direct or indirect physical or psychological means, to confess.⁵⁴⁴

E. Access to court

27. The right of access to court has been read into the notion of a fair trial. The Human Rights Committee has seen this as a 'key element' of human rights⁵⁴⁵

⁵⁴⁰ European Court, *Butkevicius v. Lithuania*, 26 June 2002.

⁵⁴¹ Article 14(3)(g) ICCPR. Human Rights Committee General Comment No.13, HRI/GEN/1/Rev.6 at 135 (2003) para 14; Communication 253/1987, *Kelly v Jamaica*, 8 April 1991, *Saunders v UK*, European Court.

⁵⁴² *Heaney & McGuinness v Ireland*, European Court, 21 March 2001

⁵⁴³ Human Rights Committee Communication 777/1997, *Lopez v Spain*, 25 November 1999, para 6.4.

⁵⁴⁴ Human Rights Committee General Comment No.32, CCPR/C/GC/32 (2007), para 41. Human Rights Committee Communication 912/2000, *Deolall v Guyana*, 1 November 2004, para 5.1.

⁵⁴⁵ Human Rights Committee, General Comment No.32, CCPR/C/GC/32 (2007), para 2. See also Communication 1015/2001, *Perterer v Austria*, 20 July 2004, para 9.2.

and the right to equality before the courts is recognised by Article 10 UDHR as well as Article 14(1) ICCPR and Article 12 of the Arab Charter.

28. The crucial aspect of the right to a fair trial is that it is not simply a matter for the State to respect the right to a fair trial. Governments must also put into place a legal and institutional framework to protect it. As such the right to a fair trial requires the State to provide, amongst other things:

- Availability of legal assistance, including legal aid;
- A prosecution service; and
- A trained and independent judiciary.

29. Furthermore, as the Special Rapporteur on the Independence of Judges and Lawyers has reiterated, 'access to justice should be unrestricted and effective'.⁵⁴⁶ This includes:

- There should be no discrimination and coercion;
- Conditions should favour the admissibility of the action;
- The necessary legal assistance should be provided;
- Remedies should be genuinely able to achieve the desired objective.⁵⁴⁷

30. Systematic attempts to prevent individuals accessing courts or tribunals will violate this right.⁵⁴⁸

31. The right of equal access does not necessarily apply to the right to appeal, and is focused on procedures at the first instance.⁵⁴⁹

32. This right of access is available to 'all individuals, regardless of nationality or statelessness, or whatever their status, whether asylum seekers, refugees, migrant workers, unaccompanied children or other persons, who may find themselves in the territory or subject to the jurisdiction'.⁵⁵⁰

33. Access to court is not an absolute right; restrictions are permitted but only in so far as they have are prescribed by law, pursue a legitimate aim on objective and reasonable grounds, and are proportionate, and if such a restriction would undermine the essence of the right itself.⁵⁵¹ Reasonable limitation periods and time limits can be lawful,⁵⁵² as are reasonable fees if appropriate for the administration of justice.⁵⁵³

⁵⁴⁶ Report of Special Rapporteur on the Independence of Judges and Lawyers, A/HRC/8/4, 13th May 2008, para 20.

⁵⁴⁷ Ibid.

⁵⁴⁸ Human Rights Committee, Communication No.468/1991, *Oló Bahamonde v Equatorial Guinea*, 20 October 1993, para 9.4.

⁵⁴⁹ Human Rights Committee General Comment No.32, CCPR/C/GC/32 (2007), para 12.

⁵⁵⁰ Ibid, para 9.

⁵⁵¹ Ibid, paras 9 and 18.

⁵⁵² *Stubbings v UK*, European Court, 22 October 1996

⁵⁵³ Human Rights Committee Communication 1514/2006, *Casanovas v France*, 28 October 2008, para 113.

34. Individuals are free to waive their rights of access to court by agreeing to arbitration. However, such agreements must be genuinely voluntary and must be subjected to careful review to ensure the applicant was not subject to constraint.⁵⁵⁴ They should also not prevent the right to access to a court.⁵⁵⁵
35. If individuals cannot access the court or tribunal because of their race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, not only will the right of access be violated,⁵⁵⁶ it is also likely this will violate provisions on non-discrimination and equality.⁵⁵⁷
36. Similar cases must be dealt with in similar ways, unless it is possible to justify on objective and reasonable grounds, different procedures for particular cases.⁵⁵⁸
37. The right of equal access to the courts applies both to the prosecution and defence.⁵⁵⁹
38. The right must also be practically viable: 'a system in which an individual's attempts to access the competent courts or tribunals are systematically frustrated...de facto runs counter to the guarantee of Article 14 of the ICCPR'.⁵⁶⁰ Therefore:
- If there is insufficient information about the location and time of the hearing, this may violate the right of access.
 - The layout of a building in which the court is housed needs to be considered if this impacts on the rights of persons with disabilities or older people.⁵⁶¹
 - Legal assistance may be required to ensure access⁵⁶² and imposition of fees or a uniform costs award⁵⁶³ have also been held by the Human Rights Committee to prevent access to justice.⁵⁶⁴
 - Requiring individuals to travel, for example, to a different location, to appeal a decision may be considered unreasonable and in violation of this right.⁵⁶⁵

⁵⁵⁴ *Deweert v Belgium*, European Court, 27 February 1980

⁵⁵⁵ Report of the Special Rapporteur on the independence of Judges and Lawyers, A/HRC/8/4, para 35.

⁵⁵⁶ Human Rights Committee, General Comment No.32, CCPR/C/GC/32 (2007), para 9; General Comment No.18 HRI/GEN/1/Rev.6 at 146 (2003), para 7.

⁵⁵⁷ See e.g. Human Rights Committee, Communication 202/1986, *Ato del Avellanal v Peru*, 20 October 1988, para 10.2.

⁵⁵⁸ Human Rights Committee General Comment No.32, CCPR/C/GC/32 (2007), para 14.

⁵⁵⁹ Human Rights Committee, Communication 1086/2002, *Weiss v Austria*, 3 April 2003, para 9.6.

⁵⁶⁰ Human Rights Committee General Comment No.32, CCPR/C/GC/32 (2007), para 9; Communication 468/1991, *Oló Bahamonde v Equatorial Guinea*, 20 October 1993, para 9.4.

⁵⁶¹ Report of the Special Rapporteur on the Independence of Judges and Lawyers, A/HRC/8/4, para 32.

⁵⁶² Human Rights Committee General Comment No.32, CCPR/C/GC/32 (2007), para 10.

⁵⁶³ Human Rights Committee Communication 779/1997, *Aarela and Nakkalajarvi v Finland*, 24 October 2001, para 7.2.

⁵⁶⁴ Human Rights Committee Communication 646/1995, *Lindon v Australia*, 25 November 1998, para 6.4.

⁵⁶⁵ Report of the Special Rapporteur on the Independence of Judges and Lawyers, A/HRC/8/4, para 31. See also ECHR, *Perez de Rada Cavanilles*, 116/1997/900/1112, 1998.

F. Access to a Lawyer

The right of access to legal assistance

39. An individual has a right to have access to the services of a lawyer to assist them to prepare their defence and at all stages of the proceedings.⁵⁶⁶ This encompasses the following:
40. The right requires prompt access to a lawyer,⁵⁶⁷ from the early stages of the investigation, as well as the ability to meet with them in private and confidentially.⁵⁶⁸
41. Every individual can represent themselves in court proceedings and consequently should not be obliged to take any lawyer appointed by the state.⁵⁶⁹ This is not an absolute right and can be restricted if the interests of justice require, such as if there is a persistent obstruction to the conduct of the trial, the individual is unable to act in their own interests, or the witnesses are particularly vulnerable.⁵⁷⁰ The individual should be informed, however, of the right to access legal assistance.⁵⁷¹
42. There is a right to be defended by a lawyer of one's own choosing.⁵⁷² This applies to both criminal and civil proceedings.⁵⁷³ However, this is not an absolute right and can be denied when an individual relies on legal aid, or in order to ensure standards of professional conduct are maintained. Similarly it is a right which can also be waived.
43. Counsel should be 'able to advise and to represent persons charged with a criminal offence in accordance with generally recognized professional ethics without restrictions, influence, pressure or undue interference from any quarter'.⁵⁷⁴
44. The Human Rights Committee has noted that access to legal assistance needs to be:
- Prompt;
 - Obtained privately;

⁵⁶⁶ Article 14(3)(d) ICCPR. Article 16(4) Arab Charter; Article 14 Palestinian Basic Law.

⁵⁶⁷ Human Rights Committee General Comment No.32, CCPR/C/GC/32 (2007), para 34. See Arab Charter, Article 16(1).

⁵⁶⁸ Ibid.

⁵⁶⁹ Human Rights Committee Communications 623/1995, 624/1995, 626/1995, 627/1995, *Domukovsky and Others v Georgia*, 29 May 1998.

⁵⁷⁰ Human Rights Committee General Comment No.32, CCPR/C/GC/32 (2007), para 37.

⁵⁷¹ UN Basic Principles on the Role of Lawyers, para 1.

⁵⁷² Article 14(3)(b) ICCPR.

⁵⁷³ UN Basic Principles on the Role of Lawyers, para 5.

⁵⁷⁴ Human Rights Committee General Comment No.32, CCPR/C/GC/32 (2007), para 34.

- Confidential: communications between a lawyer and their client are privileged.⁵⁷⁵ They should not, for example, be held with investigators;⁵⁷⁶
- Free of charge if the person has insufficient means to pay.⁵⁷⁷

Legal aid

45. Free legal assistance applies in the context of both civil and criminal proceedings.⁵⁷⁸ The Inter-American Court has held that failure to provide legal assistance can amount to discrimination on the basis of economic status⁵⁷⁹ and the Basic Principles on the Role of Lawyers note that governments should 'ensure the provision of sufficient funding and other resources for legal services to the poor and, as necessary, to other disadvantaged persons'.⁵⁸⁰ This right will arise if the person does not have sufficient means to pay and that the interests of justice require it.⁵⁸¹ In order to decide if this is the case, several factors will be taken into account:

- The gravity of the offence;⁵⁸²
- The complexity of the case;
- The ability of the defendant to understand and present the relevant arguments without assistance;⁵⁸³
- The severity of the possible penalty, particularly if the result will be deprivation of liberty.⁵⁸⁴ Where there is imposition of the death penalty, the State must provide free legal assistance.⁵⁸⁵

46. The lawyer provided should be one with the necessary competence and expertise relevant to the offence.⁵⁸⁶ Equally they should be able to 'practice their profession without undue hindrance'.⁵⁸⁷

⁵⁷⁵ G Human Rights Committee General Comment No.32, CCPR/C/GC/32 (2007), para 34. See also UN Basic Principle on the Role of Lawyers, para 8; UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by GA, 9 December 1988, principle 18.

⁵⁷⁶ Human Rights Committee Communication 1117/2002, *Khomidova v Tajikistan*, 29 July 2004, para 6.4. See before the European Court: *Ocalan v Turkey*, 12 May 2005.

⁵⁷⁷ See e.g. Human Rights Committee Communications No.646/1995, *Lindon v Australia*, 25 November 1998, para 6.5; No.341/1988, *ZP v Canada*, 11 April 1991, para 5.4; No.383/1989, *HC v Jamaica*, 28 July 1992, para 6.3.

⁵⁷⁸ See Article 16(4) Arab Charter.

⁵⁷⁹ Inter-American Court of Human Rights, Advisory Opinion OC-11/90, 10 August 1998, para 22.

⁵⁸⁰ Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

⁵⁸¹ Article 14(3)(d) ICCPR. Human Rights Committee Communication 1417/2005, *J. O., Z. S., and S. O. v Belgium*, 28 October 2008.

⁵⁸² Human Rights Committee Communication 646/1995, *Lindon v Australia*, 25 November 1998, para 6.5.

⁵⁸³ *Pham Hoang v France* [1992] ECHR 61.

⁵⁸⁴ *Benham v UK*, [1996] ECHR 22, para 59.

⁵⁸⁵ Communication 845/1999, *Kennedy v Trinidad and Tobago*, 31 December 1999.

⁵⁸⁶ UN Basic Principles on the Role of Lawyers, para 6.

⁵⁸⁷ *Elci v Turkey*, European Court, 24 March 2004

47. These principles can apply to civil proceedings, although this is not expressly mentioned by some of the treaties, including Article 14(3)(d) ICCPR.⁵⁸⁸

48. Legal aid does not automatically have to be provided in appeal proceedings: in such circumstances the likelihood of success will be considered as a relevant factor.⁵⁸⁹

G. What is a criminal charge/offence?

49. The right to a fair trial in criminal proceedings is triggered, according to Article 14 ICCPR, in respect of a criminal charge or offence. Fair trial rights apply not only to court proceedings but also to the stages which both precede and follow them. A State cannot escape its obligations under the right to a fair trial and the application of criminal procedural safeguards by seeking to classify criminal matters as non-criminal, yet at the same time retaining criminal sanctions.⁵⁹⁰

50. However fair trial rights can also be engaged when someone is significantly disadvantaged by an investigation, i.e. before they are charged with a criminal offence⁵⁹¹, but will not apply to proceedings which are not determinative of a criminal charge, e.g. pre-trial hearings concerning trial arrangements.⁵⁹²

51. Whether something amounts to a criminal charge depends on:

- Those acts considered under domestic law to be punishable;
- The nature of the offence, or the potential that this could apply to acts that are criminal in nature; and
- Whether conviction results in sanctions that 'regardless of their qualification in domestic law, must be regarded as penal because of their purpose, character or severity'.⁵⁹³

52. Classification as non-criminal in domestic law is relevant but not definitive.⁵⁹⁴

53. When assessing the nature of the offence, the following factors indicate that the offence is criminal:

⁵⁸⁸ Similarly, Article 6(3)(c) ECHR, see *Steele v UK*, [2005] ECHR 103. Human Rights Committee General Comment No.32, CCPR/C/GC/32 (2007), para 10.

⁵⁸⁹ Human Rights Committee Communication 341/1988, *Z. P. v Canada*, 11 April 1991.

⁵⁹⁰ The European Court has held that a criminal charge is an autonomous concept, and a charge is "the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence", *Deweert v Belgium* 27 February 1980, para 46.

⁵⁹¹ *Funke v France*, 25 February 1993.

⁵⁹² *Korellis v Cyprus*, 3 December 2002.

⁵⁹³ Human Rights Committee, General Comment No.32, CCPR/C/GC/32 (2007), para 15; Communication 1051/2001, *Perterer v Austria*, 10 July 2004, para 9.2. For comparable criteria under the ECHR, see *Engel v Netherlands*, [1976] ECHR 3, paras 80-85.

⁵⁹⁴ For example, *Benham v UK* [1996] ECHR 22; *Engel v Netherlands*, *ibid*, para 81.

- If the offence can be committed by everyone and not just a restricted group, such as doctors or accountants, and the purpose is to punish and deter;⁵⁹⁵
- Whether the proceedings are instituted by a public body with statutory powers of enforcement;⁵⁹⁶
- Whether the imposition of a penalty is dependent on a finding of culpability.⁵⁹⁷

54. As to the purpose, character or severity of the penalty, if the penalty is imprisonment, or can include imprisonment, such as imprisonment in default of a fine, this is likely to be a criminal charge.⁵⁹⁸ This will include situations where the offence is part of a State's separate administrative enforcement regime, not the criminal justice system.⁵⁹⁹ Financial penalties may also amount to a criminal charge, for example fines, tax penalties, particularly if they are high.⁶⁰⁰ By contrast, freezing of assets,⁶⁰¹ and regulatory offences which can only result in disqualification are unlikely to be regarded as criminal. The severity of the penalty will be the decisive factor in offences against military and prison discipline.

H. Civil rights and obligations

55. Article 14 ICCPR provides for rights of access to the courts in relation to civil proceedings.⁶⁰² The Human Rights Committee has noted that the concept of 'suit at law'/'droits et obligations de caractère civil' (in French) and its interpretation in other languages depends on the 'nature of the right in question rather than on the status of one of the parties or the particular forum provided by domestic legal systems for the determination of particular rights'.⁶⁰³

56. In order to determine whether the proceedings are 'civil' and therefore subject to the protection of the relevant treaty, one first needs to look at the extent of the right or obligation in national law.

57. The Human Rights Committee's General Comment 32 provides a useful summary of suits at law or civil proceedings. These include:

⁵⁹⁵ *Benham v UK*, para 56; *Weber v Switzerland*, [1990] ECHR 13, para 33; *Demicoli v Malta*, [1991] 14 EHRR 47, para 33.

⁵⁹⁶ *Ozturk v Germany*, 24 February 1984.

⁵⁹⁷ *Benham v UK UK* [1996] ECHR 22

⁵⁹⁸ *Engel v Netherlands*, [1976] ECHR 3, para 81.

⁵⁹⁹ *Ozturk v Germany*, 24 February 1984.

⁶⁰⁰ *Lauko v Slovakia*, [1998] ECHR 82, para 58.

⁶⁰¹ Human Rights Committee, Communication 1472/2006, *Sayadi and Vinck v Belgium*, 22 October 2008, para 10.11.

⁶⁰² There is no specific reference in the Arab Charter to civil proceedings, although Article 12 refers generally to equality before the courts and tribunals. Article 30 of the Palestinian Basic Law provides for a right to submit a case to court.

⁶⁰³ General Comment No.32, CCPR/C/GC/32 (2007), para 16; see also Communication No. 112/1981, *Y.L. v. Canada*, paras. 9.1 and 9.2. *Kaur v Canada*, Communication 1455/2006, UN Doc.CCPR/C/OP/94/D/1455/2006 (2008), para 7.5.

- judicial procedures aimed at determining rights and obligations pertaining to the areas of contract, property and torts in the area of private law;
- equivalent notions in the area of administrative law such as the termination of employment of civil servants for other than disciplinary reasons;⁶⁰⁴
- the determination of social security benefits;⁶⁰⁵
- the pension rights of soldiers;⁶⁰⁶
- procedures regarding the use of public land⁶⁰⁷ or the taking of private property.

58. In addition, it may cover other procedures which, however, must be assessed on a case by case basis in the light of the nature of the right in question.⁶⁰⁸

59. If the national law does not provide any entitlement to the individual, then there is no 'suit at law'.⁶⁰⁹ So the Human Rights Committee has said the right did not apply where there was no right,⁶¹⁰ for example,

- to be promoted to a higher position in the civil service;⁶¹¹
- to be appointed as a judge;⁶¹²
- to have the death penalty commuted by an executive body.⁶¹³

60. Similarly the right will not apply if the measures taken against them are subject to a higher administrative body. For example:

- Tax obligations and assessments of tax;
- Education rights;
- Right to stand for public office and the right to vote;
- Right of political parties to continue their activities;
- Refusal to issue a passport;
- Right of access to information, unless such information must be disclosed pursuant to Article 8⁶¹⁴, or where such information may assist in establishing a claim for damages⁶¹⁵;
- Imposition of reporting restrictions on the press preventing reporting of a public trial;

⁶⁰⁴ Communication No. 441/1990, *Casanovas v. France*, 19 July 1994, para. 5.2.

⁶⁰⁵ Communication No. 454/1991, *Garcia Pons v. Spain*, para. 9.3

⁶⁰⁶ Communication No. 112/1981, *Y.L. v. Canada*, para. 9.3.

⁶⁰⁷ Communication No. 779/1997, *Äärelä and Näkkäläjätvi v. Finland*, 24 October 2001, paras. 7.2 – 7.4.

⁶⁰⁸ Human Rights Committee General Comment No.32, CCPR/C/GC/32, para 16.

⁶⁰⁹ *Kolanowski v Poland*, Human Rights Committee, Communication 837/1998, UN Doc.CCPR/C/78/D/837/1998, (2003), para 6.4; *Fernandez v Spain*, Human Rights Committee, Communication 1396/2005, UN Doc.CCPR/C/85/D/1396/2005 (2005), para 6.3. See also before the European Court of Human Rights, *Roche v UK*, [2005] ECHR 926, paras 116-121.

⁶¹⁰ General Comment No.32, CCPR/C/GC/32 (2007), para 17.

⁶¹¹ Communication No. 837/1998, *Kolanowski v. Poland*, para. 6.4.

⁶¹² Communications No. 972/2001, *Kazantzis v. Cyprus*, para. 6.5; No. 943/2000, *Jacobs v. Belgium* para 8.7, and No. 1396/2005, *Rivera Fernández v. Spain*, para. 6.3.

⁶¹³ Human Rights Committee Communication No. 845/1998, *Kennedy v. Trinidad and Tobago*, para. 7.4.

⁶¹⁴ *Gaskin v UK*

⁶¹⁵ *McGinley & Egan v UK*

- Obligations to perform military or civic service.
- Minor punitive measures imposed on civil servants, armed forces and prisoners; except where the result is dismissal from employment⁶¹⁶ or deprivation of liberty.⁶¹⁷ Both will have the protection of Article 14(1) ICCPR.

61. Although the right does not apply to extradition, expulsion and deportation procedures,⁶¹⁸ Article 13 of the ICCPR in conjunction with Article 14 requires that asylum seekers and refugees have a right of access to courts and tribunals.⁶¹⁹ However, there are several points to note:

62. If an alien is lawfully in the territory of a state, this does not invoke the protection of Article 14 ICCPR,⁶²⁰ although it will invoke Article 13. Here Article 13 will require that the expulsion must be:

- Be made in accordance with the law;
- The individual must have the opportunity to give reasons against their expulsion;
- They must have the case reviewed by, and be represented in this context, a competent authority or persons designated as such. Such protections do not apply if there are national security concerns.
- Such guarantees also need to be interpreted in light of Article 14 and fair trial provisions.⁶²¹

63. Secondly, for aliens unlawfully in the territory, neither Articles 13 nor 14 apply, unless the lawfulness is in dispute.⁶²²

64. Lastly, for all other proceedings, whether they be civil or criminal, where an alien is a party, Articles 13 and 14 will apply.

I. The right to be informed promptly in a language which he understand and in detail, of the nature and cause of the accusation against him⁶²³

65. An individual needs to be informed, in a manner which they understand, of the nature of the charges against them. This enables them to begin preparing their defence.⁶²⁴

⁶¹⁶ Human Rights Committee, Communication 441/1990, *Casanovas v France*, 19 July 1994, para 5.2; Communication 2015/2001, *Perterer v Austria*, 20 July 2004 para 9.2.

⁶¹⁷ *Engel v Others v The Netherlands*, [1976] ECHR 3, para 81.

⁶¹⁸ Human Rights Committee General Comment No.32, CCPR/C/GC/32 (2007), para 17.

⁶¹⁹ *Ibid.*

⁶²⁰ Human Rights Committee General Comment No.32, CCPR/C/GC/32 (2007), para 62. *Kaur v Canada*, Communication 1455/2006, UN Doc.CCPR/C/94/D/1455/2006 (2008), para 7.5; *Chadzjian v The Netherlands*, Communication 1494/2006, UN Doc.CCPR/C/93/D/1494/2006 (2008), para 8.4.

⁶²¹ Human Rights Committee General Comment No.32, CCPR/C/GC/32 (2007), para 62; Communication 961/2000, UN Doc.CCPR/C/81/D/961/2000 (2004), para 6.4.

⁶²² Human Rights Committee, General Comment 15, (1986), para 9.

⁶²³ Article 14(3)(a) ICCPR; Article 6(3)(a), ECHR

⁶²⁴ In *Brozicek v Italy* the applicant was German and therefore he needed the charge properly explained to him in a language which he could understand.

66. The requirement of promptness refers to the need to provide the individual with the information as soon as they are formally charged or the individual is named publicly.⁶²⁵
67. This can be done orally or in writing, but if orally then it must be later confirmed in writing.⁶²⁶
68. The information should be detailed and include the charge, the acts alleged to have been committed and the law under which the charge falls.⁶²⁷ It should enable the individual to understand fully with what they are being charged and why. It may be possible to amend the indictment from that with which the individual was initially charged if the resulting conviction is based on the same facts.⁶²⁸

J. The right to have adequate time and facilities for the preparation of his defence⁶²⁹

69. The adequate time requirement depends on the nature and complexity of the case.⁶³⁰
70. There should be disclosure of the evidence and documents the prosecution plans to present to the court,⁶³¹ in particular, in the context of criminal proceedings, exonerating evidence,⁶³² with sufficient time to examine it. For example, notification of the charges against the accused two days before trial will violate Article 14(1) and (3) of the ICCPR.⁶³³ Where there is a late change of lawyer an adjournment may be necessary.⁶³⁴
71. In some instances it may be appropriate not to disclose information if this is necessary for a legitimate aim, is strictly necessary and the measures are proportionate. This should then be counter-balanced by the court to ensure the defendant is still then able to answer the case against them. So, for example, if an individual is provided with summaries of information on grounds

⁶²⁵ UN Human Rights Committee, CCPR General Comment No.32 CCPR/C/GC/32 (2007), para 31; and *Marques de Morais v Angola*, HRC Communication 1128/2002, 29 March 2005, para 5.4.

⁶²⁶ General Comment No.32, CCPR/C/GC/32 (2007), para 31.

⁶²⁷ General Comment No.32, CCPR/C/GC/32 (2007) *ibid.* *Pélissier and Sassi v France* [1999] ECHR 17, paras 51–52.

⁶²⁸ Human Rights Committee Communication 1128/2002, *Marques de Morais v Angola*, 29 March 2005, para 5.5. The European Court takes a more restrictive view, *Sadak and Others v Turkey* [2001] ECHR 479, para 57.

⁶²⁹ Article 14 ICCPR ; Article 16(2) Arab Charter. UN Human Rights Committee, CCPR General Comment No.32 CCPR/C/GC/32 (2007), para 32.

⁶³⁰ *Williams v Jamaica*, Human Rights Committee Communication 561/1993, UN Doc CCPR/C/59/D/561/1993 (1997), para 9.3.

⁶³¹ Human Rights Committee General Comment No.32, CCPR/C/GC/32 (2007), para 33.

⁶³² Human Rights Committee Communication 904/2000, *Van Marcke v Belgium*, UN Doc CCPR/C/81/D/904/2000 (2004), para 8.3.

⁶³³ Human Rights Committee Communications 1152/2003 and 1190/2003, *Bee v Equatorial Guinea*, 31 October 2005, para 6.3.

⁶³⁴ *Goddi v Italy*. See also Communication 282/1988, *Smith v Jamaica* UN Doc. CCPR/C/47/D/282/1988 (1993), para 10.4; and *Kurbanov v Tajikistan*, 6 November 2003, para 7.3.

of security concerns, this can be sufficient to ensure there is no violation of the right.⁶³⁵

K. An independent and impartial tribunal?

72. A fundamental principle and prerequisite of a fair trial is that the tribunal charged with the responsibility of making decisions in a case must be established by law, and must be competent, independent and impartial and free from any interference by the State, the parties and external influences.⁶³⁶

73. Like the right to *habeas corpus*, the right to an independent and impartial tribunal is now considered to be an absolute and non-derogable right in international human rights law. The right to trial by an independent and impartial tribunal is so central to the due process of law that it “is an absolute right that may suffer no exception”.⁶³⁷

74. International standards relating to the selection of judges and their conditions of employment have been established to safeguard the independence and competence of the judiciary.⁶³⁸

What is a ‘tribunal’?

75. The Human Rights Committee has held that this is ‘a body, regardless of its denomination, that is established by law, is independent of the executive and the legislative branches of government or enjoys in specific cases judicial independence in deciding legal matters in proceedings that are judicial in nature’.⁶³⁹ This requires therefore that it be:

- a. Established by law;⁶⁴⁰
- b. Is competent to decide on the issues that come before it;
- c. Is independent and impartial.

76. There is no possibility of limitations or derogations from the requirements of competence, independence and impartiality.⁶⁴¹

⁶³⁵ Communication 1051/2002 *Ahani v. Canada*, 29 March 2004, para 10.4. Contrast with the Committee’s later Concluding Observations: Canada, CCPR/C/CAN/CO/5 (2006), para 13.

⁶³⁶ Article 14(1) ICCPR; Article 10 UDHR; Article 6(1) ECHR; see also OSCE Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE, Moscow, 1991, p.112, para 19.1.

⁶³⁷ Communication 263/1987, *Gonzalez del Rio v Peru*, 28 October 1992.

⁶³⁸ Basic Principles on the Independence of the Judiciary. See also Opinion no 1 (2001) of the Consultative Council of European Judges (CCJE), on Standards Concerning the Independence of the Judiciary and the Irremovability of judges Recommendation no. r (94) 12.

⁶³⁹ Human Rights Committee General Comment No.32, CCPR/C/GC/32 (2007), para 18.

⁶⁴⁰ Communication No.263/1987, *Gonzalez de Rio v Peru*, 28 October 1992, para 5.2

⁶⁴¹ Human Rights Committee General Comment No.32, CCPR/C/GC/32 (2007), para 19; Communication 263/1987, *Gonzalez del Rio v Peru*, 28 October 1992, para 5.2. See also General Comment No.29, CCPR/C/21/Rev.1/Add.11, para 16.

Established by law

77. This relates to the rule of law and requires that the courts or tribunals are set up and regulated by legislation which comes from parliament and does not depend on executive discretion; and that they are created in accordance with the legal requirements. Therefore any legislation should set out the requirements for appointment and dismissal, for example,⁶⁴² and it has been recommended by several human rights bodies that appointments and selection should be carried out by an independent body.⁶⁴³
78. Judges should be selected on the basis of their integrity and ability and there should be safeguards against selection on the basis of improper reasons.⁶⁴⁴

Competent

79. This applies to three elements:
- a. The individual judges themselves: there should be proper procedures governing the selection, appointment, promotion and retirement of judges.
 - b. The ability to make a binding decision: this decision cannot then be changed by another authority which impacts negatively on a party.
 - c. Jurisdiction: this may require states to establish a court or provide an existing court with the jurisdiction, over an issue where there is no current right of access.⁶⁴⁵

Independence

The Basic Principles on the Independence of the Judiciary⁶⁴⁶ provide that:

- The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.
- The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.
- The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.
- There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.

⁶⁴² *Posokhov v Russia*, [2003] ECHR 17, para 39.

⁶⁴³ E.g. Human Rights Committee, CCPR/C/79/Add.79, 1997, para 18; Special Rapporteur on Independence of Judges and Lawyers, A/HRC/8/4/Add.2, paras 16-18.

⁶⁴⁴ Basic Principles on the Independence of the Judiciary, principle 10.

⁶⁴⁵ General Comment No.32, CCPR/C/GC/32 (2007), para 18.

⁶⁴⁶ Endorsed by GA Resolutions 40/32, 29 November 1985; 40/146, 13 December 1985.

- Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.
- The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.
- It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.

80. Independence of judges and lawyers is now considered to be a principle of customary international law and a general principle of international law.⁶⁴⁷ It is an absolute principle and ‘a prerequisite to the rule of law’.⁶⁴⁸ The principle presumes the following:

- Freedom from direct or indirect influence from other branches of power, including the executive and legislature.⁶⁴⁹ This also includes the need for the independence from other actors.⁶⁵⁰
- This independence must be ‘guaranteed by the state and enshrined in the constitution or law of the country’.⁶⁵¹

81. Particularly important in this context is the independence of the prosecutor.⁶⁵² The UN Guidelines on the Role of Prosecutors provide that office of the prosecutor should be ‘strictly separated from judicial functions’ and that prosecutors should carry out their functions ‘impartially and avoid all political, social, religious, racial, cultural, sexual or any other kind of discrimination’.⁶⁵³ The Inter-American Commission on Human Rights has held that prosecutors ‘must be an organ independent of the executive branch and must have the attributes of irremovability and other constitutional guarantees afforded to members of the judicial branch’.⁶⁵⁴

82. How the members of the judiciary are appointed is also relevant to their independence.⁶⁵⁵ Appointment by the executive will not necessarily violate the requirement of independence,⁶⁵⁶ provided appointees are free from influence or pressure when carrying out their adjudicatory role. Independence does not

⁶⁴⁷ Report of the Special Rapporteur on the independence of judges and lawyers, 24 March 2009, A/HRC/11/41, para 14.

⁶⁴⁸ Bangalore Principles of Judicial Conduct.

⁶⁴⁹ Human Rights Committee, CCPR/C/GC/32, para 19.

⁶⁵⁰ Human Rights Committee, General Comment No.32, para 25; UN Basic Principles on the Independence of the Judiciary, UN GA Res.40/32, 40/146, 1985, para 4.

⁶⁵¹ Basic Principles; see also Beijing Statement of Principles of the Independence of the Judiciary in the LAWAISA Region, principle 4.

⁶⁵² Special Rapporteur on the Independence of judges and lawyers, E/CN.4/2006/52/Add.4, para 86.

⁶⁵³ Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, paras 10 and 13(a) respectively.

⁶⁵⁴ Inter-American Commission of Human Rights, Report on the Situation of Human Rights in Mexico, OEA/Ser.L/V/II.100, Doc. 7 rev. 1, para. 372.

⁶⁵⁵ General Comment No.32, CCPR/C/GC/32 (2007), para 19.

⁶⁵⁶ *Campbell v Fell v UK*, [1984] ECHR 8, para 79.

however have to be guarded by statute but should be assessed on all the basis of all the facts that are publicly known.

83. Also relevant is security of tenure.⁶⁵⁷ This includes procedures for dismissal, promotion, remuneration, suspension and termination of office and guarantees against irremovability.⁶⁵⁸ These procedures must be secured in law.⁶⁵⁹
84. Guarantees from external pressure: Independence also requires that each judge and tribunal member be free from outside instructions or pressure, whether from the executive, legislature, parties to the case or other members of the court or tribunal. The executive should not be able to control or direct the judiciary.⁶⁶⁰
85. A perception of independence is also important, although the possibility of influence may not necessarily amount of a lack of independence.⁶⁶¹
86. Judges should enjoy personal immunity from civil suits in respect of acts done while exercising their judicial functions.⁶⁶² The Special Rapporteur on the independence of judges and lawyers has also suggested there should be some form of criminal immunity.⁶⁶³ Such immunity should be balanced against the need to ensure the accountability of judges.

Impartiality

87. The requirement for an impartial court or tribunal embodies the protection against actual and presumed bias.
88. This is both subjective: the judges themselves should not allow themselves to be influenced by their own bias or preconceptions; and objective: the external observer must consider the court or tribunal to be impartial.⁶⁶⁴
89. Subjective bias may be displayed by for example biased directions to the jury.⁶⁶⁵
90. Objective bias requires not only that the state protect the judiciary from conflicts of interest,⁶⁶⁶ but also that there is a responsibility on the individual judge to excuse themselves from any cases in which such conflicts may arise. 'What

⁶⁵⁷ General Comment No.32, CCPR/C/GC/32 (2007), para 19. Basic Principles on the Independence of the Judiciary, Principle 12.

⁶⁵⁸ Special Rapporteur on Independence of judges and lawyers, A/HRC/11/41/Add.2, para 99.

⁶⁵⁹ Human Rights Committee General Comment No.32, CCPR/C/GC/32 (2007), para 20; *Pastukhov v Belarus*, Communication 814/1998, UN Doc.CCPR/C/78/814/1998 (2003, para 7.3.

⁶⁶⁰ Communication 468/1991, *Oló Baramonde v Equatorial Guinea*, 20 October 1993, para 9.4.

⁶⁶¹ *Belilos v Switzerland*, [1998] ECHR 4, para 67.

⁶⁶² Basic Principles on the independence of judges and lawyers.

⁶⁶³ A/HRC/11/41, para 66.

⁶⁶⁴ Human Rights Committee, General Comment No.32, CCPR/C/GC/32 (2007), para 21; Communication 387/1989, *Kartunnen v Finland*, 23 October 1992, para 7.2.

⁶⁶⁵ Communication 349/1988, *Wright v Jamaica*, 27 July 1992, para 3.3.

⁶⁶⁶ Human Rights Committee General Comment No.32, CCPR/C/GC/32 (2007), para 19.

is decisive is whether the fear can be objectively justified⁶⁶⁷ and that the fear is one that is reasonable.

91. The principle of impartiality demands that:

- Both judges and juries be unbiased;
- Proceedings are conducted fairly; and
- Decisions made solely on the evidence.⁶⁶⁸

92. The fact that a judge has dealt with the accused on a previous occasion will not necessarily cause the proceedings to be unfair. The key issue will be the nature and character of the previous decision.⁶⁶⁹ Where the prior involvement with the individual concerned the same or a related matter, this increases the likelihood that the proceedings will be unfair.⁶⁷⁰

93. Similarly, if the identity of judges are concealed, this also undermines their independence.⁶⁷¹

94. The independent and impartial role of prosecutors is also crucial in the context of ensuring a fair trial. The UN Guidelines on the Role of Prosecutors sets out guidelines to ensure their impartiality and independence.⁶⁷²

Anonymous judges, religious courts, Courts Martial, Military Tribunals, military judges

Anonymous/'faceless judges'

95. Although the Human Rights Committee has treated trials with anonymous judges as contrary to the requirements of independence and impartiality, this may not be the case on every occasion if this is done in the context of compliance with the requirements for derogation under Article 4 of the ICCPR.⁶⁷³ Such trials will, however, be treated with considerable caution.⁶⁷⁴

Religious courts

96. The Human Rights Committee has applied certain conditions to religious courts or those based on customary law. These are that:

- a. The proceedings should be limited to minor civil and criminal matters;
- b. They must meet the requirements of fair trial and other relevant guarantees of the Covenant;

⁶⁶⁷ Communication 1122/2002, *Castedo v Spain*, UN 20 October 2008, para 9.8.

⁶⁶⁸ See the Human Rights Committee decisions: Communication 387/1989, *Kartunnen v Finland*, 23 October 1992, and Communication 356/1989, *Collins v Jamaica*, 25 March 1993, and European Court, *Fey v. Austria*, 24 February 1993

⁶⁶⁹ European Court, *Hauschildt v Denmark*, 24 May 1989.

⁶⁷⁰ European Court, *Fatullayev v Azerbaijan*, 4 October 2010; *Chesne v France*, 22 April 2010.

⁶⁷¹ Inter-American Court, *Castillo Petruzzi v Peru*, 4 September 1998, Series C No.41 (1998).

⁶⁷² As adopted by the UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August – 7 September 1990.

⁶⁷³ Communication 577/1994, *De Polay v Peru*, UN 6 November 1997.

⁶⁷⁴ Communication 1058/2002, *Mas v Peru*, 16 November 2005.

- c. Their judgements must be validated by State courts in light of the guarantees set out in the Covenant;
- d. They can be challenged by the parties concerned in a procedure meeting the requirements of Article 14 of the Covenant.⁶⁷⁵

Military Judges

97. The presence of serving military (and for that matter, police) on a tribunal will compromise the independence of that tribunal if those service personnel are appointed by and belong to the military and are subject to military discipline.

98. There are legitimate doubts as to independence because:

- The military is subject to the orders of the executive; and
- Therefore reappointment of the judge is also in the hands of the executive.

99. These concerns cannot be cured by an assurance that no instructions will be given and the members of the tribunal are instructed to act independently from the executive.⁶⁷⁶ In *Ocalan* (a case concerning the trial of the leader of the Kurdish resistance movement in Turkey, the PKK) the last minute replacement of a military judge was insufficient to remedy the lack of independence.

Courts Martial

100. The key to the compatibility of courts martial with fair trial rights is the appointment process. Crucial to this is the involvement of civilians who are unrelated to the military hierarchy.⁶⁷⁷

Military Tribunals

101. As far as military or special tribunals are concerned, the Human Rights Committee has held that the basic requirements of Article 14 apply equally to them as they do to ordinary tribunals.⁶⁷⁸ Of particular importance is that these tribunals satisfy the obligations of independence and impartiality. As the Siracusa Principles state 'civilians shall normally be tried by the ordinary courts; where it is found strictly necessary to establish military tribunals or special courts to try civilians, their competence, independence and impartiality shall be ensured and the need for them reviewed periodically by the competent authority'.⁶⁷⁹

102. Such special or military courts can impact on the right to a fair trial in a number of ways including:

- Limiting the public nature of the trial;

⁶⁷⁵ Human Rights Committee, General Comment No.32, CCPR/C/GC/32 (2007), para 24.

⁶⁷⁶ European Court, *Incal v Turkey*, 9 June 1998.

⁶⁷⁷ *Cooper v UK*, 16 December 2003; *Grievés v UK*, 16 December 2003.

⁶⁷⁸ Human Rights Committee, General Comment No.13, HRI/GEN/1/Rev.6 at 135 (2003).

⁶⁷⁹ See also Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, UN Doc.E/CN.4/1985/4, Annex (1985). Concluding observations of the Committee Against Torture: Yemen, CAT/C/CR/31/4. See also Concluding observations of the Committee against Torture: Egypt, CAT/C/CR/29/4. See also Communication 1033/2001, *Singarasa v Sri Lanka*, 21 July 2004.

- Excluding the accused or lawyer from the courtroom,⁶⁸⁰
- Restricting the rights of individuals to communicate with their lawyers.⁶⁸¹

103. The Human Rights Committee, in noting the existence in certain countries of military tribunals that try civilians, has pointed out that 'the trying of civilians by such courts should be very exceptional and 'limited to cases where the State Party can show that resorting to such trials is necessary and justified by objective and serious reasons, and where with regard to the specific class of individuals and offences at issue the regular civilian courts are unable to undertake the trials'.⁶⁸²

104. However, the Human Rights Committee has not hesitated to say that civilians should not be tried by military courts,⁶⁸³ a view increasingly shared by other human rights bodies.⁶⁸⁴

105. During such military tribunal proceedings, allegations of violations of the rights of the accused should be able to be considered by the judges at any stage.⁶⁸⁵

106. Military tribunals responsible for determining the legality of conduct in the context of armed conflict are governed by principles of humanitarian law, or the laws of war, most notably the Geneva Conventions and their Protocols, as well as customary international law.⁶⁸⁶ Amongst other things, these provide for battlefield hearings to resolve doubts about the legal status of detainees captured by the military in combat.

107. Under these circumstances the laws governing wars will be the primary basis upon which to proceed. However, that does not mean human rights law plays no role or is silent during the process.

108. Military tribunals, even within the midst of an armed conflict, must still guarantee certain minimum safeguards in relation to a fair trial. These include ensuring:

- The impartiality of the tribunal;
- That the detainee has an opportunity to contest the factual basis for his/her detention;
- That the detainee is given the reasons for his/her detention;

⁶⁸⁰ Human Rights Committee, Communications No.468/1991, *Oló Baramunde v Equatorial Guinea*, 20 October 1993, para 9.4; No.1298/2004, *Becerra Barney v Colombia*, 11 July 2006, para 7.2.

⁶⁸¹ Communications 577/1994, *Polay Campos v Peru*, 6 November 1997, *Carranza Alegre v Peru*, para 7.5.

⁶⁸² General Comment No.32, CCPR/C/GC/32 (2007), para 22. *Kurbanov v Tajikistan*, Communications 1152/2003 and 1190/2003, 31 October 2005, para 6.3.

⁶⁸³ Concluding Observations Slovakia, CCPR/C/79/Add.79 (1997), para 20.

⁶⁸⁴ See, e.g. European Court, *Ergin v Turkey*, [2006] ECHR 529, para 45. Working Group on Arbitrary Detention, E/CN.4.2004/3, para 67. See also Civil and Political Rights including the questions of independence of the judiciary, administration of justice, impunity, 12 Sep 2006, A/61/384.

⁶⁸⁵ Human Rights Committee, General Comment No.13, HRI/GEN/1/Rev.6 at 134 (2003), para 15.

⁶⁸⁶ For example Article 5 of the Third Geneva Convention regarding the rights of prisoners of war.

- That the detainee has an opportunity to be heard within a reasonable time; and
- That the detainee has the right of access to a lawyer.

The situation of detainees in Guantanamo Bay has been condemned by numerous international and regional human rights bodies.⁶⁸⁷

L. Equality of arms

109. This principle requires that each party should be able to present their case⁶⁸⁸ and to contest the arguments brought by the other.⁶⁸⁹ This also relates to equality in how the case is presented, a particularly important issue in criminal trials. The adversarial nature of the trial is therefore important⁶⁹⁰ and documentary evidence should be able to be challenged.⁶⁹¹
110. It applies to both criminal and civil proceedings⁶⁹² and applies to issues throughout the proceedings.⁶⁹³ It also entails the ability of both the defendant and the prosecutor to appeal a decision.⁶⁹⁴
111. Parties should have access to and disclosure of documents and evidence and materials that each side plans to present in court.⁶⁹⁵
112. The prosecution plays a crucial role in ensuring the fairness of proceedings⁶⁹⁶ and has a duty to disclose all its evidence to the defence.⁶⁹⁷

The right to call witnesses and cross examination

113. The right includes the ability to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.⁶⁹⁸ The accused

⁶⁸⁷ See E/CN.4/2006/120; more recently, Human Rights Committee, Concluding Observations: USA, 23rd April 2014: CCPR/C/USA/CO/4.

⁶⁸⁸ Communication 1386/2005, *Gueorguiev v Spain*, 24 July 2007, para 6.3. See also before the European Court, *Steel and Morris v the United Kingdom* [2005] ECHR 103, para 59.

⁶⁸⁹ Communication 779/1997, *Åärelä and Näkkäläjärvi v Finland*, 24 October 2001, a 7.4.

⁶⁹⁰ *Rowe and Davis v the United Kingdom* [2000] ECHR 91, para 60.

⁶⁹¹ Communication 846/1999, *Jansen-Gielen v the Netherlands*, 3 April 2001, para 8.2.

⁶⁹² General Comment No.32, CCPR/C/GC/32 (2007), para 13.

⁶⁹³ Human Rights Committee, Communication No.1348/2005, *Dudko v Australia*, para 7.4.

⁶⁹⁴ Communication No.1086/2002, *Weiss v Austria*, 3 April 2003, para 9.6. Communication no.223/1987, *Robinson v Jamaica*, 30 March 1989, para 10.4

⁶⁹⁵ Concluding Observations by the Human Rights committee on Canada, CCPR/C/CAN/CO/5, para 13. HRC Communication 1117/2002, *Khomidova v Tajikistan*, 29 July 2004.

⁶⁹⁶ Guidelines on the Role of Prosecutors, which were adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1990.

⁶⁹⁷ Communication 14448/88, *Dombo Beheer B.V. v. The Netherlands*, 27 October 1993, para. 33; European Court, *McMichael v UK*, [1995] ECHR 8.

⁶⁹⁸ Article 14(1), (3)(e) ICCPR. Human Rights Committee, General Comment No.32, CCPR/C/GC/32 (2007), para 39; Communication 1623/2007, *Guerra de la Espriella v Colombia*, 18 March 2010. Communication 911/2000, *Nazarov v Uzbekistan*, 6 July 2004, para 6.3.

should have the same powers as the prosecution to cross examine witnesses.⁶⁹⁹ This should include the ability to challenge a witness statement.⁷⁰⁰

114. Evidence produced in trial should have been in the presence of the accused, although statements can have been made during the police investigation, for example.⁷⁰¹ All material relevant to the case should be disclosed.⁷⁰²
115. The right to call witnesses is subject to certain limitations:
- a. It only applies to those witnesses relevant for the defence.
 - b. There is a proper opportunity to question witnesses.⁷⁰³
 - c. It is primarily within the discretion of the national legislature to determine the rules for admissibility of evidence.⁷⁰⁴
116. As regards anonymous witnesses, in theory this will violate the principle of equality of arms unless, exceptionally, this is balanced against the interest of the defence.⁷⁰⁵ There may be certain instances, for example involving children as victims of sexual abuse, where additional protection will be required to protect them from intimidation.⁷⁰⁶ Anonymous evidence from law enforcement officers will have to be very strictly justified.⁷⁰⁷
117. The right also includes the right to call expert witnesses, provided there is an appearance of neutrality.⁷⁰⁸ This is not an absolute right and needs to be considered in light of what is appropriate in the administration of justice and within the discretion of the national court.⁷⁰⁹ Where expert witnesses are admitted, the defence should be able to examine that witness. For example, where the court refused an individual's request for a doctor who could verify injuries he claimed were the result of torture, this amounted to a violation of Articles 14 of the ICCPR.⁷¹⁰

M. Victim and witness protection

118. Courts have an obligation to protect witnesses and those who participate in the proceedings from any reprisals⁷¹¹ and the UN Convention Against Torture

⁶⁹⁹ Human Rights Committee, General Comment No.32, CCPR/C/GC/32 (2007), para 39.

⁷⁰⁰ European Court, *Bricmont v Belgium*, 7 July 1989.

⁷⁰¹ European Court, *Asch v Austria*, 26 April 1991.

⁷⁰² Human Rights Committee, Communications 464/1991 and 482/1991, *Peart v Jamaica*, 19 July 1995.

⁷⁰³ Human Rights Committee General Comment No.32, CCPR/C/GC/32 (2007), para 39.

⁷⁰⁴ General Comment No.32, CCPR/C/GC/32 (2007), para 39. Human Rights Committee Communications 1263/2004 and 1264/2004, *Khuseynova and Butaeva v Tajikistan*, 20 October 2008.

⁷⁰⁵ *Kostovski v the Netherlands* [1989] ECHR 20; *Doorson v Netherlands*, [1996] ECHR 14.

⁷⁰⁶ See e.g. UN ECOSOC, Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime, UN Doc E/Res/2005/20 (2005).

⁷⁰⁷ *Van Mechelen and others v Netherlands*, 23 April 1997.

⁷⁰⁸ See e.g. before the European Court, *Mirilashvili v Russia* [2008] ECHR 1669, para 178

⁷⁰⁹ *Ibid.*

⁷¹⁰ Communication 1117/2002, *Khomidova v Tajikistan*, 29 July 2004.

⁷¹¹ UN General Assembly Resolution, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UN Doc GA Res 40/34 (1985).

requires states to take measures 'to ensure that...witnesses are protected against all ill-treatment or intimidation as a consequence of ...evidence given'.⁷¹²

119. There are a number of rights that victims have during the proceedings, including access to information and to effective remedies. The UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power provides for a range of standards including the compassionate treatment of victims, prompt redress, permitting their views to be heard during the proceedings, providing them with appropriate assistance and avoiding unnecessary delay.⁷¹³ Particular attention should be paid to children and women and other vulnerable groups.⁷¹⁴

N. Trial within a reasonable time

120. The various treaties make reference for the individual to be tried 'without undue delay' or 'within a reasonable time'.⁷¹⁵ This has been interpreted as requiring that individuals are tried as expeditiously as possible.⁷¹⁶ A back log of cases before the courts is not a justifiable excuse for delay.⁷¹⁷ What is reasonable or otherwise will depend on the circumstances of the particular case.⁷¹⁸ However, the following issues will be considered:⁷¹⁹

- a. The complexity of the legal issues;
- b. The nature of the facts;
- c. The number of accused, parties or witnesses
- d. The conduct of the parties;
- e. The length of each stage;
- f. The impact on the individual's position;
- g. Whether remedies are available to speed up the proceedings;
- h. The result of any appeal;
- i. The relationship between the particular proceeding and another case;
- j. The implications of the case on the national law.

121. The right will apply in both criminal and civil proceedings. In civil cases the time runs from when the proceedings are started until the judgment is executed.⁷²⁰ While a delay of just over two years was not considered to violate

⁷¹² Article 13, UNCAT; Article 12(1) ICCPED. This is also a requirement under Article 9(1) ICCPR, Communication 1250/2004, *Rajapakse v Sri Lanka*, 5 Sep 2006.

⁷¹³ UN General Assembly Resolution, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UN Doc GA Res 40/34 (1985).

⁷¹⁴ See UN ECOSOC, Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime, UN Doc E/Res/2005/20 (2005).

⁷¹⁵ Article 14(3)(c) ICCPR; Article 14(5) Arab Charter.

⁷¹⁶ Human Rights Committee, General Comment No.32, CCPR/C/GC/32 (2007), para 35. Communication 899/1999, *Francis v Trinidad and Tobago*, 25 July 2002.

⁷¹⁷ See e.g. European Court, *Nogolica v Croatia*, 7 December 2006.

⁷¹⁸ Human Rights Committee, General Comment No.32, CCPR/C/GC/32 (2007), para 35.

⁷¹⁹ Communication 1060/2002, *Deisl v Austria*, 27 July 2004, paras 11.2–11.6; Communication 788/1999, *Cagas v Philippines* 23 October 2001, para 7.4.

⁷²⁰ European Court, *Scopelliti v Italy*, 23 Nov 1993.

the ICCPR,⁷²¹ seven years was held to be unreasonable.⁷²² However, issues relating to children, including child custody, and access,⁷²³ for example, need to be tried speedily, as do those involving health and employment.⁷²⁴

122. In criminal proceedings, the time runs from when the person is charged or arrested through to when the court provides its judgment including the finalisation of the appeals process.⁷²⁵ More stringent requirements may apply where the individual is on a serious charge or denied bail.⁷²⁶ For example, a 16 month delay in a murder trial has been considered unreasonable,⁷²⁷ but an 11 month period on heroin trafficking offences was not.⁷²⁸

O. Right to a public hearing

123. As required by Article 14(1) of the ICCPR, Article 13(2) of the Arab Charter, and noted in the UDHR Article 10, this refers to the ability not only of the parties to be present at the hearing but also the public. This is a duty which 'is not dependent on any request, by the interested party'.⁷²⁹

124. The right of the accused to be present in criminal proceedings is part of the concept of *audi alteram partem* ('hear the other side')⁷³⁰ and includes the right to an oral hearing. Written proceedings will not be sufficient to protect this right during criminal trials.⁷³¹

125. The right may also apply to the appeal proceedings if it involves questions of fact as well as law.⁷³²

126. The Human Rights Committee has held that criminal trials *in absentia* will only be tolerated when the defendant has been given ample notice, and adequate opportunity, to attend the proceedings.⁷³³

⁷²¹ Communication 441/1990, *Casanovas v France*, 19 July 1994.

⁷²² Communication 203/1986, *Hermoza v Peru*, 4 November 1988. See also European Court, *Mihajlovic v Croatia*, 7 July 2005.

⁷²³ Communication 1368/2005, *E.B. v New Zealand*, 16 March 2007.

⁷²⁴ European Court, *X v France*, 31 March 1992; *Obermeier v Austria*, 28 June 1990.

⁷²⁵ General Comment No.32, CCPR/C/GC/32 (2007), para 35.

⁷²⁶ Communication 899/1999, *Francis v Trinidad and Tobago*, 25 July 2002, para 5.4.

⁷²⁷ Communication 677/1996, *Teesdale v Trinidad and Tobago*, UN Doc CCPR/C/74/D/677/1996 (2002), para 9.3.

⁷²⁸ Communication 980/2001, *Hussain v Mauritius*, UN Doc CCPR/C/77/D/980/2001 (2002), para 6.5.

⁷²⁹ Communication 215/1986, *Van Meurs v The Netherlands*, UN HRI/GEN/1/Rev.9 (Vol. I) p.195 (1989), para 6.1.

⁷³⁰ Human Rights Committee, Communication 203/1986, *Hermoza v Peru*, 4 November 1988. See Article 16(3) Arab Charter.

⁷³¹ Communication 1623/2007, *Guerra de la Espriella v Colombia*, 18 March 2010, para 9.3.

⁷³² Communication 387/1989, *Karttunen v Finland*, 23 October 1992, para 7.3.

⁷³³ See for example Communication 699/1996, *Maleki v Italy*, 27 July 1999; Human Rights Committee General Comment No.13, HRI/GEN/1/Rev.6 at 135 (2003) para 11. Communication 1173/2003, *Benhadj v Algeria*, 20 July 2007, para 8.9. Useful guidelines are also provided by the Council of Europe Resolution (75) 11.

127. For civil proceedings, Article 14(1) ICCPR ‘may’ necessitate the presence of the individual.⁷³⁴ However, if one party is present, so should the other.⁷³⁵
128. Merely by absconding, a defendant does not necessarily waive his rights to a fair trial, permanently. Before an accused can be said to have impliedly, through his conduct, waived an important right under the right to a fair trial, it must be shown that he could reasonably have foreseen what the consequences of his conduct would be. Minimum safeguards must therefore be guaranteed.
129. The right also includes the right of the public to access the hearings. This requires that all hearings on the merits, although not necessarily pre-trial hearings or those on appeal,⁷³⁶ should be oral and in public.⁷³⁷
130. This right is a qualified right which can be limited in the interests of the protection of morals, public order, national security, the interest of the private lives of the parties, or in the interests of justice.⁷³⁸ This must be in order to respond to a pressing or social need, pursue a legitimate aim, be necessary and proportionate.⁷³⁹
131. The decision must be made public unless reasons can be shown otherwise.⁷⁴⁰ This may include, according to the Siracusa Principles, for example, where there are ‘specific findings announced in open court showing that the interest of the private lives of the parties or their families or of juveniles so requires; or the exclusion is strictly necessary to avoid publicity prejudicial to the fairness of the trial or endangering public morals, public order (ordre public), or national security in a democratic society.’⁷⁴¹
132. The duty to provide a public hearing may also be violated if, for example, the time and venue is not made known to the public,⁷⁴² or facilities are not provided to enable the public to attend. This includes, for instances, ensuring there is a large enough room for the hearing if there is public interest in the case.⁷⁴³ The obligation also requires that the State ensure that certain

⁷³⁴ Communication 767/1997, *Said v Norway*, 26 April 2000.

⁷³⁵ Communication 779/1997, *Åärelä and Näkkäläjärvi v Finland*, UN 24 October 2001.

⁷³⁶ Human Rights Committee General Comment No.32, CCPR/C/GC/32 (2007), para 28. Communication 301/1988, *RM v Finland*, UN Doc.CCPR/C/35/D/301/1989, para 6.4; and Communication 819/1998, *Kavanagh v Ireland*, UN Doc.CCPR/C/71/D/819/1998, 2001, para 10.4.

⁷³⁷ General Comment No.32, CCPR/C/GC/32 (2007), para 28.

⁷³⁸ *Ibid* para 29; Communication 80/1980, *Vasilskis v Uruguay*, UN Doc.CCPR/C/18/D/80/1980, 1983, para 11.

⁷³⁹ Human Rights Committee General Comment No.29, CCPR/C/21/Rev.1/Add.11 (2001) para 4. Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR, E/CN.4/1985/4, annex, para 10.

⁷⁴⁰ General Comment No.32, CCPR/C/GC/32 (2007), para 29.

⁷⁴¹ General Comment No.32, CCPR/C/GC/32 (2007), Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR, E/CN.4/1985/4, annex, para 38(b).

⁷⁴² Communication 215/1986, *Van Meurs v The Netherlands*, UN HRI/GEN/1/Rev.9 (Vol. I) p.195 (1989), para 6.2.

⁷⁴³ *Ibid*. Communication 1502/2006, *Marinich v Belarus*, 16 July 2010, para 10.5.

categories of individuals are not prohibited from attending,⁷⁴⁴ for example, because there is no disabled access.

P. The right to have the free assistance of an interpreter if he/she cannot understand or speak the language used in court⁷⁴⁵

133. This right applies to criminal proceedings, although it is possible in exceptional cases that this may also apply in civil proceedings.⁷⁴⁶ It will apply to aliens as well as nationals of the State in question⁷⁴⁷ and to all stages of proceedings, both written and oral,⁷⁴⁸ which are necessary for the individual to defend themselves.⁷⁴⁹

134. It must be shown that the level of understanding impacts on the enjoyment of the rights.⁷⁵⁰ Where, for example, the trial relating to the rape of a girl who was a member of an ethnic minority was held in Spanish without interpretation and the victim and others were unable to understand, a violation of ICCPR was held.⁷⁵¹ Similar protection would apply to those unable to understand the proceedings due to speech or hearing impediments.

135. Cultural elements also need to be taken into account as to the rights of particularly vulnerable groups including migrants, ethnic minorities and women.⁷⁵²

136. The right is not subject to qualification, and even if the accused is subsequently convicted, she or he cannot be ordered to pay the costs of an interpreter.⁷⁵³ However this right does not provide a right to conduct proceedings in the language of the defendant's choice.⁷⁵⁴

Q. Double jeopardy

137. This is the principle that no one should be tried or punished for an offence for which they have already been convicted or acquitted.⁷⁵⁵

⁷⁴⁴ Ibid.

⁷⁴⁵ Human Rights Committee, No.451/1991, *Harward v Norway*, para 9.5; No.219/1986, *Guesdon v France*, para 102. Inter-American Court of Human Rights, Advisory Opinion, 16/99, 1 October 1999, para 120.

⁷⁴⁶ Human Rights Committee General Comment No.32, CCPR/C/GC/32 (2007), para 13.

⁷⁴⁷ General Comment No.32, CCPR/C/GC/32 (2007), para 40

⁷⁴⁸ Ibid. See also *Harward v Norway*, para 9.5.

⁷⁴⁹ Communication 1033/2001, *Singarasa v Sri Lanka*, 24 July 2004.

⁷⁵⁰ Ibid.

⁷⁵¹ Communication 1610/2007, *L. N. P. v Argentina*, HRC 18 July 2011.

⁷⁵² Report of the Special Rapporteur on the Independence of Judges and Lawyers, A/HRC/8/4, paras 29-30.

⁷⁵³ *Ozturk v Germany*, 21 February 1984.

⁷⁵⁴ Communication 219/1986, *Guesdon v France*, UN Doc CCPR/C/39/D/219/1986 (1990). Communication 439/1990, *C. L. D. v France*, UN Doc CCPR/C/43/D/439/1990 (1991).

⁷⁵⁵ Article 14(7) ICCPR; Article 19(1) Arab Charter. See also Human Rights Committee General Comment No.32, CCPR/C/GC/32 (2007), para 55; UN Working Group on Arbitrary Detention, Opinion 36/1999, UN Doc/E/CN.4/2001/14/Add.1 (2000), para 9.

138. There are, however, exceptions to this:
- a. It does not apply where the case relates to the domestic jurisdiction of two states;⁷⁵⁶
 - b. If the individual has been tried in absentia, in violation of the requirements of due process, then he can be tried again in his presence.⁷⁵⁷
 - c. Where a higher court quashes a conviction or orders a retrial.⁷⁵⁸
 - d. Other exceptional circumstances such as discovery of previously unknown evidence.⁷⁵⁹

R. A public, reasoned and timely judgment

139. Judgments must be made public in accordance with the right to fair trial.⁷⁶⁰ This will be the case even if the public were not present during the trial.⁷⁶¹ There are a range of ways in which the judgment can be made public such as in open court, through registries or websites.

140. This is not an absolute requirement and can be limited, according to the ICCPR, 'if the interest of juvenile persons otherwise requires, or the proceedings concern matrimonial disputes or the guardianship of children'.⁷⁶²

141. Adequate reasons must be given for judgments, but this does not require a detailed answer to every argument but simply 'essential findings, evidence and legal reasoning'.⁷⁶³

142. A judgment should be given within a reasonable time, namely taking into account the time from when the person was arrested or charged (in the case of criminal proceedings) or proceedings were started (for civil matters), until judgment is given including appeals. So a delay of 8 months from the end of the hearing to judgment was held to violate the ICCPR.⁷⁶⁴

S. A right to appeal

143. Those convicted of criminal offences have a right of appeal to a higher court or tribunal according to some instruments but not others.⁷⁶⁵ The Human

⁷⁵⁶ Communication 692/1996, *A. R. J. v Australia*, UN Doc CCPR/C/60/D/692/1996 (1997).

⁷⁵⁷ Communication 699/1996, *Maleki v Italy*, 27 July 1999.

⁷⁵⁸ Communication 277/1988, *Terán v Ecuador*, 26 March 1992.

⁷⁵⁹ Human Rights Committee General Comment No.32, CCPR/C/GC/32 (2007), para 56.

⁷⁶⁰ Article 14(1) ICCPR.

⁷⁶¹ Human Rights Committee General Comment No.32, CCPR/C/GC/32 (2007), para 29.

⁷⁶² Article 14(1).

⁷⁶³ General Comment No.32, CCPR/C/GC/32 (2007), para 29.

⁷⁶⁴ Communication 1246/2004, *Gonzalez v Republic of Guyana*, 25 March 2010.

⁷⁶⁵ Article 14(5) ICCPR, Article 16(7) Arab Charter.

Rights Committee has held that this requires full review of the conviction and sentence.⁷⁶⁶ However, there is no right to a hearing *de novo*.

144. The appeal procedure should comply with the fair trial standards.⁷⁶⁷
145. The right to appeal must be provided for by law, but an individual can be required to apply for leave to appeal.
146. The review, according to the Human Rights Committee,⁷⁶⁸ must be able to consider both conviction and sentence,⁷⁶⁹ fact and law.⁷⁷⁰
147. Whether an appeal can correct defects at trial is a question of fact in each case.⁷⁷¹

T. Other procedural safeguards

Unlawfully obtained evidence

148. It has traditionally been clear that evidence obtained in breach of absolute rights, such as protection from inhuman and degrading treatment, or torture, must always be excluded from trial.⁷⁷² Article 15 of the UN Convention Against Torture specifically requires this, as does previous case law of the courts and tribunals responsible for the guarantee of human rights.
149. This rule applies during a state of emergency and the only situation where it does not apply is where the confession or statement is then used as evidence of torture or ill treatment itself.⁷⁷³
150. The burden of proof is on the state to show the confession was not made under duress.⁷⁷⁴
151. Prosecutors should 'refuse to use such evidence against anyone other than those who used such methods, or inform the Court accordingly, and shall

⁷⁶⁶ Human Rights Committee Communication 355/1989, *Reid v Jamaica*, 8 July 1994; Communication 701/1996, *Gomez Vazquez v Spain*, 11 August 2000.

⁷⁶⁷ *Delcourt v Belgium*, European Court, 17 January 1970.

⁷⁶⁸ Contrast the ECHR which provides states with a greater discretion in this context.

⁷⁶⁹ Human Rights Committee, Communication 1100/2002, *Bandajevsky v Belarus*, UN Doc CCPR/C/86/D/1100/2002 (2006).

⁷⁷⁰ Communication 1104/2002, *Fernández v the Czech Republic*, UN Doc CCPR/C/83/D/1104/2002 (2005).

⁷⁷¹ *Findlay v UK*, 25 February 1997.

⁷⁷² See Palestinian Basic Law, Article 13. Human Rights Committee General Comment No.32, CCPR/C/GC/32 (2007), paras 6 and 41. General Comment No.29, paras 7 and 15. Communication 915/2000, *Sultanova v Uzbekistan*, UN Doc CCPR/C/86/D/915/2000 (2006), paras 7.2–7.3;

⁷⁷³ Human Rights Committee, General Comment No.32, CCPR/C/GC/32 (2007), para 41.

⁷⁷⁴ Human Rights Committee, General Comment No.32, CCPR/C/GC/32 (2007), para 41; Communication 253/1987, *Kelly v Jamaica*, 8 April 1991, para 7.4.

take all necessary steps to ensure that those responsible for using such methods are brought to justice'.⁷⁷⁵

U. Sentencing

152. There are no international sentencing principles but a consistency in approach has been called for by some international bodies.⁷⁷⁶

153. Various factors may be taken into account in sentencing including self defence, whether the defendant was provoked and whether their response was proportionate, distress and mental capacity.⁷⁷⁷ It has also been recommended that governments consider restitution to victims as a sentencing option.⁷⁷⁸

154. International human rights law protects against retrospective criminal penalties. This is an absolute right. It protects individuals from being convicted of criminal offences which did not exist at the time the act was committed, and prohibits the imposition of a more severe penalty for an offence than that which applied at the time the offence was committed. As an absolute right, it may not be derogated from even in time of national emergency or war.

155. An individual should not be imprisoned for failure to fulfil a contractual obligation.⁷⁷⁹

156. Protection from inhuman and degrading treatment will also be relevant in the sentencing process. This will include the nature of the punishment and reference will be made not only to acts that may cause physical but also mental suffering.⁷⁸⁰ While corporal punishment is unacceptable,⁷⁸¹ hard labour may be permitted.⁷⁸²

V. Compensation

157. In the event of a miscarriage of justice, Article 14(6) ICCPR and Article 19(2) of the Arab Charter provide for the rights of individuals to compensation in the event of 'innocence established by a final judgment', or, in the case of the ICCPR,⁷⁸³ where:

- a person has by a final decision been convicted of a criminal offence;

⁷⁷⁵ UN Guidelines on the Role of Prosecutors, adopted by the UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, para 16.

⁷⁷⁶ See e.g. in Europe, Council of Europe Recommendation R(92)17 on Consistency in Sentencing.

⁷⁷⁷ Communication 1077/2002, *Ibao v Philippines*, 28 March 2003.

⁷⁷⁸ Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UN Doc GA Res 40/34 (1985).

⁷⁷⁹ Article 11 ICCPR; Article 18 Arab Charter. See also Human Rights Committee Communication 91/1981, *A. R. S. v Canada*, UN Doc CCPR/C/OP/1 at 29 (1984), para 7; Communication 1333/2004, *Ràfols v Spain*, UN Doc CCPR/C/84/D/1333/2004 (2005).

⁷⁸⁰ General Comment No.20, HRI/GEN/1/Rev.6 at 151 (2003) para 5. Article 10(1) ICCPR.

⁷⁸¹ *Tyrer v UK*, European Court, 25 April 1978.

⁷⁸² Human Rights Committee Communication 1036/2001, *Faure v Australia*, 31 October 2005.

⁷⁸³ Article 14(6) ICCPR.

- when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice. In such cases, the Human Rights Committee will require this newly established fact to apply to both pardons and reversals.⁷⁸⁴ If however there is a pardon due to reasons other than a miscarriage of justice, no compensation will be required to be paid.⁷⁸⁵
- the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.⁷⁸⁶

158. Legislation must provide for compensation which 'can in fact be paid and that the payment is made within a reasonable period of time'.⁷⁸⁷

W. Victim's rights

159. Under international human rights law, there is a general duty to protect human rights and in this context a recognition of the rights of victims. This includes the right of victims to participate in proceedings, including to be informed of their rights, participate as a party and be informed of the outcome of the case.⁷⁸⁸

160. The UN General Assembly's Declaration on the Basic Principles of Justice for Victims of Crime and Abuse of Power⁷⁸⁹ provides for, inter alia:

- Compassionate treatment, particularly for child victims and those who have witnessed crime;⁷⁹⁰
- Prompt redress;
- Provision of information to victims on the proceedings, their rights, and provision of assistance;
- Allowing victims' views to be expressed;
- Minimising the impact of proceedings on victims. For example, if necessary, screens and other equipment can be used in court to protect vulnerable witnesses.⁷⁹¹

⁷⁸⁴ Communication 880/1999, *Irving v Australia*, 1 April 2002.

⁷⁸⁵ Human Rights Committee General Comment No.32, CCPR/C/GC/32 (2007), para 53.

⁷⁸⁶ Communication 963/2001, *Uebergang v Australia*, 22 March 2001.

⁷⁸⁷ Human Rights Committee, General Comment No.32, CCPR/C/GC/32 (2007), para 52.

⁷⁸⁸ Human Rights Committee, Communication 1610/2007, *LNP v Argentina*, 18 July 2011, para 13.5.

⁷⁸⁹ UN Doc.Res. 40/34 (1985).

⁷⁹⁰ UN ECOSOC Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime, UN Doc.E/Res/2005/20 (2005).

⁷⁹¹ *X v UK*, [1993] 15 EHRR 113.

X. Evidence collection, surveillance, investigation techniques and the right to respect for private life

Relevant international law provisions

Article 12 UDHR

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Article 17 ICCPR

- 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.*
- 2. Everyone has the right to the protection of the law against such interference or attacks.*

Article 21 Arab Charter

- 1. No one shall be subjected to arbitrary or unlawful interference with regard to his privacy, family, home or correspondence, nor to unlawful attacks on his honour or his reputation.*
- 2. Everyone has the right to the protection of the law against such interference or attacks.*

Relevant domestic law provisions:

Article 32, Palestinian Basic Law

Any violation of any personal freedom, of the sanctity of the private life of human beings, or of any of the rights or liberties that have been guaranteed by law or by this Basic Law shall be considered a crime. Criminal and civil cases resulting from such violations may not be subject to any statute of limitations. The National Authority shall guarantee a fair remedy to those who suffer from such damage.

1. Privacy has been defined as ‘the presumption that individuals should have an area of autonomous development, interaction and liberty, a “private sphere” with or without interaction with others, free from State intervention and from excessive unsolicited intervention by other uninvited individuals’.⁷⁹² The right to respect for private life is guaranteed by a number of human rights treaties.⁷⁹³ It is recognised, however, that as individuals live in a society then the protection of the right to privacy is ‘necessarily relative’.⁷⁹⁴

⁷⁹² Lord Lester and D. Pannick (eds.). *Human Rights Law and Practice*. London, Butterworth, 2004, para. 4.82; see Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, A/HRC/23/40, 17 April 2013, para 22.

⁷⁹³ See also Article 15 UNCRC, Article 14 ICM, Article 11 ACHR, Article 8 ECHR. There is no equivalent provision in the ACHPR. A/HRC/27/37, 30 June 2014.

⁷⁹⁴ Human Rights Committee, General Comment No.16 HRI/GEN/1/Rev.6 at 142 (2003), para 7.

2. This broad definition of private life is reflected in human rights case law. Respect for private life encompasses more broadly the right:
 - To be oneself
 - To live as oneself
 - To keep to oneself
3. Privacy is also essential to maintaining a functioning community. For example, families need privacy to function, as do friends, workplaces, and even political parties. Privacy allows groups to form and function without undue interference. The public and private spheres necessarily interact and they are not mutually exclusive. Almost everyone must carry on their life partly in public.
4. What is clear is that, as a matter of human rights law, the concept of private life is made up of concentric rings. The inner core of privacy rights is that notion of privacy which is essential and elemental for the individual to exist as who they are. However, the notion of privacy then broadens to include, amongst other things, personal and social relationships.
5. Included, therefore, within the idea of private life are personal freedoms, personal autonomy, personal integrity and personal relations. These ideas form part of a broader notion of the State's limited role within the private sphere where individual development is concerned. That wider notion of privacy includes more straightforward ideas such as State control of individuals within society, regulation of private conduct and surveillance.
6. States have obligations not only to refrain from interference in the right to privacy but also to protect against acts by private individuals or entities.⁷⁹⁵ This positive obligation will involve putting in place a legal framework to prosecute crimes that is effectively enforced and results in the proper protection of victims.⁷⁹⁶
7. The concept of the 'family' in the ICCPR has been held by the Human Rights Committee to include that as understood in the State concerned.⁷⁹⁷ The term 'home' is held 'to indicate the place where a person resides or carries out his usual occupation'.⁷⁹⁸ Private life will also exist in the workplace.⁷⁹⁹
8. Any interference in an individual's right to privacy must be prescribed by law, in accordance with the aims of the particular treaty and reasonable in the circumstances.⁸⁰⁰ Furthermore, it must be necessary in a democratic society,

⁷⁹⁵ Human Rights Committee, General Comment No.16 HRI/GEN/1/Rev.6 at 142 (2003), para 1. European Court, *X and Y v Netherlands*, 26 March 1985.

⁷⁹⁶ European Court, *A v Croatia*, 14 January 2011.

⁷⁹⁷ Human Rights Committee, General Comment No.16 HRI/GEN/1/Rev.6 at 142 (2003), para 5.

⁷⁹⁸ *Ibid.*

⁷⁹⁹ European Court, *Halford v UK*, 25 June 1997; *Roeman and Schmit v Luxembourg*, 25 May 2003.

⁸⁰⁰ Human Rights Committee, General Comment No.16 HRI/GEN/1/Rev.6 at 142 (2003), paras 3-4. European Court, *Keegan v UK*, 18 October 2006.

discretion should not be unfettered, it must be able to achieve the stated aim, and must be proportionate.⁸⁰¹

9. Tensions may exist between the right to privacy and other rights, including the right to freedom of expression. For example, private information may be disseminated in the media and in this context human rights bodies have held that a balance needs to be struck between the individual and the overall public interest in reporting the issue.⁸⁰² Similarly, where telephone calls of a lawyer were intercepted and then used to convict him of a crime, there was no violation of the right to privacy.⁸⁰³

A. Privacy and intrusive publications

10. Political figures, famous people, royalty and celebrities have sought to rely on private life rights to protect their private life from media intrusion.⁸⁰⁴ It is also relevant in relation to media intrusion into the lives of ordinary people, for example where a publication implies that someone is guilty of a crime when they are not,⁸⁰⁵ or identifies a person as suffering from an illness which may result in them being stigmatised socially and professionally.⁸⁰⁶ The publication of private information about a former president of Argentina where this information was already well known, the former president had not treated it as confidential, and considered to be in the public interest, was not held to be a violation of his right to privacy by the Inter-American Court.⁸⁰⁷

B. Personal data and data protection

11. 'The gathering and holding of personal information on computers, data banks and other devices, whether by public authorities or private individuals or bodies, must be regulated by law'.⁸⁰⁸
12. The ability to exchange relevant information quickly and efficiently between the police, the security services and other public bodies can be essential in developing an intelligence led approach to counter terrorism. As a result of the international nature of terrorism, this can also require the sharing of information across borders.
13. The exchange of private information, for whatever reason, about an individual between public bodies, whether internally or internationally, will engage private

⁸⁰¹ A/HRC/23/40, para 29. See also Human Rights Committee, General Comment No.27, CCPR/C/21/Rev.1/Add.9 (1999)..

⁸⁰² A/HRC/23/40, para 27.

⁸⁰³ Human Rights Committee, Communication 903/1999, *Hulst v Netherlands*, 1 November 2004

⁸⁰⁴ European Court, *Spencer v UK*, 7 April 2008.

⁸⁰⁵ European Court, *A v Norway*, 9 July 2009.

⁸⁰⁶ European Court, *C.C. v Spain*, 6 October 2009.

⁸⁰⁷ *Fontevicchia & D'Amico v. Argentina*, 29 November 2011, Series C, No. 238.

⁸⁰⁸ Human Rights Committee, General Comment No.16, HRI/GEN/1/Rev.6 at 142 (2003), para 10. See also United Nations, General Assembly Resolution 45/95, Guidelines for the regulation of computerised personal data files Adopted on 14 December 1990, A/RES/45/95.

life rights and will almost certainly interfere with them. The right of access to information⁸⁰⁹ will provide some protection in this regard.

14. The Council of Europe Convention on Data Protection provides some useful principles for the fair and lawful collection and use of data.⁸¹⁰ These include:

- Data can only be collected for a specific purpose and should not be used for any other reason;
- Data must be accurate, adequate for this purpose and stored only for as long as is necessary;
- There must be a right of access to and rectification of data for the person concerned (data subject);
- Special protection must be made for data of a sensitive nature, for example on religion, political beliefs, sexual orientation, genetics or medical information.

C. Correspondence

15. States are required to ensure the integrity and confidentiality of correspondence.⁸¹¹ 'Correspondence' covers all forms of communication, both on and offline.⁸¹²

16. As a result, capturing communications data, namely that which collects data about a communication, not the content of the communication itself, can also be seen as an interference with the right to privacy.⁸¹³

17. Communications should remain 'private, secure and, if they choose, anonymous'.⁸¹⁴ Therefore, 'correspondence should be delivered to the addressee without interception and without being opened or otherwise read. Surveillance, whether electronic or otherwise, interceptions of telephonic, telegraphic and other forms of communication, wire-tapping and recording of conversations should be prohibited'.⁸¹⁵

18. It has been held that email correspondence is covered by this right.⁸¹⁶

⁸⁰⁹ See section X.A. below.

⁸¹⁰ Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data

⁸¹¹ Human Rights Committee, General Comment No.16, HRI/GEN/1/Rev.6 at 142 (2003) para 8.

⁸¹² HRC/A/23/40, para 24.

⁸¹³ Report of the High Commissioner for Human Rights. The Right to Privacy in the digital age, A/HRC/27/37, 30 June 2014, para 20.

⁸¹⁴ HRC/A/23/40, para 23.

⁸¹⁵ Human Rights Committee, General Comment No.16, HRI/GEN/1/Rev.6 at 142 (2003) para 8.

⁸¹⁶ European Court, *Liberty and Others v United Kingdom*, 1 Oct 2008, para 56.

D. Extradition, immigration and deportation

19. The decision to extradite, remove or exclude a person from a country where he or she has close relatives or has established a private life through work or study, may constitute an interference with their private and family life.⁸¹⁷

E. Privacy, Policing and Surveillance

20. The reality is that interferences with privacy rights are at the heart of any effective policing strategy. As such how to lawfully interfere with privacy and data protection, has to be understood.

21. The European Court case of *Klass v. Germany*, emphasised

‘the danger such a law poses of undermining or even destroying democracy on the ground of defending it, affirms that the Contracting States may not, in the name of the struggle against espionage and terrorism, adopt whatever measures they deem appropriate. The Court must be satisfied that, whatever system of surveillance is adopted, there exist adequate and effective guarantees against abuse. This assessment has only a relative character: it depends on all the circumstances of the case, such as the nature, scope and duration of the possible measures, the grounds required for ordering such measures, the authorities competent to permit, carry out and supervise such measures, and the kind of remedy provided by the national law’.⁸¹⁸

22. ‘Stop and search’ procedures engage the right to respect for private life. The European Court has held that it is not permissible to search a person unless there is a reasonable suspicion of their involvement in wrongdoing.⁸¹⁹

23. Once an individual is being formally investigated by a law enforcement agency on suspicion of having committed a crime, respect for their private life is almost certainly engaged. Private life will be a relevant factor to be taken into account once information about an individual is stored and processed. Sharing of information on individuals is also an interference with privacy rights, which if it is to be lawful, must be justified.

24. All forms of covert policing and surveillance will engage the right to respect for private life including e.g. CCTV schemes where any images are recorded, processed and stored;⁸²⁰ collecting samples such as fingerprints and DNA;⁸²¹ and policing methods, such as entrapment.⁸²²

25. As regards more specifically telephone tapping, the law should:

⁸¹⁷ European Court, *Mehemi v France*, 26 September 1997.

⁸¹⁸ *Klass v. Germany; Leander v. Sweden*, 26 March 1987.

⁸¹⁹ European Court, *Gillan and Quinton v UK*, 28 June 2010.

⁸²⁰ European Court, *Peck v UK*, 28 January 2003.

⁸²¹ European Court, *Murray v UK*, 28 October 1994.

⁸²² European Court, *Texiera de Castro v Portugal*, 9 June 1998.

- a. Set out the categories of persons whose telephones may be tapped;
 - b. Spell out the nature of the offences justifying the use of tapping;
 - c. Indicate the duration of the measure;
 - d. Explain the procedure for drawing up the summary reports containing intercepted conversations;
 - e. Identify the precautions to be taken in order to communicate the recordings intact and in their entirety for possible inspection by the judge and the defence; and
 - f. Clarify the circumstances in which they are to be erased or destroyed (in particular following discharge or acquittal of the accused).⁸²³
26. Digital communications surveillance programmes must meet the requirements of international human rights law even if it is argued they are necessary on the grounds of national security or for intelligence purposes.⁸²⁴ Therefore if it can be shown that there is a legitimate aim and safeguards are in place, intrusive surveillance may be permitted.⁸²⁵ ‘Mass or bulk surveillance programmes’ are likely to be considered arbitrary.⁸²⁶
27. Secret surveillance powers is seen to increase the risk of arbitrary abuse of discretion and therefore such powers should be set out clearly in an accessible law that has foreseeable effects.⁸²⁷ Secret surveillance, such as the use of ‘watch-lists’, without an effective independent oversight, is seen as a violation of the right to privacy.⁸²⁸
28. Measures which are undertaken to counteract terrorism have the potential to violate the right to privacy.⁸²⁹ The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has urged States to ensure that their surveillance policies comply with principles of proportionality and necessity and international human rights law.⁸³⁰
29. Vague notions of ‘national security’ will raise concerns if they are used to justify interference with privacy rights.⁸³¹
30. States may use surveillance measures if they:

⁸²³ European Court, *Huvig and Kruslin v France*, 24 April 1990.

⁸²⁴ Report of the High Commissioner for Human Rights. The Right to Privacy in the digital age, A/HRC/27/37, 30 June 2014, para 23 and 24.

⁸²⁵ *Ibid*, para 25. European Court, *Rotaru v Romania*, 4 May 2000.

⁸²⁶ Report of the High Commissioner for Human Rights. The Right to Privacy in the digital age, A/HRC/27/37, 30 June 2014, para 25.

⁸²⁷ CCPR/C/USA/CO/4, para 22. See also European Court, *Teixeira da Castro v Portugal*, 9 June 1998.

⁸²⁸ Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, A/HRC/13/37, para 26. Also, Human Rights Committee, Communication 1472/2006, 22 October 2008. European Court, *Klass v Germany*, 6 September 1978.

⁸²⁹ Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, A/HRC/13/37.

⁸³⁰ *Ibid*.

⁸³¹ A/HRC/23/40, para 58. See also in context of Council of Europe, Recommendation REC (2005)10 of the Committee of Ministers to Member States on ‘Special Investigation Techniques’ in Relation to Serious Crimes Including Acts of Terrorism, (*Adopted by the Committee of Ministers on 20 April 2005 at the 924th meeting of the Ministers’ Deputies*).

- Are 'case-specific'
- the result of a warrant issued by a judge,⁸³²
- show probable cause or reasonable grounds,
- have a factual basis which relates to the behaviour of the individual and which justifying the suspicion that he or she is involved in, for example, preparing a terrorist attack.⁸³³

31. States should adopt comprehensive data protection and privacy laws and establish strong independent oversight bodies to review surveillance techniques.⁸³⁴

32. The Special Rapporteur has recommended that any surveillance techniques should follow a number of principles:⁸³⁵

- They should be the least intrusive measure possible;
- States should provide a legal base for reuse of information which must be in accordance with international human rights standards;
- There should be effective independent oversight;
- There should be transparency regarding the use of surveillance techniques. This includes that the public be able to access laws and regulations on surveillance programmes.⁸³⁶
- Effective modernization: states should reflect changes in technology in their laws and policies.

33. Those such as journalists or civil society who distribute information on surveillance programmes should be protected from punishment and abuse.⁸³⁷

34. The burden of proof will normally rest on the applicant alleging the violation. However, if the individual was unable to prove the facts due to secret surveillance techniques on the part of the State, conclusions could be drawn.⁸³⁸

F. Searches and seizure

35. The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has raised concerns that States have increased their use of stop and search powers in order to conduct

⁸³² European Court, *Imakayeva v Russia*, 9 February 2007.

⁸³³ Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, A/HRC/10/3, para 30.

⁸³⁴ Human Rights Committee, General Comment No.16, HRI/GEN/1/Rev.6 at 142 (2003).

⁸³⁵ Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, A/HRC/13/37, paras 49-57.

⁸³⁶ Joint Declaration on Surveillance Programs and their impact on freedom of expression, UN Special Rapporteur on the protection and promotion of the right to freedom of opinion and expression, Special Rapporteur for freedom of expression of the Inter-American Commission, 21 June 2013, para 12.

⁸³⁷ *Ibid*, paras 15-17.

⁸³⁸ Inter-American Court, *Escher et al. v. Brazil*, 6 July 2009, Series C, No. 200, paras. 127-128.

racial profiling and discrimination.⁸³⁹ Blanket stop and search powers will breach the requirements of proportionality and necessity.⁸⁴⁰

36. Police searches and seizure whether conducted at home, business or other premises will engage privacy rights.⁸⁴¹

G. Unlawfully obtained evidence

37. As a general principle, any evidence obtained in breach of private life rights should not form part of a criminal prosecution, because to do so may violate the right to a fair trial.⁸⁴² Investigations and prosecutions should be undertaken so as to ensure compliance with international human rights.⁸⁴³ Similarly prosecutors should refuse to use evidence 'that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute a grave violation of the suspect's human rights'.⁸⁴⁴ Evidence gained from an interference with privacy should not be submitted in such a way as to jeopardise the right of the accused to a fair trial. Human rights standards require the proceedings as a whole, including the way in which evidence is submitted, to be fair.⁸⁴⁵

38. The European Court has, however, accepted that the right to a fair trial is not necessarily breached where evidence is relied upon which was obtained in violation of the right to respect for private life. For example, where the impugned evidence (an illegal telephone tap) was not the only evidence against the accused in a case involving a serious crime, there was no violation of the right to a fair trial where that evidence was admitted.⁸⁴⁶

39. Similarly in a case where the police had not acted illegally as a matter of domestic law, but had nonetheless breached the right to respect for private life through the use of eavesdropping devices, the applicant's fair trial rights were not violated in a serious drugs case where he pleaded guilty to the offence. There was no violation of the right to a fair trial, notwithstanding that this was the only evidence against the applicant.⁸⁴⁷

40. Subsequent cases before the European Court have found a violation of the right to a fair trial where there has been an unlawful interference with privacy. This took place when the police used surveillance methods to obtain evidence against the applicant whilst he was being detained in police custody on suspicion of having committed murder.⁸⁴⁸

⁸³⁹ Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, A/HRC/13/37, para 23.

⁸⁴⁰ Ibid.

⁸⁴¹ European Court, *Niemietz v. Germany*, 16 December 1992.

⁸⁴² European Court, *Allan v UK*, 12 July 2013. See section IX above.

⁸⁴³ Human Rights Committee, re France, A/52/40 (vol.I), para 402.

⁸⁴⁴ 1990 Guidelines on the Role of Prosecutors, para 16.

⁸⁴⁵ See section IX above.

⁸⁴⁶ European Court, *Schenk v Switzerland*, 12 July 1998.

⁸⁴⁷ European Court, *Khan v UK*, 4 October 2000.

⁸⁴⁸ European Court, *Allen v UK*, 12 July 2013

41. Relevant questions in determining the fairness of the trial will include:

- Who authorised the breach of privacy and how;
- Whether the evidence could have been collected in another way; and
- The weight and probative value of the evidence.

H. Racial and Religious Profiling

42. One area of developing concern in the context of counter-terrorist strategies is the use of racial and religious profiling, which involves the collection of personal information and therefore involves interference with data protection and privacy rights. The general collection and processing of information solely by reference to criteria such as race or religion, and the use of that information as a starting point for investigations, without any specific or individual reasons to suspect the persons involved, raises serious doubts about whether such activities are compliant with privacy rights and the protection from discrimination.

X. Human Rights and the Guarantee of Democratic Pluralism

A. Freedom of Expression

International provisions

Article 19, UDHR:

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 19 ICCPR:

- 1. Everyone shall have the right to hold opinions without interference.*
- 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*
- 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
(a) For respect of the rights or reputations of others;
(b) For the protection of national security or of public order (ordre public), or of public health or morals.*

Article 20 ICCPR

- 1. Any propaganda for war shall be prohibited by law.*
- 2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.*

Article 32 Arab Charter

- 1. The present Charter guarantees the right to information and to freedom of opinion and expression, as well as the right to seek, receive and impart information and ideas through any medium, regardless of geographical boundaries.*
- 2. Such rights and freedoms shall be exercised in conformity with the fundamental values of society and shall be subject only to such limitations as are required to ensure respect for the rights or reputation of others or the protection of national security, public order and public health or morals.*

Relevant domestic provisions:

Article 19 Palestinian Basic Law

Freedom of opinion may not be prejudiced. Every person shall have the right to express his opinion and to circulate it orally, in writing or in any form of expression or art, with due consideration to the provisions of the law.

1. Freedom of expression is seen as one of the essential foundations of a democratic society,⁸⁴⁹ and is protected by many international and regional human rights treaties including Article 19 ICCPR and Article 32 of the Arab Charter.⁸⁵⁰ The Inter-American Court has held that public order requires ‘the guarantee of the widest possible circulation of news, ideas and opinions, as well as the widest access to information by society as a whole’.⁸⁵¹
2. The main elements of freedom expression as guaranteed by international human rights law, include:
 - Freedom to seek information and ideas;
 - Freedom to receive information and ideas; and
 - Freedom to impart information and ideas.
3. This freedom can be enjoyed orally, in writing, in print, in images, dress, banners, posters, audio-visual means,⁸⁵² art,⁸⁵³ or through any other media and is applied regardless of frontiers.⁸⁵⁴
4. The expression of every type of opinion or idea is covered, from political expression,⁸⁵⁵ to journalism,⁸⁵⁶ commercial speech,⁸⁵⁷ and artistic expression,⁸⁵⁸ as well as comments on public affairs,⁸⁵⁹ and teaching,⁸⁶⁰ among others. However, not all forms of expression, as will be seen below, are accorded the same protection.
5. Freedom of opinion cannot be derogated from⁸⁶¹ and the right to hold opinions without interference cannot be limited.⁸⁶² Criminalisation of the holding of an opinion will violate Article 9(1) of the ICCPR⁸⁶³ and forcing individuals to hold or not to hold a particular opinion is also prohibited.⁸⁶⁴

⁸⁴⁹ General Assembly Resolution 59/201. See also European Court, *Handyside v UK*, 7 December 1976; *Sunday Times v UK*, 26 April 1979. Human Rights Committee, Communication 628/1995, *Tae Hoon Park v Republic of Korea*, 20 October 1998, para 10.3.

⁸⁵⁰ See also Article 19 UDHR, Article 9 ACHPR, Article 13 ACHR, Article 5 ICERD, Articles 12 and 13 UNCRC, Article 10 ECHR; Article 19 Palestinian Basic Law.

⁸⁵¹ *Ivcher Bronstein Case v Peru*, 6 Feb 2001, Series C, No.74, para 151.

⁸⁵² E.g. Communication 1009/2001, *Shchetoko et al v Belarus*, 11 July 2006; Communication 412/1990, *Kivenmaa v Finland*, 31 March 2004.

⁸⁵³ Communication 926/2000, *Shin v Republic of Korea*. European Court, *Muller and others v Switzerland*, 24 May 1988.

⁸⁵⁴ Article 19(2) ICCPR.

⁸⁵⁵ Human Rights Committee, Communication 414/1990, *Mika Miha v Equatorial Guinea*, 8 July 1994, at para 6.8.

⁸⁵⁶ Communication 1353/2005, *Philip Afuson Njaru v Cameroon*, CCPR/C/89/D/1353/2005 (2007).

⁸⁵⁷ Communications 359/1989, *Ballantyne, Davidson, McIntyre v Canada*, CCPR/C/47/D/359/1989 (1993). European Court, *Markt Intern Verlag GmbH v Germany*, 20 November 1989.

⁸⁵⁸ Communication 962/2000, *Hak-Chul Sin v Republic of Korea*, CCPR/C/80/D/926/2000 (2004).

⁸⁵⁹ Communication 1157/2003, *Coleman v Australia*, 17 July 2006.

⁸⁶⁰ Communication 736/97, *Ross v Canada*, 18 October 2000.

⁸⁶¹ Human Rights Committee, General Comment No.29, CCPR/C/21/Rev.1/Add.11, para 11.

⁸⁶² Human Rights Committee, General Comment No.34, CCPR/C/GC/34 (2011), para 9.

⁸⁶³ Human Rights Committee, General Comment No.34, CCPR/C/GC/34 (2011), para 9. Communication 550/93, *Faurisson v France*, 8 November 1996.

⁸⁶⁴ Communication 878/1999, *Kang v Republic of Korea*, 15 July 2003.

6. Prior censorship, according to the Inter-American Court, is 'always incompatible with the full enjoyment' of the right to free expression.⁸⁶⁵ For example, news is a perishable commodity and 'to delay its publication, even for a short period, may well deprive it of all its value and interest'.⁸⁶⁶ Penalties imposed after publication are likely to be considered more proportionate than an injunction restraining publication.⁸⁶⁷
7. Human rights treaties do, however, provide circumstances in which it may be permissible to limit the right to free expression.⁸⁶⁸

Political and public interest expression

8. Political expression, which includes expression concerning the public interest, is the most protected form of freedom of speech.⁸⁶⁹ As the Human Rights Committee has noted in its General Comment No.34 (2011) on Article 19: 'the free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion. The public also has a corresponding right to receive media output'.⁸⁷⁰
9. Therefore where a journalist published comments which criticised a public figure, the Human Rights Committee noted 'in circumstances of public debate in a democratic society, especially in the media, concerning figures in the public domain, the value placed by the Covenant on uninhibited expression is particularly high'.⁸⁷¹ Media should be able to criticise and pass comment on political figures and political issues without restraint.⁸⁷²
10. Membership of opposition political parties or trade unions is protected and any 'blanket restrictions' will violate the right to free expression.⁸⁷³
11. The Human Rights Council has also called on States to promote respect and ensure women's exercise of freedom of opinion and expression, including as members of NGOs and associations, and in their participation in societies.⁸⁷⁴

⁸⁶⁵ *Compulsory Membership in an Association Prescribed by law for the Practice of Journalism, Advisory Opinion OC-5/85*, 13th November 1985, Series A, No.5, p.103.

⁸⁶⁶ European Court, *Observer and Guardian v UK*, 26 November 1991.

⁸⁶⁷ European Court, *Stoll v Switzerland*, 10 December 2007.

⁸⁶⁸ Human Rights Committee, Communication 458/1991, *Mukong v Cameroon*, 21 July 1994; Communication 1022/2001, *Velichkin v Belarus*, 20 October 2005.

⁸⁶⁹ European Court, *Vgt Verein gegen Tierfabriken v Switzerland*, 28 September 2009.

⁸⁷⁰ CCPR/C/GC/34, para 13.

⁸⁷¹ Communication 1180/2003, *Zelijo Bodrozic v Serbia and Montenegro*, CCPR/C/85/D/1180/2003 (2006), para 7.2. See European Court, *Fatullayev v Azerbaijan*, 4 October 2010.

⁸⁷² Human Rights Committee, General Comment No.25, A/51/40, Vol.1, para 25.

⁸⁷³ African Commission, Communications 48/90 et al, *Amnesty International and others v Sudan*, 15 November 1999, para 77.

⁸⁷⁴ A/HRC/RES/23/2, The Role of freedom of opinion and expression in women's empowerment, 24 June 2013, para 3.

12. The rights of journalists and freedom of the press receive particular attention by human rights bodies.⁸⁷⁵ This includes, for example, the ability of journalists to access and observe meetings of Parliament,⁸⁷⁶ and protection against harassment.⁸⁷⁷ The need to protect journalists' sources to ensure freedom of expression, and therefore a democratic society, is a key principle of freedom of expression.⁸⁷⁸ Where freedom of the press infringes on the authority of the judiciary,⁸⁷⁹ or to protect the rights or reputation of others,⁸⁸⁰ restrictions may be permitted. It is unlikely that a custodial sentence could ever be justified for a prosecution relating to political speech, particularly where the State could have used means other than a criminal penalty to achieve the same objective.⁸⁸¹
13. Concerns have also been expressed about the restrictions on the freedom of expression of human rights defenders,⁸⁸² with the UN General Assembly noting in particular the right of individuals 'freely to publish, impart or disseminate to others views, information and knowledge on all human rights and fundamental freedoms'.⁸⁸³

Right of access to information

14. Freedom of expression in some human rights treaties has been interpreted as providing a right of access to information.⁸⁸⁴ As the Inter-American Court of Human Rights has held in respect of Article 13 of the ACHR:

'in guaranteeing expressly the rights to "seek" and "receive" "information", protects the right of every person to request access to the information under the control of the State, with the exceptions recognised under the regime of restrictions in the Convention. Consequently, the said article encompasses the right of individuals to receive the said information and the positive obligation of the State to provide it, in such form that the person can have access in order to know the information or receive a motivated answer when for a reason recognised by the Convention, the State may limit the access to it in the particular case. The information should be provided without the need to prove

⁸⁷⁵ See e.g. African Commission, Communication 224/98, *Media Rights Agenda (on behalf of Mr N Malaolu) v Nigeria*, 6 November 2000; Communication 102/93, *Constitutional Rights Project and Civil Liberties Organisation v Nigeria*, 31 October 1998. UN Special Rapporteur, A/HRC/20/22.

⁸⁷⁶ Human Rights Committee, Communication 633/1995, *R. Gauthier v Canada*, 5 May 1999.

⁸⁷⁷ Concluding observations on Report of Gabon, Human Rights Committee, UN Doc.A/56/40, vol.I, p.44. Concluding observations on report of Peru, Human Rights Committee, UN Doc.A/56/40, vol.I, p.48.

⁸⁷⁸ European Court, *Goodwin v UK*, 27 March 1996.

⁸⁷⁹ E.g. see reasoning by European Court, *Sunday Times v UK*, 26 April 1979.

⁸⁸⁰ European Court, *Lingens v Austria*, 8 July 1986.

⁸⁸¹ European Court, *Lehideux and Isorni v France*, 23 September 1998.

⁸⁸² Human Rights Committee, concluding observations on report of Syria, UN Doc.A/56/40, vol.I, p.75. African Commission, Communication 225/98, *Huri-Laws (on behalf of Civil Liberties Organisation) v Nigeria*, 6 November 2000.

⁸⁸³ UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, GA Res.53/144, 9 December 1998, Art.6.

⁸⁸⁴ However, contrast the ECHR, see *Leander v Sweden*, 26th March 1987; but more recently, *Kenedi v Hungary*, 28th August 2009.

direct interest or personal involvement in order to obtain it, except in cases in which a legitimate restriction is applied'.⁸⁸⁵

15. Although some other human rights bodies take a more limited approach,⁸⁸⁶ the Human Rights Committee has seen this right as entailing a right to receive journalistic information,⁸⁸⁷ media access to information on public affairs,⁸⁸⁸ and for individuals to know what personal data is stored by which public authorities or private bodies and for which purpose.⁸⁸⁹ Prisoners should also be entitled to access their medical records.⁸⁹⁰ Those accused of criminal offences should also receive information on their rights.⁸⁹¹ However, the refusal of the State to disclose a secret police register could not constitute an interference with the applicant's right to receive information as he had no right to that information and the State did not wish him to receive it.⁸⁹² States also have the obligation to provide freedom of information legislation.⁸⁹³

Particular protections in the context of administration of justice

16. The judiciary are seen as playing a key role and are therefore themselves open to public scrutiny. The UN and regional special rapporteurs have therefore noted that:

- special restrictions on commenting on the courts and judges are generally not justified;
- there should be no restrictions on reporting on on-going legal proceedings unless there is a substantial risk of serious prejudice to the fairness of those proceedings or the right to a fair trial or presumption of innocence;
- any sanctions for reporting on legal proceedings should be applied only after a fair and public hearing;
- courts and judicial processes should be subject to the principle of maximum disclosure of information unless it is necessary to protect the right to a fair trial or presumption of innocence;
- judges have a right to free expression which should only be restricted where necessary to protect their independence and impartiality.⁸⁹⁴

⁸⁸⁵ *Claude Reyes and Others v. Chile*, 19 September 2006, Series C No. 151, para. 77. See also Human Rights Committee, Communication 633/1995, *R. Gauthier v Canada*, 5 May 1999.

⁸⁸⁶ E.g. the European Court sees a right of access to information in relation to court proceedings, see *Kenedi v Hungary*, 26 August 2009.

⁸⁸⁷ Communication 1334/2004, *Mavlonov and Sa'di v Uzbekistan*, CCPR/C/96/D/1877 (2009).

⁸⁸⁸ Human Rights Committee, Communication 633/95, *Gauthier v Canada*, 5 May 1999

⁸⁸⁹ Human Rights Committee, General Comment No.16, HRI/GEN/1/Rev.6 at 142 (2003).

⁸⁹⁰ Communication 726/1996, *Zheludkov v Ukraine*, 29 October 2002.

⁸⁹¹ Human Rights Committee, General Comment No.31, CCPR/C/21/Rev.1/Add/13 (2004),.

⁸⁹² European Court, *Leander v Sweden*, 26 March 1987.

⁸⁹³ Human Rights Committee, General Comment No.34, CCPR/C/GC/34 (2011), para 19; see also concluding observations, Azerbaijan, CCPR/C/79/Add.38 (1994).

⁸⁹⁴ International Mechanisms for promoting freedom of expression, Joint declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression and ACHPR Special Rapporteur on Freedom of Expression and Access to Information, Dec 2002.

17. Proceedings and penalties for contempt of court should not restrict defence rights and must be necessary for the maintenance of orderly proceedings.⁸⁹⁵

Incitement, racial hatred and hate speech

18. Article 20, ICCPR prohibits hate speech and propaganda for war. In this respect there is a close relationship between the ICCPR and the UN Convention on the Elimination of all Forms of Racial Discrimination (CERD), in particular its Article 4 which provides that States should create an offence for all dissemination of ideas based on racial superiority or hatred and incitement to racial discrimination.⁸⁹⁶ The State's failure to protect individuals from racial insults has been found to be a violation of ICERD.⁸⁹⁷
19. Particular concerns have been raised with respect to the spread of hate speech through the internet and social media.⁸⁹⁸
20. Holocaust denial is a classic example of such hate speech,⁸⁹⁹ however laws on genocide denial will also be treated with suspicion by human rights bodies.⁹⁰⁰

Apologie or the Glorification of Terrorism

21. The UN Security Council Resolution 1624 calls on States 'to prohibit by law incitement to commit a terrorist act'.⁹⁰¹ However, any counter-terrorism measures adopted by the State must conform with its international human rights obligations. As the Human Rights Committee has noted, offences including the 'encouragement of terrorism', 'extremist activity', 'praising', 'glorifying' or 'justifying' terrorism should comply with the requirements of legality, necessity and proportionality.⁹⁰²
22. In a Joint Declaration in 2005, the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the Organisation of American States Special Rapporteur on Freedom of Expression have sought to clarify the extent to which freedom of expression

⁸⁹⁵ Human Rights Committee, Communication 1373/2005, *Dissanayake v Sri Lanka*, 22 July 2008.

⁸⁹⁶ See also CERD General Recommendation 15, 24 and 40 and also ICCPR General Comment No.11 on Article 20. Rabat Plan of Action on the prohibition of advocacy on national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, adopted in 2012; UNESCO integrated strategy to combat racism, discrimination, xenophobia and intolerance; OSCE, Astana Declaration in 2010.

⁸⁹⁷ CERD Committee, Communication 16/1999, *Ahmad v Denmark*, 13 Mar 2000 See also Durban Declaration and Plan of Action, 2001.

⁸⁹⁸ See Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, A/HRC/26/49, 6 May 2014. League of Arab States and Gulf Cooperation Council, Recommendations of the Conference on Combating Cybercrime in the GCC Countries, 18th of June 2007, Abu Dhabi.

⁸⁹⁹ See e.g. Human Rights Committee, Communication 550/1993, *R. Faurisson v France*, 8 November 1996; Communication 736/1997, *M. Ross v Canada*, 18 October 2000.

⁹⁰⁰ See e.g. Human Rights Committee, Communication 550/1993, *R. Faurisson v France*, 8 November 1996.

⁹⁰¹ S/RES/1624 (2005). See also Johannesburg Principles on National Security, Freedom of Expression and Access to Information, UN Doc.E/CN.4/1996/39 (1996).

⁹⁰² Human Rights Committee, General Comment No.34, CCPR/C/GC/34 (2011), para 46.

can be limited in the context of incitement to terrorism. That Joint Declaration states:

‘The right to freedom of expression is universally recognised as a cherished human right and to respond to terrorism by restricting this right could facilitate certain terrorist objectives, in particular the dismantling of human rights.

While it may be legitimate to ban incitement to terrorism or acts of terrorism, States should not employ vague terms such as ‘glorifying’ or ‘promoting’ terrorism when restricting expression. Incitement should be understood as a direct call to engage in terrorism, with the intention that this should promote terrorism, and in a context in which the call is directly causally responsible for increasing the actual likelihood of a terrorist act occurring’.⁹⁰³

Defamation

23. Reputation is specifically protected in the right to freedom of expression. Privacy rights also protect it. Any laws on defamation, however, must be sufficiently certain.⁹⁰⁴ Defamation laws should include the defence of truth⁹⁰⁵ and States should avoid excessively punitive measures.⁹⁰⁶ An applicant’s prosecution for criminal defamation was held not to violate the right to freedom of expression because the programme in which they (as it turned out) unjustifiably criticised the Police Chief, had been transmitted at peak viewing times and had not sought to balance their assertions in any way.⁹⁰⁷

24. Several UN bodies have called on States to decriminalise defamation.⁹⁰⁸

⁹⁰³ Joint declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, 21 December 2005.

⁹⁰⁴ Human Rights Committee, Communication 727/1996, *D Paraga v Croatia*, 4 April 2001; See also concluding observations (Iraq), A/53/40, vol.1, p.21.

⁹⁰⁵ Concluding Observations on Great Britain and Northern Ireland, Human Rights Committee, CCPR//GBR/CO/6. European Court, *Europapress Holding DOO v Croatia*, 22 October 2009.

⁹⁰⁶ Human Rights Committee, General Comment No.34, CCPR/C/GC/34 (2011), para 47. Communication 1815/2008, *Adonis v Philippines*, 26 October 2011; Communication 1128/2002, *Marques de Moraís v Angola*, 29 March 2003.

⁹⁰⁷ European Court, *Pedersen & Baadsgaard v Denmark*, 17 December 2004.

⁹⁰⁸ General Comment No.34, CCPR/C/GC/34 (2011), para 47. Concluding Observations on Italy, CCPR/C/ITA/CO/5. International Mechanisms for Promoting Freedom of Expression, Joint Declaration.

B. Freedom of association and the right to peaceful assembly

International provisions:

Article 20 UDHR

- 1. Everyone has the right to freedom of peaceful assembly and association.*
- 2. No one may be compelled to belong to an association.*

Articles 21 and 22 ICCPR

Article 21

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

Article 22

- 1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.*
- 2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.*
- 3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.*

Article 24(5), (6) and (7) Arab Charter

Every citizen has the right:

- 5. To freely form and join associations with others.*
- 6. To freedom of association and peaceful assembly.*
- 7. No restrictions may be placed on the exercise of these rights other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public health or morals or the protection of the rights and freedoms of others.*

Relevant domestic provisions:

Article 26, Palestinian Basic Law

Palestinians shall have the right to participate in political life, both individually and in groups. They shall have the following rights in particular:

- 1. To form, establish and join political parties in accordance with the law.*
- 2. To form and establish unions, associations, societies, clubs and popular institutions in accordance with the law.*

3. *To vote, to nominate candidates and to run as candidates for election, in order to have representatives elected through universal suffrage in accordance with the law.*
4. *To hold public office and positions, in accordance with the principle of equal opportunities.*
5. *To conduct private meetings without the presence of police members, and to conduct public meetings, gatherings and processions, within the limits of the law.*

1. Hand in hand with freedom of expression is the right to associate, i.e. to form political parties, and protest, or the right to peaceful assembly.⁹⁰⁹ The right applies to everyone, even in the context of elections,⁹¹⁰ those expressing minority views, those defending human rights, trade unions and expressions through of a variety of forms including online media.⁹¹¹
2. The Special Rapporteur on the rights to freedom of peaceful assembly and association has recognised that States should ensure they take into account that certain provisions on freedom of assembly may disproportionately impact negatively on certain groups.⁹¹² So a child has a right to freedom of association and assembly,⁹¹³ while recognising there may be concerns of safety which will need to be taken into account.⁹¹⁴ The CEDAW Committee requires States to take measures to ensure the equal participation of women in the political and public life of the country.⁹¹⁵ The rights will also apply to migrants and non-citizens and the Special Rapporteur has recognised that peaceful assemblies can be a useful means to allow such groups to be heard.⁹¹⁶ The CRPD Committee has noted that recognition of equal legal capacity for persons with disabilities is linked to the right to freedom of association and participation in public and political life, among other rights.⁹¹⁷
3. Laws which contain explicitly discriminatory provisions will violate this right,⁹¹⁸ as will general legislation or law that has a disproportionately negative impact on some groups.⁹¹⁹ For example, laws on 'public morality' which result in

⁹⁰⁹ Article 20 UDHR, Articles 21 and 22 ICCPR; Article 24 Arab Charter; Articles 15 and 16 ACHR; Article 11 ACHPR; Article 11 ECHR. See e.g. Report of Special Rapporteur on the rights to freedom of peaceful assembly and association, Maina Kiai, A/HRC/26/29, 14 April 2014. See also Human Rights Council, Resolutions 15/21, 21/16, 24/5. See also Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, GA Res.53/144, 9 December 1998.

⁹¹⁰ Report of Special Rapporteur on the promotion and protection of the right of freedom of opinion and expression, Frank La Rue, 2 July 2014, A/HRC/26/30, 2 July 2014.

⁹¹¹ Human Rights Council, Res.24/5, para 2.

⁹¹² Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, A/HRC/26/29, paras 29-35.

⁹¹³ UN CRC, Article 15.

⁹¹⁴ A/HRC/26/29, 14 April 2014, para 24.

⁹¹⁵ Article 7 CEDAW.

⁹¹⁶ A/HRC/26/29, para 25.

⁹¹⁷ CRPD General Comment No.1 on Article 12, CPRD/G/GC/1, 19 May 2014.

⁹¹⁸ Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, A/HRC/26/29, 14 April 2014, paras 22-28.

⁹¹⁹ Ibid, para 29.

discrimination of individuals on the basis of their sexual orientation,⁹²⁰ or their ethnicity or race, will violate this right.

Peaceful Assembly – the right to protest

4. The right to peaceful assembly guarantees the right to protest. It therefore lies at the heart of a democratic society⁹²¹ and facilitates other rights.⁹²² For many, peaceful protest is their only mechanism to promote change. Guaranteeing the right to peaceful protest can be a guarantee against more desperate methods being adopted. States should provide ‘a safe and enabling environment for individuals and groups to exercise their rights to freedom of peaceful assembly, of expression and of association’.⁹²³ This requires providing protesters with public space, and protection against threat and harassment.⁹²⁴ The right applies both online and offline.⁹²⁵
5. Particular attention should be paid to women, children, and journalists in the context of protests.⁹²⁶
6. There is a positive obligation on the state to facilitate peaceful protest.⁹²⁷

Restrictions on the right to protest

7. The ability to restrict the right should be the exception not the rule.⁹²⁸ A blanket ban on demonstrations on grounds of national security, for example, will violate this right.⁹²⁹
8. If restrictions are imposed, they must be those which are strictly prescribed by law, necessary in a democratic society, proportionate and for one of the grounds protected in the treaty, and non-discriminatory.⁹³⁰ For example, the Special Rapporteur on the rights to freedom of assembly and association has raised concerns that attempts to prevent individuals from covering their faces during demonstrations on the basis that if the protest resulted in violence any perpetrators would be unable to be punished, are unnecessary and may disproportionately target specific groups including women who, for example, wear the niqab.⁹³¹

⁹²⁰ Ibid, para 30. Concluding observations Russia, CRC/C/RUS/CO/4-5, para 25.

⁹²¹ See Special Rapporteur on extra judicial executions, A/HRC/17/28.

⁹²² Ibid, para 31.

⁹²³ See Resolution, Human Rights Council, Promotion and protection of human rights in the context of peaceful protests, A/HRC/RES/25/38, 11 April 2014, para 3. See also Seminar on Effective Measures and best practices to ensure the promotion and protection of human rights in the context of peaceful protests, A/HRC/52/32, 29 January 2014.

⁹²⁴ Resolution, Human Rights Council, Promotion and protection of human rights in the context of peaceful protests, A/HRC/RES/25/38, 11 April 2014, para 4.

⁹²⁵ Human Rights Council Res.24/5; A/HRC/26/29, para 63.

⁹²⁶ Resolution, Human Rights Council, Promotion and protection of human rights in the context of peaceful protests, A/HRC/RES/25/38, 11 April 2014, paras 6-8.

⁹²⁷ European Court, *Plattform Artze fur das Leben v Austria*, 21 June 1988.

⁹²⁸ A/HRC/23/39, para 18

⁹²⁹ Human Rights Committee, Re Lebanon, UN Doc.A/52/40, Vol.I, p.56.

⁹³⁰ Human Rights Committee, General Comment No.31, CCPR/C/21/Rev.1/Add/13 (2004), para 6

⁹³¹ A/HRC/26/29, para 33.

9. Requiring protesters to give notification of a planned demonstration may not necessarily be a violation of the right,⁹³² although spontaneous demonstrations should also be permitted.⁹³³ So a requirement that applications be made for permits 15 days before the planned demonstration, applications which were often denied, and which imposed restrictions on the use of flags, among other things, was found to be a violation of the ICCPR.⁹³⁴
10. The right to 'peaceful assembly' is protected, although the right will not necessarily be lost if there are isolated incidents of violence.⁹³⁵
11. Law enforcement officials should 'avoid the use of force or, where that is not practicable, restrict such force to the minimum extent necessary' if assemblies are 'unlawful but non-violent'.⁹³⁶
12. Where assemblies are violent, firearms can be used 'only when less dangerous means are not practicable and only to the minimum extent necessary'.⁹³⁷
13. The indiscriminate use of legal force against a crowd is prohibited under all circumstances.⁹³⁸
14. States should make protective equipment and non-lethal weapons available to law enforcement officers and provide them with the appropriate training.⁹³⁹
15. The protection of the right of assembly of one group cannot be used as a justification for curtailing the right of assembly of another.⁹⁴⁰

The right of association, or the right to form political organisations

16. The right of freedom of association is vital to the functioning of democratic societies. Social development and democracies in particular are furthered by the joining together of individuals with a common purpose within groups to bring about change. From the trade union movement to environmental protection, this has all been achieved through associations.
17. Individuals will be exercising their right to freedom of association where they come together on a voluntary basis to further a common interest. Political parties are classic examples of associations, and as they are essential to the

⁹³² Communication 412/1990, *Auli Kivenmaa v. Finland*, CCPR/C/50/D/412/1990. See also Human Rights Committee, UN.Doc.A/56/40, vol.I, p.82.

⁹³³ European Court, *Bukta and Others v. Hungary*, 17 July 2007, para. 32

⁹³⁴ In respect of Belarus, UN Doc.A/53/40, Vol.I, p.29.

⁹³⁵ A/HRC/17/28, para 42. European Court, *Zilberberg v. Moldova*, 4 May 2004, and *Ezelin v. France*, 26 April 1991.

⁹³⁶ Basic Principles on the use of Force and Firearms by Law Enforcement Officials, principle 13. See also European Court, *Nurettin Aldemir v Turkey*, 18 Dec 2007.

⁹³⁷ Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, principle 14.

⁹³⁸ Resolution, Human Rights Council, Promotion and protection of human rights in the context of peaceful protests, A/HRC/RES/25/38, 11 April 2014, para 11.

⁹³⁹ *Ibid*, paras 13 and 14.

⁹⁴⁰ European Court, *Ollinger v Austria*, 29 June 2006.

proper functioning of a democracy, any interference with the rights of political parties to form must be strictly justified.⁹⁴¹ Therefore, where, for example, opposition groups were not permitted to meet in private or public and they were harassed, there was a violation of this right.⁹⁴²

18. Religious groups may also be associations,⁹⁴³ as are squatters' groups,⁹⁴⁴ although professional regulatory bodies may not be.⁹⁴⁵ Similarly, some restrictions imposed on NGOs, for example, to register may also violate this right,⁹⁴⁶ as may interferences with trade union activities.⁹⁴⁷

19. However, the Special Rapporteur has stressed the importance of legislation prohibiting and criminalising associations which promote racism and discrimination.⁹⁴⁸ Dissolution of such associations is considered to be a justifiable limitation with the right.⁹⁴⁹

20. An absolute ban on the right to strike for public servants who may not be engaged in essential services may therefore violate this right.⁹⁵⁰ However, the instigation of disciplinary action against employees or public servants for taking part in strike action is not justifiable.⁹⁵¹

Proscribing, or blacklisting, organisations

21. Both the UN and other regional organisations have lists proscribing, or banning certain terrorist organisations or individuals. Additionally, domestic frameworks may also blacklist certain groups connected with terrorism. The act of proscribing organisations will raise issues under freedom of association, unless those organisations are using their freedom of association rights to destroy the rights and freedoms of others. Under those circumstances, they do not have freedom of association rights.

22. Where freedom of association is engaged by proscription, any interference will have to be legitimate, necessary, proportionate and non-discriminatory.⁹⁵²

23. The UN Special Rapporteur on the Promotion and Protection of Human Rights while Countering Terrorism has stressed that the decision to proscribe an organisation must be done on a case-by-case basis. He

⁹⁴¹ Human Rights Committee, re Syria, A/56/40, vol.I, p.75; European Court, *United Communist Party of Turkey v Turkey*. African Commission, Communications 25/89, et al, *OMCT et al v Zaire*, 4 April 1996.

⁹⁴² African Commission, Communications 25/89 et al, *ibid*.

⁹⁴³ European Court, *Jehovah's Witnesses of Moscow v Russia*, 22 November 2010.

⁹⁴⁴ European Court, *Association Rhino and Others v Switzerland*, 11 October 2011.

⁹⁴⁵ European Court, *Le Compte, Van Leuven and De Mayer v Belgium*, 23 June 1981.

⁹⁴⁶ E.g. Human Rights Committee, re Belarus, A/53/40, vol.I, p.29.

⁹⁴⁷ Human Rights Committee, re Venezuela, A/56/40, Vol.I, p.53. See also European Court, *Young, James and Webster*, 13 August 1981.

⁹⁴⁸ Article 4 CERD, A/HRC/26/29, para 51.

⁹⁴⁹ A/HRC/26/29, para 51; European Court, *Vona v Hungary*, 9 July 2013, para 71.

⁹⁵⁰ Human Rights Committee re Germany, A/52/40, vol.I, p.34.

⁹⁵¹ European Court, *Enerji Yapi-Yol Sen v Turkey*, 21 April 2009.

⁹⁵² See section IV.B. above.

points out, affirming the general principles in relation to the right to association identified above, that:

- The State may not make a determination that an organisation is a terrorist organisation on the basis of presumptions before that association has started to engage in its activities;
- The decision to proscribe must be made by an independent judicial body and there must always be a possibility to appeal a proscription decision to a judicial body;
- Decisions to criminalise an individual belonging to a terrorist organisation should only apply after that organisation has been declared as such by a judicial body. This will not absolve an individual from their own criminal responsibility for the preparation of terrorist acts.⁹⁵³

⁹⁵³ Second Report of the UN Special Rapporteur on the Promotion and Protection of Human Rights while Countering Terrorism, A/61/267, 16 August 2006.

C. Obligation to Protect Religious Pluralism

International provisions:

Article 18 UDHR:

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

Article 18 ICCPR

- 1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.*
- 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.*
- 3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.*
- 4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.*

Article 30 Arab Charter

- 1. Everyone has the right to freedom of thought, conscience and religion and no restrictions may be imposed on the exercise of such freedoms except as provided for by law.*
- 2. The freedom to manifest one's religion or beliefs or to perform religious observances, either alone or in community with others, shall be subject only to such limitations as are prescribed by law and are necessary in a tolerant society that respects human rights and freedoms for the protection of public safety, public order, public health or morals or the fundamental rights and freedoms of others.*
- 3. Parents or guardians have the freedom to provide for the religious and moral education of their children.*

Relevant domestic provisions:

Articles 4 and 18, Palestinian Basic Law

Article 4

- 1. Islam is the official religion in Palestine. Respect for the sanctity of all other divine religions shall be maintained.*
- 2. The principles of Islamic Shari'a shall be a principal source of legislation.*
- 3. Arabic shall be the official language*

Article 18:

Freedom of belief, worship and the performance of religious functions are guaranteed, provided public order or public morals are not violated.

1. Freedom of religion is protected by international and regional instruments.⁹⁵⁴ This covers a variety of beliefs, theistic, non-theistic and atheism and the right not to profess any religion or belief.⁹⁵⁵ 'Belief' and 'religion' have a broad meaning.⁹⁵⁶
2. Freedom of thought and conscience, as well as the freedom to have or adopt a religion or belief of one's choice, are absolute rights which cannot be derogated from.⁹⁵⁷ Therefore, no-one can be compelled to reveal their thoughts or their adherence to a particular religion or belief.⁹⁵⁸
3. Central to the guarantee of religious freedom is the obligation on the part of the State to ensure respect for religious pluralism. In a society in which several religions coexist within one and the same population, the State may place restrictions on the freedom of religion only in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected.⁹⁵⁹ When exercising its regulatory power the State has, however, a duty to remain neutral and impartial.⁹⁶⁰
4. A further element of religious freedom is that it recognises the notion of collective rights - i.e. that the exercise of this right may be in community with others. Article 27 ICCPR also provides protection to individuals belonging to ethnic, religious or linguistic minorities 'in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language'. Positive measures may be required to facilitate development of religious minorities in the long term.⁹⁶¹

Manifesting religion or thought

5. The ability to manifest one's religion includes that this be done 'either individually or in community with others and in public or private'.⁹⁶² 'Worship' can include ceremonies or rituals as well as objects, displaying symbols, observing holidays and customs.⁹⁶³ Wearing of headscarves, for example, will

⁹⁵⁴ Article 18 ICCPR, Article 30 Arab Charter.

⁹⁵⁵ Human Rights Committee, General Comment No.22, CCPR/C/21/Rev.1/Add.4 (1993), para 2.

⁹⁵⁶ Human Rights Committee, General Comment No.22, CCPR/C/21/Rev.1/Add.4 (1993), para 2. European Court, *Kokkinakis v Greece*, 25 May 1993.

⁹⁵⁷ Article 18 ICCPR; Human Rights Committee, General Comment No.22, CCPR/C/21/Rev.1/Add.4 (1993), para 3. Articles 12 and 27(2) ACHR. Inter-American Court, *Case of Olmedo Bustos et al v Chile*, Series C. No.73, 5 Feb 2001. European Court, *Kokkinakis v Greece*, 25 May 1993.

⁹⁵⁸ Human Rights Committee, General Comment No.22, CCPR/C/21/Rev.1/Add.4 (1993), para 3.

⁹⁵⁹ European Court, *Kokkinakis v Greece*, 25 May 1993.

⁹⁶⁰ European Court, *Metropolitan Church of Bessarabia v Moldova*, 27 March 2002.

⁹⁶¹ Report of the Special Rapporteur on Freedom of religion or belief, Heiner Bielefeldt, A/HRC/22/51, 24 December 2012, para 25. Human Rights Committee, General Comment No.23, U.N. Doc. CCPR/C/21/Rev.1/Add.5 (1994), para 9.

⁹⁶² Article 18(1) ICCPR.

⁹⁶³ Human Rights Committee, General Comment No.22, CCPR/C/21/Rev.1/Add.4 (1993), para 4. European Court, *Jewish Liturgical Association Cha' Are Shalom Ve Tsedek v France*, 27 June 2000.

be covered.⁹⁶⁴ 'Teaching and 'practice' includes being able to choose religious leaders, schools and texts.⁹⁶⁵

6. Limitations on one's manifestation must satisfy the requirements of legality, necessity and proportionality and non-discrimination. The restrictions should only be applied for a specific purpose. In this context, if limitations are imposed in order to protect morals, the Human Rights Committee has noted that such limitations 'must be based on principles not deriving exclusively from a single tradition'.⁹⁶⁶
7. Therefore requiring a Sikh to wear safety head gear in his employment may be justified on the basis that this protected him from injury and electric shock.⁹⁶⁷
8. The manifestation of religion and belief in practice does not always include actions or behaviour that are merely motivated by the belief system. Therefore to be able to rely upon a right to manifest a belief in practice, the applicant must show that it is a 'necessary part' of the practice.⁹⁶⁸

Conscientious objection

9. Many human rights treaties do not provide express protection for conscientious objection. However, the European Court has recently recognised the existence of the right, provided it is based on religious grounds. The State can provide an alternative to military service.⁹⁶⁹ The Human Rights Committee has noted that the right could be provided under the ICCPR, Article 18, 'inasmuch as the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one's religion or belief. When this right is recognized by law or practice, there shall be no differentiation among conscientious objectors on the basis of the nature of their particular beliefs; likewise there shall be no discrimination against conscientious objectors because they have failed to perform military service'.⁹⁷⁰ However, sentencing an individual to nine months imprisonment for not wearing a uniform as part of military service was not a violation of Article 18 ICCPR.⁹⁷¹
10. No difference should be made between conscientious objectors on the basis of their particular religion or belief.⁹⁷² Alternatives to military service should be the same length of time.⁹⁷³

⁹⁶⁴ Ibid. However, see European Court, *Dogru v France*, 4 March 2009.

⁹⁶⁵ Ibid.

⁹⁶⁶ Human Rights Committee, General Comment No.22, CCPR/C/21/Rev.1/Add.4 (1993), para 8.

⁹⁶⁷ Communication 208/1986, *Sing Bhinder v Canada*, 9 November 1989.

⁹⁶⁸ European Court, *X v UK*.

⁹⁶⁹ European Court, *Bayatyan v Armenia*, 7 July 2011.

⁹⁷⁰ General Comment, No.22, CCPR/C/21/Rev.1/Add.4 (1993), para 11.

⁹⁷¹ Communication 682/1996, *Westerman v Netherlands*, UN Doc.A/55/40, p.41.

⁹⁷² Communication 402/1990, *Brinkhof v Netherlands*, 27 July 1993. European Court, *Thilimmenos v Greece*, 6 April 2000.

⁹⁷³ Communication 689/1996, *Maille v France*, 10 July 2000.

Teaching

11. Parents have the right to choose the religious or moral education of their children.⁹⁷⁴ This may require that teaching is provided in religion or ethics 'in a neutral and objective way'.⁹⁷⁵

Employment

12. In relation to military service it has been held that military discipline implies by its very nature the possibility of placing certain limitations on the rights and freedoms of members of the Armed Forces which could not be imposed on civilians.⁹⁷⁶ Similarly in cases where professional obligations required individuals to work on Sundays for Christians or Friday afternoon for Muslims, there was no violation of the right to manifest religions belief.⁹⁷⁷ However, where a person is forced to disclose their religious affiliation in order to join a profession, such as where a lawyer was forced to admit that he was not a member of the Orthodox Church when he refused to take a religious oath, the right will be violated.⁹⁷⁸

Criminalising causing offence to religious beliefs

13. In relation to protecting the religious rights of others, the Human Rights Committee has observed that the State 'should extend its criminal legislation to cover offences motivated by religious hatred and should take other steps to ensure that all persons are protected from discrimination on account of their religious beliefs'.⁹⁷⁹
14. The UN human rights bodies have paid particular attention to the issue of religious hatred.⁹⁸⁰ Collective religious hatred, namely those directed towards a particular group or individual, will violate Article 18 UDHR, Article 18 ICCPR and other instruments.⁹⁸¹

⁹⁷⁴ Article 18(4) ICCPR.

⁹⁷⁵ General Comment para 6. See also Communication R.9/40, *Hartikainen v Finland*, UN Doc.A/36/40.

⁹⁷⁶ *Yanasik v Turkey*, 6 January 1993.

⁹⁷⁷ European Court, *Khan v UK*, 4 October 2000; *Stedman v UK*, [1997] 23 EHRR 168.

⁹⁷⁸ European Court, *Alexandridis v Greece*, 21 Feb 2008.

⁹⁷⁹ CCPR/CO/73/UK, para.14 (2001)

⁹⁸⁰ E.g. Report of the Special Rapporteur on freedom of religion or belief, A/HRC/25/58, 26 Dec 2013.

⁹⁸¹ Report of the Special Rapporteur on freedom of religion or belief, A/HRC/25/58, 26 Dec 2013, para 18.

D. The Right to Property

International provisions

Article 17 UDHR:

- 1. Everyone has the right to own property alone as well as in association with others.*
- 2. No one shall be arbitrarily deprived of his property.*

Article 31 Arab Charter

Everyone has a guaranteed right to own private property, and shall not under any circumstances be arbitrarily or unlawfully divested of all or any part of his property.

Relevant domestic provisions

Article 21(3) and (4) Palestinian Basic Law:

- 3. Private property, both real estate and movable assets, shall be protected and may not be expropriated except in the public interest and for fair compensation in accordance with the law or pursuant to a judicial ruling.*
- 4. Confiscation shall be in accordance with a judicial ruling.*

1. The right to property is not found in all human rights instruments.⁹⁸² The concept of ‘possessions’ and property within those treaties which do provide for such a right has been given a broad interpretation and there must be a right within national legislation.⁹⁸³ It will cover moveable and immoveable property.⁹⁸⁴
2. There are considered to be three elements to the right to property as set down in the European Court decision in *Sporrong and Lönnroth v. Sweden*⁹⁸⁵ which have been adopted by other international human rights bodies. These are:
 - The principle of peaceful enjoyment of property;
 - Interference with this right can only be committed in accordance with certain conditions;
 - States can control the use of property in accordance with the general interest.
3. States have both negative and positive obligations in respect of the right.⁹⁸⁶ The former relates to expropriation and seizure as well as other acts such as

⁹⁸² Although there is a reference to the right to property in the UHDR, it is not included in the ICCPR nor in the ICESCR. However, see ECHR Protocol 1, Article 1; ACHPR Article 14, ACHR Article 21. Articles 15(2) and 16(1)(h) CEDAW; Article 15 ICMW; Articles 5(3) and 30(3) CRPD.

⁹⁸³ European Court of Human Rights, *Maltzan and others v. Germany*, 2 March 2005; Inter-American Court, *Five Pensioners v. Peru*, Judgment of 28 February 2003, para 103.

⁹⁸⁴ Inter-American Court, *Yakye Axa Indigenous Community v. Paraguay*, Judgment of 17 June 2005, para 137. African Commission, Communication 276/2003, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, May 2009, para 86.

⁹⁸⁵ Judgment 23 September 1982.

⁹⁸⁶ Inter-American Court, *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of 31 August 2001, para 153.

planning controls. There are also positive obligations to protect property interests,⁹⁸⁷ for example, putting in place a judicial process to enable disputes to be settled.⁹⁸⁸

The principle of peaceful enjoyment of property

4. The right to property and its peaceful enjoyment includes the right to exclude others from land. In *Chassagnou v France* the fact that land had to be used for hunting violated the applicant's rights.⁹⁸⁹
5. An arbitration award that is enforceable is a possession and so is a pending claim in civil proceedings so long as it is sufficiently established.⁹⁹⁰
6. There is no guarantee to obtain possessions through inheritance, although differences in treatment in matters of inheritance could raise discrimination issues.⁹⁹¹
7. Property rights will be engaged where property is seized for use in criminal proceedings. In *Smirnov v Russia* for example, the lengthy retention of a lawyer's computer for evidence in a criminal case amounted to a violation of Article 1 Protocol 1.⁹⁹² Similarly a person may have the right under Article 1 Protocol 1 to access seized property in order to be able to challenge sanctions taken against them or participate effectively in their trial.⁹⁹³

Interference with the right to property

8. States can interfere with the right to property provided that this is legitimate, there is a general or public interest and the measures taken are proportionate.⁹⁹⁴ A fair balance will need to be struck between the demands of the general public interest and the protection of the individual's right to property.
9. Temporary interference is not a deprivation. There was no violation in *Air Canada v UK* where their aircraft was temporarily seized to enforce special provisions in drug legislation.⁹⁹⁵ As to whether there has been a deprivation, the Court will look at the reality of the situation rather than legal formalities.⁹⁹⁶

⁹⁸⁷ E.g. European Court, *Öneryildiz v. Turkey*, 30 November 2004.

⁹⁸⁸ European Court, *Sierpioski v. Poland*, 3 November 2009.

⁹⁸⁹ European Court, *Chassagnou v France*, 29 April 1999.

⁹⁹⁰ European Court, *Pressos Compania Naviera SA v Belgium*, 20 November 1995.

⁹⁹¹ European Court, *Marckx v Belgium*, 13 June 1979.

⁹⁹² European Court, *Smirnova v Russia*, 24 October 2003.

⁹⁹³ European Court, *Družstevní Záložna Priea and Others v the Czech Republic*, 19 April 2012.

⁹⁹⁴ African Commission, Communication 276/2003, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, May 2009, paras 211 and 219.

⁹⁹⁵ European Court, *Air Canada v UK*, 26 April 1995/

⁹⁹⁶ European Court, *Sporrong and Lonnroth v Sweden*, 23 September 1982.

10. Deprivation thus includes measures which can be equated with deprivation of possessions or which detract from the substance of ownership to such an extent that they are equivalent to expropriation.⁹⁹⁷
11. The right to property is connected to the right to housing. Therefore evictions may amount to a violation of this right.⁹⁹⁸

Compensation

12. Some, but not all, of the human rights treaties provide for a right to compensation in the event of deprivation of property.⁹⁹⁹ However, this has been seen by international and regional treaty bodies as a necessary corollary of the right.¹⁰⁰⁰ The payment of compensation will in principle justify depriving people of property rights. The European Court has set out some relevant rules in respect of the amount of compensation that should be paid, holding that the taking of property without payment of an amount reasonably related to its value will normally constitute a disproportionate interference.¹⁰⁰¹ It is the market value or 'an amount reasonably related to its value' which should determine the amount of compensation to be paid.

⁹⁹⁷ European Court, *Hentrich v France*, 22 September 1994.

⁹⁹⁸ E.g. Communication nos. 54/91, 61/91, 98/93, 164/97 à 196/97 and 210/98, *Malawi African Association and Others v. Mauritania*, 11 May 2000. *Dogan and others v Turkey*, 18 November 2004.

⁹⁹⁹ E.g. the African Charter, Article 21 provides for such, but the ECHR Protocol 1 does not.

¹⁰⁰⁰ Inter-American Court, *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of 31 August 2001, para 153; European Court, *James and others v. The United Kingdom*, Application no. 8793/79, Judgment of 21 February 1986, para 54.

¹⁰⁰¹ European Court, *Lithgow and Others v. the United Kingdom*, 8 July 1986.